Court File No.: CP-34306

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CANADIAN ALLIANCE OF PIPELINE LANDOWNERS' ASSOCIATIONS, 488796 ONTARIO LIMITED and RONALD KERR

Plaintiffs

- and -

ENBRIDGE PIPELINES INC. and TRANSCANADA PIPELINES LIMITED

Defendants

A proceeding instituted under the Class Proceedings Act, 1992
S.O. 1992, c. 6

AFFIDAVIT OF DAVID CORE
(Sworn October 29, 2004)

I, DAVID CORE, of the Township of Plympton, in the County of Lambton, make oath and say:

1. I am President and Director of the Plaintiff corporation, 488796 Ontario Limited, and President and Director of the Plaintiff organization, Canadian Alliance of Pipeline Landowners' Associations ("CAPLA"), and, as such, have knowledge of the facts to which I hereinafter depose.

2. The Plaintiff, 488796 Ontario Limited, is a company duly incorporated pursuant to the laws of Ontario, having its head office in Wyoming, Ontario. Since in or about

1981, 488796 Ontario Limited has owned and farmed agricultural lands comprising approximately 66.6 acres known as Lot 4, Concession 3 in the Township of Plympton, in the County of Lambton. This farming operation currently consists of cash crops and 12,000 turkeys. Attached hereto as **Exhibit "A"** is a copy of the land title deed for this property.

3. The abovementioned agricultural lands are subject to a 60 foot wide federally-regulated pipeline easement in favour of the Defendant, Enbridge Pipelines Inc. ("Enbridge"). The easement was acquired pursuant to an Agreement for Right-of-Way and Easement dated March 18, 1957 between the predecessors in title of 488796 Ontario Limited, Jay King and Elizabeth M. King, as grantors, and Interprovincial Pipe Line Company ("IPL"), as grantee. Attached hereto as **Exhibit "B"** is a copy of this agreement.

4. The Plaintiff, CAPLA, is a federal non-share corporation incorporated pursuant to the laws of Canada whose members are non-share capital corporations or voluntary unincorporated associations representing the interests of Canadian energy pipeline agricultural landowners. CAPLA was formed as an umbrella organization in or about the year 2000 to assist Canadian pipeline landowners in more effectively addressing the impacts of energy pipeline construction and operation, including soil preservation, environmental liability, land use restrictions, safety, repair and maintenance issues, and compensation. Its Board of Directors are representatives of regional landowner associations and its corporate objects are to:

a. **"…foster and advance the interest of regional landowner associations…which are concerned with environmental, health, property damage, liability, technical, safety, economic, compensation and other issues posed by the deployment of utility pipelines";** and

b. **"to promote the better construction, maintenance and operation of utility pipelines through education, research and intervention before administrative tribunals or the courts."**

5. The Plaintiff, 488796 Ontario Limited, is a member of the Ontario Pipeline Landowners Association ("OPLA"), one of CAPLA's member associations.

THE CLAIM

6. This action was commenced by Notice of Action issued in the office of the Local Registrar of the Ontario Superior Court of Justice at London on May 31, 2000. In the Fresh as Amended Statement of Claim, the Plaintiffs claim, on their own behalf, and on behalf of individual landowners in Canada who have owned agricultural lands from and after June 1, 1990 which are subject or adjacent to pipeline easements acquired or appropriated by the Defendants and regulated under federal jurisdiction (the "Class"), *inter alia*:

a. an Order certifying this proceeding as a class proceeding and appointing them as representative plaintiffs for the Class and any appropriate subclass thereof;

b. compensation and/or damages for individual Class members under section 75 of the *National Energy Board Act*. R.S.C. 1985, c. N-7, as amended (the "*NEB Act"*) for the ownership rights restrictions, regulatory risk and loss of use and enjoyment of land sustained as a result of the imposition of control zone and/or pipeline crossing restrictions upon their lands pursuant to the provisions of section 112 of the *NEB Act* and related regulations calculated annually from June 1, 1990 for the period of each Class member's ownership thereafter based on the agricultural market value of the control zone and easement land**,** respectively, from year to year or percentage thereof as determined by the Court in the aggregate sum of $500,000,000; and,

c. in the alternative, compensation and/or damages for individual Class members pursuant to the land acquisition agreements between the Defendants and landowners for the ownership rights restrictions, regulatory risk and loss of use and enjoyment of land sustained as a result of the imposition of control zone and/or pipeline crossing restrictions upon

their lands pursuant to the provisions of section 112 of the *NEB Act* and related regulations and/or for breach of contract, calculated annually from June 1, 1990 for the period of each Class member's ownership thereafter based on the agricultural market value of the control zone and easement land, respectively, from year to year or percentage thereof as determined by the Court in the aggregate sum of $500,000,000.

UNCOMPENSATED DAMAGES

7. In the Affidavit of Dr. George L. Brinkman delivered by CAPLA in connection with the pending motions, Dr. Brinkman has discussed the nature of the regulatory restrictions on landowner ownership rights resulting from the enactment of Section 112 of the *NEB Act* and *Pipeline Crossing Regulations* (Paragraphs 13 to 32); the regulatory impacts of these regulatory restrictions on agricultural landowners (Paragraphs 33 to 39); and the uncompensated damages which agricultural landowners have suffered as a result thereof (Paragraphs 40 to 43). Dr. Brinkman has concluded:

a. the necessity for landowners to obtain company consent or leave of the Board prior to undertaking installation on easement or control zone excavation for agricultural facilities (including roads, ditches, drainage and fencing), or to operate farm equipment across the easement or undertake cultivation or other agricultural operations on easement or in the control zone at depths more than 12 inches;
b. the delays associated with obtaining such consents;
c. the necessity of complying with company requirements for construction, maintenance and abandonment of easement and control zone facilities with resulting land use limitations; and,
d. the exposure of agricultural landowners to criminal prosecution and penalty and civil liability for regulatory contraventions

constitute restrictions of the ownership rights of agricultural landowners to which they have not agreed and for which they have not been compensated under their easement agreements with the Defendants.

8. These uncompensated damages for control zone and regulatory easement restrictions include loss of income, increased costs and diminished property value resulting from:

a. the inability of agricultural landowners to make efficient use of modern cultivation technologies and large scale farm equipment;
b. facility construction and expansion restrictions or forced location on alternate sites;
c. time delays;
d. operational disruptions and interference with management flexibility; and/or
e. the restriction or limitation of control zone or easement activities to limit criminal and civil liability exposure.

DEFENDANTS' MOTION FOR JUDGMENT

9. The notice of motion and affidavits delivered in support of the Defendants' motion for judgment assert:

a. A claim for damages under Section 75 of the *NEB Act* can only be resolved by arbitration under the Act and the Plaintiffs' request for arbitration was denied by the Minister;
b. Easement agreements between the Plaintiffs and the Defendants do not entitle the Plaintiffs to the compensation or damages claimed;
c. The regulatory objective of Section 112 and related regulations is public safety and the Defendants have acquired no rights and realize no benefit from these regulatory restrictions;

d. Each of the Defendants exercises their powers and administers the requirements of Section 112 and related regulations to minimize or eliminate disruption to farming activities.

10. In response thereto, and in support of the representative's Plaintiff's motion under Section 5 (1)(a) of the *Class Proceedings Act* 1992, S.O. 1992, c.6 for an Order that the pleadings disclose a cause of action, the position of the representative Plaintiffs is:

a. With respect to resolution of a statutory claim for compensation under Section 75 of the *NEB Act*, the arbitration procedure under the *Act* is permissive and not mandatory and does not preclude this action on behalf of a much larger national class of agricultural landowners for compensation for not only the control zone restrictions which were the subject of the requested arbitration, but also for increased easement restrictions. In any event, the Minister having denied arbitration on the basis that the Section 75 damage claim for control zone compensation was not included in the limited damage claims which he had jurisdiction to refer to arbitration under the *Act*, the claim for statutory compensation can only be pursued by court action;

b. Under the provisions of the easement agreements and the statutory authority pursuant to which they were obtained by the Defendants, the rights of the Defendants were limited to easement lands and the Defendants are liable to compensate landowners for additional lands required for the purposes of their operations or subject to regulatory restriction (i.e. the control zone and increased easement restrictions) and for all damage sustained by landowners as a result thereof including interference with agricultural operations;

c. Neither the control zone nor increased easement restrictions are required for the public safety purpose identified by the NEB prior to the enactment of the *Pipeline Crossing Regulations*. In any event, by acknowledgment of the Defendants, the control zone is ineffective to ensure public safety and both the control zone and crossing restrictions are maintained because

of uncertainties with respect to adequate soil cover and the deteriorating quality of the Defendants' pipelines;

d. While the control zone and the crossing restrictions have existed since they were enacted in 1990, it is only recently that the Defendants have attempted to reduce the regulatory impact of these restrictions on agricultural landowners. Currently, cultivation limitations which continue to be imposed by the Defendants and the failure of the Defendants to provide equipment specifications acceptable for pipeline crossing continue to restrict landowners in making efficient use of modern cultivation technologies and large scale farm equipment.

NEB Arbitration

11. Shortly after commencement of this proceeding under the *Class Proceedings Act* May 31,2000, on or about July 6, 2000, CAPLA also served upon the Federal Minister of Natural Resources, the Honourable Ralph E. Goodale (the "Minister"), a Notice of Arbitration pursuant to s.90(1) of the *NEB Act* on behalf of 157 individual claimants. Attached hereto as **Exhibit "C"** are true copies of the Notice of Arbitration and covering letter.

12. The Notice of Arbitration named the Defendants in the present action, Enbridge and TransCanada Pipelines Limited ("TCPL"), as Respondents, and requested that the Minister appoint an arbitration committee pursuant to s.91 of the *NEB Act*.

13. In the Notice of Arbitration, individual claimants sought damages from the Respondents under s.75 of the *NEB Act* for the loss of interest in, and use and enjoyment of, lands sustained as a result of the provisions of s.112 of the *NEB Act*, but limited to control zone restrictions. The claim advanced in the present action concerning increased easement restrictions was not addressed in the Notice of Arbitration.

14. CAPLA served the Notice of Arbitration on the Minister in addition to commencing the present action in order to have the Minister determine whether or not arbitration was available to CAPLA as an alternative procedure to address claims for control zone compensation of some of its members.

15. The Plaintiff, 488796 Ontario Limited, was one of the individual claimants that authorized and directed CAPLA to represent its interest in connection with all discussions, negotiations, correspondence and communications in respect of its claim for compensation advanced in the Notice of Arbitration. CAPLA was authorized to conclude and recommend to individual claimants an agreement or settlement proposal, which would then require approval of the individual claimant.

16. The Defendants, Enbridge and TCPL, Respondents to the Notice of Arbitration, vehemently opposed CAPLA's request for the appointment of an arbitration committee to determine compensation for damages sustained as a result of the provisions of s.112 of the *NEB Act*. TCPL submitted to the Minister, in correspondence dated August 4, 2000, that the arbitration and negotiation procedures under the *NEB Act* could not be used to determine this type of **"class action"** claim. In correspondence to the Minister dated October 17, 2000, the Defendant, Enbridge, expressly invoked the fact that the Plaintiffs had filed a Notice of Action in the Ontario Superior Court of Justice as reason for which the Minister was required to deny CAPLA's arbitration request. Attached hereto as **Exhibits "D" and "E**" respectively are true copies of this correspondence.

17. On or about January 10, 2001, the Minister, without determining the merits of the claim advanced in the Notice of Arbitration, denied CAPLA's request for the appointment of an arbitration committee under s.91 of the *NEB Act* upon grounds that there is no jurisdiction for such a claim to be so determined under the provisions of Part V of the *NEB Act*. While sections 83 through 103 of the *NEB Act* provide for arbitration of compensation, the Minister determined that these provisions are only available to address claims directly related to the acquisition of lands for construction, inspection, maintenance or repair of a pipeline. Attached hereto as **Exhibit "F"** is a true copy of

correspondence dated January 10, 2001 from the Minister disposing of CAPLA's request for arbitration.

18. By a similar letter also dated January 10, 2001, the Minister referred to arbitration certain damage claims of landowners in connection with a newly constructed pipeline known as the Alliance Pipeline but, for reasons identical to the claim of the CAPLA claimants, refused to refer to arbitration the claim of Alliance Pipeline landowners for control zone compensation. Attached as **Exhibit "G"** to this my affidavit is a copy of this correspondence.

19. I am advised by my solicitors and verily believe that, upon appeal of the dismissal of the application for judicial review of this decision by Alliance Pipeline landowners, the Federal Court of Appeal determined that the control zone was not acquired as part of the pipeline right of way and that the issue of compensation for control zone restrictions for Alliance Pipeline landowners should be referred to arbitration under the *NEB Act*. With respect to the statutory right of landowners for full compensation under s.75 of the *NEB Act* the Court held that, although certain of such damage claims may not be referable to arbitration, the Minister had erred in concluding that a claim for control zone compensation should be so excluded because such a claim is a claim **"for compensation of the acquisition of land or compensation for damages suffered as a result of the operations of the company"**. In its compensation award of September 5, 2003 (the relevant portion of which is attached hereto as **Exhibit "H"**), the Compensation Committee appointed under the provisions of the *NEB Act* remarked on the fact that the parties had not filed evidence with respect to control zone damages and concluded:

> **"The committee notes the absence of evidence of the matters referred to the committee by counsel and is satisfied that there is no evidentiary basis, at this time, to award the Applicant any compensation in respect of the controlled area".**

20. Attached hereto as **Exhibit "I"** is a copy of correspondence dated November 27, 2002 from the Assistant Deputy Minister, Energy Sector of Natural Resources Canada,

confirming that the statutory right of landowners to full compensation under s.75 of the *NEB Act* includes compensation for all damages suffered as a result of the operations of the company. The representative Plaintiffs agree with the Defendants that the decision of the Minister refusing to refer the issue of control zone compensation to arbitration under the *NEB Act*, although wrong in law, is binding as between the representative Plaintiffs and the Defendants. However, as with other s.75 damage claims considered by the Federal Court of Appeal not to be referable to arbitration, the s.75 damage claims being pursued in this action include the control zone compensation claim of Class members whose arbitration request was refused by the Minister, and the control zone and easement restriction claims of all Class members which have not been determined by arbitration under the *NEB Act.*

Compensation Rights

21. Under the agreement for right of way and easement dated March 18, 1957 between the predecessors in title of 488796 Ontario Ltd., as grantors, and IPL, as grantee:

a. The grantors granted to IPL a right of way and easement through a 60 foot wide strip of land as described therein for the purpose of construction and operation of its pipelines on certain terms and conditions agreed to by the parties;

b. Specifically, the grantors retained **"the right fully to use and enjoy the said land except as maybe necessary for the purposes herein granted to the grantee"**;

c. While IPL's written consent was required for certain on easement excavations or installations (any pit, well, foundation, pavement, building or other structure or installations), IPL specifically agreed that its consent was not required for various agricultural activities including the paving of farm lanes or private roads, erection of fences or the construction or repair of drains on easement provided that 5 days notice of such work was given to IPL;

d. In addition, IPL agreed that it would **"…bury and maintain all pipelines so as not to interfere with the drainage or ordinary cultivation of the said land…"**

22. I am advised by my solicitors and I verily believe that both the *Pipelines Act*, R.S. 1952, c.211, sections 8, 28 and 29 (in force at the time the easement was signed), and the *National Energy Board Act*, S.C. 1959, c.46 (which created the NEB and replaced the *Pipelines Act),* sections 73 and 74 (which continued until deleted by amendment to the *NEB Act* in 1981) and section 64 (which continues in force as s.75) provided that:

a. The company is liable **"to make full compensation in the manner provided in this Act…to all persons interested, for all damage sustained by them by reason of the exercise of (the company's) powers"**;

b. The company could not without the consent of the landowner take lands for the right of way exceeding 60 feet in breadth;

c. If the company at any time required more ample space than it possessed or could take without landowner consent for construction or operation of its pipelines or **"taking any … measures ordered by the Board"**, the company was required to apply to the Board for authority to take such additional lands for which the landowner was entitled to additional compensation.

23. Upon the enactment of the *Pipeline Crossing Regulations* in 1988 and the re-enactment of s.112 of the *NEB Act* in 1990 (and as subsequently amended):

a. Restrictions on the right of the landowner to use and enjoy his lands were extended to lands beyond the pipeline easement with the creation of the control zone;

b. Crossing the pipeline easement, which had not previously been regulated, was prohibited without permission from the pipeline company;

c. Leave of the pipeline company was required in order to carry out certain work on the easement and within the control zone; and,

d. Pipeline companies were given authority to restrict the use and enjoyment of lands extending to the entire farm property on which a pipeline was located.

24. Consideration for easement agreements was paid to the grantors solely with respect to the rights granted under easement agreement, and for no other purpose. The agreement for right of way and easement constitutes the entire contract binding the parties and is specifically without prejudice to **"the grantee's statutory rights to acquire the said land or any other portions of the lands of the grantors under the provisions of the *Pipelines Act* (Canada) … or any other laws"**.

25. In spite of the direct control and authority obtained by the Defendant pipeline companies under Section 112 and related regulations over lands outside the pipeline easement, and increased authority over the pipeline easement itself, no modifications were made to existing easement agreements; no applications have been brought by the Defendants for additional lands for the operation of their pipelines or to comply with these regulatory requirements; and, no further compensation has been paid to landowners in respect of these restrictions.

Purpose/Benefit

26. The legislation governing the use of land above and beneath federally regulated pipeline easements in Canada which was in force prior to the enactment of s.112 of the *NEB Act* and related regulations contained no reference to lands outside the easement. Permission of the pipeline company was not required by legislation or easement agreements in order to operate a vehicle or mobile equipment across the pipeline or to construct facilities or excavate outside of the pipeline easement.

27. Of increasing concern in Canada is the deteriorating condition of aging energy pipelines, including those owned and operated by the Defendants. Attached hereto as

Exhibit "J" are excerpts from the *1998 Report of the Auditor General of Canada* which states:

a. **"Public concerns over safety and the environment have increased as pipelines have aged. About 60% of the present 40,000 km of pipeline regulated by the Board was constructed more than 20 years ago."**

b. **"Pipeline age alone may not be the sole determinant of risk; construction practices, methods and materials, along with maintenance practices, also play a part. Nonetheless, older pipelines are receiving more attention."**

c. **"The NEB has recognized pipeline integrity as an emerging risk area, but has not analyzed its regulated pipelines by age or location."**

d. **"Reported pipeline incidents per thousand kilometres of regulated pipeline have increased by 73 percent in the last five years. The most prevalent type of incidents are uncontrolled spillage, usually of liquid oil product, and uncontrolled escape of natural gas and high-vapour-pressure products. Since 1992, significant ruptures have totaled 18, with a high of 6 in 1994."**

28. The original purpose of the control zone as contemplated by the NEB was to provide the Board with a jurisdictional zone based on distance from the pipe where there is no right of way. Attached hereto as **Exhibit "K"** is a copy of an internal National Energy Board memorandum dated April 10, 1986 describing the purpose of the control zone:

> **"The Board's authority is limited to the right of way. In situations where there is no right of way, e.g. where the pipe is allowed on road allowances through municipal permit, our control starts at the edge of the pipe. In areas where the pipe is constructed near the limit of the right of way or where the right of way is narrow, our control starts a short distance from the pipe (2 to 3 meters). This control area may be insufficient to prevent hazards from deep excavations, blasting, large excavation equipment, poor site control, etc. …**
>
> **"Consideration should be given to modifying the Act to permit control of all activities within a prescribed distance from the pipe."**

29. The control zone as enacted by s.112 of the *NEB Act* and related regulations extends 30 meters from the boundaries of the pipeline easement (see Exhibit "F" to the Affidavit of Donald Wishart sworn December 22, 2003). Although the original public safety purpose of the control zone was only to provide the Board with jurisdiction within 30 metres either side of the pipe where no easement existed, as enacted, both the easement and control zone lands are subject to regulatory restrictions. In the case of properties crossed by the Enbridge easement, lands subject to these regulatory restrictions are 80 metres in width; for properties crossed by the TransCanada easement, lands subject to regulatory restrictions are 85 metres in width.

30. The stated purpose of the control zone as enacted was both for public safety and for the protection of the Defendants' pipelines. Attached hereto as **Exhibit "L"** is an exchange of correspondence dated February 26 and March 13, 1992 between an OPLA landowner and Roland Priddle (then chairperson of the NEB) with respect to the landowner's concerns about the creation of the control zone. Also attached hereto as **Exhibit "M"** is a fax from the NEB to the Defendant Enbridge (then IPL) dated March 9, 1992 which encloses a draft of Mr. Priddle's subsequent response to the landowner. Included in the draft but deleted from the response provided to the landowner is the NEB's advice that the purpose of the control zone includes both public safety and maintaining the integrity of the Defendants' pipelines:

> **"It is intended to allow a pipeline company or the Board to intervene and stop unsafe excavation activities, hopefully before they are carried out too close to the pipe. Widths of servitude on private property are not uniform throughout Canada and, in fact, they vary from 3m to greater than 60m. Furthermore, pipelines are not protected by a servitude across most highways or railways, which means that, absent section 112 of the Act, the safety of the public and the integrity of the pipeline would not be regulated beyond the perimeter of the pipe."**

31. However, with respect to public safety, by acknowledgment of the Defendants, the control zone even as enacted is inadequate to effectively prevent or eliminate potential consequences from pipeline failures. Attached hereto as **Exhibit "N"** are excerpts from the Board's 1995 hearing on stress corrosion cracking in which witnesses

for the Canadian Energy Pipeline Association (CEPA), of which both of the Defendants are members, testified:

- **"In order to provide buffer zones wide enough to effectively eliminate potential consequences from failures, you would have to have extremely wide buffer zones";**

- **"Acquisition and maintenance of buffer zones which would provide unequivocal safety in Canada would be impracticable";**

- **"The acquisition of the land for an effective buffer zone, together with the need, if you will, to sterilize it for all time, would be, I suggest, quite impracticable in the current environment".**

32. Attached hereto as **Exhibit "O"** are excerpts from the NEB's *Stress Corrosion Cracking Report* which refers to CEPA's submission that:

> **"The establishment of buffer zones for new pipelines would, in all probability, make land acquisition impracticable. The retroactive imposition of buffer zones to existing pipelines would require major rezoning initiatives, including the removal of existing buildings, or pipeline rerouting.**

With respect to buffer zones, the Board concluded:

> **"One method of creating a buffer zone is to put restrictions on how the land near the pipeline may be used… We conclude that the application of buffer zones for all pipelines would not be practicable, especially if applied retroactively to existing pipelines".**

33. The principle cause of ruptures, liquid and gas releases by NEB regulated pipelines is metal loss (corrosion) and cracking and not landowner activity. Attached hereto as **Exhibit "P"** is a schedule recording pipeline ruptures on NEB regulated pipelines from 1992 to 2002. Of 26 pipeline ruptures reported and investigated during this period (including 9 TransCanada and 8 Enbridge ruptures), only 1 rupture was caused by external interference with the immediate cause of most of the remaining ruptures being metal loss and cracking. Also attached hereto as **Exhibit "Q"** is the NEB's January 2004 *Focus on Safety Report* which discloses:

- **"The primary causes of ruptures among NEB-regulated pipelines are metal loss (corrosion) and cracking";**

- **"The number of hydro carbon liquid releases (spills) reported by NEB-regulated pipelines companies increased to 76 in 2002 from 55 in 2001. The 2002 and 2001 figures are significantly lower than the 265 spills reported in 2000";**

- **"The overall number of gas releases reported by NEB-regulated companies (13 releases) showed a decrease in 2002. Gas releases remained relatively constant between 2000 (23 releases) and 2001 (29 releases)";**

- **"The number of overall, unauthorized activities reported to the Board decreased significantly to 25 in 2002 from 51 in 2001 and 49 in 2000. Incidents resulting in contact with the pipeline itself remained at 1 for both 2002 and 2001, down from 2 in 2000. Eighty percent of the unauthorized activities reported to the Board per year reflect construction and landscaping resulting in soil disturbance on the pipeline right of way. Of these incidents, two thirds are a result of contractor activity";**

- Both the spill volumes per thousand kilometres for liquid pipelines (page 17 figure 4.9) and number of gas releases per thousand kilometres for gas pipelines (page 19 figure 4.12) are greater for NEB-regulated pipelines than for pipelines in other jurisdictions without comparable control zone and additional easement restrictions.

34. The control zone and additional easement restrictions as enacted substantially exceed the measures proposed to accomplish the original public safety objective of the control zone and, by acknowledgment of the Defendants and as demonstrated by NEB safety data, are ineffective for this purpose. In paragraph 33 of Enbridge's Fresh Statement of Defence, Enbridge pleads that it "did not solicit the enactment of s.112 and related regulations… and was not consulted by any public authority before these measures were taken." Paragraph 18 of the Affidavit of Donald Wishart sworn December 22, 2003 similarly states, that "TransCanada played no role in the legislative process that led to the enactment of s.112 or the crossing regulations". Contrary to these assertions, both TransCanada and Enbridge were consulted by the NEB in connection with the development of the control zone and additional easement restrictions. Attached hereto as **Exhibit "R"** is a copy of a memorandum from the Chairman of the NEB's

pipeline panel dated July 31, 1987 concerning the NEB's consultation with the industry prior to enactment of the pipeline crossing regulations. Both Defendants are included in the listing of parties consulted in connection with the development of these regulations. Specifically both Defendants requested that penalties be imposed for **"negligent excavators**" and **"nearly all respondents**" approved of the substitution of company instead of Board consent for pipeline crossing.

35. The principal benefit of the control zone and additional easement restrictions is realized by the Defendants through avoidance of the substantial cost they would otherwise have to incur to facilitate normal farm operations as required by easement agreements on and adjacent to pipeline easements including the lowering and replacement of deteriorating pipes. As discussed in the Affidavit of Dr. Brinkman, modern farm equipment may weigh in excess of 30 tons and widely used cultivation technologies penetrate to soil depths over 30 inches. Attached hereto as **Exhibit "S"** is an excerpt from the Defendant TCPL's webpage which indicates that depth of cover over TCPL pipelines as constructed is only 32 inches. Attached hereto as **Exhibits "T" and "U"** are excerpts from pipeline depth of cover surveys conducted with respect to the Defendant Enbridge's Line 7 and 8 in Southwestern Ontario which disclose (over a length of approximately 130 miles):

a. a total of 68 locations with soil cover less than the minimum 24 inch standard required;
b. from the data with respect to Line 8, an additional 9 locations with a soil cover of less than 30 inches;
c. considering a standard deviation on Line 8 of 16.4 inches from an average depth of 62 inches, an average shallow depth of 44.6 inches.

The covering correspondence from the NEB with Exhibit "T" indicates that no such depth of cover survey is available for Enbridge Line 9. Attached hereto as **Exhibit "V"** is a copy of a letter from the Defendant Enbridge dated April 20, 2004 refusing to

respond to a request from OPLA for complete depth of cover information with respect to Enbridge Line 7.

36. The depth of cover testing recorded in both of these surveys is at intervals of 50 metres. Attached hereto as **Exhibit "W"** is a copy of a letter dated May 21, 2002 from Sun Canadian Pipeline Company Ltd. (a provincially regulated company) which indicates that a depth of cover survey even at 100 foot intervals is not detailed enough to detect low cover locations and that a 25 foot survey is required to reliably evaluate pipeline soil cover.

37. Despite requests from the NEB, landowners and pipeline landowners associations, the Defendants and their industry organization CEPA have consistently refused to provide to agricultural landowners specifications for agricultural equipment which may safely be permitted to cross their pipelines. Attached hereto as **Exhibit "X"** is a copy of a letter dated April 23, 2002 from the NEB to CEPA requesting that CEPA respond to **"the confusion and frustration of (CAPLA) representatives … regarding the movement of vehicles and mobile equipment across pipelines"** through development of **"blanket approvals for certain types or classes of vehicles and mobile equipment based on generally accepted engineering principles"**. The Board noted that this would **"require a consultative approach with pipeline landowners"** and requested that the work be completed by March 31, 2003. Attached as **Exhibit "Y"** to this my Affidavit is a copy of CEPA's response of March 5, 2003 advising the NEB of CEPA's position that **"a blanket exemption may not be prudent since site specific conditions might increase the risk of damage to the pipeline"**, and that **"since the acceptability of certain farming activities will depend on localized conditions, farming operations and the specifics of the pipeline at each location, such questions are best dealt with on a case-by-case basis"**.

38. In requesting that the Defendants through their industry organization CEPA develop blanket approvals for specific, identified farm equipment (Exhibit "X"), the Board stated:

> **"The Board recognizes that the stress imposed by vehicles or mobile equipment operated over buried pipelines is a function of a number of physical factors and properties including (but not limited to) the depth of cover, the soil type, the weight of the vehicle or equipment, the surface of the tires or tracks in contact with the ground, and the material properties of the pipe itself."**

39. Although depth of cover, soil type and pipe quality are all matters which have been within the control of the Defendants since construction of their pipelines, as indicated in its response, CEPA members have preferred to rely upon the protection afforded by the control zone and additional easement restrictions instead of providing the permissible equipment specifications requested by the NEB to protect their aging, deteriorating pipelines. With respect to the vulnerability of these pipelines, attached hereto as **Exhibit "Z"** is a copy of a 2001 investigation report of the Transportation Safety Board of Canada with respect to the rupture of an Enbridge pipeline in an agricultural field near Binbrook, Ontario which resulted in crude oil contamination of almost 1.5 acres of productive farmland. The cause of the rupture was pipeline corrosion and cracking. The report concludes:

- **"In 1990, the corrosion defect…was probably 40-45 percent through wall but was not identified in the 1990 ILI vendor's final report and was therefore not repaired at the time."**

- **"During the subsequent 11 years, corrosion continued until the wall had thinned to 16 per cent of its original thickness and the pipe wall could no longer support the stresses associated with the internal operating pressure."**

40. Restrictions on facility construction, maintenance, abandonment and restoration in s.112 and related regulations were enacted specifically for the benefit of pipeline companies. Attached hereto as **Exhibit "AA"** is an excerpt of submissions from the NEB to Counsel for the Standing Committee for the Scrutiny of Regulations dated November 21, 1989 (which follow the submissions excerpted in Exhibit "E" to the affidavit of Donald Wishart sworn December 22, 2003) which addresses the purpose of these restrictions:

> **"Under Paragraph 4(n), the facility owner is responsible to maintain the facility in a good state of repair… Often facilities are removed or abandoned but the site is not restored, in which case the pipeline company at its own expense becomes responsible for restoring the site. These regulations make it clear that the facility owner is not released from its obligations under these regulations with respect to the removal and abandonment of the facility until such time as the site has also been properly restored."**

41. In acquiring easements for the construction of new pipelines following the enactment of s.112 and related regulations, pipeline companies are now acquiring and paying for equivalent restrictions on landowner rights in their easement agreements. Attached hereto as **Exhibits "BB" and "CC"** to this my Affidavit are two such examples: the form of easement agreement entered into between Maritimes and North East Pipeline Ltd. Partnership and landowners with respect to the construction of the Maritimes and North East Pipeline in 1999 (see paragraph 4(d)(e) and (f)) and the Landowner Letter of Understanding entered into between the Vector Pipeline Ltd. Partnership (in which the Defendant Enbridge is a partner) and landowners in connection with the construction of the Vector Pipeline in 1999 (see page 15, section IV.A, paragraphs 4 and 5).

42. In paragraph 20 of its Fresh Statement of Defence, the Defendant Enbridge pleads that "s.112 is in essence a 'call before you dig' provision". Attached hereto as **Exhibit "DD"** is a chart comparing the regulatory restrictions contained in s.112 of the *NEB Act* and related regulations with the regulatory requirements imposed upon landowners affected by provincially regulated pipelines. Provincial regulatory requirements simply require pipeline landowners to contact the pipeline company to obtain a location of the pipeline. They are not required by statute or regulation to obtain company consent for construction or excavation on or off easement or to cross the pipeline (except in Alberta where landowners are required to obtain written permission of the company for working within the pipeline right of way).

43. Also attached hereto as **Exhibit "EE"** is a copy of an excerpt from Enbridge's web page describing "call before you dig" requirements for Ontario homeowners

"**installing a fence, landscaping or digging a garden; renovating or building an addition to your home; or excavating for a new porch or swimming pool**". In contrast to the consent and notice requirements imposed on landowners under s.112 of the *NEB Act* and related regulations, Enbridge's advice to such homeowners is that, for the purpose of "call before you dig", the homeowner's obligation is limited to providing two working days notice to Enbridge concerning the proposed dig and Enbridge will "**send a locator to identify and mark the location of…buried facilities.**"

Regulatory Impact

44. Following enactment of the regulatory restrictions in s.112 and related regulations, up to and including 1997, the NEB continued to advise landowners in its publications and brochures that:

a. these regulatory restrictions would not affect the right of landowners under easement agreements to **"the continuation of past agricultural uses and practices on or across the right of way"** but that company consent was required for power excavation in the control zone **"for any purpose (for example, to construct a road, irrigation system, dug out or foundation)"** (NEB's 1997 publication *Pipelines: A Guide for Landowners and Tenants*, a copy of which is attached hereto as **Exhibit "FF"**;

b. permission from the company was also required **"…for the operation of heavy vehicles or mobile equipment over the right-of-way…"**; **"…for activities which reduce overall cover over the pipe…"**; **"…for any activity considered potentially hazardous to the pipeline…"** including **"operating extra-heavy equipment, sub-soiling, ground levelling, installing drainage systems, augering, (and) fencing"**; and again **"…for excavation using power operated equipment or explosives within the 30 metre controlled areas."**;

c. permission from the company was not required **"…for normal farming activity over the right-of way"** or **"operation of a heavy vehicle or**

mobile equipment in the 30 metre controlled area" (NEB's 1997 publication *Living and working Near Pipelines*, a copy of which is attached hereto as **Exhibit "GG"**).

45. In 1998, the NEB continued to provide the same advice except that company permission was required not only for power excavation in the control zone but also **"operation of a heavy vehicle or mobile equipment in the 30 meter safety zone may require permission from the pipeline company"**. Landowners were also advised of the right of the company to establish a restricted area the limits of which **"may exceed the limits of the right of way and the safety zone"**. Attached hereto as **Exhibit "HH"** is a copy of the 1998 NEB publication *Living and Working Near Pipelines - Landowners Guide*.

46. Contrary to this advice provided by the NEB to landowners that regulatory restrictions would not affect continuation of past agricultural practices and that company consent was not required for normal farm practices, the Defendants have consistently advised landowners until very recently that:

a. **"…any excavation within 30 metres (100ft.) of the pipeline must first be approved by our Company."** (Enbridge letter to landowners January 30, 1992, a copy of which is attached hereto as **Exhibit "II"**);

b. **"Uses on or within 30 meters of the right of way which require permission from IPL include: excavation or blasting; … erection of posts or fences; grading, sub-soiling or soil removal"** (Enbridge's 1995 publication *Safety on the Right of Way is Everyone's Concern*, a copy of which is attached hereto as **Exhibit "JJ");**

c. **"To ensure public safety and to protect the environment, the National Energy Board Act requires prior written approval for any activities that may occur on or within 30 meters of a pipeline right of way"** (undated publication of Enbridge and TransCanada a copy of which is attached hereto as **Exhibit "KK");**

d. **"Uses on or within 30 metres of the right-of-way requiring TransCanada's permission include any activity requiring excavation;**

…crossing of the pipeline by any heavy equipment;…erection of posts or fences; grading, soil removal" and **"TransCanada must be notified of any land development changes within 500 metres of company facilities"** (undated TransCanada publication a copy of which is attached hereto as **Exhibit "LL");**

e. **"If you plan activity on the ROW, you must consult with Enbridge Pipelines before moving ahead. Approvals for some facilities may take longer, so plan ahead"** including **"operate non-agricultural heavy vehicles or equipment on the ROW … ; install fence posts; grade, deep sub-soil or remove soil …"**; (Enbridge's 1999 and 2000 publications *Keeping in Touch – Important Information for Landowners*, copies of which are attached hereto as **Exhibits "MM" and "NN")**; and,

f. As above and **"you must notify the pipeline company before you start any excavation activity on the company's Right of Way, or excavation using power operated equipment or explosives within the 30 meter (100 foot) safety zone"**; **"depth of cover over pipeline may vary"** (Enbridge 2001 and 2002 publications *Keeping in Touch – Important Information for Landowners*, copies of which are attached hereto as **Exhibits "OO" and "PP")**.

47. In addition, since at least 2000, the NEB has been advising landowners in publications and brochures that:

a. Company consent is required for facility construction across, on, along, upon or under an existing right of way; excavation to a depth of more than a foot using explosives or power operated equipment over the right of way or in the control zone; or for operation of a vehicle or mobile equipment across a right of way (2000 and 2002 NEB publication *Excavation and Construction Near Pipelines*, copies of which are attached hereto as **Exhibits "QQ" and "RR");**

b. Reference to the exception to consent requirements for "normal farming activity" has been deleted (2001 and 2002 NEB publication *Living and Working Near Pipelines – Landowner Guide*, copies of which are attached hereto as **Exhibits "SS" and "TT").**

48. TCPL continues to advise landowners that "**Unauthorized crossings and encroachments include… unauthorized crossings by trucks over one ton or by heavy equipment."** (see Exhibit "T" to the Affidavit of Ronald Kerr.)

49. With its 2003 publication *Keeping in Touch – Pipeline Safety and Emergency Information for Landowners*, Enbridge also circulated a document entitled "2003 Public Awareness Program" recording the results of Enbridge's 2002 landowner survey which demonstrates that 97% of Enbridge landowners know the location of the Enbridge pipelines on their property and that 92% of landowners are aware that permission from Enbridge is required before excavation or blasting within 30 meters of the ROW. In this brochure, Enbridge continues to advise landowners that **"if you plan to carry out certain activities on the Right of Way (ROW), you must consult with Enbridge pipelines before moving ahead. Approvals for some facilities may take longer, so plan ahead"** including **"operate non-agricultural heavy vehicles or equipment on the ROW … ; install fence posts; grade, deep sub-soil or remove soil; excavate or use explosives within 30 meters of the ROW; … construct buildings, foundations or stockpiling of materials"**. However, for the first time Enbridge advised landowners that **"Enbridge does permit the operation of vehicles or mobile equipment across the ROW for the purpose of normal farming operations, that is for ploughing, cultivation, planting, harvesting and similar activities routine to most farms, but excluding chisel ploughing, sub-soiling or ripping to more than 45 cms. in depth"**. Attached hereto as **Exhibits "UU" and "VV"** are copies of Enbridge's 2003 publications *Keeping in Touch – Pipeline Safety and Emergency Information for Landowners* and "2003 Public Awareness Program".

50. Despite recent efforts by the Defendants to reduce the regulatory impact of control zone and additional easement restrictions on agricultural landowners, the cultivation limitations which continue to be imposed by the Defendants and the failure of the Defendants to provide equipment specifications acceptable for pipeline crossing continue to restrict landowners in making efficient use of modern cultivation technologies and large scale farm equipment.

51. In order to accommodate modern cultivation technologies, many pipelines are now being constructed at a standard minimum depth of 5 feet or more across agricultural lands. Attached hereto as **Exhibit "WW"** are excerpts from the Agricultural Impact Mitigation Agreement entered into between the Alliance Pipeline LP, the States of Iowa and Minnesota and affected landowners dated September, 1997 with respect to the construction of the Alliance Pipeline which provides for a minimum pipeline depth of cover on agricultural lands of 5 feet. Also attached hereto as **Exhibit "XX"** is an excerpt from the Schedule of Resolved Issues filed with the Joint Review Panel upon the 2003 hearing of the application for regulatory approval for the construction of the Georgia Straight Crossing Pipeline on Vancouver Island (subsequently approved) which similarly provides for a minimum pipeline depth of cover on agricultural lands of 5 feet.

52. In its 2003 publication *Pipeline Regulation in Canada – A Guide for Landowners and the Public* (excerpts of which are attached hereto as **Exhibit "YY"),** the NEB advised landowners that **"companies can and do typically provide a blanket approval for most agricultural machinery"**. However, it is the refusal of the Defendants and their industry organization CEPA to provide such blanket approvals despite the requests of landowners and the NEB (see paragraph 36 and Exhibits "X" and "Y"), and the delays necessitated to obtain company consents and provide notice for routine agricultural operations such as cultivation, planting, harvesting, manure spreading, and drainage and fence installation and repair that prevent landowners from making efficient use of technology and equipment and/or require them to implement inefficient cultivation and cropping patterns. The alternative for landowners is to incur the substantial regulatory risk of contravention of s.112 and related regulations.

53. The NEB is presently developing *Damage Prevention Regulations* to replace the current *Pipeline Crossing Regulations* which propose to replace the control zone with a "safety zone" extending 30 meters in both directions from the centre line of the pipe. While this would somewhat reduce the area of the current control zone, the safety zone would still extend 60.93 feet either side of the TCPL 75 foot easement and 68.5 feet

either side of the Enbridge 60 foot easement. Under the proposed regulations, landowners would continue to have an obligation to notify the company of any "ground disturbance" within the safety zone (which, by definition, includes agricultural activities disturbing more than 45 cm. of soil or which reduce the burial depth of the pipe) and obtain the company's consent for the movement of vehicles or equipment in a field over a pipeline. In connection with the development of the proposed regulations, the NEB conducted a Landowners Survey with respect to the current control zone and additional easement restrictions under s.112 and related regulations (excerpts from the report of which are attached hereto as **Exhibit "ZZ")** which discloses:

- **"Owners of agriculture lands are more knowledgeable than owners of other lands about the pipeline, the operating company and the NEB. They also know more about the easement agreement and the ROW. They are less likely than others to be of the opinion that approval should be required for most of the activities presented to them. They also favour less government intervention";**

- **"Agricultural landowners are least likely to agree that 10 working days is a reasonable period of time for the processing of requests for authorization to install something or move heavy equipment across the ROW";**

- **"Owners of agricultural lands, however, are less likely than others to believe that most of the current approvals should be required. These differences are not the result of a more cavalier attitude to pipeline damage prevention. However, agricultural landowners, mostly farmers, need a much quicker turnaround time for the approval process to be able to work their land effectively.";**

- Seventy-four percent of respondents have owned or managed their land for more than 10 years;
- Ninety-eight percent of landowners know at least approximately, if not exactly, where the pipeline is situated on their land. The depth that the pipeline is buried is the physical property that is least well known;
- 81% of respondents have had pipeline and other facilities located at least some of the times prior to doing excavation work. However, 66% of respondents who have needed to move heavy equipment across the right

of way (498) never or almost never contact the pipeline company before moving equipment (this percentage is 89% in Saskatchewan/Manitoba, 86% in Alberta and 48% in Ontario);

- Landowners view activities that require machinery for excavation or that will apply weight on the buried pipeline as activities that should require approval. However, activities that are not directly on the ROW or that only require manual excavating are not perceived as activities that should require approval from the pipeline company;
- Landowners whose lands are used for agriculture are less likely than others to be of the opinion that approval should be required for 6 of the 7 activities presented. The report notes:

> **"A possible explanation for the above results is that since many of the farming activities involve digging or the use of heavy machinery, any restrictions on these activities make the use of the land for agriculture more difficult. It is therefore not surprising that more agricultural landowners do not look favourably on the requirement to ask for approval every time they need to perform such activities".**

54. In providing companies with ten working days to respond to landowner requests for consent to undertake the construction or repair of facilities or soil excavation to a depth of more than 12 inches on easement or within the control zone, and an additional three day notice period before work can be commenced within which the company can impose a restricted zone preventing excavation anywhere on the farm property, Section 112 of the *NEB Act* and related regulations impose on landowners significant limitations on efficient conduct of farm operations and profitable management of their business or cause them to incur the significant risk of regulatory contravention.

55. Taking into consideration weekends and holidays, these consent and notice requirements may delay the commencement of time-sensitive activities such as cultivation, planting, harvesting, drain and fence installation and repair by up to 18 days (i.e. request for consent is submitted on a Friday before a long weekend; the company is not required to provide consent for 2 weeks; notice is provided on Monday; and the

company is not required to respond by locating their pipe until Thursday). In fact, consent requests for pipeline crossings of heavy equipment not involving excavation may result in even longer delays since there is no time limitation in the *Act* or regulations for the company to provide such consents. Farmers simply can't afford the postponement of necessary work necessitated by such time delays and the costs resulting therefrom including lost production, soil and crop damage and increased expense to reschedule contractors and equipment.

56. By way of example of the regulatory impact of these consent and notice requirements on landowners, attached hereto as **Exhibit "AAA"** is a copy of correspondence from the Defendant Enbridge to a landowner complaining about necessary tiling work undertaken by a landowner in the control zone without having provided the required three days notice. I am advised by the landowner, Klaas DeJong (a member of OPLA), and I verily believe that he had arranged with his tiling contractor in July, 2003 for necessary tiling work to be carried out on his property and was advised by the contractor at that time that although the contractor had a full schedule until the middle of September he would come as soon as possible. The contractor arrived on site on the morning of August 28 (a Thursday) prepared to undertake the necessary work. Mr. DeJong contacted the Defendant Enbridge's Sarnia office to request a pipeline locate and was advised that there was no staff available because of sick leave and holidays. Mr. DeJong then called the defendant Enbridge's Toronto emergency office and was informed that Enbridge would require three working days (until Tuesday) to provide the necessary pipeline locate. Representatives of the Defendant Enbridge did, however, attend at the site the same day to tell the contractor to stop working even though the contractor was not on the Enbridge easement.

57. Restrictions on the construction of easement and control zone facilities in section 112 of the *NEB Act* limit landowners in the construction and expansion of agricultural facilities or require them to incur additional costs for the alternate location and operation of such facilities. These restrictions also limit the development potential of their lands for non-agricultural uses. Attached hereto as **Exhibit "BBB"** is an example of a by-law

enacted by the Town of Laurentian Hills in Renfrew County, Ontario which prohibits construction of any dwelling within the control zone thereby restricting the development potential of any property with control zone for a subdivision or large scale residential development. Also attached hereto as **Exhibit "CCC"** is a copy of a Request for Reconsideration and resulting reduction of $55,000 in current property value assessment dated March 10, 2004 and issued by the Municipal Property Assessment Corporation with respect to the property of an OPLA member because of restrictions imposed under s.112 of the *NEB Act* and related regulations.

OWNERSHIP RIGHTS RESTRICTIONS

58. In addition to ownership rights restrictions recognized by the NEB in its submissions to the Standing Joint Committee with respect to facility construction, maintenance, abandonment and restoration (see above paragraph 39 Exhibit "AA"), counsel for the Standing Joint Committee in his response to the NEB of December 15, 1993 (a copy of which is attached hereto as **Exhibit "DDD")** recognized the further ownership rights restrictions imposed by control zone and additional easement restrictions in s.112 and related regulations:

> **" … the position advanced in [the NEB's] letter that the provisions of the regulations in question do not constitute a prohibition, since once the pipeline is located and staked excavation can take place, seem extremely tenuous. Surely the same argument could be used with respect to s.112(1) of the Act, which would then be said to not truly "prohibit" excavations within 30 meters of a pipeline, but merely impose the condition that leave of the Board first be obtained. Whether temporary, conditional or absolute, both s.112(1) of the Act and the provisions of the Regulations in question are prohibitions nonetheless."**

59. No landowners or pipeline landowner associations were consulted with respect the enactment of s.112 and related regulations. With respect to the most recent 1999 amendment of s.112 adding sub-section 5.1 which permits "*prohibiting of excavations in an area situated in the vicinity of a pipeline, which area may extend beyond 30 meters of the pipeline*" during the three day notice period prior to commencement of work, this amendment was enacted as a part of a Miscellaneous Statute Law Amendment Bill which

was not subject to parliamentary debate. In proceedings before the Legal and Constitutional Affairs Committee of the Senate of Canada considering the proposed amendment (an excerpt of which is attached hereto as **Exhibit "EEE"),** a senator on the committee commented:

> **"This particular process that we have here is as close as Parliament could come, I think, to amending laws without debate, and I am sure everyone would be aware that it would be an abuse of the process if what were to occur here was to pass a regulation which, because of the way it is done, ends up, in fact, being an amendment to legislation which affects the rights of property owners, if I may use that term".**

60. In a survey of landowners conducted in 2003 (with 62 landowners responding), CAPLA determined:

a. 57 properties had been owned by the responding landowners for more than 20 years;

b. at the time the property was acquired, 93% of responding landowners were not aware of any restrictions to farming on easement over the pipeline; 100% were not aware of any restrictions on farming off easement in what is now the control zone; 90/96% were not aware of any restrictions on cultivation depth or power excavation in what is now the control zone; 97% were not aware of any restrictions in the operation of a vehicle or mobile equipment across the pipeline; and 99% were not aware of any regulatory risk or liability they would incur if they damaged the pipeline while farming;

c. 86% are now aware of control zone restrictions

d. 68% of those answering have more than 6 acres of control zone;

e. of 54 responding landowners who may undertake expansion of existing facilities or new construction on their properties, over half would be prevented from doing so by control zone restrictions or would be required to alter their farming practices;

f. more than half of responding landowners have ploughed, cultivated, dug, or excavated to a depth greater than 12 inches in the control zone; almost half have constructed a building, tile drain or fence across, on, along or

under the pipeline; and 94% have crossed the pipeline with a vehicle or mobile equipment (most hundreds or thousands of times);

g. almost half of responding landowners have incurred the time, operational interference and delay to request permission of the pipeline company to undertake these activities;

h. agricultural equipment being used in the conduct of normal farm practice includes manure spreaders, combines and other equipment up to 45 tons and soil preparation equipment including subsoilers which penetrate the soil to depths up to 30 inches;

i. surface use restrictions limiting the weight of vehicles crossing the pipeline restrict the farming activities of 90% of responding landowners

j. surface use restrictions limiting cultivation depth to 12 inches restrict the farming activities of 69% of responding landowners.

Attached as **Exhibit "FFF"** is a copy of the Final Compilation of the results of this survey.

61. Recent landowner compensation settlements in connection with the construction of new provincially regulated pipelines (without control zone) have compensated landowners for easement restrictions on ownership rights in an amount equivalent to the market value of the easement lands. In Southwestern Ontario, this compensation for easement restrictions has been in the range of $2,700 to $4,000 per acre. Attached hereto as **Exhibit "GGG"** are copies of landowner compensation package summaries from the 2000 Dawn-Enniskillen Pipeline, the 2002 Century Pools Phase II Transmission Pipeline, and the 2002 Sarnia Regional Co-generation Project Pipeline demonstrating these compensation values for easement land rights (which do not include disturbance damages and crop loss which are compensated separately). Also attached hereto as **Exhibit "HHH**" is a copy of the Payment Summary schedule in the current agreement between the Gas Pipeline Landowners of Ontario (GAPLO)-Union and Union Gas Limited which provides for land rights compensation of $3600 per acre (being the average value of agricultural land and not including disturbance damages and crop loss which are

compensated separately) for limited temporary off easement access to undertake on easement maintenance digs.

62. Regulatory requirements for landowners to obtain consent and provide notice to the company before undertaking facility construction and repair or agricultural operations penetrating to a soil depth of more than 12 inches in the control zone (with the further right of the company to prevent excavation on the whole property during the three working day locate notice period) are in fact more onerous and constitute a greater restriction of control zone ownership rights than easement ownership rights restrictions contained in Enbridge's easement agreements. Compensation for these control zone ownership rights restrictions should be at least equivalent to current compensation for easement land rights and temporary off easement access.

63. Similarly, additional regulatory easement restrictions requiring landowners to obtain company consent for construction and repair of on easement roadways, drainage and fences; and consent and notice to the company for on easement farm operations penetrating to a soil depth of more than 12 inches or crossing the pipeline constitute restrictions on easement ownership rights greater than the original easement restrictions and should be compensated accordingly in accordance with current compensation practice.

REPRESENTATIVE PLAINTIFF CLAIM

64. I live on and operate the farm owned by 488796 Ontario Limited and, therefore, pipelines affect my home and my business. Pursuant to the agreement of right of way and easement (Exhibit "B"), my farm is subject to a sixty foot wide federally regulated pipeline easement in favour of the Defendant, Enbridge. Pursuant to s.112 of the *NEB Act* and related regulations, my farm is subject to the extensive land use restrictions discussed above, including a control zone extending out thirty metres on each side of the Enbridge easement and consent requirements for pipeline crossing. I had input into neither the agreement nor the regulations.

65. Although I bought into the business with the knowledge that the farm was subject to an agreement of right of way and easement, subsequent land use restrictions and additional pipeline company rights have been imposed on the farm without my consent and in direct conflict with the easement agreement. These restrictions directly affect my ability to farm, and limit my options with respect to future development.

66. My farming operation consists of both cash crop and turkey production. On the cash crop side, the farm is especially efficient. It is narrow – only two-thirds the width of a normal farm – with 53 acres of workable land. The efficiency is gained because the farm is flat, and the fields are long, requiring less turning of equipment, less fuel consumption and less time to work on the land. Attached hereto as **Exhibit "III"** is a diagram showing the layout of the farm.

67. The field, however, is split in half by the pipeline easement which runs across the middle of the farm. Under the terms of the existing easement agreement, this split does not seriously affect the efficiency of my farming operation, as the pipeline has been buried "so as not to interfere with the drainage or ordinary cultivation of the land." However, the land use restrictions imposed by s.112 of the *NEB Act* and the *Pipeline Crossing Regulations* turn the pipeline easement into a barrier of sorts running from one side of the farm to the other. Attached hereto as **Exhibit "JJJ"** is a photograph showing the view across the field along the pipeline easement from west to east.

68. For example, when I deep chisel-plough in order to alleviate soil compaction and improve drainage and crop yields, I am excavating to a depth below 30 centimetres for the purposes of the *NEB Act* and regulations. To remain in compliance, I must create a headland on either side of the easement to avoid crossing the easement and control zone. These extra headlands, where I must turn the equipment at mid-field, cost extra time, extra fuel, and extra money. Although these headlands may not be visible once a crop is planted (as the signs of prior cultivation are covered up), the effects of the additional headlands are still present in the field. Extra headlands mean I must turn equipment over the same ground several times, causing extra compaction which results in lower yields. In

general, the regulatory land use restrictions prevent me from taking advantage of an efficient field setup. Loss of efficiency invariably means loss of profit.

69. The land use restrictions also adversely affect my ability to manage tile drainage on the farm. In or about 1967, the farm was systematically tile drained every 40 feet. Under normal conditions, tiles would run from one end of the farm to the other in a direct north-south line and drain into a drainage ditch or other basin. However, at the time of installation of the tile, IPL (now Enbridge) required that header tiles be installed on either side of the easement so that the water running through the tiles on one side enters into one header tile, then crosses the easement through a limited number of crossing tile, exits into another header tile, and then runs the rest of the field through tiles spaced normally at forty feet. Attached hereto as **Exhibit "KKK"** is a diagram illustrating the difference between a normal drainage system and one that features header tiles.

70. Blockages, blow-outs and flooding may occur in all tile systems as debris, tree roots and rodents can all interfere with the flow of water. These problems are more likely to arise in a system which features header tiles, as the water flow from many tiles is forced into fewer tiles, and forced to change direction. In any case, the restrictions on excavation with mechanical equipment imposed by s.112 of the *NEB Act* and the *Pipeline Crossing Regulations* negatively affect my ability to respond to drainage problems which occur within the pipeline easement and/or the thirty metre control zone in a timely fashion. Drainage problems require immediate attention, especially during the spring planting seasons, and I cannot afford to wait three days or more for permission from Enbridge to make repairs.

71. Indeed, delays in my operation in obtaining permission to cross the pipeline with mobile equipment, deep-till the soil, or repair tile drainage, may be significantly compounded because I often rely upon the services of other individuals with busy schedules. In the spring, when most tile drainage problems occur as a result of the snow melt, tile drainage contractors are in high demand, and may not be available to make required repairs as soon as I obtain permission from Enbridge, and once the pipeline is

located and marked. I may have to wait even longer for the contractor to arrive. Meanwhile, the field may be flooding and my equipment sitting idle while I should be planting or carrying out other work in the field. The same holds true for the use of custom operators to carry out field work such as planting or harvesting. They cannot and will not wait around while I seek permission from Enbridge.

72. In addition to affecting my current farming operations, the restrictions imposed by s.112 of the *NEB Act* and related regulations also affect my ability to expand or modify my operations in the future. For instance, some of my neighbours have begun to grow sugar beets as a high-value commercial crop, and are renting local land for up to $200 per acre per year, nearly twice the going rental rate for agricultural land in my area. Sugar beet growers require land on which specific pesticides have not been applied, and my farm meets this requirement. Yet, at least one of my neighbours is reluctant to plant on farms with pipeline easements because of the restriction on crossing the pipeline with mobile equipment without pipeline company permission. A sugar beet harvester, as seen in the photos attached hereto as **Exhibit "LLL"**, weighs in excess of sixty tons when fully-loaded. Rather than risk refusal from the pipeline company to cross the easement, either now or at any moment in the future, my neighbour has simply chosen not to rent my land. This lost opportunity is another cost of land use restrictions created under the *NEB Act* and regulations.

73. If I choose to expand my turkey operation by building a new, more efficient barn, I am prohibited by current provincial and municipal guidelines to build within a certain distance from existing residential and other buildings. On my farm, this leaves the northern end of the farm as the only choice for future expansion. A building site in the north end of the field would work well because it could have road access to Fairweather Road which runs along the west side of the farm. However, the pipeline easement, with control zones on either side, creates a strip of land approximately two hundred and sixty feet in width effectively preventing construction of an intensive livestock barn even if consent could be obtained from Enbridge. In any event, I cannot afford to invest

hundreds of thousands of dollars in a new barn if my operation would be subject to the ongoing approval of the pipeline company.

74. Restrictions on expansion remain a problem whether I continue to farm myself, or decide to sell to another operator. Potential purchasers would face the same restrictions I face, and the inability to expand the turkey operation reduces the attractiveness of my farm, and its value in the marketplace. When I bought into the farm corporation in 1983, minimal land use restrictions existed pursuant to the easement agreement with Enbridge, and these restrictions were limited to the pipeline easement itself. Now, there are more restrictions on my operations within the easement than in 1983, and the pipeline company controls certain of my operations outside the pipeline easement. These new restrictions did not exist in 1983, and were not reflected in either in the easement agreement or in the price I paid to obtain an interest in the farm. However, these restrictions will factor into the price I can obtain now when selling my interest. This decrease in value is a direct result of the operations of the pipeline company, and landowners like me should be compensated for the loss.

75. This affidavit is sworn in support of a motion by the representative Plaintiffs for an order determining that the Plaintiffs' action satisfies the requirements of s.5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, in that the pleadings disclose a cause of action and in response to the Defendants' motion for judgment.

SWORN BEFORE ME)
in the Township of Plympton,)
in the County of Lambton,)
this day of ,)
2004.)
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DAVID CORE

A Commissioner for Taking Affidavits, etc.