

Intelligence MEMOS



From: Lawrence Herman
To: Prime Minister Justin Trudeau
Date: May 18, 2021
Re: **LINE 5: A WHITE HOUSE MISSING IN ACTION**

The battle over Enbridge Line 5 – unfolding in a Michigan courtroom – shows how declarations of friendship between Canadian and US governments are hostage to local politics.

Last February, the Prime Minister and the US President concluded a [Roadmap for a Renewed US-Canada Partnership](#). The Roadmap does not refer to pipeline issues, in spirit and intent it should prevent actions by the state of Michigan that will seriously harm broad Canadian interests. The Line 5 dispute is of a different order than trade cases involving discrete sectors such as softwood lumber or dairy products. Much different.

Of critical importance, Line 5 is governed by a binding treaty between Canada and the United States, guaranteeing unimpeded hydrocarbon transit where a pipeline runs through one country on its way to the other.

Yet the Biden administration has been nowhere to be seen as Canada and Enbridge argue their case in the Michigan courtroom. All because of the close relationship between Governor Gretchen Whitmer and President Joe Biden, and because of environmental politics and the way the winds are blowing in the Democratic Party. The Biden administration has passed the dispute off as something for Enbridge and Michigan to sort out.

Yet it is the 1977 treaty that is in play here; a treaty approved by the US Senate, with then-senator Biden voting yes. Its preamble speaks of the shared objectives of ensuring uninterrupted transmission of hydrocarbons on through transit pipelines. To this end, Article II says no public authority in either party shall institute measures that would have the effect of impeding or interfering “in any way” with that transmission.

While environmentalists in the US and Canada (inside and outside government) may find this uncomfortable, there it is, set down in black and white. As a matter of international as well as US constitutional law, no state or local authority has the right to interfere with or breach this treaty obligation.

Article V of the treaty does allow a degree of transit intervention, but that right doesn’t apply to local agencies and is carefully circumscribed. It allows national authorities – not the state of Michigan – to reduce or stop normal pipeline operations for a temporary period only, and only, for safety or technical reasons.

In line with the treaty preamble, Article V also stipulates that a government requiring a temporary reduction or stoppage for technical or safety reasons “shall not unnecessarily delay or cause delay in the expeditious restoration of normal pipeline operations.” Where any temporary interference occurs, the party of destination (Canada in this case) is entitled to a compensatory amount of oil or gas from the other party.

All of this is pretty straightforward. The essential point is that these provisions are binding on both countries under international law, designed to prevent any US state – or any Canadian province – from interfering. When the Senate was debating ratification in 1977, the point was actually made that the treaty would stop any Canadian province interfering with the proposed trans-Alaska pipeline being designed to carry North Slope oil to the lower 48 states. This same point obviously applies to Michigan in the case of Line 5.

How should the national governments of the two countries proceed?

In Canada’s arguments in Michigan court this month, reference was made to the arbitration provisions under the treaty regarding its interpretation, application or operation. Before getting there, that same provision says that the parties should make every effort to settle matters by negotiation. If the Trudeau-Biden Roadmap is to have any meaning, negotiation at the national level is the best path to amicable resolution, dependent, of course, on the Biden administration accepting Washington’s paramount jurisdiction in this matter.

An expeditious negotiating process under the governmental umbrella could reach an outcome that does two things – allows continued operation of Line 5 under acceptable safeguards and best industry practices, while at the same time doing no violence to either country’s carbon reduction plans and objectives in meeting the terms of the Paris Agreement.

This kind of arrangement would meet the terms of the 1977 treaty, allowing Enbridge’s technical improvements and safety plans to be presented and considered in a broader forum, more conducive than the adversarial setting of a Michigan courtroom.

Should Michigan succeed in shutting down Line 5, on the other hand, it would be both an unfriendly act and an egregious breach of treaty obligations. The Canadian government must make this point directly to the Biden administration – and in the clearest possible terms.

Lawrence Herman, a former Canadian diplomat, is counsel at Herman & Associates and senior fellow of the C.D. Howe Institute in Toronto.

To send a comment or leave feedback, email us at blog@cdhowe.org.

The views expressed here are those of the author. The C.D. Howe Institute does not take corporate positions on policy matters.

A version of this Memo first appeared in [The Globe and Mail](#).