Duncan Purvis
Senior Legal Counsel
LP Law, Regulatory Law

tel 780-508-7521
fax 780-420-8749
duncan.purvis@enbridge.com

Enbridge
10175 - 101 Street NW
Edmonton, Alberta T5J 0T6
Canada

June 21, 2017 **E-FILE**

Mackenzie Valley Land & Water Board
7th Floor, 4922 48th St, PO Box 2130
Yellowknife, NT X1A 2P6 Canada

Attention: Angela Love

Dear Ms. Love:

Re: Enbridge Pipelines NW Inc. ("Enbridge")
Line 21 Segment Replacement Project
Application for Type A Land Use Permit MV2017P0013
Application for Type B Water License MV2017L1-0002
Reply to Liidlii Kúé First Nation ("LKFN") and Samba K'e First Nation ("SKFN")

Enbridge Pipelines (NW) Inc. ("Enbridge") applied to the Mackenzie Valley Land and Water Board ("MVLWB" or the "Board") for a temporary Land Use Permit (Type A) for workspace, access and camps. Enbridge also applied to the Board for a temporary Water License (Type B) to use approximately 10,000 m^3 of water for drilling and pipeline pressure testing activities.[1] These applications before the MVLWB are narrow in scope – they do not extend to the ongoing operation of the existing Line 21. That undertaking has already been the subject of a comprehensive environmental assessment – it would not be appropriate to re-assess the impacts of that existing, approved, operation. The *Mackenzie Valley Resource Management Act* (the "Act"), supported by case law, clearly establish that the Line 21 undertaking as a whole is exempt from Part 5 of the Act.

The construction and operation of Line 21 was authorized by the National Energy Board under Certificate of Public Convenience and Necessity OC-35 in 1981,[2] which was issued only after the completion of an environmental impact assessment.[3] Enbridge acquired Water Licences from the Northwest Territories Water Board on February 16,

[1] Enbridge Response to IR #6.
[2] Enbridge Response to IR #1
[3] Enbridge Response to IR #2.

1983 and a Land Use Permit from Land Resources, Department of Indian and Northern Affairs Canada (Yellowknife) on May 18, 1983.[4]

The Line 21 Segment Replacement Project (the Project) is a maintenance project aimed at resuming safe operation of Line 21, specifically to protect Line 21 from a geotechnical hazard identified by Enbridge. The Project involves the replacement of a short segment of Line 21 – 2.5 km of an 869 km-long pipeline[5] – at a lowered depth to ensure geotechnical stability so the whole pipeline can continue operating exactly as it did earlier.

The Project is not an abandonment, decommissioning or other significant alteration to the existing undertaking (Line 21). It is maintenance in its truest sense. That is, the Project will not change what or how much of it flows through Line 21, nor will it change how Enbridge operates that pipeline. The Project will only allow Enbridge to return Line 21 to normal operations. The pipeline segment that is being replaced is an indivisible part of the whole of Line 21. Line 21 is not being decommissioned; in fact, the entire purpose of the Project is to resume and maintain overall service of the line.

In response to Information Requests from the Board, Enbridge explained why the Project is exempt from Part 5 of the Act, which contemplates environmental assessments and environmental impact reviews, by operation of s. 157.1. LKFN and SKFN disagree.

Arguments by LKFN and SKFN

LKFN and SKFN argue that Part 5 of the Act is applicable to the Project because the Project involves the decommissioning and/or a significant alteration of a segment of Line 21. They also argue the Project will significantly alter the whole of Line 21. Additionally, LKFN and SKFN argue that Enbridge did not sufficiently respond to the Information Requests from the Board. Finally, the submission from SKFN explained why it is concerned about Enbridge's proposed segment replacement. Enbridge's responses to each of those arguments are outlined below.

Statutory Interpretation

The interpretation of s. 157.1 is at the heart of the disagreement between Enbridge and LKFN and SKFN. The Board is tasked with deciding the meaning of that section.

Section 157.1 states:

> Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit, or other

[4] Enbridge Response to IR #1.
[5] Enbridge Response to IR #3.

> authorization for an abandonment, decommissioning or other significant alteration of the project.

Respectfully, the arguments by LKFN and SKFN relating to the interpretation of s. 157.1 are not supported by that section's language, the policy that underlies it, nor the binding jurisprudence that has previously interpreted it.

The interpretation of s. 157.1 that is urged by LKFN and SKFN is inconsistent with an interpretation of that section by the Court of Appeal of the Northwest Territories in *North American Tungsten Corporation Ltd. v. Mackenzie Valley Land and Water Board*.[6] That appellate decision made clear that s. 157.1 was "designed to grandfather certain undertakings which predate June 22, 1984" by exempting new applications for licences, permits or other authorizations in relation to such undertakings from Part 5.[7] Line 21 is such an undertaking.

LKFN and SKFN, wrongly, see the "undertaking" to which a licence, permit or authorization applies (e.g. Line 21) and the "project" that may be subject to abandonment, decommissioning or other significant alteration" (e.g. the 2.5 km segment of Line 21 in issue) as distinct.[8] The Court of Appeal declined to draw that same distinction because, it held, doing so would run counter to the very purpose of s. 157.1. The Court of Appeal was plain in stating that "[u]nder s. 157.1, the primary focus is on the undertaking itself." That conclusion is clear from the English version of s. 157.1. However, even if there were lingering doubt, it is resolved by the French version, which states:

> 157.1 La partie 5 ne s'applique pas en ce qui touche la demande de permis ou d'autorisation dont l'objet est lié à <u>un ouvrage ou une activité</u> [a work or an activity] visé par un permis délivré avant le 22 juin 1984, à moins que cette demande vise la désaffectation, la fermeture ou une modification importante <u>de l'ouvrage ou de l'activité</u> [of the work or of the activity].

As was recognized by the Court of Appeal in *Tungsten*, the French version of s. 157.1 makes clear that "the" work or activity that is subject to abandonment, decommissioning or other significant alteration is the same as whatever "work or activity" was the subject of a licence or permit issued before June 22, 1984.[9]

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[6] *North American Tungsten Corporation Ltd.* v. *Mackenzie Valley Land and Water Board*, 2003 NWTCA 5 ("*Tungsten*").
[7] *Tungsten* at para. 23. See also *Canadian Zinc Corporation* v. *Mackenzie Valley Land and Water Board*, 2005 NWTSC 48: "Indeed, s. 157.1 only makes sense if those words mean the same thing, since its intent must logically be that Part 5 does not apply in respect of any permit related to a qualifying undertaking except a permit for an abandonment, decommissioning or other significant alternation of the undertaking."
[8] LKFN at p. 2.
[9] *Tungsten* at para. 33.

LKFN and SKFN argue that section 157.1 does not apply because Enbridge is seeking to decommission a small segment of Line 21.[10] That argument is incorrect. What is required to engage Part 5 is a significant departure from the existing approved infrastructure's approved mode of operation. As the Court of Appeal noted: "…projects which pre-date June 22, 1984 … are to be subjected to full scale environmental assessment as prescribed under the applicable legislation [Part 5] only if they depart significantly from their approved mode of operation and engage in, for example, decommissioning, abandonment or significant alteration of the project"[11] (emphasis added). The proposed decommissioning of a small section of Line 21 (the subject of an application before the National Energy Board) does not in any way represent a departure from the current approved mode of operation of Line 21. Once the replacement segment is installed and the existing segment is decommissioned, Line 21 will continue to operate just as it does today. Replacement of segments of pipe, for reasons of safety and integrity, is unmistakably a maintenance activity.

As an alternative, LKFN argues that replacing 2.5 km of Line 21 would result in a significant alteration of the "mode of operation" of the whole of Line 21 because of altered environmental conditions and evolved construction methods since the Environmental Impact Statement for Line 21 was prepared in 1980.[12] That argument is contrary to the Court of Appeal's ruling in the *Tungsten* case, which holds that to fall within the scope of the exemption under s. 157.1, the undertaking must have had a licence, permit or other authorization issued as of June 22, 1984. Line 21 did. Section 157.1 does not contemplate an assessment of whether environmental conditions or construction methods have changed since the original authorization was issued.

LKFN's argument also fails to recognize that construction practices have evolved to be dramatically less impactful over the past 37 years. For example, HDD is far less intrusive than previous methods which required the diversion of rivers to accommodate open-cut pipeline construction. LKFN's argument seems to imply that if Enbridge proposed installing the replacement segment by the open cut method, that would not represent a significant alteration. More importantly, that argument constitutes a fundamental challenge to the wisdom of Parliament's decision to enact s. 157.1, i.e. to exempt new licences, permits and authorizations that relate to old developments from Part 5 except in prescribed circumstances. The Court of Appeal was correct to view Parliament's enactment of s. 157.1 as reflecting a conscious and deliberate balancing of "the legitimate goal of protecting land and water resources in the Mackenzie Valley for the benefit of its citizens, on the one hand, while, at the same time, exempting from the full force of new environmental legislation undertakings developed under an earlier legislative regime."[13]

[10] LKFN at pp. 2-3.
[11] *Tungsten* at para. 29.
[12] LKFN at pp. 4-5.
[13] *Tungsten* at para. 24.

Section 157.1 is reflective of a decision by Parliament to ensure that ancillary applications that are required to maintain the operations of existing approved infrastructure like Line 21 do not disrupt those very same operations by triggering environmental assessments or environmental impact reviews under Part 5.

Parliament was not ignorant to the reality of changing environmental conditions, evolving construction methods and legal developments when it enacted s. 157.1. To the contrary, Parliament made Part 5 applicable to all licences, permits and authorizations with the sole exception of those related to existing approved infrastructure. LKFN and SKFN argue that Part 5 should apply to the proposed maintenance work on Line 21 because much has changed since Line 21 was approved. Indeed, the date of approval of Line 21 is what exempts the proposed maintenance work from Part 5. Section 157.1 is engaged only in relation to developments with permits or licences in issued before June 22, 1984.

Enbridge has not applied for a licence, permit, or other authorization that would result in the decommissioning of Line 21 or otherwise significantly alter it. Enbridge only seeks to maintain Line 21 so it can return to normal service. Part 5 is not engaged, by virtue of s. 157.1. Any finding to the contrary would run counter to the language of that section, Parliament's weighing of competing policy issues, and binding jurisprudence from the Court of Appeal of the Northwest Territories.

Sufficiency of Responses to Information Requests

The submissions by LKFN[14] and SKFN[15] challenge the sufficiency of Enbridge's responses to Information Requests from the Board. In particular, they challenge the response to Information Request #2 because Enbridge did not detail what precisely was (and was not) evaluated during the environmental impact assessment for Line 21 in 1980-1982. The reason Enbridge did not outline this information is simple – the Board did not request that information, nor is it required in order to assess the applicability of s. 157.1.

In Information Request #2, the Board asked a yes/no question: "Was the Line 21 Pipeline Project subject to a process of environmental impact assessment before June 22, 1984?" A simple "yes" from Enbridge would have sufficed, although Enbridge included more detail to provide additional context for the benefit of the Board and others.

LKFN and SKFN raise issues of whether HDD was considered in the original review, whether climate change was considered, and whether the impacts on Aboriginal and treaty rights were considered.[16] With respect, this information is irrelevant to the interpretation of s. 157.1. The wording in section 157.1 (as confirmed by the

[14] LKFN at pp. 5-6.
[15] SKFN at p. 2.
[16] LKFN at pp. 5-6.

jurisprudence) is clear and unequivocal. The only question the Board needs to consider is whether the undertaking was the subject of a licence, permit or authorization issued before June 22, 1984 – not what issues may or may not have been considered at that time. If the Board were to do otherwise, and engage in a detailed review of what was assessed at the time of issuance of the licences or permits, that would defeat the intent of s. 157.1, which is to grandfather certain undertakings that predate June 22, 1984.

The Board cannot lose sight of the distinction between the environmental assessment and conditions imposed prior to a project's construction, on one hand, and operating standards relating to an approved and operating project, on the other. The arguments put forward by LKFN and SKFN seem to imply that if Part 5 does not apply, then their concerns will not be addressed. For example, SKFN states that it is concerned about the effect of work camps on the Village of Fort Simpson, and the use of local environmental monitors.

As the Court of Appeal stated in *Tungsten*:

> It has been argued that if Tungsten's undertaking, and others, were exempt from Part 5, they would enjoy an absolute exemption from environmental monitoring on any basis and this could not have been Parliament's intention. However, the assumption underlying this argument is incorrect. One must distinguish between conditions imposed before a project is built (facility compliance) and operational standards applicable to existing projects (operational compliance). Simply because an undertaking may be exempt from the full panoply of environmental assessments under Part 5 of the *MVRMA* does not mean that the undertaking is exempt from applicable regulatory standards.

That Part 5 is inapplicable to the current Project does not mean that the current Project is unencumbered from regulatory and environmental oversight. The National Energy Board (NEB) has developed a detailed and robust process for reviewing and assessing Enbridge's applications to replace a small segment of pipe by decommissioning an existing segment and installing a new one. Issues such as the ones raised by SKFN are squarely within the realm of the NEB process, which provides participants in that process the opportunity to raise its issues and have them evaluated and addressed by the NEB.

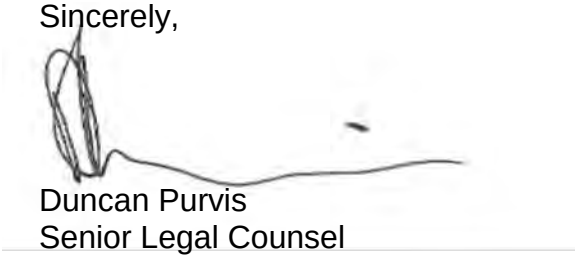
Further, the MVLWB has the authority to address issues through other means. Again, this demonstrates that just because the water licence and land use permit applications are not subject to Part 5 of the act, does not mean that these applications are without scrutiny, or that participants do not have an opportunity to raise issues and have them addressed by a regulator.

Conclusion

Line 21 is an undertaking for which licences and permits were issued prior to June 22, 1984. This undertaking is not significantly altered by any aspect of the proposed segment replacement (including the decommissioning of a small segment). By operation of s. 157.1, Part 5 is therefore inapplicable to any licence, permits or other authorizations that may be required by that segment replacement. Indeed, ensuring that maintenance projects like the Line 21 segment replacement can proceed without interfering with the operations of developments that pre-date June 22, 1984 is exactly why Parliament enacted s. 157.1. That conclusion is required both by the language of s. 157.1 and binding jurisprudence from the Court of Appeal of the Northwest Territories that has interpreted it previously. The MVLWB should not permit the current applications to be used as an opportunity to inappropriately re-evaluate the ongoing operation of an existing approved undertaking.

Should the Board require any further information, please contact Sarah McKenzie, Manager Regulatory Affairs, at 780-420-5375 or sarah.mckenzie@enbridge.com.

Sincerely,



Duncan Purvis
Senior Legal Counsel