De Beers

23 April, 2003

Mackenzie Valley Environmental Impact Review Board
Attn: Vern Christiansen
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5102 50th Avenue
Yellowknife, NT
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Dear Mr. Christiansen

Attached is De Beers Canada Mining Inc.'s response to the NSMA application for an adjournment of the Public Hearing based on preliminary and jurisdictional issues.

Sincerely

per: Laura Abbott

John McConnell
Vice President – NWT Projects

encl.

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DE BEERS CANADA MINING INC. RESPONSE TO THE NSMA'S SUBMISSIONS TO THE MACKENZIE VALLEY ENVIRONMENTAL REVIEW BOARD DE BEERS SNAP LAKE DIAMOND PROJECT ENVIRONMENTAL ASSESSMENT: PRELIMINARY AND JURISDICTIONAL ISSUES

1. De Beers Canada Mining Inc. respectfully submits to the Review Board that the North Slave Metis Alliance has not made out a valid case for adjournment of the public hearing.

2. The NSMA brief of submissions does not demonstrate any breach of the duty of procedural fairness. Nor does the brief establish the existence or breach of any relevant duty to consult.

PROCEDURAL FAIRNESS

3. The purpose of the rules of procedural fairness is to enhance the quality of decision-making and the acceptability of the decision. The complaints set out in the NSMA brief, even if established, do not alone or in combination amount to breach of the rules of procedural fairness.

Content of Rules

4. Adaptation of the rules to a process like the present environmental assessment depends upon the particular circumstances. The content of the duty of fairness varies according to the circumstances. [1]

5. The factors that affect the content of procedural fairness in any given case include: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself.[2]

6. The Ontario Environmental Appeal Board has held that procedural fairness did not require it to interpret its governing statute to permit one intervener to call further evidence. The new evidence would add two or three months to the hearing, which had already taken more than a year.

> ...We do not agree that there is a duty to continue. The legislation must be interpreted in a way that provides a reasonable balance between the facilitation of public participation and the orderly and expeditious completion of lengthy, costly, and complex proceedings. Assuming that the *audi alteram partem* rule [*i.e.,* the requirement that interested persons be heard before being adversely affected by an administrative action or decision] extends to interveners rather than just protecting persons against whom

> the government has taken some action, such as the applicants, we doubt that the rule requires a continuation of the hearing under these circumstances.
>
> The Board has a very wide discretion whether to grant party status. An interpretation of the legislation that is so inflexible as to prevent the Board from exercising adequate control over its process once party status is granted would not serve the worthwhile purpose of promoting public participation. Such an interpretation would discourage the Board from granting party status.[3]

7. The foregoing considerations apply to the submissions made by the NSMA on the present application to adjourn.

Allegations of Breach

8. The NSMA brief refers generously to "breaches of procedural fairness", but the only real particulars mentioned relate to expert consultation, schedule or timetable, and "ad hoc" process.

9. In addition, the NSMA brief argues (paragraph 8, page five) that the Pre Hearing Conferences were to be "without prejudice" but nevertheless information has been posted to the Public Registry. Posting does not establish prejudice or a breach of procedural fairness. The NSMA brief also contends (paragraph 12, page six) that a site visit by the Review Board was "contrary to the requirements of procedural fairness" but does not explain why or how or cite any authority for the contention.

Expert Consultation

10. The statement at the end of paragraph 5 (page 4) in the NSMA brief rests on a flawed characterization of the EA process, including the public hearing as a component. The statement is: "The Board's relationship with these government departments as expert advisors make it impossible for the Aboriginal parties to receive a fair and objective hearing on the issues."

11. The public hearing, in common with the entire EA, is not an adversarial process. The NSMA, like other parties and interveners, is not presumed to be adverse in interest to the proponent or to governments.

12. Another mischaracterization of the process, implicit throughout the NSMA brief, is the assumption that as an intervener it is to conduct a parallel assessment to the one being conducted by the Review Board as mandated by the *Mackenzie Valley Resource Management Act.* That is not the role of a party or intervener.

13. The NSMA argues (paragraph 6, page five) that "refusal to release" explanations and comments provided to the Review Board "on the materials in the Public

Record from its staff and expert consultants" is unfair. The argument does draw on a rule of procedural fairness, but the argument is premature.

14. The rules of fairness usually forbid critical facts being provided to the decision-maker in the absence of and without notice being given to the person affected by the decision.[4] However, what is required by the *audi alteram partem* rule will depend on all the circumstances. Whether private discussions can be held depends on the nature of the inquiry, the rules of the tribunal, the subject matter being dealt with, and other relevant factors.

15. Materiality of the information provided to the Review Board is the test for disclosure to parties to the proceeding. Where private research or advice does not materially affect the decision, no further submissions from the parties need be sought. However, where the information received from staff or consultants is different in a material way from that presented by other parties, then the evidence should be brought forward at the hearing, and prior disclosure will be required.[5]

Schedule, ad hoc Process

16. The right to be heard is not an absolute, unlimited right. The decision-making body controls its own procedures, subject to its enabling statute, and the power to set timelines is implied as part of its jurisdiction to hold a fair, expeditious, and effective hearing.[6]

17. The NSMA is entitled to make submissions to the Review Board according to the rules of procedure and the Board's management of its own time and resources. Like other interveners, the NSMA may urge the Board to require that a concern or issue be addressed by appropriate witnesses and in turn by the Review Board in its report.

18. While the *audi alteram partem* rule requires that information that will affect the decision of the MVEIRB be disclosed, it is doubtful that an intervener has the right to attend all meetings. In a similar vein, in some circumstances procedural fairness can require that only the substance of documents, not the documents themselves, be released to the parties.[7]

19. Contact among interveners, experts for the proponent, government experts and Review Board staff and consultants is part of a good faith process of reaching an understanding on environmental impacts and on what should be presented to the Review Board for its determination. Nothing is objectionable or unusual about this approach.

20. Whether the rules of procedural fairness have been conformed to in most instances can be assessed only when the process is over.

21. Like any administrative body, the Review Board

> ...is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair.... [T]he aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.[8]

DUTY TO CONSULT

22. In our respectful submission the NSMA brief takes the constitutional law duty to consult outside of its true context. Secondly, the brief does not recognize or acknowledge the extensive and on-going consultation and negotiation De Beers is engaged in with the NSMA.

23. De Beers is party to good faith negotiations with the NSMA towards an Impact and Benefits Agreement that began in June 2002 and will resume when NSMA leadership is settled. No allegation that the negotiation has been conducted otherwise than in good faith has been made in the negotiation. We are surprised and disappointed by the tone of the NSMA brief on this subject (for example, on page seven), and we seriously doubt that it reflects the views or opinions of participants in the negotiation on behalf of NSMA.

24. No reason has been put forth to explain the contention in the NSMA brief (page one, paragraph 2) that Impact Benefit, Socio-Economic and Environmental Agreements "should be finalized before the MVEIRB or the Minister makes a decision." We submit that neither the Review Board nor the Minister should await finalization. These agreements are being designed to enable primary communities to participate in the benefits of the Snap Lake project. Secondly, the agreements are intended to establish mechanisms for on-going consultation to minimize negative impacts arising from the project as ultimately approved and developed.

Allegations of Breach

25. The NSMA submission makes the observation that the duty to consult "arises from the fiduciary duty owed to Aboriginal Peoples" (page 7). The NSMA submission notes the duty is "the responsibility of the Crown", and then proceeds to argue that developers "may share this fiduciary duty and the duty to consult" and that the Review Board "may have a common law ... duty to consult."

Constitutional Duty to Consult

26. The duty to consult arises only in particular circumstances of decision-making that affects aboriginal rights.

27. The brief asserts (page seven) a duty owed by the Crown to NSMA members "to consult and accommodate". Any such duty presumes: first, a fiduciary relationship between the NSMA membership and the Crown; and secondly, a particular obligation within that relationship that gives rise to a fiduciary duty. Not all duties owed by a party in a fiduciary relationship are fiduciary duties.

28. A fiduciary duty will arise only in the context of an interest which is the subject of a dispute or decision over which the Crown has discretionary control. The NSMA has not established such an interest, or that a decision by the Crown to allow the Snap Lake project to proceed would result in the infringement of such an interest if it could be shown to exist.

29. The Supreme Court in 2002 pointed out limits to a fiduciary duty: "The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."[9]

30. The court stated that "the content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity."[10] The court elaborated:

> Not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature....This principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.[11]

31. Fiduciary relationships, like fiduciary obligations, are not all the same, but rather are shaped by the demands of the situation.

32. A duty to consult in the present circumstances would depend upon, as a starting point, an aboriginal practice, culture or tradition that would be limited by the project. DIAND has been in negotiation with the Metis peoples of the North Slave Region for decades, and has funded traditional use research which served as the basis for negotiation of lands claims under Treaty 11. Accordingly, DIAND would be the proper party to put forward the Crown's position on the existence and extent of any fiduciary relationship with and duty to the NSMA.

33. "The NSMA", the brief states (paragraph 5, page four), "is asking the Board to deal with the issue of whether the Federal Government has met its obligations to consult." Agreeing to the request would require the Review Board to make a legal determination as to the existence of a fiduciary relationship between the

Crown and the membership of the NSMA, the nature and content of any obligation to consult, when the obligation arose and whether the consultation took place. Agreeing to the NSMA's request would add a burden to the Review Board's mandate that properly rests upon the Minister of DIAND.

Developer

34. There is no authority that supports the argument that the proponent in this EA process owes the NSMA either a constitutional law duty, or a fiduciary duty to consult. The present EA process differs from the forest management at issue in the Weyerhaeuser case referred to in the NSMA brief (page 12).[12] Among many differences, the NSMA has not made a claim to aboriginal title to the subject land, and the relationship between this proponent and NSMA is fundamentally different than the relationship between the forest company and the Haida Nation.

Review Board

35. The Review Board does not owe the NSMA a duty to consult of the type or scope argued in the brief.

> ...The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.
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> ... [T]he fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.[13]

ADJOURNMENT

36. An administrative board has the discretion to set its own procedure, within the limits of procedural fairness and statutory requirements. This includes the discretion to grant or refuse an adjournment.

37. Factors relevant to decision on an adjournment include whether parties have had a reasonable opportunity in all the circumstances to present evidence and arguments, seriousness of the injury to the applicant likely to arise from an adverse decision, the costs of the adjournment (*i.e.* the extent to which the delay will damage other parties to the hearing), and the public interest in an expeditious proceeding. "A request for an adjournment will not be lightly granted at the request of one participant in a multi-party proceeding, when all others are present with their lawyers and witnesses, and are ready to start."[14]

RESPECTFULLY SUBMITTED April 23, 2003

per

John McConnell,
Vice President, NWT Projects
De Beers Canada Mining Inc.

ENDNOTES

[1] *Indian Head School Division No. 19 (Saskatchewan Board of Education) v. Knight,* [1990] 1 S.C.R. 653

[2] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

[3] *Re Uniroyal Chemical Ltd.*, 9 C.E.L.R. (N.S.) 151 (Ont. Environmental Appeal Bd.), paras. 73,83

[4] *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105

[5] *Re Saskatchewan Telecommunications* (1986), 18 Admin. L.R. 171 (Sask. Public Utilities Review Commission)

[6] *Amourgis v. Law Society* (1984), 48 O.R. (2d) 91 (Ont. Div. Ct.)

[7] *Syndicat ces employes de production du Quebec et de l'Acadie v. Canada*, [1989] 2 S.C.R. 879

[8] *Knight* v. *Indian Head School Division No. 19*, [1990] 1 SCR 653, 685

[9] *Wewaykum Indian Band* v. *Canada* (2002) SCC 79, para 81

[10] *Ibid.*, para 86

[11] *Ibid.*, para 83

[12] See: *Haida Nation* v. *British Columbia (Minister of Forests)*, [2002] B.C.J. No. 1882 (B.C.C.A.)

[13] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159

[14] Brown and Evans, *Judicial Review of Administrative Action in Canada, p. 9-100*

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