Mackenzie Valley
Environmental Impact
Review Board

In the Matter of: **The DeBeers Canada Mining Inc. Snap Lake Environmental Assessment conducted pursuant to part 5 of the *Mackenzie Valley Resource Management Act***

And In the Matter of: **An Application for an adjournment of the Public Hearing in the Snap Lake Environmental Assessment made by the North Slave Metis Alliance**

REASONS FOR DECISION

Background:

Rule 64 of the Rules of Procedure (the Rules) adopted by the Mackenzie Valley Environmental Impact Review Board (the Review Board) for the DeBeers Snap Lake project Environmental Assessment (EA) specifies that a notice of any preliminary, jurisdictional and constitutional matter to be raised at a hearing must be filed with the Review Board at least 25 days before the hearing.

The North Slave Metis Alliance (NSMA) filed such a notice (the Application) by letter dated April 3, 2003, within the time specified by the Rules. The concerns listed in the NSMA letter included two allegations:

> First, that the Review Board's Environmental Assessment (EA) process had been conducted in breach of the rules of procedural fairness; and
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> Second, that the Federal and Territorial Governments and the Developer, DeBeers Canada, had failed to adequately consult with the NSMA thereby affecting the Review Board's jurisdiction to continue with the hearing.

The NSMA asked for an adjournment of the De Beers Diamond Mines Inc. (De Beers) Snap Lake project public hearing until such time as their concerns were addressed.

The Review Board circulated the NSMA letter to the parties to this proceeding and posted it on the public record. The Board asked the other parties to indicate their interest in participating in the argument of the Application. Only the NSMA and De Beers participated. The Review Board then set dates for the submission of evidence and argument by the NSMA, for a response by DeBeers, and for reply by the NSMA.

The Review Board's ruling on the Application was delivered orally at the beginning of the hearing on April 28th, 2003. At that time, the Review Board indicated that it would file written reasons for decision subsequent to the completion of the public hearing.

These are the Review Board's written reasons for its April 28th decision on the NSMA Application.

The Legal Context:

The Mackenzie Valley Environmental Impact Review Board is a co-management institution established by section 112 of the MVRMA. The MVRMA, including part 5 which deals with environmental impact assessment, has been in force since December 1998. The MVRMA was enacted in response to the requirements of settled Aboriginal land claims in the Mackenzie Valley. The Review Board is responsible for the second and third levels of the Environmental Impact Assessment process set out in part 5 of the MVRMA, Environmental Assessment and Environmental Impact Review.

As a permanent administrative tribunal responsible for adjudication in the environmental impact assessment context, the Review Board is bound by the rules of fairness.

The Review Board operates under a set of Rules of Procedure adopted for its proceedings after extensive public consultation. Those Rules provide for the flexibility required for the Review Board to manage a proceeding such as the DeBeers EA.

As with other administrative tribunals, the Review Board is the master of its own process and the Rules provide the authority for the Board to make any changes necessary during the course of a proceeding, to respond to the needs of the parties and to events as they unfold, as long as these changes are consistent with the requirements of fairness.

Such changes have been made from time to time in the De Beers EA proceeding which has lasted over 2 years and which has required adjustments to the work plan by the Review Board on a number of occasions.

The Review Board's analysis of the issues raised by the NSMA is provided below, dealing first with the fairness issue. The Review Board extends its thanks to both the NSMA and DeBeers for their submissions and for the assistance they provided to the Board in making its ruling.

The Fairness Issue:

For the reasons set out below, the Review Board has not responded to each of the instances of "unfairness" alleged by the NSMA. We note that the NSMA submission on April 16th included some 14 paragraphs citing examples of what the NSMA argued were breaches of the rules of fairness.

It is fair to note that the NSMA advised the Review Board on several occasions during the course of the EA that they felt that certain actions and decisions taken by the Review Board were unfair. The Review Board responded to each of these concerns at the time and all of the relevant information and correspondence addressing the NSMA concerns is on the public record for this proceeding.

The position taken by DeBeers on the fairness question is best summarised by paragraph 3 of their April 23rd submission:

> "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."

DeBeers argued that the content of the rules related to fairness varies in the particular circumstances. DeBeers goes on in their response to address and refute a number of the specific allegations of unfairness made by the NSMA.

Whatever the specifics, it is clear to the Review Board that the administrative law applicable to questions of fairness is complex, fact specific, and that to apply it could require significant legal expertise. None of the Review Board members are legally trained. The Board is, however, subject to supervision by the Courts pursuant to section 32 of the MVRMA.

In the Review Board's view, it would not be appropriate for us to present a response, much less argument, through our Reasons for Decision for or against the Application made by the NSMA. The Review Board must remain independent. We cannot use our process to justify our actions retroactively.

If we argue that we were fair and our procedure correct, we might arguably be unfair to the NSMA. If we agree with the NSMA, we may arguably not be being fair to DeBeers. This is precisely why the courts do not allow administrative tribunals to

appear as respondents in judicial review applications which allege that the tribunal has breached the rules of fairness.[1]

The Review Board notes as well that in administrative law, and here the authorities are very clear, a breach of the rules of fairness is treated as a jurisdictional error.[2] In other words, if the Review Board's process has been unfair then the Board would have lost jurisdiction over the De Beers EA proceedings.

In the case of a fairness error leading to a loss of jurisdiction, the authorities are also clear that the administrative proceeding is void.[3] That means that a jurisdictional error would deprive the Review Board of the authority to intervene somehow to alter the process and fix the problem by granting a remedy to the NSMA.

Consequently, if a fairness error has been made, the Review Board cannot fix the problem. Only a court can deal with such an issue. Section 32 of the MVRMA provides a route for the NSMA to seek a remedy in the courts.

Ruling on the Fairness Allegation:

The Mackenzie Valley Environmental Impact Review Board rules that it does not have the jurisdiction to rectify a breach of the rules of procedural fairness. The authorities indicate that an error of this nature would deprive the Review Board of the authority to take the action necessary to fix it. For the reasons outlined above, the Review Board also holds that it would be improper for it to rule on the merits of the NSMA allegations.

It is the Review Board's opinion that an adjournment will not assist the NSMA or any other party in this regard since it our view that we lack the authority to fix a fairness problem.

The Review Board is also cognizant of the tremendous effort and expenditure made by all the parties to prepare for these hearings. As noted in paragraph 37 of the DeBeers submission quoting an administrative law text "A request for an adjournment will not lightly be granted at the request of one participant in a multi-party proceeding, when all others are present with their lawyers and witnesses."

Considering all the circumstances the Review denies the Application for an adjournment on the grounds of breaches of procedural fairness.

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[1] See for example the line of cases beginning with *Northwestern Utilities Ltd. v. Edmonton (City),* [1979] 1 S.C.R. 684, which limit the scope of a tribunal's participation in judicial review proceedings to matters of jurisdiction.

[2] See for example, Jones and de Villars, *Principles of Administrative Law, (3d ed.),* (Carswell: Toronto, 1999) at pages 232 to 234.

[3] *Ibid.*

The remedy for these concerns, identified by the NSMA, must be sought in the Courts.

The Consultation Issue:

The NSMA also alleges that the Governments of Canada and the Northwest Territories have failed in their duty to consult with the NSMA about the effects of the proposed development on the exercise of Metis rights. The NSMA also suggests that this duty binds the developer, DeBeers, in this case.

The duty to consult must be properly characterized in order for the Review Board to respond to this allegation.

The NSMA has cited many of the relevant cases on the duty to consult. Our brief characterization of the duty in this ruling is not suggested to be authoritative but only to provide background for the way in which the Review Board has responded to the NSMA's consultation allegation.

Cases beginning with the Supreme Court of Canada in *Sparrow*[4] have dealt with this issue. When the Crown, federal or provincial, authorizes activities which may have the effect of infringing on aboriginal rights[5], it has a duty to try to avoid or minimize the impact of the activity on the exercise of these rights. This duty arises because of the fiduciary relationship between the Crown and aboriginal people. One of the things which the cases say must be done in such a situation is to consult with the aboriginal rights holders to see how to avoid or minimize the effects on their rights.

The Review Board wishes to distinguish this kind of consultation, required by the constitutional cases from the interaction between developers and communities which is intended to inform and assist the communities and to exchange information in order for developers and communities to be good neighbours.

The consultation requirement addressed in the NSMA Application only arises in situations where there is a fiduciary relationship and it only results when aboriginal rights may be infringed by the fiduciary.

A fiduciary relationship is one of utmost good faith. It is a special kind of relationship. One example is a solicitor client relationship. The cases are clear with respect to the existence of a fiduciary relationship between the Crown and aboriginal people. When

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[4] [1990] 1 S.C.R. 1075. The duty to consult first articulated in *Sparrow* has generated a spate of litigation and academic writing. The NSMA also cited *Mikasew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2001 F.C.T. 1426 (FCTD) (leave to appeal to the Federal Court of Appeal accepted); and *Taku River Tlingit First Nation v. Ringstad et.al*, 2002 B.C.C.A. 59 and *Haida Nation v. British Columbia (Minister of Forests)* 2002 B.C.C.A. 147 (both of these cases have been accepted on appeal to the Supreme Court of Canada).

[5] Subsection 35(2) of the *Constitution Act, 1982* includes Metis among the "aboriginal peoples of Canada" and Metis rights are a subset of aboriginal rights.

approvals are granted by the Crown which may minimally infringe the exercise of aboriginal rights, the Crown has a duty to consult.

The law is not so clear about the duty, if any, of a developer. There is case law from British Columbia which is under appeal.[6] There are no cases from the NWT on the developer's duty to consult and it could be argued that the *Haida* case is not binding in the NWT.

The Review Board notes, and the record in this proceeding shows, that DeBeers has made efforts to work with communities. Some or these efforts are related to the negotiation of benefits agreements but that evidence is not on the record in this proceeding. Both the NSMA and DeBeers have made conflicting arguments about which activities do or do not qualify as consultation and what duties apply to the company and the government. This is, at its roots, a constitutional argument, one which the Review Board is not suited to handling.

The NSMA Application requests an adjournment supported by an interim recommendation by the Review Board directed to the Minister of DIAND that Canada, GNWT and the developer enter into a proper consultation process.

The dispute about consultation is in the Review Board's view, also collateral to the main purpose of this hearing. The remedy being sought by the NMSA is related to the rights of aboriginal people in relation to the Crown and the activity proposed by DeBeers. This hearing is intended to address the remaining potential environmental impacts of the Snap Lake project.

The Review Board is of the view that it does not have the authority to make a constitutional ruling on a question like this. The appropriate remedy in relation to these concerns about consultation is beyond the authority of the Review Board. Consequently, it is the Review Board's opinion that the remedy requested by the NSMA should be sought in a court of competent jurisdiction.

In ruling this way, the Review Board relies on the Supreme Court of Canada's decision in the case called *Quebec (Attorney General) v. Canada (National Energy Board).*[7]

As we said in our ruling on the fairness allegations, the Review Board must be independent and fair. The Review Board itself cannot be an independent tribunal and a fiduciary at the same time. The Review Board does not have a duty to consult, only a duty to be fair.

The Review Board is also of the view, for the reasons expressed above, that it is not appropriate to adjourn the hearing at this time. We do not believe we have the jurisdiction to make the kind of interim recommendation to the Minister requested by

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[6] *Supra,* note 4. The *Haida* case.
[7] [1994] 1 S.C.R. 159.

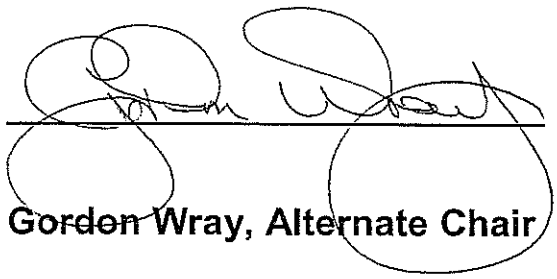
the NSMA. Our authority under section 128 of the MVRMA is restricted to the making of recommendations on matters which arise from a Review Board finding of a significant adverse environmental impact.

Consequently, the NSMA Application for an adjournment as a result of the failure of the Governments of Canada and the Northwest Territories to properly consult is also dismissed.

Conclusion:

For the reasons expressed, the Review Board denies the NSMA Application for an adjournment. The Courts are the appropriate forum for seeking the remedies requested by the NSMA. Furthermore, it is the Review Board's opinion that in the present circumstances an adjournment would greatly prejudice all the other parties in this proceeding.

For the Mackenzie Valley Environmental Impact Review Board:



Gordon Wray, Alternate Chair

Dated this 9th day of July, 2003.