

**FAX COVER SHEET**

**COPY**

**DATE:** July 20, 2004 **CLIENT #:** 216-00.4

**TO:** Indian Affairs and Northern Development  
Attention: The Hon. Andy Scott **FAX:** 1-819-953-4941

**CC:** Ka'a'Gee Tu First Nation  
Attention: Allan Landry **FAX:** 1-867-825-2002

**CC:** Government of the Northwest Territories  
Attention: Hon. Joe Handley, Premier **FAX:** 1-867-873-0169

**CC:** National Energy Board  
Attention: Kenneth Vollman, Chair **FAX:** 1-403-292-5503

**CC:** Government of Northwest Territories  
Attention: Hon. Brendan Bell  
Minister of Resources, Wildlife and  
Economic Development **FAX:** 1-867-873-0169

**CC:** Government of Canada  
Attention: Hon. Geoff Regan  
Minister of Fisheries and Oceans **FAX:** 1-613-947-7081

**CC:** Government of Canada  
Attention: Hon. Stéphane Dion  
Minister of Environment Canada **FAX:** 1-819-953-3457

**CC:** Mackenzie Valley Environmental Impact Review  
Board **FAX:** 1-867-766-7074  
Attention: Todd Burlingame, Chair

**FROM:** Louise Mandell, Q.C.

**RE:** MVEIRB's Reasons for Decision for the Paramount Resources Ltd. Cameron Hills  
Extension Environmental Assessment and Sections 130 and 131 of the  
*Mackenzie Valley Resource Management Act*

**NUMBER OF PAGES INCLUDING COVER SHEET: 6**

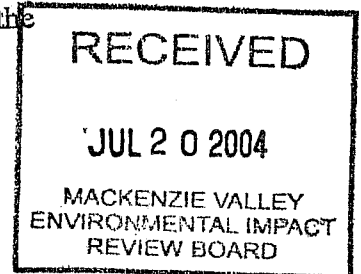
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AS SOON AS POSSIBLE.**

216-00.400421



July 20, 2004

**Via Fax: 1-819-953-4941**

Indian Affairs and Northern Development  
Terrasses de la Chaudière, North Tower  
Suite 2100 – 10 Wellington Street  
Gatineau, Quebec K1A 0H4

**Attention: The Hon. Andy Scott, P.C., M.P.**

Dear Sirs:

**Re: Mackenzie Valley Environmental Impact Review Board's  
Reasons for Decision for the Paramount Resources Ltd.  
Cameron Hills Extension Environmental Assessment and  
Sections 130 and 131 of the *Mackenzie Valley Resource Management Act***

We are writing on behalf of the Ka'a'Gee Tu First Nation (the "Ka'a'Gee Tu").

On June 2, 2004, the Mackenzie Valley Environmental Impact Review Board (the "MVEIRB") released its decision (the "Report") on the current Paramount Resources Ltd. environmental assessment (the "EA"). The purpose of this letter is to inform the Minister of Indian and Northern Affairs Canada ("INAC"), the National Energy Board (the "NEB"), and the Responsible Ministers, that the Ka'a'Gee Tu expect to be consulted concerning all aspects of the post-Report decision-making process. In particular, the Ka'a'Gee Tu expect to participate in the event that INAC, the NEB, and the Responsible Ministers consult with Paramount, consider referring any recommendations back to the MVEIRB, or consider not endorsing those recommendations which protect the rights or interests, or address the concerns of the Ka'a'Gee Tu.

The proposed development is within the traditional territory of the Ka'a'Gee Tu. As proposed, the development will have significant impacts on their territory, community, and way of life. Throughout the EA process, our client has put before the MVEIRB the interests they have in and to the lands and their concerns about the potential impacts of the proposed development to their rights and interests. Their full and unconditional inclusion in the post-Report decision-making is necessary and required. To exclude the Ka'a'Gee Tu at this point in the decision-making process would be a fundamental violation of the principles of natural justice and fairness, and a breach of the legal duty to consult.

## Background to the Paramount EA

The track record of the Crown on post-Report consultations with the Ka'a'Gee Tu is not encouraging and is out of step with the evolving jurisprudence on the Crown duty of consultation.

For example, in December, 2001, the MVEIRB issued its report on Paramount's Pipeline Project. Following extensive participation by the Ka'a'Gee Tu in the MVEIRB process, the MVEIRB recommended that Paramount not be permitted to take any irreversible steps until it (1) revises its Heritage Resources Plan to incorporate First Nations' concerns, (2) develops a compensation plan co-operatively with First Nations which addresses effects on land and resource use besides trapping, and (3) provides INAC with proof that First Nations approved Paramount's Traditional Use Study (the "TUS"), and Paramount has incorporated any mitigative measures arising from the TUS.

The Ka'a'Gee Tu then took extensive steps to urge INAC to support the MVEIRB's recommendations. Instead, INAC decided to initiate consultations with the MVEIRB in an effort to have the recommendations modified so that the Pipeline Project could commence prior to a compensation plan being developed and prior to the TUS being completed and reviewed.

The MVEIRB stated at the time:

For the EA process to be fair to all parties, from a quasi-judicial perspective, the Review Board considers it important that all parties be made aware of when the Minister requests that consultation occur between his Department and the MVEIRB as well as the concern(s) that led to the Minister making the consultation request. Formal notice is required to put the request for consultation on the Public Registry and to advise participants (expert advisors and intervenors) in the EA process, as some participants may wish to provide further advice or comment on the content of consultation discussions.

This approach will ensure that the consultation process is transparent and seen to be fair and objective. (December 21, 2001 – Letter to INAC)

As the Review Board's recommended measures were developed in the spirit of transparency, fairness and objectivity, the Review Board envisions that any changes to these measures will be made in a similar fashion. The Review Board wants to ensure that INAC has informed other EA participants (see fax distribution list) of the Jan. 4<sup>th</sup> meeting and provided them the opportunity to participate in the consultation process. As such, the Review Board has no objection to the developer or any other EA participant making their concerns, or their opinion of other[s'] concerns, known before or during the Jan. 4<sup>th</sup> meeting. (December 24, 2001 – Letter to INAC)

The Review Board has taken the position that the consultation process should, consistent with the rules of fairness, be open to parties in the environmental assessment process. (January 3, 2002 – Letter to Mandell Pinder)

The INAC and the NEB strongly objected to having an open and inclusive process. INAC wrote at the time that "INAC and other responsible ministers do not agree to the inclusion of other parties to our consultations as we believe this would be inconsistent with the requirements of the *Act*...". However, the MVEIRB refused to participate in closed consultations and the Ka'a'Gee Tu supported, and still support, that decision. Consequently, INAC and the NEB only agreed to participate in the consultation meeting that included the Ka'a'Gee Tu on a "without prejudice" basis.

The unwillingness of INAC and the Responsible Ministers to include the community in consultations concerning the Pipeline Report, has been reproduced in another EA. In the recently completed Environmental Assessment for Western Geco Ltd., the MVEIRB, INAC, and the NEB met and changed recommendations without informing affected communities that a meeting was going to take place. We understand that the communities received information only after the recommendations were changed.

### **Clear Violation of Principles of Natural Justice and Fairness**

Excluding the Ka'a'Gee Tu from post-Report consultations creates the following outcomes:

- The Ka'a'Gee Tu are allowed to participate in the stage of the proceeding where recommendations are made, but wholly excluded from participating at the stage when the actual decision is made.
- The Ka'a'Gee Tu are prevented from responding to any additional information, concerns, or issues raised by INAC, the NEB, Paramount or the Responsible Ministers in post-Report discussions.
- The MVEIRB, having issued its report and recommendations based upon an open process that actively seeks First Nations' input and offers opportunities for First Nations' participation, may alter those recommendations and have them adopted as final decisions behind closed doors, with no public participation or inclusion of affected communities, and presumably based on different considerations than those made known during the EA process.

These outcomes are contrary to principles of natural justice and basic duties of fairness. It is an undisputed principle of law that those who are empowered to act with discretion under a statute must act fairly, and that everyone has a "sacred right" to be heard before a tribunal makes a determination that affects his rights.

To implement a closed and exclusive process at the post-Report stage calls into question the entire MVEIRB procedure.

There is no basis for excluding the Ka'a'Gee Tu at the post-Report stage when the MVEIRB may be asked to, and may, change its recommendations. If the decision is made to submit matters back to the MVEIRB, or pursue modifications of the recommendations, the importance of Ka'a'Gee Tu input and comment is heightened, because it indicates that there

must be some additional information, concerns, or issues that have been raised by INAC with the MVEIRB which Ka'a'Gee Tu, affected by a change in recommendations, should be permitted to address.

### Legal Duty to Consult

The legal context in which the Paramount EA has proceeded is the constitutional duty owed by the Crown to consult with Aboriginal peoples concerning their Aboriginal and Treaty rights. The Supreme Court of Canada confirmed in *Delgamuukw* that land which is subject to aboriginal title cannot be used in a way which destroys the ability of the land to sustain future generations of Aboriginal people. The Ka'a'Gee Tu have chosen to participate in the review process and have insisted on consultation to ensure that the proposed development would not result in their children no longer being able to live as their parents have lived on the land.

To the extent that their traditional economy of hunting, trapping and fishing is replaced by an economy based on oil and gas exploitation, the Ka'a'Gee Tu want to be accommodated in the new economy within their territory.

The Crown must fulfil its duty to consult and accommodate the title and rights of the Ka'a'Gee Tu in relation to this development. In the decisions in *Haida Nation* and *Taku River*, the Court stated that the duty to consult includes an obligation to accommodate aboriginal rights and title, which includes cultural interests and economic interests. The Crown has the obligation to make reasonable inquiries to determine the First Nation's aboriginal rights and interests, and to negotiate in good faith to try to reach an agreement.

Legally established corollaries of the duty to consult include:

- good-faith discussions to substantially address the aspects of title and rights to be accommodated;
- exchanging all necessary information in a timely way so that there is an adequate opportunity to express interests and concerns; and
- a distinct process from public consultation.

The consultation process that was advocated by INAC in 2001 and 2002, as well as the process that was used for the Western Geco EA, illustrates that Crown practice remains out of step with the duty in this context. The Ka'a'Gee Tu request that a decision be made now, to reverse the closed-door, post-Report process that shuts them out.

**Conclusion**

The Ka'a'Gee Tu expect that post-Report consultations will be open, fair, and transparent. Specifically, in the event that consideration is given to the recommendations affecting them, they expect to be:

1. promptly copied on any and all correspondence between INAC and the MVEIRB, the NEB, the Responsible Ministers and Paramount;
2. informed of INAC's, the NEB's, and the Responsible Ministers' concerns and suggested modifications to the MVEIRB's recommendations;
3. invited to fully participate in any meeting between the MVEIRB, or any of its staff members, and INAC, the NEB, and/or the Responsible Ministers; and
4. invited to fully participate in any meeting between Paramount, INAC, the NEB, and the Responsible Ministers.

We look forward to hearing from you.

Yours truly,

MANDELL PINDER



Louise Mandell, Q.C.  
Barrister & Solicitor

LM/lu

ccs: Clients  
Hon. Joe Handley, Premier of the Northwest Territories  
Kenneth Vollman, Chair of the National Energy Board  
Hon. Brendan Bell, Minister of Resources, Wildlife and Economic Development, NT  
Hon. Geoff Regan, Minister of Fisheries and Oceans  
Hon. Stéphane Dion, Minister of Environment Canada  
Todd Burlingame, Chair of the Mackenzie Valley Environmental Impact Review Board