

IN THE FEDERAL COURT

BETWEEN:

**CHIEF LLOYD CHICOT suing on his own behalf and
on behalf of all Members of the Ka'a'Gee Tu First
Nation and the KA'A'GEE TU FIRST NATION**

Applicant

AND:

**THE ATTORNEY GENERAL OF CANADA and
PARAMOUNT RESOURCES LTD.**

Respondents

NOTICE OF APPLICATION

APPLICATION UNDER Sections 17, 18, 18.1, 18.2 of the *Federal Courts Act*, and
Part 5 of the *Federal Court Rules, 1998*

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief
claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by
the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be
as requested by the applicant. The applicant requests that this application be heard at
Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step
in the application or to be served with any documents in the application, you or a solicitor
acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal
Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-
represented, on the applicant, WITHIN 10 DAYS after being served with this notice of
application.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date) _____

Issued by: _____
(Registry Officer)

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TO:

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Minister of Indian Affairs and Northern Development,
Minister of Fisheries and Oceans, and
Minister of the Environment
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Hon. J. Michael Miltenberger
Minister of the Environment and Natural Resources
Government of the Northwest Territories
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National Energy Board
444 Seventh Avenue S.W.
Calgary, Alberta T2P 0X8
Attention: Mr. T. M. Baker, Chief Conservation Officer

Mackenzie Valley Environmental Impact Review Board
200 Scotia Centre
P.O. Box 938
5102 – 50th Avenue
Yellowknife, Northwest Territories X1A 2N7
Attention: Todd Burlingame, Chair

APPLICATION

This is an application for judicial review in respect of the July 5, 2005 decision (the “Ministers’ Decision”) by the Responsible Ministers (Indian and Northern Affairs Canada, Fisheries and Oceans Canada, Environment Canada, and the Government of the Northwest Territories’ Department of Environment and Natural Resources) to approve the respondents’ Cameron Hills Extension Project (the “Extension Project”) pursuant to section 130(1)(b)(ii) of the *Mackenzie Valley Resource Management Act* (the “Act”). The Ministers’ Decision is attached as Schedule “A” to this Application.

The Ministers’ Decision was communicated to the applicant on July 11, 2005.

THE APPLICANT MAKES APPLICATION FOR:

- (a) an order quashing and setting aside the Ministers’ Decision;
- (b) a declaration that the Ministers’ Decision is invalid and unlawful;
- (c) a declaration that the Responsible Ministers breached their constitutional and legal obligation to consult with the Ka’a’Gee Tu First Nation (the “Ka’a’Gee Tu”) and accommodate the Ka’a’Gee Tu’s Aboriginal and Treaty rights before issuing the Ministers’ Decision;
- (d) an order directing the Responsible Ministers to consult with the Ka’a’Gee Tu and accommodate the Ka’a’Gee Tu’s Aboriginal and Treaty Rights before allowing the Extension Project to proceed;;
- (e) an order staying the Ministers’ Decision and restraining Paramount Resources Ltd. from proceeding with the Extension Project pending the disposition of this application;
- (f) costs; and

- (g) such further and other relief as this Honourable Court may deem appropriate.

THE GROUNDS FOR THE APPLICATION ARE:

1. The Ministers' Decision is unconstitutional and outside of the Responsible Ministers' jurisdiction because:
 - (a) the Responsible Ministers knew that the Ka'a'Gee Tu have a *prima facie* case to Aboriginal and Treaty Rights in the lands which are affected by the Extension Project;
 - (b) the Responsible Ministers knew that the Ministers' Decision would potentially have a serious adverse effect on the Ka'a'Gee Tu's Aboriginal and Treaty Rights; and
 - (c) the Responsible Ministers did not fulfill their constitutional and legal obligation to consult with the Ka'a'Gee Tu and accommodate the Ka'a'Gee Tu's Aboriginal and Treaty Rights before issuing the Ministers' Decision.

2. The Ministers' Decision is also outside of the Responsible Ministers' jurisdiction under the Act because it:
 - (a) rejected the recommendations of the Mackenzie Valley Environmental Impact Review Board (the "Review Board") and therefore exceeds the Responsible Ministers' jurisdiction under s.130(1)(b)(ii) of the Act;
 - (b) involved a wide-ranging consideration of new evidence and made substantial changes to the Review Board's recommendations and therefore exceeds the Responsible Ministers' jurisdiction under s.130(1)(b)(ii) of the Act; and
 - (c) violated the applicable rules of fairness and natural justice.

3. The Ka'a'Gee Tu First Nation is an Indian Band within the meaning of the *Indian Act* and is an Aboriginal people within the meaning of section 35(1) of the *Constitution Act, 1982*.

4. At all material times representatives of Her Majesty the Queen in Right of Canada (the “Federal Crown”), including the Responsible Ministers, have had knowledge of a *prima facie* case to Aboriginal and Treaty rights that the Ka’a’Gee Tu assert to the lands affected by the Extension Project (the “Land”). Those rights include, but are not limited to:
 - (a) rights of exclusive possession to and control over the Land and resources and in the Land;
 - (b) self-government rights of jurisdiction and management over the Land;
 - (c) cultural rights to the Land; and
 - (d) rights to hunt, trap, travel and gather on and over the Land.
5. The federal Crown and the ancestors of the Ka’a’Gee Tu signed Treaty 11 in or about 1921. The federal Crown and the Ka’a’Gee Tu disagree on the interpretation of Treaty 11.
6. The Ka’a’Gee Tu First Nation is a Deh Cho First Nation and as such is engaged in the Deh Cho Process. The Federal Crown has agreed that the objective of the Deh Cho Process is to complete a Deh Cho final agreement that will clarify Deh Cho Aboriginal and Treaty rights and implement a Deh Cho government.
7. The Deh Cho Process is governed by a Framework Agreement that was signed by the Deh Cho First Nations, the Federal Crown and the Government of the Northwest Territories (“GNWT”) on May 23, 2001. The Framework Agreement recognizes that the Deh Cho First Nations assert that the Deh Cho territory has been their traditional territory since time immemorial and that:
 - (a) The Federal Crown recognizes that the inherent right of self-government is an existing Aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*;

- (b) the members of the Deh Cho First Nations are Aboriginal people within the meaning of s. 35 of the *Constitution Act, 1982*;
 - (c) the Deh Cho First Nations, the Federal Crown and the GNWT agree to negotiate on a government-to-government basis within the framework of the Constitution of Canada; and
 - (d) the parties agree to negotiate in order to set out land, resources, and governance rights to apply in the Deh Cho territory.
8. The parties to the Framework Agreement have negotiated the Deh Cho Process Interim Measures Agreement, dated May 23, 2001, and the Deh Cho Interim Resource Development Agreement, dated April 17, 2001.

Project History

(a) The Original Project

9. Paramount Resources Ltd. (“Paramount”) obtained statutory rights to oil and natural gas reserves in the Cameron Hills Northwest Territories area in the late 1980’s and early 1990’s. The Cameron Hills project area is within the claimed traditional territory of the Ka’a’Gee Tu.
10. In late 2000 and early 2001 Paramount brought applications to various regulatory authorities to construct a pipeline project (the “Pipeline Project”) and a drilling project (the “Drilling Project”) in the Cameron Hills (collectively the “Original Project”).
11. At all material times, the Responsible Ministers knew that the Ka’a’Gee Tu have a *prima facie* case to Aboriginal and Treaty rights in the lands which are affected by the Original Project and that approving the Original Project would potentially have a serious adverse effect on those rights.
12. The Drilling Project was a proposal to drill and test new oil and gas wells. Its components included: a winter access road, a winter airstrip, constructing two ice bridges on the Cameron River and one bridge on a tributary of the Cameron River, constructing up to six temporary twenty-man camps, and the drilling of wells.

13. The Pipeline Project was a proposal to build a pipeline gathering system, running from wells to a central battery, and a transborder pipeline running from the Cameron Hills into Alberta. It included the following components: a central battery, a satellite battery, a gas and oil gathering system to tie wells into the proposed central battery, a water disposal pipeline, on-site living quarters, a warehouse complex at the proposed battery, an airstrip, and an all-weather access road connecting the airstrip to the central battery, borrow pits, one permanent vehicle bridge and three all-terrain vehicle bridges, and overhead power lines connecting some wells to the proposed central battery.
14. The Original Project fell under the jurisdiction of the National Energy Board (the “NEB”) and the Review Board. The Review Board referred the Original Project for environmental assessments pursuant to s. 126(3) of the Act. The NEB and Review Board agreed that the Review Board’s environmental review process would be used by the NEB.
15. The Ka’a’Gee Tu participated in the Original Project’s environmental assessments to the best of their ability, but lacked adequate funding and resources.
16. The Review Board issued its report on the Pipeline Project on December 3, 2001, and its report on the Drilling Project on October 16, 2001. Pursuant to s. 128(1)(b)(ii) of the Act, the Review Board recommended that the Original Project be approved subject to the imposition of a number of measures that it considered necessary to prevent significant adverse impacts from the Project. In the Pipeline Project Report, the Review Board made the following recommendations which directly addressed some of the Ka’a’Gee Tu’s concerns:

R-13 INAC ensures that Paramount discusses its proposed compensation plan with the affected communities and the GNWT. Paramount should widen the scope of the compensation plan as required to ensure that reasonable and credible land and resource use impacts caused by the development and identified by the communities are

eligible for compensation.

- R-14 The MVLWB [Mackenzie Valley Land and Water Board] and the NEB ensure that Paramount includes mitigative measures in the TK [Traditional Knowledge] study to address impacts identified by the TK study. The MVLWB and the NEB should obtain copies of the completed TK study from Paramount along with evidence of community approval of the study. The MVLWB and the NEB should ensure that authorization terms and conditions are amended as appropriate to address any impacts identified by the study that have not already been addressed with existing terms and conditions.
 - R-15 INAC and Paramount amend the Benefits Plan approved by INAC on September 25, 2001 to include the revised compensation plan developed as a result of Review Board Measure #13 or that a separate compensation plan be developed to address these concerns. Should Paramount and the communities be unable to come to an agreement on the contents of the revised compensation plan, then INAC should make the final decision and proceed with its approval of the amended Benefits Plan.
 - R-16 INAC ensures that the amended Benefits Plan requires Paramount to provide copies of the Annual Reports required by the Benefits Plan to the GNWT, the Review Board, the MVLWB and the local communities in addition to INAC. The scope of the Annual Reports should be expanded beyond what is currently required. The Annual Reports should detail consultations undertaken with the local communities, discuss what concerns were raised by the communities, describe how Paramount has addressed or intends to address these concerns and discuss what actions Paramount will take to enhance positive socio-economic impacts and mitigate negative socio-economic impacts.
17. Following receipt of the Pipeline Report, on January 1, 2002 the Responsible Ministers exercised their power under s. 130(1)(b)(ii) and approved the Pipeline Project but significantly modified or deleted Recommendations 13-16 to the detriment of the Ka'a'Gee Tu without any consultation or accommodation. The Ka'a'Gee Tu strongly objected to the lack of consultation by the Responsible Ministers and the result that they reached.

(b) The Extension Project

18. In 2003, Paramount made applications to get regulatory approval for the Extension Project. Paramount proposes to drill up to 48 new oil and gas wells and build associated tie-ins to an existing pipeline over the next 10 years in the Cameron Hills. The Extension Project is an extension of the Original Project.
19. Like the Original Project, the Extension Project proceeded to an environmental assessment under the Act where the Review Board's review process would be used by the NEB.
20. At all material times, the Responsible Ministers knew that the Ka'a'Gee Tu have a *prima facie* case to Aboriginal and Treaty rights in the lands which are affected by the Extension Project and that approving the Extension Project would potentially have a serious adverse effect on those rights.
21. The Ka'a'Gee Tu participated in the Extension Project's environmental assessment to the best of their ability, but lacked adequate funding and resources.
22. On June 1, 2004, the Review Board issued a report under s. 128(1)(b)(ii) of the Act in which it recommended that the approval of the Extension Project be made subject to the imposition of certain measures that it considered necessary to prevent significant adverse impacts (the "Extension Project Report").
23. As it relates to the Ka'a'Gee Tu's interests, the Extension Project Report concluded that:
 - (a) The Cameron Hills is an important traditional use area for the Ka'a'Gee Tu both historically and today.
 - (b) Some of the commitments to mitigation measures regarding harvester compensation made by Paramount relating to the Original Project were not fulfilled.

- (c) There is a need for air quality monitoring in the Northwest Territories (NWT) emerging as a result of oil and gas development and an emerging need for enforceable air quality standards.
 - (d) The cumulative effects of ongoing development in the Cameron Hills may result in adverse effects on the regional boreal caribou population.
24. The Extension Project Report stated that the issue of a compensation plan had remained unresolved from the Original Project and that “[f]urther delay is not acceptable in light of the proposed expansion of the development for which the original plan was recommended.” The Review Board also noted disagreement between the Ka’a’Gee Tu, INAC and Paramount on the interpretation of the breadth of concerns associated with traditional harvesting, suitable compensation, and the level of authority of Aboriginal communities in operational planning should concerns about infringement on Treaty rights arise and said that:

This disagreement must be resolved in order to ensure reasonable and fair compensation for damages incurred relative to the Paramount’s activities.

25. Similarly, the Extension Project Report stated:

The Review Board supports the communities’ requests for a socio-economic agreement with Paramount. The Review Board also concurs with the GNWT on the effectiveness of socio-economic agreements to aid in assessing the impact on the social and the cultural aspects of northern development (Hearing Transcripts, Vol. 1, p. 154). The Review Board further acknowledges the efforts of the Deh Cho First Nation in establishing the Deh Cho First Nation Consultation Principles (see Appendix D), and supports the use of these principles as guidelines to conducting meaningful consultation with Deh Cho communities.

26. The Extension Project Report included the following Recommendations which directly addressed some of the Ka’a’Gee Tu’s concerns:

R-15 The Review Board recommends that Paramount and the other parties to the unfinished Cameron Hills Wildlife and Resources Harvesting Compensation Plan developed in response to measures 13 and 15 of EA01-005 [the Pipeline Project Report] complete the compensation plan. If a compensation plan cannot be completed by these parties within 90 days of the federal Minister’s acceptance of

this report, this matter will proceed to binding arbitration, pursuant to the *NWT Arbitration Act*. A letter signed by the parties, indicating agreement to the compensation plan or in the case of arbitration, the arbitrator's decision must be filed with NEB and MVLWB prior to the commencement of Paramount's operations under land use permit MV2002A0046.

R-16 The Review Board recommends that the GNWT develop a socio-economic agreement with Paramount in consultation with affected communities before operations proceed under the land use permit MV2002A0046. The socio-economic agreement is to address issues such as employment targets, educational and training opportunities for local residents and a detailed ongoing community consultation plan.

27. The Review Board was also concerned about the lack of an enforceable framework for air quality in the NWT. In the Extension Project Report, the Review Board pointed out that in December, 1999, it made a recommendation about air quality standards in a previous environmental assessment (the Ranger-Chevron EA) but that "little or no progress has been made to satisfy the Review Board's 1999 recommendation." The Review Board stated that to "prevent significant adverse impacts on air quality":

R-7 The Review Board recommends that the Government of Canada (INAC and Environment Canada) and the Government of the Northwest Territories, implement recommendation 7 from the Ranger-Chevron EA by June 2005 [relating to air quality guidelines].

28. Like in the Original Project, the Responsible Ministers exercised their power to engage the consult-to-modify provisions contained in s. 130(1)(b)(ii) of the Act. On July 5, 2005 the Responsible Ministers issued the Ministers' Decision and approved the Extension Project. The Ministers' Decision deleted Recommendation 7 and replaced it with a suggestion, and substantially rejected Recommendations 15 and 16 to the serious detriment of the Ka'a'Gee Tu.

29. The Ministers' Decision contained no acknowledgement of the efforts of the Deh Cho First Nation in establishing the Deh Cho First Nations Consultation Principles,

and said nothing about using those principles as guidelines to conduct meaningful consultation with Deh Cho communities.

30. Section 35 of the *Constitution Act, 1982* and the honour of the Crown required that the Responsible Ministers consult in good faith and endeavour to seek workable accommodation with the Ka'a'Gee Tu in respect of their Aboriginal and Treaty rights prior to allowing the Extension Project to proceed. The Responsible Ministers breached their duties to the Ka'a'Gee Tu. In particular:
- (a) There was no consultation in the consult-to-modify process because the Responsible Ministers took the position that the Crown was not required to consult at all. The Responsible Ministers failed to create or discuss a reasonable and structured process for consultation before undertaking the consult-to-modify process under the Act.
 - (b) The Responsible Ministers failed to establish any, or any reasonable, process for future consultation with respect to economic accommodation for Paramount's ongoing resource activity in Cameron Hills.
 - (c) The actual exchanges of information during the consult-to-modify process were flawed and misleading. There were no face-to-face meetings with the Ka'a'Gee Tu and the Ka'a'Gee Tu were given incomplete information.
 - (d) The Responsible Ministers relied on material from outside of the Review Board's process and failed to notify the Ka'a'Gee Tu of that material so that they could respond.
 - (e) The Ministers' Decision is irrational.
 - (f) The scope of the consultation in the consult-to-modify process was improperly limited. The Responsible Ministers did not consult in respect of Aboriginal title and self-government rights.
 - (g) The Ka'a'Gee Tu did not have adequate funding to participate in the process.
 - (h) The Ministers' Decision was made before the consultation process with the Ka'a'Gee Tu was complete and in particular:
 - (i) there were no community consultation plans in place to

guide the Ka'a'Gee Tu's relationship with Paramount and the Federal Crown;

- (ii) there were no access or impact benefits agreements between the Ka'a'Gee Tu and Paramount;
 - (iii) there was no environmental agreement between the Ka'a'Gee Tu and Paramount;
 - (iv) there was no meaningful traditional use study funded by Paramount and completed in partnership with the Ka'a'Gee Tu;
 - (v) there was no meaningful Heritage Resource Impact Assessment;
 - (vi) there was no spill rate study on Paramount's operations;
 - (vii) there was no meaningful traditional plant use study and traditional wildlife use studies; and
 - (viii) there was no development of pipeline and access route selection criteria.
31. The Responsible Ministers also failed to accommodate the Ka'a'Gee Tu's Aboriginal and Treaty rights. In particular, the Ministers' Decision did not take into consideration or accommodate the potential infringement to Aboriginal title and the right to self-government. Also, because of the failures in the consultation process, the Ministers' Decision failed to accommodate the potential infringements on other Aboriginal and Treaty rights, including cultural rights and the rights to hunt, trap, fish and gather resources on and over the Land.
32. As a result, the Ministers' Decision is unconstitutional and exceeds the Responsible Ministers' jurisdiction.
33. The Ministers' Decision also exceeds the Responsible Ministers' jurisdiction under the Act for the following reasons:
- (a) Since the Ministers' Decision fundamentally alters the purpose, substance or effect of the Review Board's recommendations it is

tantamount to a rejection and the Responsible Ministers have no jurisdiction to approve the Extension Project – they must order a full environmental impact review under s. 130(1)(b)(ii). As a result the Ministers’ Decision is unlawful and void.

- (b) In any event, the Ministers’ Decision exceeds the limited modification power granted by the Act. Section 130(1)(b)(ii) does not allow a wide-ranging consideration of new evidence and it does not allow the Responsible Ministers to make substantial changes to the Review Board’s recommendations.
- (c) For the reasons set out in paragraph 30 above, the Responsible Ministers violated the rules of fairness and natural justice that apply to the Ministers’ Decision.

34. Such further and additional grounds as counsel may identify and this Honourable Court may consider.

This application will be supported by the following material:

- (a) Affidavit of Chief Lloyd Chicot to be sworn and filed;
- (b) the record before the Review Board and the Responsible Ministers; and
- (c) such further and additional materials as counsel may advise.

Date: August 9, 2005

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Counsel for the Applicant

IN THE FEDERAL COURT

BETWEEN:

**CHIEF LLOYD CHICOT suing on his own behalf and
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AND:

**THE ATTORNEY GENERAL OF CANADA and
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Respondents

NOTICE OF APPLICATION

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