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Mackenzie Valley Environmental Impact Review Board,
200 Scotia Centre, P.O. Box 938,
Yellowknife NT X1A 2N7

Attention: Vern Christensen, Executive Director

Dear Sir:

Re: EA0506-005 Consolidated Goldwin Ventures (now Encore Renaissance Resources Corp.) Mineral Exploration Program in the Drybones Bay Area

Request for Ruling by the Yellowknives Dene First Nation for a formal oral hearing and extension of time for submissions

Our firm represents Yellowknives Dene First Nation ("YKDFN"). We have been instructed to submit this Request for Ruling to the MacKenzie Valley Impact Review Board (the "Board") with respect to the above noted Environmental Assessment ("EA") for Consolidated Goldwin Ventures' (now Encore Renaissance Resources Corp.) ("CGV") proposed exploration in the Drybones Bay area.

This Request for Ruling is made in response to the Board's letter of 5 April 2011 informing the Parties of the Board's next steps in response to the Minister's referral of the Board's 30 November 2007 decision and report ("2007 Decision") back to the Board for further consideration pursuant to s. 130(1)(b)(i) of the *MacKenzie Valley Resource Management Act*[1] ("MVRMA" or the "Act".)

YKDFN asks the Board to make the orders requested below after written submissions from all interested parties.

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[1] *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25.

RULING REQUESTED FROM THE BOARD

For the reasons explained below, YKDFN requests that the Board order:

1) a formal oral hearing of at least two days with the opportunity for oral submissions and the presentation of oral evidence on the issues under further consideration; and

2) the Board extend the time for submissions until such time as a formal hearing on the issues under further consideration can be conducted.

THE RELEVANT FACTS

On 7 December 2004, CGV submitted an amended Land Use Permit Application to the MacKenzie Valley Land and Water Board (MV2004C0038) for a drilling and mining exploration project, including the construction of a winter road.

The Board initiated an environmental assessment in September 2005 as a result of concerns about the potential adverse impacts of the exploration program. Following a period where written submissions were received, the Board held a two-day hearing. At that hearing, the Parties made submissions and the Board received traditional knowledge, including oral testimony from YKDFN Elders.

The Board deliberated and released its report and reasons for decision on 30 November 2007.

In January 2010 the responsible Ministers sent the 2007 Decision back to the Board for further consideration of Measures #1, 3, 4, 5, 6.

The Minister asked that the Board to reconsider some of the terminology in Measure 1, and then effectively rejected Measures 3-6 as being either inappropriate or unnecessary for various reasons.

On 5 April 2011, the Board informed the parties that the Board had lost quorum because of the expiry of the appointments of several members who heard the evidence on this file, and that the members would not be re-appointed.

Only two of the members who were present for the original hearings are still members of the Board.

There have been two incidents in the last few years in the Drybones Bay area resulting from mineral exploration, which have caused significant environmental damage including a major forest fire and the crash of a large truck through the ice. In addition, the Board has recently initiated an environmental assessment for a mineral exploration project in the Drybones Bay area.

GROUNDS FOR THE REQUESTED RULING

Right to an Oral Hearing

- The Board has the discretion under Rule 64 to order a formal oral hearing.
- Elder oral evidence is required in this case:
  - to provide evidence about project impacts in this area that have occurred in the last four years and how those impacts have altered the YKDFN's relationship to the land; and
  - to respond to the Minister's letter of April 2010 and faulty assumptions in the Minister's letter about the scope of cumulative impacts on the traditional values and protected rights of YKDFN in the Drybones Bay area.
- YKDFN has serious interests at stake in this proceeding:
  - At risk to YKDFN is the substantial loss of their constitutionally protected rights, relationship to the land, and way of life in the Drybones Bay area.
  - The Board has already recognized that this area is of "vital importance" and that the adverse impacts on YKDFN of this development could be significant.
- The statutory scheme of the MVRMA and the Board's own procedural rules strongly argue for an oral hearing:
    - S. 114 (c) requires the concerns of Aboriginal people to be "taken into account in the process", which requires the Board to ensure consultation and accommodation are done properly, but also that the Board's own process is culturally respectful;
    - S. 115.1 (b) requires traditional knowledge to be considered if made available to the Board;
    - Rules 32 and 33 of the Board's procedural rules oblige the Board to encourage and consider traditional knowledge – oral testimony from Elders in particular;
- The members of the Board who heard the initial oral testimony of YKDFN Elders at the public hearing are not the same as the members who will make a decision about the further consideration, therefore a new oral hearing to allow Elder testimony is necessary to comply with the rules of natural justice.

Extension of Time

- The time initially provided by the Board is not sufficient to allow for the gathering and preparation for either an oral hearing or written submissions on the matters returned for further consideration.

- A reasonable time frame needs to be provided to allow a response to the Minister's letter and to address concerns about cumulative impacts in the area.

Further explanation of these grounds is provided below.

FURTHER EXPLANATION OF THE GROUNDS

A formal oral hearing is required

1. YKDFN requests that the Board order a multi-day oral hearing to allow YKDFN Elders to speak and YKDFN to present evidence and make submissions with the respect the issues under further consideration.

YKDFN Elders need to speak

2. A formal hearing is necessary for the YKDFN to meaningfully participate. YKDFN Elders need to provide oral history evidence and oral testimony in relation to impacts of several recent incidents and to respond to the Minister's April 2010 letter.

3. Oral testimony, face to face, is the Elders' chosen method of providing evidence to the Board. Oral testimony is the culturally appropriate way for the evidence to be presented by YKDFN Elders and is the necessary way if the process is to take into account Aboriginal concerns as required under the Act.

4. There have been at least two major incidents in recent years which have had an adverse impact on the environment and YKDFN's rights and are examples of further cumulative impacts in the area.

5. In 2007 a large forest fire occurred in the Drybones Bay area as a result of mining exploration. This fire destroyed close to a thousand acres of forest and animal habitat, one known cemetery, and an unknown number of other cultural sites.

6. Another incident which has triggered significant concern regarding cumulative impacts is the crash of the large truck through the ice in the Drybones Bay area. The truck was employed in an exploration operation. It was reportedly laden with hundreds of litres of fuel and other fluid chemicals. While the initial crash occurred in 2006, the absence of clean-up or response creates great concern among YKDFN about this impact and the impact of other fuel spills in the area.

7. In addition to these events, there has been a further application to allow exploration activity in the Drybones Bay area, which, if approved, will increase the cumulative impacts in the area.[2]

8. The two incidents referred to have had significant specific impacts, but also raise concerns about the cumulative impacts of this project on the Drybones Bay area. The two "malfunctions or accidents" and evidence of their impact need to be consider by the Board in view of s. 117(2)(a) of the Act.

9. YKDFN Elders need to be able to provide oral testimony about these issues and speak about the how the two "malfunctions or accidents" have impacted the YKDFN's relationship to the land.

10. In addition, the Minister's letter of 13 April 2010 appeared to minimize the importance of cumulative impacts. YKDFN Elders need to provide oral testimony regarding the critical effect of cumulative impacts in the Drybones Bay area.

Oral hearings are needed where the interests at stake are vital

11. The Supreme Court of Canada has held that oral hearings will be required where an oral hearing is necessary for a party to meaningfully participate in a proceeding. The key factors will be the interests at stake, the nature of the issue, and the type of decision.[3]

12. Where the interests at stake are serious, such as the loss of livelihood or an infringement of a constitutional right, an oral hearing will likely be required.[4]

13. YKDFN has stated on numerous occasions both in this EA process and in others, the critical importance that its members place on the Drybones Bay area. The Board in fact has already acknowledged the significance of the area and the rights at stake:

> Drybones Bay is a **vitally important** cultural and heritage area for the Yellowknives Dene First Nation (YKDFN).... It was the site of ongoing year round use by Aboriginal community, holds many burial sites and archaeological sites, and is used extensively today for hunting, trapping, and providing youth with cultural exposure to traditional activities and the land. [emphasis added][5]

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[2] On 19 April 2011, the Board issued a notification of an environmental assessment for the Debogorski Diamond Exploration (*Land Use Permit Application MV2011C0002*), Letter from Darha Phillpot, Environmental Assessment Officer to Alex Debogorski (19 April 2011).

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

[4] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (S.C.C.), [1980] 1 S.C.R. 1105, at p. 1113

[5] MacKenzie Valley Environmental Impact Review Board, *Report of Environmental Assessment and Reasons for Decision on the Consolidated Goldwin Ventures Preliminary Diamond Exploration in Drybones Bay* (February 10, 2004) at 1, EA03-002.

14. As acknowledged above, YKDFN has constitutionally protected s. 35 Aboriginal rights which are at risk from CGV's project and the cumulative impacts of the ongoing development in the area.[6]

15. In its 2007 Decision on this file, the Board recognized the "high importance" of the Drybones area to aboriginal communities, the "extensive" historical and current use of the area, and the "critical" level of impacts as result of mineral exploration in the area.[7]

16. The cumulative impact of developments and exploration in the Drybones Bay area put at risk the way of life and the livelihood of the YKDFN in the most important area within their traditional territory.[8]

The statutory framework strongly suggests an oral hearing is necessary

17. The questions of the nature of the issue and the type of decision being made can be answered with reference to the MVRMA and the Board's rules.

18. Looking at the MVRMA as a whole, it is clear the intended purpose of the statutory scheme, including the environmental assessment process in Part 5, is to attempt to provide a means for Aboriginal involvement in the EA process in a meaningful way.[9]

19. The Board is a quasi-judicial body that makes recommendations to the responsible Ministers about the conditions under which a permit can be issued, or if the permit shouldn't be issued, which the responsible Ministers then sign-off on. The Board holds hearings at which Parties testify about technical, legal, and factual issues. The Board then deliberates, weighs the evidence and credibility of those giving evidence, and issues a decision and a report.

20. The Board did not make a broad policy decision in this case, it made a specific decision based on facts presented to it by opposing parties at a public hearing. This is clearly the type of decision to which a duty of fairness applies.

21. In addition, the specific provisions of the Act provide for both substantive and procedural rights, which strongly suggests an oral hearing is required.

22. S. 114 (c) in Part 5 for instance, requires the concerns of Aboriginal people to be "taken into account in the process". S. 114 (c) requires the Board to ensure consultation and accommodation are done properly, but also that the Board's own process is culturally respectful.

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[6] *Ibid.* and *infra.*, EA0506-005.

[7] MacKenzie Valley Environmental Impact Review Board, *Report of Environmental Assessment and Reasons for Decision, Consolidated Goldwin Ventures Inc. Mineral Exploration Program,* (30 November 2007) at, EA0506-005.

[8] *Ibid*, at 25-26, 40.

[9] *Ka'a'Gee Tu First Nation v. Canada (Minister of Indian and Northern Affairs)*, 2007 FC 764 at para. 47.

23. It is not possible for the concerns of Aboriginal people to be taken into account in the process, if the process does not accommodate Aboriginal values and culture in the communication of information.

24. S. 115.1 (b) of the Act requires traditional knowledge to be considered if made available to the Board. Traditional knowledge cannot be appropriately considered by the Board in the view of YKDFN, unless traditional knowledge holders are allowed to communicate their evidence to the Board in the manner of their choosing, consistent with their cultural traditions.

25. Finally, Rules 32 and 33 of the Board's own procedural rules oblige the Board to ***encourage*** traditional knowledge from First Nations, and oral testimony from Elders in particular.

26. In this case, the oral testimony of the Elders given directly to the Board at an oral hearing is the proper way to communicate the evidence required in this case. YKDFN Elders need to be able to speak to the impacts on their way of life of this project and the cumulative effects in the Drybones Bay area based on the events of the last four years.

An oral hearing is necessary where a new Board is making the decision

27. It is a well-settled principle that anyone who takes part in a decision must have been present to hear the testimony of the parties and witnesses. This rule is a significant component of the rules of natural justice regarding the duty of fairness.[10]

28. This rule applies even when a previous record exists of the oral testimony, including transcripts or audio, if the members deciding the issue were not present for all of the original proceeding.[11] This rule also applies to supplementary hearings or re-hearings.[12]

29. The Board acknowledged in a letter, first to the Minister, and then to the Parties, that the full complement of Board members who heard testimony at the public hearing would not be available to make the decision about the Minister's request for further consideration.[13]

30. Therefore the new Board must consider the oral testimony of the Elders (and others) on the issues of further consideration, in order for the Board to comply with the rules of natural justice.

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[10] *Doyle v. Restrictive Trade Practices Commission*, [1985] 1 F.C. 362 (C.A.), at 368-371; *Iwa v. Consolidated-Bathurst Packaging ltd.*, [1990] 1 S.C.R. 282.

[11] Brown & Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998) (looseleaf) at 12-28, 12-30; *Montreuil v. Canadian Forces*, 2008 CHRT 32 (CanLii); *O'Brien v. Canada (National Parole Board)* [1984] 2 F.C. 314; *Salvadori v. British Columbia (Ministry of Health)* [1996] B.C.C.H.R.D. No. 33 (Q.L.).

[12] Brown & Evans, at 12-30.

[13] Letter of Martin Haefele, MVEIRB to the Parties (5 April 2011).

Conclusion

31. In view of the interests at stake, the statutory and procedural rules of the Board that apply, and the Board's loss of quorum on the file, an oral hearing should be granted. Denying the Elders the opportunity to provide oral testimony at a hearing would be both disrespectful and inconsistent with the rules of natural justice and the MVRMA. In this case there is both a new Board and new information that was never before the Board.

Extension of time needed

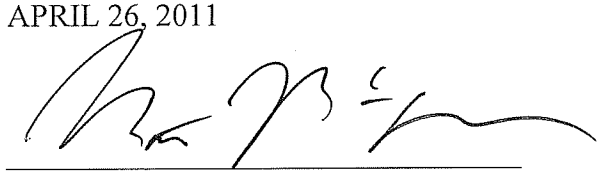
32. As noted above, the less than 30 day window of time provided by the Board is not sufficient to gather and prepare either for an oral hearing or written submissions on this matter. Therefore YKDFN requests an extension of time to allow adequate preparation for the requested oral hearing.

CONCLUSION

For all the reasons above, the YKDFN requests a Ruling from the Board ordering a multi-day oral hearing to allow YKDFN Elders to give oral testimony and YKDFN to make submissions to adequately address recent events and the Minister's April 2010 letter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

APRIL 26, 2011



Matt McPherson, Counsel for the Yellowknives Dene First Nation

cc.

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