De Beers v. *Mackenzie Valley* et al, 2007 NWTSC 24

Date: 2007 04 02
Docket: S-0001 CV2006000155

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DE BEERS CANADA INC.

Applicant

- and -

MACKENZIE VALLEY ENVIRONMENTAL
IMPACT REVIEW BOARD

Respondent

- and -

TLICHO GOVERNMENT

Intervenor

Application for judicial review of an Order of the Mackenzie Valley Environmental Impact Review Board.

Heard at Yellowknife, NT on November 21, 2006.

Reasons filed: April 2, 2007

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Applicant:	Eric Groody
Counsel for the Respondent:	John P. Donihee
Counsel for the Intervenor:	Arthur Pape and Bertha Rabesca Zoe

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REASONS FOR JUDGMENT

[1] On June 12, 2006, the MacKenzie Valley Environmental Impact Review Board ("the Review Board") ordered that an Environmental Impact Review ("EIR") be conducted of a proposal for development presented by De Beers Canada Inc. ("De Beers"). This Order was made pursuant to section 128(1)(c) of the *MacKenzie Valley Resource Management Act* S.C. 1998, c. 25 ("the *Act*"). De Beers now applies for judicial review of this Order. De Beers says that the Order should be quashed for a number of reasons.

[2] The Review Board has presented submissions to explain its practices and procedures and the record of this application. It has also presented submissions about the applicable standard of review. The Tlicho Government has intervened and has presented submissions supporting the process followed by the Review Board and its decision.

[3] The Record filed on this application consists of 3 volumes of materials filed on October 4, 2006 and a Supplementary Record filed on November 7, 2006. These materials are voluminous and provide a lot of details about the process followed by the Review Board in this case, as well as some of the processes it followed in other cases.

A) General Background of the Application

[4] In November of 2005, De Beers applied to the MacKenzie Valley Land and Water Board for a Land Use Permit and a Water Licence in order to proceed with the development of a diamond mine at Kennady Lake ("the Project"). Kennady Lake is located at approximately 280 kilometers northeast of Yellowknife.

[5] On December 22nd, 2005, the Project was referred to the Review Board by Environment Canada. This was done pursuant to Paragraph 126(2)(a) of the *Act*, which provides that certain agencies and authorities can refer a proposed development to the Review Board for an Environmental Assessment ("EA").

[6] Following this reference, the Review Board took steps to advise interested parties that the Project would be the subject of an EA. The Review Board prepared a draft Workplan for the EA. Input on the draft Workplan was received from interested parties. A final Workplan was released on February 26, 2006. The Workplan contemplated that there would be five phases to the EA: a Start-Up phase, a Scoping phase, an Analytical phase, a Hearing phase and a Decision phase.

[7] The draft and final Workplan both stated that the Review Board reserved the option to evaluate, following the Scoping phase, whether there was sufficient evidence of significant adverse environmental impacts or sufficient evidence of public concerns to justify ordering an EIR.
Record, Volume 1, Tab 9, page 2 and Tab 34, page 2

[8] The Scoping phase included a technical scoping workshop that was held in Yellowknife from March 21st to 23rd. This workshop was conducted by Review Board staff. Several agencies took part in this workshop. The purpose of the workshop was to give interested parties an opportunity to identify and prioritize the issues that they felt should be examined in the EA.

[9] A technical scoping hearing was held by the Review Board in Yellowknife on April 10, 2006. The results of the technical scoping workshop were presented at that hearing.

[10] The Scoping phase also involved processes to canvass the views of the public about the Project. To this end, a number of community workshops were organized. Review Board staff members facilitated these workshops. The workshops were held in Dettah, Lutsel K'e, Fort Resolution and Behchoko. Following the workshops, a Community Issues Scoping Hearing was held in Yellowknife. This hearing was conducted by the Review Board. Some of the people who had taken part in the community workshops reportedon the resultsof the workshops.

[11] After the Technical Scoping Hearing and the Community Issues Scoping Hearing, a number of briefing notes were prepared by Review Board staff discussing what the Review Board's next steps should be and, in particular, whether an EIR should be ordered. *Scoping Process - Staff Report, Supplementary Record, Tab 14; Briefing Note dated May 29, 2006, Record, volume 3, Tab 166.*

[12] On June 12, 2006, the Review Board issued the impugned Order. It released its Reasons for Decision and Report of Environmental Assessment on June 28, 2006. *Record, Volume 1, Tabs 1 and 4.*

[13] De Beers argues that the Review Board's decision to order an EIR contravenes the *Act* because the Review Board made this decision without having completed the EA. De Beers also alleges that the Review Board made variousjurisdictional errors in dealing with this case.

[14] To dispose of this application, I must decide what standard of review applies and apply this standard to the issues raised by De Beers: whether the Review Board complied with its statutory obligation in conducting the EA, whether it made jurisdictional errors in the process it followed, and whether it erred in its decision to order an EIR.

B) STANDARD OF REVIEW

[15] In the context of judicial review, the standard of review determines what degree of deference will be accorded to the administrative tribunal's decision. The standard of review is determined by what has been described as a pragmatic and functional analysis. This analysis requires the examination of a number of contextual factors: (a) whether the Act includesa privativeclause that sheltersthe tribunal's decisions from review, or a statutory right of appeal; (b) the expertise of the tribunal relative to that of the reviewing court on the issue raised; (c) the purpose of the Act and the specific provisions at issue; (d) whether the question raised is one of law, facts, or mixed facts and law.
Pushpanathan v. *Canada (Minister of Employment & Immigration)* [1998] 1 S.C.R. 982. *North American Tungsten Corporation Ltd.* v. *MacKenzie Valley Land and Water Board* 2003 NWTCA 5, at para.13.

[16] Section 32, which is included in Part 1 of the *Act* ("General Provisions Respecting Boards"), provides that this Court has jurisdiction in reviews of decisions made by boards. Nothing in the *Act* suggestsan intentionby Parliament to completely shelter the Review Board's decisions from scrutiny.

[17] The next two factors (expertise of the tribunal and consideration of the purpose of statute and of specific provisions at issue) are in my view closely intertwined in the context of this case. I propose to examine them together.

[18] The *Act* was designed to implement the Gwich'in and Sahtu Land claims agreements by providing an integrated system of water and land management in the MacKenzie Valley region of the Northwest Territories. *North American Tungsten Corporation Ltd.* v. *MacKenzie Valley Land and Water Board, supra,* at para.14.

[19] Section 9.1 specifically sets out the *Act*'s purpose in establishing boards:

> 9.1 The purpose of the establishment of boards by this Act is to enable residents of the MacKenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians.

[20] Section 112 of the *Act* deals with the constitution and quorum of the Review Board. That provision demonstrates a clear intent by Parliament to have the

perspective of the Gwich'in First Nation, the Sahtu First Nation and the Tlicho Government represented on the Review Board.

[21] Section 112 is in Part 5 of the *Act*. Part 5 sets out the procedure for assessing the environmental impact of developments in the MacKenzie Valley and includes the provisions at issue in this case. The purpose of Part 5 is outlined at section 114:

> 114. The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment and an environment impact review in relation to proposals for development, and
>
> > (a) to establish the Review Board as the main instrument in the MacKenzie Valley for the environmental assessment and environmental impact review of developments;
> >
> > (b) to ensure that the impact on the environment of proposed developments receives careful consideration before actions are taken in connection with them; and
> >
> > (c) to ensure that the concerns of aboriginal people and the general public are taken into account in that process.

[22] This provision suggests that the impact on the environment and public concern are factors of comparable importance in the context of the *Act.* This is reflected in a number of other provisions that also refer to both possible impacts on the environment and public concern, such as section 128.

[23] Section 115 sets out guiding principles to be followed in the process established in Part 5:

> 115. The process established by this Part shall be carried out in a timely and expeditious manner and shall have regard to
>
> > (a) the protection of the environment from the significant adverse impacts of proposed developments;
> >
> > (b) the protection of the social, cultural and economic well-being of residents and communities in the MacKenzie Valley;
> >
> > (c) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the

> Constitution Act, 1982 applies and who use an area of the MacKenzie Valley.

[24] Section 115.1 directs the Review Board to consider traditionalknowledge as well as scientific information in the exercise of its powers.

[25] In my view, certain conclusions flow from these provisions. Parliamentintended the Review Board to be the main instrument in the assessment of projects for development in the region. Aboriginal people were intended to have meaningful input in this process. Parliament intended that potential environmental impacts and public concern be important factors for the Review Board in making decisions. Parliament also intended that the preservation of social, cultural and economic well-being of the residents of the region and the importance of conservation to well-being and way of life of aboriginal people be taken into account.

[26] In this context, the Review Board's mandate is to balance many complex and potentially conflicting factors. The specificity of requirements in the Review Board's composition and quorum reflect the unique contextof the *Act*'s adoption. There is a clear link between the composition of the Review Board and some of the factors it is mandated to take into account.

[27] Given this, I find that the Review Board, by virtue of its composition and experience carrying out its mandate under the *Act*, has expertise that calls for considerable deference being accorded to its decisions. In my view the purpose of the *Act* and the specific provisions engaged in this case also support that conclusion. That is not to say that the Review Board is entitled to deference on all issues. In areas where it has no particular expertise, such as statutory interpretation, there is no reason to accord any particular deference to its decisions.

[28] The nature of the problem is the final factor that must be examined to determine what standard of review applies. Where, as in this case, several issues are engaged, they may not all be subject to the same standard of review. As already mentioned, where an issue turns on statutory interpretation, the Review Board has no particular expertise so its findings are entitled to very little deference. By contrast, if an issue turns on the assessment of information presented to the

Review Board, or on the consideration of polycentric issues and the balancing of various interests, a higher level of deference is appropriate.

[29] The first issue raised in this application is whether the process followed by the Review Board prior to making the impugned Order constituted an EA within the meaning of the *Act.* What constitutes an EA within the meaning of the *Act* is a question of statutory interpretation. The standard of review that applies to that issue is one of correctness.

[30] The next issue is whether the Review Board exceeded its jurisdiction during the process it followed. De Beers says that the Review Board did so in a number of ways. It alleges the Review Board took into account inappropriate factors; that it unlawfully sub-delegated its duties; and that it prejudged the issue of whetherthe Project should be the subject of an EIR. These issues go to the very jurisdiction of the Review Board. Jurisdiction is a matter of law, and does not involve the exercise of discretion. I find, therefore, that they must also be reviewed on a standard of correctness. *Ka'a'Gee Tu First Nation* v. *Paramount Resources Ltd.* 2006 NWTSC 30, at para.29.

[31] If I conclude that the Review Board conducted an adequate EA and that it did not commit any of the jurisdictional errors alleged by De Beers, the final issue I must examine is whether the Review Board erred in its conclusion that the Project was likely to be a cause of significant public concern. That decision was based on the Review Board's assessment of the information gatheredduring the Technicaland Scoping Hearings. It required weighing and assessing that informationin light of the guiding principles set out in the *Act.* That process is at heart of the Review Board's function. In my view, the Review Board should be extended considerable deference in exercising those functions. The standardof review that applies on the last issue is a standard of reasonableness.

C) WHETHER THE PROCESS FOLLOWED BY THE REVIEW BOARD CONSTITUTED AN EA AS CONTEMPLATED BY THE *ACT*

[32] De Beers argues that what the Review Board did in this case was an inadequate and incomplete EA that did not meet the requirements of the *Act*. In support of this position, De Beers relies on Section 117 of the *Act* and on the opening words of section 128. The relevant portions of these provisions read as follows:

117. (1) Every environmental assessment of a proposal for development shall include a determination by the Review Board of the scope of the development, subject to any guidelines made under section 120.

(2) Every environmental assessment and environmental impact review of a proposal for a development shall include a consideration of

(a) the impact of the development on the environment, including the impact of malfunctions or accidents that may occur in connection with the development and any cumulative impact that is likely to result from the development in combination with other developments;

(b) the significance of any such impact;

(c) any comments submitted by members of the public in accordance with the regulations or the rules of practice and procedure of the Review Board

(d) where the development is likely to have a significant adverse impact on the environment, the need for mitigative or remedial measures; and

(e) any other matter, such as the need for the development and any available alternatives to it, that the Review Board or any other responsible minister, after consulting with the Review Board, determines to be relevant.

(...)

128 (1) On completing an environmental assessment of a proposal for development, the Review Board shall,

(a) where the development is not likely in its opinion to have any significant adverse impact on the environment or to be a cause of significant public concern, determine that an environment impact review of the proposal need not be conducted;

(b) where the development is likely in its opinion to have a significant adverse impact on the environment,

> (i) order that an environment impact review of the proposal be conducted, subject to paragraph 130(1)(c), or
>
> (ii) recommend that the approval of the proposal be made subject to the imposition of such measures as it considers necessary to prevent the significant adverse impact;
>
> (c) where the development is likely in its opinion to be a cause of significant public concern,order that an environmental impact review of the proposal be conducted, subject to paragraph 130(1)(c); and
>
> (d) where the development is likely in its opinion to cause an adverse impact on the environment so significant that it cannot be justified, recommend that the proposal be rejected without an environmental impact review.
>
> (...)
>
> (4) The Review Board shall identify in its report any area within or outside the MacKenzie Valley in which the development is likely, in its opinion, to have a significant adverse impact on the environment or to be a cause of significant public concern and specify the extent to which the area is affected.

[33] The term "environmental assessment" is definedat section111 of the *Act*, but that definition is not particularly helpful to the disposition of this case: it simplyrefers back to section 126:

> 111. (...)
>
> "Environmental assessment"means an examination of a proposal for a development undertaken by the Review Board pursuant to section 126."
>
> (...)

[34] Section 126 sets out the circumstances where the Review Board must conduct an EA but does not describe what steps or processes must be included in an EA.

[35] De Beers argues that the word "consideration" in Subsection 117(2) creates a requirement that the Review Board analyze and make findings about all the subjects enumerated in that Subsection. De Beers says that the Review Board could not possibly have done so in this case because it did not have enough information to do so. De Beers says that because the Review Board did not conduct a proper EA it had no jurisdiction to order an EIR, as section 128 says the Review Board can only do so "on completing" an EA.

[36] In support of that proposition, De Beers relies on *Alberta Wilderness Assn.* v. *Cardinal River Coals Ltd.* [1999] 3 F.C. 425. One of the issues in that case was the meaning of the word "consideration" in section 16 of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("the *CEAA*")

[37] When the same word is used in different statutes, its interpretation in the context of one statute can be of assistance in deciding the interpretation it should have in the context of another statute. I am not persuaded, however, that the meaning given to the term "consideration" in the context of the *CEAA* is particularly helpful in resolving the statutory interpretation issue in this case. The term "consideration" is not a particularly technical word. In addition, while there are some similarities between the two statutes, there are also some differences. The *Act* is, as already mentioned, unique in the context of its adoption,the importance of the role given to the Review Board, and the importance it places on public concern.

[38] In my view, the ordinary meaning of the word "consideration" does not imply a requirement for an exhaustive review of the subject matters listed at Paragraphs 117(2)(a) to (e), nor a requirement that findings be made on all those topics.

[39] I also find that the interpretation advanced by De Beers does not fit well with other provisions of the *Act*, particularly Subsection 117(1). I find it telling that Parliament used the word "determination"in Subsection117(1) of the*Act* and the word "consideration" in Subsection 117(2). Parliament must have intended different requirements under the two provisions. "Consideration" means something less than "determination". In my view the use of the word "consideration" in Subsection 117(2) simply means that the Review Board's obligation is to take into account the factors or elements listed in the paragraphs

that follow. It does not mean the Review Board has an obligation to make a determination about all of these elements.

[40] Parliament has chosen not to define the term "EA" with any precision. It has also chosen not to legislate the specific steps that an EA must include. Parliament could have been much more specific in crafting how EAs would be conducted, but chose not to do that. This, in my view, is understandable. The scheme set out in Part 5 of the *Act* must be followed whenever a proposal for development is presented. This can encompass a wide range of proposed developments of varying significance and scale. In this context, it makes good sense that the Review Board would be given considerable flexibility in deciding the manner in which an EA will be structured and conducted in any given case.

[41] It is true that the Workplan provided that the EA would include a number of phases after the Scoping phase. It is also true that this structureis consistentwith Guidelines adopted by the Review Board, pursuant to section 120 of the *Act.* This, some might argue, confirms that the Review Board itself believed it had to conduct an exhaustive review of all the Subsection 117(2) factors, analyze them, and make determinations about them.

[42] However, it is important to note that as part of the same Workplan, the Review Board signalled that the EA may not include all the phases listed. The Review Board obviously contemplated from the start that the informationgathered during the Scoping phase may be sufficient to make a determination that an EIR should be ordered. There is no indication from the record that concerns were raised at that point, by De Beers or by any other party, about this aspect of the Workplan. It was only a number of months later that concerns were expressed about this aspect of the Workplan. *Correspondence to Review Board dated February 14th, 2006, Record, Vol.I, Tab 28; Correspondence to Review Board dated May 19th, 2006, Record, Vol.III, Tab 147.*

[43] The Scoping phase was primarily intended to identify issues that should be prioritized during the EA, but a substantial amount of information was put before the Review Board as a result of that phase. For example, the Government of the Northwest Territories filed materials that dealt at some length with issues related to the conservation of caribou, and the social impacts of development. De Beers itself presented extensive information about the Project, its potential impact, and

how De Beers proposed to address some of the concerns that might arise from it. Other participants provided input about a wide range of issues.

[44] The position advocated by De Beers implies that in every case, and even once it becomes clear to the Review Board that an EIR should be ordered for one of the reasons set out in section 128, the Review Board is nonetheless statutorily compelled to proceed to a detailed analysis and make findings on all the factors listed at Subsection 117(2) before it can order an EIR. This, it seems to me, is inconsistent with the principle set out at section 115 of the *Act*, that the process established under Part V should be carried out in a timely an expeditious manner.

[45] The *Act* is structured in a way that creates potential overlaps between the EA process and the EIR process. While in some cases it may mean that all factors set out at Subsection 117(2) are probed in depth during both processes, I am not convinced that Parliament intended this to be mandatory in every case. On the contrary, taking into consideration this *Act* as a whole and the unique context of its adoption, as set out in Paragraphs 18 to 25, *supra*, I am of the view that the powers given to the Review Board should, wherever possible, be interpreted in a manner that gives the Review Board the flexibility it needs to carry out its broad and complex mandate.

[46] For these reasons I find that the Review Board complied with its obligations pursuant to Subsection 117(2) and that it had jurisdictionto order the EIR when it did.

D) WHETHER THE REVIEW BOARD COMMITTED OTHER JURISDICTIONAL ERRORS IN THE PROCESS IT FOLLOWED

[47] De Beers points to various aspects of the record to argue that the Review Board committed excesses of jurisdiction in carrying out its review of the Project.

[48] De Beers claims that the Review Board improperly sub-delegated its powers, prejudged the issue it had to consider, and took into account irrelevant factors. As already stated, these issues, in my view, go to the Review Board's jurisdiction and must be reviewed on a standard of correctness.

[49] De Beers argues that in making its decision the Review Board improperly took into account the environmental assessment process that was conducted for the Snap Lake project, a development carried out by De Beers some years earlier. In particular, De Beers argues that the "view in hindsight" that there should have been an EIR for the Snap Lake project played a part in the Review Board's decision to order an EIR in this case. In support of this argument, De Beers relies on briefing notes and other materials prepared by Review Board staff as well as materials that show that participants in the EA raised that issue.

[50] De Beers also argues that the Review Board improperly took into account the possibility that participant funding would be available in an EIR process while such funding would not available in an EA. Again the argument is based on materials prepared by Review Board staff and other documentsin the Record that show that this was something that was discussed during the EA.

[51] It is important to draw a distinction between background information prepared for the Review Board by its staff and submissions presented by EA participants, on the one hand, and what the Review Board includesin its Reasonsfor Decision, on the other hand. It is also important to consider the context within which information was presented and to consider the Record as a whole in assessing whether the Review Board based its decision on improper factors. In my view, in fairness to the Review Board, the Reasons for Decision are where the focus of this Court's inquiry should be.

[52] For the Review Board to be able to carry out its mandate, it necessarily needs to receive input and information from its own staff and from several other sources. It is not surprising, particularly during the start-up phase of an EA, that some materials are prepared to put a proposal for development in context. This may mean reference to other ongoing or completed projects, other EAs conducted by the Review Board, information about how those processes functioned, lessons learned, even though those matters are not relevant to the decision that the Review Board has to make in the specific case under review. In addition, any process that is designed, among other things, to engage the public and seek input from various sources, has the potential of generating information and comments that are not relevant to the decision that has to be made.

[53] When the time comes to make a decision, the Review Board has the responsibility of determiningwhat informationis relevantto its decisionand what information is not. The Review Board should be presumed to have considered proper factors unless there is a clear indication that it did not. *Lethbridge (City)* v. *Daisley*, 2000 ABCA 79, paras 22 to 25.

[54] The Reasons for Decision make no reference to the Snap Lake project and no reference to participant funding. The fact that reference was made to these factors during the course of the EA should not, in my view, lead to a presumption or assumption that it formed a basis for the decision. The Review Board does not have the onus of specifically identifying all the things that were referred to during an EA process that it did *not* take into account.

[55] For the same reason, I do not agree with De Beers' assertion that the Review Board's approach to this case can be characterized as one where it prejudged the issue or fettered its own discretion. The implication of this assertion is that the Scoping phase was conducted *pro forma*, the Review Board having already decided what the outcome of the EA would be. In my respectful view the Record does not support this assertion. It is clear that substantial efforts were expended to organize the scoping workshops and hearings. Various things were done to ensure meaningful participation from the communities. An illustration of this was that even though no community workshop had been planned for the communityof Fort Resolution,one was organizedafter that communityexpressed a strong interest in having one.

[56] The steps that were taken to canvass the communities and receive input in the technical scoping workshop and hearing do not suggest that the Review Board had prejudged the issue.

[57] De Beers also argues that the Review Board improperly sub-delegated its functions to the EIR panel. In support of that contention De Beers points to various parts of the Reasons for Decision that make reference to the Review Board not making detailed findings about certain things and stating that those issues are better left to be examined as part of the EIR process.

[58] The Reasons for Decision show that the Review Board was aware of its statutory obligations and made findingsaccordingly. As alreadymentioned the structureof

the *Act* is such that an EIR panel is called upon to examine some of the same issues and factors that the Review Board must examine in the context of an EA. Once the Review Board formed the opinion that the Project was likely to be a cause of significant public concern, thereby mandating an order for EIR pursuant to section 128(1)(c), it was prudent for the Review Board not to make definitive findings on subject matters that had not been exhaustively reviewed in the EA process. That, in my view, is how the Review Board's comments in the Reasons for Decision must be interpreted. It does not amount to unlawful sub-delegation of powers, or an abdication of powers on the part of the Review Board. In addition, section 114 makes it clear that the Review Board is the main instrument for both types of processes, so it is questionable that the unlawful sub-delegation argument could succeed in any event.

[59] Having concluded that the Review Board did not make any errors going to its jurisdiction in dealing with this matter, the last issue I must consider is whether the Review Board erred in finding that the Project was likely to be a cause of significant public concern.

E) WHETHER THE REVIEW BOARD ERRED IN FINDING THAT THE PROJECT WAS LIKELY TO BE A CAUSE OF SIGNIFICANT PUBLIC CONCERN

[60] As I have mentioned previously, I find that the Review Board is entitled to considerable deference on this issue. The balancing of the various interests and factors is at the very heart of its role as the "main instrument in the MacKenzie Valley for the environmental assessment and environmental impact review of proposals for developments", under the terms of section 114.

[61] The Reasons for Decision set out why the Review Board came to the conclusion that an EIR should take place. My function is not to substitute my view to that of the Review Board, but to decide whether the Review Board's conclusion meets the threshold of reasonableness. I have concluded that it does.

[62] As already mentioned, a number of community workshops were held to give members of the public an opportunity to express their views about the Project. At the Community Issues Scoping Hearing held in Yellowknife, the Review Board was presented with the results of these workshops.

[63] The record includes detailed information about some of the issues that were raised in the communities where the workshops were held. The Review Board concluded, on the basis of this information, that the Project was likely to be a cause of significant public concern. Based on the record, I cannot say that this was an unreasonable conclusion. It is apparent from the record that concerns were expressed in all the communities where the workshops were held. These included concerns about the protection of wildlife, protectionof the water quality and quantity, issues related to contaminants, the impact of development on communities, among others. Concerns were also expressed about the fact that two culturally and spiritually significant sites had the potential of being affected by the Project.

[64] In the Reasons for Decision, the Review Board referred to the concerns that were conveyed through the Community Issues Scoping Workshops and Community Issues Scoping Hearing, and set out its analysis as to why it came to the conclusion it did. *Reasons for Decision, Record, Volume I, Tab 1 at pp.23 to 47.*

[65] The *Act* requires the Review Board to order an EIR if a proposed development is likely, in the opinion of the Review Board, to be a cause of significant public concern. It does not require the Review Board to be satisfied that these concerns are insurmountable and can never be appeased. Nor does the *Act* require the Review Board to be convinced that all the concerns are justified. It is the existence of the concern that forms the basis for ordering an EIR.

[66] Again, this must be understood against the backdrop of the unique contextwithin which this legislation was enacted, and its stated purpose. Parliament intended public concern to be an important factor in decisions about proposed developments.

[67] Under the circumstances, I am not satisfied that the Review Board's conclusion that the Project was likely to be a cause of significant public concern was unreasonable. There is, therefore, no basis for this Court to interfere with that finding.

F) CONCLUSION

[68] For these reasons, the applications to quash the Review Board's Order dated June 12, 2006 and to require the Review Board to conduct an environmental assessment in conformance with the *Act* is dismissed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
2nd day of April 2007

Counsel for the Applicant:	Eric Groody
Counsel for the Respondent:	John P. Donihee
Counsel for the Intervenor:	Arthur Pape and Bertha Rabesca Zoe

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