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December 5, 2014

**EMAIL SHELL.REVIEWS@CEAA-ACEE.GC.CA**

Joint Review Panel  
Pierre River Mine Project  
Canadian Environmental Assessment Agency  
180 Elgin Street, 22nd Floor  
Place Bell Canada  
Ottawa ON K1A 0H3

Joint Review Panel  
Pierre River Mine Project  
Alberta Energy Regulator  
9915 Franklin Avenue,  
Provincial Bldg. 2nd Floor  
Fort McMurray, AB, T9H 2K4

Dear Panel Secretariat:

**Re: Request for Written Comments: Response of the Non-Status Fort McMurray/Fort McKay Band and the Clearwater River Band No. 175**

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The Panel has requested written comments on the approach put forward by Shell Canada on the Regional Study Area sizing and the assessment of effects to Aboriginal culture and heritage.

On September 9, 2014, the Athabasca Chipewyan First Nation requested changes in approach to methodology and also requested that the Joint Review Panel consider endorsing an approach whereby cultural assessments are based on culture-specific terms of reference established by each aboriginal group. We support that approach.

On October 31, 2014, the Alberta Department of Energy and the Department of Environment and Sustainable Resource Development passed a Ministerial Order (105/2014 Energy and 53/2014 Environment and Sustainable Resource Development) under the *Responsible Energy Development Act*, which is the Aboriginal Consultation Direction. This Direction applies to all applications to the Alberta Energy Regulator for approval of any energy resource activity.

This Direction specifically states:

(a) recognizes that

- i. the AER has a responsibility to consider potential adverse impacts of energy applications on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* within its statutory authority under REDA,
  - ii...AER processes will constitute part of Alberta's overall consultation process as appropriate,
  - iii. Alberta retains the responsibility to assess the adequacy of Crown consultation in respect of energy applications,
- (b) facilitates timely, efficient and effective information exchange between AER and Alberta with respect to energy application that require aboriginal consultation; ...

A Direction was issued to the AER that the "AER shall create and maintain a consultation unit that will work ... to ensure that Alberta will be able to meet consultation obligations ... The Non-Status and Clearwater submit that the AER is now required to comply with this Ministerial Order.

On November 20, 2014, Shell held a meeting in Fort McMurray and invited aboriginal groups to participate however they did not invite the Non-Status or Clearwater to participate. Further, on November 25, 2014, Shell stated in an e-mail to John Malcolm, that there is "no duty to consult under section 35". Shell has not corresponded with my office although they are aware of my acting for the Non-Status and Clearwater.

This is contrary to the decision of the Federal Court and Federal Court of Appeal in the *Daniels v. Canada*, 2013 FC 6, 2014 FCA 101, leave to appeal to the SCC granted November 27, 2014. Metis and Non-Status Indians are Indians within section 91(24) of the *Constitution Act, 1867*. They are also clearly aboriginals under section 35 of the *Constitution Act, 1982*. Their aboriginal rights are constitutional rights which must be considered as set out in the Ministerial Order of October 31, 2014.

It appears that Shell questions the membership of the Non-Status Fort McMurray/Fort McKay Band and the Clearwater River Band. Without going into a long historical discussion of membership and recognition of status in the Fort McMurray, Fort McKay and Fort Chipewyan area, and the actions taken by Canada in informally amalgamating populations, I can advise that litigation was commenced in the Federal Court in 1997 and is on-going against Canada. Without detailing these technical legal and political issues, there are at least 700 members in the Non-Status Fort McMurray/Fort McKay Band. These people are all related aboriginals and their relationship is closely tied to the area covered by the Shell Lease. John Malcolm's mother was born on the Shell Lease site and this area is her families' traditional lands where they trapped. When she was born, she was a member of the Fort McKay First Nation. All of her descendants are members of the Non-Status. The Clearwater River Band hunted, fished and trapped on these lands and the Trap Line of Ben Powder (now deceased) descendant of Paul Cree, was on the Jack Pine Mine site. This Trap Line is now held by his wife. Paul Cree, founder of the Clearwater River Band was acknowledged as the trapper in this area in the Hudson's Bay Archive Journals in 1895.

This is part of their traditional territory. Ancestors of the Non-Status Fort McMurray/Fort McKay Band held the trap lines over the entire area. This area is historically part of and continues to be part of their traditional lands. The Non-Status Fort McMurray/Fort McKay Band continue to hunt, fish, trap and harvest throughout the areas.

Shell has not made any effort to engage in any process with the Non-Status or Clearwater and they have not corresponded with Davis, LLP. Contrary to section 35 of the *Constitution Act, 1982*, and contrary to

the Ministerial Order, no effort has been made by Shell to determine feedback for an appropriate method of assessing effects on their Aboriginal culture and heritage.

It is the position of the Non-Status and Clearwater that Shell is required to comply with the law on section 35 of the *Constitution Act, 1982* and the Ministerial Order on Aboriginal Consultation Direction of October 31, 2014. Shell must also provide funding to enable aboriginals and specifically the Non-Status and Clearwater to provide their input into this process.

In light of Shell's inability to determine the appropriate method of proceeding, it is recommended that the Panel provide a ruling on the appropriate methodologies to comply with their obligations on the assessment of this project.

Sincerely,  
**DAVIS LLP**  
Per:

<original signed by>

Priscilla Kennedy  
PXX/hd