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Our File: 2-73864
Your File: NWB1LUP0008

August 1, 2001

Nunavut Water Board
P.O. Box 119
Gjoa Haven, Nunavut
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Attention: Mr. Philippe di Pizzo,
Executive Director

BY FAX to 867-360-6369
and
BY E-MAIL to
nunavutwaterboard@nt.sympatico.ca and
rbecker@polarnet.ca

Dear Mr. di Pizzo:

Re: Echo Bay Mines Ltd. ("Echo Bay") – Water licence NWB1LUP0008 – Lupin mine;
Issues raised by Echo Bay in connection with pending application for adjustment of security amount

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I regret the lateness of this letter. However, I did not receive the correspondence to which this letter responds until the afternoon of Friday, July 27, 2001. That correspondence includes:

July 11, 2001 – from M. Ignasiak (legal counsel to Echo Bay) to Nunavut Water Board (P. di Pizzo);

July 12, 2001 – from Nunavut Water Board (P. di Pizzo) to M. Ignasiak;

July 13, 2001 – from J. Donihee (counsel to Kitikmeot Inuit Association) to Nunavut Water Board (P. di Pizzo);

July 16, 2001 – from M. Ignasiak to Nunavut Water Board (P. di Pizzo);

July 17, 2001 – from M. Ignasiak to Nunavut Water Board (P. di Pizzo); and

July 25, 2001 – from Echo Bay (B. Danyluk) to Nunavut Water Board (P. di Pizzo).

On behalf of the Department of Indian Affairs and Northern Development ("DIAND"), I wish to make the following comments with respect to issues raised in this correspondence. (I make these comments, subject to the reservation that, since the DIAND Minister has not yet approved Echo Bay's water licence, DIAND questions whether it is proper for the Board to entertain Echo Bay's application for amendments to the licence at this point.)

A. Whether a document filed less than 15 days before the hearing may be relied upon at the hearing

DIAND understands that this issue has already been resolved by the Board, via Mr. di Pizzo's letter of July 12. In his letter of July 17, Mr. Ignasiak asks that the Board reconsider its position on this issue. DIAND does not see any justification for reopening the issue.

If the Board nevertheless decides to reopen and reconsider the issue, DIAND submits that the Board's disposition of the issue should be the same as the disposition of July 12. As a general principle, it is important that any written materials which an interested person is providing be furnished far enough in advance of the hearing to enable other interested persons to digest those materials and prepare responses to them. A Board rule which gives effect to this principle should not be set aside lightly. However, in a given instance where a late filing is proposed, it may be appropriate for the Board to receive argument on whether to allow the filing; and after considering any possibilities of prejudice, any feasible scheduling adjustments, and other relevant factors, the Board may decide that allowing the filing would, on balance, be in the interests of justice. Where circumstances warrant, the Board may grant relief from the requirements of rule 3.1 by invoking the "Interpretation" provisions of its Rules (i.e. rules 1.3-1.6), or by using rule 2.1 or rule 2.2.

B. Whether Brodie Consulting Ltd. should be disqualified from serving as the Board's technical advisor in this matter on the ground that there is a reasonable apprehension that he is biased

DIAND expresses no opinion on the ultimate questions of whether there is a reasonable apprehension that Mr. Brodie is biased, and whether the services of Brodie Consulting Ltd. should be retained or dispensed with. DIAND does not see itself as having an interest in obtaining particular answers to those questions.

However, DIAND does have an interest in helping to maintain the effectiveness and integrity of the water-licensing process. DIAND also has an interest in ensuring that the Board is equipped with relevant and accurate information when adjudicating upon the bias issue, particularly since Echo Bay's allegations regarding bias speak of the relationship between Mr. Brodie and DIAND. It is with these interests in mind that DIAND asks the Board to consider the points that follow.

1) Bias is a concept which the law applies with respect to decision-makers. Decision-makers, such as the members of a tribunal, are the ones who must not give cause for any reasonable apprehension of bias. It is questionable whether one may speak of "bias" in the case of a person hired by a board to advise it. It is questionable whether a board, when hiring a technical advisor, is obliged to hire someone "unbiased"; or, to put it another way, given that the technical advisor is not the decision-maker it is questionable whether the fairness of the proceedings is negated by selecting as advisor someone who may have a partiality on a relevant issue. Most certainly there is no obligation to choose as technical advisor someone who shares the applicant's views on the points at issue, and no obligation to avoid hiring someone who is partial to a view which the applicant opposes. Echo Bay may be of the view that any "bias" on the part of the technical advisor will have an inappropriate influence on the decision-making panel; it may be of the view

that a "bias" on the part of the technical advisor will translate into bias on the panel's part. This may be an arguable viewpoint, but its correctness certainly should not be assumed.

Nevertheless, DIAND does think it desirable that the Board avoid having a particular person as its technical advisor if there is good reason to fear that that person will, in formulating his advice, be swayed against or toward one participant by some irrelevant interest or consideration. The key question is whether Echo Bay has established that there is indeed a good reason to fear that Mr. Brodie will be swayed in this way.

2) In the case of a decision-maker, the test to be used in assessing whether there is a reasonable apprehension of bias has been stated by Mr. Justice de Grandpré of the Supreme Court of Canada, in *Committee for Justice and Liberty*:[1]

> ... [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the [Federal] Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
>
> ... The grounds for this apprehension must ... be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> [The underlining is mine.]

De Grandpré J. was delivering a dissenting judgment. But the majority judgment did not take issue with his statement of principle, and it stands as one of the leading statements in Canadian law of the test for reasonable apprehension of bias. It was cited with approval by Mr. Justice Cory of the Supreme Court in *R.D.S.*,[2] where some additional instructive comments were made:

- "... the reasonable person must be an informed person, with knowledge of all the relevant circumstances ..."[3]
- "... a real likelihood or probability of bias must be demonstrated, and ... a mere suspicion is not enough."[4]
- "Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high."[5]

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1 *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, per de Grandpré J. (diss.) at 394-395.

2 *R. v. R.D.S.*, [1997] 3 S.C.R. 484; [1997] S.C.J. No. 84, per Cory J. at paragraphs 111-112.

3 *R.D.S.*, per Cory J. at paragraph 111.

4 *R.D.S.*, per Cory J. at paragraph 112.

5 *R.D.S.*, per Cory J. at paragraph 113.

- "The onus of demonstrating bias lies with the person who is alleging its existence."[6]

3) The test in *Committee for Justice and Liberty* may not be fully transferrable from decision-makers to technical advisors. However, certain elements of the definition, and the comments in *R.D.S.*, would doubtless apply to a technical advisor – i.e would apply to an allegation that there is a reasonable apprehension of bias on the part of a technical advisor.

As Mr. Justice de Grandpré indicated, where a reasonable apprehension of bias on the part of some person is claimed to exist, it is not enough to make a vague or superficial allegation that there is some ill-defined incompatibility between the person's role in the tribunal's process and some other involvement which he supposedly has. If there is only a mere suspicion of bias, the apprehension of bias is not reasonable. It is incumbent on the party which makes the bias allegation to think the matter through. That party must present a fully articulated explanation of why and how there is a reasonable apprehension of bias. The party alleging must state exactly what conflict, and what inappropriate thinking, on the part of the person in question are feared, and exactly why it is reasonable to fear these.

4) DIAND questions whether Echo Bay has adequately spelled out the particulars of the reasoning which leads it to conclude that there is a reasonable apprehension of bias on Mr. Brodie's part. And DIAND questions whether Echo Bay has provided an adequate factual basis for its conclusion.

In his initial letter, dated July 11th, Echo Bay's counsel Mr. Ignasiak offered only the simple assertion that "... there exists an apprehension of bias in respect to Mr. Brodie's participation ...". He presented no information at all as to the nature of the allegedly apprehended bias; nor did he identify any facts to support the apprehension.

In his letter of July 17th, Mr. Ignasiak gives this statement:

> ... we are of the view that there exists an apprehension of bias because Mr. Brodie does contract administration work and consults for the Department of Indian and Northern Affairs. It is inappropriate for Mr. Brodie to act as the NWB's independent expert on the magnitude and cost of the reclamation project when he is likely to oversee that same reclamation project for which he will be remunerated.

In his letter of July 25th, Bill Danyluk of Echo Bay essentially repeats Mr. Ignasiak's July 17th statement. (Further aspects of Mr. Danyluk's letter will be addressed below, in point (5).)

Mr. Ignasiak's July 17th statement contains these assertions of fact:

- Mr. Brodie does contract administration work and consults for DIAND;
- Mr. Brodie is likely to oversee a reclamation at Lupin; and
- Mr. Brodie will be remunerated for overseeing a reclamation at Lupin.

DIAND certainly agrees that Mr. Brodie has performed consulting work for the Department. However, Echo Bay, in its letters, does not provide any details of that work and show how that particular work is relevant here. Mr. Brodie has done some project supervision work for the

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[6] *R.D.S.*, per Cory J. at paragraph 114.

Department, but only a limited amount of such work. Echo Bay does not explain how it makes its way to the conclusion that Mr. Brodie is likely to perform work for DIAND on a Lupin reclamation, and that his work is likely to involve overseeing the reclamation; indeed, it does not provide a basis for concluding that there is any significant chance that Mr. Brodie will do any work for DIAND in the event that DIAND finds itself conducting a reclamation at Lupin. Furthermore, it does not give any particulars of how Mr. Brodie's remuneration would be determined if it came to pass that DIAND did hire him in connection with a Lupin clean-up.

Echo Bay also fails to say just what inappropriate conduct Mr. Brodie will supposedly be tempted to engage in when acting as technical advisor. And it fails to explain why he might be tempted to engage in inappropriate conduct – that is, fails to say what he would hope to achieve by such conduct, and how he could reasonably have a hope of achieving it. Is it Echo Bay's theory that Mr. Brodie will be inclined to inflate his estimates of what work is needed and how much the work would cost, with the idea that when he ultimately finds himself overseeing the reclamation he will obtain greater remuneration? Is the theory instead that he will inflate his estimates with a view to causing an inflation of the security-deposit requirement, thereby increasing the chances that Echo Bay will abandon Lupin, that DIAND will have to do a clean-up, and that he will get a contract?

By leaving gaps in its recitation of facts, and in its explanation of what inappropriate conduct might ensue, Echo Bay overlooks a number of relevant factual and logical considerations:

(a) Echo Bay has not alleged or established that DIAND in any jurisdiction invariably or usually turns to Mr. Brodie when it needs a certain type of work done. In particular, it has not shown that DIAND does this in the case of project-supervision work on reclamation projects.

(b) I am advised by DIAND staff that, to the best of their knowledge and belief, Mr. Brodie has not performed work for DIAND in Nunavut.

(c) Echo Bay has not alleged or established that there is any arrangement or understanding between DIAND-Nunavut and Mr. Brodie which would reasonably lead Mr. Brodie to believe he has the "inside track" on project-supervision work, or any other work, at Lupin if a clean-up were to be undertaken by DIAND.

(d) Echo Bay has not alleged or established that Mr. Brodie would want some sort of contract with DIAND in relation to a Lupin clean-up. Echo Bay has not alleged or established that Mr. Brodie would be available to do work for DIAND on a Lupin clean-up.

(e) Echo Bay has not mentioned federal-government contracting practices. If DIAND had work to offer in relation to a Lupin clean-up, and if Mr. Brodie were interested in obtaining that work, Mr. Brodie would likely have to compete in a tendering process.

(f) Echo Bay has not provided information showing that there would be a substantial relationship between Mr. Brodie's estimates in these proceedings and what he would earn if he were hired by DIAND to work on a Lupin reclamation. Echo Bay has not provided a basis for concluding that Mr. Brodie's identification of work in the licence-renewal proceedings or amendment proceedings would determine what work DIAND would perform if it ultimately embarked on a clean-up. Echo Bay has not alleged or established that Mr. Brodie's total remuneration, or rate of remuneration, would be determined by a method

which would tie the remuneration to the cost of the work actually done, or to the total amount of work actually done, or to the estimated cost or amount.

(g) Echo Bay has not addressed the possibility that both Mr. Brodie and DIAND would be averse to having Mr. Brodie perform any work in relation to a Lupin clean-up which might be incompatible with his role as an advisor to the Board on the Lupin file.

(h) With respect to the setting of a security-deposit amount, DIAND's interest – the public interest for which DIAND speaks – is in knowing as accurately as possible what the true reclamation cost of a project will be, and in having that cost covered by the security deposit. DIAND does not have an interest in the Board's selecting any particular cost figure as the right one. In the proceedings concerning the Lupin water licence, DIAND has not put forward an estimate of reclamation costs. It is not possible to curry favour with DIAND by inflating estimates of reclamation costs and thereby promoting an inflation of the security-deposit requirement.

(i) The scenarios referred to above as possible Echo Bay theories appear to assume that Mr. Brodie would act in bad faith. They may also assume that he would act in contravention of professional standards, and in a way which might be characterized as civil fraud. It is questionable whether such assumptions may properly be made when determining whether there is a reasonable apprehension of bias.

(j) Echo Bay's argument seems to imply that all those who belong to some fairly large category of people must be disqualified from serving as technical advisors to the Board regarding security. There would be a disqualification either for anyone who has worked on a DIAND reclamation project, or for anyone who has some reason to think he/she might be able to obtain work on a DIAND reclamation in the future, or for anyone who simply has some desire to obtain work on a DIAND reclamation.

5) In Mr. Danyluk's letter of July 25, Echo Bay presents criticisms of the way in which Mr. Brodie has performed his work in the past. The criticisms presented, if borne out, might go to the weight which the Board should give to the advice provided by Mr. Brodie. However, they do not seem to point to any "bias" on the part of Mr. Brodie. Nor is the praise which Mr. Danyluk directs toward Echo Bay's own contractors relevant to the issue of whether there is a reasonable apprehension of bias on Mr. Brodie's part.

6) In each of his letters, counsel to Echo Bay follows his bias allegation with a proposal for a meeting between Mr. Brodie and Echo Bay's own contractors. The two initiatives appear to be quite inconsistent. If Echo Bay sincerely believes that Mr. Brodie lacks an impartiality that is necessary in a technical advisor to the Board, then it should not be prepared to countenance a meeting with Mr. Brodie, who would be participating in his capacity as technical advisor. If Echo Bay is prepared to countenance a meeting with Mr. Brodie as technical advisor, then one may wonder whether Echo Bay really takes seriously its own objection that he is tainted.

7) During the licence-renewal proceedings, Echo Bay made no objection to Mr. Brodie's serving as technical advisor. This, too, may raise a question as to how seriously Echo Bay takes its bias allegation. Also, by not objecting earlier Echo Bay may conceivably have waived any bias-related objection which it might have had. Echo Bay's proposals for a meeting with Mr. Brodie might also amount to a waiver.

cc.: Paul Smith, DIAND

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John Brodie, Brodie Consulting Ltd., at mjohnbrodie@home.com

8) Certain passages in the Echo Bay letters might be construed as suggesting that, if the Board decides to dispense with the services of Brodie Consulting Ltd., the Board should bar Mr. Brodie from all further participation in the amendment proceedings. DIAND submits that, if the Board does decide to release Brodie Consulting Ltd., no comprehensive bar would be warranted. Nor should the Board rule inadmissible the material or testimony which Mr. Brodie has to date provided in regard to the Lupin licence; such material or testimony would remain relevant.

C. Whether the Board should authorize a meeting between Echo Bay's contractors and John Brodie

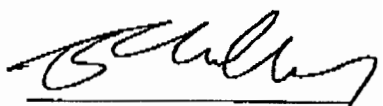
As noted above, Echo Bay's proposal for a meeting appears to be inconsistent with its assertion that Mr. Brodie is tainted by an apprehension of bias. In addition, it is likely that the existence of an unresolved bias allegation would be a negative and inappropriate factor in the atmosphere of such a meeting, and in the reactions to any outcome of the meeting. Given a situation where Echo Bay will abandon the bias allegation if it is satisfied with the meeting's outcome but will pursue the allegation if it is dissatisfied, Mr. Brodie may well be perceived as having an intimidating Sword of Damocles hanging over his head. If the results of the meeting are not to Echo Bay's satisfaction, Echo Bay may contend that it was bias on Mr. Brodie's part which prevented a more favourable outcome. If the meeting does result in Mr. Brodie's adopting views which are more in line with those of Echo Bay, the administration of justice may well suffer disrepute: intervenors and the general public may understandably wonder whether that Sword of Damocles has contributed to the change in Mr. Brodie's views. For that matter, even if Mr. Brodie does not alter his position, the public may well consider that a possibly-biased advisor had no business participating in such a meeting, and that perhaps Echo Bay did not get a fair shake at the meeting.

For these reasons, DIAND submits that there should be no meeting between Mr. Brodie and Echo Bay to discuss reclamation activities and costs so long as the bias allegation is pending and unresolved.

* * *

Thank you for your consideration of these comments.

Yours very truly



Lee F. Webber
Legal Counsel to DIAND

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Comments / Commentaires:

Mr. di Pizzo:

Re: Echo Bay Mines Ltd. – Lupin Mine – Board file NWB1LUP0008

Please see accompanying copy of submissions.

Thank you.

Lee F. Webber

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