

***OVERVIEW OF THE MARINE SHIPPING AND LIABILITY
REGIME APPLICABLE TO THE MEADOWBANK PROJECT***

**Response to Key Issue 6.7
from NIRB Pre Hearing Decision Report of July 14, 2005**

**Submitted by
Cumberland Resources Ltd.
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Based on Comments from Transport Canada**

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1.0 INTRODUCTION

In its Pre Hearing Decision of July 14th, 2005 the Nunavut Impact Review Board (NIRB) instructed Cumberland Resources Ltd. (Cumberland) to address the following key issue:

6.7 Shipping and Marine

Full explanation of potential impacts from increased shipping traffic and potential for spills, including consultations with Chesterfield Inlet and how and whether or not sections 6.2.2 and 6.2.3 of the NLCA, including the Government of Canada designation of a person who is liable for marine transportation, applies.

Cumberland completed a review of the likelihood of impacts on wildlife from shipping activities as well as consultation with residents of Chesterfield Inlet during the summer of 2005. The results of these efforts are reported elsewhere in Cumberland's filings.

This report will document the regulatory regime applicable to marine spill control and clean up including the environmental liability regime and it will address the application of the wildlife compensation regime under Article 6 of the Nunavut Land Claims Agreement (NLCA) to Cumberland's proposed shipping activities.

2.0 BACKGROUND

In order to proceed with the construction and operation of the Meadowbank project northeast of Baker Lake in Nunavut, Cumberland Resources Ltd. (Cumberland) will contract with a marine shipping company which does business in Nunavut to transport fuel, steel, construction materials, equipment and other consumables in to Baker Lake. This shipping activity will be required in support of the project for the life of the mine, from construction to decommissioning.

It is not possible to predict the actual shipping route at this time. The route may vary from year to year and depending on environmental conditions and ice. It may also vary based on the source and nature of the materials to be moved to the Meadowbank site. It could, for example, be from Montreal north along the east coast of Canada in to Hudson's Bay and down the west coast of Hudson's Bay to Chesterfield Inlet and then in to Baker Lake. Annual shipping activity may also originate in Churchill and travel up the coast of Hudson's Bay to the mouth of Chesterfield Inlet and then in to Baker Lake.

Large vessels (if they are used) cannot get through the narrows at the west end of Chesterfield Inlet so a transfer process (called "lightering") may take place at the mouth of the inlet to move the goods to smaller barges. It is also possible that barges which can travel all the way to Baker Lake may be used if the port of origin is Churchill.

In any event, Cumberland currently predicts that approximately 3-5 barges a year will go through Chesterfield Inlet and into Baker Lake all the way to the hamlet of Baker Lake where cargo will be unloaded and may be stored temporarily or else will be put on

trucks to go to the Meadowbank site. It is not clear at this time what size barges will be used and consequently how many barge loads will be required each year, but the shipping activity, including the barging, will be a contracted service. Cumberland will not be directly involved in marine shipping and will not generally be responsible for the cargo¹ until it is delivered to Baker Lake. Standard marine shipping and transportation arrangements will apply.

This report sets out an overview of the legal regime, including liability arrangements which currently apply to the shipping activities which must be contracted for by Cumberland. Its purpose is to address the concerns which have been raised by interveners in the NIRB Meadowbank Mine Review to date.

2.1 An Overview of the Legal Regime Applicable to Cumberland's Shipping Activity

Marine shipping is a heavily regulated enterprise. The legal regime applicable includes both Canadian and international law. Canada is party to a number of international conventions which both directly and indirectly affect domestic law. Any shipping activities in support of the Meadowbank project will be subject to a legal regime which addresses the design and operation of the ships or barges, the shipping activity itself, a comprehensive regime of emergency response in the case of accidents, a comprehensive regime addressing liability for spills or accidents, environmental protection and compensation for loss or damages arising from shipping activities.

Most of the relevant law is based in statute² and regulation but there are cases which will be of assistance and some provisions of the Nunavut Land Claims Agreement (NLCA) also apply. The applicable law will depend on the location and nature of the shipping or other activity, on the type of ship (including a barge) involved in the transportation and on the nature of the cargo being carried. Further, the applicable law can depend on whether any accidents occur and if they do, the nature of any material which is spilled.

This report provides a brief overview of this legal regime prepared to assist the Nunavut Impact Review Board (NIRB) to address the Cumberland Meadowbank Project. It is not a definitive review of the law of shipping or of the environmental law of the sea in Canada.³

¹ It is difficult to make a definitive statement about Cumberland's responsibility for cargo shipped to Baker Lake which covers all possible scenarios as will be shown by the review of the legal regime set out in this memo. However, it is in our view fair to say that generally, Cumberland will not be responsible for any cargo it ships until it reaches Baker Lake.

² Although some cases will be referred to in this memo, a thorough review of case law related to the various international, national statutory and land claims regimes reviewed is beyond the scope of this work.

³ Readers could refer to the Maritime Law Casebook prepared by the Dalhousie University Marine and Environmental Law Program, for additional information. See: Edgar Gold, Aldo Chircop & Hugh Kindred, *Maritime Law* (Toronto: Irwin Law, 2003).

Part 3 of this report begins with a review of the law related to shipping. Parts 4 and 5 address the environmental liability and pollution prevention regimes respectively. Part 6 briefly comments on some other statutory authorities relevant to issues raised in the pre-hearing meetings while Part 7 addresses Article 6 of the NLCA.

3.0 THE CANADA SHIPPING ACT⁴

3.1 Application

The objectives of the *Canada Shipping Act (CSA)* as set out in s. 5 include the specific objective in s. 5(c) to “protect the marine environment from damage due to navigation and shipping activities”. Transport Canada is responsible for much of the administration of the Act. Section 7(1) of the CSA reads: “Except as otherwise provided in this Act, the Minister of Transport is responsible for the administration of this Act.”

The CSA applies to “Canadian waters” which are defined to mean “the territorial sea of Canada and all internal waters of Canada”. Section 2 of the CSA defines a number of terms that will be important to our understanding of context for the regulation of shipping, including the transportation of oil by ship to Baker Lake and the regulation of the risk of potential oil spills during the shipping or lightering process.

The term “internal waters of Canada” is not defined in the CSA and neither is “territorial sea”. The term “territorial sea” has been the subject of judicial consideration by the Supreme Court of Canada in *Canada (Attorney General) v. British Columbia (Attorney General)*⁵ but the cases addressing the extent of the territorial sea are now subject to the definition in section 4 of the *Oceans Act*⁶ which sets the limit at 12 nautical miles from the nearest baseline.

The term “internal waters”, however, has not been judicially considered by the courts⁷ although it is a term mentioned in the case law. For example, the 1994 N.W.T. case of *R. v. Northwest Territories (Commissioner)*⁸ looked at the meaning of “internal waters” in relation to a water licence issued to the Town of Iqaluit when an accident resulted in the dumping of sewage into Frobisher Bay. The question was whether the definition of “inland waters” in the *Northern Inland Waters Act*⁹ included the internal waters or the territorial sea waters as defined by the *Territorial Sea and Fishing Zones Act*¹⁰. Justice

⁴ R.S. 1985, c. S-9. The *Canada Shipping Act, 2001*, S.C. 2001, c.26 was enacted to amend the *Shipping Conferences Amendment Act* and other statutes including the *Canada Shipping Act*. However, the 2001 Act will not come into force until all of the new regulations are in place.

⁵ [1984] 4 W.W.R. 289 at 299, [1984] 1 S.C.R. 388. In this case, the territorial sea was determined to be three miles based on prevailing international law norms of the day.

⁶ S.C. 1996, c.31, s.4.

⁷ Review of Carswell's *Words and Phrases*, current to June 2004.

⁸ [1994] N.W.T.J. No. 39, 8 W.W.R. 405, N.W.T.R. 250, 95 C.E.L.R. (N.S.) 85 (NWTSC)

⁹ R.S.C. 1985, c. N-25, (repealed).

¹⁰ R.S.C. 1985, c. T-8, (repealed).

de Weerd of the Supreme Court of the Northwest Territories found that “inland waters” did not include waters of the sea, whether internal waters or territorial sea waters.¹¹

The term “inland waters” was also considered in B.C. in *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*.¹² The Court stated:

Waters have been described as territorial, inland, high seas, internal, interior and national, without those words gaining a precise meaning. On occasions such words have borne two or more meanings, depending on their context, and on whether they were used in a domestic or international law term which was formerly used to describe waters over which a country asserted sovereignty. Territorial sea would now describe the band of water lying outward from a base line from headland to headland, much as it is set out in our *Territorial Sea and Fishing Zones Act*. The water inside that line is called internal or inland in international law. At common law waters are inland which are *inter fauces terrae*. They are described in the common law as being within the realm and within the country. Often a body of water will be inland in both systems of law. But the elements differ.

Thus it appears that inland waters include fresh water but that the term internal waters can include both fresh water and marine or sea water inside the limits of the territorial sea.¹³ Consequently, since the CSA applies to internal waters, it applies to the Great Lakes and provides a basis for the regulation of shipping in the marine and fresh internal waters of Canada.

At the same time other statutes apply to Canadian waters, variously defined. For example, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*¹⁴ applies to inland waters in Nunavut.¹⁵ Thus legally, internal waters can overlap with inland waters. It is clear that those portions of the shipping route within Nunavut for goods to be transported to Baker Lake for Cumberland are Canadian waters, internal waters and some portions are inland waters. In other words several statutory regimes will apply to manage shipping in support of the Cumberland project and to protect the environment in the areas affected by these activities.

The CSA also applies to vessels within “Canadian waters” (defined above) and a vessel is defined to include: “any ship or boat or any other description of vessel used or designed to be used in navigation”. This definition of vessel would include a ship carrying oil when that ship is in “Canadian waters”. The “vessel” definition also includes a barge carrying oil, as long as the barge is in “Canadian waters”.

Barges that carry oil are also subject to standards, established by Transport Canada under its authority from the CSA. These standards are discussed later in this memorandum.

¹¹ *Supra*, note 8 at para. 43 QL.

¹² [1976] 1 B.C.L.R. 97.

¹³ This was confirmed by Mr. Victor Santos Pedro of Arctic Shipping Safety of Transport Canada who confirmed that the CSA applies to all fresh and marine waters within the baseline. He said that the CSA applies to all navigable waters in Canada. He confirmed that the CSA would apply to Hudson’s Bay, Chesterfield Inlet and Baker Lake. Personal communication, July 14, 2005.

¹⁴ S.C. 2002, c.10.

¹⁵ *Ibid*, s.4, definition of “waters”.

3.2 Part XV of the CSA – Pollution Prevention and Response

Part XV of the CSA is entitled “Pollution Prevention and Response”. Part XV of the Act used to be administered by the Department of Fisheries and Oceans. However, “[a]ll policy and regulatory responsibilities associated with pleasure craft safety, marine navigation services, pollution prevention and response, and navigable waters protection were transferred from the Department of Fisheries and Oceans to Transport Canada in December 2003.”¹⁶ Although pollution prevention and response is now administered by the Department of Transportation under the CSA, in Nunavut and north of 60 the Coast Guard is still responsible for such matters.

The Canadian Coast Guard (CCG) is “an integral part” of DFO that “ensures the safe and environmentally responsible use of Canada's waters.”¹⁷ One of the areas of CCG responsibility is environmental response services. “The Environmental Response Services (ER) [of the CCG] protects the marine environment and related interests through preparedness and monitoring and by responding to marine pollution incidents in waters under Canadian jurisdiction.”¹⁸ Subject to the obligation of a shipper to respond to a spill, it is the Coast Guard that would respond to a marine pollution occurrence in Chesterfield Inlet and which would ensure that it was properly cleaned up. Mr. Steve Harbicht of Environment Canada in Yellowknife advises that in marine waters the Coast Guard is the lead agency for spill events and co-ordinates the response to a spill, the clean up and any follow up. He stated that other government departments could be involved later to deal with any payment by the polluter for clean up costs.¹⁹

Under the CSA Part XV, s. 654 defines a “ship” which: “includes any description of vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion”. This “ship” definition would include a barge. The definition applies when determining if a “ship” has caused pollution.

The application of Part XV is restricted in the north, however:

655. (1) Except where otherwise provided in this Part or in any regulation made thereunder, this Part and any regulations made thereunder apply

(a) to all

(i) Canadian waters, and

(ii) waters in the exclusive economic zone of Canada

that are not within a shipping safety control zone prescribed pursuant to the *Arctic Waters Pollution Prevention Act*, and

(b) to all ships in waters described in paragraph (a).

¹⁶ Transport Canada website, updated June 2, 2005.

¹⁷ Transport Canada website, updated June 2, 2005.

¹⁸ Transport Canada website, updated May 20, 2005

¹⁹ Personal communication with Steve Harbicht, June 30, 2005.

This means that within *Arctic Waters Pollution Prevention Act*²⁰ (AWPPA) shipping safety control zones the AWPPA is the governing legislation. Thus, because all possible routes used for shipping of Cumberland's fuel, steel and other consumables are "arctic waters" found in AWPPA zone 16 and the shipper's activities will be subject to the AWPPA regime which is discussed later in this memorandum.

3.3 The OPRC Convention

Part XV of the CSA, makes reference to the OPRC Convention.²¹ Subsection 660.2 requires Canadian ships and other ships that are not Canadian ships that are in "waters" to do certain things including complying with the regulations established under s. 660.2(a) "respecting the procedures, equipment and resources that a ship must have on board for use in respect of an oil pollution incident respecting the ship".²² They include:

660.2(2) (b) have an arrangement with a response organization to which a certificate of designation has been issued pursuant to subsection 660.4(1) in respect of a specified quantity of oil that is at least equal to the total amount of oil that the ship carries, both as cargo and as fuel, to a maximum of ten thousand tonnes, and in respect of waters where the ship navigates or engages in a marine activity;

660.2(2)(c) have on board a declaration, conforming to the regulations, that

(ii) confirms that the arrangement referred to in paragraph (b) has been made, and

(iii) identifies every person who is authorized, in accordance with the regulations, to implement the arrangement referred to in paragraph (b) and the shipboard oil pollution emergency plan.

It should be noted that the OPRC Convention clauses only apply to a "ship" in "waters" as they are defined for those clauses. Subsection 660.2(1) defines "waters" for the purposes of s. 660.2 as:

means

(a) Canadian waters, and

(b) waters in the exclusive economic zone of Canada

and includes, notwithstanding subsection 655(1), waters that are within a shipping safety control zone prescribed pursuant to the *Arctic Waters Pollution Prevention Act*.

So the OPRC Convention applies to waters within shipping safety control zones under the AWPPA if the ship is of a certain type and is within "waters" as defined in s. 660.2.

Subsection 660.2 also includes a different definition of "ship" for the purposes of that subsection:

²⁰ R.S.C. 1985, c. A-12.

²¹ The OPRC Convention definition is : "OPRC Convention" means the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, signed at London on November 30, 1990, as amended from time to time, to the extent that those amendments are in force in respect of Canada".

²² The application of subsection 660.2(2) is subject to subsection 660.2(3) but since these vessels will be crossing both arctic and non-arctic waters, full compliance with CSA requirements will be necessary.

"ship"

(a) means

(i) an oil tanker of one hundred and fifty or more tons gross tonnage, and

(ii) a ship, other than an oil tanker, of four hundred or more tons gross tonnage that carries oil as cargo or as fuel,

(b) includes two or more ships, each of whose gross tonnage is less than that mentioned in subparagraph (a)(i) or (ii), that carry oil as cargo, that are towed or pushed together and whose aggregate tonnage is one hundred and fifty or more tons gross tonnage, and

(c) does not include

(i) a ship that is not a Canadian ship if it is only transiting in the territorial sea of Canada or the exclusive economic zone of Canada and if it is not engaged in the loading or unloading of oil during transit,

(ii) any warship, naval auxiliary ship or ship owned or operated by a state and used only on government non-commercial service, or

(iii) a ship that is on location and engaged in the exploration or drilling for, or the production, conservation or processing of, oil or gas in an area described in paragraph 3(a) or (b) of the *Canada Oil and Gas Operations Act*;

It is not yet known whether the ships or barges used to transport the oil to Baker Lake will fall under the definition of "ship" for the purposes of s. 660.2 and therefore, whether or not s.660.2 will apply to the transportation. In any event complying with these requirements would be the responsibility of the shipping company hired by Cumberland.

3.4 Regulations under the *Canada Shipping Act*

There are regulations under the CSA that are relevant to the shipping of oil to Baker Lake.

(A) Oil Pollution Prevention Regulations²³

The *Oil Pollution Prevention Regulations* (OPPR) under the CSA deal with preventing oil pollution from any ship in Canadian waters. Given the definition of "ship", the regulations would apply to barges too.

Part III of this regulation addresses oily discharges. In that Part, section 28 prohibits the discharge of "oil or oily mixture" into waters under Canadian jurisdiction. This would also include a spill of oil which might occur from a ship or barge or when offloading the fuel. There are exceptions to the prohibition in Part III which are set out in detail in the regulations. The master of the ship or barge would have a duty to report any discharge.

²³ SOR/93-3.

(B) Oil Barge Standards

Barges may be required to take the goods and fuel through Chesterfield Inlet to Baker Lake. Under the CSA, Transport Canada has developed standards for oil barges called *Standards and Guidelines for the Construction, Inspection and Operation of Barges that Carry Oil in Bulk*.²⁴

In relation to barges carrying oil, there are certain standards that will be relevant. These *Standards* relate to the regulation of barges themselves, their design, construction and operation. They do not regulate the use of the barges. These matters are covered by other authorities.

The *Standards* define “oil” and “oil barge” as:

“oil” means oil of any kind or in any form and, without limiting the generality of the foregoing, includes petroleum, fuel oil, sludge, and oil refuse;

“oil barge” means any description of non-self propelled vessel, other than an oil or gas offshore drilling unit or production unit, that is constructed or converted to carry bulk oil as cargo

Section 6 of the *Standards* states that every oil barge shall comply with the Oil Pollution Prevention Regulations.

Parts II and III of the *Standards* address the inspection of barges. Part IV is called Stability and Loading Information and section 25 states that all oil barges must comply with the requirements for damage stability set out under the OPPRs. Part X deals with Towing and Operational Requirements. Under section 86, the issue of shallow water operation is addressed.

Again, the point should be made that the *Standards* address issues that must be dealt with by the shipping company. Cumberland does not have a duty to comply with these standards, simply because it has hired a company to deliver the oil which will need to be transported part or all of the way to Baker Lake on a barge.

The CSA thus regulates both ship and barge standards, operations and environmental protection including clean up requirements if a spill event occurs. This regime is applicable all the way to Baker Lake. It would apply to the shipping company and not to Cumberland.

4.0 THE MARINE LIABILITY ACT²⁵

The *Marine Liability Act (MLA)* came into force in 2001. The *MLA* addresses responsibility for damages or injuries that occur during maritime operations, including maritime shipping. Part 6 of the *MLA* repealed and replaced portions of Part XVI of the

²⁴ 1995, TP11960E, Transport Canada website.

²⁵ S.C. 2001, c. 6.

Canada Shipping Act, dealing with Civil Liability and Compensation for Pollution. The applicable regime for civil liability related to pollution is now found in the *MLA*.

4.1 Part 6 of the *MLA* – Liability and Compensation for Pollution

Part 6 of the *MLA* addresses Liability and Compensation for Pollution. This Part would apply to an oil spill from a ship. This interpretation is confirmed by Mr. Doug O'Keefe of the International Marine Policy and Liability Directorate of Transport Canada.²⁶ Section 50 states that part 6 of the *MLA* has priority over the *Arctic Waters Pollution Prevention Act* in any case where there is *inconsistency* between the two statutes.

The term “owner” for the purposes of Part 6 is defined in s. 47 to mean:

- (a) in relation to a Convention ship, the person who is registered as the owner of the ship or, if no person is so registered,
 - (i) the person who owns the ship, or
 - (ii) if the ship is owned by a state and operated by a company that is registered as the ship's operator in that state, that company; or
- (b) in relation to any other ship, the person who has for the time being, either by law or by contract, the rights of the owner of the ship with respect to its possession and use.

Therefore, the definition of “owner” does not include the owner of the cargo on the ship. This was confirmed by Mr. O'Keefe of Transport Canada. He advised that it is the ship owner who is liable for pollution under the *MLA*, not the owner of the cargo.²⁷

Section 48 of the *MLA* states that Part 6 applies to Convention ships and other ships where the actual discharge of the pollutant takes place on the territory of Canada or in Canadian waters. In Part 6 a “Convention ship” is defined as:

means a seagoing ship, wherever registered,

- (a) carrying, in bulk as cargo, crude oil, fuel oil, heavy diesel oil, lubricating oil or any other persistent hydrocarbon mineral oil; or
- (b) on a voyage following any such carriage of such oil, unless it is proved that there is no residue of the oil on board.

A “ship” is defined in s. 47 as:

“means any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion, and includes

- (a) a ship in the process of construction from the time that it is capable of floating; and
- (b) a ship that has been stranded, wrecked or sunk and any part of a ship that has broken up.

²⁶ Personal email communication with Doug O'Keefe, June 30, 2005.

²⁷ Personal telephone communication with Doug O'Keefe, June 30, 2005.

Therefore, the ship and/or barge carrying the oil to Baker Lake would fall under the definition of “Convention ship” as long as that ship could be considered a “seagoing” ship which is likely.

Section 51 makes the owner of the ship liable for the pollution from a ship and for the related costs including liability for environmental damage caused by pollution. This also includes costs and expenses incurred by any other party to prevent, minimize or remedy the pollution damage from the ship.²⁸ Section 51 sets up a very comprehensive regime of civil liability for oil pollution. Relevant portions are set out below:

51. (1) Subject to the other provisions of this Part, the owner of a ship is liable

- (a) For oil pollution damage from the ship;
- (b) For costs and expenses incurred by
 - (i) the Minister of Fisheries and Oceans,
 - (ii) a response organization within the meaning of section 654 of the Canada Shipping Act,
 - (iii) any other person in Canada, or
 - (iv) any person in a state, other than Canada, that is a party to the Civil Liability Convention,

in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship, including measures taken in anticipation of a discharge of oil from the ship, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures; and

- (c) for costs and expenses incurred
 - (i) by the Minister of Fisheries and Oceans in respect of measures taken under paragraph 678(1)(a) of the Canada Shipping Act, in respect of any monitoring under paragraph 678(1)(b) of that Act or in relation to any direction given under paragraph 678(1)(c) of that Act, or
 - (ii) by any other person in respect of measures the person was directed to take or prohibited from taking under paragraph 678(1)(c) of the Canada Shipping Act,
- to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures.

Liability for environmental damage

(2) If oil pollution damage from a ship results in impairment to the environment, the owner of the ship is liable for the costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

Strict liability subject to certain defences

(3) The owner's liability under subsection (1) does not depend on proof of fault or negligence, but the owner is not liable under that subsection if the owner establishes that the occurrence

- (a) resulted from an act of war, hostilities, civil war or insurrection or from a natural phenomenon of an exceptional, inevitable and irresistible character;
- (b) was wholly caused by an act or omission of a third party with intent to cause

²⁸ Personal email communication with Doug O’Keefe, June 30, 2005.

- damage; or
- (c) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids, in the exercise of that function.

If the ship is a Convention ship then the ship owner's liability for pollution damage is limited under section 54 of the *MLA*. If the ship that causes the oil pollution is something other than a Convention ship then the ship owner's liability is limited in accordance with Part 3 of the *MLA*.²⁹

The limits to liability are set out in Part 3 of the *MLA* as follows:

28. (1) The maximum liability for maritime claims that arise on any distinct occasion involving a ship with a gross tonnage of less than 300 tons, other than claims mentioned in section 29, is

(a) \$1,000,000 in respect of claims for loss of life or personal injury; and

(b) \$500,000 in respect of any other claims.

It thus appears that the *MLA* civil liability provisions would protect persons including companies in Nunavut from damages resulting from oil pollution, environmental and other forms of damage arising from shipping associated with the Cumberland project.

4.2 Funds for Oil Pollution Damage

If the *MLA* applies to a spill of Cumberland's cargo,³⁰ the owner of the ship carrying oil would be liable for the pollution damages under the *MLA*, not Cumberland. There is a fund established to deal with the payment for oil pollution damage from Convention ships called the International Fund for Compensation for Oil Pollution Damage (the IOPC Fund) which is defined in s. 47 of the *MLA* as the "Fund Convention". It was originally established in 1971. As is set out in s. 75, the Fund is liable for payment of compensation when a claimant cannot get the full amount of damages from the ship owner or the owner's guarantor. Canada contributes to this fund as set out in s. 76 of the Act.

Canada has also established its own fund as set out in s. 77 of the *MLA*. It is called the Ship-source Oil Pollution Fund (the SOP Fund). This fund may provide compensation in the case of damages caused by ships other than Convention ships or for Convention ships where the claims exceed the compensation payable by the IOPC Fund.³¹ Contributions have been made to the SOP Fund and it has topped out at \$300 million and no further contributions are being made at this point. This fund is to be used for claims that are made but are not paid by the ship owner since the ship owner's liability

²⁹ Personal email communication with Doug O'Keefe, June 30, 2005.

³⁰ See the discussion of the overlap and inconsistency issue in section 5 below on the *Arctic Waters Pollution Prevention Act*.

³¹ Personal email communication with Doug O'Keefe, June 30, 2005.

is limited.³² Claims to the SOP Fund are limited to \$140 million per incident for oil spills by any vessel operating in Canadian waters. The IOPC Fund 's maximum limit is \$405 million per incident. In May 2003 a Supplementary Fund Protocol for the IOPC Fund established a Supplementary Fund to cover damages beyond these amounts. However, joining the Supplementary Fund is voluntary and Canada has not yet ratified the Protocol.³³

Mr. O'Keefe was of the view that the "Canadian waters" definition would include the waters of Baker Lake and Chesterfield Inlet. Thus the *MLA* would apply in those waters if there were an oil spill from a ship. However, as discussed below, the waters of Chesterfield Inlet could also fall under the definition of "arctic waters" and may therefore also be subject to the *AWPPA* liability regime. The *AWPPA* can of course apply to discharges of waste other than oil and in the case of an oil spill in arctic waters the *AWPPA* applies. If there are any inconsistencies between the *AWPPA* and the *MLA* then the *MLA* applies to the extent of the inconsistency.

5.0 THE ARCTIC WATERS POLLUTION PREVENTION ACT

The *Arctic Waters Pollution Prevention Act* applies to marine waters adjacent to Nunavut. The Act prohibits any person or ship, except as authorized by regulation, from depositing or permitting the deposit of waste in arctic waters or on any place on land under conditions where waste may enter arctic waters.³⁴ A "person" is prohibited from depositing or permitting the deposit of waste. This would therefore not just make the ship owner liable for a deposit of waste but it could also make the owner of the "waste" liable for the deposit. However, according to Mr. Peter Timonin, Regional Director for the Prairie and Northern Regions of the Marine Safety Branch of Transport Canada, the ship owner would definitely be charged if there was a spill and charges were laid. He expressed the view that since a ship owner has control of the cargo it would be the ship owner who would be liable. Mr. Timonin stated that to his knowledge, no charges for a spill have ever been laid against a cargo owner.³⁵

Under s. 2 of the *AWPPA*, "arctic waters" are defined as:

"arctic waters" means the waters adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of west longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles, except that in the area between the islands of the Canadian arctic and Greenland, where the line of equidistance between the islands of the Canadian arctic and Greenland is less than one hundred nautical miles from the nearest Canadian land, that line shall be substituted for the line measured seaward one hundred nautical miles from the nearest Canadian land;

³² Personal telephone communication with Doug O'Keefe, June 30, 2005.

³³ *Maritime Law Review Discussion Paper*, International Marine Policy, Transport Canada: May, 2005.

³⁴ *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12, s. 4(1).

³⁵ Personal communication with Peter Timonin, July 14, 2005. This is not to say that such charges are not possible.

Therefore, the *AWPPA* applies to the sea waters around Chesterfield Inlet and, according to Mr. Ross McDonald it also likely applies to the waters of Chesterfield Inlet, as discussed previously. It may not apply to Baker Lake itself.³⁶

Under s. 2, “waste” is defined as follows:

“waste” means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man, and

(b) any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water to the extent described in paragraph (a),

and without limiting the generality of the foregoing, includes anything that, for the purposes of the *Canada Water Act*, is deemed to be waste.

Therefore, the definition of “waste” includes oil as well as other substances.

Subsection 4(1) sets out the following prohibition:

4. (1) Except as authorized by regulations made under this section, no person or ship shall deposit or permit the deposit of waste of any type in the arctic waters or in any place on the mainland or islands of the Canadian arctic under any conditions where the waste or any other waste that results from the deposit of the waste may enter the arctic waters.

Violators of the prohibition against depositing or permitting the deposit of waste into arctic waters are liable upon summary conviction to a fine, in the case of a person, of up to \$5,000 and, in the case of a ship, of up to \$100,000 and each day of continued violation is a separate offence.³⁷

The Act also imposes absolute civil liability without fault or negligence³⁸ on resource explorers, operators of land-based undertakings and ship and cargo owners for costs, expenses, loss or damage and for clean-up costs resulting from a deposit of waste in arctic waters.³⁹ This liability regime is set out in section 6 of the *AWPPA* a portion of which is below:

6. (1) The following persons, namely,

³⁶ There is evidence that parts of Baker Lake may be “brackish”. In this case, these areas might not be “inland waters of Canada” as that term is defined in the *CSA* and the *AWPPA* could apply. The term “inland waters” is also used in the *NWNSRTA*, s.4. These complex questions of fact and competing laws are beyond the scope of this memo.

³⁷ R.S.C. 1985, c. A-12, s. 18(1).

³⁸ There are no defences, unlike s. 677 of the *Canada Shipping Act*, R.S.C. 1985, c. S-9, as am. which includes such defences as the acts of third parties and negligence of government navigation authorities.

³⁹ See *AWPPA* ss. 6, 7.

(a) any person who is engaged in exploring for, developing or exploiting any natural resource on any land adjacent to the arctic waters or in any submarine area subjacent to the arctic waters,

(b) any person who carries on any undertaking on the mainland or islands of the Canadian arctic or in the arctic waters, and

(c) the owner of any ship that navigates within the arctic waters and the owners of the cargo of any such ship,

are respectively liable and, in the case of the owner of a ship and the owners of the cargo thereof, are jointly and severally liable, up to the amount determined in the manner prescribed by regulations made under section 9 in respect of the activity or undertaking so engaged in or carried on or in respect of that ship, as the case may be, for costs, expenses and loss or damage described in subsection (2).

(2) Liability under subsection (1) is

(a) for all costs and expenses of and incidental to the taking of action described in subsection (3) on the direction of the Governor in Council, and

(b) for all actual loss or damage incurred by other persons

resulting from any deposit of waste described in subsection 4(1) that is caused by or is otherwise attributable to the activity, undertaking or ship, as the case may be, referred to in subsection (1).

Therefore, if the *AWPPA* applies to a spill, Cumberland, as the cargo owner, would be jointly and severally liable for the cleanup costs.

There is a two-year limitation period under s. 6(5). A cargo owner may escape liability by establishing that the cargo, if deposited in arctic waters along with other cargo of the same nature carried by the ship, would not result in a violation of the waste deposit prohibition under s. 7(4). However, this would not be possible with a fuel spill.

Monetary limits of liability are provided for in the Act and a formula for calculating limits is set out in the regulations.⁴⁰ For oil and gas exploration or development operations, the limit is \$40 million, as set out in s. 8(f), and maximum liability for ship owners and cargo owners is 210 million gold francs as set out in s. 15(1).

According to Mr. McDonald of Arctic Shipping Safety of Transport Canada, the *MLA* does have precedence over the *AWPPA* in the event of inconsistency and these requirements may be harmonized with those in the *MLA* in the future.⁴¹

Shipping safety control zones may be established for arctic waters by order of the Governor in Council as set out in s. 11. Ships entering such zones may then be regulated in respect of construction, equipment, cargo and operation as set out in s. 12 and 13. Pollution prevention officers designated under the Act are given wide powers

⁴⁰ *Arctic Waters Pollution Prevention Regulations*, C.R.C. 1978, c. 354.

⁴¹ Personal telephone communication with Ross McDonald, June 30, 2005.

of entry and inspection, and powers to order ships to leave safety control zones and to take part in clean-up operations.⁴²

There have been 16 zones set up under the Shipping Safety Control Zones Order.⁴³ These zones have not been changed since 1978. The ships and barges carrying cargo for Cumberland would pass through at least one of the zones. Zone 16 is in the area of Chesterfield Inlet. It is likely that vessels transiting Hudson's Bay would also pass through Zones 14 and 15 on the way there. It would be the responsibility of the shipping company to ensure that it has complied with the regulations related to ship requirements for such zones.

The *AWPPA* regime provides another layer of protection for persons who might be harmed by a release of waste into arctic waters. This regime provides protection for substances other than oil and involves an absolute liability regime for civil damages. This regime applies to Chesterfield Inlet insofar as it is not inconsistent with the *MLA* regime.

According to counsel in Justice Canada the question of whether the *MLA* or *AWPPA* applies to a spill event or an incident where waste is deposited will depend on the facts including, nature of the cargo, location of the accident and other factors. It could also depend on the issue of whether there is any “inconsistency” between s. 6 of the *AWPPA* (cargo owner liable) and the *MLA* (ship owner liable). In the absence of a fact scenario it is not possible to state a general rule about which statute would apply. So, the issue of whether Cumberland as the cargo owner would be liable to clean up a spill of cargo, would depend on both the facts and the law. We can, however, say that the ship owner would in all cases be liable.⁴⁴

6.0 OTHER RELEVANT STATUTES

There are other laws which have important roles to play in the regulation of shipping and in responding to pollution or other damages which may arise from shipping activity. We review some of the relevant of these statutes below.

6.1 *Fisheries Act*⁴⁵

The *Fisheries Act* protects fish and fish habitat in Canada and applies to any body of water that may contain fish. The Act is administered by DFO with the exception of the pollution control provisions in sections 36 to 42 which are administered by Environment Canada.

The definition of “fish” includes marine mammals. As well the term “Canadian fisheries waters” is used in specific sections of the statute and is defined as:

⁴² See *AWPPA*, s. 14 & 15.

⁴³ C.R.C.1978, c. 356.

⁴⁴ Phone and email communication with Ms. Lisanne Durand, Counsel Department of Justice Canada.

⁴⁵ R.S. 1985, c. F-14.

"Canadian fisheries waters" means all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada;

The Act prohibits the deposit of a deleterious substance into waters frequented by fish (which is defined to mean Canadian fisheries waters) or in an area where such a substance may enter into any such water (s. 36.3)). Therefore, this prohibition would include the waters in Hudson's Bay as well as Chesterfield Inlet and Baker Lake which would fall under the "Canadian fisheries waters" definition. Fish do not have to be harmed by the deposit of the deleterious substance. The offence is established if it is proven that the substance is deleterious to fish and that it was deposited. The substance does not have to render the receiving waters deleterious. Only the substance itself must be deleterious. Nor does it matter whether the spill was accidental or intentional since these are strict liability provisions.

Section 36(3) sets out the following prohibition:

no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

This prohibition could apply if there was a spill of oil or another deleterious substance that was deposited in water frequented by fish.

Both sections 35 and 36 allow DFO to regulate, within its jurisdiction, almost any activity that takes place in or near fish bearing waters or fish habitats by authorizing, with conditions, the alteration, disruption or destruction of fish habitat. A Fisheries Authorization or Letter of Advice can be obtained from DFO depending on the circumstances.

If a substance does enter water, the person who owns or has "care, management or control" of the substance or who causes or contributes to the release must report the release to DFO as is set out in s. 38(4).

This statute will be important if an oil spill occurs or if a deleterious substance of another kind enters the water as a result of shipping activities in support of the Meadowbank project. Whether any liability could be attached to Cumberland in these circumstances would, however, depend on whether Cumberland had "care, management or control" of the substance or the oil when it entered the water or whether the ship owner did.

6.1.1 Marine Mammals

The issue of the effect that shipping might have on marine mammals was raised in the NIRB pre-hearing meetings. The *Marine Mammals Regulations*⁴⁶ promulgated pursuant to the *Fisheries Act* address fishing for marine mammals but there are no regulations which deal directly with shipping effects on marine mammals. Normally,

⁴⁶ SOR/93-56.

barge and ship traffic does not destroy or directly damage fish or marine mammals. There may be some risk of disturbance of these organisms but at the level of traffic proposed by Cumberland that seems an unlikely eventuality.

The more important risk in the case of Cumberland's activities which involve only a few barges a year appears to be the risk of a spill to fish or marine mammals. Regulation of activities which may lead to such events is covered by the *Fisheries Act* as well as the other legislation reviewed above.

6.2 *Nunavut Waters and Nunavut Surface Rights Tribunal Act*⁴⁷

Part 1 of the *NWNSRTA* regulates both the use of waters and the deposit of waste into waters in Nunavut.

The term "use" is defined as:

"use", in relation to waters, means a direct or indirect use of any kind, including, but not limited to,

(a) any use of water power and geothermal resources;

(b) any diversion or obstruction of waters;

(c) any alteration of the flow of waters; and

(d) any alteration of the bed or banks of a river, stream, lake or other body of water, whether or not the body of water is seasonal.

However, it does not include navigation or any other use connected with shipping activities that are governed by the *Canada Shipping Act*.

Based on this definition, Cumberland's shipping activities would not constitute a "use" of waters.

The circumstance in which the *NWNSRTA* might be engaged would be where shipping activities resulted in an unauthorized deposit of waste or a spill of waste, such as oil, into inland waters. Such an event could of course also be addressed under the *CSA* or if the deposit involved a deleterious substance, it could be addressed under the *Fisheries Act*. In the shipping context, the *CSA* regime reviewed above may be the more relevant regulatory framework for a response.

Section 4 of the *NWNSRTA* sets out a broad definition of "waste" as follows:

"waste" means any substance that, by itself or in combination with other substances found in water, would have the effect of altering the quality of any water to which the substance is added to an extent that is detrimental to its use by people or by any animal, fish or plant, or any water that would have

⁴⁷S.C. 2002, c. 10.

that effect because of the quantity or concentration of the substances contained in it or because it has been treated or changed, by heat or other means, and includes

- (a) any substance or water that, for the purposes of the *Canada Water Act*, is deemed to be waste;
- (b) any substance or class of substances specified by the regulations;
- (c) water containing any substance or class of substances in a quantity or concentration that is equal to or greater than that prescribed by the regulations; and
- (d) water that has been subjected to a treatment or change described by the regulations.

Section 12 of the Act prohibits the deposit of waste without a licence. Oil or other substances spilled during the shipping process would likely fall under the definition of “waste” in the *NWNSRTA*. Section 90 of the Act makes any person who contravenes section 12 liable to prosecution. If this statute were used to address an unauthorized deposit of waste the most likely defendant would include the shipper.

Division 5 of Part 2 of the *NWNSRTA* addresses wildlife compensation and the Nunavut Surface Rights Tribunal’s role in granting such compensation. An application can be made to the Tribunal by a claimant (an Inuk or Inuit) for loss or damage that a claimant suffers as a result of a development activity by a developer.

Section 152 of the *NWNSRTA* defines a developer as:

"developer" means any person engaged in a development activity and includes, in the case of marine transportation as described in paragraph (c) of the definition "development activity", the owner of a ship.

Cumberland will be engaged in development activity at Meadowbank. It is noteworthy, however, that a ship owner is also included in this definition. This could make a ship owner liable for any wildlife loss or damage as well.

The term “development activity” is defined in s. 152 as follows:

"development activity" means any of the following carried out on land or water in the Nunavut Settlement Area or in Zone I or Zone II, within the meaning assigned by section 1.1.1 of the Agreement:

- (a) a commercial or industrial undertaking or any extension of the undertaking, provided it is not a marine transportation undertaking;
- (b) a municipal, territorial, provincial or federal government undertaking or any extension of the undertaking, provided it is not a marine transportation undertaking; and
- (c) **marine transportation directly associated with an undertaking described in paragraph (a) or (b).** [Emphasis added]

Marine transportation associated with the Cumberland project will, at least in part, be carried out in Zone I or Zone II. These Zones are defined as follows in s. 1.1.1 of the *NLCA*:

“Zone I” means those waters north of 61 latitude subject to Canada’s jurisdiction seaward of the Territorial Sea boundary as measured from lines drawn pursuant to the Territorial Sea Geographical Co-ordinates (Area 7) Order SOR/85-872 that are not part of the Nunavut Settlement Area or another land claim settlement area;

“Zone II” means those waters of James Bay, Hudson Bay and Hudson Strait that are not part of the Nunavut Settlement Area or another land claim settlement area.

If there was a spill in the waters of either Zone I or Zone II then any wildlife compensation issues associated with the shipping activity could come under the jurisdiction of the Surface Rights Tribunal.

The combination of the definitions of developer and development activity in respect of marine shipping activity means that a ship owner is the developer and could be liable for compensation associated with marine transportation.

Section 153(1) makes a developer absolutely liable for certain types of losses or damage suffered by a claimant:

153(1) Subject to this section, a developer is absolutely liable, without proof of fault or negligence, for any of the following losses or damage suffered by a claimant as a result of a development activity of the developer:

(a) loss of or damage to property or equipment used in harvesting wildlife or to wildlife that has been harvested;

(b) present and future loss of income from the harvesting of wildlife; and

(c) present and future loss of wildlife harvested for personal use by

There are exceptions to this absolute liability in s. 153(2). In particular:

(2) A developer is not liable under subsection (1)

(a) where the developer establishes that the loss or damage was wholly the result of an act of war, hostilities, a civil war, an insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;

(b) where the loss or damage was caused by a ship, to the extent that the developer would not, but for subsection (1), have been liable as a result of a defence or limitation of liability available at law; or

(c) to the extent that the aggregate loss or damage for each incident exceeds the applicable limit of liability prescribed by, or determined pursuant to, regulations under paragraph 170(e).
[Emphasis added]

A claim for loss or damage under Division 5 must be made to the Tribunal “within three years after the later of the date on which the loss or damage occurs and the date on which it comes to the knowledge of the claimant”.

Section 154 and Division 5 of the *NWNSRTA* satisfy the requirements of sections 6.2.2 and 6.2.3 of the *NLCA*. Subsection 154(2) specifies the Ship Source Oil Pollution Fund established under part 6 of the *MLA* for purposes of section 6.2.3 of the *NLCA*. Thus marine transportation directly associated with development activity in the Nunavut Settlement Area or Zone I or II which causes any damage of the type set out in section 153 is subject to the requirement to pay wildlife compensation. If the developer and claimant cannot negotiate appropriate compensation, the Nunavut Surface Rights Tribunal has jurisdiction to adjudicate the claim and make a compensation order.

6.3 The *Migratory Birds Convention Act*, 1994⁴⁸

Another statute that should be considered is the *Migratory Birds Convention Act*, 1994. If an oil spill occurs, it is possible that migratory birds or their nests might be affected. A migratory bird is defined in s. 2(1) as “means a migratory bird referred to in the Convention, and includes the sperm, eggs, embryos, tissue cultures and parts of the bird”. Under the Act, the relevant regulations are those made under s. 12(1)(h) and (i):

(h) for prohibiting the killing, capturing, injuring, taking or disturbing of migratory birds or the damaging, destroying, removing or disturbing of nests;

(i) prescribing protection areas for migratory birds and nests, and for the control and management of those areas;

If a regulation is contravened, s. 13(1) of the *MBCA* sets out the penalties as follows:

13. (1) Every person who contravenes section 5, subsection 6(6) or any regulation

(a) is guilty of an offence punishable on summary conviction and is liable

(i) in the case of a corporation, to a fine not exceeding \$100,000, and

(ii) in the case of an individual, to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding six months, or to both; or

(b) is guilty of an indictable offence and is liable

(i) in the case of a corporation, to a fine not exceeding \$250,000, and

(ii) in the case of an individual, to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding five years, or to both.

For subsequent offences the penalties are increased in s. 13. The question is therefore who would be the “person” who would be contravening the regulation if there was an oil spill.

⁴⁸ S.C. 1994, c. 22.

7.0 THE NUNAVUT LAND CLAIMS AGREEMENT

Article 6 of the NLCA addresses wildlife compensation. Part 2 of that Article addresses marine transportation. Sections 6.2.2 and 6.2.3 read:

- 6.2.2 Subject to Section 6.2.3, this Article shall apply to marine transportation directly associated with any commercial or industrial or any municipal, territorial, provincial or federal government undertaking, or any extension thereof, on land or water in the Nunavut Settlement Area and Zones I and II but does not apply to marine transportation not directly associated with such undertakings.
- 6.2.3 The Government of Canada shall specify a person, a fund, or both, capable of assuming the liability for marine transportation imposed under this Article by Section 6.2.2, and that specified person, or fund, or both, shall be considered to be a developer and that marine transportation shall be considered to be a development activity for the purpose of this Article.

These provisions are accommodated by Division 5 of Part 2 of the *NWSRTA* as discussed above.

Article 6 applies with full force to a developer (not to the person or fund mentioned in s.6.2.3 of the NLCA) in other areas and in cases where the commercial undertaking is shipping, on inland waters for example.

It should be noted, however, that the definitions of “developer” and “development” in section 6.1.1 of the NLCA are very wide and could include Cumberland as well if inland shipping activity resulted in damages to property, equipment, wildlife reduced into possession or to present or future income from wildlife harvesting.

Liability for wildlife compensation under Article 6 is “absolute without proof of fault or negligence, for loss or damage suffered by a claimant as a result of development activity”⁴⁹ (which could include the marine transportation) “within the Nunavut Settlement Area in respect of:

- (a) loss or damage to property or equipment used in wildlife harvesting or to wildlife reduced into possession;
- (b) present and future loss of income from wildlife harvesting; and
- (c) present and future loss of wildlife harvested for personal use by claimants.⁵⁰

Some possible triggers for wildlife compensation might include compensation if a ship or barge damaged fish nets and compensation had to be paid. Compensation might, for example, include compensation for the value of the net, the lost fish and present and future loss of income and loss of wildlife harvested or to be harvested for personal use.

⁴⁹ Section 6.3.1 NLCA.

⁵⁰ This is reflected in section 153 of the *NWSRTA* cited above.

Given the time of the year when shipping related to Cumberland's project will occur, the likelihood of direct damage to terrestrial wildlife appears to be minimal. The potential for damage to fishing or hunting gear or disruption of harvesting activities appears to be a matter for the shipper. The largest risk may be that of a spill or deposit of waste of some sort that could affect income from harvesting over a long period.

8.0 SUMMARY AND CONCLUSIONS

The focus of this memorandum has been on the marine shipping context, of the activities associated with the development of the Meadowbank mine project. Cumberland Resources Ltd. intends to contract with an existing and experienced northern shipping firm to move fuel and other goods to Baker Lake.

Review of the statutory framework indicates that the contract shipper will bear almost all of the risk and legal responsibility associated with this activity and that shipping is subject to a very comprehensive regulatory framework. In cases where the *AWPPA* applies Cumberland could also be liable as the cargo owner. The question of liability for an oil spill or a release of a harmful substance or waste is a question of fact and law and depending on the circumstances the applicable rules will vary. However, it is clear from this review that extensive overlapping liability and compensation regimes are in place to cover almost every eventuality which might arise during Cumberland's operation of the Meadowbank project and that this regime provides significant protection for wildlife harvesters and residents of Kivalliq Communities.