



Department of Justice
Canada

Ministère de la Justice
Canada

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Our File: 2-73788

December 8, 1999

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Nunavut Water Board
P.O. Box 119
Gjoa Haven, Nunavut
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Attention: Mr. Thomas Kudloo,
Chairperson

Dear Mr. Kudloo:

**Re: Licence NWB1BOS9801, Permit NWB2WIN9800, and Permit NWB2WOL9800;
Submissions concerning request by BHP Diamonds Inc. relating to release**

Please accept this letter as the submissions on behalf of the Department of Indian Affairs and Northern Development ("DIAND") with respect to the request of BHP Diamonds Inc. ("BHP") dated November 29, 1999.

* * *

1. DIAND respectfully asks that the Board explicitly decline to state that BHP is released or discharged from any liabilities or obligations incurred by BHP in relation to Licence NWB1BOS9801, Permit NWB2WIN9800, or Permit NWB2WOL9800 ("the Licences").

Jurisdiction regarding the request

2. On an application for an assignment of licence, the mandate of the Board is simply to determine whether the assignment should be approved. In the *Northwest Territories Waters Act*, in section 19(2), a more specific, subordinate issue is identified: namely, whether a contravention or failure to comply is likely to result. The Board is not mandated to rule on the effects of an

assignment, or to give guidance as to what the effects might be. This extra task is not conferred by the *Act* or the Nunavut Land Claims Agreement.

3. DIAND respectfully submits that the issue of whether and to what extent a former licensee retains liability is not an issue that is within the jurisdiction of the Board. The Board's role is not to determine, before the fact, whether claims can or cannot be made by any aggrieved party against some particular person. In the first place, the issue is one that falls within the domain of enforcement (i.e. enforcement of the relevant legislation and of the licence); it is an issue to be sorted out and, if need be, litigated by the authorities who are responsible for enforcement. Secondly, the determination is to be made by a court of competent jurisdiction when faced with an attempt by an aggrieved party to obtain remediation or compensation from the particular person.

4. The potential claims that would be negated by a release or discharge are not claims of the Board. They are claims of the Crown and the designated Inuit organization. If BHP wishes to be given releases or discharges, it must request and obtain them from the Crown (i.e. DIAND) and the designated Inuit organization, not the Board.

5. BHP's request is not a request for mere clarification. BHP has entered into an assignment agreement with Cambiex Exploration Inc. ("Cambiex"); and in essence, BHP is really asking the Board to say what the effects of the agreement are, or what the effects of the Board's own decision to approve are. The Board is not empowered to give a binding ruling on these points; nor is the Board in the business of providing legal opinions to licensees and former licensees.

6. Authorizing BHP to terminate its security arrangements does not mean, or acknowledge, or logically dictate, either that there has been a release from liability or that a release must be granted. The security is only one means of facilitating enforcement of liability and collection upon a claim. It is not the claim itself, or the right to make the claim, or the obligation (liability) to satisfy the claim.

The substance of the request

7. The granting of a release or discharge would be contrary to the public interest.

It is possible that the conduct of BHP while it was the holder of the Licences may have caused environmental damage which is not yet apparent and which will become apparent only at some future time. If damage attributable to the conduct of BHP does become apparent in the future, it will be entirely reasonable for the aggrieved party (the designated Inuit organization or the Crown) to have the option of pursuing BHP for remediation or compensation. Granting a release or discharge might deprive the designated Inuit organization or the Crown of this option.

Furthermore, in the future, it may not be feasible to pursue Cambiex for remediation or compensation in respect of conduct that preceded its assumption of the licence. For example, such a course of action might be unavailable in law, or Cambiex might become insolvent. In

such a situation, an inability to pursue BHP would mean that the aggrieved party would have no source of remediation or compensation.

8. The lack of a release from the Board, the designated Inuit organization, or the Crown would not necessarily mean that, if environmental damage were discovered, BHP would be the party that would ultimately pay for remediation or compensation. There are mechanisms other than a release whereby BHP could protect itself against such an outcome. BHP could agree with Cambiex that Cambiex would indemnify BHP in respect of any claims or liabilities arising from BHP's prior status as licensee or permittee.

9. The issue of removing liability from BHP is primarily an issue between BHP and Cambiex. There is no compelling reason or need for the Crown, the designated Inuit organization, or the Board to prejudice any rights which it may have by issuing or acknowledging a release. If BHP cannot obtain an indemnification agreement from Cambiex, or if BHP and Cambiex do not wish to make such an agreement, that is their own concern.

Generally

10. BHP is the party which applied for assignments, and which has made the request in question. Therefore, the onus is on BHP to establish that a granting of the request would be consistent with the law, and would be appropriate.

* * *

Thank you for your consideration of these submissions.

Yours very truly
"Lee F. Webber"

Lee F. Webber
Legal Counsel to the
Intervenor DIAND