

## **MEMORANDUM OF LAW**

To: Tony Keen

Date: May 8, 2003

From: David H. Searle, C.M., Q.C.

File/Matter No.: BAT00114

Client: Bathurst Inlet Port and Road Project Proposal

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You have forwarded to me, among other things, a letter dated April 10, 2003 from the Honourable Robert D. Nault, Minister of Indian Affairs and Northern Development, directed to Ms. Elizabeth Copland, Chair, Nunavut Impact Review Board (“NIRB”) as well as a letter dated April 14, 2003, from Stephanie Briscoe, Executive Director, of NIRB direct to Mr. Charlie Lyall and Mr. Mervyn Hempenstall, on behalf of the Bathurst Inlet Port and Road Project. The letter from NIRB asks for your response on or before May 12, 2003 in respect of two matters. The information requested by NIRB is designed to assist them in re-screening the project by receiving from you a revised project proposal plus any new information that you might have that would fall within Article 12.5.2(i) to (j) and 12.5.5 of the Nunavut Land Claim Agreement (“NLCA”).

The Minister’s request for a re-screening is seemingly justified by the proponent having formally notified NIRB and various regulators in November, 2002 of changes to certain components of the project.

### **Legal Issue**

The underlying legal issue, simply put, is whether NIRB’s requested review should proceed under Part 5 or under Part 6 of the NLCA?

The issue arises in the following way. Pursuant to Article 12.4.4, upon receipt of a project proposal, NIRB is required to screen the proposal and to indicate to the Minister in writing whether the proposal should proceed without a review, or whether the proposal requires a review under Part 5 or 6. In this case, NIRB has decided that a review is required and so recommended to the Minister, stating as they are required to do, that the proposal requires review under Part 5 or 6.

This then takes us to Article 12.4.7 of the NCLA, which provides that where NIRB indicates to the Minister that a proposal requires review, the Minister shall “**where required, by law or otherwise**, refer the proposal to the Minister of the environment for review by a federal environmental assessment panel...”. That is the review contemplated pursuant to Part 6.

Further, where a proposal is not to be reviewed by a federal environmental assessment panel, then the Minister is required to refer the proposal to NIRB for a review, which is a Part 5 review.

In our view, the keywords are “**where required, by law or otherwise**”. Simply put, we know of no law that requires the Minister, in these circumstances, to refer the proposal to the Minister of the environment for review by a federal environmental assessment panel. This position is ably stated in a letter dated March 18, 2003, directed to the Honourable Robert Nault from Kathy Towtongie, President, Nunavut Tunngavik Inc. In coming to this conclusion, we have reviewed the *Canadian Environmental Assessment Act* (“CEAA”) and we particularly considered the applicability of Section 48(1)(b) of CEAA. We have concluded, however, that Section 48(1)(b) does not apply because the reference there to the “Minister” is not to the Minister of Indian Affairs and Northern Development but rather to the Minister of the Environment. That distinction, in our opinion, is sufficient to make that section inapplicable. Hence the only appropriate review is a Part 5 review by NIRB.