



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

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August 24, 2007

Your file Votre référence

Our file Notre référence

**By Fax 867-360-6369 and regular mail and
Email: licensing@nunavutwaterboard.org**

Thomas Kabloona
Acting Chair
Nunavut Water Board
Gjoa Haven, NU X0B 1J0

Dear Mr Kabloona

**Re: 2AM-DOH / Miramar Hope Bay Ltd. / Doris North Project / Type A Licence
Application / Indian and Northern Affairs Canada Supplemental Intervention
to August 13-15, 2007 Final Hearing**

Indian and Northern Affairs Canada (INAC) thanks the Nunavut Water Board for the opportunity to provide additional supplemental and legal information to assist in the review in the Miramar Hope Bay Ltd's (MHBL) Doris North Project Type A water licence application, specifically related to the reclamation and closure security to be posted under the water licence

Our supplemental information outlines why INAC feels that the jurisdiction of the Nunavut Water Board is over water, and the deposition of waste that may affect water. It clearly explains why we feel that the NWB jurisdiction does not extend to matters that do not create an appreciable risk to, or impact on, water

As such, in INAC's opinion it is clear that the Board's power to order the posting of security is limited to security over water-related issues. This respects the authority of the landowner to seek its own accommodations with the applicant, licensee, or prospective transferee. In addition, we feel the Minister is the only person who may draw against or apply the water-l licence security, and as the Minister's authority to do so is governed by the terms of the Act, there would be no purpose served by including anything but water-related reclamation costs in the assessment of security

As the jurisdiction of the Nunavut Water Board is limited to water-related issues, the department feels that the Board is limited to ordering a licensee (Miramar) to post security against reclamation, abandonment and restoration components that are related to water. INAC also believes that the Nunavut Water Board only has the responsibility under the Act to determining the amount of security to be posted by the licensee. The Board should not direct the Minister as to the form of security, who "holds" the security,

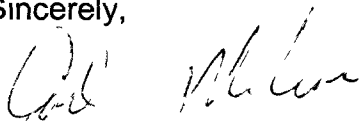
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the identity of named payees, who may draw against the security and in what circumstances and for what purposes

Further to the Nunavut Water Board decision to keep the record open, INAC submits along with this letter the attached supplemental information with respect to water-licence security requirements pursuant to the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*. The attached gives greater detail on why INAC is of this understanding

If you would like to discuss further please do not hesitate to give me a call at 867-975-4546 or by email at mcleanc@inac-ainc.gc.ca. Again, thank you for this opportunity to provide further information on this topic

Sincerely,

A handwritten signature in black ink, appearing to read 'Carl McLean', is written over the typed name.

Carl McLean
Director, Operations

cc Larry Connell, Miramar Mining Corporation, General Manager of Environment

Attachment

Indian and Northern Affairs Canada Supplementary Information, Doris North Water Licence application, August 24, 2007

Indian and Northern Affairs Canada
Supplementary Information
Type A Water Licence Application for the
Doris North Gold Mine by Miramar Hope Bay Ltd.
August 24, 2007

In Indian and Northern Affairs Canada (INAC) written intervention, verbal presentation and closing remarks at the August 13 and 14, 2007 public hearing, INAC provided evidence to the Nunavut Water Board (the Board) to assist in the licensing decision, including the setting of the water licence security amounts. The following information further explains INAC's views with respect to water-l licence security deposits pursuant to the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* and supports the position presented by INAC at the public hearing in Cambridge Bay.

Issues

INAC respectfully submits as follows:

- 1 INAC believes that the jurisdiction of the Nunavut Water Board is limited to water-related issues. As a consequence, in ordering a licensee to post security against reclamation, the Board is limited to a consideration of abandonment and restoration components that are related to water. The Board should not order security in relation to reclamation of land where there is no appreciable impact on, or risk to, water.
- 2 INAC also believes that the Nunavut Water Board has the responsibility under the Act to determine the amount of security to be posted by the licensee. All issues regarding who "holds" the security, the identity of named payees, who may draw against the security and in what circumstances and for what purposes, and other related issues, are not the jurisdiction of the Board. Similarly the form of the security is outside the jurisdiction of the Board.

INAC's views on these issues arise from its analysis of:

- (i) the Board's mandate under the *Nunavut Land Claims Agreement*¹ and the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*,² and
- (ii) the mandate granted to the Minister of Indian Affairs and Northern Development by the *NWNSRTA*.

A review of the land claim and statutory framework in which the Nunavut Water Board is established and governed demonstrates the limits on the Board's jurisdiction generally, and by extension its jurisdiction in relation to security deposits pursuant to s. 76 of the *NWNSRTA*.

¹ Hereinafter alternatively referred to as the "NLCA"

² Hereinafter alternatively referred to as "NWNSRTA" or "the Act"

Additionally, even if it were lawful for the Board to order security over land-related matters, there would be no benefit in doing so. The Minister's use of the security is itself constrained by law, such that the Minister could not draw against the security for the remediation of land only, absent an appreciable risk to, or impact on, water.

Analysis

INAC has included further analysis on the relevant elements of the Nunavut Water Board's and the Minister's responsibilities and jurisdiction.

The Board's Jurisdictional Framework

The Nunavut Water Board is established and governed by the combined effect of the NLCA and the *NWNSRTA*. The Board gets its authority from these two sources. The Board has only the authority and powers set out in, or necessarily implied by, these sources; it has no 'inherent jurisdiction' to make orders. The provisions of the NLCA that pertain to the Board deal with water, and impacts on water; a review of the NLCA makes clear that the jurisdiction of the Nunavut Water Board begins and ends with water.

The NLCA defines "water" to mean "waters in any river, stream, lake or other body of inland waters on the surface or under ground in the Nunavut Settlement Area, and includes ice and all inland ground waters, but does not include water or ice in marine areas."

The NLCA states that the Nunavut Water Board has "responsibilities and powers over the regulation, use and management of water in the Nunavut Settlement Area." The provision goes on to state that the Nunavut Water Board's responsibilities and powers are at least equivalent to the powers and responsibilities currently held (at the time of the Claim) by the Northwest Territories Water Board under the *Northern Inland Waters Act*. Finally, the provision affords the Nunavut Water Board "any other responsibilities acquired under Article 13 of the NLCA."

The major component of the Nunavut Water Board's jurisdiction flows from section 13.7.1, which states that subject to identified exceptions "no person may use water or deposit waste into water without the approval of the NWB."

Article 20 of the NLCA (Section 20.3.1) provides that in considering whether to approve a use of water or deposition of waste, the Nunavut Water Board must consider whether the Designated Inuit Organisation identified for the purposes of Article 20 has entered into a compensation agreement with the applicant for the licence, which compensation will be for "any loss or damage which may be caused by the change in quality, quantity or flow of the water."

INAC does not believe that the NLCA confers on the Nunavut Water Board 'responsibility or power' in relation to matters that do not touch upon and concern water. With respect to the NLCA's reference to the Northwest Territories Water Board and the *Northern Inland Waters Act*, the responsibilities and powers of the Northwest Territories Water Board did not, at the time of the ratification of the NLCA, and still does not extend beyond water-related issues.

The limited sphere of jurisdiction is carried forward in the *NWNSRTA*. The Act gives a definition of water consistent with that in the NLCA. The Act states that "The objects of the Board are to provide for the conservation and utilization of waters in Nunavut in a manner that will provide optimum benefit from those waters for the residents of Nunavut in particular and Canadians in general."

The powers of the Board include the issuance of licences for activities that would otherwise constitute violations of sections 11 or 12 of the *NWNSRTA*. Section 11 prohibits the unauthorized use of waters. Section 12 prohibits the unauthorized deposit of waste (i) in waters, or (ii) under conditions in which waste may enter waters, all of the Act's other references to "deposit of waste" must be read in light of these specified conditions.

Finally, the Board's name itself provides some evidence of the limits of its mandate, it is, of course, the Nunavut *Water* Board.

INAC believes the pertinent NLCA and *NWNSRTA* provisions clearly indicate that the Nunavut Water Board's mandate, responsibilities and powers relate only to water, and do not relate to land.

Limits on the Application of Security

The principle that the Board's jurisdiction is limited to water-related issues (as opposed to land-related issues) is reinforced by an examination of the legislative rules governing and constraining when the Minister may "apply" or use the security ordered by the Board.

Section 76(1) of the *NWNSRTA* gives the Nunavut Water Board the authority to require an applicant (among others) to furnish and maintain security with the Minister.

Section 76(2) of the Act explains when the Minister may apply or draw against the posted security. Broadly speaking, those circumstances are

- i) to compensate a person (including but not limited to a Designated Inuit Organisation) who is entitled to compensation under section 13 of the Act, but who has been unsuccessful in recovering that compensation (s. 76(2)(a)),
- ii) to reimburse Her Majesty in Right of Canada for costs incurred by the Crown under section 87(4) of the Act. This would be a case where an inspector has

given a direction under section 87(1), the person who received the direction has failed to comply, and the inspector has incurred costs by him- or herself “tak[ing] the measures” previously directed (s 76(2)(b)), and

- iii) to reimburse Her Majesty in Right of Canada for costs incurred by the Crown under section 89(1) of the Act. This would be a case where (in relation to a closed or abandoned work related to the use of water or deposit of waste), the Minister has taken measures to prevent, counteract, mitigate or remedy certain adverse effects, and the costs incurred by the Crown are “in relation to” a contravention of a condition of a water licence or a provision of Part I of the Act or the regulations

Each of the above circumstances relates directly to water. The first, water compensation, deals with the adverse effects of the authorized (whether by licence or regulation) use of waters or deposit of waste that may impact waters. Thus the Minister may apply the security to pay compensation for water-related adverse effects.

The second circumstance in which the Minister may apply the security is to reimburse the Crown following the “tak[ing] of measures” by the inspector, and must also be in relation to water. A valid inspector’s direction under Section 87(1) of the Act is a prerequisite to the application of the security by the Minister. A valid inspector’s direction is by definition water-related, as a review of the pertinent provision will demonstrate. Section 87(1) reads as follows,

87 (1) An inspector may direct any person to take such reasonable measures as the inspector may specify, including the cessation of an activity, to prevent the use of waters or the deposit of waste or the failure of a work related to the use of waters or the deposit of waste, or to counteract, mitigate or remedy the resulting adverse effects, where the inspector believes, on reasonable grounds,

(a) that

(i) waters have been or may be used in contravention of subsection 11(1) or of a condition of a licence,

(ii) waste has been or may be deposited in contravention of subsection 12(1) or of a condition of a licence, or

(iii) there has been, or may be, a failure of a work related to the use of waters or the deposit of waste, whether or not there has been compliance with any standards prescribed by the regulations or imposed by a licence, and

(b) that the adverse effects of that use, deposit or failure are causing, or may cause, a danger to person, property or the environment

The third circumstance in which the Minister may apply the security must also be water related. In this circumstance, the security is applied to reimburse the Crown following the taking of measures by the Minister to deal with adverse effects “in relation to” a contravention (in the context of a closed or abandoned facility). The Act is clear that it is

the closure or abandonment of “a work related to the use of waters or deposit of waste” that will trigger the Minister’s authority to apply the security

INAC disagrees with the suggestion advanced by counsel to the Kitikmeot Inuit Association’s at the public hearing in Cambridge Bay that the Minister’s authority in section 89(1)(a) attaches to the “appurtenant undertaking” writ large. The Act specifies that the power to apply security arises when there is a closed or abandoned “work related to the use of waters or deposit of waste”. A review of the seventeen uses of the defined term “appurtenant undertaking” in the *NWNSRTA* makes clear that this term is broad in scope, and the appurtenant undertaking may be composed of a number of discrete works and activities, some of which will be related to water, others not. The Act clearly uses the term “a work related to the use of waters or the deposit of waste” in section 89(1)(a) to specify the portions of the appurtenant undertaking which may trigger the authority of the Minister to apply security in the appropriate circumstances.

The Division of Land and Water

INAC is encouraging the Board to depart from its past practice of declining to distinguish between components of a project that affect land, and those that affect water.

The Board has on previous occasions declined to draw this distinction. In its *Boston Licence Renewal 2001* decision, the Board spoke of the “clear connectedness of land and water”.

In our presentation and during questions at the Doris North Public Hearings, INAC conceded that “isolating” land from water considerations is difficult, and did not dispute that water can affect land and *vice versa*. Water is undoubtedly part of a larger environment.

Nevertheless, the NLCA’s parties, and Parliament (via the *NWNSRTA*), have chosen to treat water separately from other components of the environment, and to give the Nunavut Water Board a jurisdiction that is specific to, and limited to, waters.

Thus the core of the Board’s mandate is to identify the potential effects of an appurtenant undertaking on water. The Board should not fail to apply the evidence to determine which components of a project may affect water and which likely do not.

As indicated in INAC’s written and oral evidence presented to the Board, INAC supports the approach taken by Mr. Brodie to this issue and suggests that in determining the amount of security over water-related abandonment and reclamation, the Board should quantify the degree to which any given proposed reclamation activity relates to land *versus* its connection to water,

Water-related security should only include those reclamation activities, or the appropriate portion of the costs of activities, that are necessary for the protection or

restoration of “waters” as defined in the Nunavut Land Claims Agreement and *NWNSRTA*

Though there may be few sharp dividing lines between land and water, the Board must be prepared to quantify the percentage of a proposed reclamation activity’s relatedness to land versus its connection to water, and identify those elements of reclamation activity that are substantially related to water. Elements that have only a remote connection to water, or which are unlikely to affect water, must be omitted from the security calculation. Likewise, activities aimed substantially at both land and water may be correspondingly apportioned according to a reasonable ratio.

The Single Reclamation Plan

In its *Boston Licence Renewal 2001* decision, the Board stated that

the NWB believes, where possible, that a proponent should be required to submit one single reclamation plan, without segregating land-related reclamation and water-related reclamation because reclamation activities upon abandonment will likely be more efficient and undoubtedly less onerous if conducted at the same time by the same person[]

INAC agrees that proponents should submit a single reclamation plan and, if at all possible, reclamation activities for land and water should be coordinated. All parties appear to agree that close coordination between the land owner and the Crown (as having the ownership of waters) is likely to make attempts at reclamation more efficient than where the Crown looks only to water and a private land owner only to land.

However, the Board has stated that the desirability of a single reclamation plan and the potential efficiency of a coordinated reclamation effort was a justification for declining to distinguish between land- and water-related reclamation activities and potential costs. INAC does not agree. In INAC’s view the desire for a single, coordinated remediation does not support refusing to distinguish between land- and water-related reclamation costs.

Nevertheless, as the Board looks to estimate costs for water-related security, it is a relevant consideration that a portion of the mobilization and other costs will likely be shared by the land-owner, and therefore such costs should not be allocated one-hundred per cent to the water-related reclamation estimate. In most cases, INAC will support the Board using for costing purposes an assumption that there will be a single remediation project aimed at both land and water. However the use of a costing assumption, and all parties’ hopes for a coordinated reclamation project, do not expand the jurisdiction of the Board.

It is respectfully submitted that the division of the components of an appurtenant undertaking into those that may affect water, and those that do not is a requirement of

the laws governing the Nunavut Water Board, and that the failure of the Board to do so is an error of jurisdiction

The Minister's Security Over Water-Related Reclamation

Because the Board has previously declined to draw a distinction between land and water, the Board has proceeded to order security in an amount intended by the Board to be applied to land- and water-related reclamation activities, and to order that the Minister and the private landowner be joint payees of the security instrument. Thus it is INAC's respectful submission that the failure to distinguish between land and water has led the Board into error, and to exceed its jurisdiction.

The *NWNSRTA* states that the Board has the power to order that security be "furnished and maintained with the Minister". The Act also states that the Minister — and by clear and necessary implication, only the Minister — may apply the security, and describes the circumstances in which the Minister may do so.

The requirement that the security be "furnished with the Minister" has two components. First, the Minister must have control over the security, and second the Minister or his or her delegate (or where security is posted in the form a promissory note or certified cheque, the Receiver General) must be the payee. INAC believes that the Board does not have jurisdiction to determine the payee on a security posted pursuant to the Board's order.

It does not serve the purposes of the Act to burden the Minister with a dual-payee arrangement. To do so would require the Minister to negotiate the details of the arrangement with the joint payee, and navigate through them on any and every draw. It is clearly contrary to Parliament's intent that the Minister be hamstrung by a need for third-party consent as the Minister exercises the discretion granted by the Act and proceeds to draw down the security.

Likewise, the landowner should have the freedom to organize its affairs with the licensee, and should not have to negotiate with the Minister in respect of its application of the security, or limit its draws to circumstances where the Minister would have the authority to draw against the security.

Finally, the possibility of depletion of the security cannot be ignored. The landowner may have any number of reasons or rights to draw against its security, some having no relation whatsoever to water, or the mandate of the Board. The private landowner is not subject to the restrictions in the application of security that are contained in the *NWNSRTA*. The Minister must not be placed in a situation where Board-ordered security could be expended other than as determined by the Minister. Placing any party other than the Minister or his or her delegate (or where required by the regulations, the Receiver General) in a control position over the security — such as by naming a third-party payee — would fail to give the Minister safe, ready access to the funds. Such a

result is fundamentally at odds both the plain meaning and the clear intent of the security provisions of the Act

Conclusion

The jurisdiction of the Nunavut Water Board is over water, and the deposition of waste that may affect water. This jurisdiction does not extend to matters that do not create an appreciable risk to, or impact on, water.

The Board clearly has the power to order the posting of security, but it is limited to security over water-related issues. This division of security protects the Crown as owner of the waters, and respects the authority of the landowner to seek its own accommodations with the applicant, licensee, or prospective transferee.

Moreover, as the Minister is the only person who may draw against or apply the water-licence security, and as the Minister's authority to do so is constrained by the terms of the Act as outlined above, there would be no purpose served by including anything but water-related reclamation costs in the assessment of security.

Although land and water are interrelated, the mandate of the Board is to identify the components of the appurtenant undertaking that have potential impacts on water. The Board must do this for licensing purposes, and for the purposes of determining the water-related security to be furnished to the Minister. The Board must identify those elements of reclamation activity [those to-be-remediated elements] that are related to water, distinguishing them from the elements that are not so related.

Pursuant to the *NWNSRTA*, the security posted must be in a form acceptable to the Minister, or as set out in the Regulations (section 12(3)). The Act does not give the Board any jurisdiction over who "holds" the security, the identity of the payee, who may draw against the security and in what circumstances and for what purposes. Each of these items is either wholly or partially in the discretion of the Minister or as identified in the Act. This respects Parliament's intent that the Minister should have safe, ready access to the security ordered by the Board, and that the Minister be constrained only by the terms of the Act itself, and not by a need to obtain the consent of a third-party to draw against the security.

In relation to the present Miramar Hope Bay Limited water licence application, INAC has estimated the water-related reclamation cost to be \$6.2 million. INAC has provided detailed evidence supporting the segregation of land and water related components, with the corresponding reclamation estimate, in its written intervention. INAC and its expert have explained the rationale behind, and have provided examples of, the segregation in the course of the oral hearing in Cambridge Bay.

INAC advises the Board that this methodology is consistent with that used by INAC for other Northern mining projects.

Finally, INAC is prepared to carry on discussions with the KIA and Miramar in respect of managing a reclamation project as a single endeavour, using all security (representing 100 per cent of the estimated reclamation costs) in a way that attempts to avoid or minimizes over-bonding