NUNAVUT WATER BOARD

In the Matter of: **An application for a type A Water Licence for the Doris North Project by Miramar Hope Bay Limited pursuant to the *Nunavut Waters and Nunavut Surface Rights Tribunal Act;***

And In the Matter of: **A request by the Nunavut Water Board for submissions on legal questions related to water licence security:**

SUBMISSIONS OF THE KITIKMEOT INUIT ASSOCIATION

BACKGROUND:

The Nunavut Water Board (NWB or the "Board") held a public hearing (the "Hearing") in Cambridge Bay Nunavut on August 13th and 14th, 2007 to consider an application made by Miramar Hope Bay Limited (MHBL) for a type "A" water licence for its Doris North gold project. During the course of the hearing, recommendations were made to the Board by several parties about financial security (Security) for the project. At the close of the hearing the Chairperson made the following request:

> "Second, all parties are asked if they wish to file supplemental arguments on the water license security in its form, nature, and any conditions on security. Legal arguments would be appreciated, especially by INAC, KIA, and Miramar."[1]

The Kitikmeot Inuit Association (KIA) is pleased to assist the Board by filing the submission set out below.

THE ISSUES:

During the Hearing, the NWB heard evidence and argument from MHBL, KIA and Indian and Northern Affairs Canada (INAC) on questions related to both the amount and the form and nature of the Security which the Board should order in

[1] Transcript August 14, 2007 page 475, lines 14-18.

setting the terms and conditions for the Doris North water licence. There was no issue among these parties in respect of the total amount of Security which was required.[2] KIA, MHBL and INAC were the only parties to address this issue and they agreed that the total Security required to cover all closure and reclamation liabilities is in the order of $12 Million dollars.

The issues which emerged relate primarily to the kinds of closure and reclamation matters (i.e. land or water or whole project Security) that water licence Security should be directed to. These issues are addressed below.

WHAT IS THE SCOPE OF THE BOARD'S AUTHORITY TO ORDER SECURITY?

During the Hearing MHBL pointed out that the positions taken by KIA and INAC might lead to a requirement that the applicant post more than the $12 Million dollars in Security that had been agreed to by the parties. MHBL referred to this problem as "double bonding" and argued strongly that the Board should avoid such an outcome in the water licence which it forwards to the Minister of INAC.[3]

KIA agreed that double bonding should be avoided but pointed out in its intervention that as owner of the Inuit Owned Lands (IOL) upon which the project will be constructed it (KIA) could potentially be liable for clean up costs, if the licensee's Security is not adequate or the licensee is no longer a viable entity or able to provide additional funds for closure and reclamation.

INAC argued that the NWB could only order "water related" Security and it filed a report [4] breaking down the projected $12 Million dollar reclamation cost into land-related and water-related liability using the RECLAIM model.

MHBL suggested that the splitting of land and water related liability was problematic and argued that the total Security demanded of the company should be no more than the projected total estimated for the project. MHBL argued strongly that double bonding should not happen. MHBL's reply evidence, worked into its opening presentation[5], set out the company's estimate of land versus water related Security. This analysis, based on the same model used by INAC, and developed by professional engineers came to a significantly different result.

This evidence reinforces the position taken by Miramar[6] that reclamation activities cannot in any logical way be separated between land and water

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[2] KIA Closing Remarks August 14th transcript page 452, lines 13-20.
[3] See MHBL Closing Remarks August 14th transcript pages 469 to 474.
[4] Doris North Project Reclamation Cost Estimate, by Brodie Consulting Ltd., July 2007.
[5] See Exhibits 1 and 2 slide no. 106.
[6] See slide 103 in Exhibits 1 and 2.

liabilities. We submit that KIA's cross examination of INAC witnesses also supports this MHBL position.[7]

From a technical standpoint KIA suggests that there is no clear and principled way to separate out land and water related Security. The evidence before the Board shows that the results are highly discretionary and even arbitrary. In this case, since INAC argues that the Board should only hold water-related Security these arbitrary results will affect KIA's interests. How can KIA be sure that it is holding the amount of land-related Security it needs to protect Inuit interests if the Board orders that only water-related Security be paid and KIA may only take the remainder up to the estimated total project liability?

The argument that land and water related Security should be split is based on INAC's suggestion that the Board does not have the legal authority to order that Security be paid in relation to land-related matters.

KIA submits that this INAC argument is based on an inaccurate reading of the *Nunavut Waters and Nunavut Surface Right Tribunal Act*[8] (the "Act") and the *Northwest Territories Waters Regulations*[9] (the "Regulations"). Furthermore it is inconsistent with the historical antecedents of northern and western water legislation.[10]

Let's briefly examine the authorities:

1) The Act –

The Board's authority to set Security requirements is found in section 76.

> **76.** (1) The Board may require an applicant, a licensee or a prospective assignee to furnish and maintain security with the Minister in the form, of the nature, subject to such terms and conditions and in an amount prescribed by, or determined in accordance with, the regulations or that is satisfactory to the Minister.
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> .....
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> (5) Where the Minister is satisfied that an appurtenant undertaking has been permanently

[7] See transcript August 14th, pages 302 to 311.
[8] S.C. 2002, c.10.
[9] SOR/93-303, 8 June, 1993.
[10] See for example, *The Framework of Water Rights Legislation in Canada,* David R. Percy, Q.C., Canadian Institute of Resources Law, 1988 at pages 48 to 72 "Northern Water Law: The Authority Management Scheme".

> closed or permanently abandoned or the licence has been assigned, any portion of the security that, in the Minister's opinion, will not be applied under subsection (2) shall be returned to the licensee without delay.

It should be noted that northern water licensing legislation has required that a licence be issued in relation to an "appurtenant undertaking". This scheme has been in place since the *Northern Inland Waters Act*[11] was passed. The Act defines this term in section 4 as follows:

> ''appurtenant undertaking'' means an undertaking in relation to which a use of waters or a deposit of waste is permitted by a licence."

2) The Regulations –

We should note that section 76 makes the ordering of Security discretionary and that it vests that discretion in the Board, subject to the Regulations. Section 12 of the Regulations sets out more guidance on this issue:

> 12. (1) The Board may fix the amount of security required to be furnished by an applicant under subsection 17(1) of the Act[12] in an amount not exceeding the aggregate of the costs of
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> (a) abandonment of the undertaking;
> (b) restoration of the site of the undertaking; and
> (c) any ongoing measures that may remain to be taken after the abandonment of the undertaking.

The Regulations also define the term "undertaking":

> "undertaking" means an undertaking in respect of which water is to be used or waste is to be deposited, of a type set out in Schedule II;

3) Other Authorities –

The word "appurtenant" is defined in Black's Law Dictionary (7th Ediition) as "[a]nnexed to a more important thing." So, this definition would mean that an "appurtenant undertaking" would be an undertaking to which the rights granted by a water licence are annexed. This makes sense in the context since an "appurtenant undertaking" which must use water or deposit waste cannot operate without a water licence. Carswell's *Words and Phrases* notes that the term

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[11] R.S.C. 1970 (1st Supp.), c.28 and *supra*, note 10.
[12] The NWNSRTA reference is s.76. There is no issue that the Regulations apply in Nunavut but this internal reference should be read in relation to the Nunavut legislation.

"appurtenant" has been considered by the courts in various contexts. A Manitoba Queen's Bench real property case from 1986 stated that it is a "flexible word which in ordinary usage can simply mean "annexed"."[13]

The definition of "undertaking" in the Regulations also makes reference to Schedule II which includes a classification of types of undertakings for water licensing purposes. That list includes a mining and milling classification described as "Mining and milling undertaking" - Operation of a mine within the meaning of the Canada Mining Regulations or the Territorial Coal Regulations, and any milling related thereto. MHBL has applied for a water licence in relation to a mining and milling undertaking.

4) Conclusion –

Considering the scheme of the Act and Regulations, KIA submits that it is clear that a water licence is issued in relation to an appurtenant undertaking, in the MHBL case, the Doris North gold project. Section 76 of the Act makes it clear, when read in combination with section 12 of the regulations, that NWB has the discretion to order Security in relation to the undertaking, which is the Doris North mine.

There is no suggestion anywhere in the Act or the regulations that the Board can only order Security in relation to the water related aspects of the appurtenant undertaking. KIA submits that MHBL's reply evidence which suggests that reclamation Security cannot be separated into land and water Security is in fact more consistent with the statutory framework than the approach suggested by INAC.

We further submit that careful review of the *Mine Site Reclamation Policy for Nunavut*[14] does not indicate that it calls for land and water Security to be split in the water licensing context. The policy calls for 100% of the project related liability to be secured but it does not specify that land and water related Security should be split.

In KIA's view the approach to the handling of Security suggested by INAC is simply the result of historical choices made by INAC for developments on Crown lands where the government holds all the Security and it is more convenient to hold some under the water licence and some under a Crown lease. This approach is not useful for mine developments on IOL. In fact, as KIA has argued, it leaves the landowner at risk if the Security held by the Crown is insufficient to completely close and reclaim a site. This approach leads inevitably to the double bonding problem MHBL has raised.

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[13] *Moreau Estate v. Regnier,* [1986] 4 W.W.R. 548 at 551 (Man Q.B.) Hansen J.
[14] Published by the Minister of Public Works and Government Services Canada, Ottawa 2002.

Even if KIA's interpretation of the policy is wrong and it does support the splitting of land and water Security, if the policy is inconsistent with the Act it is the Act which is paramount.

The NWB has addressed questions about splitting land and water Security in other water licences related to mining activities. In the 1999 Boston Licence the NWB ordered Security payable to the Crown and KIA as joint payees. The Boston site is on IOL. This order was based on evidence that the exploration activity was on IOL and that as landowner KIA was at risk if the licensee (BHP at the time) did not attend to cleanup or reclamation needs. The evidence submitted to the Board at the hearing however, also indicated that if both the Crown and KIA took Security then the licensee might face a disincentive because "double security" might be required. The NWB's Boston Security order, made at the suggestion of BHP, required that the bond be jointly payable to the Crown and KIA. That approach eliminated the potential for a double payment.

In the Boston licence as in other recent licences, the NWB has often refused to divide up Security into land related or water related Security and KIA has supported this approach by NWB. The Board put it this way in the 2001 renewal of the Boston licence:

> DIAND and the KIA present the NWB with strong diverging positions regarding whether land and water should be assessed separately or together when determining security costs and the payee. In two of the NWB's previous decisions,[15] the NWB reached the conclusion that there is a clear connectedness between land and water. In the 1999 Boston License Renewal, the NWB decided that the security should be made payable to both DIAND and the KIA. For the reasons given in the Boston 1999 decision, we agree that these principles continue to apply to the Application and we adopt them entirely in the case of this Application as suggested by the KIA. The NWB takes a holistic but also practical approach to reclamation: on the one hand, the NWB believes that the elements of the environment, including land and water, are interconnected; what affects one part of the environment can ultimately have an impact on other environmental elements (water and vegetation, for example). By altering the natural elements of the environment, traditional Inuit culture and use of the water can be directly affected; on the other hand, 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.

KIA supported the approach applied by NWB to this issue of land versus water Security in the Boston licence. In our view, there was no principled way to distinguish land based from water based Security. The Board has consistently held to this approach and in KIA's view, the Board has correctly interpreted its

[15] *Re BHP Diamonds Inc.* (1999), 29 C.E.L.R. (N.S.) 248, and Lupin Licence Renewal 2000

authority. Despite the assertions made by INAC in this proceeding and the evidence prepared by Mr. Brodie, there is still no appropriate way to split land and water Security.

It is KIA's submission that the NWB has the jurisdiction and authority to order Security for the whole of the Doris North project as described in the MHBL application. The Board is not legally required to take full Security but it cannot take more than is allowed by section 12 of the Regulations.

In the end, it is the Board that decides on the appropriate amount of Ssecurity for the appurtenant undertaking. The Minister of INAC has no role in that process. The statutory scheme only allows the Minister to determine if the form of the Security is acceptable or not.

ALL OF WHICH IS RESPECTFULLY SUBMITTED AUGUST 24th 2007:

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