Miramar Hope Bay Ltd. Submission on Financial Security
to the Nunavut Water Board

24 August, 2007

At the August 14th session of the hearings on the water licence application by Miramar Hope Bay Ltd. ("MHBL") for the Doris North Project, the Nunavut Water Board (the "Board") requested additional submissions on the form and nature of the security, any conditions on security, and legal issues relating to security, especially from the Department of Indian and Northern Affairs Canada ("INAC"), the Kitikmeot Inuit Association ("KIA"), and MHBL, by Friday, August 24th, at 4 P.M. central time. These are MHBL's submissions in response to that request.

Throughout the Board hearings of the Doris North water licence application, there was consensus that the total amount of security required to cover the reclamation of the project is approximately $12 million. MHBL has acknowledged its responsibility to post security against the full reclamation liability of the Doris North Project. However there is no agreement on how KIA, who is the landowner, and INAC could jointly administer such security and consequently, MHBL is being asked to post security bonds that in aggregate exceed the acknowledged liability by about $6 or $7 million. MHBL believes this is extremely unfair and would hope that the landowner and the federal government could reach some accommodation to bridge this impasse. It is an onerous requirement of this small project and would be a dangerous precedent for MHBL's future developments in the belt, and in fact, for all mining projects in the North on Inuit owned lands.

In fact, it is a policy of the KIA[i], and of INAC[ii] as well as a requirement under the regulations governing the Board's setting of the amount of security, that the amount of security not exceed the total costs of abandonment and restoration[iii]. MHBL has invested significant resources in development of the Doris North Project and expects and has always expected that, given these policies and requirements, "double bonding" would not be required. In INAC's Mine Site Reclamation Policy for Nunavut, INAC has accepted responsibility for facilitating discussions between the various regulatory bodies to promote the coordination of financial security obligations, including "**ensuring** that … the financial security for closure related activities imposed by land and water jurisdictions cumulatively, does not exceed the total reclamation cost estimates for both the land-related and water-related reclamation elements at each mine" (at p. 10, emphasis added). To date, INAC has not ensured that this will be the case.

Risk to the environment will be covered by the enforcement of the conditions of the Water License and MHBL's Project Certificate, where we could be ordered to rectify, mitigate, compensate or in fact be shut down for various infractions, should they occur. Reclamation risk will be covered by a bond estimated to be in the order of $11.5 - $12 million, which has been calculated independently by experts using approved methods and is agreed by all parties to be an appropriate amount to cover the total reclamation liability involved in the project. It should be remembered that this money will **only** be used if we fail to reclaim the mine to the agreed-upon standard. Further, there will no doubt be provision in the water licence for re-assessment of

security if reclamation costs are estimated to exceed the initially provided security. It is therefore highly unlikely that INAC or the KIA will find themselves in a situation of having to draw from their internal sources for reclamation of the Doris North project.

MHBL has suggested various options that would provide the full amount of security required for the project and not penalize MHBL or the Inuit of the Kitikmeot region by imposing bonding in excess of the agreed upon, total required amount; further, there may be additional options that would accomplish these goals.

The options suggested by MHBL in its August 13, 2006 presentation to the Board are as follows:

1. INAC would hold the full reclamation security. INAC and KIA would have an agreement covering how they could jointly manage reclamation activity if the proponent fails to meet its reclamation obligation.
2. INAC would hold full reclamation security for the project and in return provide the KIA with an indemnity against liability resulting from the mining company's activity on IOL. INAC and KIA could then have an agreement where they would jointly manage reclamation activity if the proponent failed to meet its reclamation obligation.
3. INAC and KIA each hold reclamation security that in combination represents the total estimated reclamation liability (i.e. with no overlap). KIA and INAC have an agreement if the proponent fails to meet its obligations. Both parties provide the other party with an indemnity against additional claims made by the other party against liability resulting from the mining company's activity on IOL.
4. INAC and KIA would jointly hold the full reclamation security. INAC and KIA would have an agreement covering how they could jointly manage reclamation activity if the proponent fails to meet its reclamation obligation (e.g. Boston).

The options above allow for water-related security to be held by INAC or jointly by INAC and KIA, and for land-related security to be held by INAC, or by KIA, or by KIA and INAC jointly. All of the options could include management of reclamation activities by a single party or jointly by INAC and KIA. Two of the options include INAC indemnification of KIA and one option includes KIA indemnification of INAC. Below we examine the legal bases for these arrangements. In MHBL's view, there is no reason why any of the suggested options could not be adopted by the Board, INAC, and the KIA to ensure both full coverage of the security requirements for the Doris North Project and avoid requiring bonding in excess of the agreed upon costs of reclamation and restoration.

General Powers of the Board and the Minister Regarding Security

Subsection 70(1) of the *Nunavut Waters and Surface Rights Tribunal Act* (the "Act") gives the Board the power to include in a licence any conditions that it considers appropriate, including conditions relating to any future closing or abandonment of the licensed undertaking. The Board

thus has broad jurisdiction to include in a licence any conditions that it considers appropriate, only subject to any specific restrictions contained in the Act or the regulations.

Subsection 76(1) states that the Board may require an applicant 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. In *CanZinco Ltd. v. Canada (Minister of Indian Affairs and Northern Development*[iv]*)* ("*CanZinco*"), the Court concluded that subsection 76(1) of the Act gives the Board the jurisdiction to determine the amount of the security; that it is within the Minister's discretion to require a licensee to provide the security, in the amount determined by the Board, in a form or nature that is satisfactory to the Minister; and that the Minister has the discretionary power to approve or reject the Licence in its entirety[v].

Discretion of the Minister and the Board in Setting Security

It should be noted that under subsection 76(1) of the Act the security may be determined in accordance with the regulations or such that it is satisfactory to the Minister. Thus it is optional whether or not the regulations are used to determine the various features of the security. At this time the regulations that would apply[vi], if at all, are the *Northwest Territories Waters Act Regulations* ("NWT Regs"), subsection 12(1)[vii] of which limits the amount of security to the aggregate of the costs of abandonment of the mine, restoration of the site, and post-abandonment measures, but does not require that such costs be included. The Board's discretion is further emphasized in subsection 12(2)[viii] of the NWT Regs, which gives the Board the option, when fixing the amount of security, of considering the ability of the applicant to pay the costs of abandonment, restoration, and post-abandonment measures, and the past performance of the applicant in respect of any other licence.

In *CanZinco*, the Court examined the standard of review that should be applied to the Minister's decision under section 76(1) in the circumstances of that case and found that a high degree of deference was indicated[ix]. Given the discretionary language in subsection 76(1) with respect to the powers of the Board, a court would find that similar deference should be accorded to the Board in setting the amount of security, including whether or not to include, and if included at what cost, land-related reclamation activities in the security required under the water licence. Within this discretion, the Board usually includes in water licences a term allowing for adjustment, up or down, of the amount of security required based on any changes in annual estimates of mine reclamation liability.

Holding of Security

Since under subsection 76(1) the security that the Board may require is to be "furnished and maintained with the Minister", security must be held by the Minister[x]. However, there is no apparent prohibition on the Minister being a joint security holder. Further, there is no requirement for the Board to set the amount of security for both water related and land related

reclamation; therefore, it is open for the Board to require an amount of water related reclamation security to be held by the Minister, while independently, separate bonding could be held by KIA for land related reclamation. It is also open for the Board to set the amount of security required under the water licence to include both water-related and land-related reclamation, in which case the Minister, or the Minister and KIA jointly, would hold the entire bond for the project.

In Nunavut Water Board Decision re: Boston Licence Renewal 2001(October 5, 2001), the Board decided not to separate land and water related components of the overall abandonment and reclamation plan, and consequently decided that the security would continue to name INAC and the KIA as joint payees[xi]. However, the Board recommended that the management of all land and water reclamation activities at Boston be under the direction of a single party, and that the managing party either be one of the joint security holders, as decided by mutual consent, or a third-party jointly selected by the security holders.

Form of Security

With respect to the form of the security, as discussed above, it may be determined by the Minister or in accordance with the regulations[xii]. In the Nunavut Water Board Decision re: Boston Licence Renewal 2001(October 5, 2001), the Board mentions pledge of assets and a reclamation trust fund as potential alternatives to those set out in the NWT Regs and emphasizes that the final determination with respect to the most appropriate form security shall be left to the INAC Minister, in consultation with the KIA and the applicant[xiii]. The *Security for Debts Due to Her Majesty Regulations*[xiv] provide that a Minister may accept any security deemed to be a security defined in section 4 as a charge in favour of her Majesty on the existing or future personal or real property of a debtor or on the existing or personal property of a person who is the surety or guarantor of the debtor. Therefore, the Minister appears to have broad discretion in the form of security he can accept, indicating that the most appropriate form of security should be negotiated for each specific water licence application.

Water and Land Related Reclamation Security

As noted above, given the discretionary language in subsection 76(1) with respect to the powers of the Board, a court would find that deference should be accorded to the Board in setting the amount of security, including whether or not to include land-related reclamation activities in the security required under the water licence. Except for the upper limit on the amount of security to the aggregate of the costs of abandonment of the mine, restoration of the site, and post-abandonment measures, there are no provisions in the Act or the NWT Regs that limit the Board's power to decide what amount of security to require as a term of the water licence.

Section 57 of the Act prohibits the Board from issuing a water licence unless the applicant satisfies the Board that acceptable water quality and effluent standards are maintained and that the financial responsibility of the applicant, taking into account the applicant's past performance, is adequate for the completion of the appurtenant undertaking, mitigation measures required for

any adverse impact, and the satisfactory maintenance and restoration of the site in the event of any future closing or abandonment of that undertaking[xv].

This requirement has been used by some intervenors to argue that the Board must set the security under the licence to cover both land and water related reclamation, since it refers to completion and reclamation of the appurtenant undertaking, which in this case is the mine. However, section 57 only requires the Board to be satisfied that the applicant's financial responsibility is adequate for these purposes; it does not require the Board to set security to cover the cost of these activities. Providing financial security to cover the costs of completion of a mine, for example, would not be logically contemplated as a term of a water licence, and would become prohibitive for mine development. Section 57 of the Act therefore requires the applicant to convince the Board that the company has the financial resources to develop the mine, mitigate adverse impacts, and maintain and restore the site through to closing and reclamation. The requirements for security with respect to the water licence are set out in section 76(1) of the Act, and not in section 57.

Application of the Security

Subsection 76(2) of the Act provides that the security provided by the licensee may be applied by the Minister to compensate, fully or partially, a person, including a Designated Inuit Organization, who is adversely affected by a licensed use of waters or deposit of waste if the person has taken all reasonable measures to recover but not received compensation due to it for any loss or damage that may be caused by such use or deposit. However, such a person is entitled to recover such compensation only to the extent that the person is not paid compensation under any other provision of the relevant part of the Act[xvi]. With respect to an MHBL water licence, if the KIA has been compensated for this loss or damage under its IIBA with MHBL, it would not be able to receive compensation from the security provided by the licensee under section 76(1).

Subsection 76(2) of the Act also allows the Minister to apply the security provided by the licensee to reimburse the federal government, fully or partially, for reasonable costs incurred taking remedial measures where a direction to take remedial measures was not complied with; where there have been adverse effects that are causing or may cause danger to persons, property or the environment from a contravention of the licence or failure of a work related to the use of waters or the deposit of waste; or where the costs were due to a contravention by a person who has closed or abandoned, temporarily or permanently, a work related to the use of waters or deposit of waste. Costs for remedial measures that are not covered by the security may be recovered from the person to whom the direction was issued or the person who closed or abandoned the work[xvii]. In the event of such a contravention of the licence by MHBL or such a failure of the Doris North works and failure by MHBL to take the remedial measures directed by INAC, the federal government could take the remedial measures and apply the security to those costs, as well as recover any costs not covered by the security from MHBL.

Provision of Indemnities

Two of the options suggested by MHBL for security arrangements in respect of the water licence for the Doris North project include provision of indemnities by INAC to KIA and by KIA to INAC. We are not aware of any legal barriers to the provision of indemnities by either party. Precedents exist in somewhat different but related circumstances. For example, INAC indemnified Miramar Giant Mine Ltd. from all environmental liabilities related to previous operations of the Giant Mine. The Nunavut Land Claims Agreement includes reciprocal indemnities between the Crown and the Nunavut Trust and its beneficiaries.

With respect to any general policy of INAC regarding the provision of indemnities, it should be noted that where a statute confers discretion on a decision maker, such as the discretion accorded by subsection 76(1) to the Minister with respect to the form and nature of the security required in a water licence, the decision maker may not fetter his discretion by adherence to an external authority, such as a departmental policy[xviii].

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[i] Nunavut Water Board Hearings Transcript Re: Doris North Project, Aug. 13, 2007, at 0204.

[ii] INAC's Mine Site Reclamation Policy for Nunavut –2002 states:
Since financial security has become a multi-jurisdictional issue, co-ordination is an important consideration. To ensure that financial security is most efficiently and effectively applied, DIAND will facilitate discussions between the various regulatory bodies to promote the co-ordination of financial security obligations. This will include:
. . .

- **ensuring that**, at any given time during the life of the mine, the total financial security for mine site reclamation in place, subject to the timing of any application for credit for progressive reclamation, is equal to the total outstanding reclamation liability of the mine site, and the financial security for closure-related activities, **imposed by land and water jurisdictions cumulatively, does not exceed the total reclamation cost estimates for both the land-related and water-related reclamation elements at each mine**;

(at pp. 9 and 10; emphases added).

[iii] *Northwest Territories Waters Regulations* -- SOR/93-303.
SECURITY -- s. 12
12. (1) The Board may fix the amount of security required to be furnished by an applicant under subsection 17(1) of the Act in an amount not exceeding the aggregate of the costs of
(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.

[iv] 2004 FC 1264(CanLII).

[v] See *CanZinco* paragraphs 40, 81, 92, and 93.

[vi] Existing regulations -- s. 173(1) of the Act:

173. (1) Until they have been replaced or repealed under this Act, the regulations and orders made under sections 33 and 34 of the Northwest Territories Waters Act that were in force on July 9, 1996 are binding on the Nunavut Water Board from that date, and continue to apply from that date in Nunavut, except in a national park, and the Board shall exercise the powers of the Northwest Territories Water Board under those regulations and orders in relation to Nunavut.

[vii] *Northwest Territories Waters Regulations* -- SOR/93-303.
SECURITY -- s. 12
12. (1) The Board may fix the amount of security required to be furnished by an applicant under subsection 17(1) of the Act in an amount not exceeding the aggregate of the costs of
(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.

[viii] 12(2) In fixing an amount of security pursuant to subsection (1), the Board may have regard to
(a) the ability of the applicant, licensee or prospective assignee to pay the costs referred to in that subsection; or
(b) the past performance by the applicant, licensee or prospective assignee in respect of any other licence.

[ix] In *CanZinco*, the Court stated:
[71] In the case at bar, there is no privative clause. However, the Minister has a broad and specialized expertise. The nature of the Minister's power is discretionary. Finally, the nature of the inquiry in the case at bar is highly fact-based and contextual. In determining whether to approve or reject a licence, the Minister evaluates the evidence before him.
[72] In the aggregate, these factors signal a high degree of deference.

[x] In *CanZinco*, the Court stated:
[49]The Minister points out that there is a practical basis for the Minister's jurisdiction with respect to the form of the amount of security set by the Board that does not exist with respect to the amount of security. Pursuant to s. 76(1) of the Act, the security must be "furnish[ed] and maintain[ed] with the Minister." Since it is the Minister, and not the Board, that holds the security, it follows as a practical matter that any discretion as to the form of that security must lie with the Minister.

[xi] At page 45.

[xii] Subsection 12(3) of the NWT Regs states:
12(3) Security referred to in subsection (1) shall be in the form of
(a) a promissory note guaranteed by a bank in Canada and payable to the Receiver General;
(b) a certified cheque drawn on a bank in Canada and payable to the Receiver General;
(c) a performance bond approved by the Treasury Board for the purposes of paragraph (c) of the definition "security deposit" in section 2 of the Government Contract Regulations;
(d) an irrevocable letter of credit from a bank in Canada; or
(e) cash.

[xiii] At page 45.

[xiv] SOR/87-505, under the *Financial Administration Act*.

[xv] Conditions for issuance of licence -- s. 57
57. The Board may not issue a licence unless the applicant satisfies the Board that

(a) any waste produced by the appurtenant undertaking will be treated and disposed of in a manner that is appropriate for the maintenance of the water quality standards and effluent standards that are prescribed by the regulations or, in the absence of such regulations, that the Board considers acceptable; and
(b) the financial responsibility of the applicant, taking into account the applicant's past performance, is adequate for
(i) the completion of the appurtenant undertaking,
(ii) such measures as may be required in mitigation of any adverse impact, and
(iii) the satisfactory maintenance and restoration of the site in the event of any future closing or abandonment of that undertaking.

[xvi] See subsection 13(2) of the Act.

[xvii] See sections 87 and 89 of the Act.

[xviii] See Blake, S., Administrative Law in Canada, Third Edition, at 92 to 93.