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:**

REPLY SUBMISSIONS OF THE KITIKMEOT INUIT ASSOCIATION

BACKGROUND:

On August 24th, 2007 the Kitikmeot Inuit Association (KIA), Miramar Hope Bay Limited (MHBL) and Indian and Northern Affairs Canada (INAC) submitted legal argument in response to a request by the Nunavut Water Board (NWB) for submissions on legal issues related to water licence security which arose in the public hearing addressing the MHBL Doris North project type "A" water licence application. On August 28th, 2007 KIA received an undated memorandum from the Nunavut Water Board inviting a reply submission.

The KIA reply is set out below.

REPLY TO INAC ARGUMENT:

KIA argued that the INAC approach to security issues in the August 13 and 14th hearing was narrow and blinkered. The written argument submitted by the Department on August 24th continues in this vein, attempting to limit the Board's jurisdiction in relation to security matters by adopting a narrow and restrictive approach of relevant statutory and land claims provisions.

The NWB should not adopt the INAC argument and should reject the INAC approach. It is inconsistent with the Board's own previous water licence security decisions and as will be shown below, is also inconsistent with the legislative framework and the Nunavut Land Claims Agreement (NLCA).

Water legislation has a context and the words of these statutes, in this case both the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*[1] (NWNSRTA) and the *Northern Inland Waters Act*[2] (NIWA), must be construed in the context of a reading of the whole statute, not by singling out and narrowly interpreting two or three provisions. As set out in the KIA's prior written submissions, the NWB's jurisdiction in respect of water licensing security must be construed in the context of the Board's overall licensing authorities.

It makes no sense in KIA's submission to establish a Board responsible for regulating the deposit of waste[3] under section 12(1)(b) of the NWNSRTA which reads as follows

> **12.** (1) Subject to subsection (2) and except in accordance with the conditions of a licence, no person shall deposit or permit the deposit of waste
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> (*a*) in waters in Nunavut; or
>
> **(*b*) in any other place in Nunavut under conditions in which the waste, or any other waste that results from the deposit of that waste, may enter waters in Nunavut.**
>
> (emphasis added)

and then to tell the Board that it can only order security in relation to "water related" reclamation. What about reclamation of structures, facilities and materials in areas where the waste may only "result" from the deposit of such waste (i.e. on land)?

The position taken by INAC addresses and attempts to narrow the NWB's jurisdiction. If the Board has no authority to take security in relation to what INAC engineers call "land-related" matters, then clearly the Board has no authority to order a licensee to submit a closure and reclamation plan for land related matters either. Likewise the Board's jurisdiction over the appurtenant undertaking should be similarly limited. Characterized in this way, the INAC argument undercuts the authority of water boards in all three territories and the practices of water boards in relation to abandonment and reclamation planning and security which have been in place since before the *Northwest Territories Waters Act* was enacted in 1992.

KIA submits that the INAC approach is inconsistent with the regulatory framework for northern waters which has been in place for over 35 years.

As KIA argued initially, licences are issued in respect of the "appurtenant undertaking" which in the case of the Doris North project is the whole mine.

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[1] S.C. 2002, c.10.
[2] R.S.C. 1985, c. N-25 (repealed).
[3] Note that waste is defined very broadly in s.4 of the NWNSRTA.

Closure and reclamation planning is similarly based on the whole mine. The Board's authority to regulate the deposit of waste on land in places other than in water itself is clearly set out in paragraph 12(1)(b). This makes sense because "water" includes groundwater and because good water management must take place on a watershed basis.[4] There are a number of activities undertaken on the footprint of a mine which may affect the quality, quantity or flow of water. Water boards have broad jurisdiction to regulate water use and the deposit of waste for this reason.

KIA submits that when the definition of waste is read in conjunction with section 12 of the NWNSRTA, the true scope of the NWB's jurisdiction emerges. The arbitrary deeming by INAC engineers of certain activities involved in closure and reclamation planning to be "land related" does not determine the limits of the Board's jurisdiction.

The incorporation of the NIWA scheme by reference in section 13.2.1 of the NLCA only reinforces the KIA interpretation of the Board's jurisdiction. Section 10 of NIWA gave a water board authority to issue licences in respect of an appurtenant undertaking. Water management areas under NIWA were clearly intended to be watershed based. Water boards, beginning with the NWT Water Board under NIWA through to the NWB have had the power to expropriate land.[5] Water board decisions have always been in relation to both land and water. This legal framework is consistent with the holistic Inuit concept of the land and it is this concept upon which the NWB based earlier decisions which refused to separate land and water for purposes of determining the security required for mining projects.

Clearly, a review of the Board's jurisdiction in relation to land requires a more purposive analysis. There is no reason to read an environmental statute like the NWNSRTA so narrowly. Likewise, the NLCA gives the NWB an "environmental" role, involved as it is in the land use planning and environmental impact assessment processes set out in the claim. Section 13.8.1 NLCA clearly gives the NWB authority to require land related information from applicants "consistent with the *Northern Inland Waters Act...*" on topics such as

> (b) any qualitative and quantitative effects of the proposed water use on the water management area (watershed) ....
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> (f) interests in the lands and waters which the proponent has secured or seeks to secure.....
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> (h) any other matters that the NWB considers relevant.

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[4] See the definition of "water management area" in s. 2 of NIWA.
[5] See s.77 NWNSRTA.

INAC argues, under the heading *"Limits on the Application of Security"* that a reading of sections 76 and 87 of the NWNSRTA reinforces the limits it suggests exist on the Board's jurisdiction. KIA submits that a reading of these sections does no such thing.

Subsection 76(1) simply gives the Board the authority to set security in an amount all parties agree is set by the Board. Subsection 76(2) gives the Minister the authority to apply the security in certain circumstances set out in sections 13 (not relevant), 87 and 89. Section 87 reads:

> **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 persons, property or the environment.

INAC cited this section of the statute as authority for its argument that the Inspector and Minister may only address the water related concerns encompassed by subsection 87(1). But subparagraph (ii) refers to a deposit of waste in contravention of subsection 12(1) which could under paragraph (b) include land based deposits. The chapeau and subparagraph (iii) refer to the failure of works related to the use of water "or the deposit of waste". These a works may be on land (such as waste rock piles or solid waste areas) or in the water. Finally paragraph (b) refers to the adverse effects of the "use, deposit or failure" causing danger to the "environment" not just to water. Our point is that even a simple reading of section 87 shows that it can be construed much more broadly than suggested in the INAC argument.

KIA suggests that there is similarly no reason to narrowly interpret the Minister's role and authority in the application of security under the NWNSRTA. It is our view that both the Board and the Minister have wider authority in relation to security and its application than was argued by INAC.

The determination of whether the activities proposed by an applicant for a water licence would generate waste is primarily a question of fact within the Board's

jurisdiction. Likewise whether the deposit and the place where the deposit may take place may result in waste entering water is also a question of fact within the Board's jurisdiction. These factual determinations are made in relation to the appurtenant undertaking, the whole mine. Considering the definitions of water and waste and the scope of sections 11 and 12 of NWNSRTA, and the focus of the legislation and the regulations on the appurtenant undertaking in respect of both licensing and security, it is difficult to see how the division of security into land and water related security can be effected in anything but an arbitrary way. The KIA respectfully submits that the scheme of the statute, interpreted as a whole, does not support the limits that INAC seeks to impose on the Board's jurisdiction.

MHBL ARGUMENT:

KIA agrees that subject to the regulations the Board determines the amount of security and that the maximum security which can be ordered is determined as set out in the regulations. The Board could order less than the full estimated cost of closure and reclamation if the evidence warranted such an outcome.

Section 76(1) provides that the Minister holds the security in one of the forms set out in the regulations. Subsection 12(3) of the regulations lists the acceptable forms. Looking at the words in subsection 76(1) it therefore appears that the Minister still has wide discretion to decide whether the "nature" and the "terms and conditions" of the security are satisfactory.

MHBL has argued that a strict policy against allowing joint security or prohibiting the provision of indemnities in all cases threatens to fetter the Minister's jurisdiction under section 76(1). There is merit in this argument from KIA's perspective.

INAC has relied on a jurisdictional argument to propose limits on the scope of the Board's authority to order security. Our reply to that argument is above, but the effect of basing their position on jurisdiction is that INAC has provided no evidence or argument to explain any other constraints on what the Minister can do in respect of the nature or the terms and conditions for the security. INAC for example, argues that the Minister should not have to argue with a dual-payee every time he wants to apply security. This is pure speculation. There is nothing to say that the Minister and KIA couldn't work out an acceptable arrangement for managing Doris North security.

It seems to KIA that the Board has not heard everything it needs to hear from INAC in order to come to closure on the security issue. In KIA's submission, INAC has not yet fully explained why other arrangements for the management of security from the Doris North project cannot be entertained. It certainly appears from a review of the NWNSRTA that the Minister has all the discretion necessary to undertake some creative and constructive efforts to address the unique

situation with respect to security when mine development takes place on Inuit Owned Lands.

ALL OF WHICH IS RESPECTFULLY SUBMITTED SEPTEMBER 4th 2007:

BY: John Donihee

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