



Re: Nunavut Water Board's Response to Decision of Minister of Aboriginal Affairs and Northern Development Canada to Withhold Approval of Renewed and Amended Licence 2AM-LUP1015 On Issue of Quantum of Security

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The Board's Jurisdiction to Fix the Quantum of Security under the NWNSRTA

As established under s. 76(1) of the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002, c. 10 (NWNSRTA), with respect to fixing the amount of security the Board's jurisdiction is as follows:

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.

The extent of the NWB's jurisdiction to set the quantum of security under a licence was the subject of consideration by the Federal Court in the *CanZinco* case in 2004.¹ In that case, the Federal Court accepted the argument of the Minister of AANDC at that time, that under s. 76, the Board has the duty to fix the amount of security and the form of that security is within the Minister's jurisdiction to establish unless the form is prescribed by regulation. The Court in that case also went on to say:

[100] I have accepted the Minister's interpretation of the Act that it is the Board's responsibility to fix the amount of the security, which means that, when that amount appears in the licence, it is not a mere suggestion that is subject to the final approval of the Minister. Giving the Minister power to disapprove a licence (even on the basis of a concern over security) is not the same thing as giving the Minister the power to fix the amount of security as part of the negotiations and hearings that lead up to the granting of the licence by the Board.²

On this basis, it is clear that broadly speaking, the jurisdiction to establish the amount of security clearly remains with the Board as set out under s. 76(1), as notwithstanding the Minister's withholding of approval of the Licence, the Minister's jurisdiction does not extend to fixing the amount. Consequently, the Board has determined that the NWB continues to have jurisdiction to consider further the issue of the adequacy of the quantum of security in a manner that reflects the Minister's stated concerns.

The Board's Further Consideration of the Amount of Security

Although the NWB recognizes that the NWNSRTA establishes that these circumstances do not alter the Board's continuing jurisdiction to fix the amount of security under the Licence, the NWNSRTA is silent regarding the regulatory path forward for the Board's further consideration about quantum in light of the Minister's withholding of approval of the proposed Licence. As referenced in the *CanZinco* case:

¹ *CanZinco Ltd. v. Canada (Minister of Indian Affairs and Northern Development)*, [2005] 1 FCR 454, 2004 FC 1264 (CanLII).

² *CanZinco Ltd. v. Canada (Minister of Indian Affairs and Northern Development)*, [2005] 1 FCR 454, 2004 FC 1264 (CanLII), at para. 100, p. 21.

[98]In my opinion, a statutory scheme that reserves the fixing of the amount of the security to the Board but gives the Minister the power to disapprove a licence if the amount of the security is not sufficient produces a somewhat nebulous apportionment of powers between the Board and the Minister as to who has final say over the amount of the security.

Although the Board recognizes that the NWNsRTA does not prescribe a regulatory process for addressing this type of situation, the NWB Panel duly appointed by the Board to consider the renewal and amendment application (P11 or Lupin Panel) have met to consider the Minister's request that the Board consider further the quantum of security to take into account the Minister's concerns. In response, the Panel has directed me to provide the following guidance to the parties.

Having recommended the issuance of a renewed and amended Type "A" Water Licence to authorize the water use and waste deposit associated with the undertaking of the Lupin Gold Mine in the Board's Reasons for Decision and Record of Proceedings and proposed Licence #2AM-LUP1520 issued on May 11, 2015, the Board would not consider the Panel for this application to have fully discharged its function until a licence as issued by the Board and approved by the Minister is in place. As the Minister's concerns solely regarding the amount of security have resulted in proposed Licence #2AM-LUP1520 not coming in force, the Board has concluded that there is a requirement for the Panel to further consider the issue of the quantum of security to be fixed under Part C, Clause 1 of proposed Licence #2AM-LUP1520 in a manner that reflects the Minister's stated concerns.

The Board's Request for Further Submissions of the Parties on Quantum

In the result, the Panel has directed that the Board should consider further ONLY the issue of the amount of security to be fixed under the proposed Licence. The Board's further consideration of this issue will involve requesting additional written submissions from the parties who presented evidence on the quantum of security throughout the Board's consideration of the renewal and amendment Application, namely the Applicant, Lupin Mines Incorporated and the Interveners, Aboriginal Affairs and Northern Development Canada and the Kitikmeot Inuit Association.

In soliciting these additional submissions to support the Board's further consideration of the amount of security required under the proposed Licence #2AM-LUP1520 the Board recognizes that the parties' discussion of the adequacy of the amount of security should now consider and reflect the full context of the proposed Licence #2AM-LUP1520. For example, it is now known that the proposed Licence #2AM-LUP1520 is limited to a 5 year term and the water use and waste deposit authorized under the proposed Licence is restricted to care and maintenance and a "ramp up" phase that would see the mine begin preparations for a return to operations. However, the proposed Licence does not authorize a return to full operations and requires an amendment to the Licence in order to authorize the level of water use and waste deposit required to return the

mine to active operations. Proposed Licence #2AM-LUP1520 also expressly requires the Applicant to submit an update to reclamation and closure plans and the quantum of security required to reclaim the site in any application to amend the proposed Licence to return the mine to full operation.

Consequently, the Board recognizes that the parties' previously stated positions on the amount of security may change to reflect the full context of the proposed Licence. In determining whether they wish to provide further submissions in this regard, the Board encourages the parties to consider the full context of the proposed Licence. The Board also recognizes that parties may wish to file further submissions to respond directly to the concerns expressed by the Minister in his decision to withhold approval of the proposed Licence as expressed in the Minister's letter of June 23. The Board leaves it to each party to determine whether or not they wish to provide the Board with further submissions. However, if the parties choose to file further written submissions in response to this request, the Board notes that only those submissions directed to the issue of the adequacy of the quantum of security will be considered.

Timelines for Further Submissions

The Board recognizes that until this matter is considered further and the Board is able to provide the Minister with the Board's determination and the Minister is able to make a decision resulting in the approval of the proposed Licence, the Applicant will not have a full Type "A" Water Licence in force, and as such time is clearly of the essence. However, reflecting the importance of this issue and the need to ensure the parties have the opportunity to prepare and file any further submissions, the Board has established the following timelines:

1. The Interveners, Aboriginal Affairs and Northern Development Canada and the Kitikmeot Inuit Association will have three weeks from July 13, 2015 to file any further written submissions on the adequacy of the quantum of security; and
2. The Applicant, Lupin Mines Incorporated will have four weeks from July 13, 2015 to file any further written submissions on the adequacy of the quantum of security and a final reply to the submissions of the interveners.

Next Steps Following Receipt of Further Submissions

Once the Board has received any further written submissions, the Panel will assess whether the parties should be afforded any additional opportunities to address the Panel (via teleconference or in person) and will advise the parties. Once the Panel has concluded that no further oral or written submissions are required, the issue of fixing the quantum of security will be remitted to the Panel. Once the Panel has made their determination regarding the outcome of their further consideration of the amount of security, the Board will provide the Minister and the parties with the Panel's written determination on this issue in as timely a manner as possible.

If you have questions regarding this matter, please contact the Board's Acting Executive Director, Raymond Quqshun, at Raymond.quqshun@nwb-oen.ca, Phyllis Beaulieu, Manager of Licensing at licensing@nwb-oen.ca or the Board's Director of Technical Services, David Hohnstein, at david.hohnstein@nwb-oen.ca

Sincerely,

Thomas Kabloona
Chairperson
Nunavut Water Board

Cc Honourable Bernard Valcourt, PC, QC, MP
 Minister of Aboriginal Affairs and Northern Development Canada