



It appears to the NWB that in contrast to the process followed by all the parties under all previous Annual Security Reviews and the express language in the Licence (relevant excerpt reproduced and attached as Appendix A to this correspondence) INAC is now expecting that when the outcome of the ASR process will result in a change to the security amounts to be posted under Part C of Water Licence No. 2AM-MRY1325, that the Board would include the additional steps in the process necessary to amend the Licence which would then be considered by the Minister for approval or rejection.

The relevant excerpts of the Licence (which were approved by the former Minister in 2013 and was also approved by the former Minister as amended by the Board in 2015) included in Appendix A set out the Annual Security Review process that has been followed by the Board, the Licensee, the Qikiqtani Inuit Association and Aboriginal Affairs and Northern Development Canada (as it was then known and now INAC) since the first Annual Security Review conducted by the Board in 2013-2014. In particular, the Board wishes to highlight that the periodic review of security provided for under Schedule C expressly contemplates that the outcome of the process may be adjustments to the amount of security held under the Licence, Part C, Item 1(b) as follows:

...for each subsequent year, the amount of financial security to be held under this Part [Part C] shall be reviewed by the Board in accordance with the requirements of Schedule C and adjusted to reflect the results of the Annual Security Review conducted in accordance with Schedule C [underlining added]

Reflecting this language and the understanding of the parties, since the Licence was originally issued to the undertaking in 2013, Baffinland Iron Mines Corporation (the Licensee) has, in 2013, 2014 and 2015 posted the required financial reclamation security in the form of letters of credit based on the yearly adjustments to the security designated by the Board and resulting from the Annual Security Review process of the Licence set out under Part C. However, none of these adjustments were considered by the Board, the Licensee or the parties to constitute an amendment to the Licence and none of these adjustments were submitted to the Minister for approval as amendments.

Reflecting this prior practice, it is clearly the Board's position that periodic adjustments to the security held under the Licence do not require a formal amendment of this Licence. The Board's position on this point is based on the following:

- As noted by the Courts,<sup>1</sup> it is clearly within the jurisdiction of the NWB to fix the amount of security to be held under the Licence as established under s. 76 of the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002, c. 10 (NWNSRTA) and s. 10 of the *Nunavut Waters Regulations*, SOR/2013-69 (the NWR)—these provisions do not prescribe limits on the Board's jurisdiction or ability to conducting periodic adjustments to the security to ensure that adequate financial security is maintained under the Licence over time and do not prescribe limits on the Board process to fix security over the currency of a licence;
- Pursuant to s. 70 of the NWNSRTA, subject to the NWNSRTA and the NWR, the Board has the power to include in a licence any conditions that it considers appropriate and the specific terms and conditions chosen by the Board to periodically review the security

---

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

required to be held under this Licence were subject of discussion in both the Public Hearing associated with the original Licence in 2013 and the Public Hearing associated with the amendment to the original Licence in 2015; and

- The periodic adjustments to the security held under the Licence pursuant to Part C, Item 1 of the Licence are subject to a rigorous 3-4 month process that ensures the evidence, technical review comments and concerns of the three key participants (the Licensee, the Inuit landowner and Indigenous and Northern Affairs) with an interest in the assessment, allocation and retention of security for the overall reclamation of the undertaking are provided and taken into consideration by the Board prior to any adjustments to the amount of the security being issued by the Board. In light of the very detailed procedural requirements of the Annual Security Review established under this Licence it is unclear to the Board as to the benefits of requiring any resulting adjustments to also be subject to a formal licence amendment process as well.

In addition, the Board wishes to point out that the process and timing for adjusting security as developed under Schedule C of the Licence was not designed in a vacuum. The timing and process adopted reflects the frequency of these reviews (originally established as an annual requirement, and now under the Licence as amended in 2015, annual unless waived by the Board), the limits on timing and availability of information from the Licensee with respect to the detailed work plans required to assess changes to reclamation liability in the upcoming year, and the timing of the annual review of reclamation liability estimated under the land lease applicable to the project undertaken by the Qikiqtani Inuit Association and the Licensee at the end of the calendar year.

In the Board's view, to now add, after four years of operating under the process and timelines established under the Licence, an additional step of requiring a formal amendment to the Licence to reflect when the outcome of that process is an adjustment to the security held under Part C, Item 1, which then in turn requires Ministerial review and approval or rejection of the amendment, would necessitate significant adjustments to the timelines now incorporated into all the parties' internal processes for the on-going review and adjustment of reclamation liability. Further, requiring a formal amendment to the Licence when the periodic review under Schedule C results in an adjustment to the security held under Part C, also introduces an element of procedural uncertainty and complexity to the well-established, robust and well understood process established pursuant to the existing terms and conditions in the Licence.

Although the parties may wish to "streamline" the process by which such an amendment would be initiated and considered by the Board, it must be remembered that the Board's jurisdiction to waive a public hearing before approving an amendment to a Type "A" Licence is limited and when there are public concerns expressed with respect to a given amendment, the Board may determine that a public hearing in respect of that amendment is required. With requirements to provide at least 60 days prior notice of a public hearing associated with an amendment to a Type "A" Licence, the inclusion of an additional step of requiring a formal amendment to the Licence is not an inconsequential matter.

As the Minister is aware from various Type "A" Licences recommended for renewal by the Board over the last two years (such as 2AM-MEA1525, 2AM-LUP1520) the Board is not opposed, in appropriate circumstances, to requiring an amendment to an existing Licence when changes to the amount of security are being sought. However, the specific terms and conditions

incorporated into those licences reflect very different circumstances in the context of those individual licences. With respect to the periodic review of security in those cases, the review of security was not expected to be frequent and there was no indication that the periodic review of security in those cases would be subject to unique timing and process needs. Consequently, the general licence amendment process was considered to be appropriate for this type of infrequent periodic review of security.

Although the Board views the on-going dialogue with the Minister about the topic of security to be important and constructive as all parties have an interest in ensuring a robust and effective process for ensuring that licensed undertakings maintain adequate reclamation security over the life of that undertaking, in any given licence the Board will continue to develop and implement the terms and conditions the NWB considers to be necessary to reflect the circumstances of that specific undertaking, including with respect to the periodic review of security.

Consequently, the Board does not anticipate revising the Annual Security Review process established under Type “A” Water Licence 2AM-MRY1325 and as implemented over the last four years to add an additional requirement for adjustments to the amount of security under Part C, Item 1 to be subject to a formal amendment. The Board will continue to conduct the security review process as specified in Part C and Schedule C of the Licence as amended in 2015.

If you wish to discuss this matter further, please contact the Board’s Executive Director, Stephanie Autut, by email to [stephanie.autut@nwb-oen.ca](mailto:stephanie.autut@nwb-oen.ca) or by phone at (867) 360 – 6338.

Regards,

Thomas Kabloona, Chairperson  
Nunavut Water Board

cc. Public Registry  
Stephen Williamson Bathory (QIA)  
Karen Costello (INAC)  
Jim Millard (BIMC)

## **Appendix A:**

### **Nunavut Water Board Water Licence No: 2AM-MRY1325 – Amendment No.1**

#### **Conditions Applying to Security**

**(Excerpt of Part C, Items 1- 6 at pp. 12-13 and Schedule C, Items 1-9, at pp. 50-51)**

#### **PART C. CONDITIONS APPLYING TO SECURITY**

1. Subject to the conditions set out in Part C, Items 2 and 3, the Licensee shall furnish and maintain security with the Minister in the form that is satisfactory to the Minister or that is in accordance with the applicable regulations, in the following amounts:

a. within thirty (30) days following notification by the Board, the Licensee shall post with the Minister and the Qikiqtani Inuit Association, additional financial security to that already posted under the Licence in the amount and form as determined by the Annual Security Review process referred to in Part C, Item 1(b), or Part C, Item 1(c), and/or based on the written notification from the Board and stipulations included the section pertaining to reclamation in the Board's Reasons for Decision for the Amended Licence;

b. for each subsequent year, the amount of financial security to be held under this Part shall be reviewed by the Board in accordance with the requirements of Schedule C and adjusted to reflect the results of the Annual Security Review conducted in accordance with Schedule C; and

c. the Board may waive the requirements to hold the Annual Security Review referred to in Part C, Item 1(b) provided that adequate rationale is given to stakeholders and interested parties in advance of doing so including the determination that the Project's scope proposed for a particular year may result in only negligible changes to the amount of financial security already posted and create no unsecured environmental risk or liabilities to the public and stakeholders.

2. Where the Licensee files evidence, in writing with the Board and with notice to the Minister and the Qikiqtani Inuit Association that the Licensee has furnished and maintained security with the Qikiqtani Inuit Association in an amount that the Qikiqtani Inuit Association confirms is sufficient to secure the mine closure and reclamation costs (including cumulative and legacy liabilities) estimated for the upcoming year to be required for the portion of the Project located on Inuit-owned lands, the Board may reduce the amount of security required to be held under Part C, Item 1. The Board shall ensure that the reduced amount of security furnished under Part C, Item 1 is equal to the estimated anticipated mine closure and reclamation costs (including cumulative and legacy liabilities) for the portion of the Project located on Crown-owned lands for the upcoming year.

3. In addition to the Annual Security Review set out in Schedule C, the Licensee may, at any time, submit to the Board for consideration and approval, a request to change the amount of security outlined in Part C, Item 1. The submission shall include supporting evidence to justify the request, and the Minister and the Qikiqtani Inuit Association will be consulted by the Board during the Board's consideration of this request

4. The security furnished and maintained with the Minister, under Part C, Item 1, shall be maintained until such time as it is fully or in part refunded by the Minister pursuant to section 76(5) of the Act.

This clause shall survive the expiry of this Licence or renewals thereof and until full and final reclamation has been completed to the satisfaction of the Minister.

5. In the event that the amount of security required to be held under Part C, Item 1 is reduced on the basis of evidence that the Licensee has furnished and maintained security with the Qikiqtani Inuit Association as set out under Part C, Item 2, the Licensee is required to provide the Board and the Minister with sixty (60) days written notice prior to any material change affecting the security arrangements between the Licensee and the Qikiqtani Inuit Association, including, but not limited to the form of security, quantum of security or terms associated with holding, accessing or releasing the security.

6. If the Board determines it to be necessary, or upon the request of the Licensee, the Minister or the Qikiqtani Inuit Association, the Board may issue further directions under this Part with respect to the amount of security to be furnished and maintained under the Licence

+++++  
**Schedule C Conditions Applying to Security**

The Annual Security Review (ASR) referred to in Part C shall be conducted as follows:

**Timing, Evidence and Process for ASR**

1. Unless otherwise directed by the Board, the ASR shall be conducted annually on the first Thursday of December, in the form of a teleconference meeting, with representatives from the Licensee, the Minister, the Qikiqtani Inuit Association and the Nunavut Water Board. The ASR may be conducted in the form of an in person meeting if the Board considers it necessary, or if the Board grants the special request of the Licensee, the Minister or the Qikiqtani Inuit Association, for an in person meeting.

2. Unless otherwise directed by the Board, on the first Thursday of November, the Licensee, the Minister and/or the Qikiqtani Inuit Association shall file with the Board any information they intend to rely upon for the ASR, including but not limited to:

- a. an updated Preliminary, Interim or Final Mine Closure and Reclamation Plan;
- b. the total financial security amount calculated for the highest level of reclamation liability for land and water combined for the upcoming year as calculated in accordance with Item 6 of this Schedule;
- c. the total of any equivalent financial security being held by the Minister and/or the
- d. Qikiqtani Inuit Association outside the Licence;
- e. information that supports the increase, maintenance or reduction of the total financial security under the Licence; and
- f. any other information necessary to support the request of the parties for the Board to issue further directions under Part C with respect to the amount of security to be furnished and maintained under the Licence.

3. Unless otherwise directed by the Board, within forty-five (45) days following the ASR, the Board will advise the Licensee, the Minister and the Qikiqtani Inuit Association of the total financial security for the upcoming year to be filed as required under Part C, Item 1 of the Licence.

4. Unless otherwise directed by the Board, within thirty (30) days from the date the Board releases its determination of the total financial security amount required for the upcoming year, as set out in Item

3 above, the Licensee is required to furnish and maintain security with the Minister in the amount and form that is satisfactory to the Minister or that is in accordance with the applicable regulations.

5. In any event, if the Licensee fails to file the total financial security amount required for the upcoming year as determined by the Board under the Licence on or before March 1, the Licensee is not authorized to proceed with any planned activities that could increase the total financial security amount required to be held under the Licence until they have filed the total financial security amount required to be held under Part C for the upcoming year.

### **Total Financial Security Calculation**

6. The basis for calculating the total financial security required for final reclamation under the ASR is as follows:

- a. the total financial security amount must be calculated on the basis of a holistic approach to reclamation that includes outstanding reclamation liability for land and water combined;
- b. the total financial security amount must include consideration of cumulative and legacy liabilities; and
- c. the total financial security amount must be calculated at the beginning of the work year and must be sufficient to meet the highest reclamation liability in the upcoming year.

### **Evidence to Reduce Total Financial Security under the Licence**

7. Upon receiving written evidence from the Licensee, the Minister and/or the Qikiqtani Inuit Association that adequate security, equivalent to that held under Part C of the Licence is secured by another mechanism acceptable to the Licensee, the Minister and the Qikiqtani Inuit Association, including, but not limited to the parties entering into a security management agreement or similar instrument, the Board may reduce the total financial security amount required to be held under the Licence.

8. In assessing the extent of any reduction to the total financial security amount held under the Licence as set out in Item 6 of this Schedule, the Board must ensure that when taken together, the equivalent security and the total financial security amount held under Part C of the Licence are sufficient to meet the total financial security amount for reclamation as calculated under Item 6 of this Schedule.

9. Further, in assessing the extent of any reduction to the total financial security amount held under the Licence, the Board may consider a split between the portion of financial security required for reclamation on Inuit Owned Lands and the portion of financial security required for reclamation on Crown lands and may direct that the reductions in the total financial security amount be discounted from the financial security amount applicable to only Inuit Owned Lands or Crown lands as may be appropriate.