

Double Bonding - A Continuing Barrier to Development?

John Donihee & Charles J. Birchall

Willms & Shier Environmental Lawyers LLP

**2016 Nunavut Mining Symposium
Iqaluit, Nunavut
April 4 - 7, 2016**



What is Double Bonding?

- **Double bonding occurs when a proponent, licensee or prospective assignee must provide financial security, related to a licensed undertaking, to more than one payee.**
- **Most advanced stage mining projects in Nunavut are currently all or partially on Inuit Owned Lands (IOL) and the mining companies must provide financial security to the federal Crown and to the Regional Inuit Association (RIA) Land Owner.**

An Example of Double Bonding

- **A project is located on IOL.**
- **The Nunavut Water Board (NWB) orders water licence security to be provided to ensure the full cost of closure and reclamation.**
- **This security must be held by the Minister of Indigenous and Northern Affairs Canada (INAC).**
- **The Inuit Association cannot draw on that security because the Inuit Association is not a joint payee & INAC cannot accept security that is payable to a party other than the Crown.**

Double Bonding Example Cont'd

- **In order to protect Inuit interests, the RIA requires an additional security from the project owner.**
- **The company or project owner likely has to pay financial security twice – thus creating double bonding.**

This issue constitutes an irritant at best or more likely a barrier to mining investment & development in Nunavut

The Current Law

Nunavut Waters and Nunavut Surface Rights Tribunal Act (“NWNSRTA”)

76(1) The Nunavut Water Board may require an applicant, a licensee or a prospective assignee to furnish and maintain security with the Minister [of INAC] 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.

Application of Security

76(2) The security provided by a licensee may be applied by the Minister

(a) to compensate, fully or partially, a person, including the designated Inuit organization, who is entitled to compensation under s.13 and...if the Minister is satisfied that the person has taken all reasonable measures to recover it; and

(b) to reimburse Her Majesty in right of Canada, fully or partially, for reasonable costs incurred... under ss. 87(4) or... under ss. 89(1).

Solutions Sought

- **Nunavut Securities Working Group Created**
- **Two Securities Management Agreements**
 - (a) First agreement would set out the terms of cooperation between Canada and the Regional Inuit Association (RIA)**
 - (b) Second agreement would be between the proponent, Canada & the RIA setting the amount of security**

Other Ideas

Article 20 Inuit Water Rights - Compensation

- **Article 20.3.1 of the NLCA requires that before NWB approval, the applicant for a licence and the DIO must enter into a compensation agreement for any loss or damage which may be caused by the change in quality, quantity or flow of the water.**
- **If there is no agreement, either party may refer the determination of compensation to the NWB for a binding decision. (Article 20.3.2)**

Other Ideas Cont'd

- **If the applicant and the DIO reach an agreement, the NWB must deduct the agreed upon amount of compensation from the security it sets under s. 76(1) of the NWNSRTA thus avoiding duplication.**
- **If no agreement is reached, the DIO has first priority over the security held by the Minister.**

Another Idea - NLCA Amendment

Inuit proposed a different solution

- **Amend the NLCA to ensure the RIA is protected from liability.**
- **Let the NWSRTA process be the only process and the NWB and Crown be responsible for ensuring adequate security is available.**
- **Any shortcoming would be the Crown's responsibility.**

Amendments Relating to Security

- **On June 18, 2015 the federal government assented to Bill S-6 that included an amendment to the NWNSRTA to address the double bonding issue.**
- **Under ss. 76.1(1), the Minister may enter into a written arrangement with the DIO and the applicant, licensee or prospective assignee of the license respecting security.**

Subsection 76.1(1)

If a licence is in respect of an appurtenant undertaking that is situated, partially or wholly, on Inuit-owned land, the Minister may enter into a written arrangement with the DIO and the applicant, licensee or prospective assignee of the license that provides for

(a) the amount of security to be furnished and maintained... as well as the form and nature and any conditions of the security...; and

(b) the periodic review of the security, including by taking into account any material changes to the undertaking or the risk of environmental damage, and the adjustment of the amount of the security as a result of the review.

Subsection 76.1(3)

- **The NWB shall take into account the written arrangement when it determines the amount of the security required to be furnished and maintained by the applicant, licensee or prospective assignee under subsection 76(1) of the *Act*.**
- **There are no publicly available examples of such agreements.**
- **Agreements will be a negotiated outcome and may add time and costs to project approvals.**

Questions Remain

- **If an agreement is reached under ss. 76.1(1)**
 - will the agreement be made public?
 - will the agreement be restricted to the terms in ss. 76.1(1)?
 - will the agreement settle the issue of which party has priority or first call on the security?

Questions Remain

- **If the Minister chooses not to enter into an agreement under ss. 76.1(1) or an agreement cannot be reached**
 - the issue of double bonding will remain
 - the prospect of this scenario could result in uncertainty for project proponents thus causing a potential barrier for development in Nunavut
 - it remains unclear how this process will operate

Another Possible Way Forward

- **The NWB has held, in several of its decisions, that land & water are interconnected and therefore the security for each must be determined & provided as one amount.**
- **In negotiating a compensation agreement under Article 20.3.1 of NLCA the proponent and DIO could negotiate an amount that includes damages to land & water.**
- **Recognize that under s. 76(1) of the NWNSRTA, the NWB may only require that security be furnished and maintained with the Minister of INAC.**

Possible Way Forward Cont'd

- **The agreement under ss. 76.1(1)(a) would incorporate the terms of the compensation agreement & stipulate that the DIO has first priority on the security with the condition that the Minister is provided with detailed plans and reports on how the security is applied.**
- **Under ss. 76.1(3) the NWB shall take into account the agreement when it determines the amount of security required.**

Conclusion

The Objective is Clear:

(a) Remove double bonding

(b) Find a timely process that is transparent & meets the needs of the parties

- **The ss. 76.1 process may work**
- **If not, there are other ideas**
- **Qujannamiik**

Contact Information

John Donihee

(613) 217-8521

jdonihee@willmsshier.com



Charles Birchall

(613) 761-2424

cbirchall@willmsshier.com



Willms & Shier Environmental Lawyers LLP

www.willmsshier.com