NUNAVUT IMPACT REVIEW BOARD (NIRB) FILE: 08MN053

Baffinland Iron Mine Corporation's Phase 2 Development Proposal
("Baffinland Phase 2")

WRITTEN COMMENTS OF THE QIKIQTANI INUIT ASSOCIATION ("QIA")
ON THE MOTION BROUGHT BY
NUNAVUT TUNNGAVIK INCORPORATED ("NTI")
FOR ADJOURNMENT OF THE FINAL HEARING

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I. Summary of the Motion And QIA's Response

A. Summary of what NTI requested in its motion

1. This written submission from Qikiqtani Inuit Association (QIA) provides suggested legal and practical grounds which support the November 6, 2019 motion brought by Nunavut Tunngavik Incorporated (NTI). NTI's motion asked the Nunavut Impact Review Board (NIRB or the Board) to adjourn the remainder of the Technical Session and Community Roundtables of the public hearing on Baffinland Iron Mine Corporation's (Baffinland) Phase 2 Development Proposal (Phase 2).

2. NTI's motion, made orally, requested the Board adjourn the public hearing for a period of 9 months to 1 year, or until such time as the Board found appropriate based on the motion, in order to allow Baffinland and the Parties to narrow the scope of unresolved technical issues.

3. In its motion, NTI recognized that the Board had, on November 4, already ruled that a short adjournment of the public hearing was necessary. This Board ruling was in response to a motion from the community of Igloolik, asking for time for five impacted communities to meet and review the hearing evidence in order to make further submissions regarding the Phase 2 proposal (as the Inuit communities had just received funding confirmation for this meeting). In its ruling on the Igloolik motion, the Board directed that the in-person public hearing component of the assessment of Phase 2 would be continued at another in-person session to be scheduled in the future, contingent on confirmation of federal funding and the ability to secure space for the hearing, and that the formal record would remain open until the in-person meeting concluded, or later.

4. NTI's motion noted appreciation for the manner in which the Board had been making efforts, during the public hearing process, to ensure that the process remained procedurally fair and flexible, in the face of serious procedural challenges to the ability of Parties to review and ask questions about relevant information in the time provided. NTI noted that the Board's flexibility was appropriate in view of the flexibility in the Board's process which is required by the Nunavut Land Claim Agreement (*Nunavut Agreement*) and *Nunavut Planning and Project Assessment Act* (*NUPPAA*).

5. NTI, in its motion, raised the concern that, as the public hearing on Technical Issues proceeded during the November 2 - 6, 2019 period, the scope of potential deficiencies in the hearing process became more pronounced, including the lack of sufficient time for Intervenors to fully canvass technical questions and repeated questions about whether sufficient information has been available in a timely way, in Inuktitut, to Inuit Parties. NTI indicated its view that these problems in the process were not the fault of the Board or

Intervenors but arose as a result of a fundamentally incomplete package of assessment information with significant scope of outstanding issues.

6. NTI raised concerns about continuing with the Community Roundtable portion of the public hearing process in Pond Inlet when the Community Roundtable was supposed to allow community members the opportunity to ask questions based on the evidence canvassed in the Technical Issues session in Iqaluit. The Community Roundtable process, NTI indicated, would be based on incomplete key portions of the Technical Issues agenda and a wide scope of unresolved issues.

7. NTI noted the public interest in ensuring a full and proper technical review including a process which allows the Inuit Parties to truly understand and address impacts of the Phase 2 proposal. NTI expressed concern that, after five full days of technical hearings there remained many areas of uncertainty regarding technical aspects of the Phase 2 proposal, as evidenced by the inability of the Board and Parties to ask questions about many technical areas within the available time for the Technical Session.

8. NTI noted that the gaps in the available assessment evidence, and remaining questions from the Inuit Parties, would not be addressed by the Board's accommodation of the November 4 motion from Igloolik which allowed a short adjournment.

9. NTI therefore asked the Board to adjourn the hearing for a period of 9 months to 1 year, to allow Baffinland and the Parties the opportunity to narrow the scope of unresolved and unaddressed concerns.

B. Summary of QIA's verbal response to the motion

10. QIA provided a verbal response, supporting NTI's motion requesting a delay in the hearing process until such time as Baffinland and the Parties have the opportunity to reduce the scope of unresolved technical issues.

11. QIA indicated that it continues to support the Mary River Project and wishes to ensure that the review of the proposed changes in project scope properly addresses the full scope of impacts and issues, which no longer appeared possible in the public hearing process as of November 6, 2019, given the large number of outstanding unresolved technical issues.

12. QIA indicated that it respects the Board's jurisdiction to determine the appropriate period of time for a hearing delay. QIA agreed, based on its experience with this and other projects, that a period of up to one year may be required in order to properly address current Phase 2 information gaps and uncertainties and narrow the unresolved issues.

13. QIA pointed to its previous response to the Igloolik motion, highlighting that the Board's Rules contain procedural flexibility to accommodate such a request, and that those Rules are informed by the intention of the Nunavut Agreement that the Institutions of Public Government address the unique Nunavut context and respect Inuit rights.

14. QIA expressed the concern that, should the Board proceed with the remaining Community Roundtable session in Pond Inlet based on the November 2 - 6 portion of the hearings, there was a risk that any Board approval would be based on a insufficient evidentiary record and significant gaps in the process of properly consulting with and accommodating Inuit about potential impacts.

C. The Board's Request for Written Submissions

15. All of the Parties in the Hearing, with the exception of Baffinland, supported the NTI motion for an adjournment.

16. In its oral ruling on the NTI motion, the Board addressed two aspects of this motion: the most immediate issue of whether the Community Roundtable would proceed in Pond Inlet, and the request to adjourn the public hearing on Technical Issues. The Board ruled that it was appropriate to cancel the remainder of the public hearing, noting that there was limited utility in proceeding to the Pond Inlet Community Roundtable based on an incomplete technical record. With respect to NTI's request to adjourn the public hearing on Technical Issues, the Board deferred the decision to allow the Parties in this proceeding a more fulsome opportunity to make written submissions to the Board.

17. The Board asked registered Intervenors and Parties to provide written comments, by November 15, 2019, detailing: (1) the basis for an adjournment; and (2) the required length of time for an adjournment. The Board asked Baffinland to provide its written comments by November 22, 2019. The Board advised that, following the receipt of these written comments, the Board will deliberate further and decide on the motion.

II. Relevant Statutory Authorities

18. QIA's motion relies on the following statutory authorities.

A. The *Nunavut Land Claim Agreement*

19. The *Nunavut Land Claims Agreement* (*Nunavut Agreement*) provides the overall legal framework within which NIRB operates.[1] NIRB, as one of the Institutions of Public Government established under Article 10 of the *Nunavut Agreement*, is meant to provide a Nunavut-appropriate impact review structure and process in keeping with the objectives of the *Nunavut Agreement*.

[1] *Agreement Between The Inuit Of The Nunavut Settlement Area And Her Majesty The Queen In Right Of Canada* ratified 25 May 1993, online: <http://www.tunngavik.com/documents/publications/LAND_CLAIMS_AGREEMENT_NUNAVUT.pdf> [*Nunavut Agreement*].

20. The objectives of the *Nunavut Agreement* inform the manner in which NIRB exercises its role as one of the Institutions of Public Government. Those objectives include Inuit decision-making rights regarding management of land and offshore resources, protecting Inuit harvesting rights and encouraging Inuit cultural and social well-being:

> "[T]o provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore;"
>
> "[T]o provide Inuit with wildlife harvesting rights and rights to participate in decision making concerning wildlife harvesting;"
>
> "[T]o encourage self-reliance and the cultural and social well-being of Inuit." (*Nunavut Agreement,* Preamble)

21. A key concern regarding Phase 2 is impacts on terrestrial and marine wildlife, and associated impacts on the Inuit harvest of the caribou and marine mammals which are cornerstone species for cultural and food security purposes. The *Nunavut Agreement* creates a structure for protection of Inuit wildlife harvesting rights in Article 5, the principles of which inform the exercise of authority of the Institutions of Public Government including NIRB. The *Nunavut Agreement* aims to create a system of managing wildlife that:

> "[F]ully acknowledges and reflects the primary role of Inuit in wildlife harvesting;" and
>
> "[S]erves and promotes the long-term economic, social and cultural interests of Inuit harvesters." (*Nunavut Agreement*, Article 5.1.3)

22. NIRB's procedural processes are intended, under the *Nunavut Agreement*, to provide flexibility and to accommodate the need to ensure meaningful Inuit participation. Article 12 requires NIRB to design its by-laws and rules of procedure for the conduct of public hearing and to ensure that a project will enhance the well-being of Nunavummiut and avoid and mitigate adverse impacts:

> 12.2.24 In designing its by-laws and rules of procedure for the conduct of public hearings, NIRB shall:
>
> (a) "to the extent consistent with the broad application of the principles of natural justice and procedural fairness, emphasize flexibility and informality, and specifically

(i) allow, where appropriate, the admission of evidence that would not normally be admissible under the strict rules of evidence, and
(ii) give due regard and weight to the tradition of Inuit oral communication and decision-making."

12.5.5 NIRB shall, when reviewing any project proposal, take into account all matters that are relevant to its mandate, including the following:

(a) whether the project would enhance and protect the existing and future well-being of the residents and communities of the Nunavut Settlement Area, taking into account the interests of other Canadians; …

(c) whether the proposal reflects the priorities and values of the residents of the Nunavut Settlement Area;

(d) steps which the proponent proposes to take to avoid and mitigate adverse impacts;

(e) steps the proponent proposes to take, or that should be taken, to compensate interests adversely affected by the project;…

B. The *Nunavut Planning and Project Assessment Act*

23. The requirements of the *Nunavut Agreement* are echoed in the *Nunavut Planning and Project Assessment Act* (*NUPPAA*) which provides the legislative framework implementing the intent of the *Nunavut Agreement*.[2] *NUPPAA*, which informs the exercise of NIRB's authority, recognizes the balance which must be struck between economic development, ecosystem conservation and Inuit well-being:

> "[I]t is desirable to set out a regime for land use planning and project assessment that recognizes the importance of responsible economic development and conservation and protection of the ecosystems and that encourages the well-being and self-reliance of the Inuit and other residents of the designated area." (*NUPPAA,* Preamble)

24. Section 26 of *NUPPAA* emphasizes the need for procedural flexibility in NIRB's processes including the need to accommodate Inuit oral communication and decision making:

[2] *Nunavut Planning and Project Assessment Act,* S.C. 2013, c.14, s.2.

> 26(2) A by-law or rule made under paragraph (1)(d) must give due regard and weight to the Inuit traditions regarding oral communication and decision making.
>
> 26(3) By-laws and rules relating to the conduct of public hearings must (a) emphasize flexibility and informality to the extent that is consistent with the general application of the rules of procedural fairness and natural justice and in particular must allow, if appropriate, the admission of evidence that would not normally be admissible under the strict rules of evidence.

25. Section 102 of *NUPPAA* specifically extends this procedural flexibility which accommodates Inuit cultural rights and needs to the process of facilitating public participation in the hearing process including through the mechanisms of proper notice and circulation of relevant information:

> 102 (2) The Board must take all necessary steps to promote public awareness of and participation in any public hearing to be held in respect of a project, including through the choice of the date, time and place of the hearing, notice given in relation to them and measures taken to disseminate any relevant information.

26. *NUPPAA* provides NIRB with the ability to take procedural steps to delay a hearing process in order to ensure that the Board has sufficient evidence for proper decision-making. Section 144 allows the Board to put an assessment on hold if the Board needs more information from a proponent, and specifically empowers the Board to suspend an assessment if it requires additional proponent information necessary for review of the project.

27. The process for suspending an assessment, detailed in section 144 of *NUPPAA,* is as follows:

> 1. The Board requires the proponent to provide additional information;
> 2. If the proponent fails to provide the information, the Board suspends the assessment until it is provided;
> 3. The Board must make the reasons for the suspension public;
> 4. The proponent must provide the required information within three years, or the assessment is terminated.

28. This is a very similar suspension provision and procedure to the one used by the National Energy Board in the *Clyde River*[3] case, which also raised questions of sufficiency of

[3] "The suspension of the NEB ruling in Clyde River is found in the following NEB decision: *TGS-NOPEC Geophysical Company ASA (TGS), Petroleum GeoServices (PGS) and Multi Klient Invest (MM) Application for NorthEastern*

technical information and the ability of Inuit to access and properly respond to technical information, as we discuss in more detail below.

C. The NIRB Rules of Procedure

29. The NIRB *Rules of Procedure* (*Rules*) guide the Board and Parties in the assessment hearing process.[4] Under the *Rules* the Board has a broad discretion to determine the appropriate procedure for the hearing, including setting timelines for proponents to respond to information requests (*Rules,* 17.3), and ordering adjournments on any terms it considers appropriate (*Rules,* 31.1).

30. The *Rules* are to be interpreted consistently with the *Nunavut Agreement* and with the broad application of the principles of natural justice and procedural fairness. We discuss these principles in more detail below. In general, the *Rules* are meant to be interpreted flexibly in order to result in a just, expeditious and fair hearing (*Rule*s, 4.1).

31. The *Rules* provide the Board with considerable procedural flexibility to deal with the current adjournment motion, even if the adjournment request is for an unusual length of time or if it may require a unique procedural solution. Where there is a procedural issue that is not provided for in the *Rules*, the Board may issue a direction on procedure to supplement the *Rules* at any time (*Rules,* 4.2). The Board may also dispense with or vary any part of the *Rules* which it considers it necessary for the fair determination of an issue (*Rules,* 4.3). The Board can do this with or without a hearing, or on a motion from a party (*Rules,* 4.4). The Board's direction on procedural issues prevails over the *Rules* (*Rules,* 4.5).

32. The *Rules* also provide the Board with the ability to compel a proponent to respond to Board direction that more work be undertaken to narrow the gap of unresolved technical issues:

> Where a party fails to comply with these *Rules* or a direction on procedure issued by the Board, the Board may:
>
> > (a) adjourn the proceeding until satisfied that the requirement has been complied with; or
> > (b) take such other steps as it considers just and reasonable. (*Rule*s, 6.1)

33. In addition, the Board has the procedural authority to compel a proponent to provide additional technical information at any time. Rule 17.1 provides that Parties may file requests for additional information (Technical Information Requests) from the proponent.

Canada 2JJ Seismic Survey under section 5.1(b) of the Canada Oil and Gas Operations Act Incomplete Application, online: <https://www.cer-rec.gc.ca/nrth/dscvr/2011tgs/2013-05-31nbl-eng.pdf>. As discussed below, this suspension was later found to be of insufficient time to rectify the technical information deficiencies, as detailed in the Supreme Court judgement in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,* 2017 SCC 40 [*Clyde River*].

[4] *Supra* note 2.

The Board may establish a schedule for the filing of these Technical Information Requests and for the filing of the proponent's responses (*Rule*s, 17.3). The Board has broad discretion to set timetables for the exchange of documents and for proponents to deliver information (*Rules,* 20.2(c); 21.1(g)) and to determine the timetable for the hearing (*Rule*s, 35.1).

34. The Board also has a broad discretion to adjourn a hearing on any terms it considers appropriate (*Rule*s, 31.1).

35. Overall, the *Rules* provide a flexible framework for the Board to craft the appropriate procedure to ensure a full and fair hearing of the issues. The key principles it must consider are procedural fairness, natural justice, and the protection of Inuit interests under the *Nunavut Agreement*.

III. A Summary of Key Facts Regarding the Hearing Process To Date

A. Fairness and Consultation Concerns Raised by Parties Regarding Prior to the Final Hearing

36. Throughout the review of Phase 2 to date, QIA and other Inuit Parties identified important information gaps and methodological issues that create uncertainty about potential impacts.

37. Significant gaps in technical information for the proposed project -- such as the lack of geotechnical studies on a final proposed rail route, lack of integration of Inuit Qaujimajatuqangit into baseline studies and proposed adaptive management processes, and the still-incomplete reassessment of the Culture, Resources and Land Use (CRLU) impacts -- make project-related environmental effects unclear. These gaps are discussed in more detail below. QIA would summarize the technical gaps, generally, as falling into the following categories:

1. A high degree of remaining uncertainty regarding Phase 2 impacts;
2. A misalignment between Baffinland's assessment and Inuit observations;
3. A lack of commitment to monitoring programs with high confidence in outcomes and robust Inuit involvement;
4. Insufficient Baffinland responses to address concerns about areas of significant potential impact;
5. Insufficient responses to rail route, and terrestrial and marine wildlife impacts;
6. Unaddressed concerns regarding cumulative effects;
7. Uncertainty regarding the possibility of future increases of iron ore shipping through Milne Port;
8. Unaddressed concerns with respect to socio-economic effects and benefits to Inuit;

9. A lack of integration of adaptive management principles into numerous specific management plans; and
10. A lack of integration of Inuit Qaujimajatunqangit within the assessment materials and the proposed adaptive management system.

38. The wide scope of these gaps in the assessment process to date resulted in a Final Hearing process which, as currently structured, is unable to properly evaluate the full scope of relevant evidence about Phase 2 impacts.

39. QIA consistently raised concerns that technical meetings during the review process were hindered by gaps in the quantity and quality of information supplied by Baffinland. This meant, for instance, that discussion on key issues such as integration of Inuit Qaujimajatuqangit were not completed during technical meetings due to insufficient time for technical review of all the outstanding issues.

40. Compounding these technical information gaps were delays in Baffinland's provision of fulsome materials and responses to the technical comments submitted. A key example of critical delays in provision of key technical information was Baffinland's provision of over 1000 pages of key technical evidence, with no Inuktitut translations, just two weeks prior to the start of the public hearing. This one example included outcomes from Baffinland's "Caribou Crossing Selection Workshop" upon which key Inuit concerns were meant to have been addressed.

41. Throughout the process, the Inuit Parties raised concerns about the gaps in technical information. For instance, QIA wrote to NIRB in May 2019 raising concerns about the need to address gaps in the technical record prior to the second technical meeting. In June 2019 QIA wrote to NIRB, attaching the Pond Inlet Tusaqtavut report, indicating that this report was meant to partially address a very significant gap in the technical assessment for Phase 2, namely the woefully inadequate integration of Inuit Qaujimajatuqangit and Inuit perspectives into the assessment process.

42. These process concerns undermined the participation of Inuit, especially in communities like Pond Inlet, who face significant potential impacts from the proposed Phase 2. Communities participating in the process have been consistently raising participation concerns throughout the review.

B. Fairness and Consultation Concerns Raised During the Hearing

43. It became increasingly apparent, during the November 2 - 6 public hearing process, that the hearing was impeded by significant gaps in technical information and failure to provide sufficient information to Inuit communities to address concerns or allow informed responses about impacts of the project.

44. The first three days of the Final Hearing were supposed to be the Technical Session during which there was the opportunity for Baffinland to provide final Technical Presentations on

10 different sets of technical topics, with opportunity for Intervenor questions on those topics. After 5 days of hearings, only 5 of the 10 technical topics had been canvassed, with the Board adjusting the process to truncate questions from the Inuit communities and other Parties in order to deal with time constraints.

45. The result is a Final Hearing process where, so far, the Inuit Parties (and other Intervenors) have had the ability to ask questions about less than half of the outstanding and unresolved technical issues, and there has been no opportunity for Community Roundtable questions based on the full evidence. Only one of the impacted Inuit communities, Pond Inlet, had the opportunity to orally present their Final Presentation to the Board about the Phase 2 project during the November 2 - 6 portion of the Final Hearing.

46. The Final Hearing process was also adjusted to respond to the November 4 motion from the Community of Igloolik, asking that the record of the Hearing be kept open to allow time for the most-affected Inuit communities to meet with one another, discuss the evidence, and update their submissions. Confirmation of funding for this community meeting was received as the Final Hearing process was commencing. Until that time, those communities had not been provided with an opportunity to meet directly with one another to discuss their concerns about Phase 2 as part of the process of completing their submissions. The Board ruled in favour of Igloolik's motion and also made adjustments to the hearing schedule to address the increasingly-apparent need for additional time to complete the final Technical Sessions.

47. QIA supports NTI's observation, made during NTI's November 6 adjournment motion, that the inability to complete even half of the proponent's technical presentations and questions on same during the scheduled Final Hearing was not the fault of the Board's process during the Final Hearing. It is, rather, the result of a project proposal with an inappropriately wide scope of unresolved technical issues and impact uncertainties at this stage in the Hearing process.

IV. The Appropriate Procedural Mechanism for Delaying the Proceeding

48. In conducting the assessment process, and exercising its discretion under the *Rules* and powers under *NUPPAA*, the Board's focus should be on addressing the substance of Inuit concerns about impacts and the need for a pause in the Hearing process in order to properly resolve unaddressed issues.

49. As noted above, the Board has wide discretion to adjourn the hearing on any terms it considers appropriate (*Rule*s, 31.1) and issue any procedural direction necessary for the fair determination of any issue (*Rules*, 4.3; 4.4). The *Rules* are meant to be flexible. Within the framework of principles of procedural fairness and natural justice, the Board must exercise the procedural flexibility which allows for culturally-appropriate Inuit

participation and which accommodates the protection of Inuit cultural and harvesting rights.

50. In addition to its wide discretion to adjourn a hearing (Rule 31.1), the Board also has the power to suspend an assessment process altogether until the proponent provides the required information (*NUPPAA,* s. 144). QIA suggests that a hearing adjournment and assessment suspension could be considered as sequential steps to address deficiencies in the review process.

51. QIA recommends that, first, the Board adjourn the hearing to a fixed date to allow time for Baffinland to provide the additional information requested by the Board and intervenors. QIA provides more thoughts below regarding the sufficient period for an adjournment.

52. QIA submits that it may be appropriate for the Board, either before or after an adjournment ruling is made, to canvas the Parties to determine which key technical issues require further information in order to narrow the scope of unresolved technical issues during the adjournment period.

53. QIA submits that it would be appropriate for the Board, following the adjournment period, to assess the sufficiency of the additional technical information meant to narrow the scope of unresolved technical issues to determine whether it is appropriate to proceed with the Hearing process based on the scope of evidence provided.

54. In the event that Baffinland is unable to provide requested technical information by that date, or the information that it provides does not substantially address the outstanding concerns of Inuit, QIA submits that it would be appropriate for the Board to exercise its authority under *NUPPAA* section 144 to suspend the assessment until such time as Baffinland provides sufficient information.

55. Alternatively, if the Board is of the view that Baffinland has already failed to provide information previously requested by the Board and Intervenors, QIA submits that it may be appropriate for the Board to proceed to suspend the assessment now, until such time as that information is provided.

56. QIA submits that, whichever alternative the Board chooses, the important thing is to ensure that there is sufficient time for the proponent to substantially address the concerns consistently raised by Inuit Parties regarding current key gaps in the technical record. Failure to do so is not in the public interest, as it would breach the constitutionally-protected rights of the Inuit (the protection of which is, as the *Clyde River*[5] case made clear, in the public interest).

57. An example of suspension of an assessment process to address Inuit concerns occurred in the *Clyde River* case, which offers insight into the appropriateness of this procedural

[5] *Supra* note 4 at 40.

mechanism, as well as a cautionary example of the need to ensure that a delay in a hearing process successfully allows for meaningful steps to address gaps in technical information and gaps in the Inuit consultation and accommodation process.

58. In the *Clyde River* case, the National Energy Board reviewed a proposal for marine seismic testing off the coast of Baffin Island in the same area which will be used by Baffinland for Phase 2 shipping. Similar issues arose in *Clyde River* as have arisen so far in the review of Baffinland's Phase 2 proposal, regarding the provision of technical information to Inuit and the sufficiency of the Aboriginal consultation and accommodation process.

59. In the *Clyde River* case, when the proponents were unable to address various issues raised by Inuit in the consultation process, the National Energy Board suspended the assessment to provide time for the proponents to prepare and submit information responding to those concerns. In its suspension decision, the National Energy Board addressed the following concerns:

> "[The proponents] were unable to answer various questions from community members and committed to following up with more information… There has been a lack of information and communication to date regarding how local and/or regional scientific and Inuit Qaujimajatuqangit or traditional knowledge, and information provided by potentially affected Inuit groups and/or persons has been or will be considered in the project design, including mitigation measures. [The proponents] are asked to describe in detail the information obtained from communities and organizations that relate to the project design. [The proponents] should indicate how this information has affected the project design, and if not, why."[6]

60. The final Supreme Court decision in the *Clyde River*[7] case underscores the importance of making sure that the information provided by the proponent, during a delay in the hearing process in order to fill gaps in the evidentiary record, does in fact actually address Inuit concerns, is made accessible to communities, and is available in Inuktitut. In *Clyde River,* the proponent submitted a 3,962 page document in response, and the National Energy Board lifted the suspension and resumed its assessment. It ultimately approved the project. However, the proponent's document was only posted on the Board's website and delivered to the offices of the affected Hamlets. The vast majority of the document was not translated into Inuktitut. The Supreme Court of Canada found that:

[6] *TGS-NOPEC Geophysical Company ASA, supra* note 4 at 2.
[7] *Supra* note 4.

> "[N]o further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered" (*Clyde River* at para 11).

61. As the *Clyde River* case shows, pausing the assessment process is necessary when there are outstanding concerns and questions from Inuit about a proposed project. The case also demonstrates that a reviewing Board must be careful, even when the proponent does provide answers, to ensure that the answers are actually responsive to Inuit concerns, and are accessible to the communities, in order to fulfill the requirements of proper consultation.

62. QIA's proposal would facilitate this careful approach. If the Board adjourns the assessment to a fixed date, the proponent will have time to conduct further study and submit further information responsive to Inuit concerns. QIA submits that the technical information gaps which must still be addressed in order to ensure proper assessment of Phase 2 include:

- A proposal for a specific final rail route, based on complete location-specific geotechnical, environmental, Culture, Resources and Land Use studies and confirmation of Inuit acceptance of the proposed route;
- A completed reassessment of the Culture, Resources and Land Use, including proper consideration of the combination of effects of a bi-coastal, two port and two railway project, proper integration of the findings of the Tusaqtavut study, and proper incorporation of Inuit perspectives on significance/acceptability of likely impacts;
- A refined Inuit Qaujimajatuqangit Framework, agreed to by the Inuit Parties, as committed to by Baffinland but not-yet conducted;
- Proper integration of Inuit Qaujimajatuqangit and Inuit perspectives into determinations of impact significance and other components of the Final Environmental Impact Statement Addendum (FEIS Addendum);
- Reconsideration of the shipping season opening and closing options with a process that include Inuit in decision-making regarding appropriate season times and reconsideration of whether larger ships with a narrower time window is feasible;
- An agreed-upon scope, mandate and structure for an Inuit Committee which participates in the Adaptive Management process;
- Revised caribou impact estimates, mitigation and monitoring to reduce uncertainty;
- Proper assessment of alternative shipping routes;
- Confirmation of the implications that "operational flexibility", allowing higher levels of ore production, could have on total tonnage for Phase 2 and any environmental effects estimates changes that could result if there were a difference between a 12 million tonnes per annum production rate versus an 18 (or more) million tonnes per annum production rate;
- An agreed-upon structure and plan for Inuit training and development; and
- A detailed summary of socio-economic benefits, as agreed upon with Inuit, associated with the application.

63. QIA suggests that it would be appropriate for the Parties to provide input to, and NIRB to determine, whether Baffinland has submitted sufficient additional technical information to address the wide scope of impact uncertainties and unresolved concerns that remain for Phase 2. QIA suggests that the Board can canvas the Parties on this question and then determine whether the new information is sufficiently responsive. If not, the Board may then suspend the assessment process to provide Baffinland further time to conduct the appropriate studies and provide required information, to ensure that the information provided substantially addresses the concerns about impacts on Inuit. In the absence of a proper technical record with sufficient detail and steps to address concerns about impacts or resolve the currently wide scope of unresolved concerns, there is a real risk that any Board decision will be based on many unanswered questions and concerns, which would be contrary to principles of procedural fairness, Aboriginal consultation legal obligations, and the intent of the *Nunavut Agreement* to ensure impact reviews adequately accommodate Inuit rights and concerns.

V. Delaying the Hearing Addresses Concerns of Procedural Fairness

64. The Board's *Rules* are meant to be applied in a manner consistent with the principle of natural justice and procedural fairness, while being liberally construed to ensure a just, expeditious and fair hearing (*Rule*s, 4.1). QIA submits that an adjournment of the hearing, followed by a possible suspension of the hearing if necessary, meets the requirements of procedural fairness.

65. At its most basic, the principle of procedural fairness requires that individuals or communities who are participating in a decision-making process such as this hearing have sufficient information to enable them to be fully informed of the issues, make representations, appear at the hearing, and effectively prepare their case.[8] This requires that a Party be provided with sufficient information to allow them to participate in the process in a meaningful way,[9] and disclosure of any information that may be relevant.[10]

66. If sufficient information or disclosure has not been provided, an adjournment should be granted in order to allow time for that to happen, as well as time for the Parties to prepare their case.[11]

67. In considering whether to grant an adjournment or suspend the hearing, the Board should consider:

    - Whether the Board is more likely to avoid a mistake in this assessment if it grants the adjournment (*Baker* at paras 22-25);

[8] *Patel v Canada (Minister of Citizenship and Immigration),* 2015 FC 900 at para 16.
[9] *Confederation Broadcasting (Ottawa) v. Canada (Radio-television & Telecommunications Commn.)* [1971] S.C.R. 905 at p. 925
[10] *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at paras 24-28 [*Baker].*
[11] *Bayfield v College of Physiotherapists of Ontario,* 2015 ONSC 6806.

- The seriousness of the injury likely to be sustained by Inuit if the Board comes to the wrong decision in this assessment (*Baker* at para 25); and
- How this risks affecting the constitutionally protected rights of Inuit (*Baker* at para 25).

68. QIA submits that given the extent of the gaps in the existing technical information and the seriousness of the unresolved concerns raised by Inuit, the Board would run a substantial risk of mistake by proceeding without and adjournment or suspension. Such a mistake could profoundly affect the rights of Inuit.

69. The "cost" of the adjournment - that is the prejudice to Baffinland - must be balanced against procedural fairness concerns. QIA submits, however, that the economic cost of an adjournment, although possibly not minimal from the perspective of Baffinland investors, is grossly outweighed by the risk of permanent injury to the constitutional rights of Inuit if the review process does not provide for proper "deep consultation".

70. QIA submits, moreover, that it is ultimately in Baffinland's interest for the Board to conduct a fair process that reaches a result which substantially addresses the concerns of Inuit. Failing this, the Board's decision is vulnerable to judicial review and thus further delays in the approval process, exposing the Baffinland mine to the enormous risk of having the entire project retroactively cancelled - as happened with the TransMountain and Northern Gateway pipelines as discussed below. The temporary impact of the adjournment must be weighed against the catastrophic consequences of cancellation.

VI. Delaying the Hearing Addresses Concerns Regarding the Aboriginal Consultation and Accommodation Process

A. The Requirements of "Deep Consultation" in This Case

71. The Duty to Consult and Accommodate (DTCA), was first articulated as a distinct legal requirement in the Supreme Court's 2004 *Haida Nation v British Columbia (Minister of Forests)* decision.[12] Where an Aboriginal party reasonably asserts that a Crown decision will affect Aboriginal rights, which are protected under section 35 of *The Constitution Act, 1982*,[13] there is a duty to consult and accommodate to address any potential adverse impact on the Aboriginal right.

72. The Supreme Court characterized DTCA duties as lying on a spectrum (*Haida* at para 43). In general, the level of consultation and accommodation required depends on two factors: the strength of the claim to an Aboriginal right and the seriousness of the adverse impact which a government decision would have on the claimed right (*Haida* at para 39). The more that the asserted aboriginal right is confirmed in existing cases or treaties, and the

[12] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 [*Haida*].
[13] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s.35.

more serious the potential harm to the Aboriginal right from the proposed decision, the more onerous the duty to consult and, if appropriate, accommodate.

73. In this case, the Inuit cultural, harvesting and other rights are enshrined in the *Nunavut Agreement* which, as a modern treaty, guarantees protection of these rights. Other cases, notably *Clyde River*, have confirmed that adverse impacts on marine mammals are at the highest end of the spectrum of potential harms to Inuit section 35 rights (*Clyde River* at para 43). The situation of the Phase 2 review is one where the required Aboriginal consultation and accommodation is at the highest end of the DTCA spectrum: "deep consultation" is required.

74. In *Clyde River,* the Supreme Court looked at the requirements for "deep consultation" in the context of a project with potential impacts on Inuit rights to harvest marine mammals. In describing why "deep consultation" was required in that case, the Supreme Court explained that Inuit treaty rights to hunt and harvest marine mammals were well established and important to the appellant's economic, cultural and spiritual well-being. (*Clyde River* at para 43). Additionally, the risks posed were high, as the project had the potential to increase the mortality risk of marine mammals, cause permanent hearing damage, and alter migration routes, thereby affecting traditional resource use. The Supreme Court concluded that,

> "Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum" (*Clyde River* at para 44).

75. The Supreme Court concluded in *Clyde River* that the inability of the proponent to answer Inuit community questions about potential impacts on Inuit harvesting rights, the failure to provide easily accessible technical information to remote Inuit communities with limited internet and technology access, the failure to translate key materials into Inuktitut, the failure to explain complex technical information in a culturally-accessible manner, and the failure to provide other procedural safeguards appropriate for consultation with remote Inuit communities, meant that requirements of "deep consultation" were not met (*Clyde River* at paras 47 - 49).

76. In addition to the procedural shortcomings, the Supreme Court also found that the overall inquiry was "misdirected", as the NEB focused its findings on the environmental effects and whether they could be mitigated, as opposed to the impact of the project on the rights of the Inuit. The Supreme Court considered the technological, linguistic, and other deficiencies in the process and found that,

> "[N]o mutual understanding on the core issues -- the potential impact on treaty rights, and possible accommodations -- could possibly have emerged from what occurred here" (*Clyde River* at para 49).

77. The *Clyde River* case establishes that procedural safeguards necessarily will vary with each case, but particular safeguards are necessary in all cases to fulfill a duty of "deep consultation." Those procedural safeguards, which ensure adequate "deep consultation" where impacts on Inuit rights are high, include:

- a meaningful opportunity to make submissions (*Clyde River* at para 47);
- formal participation in the hearing process (*Clyde River* at para 47);
- participation opportunities with funding to support proper participation (*Clyde River* at para 47;
- an oral hearing (*Clyde River* at para 47);
- funding to allow the Inuit community the ability to submit its own scientific evidence (*Clyde River* at para 51); and
- the opportunity to present evidence and test the evidence of the proponent and make final arguments (*Clyde River* at para 51).

78. In some situations, postponement of an assessment process may be the most appropriate measure to ensure that the duty to consult is discharged and concerns are addressed. This was, most recently, confirmed by the Federal Court of Appeal in the *Gitxaala v Canada* case about the proposed Northern Gateway pipeline.[14]

79. The *Gitxaala* case addressed concerns about the risks of proceeding with an assessment process in the absence of sufficient information or substantive answers to Indigenous concerns. The Federal Court of Appeal quashed Canada's approval of a major pipeline through northern British Columbia because of repeated failures to address the concerns raised by First Nations who would be affected, failures to provide further information or responses, and (notably) refusals to extend timelines that were arbitrarily short and insufficient to provide for meaningful consultation *(Gitxaala* at paras 327-329).

80. In *Gitxaala,* several First Nations had specifically requested that Canada's decision on the project be delayed to allow for further scientific studies (*Gitxaala* at para 250). Without these studies, there were major unanswered questions about potential oil spills, and modelling of how environmental conditions would affect spills. Canada refused to delay the decision to allow for the studies.

81. The Federal Court of Appeal in *Gitxaala* concluded that:

- "[T]he importance and constitutional significance of the duty to consult provides ample reason ... in appropriate circumstances, to extend the deadline" (*Gitxaala* at para 251);
- Aboriginal groups "were entitled to much more in the nature of information, consideration and explanation from Canada regarding the specific and legitimate concerns they put to Canada" (*Gitxaala* at para 287);

[14] *Gitxaala v Canada,* 2016 FCA 187 [*Gitxaala*].

- "The inadequacies—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project...were left undisclosed, undiscussed and unconsidered" (*Gitxaala* at para 325); and
- These problems would likely have been solved had there been an extension of time to allow these steps to be pursued (*Gitxaala* at para 328).

82. *Gitxaala* establishes that a failure to extend a project review timeline and postpone an approval, in order to ensure meaningful consultation with affected Aboriginal groups and to adequately answer their questions and address their concerns, undermines the adequacy of the review. In the *Gitxaala* case, the failure to take the time to ensure adequate Aboriginal consultation and accommodation had occurred ultimately imperilled the entire project, which was eventually cancelled.

83. Together, the *Clyde River* decision of the Supreme Court and *Gitxaala* decision of the Federal Court of Appeal provide clarity regarding the appropriate procedural safeguards to meet the requirements of a "deep consultation" process, as further detailed below with respect to specific concerns about the consultation process.

B. Lack of Adequate Access to Technical Information

84. A key concern, repeatedly raised by Inuit Parties, was the late and incomplete provision of key technical materials. For instance, Baffinland committed to provide technical materials in August, to address gaps in the technical record, and these materials were not provided until mid-October, just prior to the commencement of the Final Hearing. This included evidence on Baffinland's Food Security Assessment, Inuit Qaujimajatuqangit integration, marine mammal impact studies and other issues of high concerns to the Inuit Parties.

85. The late provision of technical materials related to repeated changes to the proposed Phase 2 project, to address the many remaining areas of uncertainty regarding the Phase 2 component infrastructure, such as a proposed final route for the rail corridor. There is, moreover, an extensive body of technical evidence that is still incomplete and outstanding, including:

- Geo-technical studies to confirm if the so-called Route 3 option for the rail corridor is even technically feasible, and the actual environmental and socio-cultural impact footprint of Route 3 in comparison to Route 1 or Route 2, as well as a full assessment of whether Route 3 is actually preferable to Inuit Parties (who have not yet received enough information to make informed estimations of its acceptability);
- Final plans, based on complete technical assessment, for rail crossing numbers and locations as well as final embankment construction plans;
- Clarity regarding the impacts of the specific level of production Baffinland envisions, now that it has amended its application to be based on rail and ship transit activity levels rather than ore production levels (and given that existing FEIS was based on

12 million tonnes per annum (MTPA) production while it appears that Baffinland is asking for 'operational flexibility' to an unspecified amount of ore which has not been subject to proper environmental assessment);
- Reassessment of Culture, Resources and Land Use, as committed to by Baffinland and which was supposed to be provided by August 23, 2019 and which Baffinland seemed to suggest at the hearing it is now not compelled to complete prior to the end of this environmental assessment; this leaves the Board to make decisions on this most sensitive and central of valued components on the basis of an inadequate and incomplete CRLU assessment;
- Proper integration of Inuit Qaujimajatuqangit into the Adaptive Management planning process; and
- A detailed summary of socio-economic benefits, as agreed upon with Inuit, associated with the application.

86. In both the *Clyde River* and *Gitxaala* decisions, as detailed above, the appellate Courts found that inadequate provision of technical information was fatal to a proper Aboriginal consultation process. In *Gitxaala,* the Federal Court of Appeal ruled that the review deadline should have been extended to address this breach (*Gitxaala* at para 329). In *Clyde River,* the Supreme Court ruled that the short extension of the hearing was insufficient to cure the inadequacies in the provision of accessible technical information. In this Phase 2 review process, QIA submits that, similarly, it is procedurally appropriate to ensure that a review in the delay process provides sufficient time for Inuit Parties to have adequate access to the type of technical information that will allow them to fully understand the final intended project, the full scope of its impacts, and what accommodation measures may be appropriate for inclusion in the terms of conditions for any approval.

C. Lack of Access to Information in Inuktitut

87. Inuit Parties have raised concerns, both prior to and during the Final Hearing process about Baffinland's failure to provide materials which are properly translated into Inuktitut, in a timely manner.

88. The Board's processes recognize that a balance must be found between procedural efficiencies and the need to ensure that Inuit are able to access key materials, and communicate, in Inuktitut, as required by the *Nunavut Agreement* and *NUPPAA*.

89. The Inuit Parties have consistently raised concerns during the review process about the provision of key technical materials in Inuktitut, including (1) the lack of some key materials in Inuktitut; (2) inconsistencies and inadequacies in the quality of translation which have created confusion; and (3) timeliness of provision of Inuktitut materials. A notable example is the provision of over 1000 pages of key technical evidence on issues of high concern to Inuit -- including marine mammal impact and food security studies -- with no Inuktitut translation, just two weeks prior to the commencement of the Final Hearing.

90. QIA notes that the Supreme Court decision in *Clyde River* specifically addressed the requirements for access to key technical materials in Inuktitut as one requirement in situations where "deep consultation" is required. In explaining in that case why the proponent's decision to submit one single 3926 document was not sufficient consultation, the Supreme Court noted that only a fraction of the technical document was translated into Inuit. The Supreme Court found that,

> "[T]o put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation… No mutual understanding on the core issues -- the potential impact on treaty rights, and possible accommodations -- could possibly have emerged from what occurred here" (*Clyde River* at para 49).

91. *Clyde River* makes it clear that, particularly for key documents in a review process, Inuktitut translation can be a component of ensuring that Inuit parties have a meaningful opportunity to really understand a proposed project. In the Phase 2 review to date, it has not been possible for the Inuit communities to properly understand the core issues and potential impacts of what is being proposed, particularly where it could affect cultural activities and food security related to cornerstone cultural species such as caribou and marine mammals. This is due, in part, to the lack of proper translation of key technical documents. This is evidenced by the scope of questions arising from the Inuit community representatives at the Technical Session of the Final Hearing as it progressed (and failed to complete).

D. Failure to Properly Integrate Inuit Qaujimajatuqangit and Inuit Perspectives

92. The technical questions and responses, in the incomplete Technical Session of the Final Hearing, revealed a high level of concern on the part of Inuit Parties that Inuit Qaujimajatuqangit and Inuit perspectives overall, have not been adequately integrated into the assessment process, including into determinations of 'significance' of impacts, mitigation and monitoring plans, or the adaptive management process.

93. During previous technical meetings prior to the commencement of the Final Hearing, the scope of unresolved technical issues created schedule challenges which meant that issues of Inuit Qaujimajatuqangit integration were not fully discussed or addressed at that point in the review process.

94. QIA submits that the failure to adequately reflect Inuit Qaujimajatuqangit has been readily evident in all assessments in the FEIS Addendum and assessments that have occurred in the interim, including, for example, in Baffinland's October 2019 Food Security Assessment. QIA has been pointing to this gap since providing technical comments in

January 2019. This led to a commitment from Baffinland to reassess Culture, Resources and Land Use, including incorporation of the results of two Tusaqtavut Reports and to ensure greater integration of Inuit perspectives on significance. Baffinland has, to date, not completed this requirement.

95. Currently, Baffinland has not captured a verifiable set of Inuit perspectives on the significance or acceptability of effects of the Project on any valued component in the FEIS Addendum or any supplemental filings. This gap in properly understanding significance has led to extensive and still unresolved questions from the Inuit Parties.

96. Inuit Qaujimajatuqangit and Inuit perspectives are also not yet adequately integrated into determinations of appropriate mitigation or monitoring. Baffinland's very recently proposed Inuit Advisory Panel, IQ Management Framework, and Culture, Resources and Land Use Monitoring Program, have not been subject to Inuit verification as to their appropriateness. Baffinland has created its IQ Management Framework based on its own perspectives and without any formal endorsement or input from the Inuit Parties.

97. For example, the Inuit Advisory Panel concept as currently proposed by Baffinland lacks any terms of reference or detail about how it would work, and has been subject to critique by Inuit Parties for seeming to be a continuation of the "refusable advice provision" model currently employed in the Working Group system. As presented by Baffinland, the Inuit Advisory Panel exists only at a conceptual level, and may act as a conduit to defer the required work on integration of Inuit Qaujimajatuqangit until well after the NIRB review process is complete, with no assurances to Inuit parties that this work will be conducted to a standard acceptable to Inuit or even exist prior to project construction and operation.

98. Overall, Inuit Qaujimajatuqangit and Inuit perspectives remain weakly integrated both in the assessment of the effects of the proposed Phase 2 Project, and in the monitoring, management and adaptive management systems proposed to govern the Project. Time is needed to get this system right so that it can protect the rights and interests of Inuit in the future, should the Project proceed. This is similar to the situation encountered by the NEB in its review of the marine seismic testing proposal in the *Clyde River* case.

99. In that case, when the NEB determined that a suspension was required in order to address deficiencies in the assessment of socio-economic impacts and Inuit consultation, the Board specifically stated that the proponent needed to address the unresolved issue of how Inuit Qaujimajatuqangit was incorporated into the assessment and how Inuit perspectives were affecting project design, and if not, why.[15] A suspension of the hearing was required so that the proponent could address this gap (which was insufficiently addressed, and which was one of the factors leading the Supreme Court to quash the approval in that project).

[15] *TGS-NOPEC Geophysical Company ASA, supra* note 4 at 2.

100. The remaining high level of uncertainty about adequate integration of Inuit Qaujimajatuqangit and Inuit perspectives was evident in the extensive questions asked by Inuit Parties during the incomplete Final Hearing Technical Session. It is clear that the Inuit Parties have a high level of concern about current technical uncertainties about the full scope of impacts and how those will be mitigated, in Phase 2, given the inadequate integration of Inuit Qaujimajatuqangit and Inuit perspectives.

101. QIA submits that, without proper integration of Inuit Qaujimajatuqangit and Inuit perspectives on significance and into the monitoring and adaptive management process for Phase 2 proposal, NIRB is being asked to make its decision based primarily to exclusively on Baffinland's admittedly western scientific perspective and with serious deficiencies in the Inuit rights accommodation process.

E. Inadequate Participant Funding

102. QIA notes that the concerns about the Aboriginal consultation and accommodation process, as detailed above, may have been exacerbated by insufficient funding for Inuit community participation.

103. QIA notes that *NUPPAA* currently does not provide for participant funding. The lack of participant funding removes a key tool for addressing Aboriginal consultation and accommodation concerns.

104. In the *Clyde River* case, the Supreme Court acknowledged that financial assistance, even when not necessary, can significantly improve the quality of consultation (*Clyde River* at paras 48-49). This is consistent with the previous Supreme Court finding in *Taku River v Canada*, where provision of participation funding was cited as one factor in determining that proper Aboriginal consultation and accommodation had occurred.[16]

105. In the Phase 2 review, the Inuit communities faced the significant challenge of reviewing enormous volumes of technical information for a project which they perceive will have enormous impacts on Inuit culture, harvesting rights, food-security, and land use. Some resources were provided to assist with participation but the affected communities indicated that it was insufficient for full participation. Without adequate resources to engage technical experts to peer review and assist in addressing their concerns, the Inuit Parties were at a significant disadvantage during the technical review process, and repeatedly expressed concerns about this.

106. Last-minute accommodation was made after the Final Hearing had already commenced, confirming that federal funding will be provided to allow the five most-affected Inuit communities to have a workshop at the end of November to discuss the technical evidence and develop further submissions to the board. QIA submits that this does not,

[16] *Taku River v Canada*, 2004 SCC 74.

however, sufficiently address the resource gap which has impeded Inuit participation to date.

107. An adjournment or suspension of the hearing process will provide an opportunity for Baffinland and other responsible Parties to ensure that the Inuit communities have the proper technical resources for meaningful engagement in the technical review process.

VII. The Appropriate Time Period for a Delay of the Hearing

108. QIA submits that the Board consider the perspectives of the most-affected Inuit communities and organizations when identifying the appropriate period for an adjournment, taking into consideration factors such as harvesting season and which steps would be required for provision and review of updated technical information from Baffinland with sufficient time to properly narrow the currently-wide range of unresolved issues.

109. QIA recognizes that, based on its experience, a period of approximately one year will likely be required for this to occur.

110. The appropriate period for adjournment should also consider the time required to address any concurrent application from Baffinland to amend Project Certificate 005 (for instance, to extend the temporary production increase set to 6.0MTPA). QIA respectfully recommends that time required to review the new application should be added to any timeline for review of the current Phase 2 proposal.

111. QIA suggests that the following steps would be required during the period of an adjournment (or, if necessary, suspension of the hearing):

    1. Confirming with the Parties which key technical issues require further information, consultation and accommodation measures in order to narrow the scope of unresolved technical issues;
    2. The provision of updated technical information by Baffinland, which addresses the key unresolved technical issues;
    3. Steps to allow further assessment certainty after the provision of updated technical information by Baffinland, including:
        a. The opportunity for further information requests and responses based on additional technical submissions from Baffinland;
        b. A technical meeting to clarify and resolve issues;
        c. A review by NIRB to assess the sufficiency of Baffinland's efforts to narrow the scope of unresolved technical issues and provide more technical certainty regarding key components of the Phase 2 proposal; and
        d. A pre-hearing conference prior to the next Technical Session of a Final Hearing to identify remaining key issues, assess the quality of technical

information provided by Baffinland, and determine if the issues are ready for the Technical Session of a Final Hearing; and

4. Determination by NIRB if a suspension of the hearing is required in the event that Baffinland is unable to provide requested technical information by the end of the adjournment period, or provides information that does not substantially narrow the scope of unresolved technical issues.

VIII. Summary of QIA Written Response to the NTI Motion

112. QIA does not take its position on the NTI motion lightly. Delay to the Phase 2 project is a very serious issue with real consequences to Inuit. As the Designated Inuit Organization under the *Nunavut Agreement*, QIA has to consider this request for an adjournment of the Final Hearing on Phase 2, and the resulting delay in the review process to allow further work to occur, very carefully. The Mary River Project plays an important economic role in contributing to the well-being of Inuit and Nunavummiut. QIA has a complex and ongoing relationship with Baffinland for the implementation of the IIBA for the Mary River Project, and a lease for activities that occur on Inuit Owned Lands, all of which will be affected by this delay.

113. QIA's goal, throughout the Phase 2 review process, has been to find the equitable balance between potential opportunities for Inuit and the effects on the environment and culture. The decisions made during this review process will have long-lasting impacts. QIA has been doing its part to convey Inuit perspectives when concerns are raised about the review process. QIA wishes to ensure that Inuit interests are at the forefront in a just and fair review process that properly consults with Inuit and accommodates Inuit concerns.

114. Despite QIA's best efforts, a wide scope of technical aspects of the project remain uncertain, and as a result many technical issues remain unresolved. The current hearing process, if it proceeds without an adjournment to allow time to narrow the scope of unresolved issues and address Inuit consultation and accommodation concerns, will result in a flawed outcome that hasn't adequately dealt with the serious questions that must be addressed for this project.

115. QIA remains willing and eager to work with Baffinland, in a process of meaningful engagement that respects Inuit concerns and aligns with the Inuit vision of Nunavut laid out in the Preamble of the *Nunavut Agreement*.

116. QIA therefore respectfully submits that:

    - An adjournment of the Final Hearing for Phase 2, for a period of approximately one year (or such time as the Board deems appropriate based on submissions from the Inuit communities) is necessary in order to address issues of procedural fairness and inadequacy in the Aboriginal consultation and accommodation process for Phase 2;

- In the alternative, it may be appropriate for the Board to consider suspension of the project assessment if an adjournment does not address current procedural fairness and Aboriginal consultation gaps;
- During the period of adjournment, Baffinland be directed to take specific steps which would ensure that the currently-wide scope of unresolved technical issues and concerns can be narrowed sufficiently to ensure a proper NIRB review in the Final Hearing.