

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

**SUBMISSION OF THE QIKIQTANI INUIT ASSOCIATION ("QIA")
REGARDING THE DECEMBER 17, 2020 NOTICES OF MOTION
BROUGHT BY THE HAMLET OF CLYDE RIVER ("Clyde River") AND
THE MITTIMATALIK HUNTERS AND TRAPPERS ORGANIZATION ("MHTO")**

1. The Nunavut Impact Review Board ("NIRB") asked all parties to comment on three motions brought in writing on December 17, 2020:
 - a. Clyde River requests an order that NIRB postpone the Public Hearing for the Mary River Project Phase 2 Proposal (Phase 2) from the currently-scheduled recommencement date of January 25, 2021, until March 2021 or later;
 - b. MHTO requests an order that NIRB adjourn the Public Hearing from the currently-scheduled recommencement date of January 25, 2021, until the first available opportunity after COVID-19 vaccinations are available and administered, travel restrictions are lifted, limits on public gatherings are lifted so that a minimum of 100 persons could attend in person at hearing sites, and Community Roundtable representatives are able to be present together in one hearing room; and
 - c. MHTO requests an order amending the agenda for the Community Roundtable to allow for presentations by all Intervenors, and not just Baffinland Iron Mines Corporation (Baffinland).
2. Clyde River and MHTO rely on a number of grounds for these motions, including:
 - a. The public health risk posed by continuing with the hearings during the COVID-19 pandemic, particularly in view of the recent presence of COVID-19 cases appearing in Nunavut, and the foreseeable end to the need for public health restrictions once vaccination programs occur in upcoming months;
 - b. The bias in favour of the proponent, Baffinland, and against the Inuit communities, in proceeding with a hearing format which:
 - i. limits Inuit participation overall due to restrictions on the number of people who can attend at meetings;

- ii. limits Inuit participation but restricting culturally relevant means of communicating through in-person attendance where impacted Inuit communities can orally communicate in-person and with one another at the same location;
 - iii. limits the ability of Inuit communities, during the hearings, to communicate with technical advisors who are not able to attend in the same locations; and
 - iv. provides the opportunity for just one party, Baffinland, to make presentations and present key relevant information during the Community Roundtable, while not allowing other intervenors the ability to make presentations that would also provide key relevant evidence which should be accessible to the NIRB panel and the Inuit communities.
- 3. As detailed below, QIA supports the three motions based on the above and other grounds outlined in the Clyde River and MHTO motions, as well as the following additional grounds:
 - a. A modest delay would allow NIRB (and the Crown) to take steps to ensure that legal obligations for deep consultation with Inuit, and accommodation, occurs properly for a project with historic levels of impacts on Inuit rights and interests (and reduces the risk for future longer delays caused by legal challenges on these grounds);
 - b. A modest delay would allow for further resolution of key outstanding issues of high significance to impacted communities, as detailed below, which will benefit NIRB's ability to discharge its role by narrowing the scope of outstanding issues and clarifying the appropriate Project Certificate terms and conditions;
 - c. A modest delay would ensure that all Parties have the benefit of key evidence required by NIRB with respect to current Baffinland operations, as outlined in the December 23, 2020 NIRB Annual Monitoring Report, and detailed below. In this just-released report, NIRB asks Baffinland to provide key information within 60 days on key issues such as the function of the Marine and Terrestrial Working Groups, ice-breaking and ice-management activities, and fish species connectivity. These are key issues in the current hearing as well and relevant to the Inuit communities' analysis of impacts of current and proposed Baffinland operations and thus the appropriate terms and conditions meant to address concerns about these matters. These are issues that QIA expects can be further advanced by the parties prior to recommencement of the Public Hearing.

Relevant Statutory and Legal Provisions Regarding the Hearing Timing and Process

- 4. NIRB has the procedural ability and obligation to ensure flexibility in its procedures to ensure meaningful Inuit participation including a process which accommodates traditional Inuit decision-making methods (which may require time for oral decision-making, internal community consultation, and translation of documents which ensures adequate community comprehension of critical issues affecting Inuit rights).

5. Article 12 of the *Nunavut Agreement*¹ imposes upon NIRB an obligation to ensure culturally-appropriate flexibility in its processes in order to ensure meaningful Inuit participation in review processes:

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 ...

(ii) give due regard and weight to the tradition of Inuit oral communication and decision-making.

6. These requirements for procedural flexibility are echoed in the *Nunavut Planning and Project Assessment Act (NuPPAA)*² which similarly requires procedural flexibility to accommodate Inuit, and emphasizes that NIRB must take “all necessary steps” to promote public participation of Inuit:

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.

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.

7. The NIRB *Rules of Procedure (Rules)*³ guide the Board and Parties in the assessment hearing process. Under the *Rules* the Board has broad discretion to determine the appropriate procedure for the hearing, including the ability to order adjournments on any terms it considers appropriate (*Rules*, 31.1). The *Rules* provide the Board with considerable procedural flexibility NIRB has the procedural flexibility, for instance, to issue a procedural direction to dispense, vary, or supplement its *Rules* at any time (*Rules*, 4.2, 4.3, 4.5).
8. Specifically, the Board has broad discretion to adjourn a hearing at any time and on any terms it considers appropriate (*Rules*, 31.1).
9. NIRB is obligated to determine hearing locations and schedules based on the considerations of “fairness to the parties, the location of the project proposal in question, the promotion of public awareness and participation at the hearing, and the convenience to the parties” (*Rules*, 35.1).

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.tunnigavik.com/documents/publications/LAND_CLAIMS_AGREEMENT_NUNAVUT.pdf> [*Nunavut Agreement*].

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

³ *NIRB Rules of Procedure*, September 3, 2009.

An Adjournment is Consistent with NIRB's Procedural and Substantive Obligations

10. 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 (*Rules*, 4.1). QIA submits that an adjournment of the hearing, and provisions for the ability for intervenors to make presentations at the Community Roundtable once the hearing recommences, meets the requirements of procedural fairness.
11. 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. The Board's ability to properly canvass the substance of the Inuit concerns, hinges on the ability of Inuit to properly understand the full technical scope of the project and proposed mitigation and accommodation measures. This Inuit engagement with the substance of the hearing matters depends, in turn, on the ability of Inuit to participate in a manner which is culturally relevant and accessible. Procedural steps which limit the ability of the impacted Inuit communities to participate in a manner which allows for face-to-face inter-Inuit discussion, in Inuktitut, as well as face to face discussion with technical advisors, poses a serious risk to meaningful Inuit participation and thus reduces the ability of the process to properly address substantive Inuit concerns.

An Adjournment Is Consistent With Deep Consultation Obligations

12. The need for substantial procedural flexibility that ensures meaningful Inuit participation, for projects with the potential for serious impacts on Inuit rights, was confirmed in the Supreme Court's decision in the *Clyde River*⁴ case involving a similar north Baffin context and a project with serious impacts on marine wildlife and ecology. The court in *Clyde River* confirmed that a "deep consultation" must be sufficiently accessible to Inuit communities. Specifically, the Court ruled that deep consultation for a project with serious impacts on Inuit must occur in a culturally appropriate manner that includes sufficient time for review of project-related materials, translation of materials, and culturally-appropriate internal community decision-making.
13. In some situations, postponement of an assessment process is the proper step to ensure that a duty of 'deep consultation and accommodation' is properly discharged. This was confirmed, for instance, in *Gitxaala v Canada* (a case involving the proposed Northern Gateway pipeline) where the Federal Court of Appeal found that, "[T]he importance and constitutional significance of the duty to consult provides ample reason ... in appropriate circumstances, to extend the deadline."⁵ In *Gitxaala*, the failure to adapt the hearing process, with procedural flexibility to ensure deep Aboriginal consultation and accommodation, ultimately imperilled the entire project which was eventually cancelled.
14. As affirmed by the Supreme Court in *Clyde River*⁶, the protection of constitutionally-protected rights of Inuit is in the national public interest, and requires deep consultation where there are significant impacts on Inuit rights. Deep consultation includes steps to address the geographic and language challenges involved in fully engaging Inuit in a culturally-appropriate manner.

⁴ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 S.C.R. 1069.

⁵ *Gitxaala v Canada*, 2016 FCA 187 [*Gitxaala*] at para. 251.

⁶ *Clyde River*, supra note 4, at para. 40.

15. QIA recognizes and appreciates the steps and considerable efforts which NIRB has been taking to adapt its procedures to the unprecedented situation of a global pandemic which limits travel and public gatherings. The implications of COVID-19 restrictions are particularly acute for Inuit consultation where inter-Inuit interaction and internal community discussion processes are the cultural foundation for Inuit decision-making on key issues such as a project like this which will affect many generations. While modifications to the hearing process to address the pandemic are appropriate at a general level, they cannot occur at the expense of a process which ultimately excludes Inuit participation in a meaningful manner for a project of this magnitude.

An Adjournment Would Allow For Potential Further Resolution of Key Issues and Provision of Key Evidence

16. A modest delay would allow Baffinland to further resolve some key outstanding issues, which will in turn allow NIRB to discharge its role based on a narrower scope of outstanding issues and further clarity about the appropriate Project Certificate terms and conditions.
17. Specifically, meaningful Inuit participation in the adaptive management planning process is the linchpin for which many of the QIA and community concerns would be resolved. QIA has been working with Baffinland, and engaging with the communities, to ensure there is clarity regarding the adaptive management planning process being processed as a mechanism to address outstanding Inuit concerns. There is, unfortunately, a remaining degree of uncertainty about Baffinland's adaptive management commitments, which means resulting uncertainty regarding committed mitigations and actions, and the suggested terms and conditions for the Project Certificate. QIA submits that a delay in the hearing process will allow the opportunity to further develop this and other key issues prior to the final portions of the hearing process. QIA recognizes that there is a balance between what information is required in the impact assessment / reconsideration process and what can be completed following a potential project approval, however the unresolved issues regarding adaptive management play a significant factor in determining if there is Inuit acceptance of project impacts and mitigations.
18. QIA is aware that the affected Inuit communities continue to raise a number of unresolved key issues on key topics such as shipping and marine mammal impacts, railway and caribou impacts, and proposed adaptive management processes meant to address impacts. A modest delay would allow Baffinland to take steps to further address and resolve, or provide further evidence, on these issues. The reconvened Public Hearing, after a delay, would therefore have the benefit of increased clarity about what issues still are outstanding.
19. A modest delay would also ensure that all Parties have the benefit of key evidence required by NIRB with respect to current Baffinland operations, as outlined in the December 23, 2020 Annual Monitoring Report. In the December 23 Report, NIRB required that Baffinland provide the following within 60 days:
 - i. A clear list of monitoring suggestions provided by the Marine Environment Working Group and Terrestrial Environment Working Group members dating back to 2018, and whether these suggestions were implemented into monitoring and the rationale if they were not;

- ii. An assessment of the ongoing ice-management activities using the icebreaker *MSV Botnika* including the potential effects of these activities on noise levels and marine mammal activity along the Northern Shipping Route, along with an updated management plan that includes this additional information on impacts along with historical ice-information that informs the use of the ice-breaker vessel; and
- iii. A detailed plan for maintaining connectivity for fish species present in streams and ensuring that all existing culverts are functional, and a summary of consultation with Fisheries and Oceans Canada regarding problematic culverts.

20. These are issues of critical concern to QIA, as they touch on the core of outstanding and potentially unresolved issues being raised by affected Inuit. QIA recognizes that NIRB is requiring this information as it is relevant to current Baffinland operations. QIA submits that these issues are also at the heart of concerns in the Phase 2 proposal, as well. As NIRB is aware, parties repeatedly raised concerns in the November 2019 Public Hearing and September 2020 technical meeting about the efficacy and adequacy of the existing Marine and Terrestrial Environment Working Groups (and the implications for alternatives for the Phase 2 project which would address those concerns) and about ice-management and ice-breaking activities. The information which NIRB is asking that Baffinland submit on these issues, by February 23, is key relevant evidence for the Phase 2 Public Hearing as well. A modest delay in the hearing process would allow this evidence to be properly before the parties to inform their submissions to NIRB regarding appropriate Project Certificate Terms and Conditions.

Balancing the Risks of An Adjournment Versus the Costs of Proceeding on January 25, 2021

- 21. QIA recognizes that there is a “cost” of the adjournment. There are financial implications and risks for Inuit employees and contractors if there are further delays to the Baffinland project. There is also financial prejudice to Baffinland. These ‘costs’ must be balanced against the risk of permanent and multi-generational injury to the constitutional rights of Inuit if the review process does not provide for proper “deep consultation” and identify the appropriate measures meant to address impacts on Inuit.
- 22. It is in the interests of all involved in this Public Hearing process if the Board conducts 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 Northern Gateway project discussed above. The temporary impact of the adjournment must be weighed against the catastrophic consequences of cancellation.
- 23. QIA does not take its position on the request to postpone the Public Hearing lightly. Delay to the Phase 2 project is a 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 Public 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 Inuit Impact and Benefit Agreement for the Mary River Project and a lease for activities that occur on Inuit Owned Lands, all of which are affected by delays in the review process including impacts to current Inuit employees and project contractors.

24. 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 NIRB decisions, and the process which NIRB uses to reach those decisions for this Project, will have long-lasting impacts. Inuit interests, specifically outstanding related to the NIRB assessment process, must be at the forefront in a just and fair review process that properly consults with Inuit and accommodates Inuit concerns.
25. QIA therefore respectfully submits that a modest delay of the Public Hearing, and an adjustment to the agenda for the Community Roundtable once it resumes to allow all Intervenors to make presentations, is procedurally appropriate to ensure that the common law requirements of procedural fairness, the statutory obligations of the *Nunavut Agreement* and *NuPPAA*, and constitutional obligations for deep consultation are met.
26. In the alternative, if NIRB decides to proceed with the Public Hearing on January 25, 2021, QIA requests that NIRB provide clarity on the following matters:
- a. NIRB proposed to use an Ottawa hub for the hearing. Ottawa is subject to a public health order preventing any public gatherings of any size, which ⁷ to expire on January 23, 2021⁸ but which may be extended in view of the continued rise in numbers of COVID-19 cases. Can NIRB clarify what alternatives will be available to the use of the Ottawa hub, if it is not possible to have any gathering at that site; and
 - b. QIA and many of the communities are experiencing difficulties in obtaining accommodation in Pond Inlet even for the limited number of people who NIRB would allow to participate at this hub. Can NIRB clarify if alternatives for accommodation are being investigated for the Pond Inlet location.

All of which is respectfully submitted,

January 7, 2021.



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⁷ Government of Ontario, *COVID-19: Provincewide Shutdown*, last accessed on January 7, 2021 at <https://www.ontario.ca/page/covid-19-provincewide-shutdown>

⁸ CTV News, *Ontario Surpasses 200,000 COVID-19 Cases Since Beginning of Pandemic as Hospitalizations Surge*, last accessed January 7, 2021 at <https://toronto.ctvnews.ca/ontario-surpasses-200-000-covid-19-cases-since-beginning-of-pandemic-as-hospitalizations-surge-1.5255517>