



NIRB File No.: 08MN053
NWB File No.: 2AM-MRY1325
QIA File No.: LUA-2008-008
DFO File No.: 2008 MR

January 15, 2021

To: The Honourable Jerry Natanine
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Re: The Nunavut Impact Review Board's Procedural Guidance and Reasons for Decision in Relation to the Notices of Motions filed by the Hamlet of Clyde River and the Mittimatalik Hunters and Trappers Organization on December 17, 2020 Regarding the Resumption of the Public Hearing for the Mary River Project's "Phase 2 Development Proposal" (NIRB File No. 08MN053)

Dear Honourable Jerry Natanine, Eric Ootoovak, and Eamon Murphy,

Please find in the text that follows the Reasons for the Decision of the Nunavut Impact Review Board (NIRB or Board) in response to the Notices of Motions filed by the Hamlet of Clyde River and the Mittimatalik Hunters and Trappers Organization (MHTO) on December 17, 2020. The Hamlet of Clyde River's Motion (Re: Postponement of the Public Hearing) asked the Board to postpone the resumption of the Public Hearing for Baffinland Iron Mines Corporation's (Baffinland) Phase 2 Development Proposal until at least March 2021.

The MHTO's first Motion (Re: Public Hearing Community Roundtable) was to amend the Public Hearing Agenda (issued December 7, 2020) to add time to allow presentations by Intervenors to Community Roundtable participants during the Community Roundtable proceedings currently

scheduled for February 1-6, 2021. The MHTO's second Motion (Re: Adjournment of the Public Hearing) also sought to adjourn the resumption of the Public Hearing for Baffinland's Phase 2 Development Proposal until a vaccine for COVID-19 could be widely administered, Nunavut Travel Restrictions were lifted, Nunavut indoor gathering restrictions were lifted to allow for meetings of 100 or more people, and community representatives could be present in a single room for the Public Hearing.

Procedural History of the Board's Consideration of the Motions

The procedural guidance and timelines for considering Motions in advance of the Board's resumption of the Public Hearing for the Mary River Project's "Phase 2 Development Proposal" (NIRB File No. 08MN053) were issued by the Board in the *Pre-Hearing Conference Decision Report* for the file issued on October 30, 2020.¹ On December 17, 2020, the Board received one (1) Notice of Motion from the Hamlet of Clyde River² and two (2) Notices of Motions from the Mittimatalik Hunters and Trappers Organization^{3,4} accompanied by the following attachments:

- the sworn Affidavit of Eric Ootoovak, Chair of the Mittimatalik Hunters and Trappers Organization;⁵
- *The Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11;⁶ Section 31.1 of the *NIRB Rules of Procedure*, 2009;⁷ and
- *Nunavut Planning and Project Assessment Act*, S.C. 2013, c 14, s. 2.⁸

On December 18, 2020 the NIRB circulated the Motions and invited parties and Intervenors to file their written responses to the Motions by January 7, 2021.

¹ NIRB, *Pre-Hearing Conference Decision Report for Baffinland Iron Mines Corporation's Phase 2 Development Proposal, Related to the Mary River Project* (NIRB File No. 08MN053), October 30, 2020 [NIRB Document ID No. 331868] (*Pre-Hearing Conference Decision Report*).

² Notice of Motion filed by J. Natanine on behalf of the Hamlet of Clyde River [NIRB Document ID: 332140].

³ Notice of Motion Re: Public Hearing Community Roundtable filed by E. Murphy (Woodward & Company LLP) on behalf of the Mittimatalik Hunters and Trappers Organization [NIRB Document ID: 332142].

⁴ Notice of Motion Re: Adjournment of the Public Hearing filed by E. Murphy (Woodward & Company LLP) on behalf of the Mittimatalik Hunters and Trappers Organization [NIRB Document ID: 332141].

⁵ Affidavit of Eric Ootoovak sworn on December 17, 2020 [NIRB Document ID: 332143].

⁶ *The Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [NIRB Document ID: 332144].

⁷ Section 31.1 of the *NIRB Rules of Procedure*, 2009 [NIRB Document ID: 332145].

⁸ *Nunavut Planning and Project Assessment Act*, S.C. 2013, c 14, s. 2 [NIRB Document ID: 332146].

The Motion from the Hamlet of Clyde River

The Hamlet of Clyde River's Motion was filed in accordance with Rule 7.1 of the Nunavut Impact Review Board's *Rules of Procedure*,⁹ and the timelines set out in the Board's *Pre-Hearing Conference Decision Report*. The Motion sought the following Order: "...that the Public Hearing for the Mary River Project Phase 2 Proposal, currently scheduled for late January, be postponed until at least March 2021."

In the letter accompanying the Motion, the grounds for the Motion were summarized as follows:

- 1) *The Hearings pose a threat to Public Health because of the COVID-19 Pandemic;*
- 2) *The Pandemic has disrupted the review process, making our participation difficult;*
- 3) *NIRB's timelines for submissions are unrealistic and make our participation difficult;*
- 4) *The format for the Hearings will limit our participation and create a bias in favour of the Proponent;*
- 5) *Vaccination programs and rapid testing may make a proper Hearing viable in the spring of 2021; and*
- 6) *The economic pressure to proceed quickly to a Hearing should be re-examined."*

The Motion from the Mittimatalik Hunters and Trappers Organization Re: Public Hearing Community Roundtable

The MHTO's Motion (re: Public Hearing Community Roundtable) was also submitted to the Board in accordance with Rule 7.1 of the NIRB's *Rules* and the timelines set out in the Board's *Pre-Hearing Conference Decision Report*. This Motion sought the following Order: "...to: Amend the Final Public Hearing Agenda (issued December 7, 2020) to include presentations by Intervenor to Community Roundtable participants during Community Roundtable proceedings currently scheduled to occur on February 1-6, 2021 during the Resumed Hearing, held at venues in Iqaluit and Pond Inlet, NU."

The following summarizes the grounds for the Motion provided by the MHTO:¹⁰

- 1) The Board must host a procedurally fair process for all parties involved ensuring opportunities to present their case.
- 2) The Public Hearing Agenda allocates Baffinland time to present information regarding its Project to Community Roundtable participants but not to Intervenor and they should be afforded the same opportunities.

⁹ *NIRB Rules of Procedure*, September 3, 2009 (the Rules); available online at: <https://www.nirb.ca/rules-of-procedure>.

¹⁰ In the interests of brevity the following is a summary of the grounds provided in the Motion, parties are referred to the Notice itself for the full description of the grounds as stated by the MHTO [NIRB Document ID: 332142].

- 3) During the November 2019 Hearing, the Board adjusted the Hearing Agenda in Iqaluit to remove Baffinland's presentation to the Community Roundtable participants; however, for the resumption of the Hearing, Baffinland has been provided their time to present again.
- 4) Although not part of the Board's Rules of Procedure, Intervenor presentations to the Community Roundtable have been standard practice.
- 5) There is no guarantee that community members attending the Community Roundtable will have attended the Technical Sessions and limited access to technology may limit community members from seeing these presentations through audio/video links.
- 6) With COVID-19 related office closures, the Board must ensure that community members receive detailed and accurate Project information from all Parties, not just the Proponent through the Community Roundtable.
- 7) In *Clyde River v. Petroleum Geo-Services Inc.*, the Supreme Court of Canada clarified that deep consultation with an Indigenous group is required when an Indigenous group has a strong claim to aboriginal or treaty right and where potential impacts are significant. This indicates that deep consultation applied to the Inuit of Nunavut including providing effective opportunities for participation. In this case, that would include allowing the MHTO to present information to community roundtable representatives enabling them to better question the Proponent and Intervenor and providing the Board with a more fulsome evidentiary record.

**The Motion from the Mittimatalik Hunters and Trappers Organization
Re: Adjournment of the Public Hearing**

On December 17, the NIRB also received the MHTO's Motion re: Adjournment of the Public Hearing accompanied by the sworn Affidavit of Eric Ootoovak, *the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (UK), 1982, c 11, Section 31.1 of the NIRB Rules of Procedure, 2009 and the Nunavut Planning and Project Assessment Act, S.C. 2013, c 14, s. 2 (NuPPAA)*. The Motion was filed in accordance with Rule 7.1 of the *Rules* and the timelines set out in the Board's *Pre-Hearing Conference Decision Report*. The Motion sought the following Order: "Adjourn the proceedings, currently scheduled from January 25th to February 6th, 2021, to the first available opportunity after the following occurs:

- a. *The widespread availability and administration of a COVID-19 vaccine in Nunavut;*
- b. *The lifting of travel restrictions, including the requirement for a 14-day isolation for Nunavut and non-Nunavut residents participating in the hearing; and*
- c. *The lifting of restrictions for gatherings so that the hearing may proceed in a manner that allows for full and meaningful participation by Inuit rights holders, including:*
 - i. *A minimum of 100 persons allowed in the hearing rooms at Pond Inlet and Iqaluit;*
 - ii. *An open hearing such that persons can attend without: concern of being turned away at the door; being prevented from attending due to lack of pre-registration;*

or being prevented from attending due to a 50 person maximum being reached; and Community Roundtable representatives being present in one hearing room”

The following summarizes the grounds for the Motion provided by the MHTO:¹¹

- 1) Both the Board’s *Rules of Procedure* and Section 35 of the *Constitution Act* allow the Board to adjourn a Public Hearing on any terms the Board deems appropriate.
- 2) The Board’s objectives under *NuPPAA* state that the Board must exercise its powers and perform duties to promote and protect the wellbeing of the residents of Nunavut and to protect the ecosystemic integrity of the designated area.
- 3) In the Supreme Court case of *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*,¹² the Court confirmed that under the *Nunavut Agreement* Inuit received Treaty rights including the right to harvest marine mammals. In that case and this one, the proposed Project would have adverse impacts on Inuit Harvesting rights.
- 4) The Government of Canada has confirmed that it will be relying on the Board’s process to fulfill the Crown’s duty to consult and has asked participating groups to provide as much detail as possible about the impacts of the Project on Inuit rights. In light of this, the Board must ensure a fulsome process that allows for deep consultation and under the current pandemic, that is not possible.
- 5) On March 12 and 17, 2020, the Board decided not to hold in-person meetings leading into this Hearing, and in the MHTO’s view, the reasoning behind the Board’s cancellation has not changed. Despite this, and the increasing COVID-19 cases in Nunavut and Canada, the Board has decided to proceed with a Hearing.
- 6) There are barriers created by limited access to Hearings such as limitations on the number of people permitted to attend, the current need to pre-register, the allocation of seats and the limiting of seating does not promote public participation nor provide due consideration and weight to the tradition of Inuit oral communication.
- 7) There are also barriers created by limited access to technology and bandwidth which in the *Clyde River v Petroleum Geo-Services Inc.* case, the Supreme Court of Canada confirmed that the consultation process was impaired and deficient, in part, due to slow internet speed and expensive bandwidth.
- 8) Given COVID-19 related office closures in Nunavut, the ability to hold in-person meetings within Nunavut communities and the comments of Baffinland and Qikiqtani Inuit Association indicating their challenges with engaging with communities over the past

¹¹ In the interests of brevity the following is a summary of the grounds provided in the Motion, parties are referred to the Notice itself for the full description of the grounds as stated by the MHTO [NIRB Document ID: 332141].

¹² [Clyde River \(Hamlet\) v. Petroleum Geo-Services Inc., 2017 SCC 40.](#)

several months, the Board must acknowledge the need to ensure Community Roundtable participants receive the highest level of engagement.

- 9) On December 16, 2020, the North Baffin Community Group commented in detail on the practical and substantive problems with scheduling a Hearing at the present time and contrary to 12.2.27 of the *Nunavut Agreement* the Board has not promoted public awareness and participation at the Hearing with no formal Hearing notice being provided and the delays in receiving translated information.
- 10) The MTHO and others will be relying on non-Nunavut based experts and legal counsel, with the current travel restrictions in place, there remains a barrier to participation for these individuals.
- 11) Deep consultation requires effective and substantive participation by Inuit, which, in the view of the MHTO, is not possible when attendance at a Hearing is limited to 50 people per venue, especially when 20-30 of those people will be representatives of the Board and Canada. MHTO submits that a minimum of 100 people is required to enable sufficient local Inuit participation.
- 12) Lastly, the current process will cause community representatives to be split between Iqaluit and Pond Inlet. This is unprecedented and creates an artificial fracture in the Community Roundtable, leaving the most affected community of Pond Inlet without the ability to caucus with other communities.

Summary of Comments on the Motion Received from Interested Parties

By January 7, 2021 the NIRB received comments from the following interested parties regarding the Motions:

Table 1: List of Commenting Parties on the Motions

Commenting Party	Document ID ¹³
Nunavut Tunngavik Incorporated (NTI)	332424 & 332429
Qikiqtani Inuit Association (QIA)	332379
Government of Nunavut (GN)	332418
Government of Canada (GoC)	332397
Ikajutit Hunters and Trappers Organization	332380
Sanirajak Hunters and Trappers Association	332400
Oceans North (ON)	332396
World Wildlife Fund (WWF)	332378
Baffinland Iron Mines Corporation	332362 & 332363

¹³ All submissions received can be accessed on the NIRB's online public registry for this assessment or by searching with the above specified Document ID numbers from the NIRB's public registry at www.nirb.ca/project/124701

[Table 2: Summary of Comments Received on the Notices of Motions](#) provides a brief summary of the comments received in respect of the Motions.

Table 2: Summary of Comments Received on the Notices of Motions

Commenting Party	Summary of Comments
Nunavut Tunngavik Incorporated	<ul style="list-style-type: none"> Supported the motion that would increase Inuit engagement and requested that NIRB make accommodations to address the concerns referenced in the motions including providing for a reasonable delay in the timing of the Public Hearing; Indicated that a reasonable delay in the Public Hearing would allow the parties to continue to resolve issues and come to a mutual understanding on the Phase 2 Project Proposal, which would facilitate a successful public hearing; Urged the NIRB to make accommodations that support Inuit engagement in the Public Hearing process and to consider all the options available including a reasonable delay, taking into account current forecasts regarding the control of the pandemic and the preference for a public hearing that maximizes in-person participation; Requested for clarification on the scope of the public gathering exemption and whether up to 100 people may attend at venues and with what restrictions; Indicated that it is vital that Inuit are able to confer with each other in-person to build a shared understanding of the substantive issues including possible mitigation measures and actions that are central to this review process.
Qikiqtani Inuit Association	<ul style="list-style-type: none"> QIA supported the three (3) motions and recommended that a modest delay would allow NIRB (and the Crown) to take steps to ensure that legal obligations for deep consultation with Inuit and would allow for further resolution of key outstanding issues of high significance to impacted communities; Recognized that there is a “cost” of the adjournment, and there are financial implications and risks for Inuit employees and contractors if there are further delays to the Baffinland project; Noted there is also financial prejudice to Baffinland, and 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; and Submitted 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

Commenting Party	Summary of Comments
	<p>presentations, is procedurally appropriate to ensure that the common law requirements of procedural fairness, the statutory obligations of the <i>Nunavut Agreement</i> and <i>NuPPAA</i>, and constitutional obligations for deep consultation are met.</p>
Government of Nunavut	<ul style="list-style-type: none"> • Does not support the motion to postpone the Public Hearing for Phase 2 until March 2021 (Clyde River), and to adjourn the Public Hearing on Phase 2 until such time as there is widespread availability and administration of a COVID-19 vaccine in Nunavut and associated restrictions lifted (MHTO); • Noted that it is reasonable that the Public Hearing reconvene per the dates identified in the Pre-Hearing Conference Decision Report; • Acknowledged that territory-wide public health restrictions, including limits on indoor in-person gathering and limits on non-essential travel put in place in mid-November 2020 to reduce the risk of COVID-19 transmission in communities presented significant challenges for proceedings requiring fulsome participation of parties and communities in a public forum; • Anticipated that presentations will be given by Intervenors during the technical portion of the Public Hearing to report on the extent of resolved and unresolved issues and the substance of their interventions; and • Recognized that the NIRB has a legislated obligation to discharge its duties which the pandemic does not remove; and the challenges posed by the public health orders are not new and have been known since the public health emergency began.
Government of Canada	<ul style="list-style-type: none"> ▪ The Board has broad discretion to determine how to conduct its reconsideration of Phase 2 under the dynamic condition of a pandemic and will defer to the Board for establishing a path forward; ▪ Recommended that the Board reconsider whether further modification to its proposed process would provide a reasonable framework and sufficient time for carrying out its duties; ▪ Noted it may be difficult to adopt a hub approach similar to the one used to carry out the Community Roundtable and Pre-Hearing Conference due to public health measures in place to prevent COVID-19; and

Commenting Party	Summary of Comments
	<ul style="list-style-type: none"> Committed to make every effort to be accommodating and adaptable to any decision the NIRB may make in resuming the Public Hearing.
Sanirajak Hunters and Trappers Association	<ul style="list-style-type: none"> Supported the Hamlet request for order seeking postponement of Public Hearing until at least March 2021; Supported the MHTO request to adjourn the Public Hearing proceedings until COVID-19 vaccine is widely available and administered in Nunavut, and associated restrictions lifted; Supported the MHTO request seeking an order to amend the agenda to include presentations by intervenors; Submitted that Pond Inlet community members should be in Iqaluit for the Public Hearing and Community Roundtable; Recommended that Pond Inlet and Iqaluit will need additional venue locations to ensure increased engagement from the community; and Sanirajak HTA is in the process of setting Inuit Qaujimajatuqangit standards, and stated question regarding how Inuit Qaujimajatuqangit has been used is unanswered.¹⁴
Ikajutit Hunters and Trappers Association	<ul style="list-style-type: none"> Supported the Hamlet request for order seeking postponement of Public Hearing until at least March 2021. Supported the MHTO request to adjourn the Public Hearing proceedings until COVID-19 vaccine is widely available and administered in Nunavut, and associated restrictions lifted; Supported the MHTO request seeking an order to amend the agenda to include presentations by intervenors; Identified several gaps and assumption deficiencies in the proposed Universal Precautionary Principles agreed between the QIA and Baffinland and recommended that those assumptions be addressed prior to any decision being made on the Phase 2 Project with specific notes on changes to resilience and governance pillars; and Requested for time for all impacted parties to present their views to the QIA board prior to correspondence to the Minister.
Oceans North	<ul style="list-style-type: none"> Supported both motions requesting an adjournment of public; and Supported the additional proposal from the MHTO to include intervenor presentations to Community Roundtable participants.

¹⁴ The NIRB notes that the NIRB issued correspondence to the Sanirajak HTA on October 9, 2020, responding to the HTA's request for clarification on what the NIRB considered to be "...an appropriate weighting of western science and Inuit Traditional Knowledge in its evaluation of the merits of the Proponent's position" and also addressing more generally the Board's approach to Inuit Qaujimajatuqangit and Inuit Qaujimaningit in the Board's assessments [NIRB Document ID No: 331682].

Commenting Party	Summary of Comments
WWF	<ul style="list-style-type: none"> WWF supported both the Motions from the Mittimatalik Hunters and Trappers Organization (MHTO) and the Hamlet of Clyde River to suspend the Public Hearing until public health and safety can be assured; Stated that convening a public hearing during a health crisis would limit community participation, would not allow adequate engagement and consultation between community members and technical experts, and reduce in-person debate and discussion time about the risks and benefits of the proposed mine expansion; and Requested that the Board support the community Motions and convene the Public Hearing at such time as it is safe for all parties to have a meaningful and productive role in the hearings.
Baffinland	<ul style="list-style-type: none"> Submitted that the motions of the MHTO and Clyde River to adjourn the Public Hearing should not be granted, and the Public Hearing should recommence as scheduled from January 25 to February 6, 2021.

The Board's Consideration of the Motions to Adjourn the Reconvened Public Hearing

As summarized above, Nunavut Tunngavik Incorporated, the Qikiqtani Inuit Association, Sanirajak Hunters and Trappers Association, Ikajutit Hunters and Trappers Association, Oceans North, and the World Wildlife Fund all supported the Clyde River and MHTO Motions to adjourn the resumption of the Public Hearing until at least March 2021 or until such time as public health restrictions are lifted to allow for unrestricted travel into Nunavut, to have no or increased limits (up to 100 people) at indoor gatherings, and a COVID-19 mass vaccination program is implemented throughout Nunavut. The Government of Canada expressed no position with respect to the Motions, but indicated that the Government of Canada would support the Board's decision. The Government of Nunavut and Baffinland Iron Mines Corporation (Baffinland) opposed the Motions to adjourn.

At the outset, the Board thanks all parties for observing the timelines for considering written motions as set out in the Board's *Pre-Hearing Conference Decision Report*¹⁵ on October 30, 2020. The Board appreciates the efforts of all parties who provided feedback, and the Board duly considered all the materials filed during the consideration of the Motions.

¹⁵ NIRB, *Pre-Hearing Conference Decision Report for Baffinland Iron Mines Corporation's Phase 2 Development Proposal, Related to the Mary River Project* (NIRB File No. 08MN053), October 30, 2020 [NIRB Document ID No. 331868] (*Pre-Hearing Conference Decision Report*).

The parties putting forth or supporting the Motions to adjourn asserted that due to the modifications to the Board's normal in-person Public Hearing processes necessary to comply with public health restrictions, the reconvened Public Hearing would be:

- Unsafe;
- Unfair to participants other than the Proponent;
- Inadequate to fulfill the obligations for Inuit consultation; and
- Not respectful of Inuit oral tradition and insufficient to allow for Inuit knowledge holders and community members to participate fully.

These parties also questioned the need for urgency in the Board's resumption of the Public Hearing, and indicated that the prejudice that Baffinland would suffer if the resumption of the Public Hearing is adjourned is minimal, when compared to the prejudice suffered by the communities, Inuit specifically, and Intervenor who have been unable to resolve their substantive issues going into the reconvened Public Hearing.

Baffinland opposed the Motions to adjourn the reconvened Public Hearing on several bases, including the following:

- The Phase 2 Development Project Proposal has an extensive procedural history with over 160 process steps and there have been numerous opportunities for Intervenor and communities to participate since the Phase 2 Development Project Proposal was submitted in October 2014;
- To date, the NIRB's modified processes have struck an appropriate balance between COVID-19 safety and affording opportunities to all parties to participate in the process;
- As set out in the NIRB's *Pre-Hearing Conference Decision Report*¹⁶ on October 30, 2020, the Board carefully considered the concerns of parties (similar to the concerns identified in respect of these Motions) when the NIRB made the decision that it was reasonable to resume the Public Hearing in January 2021;
- Baffinland has suffered and continues to suffer economic losses attributable to delays in this process and the adjustments to operations caused by the pandemic; and
- If Phase 2 is ultimately approved to proceed, the additional delay to completing the Public Hearing as scheduled would result in the loss of the 2021 sealift season and would have a cascading effect on the Proponent's ability to complete key planning, permitting, and construction activities which may result in an extended construction schedule of a year or more.

¹⁶ NIRB, *Pre-Hearing Conference Decision Report for Baffinland Iron Mines Corporation's Phase 2 Development Proposal, Related to the Mary River Project* (NIRB File No. 08MN053), October 30, 2020 [NIRB Document ID No. 331868] (*Pre-Hearing Conference Decision Report*).

The following discussion of the Board's views with respect to the Motions reflects the five (5) key themes expressed by parties in their submissions.

Is it safe to resume the Public Hearing?

The Board clearly acknowledges that the outbreak of COVID-19 that occurred in November 2020 and territory-wide lockdown measures implemented to prevent the spread from the four (4) affected communities to the rest of Nunavut was disruptive to the Board's operations and to all the participants in the Board's on-going assessments. However, the measures taken by Nunavut's public health authorities and implemented by Nunavummiut to date have responded to the outbreak situations, and there are currently no active cases of COVID-19 or outbreak situations in the Territory generally or in the Baffin Region specifically. The current situation does not differ from the circumstances in Nunavut that were in place at the time that the Board conducted the in-person Community Roundtable and Pre-Hearing Conference in early October and set the dates for the reconvened Public Hearing at the end of October 2020. The Board also notes that with some vaccinations commencing in Nunavut, and additional measures (testing for COVID-19 twice during the 14-day isolation period) that have been implemented at the southern isolation hubs since the November outbreaks, additional protections may be in place now compared to October 2020.

In addition, the NIRB's staff and Chairperson, having successfully conducted in-person proceedings in accordance with the Board's COVID-19 Protocol in late September and early October 2020, have had an opportunity to review and improve the Protocol with the benefit of experience. The NIRB has continued to work actively with the Government of Nunavut's Chief Public Health Officer, to further enhance the NIRB's Protocol. Given the Board's experience with the Protocols and the recent enhancements, the Board remains confident that in-person proceedings conducted in accordance with the Board's COVID-19 Protocol can be carried out safely.

Is resuming the Public Hearing in these circumstances unfair?

As noted by several parties, the Board is entitled to set their own procedure, in accordance with the requirements of natural justice and procedural fairness. As recognized by many courts and tribunals in 2020, the duties of decision-makers to provide timely and fair access to decision-making processes have not been suspended during the pandemic. The challenges to existing processes posed by public health restrictions are no longer new and the Board has shown a willingness and ability to modify their pre-pandemic practices to ensure that public safety and procedural fairness can be balanced by the modification of existing processes to meet these challenging circumstances of a global pandemic.¹⁷ The developing body of case law¹⁸ considering procedural fairness during the pandemic has established the following general principles:

¹⁷ The Board has issued updated procedural guidance in respect of the process and procedure for the continuation of the Board's assessment of the Phase 2 Development Project Proposal in response to the pandemic in March, May, July, August, September, October and December 2020.

¹⁸ See for example *Arconti v. Smith* 2020 ONSC 2782, *Miller v. FSD Pharma Inc.* 2020 ONSC 3291.

- The requirements of procedural fairness are not “frozen” in time and requires a constant balancing of the interests of the public, the parties and the decision-maker, that recognizes the exceptional circumstances of the pandemic;
- Parties are entitled to a fair process, not their preferred, ideal, or most comfortable process—unease or inexperience with the technology that allows for videoconference or remote access is insufficient grounds to prevent its use; and
- There is nothing about modified procedures that involve remote access, whether used in a large, complex and potentially final proceeding, or a small, straightforward and interim proceeding, that is inherently unfair, or that constitutes a breach of parties’ rights to procedural fairness.

The cases recognize that although having parties participate via remote means is not perfect and that they may experience disruptions and limitations on their participation that would not occur if they could be present, the courts and tribunals recognize that these limitations affect all remote participants equally and should not be assumed to unfairly favor one party over the other. The Board has monitored emerging best practices as other environmental impact assessment and regulatory authorities across Canada use remote access technologies to carry out public hearings and complete decision-making despite the pandemic.

For this file specifically, since the Community Roundtable and Pre-Hearing Conference in October 2020, the Board has revisited the remote access options for parties who cannot attend in-person in Iqaluit or Pond Inlet. The Board has now implemented additional measures to allow all parties to stream the proceedings and have greater access to two-way communication with the participants in the Hearing venue and present to the Board directly regardless of where they are participating.

With respect to ensuring that all participants have had adequate notice of the dates of the reconvened Public Hearing, the general timing of January/February were discussed during the Community Roundtable and Pre-Hearing Conference in early October and confirmation of the specific dates of January 25-February 6, 2021 were confirmed on October 30, 2020 when the Board’s *Pre-Hearing Conference Decision Report*¹⁹ (including the translated Executive Summary section and the translated accompanying Press Release) were circulated and posted on the Board’s public registry.

The Board’s modified processes and the Federal Crown’s obligations to conduct deep consultation with Inuit communities

The Board notes that the obligation to consult with Inuit rights holders in a manner that fulfills the honour of the Crown remains the responsibility of the Government of Canada. The NIRB’s role and responsibility with respect to undertaking some of the procedural aspects of the Crown’s duty to consult is not the same as the National Energy Board (now known as the Canada Energy

¹⁹ NIRB, *Pre-Hearing Conference Decision Report for Baffinland Iron Mines Corporation’s Phase 2 Development Proposal, Related to the Mary River Project* (NIRB File No. 08MN053), October 30, 2020[NIRB Document ID No. 331868] (*Pre-Hearing Conference Decision Report*).

Regulator), which was the subject of the Clyde River’s Supreme Court of Canada case referenced in the Motions.²⁰

The Government of Canada’s approach to consultation in the specific context of the NIRB’s assessment of the Phase 2 Development Project Proposal, was described recently in correspondence from the Northern Project Management Office²¹ as follows: “*The Government of Canada is confident that, given the design of the Nunavut Agreement, the Board’s assessment process for the Phase 2 Proposal can be relied on to assist the Crown discharging its duty to consult.*”

Are the NIRB’s modified processes for the reconvened Public Hearing respectful of Inuit oral traditions and supportive of public engagement?

The parties have expressed concerns that due to limits on the number of people that can be present at an indoor public gathering (50 person limit in Pond Inlet and Iqaluit) that the number of community members who can participate during the in-person proceedings is too limited to allow for full public participation. The parties assert that other alternative forms of participation in the proceedings such as listening via phone or radio or live streaming would not allow for full participation. Parties also identified that community representatives from the North Baffin communities wished to be together in the same room with representatives of Pond Inlet so that they can discuss issues that may arise during the Public Hearing.

The Board highlights that even prior to the pandemic, during the Board’s previous assessments of the original Mary River Project (2012) and the Early Revenue Phase (2014) there were limits on the number of parties that could come to Pond Inlet to participate during Public Hearings due to a lack of accommodations for everyone, including for community representatives. These accommodation limits during the start of the Public Hearing in November 2019 meant that community representatives from the North Baffin communities participated in the Public Hearing sessions while located in Iqaluit and would not have been able to participate in Pond Inlet. The current process of video linking the Iqaluit and Pond Inlet hubs enables participants in Iqaluit to hear all of the in-session proceedings taking place in Pond Inlet to a much greater extent than was the case in the Board’s pre-pandemic process in November 2019.

With respect to increasing the spaces available for “walk in” participation by interested members of the public in Pond Inlet, the Board has, as requested by the parties during the Community Roundtable and Pre-Hearing Conference in October 2020, modified the Board’s COVID-19 Protocols so that all participants will be masked at all times while inside (not just when social distancing could not be maintained). With these additional measures, the Board has made a request to GN’s Chief Public Health Officer to be exempted from the 50-person limit on public gatherings to allow for up to 100 people to attend in Pond Inlet and 80 people to attend in Iqaluit. The Board has already been notified by Nunavut’s Chief Public Health Officer that an exemption for 80

²⁰ [*Clyde River \(Hamlet\) v. Petroleum Geo-Services Inc.*, 2017 SCC 40.](#)

²¹ [NIRB Document ID: 332397]

people in Pond Inlet and Iqaluit will be granted if there is no COVID-19 in the communities or region at the time. If the current circumstances of no active infections in the region continues, the Board is hopeful that the Board's requests for additional capacity may be granted. In reviewing the records of previous in-person Hearings and proceedings held by the Board in Pond Inlet prior to the pandemic, the Board has confirmed that having capacity for 100 attendees was sufficient to accommodate the highest levels of community attendance during the Public Hearings for the original Mary River Project (2012) and for the Early Revenue Phase (2014).

Would harm/prejudice result if the Public Hearing was adjourned until public health restrictions associated with the COVID-19 pandemic are relaxed?

In support of the Motions, several parties questioned whether the Proponent or other parties would be harmed or otherwise prejudiced if the resumption of the Public Hearing is delayed. In response to the Motions to adjourn, Baffinland asserted that economic losses associated with the delays in the regulatory process and associated with modifications of Baffinland's operations in response to COVID-19 occurred in 2020. The Qikiqtani Inuit Association also acknowledged that benefits that could accrue to the communities if the Phase 2 Development Project Proposal was approved to proceed will be delayed if the Board's decision-making process is further delayed. Baffinland also indicated that if the Phase 2 Development Proposal is ultimately approved to proceed, if the schedule for the reconvened Public Hearing is not maintained, the 2021 sealift lift season will be lost, and a season of project construction may be lost.

In assessing the question of the harm/prejudice that may result if the reconvened Public Hearing is adjourned, the Board has also considered that the time period of the adjournment remains uncertain. Although the Motions suggest that the adjournment sought may be relatively short (possibly 2-3 months), if the Board accepted that only a return to pre-pandemic practices is required to deliver procedural fairness to the participants, the Public Hearing could not resume in-person proceedings until all Canadian jurisdictions had successfully rolled out vaccination programs and COVID-19 infections were very limited across Canada. Only then would all participants in the proceedings, including those from outside Nunavut be able to attend in-person proceedings in Nunavut. At present, the timeline for this remains very uncertain and it may yet be some time before these circumstances occur. Having an extended timeline for decision-making of several years is very difficult for the individual Panel Members who have been engaged as the decision-makers on this file since September 2019 when they attended the site visit associated with the Board's assessment and participated in the Public Hearing in November 2019.

The Board also recognizes that having a protracted, delayed, and fragmented assessment process creates regulatory uncertainty and can damage the confidence of the public, regulators, and the regulated community that the Board can fulfill their role in Nunavut's integrated regulatory system in an effective and timely manner. As noted in other jurisdictions, there is an assumption that delayed access to decision-making is prejudicial, not just to the parties involved, but to the administration of justice generally and that indefinite suspension of decision-making until the COVID-19 pandemic has passed is unreasonable.

The Board's Disposition of the Motions to Adjourn the Reconvened Public Hearing

After weighing all the parties' submissions and as detailed above, the Board's duly appointed decision-making Panel for the file has **denied** the Motions of Clyde River and the MHTO seeking to adjourn the reconvened Public Hearing, and the Board has directed that the Public Hearing should proceed as scheduled, for the following reasons:

- The length of the requested adjournment from the MHTO is effectively indefinite as it is impossible to predict when the pandemic, or related public health restrictions, will be over and the Board can return to pre-pandemic practices.
- Since the Community Roundtable and Pre-Hearing Conference conducted in October, the Board has implemented some lessons learned and the revised processes provide additional means of remote participation in the Public Hearing in a relatively expeditious manner while preserving public health and safety and balancing parties' rights to procedural fairness.
- Granting the adjournment would result in significant potential prejudice to Baffinland and its investors/customers, to the Panel as decision-makers, to communities and potentially to the broad Canadian public interest, resulting from regulatory uncertainty.
- While the NIRB acknowledges that all parties may experience challenges and be uncomfortable participating in the reconvened Public Hearing in the face of considerable limitations imposed by COVID-19 public health measures, the NIRB has demonstrated its ability to hold in-person proceedings in a manner that maintains the health and safety of all participants and communities involved, while ensuring opportunities for full participation. With the completion of the modified in-person and video-linked Community Roundtable and Pre-Hearing Conference in early October, the NIRB has demonstrated it is logistically possible to conduct in-person proceedings despite limitations imposed by COVID-19 public health measures. The Board remains committed to building on this experience to further modify Board processes to support reasonable participation in these exceptional times.

The Board's Consideration of the MHTO's Motion to Amend the Public Hearing Agenda

The Qikiqtani Inuit Association, Ikajutit Hunters and Trappers Association, Oceans North, and the World Wildlife Fund supported the MHTO's Motion to amend the Public Hearing Agenda to add time to the Community Roundtable to allow for presentations by Intervenor. The Government of Nunavut noted that Intervenor will be given time to present during the technical portion of the Public Hearing.

In support of the MHTO's motion it is stated:

Although not part of the Board's Rules of Procedure, it has been standard practice for the Board to allow intervenors an opportunity to present directly to Community Roundtable participants. With the exception of the original Mary River hearing, the Board has provided an opportunity for intervenors to make presentations to representatives during Community Roundtable sessions in every public hearing the Board has held since 2007 for projects undergoing assessment. ²²

This statement is inaccurate. Prior to 2016, the Board often did not have sufficient funds for Community Representatives to attend the entirety of the Public Hearing, including the technical sessions of the Public Hearing in which the Proponent provides detailed topic-specific technical presentations, and the registered Intervenor present a summary of their technical comment submissions, resolution of issues and basis for their interventions. As a result, the Community Roundtable Session often commenced with the Proponent providing a high-level overview of the project under assessment, followed by brief presentations by the Intervenor recapping their interventions. In 2016, in response to the feedback from Community Representatives that they wished to attend the entire Public Hearing, including all technical sessions, the Board worked to secure funding so that Community Representatives would be present during all technical sessions.

Further feedback from Community Representatives during Public Hearings conducted by the Board in 2016 indicated that, with the Community Representatives being present during the presentations by Intervenor during the technical sessions, they did not require a recap of the interventions during the Community Roundtable. Reflecting this guidance, since 2017, the Board's normal practice has been that if Community Representatives are in attendance during the technical sessions, there are no presentations by Intervenor during the Community Roundtable. See for example the Whale Tail Public Hearing conducted by the Board in 2019,²³ and Agnico Eagle Mines Limited's Saline Effluent Discharge to the Marine Environment Public Hearing conducted in 2018.²⁴ Intervenor did not make presentations during either of those Community Roundtables.

The rationale for allowing the Proponent to provide a brief summary presentation at the start of the Community Roundtable is that after in-depth technical discussions, the summary presentation can provide a less technical, plain language summary of the project and assessment of effects that is helpful to refresh the memories of Community Representatives regarding questions and comments they had identified during the technical sessions.

In respect of the Board's assessment of the Phase 2 Development Project Proposal, as parties may recall, during the November 2019 Public Hearing, the Board indicated that they would adjust the Community Roundtable session in Pond Inlet to add some time for Intervenor to make very brief summary presentations regarding their interventions to the community. The basis for this addition

²² Notice of Motion Re: Public Hearing Community Roundtable filed by E. Murphy (Woodward & Company LLP) on behalf of the Mittimatalik Hunters and Trappers Organization [NIRB Document ID: 332142] at para. 7.

²³ 190926 16MN056, Final Hearing Transcript, Volume 3, at p. 484, [NIRB Document: 326929].

²⁴ 180927 11MN034, Final Hearing Transcript, Volume 2 at p. 2013, [NIRB Document: 320533].

was that the representatives from Pond Inlet were not in attendance during the technical sessions of the Public Hearing that took place in Iqaluit. Although a limited opportunity for members of the community in Pond Inlet to live stream the proceedings taking place in Iqaluit was provided, the video link was not stable and there were several outages where the feed was lost for the attendees in Pond Inlet. Consequently, the Board was uncertain whether participants in Pond Inlet would have heard the technical presentations of all Intervenors. This will not be the circumstance at the reconvened Public Hearing as the Iqaluit hub and the venue in Pond Inlet will be video linked so that all Community Representatives can attend all technical sessions, including the presentations of Intervenors.

Given the number of Intervenors participating in the reconvened Public Hearing, adding even a short time for a recap of the Intervenors' presentations to the current Agenda would reduce the time available for Community Representatives to ask questions of the Proponent and Intervenors and share their knowledge, comments, and concerns with the Board by $\frac{1}{2}$ to $\frac{3}{4}$ of a day.

The Board's Disposition of the Motion to Amend the Public Hearing

After weighing all the parties' submissions and as detailed above, the Board's duly appointed decision-making Panel for the file has **denied** the Motion of the MHTO for an order to amend the Public Hearing Agenda to add time for presentations by Intervenors to the Community Roundtable for the following reasons:

- Community Representatives will be able to attend all technical sessions, including the presentations by Intervenors and do not require Intervenors to repeat these presentations;
- Community Representatives are able to ask questions of both the Proponent and Intervenors during the Community Roundtable, so Community Representatives can get answers to any questions that may arise during an Intervenors' presentation during the technical sessions of the Public Hearing;
- The Board does not wish to reduce the time available for Community Representatives during the Community Roundtable to provide Intervenors with time to make a second presentation after the technical session.

Should you have any questions regarding the upcoming reconvened Public Hearings please contact Cory Barker cbarker@nirb.ca or Solomon Amuno samuno@nirb.ca. Any questions regarding procedural matters should be directed to the NIRB's Executive Director, Karen Costello at (867) 983-4608 or kcostello@nirb.ca.

Sincerely,



Marjorie (Kaviq) Kaluraq
Chairperson
Nunavut Impact Review Board

cc: Mary River Distribution List
Megan Lord-Hoyle, Baffinland Iron Mines Corporation