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February 26, 2021

Marjorie Kaviq Kaluraq
Chairperson
Nunavut Impact Review Board (NIRB)
By Email: info@nirb.ca

Re: Procedural Direction and Draft Agenda for the Extension of the NIRB Public Hearing for Baffinland Iron Mines Corporation's "Phase 2 Development" Proposal

Dear Madam Chair,

Oceans North is not in a position to provide fulsome and substantive comments on the Draft Agenda given our underlying concerns, summarized below, regarding ongoing deficiencies in the process.

Date Selection

The dates appear to have been selected without any attempt at public consultation with key stakeholders. Presumably, the Proponent was consulted in the selection of these dates rather than dates in March as first suggested by the Board; we have no way of understanding the rationale for this schedule, which unfortunately overlaps with what is typically a period in which many residents of North Baffin spend much time on the land and sea ice. Further, Oceans North is advised that these dates conflict with dates selected for the Nunavut Quest. Many of the hunters who participate in the Phase 2 hearing process are also participants in this dogsled race.

Venue

It is not surprising that Mittimatilik residents followed and participated in the January-February, 2021 hearings in great numbers – they are clearly the most impacted community dealing with both current impacts (which, despite ongoing public statements by the Proponent, do in fact exist) as well as potential impacts from this proposed expansion. As we witnessed, community members came out and, to the extent that they were permitted,

shared their concerns with the Board. What we saw was a desire on the part of many citizens to participate in the main hearings, and not just the community roundtable after the purported experts have finished talking to one another. In light of this, it seems only appropriate that the hearings continue in Pond Inlet.

Format

Oceans North objects to the recent change in the hearing process by which participants are now required to submit questions in writing and engage in a written question and response format. With respect, this written exchange has been going on for several years and it is hard in good faith to imagine a constructive dialogue and helpful information emerging from such a process. Environmental impact assessment hearings with respect to a project of this scale are, both in Nunavut and the rest of Canada, by default public and oral exercises. These oral exercises are a critical fact finding process and a way to test the reliability of information and a way to call out evasive tactics. The oral and public nature of environmental impact hearings are both contemplated and reinforced in the Nunavut Agreement with express mention of the importance of oral processes in an Inuit context.

This switch to a paper hearing sets a dangerous precedent—it can be seen as an incentive to proponents to subject the public to endless and repetitive presentations to effectively “run the clock” and also engage in deliberate avoidance of hard but appropriate questions.

Procedural Fairness

Oceans North and other intervenors have sought by way of filings and motions to share critical evidence with the Board and the public in this process. The legal issues with respect to the admissibility of this evidence are not complex. Perplexingly, the Board is refusing to rule on these motions in advance of a Board-imposed deadline to submit written questions. By my last count, the Board has indicated it would rule on the admissibility of evidence on March 23, 2021 and requires the filing of written questions on March 1, 2021.

Oceans North maintains that ongoing evening and Saturday hearing times are discriminatory. These long evening hearings are not the norm in most tribunal and court proceedings in either Nunavut or Canada more generally. Hearings that run from 9 am to 9 pm present a barrier to parents (and women in particular) as well as elders and are an impediment to participation for other individuals (including citizens with disabilities) as well. We are also of the view that long days compromise respect and civility between parties.

The importance of holding an evening session is to maximize opportunities for public input in this process (e.g. for citizens who are unable to attend day sessions). We believe this interest can be accommodated without having a rolling hearing agenda that continues into evenings and weekends. With respect, Oceans North recommends that the Board consult with the Nunavut Human Rights Tribunal or a similar expert panel regarding this concern (which was also raised in the hearing by a number of other parties).

Access to Recordings

Oceans North commends the Board for its extraordinary efforts to ensure that communications technology was in place and sufficiently functional to accommodate a virtual hearing that included participants across Canada and from other countries. In addition, the Board's cooperation with Nunavut Independent Television ensured that citizens could follow the hearings from the safety and comfort of their homes. We know anecdotally that many Nunavummiut and a broader public did in fact watch the hearings through cable television and the internet.

Oceans North, Nunavut Independent Television and a number of other parties have requested that the Board authorize the release of the audiovisual recordings of the hearings that were aired via Nunavut Independent Television. Oceans North objects to the Board's decision, shared publicly on February 24, 2021 in a letter from Ms. Costello, to prohibit access, transmission and/or broadcast of these recordings.

Again, we commend the Board for televising these hearings as it promotes transparency and public participation. Ms. Costello's suggests that should any party record, retransmit or rebroadcast these hearings "the Board reserves the right to take appropriate action, which may include reconsidering making the Audio/Video feed available for live broadcast purposes." We hope that the Board carefully reconsiders such a response. The public broadcast (and retransmission) of these hearings should be seen as a tool for strengthening a public process and for promoting public confidence in this process.

With the greatest respect, this ban expressed by Ms. Costello and her suggestion that the Board will "take appropriate action" against anyone in contravention of this ban is perplexing in that the Board has already released hearing transcripts as well as audio recordings. It is even more perplexing since these very recordings were already broadcast to the public. Further, given the Board's continued practice of holding full day and long evening hearings, it is unreasonable to expect that even the most engaged citizens will ever be in a position to follow all of the hearings live or by way of a live broadcast.

Given the fact that the hearing unfolded in two languages, it is inevitable in the context of simultaneous translation that there will be shortcomings in the transcripts. These can best be addressed by providing access to the complete record, which includes the audio-visual recordings. Indeed, many of the presentations during the hearing relied on visual aids, graphics, videos, and pictures which are not captured in a transcript or audio file.

Oceans North is in possession of recordings of some of this broadcast by way of a home digital video recorder (DVR). Our staff recorded this in good faith from the cable television feed and we are at a loss as to how our possession of a recording of a televised public process is unlawful. We are aware of no precedent in Canada of a board prohibiting rebroadcast of hearings not subject to a publication ban that have already aired on public television and that have been livestreamed through the internet.

Procedural Deficiencies Must be Addressed

In recent weeks, political leaders have made express statements to Nunavummiut that they should voice their concerns within the Board's process. It is our view that critical procedural deficiencies need to be remedied to preserve confidence in this process. As we have previously acknowledged, the Phase 2 Development Proposal presents enormous challenges to the NIRB as it fulfills its mandate to "protect and promote the existing and future well-being of the residents and communities of the Nunavut Settlement Area, and to protect the ecosystemic integrity of the Nunavut Settlement Area". These challenges are only amplified in the context of the pandemic and related social disruption.

Sincerely,

A handwritten signature in black ink, appearing to read 'Christopher Debicki', with a long horizontal flourish extending to the right.

Christopher Debicki
Vice-President (Policy Development) and Counsel
Oceans North