



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

April 6, 2021

To:

Tess C. Layton
Reynolds Mirth Richards and Farmer LLP
3200 Manulife Place, 10180-101 Street Edmonton, AB T5J 3W8
Sent via email: tlayton@rmrf.com

And the Mary River Distribution List
Sent via email

Re: NIRB File No. 08MN053 – Procedural Guidance to Participants and Media in respect of rebroadcast or retransmission of live video and audio feeds of the reconvened Public Hearing for Baffinland Iron Mines Corporation’s “Phase 2 Development Proposal” (Jan. 25-Feb. 6, 2021) and upcoming extension of the reconvened Public Hearing (April 12-21, 2021)

Dear Tess Layton, Members of the Media and Parties,

On February 24, 2021 the Nunavut Impact Review Board (NIRB or Board) issued guidance reminding Parties and the media that in keeping with the Board’s approach to media coverage of Public Hearings, the rebroadcast or retransmission of the live feed from the reconvened Public Hearing for the Phase 2 Development Proposal (the Phase 2 Proposal), a proposed modification of the Mary River Iron Ore Project by Baffinland Iron Mines Corporation (Baffinland), which took place on January 25 through February 6, 2021 (the reconvened Public Hearing) was prohibited in any form unless the Board granted express written permission. On March 23, 2021, Ms. Layton, legal counsel for the Nunavut Independent Television Network (NITV) requested the Board reconsider this direction and permit NITV to rebroadcast the reconvened Public Hearing in advance of the upcoming extension of the Public Hearing (April 12-21, 2021).¹ Two submissions in support of NITV’s request were received from Oceans North (Doc ID: 334214) and World Wildlife Fund (Doc ID: 334213).

¹ Available from the NIRB’s Public Registry from the hyperlink for the file: www.nirb.ca/project/124701 and searching the NIRB Doc ID: 334215.

Two principal arguments were laid out in respect of NITV's reconsideration request:

- Public access to hearings is vital, stating *"Live and recorded coverage of the Hearing is vital to citizen access to, awareness of and understanding of the Hearing."* and
- Public access ensures community participation and fosters confidence in the hearing process, acknowledging that: *"We understand that a central concern of the NIRB is that the Hearings not be rebroadcast while the proceeding is ongoing. While we appreciate the desire of the NIRB to balance public access with the concerns of participants in the proceedings, with respect, promoting open justice can only assist the NIRB in meeting the objectives of the Hearing. Rebroadcast of the Hearing in Inuktitut and English increases the likelihood that community members will understand and respect the recommendation of the NIRB when they are equipped with the ability to see for themselves that the NIRB operates fairly and with due process."*

With respect to the Board's noted concerns with respect to the privacy rights of participants, NITV stated the following: *"With respect to any privacy concerns of third parties who attended the Hearing, NITV is committed to ensuring that these privacy concerns are addressed. For example, NITV can conceal the identifies of third-party attendees so as to ameliorate the Board's privacy concerns."*

The submission of Oceans North cited that it is not reasonable for the Board to expect people to view the proceedings live (often from 9:00 am – 9:00 pm) and noting that the Igloolik Co-op fire meant that the proceedings were not broadcast live in Igloolik during the Hearing, concluded that:

These broadcasts promote informed participation and greater transparency. 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.

The submission of WWF also referenced that Igloolik did not see the live feed and stated the following:

Community representatives invited to appear in the April Community Roundtable will benefit from reviewing what was said in the last round. Allowing Uvagut TV to rebroadcast the hearings will contribute to informed discussions during those hearings.

Lastly, freedom of the press is a foundation of our democracy. Preventing the open and free broadcast of the hearings is counter to that basic right. Rebroadcasting the hearings can only lead to positive outcomes and more effective management of the Mary River project.

GENERAL PRINCIPLES APPLICABLE TO THE NIRB'S GRANT OF MEDIA ACCESS TO BOARD PROCEEDINGS

The following general principles guide the NIRB in terms of granting media access to the Board's proceedings:

- although the Board's proceedings are public, the Board has directed that media access shall not interfere with, disrupt or distract from the Board's objective in conducting proceedings;
- it is the Board's standard practice to not allow for recording, rebroadcast or retransmission of the audio/video feeds of Board proceedings without the Board's express written consent;
- while the NIRB is engaged in decision-making, the Board has not authorized rebroadcast or retransmission of proceedings associated with the file under assessment; and
- the participants in the reconvened Public Hearing had been advised that NITV was carrying the live feed for broadcast on cable television, but the Board did not grant, and participants in the Public Hearing were not advised of any other use of the live feed by NITV or other participants.

The Board's procedural direction on February 24, 2021 reflected these principles and the Board's past practice. However, due to travel restrictions and capacity limits on the number of people who can attend the NIRB's proceedings in person during the COVID-19 pandemic, the NIRB has had to grant greater remote access to the Board's proceedings, and this raises the question as to whether the Board should revisit past practice to reflect these circumstances. Accordingly, the Board has considered the extent to which the legal concepts of "open court", "freedom of the press" and "privacy", have been modified by the courts and other decision-makers such as the NIRB who previously relied on in-person proceedings for decision-making, but are now conducting hearings using a variety of on-line platforms. In the Board's consideration of these issues, the Board has identified the following themes:

- it remains entirely within the discretion of the court (or administrative tribunal) to issue guidance and impose reasonable restrictions on media and public access to their proceedings, and the modification of standard practices to prevent the spread of COVID-19 does not change this basic premise;
- the principles of open court and freedom of the press continue to be subject to reasonable limits so that the justice and tribunal decision-making systems can function, are not disrupted and that the participation of parties in a given proceeding are not inhibited by public or media access to proceedings; and
- reasonable prohibitions on the rights of the media or parties to record and then rebroadcast or retransmit audio, video or still picture recordings of proceedings remain in force, and this remains unchanged in the "trial by Zoom" era, with trial level courts across Canada requiring all participants accessing the live feed of proceedings to undertake that they will not record the live feed in any manner.²

² For example, in Alberta, all participants in a videoconference proceeding are required to give the following undertaking: BY JOINING THIS PROCEEDING, I AGREE TO THE FOLLOWING UNDERTAKING: I understand that, in keeping with the open-court principle of Canada's justice system, I can view this proceeding but, to protect the integrity of Court proceedings, I undertake and agree not to record or rebroadcast in any manner

Other tribunals in Canada similar to the NIRB, such as Joint Review Panels under the Federal *Impact Assessment Act*,³ that have allowed access to live streams of their proceedings, have, once the matter has been remitted to decision-making, made the recordings of the live stream inaccessible to the public and media, and the recordings cannot be viewed by any parties subsequently.

The NIRB has concluded that in Canada, courts and tribunals similar to the Board, continue to impose reasonable limits on access to the recordings of their live proceedings, noting that the balancing of the interests of public and media access, the rights of decision-makers to ensure their proceedings are not disrupted or inhibited by public and media access and the expectations and privacy of participants in the proceedings remains with the decision-maker. The greater accessibility brought about by implementing remote access technologies does not change the considerations and applicable principles to be considered by the Board in terms of media and public access generally, and NITV's request specifically.

DISPOSITION OF NITV'S REQUEST

Recognizing that the Board has already granted unparalleled remote access to NITV, other media, and interested members of the public to the Board's proceedings over the past year, and acknowledging that the Board's direction regarding the prohibition on rebroadcast or retransmission is consistent with the Board's practices in all previous Public Hearings, the Board's duly-appointed decision-making Panel in respect of the Phase 2 Proposal has denied NITV's request to rebroadcast/retransmit the reconvened Public Hearing proceedings for the reasons that follow.

- Although NITV, Oceans North and World Wildlife Fund have described the rebroadcast of the reconvened Public Hearing as vital to informing the public about the Board's assessment of the Phase 2 Proposal, the Board notes that the segment that would be rebroadcast is only one component of a lengthy process, which has to date, involved over approximately 32 days of in-person meetings, the filing of thousands of documents and the exchange of thousands of questions asked in oral and written form from regulatory and community-based intervenors, community representatives from potentially affected North Baffin communities and interested members of the public. Interested members of the public and the media have full access to all relevant documentation, including the Board's prior and current procedural directions, the transcripts of the November 2019 Public Hearing, the reconvened Public Hearing and the audio files of the reconvened Public Hearing on the NIRB's Public Registry at the project link: www.nirb.ca/project/124701. The rebroadcast of only one component of the Board's process out of context creates an incomplete picture

the Court proceeding. I acknowledge that if I breach this promise and agreement, I may be subject to legal sanction, including proceedings for civil contempt of court.

³ S.C. 2019, c. 28, s. 1.

of the assessment, and may actually further misconceptions about the Board's assessment by emphasizing only one aspect of the assessment.

- As courts have recognized, “open access” in the era of exclusively in-person proceedings was restricted to parties who could physically attend a given proceeding in a single location at a set time and date. While it is regrettable that residents from Igloolik were not able to access the cable broadcast during the live proceedings, there were several representatives from Igloolik (community-based Intervenors and Community Representatives) who participated during the reconvened Public Hearing. In addition, the print media was present and provided written accounts of the proceedings, the transcript of the Board's proceedings has been posted on-line and the audio files of the reconvened Public Hearing are also available. Although community members may have preferred to watch the proceedings on television at the time, this level of access to the audio and video live feed was exceptional and has never before been made available via cable television to such a wide audience across Nunavut and Canada. With many other ways of accessing information about the Board's proceedings, as described above, the need to provide access to the proceedings in Igloolik does not justify diverging from the Board's normal prohibition on rebroadcasting before the Board has completed decision-making for the file.
- With respect to the reasonable expectations, including rights to privacy, of participants in the reconvened Public Hearing, the Board notes that it was reasonable for parties to assume that the Board's limits on rebroadcast and retransmission as expressed in prior Board proceedings would remain in force. The notification regarding NITV's broadcast of the live feed provided during the reconvened Public Hearing was in keeping with the Board's prior practice of allowing media outlets or local radio stations to connect to the live audio feed of proceedings for broadcast. It would be unfair to participants if the Board were to now lift their normal limits on rebroadcast/retransmission only after participants have participated in the reconvened Public Hearing, without having been given advance notice of this change to the Board's normal practices, and not having been given the opportunity to object, refuse to participate in the proceedings or seek to reinstate the Board's reasonable limits.
- Further, the NIRB notes that NITV's suggestion that they would respect privacy rights by blurring the images of third parties that may be visible in the frame does not address the rights and expectations of all participants in the reconvened Public Hearing, including the Proponent, Intervenors, elders, and community representatives whose participation is central to the proceedings, to not have their images and testimony rebroadcast after the live event without their consent.

PROCEDURAL DIRECTION TO ALL MEDIA AND PARTICIPANTS IN THE UPCOMING EXTENSION OF THE RECONVENED PUBLIC HEARING

For the clarity of all media and participants (in-person or participating via audio or video links), the Board reiterates the following guidance regarding the Board's requirements for media access and limits on the recording, rebroadcast/retransmission of the Board's proceedings for all participants, including the media, during the upcoming extension of the reconvened Public Hearing:

1. Media wishing to access the Board's live audio/video feed of the proceedings must make a written request to the Board's Executive Director, Karen Costello **on or before April 8, 2021.**
2. Media attending in-person at the Hearing venue must wear a press badge or other identification that makes it clear they are a member of the press and identifies the media outlet they are representing. Media signing on to the audio/video live feed via Zoom or teleconference must identify their name and media affiliation in their sign on information provided to the NIRB staff.
3. Subject only to the limited permission that may be granted to the media as described in Items 4 and 5 below, as stated in the Board's February 24, 2021 guidance letter, any recording, rebroadcast or retransmission of the reconvened Public Hearing or the upcoming extension of the reconvened Public Hearing without the NIRB's written consent is prohibited. This prohibition has been the Board's standard practice in all proceedings since 2012, and the Board will be providing reminders of the general prohibition on recording the proceedings to all participants, whether participating in-person or via audio/video feed during the upcoming proceedings.
4. If media wish to make their own recording of any aspect of the proceedings, they must make a written request to the Board's Executive Director, Karen Costello **on or before April 8, 2021.**
5. If media are permitted to film or record the audio of the proceedings, they must agree to be bound by the following:
 - a. the recording equipment (camera/microphone(s)) will be placed in a single location upon consultation with the NIRB staff;
 - b. the location of recording equipment must be fixed and will not be permitted to be moving when the proceedings are in session;
 - c. recording will only be permitted when the proceedings are in session, and there will no filming or recording of audio in the Hearing venue during breaks, recesses or other adjournments;
 - d. interviews with participants must be conducted outside the Hearing venue;
 - e. recording must not be disruptive or intrusive, and should not interfere with the ability of participants to participate in the proceedings;

- f. the Board's grant of permission to film or record the audio of the proceedings is not a waiver of the Board's prohibition on the rebroadcast/retransmission of the proceedings while the Board is engaged in decision-making;
- g. once the Public Hearing Record has closed and the decision-making for the file has concluded, the media may request the Board's written consent to rebroadcast/retransmit the recordings and the Board will provide a written response to any such request;
- h. if media are unable or unwilling to follow these directions, the Board may revoke the permission to film or record the audio of the proceedings.

Should you have any questions regarding the Board's procedural direction in respect of these matters or the upcoming extension of the reconvened Public Hearings in general, please contact 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: Megan Lord-Hoyle, Baffinland Iron Mines Corporation