

Baffinland Iron Mines Corporation's Mary River Phase 2 Proposal  
(the "Project")

## **NOTICE OF OBJECTION**

The Mittimatalik Hunters and Trappers Organization ("MHTO") submits the following objections to the Nunavut Impact Review Board ("NIRB or "the Board") on April 27, 2021 via email to [tmeadows@meadowslaw.ca](mailto:tmeadows@meadowslaw.ca) and [info@nirb.ca](mailto:info@nirb.ca).

MHTO objects to the following documents being filed with NIRB and marked as exhibits and seeks an order that NIRB exclude them from the record:

1. 210414 BIM New Support Slides-IT4M (doc ID 334663);
2. 210409 BIM Ltr NIRB Re Updated Engagement Summary, Commitment List and Revised Draft PC 005-IMTE (doc ID 334460);
3. 210406 2021 Draft Commitment List-IMTE (doc ID 334329);
4. 210408 BIM CRT Video ENV Monitoring-IA2E (doc ID 334439);
5. 210407 2021 Community Roundtable Presentation-IMTM (doc ID 334428);
6. 210406 2021 Community Roundtable Presentation-IMTM (doc ID 334354);
7. 210406 FAQ Hearing Pamphlet-IMTE (doc ID 334353); and
8. 210322 BIM Appendix 12 (within Responses to Questions) at pdf page 270 (doc ID 334147)

## **THE BASIS FOR THE OBJECTIONS ARE:**

### **Background**

1. The public review process for this Project, as the Board has noted on many occasions, has been underway for nearly three years. There have been thousands of documents filed by the Baffinland Iron Mines Corporation (“BIM” or the “Proponent”).
2. Per the Board’s March 26, 2021 letter to all parties, there have been three technical meetings, time set aside for information requests and responses and for technical review comments and responses, a pre-hearing conference, community information sessions led by NIRB, a 5 day public hearing in November 2019 and a 12 day public hearing in January/February 2021.
3. When the Board commenced the 5 day public hearing in November 2019, it became apparent to Inuit participants that BIM was not prepared for the hearing and therefore NTI brought a motion to adjourn the hearing for 9-12 months to provide additional time for, among other things<sup>1</sup>:
  - the Proponent to provide satisfactory and fulsome supplementary evidence, reports, and plans including a framework to address Inuit Qaujimajatuqangit;
  - affected communities and organizations to fully review materials and prepare their views.
4. More than one year later, in the Board’s letter to all parties issued December 7, 2020, the Board required all parties to file presentations they would be relying on by January 18<sup>th</sup>, 2021.
5. Oceans North attempted to file a new presentation in this hearing on January 29, 2021. In a decision from the Board dated February 4, 2021, the presentation was denied because it was filed outside of the January 18, 2021 deadline for filing presentations<sup>2</sup>.

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<sup>1</sup> See Doc ID 327470, page 2.

<sup>2</sup> Email from T. Meadows on behalf of NIRB to Oceans North dated February 4, 2021.

6. Since the adjournment of the Hearing in February 2021, BIM filed one document - Appendix 12 - on March 22, 2021, and the remaining materials on page 1 of this objection were filed on or after April 6, 2021, less than a week prior to the commencement of the April 12, 2021 Extended Hearing. The new slides were filed several days into the Extended Hearing.
7. The MHTO objects to the filing of the documents identified on page 1 on the following grounds:
  - a. Late filing
  - b. Nature of Evidence
  - c. Procedural Fairness
  - d. Prejudice

## Law

8. Rule 33.3 of the NIRB Rules of Procedure provides the following with respect to the admission of evidence (bold emphasis added):

The Board shall admit any relevant oral and, **subject to filing in accordance with these Rules**, any documentary evidence that is not protected by law from disclosure. Relevant evidence means evidence having any tendency to prove or disprove a fact in issue. The fact that the Board deems evidence admissible does not mean that it will determine any fact in issue. The Board may, however, exclude evidence if any of the following substantially outweigh its value:

- (a) The danger of unfair prejudice;
  - (b) Confusion of the issues;
  - (c) Considerations of waste of time;
  - (d) Duplication; and
  - (e) Presentation of repetitious evidence.
9. On the timing of the filing of evidence, the NIRB Rules of Procedure state:

38.1. Unless the Board directs otherwise, a party wishing to rely on documentary evidence at an oral hearing shall file the documentary evidence with the Board and serve a copy of it on the other parties at least 15 days before the date of the hearing.

10. Further, the Board must adopt a process in this proceeding that is procedurally fair<sup>3</sup>. This requires the Board to ensure that all of the parties are given an opportunity to present their case fully and fairly<sup>4</sup>. The Board owes a high level of procedural fairness to MHTO in this hearing as the Project has the potential to significantly and adversely impact their harvesting rights.

### **Late filing**

11. NIRB's rules are clear about filing evidence in advance of the hearing. NIRB set deadlines for the filing of evidence in advance of the hearing for all parties and there are good policy reasons for this. Parties need time to consider the evidence and to be able to respond. As set out below, knowing the case to be met and being provided with the opportunity to meet it are fundamental aspects of procedural fairness.
12. In its letter to all parties dated March 26, 2021 (doc ID 334232), the Board did not provide any further opportunity to any parties, including BIM, to file additional evidence<sup>5</sup>. In short, the Board has not "directed otherwise" regarding additional evidence. All of the documents filed by BIM since April 6, 2021 are outside the timeline set by the Board for the filing of evidence for this hearing.
13. Further, the Board required all parties to file their presentations by January 18<sup>th</sup>. The Board has enforced that requirement against other parties. There should not be an exception for BIM, particularly since BIM has had nearly three years to prepare its presentations. On this basis alone, documents 1, 4, 5, 6 & 7 listed on page 1 of this objection should be excluded by the Board. In respect of documents 5 & 6, BIM has filed previous versions of these presentations and NIRB has already directed that BIM "deliver the brief overview presentation that was provided on February 6, 2021"<sup>6</sup>.

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<sup>3</sup> *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699, paras. 20, 22

<sup>4</sup> *Baker*, para. 28

<sup>5</sup> On page 7: "the Board anticipates that there will be very limited filing of additional materials required during the extended Public Hearing".

<sup>6</sup> 20210212 NIRB Letter Parties re Draft Extended Public Hearing Agenda (Doc ID 333123), at page 4.

## **Nature of Evidence**

14. Some of the evidence that BIM has filed is repetitious and duplicative, in contravention of Rule 33.3 (d) & (e). This includes the engagement summaries (Doc IDs 334460 and 334329) as BIM provided versions of these documents prior to the hearing in January. BIM should be required to rely on the documents filed in compliance with NIRB's rules. Further, the updated engagement summaries are objectionable in any event on the grounds that they describe a "goodies tour" undertaken by BIM since the close of proceedings in February. NIRB should not be accepting this as evidence.
15. Appendix 12 sets out draft information about thresholds and indicators which BIM has said it already had, and shared with other parties. However, in response to questions on April 14, 2021, only one party (QIA) acknowledged having seen the information. Regardless, if BIM already had the material in Appendix 12 and believed it to be relevant to this Project, it should have been filed the material on time. Recall that BIM was asked a number of questions about thresholds and indicators in January/February, and at no time did BIM refer to the information contained in Appendix 12, or even the fact that the information existed.

## **Procedural Fairness**

16. This process has been ongoing for nearly three years, has involved multiple NIRB led steps, and has involved the filing of thousands of documents. NIRB has set timelines for the parties to file documents, and their Rules of Procedure provide deadlines for the filing of evidence.
17. A fundamental aspect of the duty of fairness is being able to present your "case fully and fairly".<sup>7</sup> In order to do so, parties need to know the case to be met and be provided with an opportunity to respond.

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<sup>7</sup> *Baker*, paras. 22, 28

18. The hearing should not be a revolving door where BIM is allowed to continuously supplement the record and file new materials well into the hearing. This is not fair to the parties participating in the hearing or to the Board that is tasked with assessing a now moving target. If BIM was not prepared for the hearing to proceed, BIM should have sought an adjournment of the hearing so that it could ensure that the parties and the Board had complete material before them before the hearing commenced.
19. Each of the parties in the hearing has prepared and made presentations on the material that was originally filed by BIM, and has not had the opportunity to respond to this new information and provide their views and evidence to the Board.
20. All of the BIM documents on page 1 were filed after questioning of BIM (oral and written) was substantially complete. Although parties had a limited time to question BIM during the present extension, the time provided was only 30 minutes for most parties, and it was meant to allow parties to ask follow up questions on matters arising from prior questions<sup>8</sup>.
21. The time allocated in the hearing extension was completely inadequate to deal with 8 new documents, many of which were filed days before the hearing, or, like the new slides, three days into the Extended Hearing. As such, the ability for parties to test this evidence and ask questions on the record has been effectively non-existent.
22. For all of these reasons, it is procedurally unfair to allow the Proponent to file hundreds of pages of new materials this late in the hearing. All parties are entitled to certainty about the process, and a fulsome opportunity to understand the evidence that BIM has filed in advance of the public hearing. If new material is being filed, parties must be given proper notice of that filing, and an opportunity to respond. None of this has been possible with respect to the 8 documents recently filed. BIM should not be allowed to ignore the Board's rules, or run roughshod over the process the Board has set up.

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<sup>8</sup> See page 4 of NIRB's Feb 12, 2021 letter (doc ID 333123).

23. In short, BIM should not be treated differently than the other parties to this proceeding. It is up to BIM to show up to its own regulatory application fully prepared, and the manner in which BIM continues to file evidence late should be of serious concern to the Board.

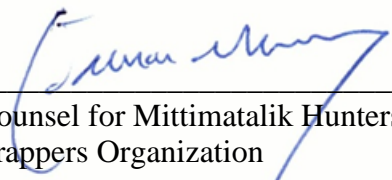
### **Prejudice**

24. The late filings by BIM prevent parties from developing questions, consulting their own experts, and preparing evidence that is responsive to the new filings. This creates a significant prejudice to the intervenors, particularly since the Hamlets and HTOs do not have the same resources or access to technical help that BIM does. The serious prejudice to the parties of admitting this evidence outweigh the value of the evidence and it should be excluded by the Board.

### **Conclusion**

25. The Board should not allow BIM to file any of the documents listed on page 1 of this objection for all of the reasons outlined herein.

April 27, 2021



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