

June 22, 2023

Nunavut Impact Review Board
29 Mitik Street
Cambridge Bay, NU X0B 0C0

Attention: Karen Costello, Executive Director

Dear Ms. Costello:

Re: Kitikmeot Inuit Association comments on DRAFT NIRB Rules of Procedure

Thank you for the opportunity to comment on the Nunavut Impact Review Board's ("NIRB" or the "Board") draft Rules of Procedure. On behalf of the Kitikmeot Inuit Association ("KIA"), we are submitting the following comments to assist the Board in revising the Rules of Procedure.

RULES OF PROCEDURE

The Rules of Procedure are comprehensive; however, KIA is concerned that the increased level of detail provided in the Rules of Procedure could formalize the NIRB process in a manner that is inconsistent with the community context in which NIRB has operated to date. As a result, careful attention should be paid to the application of the Rules of Procedure. In particular, the application in practice of **Rule 6** (the Board may liberally construe these Rules) **Rule 33** (the Board emphasizing flexibility and informality in all its Proceedings) and **Rule 7** (the Board supplementing, varying or dispensing with these Rules) will be very important in order to ensure that hearings do not become highly formal proceedings that serve to reduce community engagement and understanding.

KIA's specific concerns regarding the Rules of Procedure are as follows:

◆ **Definitions**

- **General** – KIA seeks to understand why some definitions are capitalised and others are not. **Rule 3** says that the capitalized words are "terms of art". KIA is concerned that having some words capped in the list of definitions and others not capped could cause legal disagreements among counsel. We are not sure what "terms of art" means for legal interpretation.

- **Parties** – the definition of Parties includes the public. As a result the public has many rights of the proponent or intervenors (formal parties). In KIA’s view there should be another category of participants who are not formally participating. **Rules 11, 16, 17-19, 22, 24-26, 34, 37, 42, 45-50, 58 68** should be considered as to whether they are applicable to the public as well as formal parties. Some, like **Rule 16, 32, 58** refer to Parties, and members of the public, adding to the confusion.
- **Board** – the definition of Board includes the Board’s Chairperson. The Chairperson is acting on behalf of the Board, and according to NuPPA section 19(1) is a member of the Board but is not the Board. The Rules cannot be contrary to the governing legislation.
- **Community Knowledge & Community Representatives** – the definition should define “community”. KIA assumes that it refers to settlements or places where people live, but it could also refer to other communities (ie. the environmental community, the scientific community etc.)
- **Exhibits** are defined as those filed at Public Hearings. Important exhibits may also be filed at Technical Sessions. KIA asks for those to be included in the definition.
- **Indigenous Knowledge** – KIA is concerned about the potential for confusion between different definitions for knowledge of Inuit and Indigenous Parties. Does Indigenous Knowledge include Inuit Qaujimajatuqangit (“IQ”) or vice versa? Are they treated differently by the Board? KIA is concerned that the lack of clarity could result in differences of interpretation. IQ could be defined to include Indigenous Knowledge where appropriate.
- ♦ **Documents - Rule 19** requires the Board to provide written notice of a decision to refuse filing of documents. This Rule does not clearly indicate whether the Board will provide reasons. In addition, the Party trying to file the document has no right to reply or explain. KIA is concerned that this raises a procedural fairness issue.
- ♦ **Public Registry** –
 - **Rule 21** – the repeating of the word Procedural Direction in caps and then not in caps is confusing. KIA suggests using another term like procedural guidance where not capitalised.
 - **Documents and Confidentiality - Rule 24** provides that a Party may bring a motion to prevent confidential materials from being file on the registry. It also allow a Party to seek to remove documents from the registry where confidentiality is a concern. The Rule is not clear as to which Party can seek to remove a document – can such a motion be made by a Party other than the one that filed it? In addition, the document is still on the registry

pending hearing of the motion. KIA suggests the Rule be clarified to indicate which Party(ies) may seek to remove it and we are concerned that leaving the document up on the registry would defeat the purpose of allowing for it to be removed due to confidentiality concerns. KIA suggests that the document be removed from the registry pending hearing of the motion regarding confidentiality.

- ◆ **Board Orders - delegation - Rule 31** allows the Chairperson to delegate their Order making authority. KIA seeks clarity about whether the Chairperson may delegate Order making power to staff or only Board members, and if orders on certain topics are appropriate for staff verses Board members. Is there statutory authority for such delegations? What kind of orders are being considered for delegation?
- ◆ **Procedural Direction - Rule 32** – KIA seeks to understand if this grants the Executive Director authority to issue a Procedural Direction on behalf of the Board or under his or her own authority. If under the Executive Director’s own authority, where is the legislative source of this authority?
- ◆ **Interpretation - Rule 33** provides that the application of these rules will give “due regard and weight to the traditional of Inuit oral communication and decision-making”. However, elsewhere the Rules say that the Board is committed to the “application of IQ”. KIA notes that IQ may include understandings of traditional decision making and communications. KIA understands “due regard” and “application” could mean different standards of treatment. This may lead to confusion about the application of IQ.
- ◆ **Relevance, Materiality and Weight of Information**
 - **Rule 37 and 38** require an Elder to file a CV in order to have IQ be considered as “expert” information and Parties may have to formally qualify the Elder as a witness. KIA believes that this is disrespectful and impractical as it suggests that Elders without a CV can share but will be given less weight. On the face of it, this appears to be contrary to **Rule 36** which recognises no presumption that IQ is to be accorded greater or lesser weight than scientific information. We suggest that Elders should not have to submit a CV to be qualified as a witness.

Rule 40 and 41 provide specifics about determining materiality. KIA submits these are legal concepts that the Board is bound to apply, but in KIA’s view should not be set out in the Rules. They lengthen the text of Board’s reasons and are not comprehensive. Having this material in the Rules will invite legal challenges and makes them complicated in ways that will make it more difficult for unrepresented Parties including communities and Inuit to participate in NIRB proceedings. Should the Rules not fully reflect legal approaches, the Board may find itself stuck between complying with its rules and the law. Further **Rule 41** suggests that the Board will make rulings on admissibility

of documents. KIA is not clear on the intention, but this adds another task to the Board, beyond simply considering materiality and weight in its deliberations and reasons. It implies that a Board decision on the admissibility of every document filed will be required.

- ◆ **Inuit Quajimajatuqangit - Rule 44** provides that the Board may hear from Elders after a Proceeding. KIA submits that this raises procedural fairness issues. How is this information treated, given that it does not come as part of the Proceeding? Is the Board entitled to rely on it even though the Parties may not have heard it?
- ◆ **Motions**
 - **Rule 48** does not set out the timing for filing responses. KIA submits that this is an important aspect to include in the Rules.
 - **Rule 51** is not clearly written. It seems to allow the Board to dispose of an oral motion subsequent to the hearing. KIA is concerned that had the motion been dealt with at the hearing, it could have changed something during the hearing. After the hearing it may be too late to have an impact on the proceedings
- ◆ **Transcripts - Rule 54** provides that the Board shall make final written transcripts available on the public registry within a reasonable time after the conclusion of the oral component of Proceedings. In KIA's view, the final transcripts should also be made available on the public registry before written final arguments are submitted or decisions are made by the Board.
- ◆ **Record of Proceedings – Rule 55 (a)** provides a list of what is included in the Record of Proceedings. The list is worded as being exhaustive. KIA submits the dangers of lists is that an item may come up that is not included but that is a part of the proceedings. KIA suggests that the list not be exhaustive.
- ◆ **Prohibition on Recording, Rebroadcasting or retransmitting Board Proceedings – Rule 63** prohibits recording of proceedings. KIA understands the reasons for this type of prohibition in a court. However, for EA hearings such restrictions limit transparency and communication which are key to a successful hearing, and building trust within communities.
- ◆ **Formal Intervenor – Rule 67**– KIA repeats its concern that due to the board definition of Party, there is no clear distinction between what formal intervenors can do compared to the public. **Rule 67(d)** permits the Board to dismiss an intervention request and does not allow for reply by the party seeking intervenor status. This is procedurally unfair and should be revised to allow for reply argument.

- ◆ **Adjournments – Rule 80** – The effect of this Rule when read with **Rule 46** is that a motion to adjourn the proceedings must be filed 28 days in advance. This is not practical.
- ◆ **Scoping Sessions – Rule 88** refers to Scoping Sessions as “these Proceedings”, when in fact Scoping Sessions are part of the Proceedings. The language here suggests that they are separate proceedings.
- ◆ **Community Information Sessions – Rule 92** refers to Community Information Sessions as “these Proceedings” when in fact Community Information Sessions are part of the Proceedings not separate proceedings as the language suggests.
- ◆ **Pre-Hearing Conference**
 - **Rule 104** states that the Board may hold a Pre-Hearing Conference to facilitate the Board’s Public Hearing processes and to assess whether the project proposal can move forward to the Public Hearing stage. KIA agrees that the purpose of a Pre-Hearing Conference is to facilitate the Board’s public hearing processes. However, a Pre-Hearing Conference should not include consideration of whether the project proposal can move forward to the Public Hearing stage. That decision should be made before the Pre-Hearing Conference occurs.
 - **Rule 105(c)** provides that the Pre-Hearing Conference may include discussion of the identification of any issues or outstanding Information Requests that parties are required to address prior to, or at the Public Hearing. In KIA’s view, by the time the Pre-Hearing Conference occurs, there should be no outstanding Information Requests.
- ◆ **Community Roundtable Session – Rule 112** requires the Board to keep a summary of comments, questions and perspectives shared by the Community Representatives during the Community Roundtable, and that the summary shall form part of the Record of Proceedings. If the summary is to form part of the Record of Proceedings, parties should have the opportunity to review and comment on the accuracy of the summary before it is finalized and forms part of the Record of Proceedings.
- ◆ **Public Hearings Conducted in Communities**
 - **Swearing witnesses – Rule 119** allows swearing some witnesses and not others. KIA finds this problematic. It suggests that some evidence is more important or will be given more weight. KIA is especially concerned where elder’s testimony is presented. They will not be sworn – will this affect the weight of their testimony? The Board should consider whether it is necessary to swear any witnesses in its hearings, especially when the standard Rules of Evidence do not apply and there are no real constraints on witnesses providing opinion or hearsay evidence.

- **Presentation of Evidence and Exhibits – Rule 122** provides that the Board may permit a party to lead new evidence at a Public Hearing. In KIA’s view, permitting new evidence at this stage of the Proceeding is problematic and does not give other parties the opportunity to fully consider and respond to the new evidence being introduced. If this is to be allowed the Rules must ensure that fairness prevails.
- **Questioning – Rule 126** allows the Board to limit the scope of Intervenors questioning witnesses of another party. KIA believes that this is unfair. It will be difficult to enforce this and avoid legal arguments at the hearing. Under this rule, KIA would be unable to ask Intervenors about their evidence when it affects KIA’s role as the Regional Inuit Association because KIA did not file evidence about that. Generally all the Intervenors file their evidence at the same time so limiting questioning this way is going to cause serious problems. KIA agrees that the Board can and should manage and/or – when necessary limit questioning in the interests of time and fairness. But the way these limits are expressed in this rule is problematic, unduly restrictive and will not result in a comprehensive testing of all of the evidence being introduced.
- ♦ **Project Certificate Workshop - Rule 140** provides that the Board may request Designated Inuit Organisations to provide the Board with a summary of how they intend to ensure that they will carry out the Project Certificate requirements. The Board’s authority is limited to the proponent and government, to the extent that the government agrees to measures directed to it. In some cases lease, licences and agreements between a proponent and KIA may already be in place. In others they may not yet have been negotiated. KIA agreements are matters of private law. While KIA has an interest in these Workshops and is committed to assisting NIRB it has its own and separate role in the approval of activities on Inuit land.
- ♦ **Monitoring – Rule 141 and 142 – Rule 141** allows the Board to issue a project-specific Procedural Direction to an Authorizing Agency “or other Party” (like KIA) about monitoring, and **Rule 142** gives the Board’s Monitoring Officer authority to issue Procedural Directions. The Nunavut Agreement, Article 12, Section 12.71 provides that the terms and conditions contained in a NIRB Certificate...may provide for the establishment of a monitoring program for the project which may specify responsibilities for the proponent, NIRB or government” where government means the government of Nunavut or Canada. In KIA’s view, the Board does not have the authority to issue a mandatory monitoring direction to DIOs. This authority is not found in NuPPAA either. In addition, neither the Nunavut Agreement nor NuPPAA give the Monitoring Office authority to issue Procedural Directions and such powers cannot be granted by the Rules either. Any such directions must be issued by the Board.



We look forward to discussions with you regarding the concerns outlined above together with comments raised by other parties.

Regards,

Julie Abouchar

Partner

*Certified as a Specialist in Indigenous Legal Issues and
in Environmental Law
by the Law Society of Ontario*

John Donihee

cc: Wynter Kuliktana, Kitikmeot Inuit Association

Document #: 2356446