



By Email

June 29, 2023

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

Dear Ms. Kaluraq,

Re: Submission on the Nunavut Impact Review Board's Draft Rules of Procedure

Nunavut Tunngavik Incorporated (NTI) appreciates the opportunity to provide further feedback on the Nunavut Impact Review Board's (NIRB or the Board) draft Rules of Procedure. NTI provided its initial comments on the draft Rules of Procedure in 2019.

NTI is submitting additional comments for NIRB's consideration in revising the draft Rules of Procedure. NTI's comments consider our experiences in participating in NIRB's processes, as well as those of other Inuit participants, such as the Regional Inuit Associations (RIAs), Regional Wildlife Organizations and Hunter and Trappers Organizations (HTOs).

NTI has had the opportunity to review the submissions of the Kitikmeot Inuit Association and the Qikiqtani Inuit Association and supports the resolution of the important issues raised in their submissions. NTI has also collaborated with the Kivalliq Inuit Association on the review of NIRB's Rules and Procedures and this submission incorporates their concerns and recommendations.

In its submission, NTI is guided by the direction provided in the *Nunavut Agreement*, particularly with sections 12.2.5 and 12.2.24 that provide key insights into the intended objectives and outcomes of NIRB processes.

Section 12.2.5 emphasizes that NIRB's primary objectives in carrying out its functions must be, at all times, to protect the existing and future well-being of residents and communities, as well as the ecosystemic integrity of the Nunavut Settlement Area. NIRB protecting the well-being of Inuit, who form the majority of Nunavut's resident population and the ecosystems that Inuit rely upon, is a key consideration for the Rules of Procedure. The final Rules of Procedure must be a tool that assists NIRB in meeting the objectives set out in the *Nunavut Agreement* for protecting the existing and future well being of Inuit, communities and ecosystems.

While section 12.2.5 relays the overall key objectives of NIRB processes, section 12.2.24 speaks directly to the design of NIRB's Rules of Procedure assisting Inuit in playing an integral part in NIRB processes, directing that due regard and weight be given to Inuit approaches to knowledge, oral communication and decision-making within NIRB's conduct of public hearings. Specifically, section 12.2.24 states:

12.2.24 In designing its by-laws and rules of procedure for the conduct of public hearings, NIRB shall:

(a) to the extent consistent with the broad application of the principles of natural justice and procedural fairness, emphasize flexibility and informality, and specifically

(i) allow, where appropriate, the admission of evidence that would not normally be admissible under the strict rules of evidence, and

(ii) give due regard and weight to the tradition of Inuit oral communication and decision-making; and

(b) with respect to any classification of intervenors, allow full standing to a DIO.

Considering the provisions of the *Nunavut Agreement*, NTI's comments on the draft Rules of Procedure aim to ensure that:

- Inuit participation is supported in NIRB processes through flexible practices that respect Inuit culture and remove barriers to participation;
- Opportunities to collect Inuit knowledge and Inuit Qaujimagatuqangit are enhanced and the weighing of this knowledge is conducted fairly by the Board; and
- Inuit understandings of community and ecosystem well-being are given appropriate weight in NIRB's determinations.

In considering these factors, NTI would like to acknowledge the efforts made by the NIRB to date in working to facilitate Inuit participation in its processes and considering Inuit Qaujimagatuqangit in its determinations. NTI looks forward to continuing to strengthen Inuit participation and the inclusion Inuit knowledge and oral decision-making in NIRB's process through the finalization and application of the Rules of Procedure.

NTI's Technical Comments to NIRB's Tracked Changes Draft of the Rules and Procedure

Part I

Functions and Primary Objectives to the Board

- NTI recommends that NIRB add Article 15 of the *Nunavut Agreement* to the list of articles that are relevant to the functions of the Board to recognize NIRB's role and responsibilities in marine areas, and in certain circumstances extending outside of marine areas in accordance with the *Nunavut Agreement*.

Part II to VI

Definitions

- Community Representatives – NTI agrees that the first sentence of the definition describes the term "Community Representatives":
means the representatives of potentially affected communities (which may include communities within and outside Nunavut) agreeing to participate in the Board's Proceedings.

The second sentence starting at "[t]ypically" describes how the community representatives are sometimes chosen as opposed to what the term Community Representatives means. How community representatives are chosen has varied over time and regionally. NTI recommends that a standard process for choosing Community Representatives be developed in consultation with community organizations, such as

HTOs and Hamlets, as well as the RIAs that in some instances have assisted NIRB with this process and that this process be described in NIRB's technical guidance documents.

- Designated Inuit Organization – NTI suggest the following changes (proposed additions in red with proposed deletions crossed out) to the definition of “Designation Inuit Organization” to better align with the definition with the *Nunavut Agreement*:
 - a) Nunavut Tunngavik Incorporated;
 - b) In respect of a function under the Agreement or a provision under the NuPPA, any ~~of the organizations designated in the public record, which is maintained by Tunngavik under the~~ under **Section 39.1.3** of the Agreement, as being responsible for **that function** ~~exercise of any power or the performance of any duty or function under the corresponding provision of the Agreement;~~ or
 - c) In respect of Inuit owned lands in the areas of equal use and occupancy, the corporation known as Makivik established by An Act respecting the Makivik Corporation, R.S.Q., c. S-18.1, representing the Inuit of northern Quebec, acting jointly with Tunngavik or an organization **designated** ~~determined~~ under paragraph (b).
- Elders – The definition of Elders should recognize that they are experts.
- Indigenous Knowledge – NTI shares the concerns of the Kitikmeot Inuit Association regarding how the definition of Indigenous Knowledge is related to Inuit Qaujimagatuqangit (IQ) and the potential for confusion and supports the suggestion of the Qikiqtani Inuit Association that NIRB facilitate a discussion with the Designated Inuit Organizations to clarify the appropriate use of the term Indigenous Knowledge and whether any changes are necessary in the draft Rules of Procedures.
- Monitoring Program – NTI recommends that the definition of monitoring program be expanded to refer to what may be included in a monitoring program pursuant to section 12.7.3 of the *Nunavut Agreement* to better reflect the potential scope of monitoring programs.
- Parties – NTI shares the concerns of the Kitikmeot Inuit Association that including the public in the definition of “Parties” creates confusion as to whether members of the public are equivalent to interveners under the Rules of Procedure.

Rule 6

- The key concepts of flexibility and informality in NIRB's proceedings are interconnected with the application of the principles of natural justice and procedural fairness at section 12.2.24 of the *Nunavut Agreement*. The obligation for flexibility and informality in proceedings assists to ensure Inuit participation and involvement in NIRB's decision-making as much as possible. Although Rule 33 addresses these concepts, NTI recommends that when the Rules address the principles of natural justice and procedural fairness that simultaneously the context of flexibility and informality be raised to stress the importance of these elements in the Nunavut context. For this reason, NTI recommends the following adjustments in red to Rule 6:

Consistent with the Nunavut Agreement, the NuPPAA and the broad application of the principles of natural justice and procedural fairness, **and an emphasis on**

flexibility and informality, the Board may liberally construe these Rules in order to result in the just, expeditious and fair consideration of every Proceeding properly before the Board.

Rule 9

- NTI appreciates that the Board desires to retain flexibility as to when reasons are provided when the Board notifies parties of a decision dispensing with or varying the Rules or other procedural guidance. However, NTI is of the view that the lack of reference to the provision of reasons in Rule 9 signals that the Board is unlikely to consider the need to provide reasons for its decisions. From the information provided by the NIRB at the April 28, 2023 session on the draft Rules of Procedure, this does not appear to be the intention of the Board. For this reason, NTI recommends that Rule 9 be amended to reference the consideration of providing reasons in the following manner:

In any Proceeding where the Board dispenses with or varies the Rules, Board Orders, Procedural Directions or other form of procedural guidance, the Board shall notify all Parties and the public as soon as possible of such changes. The notification shall be provided in a manner that, in the Board's opinion, best reflects the circumstances, the requirements of natural justice and procedural fairness and transparency **and will address the provision of written or oral reasons as necessary.**

Rule 19

- Consistent with NTI's comments and recommendations for Rule 9, NTI recommends that in all instances that the Board is notifying parties of a decision or is providing written notice of a decision as described in Rule 19, that the Board should explicitly reference providing reasons in the context of the broad application of the principles of natural justice and procedural fairness. To this end, NTI recommends the following adjustments in red to Rule 19:

...If the Board refuses to file Documents under this Rule, the Board will provide written notice of the Board's decision to refuse the filing to the Party who provided the Documents. **In providing the written notice, the Board will in a manner that considers the broad application natural justice and procedural fairness provide its reasons as necessary for its refusal to file Documents.**

Rule 34:

- NTI is pleased that during the April 28, 2023 session on the draft Rules of Procedure that the NIRB was able to confirm it had intended to adjust Rule 34 to incorporate the precautionary principle as indicated in the document "NIRB Draft ROP (November 2018 version): Summary of Written Comments and the Board's Responses". As previously submitted by NTI, applying the precautionary principle is critical to the NIRB's proceedings and requires proponents to bear the burden of proof that potential adverse environmental impacts can be mitigated or reversed.

Rules 37 to 39:

- NTI appreciates the effort of the NIRB to facilitate the gathering of knowledge from Elders and other community members via Rule 39 by not requiring that they be qualified as experts. However, the option of qualifying Elders as experts under Rule 37 does raise

the question of whether the information and evidence provided by Elders qualified as experts will be given greater weight in comparison to those who are not qualified as experts. Even if the NIRB includes an explicit statement in the Rules of Procedure that states that the knowledge collected from Elders who are not qualified as experts will not be given less weight by the Board, the distinction itself will continue to raise questions and create a barrier to Inuit participation.

Elders are recognized as experts by their communities and should automatically be considered experts in NIRB proceedings. The added formality of qualifying some Elders as experts creates an unnecessary distinction between Elders that is not founded on Inuit values and inadvertently creates a barrier to Inuit participation. NTI recommends that the option of qualifying Elders as experts be removed from the Rules of Procedure and that Elders be allowed to provide their expertise without any procedural formalities.

Rule 42

- NTI is unclear of the relationship between Rules 19 and 42. Both Rules allow the Board to exclude documents and not file documents on the public registry, while Rule 42 is slightly broader. There are similarities and differences in the criteria as to why documents may be excluded in Rules 19 and 42. NTI recommends that there only be one collective standard as to why documents and evidence may be excluded. Additionally, if Rule 42 is maintained and allows for the exclusion of documents, information and evidence, NTI recommends that Rule 42 include a provision for written notice as provided for in Rule 19 and for reasons as recommend by NTI in its submission on Rule 19.

Rules 53 and 54

- NTI recommends that the normal practice of the Board should be to direct that a written transcript of the oral component of NIRB's proceedings be prepared and made available on a timely basis on the public registry, subject to the Board's discretion to vary the Rules. This would increase transparency, promote involvement of Inuit, and support the informed participation by all parties. The adjustments that NTI proposes to Rules 52 and 53 are the following:

Rule 53: The Board ~~will~~ ~~may, at its discretion,~~ direct that written transcripts of the oral component of Proceedings be prepared, **unless the Board at its discretion varies this Rule.**

Rule 54. The Board shall make the final written transcripts prepared as directed by the Board under Rule 53 available on the public registry within a reasonable time after the conclusion of the oral component of Proceedings, **and at least two weeks before final written submissions are required from parties.**

Rule 76

- The information provided by NIRB at its April 28, 2023 session on the Rules of Procedure regarding the challenges, including logistical and financial, in providing virtual or remote participation at NIRB proceedings was useful context to NIRB's proposed Rule 76. NTI urges the Board to continue to evaluate options in addition to in-person proceedings to increase Inuit awareness, involvement and participation in NIRB proceedings.

There are concerns with the current approach to Rule 76. It does not acknowledge that virtual or teleconference participation can support Inuit participation at NIRB proceedings; for example, in the case of Elders that are unable to travel, or when there are challenges to in-person participation for community representatives or experts participating on the behalf of Inuit. Also, Rule 76 does not consider the importance of providing access to a live video or audio feed to NIRB proceedings, subject to Rules 63 and 64, for those interested in the proceedings, but who are not participating directly on an in-person basis. Inuit who are not community representatives should have the ability to follow NIRB proceedings either by video or audio feeds that are provided by NIRB, or a party that has received the appropriate authorization by NIRB.

Rule 84

- NTI recommends that Rule 84 specify that when government funding is made available to interveners for participation in a project review that NIRB will take into account when interveners are likely to receive the participant funding in setting the review schedule to ensure the full participation of interveners in NIRB proceedings.

Rule 105

- NTI shares concerns of the RIAs, and other parties, regarding Information Requests and agrees Information Requests should be addressed by proponents before the pre-hearing conference stage. It is a significant concern that there is no clear process to resolve disputes when there is no consensus between a proponent and one or more interveners on whether an Information Request has been met. As disputes regarding the completeness of answers to Information Requests have become contentious at previous pre-hearing conferences and public hearings, sometimes contributing to a level of distrust of the review process, NTI urges the NIRB to address this issue as soon as possible.

NTI acknowledges that the NIRB has indicated that Information Request process issues are more appropriately addressed in technical guidance documents and in the Environmental Impact Statement Guidelines. However, given the significant level of concern with the management of Information Requests by proponents and Inuit organizations, NTI recommends that the NIRB hold a special session as soon as practicable to deliberate on options and review best practices for the processing of Information Requests in environmental reviews to find a resolution to the current concerns.

Rules 110 to 112

- Community Roundtable Sessions that are conducted during pre-hearing conferences or final public hearings are critical to the meaningful participation of Inuit and communities in the project review process. As set out in Rule 111, the sessions allow community representatives to provide Inuit Qaujimagatuqangit and community knowledge to the Board. This knowledge may encompass valuable evidence regarding the lands, waters, wildlife, harvesting, cultural values and community well-being related to the proposed project, as well as knowledge related to expected impacts, particularly impacts to Inuit rights.

From NTI's perspective, it is critical that Inuit Qaujimagatuqangit and community knowledge provided during the Community Roundtable Sessions be placed on the public hearing record via either summaries or transcripts. In the context of a Community Roundtable Session conducted as part of a final public hearing, the proponent, Designated Inuit Organizations and all interveners must have access to the Inuit knowledge and evidence provided, in a timely manner, as a key step in preparing final submissions to the Board. Final submissions to the Board must consider all Inuit and non-Inuit evidence to ensure that the submissions to the Board address potential impacts to Inuit, Inuit rights, and how these impacts may be mitigated.

In addition, NTI supports the KIA and QIA submissions on the substantive and procedural importance of appropriately managing the evidence collected at the Community Roundtable Sessions by the Board and the use of this evidence in preparing final submissions to the Board.

Sincerely,



Per: Arthur Yuan

Hannah Uniuqsaraq
Acting Chief Operating Officer