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

Dear Ms. Kaluraq:

Re: QIA Comments on the Proposed Revisions to the NIRB Rules of Procedure

I am writing on behalf of the Qikiqtani Inuit Association ("QIA") to thank the Nunavut Impact Review Board ("NIRB") for the opportunity to provide additional comments on the Draft Rules of Procedure ("Draft ROP"), and to provide follow up comments from QIA.

QIA acknowledges the extensive efforts made by NIRB to incorporate the valuable feedback from parties during the previous round of comments. QIA particularly commends NIRB on the substantial work done to remove barriers to Inuit participation, and to clarify and emphasize the role of Inuit Qaujimaja-tuqangit through the Draft ROP revisions made to date.

Based on QIA's experience with NIRB procedures (and particularly the experience of the last several years of lengthy and complex reviews related the Baffinland Mary River Iron Ore Project), QIA would like to offer the following additional comments:

1. **Definition of Community Representatives**: QIA appreciates the revisions to the definition of Community Representatives which clarify that typically these Representatives are recommended by hamlets, Hunters and Trappers Organizations, and other community organizations. QIA suggests further clarification, perhaps in other NIRB guidance documents, regarding the timing and process for selecting Community Representatives.

In recent hearings in the Qikiqtani region, NIRB asked QIA to select Community Representatives, and sometimes approached local QIA staff directly for assistance. The revised Rules correctly reflect that local community organizations, not Regional Inuit Associations, should be responsible for selecting Community Representatives. QIA supports the suggestion from Nunavut Tunngavik Incorporated ("NTI") of engaging in further discussions with the DIOs, hamlets, and HTOs to ensure consistency and clarity in the process and timelines for selection of Community Representatives.

2. **Definition of Indigenous Knowledge**: QIA appreciates NIRB's efforts to address the description and application of Inuit Qaujimajatuqangit ("IQ") in the Draft ROP (as noted below). However, QIA is concerned about the addition of the new term "Indigenous Knowledge" and its relationship of this term to other terms in the Draft ROP.

   The Kitikmeot Inuit Association ("KitIA") and NTI expressed similar concerns, noting the confusion created by the insertion of this new definition and the addition of the term "Indigenous Knowledge" alongside "Inuit Qaujimajatuqangit" and "Community Knowledge" throughout the Draft ROP.

   QIA notes, for instance, that Inuit Qaujimajatuqangit includes the elements included in the draft definition of "Indigenous Knowledge," namely "the accumulated body of knowledge, observations, and understandings about the environment and the relationship of living beings with one another and with the environment, that is rooted in the way of life of Indigenous peoples."

   QIA suggests that NIRB convene a discussion with the DIOs to clarify the appropriate use of these terms and whether further changes would assist in making the application and interrelationship of these terms clearer in the Draft ROP.

3. **Definition and Sufficiency of Information Requests - Rules 32(e) and 105**: In QIA's previous comments on the definition of "Information Request" ("IR"), QIA raised a concern about the sufficiency of Information Request responses and suggested that NIRB should have explicit mechanisms to review and address inadequate responses. QIA agrees that these concerns should be addressed in the Guide to Authorizing Agencies and Guide to Proponents, clarifying expectations for the content of IR responses.

   Addressing this concern only in the technical guides is not sufficient, in QIA's view. When response material is truncated, dismissive, or merely reiterative of materials already reviewed by the Parties, and there is no mechanism for

reviewing and ensuring adequacy, there is a very real prospect of a significant scope of inadequately answered IRs, unnecessarily lengthening the review process as these matters then need to be dealt with during a public hearing (which has, indeed, occurred during some reviews).

The Draft ROP could contain an explicit mechanism for NIRB's own review of adequacy of IR responses, and/or the explicit ability of Parties to request a NIRB review or challenge IR responses for inadequacy. NIRB could look to models used by other tribunals to accomplish this goal.[1]

For instance, Rule 105 regarding Pre-Hearing Conferences could be amended to provide that NIRB undertake an adequacy assessment of IR responses and have the discretion to compel Parties to further and sufficiently respond to an IR, before a Pre-Hearing Conference is convened.

Similarly, Rule 32(e), which outlines the Board's ability to issue Procedural Directions on whether key Project documents and submissions are complete, could include a reference to the ability of NIRB to compel adequate and sufficiently responsive Information Request responses.

4. **Definition of Inuit Qaujimaningit and Inuit Qaujimajatuqangit**: QIA notes and supports the revised approach in the Draft ROP that positions a description of Inuit Qaujimajatuqangit as a preamble and foundation to be applied throughout NIRB's proceedings (and in application of all of the Rules). QIA also appreciates the current description of change of IQ used in the preamble. QIA notes the need for further discussion (as noted above) regarding the parallel use of the term "Indigenous Knowledge" which has been added to the Draft ROP and which has the potential to create confusion when used in addition to and in parallel with the term Inuit Qaujimajatuqangit.

5. **Rule 43 - Validation of IQ:** QIA previously suggested that submissions claiming to be informed by IQ should provide evidence of review and agreement by IQ holders. The Board suggests that verification should occur during the Impact Statement and technical comments phase. The revised Rule 43 does not

[1] For instance, the Canadian Energy Regulator (formerly National Energy Board) Rules of Practice and Procedure expressly provide that the CER has the ability to stay an application where a proponent fails to provide information requested by the Board or another party, and can compel responses (See CER Rules 20(2) and 34). The Mackenzie Valley Impact Review Board and the Mackenzie Valley Land and Water Board allow those Boards to reject IR responses (see MVIRB Rule 77) and parties to dispute the appropriateness of the content of an IR (See MVIRB Rule 76 and MVLWB Rule 64). The Nunavut Planning Commission Rules for Public Proceedings provide that the Commission can determine sufficiency of a response when information is withheld from the IR response and take any actions necessary to ensure the necessary information and answers are provided (See NPC Rule 21.3).

address QIA's concern about the need to verify IQ whenever it is used in a review (and not just at the Impact Statement development stage). QIA agrees with verification at these stages but emphasizes the importance of allowing IQ holders to express agreement and verify IQ during other stages, such as during Technical Hearings and Community Roundtables, where IQ and traditional knowledge are used.

6. **Rule 54 - Transcripts:** In previous comments, QIA inquired about situations where a party disputes the accuracy of the written transcript. The Board responded that parties should inform the Board of such inaccuracies, and corrections can be made by the transcriptionist. QIA suggests explicitly stating the ability of parties to suggest corrections to the transcript in the Rules of Procedure, as accuracy of Inuit words in the transcript is a particular concern. Additionally, and as also recommended by KitIA and NTI, QIA suggests amending Rule 54 to require that final written transcripts be made available on the public registry within a reasonable time after the conclusion of oral proceedings and before final arguments are scheduled.

7. **Rule 72 - Evidence of the Board's Own Subject Matter Experts**: QIA expressed concerns in its 2019 comments about the discretionary language in Rule 72. It raises questions about whether participants will be allowed to respond to submissions from Board-retained experts and whether these experts can be questioned by other parties. The underlying concern is the procedural fairness of relying on untested evidence in a hearing. NIRB did not amend the Rule and instead addressed the question (also raised by QIA) about whether advice would be given in-camera, which is related to one aspect of QIA's question but not the main procedural concern of testing the evidence.

   QIA acknowledges that NIRB's intention in this Rule is to clarify the process for a Board Order involving a Board-retained expert (rather than open space for the NIRB to hear in-camera technical evidence. While clarity of process is the intent, QIA remains concerned that the actual wording of the Rule allows NIRB to rely on expert evidence without allowing parties to respond to or question it in the proceeding, and without even disclosing the fact that such evidence has been provided to NIRB. This raises procedural fairness concerns about the need for transparency regarding what evidence a decision-maker is relying on and the right to ask questions about and respond to that evidence. In addition, as a practical matter, in a territorial context where the pool of available subject matter experts can be limited, knowing the identity and expert advice on which NIRB is relying assists in ensuring there are no conflicts when other parties retain subject matter experts who may also be advising NIRB.

8. **Rules 44, 73-75, and 76-77 - Elders' and IQ Evidence, and Remote Participation Options:** QIA offered previous comments on remote participation options for facilitating Elder and IQ-holder evidence and accommodating Inuit community participation. Those comments related to Rule 44 (accommodations for hearing from Elders and IQ holders). QIA offers further comments on Rule 44, and on Rules 73-75 (procedural flexibility for remote participation in cases of public health and safety needs), Rule 76-77 (Remote Participation Options), and on NIRB's recent consultation comments regarding remote participation.

   In its 2019 comments, QIA suggested amending Rule 44 to explicitly state that the Board can alter the location, nature, and procedures to accommodate Elders and IQ holders. NIRB responded by stating that the existing Rules were already flexible enough to address this concern, given the Board's general discretion to vary the Rules under Rule 4.

   Since the 2019 draft, NIRB introduced new Rules 73-75 that allow modifications for remote participation to meet health, safety, and regulatory requirements. These rule modifications reflect NIRB's practices and experience during the COVID pandemic. Accommodation of public health needs is an important goal, and NIRB demonstrated that remote participation options could be an effective accommodation.

   NIRB clarified in consultation updates that it intends to limit the use of remote participation options and generally require in-person hearings. NIRB shared legitimate concerns about the expense of hybrid hearings, technological reliability, and the loss of informal party exchanges when using remote hearings, including the ability to resolve minor issues face to face and during hearing breaks.

   Accommodating Inuit evidence is just as important a goal as public health accommodations, however, and has the additional requirement of being an element of addressing the procedural aspects of respect for constitutionally protected rights. However, the Draft ROP does not yet fully reflect the specificity of accommodation in proceedings when barriers to Inuit participation (including for Elders and IQ holders) arise, particularly in the context of NIRB's update indicating NIRB intends to return to almost entirely in-person hearings.

   QIA highlights that remote and hybrid hearings since early 2020 not only successfully addressed public health concerns, but also allowed for broader community participation in key reviews impacting multiple remote Inuit communities. Inuit participation was enhanced through a combination of in-person and remote options, including meetings in Pond Inlet and an additional

hub location in Iqaluit, videoconferencing, teleconferencing, and pre-recorded submissions. For instance, by enabling remote and hybrid participation, NIRB successfully accommodated up to 200 individuals, including Inuit from various communities, government representatives, and technical advisors during parts of the hearings on the proposed Phase 2 expansion for the Mary River Iron Ore Project. Since the Phase 2 hearings, the ability to provide stable internet and remote access has improved even more, at a territorial level, due to expanded satellite capacity and options which are further improving remote access options.

The cost of remote participation should be seen as an alternative cost rather than an additional expense, considering the challenges and costs associated with travel and limited in-person capacity. One of the most significant participation costs is travel, which in QIA's experience accounts for up to 75% of participation costs for Inuit community representatives. For review processes involving multiple remote communities and significant impacts, the cost of adequate Inuit participation will be required in any event, whether that is the cost of participant funding through other Government of Canada mechanisms or establishing remote access opportunities through NIRB directly. Restricting remote participation merely reallocates costs rather than avoiding them.

Treating remote participation as a rare accommodation creates barriers for Inuit in remote communities and may affect the quality of participation of technical experts including those retained by Inuit communities. Combined with the prohibition on recording or broadcasting NIRB proceedings in Rules 63-64, it restricts the opportunity for Inuit in impacted communities to hear evidence and contribute to their communities' submissions on key impact and mitigation questions. QIA is also concerned that the recent trend of declining flight availability for remote communities and increases in flight disruptions create the very real risk that Inuit participation will be sidelined when travel cannot occur.

QIA notes that a series of recent Court decisions[2] have confirmed the legitimacy of the recent and general trend within judicial and tribunal hearings, that encourage the use of videoconferencing options in proceedings. If videoconferencing achieves the goal of removing barriers to participation in the south, it serves that goal even more in the Nunavut context where distances and expenses of travel – and the internal capacity of communities to host large groups – is even more of a barrier.

[2] See, for instance: Arconti v. Smith, 2020 ONSC 2782 at para 19 and 35; Law Society of Ontario v. Regan, 2020 ONLSTA 15 at paras 11-15; Fraser v. Persaud, 2021 ONSC 8429 at para 28; Logan Instruments Canada Corp. v Wang, 2023 ONSC 2784 at para 17; and Brink's Global Services Korea Ltd. v. Binex Line Corp, 2022 FC 571 at para 82.

QIA recognizes that remote participation will not be required in all (or even most circumstances). QIA suggests that the Draft ROP should be amended, however, to reflect that the Board will consider remote or hybrid participation based on a list of discretionary factors, such as:

- The number of parties and participants in the Proceeding and the ability for a host community to provide accommodation and space for a group of that size;
- The degree to which the evidence from elders and IQ holders from multiple communities will be needed, and whether in-person or remote participation will ensure full Inuit participation;
- In the event that in-person rather than remote participation is the preference, the availability of adequate participant funding to ensure that a sufficient number of participants representing each community, and with relevant evidence, are able to attend the hearing; and
- Whether there will be accommodation to allow for pre-recorded submissions or written submissions from Inuit elders, IQ holders, and others with key evidence who are unable to attend a hearing in-person.

9. **Rules 108–112 - Community Roundtables:** QIA appreciates the use of Community Roundtables (CRTs) as an important component of project proposal reviews to ensure mutual understanding between impacted communities, the Board, and all parties involved. However, QIA is concerned that the revised Rules do not fully acknowledge CRTs as evidentiary processes where relevant evidence, particularly oral and IQ evidence, is admitted into the record. This raises concerns about procedural fairness regarding the handling of this evidence and the integration of Inuit rights impacts into submissions before the Record of Proceedings closes.

   Rules 108-112 outline the Board's discretion to hold CRTs to hear the views, concerns, and questions of affected communities and facilitate further engagement. These 'views, concerns, and question' are, in fact, "evidence" and should be respected as evidence and afforded the procedural fairness protections of evidence. CRTs allow for questioning and receiving responses from parties, expressing community views, and sharing relevant information and perspectives, including IQ, Indigenous Knowledge, and Community Knowledge. The Draft ROP states that NIRB summarizes the comments, questions, and perspectives from CRTs, which form part of the Record of Proceedings considered by the Board during decision-making. These oral aspects of a NIRB review are crucial in assessing project impacts (including impacts on Inuit rights) and

developing mitigation and monitoring measures, including specific Project Certificate terms and conditions.

QIA cautions that the current NIRB approach treats CRTs as simply opportunities for communities to express frustration or "blow off steam" without substantive impact. In NIRB's current practice, when final written submissions precede CRTs, there is no formal opportunity to incorporate CRT evidence into final submissions of parties, including with respect to project mitigation and monitoring responsive to the specific issues raised at CRTs. QIA believes that the evidence provided by directly impacted Inuit community members is vital for making informed decisions on mitigation and monitoring, and there should be a chance to reflect this evidence in proposed adaptive management commitments and formal Project Certificate terms and conditions.

It is procedurally unfair, and contrary to the common law obligations related to procedural requirements of the duty to consult and accommodate where s. 35 rights are impacted (where the Minister explicitly relies on the NIRB process to solicit evidence to ensure the duty to consult and accommodate is discharged), to preclude the ability of parties to make submissions that reflect key Inuit evidence on impacts and corresponding mitigation. QIA therefore asks, again, that the Rules be revised to reflect that, at the conclusion of a CRT and before the close of the public record, parties be able to make or amend submissions that include the integration of the Inuit evidence from CRTs.

QIA also raised a concern in its 2019 comments about the accuracy of the Board's summary of comments, questions and perspectives shared at CRTs, particularly regarding translation issues. NIRB did not address this concern in revisions to the Draft ROP. QIA agrees with KitIA that if the summary of CRTs becomes part of the Record of Proceedings, parties should have the opportunity to review and provide input on its accuracy before finalizing it for inclusion in the official Record.

QIA thanks NIRB for the opportunity to provide additional comments and looks forward to any further discussion required on the comments above, or other matters, to support NIRB's efforts to update its Rules of Procedure.

Sincerely,

Lorraine Land

Partner, OKT Law
Legal Counsel to the Qikiqtani Inuit Association