NIRB's Inchoate Incorporation of Inuit Qaujimajatuqangit in Recommendation-Making Under Nunavut's Impacts Assessment Regime

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In 1999, the comprehensive claims of the Inuit of Nunavut were settled against Canada which culminated in the ratification of the Nunavut Land Claims Agreement (NLCA). The NLCA was given legal effect through the federally enacted Nunavut Land Claims Agreement Act and Nunavut derived its existence as a territory in the federation from the federally enacted Nunavut Act. The Nunavut Planning and Project Assessment Act (NUPPAA), is a federally enacted statute which came into force in 2014, adds to the impact assessment regime provided for under Articles 11 and 12 of the NLCA. The Nunavut Impact Review Board (NIRB) requires project proponents to not only incorporate traditional knowledge—more specifically, Inuit Qaujimajatuqangit (IQ)—into the baseline collection and methodologies of resource management in their project proposals, but to further outline where management strategies, mitigation and monitoring plans, and/or operational considerations employ IQ values and knowledge. Our analysis reveals that there is inchoate incorporation of IQ into NIRB processes by the NIRB itself and argues that the NIRB ought to better incorporate IQ into its decision and report-making processes.

En 1999, l'ensemble des revendications des Inuits du Nunavut envers le Canada ont été réglées menant à la ratification de l'Accord sur les revendications territoriales du Nunavut (ARTN). L'ARTN a obtenu son statut juridique en vertu de la Loi concernant l'Accord sur les revendications territoriales du Nunavut et le Nunavut tire son existence en tant que territoire de la Loi sur le Nunavut, toutes deux promulguées par le gouvernement fédéral. La Loi sur l'aménagement du territoire et l'évaluation des projets au Nunavut, promulguée par le gouvernement fédéral et entrée en vigueur en 2014, s'ajoute au régime d'évaluation des impacts prévu par les articles 11 et 12 de l'ARTN. La Commission du Nunavut chargée de l'examen des répercussions (CNER) exige que les promoteurs de projets, non seulement intègrent les connaissances traditionnelles — plus précisément le Qaujimajatuqangit Inuit (QI) — dans la collection de données de référence et les méthodologies de gestion des ressources de leurs propositions de projet, mais aussi précisent de comment les stratégies de gestion, les plans d'atténuation et de surveillance et/ou les considérations opérationnelles utilisent les valeurs et les connaissances du QI. Notre analyse révèle une incorporation incomplète du QI dans les processus du CNER et soutient que le CNER devrait mieux intégrer le QI dans ses décisions et dans l'établissement de ses rapports.

Titre en français : *Intégration du Qaujimajatuqangit Inuit au régime d'évaluation des impacts du Nunavut*

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1. INTRODUCTION

The creation of Nunavut and its incorporation into the Canadian federation is one of Canada's greatest modern constitutional achievements. Negotiated over the twenty years preceding its legal birth, the comprehensive claims of the Inuit of Nunavut were settled against Canada and culminated in ratification of the *Nunavut Land Claims Agreement* (NLCA) in 1999 which created the territory of Nunavut.[1] The NLCA was given legal effect through the federally enacted *Nunavut Land Claims Agreement Act*,[2] and Nunavut derived its existence as a territory in the federation from the federally enacted *Nunavut Act*.[3] The NLCA, as a modern-day treaty[4] between Canada and the Inuit (of Nunavut), the latter being a constitutionally recognized and protected Aboriginal People in Canada,[5] is a broad and expansive instrument covering many areas of interest and concern to both treaty signatories. One of the most significant of these areas is the impacts assessment regime governing natural resource extraction projects comprehensively addressed in NLCA Articles 5 (Wildlife), 11

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1 *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty The Queen in Right of Canada*, 25 May 1993, online: *Collections Canada* <www.collectionscanada.gc.ca/webarchives/20071124140800/www.ainc- inac.gc.ca/pr/agr/pdf/nunav_e.pdf> [*NLCA*] (The preamble states: "…the Parties agree on the desirability of negotiating a land claims agreement through which Inuit shall receive defined rights and benefits in exchange for surrender of any claims, rights, title and interests based on their assertion of an aboriginal title…").

2 See *Nunavut Land Claims Agreement Act*, SC 1993, c 29.

3 See *Nunavut Act*, SC 1993, c 28, s 3 ("There is hereby established a territory of Canada, to be known as Nunavut, consisting of (a) all that part of Canada north of the sixtieth parallel of north latitude and east of the boundary described in Schedule I that is not within Quebec or Newfoundland and Labrador; and (b) the islands in Hudson Bay, James Bay and Ungava Bay that are not within Manitoba, Ontario or Quebec.").

4 See e.g. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53.

5 See *Charter of Rights and Freedoms*, s 35, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

(Land Use Planning), and 12 (Development Impact).[6] The *Nunavut Planning and Project Assessment Act* (NUPPAA),[7] a federally enacted statute which came into force in 2014, adds to the impacts assessment regime provided for in the NLCA.[8] Given the abundance of natural resources in Canada's northern territories[9] (Yukon, Northwest Territories, and Nunavut) it is unsurprising that such attention would have been devoted to impacts assessment concerns in the NLCA in 1999 and the enactment and later coming into force of NUPPAA in 2014.[10]

That said, although the NLCA provides to Inuit in Nunavut a *participatory* role in decision-making regarding natural resource extraction projects, the final decision as to whether a natural resource project proceeds in Nunavut rests with Ottawa.[11] That such authority rests with Ottawa is perhaps a surprising and disconcerting outcome given the (limited) self-determination rights the NLCA itself purports to provide to Inuit of Nunavut.[12] While it is not our aim to wholly critique this aspect of the NLCA's design, as this has been done elsewhere,[13] we do so partially. More importantly, we undertake in this article a study of how Inuit Qaujimajatuqangit (IQ), or, "Inuit Traditional Knowledge," factors into or is *actually* incorporated into decision-making by the Nunavut Impact Review Board (NIRB)—the body

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6 See *NLCA*, *supra* note 1.

7 See *Nunavut Planning and Project Assessment Act*, SC 2013, c 14, s 2 [*NUPPAA*].

8 *Ibid*, the preamble states: "…the Nunavut Planning Commission and the Nunavut Impact Review Board were established under that agreement, which provides that the substantive powers, functions, duties and objectives of those institutions of public government must be set out in statute…"

9 See NWT and Nunavut Chamber of Mines, "Mining Revenues Strong in Northwest Territories; pass $1 billion in Nunavut," (March 11, 2009), online: *Mining North* <www.miningnorth.com/chamber-news/101895> ("Mineral production continues to be strong at over $2 billion in the Northwest Territories, and with production growth has surpassed $1 billion for two consecutive years in Nunavut according to recently released statistics posted by Natural Resources Canada. Preliminary estimates for 2018 show that the total value of NWT mining production is $2.111 billion, up slightly by $6 million (0.3%) from $2.105 billion in 2017. Of this: Diamond production accounts for nearly the entire value (99.4%) at $2.097 billion, up slightly by $6 million (0.3%) from $2.091 billion; and with no other minerals produced in the NWT, sand, gravel, and stone production value accounts for the remaining $13 million. In Nunavut, the total value of mining production for 2018 is estimated at $1.164 billion, up $125 million (12%) from $1.039 billion in 2017. Of this: Gold production value is $595 million, up $16 million (3%) from $579 million in 2017; Silver production value is $5.1 million, down $0.9 million (15%) from 6.1 million last year; and Iron ore is projected at $564 million, up $110 million (24%) from $454 million last year. In Canada, preliminary estimates for 2018 production are $47.007 billion, an increase of $1.937 billion (4%) from $45.070 billion in 2017.").

10 See *NUPPAA*, *supra* note 7, received royal assent on June 19, 2013 and came into force on July 9, 2015. See also "Nunavut Impact Review Board- Legislation" online: *NIRB* <www.nirb.ca/legislation>.

11 See *NLCA*, *supra* note 1, Arts 12.5.6 and 12.5.7 provide that the NIRB must submit a report to the Minister and the various options open to the Minister in respect of the report. In this article, "Ottawa" is used to refer to the federal government as a whole, i.e. because it is not always clear which Minister ought to receive the recommendation. See also Daniel W Dylan, "The Complicated Intersection of Politics, Administrative and Constitutional Law in Nunavut's Environmental Impacts Assessment Regime" (2017) 68 UNBLJ 202 [*Intersection*].

12 See Jack Hicks & Graham White, "Nunavut: Inuit Self-Determination Through a Land Claim and Public Government," in Jens Dahls et al, eds, *Nunavut: Inuit Regain Control of Their Lands and Their Lives* (Copenhagen: International Work Group for Indigenous Affairs, 2000).

13 See *Intersection*, *supra* note 11.

responsible for assessing the development impacts of natural resource projects in Nunavut and making recommendations to Ottawa in respect of such projects.[14] We also consider the federal government's responses to NIRB's recommendations.[15] The study presented here is a valuable one given the importance that Inuit inherently place on incorporating IQ into daily life, and the legal provisions found in NUPPAA requiring the NIRB to at least "take into account" IQ when screening and reviewing natural resource projects.[16] Our concern is that NIRB's failure or weak attempts to transparently, objectively and concretely incorporate IQ into impacts assessment review and decision-making—over and above the NLCA's failure to provide final decision-making authority to Inuit—has the inchoate effect of divesting from Inuit control over their destinies that the NLCA was supposed or purported to provide.[17] Additionally, we suggest that the apparent lack of IQ incorporation in the reports NIRB authors and the decisions federal Ministers make in respect of such reports and projects, projects which often lead to substantive degradation and major environmental impact from mining and other resource extraction projects, has been noted in multiple studies—but note that none have sufficiently addressed the important question of the extent to which Inuit participate in decision-making and to what extent IQ is *incorporated* by the NIRB.

That such a study would be undertaken seems natural, however, in light of Canada's relatively recent decision to endorse *The United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Specifically, Articles 25 and 26 of UNDRIP provide to indigenous peoples around the world and in Canada "…the right to the lands, territories and *resources* which they have traditionally owned, occupied or otherwise used or acquired…[and]…the right to own, use, develop and control the lands, territories and *resources* that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired" and Article 32 provides "…the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."[18] Seen in this context, a close reading of the of the NLCA reveals that Inuit in Nunavut do not

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14 See *NLCA*, *supra* note 1, Art 10.1.1. In Nunavut these legal entities are referred to as Institutions of Public Government, but are functionally equivalent to administrative tribunals.

15 *NLCA*, *supra* note 1, Arts 12.5.6. and 12.5.7.

16 See *NUPPAA*, *supra* note 7, at s 103(3) ("In its review of a project, the Board must take into account any traditional knowledge or community knowledge provided to it."); see also Honorable Paul Okalik, "Nunavut: The Road to Indigenous Sovereignty" (2007) 2 Intercultural Hum Rts L Rev 11 at 16–17 ("An example of our traditional knowledge in modern law can be found in our statutes governing natural resources management. By using Inuit concepts expressed in Inuktitut, we have ensured that future land management decisions must be interpreted through the prism of Inuit Qaujimajatuqangit. For a culture that remains deeply attached to the land, the importance of such an approach cannot be underestimated. It was only a few years ago that Inuit knowledge was dismissed. It wasn't considered scientific, and was therefore unworthy of consideration.").

17 The authors are not Inuit and do not, in any form or fashion, claim to speak for Inuit. By "transparently," we mean open, clear and without obstruction; by "objectively" we mean based on externally verifiable phenomena, and by "concretely," we mean manifested and capable of being observed or perceived, see Bryan A Gardner, "Black's Law Dictionary", 10th ed, (St. Paul: Thomson Reuters, 2014) at 1241, 1683, and 1729.

18 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <www.refworld.org/docid/471355a82.html> [accessed 17 March 2019] [emphasis added] [*UNDRIP*].

exercise the kind of control over natural resources that UNDRIP envisages given the final decision-making power in respect of natural resource projects has been arrogated to Ottawa by the NLCA and NUPPAA.[19]

It is less obvious, however, that the regime provided for in the NLCA does not expressly address, much less require, the incorporation of IQ into decision-making processes regarding natural resource projects and NUPPAA only does so marginally, leaving much of the decision-making regarding these projects and other aspects of ecological governance to be made—for a multitude of other reasons beyond the ones addressed here—from the gaze of western ideology, science and neo-colonial aspirations and ambitions, rather than Inuit ones.[20] That much ought to to change, we suggest, if these provisions are to have a more meaningful presence and effect in Nunavut's impacts assessment regime and the lives of those who are most impacted by these decisions.

In this article we aim to illustrate how the impacts assessment regime in Nunavut only haphazardly—if not marginally—incorporates IQ into the recommendation-making and decision-making processes regarding natural resource extraction projects and has offered little guidance or suitable precedents for future NIRB decisions as Canada, following the recommendations of the TRC, ostensibly moves forward towards reconciliation with Indigenous peoples and seeks to bring its laws into conformity with UNDRIP.[21] In Part 2, we discuss IQ and the difficulty that incorporation and integration of traditional knowledge into the laws of Canada presents, including protecting traditional knowledge itself. In Part 3, we expose the areas in the NLCA that fail to make IQ an integral part of the report-making, recommendation-making and decision-making processes regarding natural resource extraction projects which take place in Nunavut. In Part 4, we inventory our study of academic literature dealing with the incorporation of IQ and traditional knowledge (or lack thereof) into Canadian administrative proceedings, discussing our rationale and the results generated and, in Part 5, we substantiate our findings and arguments with NIRB case illustrations. Overall, our conclusion (Part 6) is that the failures of NIRB and Ottawa to transparently, objectively, and concretely incorporate IQ into its recommendation and decision-making processes ultimately only serves to divert further autonomy from Inuit and to perpetuate neo-colonialism in Canada and keep true justice, reconciliation and control over resources for NLCA beneficiaries at bay.[22]

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19 We do not expressly focus on wildlife, and do not consider this a "resource" like minerals, for example.

20 See e.g. Alexander R D Zahara & Myra J Hird, "Raven, Dog, Human: Inhuman Colonialism and Unsettling Cosmologies" (2016) 7:1 Env Hum 169; see also Janet McGrath, "Inuit Qaujimajatuqangit: the scapegoat for deep-rooted identity-based conflict in Nunavut" in *Building Capacity* in François Trudel, ed*, Arctic Societies: Dynamics and Shifting Perspectives* (Proceedings of the Second IPSSAS seminar Iqaluit, Nunavut, Canada May 26 to June 6, 2003).

21 See "Bill C-262," online: *LEGISinfo* <www.parl.ca/legisinfo/BillDetails.aspx?billId=8160636&Language=E> at s 4 [note: committee report presented without amendment in the Senate as of November 2020] [*Bill C-262*]; see also Darek Gondor, "Inuit Knowledge and Environmental Assessment in Nunavut, Canada" (2016) 11 Sustainable Science 153 [*Gondor*] for a limited discussion of the extent to which IQ features into impacts assessment in Nunavut ("…it is *not* the main concern of the paper to assess the role of TK in NIRB recommendations or ministerial decision making…")[emphasis added].

22 See Art 35, *NLCA*, *supra* note 1.

2. INUIT QAUJIMAJATUQANGIT

Inuit traditional knowledge is referred to by Inuit in at least two different forms. Inuit Qaujimajatuqangit (IQ) (most closely translated into English as "all that Inuit know") is loosely synonymous with what in the intellectual property law academy and sphere is referred to as "traditional knowledge" or "indigenous knowledge,"[23] though it is also often and more accurately used to describe Inuit social values. "Inuit Qaujimaningit" is a similar term that, as the NIRB describes it, "…refers to traditional knowledge…local and community based knowledge, ecological knowledge (both traditional and contemporary), which is rooted in the daily life of Inuit people, and has an important contribution to make to an impact assessment."[24] For the purposes of this article, the authors use the former term because it is broader and more encompassing.

Thus far, the intellectual property academy in most common law and other countries has struggled to properly define, at least in legal terms, what "traditional knowledge" or "indigenous knowledge" is and encompasses; there is, yet, still no universally accepted definition.[25] At the domestic level, NUPPAA, for example defines traditional knowledge as "…the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and with the environment, that is rooted in the traditional way of life of Inuit of [Nunavut]."[26] In Canada, however, more than 250 references to or definitions of "traditional knowledge" or "indigenous knowledge" are found in various federal and provincial statutes none of which are referentially or definitionally uniform or consistent.[27] Such a lack of uniformity and consistency has led to fragmented and inchoate policy responses in Canada.[28]

In contrast, at the international level, the World Intellectual Property Organization (WIPO), for example, has defined traditional knowledge as "…knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within

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23 *Gondor*, *supra* note 21 ("Houde in 2007 goes further and breaks up TK into six topologies that encapsulate the previous definition: (1) factual observations, (2) management systems, (3) past and current uses, (4) ethics and values, (5) cultural identity tied to language and land and (6) cosmology… It allows for distinction between knowledge that has a space dimension and an empirical basis that can be combined with modern science (1, 2), knowledge with a time dimension expressed orally but with possible substantiating artifacts (3), and knowledge beyond time and space linked to identity, values, ethics and philosophy that is a product of human—nature co-evolution (4, 5, 6). Collection and application of traditional knowledge is classified here into Houde's six topologies of TK, ranging from factual observation to identity and cosmology, recognizing the varied nature of such knowledge systems…") [citation omitted].

24 See Nunavut Impact Review Board, "Inuit Qaujimajatuqangit," <www.nirb.ca/inuit-qaujimajatuqangit>.

25 "WIPO", online: <www.wipo.int/tk/en/tk/> [*WIPO*].

26 *NUPPAA*, *supra* note 7, at s 73(1).

27 See Daniel W Dylan, "Implementation & Governance Challenges in Canada Respecting UNDRIP Art 31" (2020) 70:1 UNBLJ [*Challenges*].

28 See Jeremy de Beer, and Daniel Dylan, "Traditional Knowledge Governance Challenges in Canada" in M Rimmer, ed, *Research Handbook on Indigenous Intellectual Property* (Edward Elgar, 2015); see also David Laidlaw, "The Challenges in Using Aboriginal Traditional Knowledge in the Courts" in Allan E Ingleson ed, *Environment in the Courtroom* at 606 (Calgary: University of Calgary Press, 2019).

a community, often forming part of its cultural or spiritual identity."[29] WIPO further defines traditional knowledge into two categories: "general" and "narrow." Traditional knowledge in a "…general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge" whereas traditional knowledge in the "…narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations."[30] It also adds that traditional knowledge "…can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge."[31]

Article 31(1) of UNDRIP also provides that Indigenous peoples have the "…right to maintain, control, protect and develop their traditional knowledge" and Article 31(2) provides that in "…conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."[32] These are exceptionally important provisions and many countries, Canada included, are faced with the task of meeting such obligations when the legitimacy of imposing colonial laws and solutions to a multitude of social and legal problems continues to be questioned by indigenous peoples and others.[33] If nothing else, however, administrative bodies and government agencies, may at least refer to and be guided by these definitions. For example, in a 2012 case dealing with human rights, both Amnesty International and the Assembly of First Nations submitted to the Federal Court of Canada that the "UNDRIP also reflects emerging norms in international law regarding the rights of indigenous peoples," and the Federal Court noted that:

> The Supreme Court of Canada has recognized the relevance of international human rights law in interpreting domestic legislation such as the *Canadian Human Rights Act*. The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.[34]

Nevertheless, WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is currently engaged in text-based negotiations with the objective of reaching agreement an international legal instrument which it is anticipated will ensure the effective protection of traditional knowledge, and its other dimensions such as traditional cultural expressions (TCEs) and genetic resources (GRs), in an international context.[35] In short, an instrument achieved in these negotiations

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29 *WIPO*, *supra* note 25.

30 *Ibid.*

31 *Ibid*.

32 *UNDRIP*, *supra* note 18, Art 31.

33 See Jennifer Henderson, Pauline Wakeham, "Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada" (2009) 35 ESC: English Studies in Canada 1.

34 *Canada (Human Rights Commission) v Canada (Attorney General),* 2012 FC 445 at 351.

35 *WIPO*, *supra* note 25.

will, from an international law perspective, provide that states endorsing and/or ratifying any such instrument ensure that traditional knowledge will, essentially, be legally *protected* from appropriation or other malevolent uses within those ratifying states—a proposition often more easily stated than accomplished.[36] Moreover, Canada would need to ratify this treaty and reconcile it with the existing intellectual property rights regime, making its efficacy in addressing these problems somewhat of a distant dream.[37]

In much the same way that traditional knowledge presents definitional challenges in the legal context, to some degree so too does IQ. As noted earlier, the federal statute known as NUPPAA defines traditional knowledge as "…the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and with the environment, that is rooted in the traditional way of life of Inuit of [Nunavut]." It is not known if this definition accords with an Inuit interpretation(s) of the same. The *Wildlife Act* of Nunavut,[38] for example, one of the only—if not the only[39]—statutes in Nunavut to refer to IQ, states in section 1 that the purpose of the Act is to "…establish a comprehensive regime for the management of wildlife and habitat in Nunavut, including the conservation, protection and recovery of species at risk, in a manner that implements provisions of the *Nunavut Land Claims Agreement* respecting wildlife, habitat and the rights of Inuit in relation to wildlife and habitat."[40]. Section 1 adds that to give effect to that purpose "…the guiding principles and concepts of Inuit Qaujimajatuqangit are important to the management of wildlife and habitat and should be described and made an integral part of this Act…"[41] Section 8 of the same Act provides twelve non-exhaustive examples of IQ such as "Pijitsirniq/Ihumaliukti,"[42] "Papattiniq/Munakhinik,"[43] "Aajiiqatigiingniq/Pitiakatigiiklotik,"[44] and "Avatimik Kamattiarniq/Amiginik Avatimik"[45] among others. In other words, the governance regime of wildlife in Nunavut is provided for based on the principles and components of IQ

The Government of Nunavut, Department of Culture and Heritage, defines IQ as "…a body of accumulated knowledge of the environment and the Inuit interrelationship with the

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36 *UNDRIP*, *supra* note 18, Art 31(2) provides: "In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."

37 See Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

38 *Wildlife Act*, SNu 2003, c 26.

39 See *Official Languages Act*, S Nu 2008, c 10.

40 *Wildlife Act*, *supra* note 38, s 1.

41 *Ibid*.

42 *Ibid*, s 8(a) ("which means that a person with the power to make decisions must exercise that power to serve the people to whom he or she is responsible").

43 *Ibid,* s 8(b) ("which means the obligation of guardianship or stewardship that a person may owe in relation to something that does not belong to the person").

44 *Ibid,* s 8(c)("which means that people who wish to resolve important matters or any differences of interest must treat each other with respect and discuss them in a meaningful way, keeping in mind that just because a person is silent does not necessarily mean he or she agrees.").

45 *Ibid,* s 8(f)("which means that people are stewards of the environment and must treat all of nature holistically and with respect, because humans, wildlife and habitat are inter-connected and each person's actions and intentions towards everything else have consequences, for good or ill.").

elements, animals, people and family"[46] and provides a definition of eight IQ principles.[47] Building upon those principles, that department has undertaken to promote within the Government of Nunavut, its "Inuit Societal Values" project, an initiative dedicated to promoting "…Inuit Qaujimajatuqangit and to strengthen[ing] the role of Elders in addressing social problems and issues in Nunavut."[48]

Returning to the discussion of impacts assessment, in reviewing and in making decisions and recommendations to Ottawa regarding natural resource extraction projects, the Nunavut Impact Review Board (NIRB), an Institute of Public Government (IPG) (whose functional equivalency is that of an administrative tribunal), states, however, that it is guided by these IQ principles espoused by the Government of Nunavut.[49] In respect of incorporating IQ into the impacts assessment regime and process, the NIRB further states:

> Within its documents and decisions, when the NIRB refers to traditional knowledge and Inuit Qaujimaningit, it is meant to encompass local and community based knowledge, ecological knowledge (both traditional and contemporary), which is rooted in the daily life of Inuit people, and has an important contribution to make to an environmental assessment. The NIRB requires project proponents to not only incorporate traditional knowledge into the baseline collection and methodologies of resource management, but further outline where management strategies, mitigation and monitoring plans, and/or operational considerations employ values of Inuit Qaujimajatuqangit.
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> Traditional knowledge can be obtained with the cooperation of other concerned parties. Peer-referenced, systematic identification of local traditional knowledge experts assures that those considered most knowledgeable within either the local community, social group, or livelihood fraternity will be revealed and potentially included in work dedicated to documenting the local ecological knowledge system. Project proponents are expected to incorporate into their Environmental Impact Statements the traditional knowledge to which they have access or the traditional knowledge that they may reasonably be expected to acquire through appropriate due diligence, in keeping with appropriate ethical standards and without breaching obligations of confidentiality.[50]

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46 See Government of Nunavut, Department of Culture and Heritage, "Inuit Societal Values Project" online: <www.gov.nu.ca/culture-and-heritage/information/inuit-societal-values-report>.

47 See Government of Nunavut, "Incoporating Inuit Societal Values," online (pdf): *Gov't of Nunavut* <www.gov.nu.ca/sites/default/files/2015-04-22-incorporating_inuit_societal_values_report.pdf> ("(a) Inuuqatigiitsiarniq (respecting others, relationships and caring for people); (b) Tunnganarniq (fostering good spirit by being open, welcoming and inclusive); (c) Pijitsirniq (serving and providing for family or community, or both); (d) Aajiiqatigiinniq (decision making through discussion and consensus); (e) Pilimmaksarniq or Pijariuqsarniq (development of skills through practice, effort and action); (f) Piliriqatigiinniq or Ikajuqtigiinniq (working together for a common cause); (g) Qanuqtuurniq (being innovative and resourceful); and (h) Avatittinnik Kamatsiarniq (respect and care for the land, animals and the environment).

48 *Ibid*.

49 See Nunavut Impact Review Board, "Home", online: *NIRB* <www.nirb.ca/inuit-qaujimajatuqangit> [*NIRB-IQ*].

50 *Ibid*.

As will be shown later, the same the language used by the NIRB in rendering reports and recommendations repeatedly appears in official NIRB documents and reports. That the NIRB is cognizant of and is "guided by" IQ principles, however, cannot be reasonably questioned.[51] That it includes reference to IQ and describes what IQ means "within its documents and decisions" perhaps cannot be questioned either; however, upon careful reading, what the above passages reveal is fourfold. First, the NIRB views IQ as a distinct system of knowledge encompassed in or enhanced by a system of values, as it states that IQ "…is meant to encompass local and community based knowledge, ecological knowledge (both traditional and contemporary), which is rooted in the daily life of Inuit people, and has an important contribution to make to an environmental assessment."[52] NIRB has, therefore, provided a definition to itself and presumably for project proponents and other stakeholders, elevating itself and others from the definitional debates which seemingly plague the legal academy. Second, NIRB places on *project proponents* the onus or duty to include IQ in project proposals, Environmental Impact Statements (EIS), and related project proposal documents,[53] which is not to be condemned, but applauded. Such applause, however, is diminished given that NIRB imposes no similar obligation upon itself. Third, NIRB places an onus on project proponents to *develop* IQ as part of the project proposal, rather than being a discrete utility of the NIRB screening and review process. Stated another way, the NIRB's incorporation of IQ into its processes, report-making and recommendation-making functions, is often directly proportionate to the amount, nature, and quality to the IQ supplied to NIRB by the project *proponent*. Fourth, as already adverted to, the NIRB does not mention or explain how IQ factors into or is included within its *own* decision-making and recommendation-making processes. Put differently, it would appear from the above passages that the NIRB places an onus on project proponents to include IQ in their project proposals and related project documents, but mandates no similar requirement to itself. Furthermore, it is nearly impossible to glean from the recommendations and reports produced by NIRB how IQ was incorporated into such recommendations and reports.

Such an outcome is perhaps an unsurprising one given that the NLCA does not place on the NIRB any onus to at least "take into account any traditional knowledge or community knowledge provided to it" whereas NUPPAA does.[54] Furthermore, there is no legal requirement incumbent upon the federal Minister to incorporate IQ when deciding what action to take in respect of the NIRB's report and recommendation(s). Owing to these flaws, the processes or systems by which IQ even factors into Nunavut's impacts assessment regime is itself, arguably, flawed. To better expose these identified legal deficiencies, in the next section we discuss the Nunavut impacts assessment regime in greater detail and as a whole, and expound upon the importance of IQ incorporation in NIRB report-making and recommendation-making.

To concretely substantiate these identified legal deficiencies in NIRB report-making and recommendation-making, however, we briefly discuss in Part 4 of this article our catalog and inventory of existing literature which, to a very limited degree, has made contributions to understandings of how IQ is incorporated in Nunavut and NIRB processes (and elsewhere

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51 *Gondor*, *supra* note 21.

52 *NIRB-IQ*, *supra* note 49.

53 *Intersection*, *supra* note 11.

54 *NUPPAA*, *supra* note 7, s 103(3) ("In its review of a project, the Board must take into account any traditional knowledge or community knowledge provided to it.").

in other jurisdictions), and in Part 5 we illustrate and explicate these deficiencies with three prominent NIRB case examples, ultimately concluding that the NIRB report-making and recommendation-making process, as currently constituted, is opaque and that it retains an implied obligation to transparently, objectively, and concretely incorporate IQ into its screening, review, report and recommendation regime which it has, for the most part, thus failed to consistently meet. In the next section, we provide an overview of the Nunavut impacts assessment regime.

3. THE NUNAVUT IMPACTS ASSESSMENT REGIME

Nearly every natural resource extraction project in Nunavut commences with a project proponent—at that instance, being a "prospector"—staking a claim to the resource to be extracted.[55] Such prospecting is typically conducted on Crown-owned lands given that the majority of surface lands and subsurface rights in the territory are owned by the federal government.[56] Inuit in Nunavut, through their birthright organization, Nunavut Tunngavik Incorporated (NTI) own and hold title to 19% of surface lands in Nunavut, and 2% of subsurface rights.[57] In either context, a project proponent will require a land lease to proceed further with the project and in order to advance the proposal, should the proponent wish to pursue the project.[58] The NLCA provisions for projects on Crown lands and Inuit-owned lands (IOL) differ slightly.[59] In many cases, however, when a project is proposed to take place on IOL, very often the proponent will execute with the appropriate Inuit Association, an Inuit Impact Benefits Agreement (IIBA) which often addresses the socio-economic benefits of a project, subject matter over which NIRB lacks jurisdiction to impose terms and conditions upon.[60] NIRB cannot impose terms and conditions respecting socio-economic benefit, and thus our analysis is not focused on what collateral social and economic benefits Inuit may ostensibly derive from these projects. Nevertheless, following the provision of legal entry onto the land, the lease is typically executed and the project may begin the process of conducting the necessary acquisition and compilation of data to draft an Environmental Impacts Statement (EIS) (and eventually prepare a "finalized" one) in order to later commence the NIRB screening process provided for in the NLCA and which is described below.

3.1. Impacts Assessment

Briefly stated, once a land lease is properly in place, and a draft EIS has been developed, a project proponent advancing a project must, under both the NLCA and NUPPAA, submit the project proposal to the Nunavut Planning Commission (NPC) for a land use conformity

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55 See *Nunavut Mining Regulations*, SOR/2014-69.

56 *Ibid.*

57 *Intersection*, *supra* note 11 at 205.

58 *NLCA*, *supra* note 1, s 1 ("'project proposal' means a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out, or a physical activity that a proponent proposes to undertake or otherwise carry out, such work or activity being within the Nunavut Settlement Area, except as provided in s 12.11.1…"). NUPPA does not define a project proposal.

59 *Ibid,* Arts 17, 18 and 19.

60 *Ibid,* Art 26 and Art 12.2.3 which provides that the "… mandate of NIRB shall not include the establishment of requirements for socio-economic benefits.").

determination.[61] (The proponent will finalize the proposal later in the process). There are currently only two active land-use plans in Nunavut: the Keewatin Regional Land Use Plan (KRLUP) and the North Baffin Region Land Use Plan (NBRLUP).[62] The NPC continues to work on a Nunavut-wide Land Use Plan, but has not yet completed it.[63] In any case, the NPC will review the project proposal to ensure that it conforms to one of these land use plans. If, in the opinion of the NPC, the proposed project conforms to one of the above-noted land use plans, or is proposed to take place in an area where there is no applicable land use plan to which the project proponent must conform, the NPC may forward the project proposal to the NIRB for screening (and review, if NIRB so deems).[64] Conversely, if, in the opinion of the NPC, the project proposal does not conform to a land use plan, the NPC may not forward to the project proposal to the NIRB and the project is stalled until the project proponent seeks an exemption to the land use plan from the "appropriate Minister" or seeks a "minor variance" from the NPC in order to bring the project proposal into conformity with the applicable land use plan.[65] Additionally, the project proponent may also choose to simply abandon the project. The exemption and minor variance processes, however, present significant legal problems in themselves, which have been discussed elsewhere.[66]

Once the NIRB receives the project proposal from the NPC, and following its initial screening, several outcomes may come about under Article 12.4.4 of the NLCA and similar provisions under NUPPAA.[67] First, the NIRB may conclude and supply a report to "the Minister" that the project proposal does not require review under parts 5 or 6 of Article 12.[68] In that case, the project may proceed subject to the Minister accepting such a recommendation. Second, to the contrary, it may conclude that the project proposal does require further NIRB review under part 5 or 6 and provide specific direction to the project proponent and other stakeholders as to what the nature of the review shall encompass.[69] Third, it may conclude and inform the project proponent that the proposal is insufficiently developed and return it to the proponent for clarification and improvement.[70] Fourth, and finally, it may conclude and inform the proponent that the project is unacceptable and will not undergo further review until certain necessary changes are made by the proponent.[71] For the purposes of discussion here, our focus is on the first and second options available to the NIRB. In other words, we are

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61 *Ibid*, Art 12.3.1.

62 See Nunavut Planning Commission, "Approved Plans," (March 2018), Nunavut Planning Commission, online (blog): *NPC* <www.nunavut.ca/land-use-plans>

63 *Ibid*.

64 *NLCA*, *supra* note 1, Art 11.5.10.

65 *Ibid*.

66 *Intersection*, *supra* note 11.

67 See sections 99–114 of NUPPAA, *supra* note 7.

68 *NLCA*, *supra* note 1, Art 12.4.4(a); *Intersection*, *supra* note 11.

69 *NLCA*, *supra* note 1, Art 12.4.4(b).

70 *Ibid*, Art 12.4.4(c).

71 *Ibid*, Art 12.4.4(d).

focused on the manner in which NIRB makes recommendations to Ottawa regarding projects; specifically, natural resource projects.[72]

It should be noted that the purpose and primary functions of the NIRB, according to Article 12.2.2 of NLCA, is, among other things, to: screen project proposals in order to determine whether a review is required; gauge and define the extent of the project's regional impacts, with such definition to be taken into account by the Minister in making his or her determination as to the regional interest; review the ecosystemic and socio-economic impacts of project proposals (although the NIRB may not establish or prescribe socio-economic requirements upon project proponents); and, determine, on the basis of its review, whether a project proposal should proceed, and if so, under what terms and conditions established by the NIRB, and then to report any such determinations to the Minister who has the final say as to whether the project will proceed.[73] Section 88 of NUPPAA states such purpose as follows: "The purpose of screening a project is to determine whether the project has the potential to result in significant ecosystemic or socio-economic impacts and, accordingly, whether it requires a review by the [NIRB] or by a federal environmental assessment panel, as the case may be."[74] To clarify matters further, this article does not discuss the processes of federal environmental assessment panels.

Upon receipt of the NIRB's report, irrespective of the recommendation included within it, the Minister in Ottawa receiving the report may respond in several ways to it.[75] First, the Minister may accept the recommendations in the report and authorize the project to proceed or not proceed, whatever the case may be.[76] Second, the Minister may reject the NIRB's report recommending that a project proceed on the basis that it is not in the national or local interest that it proceed.[77] It is not known or determinable by what criteria these determinations are made. Third, it may reject the NIRB's recommendation that the project proceed for the reasons that terms and conditions contained in the recommendation are too onerous, unnecessary or insufficient, and return the report to the NIRB for amendment and modification and resubmission.[78] Fourth, and finally, where the NIRB has recommended in its report that the project should not proceed, reject that recommendation and return the report to the NIRB for amendment and modification—even further public hearings—and resubmission with the presumed goal of supplying a recommendation opposite to the previous one.[79]

While important to the process, overall, the options available to "the Minister" are germane in this study insofar as they relate to the incorporation of IQ into the reports prepared by the

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72 See Daniel W Dylan, "The Curious Case of NIRB's Acquisition of Jurisdiction Over Scientific Research in Nunavut" (2018) 31:2 JELP 114 [*Jurisdiction*].

73 *NLCA*, *supra* note 1, Art 12.2.2 and 12.2.3.

74 *NUPPAA*, *supra* note 7, s 88.

75 Jurisdiction is a legal problem Professor Dylan has discussed elsewhere, but the common practice is to provide the report and recommendation to the federal Minister of Crown-Indigenous Relations and Northern Affairs; see *Jurisdiction*, *supra* note 72.

76 *NLCA*, *supra* note 1, Art 12.5.7(a).

77 *Ibid*, Art 12.5.7.

78 *Ibid*, Art 12.5.7(c).

79 *Ibid*, Art 12.5.7(d) and (e).

NIRB any such final decisions rendered by Ottawa. As with the NIRB, and the NPC too for that matter, there is no express provision in the NLCA that requires the NIRB or the Minister to *incorporate* IQ into any of the decisions it renders as described above. Any such requirement, at least as it is incumbent upon the NIRB and any federal environmental assessment panel is only found in NUPPAA, and even then, it is still a marginal legal requirement. To complicate matters even further, NUPPAA provides that where an inconsistency exists between the NLCA and NUPPAA, the NLCA prevails.[80] In short, resolving this inconsistency means there is no legal requirement to include IQ into NIRB screening and review-processes. That, however, does not mean there is no reason not to.[81]

3.2. Decision-making and the Absence of IQ

Given that the NLCA does not prescribe the incorporation of IQ into NIRB recommendation-making and report-making, it seems there was an attempt to assuage or remedy this deficiency in NUPPAA. Section 103(1) of NUPPAA provides a series of factors that the NIRB must take into account in conducting a review of a project; for example, it must take into account the purpose of the project and the need for the project and whether, and to what extent, the project would protect and enhance the existing and future well-being of the residents and communities of the [proposed project] area, taking into account the interests of other Canadians."[82] Notably, section 103 only requires the NIRB to "take into account" certain factors in its review process, and it would seem that the provisions do not apply to NIRB determinations, recommendations or the preparation of reports to the Minister—only that it take these factors into account *during review*. Similarly, section 103(3) of NUPPAA provides only that the NIRB "…must take into account any traditional knowledge or community knowledge provided to it."[83] Again, the provision does not prescribe or place any requirement on NIRB to include or incorporate traditional knowledge or IQ as a part of making recommendations, only merely to "take [it] into account" which might mean nothing more than giving "serious thought" to it.[84] The same may be said of Ottawa in rendering final decisions.

Even NIRB's rules of procedure merely provide that NIRB "…shall give *due regard* to Inuit traditional knowledge in all of its proceedings…[and that it] may, in an oral hearing, receive oral evidence from Elders, and shall give them the opportunity to speak at the beginning of a hearing, during a hearing, or at the conclusion of a hearing."[85] The obvious problems with this

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80 *NUPPAA*, *supra* note 7, s 3(1) ("3 (1) In the event of any inconsistency or conflict between the Agreement and this Act or any regulation made under it, the Agreement prevails to the extent of the inconsistency or conflict.").

81 See Marc G Stevenson, "Indigenous Knowledge in Environmental Assessment" (1996) 49:3 Arctic 278 ("...the strengths of traditional and Western scientific knowledge in [environmental impacts assessment] will not be realized until both are recognized as parts of a larger worldview that influences how people perceive and define reality.").

82 *NUPPAA*, *supra* note 7, s 103.

83 *Ibid*.

84 One municipal law case equated the words "taking into account" with "serious thought be given," see *Red River Construction Co v East St Paul* (Rural Municipality), 2001 MBQB 272 at para 11.

85 NIRB Rules of Procedure, NIRB website, September 3, 2009, online (pdf): *NIRB* <www.nirb.ca/publications/Rules%20of%20Procedure/090903-NIRB%20Rules%20Of%20Procedure_English-

particular procedural rule are twofold. First, the permissive rule requires only that "due regard" be given to IQ and, secondly, that such "regard" only be given in respect of proceedings, not explicitly in recommendation-making or report-making, although the phrase "all of its proceedings" may be argued—perhaps tenuously—to include "deliberations," "decision-making," or "report-making." Nonetheless, given that deliberations and recommendation-making processes are held *in camera*, the only apparent way to determine whether IQ has been incorporated into NIRB recommendations is by scrutinizing the reports NIRB prepared for "the Minister," a task which we later undertake in Part 5.

3.3. The Importance of IQ in the Regime

Despite no legal requirement to do so in the NLCA, and only the marginal one in NUPPAA, which is more or less inconsistent with the NLCA, it is important for the NIRB and Ottawa to incorporate IQ into the recommendations and decisions each respectively makes regarding natural resource extraction projects.[86] Such an assertion is grounded in the spirit and intent of the NLCA if not its provisions, and more recently in UNDRIP and Bill C-262. The NLCA states in its preamble that the parties to the treaty "…have negotiated [the NLCA]… to provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore.[87] It is noteworthy that only the right to *participate* in decision-making is purportedly provided to Inuit by the NLCA and not decision-making power or authority itself.[88] The transparent, objective and concrete inclusion and incorporation of IQ into NIRB reports would, we argue, more significantly reflect or manifest the contributions of such participation.

NLCA Article 11, devoted to land use planning, provides in article 11.2.1(b) that "the primary purpose of land use planning in the Nunavut Settlement Area shall be to protect and promote the existing and future well-being of those persons ordinarily resident and communities of the Nunavut Settlement Area taking into account the interests of all Canadians; special attention shall be devoted to protecting and promoting the existing and future well-being of Inuit and Inuit Owned Lands."[89] Article 11.2.1(c) adds that "the planning process shall ensure land use plans reflect the priorities and values of the residents of the planning regions."[90] Ostensibly, the NPC achieves these goals when it performs conformity reviews and issues land conformity decisions in respect of project proposals, though the process by which the interests of Nunavummiut (Nunavut residents) are weighed against those of "all Canadians" in light of the other issues discussed in this article remains opaque.

NLCA Article 12, devoted to Development Impact, provides in Article 12.2.5 that "… the primary objectives of NIRB shall be at all times to protect and promote the existing and future well-being of the residents and communities of the Nunavut Settlement Area, and to

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86 See *Stevenson*, *supra* note 81.

87 *NLCA*, *supra* note 1, Preamble.

88 *Intersection*, *supra* note 11.

89 *NLCA*, *supra* note 1, Art 11.2.1(b).

90 *Ibid*, Art 11.2.1(c).

protect the ecosystemic integrity of the Nunavut Settlement Area…[taking]… into account the well-being of residents of Canada outside the Nunavut Settlement Area."[91] This ambiguous statement of objective merely places an onus on the NIRB to protect and promote the well-being of Nunavummiut in relationship to other Canadian residents—there is no obligation to protect *primarily* Inuit interests. Furthermore, though various other provisions of Article 12 provide some clarity as to how this objective is to be achieved, none either state or place primacy on Inuit well-being or interests.

This outcome is perhaps no accident as Nunavut is a territorial member of the Canadian federation and is governed by a public government; that is to say, the Government of Nunavut is not intended to be the manifestation of Inuit ethnic self-government, and given the way the Articles 11 and 12 are drafted, neither are the NPC or the NIRB explicitly intended to be ethnically-composed administrative tribunals. That a Designated Inuit Organization (DIO), e.g. NTI or one of the regional Inuit birthright organizations such as the Kitikmeot Inuit Association (KitIA), the Kivalliq Inuit Association (KIA), or the Qikiqtani Inuit Association (QIA), appoint members to the NPC equal to the number that the Government of Canada and the Government of Nunavut appoints, or that the DIO may nominate members for appointment to the NIRB, but not actually appoint members, illustrates the exceeding complexity of the issues discussed here.[92] Not only is there no legal requirement to incorporate IQ into recommendation and report-making, there is no guarantee that any concerns about the omission—potential or real—of IQ from the NIRB recommendation and decision-making process can be assuaged by ensuring Inuit appointments (although very often they are) to the NPC or NIRB are made to ensure that Inuit values and IQ are given greater weight than simply being "taken into account."[93]

Although we are not, as we stated, explicitly critiquing the design of the impacts assessment regime provided for in the NLCA and NUPPAA, nor are we making the case for a greater duty to consult, it is almost impossible not to critique the NLCA's design when examining the failure of either instrument to make it an integral legal requirement to incorporate IQ into the recommendation and decision-making process regarding natural resource projects. Moreover, given that the inconsistencies between the NLCA and NUPPAA are resolved in favour of the NLCA, this effectively means that there is no legal requirement for NIRB to incorporate IQ into its recommendation-making process, and relatedly, no legal requirement for Ottawa to do so either.

If Nunavut is to be, as the name adopted by Inuit for the territory suggests, "our land,"[94] that is, the continued home of Inuit, then the processes by which NIRB makes recommendations to Ottawa regarding natural resource projects and the process by which Ottawa makes decisions regarding those projects, needs to be exposed for the neo-colonial instrumentations that they are. Inuit do not possess direct appointment-making power to the NIRB and they merely "enjoy" *participatory* rights in NIRB processes and not recommendation-making and decision-making, and have no explicit assurance that their values, goals and knowledge are

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91 *Ibid*, Art 12.2.5.

92 *Ibid*, Arts 11.4.5 and 12.2.6.

93 In no way do we impugn NIRB members who are often themselves elders and IQ holders.

94 *Hicks*, *supra* note 12.

being included in the decisions that affect them on a daily and long-term basis. This is even more acute a problem, when one looks at the provisions in UNDRIP which provide the legal entitlement to as much.

As noted in the introduction to this article, several articles of UNDRIP provide to indigenous peoples the rights to *control* resources in and on their lands. In May 2015, the Prime Minister instructed the Minister of (the now titled department of) Crown-Indigenous Relations and Northern Affairs (CIRNAC) and other Ministers to "fully implement" UNDRIP in Canada.[95] When read side-by-side, there are simple and plain inconsistencies among NLCA, NUPPAA, and UNDRIP because neither NLCA or NUPPAA provide to Inuit any significant measure of *control* over which natural resource projects proceed in Nunavut and which do not. Stated another way, even absent Ottawa's position of "fully implementing" UNDRIP, Inuit in Nunavut would not, in any event, exercise control over which projects proceed and which do not simply because of the NLCA's design.

Adding to this complexity, and exacerbating these apparent inconsistencies, is Bill C-262 which would have effectively ratified UNDRIP in Canada. Bill C-262, which was effectively killed by the Senate,[96] provided in section 4 that Ottawa "…in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples."[97] It is also noteworthy that the provision would have required the laws of Canada to conform to UNDRIP, and not the other way around.[98] Based on such a reading of section 4, it ought to be plain that the NLCA and NUPPAA impacts assessment regime processes which vests final decision-making authority in Ottawa, and not in Inuit, and which includes no legal requirement to include IQ in such a regime, is inconsistent with Articles 25, 26 and 32 of UNDRIP which provide to indigenous peoples "…the right to the lands, territories and *resources* which they have traditionally owned, occupied or otherwise used or acquired… [and]…the right to own, use, develop and control the lands, territories and *resources* that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired...[and]…the right to determine and develop *priorities and strategies* for the development or use of their lands or territories and other *resources*."[99] To suggest that when the Inuit of Nunavut signed the NLCA and "surrender[ed]any claims, rights, title and interests based on their assertion of an aboriginal title" as consideration for Canada's NLCA signature is a valid defence for non-conformity among the NLCA, NUPPAA and the laws of Canada only merely repeats the violence of colonization historically perpetrated upon Inuit in Canada by settlers and appropriators. Stated differently and plainly, Inuit ought to be in control of their destinies, not Ottawa.

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95 Minister of Indigenous and Northern Affairs Mandate Letter (November 12, 2015), online: *Gov't of Canada* <pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter_2015>.

96 See Justin Brake, "'Let us rise with more energy': Saganash responds to Senate death of C-262 as Liberals promise, again, to legislate UNDRIP," *APTN* (June 24, 2019) <aptnnews.ca/2019/06/24/let-us-rise-with-more-energy-saganash-responds-to-senate-death-of-c-262-as-liberals-promise-again-to-legislate-undrip/>.

97 *Bill C-262*, *supra* note 21, s 4.

98 *Challenges*, *supra* note 27.

99 *UNDRIP, supra* note 18, Arts 25, 26 and 32.

The manner that the NIRB impacts assessment regime currently operates, either by way of the NLCA or NIRB, is, therefore, simply not in conformity with these UNDRIP principles. Moreover, in arriving at the foregoing conclusion, the NLCA impacts assessment regime and NUPPAA are also revealed, from our vantage point, to be little more than instruments of neo-colonialism where Ottawa continues to decide the fate of Inuit in Nunavut. Although we absolutely do not speak for Inuit, it is not unreasonable to suggest and conclude that if there was some assurance that IQ was legally required and actually incorporated into the current regime, legal scholars (and perhaps Inuit too) might view the current limitations the NLCA has placed over their own destiny in a more generous light.

Our analysis and the assertions made herein are substantiated by scrutinizing three significant natural resource projects which took place in Nunavut over the last twenty years. Prior to this discussion, we present a summary of our research of existing literature respecting the incorporation of IQ into NIRB report-making and recommendation-making.

4. SURVEY OF SCHOLARSHIP RESPECTING IQ

In this section we catalog and inventory our research respecting the incorporation of IQ into Nunavut's impacts assessment regime to confirm that little attention has been paid to the issues we address. Thus, we first discuss the rationale that informs our intellectual and legal approach to the necessary incorporation of IQ into report-making and recommendation-making that NIRB undertakes to provide to the Minister. We then discuss and summarize the results of our research.

4.1. Rationale

After an in-depth analysis of relevant treaties, statutes, case law and secondary sources our research across numerous disciplines confirmed that no sustained undertaking has been made to illustrate how IQ is incorporated by the NIRB in report-making and recommendation-making, which is loosely inconsistent with the requirements of NUPPAA (but not the NLCA), and which tends to demonstrate that IQ is, at present, perhaps only marginally or ephemerally included in the NIRB's report-making and recommendation-making process. While providing detailed answers to the following question must dealt with at another time, our primary research question which guided our query asked: how can greater confidence in the methods respecting the incorporation of IQ into not only the Nunavut impacts assessment regime but also NIRB report-making and recommendation-making be more concretely achieved?

IQ is not a monolithic or static concept and while it has traditional aspects is not necessarily itself "traditional."[100] IQ is often site and locale-specific and is in that sense (among others) diverse and unique. For each project the NIRB screens, reviews and reports and makes

[100] Deborah J Halbert, *Resisting Intellectual Property* (London, New York: Routledge, 2005) at 144 ("There is a homogenizing tendency when we speak of traditional knowledge and Indigenous groups at the international level. By necessity, one must speak of these concepts as unitary because recognizing the hundreds of different groups and perspectives individually makes conversation at the international level difficult at best. This homogenizing effect must be recognized and understood only as a temporary state because it is the diversity of ideas and concepts that seems critical at this time, not the homogenization of Indigenous claims."); see also Daniel Gervais, "Spiritual But Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge" (2003) 11 Cardozo J Int'l & Comp L 467 at 472.

a recommendation to the Minister, IQ is needed from local IQ holders, elders, Hunters and Trappers Organizations (HTOs), and Inuit generally, on the potential impacts of the project, if such NIRB processes are to have authenticity and legitimacy and to at least proximately achieve Inuit goals and objectives and to protect Inuit society, culture, ways of life and IQ itself. IQ, therefore, needs to be not only gathered and respected by proponents—and even by NIRB—considered and even "taken into account," but also, we argue, transparently, objectively, and concretely and incorporated into NIRB's reports and recommendations to the Minister.

4.2. Results

After completing a literature search and sorting the retrieved information in a reference management system, initial results returned 2,117 primary and secondary literature sources based on keyword searches of eight databases. From here, these results were refined to only include the categorical terms in the title and abstract; the results of this stage were 149 primary and secondary sources. The final step was to refine the literature to full-text inclusion for the purpose of charting the information which matched the study's inclusion criteria and which might help guide answers to our question defined in the rationale. Upon completion of this final stage, 17 literature sources were included. The distribution of our findings based on literature type are: 12% case law, 29% government documents, 53% academic literature and 6% in other or miscellaneous. When sorted by country of authorship: 82% of the literature is from Canadian Institutions ranging from Alberta, Nunavut, NWT, Ontario, Quebec and Saskatchewan, 6% of the literature was published in Japan, and the remaining 12% was published in the United States. Less than a handful of these results addressed the nature of our inquiry, again indicating that not much academic attention has been focused specifically on the issue(s) which we addressed.

The overall message and themes that emerge from the culmination of the literature is that Canada (not necessarily the NIRB or proponents) has the legal duty to consult Inuit populations on any projects potentially resulting in environmental change but few if any suggested that report-making, recommendation-making, or decision-making need *actually incorporate* IQ into these processes, consultative or otherwise.[101] Furthermore, the knowledge of IQ in baseline data collection and mitigation is typically most useful because it can be adapted to project objectives and should be given more treatment than is otherwise accorded by NIRB in its screening and review reports. Environmental impact assessment must involve more than identifying, assessing and mitigating the negative environmental impacts; it must also identify and mitigate perceived concerns and enhance, where possible, the positive aspects of a project that legitimize NIRB's reports and recommendations. IQ thus has very much a

[101] See "Canada's western Arctic: An adaptive consultation process" in *Breaking ice: Renewable resource and ocean management in the Canadian north*, eds. Fikret Berkes, R Huebert, H Fast, M Manseau, and A Diduck (Calgary: University of Calgary Press, 2005) at 95–117; see also Daniel Dylan, "The Duty to Consult on Wildlife Matters in Overlapping Northern Land Claims Agreements" (July 1, 2015) 1 LLJ 45 [online]; Keiichi Omura, "Science against modern science: The socio-political construction of otherness in Inuit TEK (traditional ecological knowledge)" (2005) 67 Senri Ethno Stud at 323–344; see Dyanna Riedlinger and Fikret Berkes "Contributions of traditional knowledge to understanding climate change in the Canadian Arctic" (2001) 37 Polar Record at 315–328; RL Barsh "Taking Indigenous Sciences Seriously" ch 8 in S Bocking (ed), *Biodiversity in Canada: Ecology, Ideas, and Action* (Peterborough: Broadview Press, 2000) at 153–173; finally, see John Sallenave, "Giving Traditional Ecological Knowledge its Rightful Place in Environmental Impact Assessment" (1994) 22:1 Northern Perspectives at 1–7.

role to play in these processes. In the next section, through three prominent case examples, we illustrate why IQ's role in that respect has ostensibly remained inchoate.

5. CASE ILLUSTRATIONS

Since its inception, the NIRB has screened (and sometimes reviewed) thousands of proposed projects, ranging from mineral exploration to scientific research to mine development, approved some, not others, and approved multiple amendments to each approved project.[102] Given the scope and breadth of this article, it would be impossible to research and study every one of the NIRB's reports and recommendations in respect of these projects, associated amendments, and the Minister's decision(s) respecting those reports-cum-recommendations.[103] Thus, we scrutinized three natural resource extraction projects that took place in Nunavut over the last twenty years for the level of IQ incorporation in each. These are among the most significant natural resource projects in Nunavut's history, and each drew at the time a sufficient amount of attention from Nunavummiut and Inuit who would be affected by them. The first, and the largest, is Baffinland Iron Mines Corporation "Mary River Project." The second is Agnico-Eagle Mines' "Meliadine Gold Mine Project." And, the third is Areva Resources' "Kiggavik Project." Each contrast effectively with each other and are discussed in turn below.

5.1. Baffinland's Mary River Iron Ore Project

Baffinland Iron Mines Corporation's (BIMC) "Mary River Project" (Mary River) is the largest project in Nunavut's history, and constitutes one of the world's northernmost mines.[104] The project has identified nine (9) high grade iron ore deposits in the northern region of Baffin Island in Nunavut, and seeks to eventually mine them all for these iron ore deposits. The first phase of the project was referred to as the "Early Revenue Phase" (ERP) which sought to: extract iron ore from the first of the nine deposits, transport it from the mine site to sea, and ship it through Baffin Bay and the Atlantic Ocean through to Europe where it would be converted in marketable products (and fund later stages of the project).[105] Since inception, the project has undergone multiple revisions and amendments too significant to address here.[106] The project in its entirety, however, began with the process described in Part 3 of this article, and culminated in a NIRB screening report, Minister's decision in respect of the screening report, a final report and a Minister's final decision in respect of the final report. Each is discussed briefly below.

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102 See *Jurisdiction*, *supra* note 72.

103 The number of documents associated with each of the projects analyzed here are literally in the thousands and would be impossible to survey or review them all given the scope of this article.

104 Nunavut Impact Review Board, "Screening Decision for Baffinland Iron Mines Corporation's 'Mary River' Project Proposal," NIRB File No 08MN053, June 27, 2008 at 4 *[Baffinland Screening Report*]; Baffinland Iron Mines Corporation, "Mary River Mine," online: *Baffinland* <www.baffinland.com/mary-river-mine/mary-river-mine/?lang=en> [accessed March 10, 2019].

105 *Ibid.*

106 There is some concern among Nunavummiut and scholars that repeated amendments have the effect of enabling a proponent to have a simpler, more benign proposed project approved initially, and over time, through the use of amendments, to convert it into a more complex, less benign project with significantly more impacts than initially conceived and approved by NIRB and the Minister.

One June 27, 2008 the then Acting Chairperson of NIRB, Lucassie Arragutainaq, wrote to the then Minister of Indian Affairs and Northern Development, the Honourable Chuck Strahl, in the form of a screening decision report, to inform the Minister that the NIRB had concluded BIMC's Mary River proposal required (further and complete) review under Part 5 of the NLCA.[107] The NIRB provided several reasons for this decision which included concern for the adverse effects the project would have on the ecosystem, wildlife habitat, and Inuit harvesting activities on north Baffin Island.[108] These concerns appear in nearly every project NIRB screens/reviews, and specifically, in the projects discussed here in Part of this article. Although the concern expressed for these areas by NIRB may impute a recognition of lifestyle, cultural, and environmental concerns of Inuit, the screening decision—using tired and repetitive language—makes no mention whatsoever of how IQ factored into this screening decision, nor does it state that the decision to send the project proposal to a part 5 review was made on the basis of any IQ the NIRB has been supplied with by BIMC, stakeholders, or hearing participants or that NIRB had independently acquired. Similarly, Minister's Strahl's February 11, 2009, two-page letter to the NIRB, accepting the screening decision report, referred the project proposal back to NIRB for a Part 5 review with no mention whatsoever that such decision was based either in part or in whole on any IQ or other Inuit traditional knowledge. The Minister did, however, ask NIRB to pay particular attention to the adverse effects year-round shipping of iron ore would have on the north Baffin Island ecosystem.[109]

Following a public hearing, on September 12, 2014, Elizabeth Copland, the then acting Chairperson of NIRB, provided the then Minister of Aboriginal Affairs and Northern Development Canada, the Honourable John Duncan, with a 356-page final report recommending that Mary River be permitted to proceed under a series of terms and conditions to be included in the project certificate. In her foreword to the report, Copland wrote:

> During the Final Hearing, the [NIRB] heard concerns expressed that when facing development many Nunavummiut feel caught between two worlds: their hopes for development to yield lasting and sustainable benefits to individuals, communities, their region, Nunavut and Canada in general; and their concerns regarding potential negative impacts on the air, land, water, fish, wildlife, marine mammals, traditional areas, traditional ways and communities. The [NIRB] understands these hopes and concerns and sees thorough impact assessment as a way to bridge the gap between these worlds by ensuring that only development which will ensure the future well-being of Nunavut residents and that protects our land, water and resources be allowed to proceed.[110]

Neither Copland, nor the NIRB, would state what the NIRB's procedural or tangible response to such concerns were except, as stated above, an "understanding" that such concerns might be assuaged by consideration of them through the impacts assessment regime. In its 356-page final report, the NIRB also failed to state or provide a comprehensive explanation or account of

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107 *Baffinland Screening Report*, *supra* note 104.

108 *Ibid* at 3.

109 The Honourable Chuck Strahl, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians, Letter to Lucassie Arraguntainaq, February 11, 2009.

110 Nunavut Impact Review Board, "Final Hearing Report for Baffinland Iron Mine Corp.'s Mary River Project Proposal," NIRB File No 08MN053, September 14, 2012, 95 [*Baffinland Final Report*].

which IQ was supplied to it, and more importantly, how and which IQ was comprehensively utilized or employed to reach the recommendation which the NIRB supplied to the Minister. In only two places in the entire report, is IQ properly referred to and even mentioned in terms of its actual incorporation: one in reference to a study BIMC had conducted with respect to the traditional use of plants,[111] and one in reference to "a review of Inuit Qaujimajatuqangit (IQ) and observations of existing caribou trail orientation and abundance" the NIRB ostensibly undertook.[112] Additionally, one reference to traditional knowledge would be made in respect of walruses.[113]

The NIRB would, however, devote a section to IQ in the final report, and offered these prosaic statements:

> As indicated in both the EIS Guidelines and the [NIRB]'s previous decisions, in the [NIRB]'s view, Inuit Qaujimaningit (IQ), which encompasses Inuit Traditional Knowledge (TK) (and variations thereof) as well as contemporary Inuit knowledge that reflects Inuit societal values and experience, contributes vital information to the NIRB's review process. The term Inuit Qaujimaningit is meant to encompass local and community-based knowledge, ecological knowledge (both traditional and contemporary), which is rooted in the daily life of Inuit people and represents experience acquired over thousands of years of direct human contact with the environment. With its emphasis on personal observation, collective experience and oral transmission over many generations, Inuit Qaujimaningit provides factual information on such matters as ecosystem function, social and economic well-being, and explanations of these facts and casual relations among them. In this regard, Inuit Qaujimaningit has played a significant role in this Review by: contributing to the development of accurate baseline information; comparing predictions of effects with past experience; and assisting in the assessment of the magnitude of projected effects.
>
> The Proponent was required to incorporate Inuit Qaujimaningit into the Environmental Impact Statement (EIS), to the extent that the Proponent had access to such information and in keeping with the expectation that the Proponent would undertake appropriate due diligence to gain access to the information but may be limited by obligations of confidentiality and other ethical obligations that may attach to such information. In addition to Inuit Qaujimaningit provided as part of the EIS or in questions or responses provided by the intervenors, during the approximately six days of Community Roundtables at the Final Hearing, Elders, Inuit harvesters and other community members freely shared their extensive Inuit Qaujimaningit with the Board. The NIRB has benefitted immensely from the Inuit Qaujimaningit provided in the EIS and shared with us by the participants at the Final Hearing and

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111 *Ibid.*

112 *Ibid* at 105.

113 *Ibid* at 148 ("Traditional knowledge indicated that small numbers of walruses are present in Steensby Inlet. Key walrus areas are west of Rowley Island, along the floe edge or on moving pack ice. Walruses also occur in Hudson Strait. Very few are present along the shipping route in Eclipse Sound and Milne Inlet. About half of the footprint of the Steensby Port dock is unsuitable as walrus habitat.").

> the Board has considered and incorporated this information throughout the report and recommendations.[114]

NIRB's statement that it had "considered and incorporated this information throughout the report and recommendations" (information which it seems only the proponent provided) is a rather hollow statement given that it is difficult, if not impossible, to discern exactly where and how "this information" was actually considered and incorporated by NIRB into its NIRB final report. For example, it is not clear *how* IQ contributed to the development of accurate baseline information, what results a comparison of predicted effects with past experience produced, and *how* IQ assisted in the assessment of projected effects? This is a troubling outcome given that in the passage above NIRB specifically wrote "Inuit Qaujimaningit provides *factual* information on such matters as ecosystem function, social and economic well-being, and explanations of these facts and casual relations among them." [115] Instead, the NIRB it seems, simply assimilated or comingled any concerns and *factual information* which would have been borne out of IQ with all the other submissions it received[116] and merely paid lip service to IQ incorporation in its report. Taking a less harsh view, it might be said that the report does incorporate IQ into the recommendation made to the Minister in the form of the terms and conditions it sought to impose, but such a view relies on what might be described as an impoverished view of IQ and the importance it plays to Inuit and ought to play in rendering impacts assessment decisions in Nunavut.

Nevertheless, as the NIRB pedantically recognized and stated in the report: "In order to reach a decision, the [NIRB] conducted a thorough review of the Project Proposal, as required under Section 12.5.5 of the NLCA to consider all matters relevant to the NIRB's objectives and mandate. Throughout the NIRB's consideration of the Project, [NIRB] has been guided by our central objectives: protecting and promoting the existing and future well-being of the residents and communities of Nunavut; and the protection of Nunavut's ecosystemic integrity."[117] Incorporating IQ into report-making and recommendation-making is not, however, as we have already stated, one of the objectives and mandates of NIRB as provided for in the NLCA. To fault NIRB for not including IQ, when doing so is not an express NLCA requirement, may seem trivial or petty or even miscalculated. But NIRB's failure to do so or its weak attempts to explain how IQ has been incorporated permits the overall integrity of the report and NIRB

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114 *Ibid* at 13–14 [citations omitted] (Here the report cites transcripts of the final hearing, but does not state what was discussed at these instances during the hearing.).

115 *Ibid* at 13–14 [emphasis added].

116 *Ibid* at xi [Executive Summary] ("As outlined in this report, over the course of the Board's Screening and Review, there were numerous opportunities for federal, territorial and local government representatives, designated Inuit organizations, community representatives, Elders and members of the general public to share their perspectives about the Project and about the potential effects, both positive and negative on communities and the environment of the Nunavut Settlement Area and adjacent jurisdictions. The Board considered this input, the extensive documentation filed regarding this Project, including the information contained within the draft and final Environmental Impact Statements filed by Baffinland Iron Mines Corporation, as well as the substantial written comments, information requests and final written submissions filed by formal intervenors. The NIRB also carefully considered comments, evidence and advice from community representatives, members of the public and formal intervenors throughout the Review, including hearing from over 150 people who appeared on the record during the NIRB's Final Hearing.").

117 Baffinland Final Report, *supra* note 104 at xi.

process to be questioned when there is little to no comprehensive evidence or explanation to substantiate to what extent, if any, IQ played in NIRB's determination and recommendation to the Minister. NIRB cannot have it both ways: on one hand saying that it incorporated IQ into its report and recommendation, but failing to indicate how.

Equally concerning is that Minister Duncan's 2-page December 3, 2012 letter to Copland accepted the report and recommendation without stating that IQ had been considered, much less incorporated into the Minister's decision to accept the report and recommendation and which ultimately permitted the Mary River Project to go forward. Rather superficially, the Minister would simply write: "…the [NIRB] met its primary objectives under Section 12.2.5 to protect and promote the existing and future-well-being of the residents and communities of Nunavut, to protect the ecosystemic integrity of the Nunavut Settlement Area and take into account the well-being of residents of Canada and outside the Nunavut Settlement Area."[118] Little rationale was provided by the Minister for such a conclusion.

In short, these documents in totality reveal that while indeed the NIRB may have been "guided by" IQ and even made some superficial—even quixotic—references to its importance in the final report, the failure to comprehensively state and explain how IQ was utilized in the process of preparing the report and recommendation, much less transparently, objectively, and concretely incorporating it into the final report and recommendation reveals that NIRB processes in respect of these functions would need to change to reflect IQ incorporation and to provide Inuit and Nunavummiut a higher degree of confidence that these decisions have been rendered using Inuit methods, knowledge, values, and objectives. A similar conclusion is reached by examining the Meliadine Gold Mine Project.

5.2. Agnico-Eagle Mines Ltd. Meliadine Gold Mine Project

Agnico-Eagle Mines Ltd. (AEM), an international mining company, currently has two resource extraction projects in the Kivalliq region of Nunavut. The first and older of the two projects is the Meadowbank Gold Mine Project (Meadowbank), and the second, more recent of these projects is the "Meliadine Gold Mine" Project (Meliadine). Meliadine represents AEM's second largest gold mine in Nunavut and ostensibly contains 3.7 million ounces of gold in proven and probable reserves (16.1 million tonnes at 7.12 g/t) located within a number deposits contained on a 111,358-hectare property located near the western shore of Hudson Bay, about 25 km north of Rankin Inlet and 290 km southeast of the Meadowbank mine.[119] Like BIMC's Mary River Project, Meliadine has undergone several amendments from the time of first approval which are too numerous and need not be discussed here.

On July 8, 2011, following the earlier issuance of positive land use conformity decision by the NPC prior to NIRB's screening, the then Chairperson of NIRB, Lucassie Arragutainaq, wrote to the Minister of Aboriginal Affairs and Northern Development, the Honourable John Duncan, informing him that it was the NIRB's recommendation following screening that

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[118] The Honourable John Duncan, Minister of Aboriginal Affairs and Northern Development, Letter to Elizabeth Copland, Chairperson, Nunavut Impact Review Board, December 03, 2012.

[119] See Agnico Eagle Mines, Meliadine Project, online: <www.agnicoeagle.com/English/operations-and-development-projects/development-projects/meliadine/default.aspx>.

Meliadine required a Part 5 or Part 6 review under Article 12 of the NLCA.[120] The screening report stated that the NIRB had concerns respecting the potential "significant adverse effects on the ecosystem, wildlife habitat, and Inuit Harvesting activities" Meliadine would impose; however, the screening decision once again failed to explain how IQ or other forms of Inuit traditional knowledge led the NIRB to this conclusion. As was the case in previous example, the Minister accepted NIRB's recommendation in the screening report in a September 13, 2011 letter addressed to the NIRB Chairperson, but failed to advert to or explain if IQ had, and to what extent, played any part in accepting the NIRB's recommendation.

Nevertheless, following public hearings, on October 10, 2014, the NIRB issued a 342-page final report and recommended to the Minister of Aboriginal Affairs and Northern Development that the project proceed under a project certificate containing 127 terms and conditions. In the Chairperson's foreward, Elizabeth Copland (the then Chairperson of NIRB) would write:

> The [NIRB] heard that, in general, the residents of the Kivalliq communities welcome the employment opportunities that the Meliadine Gold Project represents, provided that it is developed in a responsible and sustainable manner. However, concerns remain regarding the permanent nature of the changes to the landscape that will take place during mine development and the potential for cumulative effects on caribou near the mine site and road, and cumulative effects on marine mammals along the shipping route.
>
> On the basis of the NIRB's consideration of the information provided during this review, the Board has concluded that if the Meliadine Gold Project is undertaken in accordance with the [NIRB]'s recommended monitoring, management and mitigation measures as set out in the terms and conditions that follow, this project can be carried out in a manner that will both protect and promote the existing and future well-being of the residents and communities of the Nunavut Settlement Area and protect the ecosystemic integrity of the Nunavut Settlement Area.[121]

While the Chairperson would also recognize in this foreword that several stakeholders' opportunities to participate in the final hearing were significantly limited because of funding, the foreword, including the executive summary, failed to adequately indicate how and which—if any—IQ was indeed incorporated into the NIRB's report and the recommendation it made to the Minister. Moreover, using almost identical language as seen in the Mary River final report, the NIRB would again prosaically write:

> As indicated in both the EIS Guidelines and the [NIRB]'s previous decisions, in the [NIRB]'s view, Inuit Qaujimaningit (IQ), which encompasses Inuit Traditional Knowledge (TK) (and variations thereof) as well as contemporary Inuit knowledge

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[120] Nunavut Impact Review Board, "Screening Decision for AEM's 'Meliadine Gold Mine' project proposal, NIRB File No 11MN034," NIRB File No 11MN034, July 8, 2011, online: *NIRB* <www.nirb.ca/portal/dms/script/dms_download.php?fileid=270237&applicationid=124106&sessionid=1k8t0v4bji87npg08vef80uvv6> [accessed March 11, 2019] [*Meliadine Screening Report*].

[121] Nunavut Impact Review Board, "Final Hearing Report for Agnico Eagle Mines Ltd.'s Meliadine Gold Project," NIRB File No 11MN034 (October 10, 2014), online: *NIRB* <www.nirb.ca/portal/dms/script/dms_download.php?fileid=287854&applicationid=124106&sessionid=1k8t0v4bji87npg08vef80uvv6> *[Meliadine Final Report*].

> that reflects Inuit societal values and experience, contributes vital information to the NIRB's review process. The term Inuit Qaujimaningit is meant to encompass local and community-based knowledge, ecological knowledge (both traditional and contemporary), which is rooted in the daily life of Inuit people and represents experience acquired over thousands of years of direct human contact with the environment. With its emphasis on personal observation, collective experience and oral transmission over many generations, Inuit Qaujimaningit provides factual information on such matters as ecosystem function, social and economic well-being, and explanations of these facts and casual relations among them. In this regard, Inuit Qaujimaningit has played a significant role in this Review by: contributing to the development of accurate baseline information; comparing predictions of effects with past experience; and assisting in the assessment of the magnitude of projected effects.
>
> The Proponent was required to incorporate Inuit Qaujimaningit into the Environmental Impact Statement (EIS), to the extent that the Proponent had access to such information and in keeping with the expectation that the Proponent would undertake appropriate due diligence to gain access to the information but may be limited by obligations of confidentiality and other ethical obligations that may attach to such information. In addition to Inuit Qaujimaningit provided as part of the EIS or in questions or responses provided by the intervenors, during the approximately two days of Community Roundtables at the Final Hearing, Elders, Inuit harvesters and other community members freely shared their extensive Inuit Qaujimaningit with the Board. The NIRB has benefitted immensely from the Inuit Qaujimaningit provided in the FEIS and shared with us by the participants at the Final Hearing and the Board has considered and incorporated this information throughout the report and recommendations.[122]

Unlike the Mary River final report, however, although the NIRB stated that it had "considered and incorporated this information throughout the report and recommendations," the final report issued in respect of Meliadine made some thirty-two (32) total references to IQ. The majority of these references pertain to AEM's inclusion and incorporation of IQ into its baseline and environmental impact studies, and altogether reflected an improvement respecting the incorporation of IQ in the final report; however, this improvement appears to be directly proportionate to the extent to which the proponent, AEM, supplied this information to the NIRB, not because the NIRB has of its own volition gathered and incorporated IQ into the report and in the preparation of the recommendation. Any potency that such IQ incorporation has in the final report is perhaps diluted by the fact that the NIRB asked someone else—the proponent—to acquire and provide this "factual information" to it. While some comfort may nevertheless be taken in the greater inclusion of IQ in respect of this project report and recommendation, the point made earlier is plainly revealed: absent the express requirement to do so, it is not clear that NIRB has or will consistently, transparently, objectively and concretely incorporate IQ into its reports and recommendations. Finally, on January 27, 2015, the then Minister of Aboriginal Affairs and Northern Development, the Honourable Bernard Valcourt

[122] *Ibid* at 13–14.

would accept the NIRB's report and recommendation, in a 2-page letter, with nary a word about IQ, how it factored into the NIRB's report and recommendation, or his own.[123]

5.3. Areva Resources's Kiggavik Uranium Mine Project

With respect to Mary River, an analysis of the screening report/recommendation and the final report/recommendation revealed that IQ was given a less than prominent role and was minimally, if at all, incorporated into both the screening and final report recommendations to the Minister. In the Meliadine Gold Mine Project, it was seen that IQ was given a more prominent role and was incorporated to a more significant degree by the NIRB in its final report and recommendation to the Minister. As noted in Part 2 of this article, it was seen that the NIRB places a significant onus on project proponents to gather and supply IQ in project proposal documents, and that the NIRB's reliance on any such IQ included in the proposal documents appears to be its primary source of IQ apart from those community members and elders who participate in NIRB hearings.[124] Unlike both of these projects, however, Areva Resources Inc.'s (Areva) Kiggavik Uranium Mine Project (Kiggavik), a controversial and contentious proposal which caused much rancour and opposition in Baker Lake and surrounding communities from the time it was proposed in 2009 to the time a final decision was rendered by the Minister in 2016, the NIRB rendered its final report and recommendation to the Minister almost strictly and entirely on procedural grounds, leaving little to no room for the incorporation of IQ. Kiggavik, however, is worthy of mention in this article not only because it illustrates how IQ values and knowledge play such an integral part in the process but also because it further illustrates the haphazard and inconsistent manner in which IQ is incorporated by the NIRB in its report-making and recommendation-making which only further serves to illustrate the need for NIRB to transparently, objectively and concretely incorporate IQ into its reports and recommendations to the Minister in respect of the impacts these projects will have on Inuit and Nunavummiut.

As with the previous projects discussed here, Kiggavik obtained a positive land use conformity determination from the NPC in January 16, 2009, and on March 13, 2009, following NIRB screening, the then Chairperson of the NIRB, Lucassie Arragutainaq, wrote to the Minister of Aboriginal Affairs and Northern Development, the Honourable Chuck Strahl, that it was the NIRB's recommendation that Kiggavik required review pursuant Article 12.4.4(b) of the NLCA.[125] Once again, the NIRB failed to make clear how IQ was used to fashion this recommendation, save for one mention in an appendix which was actually Areva's document.[126] In any event, the Minister accepted the NIRB's screening recommendation and referred the project proposal NIRB Part 5 of NLCA Article 12 review, noting that the "…

123 The Honourable Bernard Valcourt, Minister of Aboriginal Affairs and Northern Development, Letter to Chairperson, Elizabeth Copland, January 27, 2015.

124 This is not entirely surprising given that administrative tribunals render decision based on the evidence presented to them by the parties to a hearing as well as other interlocutors.

125 Nunavut Impact Review Board, "Screening Decision for AREVA Resources Canada's 'Kiggavik' Project Proposal," NIRB File No 09MN003, March 13, 2009, accessed March 11, 2019 [*Kiggavik Screening Report*].

126 Nunavut Impact Review Board, "Final Hearing Report for the Nunavut Impact Review Board's Assessment of AREVA Resources Canada Incorporated's "Kiggavik Uranium Mine" Project Proposal," NIRB File No 09MN003, May 8, 2015 [*Kiggavik Final Report*].

very technical nature of some of the issues that have raised concern may, for example, warrant additional community information sessions."[127]

Following such Part 5 review, on May 8, 2015, the then Chairperson of the NIRB, Elizabeth Copland, wrote in NIRB's 323-page final report to the then Minister of Aboriginal Affairs and Northern Affairs, the Honourable Bernard Valcourt, that the NIRB's recommendation was that the project should *not* be permitted to proceed.[128] Specifically, the NIRB wrote that it "…does not intend that this Project not proceed at any time. [Rather, the NIRB] intends that the Kiggavik Project may be resubmitted for consideration at such future time when increased certainty regarding the project start date can be provided. This may enable the [NIRB] to make more definite and confident assessments of potential ecosystemic and socio-economic effects having regard to the enduring significance of caribou, fish and marine wildlife for Nunavummiut, especially the residents and communities of the Nunavut Settlement Area, and the potential for project-specific and cumulative effects which could adversely affect these."[129] NIRB would state even more specifically, "AREVA stated at the outset of the NIRB's Final Hearing that the world price of uranium made the project uneconomic at the present time. Further, AREVA could not provide a definite start date for the Project. AREVA did express confidence that, at some point in the future, the demand for uranium would lead to an increase in price and so to development of the project. During the Final Hearing, numerous parties offered their views on the length of time before the predictions in the Final Environmental Impact Statement might need to be revisited, in whole or in part. When performing its functions, the [NIRB] found that the absence of a definite start date for the project, and the admitted necessity of revisiting the predictions in the Final Environmental Impact Assessment in future, adversely affected its consideration of the weight and confidence which it could give to assessments of project specific and cumulative effects."[130]

That the NIRB fulfilled its mandate in properly screening and reviewing the project in accordance with the principles articulated in Article 12 of the NLCA, is, as in most cases, likely beyond reproach. That said, the NIRB's recommendation to the Minister was predicated very simply on the proponent's inability to supply a specific start date for the project, leaving the NIRB to justifiably abstain from predicting whether the recommendation it made would be ecological congruous with the state of Nunavut at whatever point in the future Areva decided to commence uranium production under the project certificate.[131]

While the NIRB perhaps cannot and should not be faulted for arriving at its recommendation on these narrow grounds, even though others argued it was escapist and a pretext for actually dealing with the more complicated question of whether Inuit and Nunavummiut approved of uranium mining taking place in Nunavut,[132] as much is clear that

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127 The Honourable Chuck Strahl, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians, Letter to Lucassie Arragutainaq, February 23, 2010.

128 *Kiggavik Final Report*, *supra* note 126.

129 *Ibid* at iii.

130 *Ibid* at iv.

131 It seems Areva was simply trying to build a project package which it could later sell to another proponent, which included as part of that package NIRB and Ministerial authorization to proceed.

132 *NUPPAA*, *supra* note 7, s 147(1) provides ("If a project is not commenced within five years after the day on which the project was approved under this Part, that project is subject to a new assessment under this

the NIRB failed to capitalize on the sheer amount of Inuit stakeholder participation and the IQ supplied by these participants to it in the preparation of this report and recommendation. Stated another way, given the highly contentious nature of the project, and the number of outspoken Inuit opponents to the project,[133] the NIRB failed to sufficiently supplement its decision with or even to predicate a substantial portion of it on reasons gleaned from IQ supplied by Inuit stakeholders.

The NIRB would state at one juncture: "The [NIRB] was also influenced by Inuit Qaujimaningit respecting caribou, fish and marine wildlife, the environment in which these live, and the importance of preserving the integrity of these in the event of uranium mining development in the Kivalliq region. No party disputed the enduring significance of caribou, fish and marine wildlife for Nunavummiut, especially the residents and communities of the Nunavut Settlement Area."[134] At another juncture, it merely copied and pasted the two passages respecting "Inuit Qaujimaningit" which it reproduced in the previous final reports discussed above, except, however, this time, noticeably *absent* from the nearly identical passages was the phrase "the Board has considered and incorporated this information throughout the report and recommendations."[135] Given the relatively few and superficial references to IQ in the Kiggavik final report, the reasonable conclusion to draw is that the NIRB did not, in this case, fashion its report or recommendation to the Minister by relying on and incorporating IQ into the

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Part.").

133 Nunavummiut Makitagunarningit, "Nunavummiut Makitagunarningit responds to review board's rejection of AREVA's Kiggavik proposal," May 12, 2015, Nunavummiut Makitagunarningit, online: <makitanunavut.wordpress.com/>; Thomas Rohner, "Makita to Bennett: respect NIRB's advice on uranium mine" *Nunatsiaq News* (January 25, 2016), online: <nunatsiaq.com/stories/article/65674makita_to_bennett_respect_nirbs_advice_on_kiggavik/>; see also David Murphy, "GN responds to Makita's questions on Nunavut's Kiggavik uranium project" *Nunatsiaq News* (September 7, 2012), online: <nunatsiaq.com/stories/article/65674gn_responds_to_makitas_questions_on_nunavuts_kiggavik_uranium_project/>.

134 *Kiggavik Final Report*, *supra* note 126 at xviii.

135 *Ibid* at 12 ("As indicated in both the Environmental Impact Statement (EIS) Guidelines and the Board's previous decisions, in the Board's view, Inuit Qaujimaningit [sic], which encompasses Inuit Traditional Knowledge (and variations thereof) as well as contemporary Inuit knowledge that reflects Inuit societal values and experience, contributes vital information to the NIRB's Review process. The term Inuit Qaujimaningit [sic] is meant to encompass local and community-based knowledge, ecological knowledge (both traditional and contemporary), which is rooted in the daily life of Inuit people and represents experience acquired over thousands of years of direct human contact with the environment. With its emphasis on personal observation, collective experience and oral transmission over many generations, Inuit Qaujimaningit [sic] provides factual information on such matters as ecosystem function, social and economic well-being, and explanations of these facts and casual relations among them. In this regard, Inuit Qaujimaningit [sic] has played a significant role in this Review by: contributing to the development of accurate baseline information; comparing predictions of effects with past experience; and assisting in the assessment of the magnitude of projected effects…The Proponent was required to incorporate Inuit Qaujimaningit [sic] into the EIS, to the extent that the Proponent had access to such information and in keeping with the expectation that the Proponent would undertake appropriate due diligence to gain access to the information but may be limited by obligations of confidentiality and other ethical obligations that may attach to such information. In addition to Inuit Qaujimaningit [sic] provided as part of the EIS or in questions or responses provided by the intervenors, during the approximately two days of Community Roundtables at the Final Hearing, Elders, Inuit harvesters and other community members freely shared Inuit Qaujimaningit [sic]with the Board. The NIRB has benefitted from the Inuit Qaujimaningit [sic] provided in the FEIS and shared by the participants at the Final Hearing.").

same. Where the previous claims in the previous two projects created significant doubt as to the veracity of such a statement, here the express exclusion of such a statement removed any doubt as to its inclusion, the NIRB's reliance on IQ, and its meaningful incorporation in the final report.

In stark contrast (in terms of length) to previous Ministers of Indigenous and Northern Affairs, on July 14, 2016, the Honourable Carolyn Bennett wrote to the NIRB Chairperson, Elizabeth Copland, a 3-page letter (which was not only considerably longer but also more detailed than any Ministerial response supplied to NIRB discussed in the previous two projects) that she had accepted the NIRB's recommendation. More surprising was the fact that near the end of the letter the Minister wrote: "This decision is…consistent with the Government of Canada's January 2016 announcement of five interim principles to guide environmental assessment decision making. The [NIRB's] review accords with those principles in that it based on science, Inuit Qaujimaningit and other relevant evidence; provides for meaningful consultations of Inuit and other Indigenous Peoples; and allows for due consideration of the views of affected communities."[136] The principles to which the Minister referred were contained in a January 27, 2016 statement by several federal ministers and were claimed to be the "…first part of a broader strategy to review and restore confidence in Canada's environmental assessment processes" and that "Indigenous peoples will be more fully engaged in reviewing and monitoring major resource development projects. The process will have greater transparency."[137]

The second of these principles stated that decisions "…will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence," the principle which the Minister referred to in her letter.[138] These principles were intended to be employed by federal environmental assessment review panels, not necessarily provincial and territorial ones thus making the Minister's reliance of NIRB's conformity to this specific (or other) provision(s) somewhat but not entirely misplaced (given Nunavut's status as a federal territory); however, the Minister did not indicate how her decision to accept the NIRB's recommendation (even though it was for the project *not* to proceed) demonstrated transparency or was based on science, traditional knowledge, or other relevant evidence—it was, in effect, and simply stated, a political decision. Moreover, given that the report-cum-recommendation scarcely relied on IQ, it is more than curious how the Minister could evidence her assertion that NIRB's recommendation conformed to IQ principles. Kiggavik, along with the other projects discussed prior to it, being only thee prominent examples, we suggest, illustrates the continuing problem of the NIRB's failure to to transparently, objectively and concretely incorporate IQ into its report-making and recommendation-making processes.

6. CONCLUSION

Inuit in Nunavut are a distinct and constitutionally protected people in Canada and have, over thousands of generations, developed exceptional methods to survive and thrive in the

136 The Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, Letter to Elizabeth Copland, Chairperson of NIRB, July 14, 2016.

137 Government of Canada, "Government of Canada Moves to Restore Trust in Environmental Assessment," (January 27, 2016), online: *Gov't of Canada* <www.canada.ca/en/natural-resources-canada/news/2016/01/government-of-canada-moves-to-restore-trust-in-environmental-assessment.html>.

138 *Ibid*.

circumpolar world and one of its Canadian manifestations, Nunavut.[139] Inuit relation to, and respect for land, wildlife and natural ecosystems has shaped Inuit social values, knowledge, rules, rituals, spirituality, and social, political and economic sustenance both inside and outside of settlers' legal, social and economic organization, imposition and indefatigable coercion. This article is meant to emphasize that the preservation of Inuit culture remains closely linked to the progressive use of IQ to inform decision-making and it is key to the social and cultural identity of Inuit people. While significant research exists to show the importance that IQ ought to place in NIRB processes, few if any studies expose how IQ is *actually incorporated* by NIRB. That said, Inuit communities and other stakeholders in Nunavut ought to encourage or demand that the NIRB to use the full extent of its powers to incorporate and and increase the willingness and capacity to utilize IQ as a form of legitimate evidence informing conclusions on decisions embodied by and within the NLCA. The NIRB must continue to use its influence on decisions pertaining not only in respect of the environmental impacts of communities faced by project development, but the long-term sustainability of Inuit traditional ways of life and IQ. The demand to incorporate IQ into report and recommendation-making by NIRB is not only needed for building and strengthening relationships between Inuit, proponents, and government, but also to provide a holistic understanding of the totality of the effects impacts assessment and impacts present to the communities affected by these decisions.[140]

The mining of lands in Nunavut thus affects not only the territory's environment, wildlife, resources, and inhabitants but also the continued availability of, evolving nature of, and traditional manner of utilizing IQ to maintain a sustainable Inuit way of life. We have aimed to show is that although great *political* emphasis is placed on incorporating IQ into the NIRB processes, little *legal* emphasis is placed on doing so. Although the legal requirement to "take into account" IQ or "traditional knowledge" is found in NUPPAA, no similar requirement is found in NLCA, and because inconsistencies between the NLCA and NUPPAA are resolved in favour of the NLCA, there is, therefore, no legal requirement for NIRB to consider IQ in the reports and recommendations it makes. To hide behind the veneer that the absence of a legal provision provides, however, is to undermine the spirt and intent of the NLCA, and moreover undermines the impacts review regime which is designed to promote and protect and the well-being of Inuit and other Nunavut residents. We have not aimed to do and would not want readers to take away from this article our arguments as a wholesale indictment of impeachment of the NIRB. On the contrary, we respect and compliment the NIRB for the difficult work it undertakes and performs in an area which comprises over 20% of Canada's resource-rich land mass. We would, however, suggest that the integrity and efficacy of the impacts assessment regime administered by NIRB would be aggrandized if the manner in which IQ is incorporated into screening decisions and reports, final reports and recommendations, and other NIRB proceedings was more transparent, objective, and concrete. Until such time that the NIRB steps up to this challenge, and so too the Ministers in Ottawa, the decisions that have been made and continue to be made may be called into question for not sufficiently incorporating IQ into the NIRB reports and recommendations, thereby undermining the interests of the Inuit of Nunavut, as well as thwarting but one aspect of true reconciliation between Inuit and Canada.

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139 See e.g. Colin Irwin, "Inuit Navigation, Empirical Reasoning and Survival," (1985) 38:2 J of Nav 178.

140 See Graham White, "Cultures in Collision: Traditional Knowledge and Euro-Canadian Governance Processes in Northern Land-Claim Boards" (2006) 59:4 Arctic J 401.