DECISION MAKING IN NUNAVUT'S IMPACT REVIEW PROCESS: SEARCHING FOR ANSWERS IN A NOVEL LEGAL LANDSCAPE

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CONTENTS

Abstract

Nunavut's environmental impact review regime is situated in a unique legal context that raises unresolved questions about the relationship between the Nunavut Impact Review Board (NIRB) and the federal (and soon to be territorial) government. The Nunavut Land Claims Agreement (Nunavut Agreement)—one of Canada's modern treaties—and the *Nunavut Planning and Project Assessment Act* (NuPPAA) entrust the NIRB with carrying out environmental impact reviews and making "determinations" about project impacts, but assign final decision-making authority to a responsible minister (primarily the federal Minister of Northern Affairs). In this article, we apply a purposive analysis of the Nunavut Agreement and NuPPAA and account for relevant constitutional principles to explain the limitations on the Minister's decision-making authority. In our view, the Minister's decision-making powers are intended to serve as oversight of NIRB-led processes and determinations, despite a plain reading of the decision-making provisions suggesting the Minister's power is largely unfettered. Using the Mary River iron ore mine on Baffin Island as a case study, we offer a nuanced interpretation of the NIRB and the Minister's duties and powers. The NIRB, as a co-management body made up of Inuit and Crown representatives, is responsible for

carrying out impact reviews and related processes and determining whether a project should be approved. Through these processes, the NIRB carries out consultation with Inuit on behalf of the Crown, and its findings must be deeply considered by the Minister. In turn, the Minister must justify a decision in light of the terms and purposes of the Nunavut Agreement and NuPPAA, as well as constitutional principles including the Honour of the Crown and the duty to consult. While the Minister has the final word, the Minister's discretion is bound by these legal principles and should demonstrate respect for the NIRB's authority in furtherance of reconciliation. This purposive analysis helps explain and support the NIRB's function and credibility as a co-management board and the importance of respecting Inuit participation in decision making through NIRB-led processes.

I INTRODUCTION

Nunavut's environmental impact review regime is situated in a unique legal context that raises unresolved questions about the relationship between the Nunavut Impact Review Board (NIRB) and the federal (and soon to be territorial) government. The Nunavut Land Claims Agreement (Nunavut Agreement)[1]—one of Canada's modern treaties (i.e., post *Calder*)[2]—and the *Nunavut Planning and Project Assessment Act* (NuPPAA)[3] entrust the NIRB with carrying out environmental impact reviews (including consultation with Inuit) and making "determinations" about project impacts, but assign final decision-making authority to a responsible minister (primarily the federal Minister of Northern Affairs) ("Minister").[4] A plain reading of the decision-making provisions suggests that the Minister's power is largely unfettered. However, such a narrow view is inconsistent with the complex governance regime established under the Nunavut Agreement, including the NIRB's function as a credible co-management institution and Inuit rights to meaningful participation in decision making regarding land use and natural resource development.

In this article, we apply a purposive analysis of the Nunavut Agreement and NuPPAA to argue that the Minister's decision-making powers are intended to serve as oversight over NIRB determinations and impact review processes, not a de facto veto or cudgel. We examine explicit and implied limitations on ministerial discretion by accounting for principles of statutory and treaty interpretation, the duty to consult, and the Honour of the Crown. We account for the purpose and function of the NIRB as a co-management board and key regulator of development projects, and the Minister's role in ensuring NIRB-led consultation is conducted honourably and consistently with section 35 of the *Constitution Act, 1982*. If the Minister decides to reject or vary an NIRB determination that is otherwise consistent with the Nunavut Agreement and NuPPAA, the greater the burden on the Minister to justify how

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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: <gov.nu.ca> [perma.cc/J38P-FAMC] [Nunavut Agreement].

2. *Calder et al v Attorney-General of British Columbia*, 1973 CanLII 4, [1973] SCR 313 (SCC). Julie Jai discusses the impact of *Calder* on the negotiation of modern treaties (see Julie Jai, "Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 105 at 115–18, [Jai]).

3. *Nunavut Planning and Project Assessment Act*, SC 2013, c 14, s 1 [NuPPAA].

4. Nunavut Agreement, *supra* note 1, art 12.1.1; NuPPAA, *ibid*, s 73.

the decision upholds the terms and purposes of the Nunavut Agreement and the applicable constitutional principles.

We use the Mary River iron ore mine ("Mary River"), principally located on "Inuit Owned Lands" called Nuluujaat on Baffin Island, as a case study to explain the importance of understanding the legal meaning or durability of NIRB authority, including determinations and how they limit ministerial discretion. Mary River is a highly controversial project because of its tremendous economic potential, evidence of its adverse environmental impacts, and ongoing uncertainty about the development trajectory of the mine and related shipping port infrastructure. Review processes have been protracted and expensive, exposing tensions between Inuit organizations, local communities, environmental groups, and Baffinland Iron Mines Corporation. Given the high degree of public scrutiny in relation to the mine and its impacts, and the size and value of this resource, Mary River is arguably the most important project with which the NIRB has ever wrestled as a regulator.

This article consists of three parts. In Section II, we provide an overview of Nunavut's legal framework, including its environmental impact review process, the historical context of the Nunavut Agreement, and the significance of the NIRB as a co-management institution. In Section III, we use Mary River as a case study to demonstrate the importance of the topic and illustrate how the NIRB and the Minister interact through Nunavut's impact review regime. In Section IV, we use the context from Sections II and III to examine the relevant decision-making provisions of the Nunavut Agreement and NuPPAA to explain how and why NIRB determinations limit ministerial discretion. In the absence of specific case law on the NIRB, we discuss other cases on the duty to consult, modern treaties, and the Nunavut Agreement to discern the legal meaning of NIRB determinations and constraints on ministerial decision making.

II THE LEGAL FRAMEWORK OF NUNAVUT'S IMPACT REVIEW REGIME

On its face, Nunavut's legal framework is similar to other Canadian jurisdictions. Nunavut enjoys a public government with an elected legislative assembly.[5] The Commissioner of Nunavut serves as the functional equivalent to a provincial lieutenant governor by approving legislation, and federal law applies equally to Nunavut as it does to the rest of Canada.[6] Further, since Nunavut was carved from the Northwest Territories and inherited most of its statute book, many of its laws were imported from its territorial neighbour.[7]

As a territory, Nunavut is distinct from the provinces and does not enjoy the same constitutional status. Territories are to an extent a "creature of the federal government" by

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5. Nunavut Agreement, *supra* note 1, art 4.1.1.

6. *Nunavut Act*, SC 1993, c 29, s 5(1) [*Nunavut Act*]; *Interpretation Act*, RSC 1985, c I-21, s 8(1) [*Interpretation Act*]; Daniel Dylan, "Wildlife Management, Privative Clauses, Standards of Review, and Inuit Qaujimajatuqangit: The Dimensions of Judicial Review in Nunavut" (2021) 34:3 Can J Admin L & Prac 265 at 268–69 [Dylan, "Wildlife Management"].

7. Nunavut Agreement, *supra* note 1, art 4.1.1; *Nunavut Act*, *supra* note 6, s 29; Dylan, "Wildlife Management," *ibid* at 269; Courthouse Libraries of BC, "Nunavut: Origins of Statues and Regulations" (20 April 2023), online: <courthouselibrary.ca> [https://perma.cc/757L-JDPS].

deriving its status and powers from federal law.[8] However, the Government of Nunavut's autonomy from the federal government is expanding, including over natural resource management, as it assumes greater powers from the federal government through a devolution process, following similar developments in Yukon and the Northwest Territories. The Nunavut Devolution Agreement includes a Lands and Resources Devolution Negotiation Protocol that commits the Government of Nunavut to becoming "more accountable for decisions related to the management and the pace of development of lands and resources in Nunavut."[9] According to the final Lands and Resources Devolution Agreement, the Government of Nunavut will formally assume jurisdiction over natural resource management by April 1, 2027. For example, a territorial Minister will assume responsibilities currently held by the federal Minister of Northern Affairs under NuPPAA. The federal government remains responsible for overseeing these matters until then.[10]

Unlike Yukon and the Northwest Territories, Nunavut enjoys a modern treaty that applies to the entirety of the territory and is an integral part of Nunavut's legal framework.[11] The Nunavut Agreement guarantees Inuit treaty rights in exchange for the surrender of Aboriginal title.[12] Many treaty rights apply to all of Nunavut, such as rights to wildlife harvesting, co-management of wildlife and natural resources, water management, and economic rights through procurement policies and a designated impact benefit agreement process.[13] In the event of inconsistency with other law, the Nunavut Agreement is paramount.[14]

Inuit enjoy specific treaty rights to "Inuit Owned Lands," which are parcels of land with significant renewable or non-renewable natural resources, are of archeological, historical or cultural importance, or are areas of commercial value.[15] Inuit Owned Lands are held in fee simple and may include natural resources within, upon, or under the lands, or specified substances.[16] Inuit Owned Lands account for approximately 18 per cent of Nunavut land. Inuit hold subsurface rights to approximately 2 per cent of Nunavut land, or 10 per cent of Inuit Owned Lands.[17]

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8. *Fédération Franco-ténoise v Canada (CA)*, 2001 FCA 220 at para 39; *Nunavut Act*, supra note 6, ss 3, 7, 11, 12, 13, 23.

9. Government of Canada, "Land and Resources Devolution Negotiation Protocol: Between the Government of Canada and the Government of Nunavut and Nunavut Tunngavik Incorporated" (2008), online: <rcaanc-cirnac.gc.ca> [perma.cc/4UXG-SFTH].

10. Government of Canada, "Nunavut Devolution" (5 March 2024), online: (Government Agreement) <rcaanc-cirnac.gc.ca> [perma.cc/QX6W-8R85]. As discussed in s IV.A, the territorial minister will confront the same limitations and constraints as described in this article with respect to the federal Minister.

11. Nunavut Agreement, *supra* note 1, art 3.1.1; Dylan, "Wildlife Management," *supra* note 6 at 268–69.

12. Nunavut Agreement, *supra* note 1, Preamble, art 2.7.1; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 2 [*Clyde River*]; Jai, *supra* note 2 at 131.

13. Nunavut Agreement, *supra* note 1, arts 5, 6, 10, 11, 12, 13, 24.3, 26.

14. *Nunavut Land Claims Agreement Act*, SC 1993, c 29, s 6(1).

15. Nunavut Agreement, *supra* note 1, art 17.1.2.

16. *Ibid*, art 19.2.1.

17. Wayne Johnson, "Inuit Owned Lands; Mining and Royalty Regimes" (25 November 2009) slide 2, online (PowerPoint slides): <tunngavik.com> [perma.cc/9GTY-3HXW] [Johnson].

Mary River is located on Inuit Owned Land.[18] Subsurface rights are vested in Nunavut Tunngavik Inc (NTI), and surface rights are vested in the Qikiqtani Inuit Association (QIA), one of the three regional Inuit associations, including the Kivalliq Inuit Association and Kitikmeot Inuit Association (these are "Designated Inuit Organizations" under the Nunavut Agreement). In effect, Inuit Owned Lands are held by NTI and the regional Inuit associations on behalf of Inuit. While serving distinct functions, both groups hold mineral and surface rights at Mary River and represent Inuit interests under the Nunavut Agreement.[19] And while subsurface rights are particularly important for generating revenue from mining, surface rights are also valuable and allow Inuit to exert a degree of control over development activity. For example, a public access easement was required to establish the Milne Inlet Tote Road connecting Milne Inlet to Mary River, and Baffinland must lease surface rights from the QIA.[20]

NTI represents all Nunavut Inuit as rightsholders, represents their interests under the Nunavut Agreement, and administers subsurface mineral rights on Inuit Owned Lands on behalf of Inuit beneficiaries. The regional Inuit associations perform similar duties to NTI, representing and promoting Inuit interests and handling surface rights.[21]

The Nunavut Agreement provides that the "primary purpose" of Inuit Owned Lands is to "promote economic self-sufficiency through time, in a manner consistent with social and cultural needs and aspirations."[22] Inuit pushed for inclusion of Inuit Owned Lands during treaty negotiations to ensure they benefited fairly from resource development.[23] Negotiators were well aware of the Berger Inquiry of the Mackenzie Valley Pipeline, which found that Indigenous Peoples were not benefiting fairly from resource development.[24] This is why the Nunavut Agreement guaranteed Inuit a "maximum opportunity" to identify Inuit Owned Lands, an exercise that included extensive community consultations and geological surveys of culturally important and resource-abundant areas.[25]

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18. *Ibid* at 43; Nunavut Tunngavik Incorporated, "Inuit Owned Lands in Nunavut" (2011), online: <tunngavik.com> [perma.cc/9GLF-M9VU].

19. Robert McPherson, *New Owners: Minerals and Inuit Land Claims in Their Own Land* (Calgary: University of Calgary Press, 2003) at 131-32 [McPherson]; Daniel W Dylan, "The Complicated Intersection of Politics, Administrative and Constitutional Law in Nunavut's Environmental Impacts Assessment Regime" (2017) 68 UNB LJ 202 at 205–06 [Dylan, "Complicated Intersection"]; Dylan, "Wildlife Management," *supra* note 6 at 269.

20. Nunavut Agreement, *supra* note 1, art 21.4.1, schedule 21-2; Johnson, *supra* note 17 at slides 6, 43.

21. Dylan, "Wildlife Management,," *supra* note 6 at 269; Dylan, "Complicated Intersection," *supra* note 19 at 205–06; NTI, "Inuit and Land Claims Organizations in Nunavut" (2025), online: <tunngavik.com> [perma.cc/73HF-2ZVJ].

22. Nunavut Agreement, *supra* note 1 at art 17.1.1.

23. McPherson, *supra* note 19 at 141, 153, 208–09, and see generally 208–68.

24. *Ibid* at 69, 121. For a discussion of the Berger Inquiry, see Chris Southcott & David Natcher, "Extractive Industries and Indigenous Subsistence Economies: A Complex and Unresolved Relationship" (2017) 39:1 Can J Dev Stud 137 at 141 [Southcott & Natcher].

25. McPherson, *supra* note 19 at 141–42; Nunavut Agreement, *supra* note 1, art 18.1.1.

A. The Basics of Environmental Impact Review Processes

An environmental impact review is a "regulatory instrument used to improve decision-making by improving the planning of activities, evaluating potential environmental impacts and determining mitigation measures before development projects commence."[26] As a process for identifying and predicting the impacts of current or proposed actions, it is an inherently *ex ante*, future-oriented practice with degrees of uncertainty and risk.[27] Scientific and policy experts assist administrative review boards in assessing risks, including environmental and socioeconomic impacts, project efficiency, predictability, and costs.[28]

While impact review processes vary across Canada,[29] they generally include a few key steps: screening, scoping, impact analysis, impact evaluation, decision making, and monitoring.[30] The process is conducted by administrative review boards (such as the NIRB), with oversight by responsible federal, provincial, or territorial ministers. The impact review informs a minister's final decision and is a collaborative exercise between government, project proponents, the public, and increasingly Indigenous Peoples.

The purpose of the initial step (screening) is for the review board to determine whether a proposed project will likely result in sufficiently significant adverse environmental impacts to justify an impact review. If so, the project proceeds to scoping to determine the project's geographic, temporal, and activity-related boundaries. Scoping sets boundaries of impact analysis,[31] which compares evaluation of the existing or "business as usual" scenario to a scenario that includes project impacts and possible mitigation measures. In turn, a review board turns to impact evaluation to identify the residual environmental impacts of a project after mitigation measures are accounted for. Typically, impact analysis and evaluation are based on the review board's analysis of a proponent's environmental impact statement (EIS). The review board then compiles its analysis in an assessment report that includes a recommendation as to whether the project should proceed and, if so, what terms and conditions should apply. The review board's recommendation is formally subject to a final ministerial decision. If approved, the proponent receives a licence or certificate, and activities are monitored by government regulators for compliance with terms and conditions. Monitoring includes information collection and sharing and, if necessary, enforcement

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26. Gordon M Hickey, Nicolas Brunet & Nadege Allan, "A Constant Comparison of the Environmental Assessment Legislation in Canada" (2010) 12:3 J Env'l Pol & Plan, 315 at 316 [Hickey et al.].

27. Sanne Vammen Larsen, "Uncertainty in EIA" in Alberto Fonseca, ed, *Handbook of Environmental Impact Assessment* (Northampton, MA: Edward Elgar Publishing, 2023) 220 at 220 [Larsen].

28. Hickey et al, *supra* note 26 at 316.

29. Patricia Fitzpatrick & Byron J Williams, "EIA in Canada: Strengthening Follow-Up, Monitoring and Evaluation" in *Handbook of Environmental Impact Assessment* in Alberto Fonseca, ed, *Handbook of Environmental Impact Assessment* (Northampton, MA: Edward Elgar Publishing, 2023) 352 at 352–53 [Fitzpatrick & Williams]; Hickey et al, *supra* note 26 at 316.

30. Larsen, *supra* note 27 at 223; Steve Bonnell, "Environmental Assessment of Forestry in Canada" (2003) 79:6 Forestry Chronicle 1067 at 1067 [Bonnell].

31. Urmila Jha-Thakur, Fatemeh Khosravi & David Hoare, "The Theory and Practice of Scoping: Delivering Proportionate EIA Reports" in Alberto Fonseca, ed, *Handbook of Environmental Impact Assessment* (Northampton, MA: Edward Elgar Publishing, 2023) 111 at 111–12; Bonnell, *ibid* at 1068.

measures.[32] Data collected from monitoring exercises may be used to assess the accuracy of predicted impacts and help inform future assessments.[33]

B. Co-Management and Nunavut's NIRB-Led Impact Review Process

Like other jurisdictions, administrative boards in Nunavut oversee natural resource development, land-use planning, and water use.[34] The Nunavut Agreement establishes an impact review process that resembles other jurisdictions, although there are differences based on the NIRB's role and duties as a co-managed institution.[35]

Co-management is a term subject to varying definitions and interpretations.[36] Generally it refers to a practice of shared decision making and jurisdiction over matters within a geographic region.[37] Co-managed institutions are usually subject to an agreement outlining the rights and duties of those responsible for the co-managed resources, rules for triggering decisions, and procedures for making decisions.[38] In the Indigenous–Crown context, co-management is a sharing of powers and responsibilities and recognition of each party's respective authority.[39] Co-management boards are often made up of Indigenous and non-Indigenous representatives "who make resource management decisions through the sharing of power and application of both Western and Indigenous science approaches."[40]

Co-management is often confused with cooperative management (i.e., cooperating in work toward achieving shared objectives) or collaborative management (i.e., carrying out work as partners).[41] While it includes those components, a key component is that a state entity and Indigenous government (or other representative organization) enter a formal agreement to exercise shared decision making in a specific context over issues such as wildlife harvesting and land use.[42] Although there are different critical approaches, co-management can be understood as a legal instrument for Indigenous Peoples to assert control over their land and resources.[43]

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32. Fitzpatrick & Williams, *supra* note 29 at 356–57.

33. Larsen, *supra* note 27 at 223, 225; Bonnell, *supra* note 30 at 1067.

34. Nunavut Agreement, *supra* note 1 at art 10.1.1; Dylan, "Complicated Intersection," *supra* note 19 at 207–08.

35. For a discussion on co-management of wildlife in Nunavut, see Dylan, "Wildlife Management," *supra* note 6 at 268.

36. Graham White, *Indigenous Empowerment through Co-Management: Land Claims Boards, Wildlife Management, and Environmental Regulation* (Vancouver: UBC Press, 2020) at 10–14 [White].

37. Thierry Rodon, "Co-Management and Self-Determination in Nunavut" (1998) 22:2 Polar Geo 119 at 120 [Rodon].

38. Trevor Swerdfager & Derek Armitage, "Co-Management at a Crossroads in Canada: Issues, Opportunities, and Emerging Challenges in Fisheries and Marine Contexts" (2023) 8 Facets 1 at 1 [Swerdfager & Armitage]; Rodon, *ibid* at 121.

39. Rodon, *supra* note 37 at 122.

40. Jesse N Popp, Pauline Priadka & Cory Kozmik, "The Rise of Moose Co-Management and Integration of Indigenous Knowledge" (2019) 24:2 Hum Dimensions Wildlife 159 at 160.

41. Swerdfager & Armitage, *supra* note 38 at 2.

42. *Ibid*; Jai, *supra* note 2 at 138.

43. Rodon, *supra* note 37 at 124.

Co-management encourages knowledge co-production from Western and Indigenous sources. Co-production helps address knowledge gaps between theory (knowledge) and practice (action) in environmental management, helping policymakers take more effective actions.[44] Knowledge gaps tend to occur because of distrust and differences in cultural context between knowledge holders and policymakers.[45] The practice of knowledge co-production has also been observed in Nunavut in the context of fisheries management.[46]

In 1979, the federal government accepted the Nunavut land claim for negotiation.[47] Inuit negotiators considered the NIRB to be a key component of Nunavut Agreement negotiations as they aimed to secure a co-management role for Inuit in natural resource management that went beyond an advisory role and addressed issues raised by the Berger Inquiry.[48] Similar to other modern treaties, the Nunavut Agreement enshrined co-management with respect to EIA.[49]

Inuit negotiators were successful in establishing the NIRB as a co-management institution split between Inuit and government-appointed representatives.[50] Of the NIRB's nine members, four are Inuit representatives that are nominated by the NTI (three of whom are nominated by regional Inuit associations, who are then formally appointed by the Minister). The others include two federal appointees, two territorial government appointees, and one chairperson who is nominated by the other eight appointees.[51] The NIRB has been considered a "profound achievement" for Inuit and contributed to advancing co-management in Canada.[52]

The NIRB is the key regulator over natural resource development in Nunavut. It controls the pace of development projects, carries out consultation with Inuit through its impact review process, and relies on Traditional Knowledge and scientific methods.[53] Inuit input is ensured through consultation processes as well as decision making at the board level through Inuit-appointed representatives. In effect, the NIRB manages access and use of natural resources, including mitigation of negative impacts from resource development on wildlife and the environment.[54]

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44. Stephan Cooke et al, "Knowledge Co-Production: A Pathway to Effective Fisheries Management, Conservation, and Governance" (2021) 46:2 Fisheries 89 at 90.

45. *Ibid* at 90.

46. *Ibid* at 93.

47. Rodon, *supra* note 37 at 124.

48. Mcpherson, *supra* note 19 at 142, 153.

49. Swerdfager & Armitage, *supra* note 38 at 3.

50. The Nunavut Wildlife Management Board and Nunavut Water Board also have equal representation with four NTI appointees, and two territorial and two federal appointees (see Nunavut Agreement, *supra* note 1, arts 5.2.1, 13.3.1; see also Jai, *supra* note 2 at 139).

51. Nunavut Agreement, *supra* note 1, art 12.2.6; McPherson, *supra* note 19 at 153; Nunavut Impact Review Board, "Board Members" (last accessed 28 April 2025), online: <www.nirb.ca> [perma.cc/Q4JE-5A5F].

52. McPherson, *supra* note 19 at 154.

53. Southcott & Natcher, *supra* note 24 at 143. Note that some observers disagree with the degree to which Inuit Traditional Knowledge is integrated into NIRB processes; see Daniel Dylan & Spencer Thompson, "NIRB's Inchoate Incorporation of Inuit Qaujimajatuqangit in Recommendation-Making under Nunavut's Impacts Assessment Regime" (2019) 15:1 McGill J Sust Dev L 54 at 63 [Dylan & Thompson].

54. Southcott & Natcher, *supra* note 24 at 143.

On this basis, the establishment of the NIRB altered the colonial regulatory context in Nunavut that existed before the Berger Inquiry. Inuit, through treaty right protections and designated representation on the NIRB, have a significant degree of control over land-use planning and many of the most significant mineral deposits in the territory, especially those located on Inuit Owned Lands (e.g., Mary River). This context is quite different from other parts of Canada subject to historic treaties, and arguably has increased the possibility that resource development supports rather than diminishes treaty rights, such as wildlife harvesting.[55]

1. The Nirb-Led Impact Review Process

The Nunavut Planning Commission (NPC) and NIRB both have important roles in reviewing project proposals, and have a mandate to protect and promote the well-being of current and future residents and the "ecosystemic integrity" of Nunavut.[56] As institutions of public government,[57] the NPC and NIRB must be attentive to the public interest and Inuit rights and perspectives.[58]

Nunavut's impact review process begins when a project proponent submits a proposal to the NPC. The NPC screens the project proposal to determine compliance with the regional land-use plan.[59] If the NPC determines the project is not compliant with the land-use plan, the proponent may apply to the Minister for an exemption order.[60] If the Minister grants an exemption order, the Minister must refer it to the NIRB for screening. Certain projects are exempt from screening,[61] however, if the NPC has concerns about exempted activities' cumulative ecosystemic or socioeconomic impacts, the NPC may refer the project proposal to the NIRB for further screening.[62] If the NPC determines the project is compliant, the NPC must verify whether it is exempt from screening.[63] If it is not exempt, the NPC must forward the project proposal to the NIRB for screening[64] to determine whether the project has "significant impact potential,"[65] including significant ecosystemic or socioeconomic impacts,[66] in which

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55. *Ibid* at 143–144. Note that there is scholarship challenging the effectiveness of NIRB reviews in protecting wildlife populations and integrating Indigenous knowledge; see e.g. Emilie Cameron & Sheena Kennedy, "Can Environmental Assessment Protect Caribou? Analysis of EA in Nunavut, Canada, 1999–2019" (2023) 21:2 Conservation & Society 121. For a broader discussion about co-management boards, see White, *supra* note 36.

56. Nunavut Agreement, *supra* note 1, arts 11.2.1, 12.2.5; McPherson, *supra* note 19 at 153.

57. Nunavut Agreement, *supra* note 1, art 10.1.1.

58. *Ibid*, arts 11.2.1(b)–(c), 11.8.2, 12.2.5, 12.4.2.

59. *Ibid*, art 11.5.10; NuPPAA, *supra* note 3, s 77; Dylan, "Complicated Intersection," *supra* note 19 at 207–08.

60. Nunavut Agreement, *supra* note 1, art 11.5.11; NuPPAA, *supra* note 3, s 82.

61. NuPPAA, *supra* note 3, s 78(2), schedule 3.

62. Nunavut Agreement, *supra* note 1, art 12.3.3; NuPPAA, *supra* note 3, s 80(1).

63. NuPPAA, *supra* note 3, s 78(1).

64. Nunavut Agreement, *supra* note 1, arts 11.5.10, 11.5.11, 12.3.1; NuPPAA, *supra* note 3, s 79.

65. Nunavut Agreement, *supra* note 1, art 12.4.1.

66. *Ibid*, art 12.4.2; NuPPAA, *supra* note 3, s 88.

case an impact review is required.[67] The NIRB must account for a variety of factors, including cumulative environmental effects of the project combined with other projects and the impact on wildlife and Inuit harvesting activities, in its assessment of the significance of potential impacts.[68] The NIRB issues a report to the Minster containing a description of the project and indicating whether a project review is required.[69]

If the NIRB determines an impact review is required, and the Minister agrees and refers it back to the NIRB,[70] the NIRB must proceed to determine the scope of the project and include any work or activity it considers sufficiently related to the project.[71] If the NIRB expands the scope of the project, the process is suspended until the NPC and Minister ensure compliance with the land code and exercise powers allowing the project to proceed to a review.[72] Otherwise, the project proceeds to an impact review.

After scoping, the NIRB must issue guidelines to the proponent to prepare an EIS.[73] After the proponent submits an EIS, the NIRB must provide an opportunity for the public to provide written feedback, and it may allow for oral submissions at a public hearing.[74] In its assessment of the EIS, the NIRB must consider various factors,[75] such as whether the project will "unduly prejudice the ecosystemic integrity" of Nunavut; the cumulative effects of past, current, and future projects;[76] and whether the proposal reflects the priorities and values of the residents of Nunavut.[77]

In its final report based on the assessment of the EIS and public feedback, the NIRB must issue a report to the Minister setting out its assessment of project impacts and its "determination" regarding whether the project should be approved and, if so, what terms and conditions should apply to a project certificate; this report must be submitted to the Minister within 45 days after completing the review.[78] The Minister must decide, within 150 days of receiving the NIRB's report, to approve, reject, or vary the NIRB's determination—the Minister may reject the determination based on the regional or national interest. Alternatively, the

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67. Nunavut Agreement, *supra* note 1, arts 12.4.1, 12.4.2; NuPPAA, supra note 3, s 89(1); Dylan, "Complicated Intersection," *supra* note 19 at 208–10. Note that art 12.4.2 of the Nunavut Agreement states that the NIRB "generally" must determine an impact review is required in these instances, while NuPPAA omits the word "generally." If the NIRB finds the project will cause significant public concern or involves technology for which effects are unknown and may have significant adverse socioeconomic effects, both the Nunavut Agreement and NuPPAA trigger an impact review (see Nunavut Agreement, *supra* note 1, art 12.4.2; NuPPAA, *supra* note 3, s 88).

68. Nunavut Agreement, *supra* note 1, art 12.4.2; NuPPAA, *supra* note 3, s 89(1), 90.

69. Nunavut Agreement, *supra* note 1, arts 12.4.4; NuPPAA, *supra* note 3, s 92.

70. Nunavut Agreement, *supra* note 1, art 12.4.7(c); NuPPAA, *supra* note 3, s 94(1)(a)(iv).

71. NuPPAA, *supra* note 3, s 99(1). Note the Nunavut Agreement does not include articles regarding scoping.

72. NuPPAA, *supra* note 3, s 99(3); the NPC and Minister must exercise power under ss 77, 81, and 82.

73. Nunavut Agreement, *supra* note 1, art 12.5.2; NuPPAA, *supra* note 3, s 101(1); see also s 101(3) for the required content of the EIS.

74. Nunavut Agreement, *supra* note 1, art 12.5.3; NuPPAA, *supra* note 3, s 102(2).

75. Nunavut Agreement, *supra* note 1, art 12.5.5; NuPPAA, *supra* note 3, s 103.

76. NuPPAA, *supra* note 3, s 103(1)(f). Note the Nunavut Agreement does not include a requirement for the consideration of cumulative effects.

77. Nunavut Agreement, *supra* note 1, art 12.5.5(c).

78. Nunavut Agreement, *supra* note 1, art 12.5.6; NuPPAA, *supra* note 3, s 104(1).

Minister may vary terms and conditions if they are insufficient to address ecosystemic and socioeconomic impacts, or so onerous that they undermine project viability.[79] The Minister may refer the report back to the NIRB to conduct further consultation if the Minister finds it does not sufficiently address ecosystemic or socioeconomic impacts.[80]

The Minister must provide written reasons to the NRIB for every decision (including, as noted below, reconsideration decisions).[81] If the Minister approves the project, the NIRB must issue a project certificate to the proponent.[82] The project certificate may include terms and conditions, including a monitoring program to measure the environmental and socioeconomic impacts of the project.[83]

The NIRB may reconsider the terms and conditions of a project certificate at its own initiative, the request of a designated Inuit organization (i.e., one of the regional Inuit associations), the proponent, or any interested person if the terms and conditions are not having their intended effect, the circumstances of the project have significantly changed, or technological developments allow for a more efficient method of achieving the purpose of the terms and conditions.[84] This reconsideration process of project certificate terms and conditions is relatively simple and expedited compared to a full impact review. Through the reconsideration process as outlined in section 112 of NuPPAA and article 12.8 of the Nunavut Agreement, the NIRB typically accepts submissions from the project proponent, community members, and intervenors and evaluates information from monitoring programs. The NIRB then submits a report to the Minister, who may accept or reject the NIRB's reconsideration report. As explained in Section III, reconsideration has been used to review significant amendments to Baffinland's project certificate, including the total allowable volume of resource extraction and associated shipping traffic.

III THE MARY RIVER PROJECT: TIMELINE AND CONTROVERSIES

Mary River is the largest industrial development project in the history of the Canadian Arctic and exploits one of the richest iron ore deposits in the world.[85]

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79. Nunavut Agreement, *supra* note 1, art 12.5.7; NuPPAA, *supra* note 3, ss 105–06, 107.

80. Nunavut Agreement, *supra* note 1, art 12.5.7(e) (which concerns decision making if the NIRB is required to submit a revised report, and and thereafter the Minister makes a decision regarding the revised NIRB report. See also Dylan, "Complicated Intersection," *supra* note 19 at 210–11.

81. Nunavut Agreement, *supra* note 1, art 12.5.10.

82. *Ibid*, art 12.5.12; NuPPAA, *supra* note 3, s 111(1).

83. Nunavut Agreement, *supra* note 1, arts 12.7.1–12.7.2; NuPPAA, *supra* note 3, ss 135(1), 135(3).

84. Nunavut Agreement, *supra* note 1, art 12.8.2; NuPPAA, *supra* note 3, s 112. Note that pursuant to art 12.8.3 of the Nunavut Agreement and s 112(2) of NuPPAA, the NIRB must reconsider terms and conditions if the Minister determines that these circumstances apply.

85. *CBC News*, "Nunavut Braces for Massive Mary River Mine" (13 September 2012), online: <cbc.ca> [perma.cc/MZ6B-D9YP].

In 1986, Baffinland started exploring and developing Mary River, located approximately 160 kilometres southwest of Pond Inlet.[86] Baffinland has long planned to extract 30 million tonnes per annum (mtpa) of iron ore, and to ship 18 mtpa via Steensby Inlet to the south and 12 mtpa via Milne Inlet to the north.[87] However, Baffinland did not submit a proposal based on the full 30 mtpa scope at once and has instead split the application into phases.

Baffinland submitted its first proposal (Phase 1) to the NIRB in 2008 for the construction, operation, and reclamation of an 18 mtpa mine with transport to markets via a roughly 150-kilometre railway line to Steensby Inlet.[88] The federal government approved Phase 1 in December 2012 following a positive determination from the NIRB.[89]

In 2013, Baffinland significantly scaled back its plans with its "Early Revenue Phase" (ERP) proposal for a 3.5 mtpa mine (with operational flexibility to 4.2 mtpa) and corresponding allowances for transportation and shipping via Milne Inlet. Despite the significant change to the project's scope, transportation, and shipping routes, the NIRB did not apply a full impact review to the ERP and instead undertook a "reconsideration" process, including a public hearing and a technical review.[90] In 2014, the NIRB determined that the ERP should proceed with its terms and conditions. The Minister accepted the NIRB's determination, and Baffinland began mining operations the following year.[91]

In 2014, Baffinland submitted its Phase 2 project proposal to expand operational capacity to 12 mtpa. The original Phase 2 proposal included truck transportation via a tote road to Milne Inlet but was amended to propose a 110-kilometre railway.[92] The proposal was subject to a reconsideration process, but a final determination and decision was not made until years later.

In 2017, Baffinland submitted its "Production Increase Proposal" (PIP) to expand mining operations and shipping to 6 mtpa.[93] The NIRB determined the project should not proceed, reasoning that Baffinland already applied for and received operational flexibility to 4.2 mtpa

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86. Baffinland, "Mary River Mine" (undated, last accessed 17 April 2025), online: <https://www.baffinland.com/operation/mary-river-mine/> [perma.cc/V87X-5KS7].

87. Nunavut Impact Review Board, "Annual Report 2021–2022" (2022) at 23, online (pdf): <www.nirb.ca/sites/default/files/NIRB_AR_2021-22%20English_final.pdf> [perma.cc/BQ88-CRZU]; Baffinland Iron Mines Corporation, "2021 Annual Report to the Nunavut Impact Review Board" (31 March 2022) at 3–4, online (pdf): <baffinland.com> [perma.cc/G5MW-Y5XJ].

88. Nunavut Impact Review Board, "2017–18 Annual Report" (2018) at 24, online (pdf): <https://www.nirb.ca/sites/default/files/2017-18_NIRB_web_ENG.pdf> [perma.cc/M9EF-KSGW] [NIRB "2017–18 Annual Report"]; Nunavut Impact Review Board, "Final Hearing Report: Mary River Project," NIRB File No. 08MN053 (2012) at 1, online (pdf): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=286425&applicationid=123910&sessionid=if1qvv7hvmbbg9r8g7thl7f0c1> [perma.cc/2U4U-PDW6].

89. *Ibid*.

90. *Ibid*; Nunavut Impact Review Board, "Public Hearing Report, Mary River Project: Early Revenue Phase Proposal," NIRB File No. 08MN053 (2014) at xi, 6, online (pdf): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=291199> [perma.cc/HR6A-BQCZ].

91. NIRB "2017–18 Annual Report," *supra* note 88 at 24.

92. *Ibid* at 24–25; Nunavut Impact Review Board, "Reconsideration Report and Recommendations for Baffinland's Phase 2 Proposal" (2022) at iv, 10–11, online (pdf): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=339558> [perma.cc/PYS5-E779].

93. NIRB "2017–18 Annual Report," *supra* note 88 at 24.

under the ERP to address economic concerns and had failed to sufficiently address ongoing concerns related to ecosystemic effects, including impacts of increased shipping on marine wildlife. However, the Minister overruled the NIRB and approved the PIP. In September 2018, acting under article 12.8.3 of the Nunavut Agreement and section 112(6) of NuPPAA, the responsible Ministers approved operations at 6 mtpa with additional terms and conditions to address the NIRB's concerns.[94]

After the PIP expired in December 2020, Baffinland applied to extend operations until the end of 2021 (PIP Extension), which received approval from the NIRB and Minister. In 2022, Baffinland applied for another extension (PIP Renewal) several months after the PIP Extension project certificate expired and while its Phase 2 proposal was still under review by the Minister. After another truncated reconsideration process, the Minister approved the PIP Renewal in September 2022 but rejected Phase 2 two months later. Both decisions were highly anticipated and ultimately upheld the NIRB's determinations.[95]

It is noteworthy that in May 2022, during the PIP Renewal, Baffinland requested that the Minister use his emergency powers under section 152(1) of NuPPAA to approve the PIP Renewal due to potential job losses from economic uncertainty. The emergency authorization would have exempted the project from the required NIRB-led reconsideration process. To determine an emergency, the Minister must consider the public interest and whether such a finding is required to protect property or the environment.[96] Shortly after the request was received, the Minister refused the request on the basis he did not have the power to do so and instructed Baffinland to submit a project proposal to the NIRB for reconsideration.[97]

In July 2022, the Minister identified the project as a priority and "indicated" pursuant to section 114 of NuPPAA that the NIRB expedite and complete its reconsideration of the PIP Renewal by August 26, 2022.[98] The NIRB agreed to the request in part, held no public hearings, and limited submissions to intervenors only. However, the NIRB did not follow the requested timeline, issuing their reconsideration report on September 22. The NIRB justified

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94. Nunavut Impact Review Board, "Reconsideration Report and Recommendations: Production Increase Proposal" (2018) at iv, online (pdf): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=319640&applicationid=124702&sessionid=uifocl4vopg4dqbbnub58ejcg0> [perma.cc/3MQX-9KZK]; Letter from MP Dominic Leblanc & MP Carolyn Bennett to Chairperson of the Nunavut Impact Review Board (30 September 2018), online: <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=320546&applicationid=124702&sessionid=if1qvv7hvmbbg9r8g7thl7f0c1> [perma.cc/ZQ38-G8GY] ["Letter from Leblanc & Bennett to NIRB"].

95. Canadian Press, "Nunavut Review Board Recommends Temporary Production Increase for Iron Ore Mine on Baffinland," (23 September 2022), online: <theglobeandmail.com> [perma.cc/4CRM-WZAN]; Emily Blake, "Federal Cabinet Ministers OK Nunavut Iron Ore Mine Temporary Production Increase," (4 October 2022), online: <theglobeandmail.com> [perma.cc/39NW-PQ2K]; "Northern Affairs Minister Says No to Baffinland Mine Expansion," (16 November 2022), online: <cbc.ca> [perma.cc/W2GA-KW67].

96. NuPPAA, *supra* note 3, s 152(1)(c).

97. David Venn, "No Emergency Order for Baffinland" (1 June 2022), online: <nunatsiaq.com> [perma.cc/KST2-JZ7Y]; *CBC News*, "Minister Rejects Baffinland's Request for Emergency Order" (2 June 2022), online: <cbc.ca> [perma.cc/9ANF-7P75].

98. NuPPAA, *supra* note 3, s 114. See also, Paul Tukker, "Nunavut Reviewers under Pressure to Speed up Baffinland Review," (14 July 2022), online: <cbc.ca> [perma.cc/LQ8N-4CDV].

the extension on the basis that it required additional time to properly assess the application.[99] The Minister did not take any further action on the matter.

In 2023, Baffinland applied to continue operations at 6 mtpa in its Sustaining Operations Proposal (SOP) for two years instead of one year, triggering yet another reconsideration process by the NIRB.[100] The NIRB declined to hold public hearings but received written comments from the public and held community roundtable sessions in Iqaluit and Pond Inlet.[101] Despite ongoing disagreements among stakeholders regarding the project's impacts on marine animals, the NIRB issued a positive determination in September 2023,[102] and the Minister approved the project the following month.[103]

At time of writing, Baffinland abandoned its reapplication for 6 mtpa and has reverted to the 4.2 mtpa licence terms as it seeks financing for its previously approved Phase 1 plans for the Steensby route.[104] This marks yet another major departure from its previous plans and could trigger a reconsideration process or full impact review. In the interim, Baffinland has abandoned its plan to renew the SOP and is scaling back down to its pre-existing approval to operate at 4.2 mtpa.[105]

Figure 1 summarizes the procedural history of the Mary River project and each impact review determination, reconsideration assessment, or decision. The Minister has deferred to NIRB determinations in every case except the PIP. This pattern of decision making suggests that the Minister will not interfere lightly with NIRB processes, and the Minister understands there are limitations on their discretion and should offer deference and oversight to NIRB determinations.

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99. Nunavut Impact Review Board, "Updated Procedural Guidance Regarding the Nunavut Impact Review Board's Assessment of Baffinland Iron Mines Corporation's 'Production Increase Proposal Renewal' Project Proposal" (25 August 2022), online: <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=341496&applicationid=125710&sessionid=v7pblniln9pd52ib7tkl2nplh5> [perma.cc/C44M-YEWA].

100. April Hudson, "Baffinland Again Asks to Ship More Ore from Mary River in Nunavut, Says Jobs Are on the Line," (24 April 2023), online: <cbc.ca> [perma.cc/N7CD-KYSS]; *CBC News*, "Public Roundtables Begin on Baffinland's Latest Request to Ship More Ore from Nunavut" (27 July 2023), online: <cbc.ca> [perma.cc/LY9V-P8J6].

101. Nunavut Impact Review Board, "Reconsideration Report and Recommendations for Baffinland's Sustaining Operations Proposal" (2023) at vi, online (pdf): <nirb.ca> [perma.cc/RH3Z-JZQD].

102. *Ibid* at vii, ix–xi.

103. Letter from MP Dan Vandal to Chairperson of the Nunavut Impact Review Board (October 17, 2023), online: <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=347422&applicationid=125767&sessionid=ijo2ottud23iqjufgb4dtn0vg7> [https://perma.cc/EXL8-LJK2

104. Nehaa Bimal, "Layoffs, Scaled-Back Shipping as Baffinland Refocuses on Steensby Railway" (18 October 2024), online: <nunatsiaq.com> [perma.cc/E2NJ-P9A4] [Bimal]. Note that Baffinland announced the Steensby plans in February 2023 (see *CBC News*, "So Long Milne Inlet: After Expansion Rejection, Baffinland Turns to Steensby Rail" (17 February 2023), online: <cbc.ca> [perma.cc/AKE4-CHD4].

105. Bimal, *ibid*.

Figure 1: Summary of Mary River Project Scope, Determinations, and Decision Making

Proposal	3.5–4.2 mtpa	6 mtpa	12 mtpa	18 mtpa	30 mtpa
Phase 1 ^Y ('12)					
ERP ^Y ('14)					
PIP *X ('18)					
PIP Extension ^Y ('21)					
Phase 2 *Y ('22)					
PIP Renewal ^Y ('22)					
SOP ^Y ('23)					
Steensby resubmission (TBD)					

Orange = Steensby Route | Green = Milne Route | Horizontal Lines = NIRB Impact Review | Vertical Lines = NIRB Reconsideration | No Lines = Process TBD | ^ = NIRB positive determination/assessment |* = NIRB negative determination/assessment |Y = Minister accepted NIRB determination/assessment | X = Minister rejected NIRB determination/assessment

Based on the immense interest and controversy around NIRB determinations, it appears the public understands them to be credible and influential on the Minister's final decision.[106] Nonetheless, Mary River has exposed the legal tension between the NIRB and the Minister's authority, and in light of recent and heated disputes over the project,[107] it illustrates the importance of clarifying the limits of the Minister's discretion.

The Minister's 2018 decision with regard to the PIP appears to have been the most controversial with respect to impacts on Inuit harvesting rights. As illustrated in Figure 2, the decision correlates with a sharp decrease in the narwhal population in Eclipse Sound—a species with special cultural and food security significance to Inuit—by nearly 80 per cent from 2016 to 2021. Many Inuit, including the Mittimatalik Hunters & Trappers Organization, have expressed deep concerns about the environmental impacts of increased shipping vessel traffic on narwhal populations.[108] While narwhal abundance increased in 2023, the narwhal population remains roughly half of what was observed before mining production and shipping began.

106. Jillian Kestle-D'Amours, "Inuit Voices Grow Louder in Fight over Nunavut Mine Expansion," (27 February 2021), online: <aljazeera.com> [perma.cc/XHF8-ETHU].

107. In 2021, protestors concerned with project impacts to the environment and treaty hunting rights blocked the Milne Tote Road and airstrip, which resulted in an injunction (See *Baffinland Iron Mines v Inuavek et al*, 2021 NUCJ 22 at para 4 and *Baffinland Iron Mines Corporation v Naqitarvik*, 2023 NUCA 10 at para 4).

108. David Venn, "Community Reps Oppose Mine Expansion at Final Day of Baffinland Hearing" (6 November 2021), online: <nunatsiaq.com> [perma.cc/VML5-74ZV].

Figure 2: Decline in Narwhal Population in Eclipse Sound[109]

SURVEY YEAR	ABUNDANCE ESTIMATE
2004	20,225
2013	10,489
2016	12,039
2019	9,931
2020	5,018
2021	2,595
2022	4,592
2023	10,492

Inuit harvesting rights are protected under article 5 of the Nunavut Agreement. Decreased narwhal in Eclipse Sound impact these rights by reducing their total allowable wildlife harvest and requiring them to travel further to hunt. Due to the significant importance of narwhal to Inuit in the region, it is arguable whether the Minister's decision to vary the terms and conditions resulted in sufficient accommodation of Inuit harvesting rights.[110] At a minimum, the Minister's decision has proven highly controversial in light of ongoing impacts on narwhal.[111]

IV PURPOSIVE ANALYSIS: EXAMINING CONSTRAINTS ON MINISTERIAL DISCRETION

In this section we examine the constraints on ministerial discretion based on a purposive analysis of the Nunavut Agreement and NuPPAA as well as the application of relevant constitutional principles.

In our view, a purposive analysis, grounded on the modern principle of statutory interpretation, supports the idea that the Minister's decision-making powers are intended to serve as oversight rather than as a de facto veto. The modern principle stipulates that "words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of

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109. See Baffinland, "Appendix G.6.15: Rationale and Methodology for Averaging Abundance Estimates from Aerial Replicate Surveys" (22 March 2024) at 4, online (PDF): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=349793> [https://perma.cc/4M7E-4DLQ]. At time of writing, 2024 data is not available. Baffinland did not conduct narwhal abundance surveys in 2024 (Nunavut Impact Review Board, "2023-2024 Monitoring Report: Mary River Project Certificate No. 005" (11 March 2025) at 76, online (PDF): https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=353538 [https://perma.cc/KA38-9YEG]).

110. Nunavut Agreement, *supra* note 1, art 5.1.2.

111. Julien Gignac, "Massive Increase in Nunavut Mine Shipping Traffic Puts Narwhals at Risk: Study" (19 February 2021), online: <https://thenarwhal.ca/massive-increase-in-nunavut-mine-shipping-traffic-puts-narwhals-at-risk-study/>; see also Dylan, "Complicated Intersection," *supra* note 19 at 228 (Dylan argues that Inuit rights are "fragmented" by complex legal proceedings and processes).

Parliament."[112] This means interpreters should look beyond the text's provisions and undertake an analysis in conjunction with the scheme's context and purpose to explain legal meaning. This approach is applied even where provisions may not be ambiguous at first glance, as language cannot be interpreted separately from context and purpose.[113]

Application of this modern principle alone does not necessarily resolve interpretive ambiguity. Genuine ambiguity "arises between two or more plausible readings, each equally in accordance with the intentions of the statute."[114] If a modern reading of the text does not resolve ambiguity, interpreters may apply additional interpretive techniques to resolve it.

The purposive approach is a staple concept of the modern principle.[115] Purposes and context are critical for resolving ambiguity in statutory and treaty provisions, help to establish the meaning of text, and should be considered at every stage of interpretation. As a general rule, interpretations that promote purposes are preferred over those that do not. This principle is reflected in the federal *Interpretation Act*, which requires that every statutory enactment be "deemed remedial, and shall be given such fair, large and liberal construction and interpretation".[116] Further, federal policy requires modern treaties "to be interpreted in a reasonable and purposive manner which requires giving effect to the common intention of the parties at the time the treaties were made."[117] Both federal law and policy reflect the importance of a purposive approach and the modern principle in the interpretation of statutes and modern treaties.

Courts presume that legislatures intend to comply with the constitution.[118] Interpreters of Canadian law should consider constitutional principles established through common law, such as the Honour of the Crown, when interpreting treaties and statutes affecting Indigenous Peoples (see discussion of these principles in Section IV.D).[119]

Reconciliation is a highly relevant principle for the interpretation of statues and treaties. The question of how to promote reconciliation through treaty interpretation has been a matter of long-standing debate.[120] The law encourages the Crown to fulfil treaty promises, which are "of a very solemn and special, public nature."[121] Further, honourable interpretation of Crown obligations "cannot be a legalistic one that divorces the words from their purpose" and instead

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112. *Canada (Minister of Citizenship & Immigration) v Vavilov,* 2019 SCC 65 at para 117 [*Vavilov*]; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 .

113. *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 47.

114. *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 29.

115. Ruth Sullivan, *Statutory Interpretation* (Toronto: Irwin Law Inc, 2016) at 185–87 [Sullivan].

116. *Interpretation Act*, *supra* note 6, s 12.

117. Crown-Indigenous Relations and Northern Affairs Canada, "Statement of Principles on the Federal Approach to Modern Treaty Implementation" (last modified 28 February 2023), online: <rcaanc-cirnac.gc.ca> [perma.cc/47GR-B7H9].

118. Sullivan, *supra* note 115 at 307.

119. *Ibid* at 252–55, 257–58; see also, *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 at paras 77–87 [*Tsilhqot'in Nation*].

120. See generally Kent McNeil, "Reconciliation and the Supreme Court of Canada: The Opposing Views of Chief Justices Lamar and McLachlin" (2003) 2:1 Indigenous LJ 1.

121. *R v Badger*, [1996] 1 SCR 771 at para 76 [*Badger*]. See also *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 79 [*MMF*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 19 [*Haida Nation*]; Sullivan, *supra* note 115 at 252.

must be given "broad, purposive interpretation" that is consistent with the Honour of the Crown.[122] Reconciliation underlies the legal application of treaty rights and the purpose of treaties.[123] Interpretation must account for and give effect to an agreement as a whole and address the inherent tension between the assertion of Crown sovereignty and Indigenous Peoples' prior inherent legal authority.[124] An approach to interpretation that disregards this tension "is contrary to the purpose of treaties and undermines their ability to act as a vehicle to advance reconciliation."[125]

In *Mitchell*, the Supreme Court of Canada suggested that consideration of historical harms through statutory interpretation is only required if other interpretive techniques fail to resolve ambiguity.[126] However, courts have gravitated toward actively promoting reconciliation throughout interpretive analysis.[127] In *Nowegijick*, the court emphasized that treaty ambiguity should be resolved in favour of Indigenous Peoples and that "[A]boriginal understandings of words and corresponding legal concepts . . . are to be preferred over more legalistic and technical constructions."[128] This principle was affirmed in *Badger*, which found any restrictions on treaty rights should be narrowly construed.[129] In effect, the *Nowegijick* principle promotes reconciliation throughout the interpretive process by accounting for harms perpetuated by the Crown against Indigenous Peoples.[130]

The *Nowegijick* principle was first applied to historical treaties but has since been considered in the interpretation of modern treaties. Interestingly, the Nunavut Agreement states there shall be no presumption that doubtful expressions be resolved in favour of government or Inuit.[131] Courts have taken a slightly different approach in applying the *Nowegijick* principle in the modern treaty context. Generally, courts provide deference to the text out of respect for the intentions of the parties who negotiated agreements that are relatively clear about intentions and enhance continuity, transparency, and predictability while emphasizing the importance of upholding the Honour of the Crown.[132]

In short, key principles of statutory and treaty interpretation require a liberal construction of text that accounts for the purpose and the broader legislative and constitutional context. Articulated purposes help establish the meaning of a given text and should be considered at

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122. *MMF, ibid* at para 77.

123. *Ibid* at para 71; Kate Gunn, "Towards a Renewed Relationship: Modern Treaties & the Recognition of Indigenous Law-Making Authority" (2022) 31:2 Constitutional Forum 17 at 18–19 [Gunn]; *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at paras 67, 70.

124. Gunn, *ibid* at 19, 21.

125. *Ibid* at 20.

126. *Mitchell v Peguis Indian Band,* [1990] 2 SCR 85 at 143.

127. Sullivan, *supra* note 115 at 252–53;*Nowegijick v The Queen,* [1983] 1 SCR 29, at 30, 36 [*Nowegijick*]; See also Aimée Craft, "Treaty Interpretation: A Tale of Two Stories" (4 June 2011) at 4–5, 11, online (pdf): <ssrn.com/abstract=3433842> [perma.cc/ML23-FXJ5].

128. *Mitchell*, *supra* note 126 at 88.

129. *Badger, supra* note 121 at paras 41, 52.

130. Sullivan, *supra* note 115 at 254–55.

131. Nunavut Agreement, *supra* note 1, art 2.9.3.

132. Sullivan, *supra* note 115 at 253; Gunn, *supra* note 123 at 21–22; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 12 [*Beckman*]; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paras 36–37 [*Nacho Nyak Dun*]; *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 7.

every interpretation stage, as interpretations that promote purposes are generally preferred over those that do not. These principles should be applied when interpreting the Nunavut Agreement and NuPPAA.

A. Purposes of the Nunavut Agreement and NuPPAA

1. Nunavut Agreement

There are several objectives of the Nunavut Agreement, including to provide Inuit with wildlife harvesting rights, to promote economic opportunities and self-sufficiency, and to ensure a fair share of financial compensation and means of participating in economic opportunities.[133] Further, the treaty aims 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."[134]

The right to participate in decision making is most explicit in articles 11 and 12 of the Nunavut Agreement. Article 11 requires that "special attention" must be paid to Inuit and Inuit Owned Lands interests through land-use planning, and that the land-use planning must include "active and informed participation of Inuit and other residents affected by the land use plans."[135] Article 12 does not include explicit language speaking to Inuit participation in impact reviews, but it can be inferred that meaningful participation in NIRB-led impact review processes is important as it is related to the management and use of land and resources. Article 12 stipulates the NIRB's primary objective "shall be at all times to protect and promote the existing and future well-being" of Nunavut residents and communities, and "to protect the ecosystemic integrity" of Nunavut (while also taking into account the well-being of Canadians outside of Nunavut).[136] Similarly, when reviewing project proposals, the NIRB must consider "whether the project would enhance and protect the existing and future well-being of the residents and communities" of Nunavut, and "whether the proposal reflects the priorities and values" of Nunavut residents.[137] While these articles speak generally to "residents and communities" of Nunavut (i.e., Nunavummiut), the vast majority of the population are Inuit.[138] Read together with the objectives of the Nunavut Agreement, this implies that the way for the NIRB and the Minister to consider the well-being of Inuit, and whether a project reflects their priorities and values, is to include them in the NIRB-led impact review and decision-making process. Further, in our view, participation is ensured through the NIRB itself, which consists of Inuit representatives, which speaks to the importance of its determinations and the need for the Minister to respect and offer deference to its findings.

The Nunavut Agreement does not prescribe to what degree the NIRB and Minister must consider Inuit input. We do know, as legal scholar Daniel Dylan emphasizes, that Inuit rights

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133. Nunavut Agreement, *supra* note 1, preamble.

134. *Ibid* [emphasis added].

135. *Ibid*, art 11.2.1(b), (d).

136. *Ibid*, arts 11.2.1(b), 12.2.5; Dylan, "Complicated Intersection," *supra* note 19 at 207, 229.

137. Nunavut Agreement, *supra* note 1, art 12.5.5 (a) and (c); NuPPAA, *supra* note 3 at s 103(1).

138. Nunavut Agreement, *supra* note 1, art 12.2.5. As of 2021, 85.8 per cent of the Nunavut population is Inuit; see Statistics Canada, "Focus on Geography Series, 2021 Census of Population, Nunavut, Territory" (2021), online <statcan.gc.ca> [perma.cc/YF7V-A5UP]. See also Jai, *supra* note 2 at 131.

to participation in decision making is not equivalent to final "decision-making" authority, which rests with the Minister.[139] However, in our view, we can glean from the purposes of the Nunavut Agreement that it contemplates (1) meaningful participation of Inuit in decision making through the impact review process and (2) for those views to be deeply considered by the NIRB and the Minister. While it's important to acknowledge the Minister's final decision-making authority, we suggest these purposes speak to limitations on ministerial discretion. At minimum, they indicate that it would not be consistent with the purposes of the Nunavut Agreement for the NIRB or the Minister to not allow a meaningful opportunity for Inuit input in the impact review and decision-making processes.

2. NuPPAA

The Nunavut Agreement stipulates that legislation will be implemented to clarify the impact review process, including the powers, functions, objectives, and duties of the NIRB.[140] This is the purpose of NuPPAA, which details land-use planning and impact review processes and the powers and duties of the NPC, NIRB and the Minister.[141] In case of conflict, the Nunavut Agreement prevails over NuPPAA, but NuPPAA prevails over other federal and territorial laws.[142]

Parliamentary proceedings regarding NuPPAA provide insight into the legislative intent of the legislation and how law makers understood the NIRB and Minister's duties and powers and how Parliament understood the purposes of the Nunavut Agreement. During the bill's second reading, John Duncan, then Minister of Aboriginal Affairs and Northern Development, said that "[a]n improved regulatory regime will allow aboriginals (*sic*), communities and others to better participate in decision-making concerning the use, management and conservation of land, water and natural resources in the north."[143] He noted that former Nunavut Premier Eva Aariak called the legislation "an important milestone in establishing an effective and streamlined regime for Inuit and government to *manage resource development in Nunavut together*."[144] These comments suggest that NuPPAA was intended to further refine the NIRB-led process established by the Nunavut Agreement, allowing Inuit to participate as equal partners in land and natural resource management.

Duncan's successor, Leona Aglukkaq, described the bill slightly differently. During the report stage, Aglukkaq emphasized that NuPPAA would empower the "people of Nunavut" with tools to "manage" and "make decisions" regarding land and resource development:

> [T]he Nunavut planning and project assessment act . . . I believe will provide the *people of Nunavut* with the tools to plan and assess land, water and resource use in a responsible and sustainable manner. I believe the bill will empower *the people of Nunavut to manage their own land and resource development* to fuel strong, healthy and self-reliant communities.

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139. Dylan, "Complicated Intersection," *supra* note 19 at 229.

140. Nunavut Agreement, *supra* note 1, art 10.2.1.

141. Dylan, "Complicated Intersection," *supra* note 19 at 220.

142. *Ibid* at 221; NuPPAA, *supra* note 3, ss 3(1)–(2).

143. *House of Commons Debates*, 41-1, No 185 (26 November 2012) at 1205 (Hon John Duncan), online: <ourcommons.ca> [perma.cc/LW5N-7LS5].

144. *Ibid* at 1205 [emphasis added].

> Indeed, I am convinced that the bill would *help the people of Nunavut make planning and project assessment decisions* that would not only lead to greater economic development of the territory's land and resources but also enable them to protect their environment and preserve a precious and unique natural heritage for future generations.[145]

Aglukkaq's reference to the "people of Nunavut" is noteworthy in so far as it reminds us that the NIRB process is not exclusive to Inuit. While the vast majority of Nunavut are Inuit, and the NIRB is co-managed by Inuit representatives, the NIRB is ultimately an institution of public government and is tasked with acting in the public interest.[146]

More importantly, the former Ministers' comments explicitly state the purpose was to empower the people of Nunavut to manage their land and resources and help them make "project assessment decisions." Since the NIRB is the body through which the people of Nunavut have input in such decisions, these statements imply that NuPPAA entrenches the NIRB's role and authority in assessing projects and determining whether they should proceed. Since the NIRB leads the process that must account for potential adverse impacts on Inuit rights, the Minister must not interfere with the NIRB's role or its determinations lightly. And while NuPPAA affirms the Minister's final decision-making power, Aglukkaq's comments indicate that Parliament never intended the Minister's power to be used as an unconstrained veto or cudgel to override NIRB determinations.

This intent is reflected in some of the provisions of NuPPAA that are not included in the Nunavut Agreement. For example, if the NIRB determines an impact review is not required for a proposed project, NuPPAA requires the Minister to accept or reject that determination within 15 days of receiving notice of that determination.[147] The Minister may order the NIRB to conduct an impact review even if the NIRB determines a review is not required.[148] However, if the NIRB determines a review *is* required, the Minister *cannot* exempt the project from the impact review process. Instead, the Minister may agree that an impact review is required and authorize the NIRB to conduct an impact review, or reject the project entirely by deeming it not in the national or regional interest.[149] In effect, the Minister can increase, but not decrease, scrutiny of a project (although the Minister can cancel the project entirely if it is deemed not in the regional or national interest).

In our view, this example supports the inference that NuPPAA furthers the purposes of the Nunavut Agreement to ensure meaningful participation of Inuit in decision making and to protect Inuit rights to harvesting and the ecosystemic integrity of Nunavut. Since the NIRB is the key regulator and body that carries out consultation with Inuit, the purposes imply the Minister is by extension required to provide some deference to NIRB determinations while also ensuring rigorous consideration of ecosystemic impacts and the broader public interest. In other words, the Minister's duty is to oversee NIRB determinations to ensure compliance with the Nunavut Agreement, including the participation of Inuit in decision making,

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145. *House of Commons Debates*, 41-1, No 218 (4 March 2013) at 1200 (Hon Leona Aglukkaq), online: <ourcommons.ca> [emphasis added].

146. Nunavut Agreement, *supra* note 1, art 10.1.1.

147. NuPPAA, *supra* note 3, s 93(1).

148. *Ibid*, s 93(1)(a)–(b).

149. *Ibid*, s 94.

and ensure adequate consideration of possible ecosystemic and socioeconomic impacts. The Minister may then operationalize an NIRB determination, if the Minister decides it is compliant with the Nunavut Agreement and the public interest, by accepting the determination and, if necessary, varying the terms and conditions.

On this basis, it is important to consider whether any of this may change in a post-devolution Nunavut. As noted, on April 1, 2027, a territorial Minister of the Government of Nunavut will step into the shoes currently worn by the federal Minister, assuming responsibility for making decisions under NuPPAA and overseeing the NIRB-led impact review process. In our view, the territorial Minister, as a representative of public government, will be tasked with making final decisions on behalf of Nunavummiut while also navigating the same legal considerations and principles as the current federal Minister with respect to Inuit rights and interests and the role of the NIRB as a co-management institution. The transfer of decision-making power to an elected representative of Nunavummiut may have significant political implications and may result in different decisions than would otherwise be made by the federal Minister. Regardless, the territorial Minister will confront the limitations on ministerial discretion described in this article.

B. The Legal Authority of NIRB Determinations and Ministerial Decisions

As noted, article 12 of the Nunavut Agreement describes the impact review process and the respective duties and powers of the NIRB and the Minister. The Minister is "the federal or territorial minister having the jurisdictional responsibility for authorizing a project to proceed."[150] NuPPAA defines the "federal minister" and "responsible minister" as the Minister of Northern Affairs, except when a different minister has explicit jurisdiction.[151] If multiple ministers have jurisdictional authority, they jointly administer the duties and functions of the "responsible minister". For example, in the Mary River context, the Minister shares regulatory jurisdiction with the federal Minister of Intergovernmental Affairs & Trade; Transport; Environment and Climate Change; Natural Resources; and Fisheries, Oceans and the Canadian Coast Guard.[152]

Further, it's important to emphasize that the primary objective of the NIRB is "at all times to protect and promote the existing and future well-being of *residents and communities of the Nunavut Settlement Area*, and to protect the *ecosystemic integrity*" of Nunavut (and account for the well-being of Canadians outside of Nunavut).[153] This objective is reflected in section 23 of NuPPAA. The consideration of residents and communities generally is consistent with

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150. Nunavut Agreement, *supra* note 1, art 12.1.1.

151. NuPPAA, *supra* note 3, ss 2(1), 73(1). For a discussion on this topic, see Dylan, "Complicated Intersection," *supra* note 19 at 219–20.

152. NuPPAA, *supra* note 3, ss 149(1). See Minister of Northern Affairs, "221116-08MN053-Ltr from Minister Re Phase 2 Development Decision-IT4E.pdf" (16 November2022), online: <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=342156&applicationid=124701&sessionid=v7pblniln9pd52ib7tkl2nplh5> [perma.cc/4CEM-BUE9].

153. Nunavut Agreement, *supra* note 1, art 12.2.5 [emphasis added].

the NIRB's status as a "co-management institution of public government."[154] However, the people of Nunavut are predominantly Inuit, who enjoy treaty rights that are inextricably tied to ecosystemic integrity (e.g., wildlife harvesting). In brief, we feel it is reasonable to infer that a broad, purposive reading of article 12 makes consideration of Inuit well-being a paramount consideration for the NIRB.

On this basis, we can explore the meaning of an NIRB "determination" through the immediate context provided in article 12. The NIRB's "primary functions" are to (1) "screen proposed projects to *determine* whether or not a review is required"; (2) "gauge and define the extent of the regional impacts . . . to be taken into account by the Minister in making his or her *determination* as to the regional interest"; (3) "review the ecosystemic and socio-economic impacts of project proposals"; (4) "*determine*, on the basis of its review, whether project proposals should proceed, and if so, under what terms and conditions, and then report its *determination* to the Minister"; and (5) monitor projects for compliance with project certificate terms and conditions.[155]

Here, the words "determine" or "determination" are used to refer to the Minister's finding of whether the project is in the regional interest, the NIRB's finding regarding whether an impact review is required, and whether, based on an impact review, a project should proceed. However, other provisions limit the use of the word "determination" to the NIRB in the impact review process. The word is used in reference to the NIRB's screening process and its finding of whether an impact review is required or whether the project must be modified or abandoned because it may result in unacceptable adverse socioeconomic and ecosystemic impacts.[156] That determination must be communicated in a written report that indicates whether a project should be subject to an impact review.[157] The word is also used in reference to the NIRB's finding as to whether a project should proceed and, if so, according to what terms and condition.[158] However, it is not used in the context of the reconsideration process.

Notably, the Nunavut Agreement distinguishes NIRB determinations that account for ecosystemic factors from determinations that account for exclusively socioeconomic factors. Article 12.2.2 stipulates that NIRB determinations during screening regarding socioeconomic impacts that are "unrelated to ecosystemic impacts shall be treated as *recommendations* to the Minister."[159] Article 12.2.3 restricts the NIRB's mandate from establishing requirements for socioeconomic benefits.[160] Further, article 12.5.11, in explaining the Minister's duties upon reviewing the NIRB's determination under articles 12.5.7 and 12.5.9, stipulates the Minister may accept, reject, or vary exclusively socioeconomic determinations "without limitation" to the grounds set out in those articles.[161] NuPPAA affirms the Minister's final decision-making power over NIRB determinations and that the Minister "may reject, or vary in any manner

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154. Note that art 10.1.1 of the Nunavut Agreement does not mention "co-management," but the NIRB describes itself as such. See Nunavut Impact Review Board, "Proponent's Guide" (February 2020) at 9, online (pdf): <nirb.ca> [perma.cc/DHR5-QVZA].

155. Nunavut Agreement, *supra* note 1, art 12.2.2 [emphasis added].

156. *Ibid,* art 12.4.2; NuPPAA, *supra* note 3, s 91.

157. Nunavut Agreement, *supra* note 1, art 12.4.4; NuPPAA, *supra* note 3, s 92.

158. Nunavut Agreement, *supra* note 1, art 12.5.6; NuPPAA, *supra* note 3, ss 104–06.

159. Nunavut Agreement, *supra* note 1, art 12.2.2(d) [emphasis added].

160. *Ibid*, art 12.2.3.

161. *Ibid*, art 12.5.11.

that that Minister considers appropriate, any recommended term or condition that is related to the socio-economic impacts of the project and that is not related to its ecosystemic impacts."[162]

In our view, these provisions of the treaty and statute support an inference that NIRB determinations involving ecosystemic impacts constrain ministerial discretion to a greater degree than recommendations based on exclusively socioeconomic impacts. However, neither clarify to what degree an ecosystemic "determination" must inform a ministerial decision.

The Minister has the final say over whether a project should proceed, following receipt of the NIRB's determination and assessment report. Nonetheless, the express classification of the NIRB's discretion regarding socioeconomic impacts as recommendations suggests the NIRB's discretion concerning ecosystemic impacts is to be understood differently. In our view, it is reasonable to infer that the Minister must consider aspects of an NIRB determination that account for ecosystemic impacts more deeply than a recommendation. While an NIRB determination concerning exclusively socioeconomic impacts may be treated strictly as recommendations, NIRB determinations regarding ecosystemic impacts are seemingly intended to carry more weight. On this basis, it can be inferred that determinations with respect to ecosystemic factors are intended to constrain ministerial discretion to a greater degree. This would be consistent with the purposes of the Nunavut Agreement and the NIRB's mandate, which prioritizes the protection of the ecosystemic integrity of Nunavut. Further, this ties into the requirement for the Minister to deeply consider Inuit rights and interests in wildlife harvesting, which are deeply tied to ecosystemic integrity.

Figure 3 summarizes our interpretation of the meaning of a decision, determination, and recommendation under the Nunavut Agreement and NuPPAA. In our view, this interpretation is consistent with the purposes and intent of the Nunavut Agreement, which places special emphasis on the protection of ecosystemic integrity and Inuit wildlife harvesting rights. It also recognizes the importance of deference to the NIRB with respect to ecosystemic matters, and respect for the views of Inuit representatives on the NIRB.

Figure 3: Contrasting Decisions, Determinations, and Recommendations

Act	Actor	Authority
Decision	Minister	The Minister accepts, rejects, or varies an NIRB determination or recommendation.
Determination	NIRB	A view on whether a project should be approved (screening and final decision) that takes into account ecosystemic impacts.
Recommendation	NIRB	A view based exclusively on socioeconomic impacts that concerns its assessment of terms and conditions for a project certificate.

We wish to emphasize that in the context of an impact review, this is only one added limitation on ministerial discretion. As discussed in Section IV.D, ministerial decisions that implicate Inuit treaty rights—throughout impact reviews and reconsideration processes—should respect the NIRB's role as a co-management board with primary responsibility to regulate development in the territory, and take seriously its findings with regard to ecosystemic impacts and Inuit harvesting rights.

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162. NuPPAA, *supra* note 3, s 108.

C. *UNDRIP Act*

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is an international legal instrument that addresses a wide range of Indigenous Peoples' political, economic, social, cultural, spiritual, and environmental rights.[163] Its preamble and 46 articles affirm long-standing, broadly accepted international human rights norms in the context of Indigenous Peoples. Among its most notable articles are its affirmations of Indigenous Peoples' right to self-determination, including a right to autonomy or self-government.[164] In regard to lands and resources, UNDRIP affirms Indigenous Peoples have a right to those lands they traditionally owned and occupied, and have a right to own, use, develop, and control lands and resources they possess through traditional ownership.[165] UNDRIP also requires states to consult and cooperate in good faith through their own representative institutions to obtain the free, prior, and informed consent of Indigenous Peoples in relation to the development, use, or exploitation of mineral, water, or other resources.[166]

The federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, passed into law in 2021, affirms UNDRIP "as a universal international human rights instrument with application in Canadian law" and provides "a framework" for federal implementation.[167] The law requires the federal government to consult and cooperate with Indigenous Peoples and "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[168] While the language of section 5 and the requirement for an action plan delay the full implementation of the law, section 2 expressly states that "nothing in the Act is to be construed as delaying the application of the Declaration in Canadian law."[169] Further, the preamble affirms UNDRIP "as a source of interpretation of Canadian law."[170]

The fact that the Nunavut Agreement and NuPPAA assign the Minister final decision-making authority is problematic because, on its face, it is not consistent with the core principles of UNDRIP.[171] Further, while NuPPAA requires the NIRB to take into account Inuit knowledge in,[172] it does not expressly require the Minister to integrate Inuit knowledge into decision making,[173] and there is neither requirement in the Nunavut Agreement.[174] However, observers

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163. *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 107th Mtg, UN Doc A/res/61/295 (2007).

164. *Ibid,* arts 3, 4.

165. *Ibid,* art 26.

166. *Ibid,* art 32(2).

167. *United Nations Declaration on the Rights of Indigenous People Act*, SC 2021, c 14, s 4 [*UNDRIP Act*]; *R c Montour*, 2023 QCCS 4154 at para 1197 [*Montour*].

168. *UNDRIP Act*, *ibid* at s 5.

169. *Ibid*, s 2(3); *Montour*, *supra* note 167 at para 1196.

170. *Montour, supra* note 167 at para 1195.

171. Dylan & Thompson, *supra* note 53 at 57–58; see also John Borrows, "Canada's Colonial Constitution" in Borrows & Coyle, *supra* note 2, 17 at 32–37; Borrows discusses the need for removal of federal oversight in relation to Indigenous decision making and opportunities and limitations of the advancement of Indigenous interests within the section 35 legal framework.

172. NuPPAA, *supra* note 3, s 103(3); Dylan & Thompson , *supra* note 53 at 63.

173. Dylan & Thompson , *supra* note 53 at 63.

174. Dylan & Thompson, *supra* note 53 at 63, 67, 84.

expressed these views prior to the *UNDRIP Act* coming into effect. Since then, courts have considered its legal effect on federal law.

For example, in *R c Montour*, the Superior Court of Quebec observed that in light of reconciliation being a key purpose of section 35 and the *UNDRIP Act*, treaty interpretation "must be aligned with that goal"[175] and that it is "an interpretive tool of Canadian law having the weight of a binding international instrument."[176] Further, the court found that the presumption of conformity (i.e., the presumption that Parliament did not pass laws to contradict one another) should be applied to the *UNDRIP Act* because it endorses UNDRIP without qualification.[177]

As federal law, the *UNDRIP Act* applies to NuPPAA. In our view, the *UNDRIP Act* encourages interpretations of decision-making provisions that emphasize the purposes of the Nunavut Agreement, the protection of ecosystemic integrity and treaty rights (e.g., wildlife harvesting), and Inuit knowledge and participation in decision making. This supports our effort to contextualize the purpose of the Minister's duties and decision-making powers as one of oversight, rather than the exercise of a de facto veto without regard to Inuit views and treaty rights.

D. The Constitutional Context: The Honour of the Crown and the Duty to Consult

It is imperative to account for the constitutional principles of the duty to consult and the Honour of the Crown when assessing the legal meaning of an NIRB determination and ministerial decision. That is because in all dealings with Indigenous Peoples, the Crown must act honourably, including through the implementation of treaties.[178] The Honour of the Crown arises from its assumption of sovereignty over Indigenous lands and recognizes that colonial law and customs were imposed on people, which gives rise to a special relationship that requires honourable dealings.[179] It is engaged in situations involving the reconciliation of Aboriginal treaty rights with Crown sovereignty, including the interpretation of treaty and statutory provisions.[180] That includes a requirement of the Crown to avoid sharp dealing and to "pursue the purposes behind the promises."[181] Ultimately, what determines honourable conduct will vary based on the circumstances, but its key aim is to advance reconciliation

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175. *Montour*, *supra* note 167 at para 595.

176. *Ibid* at para 1194.

177. *Ibid* at para 1202. See also the dissent of Justices Martin and O'Bonsawin in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 317 (where the justices were willing to state that the UNDRIP can trigger the presumption of conformity).

178. *Haida Nation*, *supra* note 121 at para 17; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24 [*Taku River*].

179. *MMF, supra* note 121 at para 67; *Haida Nation, supra* note 121 at para 32.

180. *Badger, supra* note 121 at paras 68–72.

181. *MMF, supra* note 121 at paras 73, 80; Michael Coyle, "As Long as the Sun Shines: Recognizing that Treaties Were Intended to Last" in Borrows & Coyle, *supra* note 2, 39 at 63–64 [Coyle]; as noted by Coyle, the aforementioned duties of the Honour of the Crown, such as the duty to avoid sharp dealing, has not been fully fleshed out by the courts.

in a manner that fosters a respectful long-term relationship between the Crown and Indigenous Peoples.[182]

The Crown's duty to consult flows from the Honour of the Crown, although it is only one component.[183] The Crown must carry out its duty to consult Indigenous Peoples in a manner that fosters reconciliation whenever the Crown or its agents has knowledge of Aboriginal and treaty rights and contemplate action that may adversely impact those rights.[184] It is an ongoing obligation throughout the time of an activity, requiring the Crown to provide notice of further decisions that may be made in relation to the action.[185] If the duty is triggered, it carries procedural safeguards that may vary from notice and disclosure of information, to opportunities to make submissions and receive written reasons for a decision.[186] The depth of consultation depends on the strength of the claimed or proven Aboriginal rights and potential severity of impact on those rights. The more severe the potential impact of a proposed Crown action, the deeper the duty to consult and, if necessary, accommodate.[187]

The duty to accommodate means taking into account Indigenous concerns by modifying the contemplated conduct to avoid impacts to Aboriginal rights.[188] The duty may include consideration of environmental impacts of a proposed activity, but must focus on the impact on Aboriginal and treaty rights themselves.[189] While consultation and accommodation must be "meaningful" with the goal of substantially addressing concerns,[190] and the Crown must be willing to make changes based on what it hears during the consultation process, it does not necessarily mean the Crown must ultimately agree with the Indigenous perspective.[191]

While the Crown may delegate its duty to consult to regulatory agencies (such as review boards), it remains accountable for ensuring the consultation is adequate.[192] If the regulatory process does not achieve adequate consultation or accommodation, the Crown must take further measures to meet the duty, such as requesting reconsideration of the decision or postponing an order for further consultation before a decision is made. If an Aboriginal group that is party to a modern treaty perceives the process to be insufficient, they should request direct Crown engagement "in a timely manner," as they are responsible for advancing their interests.[193]

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182. *MMF*, *supra* note 121 at para 74; Richard Ogden, "Williams Lake and the Mikisew Cree: Update on Fiduciary Duty and the Honour of the Crown" (2020) 94:8 SCLR 207 at 221 [Ogden].

183. *MMF*, *supra* note 121 at para 73; *Clyde River*, *supra* note 12 at paras 38, 61; Coyle, *supra* note 181 at 63.

184. *Haida Nation, supra* note 121 at para 35; Coyle, *supra* note 181 at 41; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 33 [*Mikisew*].

185. *Rio Tinto Alan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 91–93.

186. *Haida Nation*, *supra* note 121 at paras 41, 43–45; *Beckman*, *supra* note 132 at paras 46.

187. *Haida Nation*, *supra* note 121 at paras 37, 43–45; *Tsilhqot'in Nation*, *supra* note 119 at paras 78–80.

188. *Haida Nation*, *supra* note 121 at para 47.

189. *Clyde River*, *supra* note 12 at para 45.

190. *Haida Nation*, *supra* note 121 at para 42; *Mikisew*, *supra* note 184 at 67.

191. *Taku River*, *supra* note 178 at paras 2, 25.

192. *Clyde River, supra* note 12 at paras 21–24.

193. *Clyde River*, *supra* note 12 at para 22; *Beckman, supra* note 132 at para 12.

As noted, the interpretation of modern treaties should respect the "handiwork" of parties to the treaty.[194] However, the treaty must be understood as a whole and in a generous manner in light of it's objectives.[195] A treaty exists within a special relationship that requires the Crown to act honourably in all its dealings with Indigenous Peoples in a manner that fosters reconciliation.[196] The Crown cannot contract out its duty to act honourably, as itapplies independently of the expressed or implied intention of the parties.[197] Through application of these interpretive principles, courts can advance reconciliation by encouraging fulfillment of modern treaties that were intended to create "the legal basis to foster a positive long-term relationship".[198]

1. Application of Key Constitutional Principles to the NIRB's Determinations and Minister's Decisions

The Honour of the Crown and the duty to consult apply to Nunavut's impact review process. In our view, these principles require the Minister to respect the NIRB's duties and responsibilities as a co-management institution made up Inuit and Crown representatives. While deference should be provided to the text of the Nunavut Agreement and NuPPAA, we cannot ignore these purposes and the function of the NIRB as a co-management institution and the important role it plays in involving Inuit in the decision-making process.

The duty to consult and the Honour of the Crown is engaged as soon as the Crown becomes aware of a project proposal that may impact treaty rights, and it is engaged throughout the life cycle of a project. The NIRB, as the key regulator, is tasked with carrying out honourable consultation with Inuit regarding project proposals and amendment applications through processes set out in the Nunavut Agreement and NuPPAA. Once the consultation process is complete, the NIRB issues a report and determination to the Minister. In its report, the NIRB must explain how it integrated comments from Inuit, as consideration of that feedback is a key component of involving Inuit in the decision-making process. The report should also explain how its determination ensures the protection of ecosystemic integrity and Inuit harvesting rights, and any terms and conditions should provide for accommodation of any potential impacts to treaty rights.

Through the NIRB-led process, the Crown does not relinquish its constitutional obligations. The Minister, as a representative of the Crown, must oversee NIRB-led processes to ensure the processes comply with the treaty and statute and are conducted honourably. The Minister must consider whether the NIRB adequately consulted Inuit and considered any potential impacts on treaty rights in its determination and carried out a process that upholds the Honour of the Crown. The Minister must also consider whether it would be honourable to approve, vary, or reject an NIRB determination, and whether additional consultation and accommodation measures are required (as per article 12.5.7(c)(i) and (e) of the Nunavut Agreement).

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194. *Nacho Nyak Dun, supra* note 132 at para 37; *Beckman*, *supra* note 132 at para 54.

195. *Nacho Nyak Dun, supra* note 132 at para 37; *Beckman, supra* note 132 at paras 10; Gunn, *supra* note 123 at 21.

196. *Haida Nation, supra* note 121 at para 17; *Nacho Nyak Dun, supra* note 132 at para 37.

197. *Beckman, supra* note 132 at paras, 38, 61.

198. *Ibid* at para 10; *Nacho Nyak Dun, supra* note 132 at para 38, quoting *Beckman*, *supra* note 132 at para 10

Further, the Minister must justify any decision that has the potential to adversely impact Inuit rights by ensuring accommodation of that right (e.g., through terms and conditions attached to the project certificate). Determining whether the NIRB and the Minister have met their respective duties will always require a highly fact-specific and contextual inquiry of the process and reasons for the determination and decision. In any case, the Minister clearly cannot run roughshod over Inuit rights and interests, and if treaty rights are infringed, the justification burden must be "high" and "clear and convincing."[199]

In our view, the Minister's justification burden is heightened where it varies or rejects NIRB determinations that are otherwise consistent with the purposes and terms of the Nunavut Agreement and may further limit a treaty right (e.g., through impacts on wildlife harvesting). An infringement of a treaty occurs where the limitation is found to be unreasonable, whether it imposes undue hardship, and whether it denies the rightsholder the preferred means of exercising their right.[200] If an infringement is established, the Crown must justify the limitation of a treaty right by showing it is in furtherance of a compelling and substantial objective that upholds the fiduciary relationship and the Honour of the Crown.[201]

In effect, to uphold the Honour of the Crown the Minister must ensure the NIRB carried out an honourable consultation process and complied with the Nunavut Agreement and NuPPAA. Further, the Minister must consider NIRB determinations with a level of care and attention to its special role as a co-management institution, designed to encourage shared decision-making power between Inuit and Crown representatives. Ignoring or simply overriding an NIRB determination by exercising a de facto veto would not be respectful conduct nor consistent with the principle of reconciliation. The Minister must act honourably in final decision making by ensuring appropriate accommodation of any potentially impacted Inuit treaty rights. These considerations are not limited to full impact reviews but also apply to the reconsideration processes of existing project certificate terms and conditions, as these principles are engaged on an ongoing basis by contemplated actions that may implicate Inuit treaty rights. In any case, if the Minister exercises a de facto veto by disregarding the NIRB-led consultation process and its reasons for determinations and recommendations, that would be incompatible with the process of reconciliation and the Honour of the Crown, and would therefore be unlawful.

With this nuance in mind, it remains true that the written description of the Minister's decision-making power in the Nunavut Agreement and NuPPAA is problematic, because it does not explicitly discuss these considerations. In the absence of any enumerated requirements, the treaty language suggests the Minister's authority is entirely discretionary, despite the fact that such an interpretation is inconsistent with the purposes of the treaty. As noted by legal scholar Daniel Dylan, "[a]lthough the final decision is by design meant to rest with Ottawa, a decision that is incongruous with Inuit desires and interests has the real possibility of thwarting the promotion and protection of rights which the NPC and the NIRB aim to ensure."[202] We agree

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199. See e.g. *Corporation Makivik c Québec (Procureure générale)*, 2014 QCCA 1455 at paras 85, 96–98. This case discusses a breach of the duty to consult and failure of the Minister to justify decisions under the *James Bay and Northern Quebec Agreement* with respect to co-management of wildlife (*Act approving the Agreement concerning James Bay and Northern Québec*, CQLR c C-67).

200. *Yahey v British Columbia*, 2021 BCSC 1287 at para 95.

201. *Ibid* at paras 98, 455; *Badger*, *supra* note 121 at paras 41, 78.

202. Dylan, "Complicated Intersection," *supra* note 19 at 229.

with the fact that final decision making resting with the Minister risks undermining the NIRB's role as a co-management board. However, it is important to appreciate that there are in fact constitutional checks and balances on the Minister's decision-making power. Decisions that are exercised as a de facto veto would not be justifiable, reasonable, or honourable. The Minister's decision-making power, while ostensibly unfettered, must be interpreted with a purposive analysis and constitutional overlay that accounts for the broader context and purpose of the Nunavut Agreement, the duty to consult, and the Honour of the Crown.

2. Fiduciary Duties of the Minister

A separate question is whether the Minister may owe fiduciary duties to Inuit under the Nunavut Agreement. We raise this point for consideration by those who may reject our core argument and argue that the Minister does in fact have discretion to wield their decision-making power as a de facto veto over NIRB determinations. In our view, if that is true, that would mean the Minister has unilateral, unconstrained authority over a group of people whose legal interests are vulnerable to the Minister's discretion. In trust law, the existence of such unilateral discretionary power over a beneficiary is a crucial element for identifying a fiduciary.[203] If the Minister has unilateral authority to exercise a de facto veto over NIRB determinations, this would give rise to an ad hoc fiduciary duty, as they would hold a scope of discretion that could be exercised unilaterally to impact the legal and practical interests of Inuit.[204]

There is a pre-existing, *sui generis* relationship between the Crown and Indigenous Peoples that is "trust-like" in character and also applies to Aboriginal treaties.[205] Not every aspect of this relationship gives rise to fiduciary duties,[206] but they can arise each time the Crown assumes discretionary control—whether by statute, agreement, or unilateral undertaking—over specific or cognizable Aboriginal interests.[207] Fiduciary duties may account for broader obligations to Indigenous Peoples to protect their Aboriginal rights and use of their lands.[208] This *sui generis* fiduciary duty gives rise to "general duties of good faith, loyalty, and full disclosure."[209]

Fiduciary duties are distinct from the *Haida Nation* duty to consult, but both concepts are rooted in the Honour of the Crown and provide protection for Aboriginal rights and interests. Where the Honour of the Crown gives rise to fiduciary duties, the Crown must act in the best interests of the beneficiary. Thus, to some extent, and depending on the circumstances, the application of fiduciary duties may also have an effect of limiting ministerial discretion.

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203. *Guerin v The Queen*, [1984] 2 SCR 335 at 384 [*Guerin*].

204. Ogden, *supra* note 182 at 209–10; see also *Nunatsiavut Government v Newfoundland and Labrador*, 2020 NLSC 129 (the province had assumed unilateral control over a mining development, but in doing so placed itself in the role of a fiduciary, and the court held that the province breached its fiduciary duties and contractual obligations to Inuit by failing to inform them of mineral taxation revenues).

205. *Guerin, supra* note 203 at 386; Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (Saskatoon: Purich Publishing Ltd, 2001) at 58–59 [Mainville].

206. Mainville, *ibid* at 55; *Guerin*, *supra* note 203 at 386–87; *Haida Nation*, *supra* note 121 at para 18, quoting *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 81 [*Weywaykum*].

207. *Weywaykum*, *ibid* at para 79; Mainville, *supra* note 205 at 55.

208. *Haida Nation*, *supra* note 121 at paras 18, 54; Mainville, *supra* note 205 at 5.

209. Ogden, *supra* note 182 at 209–10.

In *Beckman*, the Supreme Court of Canada acknowledged *in obiter* that fiduciary duties may arise in a modern treaty context but did not detail its reasoning.[210]

In the Nunavut context, there is an open question of whether the Crown has in fact assumed such discretionary control to the extent that it becomes a fiduciary. In a 2014 case, the Nunavut Court of Appeal declared it was unnecessary to "superimpose a fiduciary cloak over what is essentially a contractual relationship."[211] The court did not say it was impossible for the Crown to assume parallel fiduciary duties to the terms of the Nunavut Agreement—the court only held they did not apply to the specific facts of that particular case. The ruling suggests fiduciary duties may be considered on a case-by-case basis and separately from issues of breach of a treaty term or the duty to consult.

This case reflects a tendency of Canadian courts to construe treaties as contracts and to apply similar remedies to protect against violations of treaty rights. However, the framing of treaties as contracts fails to account for the fact that treaties are distinct agreements aimed at reconciling Indigenous and non-Indigenous legal orders.[212] Also, common law remedies available for breach of contract are not necessarily well suited for finding remedies aimed at upholding the spirit and purposes of a treaty.[213] Breaches of fiduciary duty may be remedied using principles of equitable compensation, but it's an open question of whether that will or could be applied to resolve a dispute involving the exercise of ministerial discretion under the Nunavut Agreement.

E. Case Law Regarding Administrative Decision Making Under the Nunavut Agreement

In Nunavut, "anyone directly affected" by an NPC or NIRB-related matter may apply to a court to seek a determination of the implementation of project certificate terms and conditions, to obtain a court order for enforcement of terms and conditions, or to seek judicial review and orders made under article 12.[214] Through judicial review, Nunavut courts may quash a decision if it is unreasonable, arbitrary, illegal, or based on improper motives, such as bad faith. Courts will review the record that was before a decision maker[215] to determine whether a decision is

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210. *Beckman*, *supra* note 132 at paras 9, 12, 142–44; *Nunavut Tunngavik Inc. v Canada (Attorney General)*, 2014 NUCA 2 at para 201 [*NTI*].

211. *NTI, ibid* at para 76, see also generally paras 70–77. In this case, Inuit applicants sought judicial review of the federal government's failure to implement an informational monitoring as required under article 12.7.6 of the Nunavut Agreement. The applicants argued that this was a breach of contract—which Canada admitted—and a breach of fiduciary duty. The trial court had held there was a breach of contract and fiduciary duty, but the Court of Appeal overturned that latter finding (see trial decision at *Inuit of Nunavut v Canada (Attorney General),* 2012 NUCJ 11). The Court of Appeal held the damages to restitution and found that the applicant failed to demonstrate that parallel fiduciary duties applied. The dissent argued for a more in-depth treatment of the question and for it to not be settled summarily (see paras 195–201, 209).

212. Coyle, *supra* note 181 at 45–47.

213. *Ibid* at 53.

214. Nunavut Agreement, *supra* note 1, art 12.10.5; NuPPAA, *supra* note 3, s 220; Dylan, "Wildlife Management," *supra* note 6 at 277.

215. *Vavilov*, *supra* note 112 at paras 108, 137.

reasonable[216] or correct in law.[217] That means Inuit may apply for judicial review to determine whether the NIRB or Minister has complied with the Nunavut Agreement or NuPPAA as well as related constitutional obligations, such as the duty to consult.

To date, there has yet to be a judicial review of an NIRB determination or corresponding ministerial decision,[218] despite the NIRB's record of hundreds of determinations.[219] Nonetheless, case law involving the Nunavut Agreement provides indicators of how a court may read and enforce its terms and purposes vis-á -is an NIRB determination and ministerial decision.

Clyde River is a well-known case that considered the Crown's duty to consult when contemplating actions that have a high potential for adverse impacts on the environment and Inuit rights to marine mammal harvesting. The National Energy Board (NEB) approved an application for seismic testing for oil and gas exploration near the community of Clyde River. The testing posed significant threats to marine life, such as narwhal, which implicated Inuit rights to marine harvesting. The court confirmed the Crown can rely on administrative bodies, such as the NEB, to undertake consultation.[220] But the court also held the NEB only undertook "surface-level" consultation despite the potential for significant impacts on Inuit treaty rights. The severity of the potential adverse impacts triggered a deep duty to consult, which was not met by the NEB,[221] and its decision was quashed with an order to undertake a new process.[222]

Clyde River confirms that where the Crown relies on a regulatory body to undertake its consultation obligations, the Crown is still responsible for ensuring adequate consultation and accommodation to uphold the Honour of the Crown.[223] While that does not mean the Crown must consider throughout every part of a process whether the duty is met or participate directly, the Crown must take measures to ensure it is met.[224] This reaffirms the role of the Crown, as represented by the Minister, in ensuring consultation and, if necessary, accommodation is undertaken adequately and honourably. Where the Crown relies on a regulatory body, such as NIRB, to carry out consultation, the Crown must ensure the process is honourable and consistent with the duty to consult.

In a 1998 case, NTI challenged a decision by the Minister of Fisheries to impose fishing quotas in the Davis Strait that did not follow the advice of the Wildlife Management Board (WMB).[225] Under the *Fisheries Act*, the Minister of Fisheries has absolute discretion to make licensing decisions.[226] However, under the Nunavut Agreement, the Minister is required

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216. *Ibid* at paras 10, 15, 23.

217. *Ibid* at paras 17, 69.

218. Dylan, "Complicated Intersection," *supra* note 19 at 222.

219. Dylan, "Wildlife Management," *supra* note 6 at 277.

220. *Clyde River*, *supra* note 12 at para 16; *Haida Nation*, *supra* note 121 at para 41.

221. *Clyde* River, *ibid* at paras 43–52.

222. *Ibid* at paras 22, 30, 32–34. A distinguishing factor is that the governing statute empowers the NEB as the final decision maker, whereas the NIRB's power to make "determinations" is more ambiguous in terms of its legal authority.

223. *Ibid* at paras 22–23.

224. *Ibid* at para 22.

225. *Nunavut Tunngavik Inc v Canada (Minister of Fisheries & Oceans)*, [1998] 4 FCA 405 [*NTI FCA*].

226. *Ibid* at para 13; *Fisheries Act,* RSC, 1985, c. 14, s 7(1).

to consider the views of the WMB and pay special attention to adjacency and economic dependence of Nunavut communities on marine resources.[227]

The motions judge held that the Minister of Fisheries failed to consider the views of the WMB because the Minister failed to provide reasons, but the Federal Court of Appeal overturned that finding because there is no requirement for the Minister to provide written reasons to the WMB, as the Nunavut Agreement is explicit when reasons are required (e.g., in response to the NIRB).[228] However, in the absence of reasons, the court could not discern whether the decision was lawful, leading the court to a reasonable inference that the Minister did not give special consideration to the required factor of adjacency and economic dependency.[229] Further, despite the Minister's "absolute discretion" under the *Fisheries Act*, the court of appeal observed it is not absolute under the Nunavut Agreement, which puts in place a regime for the management and harvesting of wildlife, including both procedural and substantive requirements that affect the decision-making process.[230] This case indicates that while courts will emphasize respect for the text of the Nunavut Agreement, they will apply limitations on ministerial discretion based on a purposive reading of the Nunavut Agreement as a whole.

In a 2003 case, NTI sought judicial review of a decision by the Minister of Indian Affairs to refuse the issuance of a water licence that the Nunavut Water Board had approved.[231] The issue was whether the *Northern Inland Waters Act* (NIWA), which permitted the Minister to override the Water Board, conflicted with the Nunavut Agreement, which did not expressly afford the Minister such power. NTI argued that where the Nunavut Agreement requires ministerial approval, it does so in clear terms, such as in articles describing the authority of the WMB and the NIRB. The court held that the Minister has authority to make a final decision despite not having explicit authority under the treaty, because the power was already established in a pre-existing and workable regime under the NIWA.[232] This ruling suggests a court may offer similar deference to ministerial authority where the authority is not clearly expressed in the Nunavut Agreement but is expressed through statute. This could mean that where the Nunavut Agreement is silent on ministerial power, but NuPPAA is explicit, the courts will defer to NuPPAA to fill the gap.

V CONCLUSION

In our view, a purposive reading of the Nunavut Agreement and NuPPAA, in light of applicable constitutional principles, supports a view that the Minister's decision-making power is to ensure oversight of NIRB determinations rather than to wield a de facto veto or cudgel.

The Nunavut Agreement and NuPPAA expressly assign final decision-making authority over a project proposal to the Minister. However, in our view, ministerial discretion is limited

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227. *NTI FCA*, *supra* note 225 at paras 29–31, 43; Nunavut Agreement, *supra* note 1, arts 5.7.27, 15.3.7, 15.4.1.

228. *NTI FCA*, *supra* note 225 at para 36.

229. *Ibid* at paras 55, 64.

230. *Ibid* at paras 15–16.

231. *Nunavut Tunngavik Inc v Canada (Attorney General),* 2003 FCT 654.

232. *Ibid* at paras 26–28.

by the purposes of the Nunavut Agreement, the duty to consult, and the Honour of the Crown—these constitutional duties of the Crown are not contracted out by the treaty.

The NIRB is a co-management board, split between Inuit and Crown representatives, and is responsible for reviewing natural resource development and carrying out impact review processes. The NIRB carries out consultation with Inuit and is obligated to prioritize in its considerations the protection of ecosystemic integrity of Nunavut and the well-being of the people of Nunavut (the vast majority of whom are Inuit). Through impact review processes, the NIRB is responsible for ensuring consultation is carried out in compliance with the Nunavut Agreement and NuPPAA and making a determination about whether a project should proceed past screening and ultimately be approved. While the Minister may accept, vary, or reject NIRB determinations, it would be inconsistent with the Honour of the Crown and reconciliation for the Minister to ignore the NIRB's authority as a co-management institution. Correspondingly, the Minister is also responsible for ensuring the NIRB-led consultation process is undertaken honourably and is consistent with the duty to consult, and they must justify their decisions accordingly.

Further, a purposive reading of the Nunavut Agreement strongly indicates that NIRB determinations that account for ecosystemic factors constrain ministerial discretion to a greater extent than those based on socioeconomic factors. In our view, the Minister is required to place greater weight on determinations with regard to the protection of Nunavut's ecosystemic integrity—and by extension, the protection of wildlife harvesting rights.

In effect, while the NIRB and Minister both play key roles in the impact review process, the Minister's role is one of oversight and should be deferential to the NIRB's authority and determinations, while also ensuring compliance with the Nunavut Agreement, NuPPAA, and constitutional obligations. To ensure the Minister is attentive to these requirements, the Nunavut Agreement requires the Minister to justify a decision by supplying the NIRB with reasons for every decision. Those reasons should demonstrate compliance with the treaty, statute, and constitution. In our view, where the NIRB fulfils its duties and upholds terms and purposes of the Nunavut Agreement in its determination, and the Minister chooses to reject or vary that determination, the greater is the burden on the Minister to justify the decision. This is because to act honourably, the Minister should offer deference to the NIRB's determinations and respect for its role as a co-management institution. In our view, deference is a form of reconciliation and is consistent with the intent of the Nunavut Agreement and NuPPAA to entrust the NIRB with a mandate to regulate natural resource development in Nunavut.

The importance of this topic transcends the relationship between the NIRB and the Minister. There is great public interest in promoting credibility and respect for NIRB authority as a co-management institution. As mineral exploration continues in Canada's largest territory, it is imperative to ensure that NIRB and ministerial powers are interpreted and exercised consistently with the purposes and terms of the Nunavut Agreement and the constitution. If the NIRB is not afforded significant deference and latitude to operate as a co-management board, the body's legitimacy will become increasingly imperilled and public confidence in the Nunavut Agreement will be undermined. As evidenced by the Mary River mine, protracted review processes can result in fragmented decisions that can have significant and consequential impacts on Inuit and wildlife. In an ideal world, current and future ministers will appreciate this legal nuance and take a deferential approach to the NIRB unless otherwise necessary to ensure the Nunavut Agreement is upheld. If not, Inuit have legal tools at their disposal to

hold the NIRB and the Minister accountable, protect their rights and interests, and ensure the purposes of the Nunavut Agreement are upheld.