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MEMORANDUM

DATE: December 8, 2022

TO: Nunavut Tunngavik Incorporated

FROM: Lorraine Land, Partner, OKT
Justice Harry LaForme, Senior Counsel, OKT
James Shields, Associate, OKT

RE: **Legal Analysis of NPC Jurisdictional Authority for Treatment of Projects with Existing Rights in the *Draft Nunavut Land Use Plan***

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I. THE LEGAL QUESTIONS

Nunavut Tunngavik Incorporated (NTI) asked OKT for a legal opinion on the scope of the authority of the Nunavut Planning Commission (“NPC”) when dealing with certain Projects that have prior approvals and thus “existing rights” under the applicable legislation, the *Nunavut Agreement* and the *Nunavut Project Planning and Assessment Act* (“NuPPAA”)¹. More specifically, NTI seeks an independent legal opinion on the degree to which Projects with “existing rights” can be exempted from Land Use Plan conformity when a significant modification to the Project is proposed.

The NPC released, and has conducted hearings regarding, the 2021 Draft Nunavut Land Use Plan (the “DNLUP”).² The *DNLUP* includes provisions which outline the application of the *DNLUP* to Projects with existing rights and thus a question of “whether there is an exemption from this Plan.”³ The *DNLUP* addresses existing rights questions in section 6.1.8 and through reliance on *Appendix A: Existing Rights*⁴ which lists 52 specific Projects which the *DNLUP* recognizes as having “existing rights”. These specific 52 Project are therefore “exempt from prohibitions on mineral exploration and production in Limited Use areas when the project undergoes a significant modification.”⁵

NTI asked our law firm, Olthuis Kleer Townshend LLP (OKT) the following legal questions:

1. Does the current *DNLUP* conform with the legal requirements of *NuPPAA* regarding the treatment of existing rights in land use planning? More specifically, do the current *DNLUP* section 6.1.8 and *Appendix A: Existing Rights*, which exempt a specific list of Projects with “existing rights” from LUP conformity in the event of a significant modification⁶ to the Project, comply with *NuPPAA*?
2. Does the *DNLUP* treatment of ancillary Projects (such as roads and railways), which directly relate to but require a new and related land use for a Project with “existing rights”, conform with the legal requirements of *NuPPAA*?

We provide an analysis of and response to these questions below. We conclude that the current *DNLUP* s. 6.1.8 and list in *Appendix A: Existing Rights* do not comply with *NuPPAA* and (as delegated legislation) are thus *ultra vires* of the jurisdiction of the NPC.

Key legal concerns which we identified are:

- (1) the under-inclusive list of Projects in *Appendix A: Existing Rights*;

¹ *Nunavut Project Planning and Assessment Act* (“NuPPAA”), S.C. 2013, c. 14, s. 2, in force July 9, 2015.

² Nunavut Planning Commission, *Nunavut Land Use Plan: Draft July 2021* (“DNLUP”).

³ *DNLUP* s. 6.1.8 “Existing Rights”, pg. 47 – 48.

⁴ *DNLUP, Appendix A: Existing Rights*, pg. 65-66.

⁵ *DNLUP*, Table 6.1.8-1, page 48.

⁶ We note that the term “significant modification” is not defined in the *Nunavut Agreement*, *NuPPAA*, or *DNLUP*. This leaves an important term open to subjective interpretation and disagreement regarding its parameters. The uncertainty about the scope of what activity or project change is captured by the term “significant modification” contributes to uncertainty about interpretation of “existing rights” for projects, as it is a trigger for determining whether or not land use plan compliance is required in certain cases, as discussed below.

- (2) the failure to differentiate between pre-2015 approved Projects which are entirely excluded from the application of *NuPPAA*, and pre-LUP approved Projects which are subject to *NuPPAA* but exempted from certain provisions; and
- (3) the exclusion of provisions which address LUP conformity requirements applicable to Projects which have “existing rights” but which are not undergoing significant modification.

We also conclude the *DNLUP* provisions dealing with ancillary land uses for Projects with “existing rights” are consistent with the provisions of *NuPPAA*, as new ancillary land uses are subject to LUP conformity review. (We note that other provisions in *NuPPAA* and the *Nunavut Agreement* can be used to address the policy concerns about already approved Projects which could be ‘stranded’ without approval of directly related and necessary new infrastructure such as roads and railways).

II. THE GOVERNING STATUTORY FRAMEWORK

The *DNLUP* includes provisions in section 6.1.8 and *Appendix A: Existing Rights* which outline the proposed *DNLUP* process for Projects with “existing rights.”⁷ Section 6.1.8 indicates these provisions are based on the requirements of the governing statute, *NuPPAA*.⁸

The legal requirements and parameters for the Nunavut Land Use Plan (LUP) and the exercise of the NPC’s jurisdiction are laid out in the *Nunavut Agreement* and *NuPPAA*. The *Nunavut Agreement* (which is the modern land claim agreement between Canada and the Inuit of Nunavut), establishes the scope of authority of the co-management boards (called the “Institutions of Public Government” or IPGs) which regulate land use planning, environmental impact assessment, water rights surface rights, and wildlife management.

The IPGs, including the NPC, are constrained in their “powers, functions, objectives and duties” to what is set out in their enabling statutes.⁹ Additional powers may be assigned to the IPGs, but only through legislation.¹⁰ That legislation can consolidate the functions of the IPGs¹¹ but, specifically, cannot alter any requirement for land use plan conformity.¹² When the governing legislation for the IPGs is developed or amended, consultation is required with the Designated Inuit Organization (DIO)¹³ which is Nunavut Tunngavik for the purpose of the development of the relevant legislation.

⁷ *DNLUP* s. 6.1.8 and *Appendix A: Existing Rights*, pg. 47-48, 65-66.

⁸ See *DNLUP* references to application of *NuPPAA* at pg. 47-48.

⁹ *Nunavut Agreement* s. 10.2.1.

¹⁰ *Nunavut Agreement* s. 10.3.1.

¹¹ *Nunavut Agreement* s. 10.6.1.

¹² *Nunavut Agreement* s. 10.6.1 (b).

¹³ *Nunavut Agreement* s. 10.8.1.

NuPPAA includes transitional provisions that clarify the application of *NuPPAA* (and thus of *NuPPAA*'s requirements for conformity with a LUP) in two different scenarios:

- Projects approved or submitted prior to *NuPPAA* coming into force on July 9, 2015, and are excluded entirely from application of all statutory requirements in *NuPPAA*; and
- Projects which retain development rights arising from their approval or submission prior to a new Land Use Plan (LUP)¹⁴ coming into effect.

For ease of reference, the rest of this memo will call these “**Pre-*NuPPAA* Excluded Projects**” and “**Pre-LUP Preserved Rights Projects**.”

Pre-*NuPPAA* Excluded Projects which were “being assessed” or had been approved under the *Nunavut Agreement* but prior to *NuPPAA* coming into force in July 2015 have legacy ‘existing rights’. They are excluded from *NuPPAA* requirements and are not subject to application of *NuPPAA* at all,¹⁵ including the requirement for LUP conformity. They are still subject to requirements of the *Nunavut Agreement* (including those provisions involving land use planning) and may be subject to other regulatory requirements.¹⁶ Where there is a significant modification to

KEY *NuPPAA* SECTIONS

207 (1) The approval of a land use plan after a project proposal has been submitted is not to be taken into account in the assessment of a project under Part 3 or for the purposes of paragraphs 14(a) [NPC obligation to monitor project on an ongoing basis to verify conformity] and 74(f) [prohibitions on carrying out a project not in accordance with a land use plan], but it must be taken into account for the purposes of subsection 69(4) [obligation of regulators to ensure permits and authorizations implement the terms and conditions for that type of land use].

207(2) An approval or amendment referred to in subsection (1) does not apply in respect of a project that was approved under Part 3 before that approval or amendment and is not to be taken into account for the purposes of paragraphs 14(a), but it must be taken into account for the purposes of subsection 69(4). For greater certainty, such a project is not subject to a new assessment under that Part.

235 (1) This Act does not apply in respect of

(a) a project that is being assessed under the Agreement or is being, or has been, lawfully carried out on the day on which this section comes into force;

(b) a project that was approved under the Agreement before the day on which this section comes into force, was commenced and then stopped or shut down for a period of less than five years, calculated from that day;

(c) the rebuilding of a work that has been closed for a period of less than five years calculated from the day on which this section comes into force, if it relates to a project that was approved under the Agreement before that day and lawfully carried out; and

(d) a project that was approved under the Agreement before the day on which this section comes into force and commenced within five years of that day.

235 (2) Despite subsection (1), if, after this section comes into force, there is a significant modification, within the meaning of section 145, to a project referred to in any of paragraphs (1)(a) to (d), this Act applies to that project.

¹⁴ A note on terminology: This memo uses the following terms: *Draft Nunavut Land Use Plan (DNLUP)* to refer to the 2021 draft land use plan currently under review by the NPC; and Land Use Plan (LUP) when referring to the existence of or requirements for a Nunavut land use plan more generally.

¹⁵ *NuPPAA* s. 235(1).

¹⁶ Other regulatory requirements which may apply, and which could impose conditions that affect land use, would include the *Territorial Lands Act*, R.S.C.1985, c.T-7, the *Territorial Land Use Regulations*, C.R.C., c.1524, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002, c.10, and *Nunavut Waters Regulations* (SOR/2013-69). We note, however, that the *Territorial Lands Act* and *Regulations* do not apply to private lands and thus do not apply on the Inuit Owned Lands which are the location for many of the Projects currently listed in *Appendix A: Existing Rights*.

these pre-*NuPPAA* Excluded Projects, they become subject to application of *NuPPAA*.¹⁷

Pre-LUP Preserved Rights Projects, on the other hand, have development rights which arise from their submission or approval prior to the Land Use Plan coming into force.¹⁸ These pre-LUP Preserved Rights Projects are exempted from compliance with a new land use plan's prohibitions on types of work and activities,¹⁹ but are still required to conform with specific terms and conditions applicable to the type of land use under the LUP.²⁰ This is unlike the situation of pre-*NuPPAA* Excluded Projects to which *NuPPAA* does not apply at all, and for which there are thus no requirements for conformity with prohibitions or with non-prohibition terms and conditions,²¹ such as setbacks and seasonal restrictions.

NuPPAA explicitly triggers a legal requirement for LUP conformity review in the case of a significant modification in either case and provides no blanket exemption to either type of Project with existing rights.

A significant modification of Pre-LUP Preserved Rights Project will trigger the application of *NuPPAA*'s requirements for assessment of the work or activity that is the significant modification.²² The *NuPPAA* requires that these projects be screened for conformity with the LUP requirements for terms and conditions for the type of land use for a Project (other than the prohibition on the type of land use).

A Pre-*NuPPAA* Excluded Project, on the other hand (which is excluded from the application of *NuPPAA* at all) is brought under the umbrella of *NuPPAA*'s statutory force as soon as it is significantly modified.²³ It then becomes subject to all of *NuPPAA*'s terms (including those applicable to Projects approved before the LUP comes into force, including the requirement for conformity review in the case of a significant modification).

Appendix 1 to this memo provides an illustrated depiction of the difference in treatment of Pre-*NuPPAA* Excluded Projects and Pre-LUP Projects with Rights Preserved when the LUP comes into force.

In the situations of either Pre-*NuPPAA* Excluded Projects or Pre-LUP Preserved Rights Projects, the Project can also be allowed to be non-conforming with an LUP

**KEY *NuPPAA*
SECTIONS**

145 If the carrying out of a work or activity is a project within the meaning of subsection 2(1) and modifies a project that has been approved under this Part, that work or activity is, despite paragraphs 74(a) and (b), not subject to an assessment under this Part unless that work or activity is a significant modification to the original project.

146 (1) For greater certainty, if the work or activity referred to in section 145 is a significant modification to the original project, it is subject to an assessment under this Part.

¹⁷ *NuPPAA* s. 235(2).

¹⁸ All of the Projects listed in the *Appendix A: Existing Rights* of the *DNLUP* fall into the category of Pre-LUP Preserved Rights Projects, though some may also be Pre-*NuPPAA* Excluded Projects if they were approved before July 9, 2015 and not significantly modified before the LUP comes into force, in which case *NuPPAA* requirements do not apply to them.

¹⁹ *NuPPAA* s. 207 and 208.

²⁰ *NuPPAA* s. 207 and 208, referring to s. 69(4).

²¹ *NuPPAA* s. 235(1).

²² *NuPPAA* s. 145 and 146.

²³ *NuPPAA* s. 235(2)

in the case of minor variances or with a Minister's exemption,²⁴ and in situations of a national emergency.²⁵ Statutory options exist, therefore, to deal on a Project-specific basis with situations where the 'normal' provisions of *NuPPAA* require regulatory adjustment.

The NPC does not have jurisdiction in its own right, under either *NuPPAA* or the *Nunavut Agreement*, to add provisions to a land use plan which completely eliminate consideration of significant modifications to Projects with existing mineral rights Projects during a conformity determination if this is not consistent with the explicit provisions of *NuPPAA* or the *Nunavut Agreement*.

III. THE *DNLUP 2021* PROVISIONS ON "EXISTING RIGHTS" DO NOT COMPLY WITH *NUPPAA*

A. The Legal Requirements for the *DNLUP* as "Delegated Legislation"

The Nunavut Land Use Plan, once approved, has the force of law, and is delegated legislation, as explained in this section. This means that the LUP must be consistent with its enabling statute, as well as the "purposes and objectives" of the enabling statute. If the NPC passes an LUP which is inconsistent with *NuPPAA*, the NPC is *ultra vires* of its jurisdiction (in other words, the NPC would be exceeding the scope of powers given to the NPC in *NuPPAA*).

Administrative law principles²⁶ apply to interpretation of NPC's jurisdiction to rely on an under-inclusive list of exempted "existing rights" Projects. In administrative law, the creation of an instrument like a Land Use Plan is a "non-adjudicative administrative action". A non-adjudicative action by a government body is action that is not a court or hearing process meant to make a 'finding' on a legal question. This can be contrasted with "adjudicative administrative actions" such as panel hearings and dispute resolution.²⁷

Non-adjudicative actions of an administrative decision maker (such as the NPC) are generally of two types. The decision maker can exercise authority through delegated legislation, sometimes called subordinate legislation, because this action is authorized by a legal instrument (like an Order in Council, a regulation, bylaws or rules of practice or procedure, which are approved by a

²⁴ *NuPPAA* s. 81(2) and 81(2), allowing minor variances, would apply in the case of Pre-LUP Rights Preserved Projects assessed after July 2015 and which are thus subject to the rest of *NuPPAA*; *Nunavut Agreement* section 11.5.11 applies in the case of a Pre-*NuPPAA* Excluded Project with existing rights which predate *NuPPAA*'s enactment, and allows a broader power for the Minister to "exempt the project proposal from conformity" upon application by the proponent.

²⁵ *NuPPAA* s. 152(1) applies to Pre-LUP Rights Preserved Projects where there is a national emergency; in the case of Pre-*NuPPAA* Exempted Projects, the Minister could use the authority under 11.5.11 to allow a variance from conformity in the case of a national emergency or in other undefined circumstances upon application by the proponent.

²⁶ "Administrative law" deals with government action. The principles of administrative law require that government actions are authorized by Parliament or by provincial/territorial legislatures, and that laws are implemented and administered in a fair and reasonable manner. Administrative law is based on the principle that government actions must (strictly speaking) be legal, and that citizens who are affected by unlawful government acts must have effective remedies.

²⁷ This is a useful distinction derived from Brown and Evans, *Judicial Review of Administrative Action* (Carswell: Toronto, 2022) Chapter 15 ("Brown and Evans").

particular grant of legislative authority).²⁸ The decision maker's authority in this case is legislative as it has the force of law and is binding. Guidelines, directives, or policies established without being prescribed by legislation, on the other hand, are similar to delegated legislation but do not have the force of law.²⁹ They are considered quasi-legislation because as they are practically significant even though being legally unenforceable.³⁰

In this case the Nunavut Land Use Plan, once approved, has the force of law, and is delegated legislation. As stated in s.1.1 of the Plan itself:

Once approved by the Government of Canada, the Government of Nunavut and the appropriate designated Inuit Organization(s), the Commission's land use plans are legally binding.³¹

Delegated legislation can be set aside if it alters, amends or otherwise does not conform to the enabling statute³² or the purposes and objects of the statute.³³

This means that the LUP must be consistent with the statutory provisions, including purposes and objectives, of its enabling statute *NuPPAA*. If the NPC passes a LUP which is inconsistent with *NuPPAA* and the *Nunavut Agreement*, the action of passing the LUP is legally invalid as the NPC would be acting *ultra vires* of its jurisdiction.

As discussed below, it is our conclusion that the *DNLUP* is non-compliant with *NuPPAA* in several areas, and if it is passed, the NPC would exceed its jurisdiction.

B. The Obligation to Apply *NuPPAA* When There is a Significant Modification

The NPC has no independent authority to alter or amend the scope of exclusions, the rights preserved, or exemptions from land use plan requirements under either *NuPPAA* or the *Nunavut Agreement*. Specifically, NPC "cannot alter any requirement for land use plan conformity."³⁴

²⁸ Brown and Evans, §15.38-43.

²⁹ David Jones, *Principles of Administrative Law*, 5e (Carswell: Toronto, 2009), p. 198; *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2 p. 7; *Re Hopedale Developments Ltd. and Town of Oakville*, 1964 CanLII 196 (ON CA), PDF p. 8.

³⁰ Brown and Evans, §15.44.

³¹ Nunavut Planning Commission, *Nunavut Land Use Plan: Draft July 2021*, s. 1.1. We note that *NuPPAA* s. 55(4) indicates that "Land use plans are not statutory instruments for the purposes of the *Statutory Instruments Act*." The purpose of the *Statutory Instruments Act* (as reflected in its full name, "*An Act to provide for the examination, publication and scrutiny of regulations and other statutory instruments*") is to confirm the requirement and process for Privy Council review and registration, Parliamentary scrutiny, and federal publication of regulations, rules and other statutory instruments. The application of the *Statutory Instruments Act* is not needed as s. 54 (4) and 55 (1) of *NuPPAA* require approval of the land use plan by the Governor in Council. The provisions which exempt *NuPPAA* from the *Statutory Instruments Act* do not, however, change the status of land plans as a type of delegated legislation as the land use plan has the force of law.

³² Brown and Evans, §15:60.

³³ *Shoppers Drug Mart v Ontario*, 2013 SCC 64 at para 24.

³⁴ *Nunavut Agreement* s. 10.6.1.

In the case of Projects with significant modifications, *NuPPAA* is clear that such Projects are subject to assessment:

145 If the carrying out of a work or activity is a project within the meaning of subsection 2(1) and modifies a project that has been approved under this Part, that work or activity is, despite paragraphs 74(a) and (b), not subject to an assessment under this Part unless that work or activity is a significant modification to the original project.

146 (1) For greater certainty, if the work or activity referred to in section 145 is a significant modification to the original project, it is subject to an assessment under this Part.

This requirement that Projects with significant modifications undergo assessment also applies to pre-*NuPPAA* Excluded Projects, which, though normally excluded from the application of *NuPPAA*, are also captured by *NuPPAA*'s jurisdiction once there is a significant modification:

235 (2) Despite subsection (1) [excluding Projects assessed or lawfully carried prior to *NuPPAA* coming into force], if, after this section comes into force, there is a significant modification, within the meaning of section 145, to a project referred to in any of paragraphs (1)(a) to (d), this Act applies to that project.

For modified Projects, the relevant provisions of *NuPPAA* applies to both Pre-*NuPPAA* Excluded Projects (which are no longer excluded) and Pre-LUP Preserved Rights Projects, including the s. 77(1) requirement for a conformity determination and the sections 145 and 146(1) requirements for project assessment.

Nothing in the *Nunavut Agreement* or *NuPPAA* allows for a blanket exemption from LUP prohibitions when a project undergoes a significant modification. Projects must conform with the prohibitions and terms and conditions in the LUP unless they are explicitly exempted as is the case for Pre-*NuPPAA* Excluded Projects (which are exempted from both prohibitions and terms and conditions) and Pre-LUP Preserved Rights Projects (which are exempted from prohibitions but not terms and conditions).

Once a significant modification to an existing Project is proposed, *NuPPAA* does not provide that the significant modification (which effectively creates a “new” Project for the purposes of the Act), can be completely exempted from compliance with the LUP. Importantly, *NuPPAA* also does not provide that the LUP itself can exempt the NPC from having to consider the scope of a significant modification to an existing Project during a new assessment and a conformity determination. This is particularly critical because of the lack of a definition of “significant modification” in the *Nunavut Agreement* and *NuPPAA* (as noted above in footnote 6), and thus the need for an analysis of whether a proposed change has reached the threshold of being “significant.”

The *DNLUP*, however, provides a blanket exemption, removing conformity determination review for certain projects undergoing a significant modification. NPC does not have the jurisdiction to allow, through the *DNLUP*, this blanket exemption exempting modified projects from conformity review as this is outside of the legal parameters set out in the *Nunavut Agreement* and *NuPPAA*.

C. The *DNLUP* Fails to Capture the Proper Scope of Projects With Existing Rights

The NPC includes precise wording in *DNLUP* s. 6.1.8 and an exhaustive list in *Appendix A: Existing Rights* to describe and outline development rights for certain Projects with “existing rights.”

There is a legal rule which applies when interpreting statutes (including delegated legislation), called the “implied exclusion rule”. This rule of statutory interpretation provides that where a statute or regulation explicitly lists exceptions, it is presumed that other things not on the list were intentionally excluded.³⁵ This is in keeping with a legal principle that *expression unius est exclusion alterius*: to express one thing is to exclude another.³⁶

Here, the language of *DNLUP* 6.1.8 in combination with *Appendix A: Existing Rights* list presents a limited list of Projects recognized as having existing rights under the *DNLUP*, with others presumably intentionally excluded. The *DNLUP* limits the Projects with recognized “existing rights” to:

- Only previously approved Projects;
- Only when there are significant modifications to those Projects;
- Only the 52 Projects in the list in *Appendix A: Existing Rights*;
- Only if the Project remains within the same footprint as the previous land use;
- Only if there is a demonstrable direct connection to a Project listed in *Appendix A: Existing Rights*;
- Only mineral exploration and production projects (which comprise all of the 52 named Projects with “existing rights” under the *DNLUP*); and
- Only mineral projects in proposed Limited Use Areas.

NuPPAA explicitly addresses only the first and second of these triggers (approved Projects and significant modification) for recognizing the existing rights of a Project. The first trigger, moreover, does not fully reflect that *NuPPAA*’s recognition of existing rights applies to both Projects currently being assessed, as well as Projects that are already assessed, approved and lawfully being carried out.

The rest of the triggers in *DNLUP* s. 6.1.8, for recognizing existing rights and confirming exemption from land use conformity, are interpretative in nature. Neither the *Nunavut Agreement* nor *NuPPAA* mention or confirm existing rights based on use of the “same footprint” or “a demonstrable direct connection”, or constrain the existing rights to only mineral projects or only Limited Use Areas.

³⁵ *Regina v Donald B Allen Ltd*, (1975), 6 OR (2d)753.

³⁶ *Canada (Information Commissioner) v Canada (Minister of National Defence) (FC)*, 2008 FC 766 at para 45 and 47, referring to *Canada (Attorney General) v Canada (Information Commissioner)*, [2004] 4 FCR 181 (FC) (abridged version); (2004), 15 Admin LR (4th) 28.

The 6.1.8 provisions and the *Appendix A: Existing Rights* list therefore exempt a very specific type, and limited number, of Projects from the prohibitions under the *DNLUP*, and only applies them when those Projects undergo ‘significant modifications’.

The *DNLUP* explicitly links this list to just one specific planning goal (economic development):

In order to support economic development in Nunavut, the Commission has identified projects with existing mineral rights in Limited Use areas in Appendix A that will not be subject to prohibitions on that type of activity at the time they undergo significant modifications, but will require a further conformity determination under the Act. As it is expected that proponents will refine the areas in which they expect to undertake mining activities and abandon rights to other areas, the Commission may conduct Plan amendments from time to time to update Appendix A.³⁷

The *DNLUP* does not address any of the following:

- Projects which are not on the *Appendix A: Existing Rights* list but which would be either excluded from *NuPPAA*’s application because they were approved before *NuPPAA* came into force in 2015, or have rights preserved and are exempted from the LUP (because they were approved before the LUP is approved). This could include, for instance, major linear infrastructure projects like roads which are not mineral projects, or tourism projects.
- The difference between pre-*NuPPAA* Excluded Projects (which are not subject to *NuPPAA* at all,³⁸ including statutory provisions which authorize the attachment of LUP-compliant terms and conditions on Projects with preserved rights) compared to pre-LUP Preserved Rights Projects for which *NuPPAA* provides exemption from prohibitions on types of land use³⁹ but still imposes the requirement for terms and conditions (such as set backs and seasonal restrictions);⁴⁰ and
- Pre-LUP Preserved Rights Projects which are not undergoing significant modification but which have existing rights and are still subject to *NuPPAA*’s requirements for regulatory terms and conditions other than prohibitions on a specific type of land use to bring those Projects into alignment with LUP requirements (including being subject to the requirement that the NPC monitor projects to ensure ongoing conformity with any applicable land use plan).⁴¹

The use of a specifically prescribed and limited list of Projects in the *DNLUP* raises jurisdictional concerns. The current wording of *DNLUP* 6.1.8-1 and the detailed list of Projects at *Appendix A: Existing Rights* are underinclusive by selecting only a portion of eligible Projects excluded from the application of *NuPPAA* or with pre-LUP Preserved Rights.

³⁷ *DNLUP* s. 6.1.8, page 48.

³⁸ *NuPPAA* s. 235.

³⁹ *NuPPAA* s. 207 and 208.

⁴⁰ *NuPPAA* s. 207 referring to s. 69(4).

⁴¹ *NuPPAA* s. 14(a).

The *DNLUP* is underinclusive by, for instance:

- exempting only Projects listed in *Appendix A: Existing Rights* from *NuPPAA*'s requirement for land use plan conformity determinations;
- limiting the application of "Existing Rights" provisions to only the specified situations of significant modification and not all Projects including those not undergoing significant modification; and
- not differentiating between pre-*NuPPAA* Excluded Projects and pre-LUP Preserved Rights Projects, which have different "existing rights" under *NuPPAA*.

The scope of Projects captured in the "Existing Rights" section of the *DNLUP*, and the associated *Appendix A: Existing Rights* list of Projects, is therefore underinclusive of what is actually required by *NuPPAA*.

D. The *DNLUP* Fails to Differentiate Between Pre-*NuPPAA* and Pre-LUP Projects

The current list of Projects in *Appendix A: Existing Rights* includes some projects approved before *NuPPAA* came into force, and which are subject to different statutory provisions than Projects approved after *NuPPAA* came into force but before the new LUP is approved.⁴²

As noted above, there is a difference in *NuPPAA*'s treatment of Pre-*NuPPAA* Excluded Projects which are excluded from the application of *NuPPAA* at all, and Pre-LUP Projects Preserved Rights Projects which are subject to modified *NuPPAA* terms regarding conformity. One specific practical difference between the two types of Projects are that the Pre-*NuPPAA* Excluded Projects, approved before July 9, 2015 and without modifications, are not subject to *NuPPAA* at all,⁴³ including provisions allowing NPC to impose terms and conditions consistent with the LUP.⁴⁴

Absent a significant modification, there are no explicit triggers to bring the older Pre-*NuPPAA* Excluded Projects into alignment with the provisions of a new LUP as they are excluded from application of *NuPPAA* entirely. This means that *NuPPAA*'s provisions requiring regulators to apply terms and conditions which are consistent with the new LUP⁴⁵ do not apply to Pre-*NuPPAA* Excluded Projects. The Pre-LUP Rights Preserved Projects with existing rights exemptions, on the other hand, are not subject to prohibitions on a specific land use, but by virtue of *NuPPAA* s. 207

⁴² Some of the projects on the *Appendix A* list, which were approved before July 9, 2015 and not subsequently modified (and thus excluded entirely from the application of *NuPPAA*) unless modified include: Amaruk – Diamond Exploration (approved by NIRB in June 2015), Nanuq North – Diamond Exploration / Peregrine Diamonds (screened by NIRB in 2009) and Churchill Diamonds – Diamond Exploration / Shear Diamonds (screened by NIRB in 2007).

⁴³ Per s. 235 of *NuPPAA*.

⁴⁴ *NuPPAA* s. 207 and 208, referring to s. 69(4). These older existing rights Projects are, however, still subject to the other terms and conditions imposed by regulators, and consistent with the requirements of the *Nunavut Agreement*.

⁴⁵ It may however be possible to argue that, for the Pre-*NuPPAA* Excluded Project, the *Nunavut Agreement* section 11.5.9 would apply, requiring all federal and territorial departments and agencies to conduct their activities and operations in accordance with the LUP.

– which in turn relies on s. 69(4) – are subject to other land use requirements of the LUP such as seasonal restrictions or setbacks.

The current *DNLUP* does not differentiate between these two different situations in the *DNLUP* generally or in the language chosen for section 6.1.8 or *Appendix A: Existing Rights*. Instead, it applies the same requirement for both:

6.1.8-5 All other requirements in the land use designation of a project identified in Appendix A, including the prohibition on breaching any applicable restrictions, continue to apply to the project after a significant modification is made.⁴⁶

Arguably this condition (which interprets and articulates the requirements of s. 69(4) of *NuPPAA*) cannot apply to pre-*NuPPAA* Excluded Projects which are not subject to any provisions of *NuPPAA*.

The *DNLUP*'s failure to differentiate between Pre-*NuPPAA* Excluded Projects and Pre-LUP Preserved Rights Projects is inconsistent with *NuPPAA* and thus with the NPC's jurisdiction to pass an LUP with these inconsistencies.

E. The *DNLUP* Fails to Include Projects With Existing Rights But Not Significant Modifications

As noted above, the only *DNLUP* requirements for Projects with existing rights is to those Projects for which “significant modifications” are proposed.

The introductory chapter of the *DNLUP* contains one sentence that explicitly provides the LUP prohibitions do not apply to Pre-LUP Preserved rights Projects, noting in s. 1.4.4. that “*the prohibitions set out in the Plan do not apply to projects referred to in subsections 207(1), 207(2), 208(1) and 208(6) of the Nunavut Planning and Project Assessment Act.*”⁴⁷

Section 207 of *NuPPAA* preserves the rights of Projects with approvals underway or complete prior to the new LUP coming into force from land use plan prohibitions, and section 208 applies the same preservation of rights to previously approved Projects which have subsequently stopped or shut down for less than five years.

The *DNLUP* s. 6.1.8 (the section focused on “Existing Rights”) does not itself refer to or discuss the preserved rights of Projects which are not undergoing significant modification. Importantly, in the “Existing Rights” section's actual Plan Requirements (which are the enforceable portions of the *DNLUP*), there is no reference to the existing rights of these pre-LUP approved Projects. Moreover, the sparse provisions in s. 1.4.4 apply only to Pre-LUP Preserved Rights Projects which have been approved under the *NuPPAA* regime, but do not capture Pre-*NuPPAA* Excluded Projects at all.

The *DNLUP* is therefore inconsistent with *NuPPAA* as it does not address the LUP compliance exemption for Pre-*NuPPAA* Excluded Projects which are not undergoing significant modification,

⁴⁶ *DNLUP*, Table 6.1.8-5, at page 54.

⁴⁷ *DNLUP*, s.1.4.4, at page 11.

and insufficiently addresses the Pre-LUP Preserved Rights Projects which are not undergoing significant modification.

F. The Current *DNLUP* is Ultra Vires of NPC's Jurisdiction if Inconsistencies with *NuPPAA* Are Not Addressed

In summary, the current *DNLUP* contains several key legal inconsistencies with *NuPPAA*. The NPC has, in the current *DNLUP*:

- selected an underinclusive list of Projects with existing rights in the event of a significant modification;
- failed to differentiate between the different existing rights for Pre-*NuPPAA* Excluded Projects and Pre-LUP Preserved Rights Projects; and
- failed to recognize (or sufficiently recognize) the existing rights for projects which are not undergoing a significant modification.

As noted in section III(A) above, delegated legislation (such as the *DNLUP*) can be set aside if it alters, amends, or otherwise does not conform to its enabling statute or the purposes and objects of the statute (which is, in this case, *NuPPAA*).

If the NPC passes the current *DNLUP*, the action of passing the portions of the LUP which are legally inconsistent with *NUPPAA* would be legally invalid as the NPC would be acting *ultra vires* (beyond the proper legal scope) of its jurisdiction with respect to those legally inconsistent provisions.

In the face of this assertion, there are two possible responses (which, in our legal opinion, are not sufficient to address the concerns about the inconsistencies between the *DNLUP* provisions on existing rights, and the requirements of *NUPPAA*).

First, one could argue that *Appendix A: Existing Rights* includes all Projects that hold “existing rights”. In that situation, NPC is entitled to deference (based on a standard of reasonableness) with respect to its assessment about whether the Appendix includes every Project which has “existing rights” and thus exemption from LUP requirements.⁴⁸ It is our legal opinion, however, that it is not reasonable to assert that the list of Projects in *Appendix A* includes every project which has “existing rights” (as our preliminary analysis confirmed projects which were not included but which would have existing rights).

Second, one could argue that s. 6.1.8 and *Appendix A: Existing Rights* do not create an exhaustive list and that these provisions do not purport to limit the full scope of “existing rights”. NPC appears to hold this view, as reflected in some of its responses to parties’ questions in the current hearings on the *DNLUP*. If this is the case, and s. 6.1.8 and *Appendix A: Existing Rights* are not meant to be an exhaustive list, however, that intention should be plainly indicated in the *DNLUP*. That is currently not the case.

⁴⁸ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras 65-68.

IV. THE *DNLUP* PROVISIONS ON ANCILLARY LAND USES COMPLY WITH *NUPPAA*

Some parties in the review process for the *DNLUP* raised questions about exemptions for new but directly related infrastructure for Projects with “existing rights”, and whether related infrastructure should be similarly exempted from the application of the LUP.

The current *DNLUP* provides that new but related Project infrastructure (such as access roads and railways), which is outside of the original footprint for Projects with “existing rights”, would require a LUP conformity review, to determine if the specific type of proposed land use is ‘prohibited’. The *DNLUP* provides that:

6.1.8-6 The construction of permanent all-season linear infrastructure in an area outside the footprint of a project identified in Appendix A is not authorized if that type of project is prohibited in that area.

The current *DNLUP* provision is consistent with the provisions of the *Nunavut Agreement* and *NuPPAA*. Nothing in the *Nunavut Agreement* or *NuPPAA* allows new infrastructure, outside of the footprint of the Projects with “existing rights”, to be exempted from compliance with the LUP or for the LUP to exempt the NPC from considering the scope of a significant modification to a Project during a new assessment and a conformity determination in any land use designation. It could be assumed that this exclusion from *NuPPAA* was a deliberate choice of the Parties which developed *NuPPAA*, given the lengthy and detailed process for developing the legislation.

This raises understandable concerns about Projects being ‘stranded’ without road or rail access. For instance, a number of large mining developments in Nunavut may require additional transportation infrastructure in order to move mined products to market, and this infrastructure may not have been part of the original Project approvals.

It is worth noting that such Projects, for which new but directly related infrastructure is required but where that new infrastructure may not conform to the new LUP, can nevertheless be exempted from LUP conformity if:

- the NPC approves a minor variance in the LUP;⁴⁹
- the proponent asks the Minister for, and the Minister grants, an exemption from the LUP (after a NPC decision of non-conformity);⁵⁰ or
- the Government of Canada – after consulting with the Government of Nunavut, the NPC and Nunavut Impact Review Board, and after obtaining the consent of NTI – amends the *NuPPAA* to add related infrastructure as a class of exempted Projects.⁵¹

In other words, there are mechanisms to address the policy concerns regarding new ancillary infrastructure needs for already-approved Projects, and those policy goals can be met through the existing legal options outlined in *NuPPAA*. The *DNLUP* correctly reflects *NuPPAA*’s requirement that new ancillary land uses still require LUP conformity review and assessment.

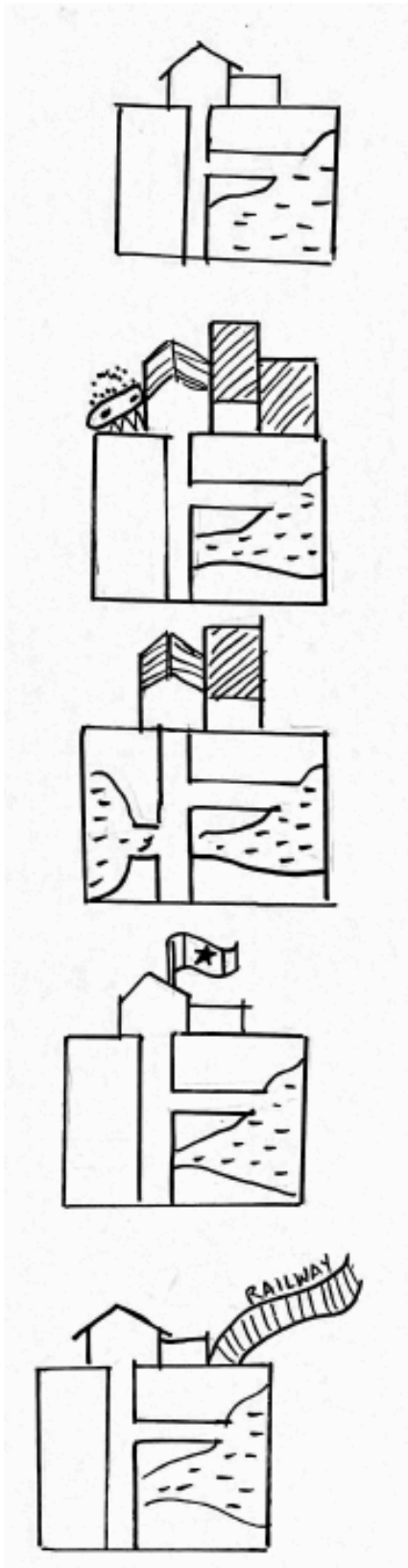
⁴⁹ *NuPPAA* s. 81.

⁵⁰ *NuPPAA* s. 82.

⁵¹ *NuPPAA* s. 228(2).

APPENDIX 1: ILLUSTRATION OF PRE-NUPPAA VERSUS PRE-LAND USE PLAN PROJECTS

PRE-2015 PROJECTS EXCLUDED FROM NUPPAA



Pre-2015 Excluded Projects

- Excluded from application of NUPPAA (s. 235)
- No LUP requirements (including s. 69(4) requirements for terms and conditions consistent with LUP)

Project Adds New Work (Significant Modification), Expands Footprint

- No longer excluded from NUPPAA (s. 235(2))
- The original Project is exempted from land use type prohibitions (s. 207) but LUP-consistent terms and conditions apply (s. 69(4))

Project Adds New Work, On Same Footprint

- If it is a Significant Modification (even on the same footprint), it is no longer excluded from NUPPAA (s.235(2)), and is subject to assessment (for those aspects other than spatial land use)
- NUPPAA doesn't differentiate based on 'footprint' but is based on 'significant' vs 'insignificant' modification

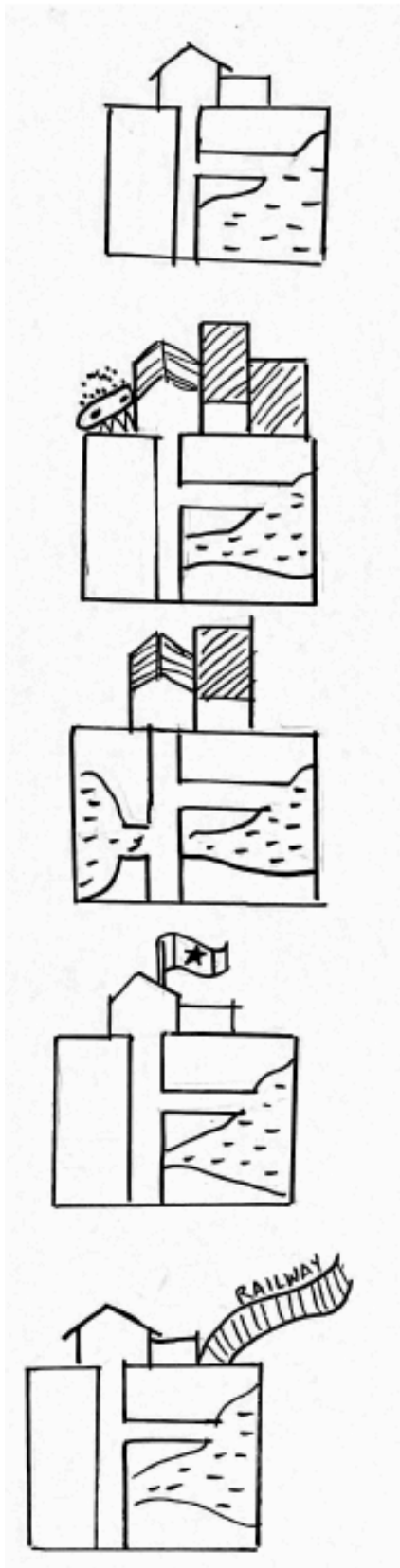
Project Adds Small / Insignificant Change

- Because it is not a significant change, s. 235(2) is not triggered, and it remains outside of the application of NUPPAA
- Therefore no LUP requirements for terms and conditions consistent with the LUP apply.

Ancillary Project (Eg. New Road / Rail Corridor)

- It is a significant modification of the land use and not excluded from NUPPAA (s. 235(2))
- Therefore it is subject to full conformity review for both prohibition on type of use, and for LUP requirements.
- Could, however, be exempted from conformity by the Minister (NA 11.5.11), or the GOC, GN, and NTI can agree on a new regulatory change (NUPPAA s. 228(2))

PRE-NLUP PROJECTS EXEMPTED FROM CONFORMITY



Pre-LUP (Pre-2023) Approval

- Exempted from LUP conformity re land use prohibitions NUPPAA (s. 207)
- Conformity still required for terms and conditions consistent with LUP (s. 207 & 69(4)) *even if there is no significant modification

Project Adds New Work, Expands Footprint

- Significant modification therefore assessment is normally required (s. 146(1))
- Conformity still required for terms and conditions consistent with LUP (s. 207 & 69(4))

Project Adds New Work, On Same Footprint

- If it is a Significant Modification (even if it is on the same footprint), then assessment is required (s. 146(1)) for aspects other than spatial land use
- NUPPAA doesn't differentiate based on 'footprint' but is based on 'significant' vs 'insignificant' modification

Project Adds Small / Insignificant Change

- Because it is an insignificant modification, no assessment is required (s. 145).

Ancillary Project (Eg. New Road / Rail Corridor)

- It is a significant modification and subject to assessment (s. 146(1))
- Therefore it is subject to full conformity review for both prohibition on type of use, and for LUP requirements.
- Could, however, be exempted from conformity by the Minister (NA 11.5.11), or the GOC, GN, and NTI can agree on a new regulatory change (NUPPAA s. 228(2))

APPENDIX 2: RELEVANT STATUTORY PROVISIONS

NOTE: Many sections of NuPPAA are cascading or domino provisions, where one section of the Act refers to and relies on one or more other sections of the Act, which in turn rely on yet other sections. This can make NuPPAA difficult to follow. We have therefore added the linked sections under the relevant clause, or added an explanation of the linked clause in square brackets, to make it easier to track and understand the section in question.

A. The Nunavut Agreement

Definition of Project

1.1.1 "project proposal" means a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out, or a physical activity that a proponent proposes to undertake or otherwise carry out, such work or activity being within the Nunavut Settlement Area, except as provided in Section 12.11 [Transboundary Effects].

Requirement that the powers of the NPC shall be set out in statute

10.2.1. All substantive powers, functions, objectives and duties of the [IPG] institutions referred to in Section 10.1.1 shall be set out in statute. Matters that do not touch upon the substantive powers, functions, objectives, duties, membership ratios and manner of appointment of members of the institutions, may be implemented through regulation, but the discretion to implement through regulation shall in no way be construed so as to broaden the powers set out in Section 10.6.1 and Section 10.7.1.

Additional powers may be assigned to the NPC through legislation

10.3.1 Legislation relating to the institutions referred to in Section 10.1.1 may provide for other matters not dealt with in Articles 11, 12, 13 and 21, and may assign additional powers, functions, objectives or duties to the said institutions.

The legislation can consolidate the functions of the NPC but cannot increase the powers of Government in relation to the NPC and, specifically, cannot alter any requirement for LUP conformity

10.6.1 Notwithstanding any other provision of the Agreement, the Parliament of Canada or the Legislative Assembly, insofar as each has authority to do so, may by statute consolidate or reallocate the functions of the institutions referred to in Section 10.1.1, or enable the consolidation of hearings conducted by the institutions, but any such statute shall not diminish or impair the combined powers, functions, objectives or duties of the said institutions, or increase the powers of Government in relation thereto, and, without limiting the generality of the limitation, such statute shall, ...

(b) not alter any requirement that a project proposal conform to or with a Land Use Plan or is exempt from such requirement before any decision to screen a project proposal is made;

Requirement to consult with DIOs in establishing the governing legislation

10.8.1 Government shall consult closely with the DIO and the relevant institution referred to in Section 10.1.1 prior to taking any initiative under Sections 10.6.1, 10.7.1 or 10.7.2. The appropriate DIO or institution shall, upon request, be given an audience with the appropriate Minister as part of such consultation.

Planning Principles and Priorities

11.2.1 The following principles shall guide the development of planning policies, priorities and objectives:...

(b) the primary purpose of land use planning in the Nunavut Settlement Area shall be to protect and promote the existing and future well being of those persons ordinarily resident and communities of the Nunavut Settlement Area taking into account the interests of all Canadians; special attention shall be devoted to protecting and promoting the existing and future well-being of Inuit and Inuit Owned Lands;

Objective of the planning process

11.2.2 The objective of the planning process shall be:

- (a) to develop planning policies, priorities and objectives regarding the conservation, development, management and use of land in the Nunavut Settlement Area;
- (b) consistent with Sub-section (a), to prepare land use plans which guide and direct resource use and development in the Nunavut Settlement Area; and
- (c) the implementation of land use plans.

Requirement that NPC review all applications for Projects, for conformity and approval of minor variances

11.5.10 The NPC shall review all applications for project proposals. Upon receipt and review of a project proposal, the NPC or members thereof or officers reporting to the NPC shall:

- (a) determine whether the project proposals are in conformity with plans; and
- (b) forward the project proposals with its determination and any recommendations to the appropriate federal and territorial agencies.

The land use plan may make provision for the NPC to approve minor variances.

Ability of Minister to exempt projects from LUP conformity after NPC review and rejection

11.5.11 Where the NPC has determined that a project proposal is not in conformity with the plan, the proponent may apply to the appropriate Minister for exemption. The Minister may exempt the project proposal from conformity with the plan and shall, subject to Sections 12.3.2 and 12.3.3, refer it to NIRB for screening. Nonconforming project proposals shall not be sent to NIRB until such exemption is obtained or a variance has been approved

B. The Nunavut Project Planning and Assessment Act

NOTE: Many sections of NuPPAA are cascading or domino provisions, where one section of the Act refers to and relies on one or more other sections of the Act, which in turn rely on yet other sections. This can make NuPPAA difficult to follow. We have therefore added the linked sections under the relevant clause, or added an explanation of the linked clause in square brackets, to make it easier to track and understand the section in question.

Definition of Project

2(1) project means the carrying out, including the construction, operation, modification, decommissioning or abandonment, of a physical work or the undertaking or carrying out of a physical activity that involves the use of land, waters or other resources. It does not include

- (a) the undertaking or carrying out of a work or activity if its adverse ecosystemic impacts are manifestly insignificant, taking into account in particular the factors set out in paragraphs 90(a) to (i);
- (b) the undertaking or carrying out of a work or activity that is part of a class of works or activities prescribed by regulation; or
- (c) the construction, operation or maintenance of a building or the provision of a service, within a municipality, that does not have ecosystemic impacts outside the municipality and does not involve the deposit of waste by a municipality, the bulk storage of fuel, the production of nuclear or hydro-electric power or any industrial activities.

NPC Obligation to Monitor for Ongoing LUP Conformity

14 In addition to its powers, duties and functions specified elsewhere in this Act, the Commission must

- (a) monitor projects approved under Part 3 to verify that they are carried out in conformity with any applicable land use plan; ...

Plan must take into account Inuit objectives for Inuit owned lands

48 (1) A land use plan must provide for the conservation and use of land and guide and direct resource use and development and must, in particular, provide for a strategy regarding the implementation of the plan and take into account

- (a) the broad planning policies, priorities and objectives established for the designated area;
- (b) the specific planning objectives and planning variables identified for any applicable planning region;
- (c) the factors referred to in section 11.3.1 of the Agreement; and
- (d) Inuit objectives for Inuit owned lands.

NPC Must Consider "Relevant Factors" in Its Exercising Powers Including Existing Rights

58 In exercising their powers and performing their duties and functions under sections 49 and 52 and subsections 54(1) to (3), the Commission, the federal Minister, the territorial Minister and the designated Inuit organization must take into account all relevant factors, including the purposes set out in section 47, the requirements set out in section 48 and existing rights and interests.

Referring to:

47 A land use plan has the following purposes:
(a) to protect and promote the existing and future well-being of the residents and communities of the designated area, taking into account the interests of all Canadians; and
(b) to protect and, if necessary, restore the environmental integrity of the designated area or the planning region, as the case may be.

49 After concluding any consultations that it considers appropriate, the Commission must prepare a draft land use plan for the entire designated area or for one or more planning regions.

52 After the public hearing is held, the Commission must consider any comments made in respect of the draft land use plan under subsection 50(2) or submissions made during the hearing and make any revisions to the draft land use plan that it considers appropriate

54(1) As soon as practicable after receiving a draft land use plan, the federal Minister, the territorial Minister and the designated Inuit organization must accept it jointly or reject it with written reasons and return it to the Commission.

(2) If the plan is rejected by the federal Minister, the territorial Minister or the designated Inuit organization, the Commission must, after considering the reasons, which it may make public, undertake once again any measures in relation to the holding of a public hearing under sections 50 to 52 that it considers necessary, make any changes that it considers appropriate and submit a revised draft land use plan to the Ministers and the designated Inuit organization.

(3) As soon as practicable after receiving a revised draft land use plan, the federal Minister, the territorial Minister and the designated Inuit organization must accept it jointly or reject it with written reasons.

Obligation on Regulators to Ensure Licences and Permits are LUP Compliant

69 (1) Each regulatory authority must, to the extent of its authority to do so, ensure that any licence, permit or other authorization that it issues implements any applicable requirements of any applicable land use plan, including those identified under subsection 48(4).

Ability of NPC to allow a Minor Variance and then the Minister of grant an exemption to LUP Compliance

69(2) If a minor variance or a ministerial exemption has been granted in respect of a project under paragraph 81(2)(a) or 82(2)(a), as the case may be, subsection (1) does not apply in respect of the requirements for that project in respect of which the variance or exemption was granted.

Refers to:

48 (4) A land use plan must identify each requirement set out in that plan whose contravention is prohibited under paragraph 74(f).

Which refers to:

74(f) It is prohibited to carry out a project, in whole or in part, if the project is not carried out in accordance with any requirement identified, under subsection 48(4), in any applicable land use plan, other than a requirement in relation to which a minor variance or a ministerial exemption has been granted under paragraph 81(2)(a) or 82(2)(a), as the case may be

Which In Turn Refers to:

Minor Variances and Minister's Exemptions

81 (2) If the land use plan authorizes the granting of minor variances and if the conditions, if any, are met, the Commission may, within 20 days after its determination that the project is not in conformity with the plan, **(a)** grant a minor variance, in which case it must verify whether the project is exempt from screening and comply with the requirements of section 79 or 80, as the case may be;

82(1) If the Commission determines that the project is not in conformity with an applicable land use plan, the proponent may request an exemption from the federal Minister or the territorial Minister, or both, taking into account their respective jurisdictions, within 60 days after

(a) that determination, if the land use plan does not authorize the granting of a minor variance or if it does and the conditions are not met; or
(b) the Commission's decision to refuse to grant a minor variance.

81 (2) The Minister or Ministers, as the case may be, must, within 120 days after receiving a request under subsection

(1) either

(a) grant the exemption, in which case the Commission must make the decision public, verify whether the project is exempt from screening and comply with the requirements of section 79 or 80, as the case may be;

74 (d) It is prohibited to carry out a project, in whole or in part, if the Commission has determined, under section 77, that the project is not in conformity with any applicable land use plan and no minor variance or ministerial exemption has been granted under paragraph 81(2)(a) or 82(2)(a), as the case may be.

Refers to:

77 (1) The Commission must determine if a project is in conformity with the land use plan that is applicable to the place where the project is to be carried out.

Insignificant Modification

145 If the carrying out of a work or activity is a project within the meaning of subsection 2(1) and modifies a project that has been approved under this Part, that work or activity is, despite paragraphs 74(a) and (b), not subject to an assessment under this Part unless that work or activity is a significant modification to the original project.

Significant modification

146 (1) For greater certainty, if the work or activity referred to in section 145 is a significant modification to the original project, it is subject to an assessment under this Part.

No LUP conformity determination for a Project approved before LUP in place

207 – 208: Rights preserved – 207(1) (2) the approval of an LUP or an amendment of an LUP after a project proposal has been submitted, or after it was previously approved, is not to be taken into account in the assessment of the Project; including 208(1) – projects that were approved and shut down for less than 5 years, or rebuilding a work closed for less than five years if previously approved

Land Use Plan Does Affect Projects Already Submitted, except for affecting T&Cs

207 (1) The approval of a land use plan under subsection 55(1) [authority for GIC & Nunavut EC to approve the draft land use plan], or its amendment under subsection 62(1) or (3) [authority for Ministers and DIOs to accept or reject the LUP], after a project proposal has been submitted in accordance with section 76 [obligation on proponent to submit a project proposal to NPC] is not to be taken into account in the assessment of a project under Part 3 or for the purposes of paragraphs 14(a) [Commission obligation to monitor projects on an ongoing basis to verify conformity] and 74(f) [prohibition on carrying out a project that is not in accordance with the LUP], but it must be taken into account for the purposes of subsection 69(4) [obligation of regulators to ensure authorizes implement terms and conditions of the applicable LUP].

A Land Use Plan Doesn't Apply to a Grandfathered Project Re Prohibition on the Project, but Does Apply Re Terms and Conditions on that Project [but a new assessment is not required]

207(2) An approval or amendment referred to in subsection (1) does not apply in respect of a project that was approved under Part 3 before that approval or amendment and is not to be taken into account for the purposes of paragraphs 14(a) [the Commission's duty to

monitor to ensure projects conform with the LUP] and 74(f) [prohibition on carrying out a project that is not in accordance with the LUP], but it must be taken into account for the purposes of subsection 69(4). For greater certainty, such a project is not subject to a new assessment under that Part.

Refers to:

69(4) For greater certainty, subsection (1) applies *[the section obligating every regulatory authority to ensure that any license or permit implements LUP requirements]* in the case of a project described in any of paragraphs (3)(a) to (e) *[the clauses which exempts a reg authority from having to ensure LUP requirements are met in the situation of projects which are submitted or approved before the LUP is in place, or in the case of rebuilding or less-than-5-year-shut-down of a previously approved project]* in relation to the terms and conditions in respect of land uses that are set out in a land use plan approved after the day set out in the relevant paragraph or that are set out in amendments made to a LUP after that day.

Stoppage, etc. — less than five years

208 (1) Despite paragraphs 74(a) and (b), the following projects are not subject to an assessment under Part 3:

- (a) a project that was approved under that Part, was commenced and then stopped or shut down for a period of less than five years; and
- (b) the rebuilding of a work that has been closed for a period of less than five years if it relates to a project that was approved under that Part and lawfully carried out.

Ability of Canada and NTI to prescribe classes of excluded (or not excluded) work and activities

228(2) The Governor in Council may, on the recommendation of the federal Minister, after consultation by that Minister with the territorial Minister, the Commission and the Board and with the consent of Tunngavik, make regulations prescribing

- (a) for the purposes of the definition project in subsection 2(1), classes of excluded works or activities; and
- (b) for the purposes of subsection 78(2), paragraph 155(1)(a) and subsection 166(2), classes of physical works and activities that are not exempt from screening.

Exemption of existing Projects under assessment or in operation as legislation coming into force

235 (1) This Act does not apply in respect of

- (a) a project that is being assessed under the Agreement or is being, or has been, lawfully carried out on the day on which this section comes into force;
- (b) a project that was approved under the Agreement before the day on which this section comes into force, was commenced and then stopped or shut down for a period of less than five years, calculated from that day;
- (c) the rebuilding of a work that has been closed for a period of less than five years calculated from the day on which this section comes into force, if it

- relates to a project that was approved under the Agreement before that day and lawfully carried out; and
- (d) a project that was approved under the Agreement before the day on which this section comes into force and commenced within five years of that day.

Significant modifications to grandfathered projects are subject to the Act's requirements

(2) Despite subsection (1), if, after this section comes into force, there is a significant modification, within the meaning of section 145, to a project referred to in any of paragraphs (1)(a) to (d), this Act applies to that project.

C. 2021 Draft Nunavut Land Use Plan

1.4.4 Offences Under the NuPPAA

.... Note that the prohibitions set out in the Plan do not apply to projects referred to in subsections 207(1), 207(2), 208(1) and 208(6) of the Nunavut Planning and Project Assessment Act [Rights preserved – 207(1) (2) the approval of an LUP or an amendment of an LUP after a project proposal has been submitted, or after it was previously approved, is not to be taken into account in the assessment of the Project; including (208(1) – projects that were approved and shut down for less than 5 years, or rebuilding a work closed for less than five years if previously approved) (page 11)

6.1.8 Existing Rights

Page 48 commentary: “In order to support economic development in Nunavut, the Commission has identified projects with existing mineral rights in Limited Use areas in Appendix A that will not be subject to prohibitions on that type of activity at the time they undergo significant modifications, but will require a further determination under the Act.”

6.1.8-1 A mineral exploration and production project previously approved under the Nunavut Planning and Project Assessment Act or the Agreement and identified in Appendix A is exempt from prohibitions on mineral exploration and production in Limited Use areas when the project undergoes a significant modification if:

(a) it is arising from and related to existing rights and interests identified as projects in Appendix A; and

(b) it remains within the same footprint of the project identified in Appendix A.

6.1.8-2 To demonstrate a project is arising from, and related to, existing rights and interests, a proponent must demonstrate a direct connection to a project listed in Appendix A.

6.1.8-3 For clarity, a change in ownership of a project identified in Appendix A, or in the ownership of the proponent, does not itself constitute a significant modification to the project.

6.1.8-4 If there is no demonstrated direct connection to a project identified in Appendix A, the modification will be considered to be a new project and be subject to the prohibitions in this Plan.

6.1.8-5 All other requirements in the land use designation of a project identified in Appendix A, including the prohibition on breaching any applicable restrictions, continue to apply to the project after a significant modification is made.

6.2.1 Ministerial Exemption: Under the Agreement and the Nunavut Planning and Project Assessment Act, if the Commission determines that a project is not in conformity with this Plan, the proponent may request an exemption from the federal Minister or the territorial Minister, or both, taking into account their respective jurisdictions.

D. Nunavut Mining Regulations

Lands not open for prospecting

5(1)(d) It is prohibited to prospect on...lands that have been withdrawn from disposal under paragraph 23(a) of the Act or set apart and appropriated under any of paragraphs 23(b) to (e) of the Act by the Governor in Council

E. Territorial Lands Act

Powers of Governor in Council to withdraw lands

23 The Governor in Council may

(a) on setting out the reasons for withdrawal in the order, order the withdrawal of any tract or tracts of territorial lands from disposal under this Act;

(b) set apart and appropriate territorial lands for the sites of places of public worship, burial grounds, schools, market places, jails, court houses, town halls, public parks or gardens, hospitals, harbours, landings, bridge sites, airports, landing fields, railway stations, town-sites, historic sites or for other public purposes and, at any time before the issue of a grant, alter or revoke those appropriations;

(c) order that grants or leases for a nominal consideration be made of the lands appropriated under paragraph (b) and that there be expressed in any grant or lease the trusts and uses to which the territorial lands granted or leased thereby are subject;

(d) set apart and appropriate such areas or lands as may be necessary

(i) to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for that purpose, or

(ii) for any other purpose that the Governor in Council may consider to be conducive to the welfare of the Indians;

(e) set apart and appropriate territorial lands for use as game preserves, game sanctuaries, bird sanctuaries, public shooting grounds, public resorts or for any other similar public purpose.