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November 15, 2016

Mr. Andrew Nakashuk, Chairperson
Nunavut Planning Commission
P.O. Box 1797
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By email c/o sehaloak@nunavut.ca

Original to follow

Dear Chairperson Nakashuk:

Re: Expert Report – The Terms “Project” in NUPPAA and “Project Proposal” in the Nunavut Agreement Have the Same Meaning

This letter is the Government of Canada’s legal submission on the relationship between the term “project” as defined in the *Nunavut Planning and Project Assessment Act* and the term “project proposal” as defined in the *Nunavut Agreement*. It is provided as an expert report as that term is used by the Commission in this process. A statement of the author’s qualifications is provided separately.

Brief Conclusions

- Despite the fact that the two definitions use different words, the term “project” as it is defined in the Act has the same meaning as the term “project proposal” as it is defined in the *Nunavut Agreement*.
- Accordingly, there is no conflict or inconsistency between the terms “project” as it is defined in the Act and “project proposal” as it is defined in the *Nunavut Agreement*.
- Under both the *Nunavut Agreement* and the Act, the assessment regime – meaning both land use plan conformity and impact assessment – does not apply when the carrying out of a work or the undertaking of an activity would have manifestly insignificant ecosystemic impacts.

Background

As required by the *Nunavut Agreement* (section 10.2.1) the core features of Articles 10, 11 and 12 of the *Nunavut Agreement* were rendered into legislation. The bill that eventually became the Act was developed over many years, through the collaborative efforts of a working group consisting of representatives of Nunavut Tunngavik Inc., the Government of Nunavut, the Government of Canada, the Nunavut Impact Review Board and the Nunavut Planning Commission.

Because they are different instruments with different drafting conventions, concepts from the *Nunavut Agreement* are often expressed in the Act using different words. There were also a select number of areas where the working group recommended changes to the existing arrangements in the *Nunavut Agreement*. In a few cases, these modifications required amendments to the *Nunavut Agreement*.

We are advised by federal officials who participated in the bill-development working group that the group settled on the definition of “project” that is now found in the Act. We are further advised that the primary purpose of that definition was to give effect to and carry forward the original meaning of “project

proposal” found in the *Nunavut Agreement*. However the working group did recommend narrowing the term to exclude certain activities and works within municipal boundaries. This was a substantive change that required amendment of the *Nunavut Agreement*, which was done¹ in accordance with the requirements of the *Nunavut Agreement* and the *Nunavut Land Claims Agreement Act*.

In the definition section, the *2016 Draft Nunavut Land Use Plan* contains the following definition: “**Project/Project Proposal** carry the meanings provided in the NUPPAA and the NLCA respectively” (p. 11). The draft plan then uses “Project/Project Proposal” throughout the balance of the draft.

While it is not clear from the draft plan itself why the drafters would use “Project/Project Proposal” instead of a single term “Project”, it appears that an explanation can be found in a letter from the Commission’s chairperson that was placed on the registry. In August 2016, Commission Chairperson Andrew Nakashuk wrote in reply to a letter from Senator Dennis Patterson:

[T]he Nunavut Planning Commission (NPC) has been discussing with relevant stakeholders the fact that the NUPPAA conflicts with the Nunavut Land Claims Agreement (NLCA) as it was amended July 9, 2015, and as a result of those conflicts the NPC is in a position of having to implement both the NLCA and NUPPAA...²

This belief that there is a conflict between the *Nunavut Agreement* and the Act seems to explain why the drafters of the *2016 Draft Nunavut Land Use Plan* considered it necessary to include both the *Nunavut Agreement* term “project proposal” and the Act’s term “project”.

Chairman Nakashuk’s letter expresses the Commission’s belief that the term “project proposal” in the *Nunavut Agreement* is broader than the Act’s term “project”. The reason stated is that the Act excludes works and activities with manifestly insignificant impacts from the meaning of the term “project.”

Analysis

Despite the differences in wording, we are of the opinion that there is no conflict or inconsistency between the *Nunavut Agreement* and the Act on this point. The definition of the term “project” in the Act was carefully designed to transfer the *Nunavut Agreement* concept of “project proposal” into legislative text without altering its meaning.

For ease of reference, the definitions in the two legal instruments are reprinted below:

¹ Order-in-Council PC 2015-851.

² Letter from Chairperson A. Nakashuk to Senator D. Patterson (August 18, 2016), available online at <http://www.nunavut.ca/files/2016-08-18%20SenPatterson%20response.pdf> (no translated versions posted).

Project Proposal in section 1.1.1 of the Nunavut Agreement

<p>“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 12.11.1 but does not include 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 activity.</p>	<p>« projet » Proposition par un promoteur visant soit la réalisation – y compris la construction, l’exploitation, la modification, la désaffectation ou la fermeture – d’un ouvrage soit le démarrage soit le démarrage ou l’exercice d’une activité concrète, ouvrage ou activité dont la réalisation ou le démarrage ou l’exercice, selon le cas, se déroulerait dans la région du Nunavut, sous réserve des dispositions de l’article 12.11.1, mais ne comprend pas les activités de construction, d’exploitation et d’entretien des bâtiments ainsi que les services, dans une municipalité, qui n’ont pas de répercussions écosystémiques à l’extérieur de la municipalité et qui n’impliquent pas le dépôt de déchets par une municipalité l’entreposage en vrac de combustible, la production d’énergie nucléaire ou d’hydroélectricité et toute activité industrielle.</p>
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Project in section 2(1) of the Act

<p>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</p> <p>(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);</p> <p>(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</p> <p>(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.</p>	<p>projet La réalisation — y compris la construction, l’exploitation, la modification, la désaffectation ou la fermeture — d’un ouvrage ou le démarrage ou l’exercice d’une activité concrète, qui comporte l’utilisation de terres, d’eaux ou d’autres ressources. Sont toutefois exclus :</p> <p>a) la réalisation d’un ouvrage ou le démarrage ou l’exercice d’une activité dont les répercussions négatives sur le plan écosystémique n’ont, de toute évidence, aucune importance, compte tenu notamment des éléments prévus aux alinéas 90a) à i);</p> <p>b) la réalisation d’un ouvrage ou le démarrage ou l’exercice d’une activité faisant partie d’une catégorie d’ouvrages ou d’activités prévue par règlement;</p> <p>c) la construction, l’exploitation et l’entretien d’un bâtiment et la fourniture d’un service, dans une municipalité, qui n’entraînent pas de répercussions écosystémiques à l’extérieur de celle-ci et qui ne comportent pas le dépôt de déchets par une municipalité, l’entreposage en vrac de combustible, la production d’énergie nucléaire ou hydroélectrique ou quelque activité industrielle.</p>
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Paragraph (a) of the definition of “project” contains an explicit narrowing of the opening words of the definition. This paragraph excludes works and undertakings with “manifestly insignificant” adverse ecosystemic impacts. There is no parallel text in the *Nunavut Agreement* that explicitly excludes the same things. However in our view, a purposive and contextual reading of the *Nunavut Agreement* demonstrates the same exclusion was already implicit in the *Nunavut Agreement*. What follows is the analysis in support of this conclusion.

On its face, the *Nunavut Agreement* definition of “project proposal” is clearly very broad; indeed, aside from geography, it is nearly unlimited in its breadth. While the definition explicitly excludes some activities inside municipal boundaries, almost every single physical activity and almost any act in relation to almost every single physical work (*i.e.*, tool, machine, structure, *etc.*) in the Nunavut Settlement Area would be caught by a literal reading of this definition.

In determining whether the literal meaning of the provision is the true meaning of the provision, the implications of the literal meaning must be considered. Taking the text strictly literally, almost everything one does in Nunavut would fall within the definition, and therefore would require a conformity determination. A conformity determination would be required before getting out of bed; before starting a car; before pitching a tent; before eating a snack; before organising or attending a meeting. All of these things include physical activities, and some are both physical activities and the operation of a physical work.

However a contextual and purposive reading of the *Nunavut Agreement* makes clear that Articles 10, 11, 12 and 13 do not concern themselves with actions that have no discernable risk of adverse ecosystemic impact. This is consistent with the principle that the law does not concern itself with trivial matters, sometimes stated in the Latin maxim *de minimis non curat lex*.

Indeed, it is impossible to conceive of a Nunavut regulatory system in which the *Nunavut Agreement* definition is read literally – this would require advance clearance from the Commission for almost everything done in Nunavut. In our opinion, this interpretation of the *Nunavut Agreement* is absurd in the legal sense, meaning that it is a result that could not possibly have been intended by the negotiators or drafters of the *Nunavut Agreement* at the time of its development.

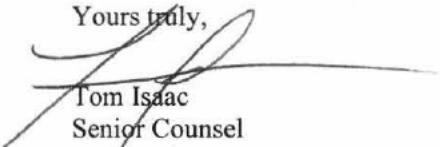
Instead it must be recognized that there is an implicit, or subtextual, exclusion from “project proposal” of things with no discernable risk of adverse ecosystemic impact. It is true that this exclusion does not expressly appear in the text of the *Nunavut Agreement*. But statutory interpretation sometimes presents challenges that can only be resolved by resort to subtext. In statutory interpretation, subtext refers to words that do not appear on the page, but must have been assumed by the drafters at the time of drafting.³ The proper legal interpretation of the definition of “project proposal” requires recognition that despite the absence of words that narrow the opening part of the definition, the definition is nonetheless narrowed by necessary implication of the scheme as a whole.

It is for this reason that the Act’s definition of “project” explicitly excludes acts with no discernable risk of significant adverse ecosystemic impact. Parliament, using the words developed by the multi-party working group, is giving voice to a silent feature that was always present in the *Nunavut Agreement* – the exclusion of things with manifestly insignificant adverse ecosystemic impacts.

On this basis, it becomes clear that:

- there is no conflict or inconsistency between the *Nunavut Agreement* term “project proposal” and the Act’s term “project”;
- the assessment regime – both land use plan conformity and impact assessment – apply only to those acts that might reasonably be expected to have a significant adverse ecosystemic impact; and
- determining whether a given physical activity or action in relation to a physical work is a project within the meaning of the Act requires the exercise of judgment, taking into account the factors identified by the Act in paragraphs 90(a) to (i).

Yours truly,



Tom Isaac
Senior Counsel

³ For an excellent discussion of this element of statutory interpretation, please refer to Randal N. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001). Problems of subtext are discussed in chapter 5.