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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: Transition Rules, Existing Rights and Related Issues in the *Nunavut Planning and Project Assessment Act*

This paper is part of the Government of Canada's submission in the land use planning process. It is intended to draw attention to certain features of the assessment regime in the *Nunavut Agreement*, which is elaborated and given further effect in the *Nunavut Planning and Project Assessment Act*. This paper focusses on elements of the legal framework, while policy issues are generally left to other portions of Canada's submission.

The topics covered in this paper are:

Part I –

- the Commission's mandate and flexibility in taking into account pre-existing rights and interests in the development of a land use plan;

Part II –

- the Act's provisions for transition on its coming into force;
- how a project, or the assessment of a project, is affected when a new land use plan is adopted;
- how the Act deals with proposed changes in a project when the change presents during an assessment; and
- how the Act deals with proposed changes to a project after the project has been approved.

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 the *Nunavut Planning and Project Assessment Act*. Because they are different instruments with different drafting conventions, concepts from the *Nunavut Agreement* are often expressed in the Act using different words. Despite the use of different words, we believe that the *Nunavut Planning and Project Assessment Act* is consistent with the *Nunavut Agreement* in all material respects.

Because the meaning of the term "project" is crucial to an understanding of the *Nunavut Planning and Project Assessment Act* and the assessment regime it carries forward from the *Nunavut Agreement*, this

paper should be read in conjunction with our *Expert Report – The Terms "Project" in NUPPAA and "Project Proposal" in the Nunavut Agreement Have the Same Meaning*.

Notes on Terminology in this Paper

The *Nunavut Planning and Project Assessment Act* uses the term "assessment" to mean at least a land use plan conformity determination process conducted by the Nunavut Planning Commission, and also screening and review conducted by the Nunavut Impact Review Board, if one or both of those impact assessment processes applies to a project.

The Act uses the defined term "project" to refer to the work or activity the proponent wants to carry out, and uses the term "project proposal" for the written materials submitted to the Commission to start the assessment process. This paper uses the Act's terms accordingly.

For certain purposes, the Act distinguishes between the approval of a new land use plan and the approval of an amendment of an existing land use plan. For simplicity, in this paper we will refer to the approval of a new land use plan as meaning both.

Part I – Existing Rights in the Plan Development Process

This part of the paper deals only with how the Act requires existing rights and interests to be considered within the plan development process. When and how a newly approved plan applies to existing projects and to projects that are already under assessment will be dealt with in Topic 2.

Existing Rights and Interests Must be Considered

Every decision-maker in the land use plan development and approval process has the duty to consider "existing rights and interests", along with a number of other factors, as part of every decision that they make (see section 58). This obligation applies to the Commission, to the federal and territorial Ministers and to the Designated Inuit Organization.

It is important to note that this issue is broader than mining rights or interests. The Act's treatment of existing rights and interests is the same for any kind of existing right or existing interest that could be affected by the plan.

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. (*Nunavut Planning and Project Assessment Act*, section 58.)	Dans l'exercice de leurs attributions au titre des articles 49 et 52 et des paragraphes 54(1) à (3), la Commission d'aménagement, les ministres fédéral et territorial et l'organisation inuite désignée tiennent compte de tout élément pertinent, y compris les objets énoncés à l'article 47, les exigences prévues à l'article 48 et les droits et intérêts existants. (*Loi sur l'aménagement du territoire et l'évaluation des projets au Nunavut*, article 58.)

This means that when there are identified existing rights and interests in any given area, they must be taken into account when determining what the rules in the land use plan should be. The Commission can consider whether it is desirable for a new land use plan to affect the anticipated exercise of pre-existing rights and interests, or whether it is desirable to avoid this. It follows that the Commission has the ability to ensure that when it proposes a land use plan, the plan's requirements will have the intended effects on existing rights and interests, and that it has identified ways to avoid undesired consequences.

Implications for Plan Contents

Section 58 gathers together in a single location a number of considerations that must influence the substantive content of a land use plan. Parliament identified existing rights or interests as one factor to be considered in plan development, along with many other factors. These considerations include the fundamental purposes of land use planning that are identified in the *Nunavut Agreement* (see the cross-reference to section 47) and the factors referred to in section 11.3.1 of the *Nunavut Agreement* (see the cross-reference to paragraph 48(1)(c)).

The purpose of section 58 of the Act is to ensure that land use plans are designed to reconcile their many, sometimes competing, objectives as best as possible. It supports the Commission having flexibility in the plan development process to ensure that all the planning policies, objectives and goals for an area are considered, and that the necessary factors that must be balanced one against another are considered.

When the Commission considers it appropriate to do so after taking into account the matters referred to in section 58 of the Act, the Commission has the ability to design land use plan requirements so that they apply selectively or differently to projects involving the exercise of pre-existing rights or interests. The Commission has the jurisdiction to draft a plan that applies differently to otherwise similar projects – for instance, the plan can be tailored to permit a project arising from existing rights or interests, while being more restrictive of projects that do not arise from rights or interests that pre-date the plan. This conclusion is based on an understanding of the role section 58 plays in the Act, and a consideration of what best serves the achievement of the Act's purposes.

The factors identified in section 58 that are applicable to any given area might point in different directions. In a given area, some factors might point to a more permissive zone (economic opportunities, transportation, energy (from *Nunavut Agreement* section 11.3.1(c), (d) and (e)). At the same time in the same area, other factors might point to a more restrictive zone (environmental considerations, cultural factors (from *Nunavut Agreement* section 11.3.1(g) and (h)). In every case, the Commission is tasked with striking a balance to the benefit of Inuit, other Nunavut residents and Canadians in general.

The ability to craft different rules for a project arising from pre-existing rights or interests facilitates striking the right balance. It empowers the Commission to develop the general rules it considers appropriate, while still giving the Commission the ability to shelter the pre-existing rights or interests if the Commission considers it appropriate to do so. Greater latitude on this point better positions the Commission to achieve the purposes and balance the factors identified in the Act and the *Nunavut Agreement*.

In the absence of this ability, the Commission would have fewer tools to make finely calibrated decisions that precisely achieve the balance the Commission is seeking among the section 58 considerations.

On that basis – and in the absence of any indication in the Act or in the *Nunavut Agreement* to the contrary – the Commission can tailor the rules in the land use plan to give effect to the Commission's intended treatment of projects arising from existing rights or interests.

Past Comments on "Grandfathering"

In December of 2015, as part of the land use planning process, Indigenous and Northern Affairs Canada circulated a draft paper on the topic of existing rights. This draft paper has been discussed and been the subject of follow-up submissions within the planning process. In particular, Nunavut Tunngavik Inc. filed a March 22, 2016 response to the paper and a follow-up letter dated December 5, 2016. These discussions and responses have been helpful, and as a result of some confusion that the draft paper created, Indigenous and Northern Affairs Canada withdrew its draft paper in May 2016.

From a legal perspective, the primary issue with the now-withdrawn draft paper is that it gave the impression that the land use plan could exempt projects from the application of the land use plan. Nunavut Tunngavik Inc. and others correctly took issue with that. The land use plan cannot exempt a project from the application of the plan. Exemption was an unfortunate word choice, and does not fit within the jurisdictional framework in which the Commission operates.

Although this was unfortunately not clear in the now-withdrawn draft paper, it is the Government of Canada's view that only the *Nunavut Agreement*, or the *Nunavut Planning and Project Assessment Act* if it is consistent with the *Nunavut Agreement*, can exempt or authorize the exemption of projects from the requirement for an assessment and the application of the plan. There is no jurisdiction for the Commission, or for the terms of the plan, to exempt projects from the application of the plan. We are hopeful that this helps address the jurisdictional concerns quite rightly raised in Nunavut Tunngavik Inc.'s submissions.

Rather, it is Canada's view that where it is appropriate to do so, the plan's provisions can be designed to ensure that the plan has the desired impact on potential projects and classes of projects, and does not have undesired impacts. There may be more than one way to achieve this, but one effective technique could be the creation of a permitted use to act as an exception to a prohibition that would otherwise apply.

Part II – Transition Provisions in the Act, Project Change, etc.

Some participants in the land use planning process have said that the current Draft Nunavut Land Use Plan is not sufficiently clear on when a conformity determination is required, whether that conformity determination is an initial determination or, in the case of a change to a project, a conformity determination triggered by that change (see for example section 6.5 of the draft plan). This is a topic that is subject to a complex set of rules.

A conformity determination is the first phase of an assessment under the *Nunavut Planning and Project Assessment Act*. The land use plan does not determine whether or when a conformity determination is required.

Instead, it is the *Nunavut Planning and Project Assessment Act* that determines whether an activity requires an assessment under the Act, and it also determines when a new assessment is required. Therefore, the only guidance the land use plan could give on this topic is an explanation of how the Act works.

Guidance documents on how the Act addresses these issues are important. However it is not clear that the land use plan itself is the optimal vehicle for such guidance. There also is a likelihood that process guidance in a land use plan could be mistaken as authoritative, because the land use plan is authoritative in other respects. Moreover, the Act is in its early days of implementation, and our understanding of the Act is bound to be refined as we work with it over time. It should be possible to revise guidance documents without amending the land use plan.

For those reasons, we recommend that the Commission create a separation between the land use plan and the Commission's procedural guidance. Perhaps this could be achieved within the same document, by clearly labelling segments as not forming part of the land use plan. Alternatively the Commission could develop a separate process-guidance document.

To the extent the Commission will endeavour to explain the statutory framework, it should do so accurately, whether it chooses to do so within the land use plan or, as we suggest, outside of the land use plan.

The challenge is to find a way to make the explanation accessible, yet fully accurate when describing the complex functioning of the Act. The Act must cover a wide variety of potential scenarios, and treats

different scenarios differently. The Act is therefore quite complex on these points.

1. *General*
   In our view, any explanation of how the Act determines whether an assessment is required would include the following:

   i) the definition of "project" in section 2, which includes the *de minimis* threshold below which the Act does not apply;

   ii) the idea that the Act only applies to projects, and identifies the project as a whole, not individual components or activities or specific permits or authorizations, as the subject of the assessment;

   iii) the Act's requirement to group multiple projects into a single project when they are "so closely related that they can be considered to form a single project" (section 76(3));

   iv) the requirement to submit a project proposal to trigger the assessment (section 76); and

   v) the requirement that the Commission conduct the conformity determination against an applicable land use plan (section 77).

2. *Coming into force of the Act*
   The Act came into force in 2015, but applies selectively to projects that already existed or were already under assessment under the *Nunavut Agreement* when the Act came into force. Any guidance on how the Act affects whether an assessment under the Act is required would include the following implications of section 235 of the Act:

   i) the Act does not apply, and therefore an assessment is not required under the Act, where:

      a. the project was being lawfully carried out before the Act came into force;

      b. an assessment of the project under the *Nunavut Agreement* began before the Act came into force;

      c. the project was assessed before the Act came into force, and was started and then stopped for less than five years;

      d. the work was assessed before the Act came into force, was built and then was closed for less than five years; or

      e. the project was assessed before the Act came into force and the project is commenced within five years of its approval; however

   ii) where there is contemplation of a significant modification (within the meaning of that phrase as it is used in section 145 of the Act) to a project or work falling in one of the categories listed in (i), then the Act applies and an assessment under the Act would be required. How the Act addresses this kind of change in a project will be returned to in paragraphs 4 and 5 below.

3. *Adoption of a new land use plan*
   Any guidance on how the adoption of a new land use plan affects a project that has either already begun or has completed its assessment under the Act would include the following implications of sections 69 and 207:

   i) the project is exempted from prohibitions created in the newly adopted plan; however

   ii) the project will be subject to terms and conditions set out in the newly adopted plan.

   This effect is achieved by setting rules for how authorizing agencies must regulate the project; it does not require additional assessment steps under the Act (*i.e.*, the existing conformity determination stands).

   These rules also mean that in the plan development process, careful drafting is required to ensure that there is a sharp distinction between prohibitions and terms and conditions.

4. *Change in the project during assessment*
   The above subjects address change caused by the coming into force of the Act or adoption of a new land use plan. When the change is in the project itself, different rules apply.

   Any guidance on how the Act deals with change in a project that has already begun, but not yet completed, its assessment under the Act would include:

   i) a new conformity process is required if the Nunavut Impact Review Board re-scopes the project to include components that were not included in the original project proposal document (section 99(3));[1]

   ii) a new assessment (starting with a new conformity process) is required when a proponent wishes to make a significant modification to a project while that project is still under assessment – but that assessment can rely on previous assessment activities (sections 141 and 142) ; and

   iii) a new assessment (starting with a new conformity process) is required where the assessment was terminated before being finished – but the new assessment can rely on previous assessment activities (sections 143(7) and (8) as well as sections 144(4) and (5)).

5. *Post-assessment project change*
   This is a portion of the Act that we believe is generally not well understood. After a project has been assessed, any change in that project is treated by the Act as a separate project. That separate project may or may not require an assessment, depending on the significance of the change.

   Therefore, any guidance on how the Act deals with change in an already assessed project would explain that the Act treats a change in a project as a new project that would modify an existing project. The original project is not reassessed, and in some cases no new assessment is required:

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[1] To reduce the number of statutory references, this paper omits the provisions that apply when the impact assessment is conducted by a federal environmental assessment panel (*i.e.*, flowing from the *Nunavut Agreement*, Article 12, Part 6) and focuses on assessments in the Nunavut Impact Review Board context (*i.e.*, flowing from Article 12, Part 5 of the *Nunavut Agreement*). A more comprehensive guidance document would need to address both.

i) if the new proposed work or activity is a project under the Act, but would not significantly modify the original project, then no assessment under the Act is required (sections 145 and 75(3)); and

ii) if the new proposed work or activity is a project under the Act, and would significantly modify the original project, then the new project requires an assessment under the Act. However it is the new work or activity – and not the already approved project – that is subject to an assessment (section 146(1)).

6. *Assessments can expire*
Any guidance on how the Act deals with delays or interruptions in projects would explain that:

i) projects that were assessed and approved under the Act, but were not commenced within five years of approval, will have their assessments expire; a new assessment is required to undertake such a project (section 147); and

ii) projects that were assessed and approved under the Act that stop, shut down or close for a period can restart without a new assessment if the interruption is for less than five years (section 208).

Conclusion

The *Nunavut Planning and Project Assessment Act* contains a large number of complex provisions that manage the coming into force of the Act, changes in land use plans, and changes in projects. We hope that by providing additional information and perspectives on these provisions, this paper is useful for the Commission and for the participants in the land use planning process.

Yours truly,

Kenneth David Landa
Legal Counsel