



Canada remains hopeful that this project will result in significant development benefits for the people of this region and that the proponent will succeed in operating an environmentally responsible mine on Baffin Island. We believe that responsible shipping and the protection of harvesting and a healthy marine environment can be accommodated within processes that are consistent with—and indeed will strengthen implementation of—the Nunavut Land Claims Agreement.

Our key recommendations are as follows:

1. An exemption to a Nunavut Land Claims Agreement process is not warranted in anything but the most extraordinary circumstances to safeguard a purpose or principle embedded in the NLCA;
2. A Ministerial exemption will likely be divisive and will make a broadly-accepted and beneficial result less likely;
3. The case for exempting industrial shipping from land use planning for one project would set a bad precedent for the future regulation of shipping in Arctic waters;
4. The NLCA provides both for land use planning and screening of impacts – dual functions so important and distinct that it created separate Institutions of Public Government to carry them out;
5. Baffinland/ArcelorMittal has largely created its own problem by getting approvals for one project and port when it was already contemplating an alternative. That said, there are processes in place to address the necessary changes to land use planning that can accommodate this application;
6. Parks Canada and the Qikiqtani Inuit Association will soon be negotiating an interim management plan for this region in advance of final creation of the Lancaster Sound National Marine Conservation Area. This process should proceed in tandem with discussions relating to land use plan amendments that could accommodate responsible shipping through ice during appropriate periods;

7. An exemption in this instance would fly in the face of over 35 years of community, industry and government participation regarding regional planning in this region.
8. Rather than intercede in this process by taking land use planning off the table and removing the Nunavut Planning Commission from the discussion, Aboriginal Affairs and Northern Development Canada should work with the NPC to enable it to proceed in a timely fashion and with appropriate regional consultation.

### **Ministerial Exemption an Extraordinary Response**

Article 11 of the NLCA suggests that an application to the Minister for an exemption to a land use plan should be regarded as an exceptional remedy; ss. 11.5.2 imposes on the Minister the requirement to provide the NPC written reasons for an exemption. Such exemption should not be interpreted to be a regular procedural outlet any time a proponent does not get the decision it hoped for through an institution of public government. This kind of convenience-based approach would be inconsistent with the functional logic of the NLCA, which provides that the “planning process shall be systematic and integrated with all other planning processes and operations, including the impact review process contained in the Agreement (ss. 11.2.1(f)).

As Article 10 makes clear, the Nunavut Planning Commission, as an IPG or “institution of public government”, is part of a broader framework of IPGs and that there is an integrated logic that applies to land and resource management decisions within the Nunavut Settlement Area. We do not believe that it is possible to both support the effective functioning of these IPGs and their interrelated processes and at the same time appeal for a ministerial exemption to the operation of NLCA-based plans and procedures.

The Ministerial override function within the NLCA should be understood as a check and balance on Institutions of Public Government and their respective administrative decisions to ensure that IPGs remain faithful to their mandates and the broader principles of the NLCA but not an unfettered license to interfere with the normal functioning of IPGs.

Ss. 11.2.1 of the Nunavut Land Claims Agreement describes the primary purpose of land use planning in Nunavut:

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.

While it is technically true that a ministerial exemption is a possibility contemplated under Article 11 of the NLCA, a purposive reading of land use planning provisions within the broader context of the agreement suggests that such exemptions ought not to be the default response when newly-proposed aspects of a project are found by the NPC to violate a land use plan.

### **Baffinland position: Insufficient Rationale for Extraordinary Measure**

Baffinland's position that an exemption to the land use plan should issue lacks a sufficient rational basis given the interests that sound land use planning is designed to protect: namely, the existing well-being of Inuit and Inuit Owned Lands in this region. Such an exemption would undermine not only land use planning in this region but also the process more generally in Nunavut and in Canada.

### ***Land Use Planning vs. Environmental Impacts***

Baffinland maintains an exemption is the most efficient way to get the shipping proposal to a review before the Nunavut Impact Review Board, arguing that “[a] NIRB process would provide for a detailed consideration of the potential environmental and socio-economic impacts and benefits of Phase 2”.

Indeed, the Nunavut Impact Review Board is a well-respected institution of public government that has in recent years provided detailed reviews of many large-scale projects. But this does not mean that it is mandated or equipped to deal with broader questions of land use planning for the Lancaster Sound region.

It would be improper for the NIRB to focus its review on such questions as how responsible shipping can be accommodated within a future national marine conservation area or what restrictions should a land use plan impose on shipping through sea ice in sensitive regions.

### ***Draft Nunavut Land Use Plan***

Baffinland’s argues, in effect, that it need not meet the requirements of the current plan because one day it will be superseded by a new plan. Applying this kind of argument to any set of rules clearly invites chaos and substitutes a company’s wishful thinking for an orderly approach to carefully thought-out systems of governance. Further, the company asserts in one sentence with no citation that “it understands” a draft of the future plan will allow shipping with no restrictions everywhere. This underscores the folly of granting an exemption at this point from the orderly examination of issues as contemplated under the NLCA under which the Minister, the company, and the public would have the benefit of understanding what the new plan will say about this issue.

The North Baffin Regional Land Use Plan was approved in 2000. This plan is rooted in the Lancaster Sound Regional Study, which was established in 1979 by the Department of Indian Affairs and Northern Development in order to determine how to best balance development, traditional and community needs in the

context of oil and gas exploration in that period. Recommendations that came out of this process included the need for a regional land use plan and culminated in the Lancaster Sound Regional Land Use Plan, adopted in 1989 (and which remains the foundation document upon which the present land use plan is based).

Advice from the Lancaster Sound Green Paper of 1982 still applies:

Throughout Canada, regional planning bodies must balance external interests with internal ones and must operate within de-fined legislative and regulatory frameworks. Presumably any regional planning body established for Lancaster Sound would have similar restrictions placed upon its degree of planning control.

However, ***if a regional planning process is to be successful, it must be seen as a legitimate one through which all sides of an issue can be addressed and dealt with in a reasonable way.*** It is not likely to be viewed this way if decisions are dominated by a particular sphere of interest, particularly when the locus of that sphere is outside the region.

*“The Lancaster Sound Region: 1980-2000”* at p. 36. Emphasis added

### ***Timelines***

An exemption is also not warranted because the time constraints Baffinland complains about appear to be largely of its own making. As early as 2010, the company was already internally contemplating Milne Inlet and Eclipse Sound as the primary shipping outlet of its product (see e.g. *Ontario Securities Commission v. Jowdat Waheed and Bruce Walter (2014)* at par. 131). Yet the company did not ask the NPC to consider its project until the end of October 2014. In the intervening period, much time and effort (including by many citizens and interested third parties) was dedicated to research and review of a shipping option in a completely different area. It is unfortunate that questions relating to land use plan conformity of intensive shipping through ice in Eclipse Sound were not addressed at an earlier date and that so much time and effort went into researching impacts and mitigations that might otherwise have been dedicated to Milne Inlet and Eclipse Sound.

We understand Baffinland's position to be that "project timelines cannot sustain further delay of the commencement of the NIRB process until after the 2016/2017 timeline referenced in NPC's May 5, 2015 correspondence, or after completion of the Nunavut Land Use Plan." To this end, and consistent with the Qikiqtani Inuit Association's call for a public process in Pond Inlet to address these issues, we encourage the Minister to ensure that the Planning Commission is in a position to address Baffinland's planning concerns in a timely fashion. We further encourage the Minister to work with other appropriate federal agencies and the Qikiqtani Inuit Association to ensure that interim management planning for Lancaster Sound proceeds in a functional and complimentary manner.

### ***Shipping Precedents***

Baffinland lists a series of industrial projects in arctic and subarctic Canada that have included shipping through ice. None of these projects (present or historical) have ever included ice breaking on a frequency and of a scale similar in breadth to this proposal. For example, Vales' Voisey's Bay project, cited by Baffinland as a comparable project, features 3-4 ship voyages per ice season, in a markedly different marine environment.

Canada takes a strong position with respect to its ability to regulate shipping through sensitive Arctic waters. This position is not universally accepted in the international community. Canada's continued ability to regulate ice-breaking activity in Canadian Arctic waters would not be well served by a decision to hastily exempt a particular proponent from processes (and related restrictions on shipping that flow from constitutionally-protected land claim agreement protections) that we expect the rest of the world to follow.

### **Concluding Remarks**

Responsible shipping through Eclipse Sound in appropriate times of the year doesn't require an exemption but can likely be accommodated in an open process that seeks to ensure the ecological integrity of this region. We would hope that all parties could commit to such a principle. Baffinland/ArcelorMittal, for its part, could signal a new willingness to become a responsible long-term operator in a sensitive marine environment by publicly supporting the National Marine Conservation process under way.

We will continue to make the case that a globally significant conservation area and a major iron ore mine committed to responsible shipping are compatible.

Sincerely,



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Hon. Johnny Mike, Minister of the Environment, Government of Nunavut  
Hunter Tootoo, Chairperson, Nunavut Planning Commission  
Elizabeth Copland, Chairperson, Nunavut Impact Review Board  
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