

By Email and Mail

March 22, 2016

Ms. Sharon Ehaloak
Executive Director
Nunavut Planning Commission
P.O. Box 2101 Cambridge Bay, Nunavut
X0B 0C0

Dear Ms. Ehaloak:

Re: Government of Canada (GoC) recommendations that the Nunavut Land Use Plan provide for “additional grandfathering” of existing mineral rights beyond the provisions of the *Nunavut Planning and Project Assessment Act (NUPPAA)*

Nunavut Tunngavik Inc., (NTI) President Cathy Towtongie wrote to the Nunavut Planning Commission (NPC) on January 29, 2016, setting out NTI's general intentions, and associated timelines, for the clarification of its positions with respect to key outstanding issues surrounding the current Draft Nunavut Land Use Plan (DNLUP). In association with regional Inuit organizations, NTI is now pursuing that work.

During the Caribou Technical Meeting, NPC requested that NTI provide its written submission by May 16, 2016. NTI will endeavour to meet this request.

Most of the key outstanding land use planning issues are entirely matters of policy choice. It has become apparent, however, that one outstanding issue --- the extent to which a NLUP can provide for “additional grandfathering” of existing mineral rights beyond the provisions of the *NUPPAA* --- raises fundamental jurisdictional questions that must be addressed prior to policy choices about that matter being reliably made.

I am confident that, with early and appropriate efforts, jurisdictional questions surrounding “additional grandfathering” can be effectively addressed without extending the timelines described in President Towtongie’s letter.

Jurisdictional questions as to additional grandfathering became apparent in the recommendations made by the GoC to the NPC on June 19, 2015 in their technical submission, that the next draft NLUP exempt land uses based on pre-existing mineral tenures from the prohibitions that apply in the Plan's protected areas. NTI and other planning participants had questions about these recommendations, and, in particular, asked the GoC to explain their jurisdictional foundation.

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On December 10, 2015, the GoC circulated a draft paper entitled “clarification of existing rights,” prepared in order to “clarify the Government of Canada's position” and “promote further dialogue.” This paper suggested a level of additional grandfathering wider than set out in the June 19 recommendations. These new recommendations call for additional grandfathering from the NLUP along the following lines:

- exemption from the effect of any requirement of the land use plan, whether the requirement is a prohibition on a land use or a term or condition on a permitted land use;
- exemption available exclusively to holders of any existing mineral interest, whether the interest is a prospecting permit or staked claim on which the minimum work required by legislation had been performed, a lease supporting a working mine, or an intermediate interest;
- exemption applicable not only to land uses undertaken, proposed or authorized before the land use plan is approved, but to any future modification of such uses in the location of the pre-existing mineral interest or any successor interest;
- exemption applicable also to any future land use elsewhere – such as a road, port, marine seismic program or marine shipment route – that is “ancillary” to the mineral use in the sense that (1) the economic viability of developing the mineral interest depends on the separate land use and (2) the project cannot be carried out otherwise in a NLUP-conformant manner.

The GoC suggests that such additional grandfathering “may cause ... a “potential staking rush” and suggests that “a pre-set-date” for the exemption could be considered accordingly.

NTI undertook to examine the GoC’s recommendations. We have now done so. NTI continues to have first order concerns about the jurisdictional foundation and legal viability of the GoC’s recommendations.

Primarily, NTI questions whether the GoC’s additional grandfathering recommendations reflect the intent of Parliament when Parliament undertook to meet the Crown’s duty to set out “all substantive powers [and] functions” of the NPC in statute (s. 10.2.1, *Nunavut Agreement*), by enacting *NUPPAA* in 2013.

As the NPC requested when *NUPPAA* was developed, *NUPPAA* provides its own, statutory exemptions of pre-existing uses from requirements of land use plans and from *NUPPAA*’s related implementation measures. This sets *NUPPAA* apart from the *Mackenzie Valley Resource Management Act* and in line with typical provincial planning statutes in Canada.

In this context, it is unclear whether *NUPPAA* authorizes the NPC to exempt any uses of land from the requirements of a land use plan, except when issuing minor variances after the plan is approved. Consistently with the *Nunavut Agreement*, *NUPPAA* specifically authorizes the responsible Minister to exempt land uses from land use plan requirements after the plan is approved, on a case by case basis. The Act also authorizes the Governor in Council, with the consent of NTI, to exempt classes of land use from the definition of “project,” hence from all of the Act’s related requirements. All such exemptions are provided for in a scheme that leaves the NPC wide latitude to design prohibitions on land use and terms and conditions for permitted use that take into account all interests that Inuit, other Nunavummiut and other Canadians have in mineral development and other uses of Nunavut lands and resources.

Given the provisions for exemptions in *NUPPAA*, it is uncertain that this statutory scheme provides a “minimum” set of exemptions which the NPC may supplement with a wide range of additional grandfathering measures up to and including ancillary projects.

In light of these reservations, and considering the NPC’s exclusive responsibility to develop land use plans in accordance with its statutory mandate, it is incumbent on the NPC to take hold of this issue to facilitate its resolution. To that end, NTI proposes that, as soon as possible, the NPC retain outside legal counsel having expertise in the field, with a view to preparing and circulating an independent legal opinion, on the following two questions:

- 1) whether the NPC possesses statutory authority to develop a land use plan that would exempt uses of land from the plan’s requirements, over and above the exemptions provided in *NUPPAA*, and
- 2) if so, having regard to the GoC’s current recommendations, what are the limits, if any, on such statutory authority?

In making this proposal, NTI notes that, given the complexity and subtlety of a number of matters that concern the jurisdiction of the Institutions of Public Government (IPGs) created by the *Nunavut Agreement*, the practice of commissioning and circulating independent legal opinions on salient issues of special importance, particularly matters pertaining the breadth and scope of an IPG’s authority as sourced in the *Nunavut Agreement* and as may be modified by implementation legislation, can be very helpful. The Nunavut Wildlife Management Board has made effective use of that practice in the past.

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NTI is mindful of the timetable under discussion for moving the draft NLUP forward towards a public hearing stage, and believes that a timely independent legal opinion is likely to facilitate, rather than delay, that effort.

NTI looks forward to the NPC's reply at its earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'James T. Arreak', with a stylized flourish at the end.

James T. Arreak,
Chief Executive Officer

C.c: David Rochette, Regional Director General, Nunavut Regional Office, Indigenous and Northern Affairs Canada
David Akeeagok, Deputy Minister, Executive and Intergovernmental Affairs, Government of Nunavut
Navarana Beveridge, Executive Director, Qikiqtani Inuit Association,
Paul Emingak, Executive Director, Kitikmeot Inuit Association
Gabriel Karlik, A/Executive Director, Kivalliq Inuit Association