THE COMPLICATED INTERSECTION OF POLITICS, ADMINISTRATIVE AND CONSTITUTIONAL LAW IN NUNAVUT'S ENVIRONMENTAL IMPACTS ASSESSMENT REGIME

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INTRODUCTION

In Canada, it is somewhat unique that environmental impacts assessment is carried out by both the federal and provincial governments, under separate but complimentary assessment regimes. Even more unique is the environmental impacts assessment regime which exists in the territory of Nunavut, Canada's youngest jurisdiction. What makes environmental impacts assessment most unique in Nunavut is the complicated intersection of land use planning, administrative rules and procedures derived from a constitutionally-protected modern day treaty—the *Nunavut Land Claims Agreement* (NLCA or Agreement),[2] and the infusion of fundamental, rudimentary or bare politics. Whereas the majority of jurisdictions in Canada base their environmental impacts assessment regimes on a commonly

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[2] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty The Queen in Right of Canada, 25 May 1993*, online: <www.collectionscanada.gc.ca/webarchives/20071124140800/http://www.ainc-inac.gc.ca/pr/agr/pdf/nunav_e.pdf> [*NLCA*]. See also the *Nunavut Land Claims Agreement Act*, SC 1993, c 29 (in which the *NLCA* is given legal force and effect) [*NLCA Act*].

developed and accepted framework that divides assessment based on jurisdiction and project type—and leave land use planning matters to provincial municipalities—the regime in Nunavut is based almost entirely on a process laid out in the NLCA and has as its aims the preservation of the Aboriginal rights and interests of Inuit beneficiaries protected by and under the Agreement. Upon closer scrutiny, however, it is apparent that the environmental impacts assessment and land use planning regimes prescribed in the NLCA, and supplemented by the federal *Nunavut Project Planning and Assessment Act* (NUPPAA),[3] are not only significantly different from other regimes in Canada but, also, that these very regimes which were designed or intended to promote and protect those rights and interests which Inuit obtained through negotiation and ratification of the NLCA may in fact undermine and fragment them. That is to say, the regimes may fragment those participatory rights as well as neighbouring or undergirding ones such as wildlife, hunting and fishing rights.

The fragmentation of these rights and interests is aptly illustrated by the NLCA process in which a Minister may grant a project proponent an exemption from land use plan conformity, land use conformity being the crucial first obstacle that nearly every resource development project in Nunavut must overcome.[4] By looking at three real-world examples: Baffinland Iron Mines Corp.'s *Mary River Iron Ore Project*, Areva Resources Canada Inc.'s *Kiggavik Project*, and the *Clyde River* case heard by the Supreme Court of Canada in November 2016,[5] this paper will canvass the Ministerial land use exemption process, illustrate the intersection of politics, administrative and constitutional law in Nunavut's impacts assessment regime, and explicate the manner in which Inuit rights and interests are being resultantly fragmented.

It is my thesis that while the NLCA provides to Inuit in Nunavut *participation* in decision-making processes respecting projects and their resulting environmental and socio-economic impacts, it does not provide final decision-making power itself, and that the absence of such decision-making power undermines—even dilutes—the very rights, interests, and culture which this participation and the NLCA was designed to promote and protect. Stated another way, the Inuit of Nunavut, by virtue of the NLCA, or lack thereof, seem to enjoy no greater right to accommodation under the duty to consult jurisprudence than do other Aboriginal groups in Canada. This circumstance is only further exacerbated where politics collides with administrative and constitutional law in Nunavut's environmental impacts assessment regime.

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[3] *Nunavut Planning and Project Assessment Act*, SC 2013, c 14, s 2 [*NUPPAA*].

[4] *NLCA*, *supra* note 2 at arts 11.5.11 – 11.5.13.

[5] *Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS)*, SCC Judgement Reserved, 2015 FCA 179, 474 NR 96 [*Clyde River*].

The legal issues explored here are not, however, the product of incomplete legal research, and are canvassed because of the practical effects they currently have in the territory and the possibility that they may produce serious, complex, and unnecessary litigation in the future.[6]

Equally relevant to the issues explored in this article is the absence of any statutory or policy guidance on the exemption process (and the other jurisdictional questions presented here) to help resolve the small but crucial ambiguities in the statutory text which are, in way or another, likely to have significant and long-term ramifications for the Inuit of Nunavut and the environment in Nunavut. As development opportunities and projects continue to emerge in Nunavut, the statutory interpretation problems have the potential to become acuter and to further manifest in different, non-mutually exclusive ways.[7]

This paper will proceed in five parts. I begin by providing a brief history of Nunavut and the NLCA in order to contextualize my analysis. Part II follow this with a brief summary of the environmental impacts assessment regime in Nunavut in order to properly situate the examination of land use plan exemptions. In Part III, I examine the land use conformity regime and then in Part IV I illustrate the problems with the examples mentioned earlier. In the final part, I offer some insight into why these emerging issues are important. Altogether, while the intersection of politics and administrative and constitutional law in an environmental impacts assessment regime is not unique to Nunavut, I aim to show that the Inuit rights and interests which the Nunavut regime was designed to protect are ultimately being fragmented in the regime's current incarnation.

I. BRIEF HISTORY OF NUNAVUT AND THE NLCA

In Inuktitut, the language of the Inuit in the eastern Arctic,[8] Nunavut means "our land." Nunavut, Canada's newest jurisdiction and territory, was created by several constitutional and statutory instruments. The *Nunavut Land Claims Agreement*, signed with apparent finality in 1993, settled the land claim of the Inuit of Nunavut[9]

[6] See e.g. *Nunavut Tunngavik Inc v Canada (AG)*, 2014 NUCA 02, 580 AR 75 [*Nunavut Tunngavik*].

[7] In this paper I argue that the issues which I discuss have the potential to produce serious, complex and unnecessary litigation in the future, but the possibilities that the ambiguities can be exploited by project proponents to maximize their chances of receiving an exemption, or that the ambiguities allow government officials to champion development to the detriment of the environment, or that the ambiguities allow the federal government to consistently override Nunavut or Inuit interests all have the potential to manifest as problems.

[8] *Official Languages Act*, RSNWT 1988, c O–1 (section 4 recognizes Cree, Chipewyan, Dogrib, Gwich'in, Inuktitut, North Slavery and South Slavery, French and English as the Official Languages of Nunavut), see also *Inuit Language Protection Act*, S Nu 2008, c17.

[9] The Inuit of Nunavut are to be distinguished from the Inuit of Nunavik, for example, and from other Inuit Peoples in Canada.

against the Government of Canada.[10] As such, it is considered a modern-day treaty and is constitutionally protected by section 35 of the *Constitution Act, 1982*.[11] Generally speaking, the Agreement sets out the various terms and conditions in which the Inuit of Nunavut agreed to surrender any future claim to Aboriginal title in Nunavut in exchange for title to defined parcels of land, rights respecting wildlife and natural resource management, among others.[12] The Agreement consists of 42 Articles, including ones devoted to, for example, wildlife, parks, conservation areas, land use, development, water rights, impact benefit agreements, among others, and is approximately 300 pages in length. The *Nunavut Land Claims Agreement Act* gives legal force to the NLCA,[13] and the *Nunavut Act*, legally creates Nunavut and gives it legal existence in Canada's constitutional order.[14] As a result, Nunavut legally joined the Canadian federal-provincial-territorial family in 1999.

Geographically, Nunavut consists of approximately 20% of Canada's land mass and demographically is inhabited by approximately 37,146 people comprising approximately 0.10% of the Canadian population as a whole.[15] Of this population, according to the Government of Nunavut Bureau of Statistics, approximately 81% are Inuit.[16] The majority of the land that comprises Nunavut is Crown land and is therefore under the dominion and jurisdiction of the federal government. Some lands have been ceded by the Crown to the territorial government, the Government of Nunavut, and are known as "Commissioner's Lands," and are essentially governed by the territorial *Commissioner's Lands Act*.[17] The Inuit of Nunavut own title to 19% of the land in Nunavut, including mineral rights to 2% of Nunavut.[18] This means that Inuit own title to, in similar fashion to a fee simple, surface rights to nearly twenty percent of the territory and only surface *and* subsurface rights in two percent. The lands which are owned by the Inuit of Nunavut are held in trust by Nunavut

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[10] *NLCA*, *supra* note 2 (the Preamble to the Agreement provides: "…the Parties agree on the desirability of negotiating a land claims agreement through which Inuit shall receive defined rights and benefits in exchange for surrender of any claims, rights, title and interests based on their assertion of an aboriginal title…"; see also *Nunavut Tunngavik*, *supra* note 6.

[11] *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[12] *NLCA*, *supra* note 2 at art 2.7.1.

[13] *NLCA Act*, *supra* note 2.

[14] *Nunavut Act*, SC 1993, c 28.

[15] Nunavut, Nunavut Bureau of Statistics, Stats Update: "Total Population by Inuit and Non-Inuit for Nunavut, Region and Community, 2001 to 2016, as of July 1", (Iqaluit: Bureau of Statistics, 2016) online: <www.stats.gov.nu.ca/Publications/Popest/Population/Nunavut%20and%20Canada%20Population%20Estimates%20StatsUpdate,%20Third%20Quarter%202016.pdf> [Stats Update].

[16] *Ibid*.

[17] *Commissioner's Land Act*, RSNWT 1988, c C–11.

[18] Nunavut Tunngavik Incorporated, "Explore the Potential of Inuit Owned Lands" (March 2011) *Nunavut Tunngavik Incorporated* (blog), online: <www.tunngavik.com/files/2011/03/lands_brochure.pdf>.

Tunngavik Inc. (NTI) and the Regional Inuit Associations (RIA) on behalf of and for the benefit of all Inuit in Nunavut,[19] and are generally known and referred to as "Inuit Owned Lands" or "IOL".

The *Nunavut Act* creates for Nunavut a Legislative Assembly similar in principle to that of a provincial legislature. The Legislative Assembly of Nunavut is populated with members elected by constituents in Nunavut's 22 ridings or constituencies. Although not entirely unique in Canada but nevertheless rare, members of the Legislative Assembly are not elected as representatives of any one or other Canadian political party (although they may be members of one) but essentially as independent members. The independent members of the Legislative Assembly select among themselves who should be designated a member of the Executive Council (the equivalent of the Governor in Council or Cabinet) and who, ultimately, will be the Premier of Nunavut. Once selected, the Premier of Nunavut assigns the various government portfolios to the various members who have been selected to serve on the Executive Council. Overall, the intent of the governance structure is to provide the framework for a consensus government.[20]

The Government of Nunavut is not, however, composed as an ethnic government of the Inuit of Nunavut, though Article 23 of the NLCA is devoted to ensuring employment for Inuit in Government of Nunavut positions.[21] Rather, the Government of Nunavut is a public government and is constitutionally obligated to act like any other public government in Canada. Nevertheless, it can be said, to some degree at least, that the Inuit of Nunavut enjoy some sort of self-determination via the territorial government.[22]

II. SUMMARY OF IMPACTS ASSESSMENT REGIME

The preamble to the Agreement provides, in part, that:

> Inuit shall receive defined rights and benefits in exchange for surrender of any claims, rights, title and interests based on their assertion of an aboriginal title…and...have negotiated [the] Agreement based on and reflecting…certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making

[19] *Ibid* ("The Regional Inuit Associations (RIAs) – Kitikmeot, Kivalliq and Qikitani – were designated as the Inuit Organizations in which surface title to Inuit Owned Lands in each representative region would vest. The RIAs administer access through the issuance of Land Use Licences and Surface Leases as well as other forms of authorization. Where subsurface title to Inuit-owned lands is held by Inuit, it is vested in NTI. Inuit Owned Lands are held in trust by NTI and the RIAs on behalf and for the benefit of all Inuit.").

[20] See David M Brock, "Power in Consensus Government", *Policy Magazine* (July/August 2014), online: <policymagazine.ca/pdf/8/PolicyMagazineJuly-August-14-Brock.pdf>.

[21] *NLCA*, *supra* note 2 at art 23.

[22] See Jack Hicks & Graham White, "Nunavut: Inuit self-determination through a land claim and public government?" in Jens Dahl, Jack Hicks & Peter Jull, eds, *Nunavut: Inuit Regain Control of Their Lands and Their Lives* (Copenhagen: International Work Group for Indigenous Affairs, 2000) 30 at 117.

> concerning the use, management and conservation of land, water and resources, including the offshore…[23]

Of particular interest and relevance here, in the present context, is the phrase "...of rights for Inuit *to participate* in decision-making concerning the use, management and conservation of land, water and resources..."

The rights for Inuit to participate in decision-making concerning the use, management, and conservation of land, water and resources, including the offshore manifests most vividly in Article 11 of the NLCA, devoted to land use planning, and Article 12 of the NLCA, devoted to development impact. Both Articles make up the most significant parts of the environmental impacts assessment regime in Nunavut. I canvass both by explicating how a project in Nunavut comes to fruition, or to the contrary, does not come to fruition, once having undergone the environmental impacts assessment process outlined in the NLCA and, following that, to a limited degree, comparatively in NUPPAA.[24] More specifically, I aim to illustrate how the rights of Inuit to "participate" in *decision-making* concerning the use, management and conservation of land, water and resources are, in current operation effectively circumscribed.[25] Stated another way, while Inuit have the right to participate in decision-making, the actual power to decide which projects in Nunavut come to fruition and which do not, at law, rests with Ottawa, not with the Inuit of Nunavut. That being the case, the neighbouring rights which the regime is meant to protect, such as those pertaining to wildlife, for example, in turn, are also—perhaps inevitably—fragmented and diluted.

The environmental impacts assessment process in Nunavut is trigged when a project proponent (proponent) develops a project proposal (proposal). The proposal must adhere to a specific set of criteria set out by the Nunavut Impact Review Board (NIRB or Board), under the NLCA, and in a similar fashion, if applicable, to certain criteria specified under NUPPAA.[26] The first step of the process requires the proponent to submit the proposal to the Nunavut Planning Commission (NPC or Commission), the administrative body responsible for land use planning in Nunavut. In contrast, the NIRB is the administrative body responsible for screening and reviewing project proposals for eco-systemic and socio-economic impacts in Nunavut.[27] Both are known in Nunavut as Institutes of Public Government (IPG), as

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[23] *NLCA*, *supra* note 2 at Preamble (this part of the preamble states similarly for wildlife harvesting and management: "to provide Inuit with wildlife harvesting rights and rights to participate in decision- making concerning wildlife harvesting…").

[24] *NUPPAA*, *supra* note 3.

[25] *NLCA*, *supra* note 2 at art 1 defines resources as "…for the purpose of Articles 25 to 27, coal, petroleum, precious and base metals and other naturally occurring substances that can be mined, but does not include specified substances." Notably it does not include wildlife or wildlife habitat.

[26] *NUPPAA*, *supra* note 3, was only declared in force on July 9, 2015 and thus is not applicable to very many current projects in Nunavut.

are the Nunavut Water Board (NWB), the Nunavut Wildlife Management Board (NWMB), and the Nunavut Surface Rights Tribunal (NSRT).

Upon receipt of the proposal by the NPC from the proponent, the Commission must determine whether the project proposed in the proposal conforms to an applicable land use plan. While the NPC has, for many years now, been developing a Nunavut Draft Land Use Plan (essentially a Nunavut-wide land use plan), it has not yet completed it.[28] The only land use plans currently operational in Nunavut are the *North Baffin Region Land Use Plan* (NBRLUP) and the *Keewatin Regional Land Use Plan* (KRLUP).[29] If the project proposed by a proponent in the proposal is not geographically located in an area which is covered by either of these two existing land use plans, the NPC will confirm that no land use plan exists that is applicable to the project and simply forward the proposal to the NIRB for an impacts assessment screening/review. If, however, a land use plan is applicable to the project proposed in the proposal, then the NPC will make a determination as to whether or not the proposed project conforms to that land use plan. Should the NPC determine that the proposal does *not* conform to the applicable land use plan the NPC will *not* forward the proposal to the NIRB.[30] Should the NPC determine that the project is not in conformity with the applicable land use plan, a number of options become available to the proponent to overcome the non-conformity or negative conformity determination. I will discuss these options in greater detail later, and one of them is, in fact, the precise focus of this article: ministerial exemptions.[31] Should, on the other hand, the NPC determine that the project proposed in the proposal conforms to the applicable land use plan it will forward the proposal to the NIRB.[32]

Upon receipt of the proposal by the NIRB from the NPC, the NIRB will undertake an initial assessment of the proposal and determine an appropriate method of screening/review for the proposal.[33] First, it may (for a variety of reasons but

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[27] See *NLCA*, *supra* note 2 at art 12.2.3. The extent to which NIRB can impose socio-economic mitigation requirements is very limited.

[28] *NLCA*, *supra* note 2 at art 11.5.1 ("A Nunavut land use plan shall be formulated by the NPC in accordance with Section 11.5.4 to guide and direct short term and long term development in the Nunavut Settlement Area. Regional or sub-regional components of the land use plan shall be implemented where approved pursuant to Section 11.5.9.").

[29] See Nunavut Planning Commission, "Approved Plans," (March 2017), *Nunavut Planning Commission* (blog), NPC online: <www.nunavut.ca/en/approved_plans>.

[30] *NLCA*, *supra* note 2 at art 12.3.4 ("NIRB shall not screen project proposals that are not in conformity with land use plans, unless an exemption has been received under 11.5.11 or a variance has been approved under Section 11.5.10.").

[31] The other options open to the proponent are to seek a minor variance or to seek a Land Use Plan Amendment.

[32] *NLCA*, *supra* note 2 at art 12.3.1 ("Where the NPC determines, pursuant to Section 11.5.10, that a project proposal is in conformity with the land use plans, or a variance has been approved, the NPC shall, subject to Sections 12.3.2, 12.3.3 and 12.4.3, forward the project proposal with its determination and recommendations to NIRB for screening.").

commonly because a proposal only has minor or minimal impacts) determine that the proposal does not require review/screening and simply forward its recommendation to the Minister for approval.[34] Because the vast majority of land in Nunavut is Crown land, the majority of projects take place on Crown land and therefore require a federal land use permit, the "Minister" tends to be the federal Minister of Indigenous and Northern Affairs Canada (INAC). But not all projects do, in fact, take place on Crown land—some take place on IOL, and in those cases, the proponent is required to obtain a land use permit from the RIA. Yet, NIRB still would send its recommendations to the INAC Minister. This raises a related but subsidiary question to the one primarily addressed here; that subsidiary question being, namely how does the INAC Minister attract or gain jurisdiction to receive the recommendation and on what jurisdictional basis decide whether a project should proceed or not.[35] As will become clear in this article, much hinges upon the ambiguity of the meaning of "the Minister" and the phrase "the jurisdictional responsibility for authorizing a project to proceed." These ambiguities, though subtle, portend serious consequences if left unaddressed and it is the purpose of this paper to explain them.

Returning to the initial assessment conducted by the NIRB upon receipt of a proposal from the NPC, the NIRB may, as a second option, send the proposal to a federal environmental assessment panel for a Part 6 review.[36] Part 6 reviews are conducted differently than Part 5 reviews and for the sake of efficiency, are not discussed here at this juncture.

Third, the NIRB may determine that a Part 5 review is required, which consists of a formal review by the NIRB itself in which the proponent explains the project in greater detail and various governmental, non-governmental and community groups, including the Inuit of Nunavut, represented either by NTI or an RIA (or both), intervene in the review process and are given the opportunity to make submissions on matters that are of concern to them.[37] Part 5 review is the most common type of project review in Nunavut. Upon completion of the review, the NIRB makes a recommendation to "the Minister having the jurisdictional responsibility for authorizing a project to proceed"[38] as to whether the project should

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[33] *NLCA*, *supra* note 2 at art 12.4.4. See also Article 12.3.2 excludes certain projects from screening altogether, but if the NPC has concerns about cumulative impacts, it may refer the proposal to NIRB despite 12.3.2.

[34] *Ibid* at art 12.4.4.

[35] Any of the ambiguities that may exist with respect to the interpretation of Article 12 provisions, could be easily resolved if both the territorial and federal governments, per Article 12.1., appointed and/or enumerated specific Ministers "to perform all functions assigned to 'the Minister.'" A similarly easy solution is not, however, available under Article 11.

[36] *NLCA*, supra note 2 at art 12.4.1. See also *NUPPAA*, *supra* note 3, s 2, s 161

[37] *NLCA*, supra note 2 at art 12.4.2

[38] *Ibid* at art 12.1.1

or should not proceed. If the NIRB's recommendation is that the project should proceed, the NIRB typically includes terms and conditions which are to be added to the project certificate which enables the project to move forward.

Upon receipt of the NIRB's recommendation following the impacts review assessment conducted by the NIRB in a Part 5 review, there are two options open to "the Minister." The Minister may accept the NIRB's recommendation that the project should or should not proceed, whatever the case may be, and such acceptance by the Minister ends the initial environmental impacts review assessment process.[39] If the project is recommended to proceed, the proponent is legally obligated to comply with the terms and conditions contained in the project certificate which may and often does include ongoing environmental and wildlife monitoring and impacts mitigation requirements, among other requirements. In contrast, the NLCA prescribes specific reasons under which the Minister may reject the recommendation that the project should proceed or should not proceed.

For example, if the NIRB determines that the project should proceed, the Minister may reject that determination on the basis that the proposal is not in the national or regional interest.[40] It is important to note that the Minister is obligated to consider the project as it relates not only to the regional interest, but also to the *national* interest. This is interesting for the reason that the NLCA is a treaty which settled the land claims of the Inuit, one of Canada's Aboriginal Peoples. One must wonder why the Minister would be obligated to consider the national interest, when it may be different from or inconsistent with the regional interest, especially given that the Agreement is meant to settle the claims of and grant rights, specifically, to the Inuit. Moreover, one would also have to wonder what the standard by which to determine what is in the national interest is and how such a standard is in fact determined. Finally, one would also wonder in a territory as vast and as sparsely populated as is Nunavut, what exactly the regional interest is or might be, and whether the regional interest ought to be read as synonymous with Inuit intra-territorial and/or territorial interests.[41]

The Minister may also reject the NIRB's recommendation that the project should proceed on the basis that the terms and conditions contained in the recommendation are more onerous than necessary or insufficiently mitigate the ecosystemic and socioeconomic impacts, or, on the basis that the terms and conditions are so onerous that they would undermine the viability of a project that is, again, in the national or regional interest.[42] In such situations, NIRB is expected to reconsider its recommended terms and conditions based on the Minister's reasons for rejecting the recommendation.[43]

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[39] *Ibid* at art 12.5.7(a).

[40] *Ibid* at art 12.5.7(b).

[41] These are questions which I undertake elsewhere in another paper.

[42] *NLCA*, *supra* note 2 at art 12.5.7(c).

[43] *Ibid* at art 12.5.7(c).

Similarly, where NIRB recommends that the project should *not* proceed, the Minister may reject that recommendation on the grounds that the project should have been approved because of its importance to, again, the national or regional interest.[44] In such a situation, the Minister will refer the report contained in the recommendation back to NIRB to consider terms and conditions which should be attached to the project's certificate.[45]

Finally, where the Minister determines that NIRB's report is deficient with respect to ecosystemic and socioeconomic issues, the Minister may refer the report back to NIRB for further review or public hearings.[46] In such a situation, upon such further review or hearings, NIRB is expected to submit a revised recommendation to the Minister, and the Minister must again accept or reject that recommendation in accordance with the provisions above.[47]

What is particularly noteworthy about all of these provisions is that the ultimate decision as to whether a project proposed in Nunavut will proceed lies with a federal Minister in Ottawa, and not with those Inuit of Nunavut who are beneficiaries of the Agreement, or with the Government of Nunavut. In other words, by design, the NLCA leaves the final decision about whether a project will proceed or not to Ottawa. In the whole regime, this is not the only power which lies with Ottawa. But we are left wondering, in the absence of a specific Minister appointed to do so, which Minister in Ottawa properly exercises the powers assigned to the "the Minister" in Article 12.[48]

NUPPAA, or the *Nunavut Planning and Project Assessment Act*, is, as its preamble states, an act "respecting land use planning and the assessment of ecosystemic and socioeconomic impacts of projects in the Nunavut Settlement Area."[49] NUPPAA purports to fill certain gaps contained in the NLCA in respect of land use planning and development, but in the event of an inconsistency between the NLCA and NUPPAA, the NLCA prevails.[50] The NUPPAA came into force in July 2015. Sections 104 to 108 of NUPPAA provide very similarly as do the NLCA

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[44] *Ibid* at art 12.5.7(d).

[45] *Ibid*.

[46] *Ibid* at art 12.5.7(e).

[47] *Ibid*.

[48] Again, as I have noted elsewhere in this paper, any interpretation problems with respect to "the Minister," could be resolved by either or both levels of government appointing/enumerating a specific Minister to exercise those powers. The problem of determining jurisdiction would be diminished, but not entirely extinguished.

[49] *NUPPAA*, *supra* note 3, preamble.

[50] *NLCA*, *supra* note 2 at art 12.2 ("Where there is any inconsistency or conflict between any federal, territorial and local government laws, and the Agreement, the Agreement shall prevail to the extent of the inconsistency or conflict. Cite to inconsistency provision in NUPPAA.").

provisions discussed above, but they are not exactly the same. It is not my intention to comprehensively focus on the similarities or dissimilarities between these two instruments at this instance, and will return to the NIRB process again later. Instead, in the next section I focus on land use planning, land use planning conformity determinations and land use planning exemptions in the NLCA, and note similarities to NUPPAA where relevant to the issues under examination here.

III. LAND USE PLAN CONFORMITY

The NLCA provides that:

> …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…[51]

We should note that this Article does not explicitly refer to land, land use, environmental concerns, wildlife, resource extraction, sustainable development, or anything related to land use planning or development impact; however, it does provide that "special attention shall be devoted to protecting and promoting the existing and future well-being of Inuit and Inuit Owned Lands." Can the promotion and protection of those areas of concern be inferred from that part of the provision which states its purpose is "…to protect and promote the existing and future well being of those persons ordinarily resident and communities of the Nunavut Settlement Area…or…the future well-being of Inuit and Inuit Owned Lands"? For the time being, we must infer this to be the case based on the way the NLCA is organized. In essence, we must infer that NPC's goals in making land use planning conformity determinations are, if nothing else, animated by the desire to protect land, wildlife, and the interests of Inuit; however, the existing and future well being of those *persons* ordinarily resident in Nunavut are also goals of land use planning in Nunavut.[52] Where the NPC has determined that a proposal is not in conformity with an applicable land use plan, three options in response to that determination become available to a proponent. The purpose of this part is to explicate these options and bring the interpretive problems into focus.

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[51] *NLCA*, *supra* note 2 at art 11.2.1(b) [emphasis added] (it should be noted that the Nunavut Settlement Area is slightly geographically different than Nunavut, but such a discussion is not needed here; also not just Inuit, but persons, meaning non-beneficiaries as well).

[52] The NLCA does not define "person," nor does it distinguish between persons and aboriginal persons, or Inuit. That being the case, the "existing and future well being of those persons ordinarily resident in Nunavut" should be read, it seems, to include Inuit existing and future well being.

A. MINOR VARIANCES

The first of these options is a minor variance. As discussed earlier, upon receipt and review of a proposal, the NPC is required to determine whether a proposal is in conformity with an applicable and existing land use plan and must forward the proposal with its determination and any recommendations to the "appropriate federal and territorial agencies"—namely the NIRB.[53] If the NPC determines that a proposal is not in conformity, then provided the applicable existing land use plan authorizes it, the NPC may approve a minor variance to the applicable existing land use plan thereby allowing the proposal to be forwarded to the NIRB.[54] Typically, the proponent applies for the minor variance—that is, again, if the land use plan authorizes the NPC to issue minor variances.[55]

B. AMENDMENTS

Another option available to a proponent and, interestingly, to others such as the Government, a Designated Inuit Organization (DIO), or any person affected by a plan, is to propose to NPC an amendment to the applicable existing land use plan.[56] It is remarkable that the standing requirement to request an amendment is minimal: "any person affected by a plan" may propose such an amendment. Naturally, the question will arise as to who is "any person affected by a plan?" and whether the answer to that question would include a resident of say, Victoria, BC, or Halifax, NS, for example, and whether that answer also includes corporations as persons. It does not seem unreasonable to conclude so if "the interests of all Canadians" are to be "taken into account" in land use planning conformity determinations. While the use of the word "person" in these provisions presents numerous statutory interpretation questions such as these, more detailed answers to those questions and rationales for them must be left for another day.

Nevertheless, NPC must consider the proposed amendment and, if it deems a review appropriate, review the proposal publicly.[57] Such a public review gives numerous stakeholders the opportunity to comment upon the amendment application. Upon completion of the proposed amendment review process, the NPC is, according to Article 11.6.3, required to make a recommendation to the Minister of Indigenous Affairs and Northern Development *and* the Territorial Government Minister responsible for Environment whether (a) the proposed amendment be rejected in

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[53] *Ibid* at art 11.5.10.

[54] *Ibid*.

[55] It is not clear if the two land use plans currently in effect in Nunavut do provide as such, and this question is the subject of discussion elsewhere in another paper.

[56] *NLCA*, *supra* note 2 at art 11.6.1.

[57] *Ibid* at art 11.6.2.

whole or in part; or (b) the proposed amendment be accepted, in whole or in part.[58] Article 11.6.3 specifically names these Ministers with respect to land use plan amendments, but can be said to anomalously do so when compared to the provision respecting land use plan exemptions found in Article 11.5.11. These options in 11.6.3, however, present the first illustration of the intersection between politics and law in Nunavut's impacts assessment regime, for two reasons.

First, land use plans are approved by these Ministers in the first place.[59] Whether the will exists to amend a land use plan which a Minister had already earlier approved in order to bring a given proponent's proposal into land use conformity is distinctly a political, not a legal question—the NLCA evidently permits it.

Second, this political question is further complicated where the Minister of one government possesses such will, and the Minister of the other government does not. Stated more simply, the NLCA provides little guidance on what happens if one Minister wishes to reject the recommendation and one wishes to accept it. The answer to this question is not clear, there is no statutory or policy guidance available, and we must, therefore, it seems, conclude that the signatories of the NLCA intentionally left resolutions of such situations to be sorted out politically.

C. LAND USE PLAN EXEMPTIONS

With the third option, which is the lynchpin of this paper, the problematic intersection between politics and law in Nunavut's impacts assessment regime is plainly displayed. NLCA Article 11.5.11 provides that where "the NPC has determined that a project proposal is not in conformity with [a land use] plan, the proponent may apply to the appropriate Minister for exemption."[60] Furthermore, upon receipt of such an exemption application, the Minister may *exempt the proposal from conformity* with the plan and will refer it to NIRB for screening.[61] While the rule sounds simple, in application the NLCA provides next to no guidance as to who the "appropriate Minister" is at law. Similarly, there are no policies or policy papers, territorial, federal or otherwise, which provide any guidance on this issue. It is also not clear why or by what rationale Ministers were specifically named in Article 11.6.3, but not so in Article 11.5.11. Where the amendment process requires the amendment application to be submitted to enumerated Ministers of both the federal and territorial governments, there is no such requirement here in the exemption application process. A number of complicated legal questions are presented by this

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[58] *Ibid* at art 11.6.3.

[59] *Ibid* at art 11.5.5 ("Upon completion of the process in Section 11.5.4, the NPC shall submit the draft plan as revised along with a written report of the public hearings to the Minister of Indian Affairs and Northern Development and the Territorial Government Minister responsible for Renewable Resources. The NPC shall also make the revised draft land use plan public.").

[60] *Ibid* at art 11.5.11.

[61] *Ibid* at art 11.5.11 (Additionally, "Nonconforming project proposals shall not be sent to NIRB until such exemption is obtained or a variance has been approved.").

interpretation issue, and in the next part I illustrate with examples the true extent of the problems these unclear answers create.

IV. IDENTIFICATION OF THE PROBLEM(S) BY EXAMPLE

Three different examples illustrate what I have asserted is, first, a complicated intersection of politics and law in Nunavut's impacts assessment regime and, second, the ways in which—despite participation in the process—the rights of Inuit of Nunavut are fragmented by such a regime. The first example is Baffinland Iron Mines Corp.'s *Mary River Iron Ore* project; the second is Areva's *Kiggavik Project*; and the third is the *Clyde River* case heard by the Supreme Court of Canada in November 2016, respecting seismic testing off the coast of Baffin Island, Nunavut.

A. BAFFINLAND IRON MINES CORP AND THE MARY RIVER IRON ORE PROJECT

Baffinland Iron Mines Corp. (Baffinland) was granted a project certificate for its Mary River Iron Ore project (Mary River) on December 28, 2012.[62] The project is situated on Crown land and mines iron ore from a site at Mary River, which is located on northern Baffin Island, an inland off of Baffin Bay. Baffinland's initial project consisted of mining iron ore from the reserve at "Deposit No. 1," at a production rate of eighteen million tonnes per year.[63] There are over nine high-grade lump and fine iron ore deposits that can be mined, crushed and screened into marketable products and then shipped through a dedicated port facility at the project site—no processing is required before shipping the iron ore to markets in Europe.[64] Baffinland has adopted a phased development strategy for the project, which Baffinland claims lowers the project's overall environmental impact.[65]

The first major amendment to the project was the "Early Revenue Phase" (ERP). On April 29, 2014, the Minister of AAND (Aboriginal Affairs and Northern Development, now Indigenous and Northern Affairs Canada (INAC)), approved the positive recommendation made by NIRB following the Article 12, Part 5 process outlined above in Part II. The ERP involves the seasonal shipping of millions of tonnes of iron ore from Milne Inlet, which is a small body of water connected to

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[62] Nunavut Impact Review Board, Public Registry, "NIRB Project Certificate [No.: 005]", (Iqaluit: Nunavut Impact Review Board, 2012), online: <www.nirb.ca/app/dms/script/dms_download.php?fileid=286442>.

[63] Baffinland Iron Mines Corporation, "Location and Project History" (March 2017), *Baffinland Iron Mines Corporation* (blog), online: <www.baffinland.com/the-project/location-and-project-history/?lang=en>.

[64] *Ibid*.

[65] *Ibid*.

Eclipse Sound and ultimately Baffin Bay.[66] The Minister also approved NPC's recommendation to amend the North Baffin Regional Land Use Plan (NBRLUP) to accommodate the seasonal shipping.

The second (proposed) amendment to the project was year-round shipping from Milne Inlet, which would have involved ice-breaking the frozen parts of Baffin Bay and the Davis Strait during the winter months.[67] The proposal was sent by Baffinland to NPC for land use conformity determination, and the NPC issued a negative conformity determination.[68] In light of the negative conformity determination, Baffinland applied for a Ministerial exemption from the NBRLUP; however, that application to the INAC Minister was submitted before NUPPAA was declared in force, and was thus submitted under the NLCA.[69] NPC issued a negative conformity determination because the effects of ice-breaking and year-round shipping did not conform to the regional land use plan.[70] Stated another way, the NPC issued a negative conformity determination because the effects of year-round shipping would be harmful to wildlife.[71] Prior to the exemption application, Baffinland had first sought an amendment to the NBRLUP, but the NPC declined to adjudicate upon the submission on the basis that it was inadequately funded by Ottawa.[72] NPC's refusal to adjudicate upon the submission presents interesting administrative law questions, but is left for discussion elsewhere.[73]

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[66] Eclipse sound is connected to Baffin Bay, at the northern end of Baffin Island.

[67] I emphasize "proposed" here because final approval of the amendment had not yet been perfected, but as I discuss later, Baffinland withdrew its year-round shipping proposal.

[68] Nunavut Planning Commission, "Negative Conformity Determination Recommendation: Baffinland Iron Mines Corporation", (Iqaluit: Nunavut Planning Commission, 2015), online: <www.nunavut.ca/files/CD/BIMC%20Amendment%20Mary%20River%20Project%20Phase%202%20NWB%202AM%20MRY1325%20DFO%2007-NCDR%20Feb15.pdf>. See also Nunavut Planning Commission, "Negative Conformity Determination Recommendation from NPC staff for Baffinland Iron Mines Corporation Phase 2 Project Proposal", (Iqaluit, Nunavut Planning Commission, 2015), online: <www.nunavut.ca/en/news/2015-negative-conformity-determination-recommendation-npc-staff-baffinland-iron-mines-corporati> [BIMC Negative Conformity Determination].

[69] It stands to reason that the proposal would have been "grandfathered" into the NLCA process rather than the NUPPAA process given that the project had started well before NUPPAA was declared in force—this, however, is another question to which the answer is provided elsewhere. See Letter from Erik Madsen, Vice President if Baffinland, to Bernard Valcourt (15 May 2015) online: <www.nunavut.ca/files/2015-05-21%20BIM%20Ltr%20Re%20Proposed%20Mary%20River%20Phase%202%20Application%20for%20Exemption.pdf >.

[70] Nunavut, Nunavut Planning Commission, "North Baffin Regional Land Use Plan", (Iqaluit, Nunavut Planning Commission, 2000) at arts 3.2.1., 3.3.1. online: <www.nunavut.ca/files/North%20Baffin%20Regional%20Land%20Use%20Plan.pdf>.

[71] BIMC Negative Conformity Determination, supra note 68.

[72] See Letter from Erik Madsen, Vice President of Baffinland, to Hunter Tootoo (28 April 2015) online: <www.nunavut.ca/files/2015-0428%20BIM%20Ltr%20to%20NPC%20Re%20Amendment%20Application%20Process.pdf>. It is interesting to note that in this letter, Baffinland explained to the then Chairperson of the NPC, Hunter Tootoo, that no formal process by which to submit an amendment application appeared to exist); See Letter from Hunter Tootoo to Erik Madsen (5 May 2015) online: <www.nunavut.ca/files/2015-05-05%20Commission%20Response%20to%20BIM%20re%20Amendment%20Process.pdf>:

As discussed earlier, NLCA Article 11.5.11 provides that exemption applications are to be submitted to the "appropriate Minister," and thus the question of *why* Baffinland submitted the exemption request to the INAC Minister (and not some other Minister) arises.[74] In other words, why is or would the INAC Minister be the "appropriate Minister" in respect of *this* exemption application? The answer to this question, if there is one, involves the statutory interpretation of a constitutionally protected treaty, as it relates to an administrative procedure prescribed within that treaty, which is what I undertake in what follows. I will discuss four possible interpretations below.

First, Article 1 of the NLCA defines Minister as "…a Minister of the Government of Canada or a member of the Executive Council appointed as [a Minister of the Government of Nunavut], as the context requires, responsible for the subject matter referred to…"[75] This definition reveals that "the appropriate Minister" under Article 11.5.11 is determined by establishing who, as "the context requires," the Minister "responsible for the subject matter referred to" is. But, this definition does not tell us what "subject matter" means.[76] We are also uncertain which or what

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> At present the Commission is in receipt of other applications and is committed to processing them on a timely basis in the order in which they have been received. Consequently, the Commission is unable to undertake any new processes not planned, budgeted for, and approved by the federal government in the Commission's previous fiscal year. The Commission would be pleased to work with BIMC if BIMC chooses to proceed with an amendment application. The Commission also would welcome further dialogue on the issues raised in your April 28, 2015 letter. However, please be aware that unless supplementary funding is advanced by Aboriginal Affairs & Northern Development Canada pursuant to our current dialogue with them on that topic, the Commission may be required to prepare a budget and work plan for BIMC's amendment application and submit them to the federal government for the 2016/2017 fiscal year.

See also, "Nunavut premier Peter Taptuna backs Baffinland in regulatory dispute: Taptuna concerned dispute over jurisdiction on shipping question puts jobs, spinoffs at risk", *CBC News* (1 June 2015), online: <www.cbc.ca/news/canada/north/nunavut-premier-peter-taptuna-backs-baffinland-in-regulatory-dispute-1.3094804>.

[73] The dispute between Nunavut Planning Commission and The Minister of Indigenous and Northern Affairs resulted in an application for judicial review by NPC, which was later withdrawn by the Nunavut Planning Commission. See Federal Court Registry, *Proceedings Queries*, (Ottawa, Federal Court Registry, 2015), online: <cas-cdc-www02.cas-satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=T-1773-14&select_court=T>.

[74] *NLCA*, *supra* note 2 at art 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.").

[75] *NLCA*, *supra* note 2 at art 1.

[76] *Cf Wheatland Industrial Park Inc, Re*, 2013 BCSC 27:

> Subject matter jurisdiction refers to the power of a particular court to decide a particular type of case. The Ontario Superior Court, as a court of general jurisdiction, has the *prima facie* power to decide every type of case, provided the statement of claim discloses a reasonable cause of action. Only by clear and explicit

"context" the definition is referring to, but it does not seem unreasonable—perhaps even necessary—to assume that "context" relates to "subject matter referred to." Such a reading only moves us minimally ahead in our understanding of the problem.

Interestingly, Article 12 of the NLCA, devoted to Development Impact, provides its own definition of Minister. It provides as follows: "'Minister', unless otherwise specified, means the federal or territorial Minister having the jurisdictional responsibility for authorizing a project to proceed; however, the Government of Canada and Territorial Government may, within their respective jurisdictions, designate a single Minister to be responsible for NIRB and to perform all functions assigned to 'the Minister'…"[77] Neither government has assigned a Minister to perform this function and if they each did, any interpretation questions would ostensibly easily resolved by simply having all Article 12 matters submitted to that so-named Minister. That said, even if such a Minister had been appointed by either government (or was now appointed), it is not clear whether the Article 12 definition would apply in interpreting an Article 11 provision, given that the NLCA provides a global definition in Article 1 which ought to apply to Article 11 interpretation questions.

Nevertheless, applying the Article 12 definition, it might be presumed that the INAC Minister had jurisdiction to receive Baffinland's exemption request because the existing project in respect of which the exemption application was made is situated on Crown land and therefore is a *subject matter* of federal jurisdiction (i.e. is "jurisdictional responsibility for authorizing a project to proceed"). In contrast, other projects in Nunavut have taken place on territorial Commissioner's Lands, and therefore by this logic, it would seem that a territorial Minister would have jurisdiction to receive the exemption request if the project were situated on Commissioner's Lands. As noted earlier, some projects take place on IOL. But it is still not clear how "jurisdictional responsibility" would be determined in such cases. Based on past practices, the most consistently applied and accepted rationale for determining "appropriate Minister" or "jurisdictional responsibility" is land tenure.[78] While it is generally the most consistently applied rationale, as I hope to show it ought not to be seen as necessarily absolute, let alone correct.

Returning to NLCA Article 1's definition of Minister, and reading it in conjunction with provision 11.5.11 to posit a second possible interpretation, the phrase "subject matter referred to" (in the Article 1 definition) can be interpreted to refer to the subject matter of the proposal—that is, what is *this* project proposal about, what is its *subject matter*? In the Baffinland example, the larger project is about mining iron ore at Mary River, but the specific part of the proposal which was determined by NPC not to conform to the applicable land use plan, had as its subject

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> limitation may the power of the Superior Court to decide a particular type of case be curtailed.

But we are not dealing here with the question of a court's competence based on subject matter jurisdiction.

[77] *NLCA*, *supra* note 2 at art 12.

[78] See e.g. *Territorial Lands Act*, RSC, 1985, c T–7 and *Territorial Lands Regulations*, CRC, c 1525.

matter, year-round shipping of iron more. That then would appear to make the impugned part of the proposal about shipping and navigation, which is, exclusively a federal matter, with jurisdictional responsibility falling to the federal Transportation Minister, not the INAC Minister.[79] On this logic, it would seem that the federal Transportation Minister should receive the exemption application instead of the INAC Minister. A reviewing court, however, would likely give deference to the federal government and find that, from a federal perspective, several ministers, jointly and/or severally, constitute the "appropriate Minister" making the decision respecting the exemption application and thus no legal error would be extant despite submission of the exemption application to the INAC Minister.[80] Even so, such a conclusion is nevertheless insufficient to justify, legally, why jurisdiction lies with the INAC Minister in this case.

As a third possible interpretation, if we note that the proponent, Baffinland, applied to the federal INAC Minister (and not to the territorial or another federal Minister), another way then, perhaps, to determine proper ministerial jurisdiction might be to look at the grounds upon which the proponent seeks the exemption, and deciding based on those specified grounds which Minister—federal or territorial—has "jurisdictional responsibility" based on the "subject matter referred to…". As we have seen, Article 11.5.11 states: "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."[81] If a territorial or federal Minister lacked the jurisdiction to decide the exemption application, it would be incumbent upon that Minister to decline adjudicating upon it. It is not clear if it would be incumbent upon the Minister rejecting the application on the basis of an absence of jurisdiction to forward the request to another Minister, but the Minister to whom the application is referred would then be forced to answer the question of who the "appropriate Minister" is. It might, however, also make sense, to some extent at least, in an example where a project that has already passed part 5 screening by NIRB, such as this example, that the same Minister which approved the NIRB's recommendation that an initial project certificate should issue, should also be the Minister which allows or denies exemption applications made by proponents in subsequent project proposals respecting that project.[82] In the Baffinland example, that then would be the INAC Minister. But the question of whether the Minister had the jurisdiction in the

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[79] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 at s 91(10), reprinted in RSC 1985, Appendix II, No 5.

[80] See James WJ Bowden & Nicholas A. MacDonald, "Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand and Australia" (2012) 6 J Parliamentary & Pol L 365. See also Mark Schacter & Philip Haid, "Cabinet Decision-Making in Canada: Lessons and Practices" (April 1999) Institute on Governance, online: <iog.ca/wp-content/uploads/2012/12/1999_April_cabinet21.pdf>.

[81] *NLCA*, *supra* note 2 at art 11.5.11 [emphasis added].

[82] *Ibid* at art 11.5.8: "Upon accepting a plan, the Minister of Indian Affairs and Northern Development shall seek Cabinet approval and commitment, and the Territorial Government Minister responsible for Renewable Resources shall seek approval and commitment of the Executive Council."

first place still lingers because NIRB is faced with a similar problem: did it make its recommendation to the correct (or "appropriate") Minister? In other words, did NIRB furnish its report to the INAC Minister, and not some other Minister, solely because the Mary River project takes place on Crown land, and if so, was that correct at law?

In this example, and proffering a fourth possible interpretation, the question also arises as to whether the Government of Nunavut could assert responsibility or jurisdiction as the "appropriate Minister" based on wildlife management, given that NPC found that the proposal did not conform to the applicable land use plan because of the deleterious effects and disturbance year-round shipping would have on and to wildlife. Yet, grounding an argument on the basis of wildlife would have to be based on jurisdiction over wildlife (which the Government of Nunavut has), and presumably not on the *effects* the proposal would have on wildlife. In other words, wildlife is not the *subject matter* of the proposal and so it seems that such an assertion by the Government of Nunavut could not be properly—or at least could only be tenuously—anchored at law.

As noted earlier, NUPPAA was designed and enacted to fill any purported gaps in the impact assessment regime created by the NLCA, but it too is not helpful in resolving the question of who the "appropriate Minister" is.

Returning, nonetheless, to NUPPAA which, again, was not in force at the time the exemption application was submitted to the INAC Minister, subsection 82(1) provides that if NPC "…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."[83]

What is similarly problematic about subsection 82(1) is that it is equally unclear which Minister (federal or territorial), to the exclusion of the other, has the "respective jurisdiction" to receive the exemption request and upon what basis such jurisdiction is determined. As the four possible interpretations I provided above with respect to interpreting the NLCA provision showed, the ambiguity lies in what "respective jurisdictions" refers to, i.e., respective jurisdiction to *what*? The land tenure of the project? The project itself? The grounds or subject matter of the exemption application? Furthermore, it is not clear *who* is to take respective jurisdictions into account—the proponent? The Minister who receives the exemption request application, irrespective of whether that Minister enjoys jurisdiction or not? Given the lack of clarity as to who the "appropriate Minister" is, *how* would the proponent—Baffinland in this example—determine jurisdiction? By looking at which government holds land tenure? By the proposal's subject matter? Which subject matter—the project as it already exists (as in this example), the subject

[83] *NUPPAA*, *supra* note 3 at s 82(1) [emphasis added].

matter of the project amendment proposal, or the subject matter of the exemption application? Many of these questions have no answers, let alone clear ones.

Yet another problem exists within subsection 82(1). It provides three options to a proponent: apply to the federal minister, the territorial minister, or *both*—the NLCA does not provide this third option, and whether it provides the first two, at least in the same manner, is a matter of interpretation. If Baffinland had submitted the exemption request to *both* Ministers, it is not clear in subsection 82(1) what happens if there is disagreement between them as to whether the exemption should issue.[84] Furthermore, no path to resolution in such a situation is provided in NUPPA. Again, it seems that the resolution to such a situation is left to be crafted in the political arena. A proponent's safest bet, from a practical and legal point of view, seems to be to submit the exemption application to both Ministers, and to leave jurisdictional questions and whether they are *ad idem* to be sorted out between them. Any unfavourable decision by either Minister (or both) might then be amenable to judicial review under Article 12.10.5.[85]

Finally, the federal *Interpretation Act* is of little assistance here, as it does not define "appropriate" or "Minister."[86] Moreover, the NLCA provides that there "… shall not be any presumption that doubtful expressions in the Agreement be resolved in favour of Government or Inuit."[87] We have seen that "Government" is defined as "…the Government of Canada or the Territorial Government or both, as the context requires, depending on their jurisdiction and the subject matter referred to…" That being the case, the Article 2.9.3 presumption is mutually exclusive to government—because it is not clear which level of government has jurisdiction in this case—leaving the only conclusion to be that doubtful expressions are *not* to be resolved in favour of Inuit. Article 1.1.6, however, enables both levels of government to designate a single Minister from either level of government to act on behalf of one government or both; however, neither government has taken this step, thus still leaving the mess of interpreting who the "appropriate Minister" is untangled.[88]

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[84] It is doubtful that the doctrine of constitutional paramountcy is of much help here given that NUPPAA is a federal statute and it is not in conflict with any provincial or territorial law. As noted elsewhere in this article, where NUPPAA conflicts with the NLCA, NUPPA yields to the NLCA.

[85] *NLCA*, *supra* note 2 at art 12.10.5 ("…any person or body that is recognized by laws of general application as having standing to seek a court determination…shall have standing before an appropriate court…to seek judicial review of decisions and orders, whether interim or final, made pursuant to this Article.").

[86] *Interpretation Act*, RSC, 1985, c I–21.

[87] *NLCA*, *supra* note 2 at art 2.9.3.

[88] *Ibid* at art 1.1.6:

> Without diminishing or otherwise altering the responsibilities of Her Majesty The Queen in Right of Canada under the Agreement, where, in the Agreement, it is unclear from the context which Government is to perform a function or where the context indicates that both Governments are to perform a function, without abrogating or derogating from their obligations under the Agreement or altering

Unfortunately, there are no clear answers to questions of which Minister has jurisdiction to issue an exemption application under the NLCA (or NUPPA). NIRB is in the essentially the same position when making recommendations to a/the Minister because it relies on the definition of Minister provided in Article 12 which, as I have shown, also has interpretation difficulties. Altogether, the absence of clarity in the NLCA and NUPPAA may be a reflection of s.91 and s.92 of the *1867 Act* in the sense that there is no head of power clearly demarcating jurisdiction over the environment in Canada's Constitution. It is doubtful that this ambiguity is a conscious design element of the Agreement, and perhaps is more likely a product of improvident drafting than anything else at the same time, however, it could be a conscious design element to the extent that the governments were at an impasse and could not resolve the issue at the time or because they wanted to provide maximum flexibility in the future. Nevertheless, until a court of law answers these questions, there will be legal uncertainty as to whether some of the decisions that are being rendered in Nunavut's environmental impacts assessment regime, especially those pertaining to exemption applications, have been made in accordance with law. So far, no one has emerged to launch a judicial review application of these decisions. However as NPC approaches completion of the Nunavut-wide land use plan, development in Nunavut increases and more conflicts between economic development and wildlife protection emerge, it seems quite possible that a party will.[89]

On that note, a final illustration in this example of the intersection of politics and law in Nunavut's impacts assessment regime is a letter sent by the Premier of Nunavut, Peter Taptuna, to the then INAC Minister urging his support for Baffinland's exemption application.[90] In a news article published by CBC News, Premier Taptuna was quoted as saying: "I gotta ensure the best interests of Nunavummiut…I am the Premier, indicating that our mandate is economic development and employment."[91] It is not clear whether the Executive Council of the Government of Nunavut countenanced the sending of such a letter, but it is clear in any event that there is no procedural basis for such a letter found in the NLCA, NUPPA, or the Constitution. Incidentally, when Baffinland's amendment application was refused, prior to the submission of its exemption application, the Premier also then sent a letter to the INAC Minister urging his general support for the project.

> their respective jurisdictions, the two Governments may designate one of them to perform that function on behalf of the other or both. The DIO shall be given notice of such designation.

[89] It is important to note that the exemption process simply enables a project that would otherwise not reach the NIRB to reach it for either a Part 4 review and Part 5 or Part 6 screening.

[90] "Nunavut premier stands by stance on Baffinland", *CBC News* (2 June 2015), online: <www.cbc.ca/news/canada/north/nunavut-premier-stands-by-stance-on-baffinland-1.3096769>.

[91] *Ibid*. See also "Nunavut premier's leaked letter to Ottawa disappoints board chair: Premier Peter Taptuna defends position as job protection strategy", *Nunatsiaq News* (1 June, 2015), online: <www.nunatsiaqonline.ca/stories/article/65674nunavut_premiers_private_letter_to_ottawa_disappoints_board_chair/>.

The Qikiqtani Inuit Association (QIA), the birthright organization (and RIA) which represents the rights and interests of Nunavut Inuit in the Qikiqtani region of Nunavut, in which Baffin Island sits, and Nunavut Tunngavik Incorporated (NTI), the birthright organization which represents the interests of Nunavut Inuit intra-territorially, nationally, and internationally, were both opposed to the granting of an exemption request.[92] In the absence of any legal or procedural basis for the Premier's letter, the only conclusion to be drawn is that the Premier was simply engaging politics. A corollary question arises as to what the best interests of Nunavummiut are in this case, and whether they accord with his assertion that the Government of Nunavut's mandate is exclusively "economic development and employment." It is also necessary to wonder if the Premier meant—either intentionally or unintentially—to ignore protection of wildlife, ecosystems, and wildlife habitat, which is a part of the Government of Nunavut's mandate as well.[93] As any government official in the Premier's position would know, a determination as to which controls or supersedes the other is very difficult, if not impossible, to make.

One might even be so bold as to say that the Premier's actions are a rendering of regulatory capture in the landscape of Canadian environmental regulation.[94] The fact that the Premier of Nunavut would urge Ottawa to override a decision made by an administrative body established by the very same treaty which acts as his territory's constitution, is indeed curious, even unusual. Given Ottawa, not Nunavut Inuit, makes final decisions which affect the future of wildlife and economic development in the territory, I argue, fragments the very rights that Inuit fought so long and hard to obtain. While we can reasonably presume that at the time the treaty was signed, Canada would not relinquish complete control of Crown land to the Inuit of Nunavut via the NLCA. The fact that the environmental impacts assessment regime culminates or crystalizes with final decision-making power vested in Ottawa shows that the NLCA in itself provides a marginal legal basis for Inuit to

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[92] "QIA, NTI team up against Baffinland's request for NPC exemption: Qikiqtani Inuit Association, Nunavut Tunngavik Inc. to oppose granting an exemption from NPC", *CBC News* (9 June 2015), online: <www.cbc.ca/news/canada/north/qia-nti-team-up-against-baffinland-s-request-for-npc-exemption-1.3105701>; see also Letter from Pauloosie Akeeagok, president of Qikiqtani Inuit Association, to Bernard Valcourt (8 June 2015) online: <www.cbc.ca/news/canada/north/qia-nti-team-up-against-baffinland-s-request-for-npc-exemption-1.3105701>; see also "Inuit org wants Valcourt to reject Baffinland request for land use exemption: Baffinland wants AAND minister to over-ride the Nunavut Planning Commission" *Nunatsiaq News* (22 May 2015), online: <www.nunatsiaqonline.ca/stories/article/65674inuit_org_wants_valcourt_to_reject_baffinland_request_for_land_use_exe/>.

[93] *NLCA*, *supra* note 2 at art 11.2.1 ("…people are a functional part of a dynamic biophysical environment, and land use cannot be planned and managed without reference to the human community; accordingly, social, cultural and economic endeavours of the human community must be central to land use planning and implementation…"); see also the self-delineated mandate of the Government of Nunavut: Government of Nunavut, *Sivumut Abluqta: Stepping Forward Together* (Iqaluit: Government of Nunavut, 2014), online: <www.gov.nu.ca/sites/default/files/sivumut_abluqta_-_eng_0.pdf>.

[94] Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 J Envtl L & Prac 111.

determine their best interests. After all, the preamble to the NLCA merely refers to "participation" in the process and that, at least, is provided. But the apparent absence of any final procedural decision-making powers for Nunavut Inuit in the environmental impacts assessment regime is ultimately the genesis of any erosion and fragmenting of those very rights, because where Inuit are not *ad idem* with Ottawa, Ottawa makes the final decisions, not Inuit.

Not much came of the apparent illegitimacy of Premier Taptuna's letters by way of public outrage, parliamentary censure or political injury, and in the end, the INAC Minister granted and issued the land use plan exemption to Baffinland.[95] Baffinland was required to submit a revised impact assessment statement to NIRB in September 2016; however, on November 30, 2016 (coincidentally the same day that the Supreme Court of Canada heard the *Clyde River* appeal discussed below), Baffinland informed the NIRB that it intended to abandon its year-round shipping proposal.[96] In a surprising twist of events, on December 19, 2016, NIRB nevertheless sent the remainder of the proposal to NPC for a new conformity screening, thus beginning the whole impacts assessment process anew.[97] In other words, the Baffinland proposal is back at square-one, seeking a conformity determination from NPC.[98]

Ultimately, through the issuance of the exemption, and Baffinland's withdrawal of that portion of the proposal proposing year-round shipping, the tough jurisdictional questions I have posed in this paper, in essence, would merely have been deferred to another day. That day would have been when NIRB completed its review and assessment of the proposed amendment impacts. If Baffinland had not withdrawn its proposal, and NIRB had recommended the proposal be accepted and the amended project proceed, the INAC Minister still would have had to decide

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[95] Letter from Bernard Valcourt to Elizabeth Copland, Chair of NIRB, Hunter Tootoo, Chair of NPC, and Erik Madsen, Vice President of BIMC (13 July 2015) online: <www.nirb.ca/app/dms/script/dms_download.php?fileid=291250>, see also "Valcourt exempts Nunavut iron mine expansion from land use plan: Minister says yes to Baffinland, sends Mary River Phase 2 proposal to the NIRB", *Nunatsiaq News* (14 July 2015), online: <www.nunatsiaqonline.ca/stories/article/65674breaking_valcourt_exempts_nunavut_iron_mine_expansion_from_npc/>.

[96] Baffinland Iron Mines Corporation, "Mary River Project, Project Update, Final Report" (30, November 2016) Nunavut Impact Review Board, online: <www.nirb.ca/app/dms/script/dms_download.php?fileid=306109>. See also "Baffinland abandons plans for 10-month shipping from Milne Inlet: Company cites community concerns for changing its stance", *CBC News* (2 December 2016), online: <www.cbc.ca/news/canada/north/baffinland-drops-10-month-shipping-plans-1.3877683>.

[97] Letter from Elizabeth Copland, Chair of NIRB, to Todd Burlington, Vice President of Sustainable Development at BIMC (19 December 2016) online: <www.nirb.ca/app/dms/script/dms_download.php?fileid=306281>. See also "Baffinland Iron Mines' phase 2 plan gets sent back to Nunavut Planning Commission: NIRB decision says proposal has significantly changed since planning commission ruled on it last year" (20 December 2016) *CBC News* online: <www.cbc.ca/news/canada/north/nirb-baffinland-phase-2-planning-commission-1.3904189>.

[98] *Ibid*. The NIRB did, however, inform Baffinland that "…the NIRB emphasizes that it is committed to ensuring that all information received during the Board's consideration of the original Phase 2 Proposal to date will be brought forward into any future assessment of the modified Phase 2 Proposal."

whether to accept that recommendation, despite the opposition from QIA and NTI respecting year-round shipping, although—much like the proposal itself—now presumably having likely fallen away.[99] This, again, however, is a political question, not a legal one. If NIRB recommended that the proposal be rejected and the amended project not proceed, the Minister would still have had to decide whether to accept that recommendation despite the Premier's support (and ostensibly Nunavut since he arguably speaks for all of its constituents) for the exemption and the project writ-large. Indeed, it will be interesting to see what result the NPC produces after a review of the new proposal is completed, i.e. whether a positive or negative conformity determination is issued, and what result the NIRB produces if the proposal is forwarded to it by NIRB. Following that, it will be even more interesting how the INAC Minister will respond to either another exemption application should it be sought, a positive or negative recommendation from NIRB if a positive conformity decision is issued, whether the Premier of Nunavut again attempts to exert pressure on Ottawa in respect of making that decision, and whether Baffinland seeks judicial review of any of these decisions or simply decides to wind-up the project altogether.

B. AREVA AND THE KIGGAVIK PROJECT

Another illustrative example of the problematic relationship among politics, administrative and constitutional law in Nunavut's environmental impacts assessment regime is found in another decision rendered by a federal Minister in respect of a project undertaken in Nunavut by the Areva Resources Canada Inc. (Areva), a company that produces nuclear energy. Areva's proposed project, the Kiggavik Project, consisted of a planned uranium mining and milling operation located approximately 80 km west of Baker Lake, in the Kivalliq region of Nunavut.[100] It was a contentious project, which bitterly divided the community. Some community members were in support of the project, because of the economic opportunities it would provide to them, while others were bitterly opposed to it because of the project's impact on wildlife and the perceived unsafety of mining uranium, despite assurances from the Canadian Nuclear Safety Commission that the project posed little to no radiation risks and no uranium would be enriched on-site.[101]

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[99] Following Baffinland's revision, tenuous support for the proposal emerged from the community closest to the project. See "Nunavut hamlet backs Baffinland's new shipping plans: But Pond Inlet wants to see the review move forward without delay" *Nunatsiaq News* (16 December 2016) online: <www.nunatsiaqonline.ca/stories/article/65674nunavut_hamlet_backs_baffinlands_new_shipping_plans/.

[100] Areva Resources, "Kiggavik Project" (10 March 2017), Areva Resources (blog), online: <http://kiggavik.ca/the-project/kiggavik/>.

[101] Many intervenors were opposed to the project; see e.g. Baker Lake Hunters and Trappers Organization, "Baker Lake Hunter and Trappers' Organization Motion to suspend the final hearing" (16 January 2015), Nunavut Impact Review Board, online: <www.nirb.ca/app/dms/script/dms_download.php?fileid=279180>, see e.g. Nunavummiut Makitagunarningit, "Submissions of Nunavummiut Makitagunarningit" Nunavut Impact Review Board

Although no specific support for this project was issued by the Government of Nunavut, the government did have a policy of supporting uranium mining in Nunavut.[102]

The proposal was submitted to NPC by Areva and underwent conformity review in accordance with the NLCA, as the project had also commenced before NUPPAA was declared in force. Following NPC's issuance of a positive conformity determination, the proposal was sent to NIRB for review and screening. A Part 5 public hearing was held in Baker Lake, and in May 2016, the NIRB recommended to the INAC Minister that the project should not proceed. Over a year later, following a federal election in the fall of 2015, which saw a new government elected, the newly installed INAC Minister accepted NIRB's recommendation, asserting, without any justification, her "jurisdictional authority for authorizing the project to proceed."[103] In this example, the Premier of Nunavut did not write any letter of support or opposition; however, in the year between NIRB furnishing its recommendation to the Minister and the Minister making the decision Areva wrote to the INAC Minister (without any procedural basis) urging her to reject the NIRB's recommendation on the basis that the project should have been approved because of its importance in the *regional* interest.[104]

Despite the many contentious issues respecting the project, NIRB thinly veiled the substantive concerns the community and many interveners expressed in the final hearing in the cloak of a concern respecting the lack of a firm starting date

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(blog), online: <www.nirb.ca/app/dms/script/dms_download.php?fileid=279195> and Letter from Cathy Vakil, Assistant Professor at Queen's University, and Linda Harvey, Doctor, to Members of Legislative Assembly, Nunavut Impact Review Board, Mayors, Kitimeot Inuit Associate, Qikiqtani Inuit Association, Nunavut Tunnagavik, "Open Letter to the Leaders of Nunavut on Health Implications of Opening the Territory to Uranium Mining" (14 March 2015) online: <www.nirb.ca/app/dms/script/dms_download.php?fileid=279244>, and Nunavummiut Makitagunarningit, "Nunavummiut Makitagunarningit Responds to Review Board Rejection of AREVA Kiggavik Proposal" (12 May 2015) Nunavummiut Makitagunarningit, online: <https://makitanunavut.wordpress.com/2015/05/12/nunavummiut-makitagunarningit-responds-to-review-boards-rejection-of-arevas-kiggavik-proposal/>:

> Nunavummiut Makitagunarningit ('Makita') today responded to the announcement by the Nunavut Impact Review Board that it has recommended the rejection of AREVA Resources' proposed Kiggavik uranium mine. 'Makita is overjoyed by the NIRB's decision,' said Makita spokesperson Hilu Tagoona. 'In light of all the serious issues raised by intervenors, and the clear majority opposition to the project expressed by the Inuit residents of Baker Lake and other Kivalliq communities during the Final Hearing, we agreed with the Baker Lake Hunters and Trappers Organization that the review process should have been terminated – and restarted only when the proponent could announce a start date for the project.

[102] Nunavut, Legislative Assembly, *Hansard*, 3rd Leg, 3rd Sess (May 31, 2012) at question 352-3(3): Uranium Mining Issues in Nunavut (Aupaluktuq); see also Government of Nunavut, "Government of Nunavut Uranium Mining Policy Statement" (10 March 2017) online: <www.uranium.gov.nu.ca>.

[103] Letter from Carolyn Bennet, Indigenous and North Affairs Canada Minister, Elizabeth Copland, Chair of Nunavut Impact Review Board (14 July 2016) online: <www.nirb.ca/app/dms/script/dms_download.php?fileid=304213>.

[104] Letter from Vincent Martin, Present of Areva Resources Canada, to Bernard Valcourt, INAC Minister, (3 July 2015) online: <www.nirb.ca/app/dms/script/dms_download.php?fileid=279298>.

for the project. Areva objected to this concern, citing another project which had been approved by NIRB despite the lack of a firm start date.[105] Had Areva even arbitrarily identified a start date for the project, NIRB and the Minister would have had to meet the substantive issues head-on instead of escaping them on the grounds—arguably a pretext—that an indefinite start date made it impossible to assess the impacts the project would have. In contrast, had NIRB recommended in its report that the project should have proceeded, Ottawa would have been faced with making sensitive political decision: approving a project which many Nunavummiut were bitterly opposed to, and justifying it on the basis that it was in the national or regional interest to approve it. While it is not necessarily unusual or problematic that Ottawa might have a final say in a project of this nature, it is conceivably and politically problematic that Ottawa could, while legal, override a decision made by a constitutionally created administrative tribunal which has as its aim the protection and promotion of the well-being of the environment and Nunavummiut through the environmental impacts assessment regime.[106] Given Canada's history of dispossessing Aboriginal Peoples from their lands, the potential of such an occurrence is unsettling.

C. CLYDE RIVER AND SEISMIC TESTING

The final example is the appeal heard by Supreme Court of Canada in November 2016: *Clyde River*, 2015 FCA 179. This case does not arise out of the NLCA impacts assessment regime, and instead arises from a decision of the National Energy Board (NEB), but it is nevertheless illustrative of the complicated relationship of politics, administrative and constitutional law in Nunavut as it relates to Inuit interests in and participation in decision-making respecting the offshore.

In May, 2011, the proponents applied to the NEB for a Geophysical Operations Authorization to undertake an offshore seismic survey program off of the coast of Clyde River, Nunavut, also located on North Baffin Island. The program would involve detonating air guns exponentially louder than a jet engine, every 13 to 15 seconds, for 24 hours a day, five months per year, for a period of five years.[107]

The residents of Clyde River, the Applicants for judicial review of the NEB decision, were opposed to the project prior to the proponents' application to the NEB, and generally remained so during the NEB's hearing and consultative process regarding the application because of the potential impact the project could have on marine mammals in the project area and the Applicants' opportunities to harvest

[105] Letter from J Duncan to Elizabeth Copland (29 May 2012), regarding Hope Bay Gold Project.

[106] *NLCA*, *supra* note 2 at art 11.2.1(b).

[107] *Clyde River*, *supra* note 5 (Factum of the Appellant at para 14)

them. The Applicants were also concerned about the effects the disturbance on marine mammals would have to their traditional way of life.

On June 26, 2014, the NEB issued to the project proponents authorization to conduct a seismic survey program. On July 28, 2014, the Applicants filed an application for judicial review in the Federal Court of Appeal (FCA) which has exclusive jurisdiction over the NEB. The application was heard by the FCA on April 20, 2015 and judgment dismissing the application was issued on August 17, 2015. On October 16, 2015, the Applicants filed an application for leave to appeal to the SCC. On March 10, 2016, the SCC granted leave to appeal. The Court also ordered that the appeal would be heard in conjunction with *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., et al.*, another similar case.[108] The Appeal was heard on November 30, 2016 and judgement was reserved.

The Applicants argued in their leave to appeal factum that: the duty to consult with them was triggered by the NEB's receipt of the proponents' GOA application; given that they possessed treaty rights to harvest marine mammals in the project area and the potential impact on those rights, the duty to consult lied at the high end of the consultative spectrum and therefore meaningful attempts to engage them in the decision-making process were required and if necessary, so too was accommodation; and, the Crown had done "virtually nothing" to discharge this duty.[109] This case is important in the context of this paper and particularly to the Baffinland example, because it illustrates, at the intersection of politics and law, in making a decision to accept or reject a recommendation of the NIRB or the NPC, or to issue an exemption application request, the complex and necessary legal question—which the Supreme Court will answer—of whether it is incumbent upon the adjudicating Minister to fulfill the constitutional duty of consultation with Inuit affected by the decision being rendered by that Minister.

If the Baffinland project amendment-cum-exemption application were still capable of being accepted by Ottawa, and thus year-round shipping through Baffin Bay and the Davis Strait would have resulted, and if the SCC ultimately finds that the NEB did not fail in its duty to consult to Inuit, and the proponents are free to proceed with their seismic survey testing in Baffin Bay and the Davis Strait, the combined or cumulative effects of these projects will be devastating to wildlife and the Inuit who rely upon for cultural and subsistence purposes. Altogether, these three examples illustrate that decision-making respecting resource extraction in Nunavut is anything but simple, and instead politically and legally complex. Moreover, we see how Inuit rights are fragmented by these complex legal proceedings and processes.

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[108] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc, NEB*, 2015 FCA 222, [2016] 3 FCR 96.

[109] *Clyde River*, *supra* note 5 (leave to appeal Factum of the Appellant at para 36–51).

V. WHY THESE ISSUES ARE IMPORTANT

We need only look at the primary purpose of land use planning again to understand why these issues are important. As we saw, the NLCA provides that:

> …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…[110]

We can also look to Article 12 again, which states that the NIRB's mandate "shall be at all times to protect and promote the existing and future well-being of the residents and communities of the Nunavut Settlement Area, and to protect the ecosystemic integrity of the Nunavut Settlement Area."[111]

If a federal Minister continues to issue land use plan exemptions in respect of projects which do not conform to an applicable land use plan because of the deleterious effects it would have, and in respect of proposals which the Inuit of Nunavut strongly object to, the impact on Inuit rights and interests contained in the NLCA such issuance would have is unclear. If my thesis is correct, the exercise and enjoyment of those rights, if nothing else, will be diluted. Similarly, if a federal Minister ultimately decides which projects go forward under the NIRB process, and which do not, any resulting impact on the rights and interests Inuit have in the NLCA will also probably be diluted. Although the final decision is by design meant to rest with Ottawa, a decision that is incongruous with Inuit desires and interests has the real possibility of thwarting the promotion and protection of rights which the NPC and the NIRB aim to ensure. As noted in the foregoing analysis, the NLCA only contemplates "participation" by Inuit in the regime discussed in this article, not "decision-making." To the extent that Inuit are provided an opportunity to "participate" in the regimes' administrative processes, such as a Part 5 review, perhaps it can be said that the spirit and intent of the Agreement is being lived up to. But with close to twenty years having lapsed since the Agreement was signed, we can see how much the Agreement's design is skewed in the federal government's favour. Such a result is troubling because Nunavut's future is at stake, the future of Inuit in Nunavut is at stake, land and resources are at stake as is land and resource development, wildlife and marine mammals, and Nunavut's society, economy and posterity. The Agreement was supposed to place in the hands of the Inuit some, if not entire, control over their destiny.

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[110] *NLCA*, *supra* note 2, at art 11.2.1(b).

[111] *Ibid* at art 12.2.5.

As experiences in the Baffinland and other projects (not discussed here) illustrate, the tendency for proponents to propose one project and slowly, over time, erode the protective mechanisms contained in a project certificate through numerous minor variances, amendments, and applications for exemptions seems to be an emerging trend. Being such a young jurisdiction, it is difficult to test what the cumulative effect of such practices across varying projects would be in Nunavut. Part of the problem with respect to predicting the effects such decisions might have, apart from the inherent impossibility of accurately predicting the future, is embodied in the nature of defining the problem itself. While I have illustrated the problems associated with interpreting these provisions, the consequences have yet to manifest in legal challenges.

Ultimately, in Nunavut's environmental impacts assessment regime the question of whether politics, and not law, are deciding the fate of Inuit and Nunavut arises. So too does the question of what the impact on Inuit society, culture and way of life is once projects which are approved in the name of economic development go forward at the expense of wildlife and environmental protection. One might also fear that Inuit Qaujimajatuqangit (traditional knowledge) is also slowly eroded by the regime and the increasing prevalence in Nunavut of the cash economy. Related to that are other important social and legal concerns that exacerbate the issues discussed here, such as (in particular order): climate change, eroding seasons, poverty, homelessness, education, unemployment, crime (murder, sexual assault), suicide, alcohol and substance abuse, and re-colonization, which are all intricately interwoven in Nunavut, and simultaneously too complex to discuss here.

CONCLUSION

This article has raised many more questions than it has answered—but many of these questions can only be answered by the courts. As such, they remain emerging issues with little territorial jurisprudence to guide lawyers and the courts. While Nunavut's environmental impacts assessment regime is governed by administrative procedures established in a constitutionally protected treaty, there are competing interests, and the issues, it seems, are resolved politically as much as they are legally, if not more so. My analysis is important because NUPPAA is what now governs project planning at the statutory level in Nunavut, and the statute's durability will be put to the test by future projects; however, we are reminded that, in any event, inconsistencies between NUPPPAA and the NLCA are resolved in favour of the NLCA, leaving the questions I have raised here to still be answered. Even so, the absence of clarity as to which Minister—federal or territorial—and by what jurisdiction or legal authority he or she authorizes a project to proceed or issues a land use exemption remains highly problematic. The problems associated with establishing or determining Ministerial jurisdiction, or who the "appropriate Minister" is in land use exemption applications, is only further complicated when politics joins the fray, sometimes bordering on or even fully venturing into regulatory capture, serving mostly, if not exclusively, to fragment the rights and interests of Nunavut Inuit under the Agreement when final-decision making power is vested in Ottawa. The problems remain, and it seems, for the time being at least, will

only be resolved where politics and administrative and constitutional law intersect in Nunavut's environmental impacts assessment regime.