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Nunavunmi Anngutighatigut Aulapkaijitkut Katimajiat
Nunavut Wildlife Management Board

ᐱᓗᐊᑦᑕᐃᓕᓂᖅ ᐆᒪᔪᕐᓂᒃ ᐊᖅᑯᑎᒋᓗᒍ ᐊᑐᕐᑎᑕᐅᓂᖏᑦ ᐃᓄᐃᑦ ᖃᐅᔨᒪᓂᑐᖃᖏᑦ ᐊᒻᒪᓗ ᖃᐅᔨᓴᕐᑎᒻᒪᕆᑦ ᖃᐅᔨᒪᓂᖏᑦ
Tammaqtailinahuarniriit anngutighat atuqhugit Inuit qaujimajatuqangillu ilihimaniillu ilitquhiannin
Conserving wildlife through the application of Inuit Qaujimajatuqangit and scientific knowledge

February 17 2015

Hon. Gail Shea
Minister of Fisheries
And Oceans,
Government of Canada

Hon. Johnny Mike
Minister of Environment,
Government of Nunavut

Hon. Leona Aglukkaq
Minister of the Environment
Government of Canada

Hon. Bernard Valcourt
Minister of Aboriginal
Affairs and Northern
Development,
Government of Canada

Cathy Towtongie
President of Nunavut
Tunngavik Inc.

James Qillaq
Chairperson of the
Qikiqtaaluk Wildlife Board

Michelle Akkuardjuk
Acting Chairperson of the
Kivalliq Wildlife Board

Attima Hadlari
Chairperson of the
Kitikmeot Regional
Wildlife Board

Manasie Naullaq
Chairperson of the
Hall Beach Hunters
and Trappers Org.

David Irngaut
Chairperson of the
Igloolik Hunters Board
and Trappers Org.

Dear Colleagues:

Re: The legal capacity of the Nunavut Wildlife Management Board to assess whether the Crown has fulfilled its constitutional obligation to consult with, and accommodate, Inuit in the context of a Nunavut Wildlife Management Board public hearing

You may be aware that the Nunavut Wildlife Management Board (NWMB or Board) recently decided to adjourn its public hearing to consider the establishment of a management unit and a total allowable harvest for Foxe Basin walrus. The NWMB took that action in order to assess whether the Department of Fisheries and Oceans (DFO) has adequately met its constitutional obligation in the circumstances to consult and, if appropriate, accommodate affected Inuit.[1]

Based upon relevant jurisprudence from the Supreme Court of Canada, the Board has asserted, since 2012, that it possesses the authority – and the responsibility - to "*...assess the adequacy of the consultation measures undertaken by the proponent*"[2] at an NWMB hearing. The above-referenced Foxe Basin walrus hearing marks the first time that the Board has received hearing

[1] For further details regarding the adjournment and subsequent rescheduling of the hearing, please see the NWMB's January 9th 2015 Public Notice, and its February 6th 2015 follow-up Public Notice and correspondence to the hearing parties. All three documents are available to view and download from the Board's *Public Hearings Registry* on its website (www.nwmb.com).
[2] NWMB *Governance Manual* (March 2012), page 26, section 4.4 ("*Proposal for Decision*"), footnote no. 23.

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ᐃᖃᓗᐃᑦ, ᓄᓇᕗᑦ X0A 0H0
☎ (867) 975-7300
(888) 421-9832

Titiqqap Turaarvia 1379
Iqaluit, NU X0A 0H0
☎ (867) 975-7300
(888) 421-9832

Box 1379
Iqaluit, NU X0A 0H0
☎ (867) 975-7300
(888) 421-9832

submissions alleging inadequate consultation by a proponent. As a result, the NWMB decided to adjourn the hearing for three months, in order to provide an opportunity for all of the hearing parties to file written submissions concerning the adequacy of DFO's consultation measures.

At the same time, the NWMB also decided to obtain a research report from Mr. David Mullan[3] - recognized as one of Canada's foremost scholars in administrative law – concerning the legal capacity of the Board to conduct such an assessment. Mr. Mullan recently delivered his report to the NWMB, a copy of which is attached to this correspondence.

That report is in full agreement with the position taken by the Board in 2012, and with its recent decision to assess the adequacy of consultation measures with respect to Foxe Basin Walrus. The NWMB clearly has the capacity to consider questions of law; indeed, its primary responsibilities under the *Nunavut Land Claims Agreement*, of their very nature, involve consideration of the constitutional rights of Inuit. Furthermore, if the sufficiency of the Crown's consultation efforts is at stake in an NWMB hearing, any consideration of this issue must be undertaken by the NWMB, rather than by the Minister, in order to preserve the independence and lack of bias expected in tribunal decision-making.

The NWMB is providing Mr. Mullan's report to you in order to fully inform its co-management partners about this essential aspect of the Board's jurisdiction. Should you or your officials have any resulting questions or concerns, please don't hesitate to contact the NWMB at your convenience.

Yours sincerely,

Ben Kovic,
Chairperson of the
Nunavut Wildlife Management Board

Enclosure (1)

c.c. Nunavut Inuit Wildlife Secretariat, for distribution to the Chairpersons of Nunavut's Hunters and Trappers Organizations

[3] Professor *Emeritus*, Queen's University Faculty of Law.

103-185 Ontario St.,
Kingston, Ontario
K7L 2Y7
mulland@queensu.ca
613-546-1297
February 6, 2015

The Nunavut Wildlife Management Board,
P.O. Box 1379,
Iqaluit, Nunavut
X0A 0H0

Dear Members of the Board:

Statement of Work

You have asked me to provide the NWMB with a report on its legal capacity to assess whether the Crown, as personified by the federal Department of Fisheries and Oceans, has fulfilled its constitutional obligation to consult with affected aboriginal peoples on the Department's proposals on the harvesting of the Foxe Basin walrus which are the subject of a public hearing before the NWMB.

Summary of Conclusions

In my view, the NWMB has the legal capacity to conduct such an assessment to determine whether the Crown not only has consulted adequately but also, where appropriate, in the formulation of its various proposals, accommodated the affected aboriginal peoples.

General Principles

In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, the Supreme Court of Canada determined that, unless explicitly authorized by statute, administrative tribunals were not legally authorized to fulfill the Crown's constitutional duty to consult and, where appropriate, accommodate aboriginal peoples as part of their responsibilities for the conduct of hearings into applications affecting the rights and interests of those aboriginal peoples. However, at paras. 66-75, McLachlin CJ, delivering the judgment of the Court, held, in the context of an application in which the Crown was the proponent, that the British Columbia Utilities Commission had both the capacity and the responsibility to consider whether the Crown had consulted adequately with the affected aboriginal peoples.

There were two principal reasons for the Court's finding of this capacity:

1. The Commission's general capacity to consider questions of law.

2. The legislative criteria by reference to which the Commission was to consider whether to approve an application, and, in particular, the requirement that it consider "any other factor that the Commission considers relevant to the public interest."

With respect to the first criterion, McLachlin CJ (at para. 69) stated that "[i]t was common ground the [Act] empowers the Commission to decide questions of law." What becomes clear, however, from a reading of the judgment of the British Columbia Court of Appeal (2009 BCCA 67, at paras. 36-41) is that the capacity to determine questions of law was not expressly or explicitly conferred by the empowering statute but derived by implication from a range of other provisions and, in particular, the Act's appeal provision and privative clauses.

That is significant because of its connection with other precedents of the Supreme Court. In both *Nova Scotia (Workers' Compensation Board) v. Martin and Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, and *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, the Supreme Court ruled that, where the legislature conferred explicitly on an administrative tribunal the capacity to determine questions of law, there was a very strong presumption that that tribunal had the legal capacity, indeed responsibility to deal with constitutional questions (including questions as to the validity of legislation) that arose in matters otherwise properly before it. However, the Court went on to accept that the capacity to consider questions of law (and hence constitutional questions) could also arise by implication from the terms of the tribunal's constitutive legislation.

For present purposes, it is significant that the second of those cases involved an assertion of the capacity of the Forest Appeals Commission to deal with issues arising by virtue of section 35 of the *Constitution Act, 1982* and its protection of aboriginal rights. It was also a case in which the relevant statute did not explicitly confer on the Commission the capacity to deal with questions of law. Rather, Bastarache J, delivering the judgment of the Court, held (at paras. 41-42) that that capacity arose by way of inference from the provisions entitling parties to make submissions "as to the facts, law and jurisdiction" and the confining of appeals to the British Columbia Supreme Court to "a question of law or jurisdiction."

In *Paul*, at para. 39, Bastarache J also minimized the extent to which practical considerations could serve to rebut the presumption that arose from the capacity to determine questions of law, suggesting that such considerations would come into play only where there was another more appropriate way of handling a particular dispute. In the following paragraph, at least in a non-*Charter* context, he refused the invitation to link the issue of the Commission's capacity to deal with section 35 issues to a consideration of the Commission's remedial capacities. The Commission's remedial powers were not determinative.

Application to NWMB

Under Article 5.2.1 of the *Nunavut Land Claims Agreement* ("*NLCA*"), the NWMB is established as "an institution of public government." Greater precision is given to what that means by the rest of Article 5 defining the responsibilities of the NWMB. Clearly, those responsibilities include acting as a tribunal or agency conducting hearings in matters affecting the rights and interests of aboriginal peoples and, as such, in general, subjecting the NWMB to the common law rules of procedural fairness in addition to

whatever procedural obligations are imposed explicitly by Article 5 and the procedural rules made by the NWMB under Article 5.2.27.

When the NWMB exercises its power to hold a public hearing into an issue, there is therefore no doubt that it is acting as a tribunal. It further follows from this that the principles established in *Carrier Sekani* (incorporating those in *Paul*) apply to any assessment of the NWMB's legal capacity to determine issues of consultation and accommodation. In particular, it reaches the question: Does the NWMB have the capacity to determine whether the proceedings engage the Crown's constitutional obligation to consult and, where appropriate, accommodate aboriginal peoples, and, if so, whether the Crown has met those responsibilities?

There is no provision in either the *NLCA* or the *Nunavut Land Claims Agreement Act*, conferring explicitly on the NWMB the capacity to determine questions of law. However, there are provisions in the *NLCA*, that support the argument that that capacity exists by way of inference or implicitly. Article 5.3.1 provides that decisions of the NWMB are reviewable on the grounds set out in subsections 28(1)(a) or (b) of the *Federal Court Act, 1985*, presumably now subsections 18.1(4)(a) and (b) of that Act. These provide for review on the basis of jurisdictional error and procedural error. Thereafter, decisions of the NWMB are protected by a privative clause (Article 5.3.2) from other forms of review, including review for error of law under section 18.1(4)(c) of the now *Federal Courts Act*. As in *Paul*, these judicial review provisions support the implication that the NWMB has the capacity to consider questions of law.

Further support for the existence of the implicit power to consider questions of law (including constitutional questions and the fulfillment of any duty to consult and accommodate) exists in Article 5.2.29 and the NWMB's discretion to appoint counsel to "conduct or argue the case or any particular question arising in any matter coming before it." This amounts to recognition that the NWMB may have to confront legal questions in the course of a public hearing and providing a basis on which the NWMB may be more fully informed about the proper determination of such questions. Similarly, Article 5.2.30, conferring on the NWMB the powers of commissioners appointed under Part I of the *Inquiries Act*, R.S.C. 1970, c.I-13, is also indicative of the capacity to consider legal questions. Thus, Ratushny in *The Conduct of Public Inquiries: Law, Policy, and Practice* (2009), at 305, by reference to *Martin and Laseur*, accepts that Commissioners of Inquiry will have the capacity to deal with constitutional questions that arise in the course of fulfilling their mandate.

Admittedly, there is no statutory requirement that members of the NWMB (or any one of them) have legal training and, indeed, none of the current members is legally qualified. However, in *Paul*, the then *Forest Practices Code of BC Act*, R.S.B.C. 1995, c. 159, Part 9, did not impose any qualifications for appointment to the Forest Appeals Commission. The NWMB also benefits from legal advice from its own counsel, and, as already noted, has the explicit right to appoint counsel to argue legal issues that it confronts in the course of its hearings.

In terms of *Paul*, it is also highly relevant that the NWMB's responsibilities of their very nature involve consideration of the constitutional rights of Inuit as an essential ingredient in any public hearing on an application affecting traditional harvesting rights of Inuit. This is abundantly clear from the Principles

and Objectives of Article 5 and, in particular, Articles 5.1.2 (a) to (c), as well as virtually every clause of Article 5.1.3. In terms of the specific responsibilities of the NWMB and, in particular, those respecting total allowable harvests and ascertaining and adjusting basic needs levels (Articles 5.2.33(d) to (f) as well as (k) respecting non-quota limitations), the NWMB's decision-making must be informed by those Principles and Objectives. This evaluative process involves as an integral component the determination of constitutional imperatives.

The NWMB's decisions are subject to approval by the Minister, and I suppose it might be argued that any consideration of the existence and fulfilment of the duty to consult should take place at that level. However, as indicated already, the fact that a body is a non-final one is not in itself a basis for concluding that that body does not have the capacity to consider legal (including consultation) questions. This is evident from Ratushny's conclusions with respect to commissions of inquiry and is also implicit in the judgment of Mactavish J of the Federal Court in *Cosgrove v. Canadian Judicial Council*, [2006] 1 F.C.R. 327, at paras. 43*ff* (rev'd on other grounds: [2007] 4 F.C.R. 714) dealing with the proceedings of the Canadian Judicial Council, a recommendatory body on judicial misconduct and penalties.

As for the argument based on *Paul*, that issues pertaining to the duty to consult are more appropriately dealt with at the ministerial level, it lacks credibility and at most goes to remedy. Despite the Minister's power of disallowance under Article 5.3, it is the NWMB, not the Minister that is responsible for the public hearing of the matter, a factor that favours heavily the NWMB as the appropriate venue for the airing and initial resolution of consultation issues. It is also the case that, in many instances, what will be at stake is the issue of whether the Minister's own department (or that of a Cabinet colleague) sufficiently engaged in consultation. Any consideration of this issue for the first and only time in the context of a ministerial approval process would lack the appearance of independence and lack of bias that is so much the expected feature of first instance tribunal decision-making.

To the extent that the argument is that such issues are dealt with more appropriately by the courts on judicial review, the answer can be found in a significant element of the reasoning behind the Supreme Court's acceptance of the capacity of tribunals to deal with constitutional questions: While on pure questions of constitutional law, tribunals have no entitlement to deference from the court when their determinations of such questions are subject to judicial review, nonetheless, that does not amount to an argument against tribunal exercise of that jurisdiction. Even on pure questions of law, the reviewing court will benefit from the tribunal's reasoning in support of admittedly contingent determinations and also the record built by the tribunal in the consideration of such issues. Moreover, the building of a record for the satisfactory resolution of any judicial review application is even more useful in the context of evidential questions, questions of mixed law and fact, or law/fact application. Indeed, in that context, as opposed to pure questions of law, some level of deference is owed by the courts to the tribunal including deference on elements of the duty to consult and, where appropriate, accommodate. (See, for example, the discussion by McLachlin CJ in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paras. 60-63, as reiterated in *Carrier Sekani*, at para. 78. See also *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 48.)

As a final point, I would also note that, as the Crown is the proponent in this case and as such obviously a party to the hearing before the NWMB, there can be no objection made to the application of *Carrier Sekani* on the basis that a tribunal has no capacity to consider whether the duty to consult has been met when the holder of that duty is not a proponent or, at the very least, a party to the proceedings before the tribunal: see Alberta ECRB Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law, *Osum Oil Sands Corp., Taiga Project*, August 24, 2012 (application for leave to appeal denied: 2012 ABCA 304 (*sub nom. Cold Lake First Nations v. Alberta (Energy Resources Conservation Board)*).

Conclusions

For the reasons provided, it is my conclusion that the NWMB has the capacity in the context of the current proceeding to determine whether the Crown (through the Department of Fisheries and Oceans) met any constitutional duty to consult and accommodate[1] affected Inuit.

Yours truly

(David J. Mullan)

[1] For the purposes of this report, I have not reviewed in any detail whether the responses of the NWMB may differ as between a determination that the Crown has failed to consult adequately and a determination that, having consulted adequately, the Crown in advancing its proposals has failed to accommodate sufficiently. It may be that, while the NWMB cannot itself make good the failure to consult, it can in terms of its consideration of the merits of any proposal identify the accommodation defects and remedy them in the order or decision that it makes. In this context, however, I have treated that issue as premature.