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May 17, 2017

Daniel Shewchuk
Acting Chairperson
Nunavut Wildlife Management Board
P.O. Box 1379,
Iqaluit, NU
X0A 0H0

Josepi Padlayat
Chairperson
Nunavik Marine Region Wildlife Board
P.O. Box 433,
Inukjuak, QC
J0M 1M0

Dear Sirs:

Re: Nunavut Wildlife Management Board and Nunavik Marine Region Wildlife Board written public hearing to consider the 2017/18 and 2018/19 Total Allowable Catch levels for Northern and Striped Shrimp

Thank you for the opportunity for Nunavut Tunngavik Incorporated (NTI) to comment on the issues for decision and recommendation in this joint proceeding.

On December 6, 2016, in response to the Nunavut Wildlife Management Board's (NWMB's or Board's) request for comments on its Marine Allocation Policy, NTI provided the NWMB and the Department of Fisheries and Oceans Canada (DFO) with NTI's paper entitled "POSITION OF NUNAVUT TUNNGAVIK INCORPORATED ON INUIT FISHING OF MARINE SPECIES IN THE NUNAVUT SETTLEMENT AREA FOR SALE" (NTI Position paper). NTI sent Minister LeBlanc a copy of this paper on January 16, 2017. For the information of the Nunavik Marine Region Wildlife Board and other parties to this proceeding, a copy of the paper is enclosed. A translated copy will follow shortly. Please treat this paper as part of NTI's submission in this proceeding.

The following comments reflect the analysis presented in the NTI Position paper. NTI's comments underscore the need, in particular, when making fisheries management decisions that apply to Inuit fishing, for the NWMB and the Minister of Fisheries

-to distinguish clearly between the *Nunavut Agreement* regime that applies inside the Nunavut Settlement Area from the different *Nunavut Agreement* regime that applies in Zones 1 and II; and

-to comply in full with the Agreement's requirements, where they apply.

1. The Zones, Areas and Stocks affected

DFO's proposals apply to the Western and Eastern Assessment Zones (WAZ and EAZ respectively), mapped on the first page DFO's February 27, 2017 submission. The WAZ and EAZ lie in Canada's Shrimp Fishing Areas (SFA) 2 and 3

The WAZ includes a portion of the NSA, shown on DFO's map as NU-W. None of the remainder of the WAZ falls in Zone 1 or II of the *Nunavut Agreement*.

The EAZ includes the portion of the NSA shown on the map as NU-E. Most of the remainder of the EAZ – the part of the remainder lying north of 61 degrees latitude - falls in Zone 1 of the *Nunavut Agreement*.

The shrimp in question have a wide distribution within the Labrador Current, and likely are mixed stocks. The stocks in the area shown on DFO's map as DS-E include stocks that are considered to be shared with Greenland in North Atlantic Fisheries Organization (NAFO) Subareas 0 & 1 and are assessed by the NAFO Scientific Council.

2. DFO Proposals

Throughout the WAZ, DFO proposes to reduce the Total Allowable Catches (TACs) for borealis (northern) shrimp and montagui (striped) shrimp from their current levels of 2,080t and 6, 138t respectively to 1,967t and 4, 758t respectively.

Throughout the EAZ, DFO proposes to maintain the current TAC for striped shrimp at 870t.

DFO has also expressed these proposals in terms of exploitation rates.

(There is no proposal before the Boards respecting EAZ northern shrimp.)

3. NTI Comments respecting the proposals as they would apply outside the Nunavut Settlement Area (NSA)

a) Requirement of a recommendation from the NWMB

Outside the NSA, the *Nunavut Agreement* regime that applies in Zones 1 and II of the Agreement requires Government to seek the advice of the NWMB when making any shrimp management decision that would affect the substance and value of either 1) Inuit fishing rights within the NSA's marine areas or 2) Inuit fishing opportunities within the NSA's marine areas: s. 15.3.4.

Because persons defined as Inuit under the Agreement control the Qikiqtaaluk Corporation (QC) and Baffin Fisheries Coalition (BFC), and a majority of Inuit hold positions relating to the shrimp fishing or carry out the shrimp fishing in those organizations, QC and BFC exercise Inuit fishing rights under Article 5 of the Agreement when fishing shrimp in the NSA. The Inuit ownership, control and participation in shrimp fishing by these organization also signify that their shrimp fishing in the NSA above any Basic Need Level (BNL) or Adjusted Basic Needs Level constitute Inuit harvesting opportunities within the meaning of section 15.3.4.

Because Zone 1 is adjacent to the NSA, any EAZ shrimp quota decision in Zone 1 affects the availability of fishable shrimp in the NSA. Hence DFO's pending decision affects the substance and value of Inuit rights or Inuit opportunities to fish striped shrimp in the NSA, and the NWMB's advice on any change to the striped shrimp quota in EAZ is required. DFO's proposal appears to recognize this *Nunavut Agreement* requirement, in that the proposal seeks the NWMB's recommendation on this issue.

b) Requirement to include NTI representatives in discussions leading to the proposals

Outside the NSA, the *Nunavut Agreement* regime that applies in Zones 1 and II also requires that NTI representatives be included in discussions leading to DFO shrimp fishing proposals that relate to an international or interjurisdictional agreement concerning shrimp fishery management in Zone 1 or II: sections 15.3.5, 5.9.2.

These fisheries are intended by Canada to be managed under a Canada-Greenland informal bilateral agreement governing the fishing of shrimp in SFA 1, whose stocks likely are mixed with the stocks in SFA 2 and 3 that are subject to these proposals. For that reason, and because, in any event, these fisheries are managed under the *NAFO Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, NTI representatives should have been included in the discussions leading to DFO's proposals.

4. NTI Comments respecting the proposals as they would apply within the NSA

a) Need to re-define the issues for NWMB decision in NU-W and NU-E as proposed Total Allowable Harvests (TAHs)

Within the NSA, the *Nunavut Agreement* regime includes Inuit fishing rights and decision authority on the part of the NWMB.

Inuit have the right to fish without quantitative limitation in the NSA unless the limitation either 1) is a justified TAH established by the NWMB, or 2) continues, without modification, a limitation that was constitutionally valid and in place before the Agreement came into effect on July 9 1993: sections 5.3.3, 5.6.1, 5.6.4.

The NWMB has sole authority in the NSA, subject to the Minister's ultimate power to vary or reject the NWMB decision, to establish a justified TAH: sections 5.3.3, 5.3.22, 5.6.16.

As already noted, persons defined as Inuit under the Agreement control the QC and BFC, and a majority of Inuit hold positions relating to the shrimp fishing or carry out the shrimp fishing in those organizations. QC and BFC shrimp fishing in the NSA therefore is "Inuit" fishing within the meaning of Article 5 of the Agreement.

On occasion in the past, the NWMB has endeavoured to modify marine fishing quotas in the NSA, without deciding whether a TAH can be justified and if so at what level, on the basis of section 5.6.4 of the Agreement.[1] This section does authorize the continuation of valid pre-1993 quotas in the NSA until reviewed by the NWMB. However, once reviewed by the NWMB – whether for continuation of the maximum quantity allowed at pre-1993 levels, modification, or removal - a valid pre-1993 quota that applies to Inuit NSA fishing may only be either removed by the Board or replaced by a justified TAH. This is the necessary implication of the direction in this section that the NWMB must deal with such a quota "in accordance with this Article". (NTI's Position paper discuss this point further: see paragraph 6 of the paper and the accompanying footnote. For ease of reference, a copy of the 2006 legal opinion by Ruth Sullivan commenting on section 5.6.4, referenced in the NTI Position paper, is enclosed.)

It follows that, in order to make Agreement-compliant decisions based on DFO's current proposals, the NWMB and Minister must treat DFOs proposals as they apply within the NSA as follows:

NU-W

-as a proposal for a TAH on northern shrimp at an unspecified level representing the quantity, within the proposed TAC, that is located within Nu-W;

-as a proposal for a TAH on striped shrimp at an unspecified level representing the quantity, within the proposed TAC, that is located within Nu-W;

NU-E

-as a proposal for a TAH on striped shrimp at an unspecified level representing the quantity, within the proposed TAC, that is located within Nu-E.

[1] For example, the NWMB took the following position in its October 2, 2012 letter to the Minister of Fisheries and Oceans concerning marine shrimp fishing: "all quantitative limitation decisions made by the Board in response to the Proposal [for changes to shrimp fishery management submitted by DFO] remain in the form of quotas, as permitted by NLCA s. 5.6.4."

b) NTI comments on proposed TAHs in NU-W and NU-E

i) TAH levels are not yet specified

Practically speaking, in the marine shrimp fishing context, the Board must know the quantity of any proposed TAH in order to render a TAH decision. NTI and the other affected parties have the right to review the proposed quantity and its basis of estimation and calculation, to have a reasonable opportunity to comment, and to have their comments considered in the Board's decision. NTI submits that, as soon as possible, the Board should direct DFO to generate this information and provide it to the Board and affected parties. The Board's decision schedule for NU-W and NU-E will need to be extended accordingly.

ii) need for evidence and rationale for justification

In cases, such as these, where the Agreement criterion relied on to justify a TAH will be conservation-based, the Board has adopted the necessary and appropriate practice of requiring the proponent to provide sufficient evidence and rationale to show, pursuant to s. 5.3.3(a) of the Agreement, that

1) a TAH is necessary in order to effect a valid conservation objective, and that

2) the proposed level of TAH will restrict Inuit harvesting only to the extent necessary to satisfy the conservation objective. "Conservation" is to be understood according to the principles of conservation provided in Article 5: sections 5.1.3, 5.1.5.

Because DFO's proposal does not acknowledge the *Nunavut Agreement*'s justification requirement, NTI and affected parties are not in a position to comment on the proposed justification for these TAHs. NTI therefore submits that the Board should direct DFO either to confirm that it intends the Board to decide the issue of justification based on the information and comments contained in the current proposal, or to provide sufficient evidence and rationale on this issue. In either case, affected parties should be accorded reasonable opportunity to comment. The Board's decision schedule for NU-W and NU-E will need to be extended accordingly.

c) Need to strike the BNL for each population for which the Board establishes a TAH

Wherever the NWMB establishes a TAH on a wildlife population for the first time, it also must strike the BNL for the population: section 5.6.19.

Accordingly, if the NWMB decides that TAHs are justified for northern and striped shrimp in NU-W and for striped shrimp in NU-E, it also must strike the BNL for each of these populations.

Different formulae for calculating the BNL are provided by the Agreement, depending on a number of factors. The formula for calculating a BNL where a TAH was not in place when the Nunavut Harvest Study commenced is the formula in s. 5.6.23 (b), which may be shown as follows:

(Greatest annual amount harvested in the five years prior to imposition of the TAH) + (average annual amount harvested during the five years of the Nunavut Harvest Study)

———————————

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BFC and QC were the only Inuit fishing striped or northern shrimp in the five years prior to 2017, when a TAH may be established. QC was the only Inuit organization harvesting shrimp during the five years of the Harvest Study (1996-2001). In this context, the formula for both NSA populations therefore is:

(Greatest combined total of BFC and QC shrimp in any year between 2012 and 2016) + (average amount harvested by QC between 1996 and 2001)

———————————

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NTI submits that the Board should direct DFO to provide these numbers and their basis of calculation, and that the Board should give the parties an opportunity to comment before striking these BNLs on the basis of the numbers provided. The Board should not establish this TAH before striking the BNL. The Board's schedule therefore should be extended accordingly.

Once these BNLs are struck, it is the role of the Qikiqtaaluk Wildlife Board and the related Hunters and Trappers Organizations to allocate the BNL between BFC and QC: sections 5.7.3(b), 5.7.6 (b). It is the role of the NWMB to allocate any surplus remaining from the TAH among all licence holders, including BFC and QC, based on the priorities set out in the Agreement: sections 5.6.31-5.6.40.

Thank you again for this opportunity. NTI looks forward to continuing to participate in this very important proceeding.

Sincerely,

James Eetoolook

Vice-President

CC. Jobie Tukkiapik, President, Makivik Corporation

ENCs. (NTI Position paper and Sullivan opinion)

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POSITION OF NUNAVUT TUNNGAVIK INCORPORATED (NTI) ON INUIT FISHING OF MARINE SPECIES IN THE NUNAVUT SETTLEMENT AREA (NSA) FOR SALE

November 25, 2016

Definition

In this paper, "Inuit Fishing Rights" means Inuit rights, derived from Article 5 of the *Nunavut Agreement*, to fish in the Nunavut Settlement Area.

Fishing Marine Species in the NSA for Sale

1. Inuit Fishing Rights include the right to fish for sale to any person inside or outside the NSA: ss. 5.6.1; 5.6.3; 5.7.30.

2. Inuit Fishing Rights include the right to fish, for sale, all species: s. 1.1.1 (definition of "wildlife"); s. 5.6.1.

3. Inuit Fishing Rights, therefore, include the right to fish, for sale, all deep water and intertidal species. The deep water species include, but are not limited to, turbot and shrimp. The intertidal species include, but are not limited to, clams, mussels, scallops, sea urchins and kelp.

4. The forms of organization in which Inuit, including Hunters and Trappers Organizations (HTOs) and Regional Wildlife Organizations (RWOs), may exercise Inuit Fishing rights include economic organizations that Inuit control and in which a majority of Inuit hold relevant positions or carry out relevant work.

Total Allowable Harvests (TAHs)

5. Under Article 5, the only quantitative limit that the Nunavut Wildlife Management Board (NWMB or Board) and Minister may establish after July 1993 on the exercise of Inuit Fishing Rights is a TAH: s. 5.6.1.[1] A TAH may only be established if and to the extent that a TAH is necessary in order to satisfy one of the valid purposes recognized in Article 5: s. 5.3.3.

6. Similarly, once a pre-*Agreement* quantitative limit is reviewed by the NWMB, the only valid quantitative limit that applies to the exercise of Inuit Fishing Rights is a justified TAH: s. 5.6.4 ("in accordance with this Article").[2]

7. Therefore no "quota" introduced after July 1993 on the NSA fishing of any marine species applies to the exercise of Inuit Fishing Rights unless the limit is a justified TAH, and no modification of a "quota" on these species that the NWMB or Minister has purported to set after July 1993 applies to the exercise of Inuit Fishing Rights unless the modification is a justified TAH.

8. For turbot, shrimp, clams, mussels, scallops, sea urchins or kelp, the only modification to a pre-1993 quota applicable to Inuit Fishing Rights of which NTI is aware is the established TAH for Cumberland Sound turbot. There are no TAHs established on any other stocks of these species. Among the current NSA "quotas" that cannot apply to the exercise of Inuit Fishing Rights are:

- the "quotas" on the Clyde River, Pond Inlet and Qikiqtarjuaq turbot fisheries within the NSA;
- the "quotas" for northern and striped shrimp fisheries in "Nunavut East" and "Nunavut West", and
- the "quotas" on the fisheries currently conducted in Sanikiluaq and Qikiqtarjuaq for clams, mussels, scallops, sea urchins and kelp.

A TAH will have to be considered and, if justified, established, for each of these fisheries before any quantitative limit can apply to the exercise of Inuit Fishing Rights. (It would not be permissible under the Agreement to treat a "quota" as though it were a TAH.)

Basic Needs Levels (BNLs) and Surplus

9. Under Article 5, any TAH must be accompanied by a BNL setting aside the minimum Inuit priority portion of the TAH: ss. 5.6.19; 5.6.20. The BNL must be calculated to include the exercise of Inuit Fishing Rights for any purpose: s. 5.1.1, definition of "basic needs level"; s. 5.6.23; Sch 5-4. HTOs and RWOs allocate the BNL amongst Inuit: S-s. 5.7.3(b); S-s. 5.7.6(b).

10. Allocation of any surplus of TAH after the BNL has been set aside must follow the priorities set out in Article 5, which include high priorities for the continuation of any existing

commercial operations and for new economic ventures sponsored by HTOs and RWOs: ss. 5.6.31-5.6.40. The NWMB allocates the surplus, subject to the Minister's ultimate role: ss. 5.6.31-5.6.40; s. 5.3.16.

11. The NWMB and Minister operated under an incorrect view of Article 5's BNL calculation provisions when the NWMB first struck a BNL for Cumberland Sound turbot in 2005. Fish caught for sale by Inuit were excluded from the 2005 calculation. The NWMB has since corrected its practice and undertaken to include fish caught for sale in its BNL calculations. NTI will expect the NWMB to recalculate the Cumberland Sound BNL on the correct basis. When this BNL is increased, the Inuit company currently fishing from the surplus in Cumberland Sound will be eligible for allocation of the BNL by the HTO, and may have access to the surplus in accordance with Article 5's surplus priorities, including for any continued pre-existing commercial operations and any new HTO-sponsored ventures.

12. If the NWMB should set a TAH on NSA northern and striped shrimp and strike the BNL, then Inuit organizations eligible for a BNL allocation, such as the Baffin Fisheries Coalition and Qikiqtani Corporation, also may have access to the surplus in accordance with Article 5's surplus priorities.

Licences

13. Inuit Fishing Rights include the right to harvest most species of fish in the NSA for sale without a licence, in any amount where there is no TAH, and up to any adjusted BNL where there is a TAH: ss. 5.7.26; 5.6.1.

14. Article 5's exceptions to the usual licence exemption under Inuit Fishing Rights include cases where Inuit harvesting a species of marine fish or shellfish commercially did not harvest the species commercially during the 12 months preceding the initialling of the first interim wildlife agreement between Inuit and the Crown on October 27, 1981: s. 5.7.27.

15. NTI notes, but reserves comment on, the apparent assumption of the Department of Fisheries and Oceans (DFO) that s. 5.7.27 of the *Agreement* allows legislation governing commercial fishing to require Inuit to obtain a commercial licence in order to harvest turbot, shrimp, clams, mussels, scallops or sea urchins commercially. (A commercial licence would include an "exploratory" licence, such as those that have been issued for the Clyde River and Pond Inlet turbot fisheries and several Inuit fisheries of intertidal species.) Any such licence may not be unreasonably denied to Inuit applicants or made subject to an unreasonable fee: s. 5.7.27. Any licence requirement mandated by s. 5.7.27 does <u>not</u> authorize the NWMB or Minister:

- to impose quantitative limits on Inuit fishing for sale other than a TAH;
- to impose unjustified non-quota limitations on Inuit fishing for sale;

- to avoid striking a BNL where a TAH has been set, or
- to exercise HTO/RWO authority to allocate a BNL.

NWMB decisions and recommendations under the Board's "Marine Allocation Policy"

16. The NWMB should require all proposals for NWMB decision or recommendation respecting limitations on the exercise of Inuit Fishing Rights to differentiate clearly between limitations that would apply within the NSA and limitations that would apply outside the NSA. This means that all DFO proposals to the NWMB respecting inshore and offshore fishing limitations should recognize a distinct NSA fishing zone or zones, such as DFO has recognized in the case of "Nunavut East" and "Nunavut West" for northern and striped shrimp. (NTI has advocated this practice since October 25, 2005 - see NTI's letter to the NWMB of that date). Related Board decisions and recommendations also should make this demarcation clearly.

17. To the extent that a management decision made by the NWMB or Minister in relation to straddling stocks does purport to apply within the NSA, the decision must conform substantively and procedurally to all the decision making requirements, limitations, and allocative consequences set out in Article 5 of the *Agreement.*

[1] NTI has provided the Board, DFO and the GN with copies of the August 1, 2007 legal opinion by Robert Janes and Dominique Nouvet confirming this interpretation of Article 5. In response to judicial proceedings brought by NTI order to protect this feature of Article 5, the Board had committed in 2006 to consider establishing a TAH for Kingnait Fiord char rather than a "quota" purporting to apply to Inuit.

[2] That the NWMB may not modify a pre-1993 quota limitation except by replacing it with a justified TAH follows from the requirement in s. 5.6.4 that any such modification must be made "in accordance with [Article 5]". As just noted, the only quantitative limitation on Inuit harvesting that the Board may establish under Article 5 is a justified TAH. NTI has provided the Board, DFO and the GN with copies of the December 15, 2006 legal opinion by Ruth Sullivan confirming that Article 5's constraints are triggered once the Board undertakes to review a pre-1993 limitation on Inuit harvesting. Sullivan's description of the purpose of s. 5.6.51 applies equally to section 5.6.4:

> It is … worth considering the purpose of transitional provisions. As their name indicates, they are designed to manage the transition from one legislative regime to another. … In my view, [s. 5.6.51] was designed to avoid a legislative vacuum between the time the Agreement was ratified and the time the Board would be in a position to start making informed decisions. … [T]he Board has the sole authority and primary responsibility to ensure that the type of management system envisaged by the parties is put into place. An interpretation that would permit the Board to escape its responsibility would defeat that purpose. (p. 13, "The Re-enactment of Pre-1993 Quota Limitations", Ruth Sullivan, December 15, 2006)

The NWMB appears to have overlooked these implications of s. 5.6.4 when it wrote as follows in an October 2, 2012 letter to the federal Minister of Fisheries: "all quantitative limitation decisions made by the Board in response to the Proposal [for changes to shrimp fishery management submitted by DFO] remain in the form of quotas, as permitted by NLCA s. 5.6.4."

To: Joe Kunuk

From: Ruth Sullivan

Date: December 15, 2006

Re: The re-enactment of pre-1993 non-quota limitations

……

Background

In 1999, the NWT *Wildlife Act* of 1988, along with its regulations, was continued under s. 29 of the *Nunavut Act*.[1] These regulations included a number of non-quota limitations on the harvesting of wildlife.

In 2003 a Nunavut *Wildlife Act*[2] was enacted. Before enactment, it was reviewed by the Board and accepted by the Minister in accordance with Article 5 of the Nunavut Land Claims Agreement, including s. 5.3.3. A number of the regulations made under the NWT Act were continued under the new *Wildlife Act*. However, these did not require review by the Board because, in so far as they contained non-quota limitations, they were deemed under s.5.6.51 to have been established by the Board in accordance with Article 5 and were to continue in force until modified or removed by the Board.

The Government of Nunavut recently proposed to repeal the NWT regulations continued under the 2003 Act, removing some of them, modifying others, and re-enacting still others. As required by Article 5, the Government submitted these proposed regulations to the Board for review and decision.

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The questions to be addressed in this opinion arose because, part way through the Board's review, the Government adopted the position that if any non-quota limitations contained in the proposed regulations are substantially the same as those continued under the Act in 2003, they are not subject to s. 5.3.3 of the Agreement.

Questions and Short Answers

1) If legislation in effect in 1993 is later repealed, and the limitations it contained are incorporated without modification in new legislation that comes into effect on the date that the previous provisions were repealed, do the incorporated limitations fall under section 5.6.51 of the Nunavut Land Claims Agreement?

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[1] S.C. 1993, c. 28.

[2] S.Nu. 2003, c. 26.

Unless re-enactment of a limitation can be considered a way of establishing it within the meaning of s. 5.6.48, which may be a difficult case to make out, re-enactment does not take 1993 limitations out of s. 5.6.51. Such limitations are deemed to have been established by the Board and they remain in force until modified or removed by the Board.

2) When considering whether to remove limitations that fall under 5.6.51, must the Board remove them to the extent that they do not satisfy the criteria set out in section 5.3.3?

When the Board concludes in the course of a review that one or more limitations preserved by s. 5.6.51 violate s. 5.3.3, it is obliged to remove them or modify them so as to bring them in line with the section. To suggest that the Board could conclude that a limitation is impermissible, yet decline to modify or remove it would defeat the purpose of the Article and would therefore be absurd.

3) Must the Board review such limitations at an appropriate time, or may the Board decline to consider the issue?

In my view, the Board has a duty to review 1993 non-quota limitations and to decide whether to modify or remove them, a decision which must be made in accordance with s. 5.3.3. However, the timing and circumstances under which this duty must be performed are far from clear.

Analysis

In the analysis which follows, I deal with question 1 first, then question 3 and finally question 2. My analysis is based on my reading of Articles 2 and 5 of the Agreement, the 2003 *Wildlife Act* and *R. v. Sparrow*. I did not read the other Articles of the Agreement or consult other caselaw.

Question 1

If legislation in effect in 1993 is later repealed, and the limitations it contained are incorporated without modification in new legislation that comes into effect on the date that the previous provisions were repealed, do the incorporated limitations fall under section 5.6.51 of the Nunavut Land Claims Agreement?

There is a strong argument in favour of the view that if non-quota limitations in force in 1993 were re-enacted by the Commissioner in Council, they would continue to be subject to the transitional provision in s. 5.6.51:

> 5.6.51 Non-quota limitations on harvesting in force at the date of the ratification of the Agreement [in 1993] shall be deemed to have been established by the NWMB, and shall remain in effect until removed or otherwise modified by the Board in accordance with this Article.

Between 1993 and 2003, the Board did nothing to modify or remove these limitations; therefore, as provided in the section, they remain in force. Given the plain meaning of this language, the only thing that can take them out of the section is modification or removal by the Board. A re-enactment is neither a modification nor a removal.

While this argument is persuasive, a more nuanced analysis is possible. The transitional provisions of the 2003 *Wildlife Act* do not address the fate of regulations made under the the former NWT Act that were still in force in 1993. However, the *Wildlife Transitional Regulations* made under the 2003 Act in 2005 provides the following:

> 5 (2) For greater certainty, pursuant to the Agreement, non-quota limitations on harvesting in the current regulations that were in force at the date of the ratification of the Agreement shall be deemed to have been established by the NWMB, and shall remain in effect until removed or otherwise modified by the Board in accordance with Article 5.
>
> *Nu. Reg. 012-2005, s. 5, effective July 8, 2005 (Nu. Gaz. Pt. II, Vol. 7, No. 6).*
>
> 6. For greater certainty, the current regulations remain in force in accordance with section 36 of the Interpretation Act.
>
> *Nu. Reg. 012-2005, s. 6, effective July 8, 2005 (Nu. Gaz. Pt. II, Vol. 7, No. 6).*

This provision probably exceeds the regulation-making authority of the Commissioner in Council under the 2003 Act. But this probably makes little difference since the provision merely recites s. 5.6.51 of the Agreement and the legal effect of s. 36. It does not make new law. It does, however, raise the question of the relationship between s. 5.6.51 of the Agreement and s. 36 of the *Interpretation Act:*[3]

> 36. (1) In this section,
>
> "former enactment" means an enactment that is repealed; (texte antérieur)
>
> "new enactment" means an enactment that is substituted for an enactment that is repealed. (nouveau texte)
>
> (2) Where an enactment is repealed in whole or in part and another enactment is substituted for the former enactment,
>
> …

[3] Although the Agreement is to be interpreted according to the federal *Interpretation Act*, Nunavut statutes and regulations are subject to Nunavut's own *Interpretation Act*.

> (e) all regulations made under the former enactment remain in force and shall be deemed to have been made under the new enactment in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead;

The effect of this provision is to automatically continue the 1993 regulations under the new *Wildlife Act*; there is no need for re-enactment.

By contrast, the non-quota limitations that the government proposes to retain in its new regulations rely on a different ground. That is the common law rule that when an existing provision is repealed and replaced with a new provision that is substantially the same, the new provision is not considered to make new law, but rather to continue the previous law.[4] This means that the coming into force date of the provision does not change, but remains the same as it was before re-enactment. The effect of this rule with respect to a proposed regulation that substantially reproduces a 1993 limitation is that the new provision retains the commencement date of the previous one. According to the Government, it follows that the limitation contained in the provision would continue to fall within the terms of s. 5.6.1.

This reasoning is persuasive. However, it is arguable that re-enactment (as opposed to continuation) is, in effect, a decision to "remove" and "establish" a limitation within the meaning of s. 5.6.48. Ignoring regulations that are continued under s. 36 of the *Interpretation Act* may not be a decision, but choosing to re-enact them is. This analysis is somewhat plausible because in a re-enactment, the re-enacted provision really is repealed and a new provision is enacted, often using different language. Formally it is a new provision, even though the substance remains the same. A bill proposing re-enactment goes through the same legislative process as any other bill. If this reasoning were accepted, re-enactment would amount to establishment of a new limitation and so would be subject to s.5.3.3.

This understanding of re-enactment is supported by a purposive analysis of Article 5, a purpose analysis of s. 5.6.51 and an analysis of the scheme. These analyses appear below.[5]

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[4] This rule is codified in s. 44(f) of the federal *Interpretation Act* which provides: "Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor, …(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment". This provision is not included in Nunavut's *Interpretation Act*. For further explanation, see Ruth Sullivan, *Statutory Interpretation* (Concord Ontario: Irwin Law, 1997), at 20-21.

[5] For scheme analysis, see pp. 5-7; for purposive analysis see pp. 12-14.

Conclusion

If a court were to conclude that in order to give effect to the intention of the parties, the proposed re-enactment of a1993 limitation requires a decision from the Board, one way of rationalizing this outcome would be to treat the repeal part of re-enactment as a removal and the re-enactment part as establishment. However, this would be an unusual way to think of re-enactment and it is very possible that on this point the Government's position would prevail.

Question 3

3) Must the Board review such limitations at an appropriate time, or may the Board decline to consider the issue?

Does the Board owe a duty?

In my view, Article 5 imposes a duty on the Board in connection with non-quota limitations. The content of this duty is not to modify or remove the limitations preserved by s. 5.6.51. but rather to consider and decide whether to do so. This conclusion is based in part on s. 5.2.33 of the Agreement, which provides:

> 5.2.33 Recognizing that Government retains ultimate responsibility for wildlife management, the NWMB shall be the main instrument of wildlife management in the Nunavut Settlement Area and the main regulator of access to wildlife and have the primary responsibility in relation thereto in the manner described in the Agreement. Accordingly, the NWMB shall perform the following functions:
>
> (k) establishing, modifying or removing non-quota limitations (Sections 5.6.48 to 5.6.51);

It is well understood that in legal documents "shall" imposes a duty. The Agreement is to be construed in accordance with the federal *Interpretation Act*. Section 11 states that "shall" is to be construed as imperative and "may" as permissive.

My view also relies on the purpose and scheme of Article 5. The governing principles and objectives of the Article are set out in Part 1 and include the following:

> 5.1.2. This Article recognizes and reflects the following principles:
> …
> (e) there is a need for an effective system of wildlife management that complements Inuit harvesting rights and priorities, and recognizes Inuit systems of wildlife management that contribute to the conservation of wildlife and protection of wildlife habitat;
> (f) there is a need for systems of wildlife management and land management that provide optimum protection to the renewable resource economy;
> (g) the wildlife management system and the exercise of Inuit harvesting rights are

governed by and subject to the principles of conservation;

5.1.3 This Article seeks to achieve the following objectives:
(a) the creation of a system of harvesting rights, priorities and privileges that
(i) reflects the traditional and current levels, patterns and character of Inuit harvesting,
(ii) subject to availability, as determined by the application of the principles of conservation, and taking into account the likely and actual increase in the population of Inuit, confers on Inuit rights to harvest wildlife sufficient to meet their basic needs, as adjusted as circumstances warrant,
…
(v) avoids unnecessary interference in the exercise of the rights, priorities and privileges to harvest;

(b) the creation of a wildlife management system that
(i) is governed by, and implements, principles of conservation,
(ii) fully acknowledges and reflects the primary role of Inuit in wildlife harvesting,
(iii) serves and promotes the long-term economic, social and cultural interests of Inuit harvesters,

As these principles and objectives indicate, the primary goal of Article 5 is to establish a system of wildlife management that

- gives full effect to Inuit harvesting rights based on traditional as well as current practice
- gives priority to Inuit in harvesting wildlife
- ensures Inuit participation in decision-making
- conserves wildlife resources

The primary means through which this goal is to be achieved is informed decision-making by the Board in accordance with the criteria set out in s. 5.3.3. The decision-making of the Board is to be informed by various programs of research. In Part 2, ss. 5.2.37 and 5.2.38 indicate that one of the Board's main functions is to initiate and supervise research pertinent to wildlife management and the rational use of wildlife resources (s.5.2.37(a)). Parts 4 and 5 instruct the Board to carry out a five year Nunavut Wildlife Harvest Study and a five year Inuit Bowhead Knowledge Study. The Harvest Study must be designed to promote maximum harvester participation (s. 5.4.3); its purpose is to collect data useful in making the decisions required of the Board in Part 6 (s. 5.3.5).

The apparent scheme of Article 5 is as follows.. First, the Board is established. Then it carries out research. Then, when it has adequately informed itself, it makes the decisions necessary to achieve the goal described above. While the Board is conducting the research necessary to make these informed decisions, pre-existing allocations and

limitations are preserved, as provided in ss. 5.6.4 and 5.6.51.[6] But once the Board has adequately informed itself, in my view it has a duty to make the decisions entailed by its functions under s. 5.2.33. If these are not made, the primary goal will not be achieved.

Section 5.6.8 of the Agreement provides further modest support for this analysis. It provides that the Board is not obliged to examine a presumption as to needs for the purpose of rebuttal unless requested to do so by the appropriate Minister, an HTO or an RWO. This provision does no work, contrary to the presumption against tautology, unless the Board has an obligation to perform the functions set out in s. 5.2.33. The provision implies that the Board is under an obligation to perform its functions unless the text expressly says otherwise.

When must the duty be exercised?

Even if the Board has a duty to consider and decide as described above, the circumstances in which this duty must be performed are far from clear. It is conceivable that the Board could decline to perform this duty indefinitely. As John Mark Keyes explains in 'Required Rule-making: When Do You Have to Make Delegated Legislation?":

> The courts have generally been reluctant to recognize obligations to make delegated legislation. This is hardly surprising. The discretion inherent in legislative authority typically goes beyond choosing one of several discrete options. It involves a wide range of measures. Enforcing an obligation to legislate takes the courts into policy-making since they have to determine what legislative measures are, as a minimum, needed to meet the obligation.[7]

Keyes is speaking of a duty to make regulations owed by the Governor General in Council or a Lieutenant Governor in Council. But his remarks illustrate the sort of difficulties that courts encounter when attempting to enforce a duty to exercise regulatory authority. One of main uncertainties in this case is timing – when must the duty be performed? what triggers it?

There is only one reference to timing that relates to the Board's duty to consider non-quota limitations and decide whether to modify or remove them. Section 5.6.48 provides:

> 5.6.48 Subject to the terms of this Article, the NWMB shall have sole authority to establish, modify or remove, <u>from time to time and as circumstances require,</u> non-quota limitations on harvesting in the Nunavut Settlement Area.

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[6] See also s. 5.7.24 preserving 1993 restrictions governing access by Inuit to Parks and Conservations Areas until removed or replaced by the Board.

[7] (2002), 15 Canadian Journal of Administrative Law and Practice 293, at p.3.

This section does two things -- it confers exclusive power on the Board to carry out the mentioned functions and it also states when the duty may (or must) be performed. The phrase "from time to time" implies that the Board has discretion to decide when it is best to perform the duty.

However, the phrase "as circumstances require" appears to constrain that discretion. The authority to decide what is required by circumstances is not expressly conferred on the Board. In principle, therefore, failure by the Board to perform its duty would be subject to review on the ground that it failed to act when circumstances required it to do so.

The contrast between the language in this section and the language in section 5.6.26 may be significant. Section 5.6.26 says, "The NWMB shall periodically review the basic needs level …." The use of different words in a legal text is usually understood to signal a different meaning. Arguably "from time to time and as circumstances require" is meant to confer less discretion than "periodically".

The drawback to this approach is that "as circumstances require" is vague. Under s. 5.3.25, the Board is obliged to deal with management matters referred to it by the Minister. Under s. 5.2.15 the Board is obliged to meet within 21 days of receiving a written request from any four members of the Board. Arguably these exhaust the methods by which the Board can be required to review non-quota limitations.

Taking another approach, one could argue that under the scheme of Article 5, 1993 limitations were to be continued only until the Board was in a position to make an informed decision about them. It is clear from the principles and objectives set out in Part 1 that the system of wildlife harvesting established by the Article must fully recognize and implement Inuit rights subject only to the limits mentioned in s. 5.3.3.

5.3.3 Decisions of the NWMB or a Minister made in relation to Part 6 shall restrict or limit Inuit harvesting only to the extent necessary:

(a) to effect a valid conservation purpose;
(b) to give effect to the allocation system outlined in this Article, to other provisions of this Article and to Article 40; or
(c) to provide for public health or public safety.

The Board has primary responsibility for ensuring that the system of wildlife management established under Article 5 in practice fully recognizes and implements Inuit rights. As noted above, it does so through informed decision-making. A court might well conclude that the Board's duty to consider existing non-quota limitations and to decide whether to modify or remove them must be performed as soon as the Board has done the research necessary to determine what minimum limitations are necessary for the purposes set out in 5.3.3 (a) – (c).

The drawback to this argument is that the notion of being adequately informed is nebulous and the Board alone is in a position to judge when adequacy has been achieved. It is also noteworthy that elsewhere in the Article, the Board is expressly obliged to act

within a certain time frame. However no such obligation is imposed in connection with non-quota limitations, suggesting that timing is within the discretion of the Board.

A better possibility is that the duty to consider and decide must be performed upon completion of the 5 year Wildlife Study or within a reasonable time after completion. This solves the timing problem in a plausible and workable way. Under s. 5.4.2, the Study had to begin within a year of ratification. Once it was completed, the Board had to begin its review of the limitations preserved by s. 5.6.51, then forward its decisions on whether to modify or remove them to the Minister.

The drawback to this possibility is the absence of any provision expressly requiring the Board to undertake this review. There is a noticeable contrast between the ways in which the Wildlife Study and the Bowhead Knowledge Study are dealt with in the Article. Both studies must be completed within a time frame – within 6 years and 5 years respectively. In the case of Bowhead whales, s. 5.6.18 provides

> 5.6.18 By the first anniversary of the commencement of the study pursuant to Part 5, the NWMB shall establish a total allowable harvest for harvesting by Inuit in the Nunavut Settlement Area of at least one bowhead whale, subject to Sections 5.3.3 to 5.3.6 and considering the results of the study to date and other information as may be available to it. For greater certainty, the decision of the NWMB respecting the total allowable harvest is subject to Sections 5.3.16 to 5.3.23. Thereafter, the total allowable harvest shall be dealt with by the NWMB from time to time under Sections 5.6.16 and 5.6.17, considering the results of the study and other information as may become available.

Along similar lines, s. 5.6.25 provides:

> 5.6.25 The NWMB shall establish the basic needs levels for beluga, narwhal and walrus within 12 months of the NWMB being established taking into account the fact that they are in short supply in some areas and therefore that the harvest by Inuit has been and is artificially low in relation to their needs and does not necessarily reflect their full level of needs.

If the duty to consider and decide whether to modify or remove limitations were triggered by completion of the Wildlife Study, one would have expected a provision like 5.6.18 or 5.6.25 to be included among the provisions dealing with non-quota limitations.

One circumstance in which the Board's duty is clearly triggered is when a matter is referred to the Board under s. 5.3.25.

> 5.3.25 Nothing in this Article will prevent a Minister, on the Minister's own initiative, from referring a management matter to the NWMB. Where a matter is referred, the NWMB shall deal expeditiously with it. The NWMB will respond to Ministerial initiatives with decisions in time to permit Ministers to meet their national and international obligations.

It is arguable that in seeking the Board's approval for new regulations, the Minister has referred a management matter to the Board within the meaning of s. 5.3.25. If this interpretation is correct, then the Board would be obliged to respond to the Minister "expeditiously" – that is, as soon as possible having regard to the Board's duty to promote and act within the principles and objectives of Article 5 and to apply the criteria set out in s. 5.3.3 in light of the research available to it from the Wildlife Harvest Study and from studies under s.5.2.37. Even if this understanding of s. 5.3.25 is incorrect, there can be no doubt that the Government has sought the Board's approval of its proposed regulations, the Board has undertaken to review them, and every review by the Board must be taken in accordance with its duties, having regard to the information available to it. As emphasized above, informed decision is the primary instrument for achieving the objectives of the Article.

Is a decision to re-enact 1993 limitations subject to s. 5.3.3?

It is possible to think of the regulations referred to the Board as raising a single issue – how to deal with the non-quota limitations preserved by s.5.6.51. On this analysis, the regulations that make no change must be reviewed along with those that propose change. Conceptually it is a single package and must be dealt with as such. Since a significant part of this package may restrict or limit Inuit harvesting beyond what is necessary for the purposes set out in s. 5.3.3 (a) – (c), the Board's decision about what to do with these limitations would be subject to that section. The package as a whole would have to meet criteria.

Alternatively, and more likely perhaps, the matter might be analyzed as consisting of distinct proposals – some to establish new limitations, others to modify or remove them, and others to re-enact them. It is far from self-evident that a decision to re-enact a limitation is a decision to restrict or limit Inuit harvesting within the meaning of s. 5.3.3. As discussed above, it is certainly arguable that because a decision to re-enact is not a decision to modify or remove, any re-enacted limitation would remain subject to the deeming provision in s. 5.6.51. That section clearly states that non-quota limitations existing in 1993 shall remain in effect until removed or otherwise modified by the Board. When a limitation is re-enacted, the Board does not decide to remove or modify it.

Furthermore, even if re-enactment is considered a decision, arguably it is not a decision covered by s.5.3.3, but rather relies on 5.6.51 for its validity. Section 5.6.51 provides that 1993 non-quota limitations are "deemed to have been established by the NWMB". To be valid, a decision of the Board establishing a non-quota limitation obviously must be made in accordance with s. 5.3.3.[8] It follows, then, that 1993 limitations preserved by s.5.6.51 are deemed to have been made in accordance with s. 5.3.3 and to meet the criteria set out there. The Board is free to review that deemed decision at any time and decide to modify or remove it. But so long as the 1993 limitation remains in force, the Board's deemed decision must be considered to comply with s. 5.3.3.

[8] It seems fair to interpret "deemed to have been established" as meaning "deemed to have been lawfully established".

I prefer the following reasoning. A decision to re-enact a limitation is properly thought of as a decision to not modify or remove – which is not the same as the deemed decision to establish. As noted above, the content of the duty owed by the Board is not a duty to modify or remove limitations, but rather a duty to consider and decide whether to do so. So long as the Board fails to modify or remove a 1993 limitation, the limitation continues to be in deemed compliance with s. 5.3.3. But once the Board considers whether to modify or not, whether to remove or not, the resulting decision is distinct from its deemed decision. It is not a decision governed by s. 5.6.51. Therefore, it must be made in accordance with s. 5.3.3. And if the Board concludes that the 1993 limitation does not comply with s. 5.3.3, it is obliged to modify or remove it, thereby taking the limitation out of s. 5.6.51.[9]

When there are two plausible interpretations of an Act, the courts prefer an interpretation that promotes the purpose of the Act, fits the scheme, and is consistent with established presumptions of legislative intent.[10] In my view, an interpretation of Article 5 that treats the proposed re-enactment as a decision subject to s.5.3.3. better promotes its purpose, is more consistent with its scheme. The purposive and scheme analysis is further explored below.[11]

Conclusion

I conclude that the Board has a duty to consider and decide whether to modify or remove 1993 non-quota limitations, but the scheme does not clearly provide for that duty to be performed at any particular time, apart from the provisions in s. 5.6.25 and s. 5.2.15. However, once the Board (for whatever reason) has undertaken a review, the resulting decision must be made in accordance with s.5.3.3. This follows from recognition that actually considering and deciding whether to modify or remove a 1993 limitation is distinct from being deemed to have established it.

Question 2

2) When considering whether to remove limitations that fall under 5.6.51, must the Board remove them to the extent that they do not satisfy the criteria set out in section 5.3.3?

If I understand correctly, the Government takes the following position. If the Board decides not to modify or remove a 1993 limitation that unduly restricts Inuit harvesting, the limitation remains within the scope of s. 5.6.51. This means that the impermissible limitation is deemed to be in compliance with s. 5.3.3 and will remain in force until it is

[9] The justification for this claim is dealt with below.

[10] Of course, the Agreement is not an Act and the *Nunavut Land Claims Agreement Act* does not incorporate it by reference. However, it does make the Agreement binding on third parties and gives statutory force to the rights, privileges, benefits, powers, duties and liabilities created by the Agreement. Also, making interpretation subject to the federal Interpretation Act might suggest that the usual rules of statutory interpretation apply.

[11] See pp. 12-14.

actually modified or removed. A decision not to modify or remove cannot take a preserved limitation out of the section.

The implications of this argument are as follows. Regardless of whether the Board decides to remove or not remove, its decision escapes scrutiny under s.5.3.3. The same goes for a decision not to modify. But if the Board decides to modify, its decision must comply with s. 5.3.3. At first glance, this may seem anomalous, but it follows from the wording of s. 5.6.51.

In my view, the Government argument begs the question; that is, the argument is persuasive only if one assumes that the Board is not obliged to modify or remove a limitation that is found to be impermissible in the course of a review. But there is no reason to make that assumption and in fact it undermines the purpose and scheme of the Article.

purpose and scheme

Under s. 2.9.4, the Agreement is to be construed according to the federal *Interpretation Act*. Section 12 of the Act provides:

> **12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The objectives of Article 5 are clearly set out in s. 5.1.3 and include the following:

> (a) the creation of a system of harvesting rights, priorities and privileges that
>
> (i) reflects the traditional and current levels, patterns and character of Inuit harvesting
>
> …
>
> (v) avoids unnecessary interference in the exercise of the rights, priorities and privileges to harvest;
>
> (b) the creation of a wildlife management system that
>
> …
>
> (ii) fully acknowledges and reflects the primary role of Inuit in wildlife harvesting,
>
> (iii) serves and promotes the long-term economic, social and cultural interests of Inuit harvesters,

As mentioned above, these objectives are to be achieved through informed decision-making. The Board carries the primary responsibility for ensuring the wildlife management system in Nunavut meets these objectives. It follows, in my view, that all decisions taken by the Board must promote these objectives. Any discretion conferred on the Board is constrained by the principles and objectives set out in Part 1. Any decision taken by the Board must comply with s. 5.3.3.

I assume that at least some 1993 non-quota limitations could impose significant restrictions on traditional Inuit rights, priorities and privileges to harvest. Certainly the

NWT limitations were not made with these particular principles and objectives in mind. They were made in a very different context, addressing a different set of priorities and constraints. Furthermore, most if not all were probably made before the decision in *R. v. Sparrow*.[12]

In these circumstances I believe that the Board has a duty first to consider and decide whether the preserved limitations are permissible. This duty is discussed above. Second, upon discovery that some limitations are impermissible, the Board has a duty to decide to modify or remove them, so as to bring them in line with section 5.3.3 and stay within the scope of its discretion. Any other conclusion would tend to defeat the purpose of the Article, a well recognized form of absurdity.

It is also worth considering the purpose of transitional provisions. As their name indicates, they are designed to manage the transition from one legislative regime to another. The Government apparently refers to s. 5.6.51 as a substantive grandfathering provision. My impression is that grandfathering has a different purpose – to preserve pre-existing rights and privileges so as to avoid the evil of retrospectivity. That is not what is going on in s. 5.6.51.[13] In my view, that provision was designed to avoid a legislative vacuum between the time the Agreement was ratified and the time the Board would be in a position to start making informed decisions. The Government's interpretation implies that the provision was designed to permit the Board to avoid dealing with the preserved limitations for as long as it likes. However, given the principles and objectives of the Article, this interpretation is implausible. As mentioned above, the Board has the sole authority and primary responsibility to ensure that the type of management system envisaged by the parties is put into place. An interpretation that would permit the Board to escape its responsibility would defeat that purpose.

compliance with s. 35 of the Constitution Act

Section 2.9.3 of the Agreement provides that there shall not be any presumption that doubtful expressions in the Agreement be resolved in favour of Government or Inuit. However, this does not exclude appeal to other presumptions.

In statutory interpretation, it is presumed that the legislature intends to comply with constitutional law. Therefore, in cases of genuine ambiguity, courts should prefer an interpretation that complies with the constitution over one that does not. It is not clear to me how such a principle applies to a land claims agreement that has not been incorporated by reference into an Act of Parliament.[14] However, intuitively it seems right that the Agreement should be interpreted in light of s.35 of the Constitution Act, as interpreted by *R.v. Sparrow*. Apparently *Sparrow* played an important role in the *travaux preparatoire* of the Agreement.[15] and it appears that much of Article 5 is inspired by

[12] [1990] 1 S.C.R. 1075.
[13] Please note that I did not have time to research this point.
[14] See note 9 above. There may be case law relevant to this point of which I am unaware.
[15] If these are available, it would be worth examining them for indications of the parties' intent.

Sparrow.[16] If a preserved limitation appears to violate s. 35 of the Constitution Act, it is hard to believe that the Board has no duty to modify or remove it.

conclusion

In my view, s. 5.6.51 cannot be interpreted as intending to preserve limitations on the harvesting rights or priorities of the Inuit for an indefinite period. On the contrary, the Board is to review the 1993 legal regime and bring it in line with the principles, objectives and provisions of Article 5. If in the course of the review, the Board concludes that a preserved limitation does not comply with s. 5.3.3, it has a duty to modify or remove it.

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[16] Section 5.3.3 in particular appears to be rooted in *Sparrow*. As Lamer C.J. and LaForest J. wrote:

> 82 [In justifying a limitation of Aboriginal rights, the court must address] the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

See also s. 44 where the court writes

> 44. … historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).