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Nunavunmi Anngutighatigut Aulapkaijitkut Katimajiat
Nunavut Wildlife Management Board

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Tammaqtailinahuarniriit anngutighat atuqhugit Inuit qaujimajatuqangillu ilihimaniillu ilitquhiannin
Conserving wildlife through the application of Inuit Qaujimajatuqangit and scientific knowledge

NWMB - SENT
DATE: email May 1/09 TSI

May 1st 2009

Honourable Gail Shea
Minister of Fisheries and Oceans
Government of Canada

Honourable Dan Shewchuk
Minister of Environment
Government of Nunavut

Paul Kaludjak
President of Nunavut
Tunngavik Incorporated

Peterosie Qappik
Chairperson of the Pangnirtung
Hunters & Trappers Association

Manasa Evic
Chairperson of Pangnirtung
Fisheries Ltd.

Jayko Alooloo
Vice-Chairperson of the
Qikiqtaaluk Wildlife Board

Dear Colleagues:

Re: June 2nd 2009 Nunavut Wildlife Management Board public hearing to consider the level of Total Allowable Harvest, the Basic Needs Level and the Surplus for the Char Fishery in Kingnait Fjord

Further to the letter - dated April 23rd 2009 - sent to you by the Nunavut Wildlife Management Board (NWMB or Board), announcing the June 2nd public hearing for the Char Fishery in Kingnait Fjord, the NWMB is forwarding to you a legal opinion from Lang Michener LLP, attached to this letter. The opinion, dated April 29, 2009, addresses what types of harvests are required to be included in a Basic Needs Level.

Please treat the opinion as a hearing document, additional to the ten others delivered to you on April 23rd. Please also note that, although the opinion was commissioned by the Board, it does not necessarily represent the opinion of the NWMB at this time. Rather, it is an independent opinion recently received by the Board, which is being distributed to the hearing parties for their review, consideration and potential comment in oral and/or written submissions. The NWMB will carefully consider the opinion, and all relevant arguments and evidence, in making its decision(s) with respect to the level of Total Allowable Harvest (TAH), the Basic Needs Level (BNL) and the allocation of the Surplus, if any, for the Char Fishery in Kingnait Fjord, pursuant to Sections 5.6.16, 5.6.17, 5.6.19, 5.6.23, 5.6.24 and 5.6.31 of the *Nunavut Land Claims Agreement* (NLCA).

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The opinion – along with all the other hearing documents - is also available for download from the NWMB's website (www.nwmb.com), or by contacting the NWMB at the following coordinates:

NUNAVUT WILDLIFE MANAGEMENT BOARD
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Phone: (867) 975-7300
Fax: (867) 975-7320
E-Mail: receptionist@nwmb.com

In its April 23rd letter, the NWMB extended an invitation to you to provide written submissions by no later than 5:00 p.m. on May 26th 2009. **Please note that the deadline for receipt of submissions is now extended by one day, to no later than 5:00 p.m. on May 27th 2009.** Unless persuasive reasons are provided to the Board for late filing, the NWMB will not consider materials during the hearing that are not filed on time.

Submissions may be filed with the Board in person, by courier or by mail. They should be clearly marked as pertaining to the NWMB Hearing for Kingnait Fjord Char. Delivery of the submissions may also be made through fax or electronic transmission, but only if your organization confirms by phone with the NWMB – by no later than 5:00 p.m. (Iqaluit time) on May 27th 2009 – that a complete and legible copy of the transmission has been received by the Board. Documents are deemed to have been filed on the actual day of receipt by the NWMB.

Please keep in mind that the more thorough, reliable and persuasive supporting evidence and justifications are for your submissions, the more weight they will be given by the NWMB in the *NLCA* decision-making process.

If you require further information, please do not hesitate to visit the NWMB website or to contact the Board directly.

Yours sincerely,

Harry Flaherty,
A/Chairperson of the
Nunavut Wildlife Management Board

c.c. Richard Connelly, Executive Director of the Nunavut Inuit Wildlife Secretariat, for distribution to all Nunavut Hunters and Trappers Organizations, the Kivalliq Wildlife Board and the Kitikmeot Regional Wildlife Board;

Eric Kan, Area Director, Eastern Arctic Area, Department of Fisheries and Oceans;

Stefan Romberg, Resource Management Officer, Department of Fisheries and Oceans;

Wayne Lynch, Director Fisheries and Sealing, Department of Environment; and

Gabriel Nirlungayuk, Director of Wildlife, Nunavut Tunngavik Inc.

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SCC Paralegal: Miranda Scott x 154
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BY EMAIL

April 29, 2009

Michael d'Eça
Barrister & Solicitor
159 Holmwood Ave.
Ottawa, Ontario
K1S 2P3

CONFIDENTIAL
SOLICITOR-CLIENT PRIVILEGE

Dear Mr. d'Eça:

Re: Nunavut Wildlife Management Board – "Basic Needs Level" Meaning in Section 5.6.19 of NLCA, Our File No.: 75237-7

I confirm that we were retained to provide our opinion on the question of what types of harvest should be included in the calculation of basic needs levels.

This opinion letter is organized as follows:

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*Practising member of the Ontario, Alberta, Northwest Territories, Yukon and Nunavut Bars; and U.S. Attorney, Arizona

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A. Executive Summary

Question: **Basic Needs Level**

Pursuant to Section 5.6.19 of the *Nunavut Land Claims Agreement* ("NLCA"), when striking a basic needs level ("BNL") for Inuit harvest of a stock or population, what types of harvests are the NWMB required to include? Are Inuit commercial and quasi-commercial uses to be included or excluded?

Three alternatives/options exist as to what harvests should be included in a BNL:

Option 1: A BNL includes only Inuit harvests as described in the NWHS Final Report:
- harvests taken for domestic and cultural purposes (subsistence harvests);
- subsistence and commercial fur harvests; and
- subsistence and commercial harvests for use in the hunter's community or for intersettlement trade.

Option 2: A BNL includes all Inuit subsistence and small scale/quasi-commercial (basic economic need) harvests preceding the establishment of a TAH.

Option 3: A BNL includes all Inuit harvests (subsistence and commercial) preceding the establishment of a TAH;

Answer:
Overall, option 3 - subsistence and commercial harvests - is the most consonant with the provisions and the object and purpose of Article 5.

Sections 5.6.19 to 5.6.25 of the NLCA do not specify what types of harvests the NWMB shall include in calculating a basic needs level. However, read in context with the whole of Article 5

and the NLCA , in our opinion the calculation of a BNL is a numeric calculation based on (i) the amounts harvested during the original 5 year Nunavut Wildlife Harvest Study or (ii) those amounts and harvests during the 5 year period prior to the imposition of a total allowable harvest, as applicable, without regard to the type of consumption or use by Inuit. We find no express or implied distinction to be drawn between the subsistence or commercial purposes for which Inuit may have been harvesting during the applicable period.

B. Opinion

Question: **Basic Needs Level**

Pursuant to Section 5.6.19 of the *Nunavut Land Claims Agreement* ("NLCA"), when striking a basic needs level ("BNL") for Inuit harvest of a stock or population, what types of harvests are the NWMB required to include? Are Inuit commercial and quasi-commercial uses to be included or excluded?

Answer:

Sections 5.6.19 to 5.6.25 of the NLCA do not specify what types of harvests the NWMB shall include in calculating a basic needs level. However, read in context with the whole of Article 5 and the NLCA , in our opinion the calculation of a BNL is a numeric calculation based on (i) the amounts harvested during the original 5 year Nunavut Wildlife Harvest Study or (ii) those amounts and harvests during the 5 year period prior to the imposition of a total allowable harvest, as applicable, without regard to the type of consumption or use by Inuit. We find no express or implied distinction to be drawn between the subsistence or commercial purposes for which Inuit may have been harvesting during the applicable period. A BNL is intended as a snapshot of certain harvest levels subject to the applicable formulas specified in Sections 5.6.21 and 5.6.23 – and it obliges the NWMB to strike a base line level of harvesting for Inuit which captures and preserves this first demand by Inuit on the total allowable harvest for that stock or population.

1. Relevant Statutory Scheme

(i) Object and purpose of Article 5

Article 5 is the governing article of the NLCA for wildlife management and harvesting within the Nunavut Settlement Area ("NSA").[1] The principles and objectives of Article 5 are set out in Sections 5.1.2 to 5.1.5. Two dominant themes run through these principles and objectives:

- the significance of conservation in Nunavut's wildlife management system (see, for instance, Sub-sections 5.1.2(e) and (g), 5.1.3(a)(ii), (b)(i) and (iv), 5.1.4 and 5.1.5); and

[1] *Nunavut Land Claims Agreement*, Article 5

- the importance of ensuring the long-term economic, social and cultural interests of Inuit harvesters within that system (see, for instance, Sub-sections 5.1.2(a), (b), (c), (e) and (h), 5.1.3(a)(i), (ii), (iii) and (v), 5.1.3(b)(ii), (iii) and (v) and 5.1.4).

These themes are neither mutually exclusive nor in competition with one another. On the contrary, they are complementary and mutually reinforcing. The economic, social and cultural interests of Inuit include the conservation of wildlife – and the conservation of wildlife is an essential element in ensuring the long-term economic, social and cultural interests of Inuit harvesters.[2]

Section 5.1.3 proclaims that the Agreement seeks to achieve as one of its objectives, *"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..."* [Emphasis added].

In essence, the object and purpose of Article 5 is to manage wildlife in a way that meets the principles of conservation while protecting and prioritizing Inuit rights to harvest.

(ii) Article 5 provisions related to basic needs levels

Section 5.6.1 addresses an Inuk's right to harvest where a total allowable harvest ("TAH") has not been established by the NWMB. In that circumstance, *"...an Inuk shall have the right to harvest that stock or population in the Nunavut Settlement Area **up to the full level of his or her economic, social and cultural needs**, subject to the terms of this Article."*[Emphasis added] In addition, NLCA Section 5.6.2 states that, *"For the purposes of Section 5.6.1, full level of needs means full level of harvest."*

NLCA Section 5.6.9 states: *"In assessing the economic, social and cultural needs of Inuit, the NWMB shall consider: (a) actual levels of harvest; (b) availability of and accessibility to wildlife; and (c) the general economic, social and cultural conditions and circumstances of Inuit."* [Emphasis added].

Sections 5.6.19-5.6.25 directly address basic needs levels - a BNL must be created when a TAH has been determined. In addition to providing for the procedure to follow to establish BNLs – based on harvested amounts during the Study - the sections provide that:

First Demand

- the *"basic needs level shall constitute the first demand on the total allowable harvest. Where the total allowable harvest is equal to or less than the basic needs level, Inuit shall have the right to the entire total allowable harvest" (*Section 5.6.20);

[2] See, for instance, the following *Inuit Qaujimajatuqangit* principles from Nunavut's *Wildlife Act*: Subsection 8(f) - ***Avatimik Kamattiarniq/Amiginik Avatimik*** (*"... people are stewards of the environment and must treat all of nature holistically and with respect, because humans, wildlife and habitat are inter-connected and each person's actions and intentions towards everything else have consequences, for good or ill"*); and, Subsection 8(i) – ***Surattittailimaniq/Hugattittailimanik*** (*"... hunters should only hunt what is necessary for their needs and not waste the wildlife they hunt"*).

Calculation Formula

- "the NWMB shall calculate the basic needs level as the higher of:

  (a) an amount based on data from the original five year harvest Study, calculated according to the method described in Sub-section 5.6.21(a), or, where an HTO has previoiusly elected the method described in Sub-section 5.6.21(b), the harvest level of the stock or population in the identified year; or

  (b) the aggregate of the greatest amount harvested in any one year during the five years prior to imposition of a total allowable harvest and the average annual amount taken over the five years of the Study, which aggregate is then divided by two." (Section 5.6.23)[3]

- where Sub-section 5.6.23(b) applies, the "*the NWMB shall rely on the best evidence available as to the levels of harvesting by Inuit in the five years prior to establishment of a total allowable harvest.*" (Section 5.6.24)

Sections 5.6.26 to 5.6.30 contemplate periodic review and, if warranted, adjustment of the BNLs for various stocks or populations.

Adjusted Basic Needs

- a BNL may be adjusted to meet increased consumption or use by the Inuit, inter-settlement trade, and marketing for consumption or use in the NSA (Section 5.6.26);

In the event that the BNL (including any adjustments) is less than the TAH, there is the residual question of how to allocate the surplus.

Surplus

- the allocation of any surplus to be determined according to the following order and priority:

  (a) to provide for personal consumption by other residents;
  (b) to provide for the continuation of existing sports and other commercial operations;
  (c) to provide for economic ventures by HTOs and RWOs;
  (d) to provide for other uses (commercial, commercial sports, recreational or other uses) (Section 5.6.31);

  any portion of the surplus allocated for commercial use is to be governed by a limited entry system for commercial harvesting – the Inuit to have at least the same right to

[3] This calculation formula in Section 5.6.23 incorporates by reference the formula in Section 5.6.21 which is a parallel provision for when a TAH already exists at the commencement of the Study. As we are unaware of there being any TAHs for stocks or populations at the commencement of the Study in 1996, it appears the only application of Section 5.6.21 is as it relates to Section 5.6.23. We therefore recognize that Sections 5.6.23 (as amplified by Section 5.6.24) governs outstanding BNL calculations and that the data available from the original 5 year harvest Study may be affected by more recent data if Section 5.6.23(b) applies.

apply for commercial opportunities as all other persons who qualify (Sections 5.6.40, 5.6.46).

Pursuant to Section 5.7.26: "*Subject to the terms of this Article, an Inuk with proper identification may harvest up to his or her adjusted basic needs level without any form of licence or permit and without imposition of any form of tax or fee.*"

The NLCA also sets out, at sections 5.6.5-5.6.11, that the Board is to presume, as a matter of fact and without further evidence, that the Inuit need the TAH established for the following: all bears; musk-ox; bowhead whales; all migratory birds and their eggs (except migratory birds, as listed in Part I of Schedule 5-3, during the fall season); all raptors, including owls; and eiderdown from eider duck nests.

2. NLCA reference to "full" and "basic" needs

Article 5 refers to both - "*full level of ...needs*" and "*basic needs level*".

As a starting point, prior to the establishment of a TAH, an Inuk can harvest up to his or her full level of needs (Section 5.6.1). Article 5 also recognizes three components of need – economic, social and cultural, and acknowledges that the Board is to assess (evaluate) those components (Sections 5.6.1 and 5.6.9 – see also Section 5.6.27).

Subsequently, after the establishment of a TAH, the BNL shall constitute the first demand on the TAH and Inuit can harvest up to the BNL. Where the TAH is equal to or less than the BNL. Inuit shall have the right to the entire TAH.(Section 5.6.20).

Notwithstanding the use of the words "full" and "basic" to describe levels of needs, there is no explanation or reconciliation of how these levels differ. The "full level of ...needs" applies to how much <u>each</u> Inuk may harvest when the NLCA came into effect and prior to a TAH having been established by the NWMB. The term "basic needs level" applies to <u>all</u> Inuit in a community or a Region harvesting as an aggregate, after a TAH has been determined and a BNL struck by the NWMB (Sub-sections 5.7.3(b) and 5.7.6(b)).

The point is, the words "full" and "basic" are used in different contexts and are not meant by reference to their ordinary meanings to convey <u>relatively</u> different harvest levels. The word "full" is used in its ordinary sense to describe an Inuk's harvest rights as sufficient to completely or entirely meet all economic, social and cultural needs (subject to availability of wildlife – see Section 5.6.2.). Whereas the word "basic" is used more as a term or label for whatever harvest amount may be calculated using the formulas in Sections 5.6.21 or 5.6.23. In this sense, the meaning of "basic needs level" is not really informed by the adjective "basic" but rather by whatever the calculation turns out to be. It is the calculation itself that determines what the "basic needs level" means. The word "basic" does not direct what types of harvest are to be included in the calculation nor determine or modify the resulting amount. In context, however, it is reasonable to conclude that the choice of the word "basic" to form part of the term "basic needs level" – intended as this amount is to constitute the first demand on the TAH – is to

emphasize that the BNL is the fundamental priority promised to Inuit under the NLCA to the extent the TAH conservation limit can bear such an Inuit harvest.

3. Provisions for "Personal Consumption" by Other Residents and "Existing Commercial Operations"

Section 5.6.31 states that the NWMB shall determine the allocation of surplus (TAH minus BNL), if any, in order of priority, the first two priorities being:

(a) personal consumption by other residents;
(b) continuation of existing sports and other commercial operations.

The term "personal consumption" is only used in conjunction with "other residents" (see Sub-sections 5.6.27(e), 5.6.31(a), 5.6.32, 5.6.33 ("or by their dependents") and 5.6.35 and "other residents" is a defined term in Section 5.1.1 to mean residents of the NSA other than Inuit.

By comparison, references to "consumption" by Inuit does not include the modifying adjective "personal" (see Sub-sections 5.6.26(a) and (c) and 5.6.27(b)).

Why is the term "personal" consumption used only in relation to other residents? The answer may be inferred from the bases for the NWMB's calculation of the BNL in Section 5.6.21 and the priority scheme in Section 5.6.31 for allocating any surplus.

Sections 5.6.21 and 5.6.23 make no reference to "consumption" by Inuit – the calculation is premised on recorded harvest levels by Inuit for each stock or population. There is no stipulation as to the "consumption" or "use" by Inuit – it is all about the Study harvest numbers when the BNL is first calculated.

Subsequently in Section 5.6.26, the NWMB is required to periodically review all BNLs and determine whether an <u>additional</u> allocation is required to meet any or all of:

(a) increased consumption or use by Inuit
(b) intersettlement trade [by Inuit]; and
(c) marketing for consumption or use in the NSA [by Inuit].

That the adjustment of a BNL shall be based on "consumption or use" by Inuit and not "personal consumption" implies that the original BNL (calculated based on harvest amounts) accepted <u>any</u> purpose the Inuit harvesters may have intended during the Study. This view is supported by Section 5.6.1 which states an Inuk shall have the right to harvest a stock or population "up to the full level of his or her economic, social and cultural needs, subject to the terms of this Article."

Once the TAH is established "an Inuk shall have the right to harvest that species in accordance with the terms of this Article."(Section 5.6.3) Under Section 5.6.5, it is presumed as a matter of fact without further evidence that Inuit need the full TAH for certain species (bears, musk-ox, bowhead, *et al*). There is no express provision negating the conclusion that Inuit may continue

to harvest up to the full level of their economic, social and cultural needs so long as this is equal to or less than the TAH. And once the BNL baseline is established, additional harvest allocation may be granted to Inuit based on the NWMB's periodic reviews against criteria in Section 5.6.26.

It bears noting that in Article 16 Section 16.1.2 provides that Inuit shall have the right to use open waters in the Outer Land Fast Ice Zone (which extends well beyond the NSA) for purposes of harvesting, for domestic consumption, all species other than marine mammals. Pursuant to Section 16.1.1, the full suite of Article 5 rights apply to the harvest of marine mammals in the open waters of the Outer Land Fast Ice Zone.[4]

No similar "domestic" qualification is placed on "consumption" or "use" by Inuit in relation to the first calculation of the BNL pursuant to Sections 5.6.21 and 5.6.23 or any adjustment upwards pursuant to Section 5.6.26. Indeed, conceivably, the "basic needs level" struck for Inuit could be approximately the same amount as the aggregate of all the "full levels" of economic, social and cultural needs of each Inuk if Inuit were harvesting at this "full level" during the Study.

4. Nunavut Wildlife Harvest Study

The purpose of the Nunavut Wildlife Harvest Study (NWHS), as set out in Section 5.4.5, is "*...to furnish data, to establish current harvesting levels, to assist the NWMB in establishing levels of total allowable harvest and, in general, to contribute to the sound management and rational utilization of wildlife resources in the Nunavut Settlement Area.*" In order to achieve that purpose, the **NWHS is to "*document the levels and patterns of Inuit use of wildlife resources for the purpose of determining the basic needs level*...** [Emphasis added]"

Pursuant to the Terms of Reference for the NWHS (NLCA Schedule 5-5), "*the study shall be conducted primarily by means of a diary/calendar record kept by harvesters of* ***all wildlife harvested daily***...[Emphasis added]"

It appears that for all species (save the exceptions – beluga, narwhal and walrus – set out in Section 5.6.25) the data from the NWHS is key to a determination of the BNL (Sections 5.6.21-5.6.23). That data is intended to include **all** self-reported wildlife harvested daily by each harvester.

5. Views of Parties

(i) View of NTI

[4] NLCA, Article 16

In 2005, the Board issued decisions regarding a new total allowable harvest and a related basic needs level.[5] In responding to these decisions (June 16, 2005), NTI expressed its disagreement with the Board's distinction between Inuit uses of a commercial and quasi-commercial nature and other Inuit uses for the establishment of BNLs. As explained by NTI:

> As set out in the February 2nd letter, Decision No. 2 purports to establish a Basic Needs Level (BNL) for Pangnirtung for the turbot management area of Cumberland Sound at 4.4 tonnes. This calculation is apparently based on a decision taken in the course of the administration of the Nunavut Wildlife Harvest Study (NWHS) to make distinctions between Inuit uses of a commercial and quasi-commercial nature and other uses. Whatever assumptions made in the administration of the NWHS, there is no basis in the text of the NLCA to delete commercial and quasi-commercial uses from the calculation of BNLs. Numerous textual indicators --- for example, the definitions of "harvest", the unqualified reference to "Inuit use" in subsection 5.4.5(a), and the starting place definition of core Inuit rights in 5.6.1 --- indicate a contrary intention. [Emphasis added][6]

NTI further expanded on its understanding of the harvesting rights/management regime of the NLCA in a letter dated October 25, 2005:

> . . . where a BNL is calculated, all previous Inuit use, however characterized in the pre-NLCA world, must fold into the calculation of Inuit priority.[7]

(ii) View of the Harvest Study Steering Committee – Final Report of the Nunavut Wildlife Harvest Study

The Final Report of the Nunavut Wildlife Harvest Study (2004), addresses the issue of what types of harvests are to be recorded and used in the calculation of BNL's. The Report provides:

> The Steering Committee considered that the primary application of the Harvest Study results was for the calculation of basic needs levels. Although the NLCA does not explicitly define the basic needs level, the Committee concluded that:
>
> > "the context of the Agreement does indicate that the basic needs level is that amount of harvest which is currently taken for domestic and cultural purposes . . . Harvesting or gathering for the purposes of obtaining skins, feathers, dog food, craft materials etc. would all be acknowledged "basic needs" components as long as the use occurred in the hunter's community or entered into inter-settlement trade. Apparently not eligible for consideration as an item of "basic need" would

[5] Letter from NWMB to Minister of Fisheries and Oceans, dated February 2, 2005, forwarding TAH/BNL decisions. See also letter from Minister of Fisheries and Oceans to NWMB, dated April 6, 2005, accepting TAH/BNL decisions.
[6] Letter from NTI, to NWMB, dated June 16, 2005
[7] Letter from NTI, to NWMB, dated October 25, 2005

be material harvested or gathered for commercial sale as food outside the Nunavut Settlement Area". [8]

The key exception was the fur harvest, which was always included. [Emphasis added]

(iii) Query of the NWMB

In responding to the June 16, 2005 letter of NTI, the Board requested appropriate justification of the contention put forward by NTI, pointing out that certain provisions of Article 5 underline the need for a thorough justification. As set out by the Board:

> The NWMB . . . asks that NTI provide, prior to the end of November 2005, a thorough justification for the contention that commercial uses are to be included in the calculation of BNLs. The Board also requests that your justification address the difference between the commercial uses contained within the BNL and the "existing . . . commercial operations", "viable economic ventures", "commercial ventures" and "commercial . . . uses" to be provided allocations from the surplus, as per NLCA Sections 5.6.38 to 5.6.40[9].

6. Possible Alternatives/Options

Three alternatives/options exist as to what harvests should be included in a BNL:

Option 1: A BNL includes only Inuit harvests as described in the NWHS Final Report:

- harvests taken for domestic and cultural purposes (subsistence harvests);
- subsistence and commercial fur harvests; and
- subsistence and commercial harvests for use in the hunter's community or for intersettlement trade.
-

Option 2: A BNL includes all Inuit subsistence and small scale/quasi-commercial (basic economic need) harvests preceding the establishment of a TAH.

Option 3: A BNL includes all Inuit harvests (subsistence and commercial) preceding the establishment of a TAH;

7. Relevant Considerations

- ***No Reference to Subsistence In Agreement***

The NLCA, within the context of establishing a BNL, does not use the term "subsistence". By contrast, the Umbrella Final Agreement (Yukon) does define the term in the following manner:

[8] Nunavut Wildlife Harvest Study (2004), at pp.22-23
[9] Letter from NWMB to NTI, dated August 15, 2005

(a) the use of Edible Fish or Wildlife Products by a Yukon Indian Person for sustenance and for food for traditional ceremonial purposes including potlaches; and

(b) the use by a Yukon Indian Person of Non-Edible By-Products of harvests under (a) for such domestic purposes as clothing, shelter or medicine, and for domestic, spiritual and cultural purposes; but

(c) except for traditional production of handicrafts and implements by a Yukon Indian Person, does not include commercial uses of Edible Fish or Wildlife Products or Non-Edible By-Products.[10]

- ***Commercial Uses***

The NLCA contains a comprehensive scheme for the allocation of surplus. Pursuant to Section 5.6.31, the NWMB is to provide for the continuation of existing commercial operations. Any portion of the surplus allocated for commercial use is to be governed by a limited entry system for commercial harvesting – with Inuit to have at least the same right to apply for commercial opportunities as all other persons who qualify (Sections 5.6.40, 5.6.46).

- ***Adjusted Basic Needs Level***

It appears that BNL adjustments, upon periodic review, are to consider Inuit economic, social and cultural needs. With respect to economic needs, although no specific mention is made of the word "*commercial*", the Board is required – in reaching a decision to adjust the BNL – to consider intersettlement trade and marketing within the NSA, and to determine whether an additional allocation is required to meet these economic/commercial needs (Sections 5.6.26 and 5.6.27).

- ***Aboriginal Rights SCC Jurisprudence***

In a number of decisions the SCC has addressed the distinction, within the context of defining and delineating treaty and aboriginal rights, between commercial exploitation and domestic use of resources, including wildlife. These judgments provide insight on how courts differentiate between subsistence and commercial exploitation of resources.

R. v. Marshall[11]: the issue was whether a Mi'kmaq Indian, who had been charged with fishing for eels and selling eels without a licence, had a treaty right to catch and sell eels – the treaty was silent about fishing and with respect to trade said that the Indians would no longer trade "any commodities in any manner" except with the managers of "truck houses" established by the governor. The SCC held that this clause conferred a right to

[10] Umbrella Final Agreement (Yukon), Section 16.2.0. The right to harvest for Subsistence is found in Chapter 16 – Fish and Wildlife - the right applies to the Traditional Territory of the First Nation
[11] [1999] 3 S.C.R. 456.

hunt, fish and gather and also conferred a right to trade the products of hunting, fishing and gathering sufficiently to make a "moderate livelihood". [Emphasis added.]

R. v. Marshall; R. v. Bernard[12]: Mi'kmaq Indians in N.S. and N.B. started commercial logging operations on Crown lands without required authorization – they were charged with offending forest management laws; they argued that their ancestors used wood in 1760 as firewood and to make a number of things (buildings, sleds, canoes etc). These things were sometimes traded. The SCC held that while modern eel fishing was the logical evolution of a traditional fishing activity (*Marshall 1*), the same could not be said of logging. Logging was not a traditional activity in 1760. Therefore, while treaty rights are not frozen in time, modern logging activity could not be characterized as the natural evolution of the minor trade in wood products that took place at the time of treaty – the defendants in this case had no treaty right to cut down trees for commercial purposes without a licence. The applicable test was whether the accused's logging activity could be considered the logical evolution of a traditional Mi'kmaq trading activity protected by treaties. [Emphasis added.]

R. v. Sparrow[13]: pre-contact fishing practices integral to the culture of aboriginal people translate into a modern-day right to fish for food, social and ceremonial purposes.

R. v. Vanderpeet[14]: the aboriginal right to fish has not been recognized as extending to fishing for the purpose of sale or commercial fishing.

R. v. Sappier[15]: the word "domestic" qualifies the uses to which the harvested timber can be put to use. The right, so characterized, has no commercial dimension. This means that the harvested wood cannot be sold, traded or bartered to produce assets to raise money.

R. v. Kapp[16]: in 1998, the federal Government issued a communal fishing licence to three First Nation communities in B.C. The licence allowed them to fish exclusively for a 24-hour period for food, social and ceremonial purposes, and to sell their catch. Some of the Aboriginal fishers who were designated to fish during this period were also licenced commercial fishers. The SCC held that the Pilot Sales Program was protected by Section 15(2) of the *Charter* and so did not violate the equality provision of Section 15.

8. Preferred Option

We have reviewed the three options and are of the opinion that overall, option 3 - subsistence and commercial harvests - is the most consonant with the provisions and the object and purpose of Article 5 for the following reasons:

[12] [2005] 2 S.C.R. 220
[13] [1990] 1 S.C.R. 1075
[14] [1996] 2 S.C.R. 507
[15] [2006] 2 S.C.R. 686
[16] *R v. Kapp,* 2008 S.C.C. 41

- The Terms of Reference for the NWHS state that all wildlife harvests (not only harvests described in the NWHS Final Report, or subsistence and small scale/quasi-commercial harvests) are to be recorded;

- Sub-section 5.1.2(b) (principles) confirms that the legal rights of Inuit to harvest wildlife flow from their traditional and current use (commercial use not expressly excluded);

- pursuant to Sub-section 5.4.5(a), the NWHS is required to "*document the levels and patterns of Inuit use of wildlife resources for the purpose of determining the basic needs level...*" No mention is made of any limitation (subsistence, small scale commercial, etc.) to "*Inuit use of wildlife resources*".

- the inclusion of commercial harvests in the BNL is consistent with the right of an Inuk to dispose freely to any person any wildlife lawfully harvested, including selling inside or outside the NSA, pursuant to Section 5.7.30. This right is subject to the limits in Section 5.6.26 in respect of additional allocation above the initial BNL but there is no similar limitation expressed in the BNL calculation under Sections 5.6.21 or 5.6.23;

- the provisions of the Agreement on allocation of surplus and economic activities can be reconciled with option 3. Section 5.6.38 (existing sports and other commercial operations) applies to any existing non-Inuit commercial operations (sports lodges, royalty charters, joint ventures, etc.), while Sections 5.6.39 and 5.6.40 apply to proposed Inuit and non-Inuit commercial uses (or, in the case of Section 5.6.40, other uses);

- the limited entry system for commercial licences treats Inuit the same as non-Inuit with respect to access to commercial opportunities (Sections 5.6.45 and 5.6.46) – except for Section 5.6.39 commercial ventures sponsored by HTOs and RWOs and designed to benefit Inuit. The lack of preferential treatment for Inuit in accessing commercial opportunities under Section 5.6.38 and 5.6.40 supports the understanding that the BNL already includes all Inuit commercial harvests preceding the establishment of the TAH. Otherwise, one would reasonably expect the land claim to provide more preferential treatment for Inuit commercial harvesting opportunities;

- the inclusion of all pre-TAH commercial harvests within the BNL strengthens the long-term economic interests of Inuit, meets the principles of conservation, and protects and prioritizes Inuit rights to harvest.

It is within the realm of the Courts to interpret the NCLA and determine that a BNL includes (1) only Inuit harvests described in the NWHS Final Report, or (2) Inuit subsistence and small scale

commercial harvests, or (3) Inuit subsistence and commercial harvests to establish the current harvesting levels of Inuit during the 1996-2001 Study and more recently. In our opinion, including commercial harvest during the qualifying time period in the calculation of a BNL is intended by the provisions of the NLCA, and therefore option 3 is the most reasonable option for the Board to adopt. That having been stated, the implementation of option 3 clearly presents challenges – particularly with respect to existing commercial licencing, permitting, inspection, certification, and marketing arrangements and expectations, both nationally and internationally. All parties would need to work closely together in order to ensure that the adoption of option 3 would not negatively affect the economic/commercial interests of Inuit.

We trust this opinion is of assistance to your continuing advice to the Board and we welcome any supplementary questions you may have.

Yours very truly,

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