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APPENDIX A TO THE MARC 10<sup>TH</sup> 2010 LETTER OF THE NUN. JT WILDLIFE MANAGEMENT  
BOARD CONCERNING THE TYPES OF HARVESTS TO BE INCLUDED IN A BASIC NEEDS LEVEL

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BY EMAIL

April 29, 2009

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**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:

	PAGE
A. Executive Summary .....	2
B. Opinion .....	3
<u>Question:</u> Basic Needs Level .....	3
<u>Answer:</u> .....	3
1. Relevant Statutory Scheme .....	3
(i) Object and purpose of Article 5 .....	3
(ii) Article 5 provisions related to basic needs levels .....	4
First Demand .....	4
Calculation Formula .....	5
Adjusted Basic Needs .....	5
Surplus .....	5
2. NLCA reference to “full” and “basic” needs .....	6
3. Provisions for “Personal Consumption” by Other Residents and “Existing Commercial Operations” .....	7
4. Nunavut Wildlife Harvest Study .....	8
5. Views of Parties .....	8

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



(i) View of NTI.....	8
(ii) View of the Harvest Study Steering Committee – Final Report of the Nunavut Wildlife Harvest Study.....	9
(iii) Query of the NWMB.....	10
<b>6. Possible Alternatives/Options .....</b>	<b>10</b>
<b>7. Relevant Considerations .....</b>	<b>10</b>
▪ No Reference to Subsistence In Agreement .....	10
▪ Commercial Uses .....	11
▪ Adjusted Basic Needs Level .....	11
▪ Aboriginal Rights SCC Jurisprudence .....	11
<b>8. Preferred Option.....</b>	<b>12</b>

## 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”).<sup>1</sup> 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

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<sup>1</sup> *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.<sup>2</sup>

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);

<sup>2</sup> 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 previously 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)<sup>3</sup>*
- 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

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<sup>3</sup> 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 each 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 all 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 relatively 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 additional 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 any 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.<sup>4</sup>

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

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<sup>4</sup> NLCA, Article 16

In 2005, the Board issued decisions regarding a new total allowable harvest and a related basic needs level.<sup>5</sup> 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 2<sup>nd</sup> 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]<sup>6</sup>

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.<sup>7</sup>

**(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

<sup>5</sup> 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.

<sup>6</sup> Letter from NTI, to NWMB, dated June 16, 2005

<sup>7</sup> Letter from NTI, to NWMB, dated October 25, 2005



be material harvested or gathered for commercial sale as food outside the Nunavut Settlement Area”.<sup>8</sup>

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<sup>9</sup>.

**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:

<sup>8</sup> Nunavut Wildlife Harvest Study (2004), at pp.22-23

<sup>9</sup> 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.<sup>10</sup>

▪ ***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*<sup>11</sup>: 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

<sup>10</sup> 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

<sup>11</sup> [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*<sup>12</sup>: 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 I*), 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*<sup>13</sup>: 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*<sup>14</sup>: the aboriginal right to fish has not been recognized as extending to fishing for the purpose of sale or commercial fishing.

*R. v. Sappier*<sup>15</sup>: 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*<sup>16</sup>: 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:

<sup>12</sup> [2005] 2 S.C.R. 220

<sup>13</sup> [1990] 1 S.C.R. 1075

<sup>14</sup> [1996] 2 S.C.R. 507

<sup>15</sup> [2006] 2 S.C.R. 686

<sup>16</sup> *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,

**Lang Michener LLP**

Per: **Eugene Meehan, Q.C.**  
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EMM/mjb

**APPENDIX B TO THE MARCH 10<sup>TH</sup> 2010 LETTER OF THE NUNAVUT WILDLIFE  
MANAGEMENT BOARD CONCERNING THE TYPES OF HARVESTS TO BE INCLUDED IN A  
BASIC NEEDS LEVEL**

**SUBMISSION TO THE  
NUNAVUT WILDLIFE MANAGEMENT BOARD**

**Issue:** Basic Needs Level for Arctic Char in Kingnait Fjord, Nunavut

**Background:**

A public hearing on Kingnait Fjord Arctic char was held June 3, 2009 in Pangnirtung to consider establishing a Total Allowable Harvest (TAH). As a submission to be considered as part of the public hearing, the NWMB provided a legal opinion from Lang Michener LLP on the definition of a Basic Needs Level (BNL). It was agreed before the hearing that the discussion on the BNL would be postponed to allow all parties to review the legal opinion.

**Assessment:**

References are to provisions in the Nunavut Land Claims Agreement (NLCA).

In DFO's view it is relevant that the BNL uses the term "basic needs" to inform the scope of the right. This term reflects harvesting for the purposes set out in 5.6.26 (a) to (c) and does not include harvesting for commercial purposes other than for intersettlement trade or marketing for consumption or use in the Nunavut Settlement Area (NSA). For example, in DFO's view the BNL would include sale within the community for local consumption through the local Hunters and Trappers Organization (HTO) or the local store. However, it would not include harvesting fish to supply the local fish plant for export.

While the elements of what is included in the BNL are not explicitly defined in the NLCA, in DFO's view the elements set out in 5.6.26 reflect the intended purposes for harvests that comprise, and are used in calculating, the BNL. Under 5.6.26, the NWMB is required to periodically review the BNL for each stock or population and determine whether an additional allocation is required to meet any or all of:

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

In DFO's view, the Adjusted BNL, which is the BNL as may be adjusted upon periodic review, and the BNL would both be comprised of the same elements. The factors in 5.6.27 considered by the NWMB in making a decision related to 5.6.26 are consistent with this view.

The purpose of the Nunavut Wildlife Harvest Study (the Harvest Study) as set out in 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 NSA. To this end, the Study shall: (a) document the levels and patterns of Inuit use of wildlife resources for the purpose of determining the basic needs level ...” While 5.4.5(a) is a key part of the Harvest Study, there is nothing in the wording of 5.4.5 that suggests that the BNL includes harvesting for purposes other than the elements set out in 5.6.26(a) to (c). In looking at the levels and patterns of Inuit harvests during the period covered by the Harvest Study, in addition to harvesting for purposes set out in 5.6.26, Inuit may also have harvested for other purposes. This does not mean that harvesting for all purposes is included in the BNL. Harvest amounts taken into account in calculating the BNL are those that reflect the purposes of the harvests that comprise the BNL. The approach taken during the design and execution of the Harvest Study is consistent with this view.

Several committees were established by the NWMB to advise and administer the Harvest Study. This included the establishment of a Steering Committee in 1994, chaired by the NWMB and comprised of representatives appointed by the three Regional Wildlife Organizations (RWOs), DFO, Environment Canada, and the GNWT Department of Renewable Resources. The Steering Committee reasoned that the primary application of the Harvest Study was for calculating basic needs level, and concluded that although the definition of BNL was not explicitly defined in the NLCA:

*“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 purpose of obtaining skins, feathers, dog food, craft materials etc. would all be acknowledged “basic needs” components as long as the end 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 be material harvested or gathered for commercial sale as food outside the Nunavut Settlement Area.” (NWMB, 1995b: 2).*

The Steering Committee established guidelines and methods to manage commercial harvest reporting, which included removing records whose comments indicated that the harvest had been sold to a fish or meat plant or indicated that the harvest had been ‘sold’ or was ‘commercial’, while records whose comments indicated that the harvest had been sold for local consumption, for example to the local HTO or one of the local stores were retained (NWHS, pg. 23).

In DFO’s view, the use of the term “personal consumption” in relation to “other residents” in 5.6.27(e) and 5.6.31 but not in the context of 5.6.26(a) or 5.6.27(b) does not indicate that “use by Inuit” in 5.6.26(a) is intended to be “use for any purpose” (including harvesting for commercial purposes). “Personal consumption by other residents” is defined in 5.6.33 as “consumption in the NSA by other residents and their dependents”. Adding “personal” before “consumption by other residents” indicates the narrower scope of that wording; it is more limited in scope than 5.6.26(a) and would not include the purposes in 5.6.26 (b) and (c).

Given the specificity of 5.6.26(b) and 5.6.26(c), both of which reflect economic activity, in DFO's view "consumption or use by Inuit" in 5.6.26(a) is not intended to include harvesting for commercial purposes.

Similarly, the use of the term "domestic consumption" in the context of the Inuit harvesting right in 16.1.2 indicates the intended scope of that right.

In DFO's view, not having the term "subsistence" appear in 5.6.26 or in the provisions related to the Harvest Study or for calculating the BNL does not imply that the intention of the parties was to include harvesting for commercial purposes other than intersettlement trade or marketing for consumption or use in the NSA. Different land claims agreements use different terms to provide for similar rights and concepts. For example, 5.6.1 and 5.6.26 also do not use the term "food", but no one would suggest that harvesting by Inuit for food is not included in these provisions.

Determination of the BNL and the right to dispose of any wildlife lawfully harvested set out in 5.7.30 are two different matters. Further, the right in 5.7.30 is specifically subject to 5.6.26 to 5.6.30, related to the Adjusted BNL. In DFO's view, the intention is to limit the disposition of wildlife harvested under the BNL, as may be adjusted upon periodic review, to disposition consistent with the purposes of the harvests identified in 5.6.26 (a) to (c). Other harvests by Inuit, for example in the context of commercial fisheries under the surplus, are not subject to this limitation. In DFO's view the reference to 5.6.26 to 5.6.30 supports the position that the BNL and Adjusted BNL do not include harvesting for commercial purposes other than for intersettlement trade or marketing for consumption or use in the NSA.

If the BNL included commercial harvests for purposes other than intersettlement trade or marketing for consumption or use in the NSA, such as for example harvesting fish for the local fish plant for export, there would be much less likelihood of there being a surplus to provide for the harvesting opportunities identified in section 5.6.31. These opportunities include harvesting by Inuit and non-Inuit and by Designated Inuit Organizations (DIOs) in the order and priority set out in that section. The detail and specificity of provisions related to allocating the surplus supports DFO's view that where a TAH is established, commercial harvesting opportunities other than for intersettlement trade or marketing for consumption or use in the NSA are provided through allocating the surplus.

In negotiating land claims agreements, the Government also takes third party interests and the public interest into account. As noted above, the NLCA, in addition to setting out harvesting rights in 5.6.1 and 5.6.3 (related to the BNL and Adjusted BNL), also provides for economic opportunities in the NSA for Inuit and DIOs. The objectives set out in 5.1.3(a) noted below reflect Inuit harvesting in the NSA and also reflect third party interests.



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,
- (iii) gives DIOs priority in establishing and operating economic ventures with respect to harvesting, including sports and other commercial ventures,
- (iv) provides for harvesting privileges and allows for continued access by persons other than Inuit, particularly long-term residents, and
- (v) avoids unnecessary interference in the exercise of the rights, priorities and privileges to harvest; ...

Subsection (i) indicates that the system is to reflect traditional and current harvesting by Inuit, but does not suggest that all current harvesting needs to be rights based or that current harvesting may not include traditional and other harvesting. Subsection (ii) refers to Inuit harvesting rights sufficient to meet basic needs, as adjusted as circumstances warrant. The use of the terms “basic” and “needs” reflects the scope of the right and the wording in subsection (ii) supports the view that the Adjusted BNL is an adjustment to the elements that comprise the BNL. Subsection (iii) reflects a priority to be given to DIOs for specific economic opportunities with respect to harvesting. Subsection (iv), refers to harvesting privileges, without reference to “Inuit” or “non-Inuit”, thus indicating that it includes harvesting privileges of both.

Harvesting provisions in Article 5 reflect this system of harvesting rights, priorities and privileges. As discussed above, the provisions provide for Inuit rights to harvest sufficient to meet their basic needs, as adjusted as circumstances warrant upon periodic review. Where a TAH is established, the system provides for the BNL, as adjusted, to be the first demand against the TAH. The provisions on the allocation of the surplus (5.6.31 to 5.6.40) reflect 5.1.3 (iii) and (iv). There is nothing in the wording of 5.6.31(b) to suggest an intention to limit that provision to non-Inuit – the existing sport and commercial operations being referenced would include both Inuit and non-Inuit operations. Specific opportunities for ventures sponsored by HTOs and RWOs are provided for in 5.6.31(c). The other uses under 5.6.31(d) include commercial harvesting under a limited entry system and 5.6.46 provides that Inuit shall have “at least the same right to apply (for access to commercial opportunities) as all other persons who qualify and to have their applications considered on their merits”.

As noted above, in DFO's view, where a TAH is established, the NLCA intended to provide for Inuit harvesting in the NSA for commercial purposes other than intersettlement trade or marketing for consumption or use in the NSA through the allocation of the surplus. Where a TAH is established, this approach provides priority for the BNL (as may be adjusted) and promotes the long-term economic, social and cultural interests of Inuit harvesters while providing opportunities to fish for non-Inuit where there is a surplus.

#### **Kingnait Fjord Arctic Char:**

In the event that the NWMB decides to establish a TAH for the Kingnait Fjord Arctic char, then the BNL will need to be set. The recommendation that DFO provided at the Public Hearing in Pangnirtung was to set a TAH taking into account the following levels of risk:

Total Harvest	Risk
>4800 kg	High
2700-4800 kg	Moderate
<2700	Low

Upon reviewing the transcript of the hearing, DFO would like to clarify one point. The total harvest levels reflected above are for all fishing, not just commercial fishing. (0083 lines 8 to 18 of the transcript)

#### **Conclusion:**

In DFO's view the BNL (as adjusted as circumstances warrant) consists of harvesting for: (a) consumption and use by Inuit, (b) intersettlement trade, and (c) marketing for consumption or use in the NSA. The BNL does not include harvesting for other commercial purposes such as, for example, harvesting fish to supply the local fish plant with fish for export. DFO is of the view that these other commercial opportunities should be conducted and are provided for in the NLCA, but that they are not part of the BNL (as may be adjusted upon periodic review).

**Prepared by:** DFO Central and Arctic Region

**Date:** July 14, 2009



APPENDI. TO THE MARCH 10<sup>TH</sup> 2010 LETTL OF THE NUNAVUT WILDLIFE  
MANAGEMENT BOARD CONCERNING THE TYPES OF HARVESTS TO BE  
INCLUDED IN A BASIC NEEDS LEVEL

August 10, 2009

Mr. Harry Flaherty  
Acting Chairperson  
Nunavut Wildlife Management Board  
Iqaluit, Nunavut X0A 0H0

Dear Mr. Chairperson,

**Re: Reply to DFO submission re Basic Needs Level for Arctic Char, July 14, 2009**

Prior its June 3 public hearing held in Pangnirtung, the Board invited submissions regarding its legal opinion on the question whether, under the *Nunavut Land Claims Agreement (NLCA or the Agreement)*, the NWMB should include commercial harvests by Inuit when calculating the Inuit Basic Needs Level (BNL). NTI made its views known to the Board on this issue in a previous proceeding in 2005, and did not take up the Board's invitation.

Having reviewed DFO's July 14 comments on the Board's opinion, NTI wishes to offer the reply set out below.

The Board's opinion concludes that commercial harvests by Inuit must be included in calculating the BNL. This accords with NTI's previously stated view. DFO's submission takes the opposite position. NTI submits that the Board should adopt the conclusion of its legal opinion for the purposes of this proceeding and in all future BNL calculations. (In the latter context, NTI recommends that the Board also copy the Government of Nunavut (GN) as soon as possible with the pertinent documents, invite the GN's response, and allow affected parties a right of reply.)

NTI largely accepts and recommends to the Board the supporting analysis in the Board's opinion. It is balanced and well-reasoned. (For present purposes, NTI wishes to register only two reservations with the analysis, at the conclusion of this letter.)

In reply to the DFO comments, NTI notes:

1. Under the NLCA, the core Inuit harvesting right is described by reference to "needs" (5.6.1; 5.6.3; 5.6.5; 5.6.19). Despite this guidance, DFO's analysis of the scope of Inuit fishing rights ignores the descriptors of Inuit "needs" given in sections 5.6.1

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and 5.6.2 when discussing what types of “needs” or “use” might be included in sections 5.6.19 - 5.6.24 (basic needs level), 5.4.5 (a) (uses to be included when calculating the basic needs level) and 5.1.2(b) (uses on which Inuit legal rights to harvest wildlife are based).

Section 5.6.1 includes “economic” purposes in its description of “needs”, and section 5.6.2 describes “needs” on the basis of actual harvest levels, regardless of purpose.

In this respect, the DFO analysis fails to read the provisions of the *Agreement* together. It thus fails to meet a cardinal rule of contract and statutory interpretation, one which is adopted expressly by the *Agreement* in section 2.9.1.

2. DFO’s treatment of the limitations in s. 5.7.30 on the Inuit right to sell harvested wildlife as though they express limitations on the amounts to be included in BNL calculations is unsupported by any text in the *Agreement* and is internally contradictory. Section 5.7.30 states that the right to sell includes the right to sell “outside the Nunavut Settlement Area”.

3. As the Board’s opinion notes, comparison between Inuit fishing rights within the NSA under Article 5 and Inuit fishing rights outside the NSA under Article 16 reveals a contrast in terms, not a similarity. The comparison tends to support rather than preclude reading Article 5 rights as having a scope beyond “domestic” purposes.

4. DFO’s account of the Article 5 objective for creating a system of harvesting rights, priorities and privileges set out in section 5.1.3 (iv) is untenable in two respects. First, the suggestion that “current levels, patterns and character of Inuit harvesting” is not necessarily a reference to rights ignores the preceding principle in section 5.1.2, which states that “the legal rights of Inuit to harvest flow from their traditional and current use”. Second, the suggestion that the *Agreement* protects any Inuit interests, economic or otherwise, in the form of “privileges” ignores how “privileges” is used in the body of section 5.1.3 and runs counter to a core objective of the land claims agreement. The body of section 5.1.3 refers only to “rights” for Inuit and only to “privileges” for non-Inuit. A core objective of the land claims agreement is to accord Inuit defined “rights and benefits” in exchange for surrender of claims based on an asserted aboriginal title which non-Inuit do not have. It would run counter to such an objective for the *Agreement* to contain positive provisions concerning commercial fishing that merely privilege Inuit to access commercial fishing licences for which they would be eligible already as members of the public. Rather, as the Board’s opinion suggests, the *Agreement*’s assurance in section 5.6.46 that Inuit may participate equally in commercial licence opportunities in cases of surplus implies that Inuit also have related rights under the *Agreement*, making it necessary to clarify that having such related (economic) rights through the BNL does not curtail Inuit

access to any surplus as members of the public. Indeed, nowhere in the *NLCA* are Inuit rights, benefits or opportunities referred to as "privileges".

5. DFO's analysis ignores the fact that a BNL is a floor on the share of allowable harvest that Inuit may take as of right under the *NLCA*, fixed at a particular point in time, while the Adjusted Basic Needs Level (ABNL) is a ceiling to be adjusted indefinitely. There is thus good reason to expect that different elements may make up BNLs and ABNLs respectively while ensuring equity for third parties and the public.

6. DFO's analysis does not acknowledge the economic and demographic realities of Nunavut, which the *NLCA* negotiators necessarily considered at the same time that they paid exacting attention to public and third party interests. Wildlife continues to be an exceptionally important economic resource to Inuit. The dearth of other types of economic opportunity in this part of Canada makes it a national interest to secure and promote Inuit access to such resources in this particular land claims agreement, whose core objectives include encouraging Inuit self-reliance. Also, although it is to be desired, and the land claims agreement invites it, there has not as yet ever been a large-scale commercial fishing industry in the Nunavut Settlement Area. Indeed, there is no commercial fishing at all in most Nunavut communities, 16 years after the *Agreement* came into effect. A national perspective does not justify reading down regional land claims agreements for the sake of uniformity.

Thank you for considering this reply.

(The two reservations with the Board opinion that NTI wishes to note at this time are:

1. Inclusion of commercial harvests quantities in the BNL does not appear to add to the implementation challenges referred to at the conclusion of the Board's opinion. The challenge of adapting pre-*NLCA* fisheries management practices so as to accommodate the Inuit right to fish without a licence and to sell fish lawfully caught under the *NLCA* is a real one, which NTI remains committed to working on in partnership with DFO, HTOs and RWOs, and the Board. This challenge is the same, however, regardless of the level at which a BNL is set.

2. In *R v. Gladstone*, [1996] 2 S.C.R. 723, the Supreme Court of Canada recognized an aboriginal right extending to fishing for the purpose of sale or, in other words, commercial fishing.)

Sincerely,



Raymond Ningeocheak,  
Vice-President of Finance and Executive Member responsible for Wildlife  
Nunavut Tunngavik Incorporated

CC. DFO      Eric Kan– DFO regional lead in Iqaluit