RESPONSE TO THE NUNAVUT WILDLIFE MANAGEMENT BOARD, SPECIAL MEETING NUMBER 12

Nunavut Tunngavik Incorporated, October 22, 2006

This Response addresses an asserted NLCA justification for limiting Inuit harvesting that the NWMB's counsel has indicated the Board may consider at this Meeting. The justification does not appear in the GN's submissions. This Response is made without prejudice to any objections that NTI may make at the Meeting regarding the procedure or timing by which the Board considers any such justification.

The justification in question is raised in the NWMB's document entitled "Proposed Total Allowable Harvest and Non-Quota Limitations in the Draft 2005 Wildlife Regulations and Orders" (April 13, 2006). Of the proposed limitations that NTI is challenging in this Meeting, the justification relates to the following:

- Prohibiting the use of low pull weight crossbows to harvest small game
- Prohibiting the use by Inuit of non-"traditional", 'passive' weapons to harvest big game;
- Prohibiting the use of ammunition smaller than .243 calibre to harvest moose, bears or muskox; and
- Prohibiting harvesting contrary to four *Inuit Quajimajatuqangit* (IQ) principles.

The Asserted NLCA Justification

For each of the above-noted limitations, the NWMB document suggests that there is a possible justification that "falls under NLCA 5.3.3(b)". Section 5.3.3(b) states:

> ***Criteria for Decisions by NWMB and Minister***
>
> 5.3.3 Decisions of the NWMB or a Minister made in relation to Part 6 shall restrict or limit Inuit harvesting only to the extent necessary:
>
> ...
>
> (b) to give effect to the allocation system outlined in this Article, to other provisions of this Article and to Article 40;… .

For the first three limitations noted above, the justification offered is that the prohibited harvesting is "inhumane" [or "potentially inhumane"]/not reflective of the traditional character of Inuit harvesting (NLCA S.5.1.3(a)(i) and 5.3.3(b))." Reference is also made to the *Wildlife Act,* ss.8 (k) (*Sirliqsaaqtittittailiniq* – hunters should avoid causing wild animals unnecessary suffering when harvesting them)) and (m) (*Ikpigusuttiarniq* – all wildlife should be treated respectfully). Section 5.1.3(a)(i) of the NLCA states:

> ***Objectives***

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, … .

For the fourth limitation above (prohibiting harvesting contrary to IQ principles) the justification offered under s. 5.3.3(b) is that "The adoption of these provisions assists in the creation of a system of harvesting rights, priorities and privileges that reflect the traditional patterns and character of Inuit harvesting".

In a later account, offered on a "without prejudice" basis, the NWMB's counsel added that "with respect to human harvesting," sections 5.1.3(a)(i) and 5.1.3(b)(iii) of the NLCA are "Article 5 provisions" that that the Board "should consider giving effect to under NLCA S.5.3.3(b)".[1] Section 5.1.3(b)(iii) states:

Objectives

5.1.3 This Article seeks to achieve the following objectives:

….

(b) the creation of a wildlife management system that

…

(iii) serves and promotes the long-term economic, social and cultural interests of Inuit harvesters,…

The later account also suggested that "the connection between humane harvesting issues, the traditional and current character of Inuit harvesting, and the social and cultural interests of Inuit harvesters is self-evident" and, further, that the reason the Board may find it necessary to consider this justification is that there may be an insufficient connection between the justification advanced by the GN based on s. 5.7.42(b) of the NLCA,[2] and the NWMB's jurisdiction to impose a "humane harvesting limitation."[3]

NTI Submission

[1] E-mail communication from NWMB counsel to NTI and GN counsel, October 12, 2006.

[2] 5.7.42 An Inuk or assignee pursuant to Sub-section 5.7.34(a) may employ any type, method or technology to harvest pursuant to the terms of this Article that does not:

...

(b) conflict with laws of general application regarding humane killing of wildlife, public safety and firearms control;… .

[3] Second e-mail communication from NWMB counsel to NTI and GN counsel, October 12, 2006.

NTI submits that the words "shall limit Inuit harvesting only to the extent necessary … to give effect to … other provisions of this Article" in subsection 5.3.3(b) of the NLCA do not allow the NWMB or Minister acting under 5.3.3 to use Article 5's Objectives as justifications for limiting Inuit harvesting. In NTI's submission, that would mistake the intended effect of 5.3.3(b) and Article 5's Objectives, and undermine the intended protective effect of section 5.3.3 as a whole.

On a preliminary point, NTI does not read Article 5 as providing for harvest limitations by type, such as "humane harvesting limitations". Article 5 only provides for harvest limitations, the Board's sole authority to establish any such limitations, and, further, certain permissible bases for the Board or a Minister to decide on those harvest limitations. For this reason, the following submissions do not address "the NWMB's jurisdiction with respect to humane harvesting limitations"[4] as a category.

5.3.3(b)

The plain meaning of the words "… to give effect to …other provisions of this Article" refers to provisions of Article 5 that could not take effect except by means of such limitations.

Assuming it is accurate to treat the emergency kill provisions of the draft Harvesting Regulations as harvest limitations, the NWMB's April 13 document correctly treats sections 5.6.52 and 5.6.53 as examples of such provisions.[5] On that basis, without corresponding NWMB limitations, these provisions of the NLCA could not have their intended effect. The draft Harvesting Regulations' emergency kill provisions are therefore "necessary … to give effect to" sections 5.6.52 and 5.6.53.

A further example of the type of "other provision of this Article" that is referred to in 5.3.3 (b) is section 5.6.18. Without the corresponding limitation being established under 5.3.3 (b), Inuit could not receive the total allowable harvest of at least one bowhead whale (subject to the other constraints of 5.3.3) that is promised by s. 5.6.18. The NWMB's bowhead whale TAH was therefore necessary to give effect to s. 5.6.18.

By contrast with these examples, there is no basis in the words of s. 5.3.3 (b) to read its allowance as extending to any limitations that are *not* "necessary… to give effect to… other provisions", but which might (for the sake of argument) relate to interests or objectives that are served by other provisions. The Objectives of creating a system of rights that reflects the character of Inuit harvesting, and of creating a wildlife management system that serves and promotes the long-term interests of Inuit harvesters, clearly do not require any particular limitations on Inuit harvesting to be established by the Board or Government in order to have effect. None of the four limitations that the

[4] Third e-mail communication from NWMB counsel to NTI and GN counsel, October 12, 2006.

[5] The NWMB's April 13 document states that, in relation to the proposed emergency kill provisions of section 15 of the draft Harvesting Regulations, "Justification falls under NLCA 5.3.3(b). See NLCA Sections 5.6.52 and 5.6.53".

NWMB document associates with this potential justification can therefore be "necessary…to give effect to" these Objectives, and none of these limitations is therefore allowed by a justification falling under 5.3.3(b).

5.3.3 purposes

The foregoing reading of section 5.3.3(b) in Article 5, as allowing only for limitations that are necessary to give effect to certain Article 5 *provisions*, is reinforced by contrasting this reading with the function of the three *purposes* (or objectives) referred to in sections 5.3.3(a) and (c).

The core authority of the Board to establish quantitative and non-quantitative harvest limitations is set out in ss 5.6.16 and 5.6.48. Section 5.3.3, however, imposes objective, legal constraints on how that authority may be exercised respecting Inuit harvesting. Due to the constraints of section 5.3.3, there is no permissible basis in Article 5 for exercising such jurisdiction *for a purpose* (i.e. in terms of the Supreme Court of Canada judgement in the *Sparrow* case that spawned section 5.3.3, a "legislative objective"[6]) other than "conservation" (5.3.3(a)), "public health" or "public safety" (5.3.3(c)).[7] In other words, because section 5.3.3 allows "only" those limitations that meet its constraints, "humane killing" "humane harvesting", 'reflecting the character of Inuit harvesting' or 'serving the long-term interests of Inuit harvesters' are not permissible *purposes* or objectives for limiting Inuit harvesting under the NLCA.

It is acceptable to look elsewhere in Article 5 for provisions other than 5.3.3 that might possibly furnish additional bases for the NWMB to exercise its authority to limit Inuit harvesting. However, the only possible basis for restrictions relating to humane killing or humane harvesting that is found in Article 5 is section 5.7.42(b). NTI agrees with the NWMB's counsel that this provision does not give the NWMB any additional basis for exercising its authority to limit Inuit harvesting. In NTI's view, the type of incidental restrictions that may be imposed by "laws of general application" under s. 5.7.42(b) – boat safety rules in the case of general laws for public safety, for example - are not harvest limits within the meaning of sections 5.6.16, 5.6.48, and 5.3.3. They fall outside the scope of measures that Article 5 treats as "wildlife management," for which the NWMB is the main instrument in the Nunavut Settlement Area. Accordingly, section 5.7.42 does not allow the NWMB to limit Inuit harvesting for humane killing or humane harvesting reasons. (Further, because 5.7.42(b) does not pertain to harvest limitations in the realm of wildlife management, this section also does not allow the Minister to do so.)

Compared to the function of 5.3.3(b), there is significantly more scope for decision allowed under 5.3.3 (a) and (c). The words, only to the extent necessary "to effect a …

[6] *R v. Sparrow* [1990] S.C.R 1075 ("the test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples").

[7] There are some differences in the way those three purposes are expressed as between 5.3.3(a) and 5.3.3(c), but in NTI's view those differences can be set aside in this analysis.

purpose" (5.3.3(a)) or only to the extent necessary "to provide for" a purpose or objective (5.3.3(c)) afford a set of choices to be made, to the extent that limiting Inuit harvesting is necessary to meet that purpose. Again, however, the *purposes* for which section 5.3.3 allows limitations on Inuit harvesting do not include humane harvesting, humane killing, reflecting the character of Inuit harvesting or serving the long-term interests of Inuit harvesters. Such purposes were clearly not considered by the parties to the NLCA to be sufficiently "compelling and substantial"[8] to stand as purposes that may justify Inuit harvest limits necessary to fulfill them. The two Objectives that the NWMB document refers to, in particular, would serve a uniquely paternalistic role in the NLCA[9] if they were to have the effect that the NWMB document attributes to them.

Article 5's Objectives

Article 5's Objectives are clearly intended to serve as broad objectives for the systems of rights and systems of management established under Article 5. While they affirm the priority of conservation over Inuit harvesting interests, nothing in these Objectives suggests that, in themselves, they are intended to serve as justifications for limiting Inuit harvesting. From the point of view of the Agreement's objective of recognizing Inuit rights,[10] to give Article 5's Objectives such a sweeping effect would seem to turn them upside down, particularly the Objectives of conferring harvesting rights on Inuit, and avoiding unnecessary interference with such rights.[11]

Such a sweeping reading of section 5.1.3 would also seriously diminish the effect of section 5.3.3, which is clearly intended to serve as the cornerstone of protection for Inuit harvesting rights under the Agreement.

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[8] Following the handing down of the Supreme Court of Canada's first decision on the constitutional protection of aboriginal rights in *R v. Sparrow*, the parties negotiating the NLCA revisited the wildlife provisions that had been developed and revised what is now 5.3.3 in response to the decision. (If the NWMB wishes to have NTI provide this legal context in a different form, NTI is prepared to do so.) *Sparrow*'s requirement that legislative objectives be "compelling and substantial" was stated in the following passage:

> "The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, *or other objectives found to be compelling and substantial.(emphasis added)*

[9] In ss. 5.7.1-5.7.14, Article 5 provides for HTO/RWO authority so that Inuit harvesters may regulate their own practices in their own interests by consensus, without any requirement of justification.

[10] Preamble, NLCA: "AND WHEREAS the Parties have negotiated this land claims Agreement based on and reflecting the following objectives: … to provide Inuit with wildlife harvesting rights". ..

[11] 5.1.3 This Article seeks to achieve the following objectives: (a) the creation of a system of harvesting rights that …(ii) subject to availability, as determined by the application of the principles of conservation, and taking into account the actual and likely increase in the population of Inuit, confers on Inuit rights to harvest wildlife sufficient to meet their basic needs, as adjusted as circumstances warrant .. and (v) avoids unnecessary interference in the exercise of the rights, priorities and privileges to harvest.

In particular, NTI submits that there is no basis in the text of Objectives 5.1.3(a) (i) or 5.1.3(b) (iii) to read "humane harvesting" concerns into Article 5's objectives relating to the character of Inuit harvesting or to Inuit harvesters' long-term economic, social and cultural interests. In NTI's submission, any such connection is not self-evident.

Further submissions

If (for the sake of argument) passive weapons could be prohibited solely according to whether this is necessary to preserve their "traditional" character, based on 5.3.3(b) and 5.1.3(a) (i), then any Inuit harvesting practice could be confined to its traditional character by the NWMB or Minister for this reason. NTI submits that there is no basis in Article 5 or in the case law that decides the constitutional protection afforded Aboriginal and treaty rights[12] for such a broad override of the protection that is otherwise given by section 5.3.3. Such a conclusion would also contradict the equal direction in s. 5.1.3(a) (i) to reflect the *current* character of Inuit harvesting.

Extending the NWMB's jurisdiction is, in NTI's submission, not a valid reason for the NWMB to prefer any interpretation of NLCA provisions over another. Therefore, in NTI's submission, the prospect that this justification, if accepted, might extend the Board's jurisdiction respecting humane harvesting, should not be considered in the Board's analysis.

In NTI's submission, no evidence has been offered in Special Meeting Twelve in support of this justification for any of the challenged limitations addressed in this Response.

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[12]In *Eastmain Band v. Canada* [1999] 1 F.C. 501, the Federal Court of Appeal ruled that modern treaties are to be interpreted in the light of their legal context: "Thus while the interpretation of agreements entered into with the Aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who signed it and take into account the historical and legal context out of which it developed".