The make-up of the basic needs level under Article 5 of the *Nunavut Land Claims Agreement*

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1. Introduction

The *Fisheries Act* and its regulations applicable in Nunavut have not changed significantly on their face since the *Nunavut Land Claims Agreement* (Agreement, or *NLCA*) was ratified in 1993. The legislation mandates the allocation of fish according to the purpose of the fishing, whether for sport, sale ("commercial"), or domestic purposes.

As this paper shows, the parties to the *NLCA* adopted a different approach when they defined Inuit harvesting rights in the Nunavut Settlement Area (NSA). Under the *NLCA*, Inuit fishing as of right is allocated in circumstances of limited availability according to actual amounts fished previously by Inuit, for any purpose.

While the Act and its regulations have not changed significantly on their face, the rules of interpretation set out in both the *NLCA* and its ratification legislation require that the Act and its regulations now be "read down" to accommodate the *NLCA* in all its particulars. The ongoing disconnect between the Act and its regulations on their face, and the legal realities of post-*NLCA* fisheries management in the NSA, is a source of considerable and regrettable public and administrative confusion. This disconnect would best be removed by bringing all legislation pertinent to fisheries management in the NSA fully into line with the provisions of the *NLCA*.

Such an outcome, entailing close consultation with NTI, is contemplated by the *NLCA* itself (2.6.1).

This paper is being provided to the Minister of Fisheries and the Nunavut Wildlife Management Board (NWMB, or Board) as part of the proceedings of the NWMB in determining, for the first time, a total allowable harvest and associated basic needs level under the Agreement for the Kingnait Fiord char stock near Pangnirtung. The paper elaborates on NTI's previous submission to the NWMB dated August 10, 2009. Provision of the paper constitutes a contribution from NTI to the bilateral consultative exchange between the Crown and NTI that animates the *NLCA* as a whole, consistent with the reasoning recently adopted by the Supreme Court of Canada in its *Little Salmon* decision.

2. NTI Analysis

Inuit harvesting rights and the basic needs level

Article 5 recognizes that "the legal rights of Inuit to harvest wildlife flow from their traditional *and current use*" (5.1.2(b), emphasis added).

The core Inuit harvesting right is provided for in two circumstances, depending on whether the requirements of conservation demand that the NWMB establish a total allowable harvest[1] for the stock or population in question.

Where a total allowable harvest has not been established, "an Inuk shall have the right to harvest … up to the full level of his or her economic, social, and cultural needs, subject to the terms of this Article" (5.6.1). "Full level of needs" is defined for this purpose as "full level of harvest" (5.6.2). Thus, in this circumstance, an Inuk has the right to the level of harvest that he or she takes, including wildlife harvested for economic purposes. There can be no doubt that harvesting for commercial purposes is included in this formulation of the core Inuit harvesting right.[2]

[1] A total allowable harvest is "an amount of wildlife able to be lawfully harvested as established by the NWMB pursuant to Sections 5.6.16 to 5.6.18" (5.1.1). Because a total allowable harvest is a limitation on Inuit harvesting, its establishment is subject to section 5.3.3, which requires that Inuit harvesting be limited only to the extent necessary for conservation, public health, public safety, or to give effect to provisions of Articles 5 or 40 that require such limitations in order to have effect.

[2] It is also relevant that "harvest" is expressly defined in the *NLCA* as including "fishing, as defined in the *Fisheries Act*" (1.1.1). Under section 2 of the *Fisheries Act,* "fishing" includes fishing "by any method", hence *NLCA* harvesting includes methods of fishing that are used exclusively, or virtually exclusively, when fishing commercially.

Where the NWMB establishes a total allowable harvest, the NWMB must also strike a "basic needs level," defined as the "level of harvesting by Inuit" that is identified in sections 5.6.19 to 5.6.25 (5.6.19; 5.1.1). The basic needs level is "the first demand on the total allowable harvest" (5.6.20). Where the total allowable harvest is equal to or less than the basic needs level, the Agreement reserves to Inuit "the right to the entire total allowable harvest." Where the total allowable harvest is greater, Inuit are entitled to the basic needs level, and the surplus is allocated among public and third party users and Inuit organizations according to a detailed order and priority (5.1.1; 5.6.20; 5.6.31-5.6.40). In short, the basic needs level constitutes a priority right of Inuit to harvest up to a minimum amount of wildlife to the extent the amount is available. The scheme deliberately balances the treaty entitlement of Inuit with the demands of conservation, and allows for non-Inuit harvesting from any surplus in accordance with Article 5's objectives (see APPENDIX I).

The "level of harvesting by Inuit" that constitutes the basic needs level must be calculated by the NWMB according to one of two sets of rules. If the stock or population in question was already subject to a total allowable harvest when the NWMB's Harvest Study commenced, the level is a function of either the "greatest amount harvested" in a year combined with the "average annual amount" in the five years of the Study, or an "amount harvested" in a Study year nominated by an HTO (5.6.21; 5.6.22). If, as in the case of the Kingnait char stock, the total allowable harvest is not established until after the NWMB's Harvest Study commenced, the basic needs level is a function of either "an amount based on data from the original five year Harvest Study," or a combination of "the average annual amount" shown by the Study with "the greatest amount harvested in any one year during the five years prior to the imposition of the total allowable harvest" (5.6.23).

There are no qualifying words in the Agreement's express provision for a basic needs level, definition of the level, or directions for calculating the level, that restrict the type of harvest to be counted by its purpose. In the context of the Agreement's companion provision for a core Inuit right that reflects a "full level of … economic, social and cultural needs", and considering the Agreement's balancing objectives, the term "basic needs" necessarily implies that the level in question is intended to reflect economic as well as other needs, and to serve as a fair minimum that Inuit may rely on over time, subject only to conservation. To emphasize, "basic" means minimum here, and "needs" includes economic needs. Nothing in these provisions suggests that "basic" is meant to imply "non-commercial" or "not for export". On the contrary, the direction is simply to count harvest amounts, over certain periods and according to various formulas. Underscoring this approach, the methodological instruction accompanying the only Agreement formula that includes data taken from outside the Harvest Study highlights the breadth of the calculation, providing that "the NWMB shall rely on the best evidence available as to the levels of harvesting by Inuit" in the period outside the Study (5.6.24(b)). Taken together, these

provisions can only be read as requiring that the basic needs level reflect total amounts harvested by Inuit for any purpose.

The Terms of Reference for the Harvest Study support this reading: "The study shall be conducted primarily by means of a diary/calendar record kept by harvesters *of all wildlife harvested daily*" (Schedule 5-5, emphasis added). Similarly the statement of purpose for the Study:

> The purpose of the study shall be 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. (5.4.5, emphasis added)

The Study is required, in particular, to "document the levels and patterns of Inuit use of wildlife resources for the purpose of determining the basic needs level" (5.4.5 (a)). "Inuit use" must mean Inuit harvest in this context: a methodological instruction given for the purpose of determining the basic needs level cannot subordinate to its terms the Agreement definition of the level and the Agreement directions for calculating the level and recording related data. At the very least, if the parties had intended paragraph 5.4.5(a) of the Agreement to narrow the scope of the definition and its supporting sections 5.6.19 to 5.6.25, one would expect those provisions to be described as 'subject to s. 5.4.5(a)', but no such words or similar indication appear in the Agreement.

Adjusted basic needs level

Analysis of the make-up of the basic needs level must also take into account the make-up of the adjusted basic needs level. This is not to say, however, that the same limits apply to both levels. The two levels serve different functions in the Agreement.

The basic needs level is a permanent floor on the quantity in question, subject to availability. The adjusted level, however, is a variable ceiling on that quantity (5.1.1; 5.6.26-5.6.30). The Agreement includes amounts of Inuit harvest for the purpose of sale outside Nunavut in the *minimum* quantity, out of consideration for the range of amounts that Inuit likely took or would take for this purpose in the periods specified. (See the provisions referred to above.) The Agreement excludes demand for the purpose of sale outside Nunavut from the factors that support adjustment of the *ceiling*, out of consideration for continued access to available amounts above the minimum by the public and third parties, including non-Inuit commercial harvesters. (See paragraphs 5.6.26 (c) and 5.6.27 (b)). By excluding amounts for export from the calculation of any Inuit priority share that would be *higher than the basic needs level*, the Agreement allows for continued access to commercial fisheries by persons other than Inuit, where stocks are sufficiently abundant.

Negotiating context

Representatives of Canada and Inuit familiar with the economic facts on the ground in Nunavut negotiated the *NLCA* over a period of years, reconciling Aboriginal with public interests. Government wildlife managers - the federal Department of Fisheries and Oceans (DFO) - in particular, took an active role.

APPENDIX II outlines the state of "commercial" fishing in the NSA in 1993, when the *NLCA* was ratified. (Inuit entitlement to a basic needs level is limited to the NSA; the issue does not arise in the outlying fishing areas in Zones 1 and 2, which receive different treatment under the Agreement.)

Inuit fishing for export in the NSA in 1993 was of a modest scale, and it remains so today. Based on the conditions outlined in APPENDIX II it is apparent that, for the foreseeable future, Inuit fishing for export in the NSA is highly unlikely to determine whether a surplus exists over a significant range of species, or even over a significant range of stocks or populations within a single species. The factor can have no impact, in particular, on current Kingnait Fiord char allocations. Of all the "commercial" fish species and stocks addressed by the Harvest Study, APPENDIX II shows that the Cambridge Bay char stocks constitute the only case in which the factor of exports might likely determine whether or not a significant surplus would remain after calculation of the basic needs level. Even the single case is easily explained from the negotiators' vantage point. The Cambridge Bay commercial char fishery was developed solely by Inuit; other fishers did not take up their opportunity to participate. It is more than plausible to read the Agreement as not expected to reserve a surplus from this single, exclusively Inuit fishery when a total allowable harvest is established for the first time.

Should a basic needs level be struck in the distant future much beyond a level that the negotiators would have foreseen, [3] it is equally apparent that this result would not have been viewed as an aberration from the scheme. The Inuit profit would have been seen to serve the Agreement objective of encouraging Inuit self-reliance (Preamble). The negotiators would have been confident that existing non-Inuit interests are not significantly disturbed, because the basic needs level only depends on harvesting already engaged in by Inuit.

Summary

[3] The negotiators also included an 'averaging' clause to moderate any excessive effect of a 'bumper crop' in the Inuit harvest in any one relevant year. S. 5.6.23(b) provides that if Inuit were to have such a 'bumper' commercial harvest after the Study period that heightens the basic needs level, the NWMB must average the take in the 'bumper' year with the five year average Study results.

In addition, the negotiators provided that Inuit may be required to obtain a commercial licence when fishing a species that was not fished commercially in 1981, provided that such licences may not be unreasonably withheld from Inuit or accompanied by an unreasonable fee (5.7.27).

The basic needs level is the minimum level to which Inuit may harvest available wildlife as of right under the *NLCA*, and it is calculated on the basis of amounts actually harvested by Inuit in a period identified in the Agreement. Neither the Agreement text, nor its negotiating context, provides any valid reason to depart from the Agreement's definition of the basic needs level as the "level of harvesting by Inuit identified in sections 5.6.19 to 5.6.25." This includes Inuit harvesting for any purpose, including harvest for export outside Nunavut. The *Agreement*'s exclusion of amounts for export from a potentially higher "adjusted basic needs level" ensures that continued non-Inuit access to commercial fisheries is allowed for into the future, as long as stocks are ample.

3. NTI further reply to DFO Submission

NTI replied to DFO's July 14 2009 submission in NTI's submission dated August 10, 2009. The following points are included here for elaboration and emphasis.

a. The DFO submission's opening assertion (page 1) that "basic needs" in this context must exclude needs that depend on sale outside Nunavut is simply a conclusion stated as an argument. It is not only unsupported by the text of the Agreement, which does not equate the basis of calculating the basic needs level with the basis for calculating the adjusted level; it is also contrary to the several opposite instructions in the text noted in NTI's analysis above.

b. The DFO submission's search for the "elements" of the basic needs level (page 1) in provisions that do not address the basic needs level is misguided. As defined in the Agreement, the basic needs level has no particular elements – it is a calculation of "amounts harvested."

c. The DFO submission's otherwise close examination of the adjusted basic needs level provisions (pages 1-3) ignores the terminology in those provisions that is consistent with NTI's reading of the basic needs level provisions. Paragraph 5.6.27 (b) confirms that "marketing" can be considered a "use" of wildlife, and paragraph 5.6.27(e) treats personal consumption as only one purpose for which wildlife may be used. As the Lang Michener opinion obtained by the NWMB notes, those provisions thus support reading "use" in 5.4.5(a) as unqualified as to purpose.

d. It is no answer to the unqualified definition of basic needs level in the Agreement to note that not all modes of consumption of the amounts included in the core Inuit harvesting right are specified in the Agreement. "[F]ood" is not specified in section 5.6.1 or section 5.6.26 (DFO submission, page 3) because food is clearly included in the needs that are specified. Similarly, harvesting for sale outside Nunavut is included in "harvesting". Nothing about this logic implies that an unstated restriction on the breadth of the words "level of harvesting by Inuit" (such as harvesting "for commercial purposes other than intersettlement trade or marketing for

consumption or use in the NSA", in DFO's example) may be read into the Agreement's basic needs level provisions.

e. The DFO submission suggests (page 3) that the *NLCA*'s basic needs level provisions reflect "similar rights and concepts" in "different land claims agreements", yet the submission does not reference any other land claims agreement. There is no basis in section 35 of the *Constitution Act, 1982*, federal claims policy, or the *NLCA* itself, for presuming that the economic rights of Nunavut Inuit under their modern treaty have the same content as the economic rights recognized for a different Aboriginal people in a different modern treaty. As noted in NTI's August 10 submission, the Supreme Court of Canada recognized an Aboriginal right to fish commercially in *R v. Gladstone*, [1996] 2 S.C.R. 723.

f. DFO's analysis is at odds with the language of section 5.7.30 and at least one supporting provision. The submission concedes that determination of the basic needs level and the right to dispose of wildlife "are two different matters" (page 3), yet it contends that the reference to the adjusted basic needs level in the Agreement's provision for an Inuit right to sell wildlife must exclude such amounts from what may be sold "outside the Nunavut Settlement Area" under the section. This would leave Inuit with no right to sell for export even amounts of fish that they had been catching previously for food. It would leave the negotiated right to sell fish caught in accordance with conservation requirements virtually empty: Inuit would have the "right" to sell outside Nunavut only fish that DFO grants them permission to catch for this purpose. This construction disregards the words "any wildlife lawfully harvested" in s. 5.7.30 entirely. It would also render nugatory the right to a waiver of export licence fees that is guaranteed under s. 5.7.31 "unless the wildlife has been harvested from the surplus."

In short, in endeavouring to enlist the Agreement's provision for an Inuit right to sell their harvest in aid of a restrictive reading of the amounts that Inuit may harvest as of right, the DFO submission empties the right to sell itself of any meaningful content.

g. The DFO submission asserts, without evidence, that including fish taken for sale outside Nunavut in the basic needs level would produce "much less likelihood of there being a surplus" for allocation under s. 5.6.31 (page 3). This assertion has no demonstrable interpretive relevance; but, even putting that aside, as NTI's analysis shows, the economic realities familiar to the negotiators suggest that, for the foreseeable future, this factor is likely to have little if any effect on the presence of a surplus for most of the fish species and stocks addressed by the Harvest Study. The reading of the basic needs level provisions to which DFO's submission subscribes does not "promote[] the long-term economic interests of Inuit harvesters" (page 5). DFO's view would discount for all time from a system of rights that is intended to support current Inuit economic activity and promote it into the future, economic activity that Inuit already have been engaged in.

4. NTI response to Minister's reasons

By letter to the NWMB dated August 5, 2010, the Minister of Fisheries rejected the NWMB's April 4 2010 initial decision to include amounts fished by Inuit for export in the Kingnait Fiord char basic needs level. In a September 15 follow-up letter, the Minister elaborated on her reasons.

The Minister relied on DFO's July 14 2009 analysis (referring to it as "our position" in her September 15 letter, page 1). The Minister unfortunately and inexplicably did not acknowledge or respond to NTI's August 10, 2009 reply.

The Minister also offered two further reasons why she did not accept the NWMB's decision:

> 1) She asserted that the *NLCA* does not permit the NWMB to rely on data that the NWMB had left out of the Harvest Study when the Board is striking a basic needs level under s. 5.6.23(a) of the Agreement (pages 2-3, August 5 letter);
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> 2) Without indicating how she expected the NWMB to respond in the context of the decision at hand, the Minister stated that "DFO is not aware of any management tools… which would allow the HTOs or RWOs to regulate, monitor or enforce harvesting practices of its members to provide for the conservation of fish stocks under a BNL regime" (page 2, September 15 letter). She proposed, "as a first step" to deal with that issue, discussions about DFO licences and non-quota limitations and other monitoring, sampling, and enforcement tools. She emphasized the increasing need for fish marketers to be able to demonstrate to buyers that their product has been fished sustainably.

The cover letter to this paper will respond to the issues of process that are raised by the Minister's letters. For purposes of initiating the further discussions between DFO and NTI that in NTI's view are necessary, NTI offers the following response to the Minister's further reasons:

> 1) The NWMB's proposal would correct a past Board error. The data in question was collected and maintained by DFO. It remains available and its reliability is not questioned. An error on the part of the Board in the proper interpretation of the *NLCA* can in no way alter the meaning and reach of a constitutionally protected land claims agreement. In NTI's view, is inconsistent with the honour of the Crown for a Minister to oppose a co-management board's effort to remedy the board's previous failure to comply with an Agreement obligation.
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> 2) The Agreement requires the NWMB to strike a basic needs level for this fish stock. This requirement is triggered because, and only because, the NWMB has decided that

conservation demands a limit on the total quantity taken from this stock. Under the Agreement, Inuit may not harvest more than the total allowable harvest, or, where the basic needs level is lesser, more than the basic needs level. It is therefore irrelevant to the basic needs level decision whether or not the government recognizes Inuit "conservation" tools that regulate Inuit fishing *within* the Inuit priority share. In particular, as NTI noted in its August 10 2009 comment on the Board's legal opinion, the challenge of adapting DFO's pre-*NLCA* fisheries management practices so as to recognize the Inuit right to fish without a licence and to sell fish lawfully caught under the *NLCA* is the same regardless of the level at which a basic needs level is set. For that matter, the challenge is the same regardless whether or not a total allowable harvest and basic needs level are set, because both Inuit rights in question also apply in the absence of any quantitative limit on the harvest. This is a marketing challenge, not a conservation challenge, and NTI is encouraged that DFO is initiating a certification process that perhaps can be adapted to the task.

APPENDIX I

Objectives of Article 5

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,
(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;

(b) the creation of a wildlife management system that
(i) is governed by, and implements, principles of conservation,
(ii) fully acknowledges and reflects the primary role of Inuit in wildlife harvesting,
(iii) serves and promotes the long-term economic, social and cultural interests of Inuit harvesters,
(iv) as far as practical, integrates the management of all species of wildlife,
(v) invites public participation and promotes public confidence, particularly amongst Inuit, and
(vi) enables and empowers the NWMB to make wildlife management decisions pertaining thereto.

APPENDIX II

"Commercial" harvesting in the Nunavut Settlement Area in 1993

The Agreement required the Harvest Study to be commenced within a year of the Agreement's ratification (5.4.2). (A moderate delay in fact occurred. The Agreement was ratified in 1993; the Study ran from 1996 to 2001.)

In light of the regulations that applied to Inuit at the time, all Inuit commercial fishing, whether for export or otherwise, was governed by licences and quotas administered by DFO: there is no reason to assume that any Inuit commercial fishing was unknown to DFO and the *NLCA* negotiators or that any such fishing was excessive.

The extent of Inuit commercial harvesting was as follows:

- With the exception of the shrimp harvest, which is not included in the Harvest Study, there was no significant Inuit commercial harvest, or reason to anticipate such a harvest, for any wildlife species in the NSA except a few populations of muskox and caribou and the following stocks of char and turbot:
    - Char throughout Nunavut, but only on a large scale in the vicinity of Nunavut's two fish plants, at Cambridge Bay and Pangnirtung/Cumberland Sound;
    - Cumberland Sound turbot;
- Most char fished commercially in Nunavut was consumed in Nunavut. Most of the char sold to the Cambridge Bay fish plant was exported (to San Francisco). A significant portion of the char sold to the Pangnirtung fish plant – perhaps more than half - was exported (to southern Canada and Boston). In summary, Inuit participation was as follows:

    Char across Nunavut

    - The majority of licences were held by HTOs, in the form of commercial or "exploratory" licences;
    - In most char lakes and rivers, especially in the vicinity of communities, the larger portion of the Inuit catch was taken for Inuit consumption; exploratory licences tended to be issued by DFO as an incentive for Inuit to fish further from communities, in waters that DFO classed "underutilized".

    Cambridge Bay char

- Char sold to the Cambridge Bay fish plant tended to be taken from rivers and lakes that DFO considered "underutilized", which the HTO dedicated to commercial fishing;
- The Cambridge Bay commercial char fishery was developed entirely by Inuit. Non-Inuit fishers had not shown interest in participating. DFO did not issue commercial fishing licences to persons other than Inuit for this fishery, notwithstanding that persons other than Inuit were equally eligible for such licences under the regulations.

Kingnait Fiord char

- 1993 export figures are not readily available to NTI, but out of the NWMB's currently proposed TAH of 6250 kg. for Kingnait Fiord char, approximately 2200 kg. were exported last year. According to the Study, Inuit caught more than 7500 kg. annually in the relevant period *for consumption or sale within Nunavut*. These figures show that the export factor would make no difference to the availability of a surplus for Kingnait Fiord char under the NWMB's proposed decisions;
- DFO now proposes a TAH of 2700-4800 kg and a BNL of 7600 kg. Accordingly, the export factor would make no difference to the availability of a surplus for Kingnait Fiord char under DFO's calculations.

- The Cumberland Sound turbot commercial fishery was based on exports to Boston. Inuit participation was as follows:

  - Inuit fished turbot inshore in Cumberland Sound;

  - 1993 figures are not readily available to NTI, but the NWMB's 2005 TAH/BNL decisions are informative. The NWMB set the TAH at 500 metric tonnes in 2005. Excluding fish caught for export, the Board set the BNL at 4.4 metric tonnes. Including the Inuit inshore catch of approximately 385 metric tonnes, there would likely be a surplus available of more than 100 metric tonnes.

In summary, in 1993, of all the species and stocks of fish in Nunavut covered by the Harvest Study, the Cambridge Bay char stocks constituted the only case in which the factor of "commercial" exports likely would have influenced whether or not a significant surplus would remain after calculation of the basic needs level. The Cambridge Bay char stocks were fished commercially solely by Inuit.