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

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Definition

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

Fishing Marine Species in the NSA for Sale

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

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

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

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

Total Allowable Harvests (TAHs)

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

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

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

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

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

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

Basic Needs Levels (BNLs) and Surplus

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

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

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

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

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

Licences

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

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

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

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

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

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

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

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

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

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

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

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