To: Joe Kunuk

From: Ruth Sullivan

Date: January 11, 2007

Re: The re-enactment of pre-1993 non-quota limitations: response to the government position

Introduction

I have reviewed the following material in so far it relates to the re-enactment of non-quota limitations (NQL's) that have been continued under s. 5.6.51 of the *Nunavut Land Claims Agreement:*

November 14, 2006 letter setting out GN position
November 20, 2006 letter setting out Board position
December 18, 2006 letter setting out NTI position
December 20, 2006 letter setting out GN position

Here is a **summary of my conclusions**.

1. No doubt, the effect of s. 5.6.51 is to continue pre-1993 NQL's until removed or modified, but that says nothing about an actual decision by the Board to re-enact them nor does it preclude a duty to remove or modify them if they do not measure up to the purpose and scheme of Article 5. Section 5.6.51 may be unambiguous, but the issue is not the meaning of that section. The issue, properly formulated, is the following:

- when asked to approve a proposal to establish a new wildlife management regime, does the Board owe a duty to consider and decide whether pre-1993 NQL's included in the proposal should be modified or removed?
- if the Board in fact considers one or more pre-1993 NQL's and decides not to modify or remove them, must its decision accord with s. 5.3.3 of the Agreement?

2. To the extent the NQL's to be re-enacted by the GN form part of an integrated scheme of wildlife management submitted to the Board as a single overall package, the Board's response to the proposed re-enactments must form part of the overall decision the GN is seeking from the Board, a decision that obviously must be taken in accordance with the criteria set out in s. 5.3.3.

The problem with the government's argument

The government's argument appears to be the following. Section 5.6.51 is a valid provision and its wording is unambiguous. It provides that NQL's in force at the date of ratification of the Agreement remain in effect until removed or otherwise modified by the

Board. Since these limitations are continued by virtue of the section, there is no need for the Board to make a decision to continue them.

There is a sense in which this analysis clearly is true. If the Board does not address its mind to the continuation of pre-1993 NQL's, or even if it does consider them and decides to do nothing about them, they will remain in force by virtue of s. 5.6.51. In this sense, a decision by the Board to continue NQL's is not required – not required for their legal continuation.

However, two objections can be made to the GN's argument – or more accurately, perhaps, there are two ways of formulating a problem with the GN's reasoning.

First, it is arguable that the GN has incorrectly identified the issue raised by the current circumstances. That issue is not whether a Board decision is required for the continuing legal validity of the NQL's. Under s. 5.6.51, the decision to establish the pre-1993 NQL's is deemed to have been taken in accordance with Article 5 requirements – and obviously that deemed decision cannot be revisited. It is a non-rebuttable legal fiction.

However, what is at issue in the current circumstances is not the Board's *deemed* decision to *establish* the NQL's but rather its *actual* decision whether to *modify or remove* certain of them for the future. In the current circumstances, the Board is in fact addressing its mind to the continuation of certain pre-1993 NQL's and it will in fact decide whether to modify or remove them. The real question, then, is whether the Board's actual decision about the NQL's is a decision within the meaning of s. 5.3.3 and must therefore be made in accordance with its criteria.

I see no basis for concluding that the answer to this question could be no. As explained in my first memo, given the purpose and scheme of Article 5, the only plausible interpretation is that s. 5.3.3. does apply. The GN has said nothing that contradicts this conclusion. Its argument is based entirely on the terms of s. 5.6.51, but that section says nothing about how actual, post-1993 decisions must be taken.

Second, as indicated above, there is another way of looking at the problem. If I understand correctly, the GN takes the issue to be whether in current circumstances the Board is required to make a decision concerning the NQL's that are to be re-enacted under the GN's proposed reform. Although s. 5.6.51 may not be ambiguous, this formulation of the issue most certainly is. To see the ambiguity, one need only ask required for what purpose?

One possibility is that the Board must decide whether to continue the pre-1993 NQL's in order to preserve their legal existence and validity. For that purpose, no decision is required. But that conclusion does not rule out another possibility, namely the Board must decide whether to continue the pre-1993 NQL's in order to carry out its duties under Article 5 of the Agreement. As explained in my first memo, I believe that under Article 5, the Board has a duty to consider and decide whether pre-1993 NQL's should be modified or removed. This duty is crystal clear when the matter has been referred to the Board by

the Minister, as provided for in s. 5.3.25.[1] Apart from that section, in my view once the Board for whatever reason undertakes a review of pre-1993 NQL's, it must reach a decision and that decision must meet the criteria set out in s. 5.3.3.

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The "overall package" argument

In both its November 14th and the December 20th letters, the GN emphasizes that its proposed package of new and continued regulations forms a consistent and comprehensive wildlife management regime. In other words, the limitations to be re-enacted work in concert with the proposed new regulations to form an integrated system; the GN has presented the Board with a single overall package.

I have not examined the package presented to the Board for approval, but one would expect and hope that the GN's claim is true. Certainly, the establishment of a consistent and comprehensive wildlife management regime has to be the goal of all concerned. And clearly, this regime must be one that meets the principles and objects of Article 5, including s. 5.3.3.

If this is so, then the GN's position that re-enacted NQL's require no justification is difficult to understand. To the extent the various regulations (whether new, amended or re-enacted) work together to form an integrated system, they must all be examined together in accordance with the principles and objects of Article 5, including in particular the criteria set out in s. 5.3.3.

The GN cannot consistently argue that the proposed re-enactments form an integral part of its overall package but the Board's response to the re-enactments forms no part of the Board's decision to be made under s.5.3.3. Just as it would be unacceptable for the Board to forego justification of selected new limitations, so it is unacceptable for it to forego justification of selected limitations to be re-enacted. In terms of their role in the management regime and their impact on Inuit rights, there is nothing to distinguish pre-1993 NQL's from post-1993 ones.

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[1] That section expressly refers to the Board's duty to decide, and it calls for an expeditious decision from the Board. The purpose of the section is to ensure that the Board cannot thwart the plans of the GN by dragging its heels.