

*i) Implication of the policy nature of the flexible quota system*

Emphasis was placed by the Board's counsel at Session 2 on the fact that adjustments to the following year's TAH to account for the taking of bears in the circumstances covered by these limitations is a function of Board policy rather than law. With respect, that observation does not address NTI's point. What is relevant is that the Board (and Government, in the process of reviewing Board decisions) has it completely within its power to make the appropriate adjustment necessary to give effect to conservation if and when such bears are taken. Whether they follow the flexible quota formula or not, the Board's adjustments, once made, are required by law to be implemented (s. 5.3.15, NLCA) and the quota limitations by which adjustments are implemented are fully enforceable. That is why these flat prohibitions go beyond "the extent necessary" to effect a valid conservation purpose under the NLCA. It does not matter that, should the Board or Government choose, they might make exceptions in some cases, *because it is solely up to the Board and Government to ensure that any such exceptions do not compromise valid conservation purposes.*

To illustrate, suppose that the prohibition is removed and a female and the two cubs she is accompanying are harvested in year 1. Suppose that, after the community's other sex-selective polar bear harvest and credits are considered, the flexible quota formula calls for a consequent reduction of four tags from the community's allotment in year 2. If the Board (and Government) follow the formula and reduce the year 2 TAH by four, the conservation purpose served by the formula is fully met. If the Board (or Government) choose to depart from the formula and reduce the year 2 TAH by only three bears, *neither authority has any more reason to doubt that their considerations for making the exception are fully justified by conservation than they have reason to doubt that the formula they approved does so.* (The Board's counsel acknowledged this point when he informed the Meeting of a case in 2006 in which the Board decided to depart from the formula in the other direction, indicating that the Board did so only having determined "that the principles of conservation would not be met by applying the flexible quota system, and therefore, decided to reject a request for a conversion of accumulated polar bear credits into tags." (Session 2 transcript, page 437 (17-23)).

It should be noted, too, that TAH adjustments are enforced at both the community and individual levels independently of these prohibitions. The hypothetical example above shows that a community is made responsible in subsequent years for any over-harvests in previous years, in so far as the Board or Government decides that conservation requires this. Under the Wildlife Act, individuals will be made responsible in year 2 by means of a punishable offence if by harvesting without a tag they fail to comply with the year 2 TAH reduction. In other words, the law ensures that individuals, too, are punished for harvesting more than they are permitted. Although the system leaves it to the HTO/RWO to decide which individuals to deprive of tags in year 2 due to over-harvests for which

individuals were responsible in year 1, this is consistent with the exclusive authority assigned to these bodies under the NLCA to make individual allocation decisions. Allocation decisions are conservation-neutral.

*ii. Basis for HTO/RWO endorsement of the 2004 MOUs*

It is not NTI's argument that the NWMB incorrectly treated these prohibitions as terms of the International Agreement on the Conservation of Polar Bears (IACPB) within the meaning of s. 5.9.4 of the NLCA and hence exempt from the justification requirements of s. 5.3.3. Rather, NTI's concern that the requirements of the IACPB may have been misunderstood relates to the basis upon which HTO and RWO representatives signed the 2004 Polar Bear MOUs.

The Board appears to consider the HTO/RWO signatures on the 2004 MOU as evidence that may weigh in favour of deciding that these prohibitions are justified under s. 5.3.3. NTI accepts that HTO and RWO support for or opposition to a particular limitation that is before the Board for decision can be relevant to whether the limitation should be determined to restrict Inuit harvesting "only to the extent necessary" under 5.3.3. (As NTI has previously submitted, HTO or RWO "consent" to any such limitations is not relevant, and should neither be requested by Government representatives nor taken into account as such by the Board. The constraints of s. 5.3.3 are not waivable under the NLCA.)

However, in NTI's submission, the Board should not treat the HTO or RWO signatures on the 2004 MOUs as signifying anything about the views of HTOs and RWOs as to whether these prohibitions are necessary for a valid conservation purpose, because the evidence that has been provided to the Board suggests it is likely that the signatories believed that no justification for these prohibitions was necessary because they are requirements of the IACPB.

Without restating NTI's previous written submissions on this point or reviewing all of the evidence given in Session Two, in NTI's submission the following characterization of these prohibitions by the GN's Manager for Wildlife Research illustrates the likely misunderstanding:

26 DR. TAYLOR: Thank you,  
00489  
1 Mr. Chairman.  
2 I guess I'd like to start by addressing a  
3 couple of information things that might clarify  
4 some of what happened during the MOU  
5 consultations. Specifically the international  
6 agreement does state that polar bears will be  
7 managed according to sound conservation  
8 practices, but stops short of listing specific  
9 conservation prescriptions that would make up  
10 what would amount to sound conservation  
11 practices.  
12 However, there is an IUCN Polar Bear



13 Specialist Group that meets about every three or  
14 four years, who do consider what does and what  
15 does not essentially amount to sound  
16 conservation practices. They provide their  
17 recommendations to the signatories in the form  
18 of resolutions.  
19 And at the first meeting of the IUCN Polar  
20 Bear Specialist Group, one of the decisions was  
21 that there would be no harvesting of females  
22 with cubs. So that's where the prohibition  
23 comes from, it's the IUCN Polar Bear Specialist  
24 Group's interpretation of that part of  
25 international agreement.  
26 Another relevant resolution that came about  
00490  
1 1996 or '97 that was sponsored by Canada, but  
2 sponsored by all the member nations or signatory  
3 nations was that it was acknowledged that cubs  
4 could be harvested for cultural and nutritional  
5 purposes as long as the female was protected.  
6 So we do have support from the IUCN Polar Bear  
7 Specialist Group for the provision in the MOU  
8 that allows the cubs to be taken so long as the  
9 mother isn't harmed.

(emphasis added)

If, as Dr. Taylor appeared to indicate, this was the type of explanation given to the communities, it is likely that the recipients believed that the prohibitions in question were required by the IACPB. It was only later in Session 2, in response to a question from the Chair, that Dr. Taylor acknowledged that there are different ways in which the IACB requirement of "sound conservation practices" can be met, depending, among other considerations, on the terms of Aboriginal treaties:

10 Mr. Chairman.  
11 I have more than one question to GN. And  
12 just to get clarification, the NTI had stated  
13 that the communities in Alaska, Greenland, it  
14 seems like they're using less limitations than  
15 Canadians. And it's true, as Mitch Taylor said,  
16 these other countries are now starting to use  
17 regulations, and Alaskans, and in Canada, and  
18 also in Northern Quebec and Labrador regions do  
19 they have any regulations, too? That's my first  
20 question.  
21 THE CHAIR: Who's going to respond?  
22 Steve or Dr. Taylor.  
23 DR. TAYLOR: In Northern Quebec  
24 there's no quota system, and there's no  
25 regulations prohibiting harvesting females with  
26 cubs. Also, Treaty Indians, due to their treaty  
00510  
1 rights, can harvest essentially up to the level  
2 of their needs, and it's also not possible to

3 restrict their take of females with cubs. But  
4 the conservation organizations, both Land Claim  
5 and provincial, essentially through conservation  
6 education, strive to reduce the take of family  
7 groups, and few family groups are taken.

(emphasis added)

As NTI has explained in writing and orally, this misunderstanding extended to NTI representatives themselves, who were working without counsel in the MOU process. Because NTI's representatives understood the Government to be saying that these prohibitions are terms of the IACPB and that no 5.3.3 justification was therefore necessary, NTI did not seek the kind of conservation rationale for these prohibitions that has now been advanced by the GN in this process. For that reason there were no discussions of the issues addressed in points i) and iii) of this Reply, in particular, at the time.

For these reasons, NTI submits that the Board should not treat the HTO/RWO signatures on the 2004 Polar Bear MOUs as relevant to the justification of these prohibitions, and should not assume that NTI ought to have raised the justification concerns that NTI has raised since about these prohibitions, during the MOU process.

*iii) Basis of the GN's assertion at Session 2 that if the prohibition against harvesting family groups were removed, TAH levels would have to be reduced in order to maintain sustainable harvests.*

This assertion was sufficiently new in Session 2 that NTI did not have full opportunity to consider it and respond. The GN's written submission on this point stated merely that the TAH levels on polar bears are "predicated on not harvesting family groups" (GN **NQLs in the Proposed Wildlife Regulations**, updated September 8, 2006). At Session 2, the GN asserted that "If the harvest was shifted from juvenile animals and senescent animals, females, to animals in prime reproductive rate, the sustainability of a given harvest would be reduced, meaning we would have to adjust the TAH levels downward" (Session 2 transcript, page 460 (21-26)).

NTI submits that the Board should provide an opportunity for full discussion and examination of this assertion on a scientific basis in this Meeting, and that such a process has not yet occurred. NTI's biologist, Dr. Lee, has run a number of simulations on the calculations model that the GN is relying on, and the results have varied considerably between particular polar bear populations. In NTI's submission, based on this preliminary information, there appears to be reason for the Board to examine the GN's assertion further. NTI requests a further opportunity to ask questions of the GN's Manager of Wildlife Research in relation to this assertion.

Further, NTI questions whether there is any empirical or other reliable basis for the premise of the GN's assertion, namely, that if these prohibitions were removed, the harvest would actually shift towards family groups. In NTI's submission, this premise

fails to take any evident account of the fact that the affected communities already have a strong disincentive to harvest breeding females, in the negative TAH adjustments that have resulted and would continue to result pursuant to the flexible quota system or its variant. NTI requests that the GN provide the Board with any relevant evidence that the GN has or can reasonably obtain of this nature, from Nunavut or other jurisdictions. In NTI's submission, the regular adjustment to TAHs to which Nunavut communities are accustomed means that the Board should obtain persuasive evidence in support of the GN's premise before determining that these prohibitions have been adequately justified for the purpose of s. 5.3.3(a) of the NLCA.