



productive time for the NWMB<sup>1</sup> - it is clear that nine months is too long a period to have to wait for a reply. The NWMB again apologizes for the delay, and is determined to improve on its correspondence times.

**1. NLCA S.5.6.16**

You will be pleased to learn that the NWMB has recently obtained a comprehensive legal opinion - from Eugene Meehan Q.C. of Lang Michener LLP - regarding the Board's jurisdiction to establish, modify or remove levels of harvesting under NLCA S.5.6.16. That opinion is attached to this letter. Mr. Meehan's view is that there are arguably two interpretations that could be sustained by a Court – the one advanced by the NWMB and the other proffered in the Cook Roberts opinion. His conclusion is that the NWMB has a reasonable arguable position.

Before turning to that position, I would like to briefly address the misunderstandings that have arisen between our two organizations concerning our respective positions. In considering the Cook Roberts opinion, the NWMB focused on what it perceived as an alarming contention that it is attempting to avoid the TAH Allocation Scheme (p.5), circumvent the Basic Needs Level rules (p.5 & 7), and subvert/undermine a fundamental purpose of Article 5 (p.6 & 7), so as to achieve an absurd outcome (p.7).

As a result, the purpose of the September 26<sup>th</sup> and November 23<sup>rd</sup> 2007 explanations from the Board was two-fold:

1. To point out, from a legal perspective, that the ordinary meaning of the words in NLCA S.5.6.16 is clear, and that none of the words in the provision are superfluous, meaningless or typographical errors<sup>2</sup>; and
2. To assure NTI:

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<sup>1</sup> During this intensive period, the NWMB – with a smaller number of staff than, for instance, NTI's Wildlife Department – held eight Conference Call Meetings (111 to 118), four Regular NWMB Meetings (54 to 57), and three full hearings (TAH for Bowhead Whales, TAH for Baffin Bay Polar Bear and listing of Grizzly Bears under the *Species at Risk Act*). In addition, the Board concluded and commenced implementation of a crucial, multi-party Memorandum of Understanding to harmonize the listing of species at risk under the *Species at Risk Act* and the NLCA – and did the same with respect to a comprehensive *Allocation Policy for Commercial Marine Fisheries*. The NWMB also filed in Federal Court, and worked diligently on, a crucial application for judicial review in connection with the development of Nunavut's commercial marine fisheries. All of these accomplishments were achieved while carrying out the multitude of day-to-day management activities that occupy the NWMB's time.

<sup>2</sup> There was at least an implication by NTI's legal department in 2005 that the word "or" in S.5.6.16 may actually have been meant to be "on". See the faxed message from NTI's legal counsel to the NWMB's legal counsel, dated November 3<sup>rd</sup> 2005: "See 5.19.1 in AIP [Agreement in Principle]. *Interesting shift in 5.6.16. I'm checking out the FA [Final Agreement] original.*" See also NLCA S.2.8.1.

- (a) that the NWMB is fully committed to the TAH Allocation Scheme, which is absolutely essential to the proper functioning of wildlife management in Nunavut; and
- (b) that the establishment of levels of harvesting with respect to Inuit would be used as an exceptional, temporary, interim measure - in circumstances where insufficient evidence is available - to gather the data necessary to confidently establish a TAH, (adjusted) BNL and surplus.

With the receipt of NTI's December 7<sup>th</sup> 2007 letter, it became clear to the NWMB that its explanation was not enough to satisfy NTI. Unfortunately – for the reasons stated above – it has taken several months to provide the fuller legal explanation.

### **1.1 Necessary approach to the interpretation of NLCA S.5.6.16**

In the absence of clearer technical drafting of NLCA Sections 5.6.1 and 5.6.16, the proper interpretation of S.5.6.16 must be directed by the core principles and objectives of NLCA Article 5, which reflect the overall object and purpose of Article 5.

### **1.2 Principles and objectives of NLCA Article 5, and the object and purpose of Article 5**

The principles and objectives of Article 5 are clearly set out in Sections 5.1.2 to 5.1.5. There are two dominant themes running through those principles and objectives:

- The vital importance of conservation in Nunavut's wildlife management system (see, for instance, S.5.1.2(e) and (g), S.5.1.3(a)(ii), (b)(i) and (iv), S.5.1.4 and S.5.1.5); and
- The vital importance of ensuring the long-term economic, social and cultural interests of Inuit harvesters within that system (see, for instance, S.5.1.2(a), (b), (c), (e) and (h), S.5.1.3(a)(i), (ii), (iii) and (v), S.5.1.2(b)(ii), (iii) and (v) and S.5.1.4).

Those themes are neither mutually exclusive nor in competition with one another. On the contrary, they are complementary and mutually reinforcing. The economic, social and cultural interests of Inuit include the conservation of wildlife - and the conservation of wildlife is an essential element in ensuring the long-term economic, social and cultural interests of Inuit harvesters.<sup>3</sup>

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<sup>3</sup> See, for instance, the following *Inuit Qaujimagatuqangit* principles from Nunavut's *Wildlife Act*: S.8(f) - *Avatimik Kamattiarniq/Amiginik Avatimik* ("... people are stewards of the environment and must treat all of nature holistically and with respect, because humans, wildlife and habitat are inter-connected and each person's actions and intentions towards everything else have consequences, for good or ill"); and, S.8(i) - *Surattittailimaniq/Hugattittailimanik* ("... hunters should only hunt what is necessary for their needs and not waste the wildlife they hunt").

It is submitted that, together, these two dominant and inter-twined themes reflect the overall object and purpose of Article 5. The object and purpose of Article 5 is to manage wildlife in a way that meets the principles of conservation while protecting and prioritizing Inuit rights to harvest.

### 1.3 The importance of determining an accurate BNL number

Essential to a proper understanding of the NWMB's interpretation of NLCA S.5.6.16 is an appreciation of the relationship between the TAH and the BNL, and of the significance of the BNL number. Except for "*Presumptions as to Needs*" wildlife,<sup>4</sup> the establishment of a TAH for a wildlife population can not be reasonably accomplished without also striking a BNL pursuant to NLCA S.5.6.19. The establishment of a TAH is, in fact, an automatic trigger for the establishment of a BNL. The BNL constitutes the first demand on the TAH (S.5.6.20).

The BNL number - struck by the NWMB pursuant to NLCA S.5.6.19 to 5.6.24 – represents a specific amount of wildlife guaranteed to Inuit as a constitutionally-protected right (S.5.6.20). That specific amount can never be lowered (S.5.6.29). As long as the TAH is equal to or greater than the BNL number, Inuit have an unqualified right to the full BNL. If the TAH should be reduced to lower than the BNL, the BNL number remains and Inuit have a right to the entire TAH (S.5.6.20).

Should Inuit ever become the minority in Nunavut<sup>5</sup>, they will still (and, pursuant to the terms of the NLCA, will forever) be entitled to the originally-established full BNL (or the full TAH, should it be lower than the BNL).

Accordingly, the NWMB is under a heavy responsibility to try to ensure that, whenever it is required to strike a BNL, it relies upon sufficient evidence to make accurate BNL determinations.

In order to strike a BNL, the Board is required by the terms of the NLCA to use the data from the 1<sup>st</sup> Nunavut Wildlife Harvest Study (1996-2001)<sup>6</sup> – assuming that the particular population under consideration had been harvested during the years of the Study – as well as "*the best evidence available as to the levels of harvesting by Inuit in the five years prior to establishment of a total allowable harvest.*" (NLCA S.5.6.24)

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<sup>4</sup> "*Presumptions as to Needs*" wildlife are addressed in NLCA Sections 5.6.5 to 5.6.11. In addition, see the unique treatment of beluga, narwhal and walrus in NLCA S.5.6.25 – wherein the NWMB is authorized to establish BNLs independently of the establishment of TAHs.

<sup>5</sup> Considering the rapid effects of global warming, the size of Nunavut (20% of Canada's land mass – an area equal to continental Europe), the relatively low population numbers for Nunavut Inuit (24,635 – 2006 Census) and the territory's apparently bountiful sub-surface mineral content, this is a realistic possibility. See also the contemporary Aboriginal and non-Aboriginal population levels for the Yukon Territory.

<sup>6</sup> A second Harvest Study is currently being organized, and is scheduled to commence within the next year.

If the quality of the data/evidence available to the NWMB is poor, the resulting BNL will not fully reflect the basic economic, social and cultural needs of Inuit. While that BNL could be adjusted upwards following the receipt of new, more reliable information, the BNL quantity itself could never be changed. For the purpose of ensuring a guaranteed Inuit entitlement in perpetuity to a particular quantity of that wildlife population, the BNL amount would always remain at the inexact level initially determined by the NWMB.

Such an outcome would not optimally reflect either the principles and objectives of Article 5 or the object and purpose of the Article. In the case of those BNL numbers that are lower than they would otherwise be if based on more complete and reliable information, the Article 5 management system would arguably have fallen short in serving and ensuring the promotion of the long-term economic, social and cultural interests of Inuit harvesters.

#### **1.4 The interpretation of NLCA S.5.6.16 in light of the principles and objectives of Article 5**

If S.5.6.16 were to be interpreted such that the NWMB would have an opportunity - in particular circumstances - to establish a temporary, interim level of harvesting prior to establishing a TAH, the Board would be able to use that interim period to obtain sufficient information to confidently establish:

- (a) a TAH that accurately reflects an initial maximum sustainable yield for that particular population of wildlife; and
- (b) a BNL that accurately reflects the basic economic, social and cultural needs of Inuit with respect to that particular population of wildlife.

In such a circumstance, the NWMB would need to explicitly guarantee that the “level of harvesting” decision was temporary, and was made with the express purpose of gathering the information necessary to confidently establish a reasonably accurate TAH and BNL for the population.<sup>7</sup> In addition, the Board would need to ensure that the interim arrangement meets the principles of conservation and protects and prioritizes Inuit rights to harvest. The NWMB would achieve those two purposes by ensuring that the level of harvesting:

- (a) restricts Inuit harvesting only to the extent necessary to effect the valid conservation purpose of maintaining a vital, healthy wildlife population capable of sustaining harvesting needs (NLCA S.5.3.3(a) and S.5.1.5(c)); and
- (b) gives Inuit priority to the harvest, while providing for harvesting privileges and allowing for continued access by persons other than Inuit.

Therefore – in those circumstances where the immediate establishment of a TAH and BNL for a particular wildlife population would have to be based upon insufficient

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<sup>7</sup> Naturally, in every circumstance where sufficient information is already available, the NWMB would not need to establish an interim level of harvesting, and would proceed directly to establishing a TAH, BNL, etc.



evidence - the establishment of a temporary, interim level of harvesting to generate sufficient evidence to produce a reasonably accurate TAH and BNL would arguably better reflect the principles and objectives of Article 5, as well as the object and purpose of the Article.<sup>8</sup>

## **1.5 Conclusion**

For the reasons set out above, the NWMB continues to maintain that its jurisdiction under NLCA S.5.6.16 includes the authority to establish, modify or remove levels of harvesting in particular circumstances. Nevertheless, the Board recognizes that NTI's interpretation of NLCA S.5.6.16 is not unreasonable, and wishes to be responsive to the strongly-held views of its co-management partner with respect to this matter. Accordingly, the NWMB is willing to proceed for the time being as recommended by NTI, and thereafter to evaluate the implementation of the "TAH-BNL-Surplus" allocation system as necessary.

As a result - until such time as the NWMB should determine that the Nunavut wildlife management system is not being properly served by the immediate adoption of a TAH and BNL whenever a quantitative harvesting limitation for Inuit is necessary - the Board will not establish a level of harvesting for Inuit.

## **2. Kingnait Fjord**

### **2.1 2005 and 2006: Kingnait Fjord application for judicial review**

I will begin with a brief review of the recent history of char fisheries in the Cumberland Sound area. In June of 2005, the NWMB established a (temporary) level of commercial char harvesting of 2,000 kilograms in Kingnait Fjord (with the non-commercial harvest remaining un-regulated), allocated to the Pangnirtung Hunters and Trappers Organization (HTO). Shortly after the Minister accepted the Board's decision, NTI filed an application for judicial review. Its position was that the only quantitative limit that can be placed on Inuit harvesting is a TAH - with the (adjusted) BNL to be determined by the NWMB and allocated to Inuit as the first priority under the TAH.

NTI withdrew the application for judicial review after the NWMB indicated that it was preparing to establish a TAH for the 2006 harvesting season. In a May 12<sup>th</sup> 2006 letter to the HTO, the NWMB extended this timeline – with agreement from both NTI and the Department of Fisheries and Oceans (DFO) – to have a TAH in place for the 2007 season.

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<sup>8</sup> Please note the direction set out in NLCA S.5.6.9(a) that, "*In assessing the economic, social and cultural needs of Inuit, the NWMB shall consider (a) actual levels of harvest...*" [Emphasis added]

## 2.2 2006 and 2007: Fishing plans for exploratory char fisheries

In the meantime, following successful co-management discussions in April and May of 2006 - and with the achievement of a consensus recommendation in a May 18<sup>th</sup> 2006 conference call among NWMB, NTI and DFO technical and legal representatives - the NWMB decided in June of that year to approve a fishing plan for commercial char harvests by the Pangnirtung HTO in 11 other water bodies in the Cumberland Sound area (with the subsistence harvest to remain unchanged).<sup>9</sup> The NWMB's consideration of the plan and its decision to approve it were both conducted at its Regular Meeting No. 46 (June 6<sup>th</sup> to 8<sup>th</sup> 2006), attended by NTI's fisheries advisor and Director of Wildlife.

The purpose of the plan was to allow commercial fishing to proceed without having to establish a TAH, BNL or surplus until after sufficient data was gathered. The plan included:

- (a) Specific levels of commercial harvesting (agreed to by DFO and the HTO);
- (b) A gear size restriction;
- (c) The requirement for HTO members to report catch per unit effort (CPUE) and provide samples needed by the NWMB and DFO to eventually set a TAH and BNL (and, potentially, a surplus) for each of the various water bodies; and
- (d) In the case of one water body, specific restrictions related to the harvest of Atlantic Cod – arctic population (assessed in 2003 by the Committee on the Status of Endangered Wildlife in Canada as being a species of special concern).

Despite the lack of any samples or CPUE reporting by the fishers for the 2006-07 fishing season, in July of 2007 - at Conference Call No. 106 - the NWMB again considered and approved the management plan, as set out in DFO's May 22<sup>nd</sup> 2007 Briefing Note to the NWMB and as agreed to by DFO and the HTO. Conference Call No. 106 was attended by NTI's fisheries advisor.

The May 18<sup>th</sup> consensus recommendation from NTI, DFO and NWMB technical and legal representatives also included the proposed approval of a similar fishing plan for the Pond Inlet HTO in the Koluktoo Bay/Milne Inlet area. That plan was also considered and approved by the NWMB at Regular Meeting No. 46.<sup>10</sup> In addition, on July 12<sup>th</sup> 2007 at

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<sup>9</sup> The proposal to recommend that the NWMB approve a fishing plan for the management of the eleven water bodies was agreed to by all participants at the conference call, including the three NTI representatives in attendance (legal counsel, fisheries advisor, wildlife advisor). See the handwritten notes of the NWMB legal advisor made during the call: "*Agreed for rec to NWMB. NWMB approves a plan that DFO & HTOs have worked out themselves for this year.*" See also the May 26<sup>th</sup> 2006 Briefing Note from the NWMB's Director of Wildlife, at Tab 23 of the Regular Meeting No. 46 Binder.

<sup>10</sup> See Tab 21 of the Regular Meeting No. 46 Binder.

Conference Call No. 107, the NWMB made a decision, after due consideration – in connection with the drainage of lakes for mining purposes - to establish a level of harvesting by Inuit and the mining company of all fish species in Second Portage Lake, Third Portage Lake, Vault Lake and Tail Lake in the Kitikmeot Region. Conference Call No. 107 was attended by NTI's fisheries advisor.

NTI's apparent comfort with the considerations carried out and the decisions made at NWMB Regular Meeting No. 46 and NWMB Conference Call Nos. 106 and 107, as well as its active participation in the consensus recommendations in May 2006 for approval of the char fishing plans, reasonably led the NWMB to understand that – since the withdrawal of the application for judicial review in the spring of 2006 – *“NTI has raised no objections to any such decisions made by the Board – in fact, has in some instances provided helpful recommendations as to how to proceed.”*<sup>11</sup>

### **2.3 March/April 2008: Meeting of the Nunavut Regulatory Review Committee and follow-up actions**

With respect to the March 2008 meeting of the Nunavut Regulatory Review Committee (NRRC) developing the draft *Nunavut Fishery Regulations*, the NWMB's legal counsel did mistakenly indicate that NTI had unilaterally withdrawn its application for judicial review two years earlier. However, his contention was immediately disputed by NTI's wildlife advisor, which ended the brief exchange on that particular matter at the meeting.

As to NTI's contention that the NWMB's legal counsel *“also said that NTI led the Board to believe that NTI would not object if the Board continued to set quotas on Inuit harvests without a BNL if the Board did so on an interim basis, preliminary to a TAH”*, the NWMB's legal counsel does not recall the specifics of that discussion. Nevertheless - as described in some detail in this letter - the NWMB and its counsel did, for a considerable period of time (May 2006 to August 2007), reasonably conclude that NTI was comfortable with the series of relevant NWMB considerations carried out and decisions made at the Board's Regular Meeting No. 46, Conference Call No. 106 and Conference Call No. 107.

Directly following the NRRC meeting, the NWMB's counsel reviewed the Kingnait Fjord file, which confirmed that the application had been withdrawn on the understanding that the NWMB would establish a TAH for the 2006 fishing season - later extended to the 2007 season. Counsel immediately contacted the NWMB and arranged for a Board conference call regarding this outstanding NWMB commitment. The NWMB met on April 2<sup>nd</sup>, and received a full briefing from its legal counsel. The Board decided to wait until after it had received the independent opinion from Mr. Meehan before contacting NTI and DFO with respect to a responsible way forward.

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<sup>11</sup> The NWMB's November 23<sup>rd</sup> 2007 letter to NTI, page 10.

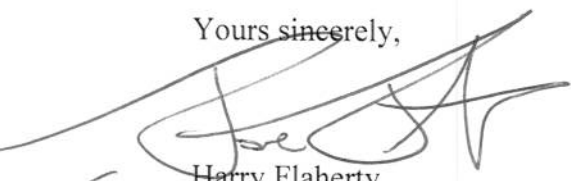


## 2.4 Conclusion

The NWMB acknowledges its overdue commitment to establish a TAH, BNL and (potential) surplus for Kingnait Fjord char. At the same time, it is important to also recognize that the delay has not hindered the community of Pangnirtung from continuing its 2,000 kg commercial char harvest each year, nor from continuing its traditional subsistence harvest every year.

While the NWMB is concerned about the sufficiency of the evidence in the case of Kingnait Fjord char to confidently establish a BNL that fully reflects the basic economic, social and cultural needs of Pangnirtung Inuit, the Board is prepared to proceed as recommended by NTI. Accordingly, the NWMB has placed this matter on its hearing schedule as a priority matter, and expects to establish a TAH, BNL and (potential) surplus prior to the commencement of the 2009 fishing season.

Yours sincerely,

  
for Harry Flaherty,  
A/Chairperson of the  
Nunavut Wildlife Management Board

- c.c. Simon Awa, Deputy Minister of Environment, Government of Nunavut;  
John Sims, Deputy Minister of Justice, Government of Canada;  
Markus Weber, Deputy Minister of Justice, Government of Nunavut;  
Richard Spaulding, Legal Counsel, Nunavut Tunngavik Inc.;  
Dougald Brown, Litigation Counsel, Nunavut Tunngavik Inc.;  
François Dorval, Legal Counsel, Makivik Corporation;  
Patrick Orr, Legislative Counsel, Government of Nunavut;  
William MacKay and Lorraine Land, Legal Counsel, Government of Nunavut;  
Ruth Grealis, Legal Counsel, Department of Justice, Government of Canada;  
Sharon Walter, Legal Counsel, Department of Justice, Government of Canada;  
Alex Li, Director, Legislative & Regulatory Affairs, Department of Fisheries and Oceans, Government of Canada;  
Keith Pelly, A/Director, Eastern Arctic, Department of Fisheries and Oceans, Government of Canada;  
Siu-Ling Han, Section Head, Environment Canada, Northern Conservation;  
Hagar Idlout-Sudlovenick, Director, Intergovernmental Affairs and Inuit Relations Directorate, Department of Indian Affairs and Northern Development;  
Leona Nakashuk, Chairperson of the Pangnirtung Hunters and Trappers Organization