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NUNAVUT TUNNGAVIK

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ᔭᓇᐃ 9, 1993-ᒥᑦ
Incorporated July 9, 1993

July 8th, 2008

Harry Flaherty
Acting Chairperson
Nunavut Wildlife Management Board
Iqaluit, Nunavut X0A 0H0

Dear Mr. Flaherty:

Re: s. 5.6.16 of the NLCA and establishment of TAHs for Kingnait char

I am writing once again to request that the Nunavut Wildlife Management Board (NWMB or Board) revise its interpretation of s. 5.6.16 of the NLCA and decide on Total Allowable Harvests (TAHs) for Kingnait Fiord char as soon as possible.

Section 5.6.16

On August 14, 2007, NTI provided the Board with a legal opinion by Robert Janes on the effect for Inuit of the words "or harvesting" in s. 5.6.16 of the NLCA. Mr. Janes concluded:

> "the Board may only limit the quantity of animals harvested by the Inuit by adopting a TAH, which in turn requires setting a Basic Needs Level [BNL] (or an Adjusted Basic Needs Level) and according that Basic Needs Level absolute priority."

The Board has not replied to the substance of Mr. Janes' opinion, notwithstanding that NTI's letter asked the Board to reconsider its position and respond with a complete analysis if it continues to disagree with the conclusion. (The Board did write on November 23, 2007, asserting that NTI had misinterpreted the Board's position and intentions, claiming without substantiation that NTI had changed its own view, and quoting the French text of section 5.6.16. On December 7, 2007 NTI responded that its position has not changed and noted again that the Board's stated position necessarily means that quotas may be placed on Inuit harvesting without setting aside any minimum Inuit share. The Board did not reply. For ease of reference the relevant excerpts of this unfortunate exchange are attached as an appendix to this letter.)

The issue also came up in the legislative working group on Nunavut Fisheries Regulations, where the Board submitted a September 26 2007 brief that ignored the Janes opinion and asserted simply that the words "or harvesting" in 5.6.16 are not a typo, quoting the French text as support. As NTI's counsel pointed out, this is an inadequate response to a legal analysis on an issue of central importance to Inuit harvesting rights that lies at the core of the Board's responsibilities.

In order to move this matter forward, NTI has commissioned a further opinion by Mr. Janes and his associate Dominique Nouvet on the French text of section 5.6.16 and

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P.O. Box 280, Rankin Inlet, NU X0C 0G0, Tel: (867) 645-5400, Fax: (867) 645-3451

related NLCA provisions. A copy is attached. The authors conclude that the French text offers no reason to alter their previous opinion.

These legal opinions are clear and carefully reasoned. By contrast, the Board has never presented a legal analysis to support its contrary view. In fact, as the authors point out, the contrary view

> "would render superfluous an extensive section of the Chapter and jeopardize ... important measures that are included in the Chapter to protect Inuit harvesting. In our view, this outcome would be far more problematic from a statutory interpretation perspective than the failure to attribute a distinct meaning to the words "or harvesting"/ "ou les quantités récoltées." It would undermine the primary rule of interpretation, namely that words must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (emphasis added)[1]."

Now that NTI has presented the Board with expert legal opinions on both the English and French texts of section 5.6.16, reaching the same unequivocal conclusion, NTI asks again that the Board reconsider its view and advise NTI and government accordingly.

TAHs on Kingnait Char

As you will recall, when the Board claimed to set a "quota" on Kingnait char in 2005 without setting aside a Basic Needs Level, NTI brought legal action. NTI later discontinued the proceeding on the basis of the Board's assurance that TAH decisions on Kingnait char were forthcoming. Unfortunately, the Board then scheduled the necessary meeting without adequate notice. In this circumstance, NTI supported the Board's decision "to postpone making the NWMB TAH/BNL decision on this char fishery to facilitate procedural fairness and public notice requirements." (letter from Board to Pangnirtung Hunting and Trapping Organization, May 12, 2006).

The two years that have passed since are much longer than needed for the Board to provide adequate notice of a meeting on this issue.

Accordingly, NTI urges the Board to reschedule this meeting in Pangnirtung as soon as can be done in accordance with procedural fairness. The meeting should not be held later than October 31, 2008.

NTI must also respond to comments that I am informed were made by the Board's counsel at the March 19 2008 legislative working group meeting in relation to the Kingnait char litigation. Ruth Grealis, a federal Justice counsel who represented DFO while the litigation was pending, was present at the meeting. Board counsel Michael d'Eca stated that NTI withdrew its application for judicial review "unilaterally". Mr.

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[1]See for example, ***Barrie Public Utilities v. Canadian Cable Television Assn.*** 2003 SCC 28 at para. 20.

d'Eca 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.

NTI has conveyed these comments to its litigation counsel, Dougald Brown, and he has responded as follows:

> "NTI withdrew its application for judicial review following discussions between NTI counsel, NWMB counsel and counsel for the Attorney General, a record of which is on file. Pursuant to those discussions, on May 19, 2006, NWMB counsel provided NTI counsel and counsel for the Attorney General with a letter dated May 12, 2006, from the Board to the Pangnirtung HTO. This letter stated that the NWMB would establish a TAH/BNL for the Kingnait Fjord char fishery later in 2006. The letter stated that the only reason for not proceeding to establish a TAH/BNL in June, 2006, as planned, was inadequate time to provide public notice and adhere to procedural fairness requirements. There was nothing in the NWMB's letter to suggest that the setting of interim quotas without a TAH was to be a general practice. Rather, the continuation of the existing quota for the 2006 Kingnait Fjord fishery was presented as an exceptional arrangement necessitated solely by the Board's inability to provide timely public notice. On the basis of the NWMB's statement that it would proceed to establish a TAH/BNL for the fishery later in 2006, NTI withdrew its application for judicial review. Nothing in the
> Board's letter or in the record of discussions amongst counsel indicates that NTI was asked or agreed to acquiesce to a practice in other situations of setting quotas on an interim basis without a TAH. I believe it is clear that NTI did not and would not agree to such a practice. I trust this clarifies the circumstances surrounding the resolution of NTI's judicial review application."

To reconfirm, NTI opposes any establishment of quotas on Inuit harvesting without the setting of BNLs, because any such measures would contravene the NLCA's fundamental guarantee that Inuit needs are a first demand on limited harvest levels.

I look forward to your reply at your earliest convenience. I also look forward to placing future discussions between NTI and the Board on matters of NLCA interpretation on a rigorous footing, in keeping with the importance of the Agreement to the people of Nunavut and with the Board's duty to consult Inuit meaningfully on matters affecting their rights.

Sincerely,

Raymond Ningeocheak,
Vice-President of Finance and Executive Member responsible for Wildlife
Nunavut Tunngavik Incorporated

CC. 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
Michael d'Eca, Legal Counsel, Nunavut Wildlife Management Board
Francois Dorval, Legal Counsel, Makivik Corporation
William MacKay and Lorraine Land, Legal Counsel, Government of Nunavut
Ruth Grealis and Sharon Walter, Legal Counsel, Dept of Justice, Government of Canada
Alex Li, Director, Legislative and Regulatory Affairs, Department of Fisheries and Oceans, Government of Canada

APPENDIX TO LETTER FROM NTI to NWMB - EXCERPTS FROM PREVIOUS LETTERS

NWMB letter to NTI November 23, 2007

"Issue 3: NWMB authority to establish, modify or remove levels of harvesting

The NWMB had understood that NTI's withdrawal of its November 2005 application for judicial review reflected a reasonable level of comfort with the NWMB's approach to establishing quantitative limitations on harvesting. Indeed, since that withdrawal, 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.

The NWMB was particularly surprised by NTI's allegation in its letter that *"The Board also holds, despite the contrary ruling in Sparrow, that it is consistent with aboriginal peoples' harvesting rights to impose quotas without setting aside any priority aboriginal share of the harvest."*

That allegation was echoed in the accompanying Cook Roberts opinion, which warned that *" S.5.3.3...does not provide a means for circumventing the Basic Need Level rules,"* and that, *" Interpreting s.5.6.16...as allowing the Board to set limits that do not take into account and accord full priority to Basic Need Levels would subvert what is evidently a fundamental purpose of the Wildlife Chapter, namely ensuring that the Inuit's traditional and heavy reliance on wildlife harvesting is protected and prioritized."*

The Board asserts that any allegation, suggestion or implication of the NWMB circumventing Basic Need Level rules or subverting a fundamental purpose of Article 5 is without reasonable foundation.
The NWMB wishes to assure NTI that it has always been - and remains - fully committed to the *"Total Allowable Harvest- Basic Need Level- Surplus"* allocation system set out in Article 5 of the NLCA. That system is absolutely essential to the proper functioning of wildlife management in Nunavut. Its implication is a solemn commitment guaranteed to Inuit as a fundamental aspect of the rights and benefits provided to them under the NLCA.

At the same time, NLCA S.5.6.16 explicitly refers to the NWMB - subject to the terms of Article 5- establishing, modifying or removing, from time to time and as circumstances require, levels of harvesting in the Nunavut Settlement Area. The wording of S.5.6.16 is not a typo or some other mistake - see, for instance, the authoritative French version of the provision:

> *" Sous réserve des conditions prévues par le present chapitre, le CGRFN a le pouvoir exclusive d'établir, de modifier ou de supprimer, selon les*

circonstances, les récoltes totales autorisées ***ou les quantités récoltées*** *dans le cadre d'activités de récolte dans la region du Nunavut."*

In fact, the circumstances under which the NWMB establishes levels of harvesting are very rare. Once the TAH system is fully operational, they will be much rarer still.

To date, every time during the last couple of years that the NWMB has set - either explicitly or implicitly- a level of harvesting, it has decided that the entire harvest is to be taken by Inuit. It has also indicated in every instance but one that it intends to establish a TAH as soon as reasonably possible. The reason it has not proceeded by way of total allowable harvest has been because it did not have the data necessary to confidently establish a TAH, (adjusted) BNL and surplus at that time. That data is currently being gathered.

The one exception referred to above took place in July of 2007. The NWMB approved a level of harvest by Inuit and a mining company of all fish species in 4 Kitikmeot lakes- with all of the harvested fish to be provided to the Inuit. The lakes in question required draining because pf the mining development (approved in accordance with NLCA Article 12). The harvest was approved so as to effect the following valid conservation purposes:

(i) to help determine the actual size, distribution and density of fish in Arctic lakes, and

(ii) to test lake production models which predict fish population density and production from lake parameters

The NWMB's approval decision was with respect to a level of harvesting rather than a TAH because there was no need in that circumstance to establish a level of total allowable harvest to determine a BNL, to decide whether to adjust that BNL, or - in the event of a surplus - to decide on global and individual allocations of that surplus.

The NWMB expects that eventually the most likely - certainly the most common - circumstance reasonably requiring the establishment of a level of harvesting will be one in which there is inadequate or no justification under NLCA S.5.3.3 to limit Inuit harvesting by quantity, but it is reasonable for the Board to limit harvesting by non-Inuit. In that situation, NLCA S.5.6.1 would govern Inuit harvesting (subject to NLCA S.5.6.48/5.3.3), and the NWMB would establish a level of harvesting for non-Inuit pursuant to its authority under NLCA S.5.6.16. NTI is on record - in the development of the *Wildlife Act* - as recognizing the NWMB's jurisdiction to establish a level of harvesting in that circumstance."

NTI letter to NWMB December 7, 2007

"5.6.16

Regrettably, for a second time in the Special Meeting Twelve proceeding, the Board is asserting that NTI has reversed its view on a fundamental *NLCA* issue, without the Board offering any evidence for its assertion. After the first such occasion (the April 11 and April 30 2007 exchange of letters on the 5.3.3(b) issue) the Board simply failed to respond when NTI pointed out that there was no basis for the Board's characterization of NTI's past views. In order to enable NTI to respond adequately in future, NTI asks that the Board cite NTI's statements when referring to NTI positions.

In this case, the Board could not be more mistaken in asserting that NTI has indicated "a reasonable level of comfort with the NWMB's approach to establishing quantitative limitations on harvesting" applicable to Inuit outside the Total Allowable Harvest context (November 23 letter, page 10). NTI has given the Board no such indication. NTI has always opposed the Board's approach. Robert Janes' opinion concluding that the Board's approach is contrary to the *NLCA* confirms NTI's previous understanding.

With respect, it is also unhelpful when attempting to resolve legal differences of this kind for the Board to characterize a party's submission as an "allegation".[2] These matters are serious, but NTI is submitting that the Board erred in interpreting the Agreement, not that the Board acted in bad faith. It is NTI's responsibility to make such submissions when NTI forms the view that the Agreement is being contravened. Where the disagreement turns on fundamental questions that are likely to arise repeatedly in the Board's work, and the parties with whom the Board differs are parties to the *Nunavut Land Claims Agreement*, it is also reasonable for the parties to expect a sustained willingness on the part of the Board to discuss the problem openly, exchange analysis, and seek resolutions.

In this case, NTI's imputed "allegation" is that the Board's position implies that quotas *may* be placed on aboriginal harvesters without setting aside any priority aboriginal share of the harvest. NTI is not asserting that the Board has done this; only that the Board's adoption of harvest levels applicable to Inuit outside that *NLCA*'s Total Allowable Harvest /Basic Needs Level system *necessarily and wrongly implies that the Board or Government may do this under the NLCA.* Surely there can no misunderstanding on the part of the Board about this implication of its position. If so, NTI trusts that the Board will reconsider its approach as soon as possible."

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[2] November 23 letter from the Board, page 10. This is not the first occasion on which the Board has employed such language in response to a submission challenging the legal basis of a Board position. When NTI asked the Board to reconsider its establishment of certain non-quota limitations on the harvesting of polar bears in 2005, the Board replied that it is a "serious allegation" to assert that the Board's decisions "do not meet the NLCA justification standard" (letter from NWMB to NTI dated February 14, 2005, page 5).