Nunavut Wildlife Management Board
Public Hearing to review interim decisions concerning the Southampton Island Caribou population

REPLY TO THE GOVERNMENT OF NUNAVUT SUPPLEMENTARY SUBMISSION

Nunavut Tunngavik Incorporated
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PART I – TOTAL ALLOWABLE HARVEST FOR SOUTHAMPTON ISLAND CARIBOU

Firstly, information from the Government of Nunavut and Inuit distinguishes the caribou on Southampton Island as a population separate from other caribou populations. Secondly, the most recent GN survey conducted in June 2013 provides an estimate of 7,287 ±1,261 animals (95% CI) for this population. The results indicate that the population has undergone a significant decline from the 30,381 ± 3,982 (95% CI) estimate in 1997, consistent with Inuit observations. These recent survey results also indicate that the population has not shown recovery.

Currently, the Coral Harbour (Aiviit) Hunters and Trappers Organization (HTO) supports setting a quantitative limit of 800 animals for the Southampton Island caribou population. Based on the available scientific information and *Inuit Qaujimajatuqangit*, NTI recognizes the conservation concern identified by the GN, community of Coral Harbour and Aiviit HTO. NTI supports the GN and Aiviit HTO request to establish a total allowable harvest for the SHI caribou population.

PART II – BASIC NEEDS LEVEL FOR SOUTHAMPTON ISLAND CARIBOU

A. Amounts of harvested wildlife to be included in a basic needs level under the Nunavut Agreement

1. The significance of the basic needs level under the Agreement

Under the Nunavut Agreement (NLCA, or Agreement), the basic needs level (BNL) is the share of any total allowable harvest (TAH) that is reserved by the Agreement to Inuit.

The issue in contention in this proceeding is how high this level must be fixed under the NLCA, or, in other words, how large a share of any TAH the NLCA reserves for Inuit.

This issue does not have conservation implications. A TAH reflects the requirements of conservation; the BNL does not.

The size of the BNL affects how much control government may exercise over Inuit harvesting of the affected stock or population under the NLCA. It also affects who may harvest the stock or population in question, and how much they may harvest.

For example, where Inuit harvest out of a TAH from the surplus – i.e. above the BNL or any higher, adjusted BNL (ABNL) – government may require Inuit to have a licence. By contrast, where Inuit harvest within an ABNL, they have the right under the NLCA to do so without any form of licence.

Where Inuit harvest from the surplus, government must set aside up to the first 14% for personal consumption by other residents or their dependents, and distribute the remainder between – in order of priority – any existing commercial operations, any HTO/RWO-sponsored economic ventures, and other uses. By contrast, where Inuit harvest within an ABNL, the entire share is reserved to Inuit.

The approach of the Nunavut Wildlife Management Board (NWMB or Board) to the calculation of a BNL is not a discretionary matter. The NLCA does not permit the Board to include one type of Inuit use in the BNL for one population or species of wildlife, but not for another. The Board must establish the BNL according to the NLCA's instructions, which do not differ between species or populations of wildlife.

For convenience, this Reply will refer to the periods of Inuit harvesting that the NLCA directs the NWMB to base its BNL calculations on as the "BNL periods". For stocks or populations, such as Southampton Island caribou, for which a TAH is being considered for the first time after the Nunavut Wildlife Harvest Study commenced, the BNL periods are 1996-2000[i] and 2007-2011 (s. 5.6.23, NLCA). (All section numbers in this Reply are to the NLCA unless otherwise indicated).

2. Board Decision

The GN Supplementary Submission (GN Submission) does not acknowledge the decision that the NWMB has made on this issue, or address the Board's reasons for decision.

On December 1, 2009, the Board passed the following resolution:

> **RESOLVED that the NWMB recognize that a basic needs level includes all Inuit harvests, both subsistence and commercial, preceding the establishment of a level of total allowable harvest**.

On April 9, 2010, the Board wrote jointly to the GN Minister of Environment, the federal Minister of the Environment, and other recipients, informing them of its decision. The Board had sent all the recipients copies of an independent legal opinion on the issue previously, and invited comment.[ii] The letter explained that the Board had decided, after consideration of the comments received, that the Board agreed with the independent legal opinion. The Board provided its reasons under the heading "Basis for Decision."

The Board's decision and letter made clear that the decision represents the Board's interpretation of the requirements of the NLCA, thus applies to all species for which a BNL is struck, and all proceedings establishing BNLs. Recognizing that the Board's previous practice had differed, the Board's letter noted that, if the Board's decision receives the recipients' support, it will constitute a "fundamental and necessary change in the Nunavut wildlife management system – a change that will bring the management regime more fully into line with the allocation system outlined in NLCA Article 5".

The NWMB again brought its 2009 decision and its basis to the attention of the GN Minister of Environment in a May 30, 2012 letter written in the context of this proceeding, responding to the Minister's request that the Board set a TAH for Southampton Island caribou. This letter attached a copy of the Board's April 9, 2010 letter, and the independent legal opinion, advising the Minister that the Board was doing so in order "to assist you in formulating the GN position in time for the NWMB's full review and resulting decision".

To NTI's knowledge, the GN did not respond to the Board's decision or related independent legal opinion.

NTI submits that, in keeping with the rigour with which the Board has approached this issue previously, the Board should not alter its decision in this proceeding unless the Board is persuaded that compelling reasons have been offered.

3. NTI previous submissions

NTI's previous submissions on this issue in the ongoing Kingnait Fiord char proceeding are attached as appendices, and form part of this Reply.

In **APPENDIX A,** NTI's letter to the NWMB dated August 10, 2009, NTI largely accepts and recommends to the Board the supporting analysis in the Board's independent legal opinion.

APPENDIX B, NTI's December 9, 2010 paper entitled *The make-up of the basic needs level under Article 5 of the NLCA*, includes a description of the "commercial" harvesting activities of Inuit in 1993 (Appendix II of the paper). This description is relevant to consideration of the factual context within which the BNL provisions of Article 5 were negotiated and ratified. The description focusses on fisheries. Furbearers are not mentioned because there is no need to strike a BNL for furbearers. (Under ss. 5.6.12-5.6.13, only Inuit, certain holders of a General Hunting Licence prior to 1981, and persons approved by an HTO may harvest furbearers.)

4. Summary of the Board's independent legal opinion

The Board's independent legal opinion includes analysis separate from the seven concluding reasons referred to by the Board's April 9 2010 letter. Considering that the Board's decision to include all types of Inuit harvesting in its BNL calculations is based on the Board's agreement with the opinion, and in order to place the opinion in the context of the GN's arguments, it is useful to provide a summary, as follows. (All quotations are from the Lang Michener opinion, "*Basic Needs Level" Meaning in Section 5.6.19 of the NLCA*, by Eugene Meehan, dated April 29, 2009.)

a) Conclusion

The opinion concluded that, "read in context with the whole of Article 5 and the NLCA … a BNL is a numeric calculation based on … amounts harvested…, without regard to the type of consumption or use by Inuit. We find no express or implied distinction to be drawn between the

subsistence or commercial purposes for which Inuit may have been harvesting during the applicable period."

b) Analysis

1) The dominant, mutually reinforcing themes of Article 5's principles and objectives are that wildlife is to be conserved, and the long-term economic, social and cultural interests of Inuit harvesters protected.[iii] (emphasis in original)

2) Under Article 5, if a TAH is established, the basic needs level is the first demand on the TAH, and Inuit can harvest up to the BNL within the limit of the TAH.[iv]

3) A basic needs level is a quantitative measure, the formulae for which are set out in full in ss. 5.6.21-5.6.23: "it is the calculation itself that determines what the 'basic needs level' means."[v]

4) The formulae for the BNL depend only on amounts harvested, without distinction as to purpose: "Sections 5.6.21 and 5.6.23 make no reference to 'consumption' by Inuit … or 'use' by Inuit – it is all about the Study harvest numbers when the BNL is first calculated".[vi]

5) "Basic" in this context means "base-line", in the sense of the minimum that is guaranteed or "the fundamental priority promised to Inuit". "The word 'basic' does not direct what types of harvest are to be included in the calculation nor determine or modify the resulting amount." [vii]

6) Nor does "basic" needs level, in relation to the "full" level of needs up to which an Inuk has the right to harvest under Article 5 if no TAH is present, necessarily mean a lesser level: "the words 'full' and 'basic' are … not meant .. to convey relatively different harvest levels" (original emphasis). "Indeed, conceivably, the 'basic needs level' struck for Inuit could be approximately the same amount as the aggregate of all the 'full levels' of economic, social and cultural needs of each Inuk if Inuit were harvesting at this 'full level' during the Study."[viii]

7) Basic "needs" must be understood to include all types of economic need, because, as a starting point, s. 5.6.1 defines the Inuit right to harvest by reference to their "full economic, social and cultural needs" if a TAH is absent, and no provision negates the conclusion that, if a TAH is present, the Inuit right to harvest reflects the same types of need, limited only by the TAH. Consistently with this view, Article 5 treats Inuit needs as including economic needs throughout its provisions, including sections 5.6.9 (assessment of the needs of Inuit by the NWMB in the context of Article 5's presumptions as to need for species such as bears, muskox, and bowhead whales) and s. 5.6.27 (factors for adjusting the BNL).[ix]

8) Once the baseline is established, the Agreement restricts adjustments above the minimum - ABNLs - to "consumption or use" that does not include sale for

consumption outside the Nunavut Settlement Area (NSA). The fact that the parties agreed to limit the upward extent of adjustments to the BNL by types of use does not imply that the minimum guarantee to Inuit is similarly limited by types of use. "[There are] limits in Section 5.6.26 in respect of additional allocation above the initial the BNL but there is no similar limitation expressed in the BNL calculation under Sections 5.6.21 or 5.6.23". (original emphasis)[x]

9) The fact that the parties also agreed to commercial preferences for Inuit in the allocation of any surplus above the BNL, after resident non-Inuit personal consumption and vested commercial operations are provided for, also is consistent with Inuit commercial use being factored into the BNL. The presence of Inuit commercial preferences in the surplus allocation scheme does not imply that these are the only commercial features of Inuit harvesting rights under Article 5.[xi]

10) Inclusion of all pre-TAH commercial harvests within the BNL strengthens the long-term economic interests of Inuit, reflecting one of Article 5's twin dominant themes. At the same time, this understanding of the BNL satisfies the other dominant theme of conservation (in that harvesting under the BNL always is limited by the TAH).[xii]

11) This understanding of the BNL also is supported by
    a) Article 16, which, by restricting Inuit rights to harvest certain species in the open waters of an area *outside the Agreement settlement area* to "domestic consumption", implies that the parties would have described the BNL that applies under Article 5 by types of use if they had intended the BNL to be restricted by types of use;[xiii]
    b) the Terms of Reference for the Harvest Study (Schedule 5-5), which state that all wildlife harvests (not only NWHS Final Report harvests, or subsistence or small scale harvests) are to be recorded;[xiv]
    c) s. 5.1.2(b), which, by confirming that "the legal rights of Inuit to harvest wildlife flow from their traditional and current use of wildlife" without excluding commercial uses, implies that commercial uses are included (emphasis added by opinion to Article 5 text);[xv]
    d) s. 5.4.5(a), which requires the Harvest Study to "document the levels and patterns of Inuit use of wildlife resources for the purpose of determining the basic needs level" without mentioning any limitation, such as subsistence, small scale commercial, etc., to the "Inuit use of wildlife resources" that is to be documented;[xvi]
    e) s. 5.7.30, which is consistent with the inclusion of commercial harvests in the BNL in conferring on Inuit the right to dispose freely to any person any wildlife lawfully harvested, "including selling inside or outside the NSA";[xvii] and
    f) consideration of the place of Inuit in the limited entry system for commercial licences at the lowest priority step in the surplus allocation scheme. At this

step, Inuit are provided no more than equal access to licences with non-Inuit, implying that Inuit commercial harvests preceding the establishment of the TAH already are included in the BNL.[xviii]

In the course of this reasoning, the analysis also considered

- the contrast between the Yukon Umbrella Agreement's provisions for subsistence-based harvesting by Yukon Indians, and the Nunavut Agreement's undifferentiated provisions for establishing the BNL;
- the views expressed by the Harvest Study Steering Committee in the Final Report of the Nunavut Wildlife Harvest Study;
- the views that had been expressed previously by NTI, and
- most of the Supreme Court of Canada's then-current rulings regarding the distinction between commercial and domestic uses of wildlife for purposes of defining Aboriginal or historical treaty rights.

5. GN position

The GN submits that the harvest of Southampton Island caribou carried out by Inuit between 1993 and 2007 for sale to the Rankin Inlet meat plant "is not the kind of harvesting which is intended to be included in a 'basic needs' harvest under the NLCA"[xix]. It is also the GN's view that, in any case, because data from this harvest were not recorded in the Nunavut Wildlife Harvest Study, the Board must exclude the GN's reported figures for this harvest in the BNL periods when calculating the BNL.[xx]

The resulting BNL would be 1906 animals annually, a reduction of at least 2457 animals, or more than 56%, from the total of at least 4363 that would result if the GN's reported figures for this harvest were included.[xxi]

The GN's position assumes that the products from carcasses sent to the Rankin Inlet meat plant between 1993 and 2007 were to be sold outside the NSA. [xxii] The GN asserts that the Inuit harvesters who engaged in this harvest between 1993 and 2007 were doing so in the employment of, or under contracts with, a company regulated by government.

The reasons given for the GN's position may be summarized as follows:

a) amounts harvested for sale outside the NSA must be excluded if harvesting for sale outside the NSA, carried out by Inuit employees of a regulated company, was neither traditional nor current when the NLCA came into effect;
b) amounts not included in the Nunavut Wildlife Harvest Study may not be considered in calculating the BNL;
c) the NLCA factors for adjusting the BNL do not allow harvesting for sale outside the NSA to be considered in an adjustment, and

d) the NLCA provides for allocating the surplus to HTO/RWO economic ventures and Inuit participation in any limited entry system for commercial harvesting.

6. NTI reply

It is not clear what bearing on BNL calculation the GN attributes to the NLCA factors for adjusting the BNL, or to the NLCA provisions for allocating the surplus. If the GN construes these provisions as meaning that harvesting for sale outside the NSA may not be considered in the setting of a BNL, regardless whether such a practice is traditional or current, the GN's position is more restrictive than the Submission acknowledges. It would rule out, for example, consideration of harvesting for sale outside the NSA in the Kingnait char BNL, contrary to the GN's invitations to the Board in the March 31 2014 cover letter to the Submission, and in the Executive Summary, to treat the Southampton Island calculation as unique.[xxiii] NTI submits that the Lang Michener opinion provides a full answer to any such contention. See also **Appendices A and B** to this Reply, pages 2 and 5;8 respectively.

If, on the contrary, these provisions are relied upon only as support for the GN's contentions regarding the timing and organization of previous Inuit harvesting for sale outside the NSA, NTI submits that neither provision addresses those matters or has any logical bearing on them.

It remains to reply to the GN's other reasons for its position. Recognizing that the questions of timing of "this kind of harvesting" and how such harvesting was organized are linked in the GN Submission, it is helpful to address them distinctly.

1) Amounts harvested for sale outside the NSA during the BNL periods are intended to be included in a basic needs level under the NLCA, whether or not harvesting for sale outside the NSA was taking place when the NLCA came into effect or had taken place previously

a) Ss 5.1.2(b) and 5.1.3(a)(i) and (ii) of the Agreement

The GN argues that harvesting of Southampton Island caribou by Inuit for sale outside the NSA was neither traditional nor occurring when the Agreement came into effect (July 9, 1993), so is disqualified for consideration in the calculation of the BNL by s. 5.1.2(b) of the Agreement.[xxiv] S. 5.1.3 (a) (i) is also referred to, apparently as support for the same reasoning.

S. 5.1.2(b) of the Agreement states:

5.1.2 This Article recognizes and reflects the following principles:

…

(b) the legal rights of Inuit to harvest wildlife flow from their traditional and current use;

…

In NTI's view, the GN reasoning misinterprets the ordinary meaning of the words "flow from" and "use" in s. 5.1.2(b), and reads "current" too narrowly. It also misconstrues the intended relationship between an Article 5 principle and substantive provisions. The GN's conclusion is not supported by the text. S. 5.1.3 does not rehabilitate the GN position.

In particular:

- The statement in s. 5.1.2(b) that legal rights "flow from" traditional and current use identifies the origin of the rights. It does not define the rights, or restrict their scope, nor would it – even if this were a substantive provision of Article 5 rather than an informative principle – curtail the reach of the other words in the Article that describe the meaning of the rights.
- "Current" can mean present at the operative time, not only at the time the word "current" is used. In s. 5.1.2(b), "current" refers to the time when the Agreement was negotiated and signed, but it is also prospective, as it is in the preceding principle that "Inuit are traditional and current users of wildlife" (s. 5.1.2(a)). Thus, in s. 5.1.2(b), "current" can mean present as of any operative time at which the Agreement attributes harvesting rights to Inuit based on their use of wildlife. For BNL purposes, the operative time would be the five years of the Harvest Study and the five years before a TAH is established. Indeed, an operative time for "current" later than July 9, 1993 *would have to be indicated* by s. 5.1.2(b) in the case of the Inuit right to a BNL if this principle delimited the content of a BNL by uses. Otherwise the Agreement's BNL instructions would contradict s. 5.1.2(b). If the operative time for the "current" use that counts for BNL purposes were no later than July 9, 1993, Inuit could not have *any* BNL under the GN's reasoning, or at least not any BNL higher than levels harvested in 1993, because a BNL depends *only* on use that occurs in periods after the Agreement has become law (ss. 5.6.21; 5.6.23). Article 5 uses the word "current" to mean present at the operative time in at least one other provision. [xxv]
- In any case, the Agreement's BNL formulae all anchor the BNL in the five- year Harvest Study period, which the Agreement stipulates to commence within one year after the Agreement's ratification (see ss. 5.6.21, 5.6.23, and 5.4.1). The NLCA is the product of a fourteen year negotiation. To suggest, as the GN reasoning does, that the requisite Harvest Study period is not wholly "current" within the meaning of the principle identifying when Inuit harvesting rights under Article 5 originated, because the study was slated to begin within one year after the Agreement came into effect, is absurd in this context. S. 5.4.5 puts the matter to rest, confirming that the Harvest Study years are "current" for Article 5 purposes, and for BNL purposes in particular: "The purpose of the Study shall be to … establish current harvesting levels … ".
- "Use" is undifferentiated; it does not mean 'uses'. In stating that "these uses" - referring to the use recognized in s. 5.1.2(b) - should be considered on the basis of evidence of "commercial" harvesting when the NLCA became law, and then discounting harvesting

for sale outside the NSA as eligible for the BNL on the ground that this is a *different* use than the harvesting in which Inuit were engaged when the Agreement became law, the GN argument imports into the principle a distinction between uses, or types of use, that the principle does not contain. The result of this error is to concede that, at all the material times, Inuit were, in fact, *using* all the Southampton Island caribou that the Board's 2009 decision would treat as eligible for the BNL, only to claim that, because the *type* of use had changed, *more than half of the caribou used* must be disregarded. This reasoning has nothing to do with s. 5.1.2(b), which treats any traditional or current Inuit use of wildlife as the origin of Inuit legal rights to harvest wildlife for any purpose.

- It is an error to assume that Agreement principles confine the ordinary meaning of the substantive provisions of the Agreement conferring rights on Inuit, necessarily restricting their reach. This error appears to lead the GN to believe that its reasoning may ignore the many other provisions of the NLCA that run counter to the GN's reading of s. 5.1.2(b).

The contrast between the GN reading of s 5.1.2(b) and the Lang Michener reading highlights these errors. The Lang Michener opinion emphasized that the words "current use" in s. 5.1.2(b) imply that any use of wildlife in the relevant period qualifies for inclusion in the BNL calculation. The ordinary meaning of s. 5.1.2(b) in the BNL context is that the BNL entitles Inuit, on a priority basis, to continue using wildlife.

Most of the foregoing errors are fatal in themselves to the GN reading of the significance of s. 5.1.2(b) in the calculation of BNLs. Because s. 5.1.2(b) only identifies where Inuit harvesting rights "flow from", it cannot possibly restrict the ordinary meaning of the NLCA's express BNL instructions (such as that the Harvest Study must be based on records of "all wildlife harvested daily" – Schedule 5-5) – even if the GN reading of s. 5.1.2(b) were correct otherwise. Because s. 5.4.5 stipulates that harvesting between 1993 and 1998 is "current" in the Article 5 context, s. 5.1.2 (b) would support including in the BNL all amounts harvested for sale outside the NSA in both BNL periods wherever – as in this case[xxvi] – substantial harvesting of this "kind" occurred between 1993 and 1998, even if the GN's reading of s. 5.1.2(b) were correct in all other respects. Because "use" in s. 5.1.2(b) does not differentiate between types of use, harvesting for sale outside the NSA is Inuit use of wildlife under s. 5.1.2(b), even if s. 5.1.2(b) were definitive for the BNL and "current" only meant present as of the time the Agreement became law (and, indeed, even if s. 5.1.2(b) referred only to traditional use). Even if the GN reading of the language of s. 5.1.2(b) were correct in every respect, s. 5.1.2(b) cannot curtail Article 5's instructions for the calculation of BNLs, because s. 5.1.2(b) is only a principle informing Inuit rights – it does not define Inuit rights. (This Reply turns to the substantive BNL instructions that the GN rationale disregards in the next section below).

S. 5.1.3(a)(i) of the Agreement states:

5.1.3 This Article seeks to achieve the following objectives:

(a) the creation of a system of harvesting rights, priorities and privileges that

(i) reflects the traditional and current levels, patterns and character of Inuit harvesting,

…

S. 5.1.3(a)(i) does not assist the GN's argument. In construing this objective as creating a "system of rights, priorities and privileges for Inuit", the GN rationale further misinterprets the words of the NLCA, assuming that this objective attaches "privileges" to Inuit when it does not. Article 5 attaches rights and priorities to Inuit, and – consistently with this objective – only privileges to other harvesters. S. 5.1.3(a) (iv), not referred to in the GN rationale, states that the system to be created "provides for harvesting privileges and allows for continued access by persons other than Inuit, particularly long-term residents".

The word "current" in s. 5.1.3(a)(i) is not used in a different way than in s. 5.1.2(b). Indeed, as the Lang Michener opinion emphasized,[xxvii] the phrase "current levels" here affirms that Article 5's rights and priorities aim to reflect amounts harvested by Inuit, supporting the Board's view that any Inuit use of wildlife at the operative time counts for the purpose of calculating the BNL priority. The main significance of "patterns" in this objective is for harvest locations and temporal variations in harvesting, issues that determine the harvesting that counts in the BNL periods, but do not relate to the purpose of the harvest. The main significance of "character," to the extent that "character" differs from "patterns", is for methods of harvesting, an issue that does not affect the BNL. Further, as in the case of "use" of wildlife in s. 5.1.2(b), the "character" of Inuit harvesting is not lost only because it changes.

The GN Submission also refers in passing to the objective provided in s. 5.1.3(b), as follows:

> 5.1.3 This Article seeks to achieve the following objectives:
>
> (a) the creation of a system of harvesting rights, priorities and privileges that
>
> …
>
> (ii) subject to availability, as determined by the application of the principles of conservation, and taking into account the likely and actual increase in the population of Inuit, confers on Inuit rights to harvest wildlife sufficient to meet their basic needs, as adjusted as circumstances warrant,

Not mentioned in this context, and, in NTI's view, not taken adequately into account in the GN reasoning, is the significance here of the word "confers" This objective expressly contemplates the NLCA *creating* a system of rights and priorities that "confers" on Inuit rights they did not necessarily have before, even as such rights reflect traditional and current Inuit harvesting. This may mean that Inuit have rights after the Agreement came into effect that Inuit did not have before, and it may include having rights to harvest more wildlife after the BNL periods than Inuit would have had before either BNL period commenced.

b) The other Agreement provisions considered by Lang Michener

The GN's given reasons to exclude harvesting for sale outside the NSA from consideration in the BNL if such harvesting was not traditional or occurring in 1993 do not address several of the

NLCA provisions relied on by Lang Michener to conclude that all Inuit harvesting counts in the BNL so long as it occurs in the BNL period. The GN Submission is selective in this regard. In other respects, the GN reasons ignore Lang Michener's contrary reading of NLCA text referred to, or even the possibility of such a reading.

In particular, the GN submission

- does not acknowledge the second theme recognized by Lang Michener as dominating Article 5's principles and objectives - protection of Inuit harvesters' long-term economic and other interests – or refer to the key provisions cited by Lang Michener in support of this reading[xxviii];
- does not consider that ss. 5.6.21 and 5.6.23 might *require* that the BNL be calculated numerically, without regard to the purpose of the harvesting; (Indeed, even the possibility that the BNL is intended to be calculated in this manner is not acknowledged, except as a position held by NTI);
- does not address the meaning of "needs" in "basic needs level" or consider, in particular, that the initial BNL calculation might be intended to satisfy "economic" needs, considering the inclusion of economic needs among the Inuit needs embraced by ss. 5.6.1 and 5.6.9;
- does not address Article 16's provision for Inuit rights to use particular wildlife for "domestic consumption" outside the NSA**;**
- does not address the express instructions of the Harvest Study Terms of Reference for keeping of Harvest Study Records;
- does not address Article 5's main instruction as to the scope of harvesting to be considered in the BNL, s. 5.4.5(a);
- does not consider that the right of Inuit to sell wildlife harvested from within the BNL or ABNL "inside or outside the Nunavut Settlement Area", only conferred on Inuit by s. 5.7.30 when the Agreement came into effect, might imply that the quantities Inuit may harvest in order to exercise this right include quantities harvested during the BNL periods for sale outside the NSA.

In NTI's view, section 6(1)(a) of this Reply above, showing how the GN's reasoning errs in its reliance on ss 5.1.2(b) and 5.1.3(a)(i) and (ii) of the NLCA, is a complete answer to the GN position that amounts harvested for sale outside the NSA do not count in the BNL unless such harvesting was traditional or occurring when the Agreement was signed. That the GN adopted this position without regard to the many contrary NLCA indications examined by Lang Michener demonstrates further that the GN's view is ill-founded.

c) Inuit use of other species

The foregoing considerations show GN's rationale for excluding from the BNL caribou harvested for a meat plant during the BNL periods to be artificial, dependent on distinctions between types of harvesting that are not made in the NLCA respecting the initial BNL. Consideration of the history of Inuit trade in other species underscores this difficulty.

For many decades before the NLCA was signed, Inuit were being commissioned by the Hudson Bay Company and other government-regulated businesses to sell and barter the products of their harvest of white fox, polar bears, and other fur-bearing animals for re-sale overseas. Traditionally, similar practices were common for walrus tusks, eider duck down, and narwhal tusks. Inuit also played critically important roles, in exchange for goods and cash remuneration, in the relatively industrial bowhead whale hunts and beluga drives. In the bowhead hunts, Inuit manned boats and equipment supplied by their trading partners. In most of these cases, amounts harvested by Inuit would vary with the prices paid and with other needs that Inuit had for these and other species. The patterns and character of Inuit harvesting were affected by such trade. Inuit individuals, families and hunting groups organized themselves and their work so as to maximize their yield from such harvesting, while attending to their other economic, social and cultural needs.

More recently, Inuit have engaged in large-scale commercial char fishing and muskox harvesting for sale outside the NSA. At times, this use of muskox, in particular, has taken place under conditions similar to those that describe Inuit harvesting of Southampton Island caribou for sale to the Rankin Inlet meat plant.

Presumably, by conceding that "traditional" use of wildlife qualifies for BNL purposes, the GN means to allow that corporately- financed Inuit harvesting that supplies an international demand is a valid source of Inuit legal rights to harvest under the NLCA if "this kind of harvesting" originated in the *distant past*. Presumably, at the same time, should the presumption as to needs that Inuit harvesting of muskox enjoys under the Agreement ever be rebutted, the GN also would intend to demand that the NWMB examine the 1993 start-up date of the Kitikmeot Food Corporation*,* as for any similar Inuit operation commenced in the *recent past,* so that the NWMB may hold the line at July 9, 1993, and exclude any of "this kind of harvesting" that commenced later from the Inuit priority under the NLCA.

Although the GN invites the Board to assume that char fished for sale outside the NSA might be treated differently, the GN's argument here would have the same consequence for BNLs established for char that Inuit began after mid-1993 to fish for supply to fish plants and sale outside the NSA.

Viewed in the context of the range of wildlife species harvested by Inuit, the role that the GN assigns to the effective date of the Agreement for BNL calculation purposes can be seen to be arbitrary. An irony of this error is that the near-1993 start-up date of all three of Nunavut's wild food processing plants likely reflected optimism on the part of Inuit and government that the pending land claims agreement would increase Inuit opportunities to benefit economically from Nunavut's wildlife. The GN's reasoning in this proceeding, however, would penalize Inuit for seizing such opportunities, deducting any amounts that they harvested in new export enterprises from their BNL priority entitlement.

It must be emphasized that the cut-off effect attributed to July 9, 1993 by the GN's argument would continue restricting the Inuit priority share of the harvest into the indefinite future, for fishing or any other wildlife enterprises that Inuit might initiate. Where the Board's current

approach would in most cases set a future BNL by balancing amounts that Inuit used during the Harvest Study period with amounts that a new Inuit operation uses in the five years preceding the TAH, the GN's position discounts any use for export that was not engaged in traditionally or before July 9, 1993.

d) The 1993 regulatory regime

The GN also asserts that the traditional and current use of wildlife from which Inuit legal rights to harvest flow "should, as a starting point… be considered in the context of the regulatory regime … at the time that the NLCA became law". This, presumably, is why the Submission emphasizes that the "commercial harvest of caribou on Southampton Island" was "fully regulated" and "closely managed" by government, and that "all of the commercial activities included in these operations were the responsibility of a company operating under a licence issued by government." It is contended, apparently, that Inuit harvesting requiring the permission of the Government when the Agreement came into effect cannot contribute to the BNL.

In reply, first, it must be acknowledged that the constitutional validity of most territorial regulations purporting to restrict Inuit harvesting between 1982 and 1993 (when aboriginal and treaty rights received constitutional protection in Canada and the Nunavut Agreement came into effect, respectively) was not decided by the jurisprudence in that period. Given that period has now passed and Inuit rights have been forever altered, the validity of most such restrictions must remain speculative.

Second, the proposition that Inuit harvesting rights under the NLCA should be defined in the context of the regulatory regime that applied when the NLCA became law sweeps aside the Agreement purpose to establish certainty and clarity of Inuit rights. The NLCA promises to "create" a system of wildlife management, and "confer" rights and priorities on Inuit so that Inuit rights no longer depend on an uncertain interplay of undefined aboriginal rights and regulations. Through the Agreement, all previous regulations had to give way to the Agreement's treaty regime to the extent of inconsistency (s. 2.12.2), just as pre-Agreement aboriginal rights were replaced with Agreement treaty rights (s. 2.7.1). That Article 5 expressly makes Inuit harvesting in the NSA subject to legislation implementing a term of an applicable international treaty that was "in existence at the date of ratification of the Agreement" (s. 5.9.4) is an exception proving the rule. [xxix] Nothing in the BNL or other provisions of Article 5 supports the proposition that the regulatory regime that purported to apply on July 9, 1993, factors in any way into the calculation of a BNL.

Third, the GN's assertion disregards the established jurisprudence on section 35 of the *Constitution Act, 1982*. As the Supreme Court of Canada has recognized, the constitutional entrenchment of aboriginal and treaty rights in 1982 followed a struggle by Aboriginal peoples to overcome the results of their rights having long been "honoured in the breach" under Canada's laws. To confine the aboriginal rights recognized in the Constitution to practices permitted by regulations existing at the moment such rights were recognized would be to incorporate "a crazy

patchwork of regulations", the Supreme Court said in *R v. Sparrow*. Accordingly, the Court rejected the "frozen rights" concept of Aboriginal rights.[xxx] Having established that the constitutional purpose of recognising Aboriginal and treaty rights is to reconcile Aboriginal peoples' occupation of territory with the Crown's unilateral taking of control over such territory, it is highly unlikely that Canadian courts would entertain the GN's proposition in a case about treaty rights.

For those reasons, it does not matter to the NLCA rights of Inuit to harvest Southampton Island caribou for sale outside the NSA in the BNL periods whether the 1993 regulations, on their face, required Inuit to be harvesting or disposing of their harvest under the authority of a licence, commercial or otherwise. Nor does it matter how such regulations might have purported to control Inuit harvesting in other ways.

(The significance that the GN attaches to government regulation of the contractors for wildlife harvested by Inuit is addressed in section 6(2) and part B. of this Reply.)

2) Amounts harvested by Inuit who are paid per-animal-harvested by a regulated company that sells the product outside the NSA are intended to be included in a basic needs level under the NLCA, regardless whether government underwrites the company or whether Inuit harvesters were compensated in this way in 1993 or previously

The GN links its argument respecting harvesting for sale outside the NSA to an argument that employment of the Inuit carrying out such harvesting, by a company licensed and underwritten by government, disqualifies amounts so harvested from eligibility for the BNL if Inuit were not employed in this way in 1993 or previously.

This Reply already has addressed the significance of changes in how Inuit used wildlife traditionally or in 1993. Because it does not matter to the BNL how Inuit use wildlife, changes in use are not relevant; it matters only that amounts are harvested by Inuit in the BNL periods. NTI's comments above in the context of changes in the destination of wildlife products harvested for sale apply equally to changes in whether or how Inuit are compensated for their harvesting, or how Inuit organize themselves for their harvesting. (See, in particular, sections 6 (1) (a) - (c) of this Reply.)

It remains to address the possible contention that the employment described by the GN would disqualify the amounts harvested from eligibility for the BNL even if the practice were traditional or occurring in 1993.

The GN's basic assertion here is that "Inuit involved in these operations were employed as hunters."

In reply, first, NTI submits that the Board should not accept, absent convincing evidence not provided in the GN Submission, that the Coral Harbour Inuit who harvested caribou for supply to

the meat plant during the BNL periods did so as employees of anyone other than themselves. Similarly, if the Board were to accept that these Inuit were harvesting as employees of a third party, the Board should require convincing evidence before accepting that any terms of employment that could be construed so as to waive, assign, restrict, or prejudice in any other way the rights of Inuit under the Agreement apply to such harvesting.

Second:

- There can be no dispute that, under the NLCA, to "harvest" is to reduce or take wildlife into possession (s. 1.1.1); that the wildlife taken in the operation described by the GN was harvested before the products were processed and sold to the Rankin Inlet meat plant, and that all persons engaged in the hunting of these caribou were "Inuit" within the meaning of the Agreement.
- Considering the NLCA definition of "harvest", the right to harvest in s. 5.6.1, and the rights of access and rights to employ chosen methods and technologies that attach to Inuit harvesting under Article 5, any Inuk who applies his or her efforts, skills and equipment to hunt wildlife in the manner and to the extent that Coral Harbour hunters did when hunting Southampton Island caribou for supply to the meat plant must be recognized as harvesting wildlife within the meaning of the NLCA. Accordingly, unless lawful terms of an employment or similar contract can and do lead to a different and defensible conclusion, any Inuk who takes compensation for doing this must be considered to be engaging in "Inuit use of wildlife resources" within the meaning of s. 5.4.5 of the NLCA, and any amount of wildlife that such an Inuk harvests is an "amount" to be considered in calculating the BNL under s. 5.6.23.
- The Coral Harbour hunters
    - ranged from a temporary camp set up on the land for the butchering of animals, used their own snowmobiles and sleds to travel to and from the camp and to find and access caribou, shot the animals with their own guns, and transported the carcasses back to the camp;
    - were paid by the piece (in the Coral Harbour case, approximately $20 for an animal shot in the neck or head, less for one shot in the shoulder, and nothing for an animal shot in the gut), and
    - were paid nothing when weather or mechanical problems prevented them from making kills.

  These facts, which to NTI's knowledge are disputed, make it unlikely that such hunters were acting as employees of a third party.

Third, it would require extraordinary terms in an employment contract to alter the conclusion above that the amounts harvested in this operation qualify for inclusion in a BNL calculation, if, indeed, any employment contract could do so. In particular:

- If the hunters who killed these animals were not taking them into their own possession and then disposing of the carcasses to the organization that paid them, in the exercise of their rights as Inuit under ss. 5.6.1 and 5.7.30 the Agreement, the harvest described by the GN Submission would not have been lawful – even if there had been contracts of employment - because the organization did not have lawful authority to harvest the

animals itself. Apparently, the business was licenced only to buy the carcasses from their rightful owners, process and sell them.[xxxi]

- If there were an employment or agency relationship meeting the objective test for such status provided in the common law and statute law, and if there were lawful authority for the employer/principal to harvest, it also would have to be demonstrated, at least, that
  - -the terms of the employment or agency contract made it clear that the Inuit harvesters were to acquire no property or other rights in the killed animals regardless of the circumstances in which the Inuit hunters pursued, killed, held possession, and disposed of the dead animals;
  - -the same terms bound all the Inuit hunters engaged in the relevant activity;
  - -the terms did not just as plausibly describe, to the contrary, a relationship in which the business paying the hunters was acting as the hunters' agent for marketing or other purposes, and
  - -such contracts were not invalid as being contrary to public policy, amounting to colourable endeavors to diminish Inuit access to caribou contrary to the allocative, dispositional, and other Inuit rights provisions of the Nunavut Agreement. (I.e. it would have to be shown that such contracts were not efforts to preempt the acquisition of the BNL by Inuit, contrary to the assignment restrictions in the Agreement).

Fourth, as no contractual terms of the extraordinary nature described above are asserted by the GN, the GN has conceded all the facts necessary to establish that the amounts harvested qualify for inclusion in the BNL, by acknowledging that the Coral Harbour hunters did all the necessary hunting. The Board therefore need not and should not entertain the prospect that employment on the part of these hunters might alter this conclusion. Finally, nothing in the Agreement suggests that government support for Inuit harvesting may disqualify such harvesting from consideration as a right or priority under the NLCA. Nothing in the Agreement states or implies that the availability or application of public sector moneys could affect the priority of Inuit harvesting, whatever diverse forms those public sector contributions might take (e.g. fuel subsidies, tax exemptions for tools and other costs, freight subsidies on the shipment of country food, grants to processing plants, grants to HTOs, etc).

NTI emphasizes that where - as in this instance - Inuit are harvesting as individuals, the nature of the business compensating the harvesters does not matter for BNL purposes. Inuit also may harvest collectively, in partnerships, companies, or other business organizations. While not relevant here, there might possibly be other cases in which the ownership and control of the venture paying harvesters is relevant to a BNL determination.

3) All amounts that the NLCA requires to be included in the Harvest Study must be included in the BNL calculation

The GN also argues that the Harvest Study's omission of amounts harvested for sale outside the NSA would disqualify such amounts from inclusion in the BNL, even if the omission were an error. The GN offers no reasons for this position except to quote s.5.6.23, whose relevant

instruction relies on "data from the original five year harvest Study" and an "average annual amount taken over the five years of the Study".

In reply, NTI submits that if this argument were correct, the Board would be unable simply to add in the undisputed numbers that the Agreement required the Harvest Study to include. The same reliable evidence, supplied by the GN, that the Harvest Study should have included is available to the Board now.

Further, the Board, which was required by the Agreement to direct the carrying out of the Study, would be forced to compound the Harvest Study error by establishing a BNL that is patently contrary to Agreement requirements.

In the absence of any persuasive reason offered by the GN, the Board should maintain the practice it initiated in the Kingnait Fiord char proceeding, making the necessary arithmetic correction itself. NTI's previous submissions in this proceeding have assumed that the Board would do this.

4) Conclusion respecting amounts to be included in a BNL

In 1993, when Inuit entered into a modern treaty with the Crown, Inuit were traditional and current users of wildlife, as they are today. In the treaty, the parties agreed that Inuit use of wildlife should be protected in a new system of harvesting rights that promotes Inuit economic interests into the future. The new system includes an Inuit right to a priority share of the harvest in times of shortage. Having agreed that Inuit use will have priority, the negotiators had to decide how to express the priority share, and how it would be calculated. They agreed that the BNL would be a minimum amount, which could be adjusted upwards but could not be reduced. They agreed it would be fair to anchor the calculation in Inuit use of wildlife during five of the six years following the treaty signing – when a Harvest Study would take place - regardless how far into the future a shortage makes the calculation necessary. If the shortage occurs after that period, the minimum is the higher of a sum based on use during the Harvest Study, and a sum based on use during the Harvest Study combined with use in the five years prior to the calculation. Allowing for use that is relatively current when the calculation is made spreads the risk that Inuit economic, social, and cultural needs for wildlife might be underrepresented in either period.

In this proceeding, the Government of Nunavut asserts that, notwithstanding the Nunavut Agreement's BNL instructions, the recognition of current Inuit use of wildlife in the principles and objectives of Article 5 ends the kinds of use that Inuit may make of wildlife for purposes of establishing their priority share, on the day the Agreement came into effect. This is illogical, in that a 1993 end-date for eligible uses would fall before the uses to be counted can possibly begin. It is arbitrary, in that it assumes a backward- looking function for Article 5, rather than the forward-looking purposes stated in Article 5's principles and objectives, and ignores altogether Article 5's objective to promote Inuit economic interests in wildlife for the long-term. It strains the ordinary meaning of the words in the provisions relied on, particularly by interpreting "flow

from" to mean 'are limited to' and "use" to mean, necessarily, a series of 'uses'. It also imposes an insupportably rigid meaning on the word "current."

The Board should reject the GN's position because the independent legal opinion on which the Board has based its reading of the Agreement's BNL instructions is substantially correct. For Inuit, the BNL "flows from their traditional and current use" of wildlife in the sense that the BNL entitles Inuit to continue to use wildlife, as they had traditionally and did when the Agreement was signed. In the case of Southampton Island caribou, the BNL provides Inuit with a priority share of any future total allowable harvest based on any Inuit use of this population in the BNL periods specified in the Agreement.

The GN also asserts, without providing any further reasons based on the Agreement, that compensated hunting by Inuit does not qualify for the BNL if the hunting is carried out under a contract of employment and this did not occur prior to 1993. The Board should reject this view because the GN concedes that no one but Inuit hunted the Southampton Island caribou in question, and the Agreement reserves all amounts harvested by Inuit during the applicable periods to the BNL.

In NTI's view, the GN Submission fails to recognize that the approach to Inuit harvesting rights taken under the Nunavut Agreement is to erase artificial and economically disadvantageous distinctions between monetarized and non-monetarized harvesting, and between various forms of efficient and productive use. The formulation of rights around the concept of "subsistence", found in other treaties, is entirely absent from Article 5. The Nunavut Agreement embraces the proposition that conservation must drive total harvesting levels, but harvesting itself should not be encumbered by rules that rob Inuit of opportunities to make rational choices that maximize their own best interests.

B. Facts to be considered by the Board when determining amounts to be included in the BNL for Southampton Island caribou, and NTI requests

1. Facts relevant under the Board's 2009 decision

The record of this proceeding discloses all the facts necessary for the NWMB to calculate the BNL for Southampton Island caribou in accordance with the NWMB's 2009 decision and supporting legal opinion. To NTI's knowledge, none of these facts are in dispute. They include the information that NTI relied on in its previous written submissions, dated November 18 and December 18, 2013, proposing that the Board establish the annual BNL for Southampton Island caribou at no less than 4,363 animals, subject to the Board's consideration of any further evidence received in the public hearing supporting a higher level.

2. Facts the GN considers relevant, and related information from NTI

In view of the GN's assertions that the business that paid Coral Harbour hunters to harvest caribou for supply to the meat plant during the BNL periods was a government-licensed company employing the hunters, and in view of the significance that the GN asks the Board to

attach to such facts, the NTI asks the Board to invite the GN to provide the Board, by no later than May 15, 2014:

- True and complete copies of the licenses referred to by the GN, from and including 1996 to 2007, including all licence conditions;
- The best documentary evidence in the GN's possession or available to the GN, proving, in the same period, employment of the hunters, the terms of employment, and the identity of the employer (e.g., subject to applicable privacy laws, letters of engagement or other employment contracts, payroll records, tax deductions, records of issuance of ammunition, severance notices for UI, or CPP contributions, etc.).

If the Board accepts that these assertions are relevant, NTI submits that the Board should require clear and convincing evidence before finding as facts i) that the business paying these hunters was licenced to harvest wildlife by employing individuals to harvest, or ii) that these hunters were harvesting caribou for supply to the meat plant as employees of the business.

This Reply has noted the following facts, indicating that, absent clear and convincing documentary evidence to the contrary, it is unlikely that the hunters of Southampton Island caribou for supply to the meat plant during the BNL periods were employees of a third party:

- the hunters were Inuit who
  - ranged from a temporary camp set up remotely, used their own means of transportation to find and access and the wildlife, killed the animals with their own weapons and took the wildlife into their possession;
  - were paid by the piece, receiving nothing when weather or mechanical problems prevented them from harvesting successfully.

These facts are undisputed, so far as NTI is aware. Should the Board determine at any time before making its BNL decision in this proceeding that any of these facts are disputed, NTI requests that the Board use its powers under the Inquiries Act to take sworn testimony, by affidavit or in person, and compel the production of documents, in order to ensure that the Board has the best evidence available to it for determining the facts in dispute.

NTI disputes the statement in GN's submission that all Southampton Island caribou harvested for the meat plant in 2007 was for sale outside the NSA, and the assumption in the GN's submission that all caribou harvested for the meat plant in the other years of the BNL periods (1996-2001) was for sale outside the NSA. In particular, it is NTI's understanding that:

- all meat sold by the plant until approximately 1995 was sold in the NWT;[xxxii]
- from approximately 1996 until 2007, sales from the plant were not limited to destinations outside the NSA. In particular;
  - smoked ribs, hocks and dry meat were sold in the NSA;[xxxiii]
  - it is a logical inference from the pre-1995 history that cuts packaged for export continued to be sold to Nunavut restaurants, and perhaps to other Nunavut buyers.
- from 1993 until 2007

- some of the skins were distributed and used locally (sleeping skins, sewing clothing etc.), and
- tongues, hearts, back fat (tuunu), leg marrow, and briskets were transported back to Coral Harbour for distribution to community residents.[xxxiv]

In order to enable the Board to consider, contrary to NTI's view, treating any of these disputed facts as relevant to its BNL decision, NTI requests that the Board invite the GN to provide its best evidence of its understandings of these facts to the Board by May 15, 2014. (NTI's current best evidence of its understandings is noted in this Reply, with sources indicated in the endnotes.) If NTI and the GN do not agree on such facts promptly thereafter, NTI requests that the Board use its powers under the Inquiries Act to take sworn testimony, by affidavit or in person, and compel the production of documents, in order to enable the Board to determine these facts if it should decide that they are relevant.

As already noted, in NTI's view, the nature of the business that compensated the Coral Harbour hunters during the BNL periods is not relevant in this proceeding. For the Board's information, however, NTI notes its following understanding respecting the organization that sold Southampton Island caribou to the Rankin Inlet meat plant:

- between approximately 1993 and 2002, the organization was a family business owned and operated by an Inuk living in Coral Harbour;
- between approximately 2003 and 2006, it was the Coral Harbour Community Development Corporation, directed by a community board, and having no substantial share capital held by a non-Inuit person or business;
- in 2007 and until this hunt ended in 2007, it was the same Inuit family business that initiated the enterprise.[xxxv]

C. When the BNL for Southampton Island caribou must be established

In reply to the GN proposal that the Board postpone establishing the BNL until an unspecified time after determining the TAH,[xxxvi] NTI submits that s. 5.6.19 of the NLCA requires that any BNL calculated on the basis of s. 5.6.23 be established immediately upon the Board determining the TAH.

S. 5.6.19 states:

> Where a total allowable harvest has been determined by the NWMB in accordance with Sections 5.6.16 and 5.6.17, the NWMB shall strike a basic needs level in accordance with this Part.

NTI also submits that, once the Board has determined the TAH on review of the Government's interim TAH decision, the Government's lawful authority to deny applications from eligible non-Inuit applicants to harvest animals from this population may be susceptible to challenge until the BNL is established.

Submitted on behalf of Nunavut Tunngavik Incorporated,

James Eetoolook,
Vice-President

APPENDIX A to NTI reply to the GN Submission

APPENDIX C TO THE MARCH 10TH 2010 LETTER OF THE NUNAVUT WILDLIFE MANAGEMENT BOARD CONCERNING THE TYPES OF HARVESTS TO BE INCLUDED IN A BASIC NEEDS LEVEL

NUNAVUT TUNNGAVIK

August 10, 2009

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

Dear Mr. Chairperson,

Re: Reply to DFO submission re Basic Needs Level for Arctic Char, July 14, 2009

Prior its June 3 public hearing held in Pangnirtung, the Board invited submissions regarding its legal opinion on the question whether, under the *Nunavut Land Claims Agreement* (*NLCA* or the *Agreement*), the NWMB should include commercial harvests by Inuit when calculating the Inuit Basic Needs Level (BNL). NTI made its views known to the Board on this issue in a previous proceeding in 2005, and did not take up the Board's invitation.

Having reviewed DFO's July 14 comments on the Board's opinion, NTI wishes to offer the reply set out below.

The Board's opinion concludes that commercial harvests by Inuit must be included in calculating the BNL. This accords with NTI's previously stated view. DFO's submission takes the opposite position. NTI submits that the Board should adopt the conclusion of its legal opinion for the purposes of this proceeding and in all future BNL calculations. (In the latter context, NTI recommends that the Board also copy the Government of Nunavut (GN) as soon as possible with the pertinent documents, invite the GN's response, and allow affected parties a right of reply.)

NTI largely accepts and recommends to the Board the supporting analysis in the Board's opinion. It is balanced and well-reasoned. (For present purposes, NTI wishes to register only two reservations with the analysis, at the conclusion of this letter.)

In reply to the DFO comments, NTI notes:

1. Under the NLCA, the core Inuit harvesting right is described by reference to "needs"
(5.6.1; 5.6.3; 5.6.5; 5.6.19). Despite this guidance, DFO's analysis of the scope of Inuit fishing rights ignores the descriptors of Inuit "needs" given in sections 5.6.1

Qikiqtaaluk
Arctic Bay
Qikiqtarjuaq
Cape Dorset
Clyde River
Grise Fiord
Hall Beach
Igloolik
Iqaluit
Kimmirut
Pangnirtung
Pond Inlet
Resolute Bay
Sanikiluaq

Kivalliq
Arviat
Baker Lake
Chesterfield Inlet
Coral Harbour
Rankin Inlet
Repulse Bay
Whale Cove

Kitikmeot
Cambridge Bay
Kugluktuk
Gjoa Haven
Kugaaruk
Taloyoak

www.tunngavik.com
Incorporated July 9, 1993

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

and 5.6.2 when discussing what types of "needs" or "use" might be included in sections 5.6.19 - 5.6.24 (basic needs level), 5.4.5 (a) (uses to be included when calculating the basic needs level) and 5.1.2(b) (uses on which Inuit legal rights to harvest wildlife are based).

Section 5.6.1 includes "economic" purposes in its description of "needs", and section 5.6.2 describes "needs" on the basis of actual harvest levels, regardless of purpose.

In this respect, the DFO analysis fails to read the provisions of the *Agreement* together. It thus fails to meet a cardinal rule of contract and statutory interpretation, one which is adopted expressly by the *Agreement* in section 2.9.1.

2. DFO's treatment of the limitations in s. 5.7.30 on the Inuit right to sell harvested wildlife as though they express limitations on the amounts to be included in BNL calculations is unsupported by any text in the *Agreement* and is internally contradictory. Section 5.7.30 states that the right to sell includes the right to sell "outside the Nunavut Settlement Area".

3. As the Board's opinion notes, comparison between Inuit fishing rights within the NSA under Article 5 and Inuit fishing rights outside the NSA under Article 16 reveals a contrast in terms, not a similarity. The comparison tends to support rather than preclude reading Article 5 rights as having a scope beyond "domestic" purposes.

4. DFO's account of the Article 5 objective for creating a system of harvesting rights, priorities and privileges set out in section 5.1.3 (iv) is untenable in two respects. First, the suggestion that "current levels, patterns and character of Inuit harvesting" is not necessarily a reference to rights ignores the preceding principle in section 5.1.2, which states that "the legal rights of Inuit to harvest flow from their traditional and current use". Second, the suggestion that the *Agreement* protects any Inuit interests, economic or otherwise, in the form of "privileges" ignores how "privileges" is used in the body of section 5.1.3 and runs counter to a core objective of the land claims agreement. The body of section 5.1.3 refers only to "rights" for Inuit and only to "privileges" for non-Inuit. A core objective of the land claims agreement is to accord Inuit defined "rights and benefits" in exchange for surrender of claims based on an asserted aboriginal title which non-Inuit do not have. It would run counter to such an objective for the Agreement to contain positive provisions concerning commercial fishing that merely privilege Inuit to access commercial fishing licences for which they would be eligible already as members of the public. Rather, as the Board's opinion suggests, the *Agreement*'s assurance in section 5.6.46 that Inuit may participate equally in commercial licence opportunities in cases of surplus implies that Inuit also have related rights under the *Agreement*, making it necessary to clarify that having such related (economic) rights through the BNL does not curtail Inuit

access to any surplus as members of the public. Indeed, nowhere in the *NLCA* are Inuit rights, benefits or opportunities referred to as "privileges".

5. DFO's analysis ignores the fact that a BNL is a floor on the share of allowable harvest that Inuit may take as of right under the *NLCA*, fixed at a particular point in time, while the Adjusted Basic Needs Level (ABNL) is a ceiling to be adjusted indefinitely. There is thus good reason to expect that different elements may make up BNLs and ABNLs respectively while ensuring equity for third parties and the public.

6. DFO's analysis does not acknowledge the economic and demographic realities of Nunavut, which the *NLCA* negotiators necessarily considered at the same time that they paid exacting attention to public and third party interests. Wildlife continues to be an exceptionally important economic resource to Inuit. The dearth of other types of economic opportunity in this part of Canada makes it a national interest to secure and promote Inuit access to such resources in this particular land claims agreement, whose core objectives include encouraging Inuit self-reliance. Also, although it is to be desired, and the land claims agreement invites it, there has not as yet ever been a large-scale commercial fishing industry in the Nunavut Settlement Area. Indeed, there is no commercial fishing at all in most Nunavut communities, 16 years after the *Agreement* came into effect. A national perspective does not justify reading down regional land claims agreements for the sake of uniformity.

Thank you for considering this reply.

(The two reservations with the Board opinion that NTI wishes to note at this time are:

1. Inclusion of commercial harvests quantities in the BNL does not appear to add to the implementation challenges referred to at the conclusion of the Board's opinion. The challenge of adapting pre-*NLCA* fisheries management practices so as to accommodate the Inuit right to fish without a licence and to sell fish lawfully caught under the *NLCA* is a real one, which NTI remains committed to working on in partnership with DFO, HTOs and RWOs, and the Board. This challenge is the same, however, regardless of the level at which a BNL is set.

2. In *R v. Gladstone*, [1996] 2 S.C.R. 723, the Supreme Court of Canada recognized an aboriginal right extending to fishing for the purpose of sale or, in other words, commercial fishing.)

Sincerely,

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

CC. DFO Eric Kan– DFO regional lead in Iqaluit

APPENDIX B to NTI reply to the GN Submission

The make-up of the basic needs level under Article 5 of the *Nunavut Land Claims Agreement*

Nunavut Tunngavik Incorporated Wildlife Department
December 9, 2010

1. Introduction

The *Fisheries Act* and its regulations applicable in Nunavut have not changed significantly on their face since the *Nunavut Land Claims Agreement* (Agreement, or *NLCA*) was ratified in 1993. The legislation mandates the allocation of fish according to the purpose of the fishing, whether for sport, sale ("commercial"), or domestic purposes.

As this paper shows, the parties to the *NLCA* adopted a different approach when they defined Inuit harvesting rights in the Nunavut Settlement Area (NSA). Under the *NLCA*, Inuit fishing as of right is allocated in circumstances of limited availability according to actual amounts fished previously by Inuit, for any purpose.

While the Act and its regulations have not changed significantly on their face, the rules of interpretation set out in both the *NLCA* and its ratification legislation require that the Act and its regulations now be "read down" to accommodate the *NLCA* in all its particulars. The ongoing disconnect between the Act and its regulations on their face, and the legal realities of post-*NLCA* fisheries management in the NSA, is a source of considerable and regrettable public and administrative confusion. This disconnect would best be removed by bringing all legislation pertinent to fisheries management in the NSA fully into line with the provisions of the *NLCA*. Such an outcome, entailing close consultation with NTI, is contemplated by the *NLCA* itself (2.6.1).

This paper is being provided to the Minister of Fisheries and the Nunavut Wildlife Management Board (NWMB, or Board) as part of the proceedings of the NWMB in determining, for the first time, a total allowable harvest and associated basic needs level under the Agreement for the

Kingnait Fiord char stock near Pangnirtung. The paper elaborates on NTI's previous submission to the NWMB dated August 10, 2009. Provision of the paper constitutes a contribution from NTI to the bilateral consultative exchange between the Crown and NTI that animates the *NLCA* as a whole, consistent with the reasoning recently adopted by the Supreme Court of Canada in its *Little Salmon* decision.

2. NTI Analysis

Inuit harvesting rights and the basic needs level

Article 5 recognizes that "the legal rights of Inuit to harvest wildlife flow from their traditional *and current use*" (5.1.2(b), emphasis added).

The core Inuit harvesting right is provided for in two circumstances, depending on whether the requirements of conservation demand that the NWMB establish a total allowable harvest[1] for the stock or population in question.

Where a total allowable harvest has not been established, "an Inuk shall have the right to harvest … up to the full level of his or her economic, social, and cultural needs, subject to the terms of this Article" (5.6.1). "Full level of needs" is defined for this purpose as "full level of harvest" (5.6.2). Thus, in this circumstance, an Inuk has the right to the level of harvest that he or she takes, including wildlife harvested for economic purposes. There can be no doubt that harvesting for commercial purposes is included in this formulation of the core Inuit harvesting right.[2]

Where the NWMB establishes a total allowable harvest, the NWMB must also strike a "basic needs level," defined as the "level of harvesting by Inuit" that is identified in sections 5.6.19 to 5.6.25 (5.6.19; 5.1.1). The basic needs level is "the first demand on the total allowable harvest" (5.6.20). Where the total allowable harvest is equal to or less than the basic needs level, the Agreement reserves to Inuit "the right to the entire total allowable harvest." Where the total allowable harvest is greater, Inuit are entitled to the basic needs level, and the surplus is allocated among public and third party users and Inuit organizations according to a detailed order and priority (5.1.1; 5.6.20; 5.6.31-5.6.40). In short, the basic needs level constitutes a priority right of Inuit to harvest up to a minimum amount of wildlife to the extent the amount is available. The

[1] A total allowable harvest is "an amount of wildlife able to be lawfully harvested as established by the NWMB pursuant to Sections 5.6.16 to 5.6.18" (5.1.1). Because a total allowable harvest is a limitation on Inuit harvesting, its establishment is subject to section 5.3.3, which requires that Inuit harvesting be limited only to the extent necessary for conservation, public health, public safety, or to give effect to provisions of Articles 5 or 40 that require such limitations in order to have effect.

[2] It is also relevant that "harvest" is expressly defined in the *NLCA* as including "fishing, as defined in the *Fisheries Act*" (1.1.1). Under section 2 of the *Fisheries Act,* "fishing" includes fishing "by any method", hence *NLCA* harvesting includes methods of fishing that are used exclusively, or virtually exclusively, when fishing commercially.

scheme deliberately balances the treaty entitlement of Inuit with the demands of conservation, and allows for non-Inuit harvesting from any surplus in accordance with Article 5's objectives (see APPENDIX I).

The "level of harvesting by Inuit" that constitutes the basic needs level must be calculated by the NWMB according to one of two sets of rules. If the stock or population in question was already subject to a total allowable harvest when the NWMB's Harvest Study commenced, the level is a function of either the "greatest amount harvested" in a year combined with the "average annual amount" in the five years of the Study, or an "amount harvested" in a Study year nominated by an HTO (5.6.21; 5.6.22). If, as in the case of the Kingnait char stock, the total allowable harvest is not established until after the NWMB's Harvest Study commenced, the basic needs level is a function of either "an amount based on data from the original five year Harvest Study," or a combination of "the average annual amount" shown by the Study with "the greatest amount harvested in any one year during the five years prior to the imposition of the total allowable harvest" (5.6.23).

There are no qualifying words in the Agreement's express provision for a basic needs level, definition of the level, or directions for calculating the level, that restrict the type of harvest to be counted by its purpose. In the context of the Agreement's companion provision for a core Inuit right that reflects a "full level of … economic, social and cultural needs", and considering the Agreement's balancing objectives, the term "basic needs" necessarily implies that the level in question is intended to reflect economic as well as other needs, and to serve as a fair minimum that Inuit may rely on over time, subject only to conservation. To emphasize, "basic" means minimum here, and "needs" includes economic needs. Nothing in these provisions suggests that "basic" is meant to imply "non-commercial" or "not for export". On the contrary, the direction is simply to count harvest amounts, over certain periods and according to various formulas. Underscoring this approach, the methodological instruction accompanying the only Agreement formula that includes data taken from outside the Harvest Study highlights the breadth of the calculation, providing that "the NWMB shall rely on the best evidence available as to the levels of harvesting by Inuit" in the period outside the Study (5.6.24(b)). Taken together, these provisions can only be read as requiring that the basic needs level reflect total amounts harvested by Inuit for any purpose.

The Terms of Reference for the Harvest Study support this reading: "The study shall be conducted primarily by means of a diary/calendar record kept by harvesters *of all wildlife harvested daily*" (Schedule 5-5, emphasis added). Similarly the statement of purpose for the Study:

> The purpose of the study shall be to furnish data, *to establish current harvesting levels*, to assist the NWMB in establishing levels of total allowable harvest and, in general, to contribute to the sound management and rational utilization of wildlife resources in the Nunavut Settlement Area. (5.4.5, emphasis added)

The Study is required, in particular, to "document the levels and patterns of Inuit use of wildlife resources for the purpose of determining the basic needs level" (5.4.5 (a)). "Inuit use" must mean

Inuit harvest in this context: a methodological instruction given for the purpose of determining the basic needs level cannot subordinate to its terms the Agreement definition of the level and the Agreement directions for calculating the level and recording related data. At the very least, if the parties had intended paragraph 5.4.5(a) of the Agreement to narrow the scope of the definition and its supporting sections 5.6.19 to 5.6.25, one would expect those provisions to be described as 'subject to s. 5.4.5(a)', but no such words or similar indication appear in the Agreement.

Adjusted basic needs level

Analysis of the make-up of the basic needs level must also take into account the make-up of the adjusted basic needs level. This is not to say, however, that the same limits apply to both levels. The two levels serve different functions in the Agreement.

The basic needs level is a permanent floor on the quantity in question, subject to availability. The adjusted level, however, is a variable ceiling on that quantity (5.1.1; 5.6.26-5.6.30). The Agreement includes amounts of Inuit harvest for the purpose of sale outside Nunavut in the *minimum* quantity, out of consideration for the range of amounts that Inuit likely took or would take for this purpose in the periods specified. (See the provisions referred to above.) The Agreement excludes demand for the purpose of sale outside Nunavut from the factors that support adjustment of the *ceiling,* out of consideration for continued access to available amounts above the minimum by the public and third parties, including non-Inuit commercial harvesters. (See paragraphs 5.6.26 (c) and 5.6.27 (b)). By excluding amounts for export from the calculation of any Inuit priority share that would be *higher than the basic needs level,* the Agreement allows for continued access to commercial fisheries by persons other than Inuit, where stocks are sufficiently abundant.

Negotiating context

Representatives of Canada and Inuit familiar with the economic facts on the ground in Nunavut negotiated the *NLCA* over a period of years, reconciling Aboriginal with public interests. Government wildlife managers - the federal Department of Fisheries and Oceans (DFO) - in particular, took an active role.

APPENDIX II outlines the state of "commercial" fishing in the NSA in 1993, when the *NLCA* was ratified. (Inuit entitlement to a basic needs level is limited to the NSA; the issue does not arise in the outlying fishing areas in Zones 1 and 2, which receive different treatment under the Agreement.)

Inuit fishing for export in the NSA in 1993 was of a modest scale, and it remains so today. Based on the conditions outlined in APPENDIX II it is apparent that, for the foreseeable future, Inuit fishing for export in the NSA is highly unlikely to determine whether a surplus exists over a significant range of species, or even over a significant range of stocks or populations within a single species. The factor can have no impact, in particular, on current Kingnait Fiord char allocations. Of all the "commercial" fish species and stocks addressed by the Harvest Study, APPENDIX II shows that the Cambridge Bay char stocks constitute the only case in which the

factor of exports might likely determine whether or not a significant surplus would remain after calculation of the basic needs level. Even the single case is easily explained from the negotiators' vantage point. The Cambridge Bay commercial char fishery was developed solely by Inuit; other fishers did not take up their opportunity to participate. It is more than plausible to read the Agreement as not expected to reserve a surplus from this single, exclusively Inuit fishery when a total allowable harvest is established for the first time.

Should a basic needs level be struck in the distant future much beyond a level that the negotiators would have foreseen, [3] it is equally apparent that this result would not have been viewed as an aberration from the scheme. The Inuit profit would have been seen to serve the Agreement objective of encouraging Inuit self-reliance (Preamble). The negotiators would have been confident that existing non-Inuit interests are not significantly disturbed, because the basic needs level only depends on harvesting already engaged in by Inuit.

Summary

The basic needs level is the minimum level to which Inuit may harvest available wildlife as of right under the *NLCA,* and it is calculated on the basis of amounts actually harvested by Inuit in a period identified in the Agreement. Neither the Agreement text, nor its negotiating context, provides any valid reason to depart from the Agreement's definition of the basic needs level as the "level of harvesting by Inuit identified in sections 5.6.19 to 5.6.25." This includes Inuit harvesting for any purpose, including harvest for export outside Nunavut. The *Agreement*'s exclusion of amounts for export from a potentially higher "adjusted basic needs level" ensures that continued non-Inuit access to commercial fisheries is allowed for into the future, as long as stocks are ample.

3. NTI further reply to DFO Submission

NTI replied to DFO's July 14 2009 submission in NTI's submission dated August 10, 2009. The following points are included here for elaboration and emphasis.

a. The DFO submission's opening assertion (page 1) that "basic needs" in this context must exclude needs that depend on sale outside Nunavut is simply a conclusion stated as an argument. It is not only unsupported by the text of the Agreement, which does not equate the basis of calculating the basic needs level with the basis for calculating the adjusted level; it is also contrary to the several opposite instructions in the text noted in NTI's analysis above.

[3] The negotiators also included an 'averaging' clause to moderate any excessive effect of a 'bumper crop' in the Inuit harvest in any one relevant year. S. 5.6.23(b) provides that if Inuit were to have such a 'bumper' commercial harvest after the Study period that heightens the basic needs level, the NWMB must average the take in the 'bumper' year with the five year average Study results.

In addition, the negotiators provided that Inuit may be required to obtain a commercial licence when fishing a species that was not fished commercially in 1981, provided that such licences may not be unreasonably withheld from Inuit or accompanied by an unreasonable fee (5.7.27).

b. The DFO submission's search for the "elements" of the basic needs level (page 1) in provisions that do not address the basic needs level is misguided. As defined in the Agreement, the basic needs level has no particular elements – it is a calculation of "amounts harvested."

c. The DFO submission's otherwise close examination of the adjusted basic needs level provisions (pages 1-3) ignores the terminology in those provisions that is consistent with NTI's reading of the basic needs level provisions. Paragraph 5.6.27 (b) confirms that "marketing" can be considered a "use" of wildlife, and paragraph 5.6.27(e) treats personal consumption as only one purpose for which wildlife may be used. As the Lang Michener opinion obtained by the NWMB notes, those provisions thus support reading "use" in 5.4.5(a) as unqualified as to purpose.

d. It is no answer to the unqualified definition of basic needs level in the Agreement to note that not all modes of consumption of the amounts included in the core Inuit harvesting right are specified in the Agreement. "[F]ood" is not specified in section 5.6.1 or section 5.6.26 (DFO submission, page 3) because food is clearly included in the needs that are specified. Similarly, harvesting for sale outside Nunavut is included in "harvesting". Nothing about this logic implies that an unstated restriction on the breadth of the words "level of harvesting by Inuit" (such as harvesting "for commercial purposes other than intersettlement trade or marketing for consumption or use in the NSA", in DFO's example) may be read into the Agreement's basic needs level provisions.

e. The DFO submission suggests (page 3) that the *NLCA*'s basic needs level provisions reflect "similar rights and concepts" in "different land claims agreements", yet the submission does not reference any other land claims agreement. There is no basis in section 35 of the *Constitution Act, 1982*, federal claims policy, or the *NLCA* itself, for presuming that the economic rights of Nunavut Inuit under their modern treaty have the same content as the economic rights recognized for a different Aboriginal people in a different modern treaty. As noted in NTI's August 10 submission, the Supreme Court of Canada recognized an Aboriginal right to fish commercially in *R v. Gladstone*, [1996] 2 S.C.R. 723.

f. DFO's analysis is at odds with the language of section 5.7.30 and at least one supporting provision. The submission concedes that determination of the basic needs level and the right to dispose of wildlife "are two different matters" (page 3), yet it contends that the reference to the adjusted basic needs level in the Agreement's provision for an Inuit right to sell wildlife must exclude such amounts from what may be sold "outside the Nunavut Settlement Area" under the section. This would leave Inuit with no right to sell for export even amounts of fish that they had been catching previously for food. It would leave the negotiated right to sell fish caught in accordance with conservation requirements virtually empty: Inuit would have the "right" to sell outside Nunavut only fish that DFO grants them permission to catch for this purpose. This construction disregards the words "any wildlife lawfully harvested" in s. 5.7.30 entirely. It would also render nugatory the right to a waiver of export licence fees that is guaranteed under s. 5.7.31 "unless the wildlife has been harvested from the surplus."

In short, in endeavouring to enlist the Agreement's provision for an Inuit right to sell their harvest in aid of a restrictive reading of the amounts that Inuit may harvest as of right, the DFO submission empties the right to sell itself of any meaningful content.

g. The DFO submission asserts, without evidence, that including fish taken for sale outside Nunavut in the basic needs level would produce "much less likelihood of there being a surplus" for allocation under s. 5.6.31 (page 3). This assertion has no demonstrable interpretive relevance; but, even putting that aside, as NTI's analysis shows, the economic realities familiar to the negotiators suggest that, for the foreseeable future, this factor is likely to have little if any effect on the presence of a surplus for most of the fish species and stocks addressed by the Harvest Study. The reading of the basic needs level provisions to which DFO's submission subscribes does not "promote[] the long-term economic interests of Inuit harvesters" (page 5). DFO's view would discount for all time from a system of rights that is intended to support current Inuit economic activity and promote it into the future, economic activity that Inuit already have been engaged in.

4. NTI response to Minister's reasons

By letter to the NWMB dated August 5, 2010, the Minister of Fisheries rejected the NWMB's April 4 2010 initial decision to include amounts fished by Inuit for export in the Kingnait Fiord char basic needs level. In a September 15 follow-up letter, the Minister elaborated on her reasons.

The Minister relied on DFO's July 14 2009 analysis (referring to it as "our position" in her September 15 letter, page 1). The Minister unfortunately and inexplicably did not acknowledge or respond to NTI's August 10, 2009 reply.

The Minister also offered two further reasons why she did not accept the NWMB's decision:

> 1) She asserted that the *NLCA* does not permit the NWMB to rely on data that the NWMB had left out of the Harvest Study when the Board is striking a basic needs level under s. 5.6.23(a) of the Agreement (pages 2-3, August 5 letter);
>
> 2) Without indicating how she expected the NWMB to respond in the context of the decision at hand, the Minister stated that "DFO is not aware of any management tools… which would allow the HTOs or RWOs to regulate, monitor or enforce harvesting practices of its members to provide for the conservation of fish stocks under a BNL regime" (page 2, September 15 letter). She proposed, "as a first step" to deal with that issue, discussions about DFO licences and non-quota limitations and other monitoring, sampling, and enforcement tools. She emphasized the increasing need for fish marketers to be able to demonstrate to buyers that their product has been fished sustainably.

The cover letter to this paper will respond to the issues of process that are raised by the Minister's letters. For purposes of initiating the further discussions between DFO and NTI that in NTI's view are necessary, NTI offers the following response to the Minister's further reasons:

1) The NWMB's proposal would correct a past Board error. The data in question was collected and maintained by DFO. It remains available and its reliability is not questioned. An error on the part of the Board in the proper interpretation of the *NLCA* can in no way alter the meaning and reach of a constitutionally protected land claims agreement. In NTI's view, is inconsistent with the honour of the Crown for a Minister to oppose a co-management board's effort to remedy the board's previous failure to comply with an Agreement obligation.

2) The Agreement requires the NWMB to strike a basic needs level for this fish stock. This requirement is triggered because, and only because, the NWMB has decided that conservation demands a limit on the total quantity taken from this stock. Under the Agreement, Inuit may not harvest more than the total allowable harvest, or, where the basic needs level is lesser, more than the basic needs level. It is therefore irrelevant to the basic needs level decision whether or not the government recognizes Inuit "conservation" tools that regulate Inuit fishing *within* the Inuit priority share. In particular, as NTI noted in its August 10 2009 comment on the Board's legal opinion, the challenge of adapting DFO's pre-*NLCA* fisheries management practices so as to recognize the Inuit right to fish without a licence and to sell fish lawfully caught under the *NLCA* is the same regardless of the level at which a basic needs level is set. For that matter, the challenge is the same regardless whether or not a total allowable harvest and basic needs level are set, because both Inuit rights in question also apply in the absence of any quantitative limit on the harvest. This is a marketing challenge, not a conservation challenge, and NTI is encouraged that DFO is initiating a certification process that perhaps can be adapted to the task.

APPENDIX I

Objectives of Article 5

Objectives

5.1.3 This Article seeks to achieve the following objectives:

(a) the creation of a system of harvesting rights, priorities and privileges that
(i) reflects the traditional and current levels, patterns and character of Inuit harvesting,
(ii) subject to availability, as determined by the application of the principles of conservation, and taking into account the likely and actual increase in the population of Inuit, confers on Inuit rights to harvest wildlife sufficient to meet their basic needs, as adjusted as circumstances warrant,
(iii) gives DIOs priority in establishing and operating economic ventures with respect to harvesting, including sports and other commercial ventures,
(iv) provides for harvesting privileges and allows for continued access by persons other than Inuit, particularly long-term residents, and
(v) avoids unnecessary interference in the exercise of the rights, priorities and privileges to harvest;

(b) the creation of a wildlife management system that
(i) is governed by, and implements, principles of conservation,
(ii) fully acknowledges and reflects the primary role of Inuit in wildlife harvesting,
(iii) serves and promotes the long-term economic, social and cultural interests of Inuit harvesters,
(iv) as far as practical, integrates the management of all species of wildlife,
(v) invites public participation and promotes public confidence, particularly amongst Inuit, and
(vi) enables and empowers the NWMB to make wildlife management decisions pertaining thereto.

APPENDIX II

"Commercial" harvesting in the Nunavut Settlement Area in 1993

The Agreement required the Harvest Study to be commenced within a year of the Agreement's ratification (5.4.2). (A moderate delay in fact occurred. The Agreement was ratified in 1993; the Study ran from 1996 to 2001.)

In light of the regulations that applied to Inuit at the time, all Inuit commercial fishing, whether for export or otherwise, was governed by licences and quotas administered by DFO: there is no reason to assume that any Inuit commercial fishing was unknown to DFO and the *NLCA* negotiators or that any such fishing was excessive.

The extent of Inuit commercial harvesting was as follows:

- With the exception of the shrimp harvest, which is not included in the Harvest Study, there was no significant Inuit commercial harvest, or reason to anticipate such a harvest, for any wildlife species in the NSA except a few populations of muskox and caribou and the following stocks of char and turbot:
    - Char throughout Nunavut, but only on a large scale in the vicinity of Nunavut's two fish plants, at Cambridge Bay and Pangnirtung/Cumberland Sound;
    - Cumberland Sound turbot;
- Most char fished commercially in Nunavut was consumed in Nunavut. Most of the char sold to the Cambridge Bay fish plant was exported (to San Francisco). A significant portion of the char sold to the Pangnirtung fish plant – perhaps more than half - was exported (to southern Canada and Boston). In summary, Inuit participation was as follows:

    Char across Nunavut

    - The majority of licences were held by HTOs, in the form of commercial or "exploratory" licences;
    - In most char lakes and rivers, especially in the vicinity of communities, the larger portion of the Inuit catch was taken for Inuit consumption; exploratory licences tended to be issued by DFO as an incentive for Inuit to fish further from communities, in waters that DFO classed "underutilized".

    Cambridge Bay char

- Char sold to the Cambridge Bay fish plant tended to be taken from rivers and lakes that DFO considered "underutilized", which the HTO dedicated to commercial fishing;
- The Cambridge Bay commercial char fishery was developed entirely by Inuit. Non-Inuit fishers had not shown interest in participating. DFO did not issue commercial fishing licences to persons other than Inuit for this fishery, notwithstanding that persons other than Inuit were equally eligible for such licences under the regulations.

Kingnait Fiord char

- 1993 export figures are not readily available to NTI, but out of the NWMB's currently proposed TAH of 6250 kg. for Kingnait Fiord char, approximately 2200 kg. were exported last year. According to the Study, Inuit caught more than 7500 kg. annually in the relevant period *for consumption or sale within Nunavut*. These figures show that the export factor would make no difference to the availability of a surplus for Kingnait Fiord char under the NWMB's proposed decisions;
- DFO now proposes a TAH of 2700-4800 kg and a BNL of 7600 kg. Accordingly, the export factor would make no difference to the availability of a surplus for Kingnait Fiord char under DFO's calculations.

- The Cumberland Sound turbot commercial fishery was based on exports to Boston. Inuit participation was as follows:

  - Inuit fished turbot inshore in Cumberland Sound;

  - 1993 figures are not readily available to NTI, but the NWMB's 2005 TAH/BNL decisions are informative. The NWMB set the TAH at 500 metric tonnes in 2005. Excluding fish caught for export, the Board set the BNL at 4.4 metric tonnes. Including the Inuit inshore catch of approximately 385 metric tonnes, there would likely be a surplus available of more than 100 metric tonnes.

In summary, in 1993, of all the species and stocks of fish in Nunavut covered by the Harvest Study, the Cambridge Bay char stocks constituted the only case in which the factor of "commercial" exports likely would have influenced whether or not a significant surplus would remain after calculation of the basic needs level. The Cambridge Bay char stocks were fished commercially solely by Inuit.

ENDNOTES to NTI Reply

[i] The Nunavut Wildlife Harvest Study commenced in 1996. The Agreement required the Study to commence by July 9, 1994 (s. 5.4.2). Neither NTI nor, to NTI's understanding, the GN, takes issue in this proceeding with the delay in commencement of the initial BNL period.

[ii] In its May 1, 2009 letter to the GN, NTI, and other recipients, the Board explained that the opinion was commissioned as an independent opinion and would be considered, along with comments and submissions received from the recipients, before the Board makes its decision respecting the basic needs level for Kingnait Fiord char.

[iii] Lang Michener opinion, pages 3-4.

[iv] Lang Michener opinion, page 6.

[v] Lang Michener opinion, pages 6 and 7.

[vi] Lang Michener opinion, page 7.

[vii] Lang Michener opinion, pages 6-8.

[viii] Lang Michener opinion, pages 6, 8.

[ix] Lang Michener opinion, pages 6-8.

[x] Lang Michener opinion, page 13.

[xi] Lang Michener opinion, page 13.

[xii] Lang Michener opinion, page 13.

[xiii] Lang Michener opinion, page 8.

[xiv] Lang Michener opinion, page 13.

[xv] Lang Michener opinion, page 13.

[xvi] Lang Michener opinion, page 13.

[xvii] Lang Michener opinion, page 13.

[xviii] Lang Michener opinion, page 13.

[xix] GN Submission, page 8. (The GN Submission does not contain page numbers. For ease of reference, this Reply numbers the GN pages commencing on the page after the Executive Summary.)

[xx] GN Submission, page 10: "DoE's position is that the calculation should be based on the harvest number recorded in the Harvest Study. The commercial harvest statistics recorded in Table 1, Appendix A were not reported in the Harvest Study; these were provided by DoE."

[xxi] See the GN Submission, struck –out totals in Appendix A, Tables 1 and 2. If the GN's reported "commercial" harvest were included, the NLCA s. 5.6.23 (a) formula reflected in Table 1 would produce the higher total and therefore would apply.

[xxii] The GN Submission states in Appendix A, Table 2 that "The 2007 commercial harvest was marketed outside the Nunavut Settlement Area". The GN contends that "it is difficult to support an argument that harvests of Southampton Island caribou for commercial sale outside of the Nunavut Settlement Area should be included in the Aiviit BNL because there is no evidence that such harvesting formed part of either the traditional or current use of caribou by Aiviit Inuit in 1993" (page 7). In Appendix B to the Submission, the history of the Southampton Island harvest provided shows "commercial" harvesting commencing in 1993 and ending in 2007, when the Submission reports that the "commercial harvest program supported and regulated by the GN was discontinued" (page 9). At page 7, the Submission excludes from the GN's recommended method of BNL calculation caribou harvested "for sale outside the NSA" and includes caribou "marketed for sale" - after 2007 – "only within the Nunavut Settlement Area." Totals from all of the "commercial harvest" amounts for 1993-2007 reported in Appendix A, Tables 1 and 2 of the Submission are struck out from the calculations shown.

[xxiii] The cover letter to the Submission states:

As you are aware, there have been informal meetings between the NWMB, Nunavut Tunngavik Incorporated, Department of Fisheries and Oceans, and the GN on the question of the appropriate way to calculate the basic needs level for harvested Arctic char in Kingait Fiord where portions of the recent harvest has been used for commercial sales. These are ongoing discussions that have yet to result in a resolution among the participating parties.

There is a diversity of views on the issues relating to the allocation of basic needs level and whether such an allocation should include commercial harvest for sale outside of the Nunavut Settlement Area. It is with this in mind that DoE is committing to fully participating in the ongoing discussions involving Arctic char in Kingait Fiord.

However, allocation of commercial fishing quota should not detract from or be conflated with the request before the Board. This is a request that the Board take immediate management initiatives to conserve the declining population of the Southampton Island caribou herd by establishing a TAH of 800 and imposing NQLs on harvesting.

The Submission's Executive Summary states:

"DoE has addressed Southampton BNL in part 2 of this submission and respectfully submits that the circumstances related to the history of commercial caribou harvesting on Southampton Island are unique and that the evidence summarized in this submission indicates that commercial harvesting should not be included in BNL calculations in this case. DoE suggests that each BNL calculation must be addressed in its specific factual context. We also respectfully suggest that the NWMB should avoid making broad rulings on the approach to BNL calculation which could fetter its discretion in the future. DoE and the Government of Nunavut are of the view that each such instance should be determined on its own facts and on its own merits."

xxiv GN Submission, page 7: "More specifically, section 5.1.2 of the NLCA recognizes that "the legal rights of Inuit to harvest wildlife flow from their traditional and current use".3 In the DoE's view these uses should, as a starting point, be considered in the context of the regulatory regime and evidentiary basis of commercial harvesting at the time that the NLCA became law. …
…
At the time the NLCA became law, in 1993, commercial harvesting of caribou on Southampton Island was very limited. … The harvest numbers indicate that between 1978 and 1992 there was no commercial caribou harvesting on Southampton Island.
Thus, it is difficult to support an argument that harvests of Southampton Island caribou for commercial sale outside of the Nunavut Settlement Area should be included in the Aiviit BNL because there is no evidence that such harvesting formed part of either the traditional or current use of caribou by Aiviit Inuit in 1993."

xxv S. 5.7.17(a)(v) refers to "a surface lease *current on October 27, 1981*" (emphasis added).

xxvi According to Appendix B of the GN Submission, Inuit harvested 5 caribou on a "commercial" basis in 1993, 1000 in 1994, 2,356 in 1995, 1,839 in 1996, 3,365 in 1997, and 2,956 in 1998. As has been noted, the GN Submission assumes that all such amounts were harvested for sale outside the NSA.

xxvii Lang Michener opinion, page 4.

xxviii Not referred to in the GN argument, in particular, are the following principles and objectives cited by the Lang Michener opinion at page 4: ss 5.1.2 (c); 5.1.3(a) (iii) and (v), and 5.1.3(b)(ii), (iii).

xxix Article 5's two transitional provisions, deeming a valid limitation on Inuit harvesting that is "in force immediately prior to the date of ratification of the Agreement" to have been established by the

NWMB until removed or modified by the Board in accordance with Article 5, also qualify the effect of the Agreement's paramountcy over 1993 regulations. See ss. 5.6.4 and 5.6.50. This does not make any such limitation relevant to the definition of the BNL or any other Article 5 right.

[xxx] *R v. Sparrow* [1990] 1 S.C.R. 1075. (The apparent GN argument here is even more restrictive than the federal government's unsuccessful argument in *Sparrow*. Here, the GN appears to argue that Aboriginal harvesting permitted under licences when the treaty was signed should not be considered a treaty right. In *Sparrow,* the Court rejected the argument that Aboriginal harvesting permitted under licences when Aboriginal rights were recognized exhausts the content of Aboriginal harvesting rights.)

[xxxi] "More specifically, all sales of caribou were conducted by companies licenced by the government … .": GN Submission, pages 7-8.

[xxxii] "Kivalliq Arctic Foods, in Rankin Inlet, purchases and processes caribou from the Coral Harbour (Salliq) harvest. …

Prior to 1995, Kivalliq Arctic Foods caribou was sold locally in the Northwest Territories. The company then received federal approval to sell throughout Canada. To sell to the US and European markets a veterinary inspector must be located on-site in Rankin Inlet to sign the documents. After establishing a network of distributors, Kivalliq Arctic Foods expanded into the USA and Europe."

From "A study of enterprise in Rankin Inlet, Nunavut: where subsistence self-employment meets formal entrepreneurship" *Int. J. Entrepreneurship and Small Business, Vol. 7, No. 1, 2009,* by A.M. Mason, L.P. Dana, and R.B.Anderson, at pages 12-13: http://www.academia.edu/3165432/A_study_of_enterprise_in_Rankin_Inlet_Nunavut_where_subsistence_self-employment_meets_formal_entrepreneurship

[xxxiii] Information obtained by NTI Senior Wildlife Adviser Glenn Williams from former GN Economic Development Adviser Richard Connelly in a telephone interview on April 15, 2014. Mason, Dana, and Anderson, cited above, also report that "The company also makes jerky, sausage, smoked ribs, and *Mikku* (a local dried caribou delicacy) developed as a customised product just for the Nunavut market. The products are sold through a retail and wholesale store and online." (page 13)

[xxxiv] Glenn Williams' April 15 2014 telephone interview with Richard Connelly, noted above.

[xxxv] Glenn Williams' April 15 2014 telephone interview with Richard Connelly, noted above.

[xxxvi] GN Submission, pages 5 and 6, under "b) Allocations of harvest quota are not required in setting the TAH". At page 6 the Submission states: "We urge the NWMB to makes its TAH decision as soon as possible. Concerns related to the appropriate BNL can be addressed subsequently."