



Tammaqtainahuariniit anngutighat atuqhugit Inuit qaujimajatuqangillu ilihimaniillu ilitquhiannin
Conserving wildlife through the application of Inuit Qaujimajatuqangit and scientific knowledge

**Mr. Andrew Nakashuk, Chairperson
Nunavut Planning Commission
P.O. Box 1797
Iqaluit, Nunavut
XOA OHO**

Re: Expert Report from the Nunavut Wildlife Management Board in response to the September 29th 2016 Expert Report filed by Ecojustice on behalf of the World Wildlife Fund - Canada

The Board requests that you consider the NWMB Expert Report in conjunction with the expert report filed by Lynn Hjartarson, Regional Director General for Justice Canada. The Board and the Government of Canada are in agreement that – contrary to the conclusion reached by Ecojustice - the Nunavut Planning Commission (NPC) does not have jurisdiction over non-quota limitations in the Nunavut Settlement Area, and a land use plan cannot establish limitations on methods of harvesting therein. For clear and essential reasons, that authority rests with the NWMB under the terms of Article 5 of the *Nunavut Land Claims Agreement*.

Yours sincerely,

Attachment: 1 (Expert Report: “*Potential Jurisdictional Conflict between NWMB and NPC*”)

¹ See, for instance: <https://www.irwinlaw.com/authors/david-mullan> and <http://law.queensu.ca/Renowned-law-scholar-David-Mullan-to-receive-honorary-LLD-from-Queens-with-live-broadcast-via-the-Internet>

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December 4, 2016

The Nunavut Wildlife Management Board,
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Dear Members of the Board:

Potential Jurisdictional Conflict between NWMB and NPC

I. Introduction

Michael d'Eça, Counsel to the Board has asked me to provide you with a research report on the extent to which the mandate of the Nunavut Planning Commission ("NPC") under Article 11 of the *Nunavut Land Claims Agreement* (NLCA) allows it, in the name of environmental protection and regulation of land use, to exercise authority with respect to matters over which the NWMB has responsibility. More particularly and principally, can the NPC either directly or indirectly impose or require NWMB imposition of non-quota limitations ("NQLs") on the harvesting of wildlife by Inuit?

II. Recommendation

Subsequent to my acceptance of this assignment, Mr. d'Eça provided me with a draft opinion from the Department of Justice Canada ("Justice") on the same issue. The analysis and conclusions reached in that opinion mirror my own views on the issue and, as a consequence, my recommendation is that the NWMB endorse that opinion as also representing its own position. I will, however, add a few other points supporting the conclusion that the NPC cannot directly regulate methods of harvesting, in particular, by the creation of NQLs. I also address the issue of how inevitable jurisdictional disputes should be addressed. Here, I recommend a protocol of processes based on protection of the NWMB's jurisdiction over harvesting and the development of NQLs.

III. Additional Considerations

(a) Article 11.2.1(c) provides as one of the guiding principles for planning that

... special attention shall be devoted to protecting and promoting the existing and future well-being of Inuit and Inuit Owned Lands.

However, Article 5 is much more specific than that with the protection of Inuit rights being central to the underpinnings of the NWMB's existence. Indeed, implicit in the principles

outlined in Article 5.1.2 is a commitment to the creation of an expert regime capable of fully understanding the nature and extents of Inuit rights and making appropriate decisions to protect those rights. This is particularly reflected in Article 5.1.2(c):

[T]here is a need for an effective system of wildlife management that complements Inuit harvesting rights and priorities, and recognizes Inuit systems of wildlife management that contribute to the conservation of wildlife and protection of wildlife habitat; ...

What the terms of this Article also underscore is that leaving harvesting and NQLs to the exclusive jurisdiction of the NWMB does not create a void with respect to the promotion of conservation. Conservation is a key element throughout Article 5 as reflected not only in Article 5.1.2(c) but also in the very next Article 5.1.3(b) ("Objectives") and in the specific roles assigned to the NWMB as in Article 5.3.3(a) ("Criteria for Decisions by NWMB and Minister"):

Decisions of the NWMB or a Minister made in relation to Part 6 shall restrict or limit Inuit harvesting only to the extent necessary ... to effect a valid conservation purpose.

What, however, is critical about this provision as with Article 5.1.2(c) is the very particular context within which conservation measures are assessed. Interference with harvesting in the name of conservation should minimally impair Inuit rights and reflect an understanding that Inuit have their own systems of wildlife management which is based on principles of conservation. That is the perspective that the NWMB is explicitly required to bring to its regulatory functions. To allow the NPC to trench upon those NWMB functions would run the risk of undermining the delicate balancing task involved in matching Inuit harvesting rights with conservation objectives.

- (b) In its opinion, Justice rejects the argument that Article 5.7.42(c) provides justification for NPC imposition of NQLs on harvesting. This provision contains three exceptions to the rights of Inuit and their assigns to use "any type, method or technology" when engaged in harvesting. The first exception is a NWMB-imposed NQL while the second is harvesting that conflicts with laws of general application relating to three subjects including the "humane killing of wildlife." The third exception is a "type, method or technology" for harvesting that "result[s] in harmful alteration to the environment." In an expert report to the NPC, Ecojustice has urged that this third limitation provides a springboard to NPC regulation of methods of harvesting. The Justice Opinion rejects this and, in particular, argues that any overriding of the NWMB's "sole authority" under Article 5.6.48 of the NLCA to impose NQLs cannot arise inferentially; it would have to be explicit. I endorse this conclusion and would add, in response to the argument that there must be a regulatory enforcement mechanism to which the third exception attaches, that the appropriate reference point is not through the land use control jurisdiction of the NPC and the imposition of its own NQLs, but Article

5.7.44 which contemplates a regime of penalties for violation of – among other provisions of Article 5 - Article 5.7.42:

Any penalties imposed on Inuit with respect to harvesting in a manner contrary to the Agreement shall, as a general principle, be just and equitable, and shall not be more severe than those applicable to harvesters other than Inuit in comparable circumstances.

- (c) Also supporting Justice's opinion on the absence of any direct NPC jurisdiction over NQLs are Articles 5.6.51 and 5.7.24. The first states that NQLs in force at the time of ratification of the NLCA remain in force and may be removed or modified only by the NWMB. The latter similarly preserves restrictions imposed on Inuit access to Parks and Conservation Areas for reasons of conservation. They too can be removed only by the NWMB or by bilateral agreement between management agencies and Inuit. Clearly, the NPC's regulatory authority does not extend under these provisions to removing existing harvesting restrictions. That is primarily the task of the NWMB and that conferral of authority can also be seen as speaking more generally to a lack of NPC authority over the establishing of new NQLs. If it was the intention of the drafters of the NLCA that the NPC have NQL jurisdiction in the interests of conservation, one would have expected that same jurisdiction to extend to the removal of pre-NLCA restrictions.
- (d) I would also add to Justice's analysis of Article 5.2.36 that it is noteworthy that, in providing for the involvement of other appropriate government agencies, its subject is the "management of lands, including flora" but **not** fauna.
- (e) More generally, it is noteworthy that Article 5 does provide for one form of interaction between the NWMB and the NPC. Article 5.2.33(j) gives the NWMB jurisdiction over NQLs with no mention that that jurisdiction is shared in any way with the NPC. However, in the very next provision, Article 5.2.34, the NLCA sees fit to provide for a relationship between the NWMB and the NPC on another subject, the identification of wildlife management zones and areas of high biological productivity. When the Agreement wanted to, it did speak specifically to the links between the two regulatory bodies and provided how that relationship was to evolve. Tellingly, in this instance, the initiator is specified as the NWMB, not the NPC. It is for the NWMB to make recommendations to the NPC "with respect to planning in those areas".
- (f) Article 5.7.18(d) is also instructive in the sense that it too provides for limited indirect authority on the part of the NPC with respect to Inuit access to lands provided for in Article 5.7.16. Access rights are subject to override by any land use activity that is **authorized** under Article 11 (Land Use Planning). The failure to provide restrictions based on land use activities **prohibited** by the NPC under Article 11 once again reinforces the argument that the NPC has

no authority to establish NQLs or other forms of limitation within the jurisdiction of the NWMB.

- (g) In addition to Article 11.8.1, set out in the Justice opinion and requiring land use plans to be developed and implemented in a manner consistent with Articles 5 and 7, Article 11.2.1(f) also specifies that the “planning process be systematic and integrated with all other planning processes and operations.” This too speaks to the NPC respecting the decision-making integrity and specific responsibilities of the NWMB.

IV. How to Make This All Work?

Of course it is inevitable in a planning process that has as one of its principal objectives “environmental protection ... including wildlife preservation” (Article 11.3.1) that there will be some degree of overlap between the content of land use plans and the jurisdiction of the NWMB. The question then becomes one of management and the development of coordination protocols between the two regulators as contemplated by Schedule 3 (“Implementation Guidelines”) of *A Contract Relating to the Implementation of the Nunavut Final Agreement*, Part 1 at p.7.

Without being definitive as to the contents of such a protocol, it seems to me that the following need to be kept in mind in the development of such a working arrangement:

- (a) To the extent that the contents of any draft NPC land use plan or project proposal involve either direct or indirect derogation from the NWMB jurisdiction over harvesting and NQLs in particular, the NPC has the ability (indeed the responsibility) to bring the matter early on to the NWMB for its consideration (which, as discussed above, may well involve separate NLCA Article 5 decision-making – see NLCA Sections 5.3.7 to 5.3.23), following which an NPC decision or recommendation would then go to the appropriate Minister or Ministers for approval.
- (b) Particularly in the context of the preparation of draft land use plans, the NPC should be particularly aware of any potential impact on the NWMB and engage with the NWMB as required under Articles 11.5.3-4 – providing an opportunity for written and oral comments and accord status to the NWMB at public hearings on draft plans.
- (c) Ultimate authority for the approval of land use plans also vests in the relevant Ministers, Cabinet and the Nunavut Executive Council (Articles 11.5.5-9). Any protocol should make it clear that the NWMB has status to raise any abiding jurisdictional concerns as part of that approval process. While that safeguard is not present in quite the same way in the case of project proposals, the NPC is required to forward determinations and recommendations to the “appropriate federal and territorial agencies” (Article 11.5.10). The protocol should make it clear that the NWMB is such an agency with respect to determinations and recommendations that affect its jurisdiction. Similarly, in the case of recommendations to the Minister that a project that does not conform to a land use plan be exempted (Article 11.5.11), the NWMB should be accorded participatory rights when its jurisdiction is or may be implicated.

I trust this meets my mandate but please do not hesitate to contact me if further elaboration is necessary.

Yours truly,

ORIGINAL SIGNED
(David J. Mullan)



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Conserving wildlife through the application of Inuit Qaujimajatuqangit and scientific knowledge

ՈՒՆԱՆ 13, 2016

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1 CduJ, כדור צד: <https://www.rwinlaw.com/authors/david-mullan> אף לא <http://law.queensu.ca/Renowned-law-scholar-David-Mullan-to-receive-honorary-LLD-from-Queens-with-live-broadcast-via-the-Internet>

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