Federal Court  Cour fédérale

Date: 20191030

Docket: T-1994-16

Citation: 2019 FC 1297

Ottawa, Ontario, October 30, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MAKIVIK CORPORATION

Applicant

and

THE HONOURABLE CATHERINE MCKENNA, IN HER CAPACITY AS MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND THE ATTORNEY GENERAL OF CANADA, IN HER CAPACITY AS THE LEGAL MEMBER OF THE QUEEN'S PRIVY COUNCIL CHARGED WITH THE REGULATION AND CONDUCT OF ALL LITIGATION AGAINST THE CROWN AND NUNAVIK MARINE REGION WILDLIFE BOARD AND EEYOU MARINE REGION WILDLIFE BOARD AND THE GRAND COUNCIL OF THE CREES

Respondents

and

NUNAVUT TUNNGAVIK INCORPORATED

and

ATTORNEY GENERAL OF NUNAVUT

Interveners

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Makivik Corporation [Makivik], is seeking judicial review under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, against the Minister of Environment and Climate Change Canada's [Minister] decision dated October 19, 2016. This decision varied the Nunavik Marine Region Wildlife Board's [NMRWB] and the Eeyou Marine Region Wildlife Board's [EMRWB] final decision regarding the Total Allowable Take [TAT] and non-quota limitations for the harvesting of Southern Hudson Bay [SHB] polar bears within the Nunavik Marine Region [NMR], pursuant to section 5.5.12 of the *Nunavik Inuit Land Claims Agreement* [NILCA] and section 15.3.7 of the *Eeyou Marine Region Land Claims Agreement Act* [EMRLCA].

[2] As recognized by all the parties, NILCA is a constitutionally protected modern treaty which fosters reconciliation. In *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 [*Nacho Nyak Dun*], Justice Karakatsanis, writing for the Supreme Court of Canada, stated at para 1:

> As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation. Negotiating modern treaties, and living by the mutual rights and responsibilities they set out, has the potential to forge a renewed relationship between the Crown and Indigenous peoples.

[3] This application primarily concerns Article 5, which establishes a co-management regime that seeks to integrate Inuit knowledge and approaches to wildlife management with Western scientific knowledge. The parties have all made it clear that the conservation and state of polar bears is fundamentally important to the Inuit, other indigenous people, and society at large.

NILCA provides a mechanism for considering various interests and factors toward managing this precious resource. There is no doubt that the matter is complex—Makivik's own procedural approach and characterization of the issues reflect the complexity of the NILCA process. In their submissions and in the included affidavits, the parties have all noted the difficult nature of this matter, which involves an animal that roams across territorial and provincial boundaries, and which involves two different Inuit communities from different jurisdictions of Canada and other Indigenous governments. All of the above-listed parties have an interest in the resource.

[4] Article 5 of NILCA also contains the decision-making process that determines how conservation decisions are made. In theory, and based on a review of the extensive provisions of Article 5, the decision-making process is straightforward. However, in reality and since this was the inaugural process for such a decision under NILCA, understandable delays occurred and issues arose between the parties, leading to this proceeding.

[5] Makivik submits that this case really is not about polar bears, nor is it about the duty to consult. It submits that this case is about the implementation of Inuit treaty rights under NILCA. Makivik also claims that the Minister's October 19, 2016 decision was neither correct nor reasonable. It does not seek to quash the Minister's decision. Rather, Makivik seeks several declarations concerning the Minister's decision.

[6] For the following reasons, the application for judicial review is dismissed.

II. Background

[7] As this matter involves many parties and a complicated decision-making process, I find it appropriate to provide a complete account of the background.

A. *The history of polar bear harvesting*

[8] For the Inuit, the polar bear, or "Nanuq" in Inuktitut, is a powerful and meaningful being. Polar bears are prominent in their culture, as they are highly valued and appreciated for their meat and fur. The Inuit have hunted polar bears as a source of sustenance for thousands of years, and many Inuit communities continue to rely on polar bears for both social and economic purposes.

[9] There are nineteen different subpopulations of polar bears that have been divided according to specific geographical zones. Most of these subpopulations are found within the Territory of Nunavut. The present application addresses only one out of nineteen of these subpopulations: SHB polar bears within the NMR.

[10] Recognizing that the Inuit hunt SHB polar bears as a form of necessity, the Inuit of Nunavut have long participated in a management scheme that establishes a legal framework, through quota systems, for the harvesting of polar bears. For instance, the *Nunavut Land Claims Agreement*, SC 1993, c 29 provides rights and responsibilities to Hunters and Trappers Organizations [HTO] for the harvesting of polar bears. Each regional wildlife organization establishes a total allowable harvest for species, such as polar bears, and the HTOs lead their

communities by managing and implementing harvesting rules amongst their members. The Nunavik Inuit of Quebec [Nunavik Inuit] have had a similar quota system which has set out the minimum level of polar bear harvest since the inauguration of the *James Bay and Northern Quebec Agreement* of 1975, as discussed in Mr. Alaku's affidavit.

[11] From the 1970s until 2011, the quotas had remained the same for Nunavik Inuit. However, in 2010-2011, there was a significant increase in polar bear harvesting. This caused many organizations, including Makivik, to hold a meeting in June 2011 to remedy this upswing in harvesting through a voluntary agreement. Consequently, the 2011 voluntary agreement came into effect on September 21, 2011. It contained a fixed quota for each of the communities involved, amounting to a total of 60 polar bears per year that could be harvested as follows: 26 polar bears for Nunavik Inuit, 25 for Nunavut Inuit, 4 for Cree of Eeyou Istchee and 5 for Cree Nations of Ontario.

[12] Mr. Alaku states that prior to the Minister's decision "there has never been a quota or upper limit on the number of polar bears that Nunavik Inuit are permitted to take". As Makivik's counsel stated, "Up until the decision of the Minister at issue in these proceedings, there had never been any legally enforceable quota on Nunavik Inuit harvesting of polar bears".

B. *The Applicant*

[13] The Applicant, Makivik, is the legal representative of Nunavik Inuit. Makivik is a non-profit organization, established in 1978 under the *James Bay and Northern Quebec Agreement* of 1975 and NILCA. Its primary role is to administer the lands of the Inuit, as well as to protect the

rights, interests and financial compensation provided by the aforementioned agreements. Makivik has played a significant role in the inauguration and expansion of Nunavik. Makivik is also involved politically, culturally, and economically in various projects dealing with modern aboriginal treaties, governments, and other Inuit.

C. *The Respondents*

(1) The NMRWB and the EMRWB

[14] The Respondents, NMRWB and EMRWB [the Boards], are the main instruments of wildlife management in the NMR (Section 5.2.3 of NILCA) and the Eeyou Marine Region [EMR]. Pursuant to section 5.2.1 of NILCA, the NMRWB has a composition of seven members to be appointed as follows: Makivik appoints three members, the federal Minister responsible for fish and marine mammals and the federal Minister responsible for the Canadian Wildlife Service each appoint one member, and the Government of Nunavut Minister responsible for wildlife appoints one member. Together, the parties also elect one chairperson. Under section 5.2.2 of NILCA, Makivik and the respective Governments (Canada and Nunavut) also have the right to have technical advisors to attend all meetings as non-voting observers.

[15] Created under NILCA, the NMRWB studies both Inuit traditional knowledge [ITK] and Western science throughout its decision-making process. The EMRWB was formed under EMRLCA. The EMRWB did not present written submissions as it chose not to appear in the present matter.

[16] Makivik recognizes the tension between indigenous knowledge and management of resources and government management of resources through reliance on science. Makivik submits that this tension is bridged in NILCA through the creation of the NMRWB and by the principles of conservation that guide it.

(2) The Grand Council of the Crees (Eeyou Istchee)

[17] The Respondent, the Grand Council of the Crees [Cree Respondent], is a non-profit organization that aims to represent and defend the interests of the Eeyou Itschee residing in eastern James Bay and southeastern Hudson Bay.

(3) The Attorney General of Canada

[18] The Respondent, the Attorney General of Canada [AG of Canada], is the legal representative of the Minister. Pursuant to the process established in sections 5.5.6 to 5.5.13 of NILCA, the Minister can accept, reject or vary the Boards' final decisions and provide reasons for doing so.

D. *The Interveners*

(1) Nunavut Tunngavik Incorporated

[19] The Intervener, Nunavut Tunngavik Incorporated [NTI], is an organization that represents the Inuit of Nunavut. NTI continues to play an active role in ensuring that all parties

involved, including the Government of Canada and the Government of Nunavut, implement the *Nunavut Land Claims Agreement*.

(2) The Attorney General of Nunavut

[20] The Intervener, the Attorney General of Nunavut [AG of Nunavut], represents the Minister of Environment of Nunavut who can accept, reject or vary the Boards' final decision in accordance with sections 5.5.14 to 5.5.21 of NILCA.

[21] The AG of Nunavut presented arguments asking this Court to decline the granting of declaratory relief sought. The Intervener relies on *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] in order to submit that the case is moot under the initial phase of a two-step analysis for the doctrine of mootness (no live controversy). In the event that this Court concludes that the case is not moot, the AG of Nunavut argues that the Court reserves the right to exercise its discretion upon judicial review and should, therefore, decide not to grant declaratory relief. The Intervener AG of Nunavut also submits that it is highly likely that future decisions made by the NMRWB and the EMRWB regarding the Foxe Basin and Davis Strait polar bear within the NMR, or other species, become the subject of judicial review. The Court must therefore act accordingly in order to allow the NMRWB to have the opportunity to interpret NILCA in the future. By declining to grant relief, it is submitted that the parties involved would be more open "to govern together and work out their differences" and "to work out their understanding of a process – quite literally, to reconcile – without the court's management of that process": *Nacho Nyak Dun* at paras 33, 60.

[22] The Intervener AG of Nunavut contends that the case is moot as "there is no longer a concrete legal dispute" regarding the Minister's decision. The AG of Nunavut notes that Makivik is no longer asking this Court to quash the Minister's decision because Makivik re-amended its application for judicial review by replacing the relief it sought with declaratory relief.

[23] The Intervener AG of Nunavut also notes that Makivik submitted a similar judicial review before the Nunavut Court of Justice. In the event that this Court renders its decision on the present matter, the Intervener argues that the Federal Court decision is not binding on the Nunavut Superior Court of Justice.

E. NILCA and EMRLCA

[24] NILCA came into force on July 10, 2008. On December 1, 2006, Nunavik Inuit and the Government of Canada became signatories of the agreement. NILCA establishes principles on Nunavik Inuit's harvesting rights in the NMR, as well as the Minister's right to intervene in certain circumstances. With NILCA, Nunavik Inuit agree to exchange their aboriginal rights and title in the areas in question for treaty rights. NILCA also includes principles of conservation, as well as the implementation of a TAT and non-quota limitations for the NMR in recognition of Cree and Inuit rights in the overlap area.

[25] The NMR comprises vast areas of lands and waters within the boundary found in Schedule 3-2 of NILCA. Pursuant to section 3.2 of NILCA, the NMR includes areas of equal use and occupancy with the Nunavut Inuit, and the overlap area is equally used and occupied by the

Cree of Eeyou Itschee. The coordination of the overlap area is addressed in Article 28 of NILCA and in the Cree/Inuit Offshore Overlap Agreement.

[26] EMRLCA was signed by the Cree of Eeyou Istchee and the Government of Canada on July 7, 2010 and came into effect on February 15, 2012. This modern treaty covers the EMR area adjacent to Quebec.

F. *Convention on International Trade in Endangered Species of Wild Flora and Fauna*

[27] Ratified in 1975, the *Convention on International Trade in Endangered Species of Wild Flora and Fauna* [CITES] is an international treaty which protects the trade of certain species of wild animals and plants from over-exploitation. In order to do so, CITES emphasizes the importance of international cooperation. CITES contains Appendices that regulate the international trade in specimens of certain species enlisted in an Appendix. Polar bears are currently part of Appendix II of CITES. This means that, "[t]he export of any specimen of a [polar bear] shall require the prior grant and presentation of an export permit".

G. *The 2014 Voluntary Agreement*

[28] In September of 2014, interested parties, including NTI and Makivik, held a meeting about polar bear management where, after discussion, the parties entered into a voluntary agreement for the harvesting of SHB polar bears [2014 Voluntary Agreement]. The parties to the 2014 Voluntary Agreement were:

- Nunavut Department of Environment

- Nunavut Tunngavik Incorporated
- Makivik Corporation
- Ontario Ministry of Natural Resources and Forestry
- Cree Trappers Association (Quebec)
- Fort Severn Cree Nation
- Cree Nation Government (Quebec)
- Environment Canada
- Sanikiluaq Hunters and Trappers Organization
- Inukjuak Nunavimmi Umajulirijiit Katujjiqatigiinninga
- Kuujjuarapik Nunavimmi Umajulirijiit Katujjiqatigiinninga
- Umiujaq Nunavimmi Umajulirijiit Katujjiqatigiinninga
- Qikiqtaaluk Wildlife Board

[29] In the 2014 Voluntary Agreement, the parties established different voluntary quotas than those negotiated in 2011, with the total voluntary limits set at 45 polar bears per year for all the communities involved: Nunavik Inuit agreed to harvest 22 polar bears; Nunavut Inuit, 20; Cree of Eeyou Istchee and Cree Nations of Ontario, 1 or 2 (total of 3 for all Cree).

H. *The process begins*

[30] In a letter dated January 10, 2012, Peter Kent, former Minister of Environment Canada, sent a formal request to the NMRWB to establish a TAT for each subpopulation of polar bear in the NMR. This request was in response to the letter of the then chair of the NMRWB who raised

concerns about the 2011 voluntary agreement and the fact that the NMRWB was not engaged and that the NILCA process was not used.

[31] There are three subpopulations of polar bear that are harvested by Nunavik Inuit: Davis Strait, Foxe Basin and SHB. The NMRWB first chose to review the SHB management unit, which is harvested by Nunavik Inuit, the Nunavut Inuit of Sanikiluaq, as well as the Cree of Eeyou Istchee.

[32] It took the NMRWB more time than anticipated to move forward with the process since the results of a 2011-2012 aerial survey were only completed in November of 2013 by the Ontario Ministry of Natural Resources and Forestry. Based on this survey, there was an estimate of 951 bears for the SHB subpopulation. After further revision, the number was later amended to an estimate of 943 polar bears.

[33] On December 19, 2013, the NMRWB issued a Public Hearing Notice inviting all interested parties to file written submissions and supporting documents by January 27, 2014, regarding the establishment of a TAT for the SHB polar bear within the NMR. The notice indicated that the public hearings which would take place in Inukjuak, Quebec from February 12th to 14th, 2014. More than a dozen parties filed written submissions prior to the public hearings and most of those same parties also made oral submissions. These parties included governmental departments, aboriginal organizations, environmental non-governmental organizations, local Inuit hunting groups, and individual Inuit hunters.

[34] At a briefing of the NMRWB and its staff after the public hearings, it was noted that additional information was needed before the NMRWB could make a decision. Specifically, it was felt that more information was required from the actual users of the resource since the public hearings were not the ideal method for obtaining this type of information. They decided to request further information from the attendees of the public hearings and to undertake a study of relevant ITK.

[35] The results of the ITK study were summarized in a seven-page chart called "Nunavik Inuit Knowledge of Polar Bears: Summary of Knowledge and Suggestions" [ITK Summary]. The ITK Summary was forwarded to the parties that had participated in the public hearings for comment. The NMRWB engaged a third party to prepare a final report. At the time of the Minister's decision, only the ITK Summary was available.

I. *The Boards' initial and final decisions*

(1) The Boards' initial decision

[36] It should be noted that the delay the Boards' decision-making was because this was the first such process under NILCA and, due to an oversight, the EMRWB was not initially involved. This was remedied and the Boards ultimately made their decision.

[37] On July 23, 2015, the Boards sent a letter to both the Minister of Environment of Canada and the Minister of Environment of Nunavut, informing them of their decision regarding the SHB polar bear TAT and non-quota limitations within the NMR.

[38] The Boards determined that the TAT for SHB polar bears in the NMRWB should be fixed at 28, per section 5.5.3 of NILCA. According to the Boards, it was essential to have a flexible management unit to avoid overharvesting. The Boards also concluded that the Crees of Eeyou Istchee are permitted to harvest at least one polar bear from the TAT of 28 bears. The Boards further decided that there should not be a requirement for sex-selective harvesting, as it would be contrary to section 5.5.3 of NILCA. Finally, the Boards presented a list of non-quota limitations for a fair and strict implementation of the TAT allocation.

[39] On September 22, 2015, the Minister of Environment of Nunavut rejected the Boards' initial decision to establish a TAT of 28 polar bears, pursuant to section 5.5.16 of NILCA and section 15.4.3 of EMRLCA. Consequently, the Minister of Nunavut asked the Boards to reconsider their decision, this time, without exceeding a maximum sustainable harvest rate of 4.5 percent. The Boards were also asked to implement a sex-selective harvest of two males for every female bear.

[40] On September 23, 2015, the Deputy Minister of Environment Canada wrote a letter to the Boards informing them that their decision was rejected pursuant to paragraph 5.5.3(a) of NILCA and paragraph 15.2.1(a) of EMRLCA. The letter explained that the TAT of 28 polar bears for Nunavik Inuit and the Crees of Eeyou Istchee "is likely not sustainable and creates conservation concerns for this management unit". The Deputy Minister also invited the Boards to issue a final decision by taking into account the maximum sustainable harvest of 4.5 percent, as well as the non-quota limitation of a sex-selective harvest of two males per one female bear. In addition, the

Deputy Minister referred to the 2014 Voluntary Agreement as a "domestic interjurisdictional agreement" for the first time.

(2) The Boards' final decision

[41] On December 21, 2015, the Boards issued their final decision ("Final Decision-Establishing a TAT and Non-Quota Limitation for SHB polar bears, within the NMR"). Once again, the letter was sent to both the Minister of Environment of Canada and the Minister of Environment of Nunavut.

[42] The Boards confirmed their initial decision establishing a TAT of 28 polar bears for the NMR. According to the Boards, "[a] TAT of twenty-eight (28) reflects the low-end of estimated annual harvests by Nunavik Inuit […] and permits an allocation to the Cree of Eeyou Istchee." The Boards maintained their position on the importance of flexibility within the management system. The Boards did not agree with the Ministers regarding the implementation of a formal sex-selective harvest. Instead, the Boards explained that a sex-selective harvest of two males per one female bear "goes against Inuit traditions and values", "upsets the natural balance of wildlife populations and tends to remove the fittest breeders".

[43] The Boards also fully maintained the initial non-quota limitations in their final decision since "neither government offered concerns about the non-quota limitations proposed initially". The Boards did not agree with the Deputy Minister regarding the 2014 Voluntary Agreement. In their final decision, the Boards contend that the 2014 Voluntary Agreement "is not a domestic interjurisdictional agreement" as per section 5.5.4.1 of NILCA and section 15.2.2 of EMRLCA.

The Boards further added that, in any case, the 2014 Voluntary Agreement "is without prejudice to the decision-making processes defined in the applicable Land Claims Agreements".

J. *The process leading to the Minister's decision*

[44] On February 17, 2016, the Director General of Canadian Wildlife Service wrote to the Boards that Environment and Climate Change Canada [ECCC] would have a response and an analysis of the Boards' final decision by June 30, 2016. The Minister was unable to provide a response by June of 2016. Instead, ECCC officials began to write the Memorandum to the Minister in July of 2016.

[45] On September 21, 2016, ECCC officials sent a Memorandum to the Minister in response to the Boards' decision. ECCC recommended that the Minister vary the Boards' final decision, "based on conservation and technical concerns". It also recommended that the Minister reduce the TAT from 28 to 23 polar bears "for conservation reasons (sustainability of the management unit)". The Memorandum was also accompanied by a detailed document, "Analysis of the Final Decision and Rationale for Varying the Decision", explaining to the Minister how ECCC officials came to a TAT of 23 polar bears.

K. *The Minister's decision under review*

[46] In a letter dated October 19, 2016, accompanied by two documents titled respectively, "Response to Final Decision on TAT for Southern Hudson Bay polar bear" [Response] and "Analysis of Decision on TAT and Non-Quota Limitations for SHB polar bears, within the

NMR" [Analysis] the Minister advised the Boards that it decided to vary the TAT and non-quota limitations for polar bears within the NMR, pursuant to paragraph 5.5.3(a) of NILCA. After considering the Boards' final decision, the Minister decided that there would be an annual TAT of twenty-three (23) polar bears from the SHB management unit for the NMR. The Analysis states:

> The TAT of 23 establishes a combined harvest of polar bears from the Southern Hudson Bay management unit of close to 4.5% which aligns with the widely accepted sustainable removal level.
>
> […]
>
> [A] maximum harvest of close to 4.5% should be established, to ensure the population remains stable and the harvest sustainable. This is consistent with previous statements by Environment and Climate Change Canada (e.g., the Environment and Climate Change Canada submission to the Southern Hudson Bay public hearing held in Inukjuak in February 2014 and Deputy Minister Michael Martin's letter of September 23rd, 2015).

[47] In the Response, regarding the final decision on the annual TAT for the SHB polar bear, the Minister indicated the manner in which the TAT shall be implemented within the NMR, namely that:

> a. all human-caused mortalities will be deducted from the TAT, including any bears killed on defense of life and property;
>
> b. if the sum of all human-caused mortalities exceeds the TAT in a given year, the following year's TAT will be reduced correspondingly;
>
> c. […]

[48] The Minister, in the Response, accepted some of the Boards' non-quota limitations for the harvest of polar bears in management unit, subject to other non-quota limitations, such as:

> 1. The TAT will be harvested annually, limited to 1 female per 2 males;
>
> 2. All polar bears killed by humans, whether as part of the subsistence harvest or in defense of life and property, will be reported to the appropriate authority as soon as possible (whether or not these are intended for sale);
>
> 3. […]

[49] The Minister's letter also included the following wording:

> Once the new survey results and traditional knowledge study become available, I am open to reconsidering the total allowable take for this management unit of polar bears.

L. *Makivik Corporation's Application*

[50] On November 18, 2016, Makivik filed the present proceedings. Makivik does not agree with the Minister's decision dated October 19, 2016, and had asked the Court for an order "quashing that decision and remitting the matter to the [Minister] to render a new decision".

[51] On April 25, 2017, Makivik filed an amended application for judicial review with the Court's consent. Cross examinations occurred in late 2017 and early 2018. On April 6, 2018, Makivik re-amended its application for judicial review, also with the Court's consent. As a result of a new 2016 aerial survey, Makivik explained that the newly amended application for judicial review now sought only declaratory relief from the Court rather than a request to quash the Minister's decision and remit the back to the Minister. Makivik also asked the Court for an order to grant costs in the present application.

III. The Evidence

[52] The evidence for the present application consists of a certified tribunal record as well as other material that was not in the certified tribunal record including affidavits and supporting exhibits. As described above, the parties have cross-examined some of these affiants and the transcripts were included in the record.

[53] The parties have acknowledged that the record contains much information that was not before the Minister. The AG of Nunavut devoted a significant amount of its submissions on this point and the problem that the record poses where Makivik now seeks only declaratory relief.

[54] Makivik filed the affidavit evidence of:

- Valentina Cean, an employee of Dionne Schulze. Her affidavit includes exhibits in the form of documents that are publicly available on the NMRWB's website, including reports, letters, and research information. These are not contained in the other affidavits produced by Makivik.
- Mark O'Connor, Resource Management Coordinator at Makivik Corporation. He was previously the Director of Wildlife Management with the NMRWB. As Director, he was responsible for collecting and analyzing relevant information on wildlife species in the NMR. He also supervised staff work on these issues and coordinated with the representatives from other regulatory agencies that also dealt with species from the NMR. He provided some clarity and explanations about the delayed results of the 2011-2012 aerial survey and the ITK study.

- Gregor Gilbert, Senior Resource Development Department Coordinator for Makivik. He participates in developing management plans for the resources harvested by Nunavik Inuit. He also sits on various committees that discuss certain wild species such as the Eastern Hudson Bay beluga. Ever since he joined Makivik in 2010, he has primarily been working on polar bear management. He provided a map produced by Environment Canada to demonstrate the composition of polar bear management units within the NMR.
- Adamie Delisle Alaku, Executive Vice-President for the Resource Development Department for Makivik. Attached to his affidavit was a copy of the 2014 Voluntary Agreement. His affidavit mentions the correspondence between himself and the then-Minister of Environment on the importance of establishing a voluntary agreement between the parties involved. He was cross-examined.
- Paulusi Novalinga, Inuk living in the town of Puvirnituq on Hudson Bay. He is president of the *Anguvigaq* (Nunavik Hunters, Fishermen and Trappers Association). During the NMRWB's public hearing in 2014, he presented some of the issues that the organization had about the polar bear population. He provided history and background respecting the Inuit and their harvesting activities.

[55] The Respondent AG of Canada filed the affidavit evidence of:

- Dr. Rachel Vallender, Acting Manager and biologist. She works for the Canadian Wildlife Service of Environment and Climate Change Canada. Ms. Vallender has a PhD in biology from Queen's University. She has seventeen years of experience on wild species, especially on migratory birds. In her affidavit, she mentions the importance of including ITK in wildlife management decision-making. She was cross-examined. On

September 22, 2017, Makivik filed a motion record asking this Court to grant an Order striking paragraphs 90, 91 and 92, and associated exhibits RV-28 and RV-29 from the affidavits of Ms. Rachel Vallender. The Respondent AG of Canada filed its response within a motion record, arguing that Makivik's request is premature.

[56] The Respondent NMRWB filed the affidavit evidence of:

- Kaitlin Breton-Honeyman, Director of Wildlife Management at the NMRWB. She has a Bachelor's Degree in Natural Sciences from Trent University with a major in Biology. As of July of 2013, she was involved in preparing the NMRWB's public hearing on February-12-14, 2014. She reviewed the public hearing notice that was sent out to all parties on December 19, 2013. She was also part of the team in charge of compiling, reviewing and summarizing any written submissions she received from the parties following the public hearing notice. She was cross-examined.

[57] The Cree Respondent filed the affidavits of:

- Isaac Masty, a Cree beneficiary of the *James Bay and Northern Quebec Agreement* of 1975 and an Indian under the *Indian Act*, RSC, 1985, c I-5. He is Vice-Chairperson of the EMRWB since 2016. While he was President of the Cree Trappers Association from 2009 to 2011, Isaac Masty was present at the meeting held in Inukjuak, Quebec, on September 20-22, 2011. In his affidavit, he states that the EMRWB did not participate in negotiating the document entitled "Consensus from the Southern Hudson Bay polar bear management meeting in Inukjuak September 2011". Mr. Masty did not provide evidence attached to his affidavit.

- Alan Penn, currently employed as a science advisor to the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government. Mr. Penn has over 40 years of work experience on natural resources and environmental issues in northern Quebec. He participated in negotiating EMRLCA. He attended the meeting held in Ottawa on September 25-27, 2014. Like Isaac Masty, Alan Penn also stated in his affidavit that Canada did not intend to refer to the Consensus document as a "domestic interjurisdictional agreement" within the context of EMRLCA. He was cross-examined.
- Brian Craik, Director of Federal Relations for the Grand Council of the Cree (Eeyou Istchee)/ Cree Nation Government. He was also responsible for negotiating EMRLCA. Mr. Craik provided information about Cree decision-making structure and the negotiation process of EMRLCA.

[58] On judicial review, it is trite law that the Court should only consider evidence that was before the original decision-maker: *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 39 [*Henri*]. Here, the parties produced affidavits that contained a significant amount of evidence in support of their records.

[59] In determining whether additional evidence may be introduced upon judicial review, three exceptions govern:

> […] The only exceptions to this rule have been made in instances where the evidence was introduced to support an argument going to procedural fairness or jurisdiction (as in *McConnell v. Canada*, 2004 FC 817 at para 68, upheld at 2005 FCA 389), or where the material is considered general background information that would assist the Court (see, for ex., *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 [*Chopra*] at para 9).

(*Ochapowace First Nation v Canada (Attorney General)*, 2007 FC 920 at para 9)

[60] I acknowledge the argument of the AG of Nunavut that the record has been impacted by time and due to the changing focus of the proceedings as evidenced by the amended and re-amended applications for judicial review.

[61] After carefully reviewing the affidavit evidence on file and the submissions of the parties, I note that much of the material included in the parties' supporting affidavits present general background information that would assist the Court. In particular, Ms. Valentina Cean's affidavit contains documents, such as a summary report collected by the NMRWB during its ITK study after the public hearings in Inukjuak entitled "Nunavik Inuit Knowledge of Polar Bears: Summary of Knowledge and Suggestions". Ms. Cean's affidavit also includes guidelines from the NMRWB called "Guidelines for the Nunavik Marine Region Public Hearing to consider establishment of a Total Allowable Take for Southern Hudson Bay polar bear with the Nunavik Marine Region".

[62] Ms. Vallender's affidavit also contains several presentations from experienced and knowledgeable hunters and research scientists on SHB polar bear management. Although they were not included in the record before the Boards, I find that such affidavit evidence is admissible in the case at bar. Although it is not relevant to the merits of the matter, it is helpful to the Court toward understanding the issues in this proceeding.

[63] In light of the difficulty with the record before me, in my analysis and reasons I will be referring to some of the affidavit material only for the context or the backdrop upon which the Minister's decision was made.

A. *Makivik's Motion to Strike Portions of the Vallender Affidavit*

[64] As a general principle, reviewing courts are to proceed on the merits based on the available evidence that was before the original decision-maker (*Henri* at para 39). "Affidavit evidence going to the merits of the matter already decided by the decision-maker should instead be struck out as they invade the role of the initial decision-maker as fact-finder and merits-provider" (*Shahzad v Canada (Citizenship and Immigration)*, 2017 FC 999 at para 21; see also *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22).

[65] In response to Makivik's motion record concerning Ms. Vallender's affidavit evidence, I grant Makivik's motion and accordingly, the Court will strike paragraphs 90, 91 and 92 of Ms. Vallender's affidavit. These paragraphs refer to the 2016 aerial survey results, which were not available before the Board or the Minister at the time of the decision and these paragraphs contain more than simply background information. Exhibits RV-28 and RV-29 are accordingly also not relevant or admissible evidence for the purposes of this judicial review as there is no evidence to suggest that they were before the Minister. Further, they contain more than background information.

[66] Paragraphs 90, 91 and 92 and the associated exhibits are therefore struck and have not been considered.

B. *Makivik's Motion to Determine the Propriety of Objections made by the AG of Canada during the course of a Written Cross-examination*

[67] This motion also relates to Ms. Vallender's affidavit and documents produced in her affidavit (Exhibits, CE4, CE-5 and CE-6). As set out in Makivik's motion, subsequent to the November 2017 cross-examination of Ms. Vallender, Makivik and the AG of Canada agreed as follows:

> a. Respondent Canada would provide the documents requested on a courtesy basis, with, however, certain information redacted for claimed privileges;
>
> b. After reviewing them, the Applicant could decide which ones it believed were relevant and have them produced, via supplementary written cross-examination of Dr. Vallender;
>
> c. The documents would be produced with Dr. Vallender's response to the supplementary written cross-examination, under reserve of the objections of Respondent Canada with respect to relevancy and privilege;
>
> d. Dr. Vallender's response and the attached documents would be filed as part of the Applicant's Record; and
>
> e The Applicant could then file a motion under Rule 95 to have Respondent Canada's objections and privilege claims determined by the Court, motion would be presented to the judge hearing the case on the merits.

[68] The documents in question relate to internal communications within ECCC prior to the Minister's decision. The AG of Canada, in addition to procedural arguments about the propriety of Makivik's request, objects to the production of the redacted portions of the correspondence

based on relevance and privilege. AG of Canada argues that the documents in question were drafted or created before the Deputy Minister's rejection of the initial decision of the Boards.

[69] Makivik disagrees, suggesting that the documents are relevant because: the Minister adopted all of the recommendations of the ECCC staff so any fettering of discretion was transferred to the Minister; much of the exhibits produced by the AG of Canada in its record were also not before the Minister when she made her decision so the AG of Canada cannot now allege that these documents are irrelevant; and that the deliberative privilege argument has no application to administrative decisions or, that if there is deliberative privilege in this case, it can be revoked. Lastly, Makivik argues that the honour of the Crown and NILCA militate in favour of the disclosure of the information.

[70] I am persuaded by the arguments of the Respondent AG of Canada that the documents in question are not relevant to the merits of the application before me. At this time, I need not determine whether they are privileged. As all parties have noted, the record has produced a voluminous amount of materials much of which was not before the Minister, whose decision is the subject of the judicial review. As discussed above, I have decided to view much of this material as background or to aid in providing context. Similarly, I find that the documents Makivik's motion seeks to produce are not relevant to this proceeding. There is nothing to suggest that they would clarify the Minister's decision-making process under these circumstances. I would not benefit from the production of the redacted portions of the documents in my deliberations in light of the state of the material produced by the parties and the direction that the proceeding has taken.

[71] Makivik's motion is therefore dismissed. The AG of Canada's objections regarding the relevance of Exhibits CE-4, CE-5 and CE-6 are maintained and these exhibits will be struck from the Court record.

IV. Issues

[72] Makivik raised the following issues:

(a) At the time she rendered her decision, did the Minister have jurisdiction to vary the non-quota limitations established by the Boards in their final decision?

(b) In the alternative, if the answer to the above question is yes, is the Minister's decision to establish a sex-selective harvest and vary other non-quota limitations decided by the Boards correct and/or reasonable?

(c) Was it correct or reasonable for the Minister to have considered the politics of international trade and/or issues related to CITES when making her decision?

(d) Was it correct or reasonable for the Minister to have considered the 2014 Voluntary Agreement when making her decision?

(e) Was it correct or reasonable for the Minister to place the entire burden of her conservation concerns on Nunavik Inuit?

(f) Did the Minister act reasonably or was she correct in law when she failed to provide the NMRWB with the opportunity to respond to her concerns regarding the methodology and results of its Inuit traditional knowledge study prior to making her decision?

(g) Did the Minister act reasonably or was she correct in law when she failed to seek further information regarding the methodology and results of the NMRWB's Inuit traditional knowledge study prior to making her decision?

(h) Did the Minister fail to give full regard to the integration of Nunavik Inuit knowledge of wildlife and wildlife habitat with knowledge gained through scientific research when making her decision?

(i) Did the Minister act reasonably or was she correct in law to rely on a "cautious management approach" as justification for limiting Nunavik Inuit harvesting when making her decision?

(j) Did the Minister prejudge the issue and/or fetter her discretion by adopting the position that the total harvest from the SHB population would have to be "defensible according to the CITES criteria"?

[73] In its written submissions, the NMRWB raised the following issues:

(a) Did the Minister fail to follow the procedure established under NILCA by failing to raise concerns about the methodology and results of the NMRWB's Inuit traditional knowledge study at the appropriate time and by thus failing to give the Board the opportunity to respond? If so, does this render the Minister's decision incorrect and/or illegal?

(b) Did the Minister fail to demonstrate the proper level of deference to the principles and objectives of NILCA? If so, does this render the Minister's decision incorrect and/or illegal?

(c) Did the Minister fail to demonstrate the proper level of deference to the NMRWB's Final Decision? If so, does this render the Minister's decision incorrect and/or illegal?

[74] The Intervener NTI, on the other hand, obtained leave of this Court to intervene on two of the issues raised by Makivik, namely that: 1) the Minister did not err in considering the 2014 Voluntary Agreement on polar bear quotas, and 2) the Minister did not "wrongfully and unfairly" favour the interest of Nunavut Inuit over Nunavik Inuit. NTI takes no position on the other issues raised by Makivik in the present application for judicial review.

[75] I will address the issues in the manner identified by Makivik because the issues identified by the NMRWB and NTI are encompassed within the issues raised by Makivik. The parties, for the most part, have also addressed their respective arguments in the manner identified by Makivik.

A. *Mootness Argument*

[76] As outlined in paragraphs 20-23, the Intervener AG of Nunavut asked this Court to decline to consider this application since the issues are, they allege, moot. Alternatively, if I did

not consider the application moot, the AG of Nunavut urged me to exercise this Court's discretion to decline granting declaratory relief.

[77] None of the parties have considered the mootness of the case. Instead, the parties presented written arguments arguing their support or disagreement with the Minister's decision. The Intervener AG of Nunavut submits that Makivik is now only asking this Court to address issues with respect to the implementation of NILCA. As determined in *Borowski*, "[t]his is not a request to decide a moot question but to decide a different, abstract question".

[78] The Intervener AG of Nunavut therefore submits that the present application for judicial review is no longer about the harvesting of polar bears from the SHB subpopulation because the remedy sought by Makivik applies to "any species harvested by Nunavik Inuit".

[79] I am not persuaded by the argument of the Intervener AG of Nunavut. I take the view that there remains a live controversy in how the decision-making process under NILCA is to unfold. Having the Court address the arguments may offer some guidance to the parties for how the process unfolded in this instance and it may assist in how future decisions will be made. The Court, considering the criteria as set in *Pro-West Transport Ltd. V Canada (Attorney General)*, 2007 FCA 206, will exercise its discretion to hear this matter.

V. Standard of review

[80] Before dealing with the issues as identified by Makivik, I must address the appropriate standard of review. The parties do not agree on the appropriate standard of review and their submissions are summarized below.

A. *The Applicant*

[81] Makivik acknowledges that the Supreme Court of Canada has not directly considered the question of what standard of review should apply to decisions made under or pursuant to modern treaties.

[82] Makivik relies on *Nacho Nyak Dun*, at paragraph 35, for the proposition that the only deference is to the terms of the Treaty itself, thereby suggesting that the standard of review is correctness. They further argue that none of the hallmarks of reasonableness are present in the decision-making regime in NILCA. For instance, they submit that there is no privative clause which benefits the Minister, NILCA is not the Minister's home statute, that the Minister has no particular expertise— or at least no more than Nunavik Inuit, and that the majority of the questions are not fact-based questions about conservation but legal questions about the proper interpretation of NILCA.

[83] Makivik further argues that the Supreme Court's words in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 30 [*Dunsmuir*] require balancing the rule of law with legislative intent. In

this case, they contend that there is no legislative intent, so only the terms of the Treaty are important. This further suggests that the correctness standard applies.

[84] Lastly, Makivik argues that *Kadlak v Nunavut (Minister of Sustainable Development)*, [2001] 6 WWR 276 [*Kadlak*] establishes that the standard of review is correctness and therefore this Court can rely on the principles of that case for the proposition that the standard of review is correctness.

B. *The Respondent NMRWB*

[85] The Respondent NMRWB did not make submissions on the standard of review.

C. *The Cree Respondent*

[86] The Cree Respondent supports Makivik's position that the standard of review is correctness in that the contents of the Treaty itself support deference to its terms. It too relies on *Nacho Nyak Dun* for the argument that the Minister owed the NMRWB deference due to their specialized knowledge or expertise and, therefore, the Minister can only propose partial or minor variations without altering the fundamental nature of the decisions.

D. *The Intervener AG of Nunavut*

[87] The Intervener AG of Nunavut argues that there is no jurisprudence that establishes the standard of review under the circumstances and therefore the Court must perform the analysis in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 29

[*Pushpanathan*]. It also argues that determining the standard of review is unnecessary if declaratory relief is declined.

E. *The Respondent AG of Canada*

[88] The Respondent AG of Canada argues that the presumptive standard of review is reasonableness, citing *Dunsmuir* at para 30 and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 39. The Respondent also relies on *Nunatsiavut v Canada (Attorney General)*, 2015 FC 492 [*Nunatsiavut*] for support that the proper standard of review is reasonableness.

F. *The Intervener NTI*

[89] The Intervenor NTI argues that the standard of review varies according to the characterization of the issue. They argue that: in terms of the interpretation of the Treaty, the standard of review is correctness since the Treaty is not the home statute of the Minister; in reviewing whether the 2014 Voluntary Agreement is a breach of the Treaty, the standard of review is correctness; in exercising the Minister's discretion pursuant to the Treaty, the standard of review is reasonableness; in determining the fairness of the TAT, it is not a Treaty Interpretation issue, therefore the standard of review is reasonableness.

G. *Analysis*

[90] I acknowledge that there is no well-established standard of review for the current matter which, as Makivik submits, is not a duty to consult case but rather an implementation of a

modern treaty. I also note that *Nacho Nyuk Dun, Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Little Salmon*], and *Nunatsiavut*, which were argued by the parties, all dealt with a duty to consult issue arising from a modern treaty. However, as stated, these cases are of limited application since Makivik has made clear that this case is not about the duty to consult. I must therefore embark on a standard of review analysis.

[91] The Supreme Court's analysis in *Pushpanathan* or *Dunsmuir* details that when determining the standard of review there are four factors to be taken into account. In *Dunsmuir*, the Supreme Court stated the following at para 64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal. In many cases it will be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[92] In *Canada (Citizenship and Immigration) v Khosa* [2009] 1 SCR 339 [*Khosa*], Justice Binnie, for the majority, also stated at para 376:

> Those factors have to be considered as a whole, bearing in mind that not all factors will necessary be relevant for every single case. A contextualized approach is required. Factors should not be taken as items on a checklist of criteria that need to be individually analyzed, categorized and balanced in each case to determine whether deference is appropriate or not. What is required is an overall evaluation. Nevertheless, having regard to the argument made before us, I propose to comment on the different factors identified in *Dunsmuir*, all of which in my view point to a reasonableness standard.

[93] I take the above passages to mean that no one factor is determinative. As in *Khosa*, it is be necessary in this case to comment on each factor.

[94] With respect to the absence or presence of a privative clause, NILCA does not contain a privative clause. In fact, NILCA itself provides that any decisions of the Minister may be challenged by way of judicial review. Therefore, I must review the other factors.

[95] The second factor is the purpose of the tribunal as determined by the legislation (or modern treaty in this case). *Dunsmuir*, at para 54, provides the following statement as to the deference owed:

> Deference will usually result where a tribunal is interpreting its own stature o*r statutes closely connected to its function*, with which it will have particular familiarity: […] Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule to a specific statutory context…
>
> [Emphasis added.]

[96] In this case, there is no statute but the terms of the modern treaty. The modern treaty, or at least many of the provisions, such as Article 5, is (or, are) in some respects closely connected with the Minister's functions, which are primarily related to conservation. Paragraph 5.1.2(j) provides that, "Government has ultimate authority for wildlife management and agrees to exercise this responsibility in the NMR in accordance with the provision of this Article".

[97] The submissions of the parties on the applicable treaty interpretation principles are also useful. The submissions of the parties, while referring to cases involving the duty to consult, are

relevant for the principle that Courts should exercise restraint. As stated by Justice Binnie in *Little Salmon* at para 54:

> The difference between the LSCFN Treaty and Treaty No. 8 is not simply that the former is a "modern comprehensive treaty" and the latter is more than a century old. Today's modern treaty will become tomorrow's historic treaty. The distinction lies in the relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork: *Quebec (Attorney General) v. Moses*, 2010 SCC 17. [2010] 1 S.C.R. 557.

[98] In my view, the principle of judicial restraint points to deference toward the terms of the Treaty unless there is some reason to depart from those terms as noted by Justice Binnie in *Little Salmon*.

[99] The Court in *Pushpanathan* at para 36 also states:

> …While judicial procedure is premised on a bipolar opposition of the parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint. The polycentricity principle is a helpful way of understanding the variety of criteria developed under the rubric of the "statutory purpose".

[100] I am of the view that the regime created by NILCA is also such a polycentric system where various interests are to be considered for the overall purpose of conservation, with special consideration being given to the interests of Nunavik Inuit. The collaborative process in NILCA,

as evidenced by the processes that the Boards and Minister employed, reflects both a consideration of several interests and different types of information. With that said, this application considers only the Minister's decision. The Minister's decision-making process in light of the overall process points to a deferential standard.

[101] The third factor is the "nature of the problem" and whether it is a question of law or fact. In *Pushpanathan* at para 37, the Court stated:

> There is no clear line to be drawn between questions of law and questions of fact, and in any event, many determinations involve questions of mixed law and fact. An appropriate litmus test was set out in *Southam, supra*, at para 37 by Iacobucci J., who stated:
>
> > Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might classify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

[102] In this regard, the process set out in NILCA is a collaborative process that strives to settle key facts in order to determine an appropriate wildlife management approach. On its face, it is my view that it is a fact-finding mission that both the Boards and the Minister employ. The record confirms this. The NILCA decision-making process points to deference.

[103] Regarding the last factor, expertise, I note that the intent of NILCA and the collaborative decision-making process is to blend ITK with the scientific knowledge or expertise of the Minister when it comes to wildlife management. In addition, the parties have negotiated a comprehensive treaty that also provides that, in paragraph 5.1.2(j), the "Minister has the ultimate

responsibility for wildlife management" and the Minister agrees to exercise this responsibility in accordance with Article 5.

[104] The Court does not have the benefit of any evidence that may assist in determining the parties' intent respecting paragraph 5.1.2(j). I am left to review the terms of NILCA itself. In my view, the terms of NILCA, as a whole, favour an interpretation that the parties accepted the Minister, ECCC officials, and staff possess some degree of expertise. The inclusion of paragraph 5.1.2(j) itself appears to reflect this.

[105] An analogous consideration of the terms of a modern treaty, albeit in a duty to consult case, was undertaken in *Nunatsiavut* at para 116:

> For example, a modern treaty by its terms may specify all, or certain aspects of, the consultation required, including participation in an identified environmental assessment process. Should the Crown fail to comply with those consultation requirements by not participating then it would have breached its duty to consult and, necessarily would have failed to identify and implement an adequate process of consultation in that regard. To proceed on that basis would be an error of law. However, if the Crown correctly identified the prevailing legal parameters, then the adequacy of the consultation process would be reviewed on the reasonableness standard.

[106] Therefore, the Minister's adherence to the decision-making process of NILCA will be reviewed on the correctness standard. This can be framed as whether the Minister had exercised her jurisdiction properly, which Makivik submits she did not. Jurisdictional challenges are determined on the correctness standard (*Dunsmuir* at para 59; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 18 and 24).

[107] The Minister's decision as a whole will be determined on the reasonableness standard. Under this standard, the Court is concerned mostly with the "existence of justification, transparency and intelligibility" and whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at para 47.

[108] The reasonableness standard is also supported by the following passage of *Nacho Nyak Dun* at para 60:

> Close judicial management of the implementation of modern treaties may undermine the meaningful dialogue and long-term relationship that these treaties were designed to foster. Judicial restraint leaves space for the parties to work out their understanding of a process- quite literally, to reconcile- without the court's management of that process beyond what is necessary to resolve the specific dispute.

[109] The parties have acknowledged that the NILCA decision-making process has never before been undertaken. NILCA provides for collaboration between the Boards and their technical advisors with the Minister and the Minister's technical advisors. That process is clear and undisputed. What is in dispute is the end result of that process which involved an assessment of this information and weighing or balancing of information leading to the Minister's decision.

VI. Submissions of the Parties and Analysis

A. *Did the Minister have jurisdiction to vary the non-quota limitations established by the Boards in their final decision?*

B. *In the alternative, if the answer to the above question is yes, is the Minister's decision to establish a sex-selective harvest and vary other non-quota limitations decided by the Boards correct and/or reasonable?*

(1) Applicant's position

[110] As a starting point, Makivik argues that, by virtue of section 5.3.1 of NILCA, there can be no restrictions of any kind imposed on Nunavik hunting rights unless the Treaty's terms are followed.

[111] Makivik submits that the Minister did not have jurisdiction to vary the non-quota limitations established by the Boards in their final decision. Makivik submits that the Minister ought to have rendered a decision within a comprehensive process established by NILCA, specifically sections 5.5.7 to 5.5.12. Makivik argues that the Minister failed to provide the Boards an opportunity to consider and to respond to their concerns regarding the non-quota limitations mentioned in the Boards' initial decision. It is therefore submitted that the Minister had no jurisdiction to vary the decision in accordance with section 5.5.12, as discussions under sections 5.5.8 and 5.5.11 did not occur (*The First Nation of Nacho Nyak Dun v Yukon*, 2015 YKCA 18 at para 151). Makivik contends that such omissions by the Minister should not be permitted as it would threaten the "central role" of the Boards in wildlife management in the NMR, as described in section 5.2.3 of NILCA (*Nacho Nyak Dun* at para 48).

[112] Makivik does, however, acknowledge that ECCC officials raised their concerns regarding some of the non-quota limitations established by the Boards. Makivik explains that the Minister cannot raise concerns after the Boards' final decision, without any consultation, as it is contrary to the modern treaty negotiated between the parties. According to Makivik, this procedural error constitutes "a breach of the honour of the Crown", even if it would not have changed the

outcome (*Corporation Makivik c Québec (Procureure générale)*, 2014 QCCA 1455 at para 78). On July 22, 2016, the Boards responded to ECCC's letter and wrote that no exchange had occurred in accordance with the preamble and provisions of NILCA.

[113] In the event that I conclude that the Minister did have jurisdiction to vary the Boards' decision, Makivik argues that the Minister's decision is incorrect and/or unreasonable. Although Makivik opposes to the entirety of the decision, it only chose to make submissions regarding the Minister's decision to impose a sex-selective harvest for brevity. Makivik submits that the Minister's response to respect the 4.5 percent removal rate requirement for the harvesting of polar bear "goes against Inuit traditions and values". As recognized by paragraph 5.1.2(c) of NILCA, Makivik submits that Nunavik Inuit have developed particular knowledge and understanding of the region and its resources.

(2) Respondents' positions

[114] The Respondent NMRWB and the Cree Respondent both argue that the Minister showed no deference to the Boards' decision since she ignored the Boards' non-quota limitations and established her own non-quota limitations. It is submitted that the Minister wrongly exercised her authority to vary the Boards' final decision since she can only accept, vary or reject non-quota limitation previously fixed by the NMRWB. The Respondents contend that the Minister disregarded the NMRWB's mandate from NILCA, a modern treaty that is "intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership" (*Nacho Nyak Dun* at para 33). The Cree Respondent is of the view that the Minister failed to "(1) tak[e] a

broad purposive approach to the interpretation of the promise; and (2) ac[t] diligently to fulfill it" (*Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 75).

[115] The Respondent AG of Canada, on the other hand, submits that the Minister did not err in rejecting the Boards' initial decision as a whole. It is submitted that NILCA allows the Minister to either accept or reject the Boards' decision. The Respondent AG of Canada argues that the Minister considered the Boards' non-quota limitations and rejected, or varied, only four of them since the Boards did not have the authority under NILCA to establish such non-quota limitations. It is further argued that the Minister reasonably imposed a sex-selective harvest and properly explained in the decision why it was necessary to respect the 4.5 percent removal rate requirement for the harvesting of polar bear, based on the scientific data before the Minister. According to the Respondent AG of Canada, Nunavik Inuit would not be prevented from exercising their harvesting rights by limiting the hunting of polar bear to a sex-selective harvest. In any case, the Respondent is of the view that the Minister did not impose a sex-selective harvest, but rather recommended that the Boards review this issue in the upcoming harvesting seasons.

(3) Analysis

(a) *Jurisdiction*

[116] I am persuaded by the argument of the AG of Canada and find that the Minister did have jurisdiction to vary the non-quota limitations established by the Boards in their final decision.

[117] Makivik's reliance on *Nacho Nyuk Dun* and the fact that that case involved a similar treaty decision-making process is not persuasive. The Supreme Court of Canada in that case found that, "allowing the Yukon government an unconstrained authority to modify the final recommended plan would render this process meaningless, as Yukon would have free reign to re-write the plan at the end" (at para 48). I do not view the Minister's approach as an unconstrained authority. NILCA set out what the Minister could or could not do in sections 5.5.7 to 5.5.11. These sections are reproduced below:

> 5.5.7 When the NMRWB makes a decision, it shall forward that decision to the Minister. The NMRWB shall not make that decision public.
>
> 5.5.8 After receiving a decision of the NMRWB pursuant to section 5.5.7, the Minister shall within 60 days or within such further period as may be agreed upon by the Minister and the NMRWB:
>
> (a) accept the decision and notify the NMRWB in writing; or
>
> (b) reject the decision and give the NMRWB reasons in writing for so doing.
>
> 5.5.9 The Minister shall be deemed to have accepted the decision of the NMRWB when:
>
> (a) the Minister has so notified the NMRWB in writing; or
>
> (b) the Minister has not rejected the decision within the time period and in the manner required pursuant to section 5.5.8.
>
> 5.5.10 Where the Minister is deemed to have accepted a decision of the NMRWB as provided in section 5.5.9, the Minister shall proceed forthwith to do all things necessary to implement that decision.
>
> 5.5.11 Where the Minister rejects a decision of the NMRWB pursuant to section 5.5.8, the NMRWB shall reconsider the decision in light of the written reasons provided by the

> Minister and make a final decision, which it shall forward to the Minister. The NMRWB may make the final decision public.

[118] The Minister followed that process. The process does not specify any additional steps for the Minister to take in considering the decisions of the NMRWB and making her own decisions.

[119] Makivik argued that when the Deputy Minister rejected the initial decision, the ECCC was silent about the non-quota limitations established by the Boards, yet the Minister's final decision varied this aspect of the Boards' final decision. It is this omission between the response from the Deputy Minister and the Minister's decision that Makivik argues leads to a lack of jurisdiction.

[120] The Respondent AG of Canada argued that the Minister had the authority to modify the non-quota limitations and that there was no requirement to provide detailed reasons for the rejection of the initial decision of the Boards. The Respondent further argues that, in any event the Minister, through the ECCC officials, did communicate concerns regarding the non-quota limitations.

[121] In oral argument, the AG of Nunavut pointed out that the public meeting notice referred to and attached in Mr. Gilbert's affidavit referred only to TAT. The notice provides, in part, "Further hearings will be held to consider harvests from Foxe Basin and Davis Strait subpopulations, and all non-quota regulations applicable to polar bear harvesting". However, the Boards' decision is not challenged. The notice and the ensuing decision of the Board reflect the

“newness” of the process that the parties were undertaking. Accordingly, I will not rely on this factor.

[122] The process undertaken by the Boards and the Minister could certainly have been improved. As stated above, the process in sections 5.5.7 to 5.5.11 do not set out the specific requirements of the Minister in arriving at a decision when considering a decision of the NMRWB. Beyond the requirement to provide reasons, they do not provide much guidance.

[123] As a general observation, I note that the composition of the NMRWB includes Makivik officials as well as Government officials, and it is surprising that only now the parties are making submissions about the deficiencies in the communications leading up to and during the decision-making process; yet there is no evidence that this was raised amongst the NMRWB members or among the technical representatives that the parties are permitted to enlist. If there were any discussions at the NMRWB or among the technical representatives, I do not have any evidence of this. Rather, in the affidavit of Ms. Breton-Honeyman, at paragraphs 71 to 74, the Minister did not always send a technical representative to the meetings and if there was a technical person attending they either did not voice any concerns with processes and other matters, or they were unfamiliar with NILCA. This was not refuted by the AG of Canada.

[124] Nevertheless, notwithstanding the fact that this inaugural process was not ideal, I find that the Minister followed the decision-making process set forth in NILCA. In other words, NILCA contains no specific restrictions on the Minister’s authority or jurisdiction to vary any non-quota limitations.

(b) *Was the Decision reasonable?*

[125] Turning now to the question of whether the Minister made a reasonable decision in relation to the non-quota limitations, once again the terms of NILCA must be reviewed. The Boards' ability to set non-quota limitations in accordance with section 5.2.19 is not unconstrained. The Boards' decision is subject to the terms of Article 5, which require both noting the Minister's ultimate authority on wildlife matters and aligning with the principles of conservation enumerated in sections 5.1.2 and 5.1.3.

[126] In addition to the terms of NILCA, it is important to look at the interactions of the Treaty partners. This is not a typical legal document— it is a constitutionally protected Treaty. Accordingly, the Minister's actions and steps taken must be viewed in this light and with the honour of the Crown.

[127] Taking these principles into account, I am persuaded by Makivik's argument that the omission between the response from the Deputy Minister and the Minister or between the ECCC staff and the NMRWB or its staff renders the Minister's decision unreasonable with respect to the non-quota limitations.

[128] As stated above, I have not been presented with any evidence that any discussions occurred at the NMRWB level or at the technical representative level. Had such discussions occurred and had such evidence been presented in this proceeding, I might have found otherwise.

[129] I therefore find that the Minister had jurisdiction to vary non-quota limitations but that this jurisdiction was not exercised reasonably.

C. *Was it correct or reasonable for the Minister to have considered the politics of international trade and/or issues related to CITES when making her decision?*

(1) Applicant's position

[130] Makivik argues that the Minister did not have the authority to refer to CITES in rendering the decision. In its written submissions, Makivik argued before this Court that the Minister's decision was unreasonable for considering CITES because:

(a) CITES does not place any legal obligations on Canada with respect to the level of the polar bear harvest, […];

(b) CITES is not an "international agreement" that must be taken into account under s. 5.5.4.1; and

(c) Inuit's economic interest in avoiding a trade ban is far less important than their cultural interest in maintaining an appropriate level of hunt.

[131] In the Memorandum to the Minister dated September 21, 2016, ECCC officials raised sustainable harvest and conservation concerns regarding the importance of polar bear parts for Nunavik Inuit's economic interests. Makivik, however, submits that, "[c]ommercial gain is not the aim of [Inuit] harvesting of polar bears". The Affidavit of Mr. Alaku provides, at paragraphs 25 and 26:

> I must emphasize, however, that the sale of the hide is not the primary motivating factor for Nunavik Inuit harvesting of polar bear. If the international trade of polar bear hides was banned tomorrow, and if the market for these hides ceased to exist, Inuit would continue harvesting polar bears, just as we did long before this market ever existed.

> This is why we cannot accept restrictions that are driven by considerations of international trade. Commercial gain is not the aim of our harvesting of polar bears; while the sale of hide can represent an important windfall for a particular hunter, polar bear hunting is, at its heart, about our connection with our environment.

[132] Makivik submits that the Minister erred in noting that the banning of polar bear trade under CITES would impact Inuit harvesting rates. Makivik argues that, "the two concepts are legally independent from one another".

(2) Respondents' positions

[133] The Respondent AG of Canada submits that the Minister's decision is reasonable and makes no mention of the politics of international trade or CITES. It is submitted that the Minister's decision to vary the TAT was based only on conservation concerns and therefore Makivik's argument is academic. In their recommendation letter to the Minister, ECCC officials only introduced issues related to CITES and international trade as an additional source of information about the principles of conservation, as required by NILCA.

[134] The Respondent AG of Canada further argues that the Minister did not err in considering issues related to CITES as the Convention does not contradict the principles established in NILCA. Considering that polar bears are enumerated in Appendix II of CITES, Article 2(a) of CITES states that, "all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival". Pursuant to section 5.1.2 of NILCA, the Respondent submits that, "the wildlife management system and the exercise of Nunavik Inuit

harvesting rights are governed by and subject to the principles of conservation". The Respondent AG of Canada therefore argues that both NILCA and CITES intend to respect the principles of conservation in order to protect the polar bears.

[135] The Respondent AG of Canada reminds Makivik, citing NILCA paragraph 5.1.3, that the purpose of NILCA is to promote the "long-term economic, social and cultural" interests of Nunavik Inuit [Emphasis added by the Respondent AG of Canada]. CITES therefore is an international agreement that was reasonably taken into account by the Minister in making the decision.

(3) Analysis

[136] I acknowledge the argument of Makivik that the profound cultural importance of the polar bear hunt is the most important factor for the Inuit and that this factor should have weighed more heavily in the balance for the Minister than any threat of a trade ban. Makivik argues that the Minister's reliance on a possible ban due to CITES justified the Minister in placing undue weight on the Inuit's economic interest in avoiding a trade ban. In making this argument, Makivik correctly notes the balancing that the Minister (and also the Boards in their initial and final decisions) must undertake.

[137] I also note that the affidavit of Gregor Gilbert makes many references to CITES and the discussions among the various parties over the course of several years related to CITES. Mr. Gilbert also echoes Mr. Alaku's evidence related to the degree of economic importance. For example, Mr. Gilbert states:

[46] Inuit organizations including Makivik were concerned by the possibility that polar bear would be up-listed to Appendix I. While trade and economic benefits are not the primary motivator for most polar bear harvesting carried out by the Inuit, it remains the case that, in an area where economic opportunities and well-paying jobs can be hard to come by, the amounts earned from the sale of a polar bear hide can be a very important source of income for communities. As the market for polar bear hides is mostly located outside of Canada, Inuit knew that if polar bear were up-listed this important source of income would disappear.

[…]

[65] In July 2012, a letter that had been approved by the relevant parties (Environment Canada, Makivik, Nunavut Tunngavik Incorporated, the NMRWB, Quebec and Ontario) was circulated to hunters in the Southern Hudson Bay management unit advising them that the 2011 voluntary agreement would likely be renewed. Among other things, this letter noted as follows:

> You will recall from the meeting in Inukjuak that Environment Canada officials spoke about the international scrutiny that polar bear management in Canada faces. In fact, several animal rights NGOs are using the SHB situation as a rationale to uplist polar bears to Appendix 1 of CITES at the upcoming Conference of the Parties in March 2013. If this proposal is successful it would effectively end trade in polar bear, and this would have a detrimental impact on hunters across the Canadian Artic. Abiding by the voluntary harvest limit is one way that we can collectively show the world that Canadians of the North are invested in a sustainable and responsible harvest.

[…]

[67] Indeed, as foreseen in this letter, a proposal to up-list polar bear from Appendix II to Appendix I was made by the United States ahead of the 2013 CITES CoP which took place in Bangkok, Thailand, from March 3 to 14, 2013.

[…]

[82] I attended the meetings in Ottawa in September 2014 that led to the 2014 voluntary agreement as a member of Makivik's delegation. It was clearly understood by all parties to those

> meetings that the purpose of the voluntary agreement was to counter the interest groups and governments that were lobbying for the up-listing of polar bears at CITES.

[138] Rachel Vallender stated at paragraph 21 of her affidavit:

> While the possible uplisting of polar bear under CITES was one of the reasons behind meetings to discuss, and subsequently develop, the 2011 and 2014 voluntary agreements, it was always secondary to ensuring a sustainable harvest of a species at risk. Indeed, ensuring the continuation of sound management practices was always the primary driver in any process involving the SHB polar bear subpopulation, including the two voluntary agreements and the Minister's decision of October 19, 2016.

[139] The above excerpts illustrate that Makivik and other parties were aware that CITES was a factor that was a backdrop to the discussions leading to and including the 2014 Voluntary Agreement. Makivik asserts that CITES played too prominent a role within ECCC staff and her decision.

[140] However, in reviewing the evidence, I am persuaded by the argument of the Respondent AG of Canada. The Minister was, by virtue of NILCA sections 5.5.3 and 5.5.4.1, entitled to consider certain domestic interjurisdictional agreements or international agreements pertaining to such wildlife. The sections read:

> 5.5.3 Decisions of the NMRWB or a Minister made in relation to Parts 5.2 and 5.3 shall restrict or limit Nunavik Inuit harvesting only to the extent necessary:
>
> (a) to effect a conservation purpose in accordance with sections 5.1.4 and 5.1.5;
>
> (b) to give effect to the allocation system outlined in this Article, to other provisions of this Article and to Articles 27, 28 and 29; or

(c) to provide for public health or public safety.

5.5.4.1 Certain populations of wildlife found in the NMR cross jurisdictional boundaries and are harvested outside the NMR by persons resident elsewhere. Accordingly, the NMRWB and the Minister in exercising their responsibilities in relation to section 5.2.3, paragraphs 5.2.4(b), (c), (d), (f), (h), and sections 5.2.10 to 5.2.22, 5.3.8, 5.3.10 and 5.3.11 shall also take account of harvesting activities outside the NMR and the terms of domestic interjurisdictional agreements or international agreements pertaining to such wildlife.

[141] It is not necessary for me to make a determination on whether or not CITES is an international agreement pertaining to wildlife. That is exclusively for the Treaty parties to determine. In any event, the Minister has not made a unilateral determination of whether CITES fits within that meaning therefore the parties can determine this in the future. I reproduced the above sections merely to illustrate that the Boards and the Minister must balance other matters. CITES was a factor among many other factors to consider with the ultimate goal of making a reasonable decision that had its basis on the principles of conservation as set out in sections 5.1.4 and 5.1.5. Those sections read as follows:

5.1.4 The principles of conservation will be interpreted and applied giving full regard to the principles and objective outlined in sections 5.1.2 and 5.1.3 and the rights and obligations set out in this Article.

5.1.5 For the purposes of this Article the principles of conservation are:

(a) the maintenance of the natural balance of ecological systems within the NMR;

(b) the maintenance of vital, healthy wildlife populations capable of sustaining harvesting needs as defined in this Article;

(c) the protection of wildlife habitat; and

> (d) the restoration and revitalization of depleted populations of wildlife and wildlife habitat.

[142] I find that the Minister's decision was not focused on CITES nor did CITES disproportionately impact the decision. The Minister was required to balance various matters and she did just that. ECCC officials in the Memorandum to the Minister did refer to CITES but I do not find that the Minister relied solely on CITES nor that there was an improper reliance on CITES.

[143] I do agree with Makivik's argument that, so far as the interests of the Inuit are more than economic, the harvesting of polar bears would continue even if the trade of polar bear skins were to be banned. However, I am persuaded by the AG of Canada's arguments that CITES or any consideration of a possible trade ban was properly considered in the Minister's balancing. The evidence indicates that CITES has always been in the backdrop of discussions related to polar bears.

[144] The Minister's consideration of CITES was reasonable because it informed her understanding of NILCA's goals of proper wildlife management and principles of conservation.

D. *Was it correct or reasonable for the Minister to have considered the 2014 Voluntary Agreement when making her decision?*

(1) Applicant's position

[145] Makivik argues that it was unreasonable for the Minister to have considered the 2014 Voluntary Agreement when making its decision. In the Memorandum to the Minister, ECCC

officials used this agreement to support their recommendation to the Minister that the agreement is a domestic interjurisdictional agreement pursuant to section 5.5.4.1 of NILCA. Makivik submits that the Minister therefore:

(a) committed an error in law by concluding that the 2014 Voluntary Agreement is a "domestic interjurisdictional agreement" within the meaning of NILCA;

(b) committed an error of mixed fact and law by failing to appreciate the legal effect of the "without prejudice" language in the 2014 Voluntary Agreement; and

(c) incorrectly and/or unreasonably relied on this agreement, in light of the facts leading to its conclusion and requirements of the honour of the Crown.

[146] Makivik contends that NILCA does not provide a definition for the term "domestic interjurisdictional agreement". In the event that the 2014 Voluntary Agreement was a domestic interjurisdictional agreement, Makivik argues that the Minister should have allowed the NMRWB to get involved in the negotiation of the agreement, as required by section 5.8.5 of NILCA (*Kwanlin Dün First Nation v Government of Yukon, et al.*, 2008 YKSC 66 at para 43). Makivik also submits that the Minister should not have relied on the 2014 Voluntary Agreement when it was already scheduled to expire in November of 2016.

(2) Respondents' positions

[147] The Cree Respondent agrees with Makivik's submissions and argues that the 2014 Voluntary Agreement cannot be considered a "domestic interjurisdictional agreement". The Respondent submits that the 2014 Voluntary Agreement was never meant to be a domestic interjurisdictional agreement, as the parties never signed the document. The Cree Respondent pointed to an approval process required for any matter or agreement to be binding on it. It argues that the Minister therefore erred in referring to the 2014 Voluntary Agreement as a "domestic

interjurisdictional agreement", as required by NILCA. The Cree Respondent preferred to refer to this voluntary agreement as a "document".

[148] The Respondent AG of Canada, on the other hand, contends that the Minister properly assessed the 2014 Voluntary Agreement and the Minister's decision was solely based on conservation concerns after careful review of the entirety of the evidence, including the 2014 Voluntary Agreement. The Respondent argues that neither ECCC officials nor the Minister considered varying the Boards' decision because of its non-conformity to the 2014 Voluntary Agreement. The Respondent is of the view that the 2014 Voluntary Agreement does not go against the mandate and objectives of NILCA. In any case, the Respondent further submits that the 2014 Voluntary Agreement allowed Nunavik Inuit to obtain a higher TAT for the harvesting of the SHB polar bears. Consequently, it is submitted that the Minister reasonably assessed the 2014 Voluntary Agreement as required by section 5.5.4.1 of NILCA, regardless of whether the 2014 Voluntary Agreement is a domestic interjurisdictional agreement.

(3) Intervener NTI's position

[149] The Intervener NTI also submits that the Minister properly considered the 2014 Voluntary Agreement. According to NTI, the 2014 Voluntary Agreement is the result of countless efforts and concessions that should respectfully be taken into account by the Boards and the Minister. NTI submits that, "[i]n resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and work out their differences" (*Nacho Nyak Dun* at para 33). NTI submits that the Minister did respect the parties'

2014 Voluntary Agreement, which already has a fixed allocated quota of the polar bear harvest in the SHB population.

[150] NTI does not agree with Makivik's contention concerning the characterization of the 2014 Voluntary Agreement. The Intervener NTI argues that the 2014 Voluntary Agreement did not have to be a "domestic interjurisdictional agreement" for it to be considered by the Minister in the decision. According to section 5.5.4.1 of NILCA, NTI submits that the Minister shall take into account domestic interjurisdictional agreements. However, the same provision of NILCA also includes, amongst others, that the Minister shall take into account "harvesting activities outside the Nunavut Settlement Area", which can be found in the terms of the 2014 Voluntary Agreement. This means that section 5.5.4.1 does not limit the Minister to only considering domestic interjurisdictional agreements.

[151] In any event, NTI is of the view that the 2014 Voluntary Agreement is a "domestic interjurisdictional agreement". Contrary to Makivik's submission regarding section 5.8.5 of NILCA, NTI argues that the NMRWB was present at the 2014 meeting which led to the crystallization of the 2014 Voluntary Agreement. In fact, the NMRWB chose to participate in the meeting as an observer. NTI argues that the NMRWB acted as an impartial tribunal in accordance with section 5.8.5 of NILCA. The evidence on record also shows that the NMRWB "did not wish to be an active participant at this meeting, as it was engaged in its own NILCA-stipulated process".

[152] NTI further argues that the presence of "without prejudice" language in the 2014 Voluntary Agreement did not prevent the Minister from referring to the agreement in its final decision. While the Minister was under no obligation to rely on the 2014 Voluntary Agreement, NTI submits that it was certainly not an error to have nonetheless respected the agreement "reached by and for Inuit" in order to determine harvesting quotas for Inuit.

(4) Analysis

[153] I am persuaded by the arguments of Makivik and the Cree Respondent that the 2014 Voluntary Agreement is not a "domestic interjurisdictional agreement" within the meaning of NILCA. As a basic point, the parties to the Treaty should be in a position to determine what kind of agreement meets this definition in the absence of a clear definition. The parties to NILCA have a jointly composed board in the NMRWB, along with technical advisors. One would assume that a co-management Board would have some discussions as to what constitutes a domestic jurisdictional agreement for the purposes of wildlife management. As this was an inaugural decision-making process under NILCA, it is understandable that there may have been some missteps taken by various parties; however, the classification of the 2014 Voluntary Agreement as a domestic interjurisdictional agreement by one party without the other parties' knowledge is not within the spirit and intent of the modern Treaty.

[154] In addition, the NMRWB was not formally given a role in the development of a domestic interjurisdictional agreement as required by section 5.8.5 of NILCA. The evidence indicates that the NMRWB attended as an observer. The decision-making process within the Cree Respondent governance structure also was not followed. It was incorrect for the Minister to consider the 2014

Voluntary Agreement as a domestic interjurisdictional agreement. It may be that the terms of any future voluntary agreement will attain such status by agreement of the parties.

[155] Turning now to whether the Minister should have considered the 2014 Voluntary Agreement at all, a brief overview by the affidavit of Mr. Alaku provides insight:

> [64] Indeed, it was clear to all participants that the driving force behind this meeting was Environment Canada's concerns regarding international scrutiny of polar bear harvesting in Canada, and the Southern Hudson Bay management unit in particular.
>
> […]
>
> [67] For this reason, article 7 of the 2014 voluntary agreement states as follows: "This voluntary agreement is without prejudice to other agreements pertaining to the harvest of polar bears, or to the decision-making process defined in the applicable land claim processes." It is notable that Environment Canada was a party to the 2014 voluntary agreement and that it agreed to this provision.
>
> [68] In light of this provision and of the context of the 2014 voluntary agreement, we at Makivik were very upset when we learned that one of the reasons that the Minister rejected the NMRWB's initial decision was because Environment Canada believed that the 2014 voluntary agreement constituted a "domestic interjurisdictional agreement" within the meaning of NILCA and that the NMRWB was required to take it into account when making its decision. For Makivik, this represented a betrayal of both the express terms of the 2014 voluntary agreement and of the spirit of cooperation and trust with which we had approached the meetings that led to it. I am informed by my legal counsel that this letter will be attached to the affidavit of Gregor Gilbert.

[156] This evidence confirms that the NMRWB was not comfortable with the idea of voluntary agreements generally. This was also indicated in the letter of the then Chair of the NMRWB in his letter to then Minister Peter Kent. However, voluntary agreements have been used as a means to respond in a timely manner to pressing wildlife management issues. I acknowledge the tension

in wanting to breathe life into a modern treaty such as NILCA by the Board decision-making process while at the same time having practical, temporary, and quick access to a voluntary agreement.

[157] Notwithstanding this tension, I also find that it was reasonable for the Minister to consider the terms of the 2014 Voluntary Agreement in arriving at her decision. As with CITES and other information before her (such as the ITK Summary and available scientific information), the 2014 Voluntary Agreement was one factor among many to consider. I find that it was not a focus of the Minister's decision. The non-prejudice language allowed for the consideration of the 2014 Voluntary Agreement as it was also not a privileged document.

[158] As a result, I conclude that there was no overreliance on the 2014 Voluntary Agreement in arriving at the Minister's decision. The Minister (and the Boards) were required to balance the various factors and the many interests at play and the Minister reasonably considered the 2014 Voluntary Agreement.

E. *Was it correct or reasonable for the Minister to place the entire burden of the conservation concerns on Nunavik Inuit?*

(1) Applicant's position

[159] Makivik argues that the Minister could have asked the NMRWB to go over the total allowable harvest of the Nunavut Inuit in the SHB management unit, pursuant to section 5.3.25 of NILCA. Makivik submits that the Minister was mindful of Nunavik Inuit's distress regarding the unequal split of quotas between themselves and the Nunavut Inuit. According to Makivik, the

Minister's omission to review the Nunavut Inuit's total allowable harvest was erroneous in that it breached the duty of minimal interference of Nunavik Inuit rights, as required by section 5.5.3 of NILCA. In accordance with paragraph 5.1.3(h) of NILCA, the Minister also ignored the objective of the wildlife management system, which aims to "promote public confidence in wildlife management, particularly amongst Nunavik Inuit".

[160] Makivik also submits that, once the Nunavut Wildlife Management Board [NWMB] advised that they would not be able to complete the process by September 2014 and when NWMB did nothing, ECCC let the matter drop. In essence, Makivik argues that the Minister should have insisted on a simultaneous review of Nunavut Inuit's TAT. In the end result, they claim, Nunavut Inuit agreed to a harvest of 20 bears when they were entitled to 25.

(2) Respondents' positions

[161] The Respondent AG of Canada generally agrees with NTI's submissions outlined below. The Respondent also adds that the Minister carefully reviewed the evidence and determined that the SHB polar bear subpopulation was only able to sustain a maximum harvest of 45 polar bears. By varying the TAT from 28 to 23 polar bears for Nunavik Inuit, it is submitted that, "[t]he resulting ratio between the Nunavut Inuit and Nunavik Inuit is essentially the same (i.e. 20 and 22, and now or 25 and 27), with Nunavik Inuit having around 52% of the total harvest of polar bears". The Respondent AG of Canada therefore argues that the Minister did not favour the Nunavut Inuit in the TAT allocation.

(3) Intervener NTI's position

[162] NTI argues that the Minister did not "wrongfully and unfairly" favour the interest of the Nunavut Inuit over Nunavik Inuit. During the negotiations of the 2014 Voluntary Agreement, it is submitted that the Nunavut Inuit of the Sanikiluaq community agreed to reduce their total allowable harvest from 25 to 20 polar bears a year although they had been harvesting the same amount of polar bears for over forty years. The Nunavut Inuit's decision to reduce their harvest was made in response to the conservation crisis of polar bears in the SHB. According to NTI, this conservation crisis was caused by Nunavik Inuit who became more involved in hunting from between 0 and 11 polar bears from 2003-2009, to 36 polar bears in 2010 and 74 polar bears in 2011. NTI also argues that the ratio of polar bears between the Nunavut Inuit and Nunavik Inuit is fair because the SHB has a higher population of Nunavik Inuit than Nunavut Inuit. NTI therefore submits that, "the respective polar bear quotas should be proportional to population".

(4) Analysis

[163] I am persuaded by the arguments of the AG of Canada and the Intervenor NTI in that the Minister did not unfairly and wrongfully consider the interests of Nunavut Inuit over Nunavik Inuit.

[164] While it is true that, as referenced in Mr. Alaku's affidavit at paragraphs 54, 58, and 60, the NWMB had not undertaken a process like the Boards did under NILCA, I am persuaded by the argument of the Respondent AG of Canada that the Minister had no possibility at the time of her decision to review a decision from the NWMB or to set polar bear harvesting limits for the Nunavut Inuit. Ideally, the process of the NWMB would have been undertaken concurrently with the NMRWB; but, unfortunately, that did not occur.

[165] Ms. Vallender, in paragraphs 88 and 89 of her affidavit sets out the difficulties in considering the Nunavut Inuit's interest. Essentially, unless there was a set limit imposed pursuant to NILCA there was a possibility that the Nunavut Inuit would not adhere to their voluntary limit of 20 polar bears per year and, instead, would revert back to their already established harvest level of 25.

[166] Such is the nature of this complex wildlife management structure as indicated at the outset of this decision. The plurality of interests requires that certain matters be dealt with at their respective tempos within their respective processes, all with the objective of adhering to the principles of conservation and taking the interests of the Inuit into account. As stated, the NWMB had not, at the time the Minister rendered her decision, engaged in their respective process as the NMRWB had done.

[167] I acknowledge the Respondent AG of Canada's argument that the current situation does not need to be permanent. The Respondent AG of Canada correctly notes that the Minister's decision acknowledges that adaptive wildlife management regimes require the best available information at a given time and that new information may lead to a re-evaluation of a previous decision. It argues that the Minister's decision was of a temporary nature. This temporary nature of the regime is also reflected in the Boards' final decision. All parties were alive to the temporary nature of any decision.

[168] The availability of this new information in the Boards' processes, along with that of the NWMB in the future, will allow for more collaboration and, perhaps, will lead to different outcomes in the future.

F. *Did the Minister act reasonably or was she correct in law when she failed to provide the NMRWB with the opportunity to respond to her concerns regarding the methodology and results of its traditional knowledge study prior to making her decision*

G. *Did the Minister act reasonably or was she correct in law when the Minister failed to provide the NMRWB with the opportunity to respond to her concerns regarding the methodology and results of its Inuit traditional knowledge study prior to making her decision?*

[169] As these two issues were presented together in Makivik's written and oral argument, I will address them together.

(1) Applicant's position

[170] Per section 5.5.8 of NILCA, the Minister must provide the NMRWB with written reasons for rejecting the Boards' decision. Makivik argues that the Minister failed this step in the decision-making process, not allowing the NMRWB to respond to the Minister's concerns regarding the context and methodology of the ITK study. It therefore submits that the Minister failed to give the Boards an opportunity to respond and seek clarification regarding the ITK study. As set forth in Makivik's Memorandum of Fact and Law at page 37:

> violated the provisions of NILCA that required them to communicate to the Boards the reasons for their rejection of the Boards' first decision;
>
> acted dishonourably by failing to raise these concerns with the Boards despite having many opportunities to do so;

(2) Respondents' positions

[171] The Respondent NMRWB and the Cree Respondent agree with Makivik's submissions and argues that the Minister failed in her requirement to provide reasons for rejecting the NMRWB's initial decision. As indicated under section 5.2.3 of NILCA, the Respondents submit that it is "the main instrument of wildlife management in the NMR and the main regulator of access to wildlife". When the Minister rejects the NMRWB's initial decision, reasons in writing must be provided to give the Board an opportunity to review them before reaching its final decision (NILCA, sections 5.5.8 and 5.5.11). Consequently, the NMRWB was not able to respond to the Minister's concerns regarding the ITK study as the final decision had already been rendered. The Respondent NMRWB submits that it was prevented from participating in NILCA's internal processes.

[172] The Respondent NMRWB also argues that the Minister preferred the scientific approach to ITK. In reaching her decision, the Minister chose to focus part of her analysis on the 4.5 percent maximum sustainable harvest level of the SHB polar bear. The NMRWB submits that in *Nacho Nyak Dun* at para 55, the Supreme Court of Canada concluded that, "Yukon thwarted the land use plan approval process" by failing to give an opportunity to respond to concerns raised by Yukon. The NMRWB therefore contends that the Minister failed to respect the provisions of NILCA by not allowing the NMRWB to participate in the decision-making process.

[173] The Cree Respondent argues that the Minister should have determined whether the NMRWB's decision was reasonable. Instead, the Minister ignored the Board's decision and

made its own assessment of Western scientific knowledge and the available ITK, “as if there could only be one “correct” level of total allowable take”.

[174] The Respondent AG of Canada, on the other hand, argues that it was reasonable for the Minister not to request additional information from the NMRWB about the methodology and results of its ITK study. When the Minister made its final decision without consulting the NMRWB, the AG of Canada submits that the Minister was only provided with a seven-page ITK Summary. It is submitted that the final version of the ITK report could not have been completed before May 4, 2018, which would not have served the Minister even if she had provided the NMRWB with an opportunity to respond to her concerns. It is this final report that could have fully addressed the Minister’s concerns regarding the context and methodology of the Inuit ITK study. In any case, the Respondent AG of Canada argues that the Minister considered all the evidence and information that was available to her at the time of her decision. The AG of Canada also reiterates that the information about the methodology of the ITK study was not even a subject of debate at the Boards’ public hearing process.

(3) Analysis

[175] As discussed above, the NILCA decision-making process, on its face, does not reveal any dialogue that must occur while the Boards and the Minister make decisions. As Ms. Breton-Honeyman states at paragraphs 78 and 79 of her affidavit:

> The analysis in the attachment to this letter from the Minister, “Attachment 1 – Response to the Final Decision on TAT for Southern Hudson Bay polar bear”, is the type of rationale for rejection that should have been provided to the Boards in response

> to the initial decision (see Attachment 1 of the Minister of Environment and Climate Change's decision);
>
> This would have allowed the Board to respond to these concerns;

[176] I am aware from the affidavit of Mr. O'Connor that a total of 26 hunters from three Nunavik Inuit communities were interviewed and that the study was conducted in a professional manner by Ms. Breton-Honeyman. None of the other parties disputed Ms. Breton-Honeyman's professionalism in her approach to the ITK study she led. Similarly, none of the parties are challenging the invaluable knowledge of those interviewed. The NMRWB and the Minister and/or the ECCC staff simply were not raising issues with one another.

[177] Nevertheless, I find that there was no obligation on the part of any of the NILCA parties to re-engage with each other in the middle of their respective decision-making processes. The Minister was not required by NILCA to re-engage with the Boards or to provide the Boards with an analysis document. It would certainly be a good practice for the NMRWB and their technical representatives to have comprehensive discussions about the approaches the respective parties were taking such that those discussions would make their way to the respective principals of the parties.

[178] I am cognizant of the statements of Mr. O'Connor and Mr. Alaku, who stated that they were not aware of any document setting out government policy or standards on the gathering of ITK. Ms. Vallender confirms in her affidavit that a draft protocol for integrating ITK into wildlife management decisions has been drafted but it has not been accepted by the parties. I

view this as an attempt to address the issues that are raised in this proceeding; however, the parties have not yet achieved success on a joint approach.

[179] The record indicates that several matters were in flux as new information was gathered and as new processes were engaged. This is not surprising in a wildlife management context—the temporary nature of matters and the continuous refinement of processes may be the only workable approach to wildlife management issues.

[180] The Minister's decision specifically mentions that the ITK information will eventually be provided and that the decision will need to be reconsidered in light of the new evidence and the results of an aerial survey would be carried out in 2016. I appreciate that the NMRWB would have preferred to receive the Minister's concerns about the methodology with the ITK Summary earlier and the NMRWB would have wanted an opportunity to respond to any concerns about the methodology and be provided with an opportunity to address any concerns with it.

[181] I find that the Minister's decision, in not providing her concerns to the NMRWB in this instance, was reasonable in light of the terms of NILCA. I also find that the decision to decline to seek further information regarding the methodology of the ITK study was reasonable. In the future, the parties would benefit from better communication so that wildlife management decisions are properly made at the Board and Ministerial level rather than by recourse through the Courts.

H. *Did the Minister fail to give full regard to the integration of Nunavik Inuit knowledge of wildlife and wildlife habitat with knowledge gained through scientific research when making the decision?*

(1) Applicant's position

[182] Makivik argues that the Minister failed to incorporate ITK with scientific knowledge in the decision. Makivik submits that the Minister failed to provide reasons to explain why it chose to give more weight to the scientific information rather than the ITK before the NMRWB. Consequently, at page 27 of its Memorandum of Fact and Law Makivik submits that the Minister and ECCC:

> breached their obligation under NILCA to give full regard to the "value of Nunavik Inuit approaches to wildlife management and Nunavik Inuit knowledge of wildlife" and to the integration of these approaches with scientific knowledge.

[183] Makivik submits that, "neither western science nor traditional ecological knowledge is sufficient in isolation for understanding the complexities of polar bear ecology, especially in the context of global climate change" (AR, Exhibit CE-2, Dominique Henri, *Combining Aboriginal Traditional Ecological Knowledge and Western Science for Polar Bear Research and Management in Canada: A Critical Review*, prepared for the Wildlife Research Division, Environment Canada (March 31, 2010), iii).

(2) Respondents' positions

[184] The Respondent NMRWB and the Cree Respondent argue that modern treaties such as NILCA should be treated respectfully. The NMRWB submits that modern treaties are the result of arduous and extensive negotiations "between well-resourced and sophisticated parties" (*Nacho Nyak Dun* at para 7; *Little Salmon* at para 9). That is why both Respondents argue that the Minister should have shown greater deference to the principles and objectives of NILCA.

The complex terms and detailed pages of modern treaties are meticulously drafted by the parties involved (*Nacho Nyak Dun* at para 36; *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 7). As stated by the Supreme Court of Canada in *Nacho Nyak Dun* at paragraph 37, "[p]aying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text as a whole and the treaty's objectives". The Cree Respondent argues that the Minister failed to take the NMRWB's findings into consideration and substituted them with its own. Therefore, it is submitted that the Minister's failure to consider ITK disregarded the *sui generis* nature of modern treaties.

[185] The Respondent AG of Canada, on the other hand, argues that the Minister properly considered all the available ITK prior to the decision. Although the Minister and the ECCC staff were provided with the ITK Summary, what occurred was a weighing of the ITK Summary with the scientific research. The Respondent AG of Canada submits that the Minister integrated some of the primary findings of the study in her decision, pursuant to paragraph 5.1.3 (f) of NILCA. For example, the Respondent submits that the Minister properly determined in her decision that both ITK and scientific reports found that climate change had a negative impact on the population size of polar bears. The Respondent AG of Canada further argues that the data found in the ITK Summary and the scientific report was not gathered during the same period of the year, which made the comparison even more difficult.

(3) Analysis

[186] Ms. Breton-Honeyman captures the tension at play between the scientific data and the ITK where she sets out the following conclusions of her research at paragraph 52 of her affidavit:

a. Polar bear harvesting by Nunavik Inuit communities generally has been under-reported. Hunters commonly only report polar bears they want to sell, not all of the bears they hunt (i.e. for personal use). There was no mandatory reporting mechanism in place. The historical and actual harvesting statistics are obviously very important for the establishment of the TAT of polar bears for a specific region;

b. By and large, Nunavik residents have observed an increase in the polar bear population, and a particularly notable increase since the 1980s (although this varies slightly depending on certain geographic consideration);

c. Nunavik Inuit most commonly reported observing litters of 2 or even 3 cubs, and some participants further noted that this is an increase over what has been observed in the past (frequently litters of only one cub). This is higher than the litter sizes that Dr. Obbard reported (1.56)(Exhibit GG-16);

d. Unlike the conclusions in Dr. Obbard's report, Inuit have not noticed a significant decline in the health of the polar bears. In fact Nunavik Inuit report that it is rare to see a skinny bear and most bears are observed to be healthy, within notably inter-annual natural fluctuations (i.e. skinnier in the summer and fatter in the winter/spring);

[187] As noted by Makivik, under NILCA, Nunavik Inuit harvesting rights can be limited only to the extent necessary to effect a conservation purpose in accordance with sections 5.1.4 and 5.1.5. It also argues that the Minister was also required to give full regard to the principles of paragraph 5.1.3(f), which recognizes the value of Inuit knowledge and integrates it with Western scientific research. That paragraph reads as follows:

> 5.1.3 The objective of this Article is to create a wildlife management system for the NMR that:
>
> (f) recognizes the value of Nunavik Inuit approaches to wildlife management and Nunavik Inuit knowledge of wildlife and wildlife habitat and integrates those approaches with knowledge gained through scientific research;

[188] I agree with Makivik's understanding of the approach in NILCA. Makivik also quotes the leading expert of ECCC who recognized that, "neither western science nor traditional ecological knowledge is sufficient in isolation for understanding the complexities of polar bear ecology, especially in the context of climate change".

[189] However, I am not persuaded by Makivik's argument that, essentially, the Minister set aside the Board's ITK Summary and that the failure of the ECCC to raise any concerns further compounded the error. The information before the Minister indicates that the Minister did factor in the ITK Summary as one of many factors to consider. Although the extent of the number of Nunavik Inuit participating in the study did not reflect the totality of the knowledge of the users of the resource, it was nevertheless considered.

[190] The Analysis accompanying the Minister's decision also discussed the "widely sustainable removal level" of 4.5 percent and noted that the TAT of 23 was close to this level. A further document, the Memorandum to the Minister also noted that the actual removal rate established by the Minister's proposed decision (at the time options were being presented to the Minister) was actually 4.7 percent. In other words, allowing the TAT to be set at 23 was actually above the accepted rate of 4.5 percent. The Respondent AG of Canada submits that this higher removal rate was as a result of the Minister factoring in ITK. Ms. Vallender states at paragraph 74 of her affidavit that, without the ITK suggesting an increase in one portion of the subpopulation, as well as concerns for human safety and the balancing of this information "I would have recommended a removal rate of less than 4.5% in order to try to ensure population stability given the pressures facing this subpopulation based upon scientific research".

[191] What the Minister and ECCC officials had before them was the ITK Summary. This summary was all that was available due to time pressures that were before the NMRWB. The NMRWB properly sought out additional traditional knowledge after the public hearings did not produce enough to the satisfaction of the NMRWB. This information was also considered by the Minister in accordance with NILCA provisions.

[192] The record also shows that the Boards also weighed the various information before them including summaries of the ITK gathered in the 1980's. It was the lack of ITK before the Boards that compelled the Boards to seek out more ITK after the public hearings in February 2014. As stated by Ms. Breton-Honeyman at paragraph 42 of her affidavit:

> Furthermore, presentations by invited Elders as well as other individual Inuit during the hearing made it clear to the Board that much of the knowledge known to Inuit from the Nunavik communities within the Southern Hudson Bay polar bear range was not documented in a comprehensive manner and was therefore not available for the Board to rely on in the same way as the scientific evidence.

[193] Makivik appears to suggest that the ITK Summary was enough and should have played a more prominent role in the Minister's decision. The Respondent AG of Canada says the ITK was factored into the decision.

[194] I am cognizant of Makivik's argument that none of the ECCC technicians had raised any issues with the methodology of the ITK Summary in their various meetings. Certainly, as discussed earlier, the parties would do well to utilize the NMRWB to its fullest potential, as it is the "main instrument" of wildlife management. NILCA does not specify whether and how the

parties must raise issues with one another, but a co-management board might be an ideal venue for such candid discussions. I hope that parties have learned from this inaugural process.

[195] In light of the evidence, I find that the Minister took the available ITK into account in her decision when assessing the available scientific evidence. In this regard, the Minister's decision is reasonable.

[196] I also note that the Boards struggled with the same balancing that had to occur when they stated the following in their opening paragraph of the conclusion in their first decision:

> Although further work is needed to improve the way in which the knowledge of Nunavik Inuit is brought together with knowledge gained by scientific research for decision-making, the NMRWB has made significant efforts to give full consideration to knowledge from all sources throughout this process. The preceding text provided an overview of the biological, socio-economic and harvest information that was considered by the NMRWB in reaching its decision on the Total Allowable Take for Southern Hudson Bay polar bears. Since a comprehensive study of Nunavik Inuit Traditional Knowledge was not available to previous decision-makers, it is possible that aspects of the NMRWB decision differ from previous agreement while maintaining a similar management objective.

I. *Did the Minister act reasonably or was she correct in law to rely on a "cautious management approach" as justification for limiting Nunavik Inuit harvesting when making her decision?*

(1) Applicant's position

[197] According to Makivik, the Minister erred in concluding that, "a cautious management approach is warranted for the Southern Hudson Bay management unit". Makivik submits that Article 5 of NILCA is silent on the cautious management approach or a "precautionary

approach". It is submitted that any precautionary approach needs to align with Inuit harvesting rights, also taking into account wildlife management with scientific knowledge as established by NILCA. Makivik acknowledges that, "the precautionary principle is a principle of customary international law" (*114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 32). However, Makivik understands that a validly adopted law or regulation cannot be annulled for disregarding the precautionary principle (*Hanna v Attorney General for Ontario*, 2010 ONSC 4058 at para 14). Makivik argues that by not integrating Inuit approaches to wildlife management with scientific knowledge, as required by NILCA, the Minister failed to discharge its obligations under NILCA in a manner consistent with the honour of the Crown.

(2) Respondents' positions

[198] The Respondent AG of Canada argues that the Minister did not err in adopting a cautious management approach. According to the Respondent, the Minister's reasons were clearly articulated at the beginning of the decision: "The decision also recognizes the need to exercise caution so as to ensure a sustainable harvest, and the fact that once new information is available, the TAT can be re-assessed". Such an approach would avoid detrimental consequences to the SHB polar bear population. The Minister was well aware of the differences between the ITK and the scientific evidence, which is why it was necessary to adopt a cautious management approach.

[199] The Respondent AG of Canada also argues that this approach is reflected in the Boards' final decision when it indicated that frequent scientific populations estimates were needed to ensure that harvesting did not become detrimental and that the decision may need to be re-visited

should the wildlife management system result in undue pressures on the polar bears due to environmental changes.

(3) Analysis

[200] As stated above, what this proceeding reveals is the tension between the approaches of the Boards and the Minister. For example, at paragraphs 63 to 65 of her affidavit, Ms. Breton-Honeyman states:

> From the Board's perspective, the population would likely have to decline significantly before a conservation concern would arise;
>
> Furthermore, the Board decided that a TAT of 28 bears until new survey results are available (likely in 2018) would not pose a conservation concern;
>
> The letter also stated that, as Environment Canada had already expressed in its submissions during the public hearing, "a maximum sustainable harvest of 4.5% should not be exceeded as it could cause the population to decline";

[201] Ms. Vallender, in paragraphs 62 to 66 of her affidavit, also sets out in detail the rationale for the cautious management approach, namely that there may have been incomplete information, a lack of information or even conflicting information before the parties.

[202] I am persuaded by the argument of the Respondent AG of Canada. I find that it was necessary and reasonable to adopt a cautious management approach in light of the state of the information before the Boards and the Minister, which could be described as interim information. In fact, in the wildlife context, the information will be constantly changing. The

decisions will have to be revisited accordingly from time to time as conditions change. The Board itself mentioned this in its final decision.

[203] I also note NILCA's paragraph 5.1.2(h), along with the Principles of Conservation set out in sections 5.1.4 and 5.1.5, together with limited information before the Minister, led to the adoption of the cautious management approach.

[204] I find that the Minister further recognized the need for further assessments of information by the limited duration of her decision where it provided that the decision would remain in effect until new data became available and a new process would be engaged. The Minister's approach was reasonable under these particular circumstances.

J. *Did the Minister prejudge the issue and/or fetter her discretion by adopting the position that the total harvest from the SHB population would have to be "defensible according to the CITES criteria"?*

(1) Applicant's position

[205] Makivik argues that the Minister wrongly prejudged the issue and/or fettered its discretion in deciding that the total harvest of SHB polar bear population needed to satisfy CITES parties and respect the 4.5 percent removal rate.

[206] As submitted by Makivik, in *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 60, the Federal Court of Appeal determined that:

> [D]ecision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an

> administrative policy: *Thamotharem*, *supra* at paragraph 59; *Maple Lodge Farms*, *supra* at page 6; *Dunsmuir*, *supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.
>
> [Emphasis added.]

(2) Respondents' positions

[207] The Respondent AG of Canada disagrees with Makivik's submission and argues that the Minister did not fetter her discretion when making her decision. The Respondent argues that the crux of Makivik's argument is based on the premise that the Minister prejudged the decision to satisfy CITES parties. In *Elson v Canada (Attorney General)*, 2017 FC 459 at para 139, this Court found that, "[t]he onus is on the Applicant to establish that there is a prejudgment of the matter to the extent that any representations at variance with the view which has been adopted would be futile". The Respondent AG of Canada therefore submits that Makivik failed to demonstrate that the Minister was biased during the decision-making process. The Respondent contends that the Minister rendered her decision with an open mind, by relying on the available evidence before her.

(3) Analysis

[208] I am persuaded by the argument of the Respondent AG of Canada. Makivik has not discharged the high evidentiary burden to establish bias or to establish that the Minister's discretion was fettered. To the contrary, the record illustrates that the Minister's decision was influenced by the information before the Boards along with the ECCC's advisors. More

importantly, the Minister's letter itself indicates the temporary nature of the decision, noting that, once new information is assessed, the TAT can be reassessed.

[209] As stated above, the process has room for improvement. In the future, it might possibly address all of the issues raised in this proceeding in wildlife management decisions for the benefit of Nunavik Inuit.

VII. Conclusion

[210] I summarize my answers to the issues as follows:

(a) At the time she rendered her decision, did the Minister have jurisdiction to vary the non-quota limitations established by the Boards in their final decision?

Yes.

(b) In the alternative, if the answer to the above question is yes, is the Minister's decision to establish a sex-selective harvest and vary other non-quota limitations decided by the Boards correct and/or reasonable?

No.

(c) Was it correct or reasonable for the Minister to have considered the politics of international trade and/or issues related to CITES when making her decision?

Yes.

(d) Was it correct or reasonable for the Minister to have considered the 2014 Voluntary Agreement when making her decision?

Yes.

(e) Was it correct or reasonable for the Minister to place the entire burden of her conservation concerns on Nunavik Inuit?

The Minister did not do so, and the decision was reasonable.

(f) Did the Minister act reasonably or was she correct in law when she failed to provide the NMRWB with the opportunity to respond to her concerns regarding the methodology and results of its Inuit traditional knowledge study prior to making her decision?

Yes.

(g) Did the Minister act reasonably or was she correct in law when she failed to seek further information regarding the methodology and results of the NMRWB's Inuit traditional knowledge study prior to making her decision?

Yes.

(h) Did the Minister fail to give full regard to the integration of Nunavik Inuit knowledge of wildlife and wildlife habitat with knowledge gained through scientific research when making her decision?

No.

(i) Did the Minister act reasonably or was she correct in law to rely on a "cautious management approach" as justification for limiting Nunavik Inuit harvesting when making her decision?

Yes.

(j) Did the Minister prejudge the issue and/or fetter her discretion by adopting the position that the total harvest from the SHB population would have to be "defensible according to the CITES criteria"?

No.

[211] Accordingly, the application for judicial review is dismissed. The Minister's consideration and adherence to the NILCA decision-making process was correct and, with the exception of my finding respecting issue (b), the remainder of the Minister's decision was reasonable. As Makivik and the other parties made clear, Makivik is not seeking to quash the Minister's decision so the decision, as it is, stands. The temporary nature of the decision is a major factor in my decision.

[212] I also find that declaratory relief would not be appropriate at this preliminary stage, as it would affect the parties' intention to improve the wildlife management system for Nunavik Inuit

as established by NILCA. There are other subpopulations of polar bear to be considered by the NMRWB and the Minister and other wildlife species that the parties will need to manage.

[213] I appreciate Makivik's and the Cree Respondent's references to the principles of treaty interpretation; however, "The court's role is not to assess the adequacy of each party's compliance at each stage of a modern treaty process" (*Nacho Nyak Dun* at para 60). It is premature to grant declaratory relief on issues regarding the interpretation of NILCA, issues that could have been resolved by the parties at an earlier stage would not serve useful, especially in similar matters in the future. "Modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership" (see *Report of the Royal Commission on Aboriginal Peoples* at 3, 10 and 40-41; see also *Little Salmon* at para 10; see also *Nacho Nyak Dun* at para 33).

[214] In *Solosky v The Queen*, [1980] 1 SCR 821, the Supreme Court of Canada found that, "[o]nce one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case".

[215] By declining to grant relief in the present application, I am of the view that the parties would continue "to govern together and work out their differences" and "to work out their understanding of a process – quite literally, to reconcile – without the Court's management of that process" (*Nacho Nyak Dun* at paras 33 and 60).

JUDGMENT in T-1994-16

THIS COURT'S JUDGMENT is that:

1. Makivik's motion to strike paragraphs 92, 93 and 94 and the accompanying exhibits of Rachel Vallender's affidavit is granted.
2. Makivik's motion to determine the propriety of objections made by the AG of Canada during the course of a written cross-examination is dismissed.
3. The Application for judicial review is dismissed.
4. Notwithstanding the finding on issue b) as set out above, and exercising my discretion in the matter, I decline to grant the declaratory relief sought by Makivik.
5. I exercise my discretion and decline to award costs due to the nature of these proceedings and the fact that this was an inaugural process for the parties.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1994-16
STYLE OF CAUSE:	MAKIVIK CORPORATION v THE HONOURABLE CATHERINE MCKENNA, IN HER CAPACITY AS MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND THE ATTORNEY GENERAL OF CANADA, IN HER CAPACITY AS THE LEGAL MEMBER OF THE QUEEN'S PRIVY COUNCIL CHARGED WITH THE REGULATION AND CONDUCT OF ALL LITIGATION AGAINST THE CROWN AND NUNAVIK MARINE REGION WILDLIFE BOARD AND EEYOU MARINE REGION WILDLIFE BOARD AND, THE GRAND COUNCIL OF THE CREES AND NUNAVUT TUNNGAVIK INCORPORATED AND ATTORNEY GENERAL OF NUNAVUT
PLACE OF HEARING:	INUKJUAK, NUNAVUT
DATE OF HEARING:	FEBRUARY 4-7, 2019
JUDGMENT AND REASONS:	FAVEL J.
DATED:	OCTOBER 30, 2019

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