



P.O. Box 2050, Station B
Happy Valley - Goose Bay
NL, A0P 1E0

T: 709.896.6780
F: 709.896.6786

www.torngatsecretariat.ca

Monday, May 17, 2010

The Honourable Gail Shea, M.P.
Minister of Fisheries and Oceans
200 Kent Street
Ottawa, Ontario
K1A 0E6

Re: Management of the Northern Shrimp Fishery in the Labrador Inuit Settlement Area, and waters adjacent to the "Zone"

Dear Minister Shea:

As Chairperson of the Torngat Joint Fisheries Board, and subject to the provisions of the Labrador Inuit Land Claims Agreement (LILCA), I submit for your consideration the Board's recommendations on the management of the 2010 Northern Shrimp Fishery, which overlaps the portion of the Labrador Inuit Settlement Area defined as the "Zone", as well as waters adjacent to the Zone.

The Board recommends:

- *The Minister increase the exploitation rate on the northern shrimp fishable biomass in Shrimp Fishing Area 4 (i.e. SFA 4) to 14% in 2010 and that 75% of the corresponding increase in the Total Allowable Catch be allocated to the Nunatsiavut Government.*
- *The Minister initiate consultation with the Torngat Joint Fisheries Board on the application of the Last-In-First-Out policy as it applies to the Northern Shrimp Fishery.*

In earlier correspondence the Board described the growing disenchantment in Nunatsiavut over the languishing state of their commercial fishery, despite a land claims agreement that has provisions to remedy disparities and longstanding issues that have not been addressed through normal fishery consultative mechanisms and advisory processes.

The Board raises for your consideration three principal issues in the Northern Shrimp Fishery:

1. Inequitable Allocation of fishing opportunities to the Nunatsiavut Government in Shrimp Fishing Areas adjacent to the Labrador Settlement Area vis-à-vis Section 13.12.7 of the LILCA, and
2. The "Honour of the Crown" as it relates to the interpretation of treaty language and consultation.
3. Consultation with the Board on allocation decisions and the Last In First Out principle in the Northern Shrimp Fishery, and the relevance and application of the policy to the Nunatsiavut Government.

The Board's analysis of allocations in SFA 4 and SFA 5 reveal that the Nunatsiavut Government and the Labrador Inuit have not benefitted to the same extent as other peoples, regions, fishery groups or participants from resources adjacent to their traditional use areas, communities and land claims area.

The Board has learned that the Honour of the Crown under current aboriginal and treaty law is well defined, and a literal interpretation of Section 13.12.7 would not likely be favoured by the



P.O. Box 2050, Station B
Happy Valley - Goose Bay
NL, A0P 1E0

T: 709.896.6780
F: 709.896.6786

www.torngatsecretariat.ca

courts if the dispute were to deteriorate to a legal challenge. In short, the case law on the Honour of the Crown is unequivocal; treaties and documents must be interpreted generously.

The Board is of the view that its recommendation for the significant allocation will bring Nunatsiavut participation in a fishery adjacent to the Labrador Inuit Settlement Area near the levels enjoyed by other resource users to fisheries off their coasts and traditional use areas.

The Board's recommendations are offered in conjunction with its earlier recommendation on Greenland halibut, and are intended to introduce balance through a system's approach. The actions required to implement these changes would not be precedent setting, and would uphold the Honour of the Crown.

Your's truly,

John Mercer
Chairman
Torngat Joint Fisheries Board

cc. William Barbour, Minister of Lands and Natural Resources
Clyde Jackman, Minister of Fisheries and Aquaculture
LILCA Implementation Committee

Torngat Joint Fisheries Board
Memorandum to the Minister of Fisheries and Oceans
Fishery Management in Nunatsiavut
(May 17, 2010)

Issue: Management of the Northern Shrimp Fishery in the Labrador Inuit Settlement Area, and waters adjacent to the “Zone”.

Recommendation:

It is recommended that:

- The Minister increase the exploitation rate on the northern shrimp fishable biomass in Shrimp Fishing Area 4 (i.e. SFA 4) to 14% in 2010 and that 75% of the corresponding increase in the Total Allowable Catch (TAC) be allocated to the Nunatsiavut Government.
- The Minister consult with the Torngat Joint Fisheries Board on the application of the Last-In-First-Out policy as it applies to the Northern Shrimp Fishery.

Background:

1. The Torngat Joint Fisheries Board and management of the Northern Shrimp Fishery

- The Torngat Joint Fisheries Board (hereafter the “Board”) is the creation of the three negotiating parties to the Labrador Inuit Land Claims Agreement (hereafter the “LILCA”), and established under the Agreement, with its roles, responsibilities and powers outlined in parts 13.10 and 13.11 of Chapter 13. The Board is the primary body making recommendations on the conservation of a species set out in the Agreement, and the management of fisheries in the Labrador Inuit Settlement Area (other than the Inuit Domestic Fishery, whose management falls under the authority of the Nunatsiavut government).
- The TJFB has both the authority and responsibility to make recommendations and provide advice to the Minister on management and allocation decisions on northern shrimp - sections 13.11.1 (a) and (b), 13.11.2 (b), 13.11.9 and 13.12.7 of the LILCA.
- The northern shrimp fishery began off the coast of Labrador and the present day Labrador Inuit Settlement Area in the mid 1970's, primarily in the Hopedale and Cartwright Channels (present day SFA 5), and these areas along with Hawke Channel, St. Anthony Basin and the Saglek Bank slope off northern Labrador have been longstanding fishing areas. Fishing areas farther north have contributed to a lesser degree, and in

recent years SFA 7 and the Funk Island Deep in SFA 6 have experienced substantial growth.

- The development and management of the northern shrimp fishery has followed a different path than the other primary shellfish fisheries in Atlantic Canada, being the only such fishery where access is not limited by sector or regional management. Put simply, shrimp off Nova Scotia is limited to Nova Scotian fishing interests; Gulf Shrimp is limited to Gulf-based fishing interests, but northern shrimp off Newfoundland and Labrador has been made available to fishing and non-fishing interests in Atlantic Canada including Nunavut and Nunavik.
- The 1990s marked a period of substantial growth of the northern shrimp resource (particularly in SFAs 5 & 6), quotas and landed value. The decline of groundfish and the moratorium on northern cod resulted in many requests and subsequent access to the burgeoning and lucrative northern shrimp fishery by groups throughout Atlantic Canada. The fishery is now showing some signs of decline, and participants are being severely impacted by the current global economic crisis.
- Increased access to the shrimp resource for Aboriginal people was a priority for Fisheries and Oceans Canada in 2003, resulting in temporary allocations to the Innu, the Nunatsiavut Government, the Labrador Métis Nation and the Miawpukek First Nation. Access to the Northern Shrimp Fishery has also been provided to special interest groups including the Fogo Island Cooperative in SFA 6, a PEI Consortium in SFA 7, and inshore cod fishers from the Quebec lower north shore. There are also special allocations to Nunavik and Nunavut interests in SFA 5, obtained through the Northern Coalition.
- The Board has found through its analyses that allocation principles have been inequitably and inconsistently applied in respect of Labrador Inuit access to the northern shrimp resource, particularly to those shrimp fishing areas situated within the Labrador Inuit Settlement area, and the waters immediately adjacent to the “Zone”.
- The importance of northern shrimp to the Labrador Inuit is evident in the LILCA. Its prominence is marked by it being the only species for which there is a specific clause in the land claim agreement, to wit Section 13.12.7:

“If in any calendar year after the Effective Date the Minister decides to issue more Commercial Fishing Licences to fish for shrimp in Waters Adjacent to the Zone than the number available for issuance in the year of the Agreement, the Minister shall offer access to the Nunatsiavut Government through an additional Commercial Fishing Licence issued to the Nunatsiavut Government or by some other means to 11 percent of the quantity available to be Harvested under those licences.”

2. The 2008 increase of the SFA 4 TAC and The Honour of the Crown

- The Board is concerned with the decision to increase the SFA 4 northern shrimp Total Allowable Catch by 1000t for the 2008 fishing season without consulting the Board, and the subsequent allocation process which ignored Section 13.12.7 of the LILCA.
- The allocation process of the past decade has significantly limited Labrador Inuit opportunities, particularly in SFA 4. The allocation decisions run counter to the principle of the Honour of the Crown as it relates to interpreting language of a treaty, and aboriginal case law such as *Haida v. B.C (2004)*, where the court clearly indicated that the duty of the Crown is to interpret treaties generously, and to consult and accommodate. Despite Ministerial authorization of new access, entrants, and multiple quota increases, the Nunatsiavut Government has been excluded from fishing areas within and immediately adjacent to the Labrador Inuit Settlement Area, perhaps as a result of an overly literal interpretation of Section 13.12.7.
- In correspondence to the Northern Shrimp Advisory Committee (NSAC) of February 18, 2009 Fisheries and Oceans Canada (hereafter DFO) confirmed a 1000t increase to the SFA 4 quota for 2008, distributed as per traditional sharing arrangements in the fishery. The Board was provided no opportunity to give advice on the allocation principles, scientific information and conservation measures, or the interpretation and application of Section 13.12.7 in respect of the traditional sharing arrangements and new processes or measures that could be invoked as a result of the LILCA. The coastal and marine region encompassed within SFAs 4 and 5 are *de facto* traditional Labrador Inuit occupancy and resource use areas. The Nunatsiavut Government has been provided no access to SFA 4 to date, and this is inconsistent with general allocation principles and the provisions of Section 13.12.7 of the Agreement.
- Had the Board been consulted, it would have advised of its understanding of case law on the Honour of the Crown in respect to aboriginal rights and treaties. It would have recommended that the Nunatsiavut Government receive separate and distinct allocations of northern shrimp in SFA 4 and SFA 5 in each instance where there is an increase, as these areas are within and immediately adjacent to the Labrador Inuit Settlement Area (i.e. the “Zone”).
- The fact that there is a stand-alone clause on northern shrimp in Chapter 13 provides insight to the substantive discussions around shrimp quotas and licences during land claim negotiations on the Fisheries Chapter, which were coincident with the rapid growth of the fishery. The Labrador Inuit had expectations that there would be opportunities with respect to northern shrimp.
- The Board obtained a *without prejudice* legal opinion of Section 13.12.7 and also a summary of the jurisprudence on the Honour of the Crown with reference to modern

treaty agreements for the purpose of reconciling differences of interpretation and application between the Nunatsiavut Government and the DFO.

- The Board was advised that a literal interpretation of Section 13.12.7 would likely be deemed unreasonable in the eyes of the court because of the Crown's duty to interpret treaties generously and not use treaty language in a prejudicial manner. The Board holds the view supported by the case law that like other agreements the LILCA was crafted as a living and enabling document and not an instrument to be used pejoratively by the negotiating parties. There have been multiple quota increases in SFA 4 and the Nunatsiavut Government has yet to be provided any opportunity. The jurisprudence on the "Honour of the Crown" is unequivocal around the interpretation and application of treaty language, with the relevant case law indicating that such language is not to be narrowly interpreted or construed if a more general construction is reasonable.
- The language of Section 13.12.7 has proven controversial. There have been large quota increases and many new entrants to the northern shrimp fishery since 1996, but no Minister of Fisheries and Oceans has issued a shrimp licence adjacent to the "Zone" prior to or since the LILCA was officially promulgated. In this context, the literal interpretation of the clause has unduly restricted the Labrador Inuit from acquiring and developing opportunities from immediately adjacent natural resources, which is at odds with the spirit and tenor of the negotiations and the resulting land claim agreement.

3. Inequities in Northern Shrimp Allocations adjacent to the Zone

- Equitable allocation is an immediate and pressing issue for Nunatsiavut at this time, across all fisheries. The Northern Shrimp Fishery Total Allowable Catch has increased significantly over the past decade, and particularly through the 1997 to 2003 period in SFAs 4, 5 and 6 off Labrador. It is this period that reflects the greatest increase in quotas and introduction of new users. Nunatsiavut interest participation in the fishery has declined from a historical level of 9% to a present level of 5% over this time span.
- Nunatsiavut Government and other Labrador-based interests have not been the principal beneficiaries of resources occurring immediately off the Labrador Inuit Settlement Area and the Labrador coast. Despite a succession of large quota increases in the fishing areas immediately adjacent to the northern and southern Labrador, in some instances within tens of miles of communities, the overall access of aboriginal and non-aboriginals in Labrador has hovered around 23%. Access increased to 27% in 1997 as a result of allocation increments on the announcement of 7,650t and 12,050t increases to the TAC in SFAs 5 & 6 in that year, but dropped to 22% in 1998 and 20% in 1999 and 2000.
- In 1998 there was a 3,120t increase in SFA 4 TAC, the fishing area situated immediately off northern Labrador. Nunatsiavut-based enterprises in the offshore sector received nominal shares as traditional offshore users but there was no separate and larger increment for the Labrador Inuit to recognize their adjacency, historical attachment and need.
- In 2000 Labrador interests saw their access in the northern shrimp fishery drop to a low of 20% when new allocations announced in 3L (i.e. SFA 7) were provided almost exclusively to the adjacent 3L inshore fleet and other southern interests. Despite substantial quota increases and resource sharing of shrimp adjacent to their communities in shrimp fishing areas 4 and 5, the same allocation criteria and decision making was not reciprocated for the Labrador Inuit.
- Announced quota increases in SFAs 0, 1, 2 and 3 in recent years are dubious allocations, as evidenced by corresponding catch rates over the last decade. The reasons for this are: the resource is not robust in SFA 1, where TACs are increased by Canada on the basis of science conducted in Greenlandic waters; in SFA 2 catch rates are significantly less than areas to the south and are inconsistent in exploratory areas; SFA 3 consists of less valuable and commercially less viable *Pandalus montaguus*. In SFA 0 the resource, if present, is simply too far away and thus too expensive to catch. Nonetheless, in recent years Nunavut (and Nunavik) has been the major beneficiary of northern shrimp allocations adjacent to its land claim area. In 1999 Nunavut received 50% of a 3,500t exploratory quota in SFA2. In 2004, they were provided a 3,722t increment in SFA 1 -

66% of new allocations that year. Some of the biggest beneficiaries of the quota increases off the Nunatsiavut and Labrador coast in recent years have been the residents of Nunavut and Nunavik (notwithstanding allocation-holders from the Maritimes and Quebec).

- If key DFO allocation criteria of adjacency, need, historical dependency, and economic dependency (ref: 2007 Northern Shrimp Management Plan) were applied for the new allocations to Nunavut and the 3L Inshore fleet a *quid pro quo* for the Nunatsiavut Government and the Labrador Inuit should be at least 50% of the available quotas in each of SFAs 4 and 5, and 20% of the SFA 6 quotas. The Labrador Inuit are inarguably the most adjacent users in the first two areas, have indisputable historical attachment and economic dependence on the marine resources off their coast, and have great need as a new and self-sustaining government. In SFA 4 the Nunatsiavut Government has no access to the 11,320t fishery, and in SFA 5 they were allocated a total of 1,260t of the 23,300t TAC - 0% and 5% respectively. Ironically, Inuit licence-holders from northern Quebec and Nunavut hold more allocations off Nunatsiavut than do the Labrador Inuit.
- An examination of the allocations of the Labrador Inuit licence-holders in SFAs 4 and 5, which is extraneous to this issue because the LILCA refers only to the Nunatsiavut Government, reveals that participation is below 10% and 17%, respectively, and less than 15% overall given that these entities hold only 4,936t of the total 34,620t available in these areas (and less if the allocations held under a 50/50 joint venture in Pikalujak Fisheries are extracted).
- The summary to this issue is that the Nunatsiavut Government and Labrador Inuit have not been the primary beneficiaries of resources within and most adjacent to their land claim area; in every other jurisdiction adjacency alone has sufficed as the rationale for providing the bulk of allocations to local users. The interests of the Nunatsiavut Government and communities have apparently been overlooked or discounted, to the benefit of ex-sector and extra-regional interests.

4. Current Resource Status and the Last In First Out Principle

I. SFA 6

- The northern shrimp fishery in this area has experienced its peak, as signs of a decline have emerged. In recent years anecdotal accounts of declining catch rates, reduced abundance and small shrimp surfaced in SFA 6. These observations were confirmed by science data presented at the 2010 Northern Shrimp Advisory Committee Meeting. The biomass indices reveal a 50% reduction from a peak in 2006, and Catch Per Unit Effort (CPUE) of both the offshore and inshore fleets have been in decline since 2006 and 2007, respectively. The current harvest level may be unsustainable and a TAC reduction is warranted.

II. SFA 5

- In SFA 5 the resource situation is positive, but there is uncertainty because of conflicting signals from the research vessel surveys and the commercial fishery. The offshore vessel CPUE remains above the long-term mean but the research vessel biomass estimate for Cartwright Channel has declined by 40% in 2009. The difficulty in assessing this stock is that the other major component of the resource, the Hopedale Channel, is in NAFO Division 2H, which is surveyed only every second year. Research data and stock status for Division 2H will not be available until the spring of 2011.

III. SFA 4

- In SFA 4 the resource status is very positive. The commercial fishery CPUE has increased since 2004 and is now well above the running average. The industry/DFO research survey biomass estimates have been increasing throughout the 2005 to 2009 period. Recruitment to the stock has also been positive over the same period, and is currently above the 5 year mean. The exploitation rate has declined from 16% to a low of 6%. Current resource status appears positive from all fishery and survey indices. On the basis of this information, an increase of the TAC resulting from adjusting the exploitation rate to 14% of the fishable biomass in 2010 would be consistent with the management approach used in other areas. It maintains a conservative exploitation rate, and provides the opportunity to bring Labrador Inuit participation in SFA 4 to near 50% of the TAC in this adjacent area.

Resource Summary

- The significant change in the SFA 6 resource calls for conservative management and the industry acknowledges the need for a quota reduction. A significant reduction may be necessary, and how this reduction will be applied is on the agenda of industry participants. The Last-In-First-Out concept was resurrected during the 2010 NSAC meeting. The Northern Shrimp Management Plan (2007) references the use of the Last-

In-First-Out concept as the primary policy guiding allocations when dealing with declines, subject only to land claims obligations. This principle and the 37,600t threshold quota to ensure the viability of 17 existing offshore licence-holders originated in response to the temporary allocations and access provided to inshore participants in the 1997 Northern Shrimp Management Plan. A review of NSAC minutes of the period will confirm the principle was implemented at the behest of existing offshore licence-holders.

- The Board is concerned that the Labrador Inuit may be impacted significantly by the Last-In-First-Out concept in a fishery where the evidence suggests they have not received equitable consideration. For the Labrador Inuit to be subject to the provisions of the Last-In-First-Out concept is tantamount to their being doubly penalized. In the absence of clear criteria and the process for the application of this concept, the Board seeks clarification and consultation with DFO as an anticipatory measure.

Current Synopsis

- Given the precarious state of the Nunatsiavut fishery and a collective desire to address current challenges, the Nunatsiavut Government, the Labrador Inuit Development Corporation and the Torngat Fish Producers Cooperative Society Limited engaged consultants to undertake a review of their fishing assets, with a view to consolidating the various holdings into one viable fishing entity. The consultant's analysis of the assets, resource allocations and licences held by the parties suggest an opportunity exists, but the resource package is deficient without a groundfish supply. The Board has submitted an earlier recommendation in respect of Turbot. The northern shrimp allocations currently held and any new allocations will be vital in the long-term planning and success of Labrador Inuit fishing operations.
- Resource opportunities are few along the northern Labrador coast, and Northern Shrimp is by far the staple of the Nunatsiavut Government and Inuit businesses, and will factor heavily in their ongoing fishery operations. Unlike areas to the south that have multiple fisheries, there are few other resource opportunities accessible to Nunatsiavut on the Labrador coast. Commercial aggregations of large pelagic species and small pelagic species such as capelin, herring and mackerel are virtually non-existent north of NAFO Division 2J, and there is no nearshore or offshore lobster or large aggregations of scallop or surf clams. Snow crab is near the extreme northern limit of its range off the Labrador Inuit Settlement Area, and in decline throughout Atlantic Canada. The balance of science data indicates that the 2H/2J boundary marks a natural boundary for the species, beyond which abundance is nominal and distribution becomes markedly discontinuous. The only true groundfish opportunity is northern turbot, and the Board outlined how past and very recent allocation decisions have resulted in the virtual exclusion of the Labrador Inuit and the Nunatsiavut Government from this fishery.

- Shrimp Fishing Area 4 offers a real opportunity for the Labrador Inuit in terms of available adjacent resources. The global economic crisis is hitting all participants in the fishery, and the Labrador Inuit who are far removed from the mainstream fishery will be particularly challenged should the current situation persist.
- If the present challenges in the fishing industry persist, the disagreement over the interpretation of Section 13.12.7 may result in a court challenge to test the veracity of the LILCA and the Honour of the Crown. The legal opinion provided to the Board, though simply an opinion, suggests significant onus would be placed on the Crown to resolve this dispute amicably and reasonably.

Alternatives:

- **Allocate Fishing Opportunities in the area adjacent to the Zone.** This is the recommended course of action. The Board recently provided the Minister with a recommendation concerning the disposition of turbot quotas in Newfoundland and Labrador as a means to remedy another longstanding inequity in the 2+3K turbot fishery. The allocation of northern shrimp in SFA 4 to the Nunatsiavut Government complements this measure, introduces some equitability, and promotes the development of an Inuit enterprise that can sustain Labrador Inuit fishing operations in the long run.
- **Status Quo** – This is not recommended. Unless information to the contrary is provided, or a detailed explanation of current circumstances comes to light to which the Board is not privy, this matter requires action and redress. On the basis of the available information, the Board can draw no other conclusion than the resource allocation decisions in respect of the Nunatsiavut Government and the Labrador Inuit in the northern shrimp fishery are contrary to the LILCA and the routinely applied resource allocation principles of the Department of Fisheries and Oceans. Further, maintenance of the status quo will likely lead to deterioration of the relationship between the parties.
- **Purchase of existing access and allocations** – This is a potential alternative, but the ability to allocate significant resource opportunities in SFA 4 at the present time precludes such a course of action.
- **Dispute Resolution** – The current issues in the northern shrimp fishery have reached a critical state from a Nunatsiavut Government perspective due to the adherence by the Crown to a strict interpretation of Section 13.12.7. A third party intervention or arbitration could be a means to resolve this matter amicably. The Board does not believe that the current impasse was the intent of either party, but reflects a strict rather than reasonable application of treaty language, and offers this alternative as a next step to the recommended course of action.

Legislative and Policy Considerations:

- The Labrador Inuit Land Claims Agreement and the Fisheries Act provide the legal and constitutional basis to the supplied recommendation and the suggested course of action.

Financial Considerations

- There are no cost implications associated with the recommended course of action, as the prescribed actions fall within the routine business of the Department of Fisheries and Oceans

Intergovernmental Considerations

- No other inter-jurisdictional agreements or land claims provisions are relevant to this matter, or impacted by the recommended course of action.

Consultations and Meetings

- The Board was represented at the 2010 Northern Shrimp Advisory Committee meeting in St. John’s on April 14, 2010.
- The Board initiated research and analysis on the development and management of the Northern Shrimp Fishery in response to the observation of growing discord between the Department of Fisheries and Oceans and the Nunatsiavut Government over the subject matter in various industry and routine meetings and related correspondence. The results of these analyses and subsequent deliberation warranted a meeting and formulation of policy recommendations during a meeting of the Board on May 13th, 2010.

Prepared by: Torngat Wildlife, Plants and Fisheries Secretariat

Approved by: _____

Chairman

Date:

Approved by: _____

Executive Director

Date: