

# Jurisdictional Issues for Fish and Marine Management in Northern Manitoba



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## Summary

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This is a brief analysis of jurisdictional issues for fish and marine mammals for the coast of northern Manitoba. It is an overview of the relevant issues; it is not a legal analysis or opinion.

Despite its relative isolation, the coast of northern Manitoba is subject to myriad levels of government, legislation and international agreements. However, not all these responsibilities, legislation, and agreements are uniformly implemented.

This analysis highlights some of the jurisdictional issues that need to be considered when establishing an integrated system of fish and marine management. The analysis is not exhaustive and gives rise to as many questions as it answers. For example, what is the existing regulatory regime and the role of the Department of Fisheries and Oceans under the regime?

Further, how is that regime modified and changed as a result of rights and processes under the Inuit Final Agreement?

The analysis begins with the review of the common law regime and constitutional jurisdiction of the federal and Manitoba governments on the coast and in adjacent offshore waters. The international regime applicable to area is then summarized, followed by a review of the responsibilities and legislation of the federal and provincial government departments. The analysis then examines the Inuit Final Agreement and its application to northern Manitoba. It continues with an overview of the issues for fish and marine mammals. The analysis concludes with a discussion of the possible role for the Department of Fisheries and Oceans in an integrated fish and marine management regime for northern Manitoba.

## Magdalena AK Muir

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International Energy, Environmental and Legal Services (IEELS) provides legal and consulting services in the areas of natural resources, environment, First Nations issues, and business negotiations. One area of specialization for IEELS is resource management in northern Canada, particularly the interaction between federal, territorial and provincial legislation, and rights and processes established under the northern land claims agreements.

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## Commonlaw

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### Introduction

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The term "common law" is used to refer to the law of nations derived from the cumulative decisions of the court and quasi-judicial bodies.

Common law in Canada is based on judicial decisions in the United Kingdom, Canada and other common law countries. The common law can be both national and international. International common law evolves from the decisions of international tribunals and courts established under treaties and conventions. The international common law may also evolve from decisions by courts and arbitrators when parties mutually agree to submit their disputes for resolution.

The common law indicates when a country has rights. The common law predates legislation, and may be explicitly modified by legislation, or by agreements. For example, a number of common law rights are based on ownership of riparian lands, and have been restricted by legislation which removes the private ownership of lands necessary to create the right. Similarly, international customary law dealing with the economic and territorial rights of coastal countries has been formalized or expanded by the *United Nations Convention on the Law of the Sea* .

The common law of Canada is primarily derived from the United Kingdom, which is a unified state. In contrast, Canada is a federation with powers being divided between federal and provincial governments. Therefore, while the common law may

describe the rights, it does not necessarily determine which level of government in Canada will hold the rights.

### Riparian rights

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Riparian rights are the rights of the landowner, who owns land adjacent to a river, to receive waters unaffected in quality, quantity and rate of flow. The landowner also has the obligation to pass on the water in the same state they received it. Lastly, under common law, a riparian owner is deemed to own the bed of the river body to midstream in the river, and have the right to fish and erect structures on that river bed, subject to public rights of navigation.

Government and private parties may be riparian landowners and hold riparian rights. Riparian rights are often restricted by legislation which may limit or eliminate these rights. Legislation often prevents the transfer of land adjacent to a river or of the river bed. Instead, these ownership rights are retained by the federal or the provincial governments.

### Right to fish

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Under common law, the right to fish is determined by ownership of the bed of the river, lake or water body. The party who owns the bed has the exclusive right to fish in waters above that bed.

Unless ownership of the bed was transferred to a private party prior to the enactment of modern legislation, the bed is usually owned by the federal or the provincial government. This government then authorizes other parties to fish in those

waters. Tidal waters are subject to the public right to fish.

### **Ownership of the coast**

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Under common law, a country's jurisdiction extends to the low-water mark along coastlines. While the government may transfer property to private landowners up to the high water mark, the government usually retains ownership and jurisdiction between the high water mark and the low-water mark. As the provinces own most of the coast within their boundaries, the province will, subject to national parks and other federal lands, own up to the low-water mark along coastlines.

### **Ownership of waters and seabed below the low-water mark**

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Waters and the seabed below the low-water mark are vested in the state government. Authority for proposition is found in *Rv Keyn* (1876) 2 Ex D 63, as applied in Canada under *Re Offshore Mineral Rights of BC* [1967] SCR 792 at 803-805.<sup>1</sup> In Canada, these rights are held by the federal government.

### **Territorial sea, continental shelf and waters within the "jaws of the land"**

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International law has recognized the territorial sea as part of the territory of a coastal country. The territorial sea originally consisted of the sea within three miles, or a cannon's range, of the coast. Overtime, coastal countries could claim a wider sea

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<sup>1</sup>See *Re Newfoundland Continental Shelf* [1984] 1 SCR 79, and *ParFinesse Yachts v NS (Minister of Finance)* (1992) 112 NSR (2d) 31 (SC).

under international law. Canada, along with other parties, then claimed a territorial sea of 12 miles. International law also recognized that coastal countries have the exclusive right to explore and exploit natural resources on the continental shelf.

Under common law, inland waters such as harbours, bays and estuaries within the "jaws of the land" of a country are under the jurisdiction of that country. These inland waters may be within federal or provincial jurisdiction, depending on who owns the land along the coast.

Larger bays within Canada, such as Hudson Bay and James Bay, which are bounded by two or more provinces, are likely to be within federal jurisdiction. Smaller harbours, bays and estuaries, which are entirely located within provincial boundaries, are likely to be within provincial jurisdiction<sup>2</sup>.

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<sup>2</sup>It is difficult to state whether a harbour, bay or estuary is within federal or provincial jurisdiction without specific knowledge of the geography and layout of the land. For example for a bay, jurisdiction will be a factual determination based on the depth and width of the bay, and the specific geography.

## Constitutional jurisdiction of the federal and Manitoba governments

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### Management of fish and fish habitat

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The federal government manages inshore and offshore fisheries under section 91(12) of the *Constitution Act, 1867* which confers authority over "seacoast and inland fisheries". "Fish" is defined broadly, and the federal powers with respect to fisheries include the management of fish, and the protection of fish habitat.

Fish management includes both conservation and business purposes, such as the promotion of sport fishing.<sup>3</sup>

The federal government may legislate for conservation purposes or for the preservation of fish by establishing closed seasons, and prohibiting the use of destructive fishing methods, irrespective of who owns the fishing rights.<sup>4</sup>

The federal government may also act to protect fish habitat, and to ensure that spawning grounds and fish habitat are not polluted. This power to protect the environment is not a general power to regulate with respect to water pollution. Instead, it is power to regulate wherever there is

a clear connection between the regulated activity and a harmful effect on fish.<sup>5</sup>

### Right to fish

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Under common law, the right to fish is determined by ownership of the bed, which may be owned by the government or private parties.<sup>6</sup> Though there are exceptions for earlier transfers of land, federal and provincial legislation usually specifies that government retains ownership of the bed of rivers, lakes and water bodies. The province usually owns the water body, and thus the right to fish, when the bed is located within provincial boundaries.

The federal government has the right to fish in water bodies which are on or adjacent to federal property (national parks and the northern territories) and in waters outside provincial boundaries (offshore waters including Hudson and James Bays).

Tidal waters are exceptions to the general rule that ownership of the bed carries with it the exclusive right to fish. Tidal waters are waters affected by the tide, for example, the sea and its bays, estuaries, and

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<sup>5</sup> *Fowler v The Queen* [1980] 2 SCR 213, and *Northwest Falling Contractors v The Queen*, [1980] 2 SCR 292.

<sup>6</sup> It is useful to note that governments seldom exercise the right to fish themselves. Instead, they typically assign this right to private parties through a licensing process. First Nations do not tend to own fish stocks under agreements, treaties or aboriginal rights. Instead they tend to have preferred access to that resource, subject to conservation needs.

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<sup>3</sup> *Gulf Trawler Association v Canada* [1987] 2 FC 93 (CA).

<sup>4</sup> *A-G Canada v A-G Ontario (Fisheries)* [1898] AC 700 at 713.

the mouths of rivers. In tidal waters, there is the public right to fish which overrides the proprietary right of the owner of the bed.<sup>7</sup>

## Navigation and shipping

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Federal government has authority to regulate with respect to navigation and shipping under section 91(10) of the *Constitution Act, 1867*. Under this authority, they have the ability to regulate navigable waters, works of navigation, harbours; and a body of maritime or admiralty law that includes liability; marine insurance; the sale, purchase and ownership of ships; the construction, repair and maintenance of ships; and pilotage and towing. The courts recently found that the federal government has jurisdiction over maritime negligence as part of an interconnected regime over navigation and shipping.<sup>8</sup>

The federal government also regulates dumping at sea, but only to the extent this dumping harms navigation and shipping. The federal government may also regulate ocean dumping for other purposes such as protection of the environment under the residual federal power for "Peace, Order and Good Government".<sup>9</sup>

## Territorial sea, seabed and continental shelf

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The province does not own the seabed, has the right to explore or exploit minerals, or possess jurisdiction over the territorial sea, seabed or continental shelf.

<sup>7</sup> PHogg, *Constitutional law of Canada*, 2nd ed (Toronto: Carswell, 1985), 592.

<sup>8</sup> *Ordon Estate v Grail* [1998] SCJ No 84.

<sup>9</sup> *Constitution Act, 1867*, section 91.

Instead, the federal government has the right to explore and exploit the resources and has jurisdiction over the seabed of the territorial sea. The high sea beyond the territorial sea is also outside the territory and jurisdiction of the province. The only exception is if the province included a portion of the offshore in its territory when it entered confederation. These conclusions resulted from extensive constitutional litigation, which is discussed below.

The *Constitution Act, 1867* is silent on which level of government has jurisdiction over the territorial sea and continental shelf. This matter was then decided by the courts for the offshore of the provinces of British Columbia and the Newfoundland. In *Re Offshore Mineral Rights of BC* [1967] SCR 792, the Supreme Court of Canada held that the boundaries of British Columbia ended at the low-water mark. This is the general rule, and the boundaries of British Columbia had never extended beyond the low-water mark. Therefore British Columbia did not have any property rights, or rights to explore and exploit, or legislative jurisdiction over either the territorial sea or the continental shelf.

Since British Columbia had never been a sovereign state recognized by international law, it could not have acquired rights created by international law. Therefore, the court also concluded the federal government owned the seabed of the territorial sea, and had legislative jurisdiction over it. With respect to the continental shelf, while the federal government did not own these natural resources, it had the right to explore and exploit them and related legislative jurisdiction.

In *Re Newfoundland Continental Shelf* [1984] 1 SCR 79, the Supreme Court of Canada similarly held that at the time of union in 1949, Newfoundland did not have the status of a sovereign state. At that time, the international law did not recognize a coastal state's right over the resources of the continental shelf. Therefore, the federal government held the right to explore and exploit the resources of the continental shelf.

There has been only one exception to offshore rights. In *Re Ownership of the Bed of the Strait of Georgia* [1980] 1 SCR 388, the Supreme Court of Canada held that the water between the mainland of British Columbia and Vancouver Island, though not inland waters, had been included within the boundaries of British Columbia when it became a province of Canada (1871). Therefore, the provincial government had jurisdiction over these waters.<sup>10</sup>

### **Summary of constitutional issues for Manitoba coast**

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Under constitutional law and subject to federal legislation and agreements, Manitoba will own land and have legislative jurisdiction up to the low-water mark on the coast. Subject to federal legislation and agreements, the province will not own the seabed under the territorial sea, have rights to explore or exploit resources in the continental shelf, or have legislative jurisdiction over the territorial sea, or continental shelf of Manitoba.

No information suggests a unique offshore regime is in place for Manitoba. It is also difficult to argue for the historical use and control over the offshore based on the

powers which the province exercised over territorial waters prior to entering the confederation of Canada since the province was formed by the federal government from the then Northwest Territories.

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<sup>10</sup>PHogg, *Constitutional Law of Canada*, 586-588.

## International agreements and conventions

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### Introduction

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In Canada, the federal government has the ability to enter into international agreements and conventions. The federal government can enter into commitments for matters within the constitutional jurisdiction of both the federal and provincial governments. However, the federal government cannot require the provincial government to comply with international agreements for matters within provincial jurisdiction. Therefore, the international agreements need to be implemented cooperatively by both the federal and provincial governments within their respective areas of jurisdiction.

### *United Nations Convention on the Law of the Sea*

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The *United Nations Convention on the Law of the Sea* (1994) establishes ownership and jurisdiction over offshore waters and resources between different nations. It does not address or modify the internal relations or division of powers between the federal and provincial government. It does however define the outer limits of the federal government's rights in the offshore.

The Convention confirms that international common law with respect to territorial sea and resources of the continental shelf that every coastal state has sovereignty over these sea adjacent to the coast for 12 nautical miles, otherwise referred to as the territorial sea. These rights extend to the airspace above, as well as the

bed and subsurface resources. The Convention confirms that coastal states have the right to explore and exploit resources on the continental shelf.

The Convention adds to the common law. The Convention provides for a contiguous zone, from 12 to 24 nautical miles offshore, contiguous to the territorial sea. The Convention also establishes an economic zone extending 200 miles, including the territorial sea.

The Convention also clarifies coastal rights of archipelago states such as the Canadian Arctic. Part IV of the Convention defines an archipelago as a group of islands that form an intrinsic geographical, economic or political entity, or which have been regarded as such. An archipelago state may draw straight baselines joining the outermost points of the outermost islands, subject to ratios for land and water being satisfied and the rights of international navigation.<sup>11</sup>

The last provision is relevant for the Canadian Arctic as there has been some ongoing dispute, primarily between Canada and the US and Denmark, as to whether these waters are "high seas" or internal waters subject to the right of international navigation. Hudson Bay and Hudson Strait have long been viewed internationally as internal Canadian waters. However, there

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<sup>11</sup> *United Nations Convention on the Law of the Sea* (1994), articles 46-47.

has been less of a consensus with respect to other waters and straits.<sup>12</sup>

### **Arctic Environmental Protection Strategy**

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The Arctic Environmental Protection Strategy resulted from a meeting in Rovaniemi, Finland in 1991. Canada, along with seven other Arctic countries, signed this non-binding strategy.

Several programs have been initiated under the strategy including: an Arctic monitoring and assessment program which documents chronic pollution in Arctic waters; the conservation of arctic flora and fauna which includes habitat conservation and indigenous knowledge; the protection of the marine arctic environment; and an emergency prevention preparedness and response working group. Unfortunately the joint research program under the Arctic Environmental Protection Strategy is not being funded consistently.<sup>13</sup>

### **United Nations Framework Convention on Climate Change**

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In 1992, 154 countries at Rio de Janeiro signed the *United Nations Framework Convention on Climate Change*.

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<sup>12</sup>Canada has resolved most of its maritime boundary disputes through international adjudication. However disputes remain with the US over the Beaufort Sea, and with Denmark over the Davis Strait and Baffin Bay. See also J Richstone, "Arctic sovereignty: the search for substance," *CARC Newsletter* (vol 14, no 4).

<sup>13</sup> H Welch, "Marine conservation in the Canadian Arctic: a regional overview," *CARC-Northern Perspectives* (vol 23, no 1, Spring 1995), 11.

The Convention came into force on March 21, 1994.

The Kyoto Protocol was adopted in December 1997. The Protocol was adopted by consensus. Industrialized countries entered a legally binding commitment to reduce their greenhouse gas emissions by at least five percent compared to 1999 levels by the period 2008-2012.

Canada is a signatory to both the Convention and the Kyoto Protocol. The 1998 Buenos Aires conference adopted a two-year plan of action. It set deadlines for finalizing the details of the Kyoto Protocol so that the agreement will be fully operational when it enters into force sometime after 2000.

### **Agenda 21, United Nations Conference on Environment and Development**

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*Agenda 21*, United Nations Conference on Environment and Development recognizes the special importance of oceans and coastal zones in relation to sustainable development, and calls on coastal states to commit themselves to integrated management and sustainable development of coastal and the marine environment.

Canada was a participant to the Conference and made a commitment to coastal zone management. Various initiatives are now underway to fulfill those obligations.<sup>14</sup>

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<sup>14</sup> Further information on multi-party initiatives to implement *Agenda 21* is available from Project dé société (Ottawa) and the International Institute for Sustainable Developments (Winnipeg).

## **Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities**

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The Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities was adopted on November 1995 by over 100 governments and the European Commission who attended the Intergovernmental Conference assembled for that purpose.

Canada has agreed to a national program of action to address the protection of the marine environment from land-based sources of pollution. This program includes an Arctic chapter that applies to the Canadian Arctic region. Canada is also a participant in an Arctic regional chapter that includes the participation of other countries in the Arctic circumpolar world. This program is important because it specifically focuses on the impact of terrestrial pollution on the marine environment.

## ***Ramsar Convention on Wetlands***

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The *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (the *Ramsar Convention on Wetlands*) was signed in Ramsar, Iran on February 2, 1971, and came into force on December 21, 1975. It provides a framework for national action and international cooperation for the conservation and use of wetland and resources.

The *Ramsar Convention on Wetlands* is the only environmental treaty dealing with a particular ecosystem. In total, 977 wetland sites covering 71 million hectares are designated for inclusion on the Ramsar List

of Wetlands of International Importance. A few of these sites occur within Canada.

The coastal plain of Hudson Bay's wet coast is generally low and poorly drained. Vast marshes occur at the coast, extending 5 to 15 kilometers inland. The shallow coastal waters provide good habitat to water birds during migration. The McConnell River Bird Sanctuary in the Nunavut Territories has been designated under the Ramsar Convention. However, no coastal regions have been designated off the Manitoba coast.

## ***International Convention for the Regulation of Whaling***

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The *International Convention for the Regulation of Whaling* was negotiated in 1946. Membership is open to all nations, whaling and non-whaling. The Convention established the International Whaling Commission.

The International Whaling Commission has instituted a commercial ban on whaling, though "scientific whaling" is still conducted by signatory nations, including such as Japan. A plan exists to remove beluga whales from the Churchill coast for transport to marine facilities in Canada and abroad. It is not clear if this capture falls within the scientific exception.

Canada has withdrawn from the Convention, in part as First Nations such as the Inuit have indicated their opposition to both the Convention and to Canada's participation. Inuit and Inuvialuit subsistence whaling of beluga and bowhead whales continues despite the actions of the Commission. While First Nations may have some parallel concerns, their interests do not necessarily coincide with the commercial

interests represented by parties such as the High North Alliance.

The High North Alliance is an organization of whalers, sealers, and fisherman from Canada, Greenland, Faro Islands, Iceland, Norway, and coastal communities. The Alliance would like the International Whaling Commission to be replaced by a regional organization, and have proposed coastal whaling under the International Whaling Commission's Revised Management Procedures with the restriction of use of the products of that whaling to local consumption. Those proposals have as yet been unsuccessful.

### ***Agreement on the Conservation of Polar Bears and Their Habitat, 1973***

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Canada, the United States, Denmark, Greenland, Norway and Russia are members of the *Agreement on the Conservation of Polar Bears and Their Habitat, 1973*. The Convention provides that polar bears may be harvested under the following circumstances.

Article III, 1

(d) by local people using the traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party; or

(e) wherever polar bears have or might have been subject to taking by traditional means by its nationals.

The Convention also provides for a joint management approach to polar bear management and the sharing of research.

The Inuit and Inuvialuit in the Nunavut and Northwest Territories manage a commercial harvest of polar bears, where local communities receive quotas for harvests of polar bears. The community then transfer that quota to sport hunters for a fee.

Though the United States does not permit its citizens to harvest polar bears, it does permit the import of polar bear trophies from approved populations in the Northwest Territories and Nunavut Territory, including the populations near the western portion of Hudson Bay, if certain requirements are met. These requirements are that Canada has a monitored and enforced sport hunting program, that populations are maintained at sustainable levels, and that actions occur consistently with the Convention.

### **United Nations Conference on Straddling Stocks and Highly Migratory Stocks**

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This United Nations Conference was established under the *United Nations Convention on the Law of the Sea* to address fish species that migrated within and beyond the two hundred-mile exclusive economic zone established under the Convention. This conference led to a *Straddling Stocks Agreement* that is being adopted by the participants.

## Canadian government departments and legislation

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### Department of Fisheries and Oceans

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The Department of Fisheries and Oceans has primary responsibility for the management of fish and protection of fish habitat in inland and offshore waters of Manitoba under the *Fisheries Act*; for marine management in Hudson Bay and Arctic waters under the *Oceans Act*; and for navigation and shipping through these waters through the Coast Guard under the *Shipping Act*. Fish is understood to include marine animals.

The merger of the Canadian Coast Guard with the Department of Fisheries and Oceans was completed in 1996. Responsibility for all Coast Guard functions was transferred to the Department of Fisheries and Oceans with the exception of harbours and ports, ship safety, pilotage and Crown Corporations. The Coast Guard provides the operation functions of navigation and shipping under the *Canada Shipping Act*, while Transport Canada is focused on the reform of the Act.

Transport Canada has prime responsibility for overseeing reform of the *Canada Shipping Act*, though some sections of the Act such as pleasure craft, search and rescue, receiver of wrecks and pollution preparedness and response are the responsibility of the Department of Fisheries and Oceans. Legislative reform on the *Shipping Act* is being managed by the Marine Safety Directorate of Transport Canada, and includes a Steering Committee made up of representatives from several

branches and different government departments.

### *Fisheries Act*

The *Fisheries Act* defines fish broadly to include shellfish, crustaceans, marine animals, and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans, and marine animals.<sup>15</sup> This expansive definition of fish ensures that marine mammals are considered in the protection of fish and fish habitat.

The Act also contains provisions concerning fish habitat protection and pollution prevention. The prohibition against activities that harmfully alter, disrupt or destroy fish habitat is not dependent on federal ownership of land, and can be used to control developments on land, on the bed of a water body or seabed, or in any way affecting freshwater or coastal fish habitat. The prohibition against the deposit of deleterious substances can be used to control upstream sources of pollution as well as discharges in the offshore operations. Finally, the Act authorizes regulations for the conservation and protection of fish, and the conservation and protection of spawning grounds.

### *Oceans Act*

The *Oceans Act* implements the *United Nations Convention on the Law of the Sea* domestically in Canada. Only those provisions affecting jurisdiction over the

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<sup>15</sup> *Fisheries Act*, section 2.

coast, seabed and offshore waters are addressed.

Section 2.1 indicates the Act is not intended to abrogate or derogate from any existing aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*. The *Oceans Act* also states at several times that it does not abrogate or derogate from legal rights or interests held before February 4, 1991.

Definitions include a definition of "federal law" that excludes territorial laws. "Law" is defined in respect of provincial law as a law in force from time to time. The phrase "Minister" refers to the Minister of Fisheries and Oceans.<sup>16</sup>

The Act binds both the federal government and provincial governments such as Manitoba.<sup>17</sup>

The territorial sea of Canada is defined as being 12 nautical miles distant from the nearest point of the baselines.<sup>18</sup> Section 5 defines the baseline as the low-water mark along the coast or on a low tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea of Canada from the mainland or an island. A low tide elevation is the naturally formed area of land that is surrounded by and above water at low tide but submerged at high tide.

There are reference to areas over which Canada has a historic or other title of sovereignty. This can be viewed as a reference to disputes over sovereignty in the high arctic, and in particular the competing

views of sovereignty by Canada, the US and Denmark over contested waters.

Section 6 defines the internal waters of Canada as the waters on the landward side of the baselines of the territorial sea of Canada. The internal waters and territorial seas are defined to be part of Canada.<sup>19</sup> The federal government owns these seabed and the subsoil below the internal and territorial sea of Canada, except if that area of the seas is within a province.<sup>20</sup>

Subject to other federal legislation and limitations contained in the Act, section 9 of the Act referentially incorporates the laws of the province to any area of the internal or territorial that is not within the province, and where it is prescribed in regulations. However, this provision does not provide the basis for any claim by the province, provide legislative jurisdiction by the province over the sea or any living or non-living resources in that area, or limit any federal laws.<sup>21</sup>

Section 10 defines the contiguous zone of Canada as an area of the sea from the 12 nautical mile limit of the territorial sea to the distance of 24 nautical miles. Federal laws extend to the contiguous zone.<sup>22</sup>

Section 13 defines the exclusive economic zone of Canada as the area from the outer limit of the territorial sea (12 nautical miles) to a distance of 200 nautical miles. Within that area, the federal government has sovereign rights in the economic zone for exploring and exploiting;

<sup>16</sup> *Oceans Act*, section 2.

<sup>17</sup> *Ibid*, section 3.

<sup>18</sup> *Ibid*, section 4.

<sup>19</sup> *Ibid*, section 7.

<sup>20</sup> *Ibid*, section 8.

<sup>21</sup> *Ibid*, section 9.

<sup>22</sup> *Ibid*, sections 11-12.

conserving and managing the natural resources, living or non-living, of the waters adjacent to the seabed, of the seabed and subsoil and any other economic activities. This federal jurisdiction extends to marine scientific research and the protection and preservation of the marine environment.<sup>23</sup>

Section 17 states Canada's jurisdiction over the continental shelf. The continental shelf is the seabed and subsoil of the submarine areas, including those of the exclusive economic zones that extend beyond the territorial sea through the natural prolongation of the land territory of Canada. In section 18, Canada retains sovereign rights over the continental shelf for the purpose of exploring and exploiting mineral and non-living resources of the seabed and subsoil of the shelf, together with living organisms belonging to sedentary species.

Section 21 applies provincial law to the exclusive economic zone and the continental shelf in the same terms and subject to the same limitations described within section 9 for the inland and territorial seas.

Despite the lack of regulations referred to under sections 9 and 21 of the Act, some questions arise. What is the impact of the *Oceans Act* applying provincial laws in the offshore? If so, how would federal and provincial laws interact with rights and processes under the Inuit Final Agreement?

### ***Canada Shipping Act***

The Coast Guard of Department of Fisheries and Oceans, and the Department of Transport share jurisdiction under the

<sup>23</sup>Ibid, sections 14-15.

*Canada Shipping Act*. The Act places numerous requirements for the shipping industry including registration of ships, certification of officer and working conditions. The Act authorizes the enactment of regulations and over one hundred regulations have been enacted.

*Canada Shipping Act*, Part XV, contains provisions for the protection of marine environment that apply to all Canadian waters, and fishing zones of Canada.

Canada's Marine Oil Spill Preparedness and Response Regime is established under Part XV of *Canada Shipping Act* to address some, but not all, of the issues in relation to preparedness and response to oil spills under Part XV of the *Canada Shipping Act*. This regime is not exhaustive as it does not address the prevention of spills, which is the responsibility of many parties, including Transport Canada, Environment Canada and the Canadian Coast Guard. Nor does it deal with land-based spills, or spills at offshore drilling rigs or production platforms.

Coast Guard, Transport Canada and Environment Canada implement the regime. A recent discussion paper by the Minister of Fisheries and Oceans has been submitted to clarify the responsibilities and propose specific measures.<sup>24</sup>

### **Department of Transport**

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The Department of Transport is involved in the reform of the *Canada*

<sup>24</sup> *Proposed adjustment to the governance of Canada's marine oil spill preparedness and response regime*, Minister of Public Works Canada, Ottawa, December 1998.

*Shipping Act*, and in implementing the legislation described below.

### ***Arctic Waters Pollution Prevention Act***

The *Arctic Waters Pollution Prevention Act* prohibits the deposit of any waste in any arctic marine waters, or on land where the waste may enter marine waters, except as authorized by regulations. Three departments implement the Act: Transport Canada, Department of National Resources, and the Department of Indian Affairs and Northern Development.

### ***Navigable Waters Protection Act***

The *Navigable Waters Protection Act* prohibits the obstruction of navigable waters, unless approved by the Minister of Transport.<sup>25</sup> It also allows the Minister to authorize the removal of an abandoned vessel.<sup>26</sup> Lastly, it provides some control over ocean dumping.<sup>27</sup>

### ***Transportation of Dangerous Goods Act***

The *Transportation of Dangerous Goods Act* addresses the movement and transport of dangerous goods between provinces, or in areas subject to federal jurisdiction.

### ***Canada Marine Act***

The National Marine Policy (1995) proposed that the federal government divest ownership of ports and that government's future role be restricted to regulation. This

<sup>25</sup> *Navigable Water Protection Act*, section 5.

<sup>26</sup> *Ibid*, section 20.

<sup>27</sup> *Ibid*, sections 21-22.

policy resulted in the enactment of the *Canada Marine Act* (1998), and the divestiture of ports such as the Port of Churchill to private ownership.

## **Environment Canada**

Environment Canada regulates with respect to the environment under two pieces of legislation: the *Canadian Environmental Assessment Act* and the *Canadian Environmental Protection Act*. Both are described in greater detail below.

The Canadian Wildlife Service, Environment Canada is responsible for migratory birds, and for federal wildlife management and research. The department defines polar bears as terrestrial amphibious wildlife.

### ***Canadian Environmental Assessment Act***

The *Canadian Environmental Assessment Act* establishes a process to assess the environmental aspects of a project before deciding whether to authorize that project. Government departments that are responsible authorities under the Act, usually because they are approving some aspect of a project, are required to cooperate with the Canadian Environmental Assessment Agency in the environmental impact assessment of that project.

This Act was enacted in 1992, and has been used to environmentally assess a wide variety of projects, and to address and resolve environmental aspects of a project before it is approved.

This process functions independently, and, in certain instances, in cooperation with provincial environmental assessment processes, and with administrative agencies like the National

Energy Board and the Alberta Energy and Utilities Board. The process has resulted in a unified "environmental assessment" process for a number of large mining, oil and gas pipelines, and offshore marine developments.

### ***Canadian Environmental Protection Act***

The *Canadian Environmental Protection Act* is environmental legislation, which addresses matters such as international air quality, ocean dumping and regulation of toxic substances.

A Bill to amend and replace the Act is being considered by the Canadian Parliament. Bill C-32 is important as it represents the inclusion of sustainable development principles, creates greater public participation in environmental decision-making, and provides a framework that Canada may require to comply with its obligations under the Climate Change Convention.

The Bill includes provisions for:

- the inclusion of sustainable development principles, including the precautionary principle;
- the creation of a national advisory committee that includes representatives of the federal and provincial governments and First Nations;
- the creation of an environmental registry to distribute information on environmental prosecutions;
- public consultation on changes to the Act and administrative agreements under the Act;
- further rights for private parties to request an environment inspection and investigation, and to launch private

prosecution if government fails to prosecute;

- regulation of biotechnology; and
- Provisions that allow for alternative approaches to environmental regulation, including the use of economic instruments for emission trading.

### ***Canada Wildlife Act***

This Act establishes Canadian Wildlife Service's responsibility with respect to wildlife. With the exception of polar bears, the wildlife is primarily migratory birds or terrestrial.

### ***Heritage Canada***

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Parks Canada operates under the auspices of Heritage Canada. In Manitoba, Parks Canada is responsible for the Wapusk National Park. This park is located within the Hudson Bay Lowlands and was established pursuant to a federal-provincial memorandum of understanding in April 1996. The Wapusk National Park has not yet been placed under the *National Parks Act*. Another national park has been suggested for the Hudson Bay Lowlands, but no details are available.

### ***National Parks Act***

The *National Parks Act* authorizes the establishment of new parks, as well as maintenance of existing parks. A 1988 amendment to Act broadened the definition of marine parks. Regulatory powers of Parks Canada under the Act include the management of fisheries, the control of renewable resource harvesting, and permits to remove sand and gravel often found in relation to the fish habitat.

The Wapusk National Park is the result of a partnership involving the federal and provincial governments, the local government district of Churchill, and First Nations of Fox Lake and York Factory (represented by the Manitoba Keewatinowi Okimakanak). The park is subject to a management board formed of all these parties, and subject to interim management guidelines dated February 6, 1998 pending development of a final management plan.

The park is part of a polar bear denning area, and is surrounded by adjacent provincial wildlife management areas that are also subject to a conservation regime.

Issues that need with respect to the park, include: the integration of the management regime for this park and the adjoining provincial wildlife management area; the degree of protection on adjacent coastal waters; the participation of the Department of Fisheries and Oceans with any marine issues in relation to the park; and whether the Inuit and structures under the Agreement need to be incorporated into the management regime for the park.

## **Government of the Nunavut and the Northwest Territories**

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The Nunavut Territory was formally constituted on April 1, 1999. The governments of the Northwest and Nunavut Territories operate under delegated authority from the federal government. As such, they have authority over certain lands and wildlife, and responsibilities for delivering social services. Both territories are subject to land claims agreements that create institutions of public government, processes and First Nations rights throughout their territories.

The territorial governments are primarily responsible for wildlife management in the territories. The territorial legislation with respect to wildlife is not discussed here as the territorial governments' jurisdiction is restricted to its territory, and as this analysis focuses on fish and marine management applicable to the Manitoba coast and adjacent offshore waters.

Wildlife is regulated by these governments in cooperation with the Inuvialuit and the Inuit under the different wildlife management regimes established under the Inuvialuit Final Agreement and the Inuit Final Agreement respectively. Unlike territorial legislation, the wildlife management regimes established under the claims can extend beyond the territories into Manitoba. Beluga whales and polar bears are examples of wildlife species that are regulated under the claims, are subject to Inuit and Inuvialuit harvesting rights, and migrate to the Manitoba coast and offshore waters.

## Manitoba government departments and legislation

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### *Manitoba Natural Resources Transfer Agreement*

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The *Manitoba Natural Resources Transfer Agreement* was signed in December 1929 and became effective July 1930. It was designed to put Manitoba in the same position as the original provinces in the confederation of Canada with respect to the administration and control of land and resources. The Agreement transferred administration and control of lands and resources from Canada to Manitoba, with the exception of federal lands such as national parks and Indian reserves. A 1938 amendment to the Agreement clarified water; water powers were included in the transfer.

The Canadian Constitution, federal and provincial legislation and treaties govern the protection, ownership, allocation, use and management of wildlife. When Manitoba joined the Canadian confederation in 1870, it took over jurisdiction for the administration of wildlife. In 1871, Treaty No 1 was signed between the Ojibway peoples of Southern Manitoba and the Queen. Other treaties were also signed that provided for the use of wildlife resources.

The right of First Nations to use wild animals in Manitoba is summarized by the *Manitoba Natural Resources Transfer Agreement*, which states:

that the said Indians shall have the right, which the province hereby assures to them of hunting, trapping and fishing game and fish at all seasons of the year on all unoccupied Crown lands and on any other

land to which said Indians may have right of access.

Rights under this agreement apply to all Indians in Manitoba, whether or not they are ordinarily residents there or members of a band. They are not required to have a hunting license, or observe bag limits or seasons. These rights are defined on an ongoing basis by negotiations and the courts.<sup>28</sup>

### *Water Rights Act and Water Power Act*

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Manitoba's current water legislation is enacted under the authority of the *Manitoba Natural Resources Transfer Agreement*. A 1938 amendment to the Agreement clarified that water and water powers were included in the transfer.

Manitoba has water legislation, which substantially or totally replaces the common law and riparian rights.

The *Water Rights Act* requires any person who wishes to use or divert water to obtain a licence from the provincial Minister of Natural Resources.

The *Water Power Act* authorizes provincial cabinet to make regulations regarding the use and allocation of "provincial water powers", waters and provincial lands relating to a water power "undertaking". Regulations have been

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<sup>28</sup>First Nation wildlife rights under the *Manitoba Natural Resources Transfer Agreement*, and treaty and aboriginal rights to wildlife are complex issues that have been subject to much litigation. This analysis does not address these First Nations rights.

enacted dealing with the terms and conditions of the allocation, and use of provincial water powers, waters and lands, and water power undertakings.

Undertaking means an undertaking for "the development of any provincial water power or in the transmission, distribution, or utilization of the force or energy produced from the water power." It is defined to include the "storage, pondage, carriage or diversion of water." The Act also defines "water power" as energy being produced or generated by the flow or fall of water.<sup>29</sup>

The combination of the *Water Power Act* and the *Water Rights Act* permits the provincial government to transfer the water rights to Manitoba Hydro necessary for hydroelectric projects and electricity generation.

### ***Wildlife Act***

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Wildlife management in Manitoba is the responsibility of the Department of Natural Resources and primarily administered by Wildlife Branch, with enforcement and some management duties being conducted by the Operations Division. The department is responsible for management of all wild vertebrate animal species within provincial boundaries, and certain plants listed under the *Endangered Species Act*. The provincial Parks Branch manages provincial parks.

Wildlife management is directed through regulations under various Acts and approved policy. Provincial protected

species are managed under the *Wildlife Act* and *Endangered Species Act*. Activities such as killing, capture, and possession are subject to provincial approval. Other legislations such as the *Crown Lands Act*, the *National Parks Act*, the *Ecological Reserves Act* and the *Environment Act* also affect wildlife.

The *Wildlife Act*, which was enacted in 1980, has been identified as requiring changes for controlling land use, habitat protection and management of species at risk. Therefore the Act is subject to a review, particularly with respect to principles of sustainable development, the Wildlife Branch and its mandate, the definition of wildlife, ownership of wildlife, a provincial wildlife plan, species management, land use permitted for designated wildlife lands, wildlife advisory boards, and cooperative wildlife management.<sup>30</sup>

Wildlife management areas are designated adjacent to the Wapusk National Park to protect the polar bear denning area. These wildlife management areas are designated by the province for the management, conservation, and the protection of habitat and wildlife and resources. Most areas contain multiple-use lands and are usually open for mineral exploration.

### **Town and Port of Churchill**

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The town of Churchill is the northern terminus of the Hudson Bay Railway, and possesses an airport, a deep-water marine port, and a grain elevator. As a result of

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<sup>29</sup>This analysis of Manitoba water law relies on Gordon CHannon, "Rivers run to the sea," article for the "National symposium on water law," (Ottawa: Canadian Bar Association, April 1999).

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<sup>30</sup>"Manitoba wildlife sustainable development strategy workbook," Policy Area 9: Legislation and Administration.

these facilities, Churchill has traditionally been a transport for supply barges for the Keewatin district in the Nunavut Territory, and for the movement of grain on ocean-going vessels.

The Port of Churchill was previously operated by the federal government as a Crown corporation. It has recently been privatized under the National Marine Policy (1995) and the *Canada Marine Act* (1998).

OmniTrax Canada recently acquired the Port of Churchill. OmniTrax has also acquired the Hudson Bay Railway, which it operates in close coordination. The port is available for shipping and receiving ocean vessels from July until early November. Earlier or later scheduling is available using ice-class vessels or icebreakers.

Significant improvements to existing port facilities and transportation services are underway or being planned. It is not clear whether these improvements to facilities and services have been subject to environmental assessment under the *Canadian Environmental Assessment Act*, or approvals by the Department of Fisheries and Oceans.

Tourism is Churchill's fastest growing industry. Polar bears are the mainstay of the tourism sector as the bears congregate in the areas from late September to early November. Beluga whales move into the waters of the Churchill River estuary during July and August. Migratory birds are also prevalent from May to August. Significant numbers of people visit Churchill, Wapusk National Park, the Churchill River and the local area at this time.

It is not clear if these tourist activities affect wildlife or the marine environment, have been subject to

environmental assessment or require approvals by any federal government departments.

## Inuit Final Agreement

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### Application

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The federal government cannot transfer more rights to the Inuit under the Inuit Final Agreement<sup>31</sup> than they possess under the existing Canadian constitutional structure. Therefore, any rights under the Agreement must be interpreted in light of the existing division of powers between the federal and provincial governments under the *Constitution Act, 1867*.

The Inuit Final Agreement applies to the Nunavut Settlement Area and beyond. Inuit rights apply to the Nunavut Settlement Area and to areas external to the Nunavut Settlement Area to the extent those areas, rights and processes are specified in the agreement. The only exception to this rule is for lands and waters in Manitoba, which may be subject to Inuit aboriginal title and claims.

### Cessation of Inuit aboriginal title

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The Inuit cede aboriginal rights and title to lands, waters and the offshore under Canadian jurisdiction under section 2.7.1, with their remaining rights being those specified under the agreement.

Section 2.7.1 states the Inuit:

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<sup>31</sup>The full name of the Inuit Final Agreement is the "Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada". It is also sometimes referred to as the Nunavut Final Agreement. It will be referred to as the Inuit Final Agreement in recognition that the Inuit are the beneficiaries under the Agreement.

cede, release and surrender to Her Majesty The Queen in Right of Canada all their aboriginal claims, rights, titles and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada

However, section 42.1.1 states that section 2.7.1 does not apply in and to lands and waters within Manitoba.

Notwithstanding anything in the Agreement, Section 2.7.1 shall not apply in and to lands and waters in Manitoba

The Inuit Final Agreement then defines lands and waters in the following way:<sup>32</sup>

"lands" does not include water but includes lands covered by waters, whether in the onshore or offshore;

"waters" means waters in any river, stream, lake or other body of inland waters on the surface or underground in the Nunavut Settlement Area, and includes ice and all inland groundwaters, but does not include water or ice in marine areas;

The definitions of lands and waters restrict the application of section 42.1.1 to the land territory of Manitoba, and do not extend to any marine areas that may be within the jurisdiction of Manitoba. Therefore, the Inuit only have aboriginal rights in the land territory of Manitoba. All rights in the rest of Canada and the offshore waters arise solely under the Agreement.

Section 42.1.2 places some limit on Inuit rights within Manitoba. It states the Inuit are not entitled to seek or secure from the federal government any rights other than

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<sup>32</sup>Inuit Final Agreement, section 1.

a definition of Inuit wildlife harvesting rights in exchange for Inuit claims, rights, titles and interests in and to the lands and waters in Manitoba. However, section 42.1.3 states that section 42.1.2 does not limit remedies for any infringement of any Inuit claims and rights in Manitoba. Therefore, the Inuit could have a full range of civil remedies to prevent the breach of a original title, including injunctions and damages.

The combination of section 2.7.1 and section 42.1 confirm that the Inuit retain wildlife harvesting rights, and they mean to protect those rights, on the Manitoba coast.

A number of issues arise and need to be considered to understand the wildlife management regime relevant to the land portion of the Manitoba coast. It is important to understand the relationship between section 40.4 (Part 4: Denesuline Indian Bands: Northern Manitoba) and section 42.1 of the Agreement. Is section 40.4 the expression of Inuit rights in Manitoba, or merely transitory provisions? Further, do wildlife harvesting rights under either section include wildlife management rights, and the ability to receive wildlife compensation and to seek the full gamut of legal remedies when these rights are abridged?

## Definitions in the Inuit Final Agreement

The definitions in section 1.1.1 are important for understanding the Inuit Final Agreement. Lands and waters have been defined above. The following phrases are also defined in section 1.1.1 and are reiterated below:

"bed" of a body of water means the land covered so long by water as to rest it from vegetation or a stoma distinct character

upon the vegetation where it extends into the water or upon the soil itself;

"domestic interjurisdictional agreement" means a wildlife agreement between two or more of the Government of Canada, provincial governments in Canada and territorial governments in Canada ;

"harvest" means the reduction of wildlife into possession;

"IIBA" means an Inuit Impact and Benefit Agreement referred to in Article 8, 9 or 26;

"marine areas" means that part of Canada's internal waters or territorial sea, whether open or ice-recovered, lying within the Nunavut Settlement Area, but does not include inland waters. For greater certainty, the reference to internal water or territorial sea includes the seabed and subsoil below those internal waters or territorial sea;

"marine species" means fish and includes part of fish, shellfish, crustaceans, marine animals and parts of shellfish, crustaceans or marine animals, and the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals;

"ordinary high-water mark" or "bank" of a body means the limited edge of its bed;

"Outer Land Fast Ice Zone" means the area bounded by

(a) in the north by Latitude 73 degrees 40' off Cape Liverpool on Bylot Island,

(b) in the south, by Latitude 66 degrees 37' N, off Cape Dyer on Baffin Island,

(c) in the west, by the seaward edge of the Territorial Sea boundary off the east coast of Baffin Island, and

(d) in the east, by the maximum limit of land fast ice (1963-1989) as shown on the map titled Limit of Land Fast Ice - East Baffin Coast, jointly delivered by the Parties to the registrar, a copy of which is set out in Schedule 16-1 for general information purposes only;

"principles of conservation" means those principles set out in Section 5.1.5;

"wildlife" means all terrestrial, aquatic, avian and amphibian flora and *fauna ferae naturae*, and all parts and products thereof;

"Zone I" means those waters north of 61 degree latitude subject to Canada's jurisdiction seaward of the Territorial Sea boundary as measured from lines drawn pursuant to the Territorial Sea Geographical Co-ordinates (Area 7) Order SOR/85-872 that are not part of the Nunavut Settlement Area or another land claim settlement area;

"Zone II" means those waters of James Bay, Hudson Bay and Hudson Strait that are not part of the Nunavut Settlement Area or another land claim settlement area.

The definitions in the Inuit Final Agreement influence and shape the understanding of rights and processes. A number of definitions should be highlighted due to their importance for subsequent processes. For example, the definitions of Zones I and II, and the Outer Land Fast Ice Zone are important as they are all marine regions outside the Nunavut Settlement Area which are subject to some wildlife and marine management regime under the Agreement. Zone I is defined in terms of the territorial sea within Canadian jurisdiction. How extensive is Zone I and where is located? Zone II is defined to include the waters of the Hudson Bay. How does this zone, and its management regime, relate to the Marine Area East of Manitoba?

The definition of marine species is somewhat similar to the definition of fish under the *Fisheries Act*, while the definition of wildlife under the Agreement is very inclusive. This gives rise to the issue of how species such as polar bears will be regulated under the Agreement.

## Regions subject to the Inuit Final Agreement

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### Introduction

This portion summarizes some of the provisions that may directly or indirectly affect the Manitoba coast and adjacent waters, and fish and marine mammal management on the coast and in these waters. Several of these regimes, as well as rights and processes described elsewhere in the Agreement, may apply concurrently and could need to be considered together.

### Article 3: Nunavut Settlement Area

The Inuit Final Agreement is an agreement that is oriented towards, and intended to apply to marine areas within and external to the Nunavut Settlement Area. This was clearly the intent of both the federal government and the Inuit, perhaps due to the Inuit focus on marine resources and as a means of confirming Canadian sovereignty to Arctic waters.<sup>33</sup>

The preamble to the Agreement lists the objectives of the Agreement including its application to the offshore. Three of those objectives are reiterated below:

- to provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of lands, waters and resources, including the offshore;
- to provide Inuit with wildlife harvesting rights and rights to participate in decision-making concerning wildlife harvesting;

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<sup>33</sup>Inuit Final Agreement, sections 15.1.1 and 16.1.1.

to provide Inuit with financial compensation and means of participating in economic opportunities;

Article 3 defines the Nunavut Settlement Area in terms of Area A which is the Arctic Islands and mainland of the eastern Arctic and adjacent marine areas described in Part 2, and Area B which is the Belcher Islands, associated island and adjacent marine areas. Areas A and B include the marine areas enclosed within the boundaries.

Section 3.5.1 reiterates that the Inuit have additional rights to areas outside the Nunavut Settlement Area as provided in the Agreement. This analysis focuses on the application of the Inuit Final Agreement to the Manitoba coast and adjacent offshore waters.

#### **Article 16: Outer Land Fast Ice Zone- East Baffin Coast**

The geographical parameters of the Outer Land Fast Ice Zones are defined in the section 1.1.1 of the Agreement, with a map being provided in Schedule 16.1. Section 16.1.1 provides that certain rights in the Inuit Final Agreement apply in this area "in a manner consistent with Canada's sovereignty, sovereign rights and jurisdiction, and with Canada's international obligations". These articles include Articles 5 (Wildlife), with respect to all harvesting for land-fast ice and all marine mammals in open waters, and Articles 6 (Wildlife Compensation), 11 (Land Use Planning), 12 (Development Impact), and 25 (Resource Royalty Sharing).

Sections 16.1.2 and 16.1.3 provide some additional Inuit rights:

16.1.2

In addition to the rights under Section 16.1.1, Inuit shall have the right to continue to use open waters in the Outer Land Fast Ice Zone for the purpose of harvesting, for domestic consumption, all species other than marine mammals. Inuit shall not need licences for such activities but shall be subject to all other management regulations imposed by appropriate government authorities consistent with part 3 of Article 15 [Wildlife Management and Harvesting Beyond the Marine Areas of the Nunavut Settlement Area].

16.1.3

Fisheries in the Outer Land Fast Ice Zone shall be managed so as not to deplete marine mammal populations.

The Outer Land Fast Ice Zone is outside the Nunavut Settlement Area, but important as it provides a model of the Inuit possible rights to marine water external to the Nunavut Settlement Area.

Courts may also use the clarity of the regime in this instance and the ambiguity in other instances in the Agreement as an interpretive guideline for the management regime applicable to Manitoba offshore waters.

#### **Article 15: Marine Areas**

Article 15 is a crucial chapter for understanding the regime applicable to marine waters adjacent to Manitoba and south of the Nunavut Settlement Area.

Section 15.1.1 states the following principles:

- (a) Inuit are traditional and current users of certain marine areas, especially the land fast ice zones;
- (b) the legal rights of Inuit in marine areas flowing from the Agreement are based on traditional and current use;

- (c) Canada's sovereignty over the waters of the arctic archipelago is supported by Inuit use and occupancy;
- (d) Inuit harvest wildlifethatmigrate beyond the marine areas;
- (e) an Inuit economy based on marine resources is both viable and desirable;
- (f) there is the need to develop and coordinate policies regarding the marine areas; and
- (g) there is a need for Inuit involvement in aspects of Arctic marine management, including research.

Section 15.2.2 states that the following articles apply to marine areas, subject to any internal limitations in these articles: Articles 5 (Wildlife), 6 (Wildlife Compensation), 8 (Parks), 9 (Conservation Areas), 11 (Land Use Planning), 12 (Development Impact), 23 (Inuit Employment within Government), 24 (Government Contracts), 25 (Royalty Resource Sharing), 27 (Natural Resource Development), 33 (Archeology), and 34 (Ethnographic Objects and Archival Materials).

Part 3 of Article 15 focuses on wildlifemanagementandharvestingbeyond the marine areas of the Nunavut Settlement Area, suggesting section 15.2.2 may not apply to these areas.

Part 3: Wildlife Management and Harvesting Beyond the Marine Areas of the Nunavut Settlement Area contains provisions for management structures and Inuit harvesting rights for migratory marine species in Zones I and II, and adjacent areas. These provisions may be relevant for the coastal region adjacent to Manitoba. The scope of Article 13, Part 3 is also explored in the decision *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)*

(FCCA) dated July 2 and 13, 1998, which is discussed below.

Sections 15.3.1-8 contains relevant provisions. Those provisions important for wildlifemanagementandharvestinginZone II are reiterated below:

#### 15.3.2

Government will maintain a structure or structures to promote coordinated management of migratory species in Zones I or II and adjacent areas.

#### 15.3.3

The NWMB shall appoint appropriate representation from the Nunavut Settlement Area to the structure or structures referred to in Section 15.3.1

#### 15.3.4

Governments shall seek the advice of the NWMB with respect to any wildlife management decisions in Zones I and II which would affect the substance and value of Inuit harvesting rights and opportunities within the marine areas of the Nunavut Settlement Area. The NWMB shall provide relevant information to Government that would assist in wildlifemanagementbeyond the marine areas of the Nunavut Settlement Area.

#### 15.3.5

Part 9 of Article 5 shall apply to any international or domestic interjurisdictional agreement relating to wildlifemanagement applicable to Zones I and II.

#### 15.3.6

[Role of NWMB with respect to research]

#### 15.3.7

Government recognizes the importance of the principles of adjacency and economic dependence of communities in the Nunavut Settlement Area on marine resources, and shall give special consideration to these factors when allocating commercial fishing licences within Zones I and II. Adjacent means adjacent to or within a reasonable geographic distance to the zone in question. The principles will be applied in such a way

astopromoteafairdistributionoflicences betweentheresidentsoftheNunavut SettlementAreaandtheotherresidentsof Canadaandinamannerconsistentwith Canada'sinterjurisdictionalobligations.

#### 15.3.8

Forgreatercertainty,nothinginthisArticle shallprecludeInuitaccesstowildlife harvestingpurposesinZoneIandII.

Section15.3.8confirmsInuit wildlifeharvestingrightsstillexistinthe offshore.Part9ofArticle5isalsorelevant anddiscussedbelow.

Theonlyotherprovisionofnotein Article15issection15.4.1,"Part4:Marine Management",whichstates:

#### 15.4.1

TheNIRB[NunavutImpactReviewBoard], theNWB[NunavutWaterBoard],theNPC [NunavutPlanningCommission]andthe NWMB[NunavutWildlifeManagement Board]mayjointly,asaNunavutMarine Council,orseverallyadviseandmake recommendationstoothergovernment agenciesregardingthemarineareas,and Governmentshallconsidersuchadviceand recommendationsinmakingdecisions whichaffectmarineareas.

TheNunavutMarineCouncilhas onlyrecentlybeenformed,andno informationisyetavailableaboutits mandateandpriorities.

*Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)* examinesPart3ofArticle15inthecontext oftheallocationofthetotalallowablecatch forturbotinZoneI.Italsoreferstobutdoes notreachanyconclusionsforsection15.4.1 inPart4.Theunderlyingfactsbehindthe caseareasfollows.In1997,theMinsterof theFisheriesandOceanshadreallocatedan increaseinthecatchforturbotsuchthatthe NunavutInuit'soverallshareofthecatch wasreducedfrom27.3%to24%.The

corporatarmoftheInuit,Nunavut TunngavikInc,challengedthisreallocation onanumberofgrounds.TheFederalCourt TrialDivisionissuedadecisiononthe matter,thatwasappealedtotheFederal CourtofAppeal.TheFederalCourtof AppealsetasidetheMinister'sdecisionas beingcontrarytolaw,andreferredthe mattertothecurrentMinister.

TheFederalCourtofAppealreasons forthedecisionshedlightonthe interpretationofPart3.TheCourtfirst foundthattheAgreementimposes proceduralandsubstantiverequirementson theMinister'sdecision-makingprocessso thattheirdiscretionisnolongerabsolutefor eithertheNunavutSettlementArea,or ZonesIandII.InZonesIandII,theprimary andoverallresponsibilitiesforwildlife managementareheldbythefederal government,subjecttoconditionsand requirementswhichrecognizetheneedfor InuitinvolvementinaspectsofArctic marinemanagement.

TheCourtthenanalyzedsection 15.3.4andmadethefollowingconclusions:

IftheAgreementaimsatsensuringthat NunavutInuitwillbeconsultedwithrespect towildlifemanagementdecisionsinZonesI andIIwhichwouldaffectthesubstanceand valueoftheirharvestingrightswithinthe marineareasofNunavutSettlementArea because turbotaremigratoryfish,the allocationofturbotfishingquotasand licencesinZonesIandIIissuchadecision. Thisiswhyanobligationisputonthe Governmenttoseektheadviceofthe NWMB.Consequently,Section15.3.4puts proceduralrestrictionsontheMinister's exerciseofdiscretionwhicharesatisfied whentheMinisteringoodfaithseeksand considerstheviewsoftheNWMB.The NWMB'sfunctionwithrespecttowildlife managementdecisionsinZonesIandIIis

merely advisory and the Minister is not bound by that advice.

The Court also made specific comments on section 15.3.7:

A purposive interpretation of Section 15.3.7 evidences an intention of the parties to the Agreement to establish a principle of equity, not of priority, in the distribution of commercial fishing licences within Zones I and II. In addition, the balancing of interests between the residents of the Nunavut Settlement Area and other residents of Canada has to be consistent with Canada's interjurisdictional obligations. No one, in the context of the present appeal, has tried to ascribe a meaning to the term "interjurisdictional obligations" and it is not necessary to do so in order to dispose of the appeal. It is clear, however, that such a requirement which affects the distribution of licences is incompatible with a principle of priority of access, especially one of the magnitude claimed by the respondent.

Further the Court states:

Section 15.3.7 imposes a duty on the Government to give special consideration to the adjacency and economic dependence principles. This duty aims at guaranteeing the Nunavut Inuit that, in the allocation of commercial fishing licences, their commercial dependence on marine resources, in view of their proximity to these resources, will be considered by the licencing authority. Special consideration of these principles means that a particular and appropriate attention ought to be given to these principles when balancing the fierce competing interests at stake with a view to promoting a fair balance in the distribution of commercial fishing licences in these zones, that is to say one which either clearly reflects a proper application of these principles or bearing in mind all the other factors that the Minister has to consider in the exercise of his discretion.

The Court found that sufficient consultation had occurred to satisfy section

15.3.4. It then set aside the Minister's decision for the allocation of the catch and referred that matter for reconsideration to the current Minister. It did so as there were no explanations or reasons that the decision was lawful, leading to the reasonable inference that the Minister did not give special consideration to the adjacency and economic dependence principles as required by the Agreement. The Minister could also have misconstrued these principles when allocating commercial fishing licences within the zone.

#### **Article 40: Other Aboriginal Peoples**

Article 40 of the Inuit Final Agreement addresses the relationships between the Inuit and adjacent First Nations whomay have overlapping aboriginal claims, or traditional harvesting rights in the other's claims area. Article 40, Part 1 addresses the relationship between the Inuit Final Agreement and other aboriginal and treaty rights, and indicates the agreement is not intended to affect these other rights.

Parts 2 and 3 address the Inuit of Northern Quebec and other aboriginal peoples in the Northwest Territories, while Part 5 addresses the Denesuline Bands of Northern Saskatchewan. Parts 2, 3 and 5 of Article 40 will not be discussed in this analysis.<sup>34</sup>

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<sup>34</sup> While it will not be discussed further, it is important to note that section 40.2 discusses the Northern Quebec Inuit Offshore Land Claims Agreement that has not yet been finalized. Once finalized, this agreement is likely to modify the offshore regime under the Inuit Final Agreement as Zones I and II are defined in terms of land that are not part of the Nunavut Settlement Area and any land claims agreement.

"Part 4: Denesuline Indian Bands: Northern Manitoba" discusses reciprocal wildlife harvesting rights between the Inuit and the Fort Churchill and the Northlands Indian Bands.

Part 4 addresses rights of Manitoba First Nations to hunt in the Nunavut Settlement Area and on Inuit Owned Lands on the same terms and with the same access as the Inuit (sections 40.4.1-40.4.3). The harvesting rights of the Inuit and Manitoba First Nations are based on reciprocity; both parties have similar harvesting rights and the ability to participate in each other's management process. Several provisions may be relevant for understanding the applicable regime and are reproduced below:

#### 40.4.4

Notwithstanding Sections 40.4.2 and 40.4.3, the NWMB may establish limits and regulations governing wildlife harvesting by members of the Northlands and Fort Churchill Bands within the Nunavut Settlement Area commensurate with any limits and regulations governing wildlife harvesting by Inuit in an area which Inuit have traditionally used and continue to use for wildlife harvesting in northern Manitoba.

#### 40.4.5

The NWMB shall consult with the Councils of the Bands on decisions of the NWMB of direct concern to those Bands and to determine how fairly to give effect to Sections 40.4.2 and 40.4.4.

#### 40.4.6

The NWMB shall work cooperatively with any interjurisdictional management institutions for protecting and conserving caribou herds or other species which are harvested by members of a Band and Inuit.

#### 40.4.8

The NPC, NIR Band and the NWB, in performing their review functions, shall allow full standing to the Council of the Band to make representations respecting

their interests in an area they have traditionally used and continue to use, and shall take those representations into account.

Sections 40.4.4-6 and 40.4.8 establish a potential joint framework for wildlife management based on principles of reciprocity. It is not clear whether how this principle of reciprocity will work, particularly if Manitoba First Nations do not currently harvest the species in question.

It is also not clear how Part 4 of Article 40 integrates with "Article 42: Manitoba and Marine Area East of Manitoba". "Part 1: Inuit Harvesting Rights: Manitoba" of Article 41 suggests that this issue has not been resolved yet.

### **Article 42: Manitoba and Marine Area East of Manitoba**

Article 42 contains Part 1 which deals with Inuit harvesting rights in Manitoba, and Part 2 which deals with Inuit harvesting rights to the marine area east of Manitoba. "Part 1: Inuit Harvesting Rights: Manitoba" is discussed above in the context of the Inuit cessation of aboriginal title. Part 1 will not be discussed any further here except to note that it makes any wildlife harvesting or management regimes subject to aboriginal claims and title, and subject to any remedies a court may order to protect those claims and title. It is not clear why this matter was not resolved at the time of the Inuit claim, unless Manitoba First Nations are also involved in comprehensive or specific land claims negotiations with the federal or Manitoba government.

"Part 2: Inuit Harvesting Rights: Marine Area East of Manitoba" addresses Inuit harvesting rights to the marine area east of Manitoba. This marine area is the

areas south of the Nunavut Settlement Area, and between the Manitoba coast and 15 miles offshore of that coast. It is defined in the following way:

42.2.1 In this part, "marine area east of Manitoba" means the area of Hudson Bay bounded by the coast of Manitoba, the 60th parallel of latitude and a straight line running southerly, from the point at the 60th parallel of latitude 15 miles distant from the coast of Manitoba, to the east bank of the mouth of the Churchill River.

Section 42.2.2 describes Inuit harvesting rights, while sections 42.2.3-42.2.7 and 42.2.14 state conditions on those rights. Section 42.2.2 is repeated in its entirety, while the remaining sections are briefly summarized:

42.2.2

In the marine area east of Manitoba, Inuit designated by the Keewatin RWO [Regional Wildlife Organization] shall have the right to harvest wildlife up to the level, taking into account Inuit harvesting of that species outside the marine area east of Manitoba, required to satisfy their personal, family or community consumption needs, subject only to restrictions or limitation agencies imposed by management agencies necessary to:

- (a) effect a valid conservation purpose;
- (b) provide for public health or safety, or human methods of harvesting;
- (c) implement those terms of an international agreement, as qualified by Section 5.9.1, that were in existence at the date of the ratification of the Agreement;
- (d) provide for harvesting by other aboriginal peoples pursuant to an aboriginal or treaty rights and the reasonable harvesting activities of other harvesters, provided that the Inuit right to harvest a species:
  - (i) shall not be more severely limited or adversely regulated than is the case with any

other aboriginal peoples harvesting the same species; and

(ii) shall take priority over harvesting of that species by non-aboriginal users;

(e) provide reasonable limits on disturbance or depletion of any species important for tourism; or

(f) in relation to a Park or Conservation Area, implement the terms of an agreement between Keewatin RWO and the management agency responsible for that Park or Conservation Area.

Section 42.2.3 clarifies that a restriction on the Inuit harvesting rights discussed above may be imposed by a domestic interjurisdictional agreement, while section 42.2.14 states that Part 2 does not derogate from the principle of adjacency found in section 15.3.7 and discussed in the case of *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)*.

Section 42.2.7 requires management agencies to take into account the special purposes and policies relating to Parks and Conservation areas when making decisions under section 42.2.2 with respect to these areas. The remaining provisions focus on the Nunavut Wildlife Management Board and the Keewatin Regional Wildlife Organization with respect to consulting and cooperating with management agencies.

"Part 2: Inuit Harvesting Rights: Marine Area East of Manitoba" addresses Inuit harvesting rights to the marine area east of Manitoba. It is not clear how this regime interacts with the regime established in Article 15 for offshore waters in Hudson Bay (Zone II).

## **Inuit Final Agreement rights and processes for northern Manitoba**

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A number of Inuit Final Agreement rights and processes apply to wildlife harvesting and management in Manitoba and adjacent offshore waters. Rights and processes under the Agreement that may apply to the Manitoba coast and offshore waters include the Nunavut Wildlife Management Board, the Marine Council, environmental assessment, wildlife harvesting, and wildlife compensation.

It is also necessary to understand how rights and processes designed for the Nunavut Settlement Area are modified for the Manitoba coast, offshore waters in the Manitoba Marine Area East, and the offshore waters of Zone II in Hudson Bay. These rights and processes may differ in how they apply in the respective areas, and how they interact with each other. While other provisions are also relevant, the wildlife harvesting and wildlife compensation regimes are discussed below.

"Article 5: Wildlife" creates a framework for wildlife management and rights in the Nunavut Settlement Area. Section 5.1.7 states none of the rights in the article apply to wildlife harvested outside the Nunavut Settlement Area. However, certain provisions in the Agreement are explicitly stated to apply outside the Nunavut Settlement Area, are likely to apply to the Manitoba coast and offshore waters, and are summarized below.

The Inuit Final Agreement specifies that the Nunavut Wildlife Management Board is the main instrument of wildlife management in the Nunavut Settlement

Area, the main regulator of access to wildlife, and has primary responsibility in the manner described in the Agreement. However, the Agreement also provides that government, federal or territorial, retains ultimate responsibility for wildlife management.<sup>35</sup> This provision permits a flexible allocation of authority between government and the board, depending on the board's responsibility and the matter being considered.

Section 5.3.4 addresses wildlife populations that migrate outside the Nunavut Settlement Area and are harvested in those jurisdictions. In those situations, the Nunavut Wildlife Management Board and the Minister are required to consider terms of domestic interjurisdictional agreements and international agreements when setting harvest levels in the Nunavut Settlement Agreements. The Inuit Final Agreement establishes a process for the Nunavut Wildlife Management Board's decision in relation to "Article 40: Other Aboriginal People".<sup>36</sup>

Part 9 of Article 5 focuses on international and domestic interjurisdictional agreements. These provisions are important as they are explicitly deemed to apply to marine areas outside the Nunavut Settlement Area.<sup>37</sup> Section 5.5.9.1 requires that legislation implementing these agreements treat the Inuit "at least as favourable a basis" as any other aboriginal people in Canada. Section 5.9.7 specifies Inuit participation in government policy for international agreements relating to

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<sup>35</sup> Ibid, section 5.2.33.

<sup>36</sup> Ibid, sections 5.3.7-5.3.16.

<sup>37</sup> Ibid, section 15.3.5.

harvesting rights in the Nunavut Settlement Area, where that participation extends beyond that generally available to non-governmental organizations. Wildlife harvesting in the Nunavut Settlement Area is also explicitly stated to be subject to legislation implementing international agreements, if those agreements were in existence when the Inuit Final Agreement was ratified.<sup>38</sup>

The most interesting provision is section 5.9.5 that provides that the Nunavut Wildlife Management Board shall have a role in the negotiation or amendment of domestic interjurisdictional agreements "commensurate with its status and responsibilities in the management of wildlife in the Nunavut Settlement Area." As a result, it is necessary to have a legal and functional understanding of the board in the Nunavut Settlement Area to understand this provision.

Arguably, the board's jurisdiction over wildlife could exceed the jurisdiction of either federal or provincial governments in the rest of Canada. Thus, the Board could have a very significant role in any subsequent domestic interjurisdictional agreements for species or ecosystems in the Hudson Bay region.

"Article 5: Part 5: Inuit Bowhead Knowledge Study" also contains specific provisions for bowhead whales, and the framework for future harvests if this population responds. It also illustrates some of the tensions between subsistence harvesting by First Nations, and commercial harvesting.

#### 5.5.1

<sup>38</sup>Ibid, section 5.9.4.

Commercial harvesting of bowhead whales earlier this century by non-Inuit greatly reduced the stocks of bowhead whales found in the Nunavut Settlement Area.

Government acknowledges the Inuit view that, following the cessation of commercial harvesting, stocks of bowhead whales in the Nunavut Settlement Area have increased in recent decades as a result, in part, of Inuit voluntarily curtailing their harvesting practices to allow the recovery of the bowhead whale population.

Article 6 describes the wildlife compensation process under the Agreement. It is not discussed extensively here other than to note it includes developments in the Hudson Bay (Zone II).<sup>39</sup> There is also a complex regime in place delineating compensation for marine transportation.<sup>40</sup>

Some of the Inuit Final Agreement's land and resource management process may also apply. Land use planning applies to land and marine areas in the Nunavut Settlement Area.<sup>41</sup> The environmental assessment process in Article 12 can apply to project proposals that take place within the Nunavut Settlement Area and adjacent areas. Part 1 of Article 12 addresses transboundary impacts of projects outside the Nunavut Settlement Area that affect that region.<sup>42</sup> Environmental assessment applies to land and marine areas within the Nunavut Settlement Area and to the Outer Land and Fast Ice Zone. Marine transportation is again subject to complex exclusions in that shipping associated with project proposals is subject to Article 12. However, "normal

<sup>39</sup>Ibid, section 6.1.1.

<sup>40</sup>Ibid, sections 6.2.2, 6.2.3, and 6.3.4.

<sup>41</sup>Ibid, section 11.1.4.

<sup>42</sup>Ibid, sections 12.11.1-12.11.2.

community supply or individualship movements not associated with project proposals" are not subject to certain parts of Article 12.<sup>43</sup>

## **Issues for northern Manitoba**

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A number of issues arise when one considers the application of the Inuit Final Agreement to northern Manitoba. Some of these issues are:

To what extent does the Inuit Final Agreement create Inuit rights and processes for the Manitoba coast and offshore waters? What are these Inuit rights and processes, and how do they interact with the rights and processes of Manitoba First Nations?

When and how will fish and marine mammals on land and offshore of Manitoba, and activities affecting these populations, be subject to the Inuit Final Agreement? The Agreement establishes the management structures and compensation processes that could apply.

Considering these structures and processes in the context of one species, how is the polar bear population in question regulated under the Inuit Final Agreement? How does that regime differ in the respective areas subject to the Agreement? The Inuit only commercially harvest polar bears in Nunavut Territory. Is there any possible impact on Manitoba First Nations, and could the Agreement provide Manitoba First Nations with a right to commercially harvest polar bears?

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<sup>43</sup>Ibid, section 12.12.2.

## Fish and marine mammals in northern Manitoba

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### Inland fisheries

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The inland fisheries are important on the coast of northern Manitoba for subsistence, recreational and tourism purposes. They are not dealt with extensively here except to note the presence of anadromous fish that utilize the river and marine environment in their lifecycle.

### Offshore fisheries

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Offshore fisheries can be understood to include fish and marine mammals. Important marine mammals include seals, walrus, beluga and bowhead whales and polar bears. Each species gives rise to different concerns, is subject to different regulations, and is interrelated with the other species. For example, seals are the main food source for polar bears while beluga and bowhead whale populations are challenged by historic and present harvesting practices.

Focusing on polar bears, polar bears are understood and defined as marine mammals under international conventions, US legislation and scientific writings. In Canada, polar bears are interpreted federally as a terrestrial amphibious wildlife. In the Northwest Territories, polar bears are viewed as mammals. This difference in definition may be important for rights under the Inuit Final Agreement.

It is also necessary to understand the science pertaining to polar bears to determine the seasonal habitat, the geographic ranges, the genetic makeup and the harvesting pressures on the polar bear population that frequents northern Manitoba

and the southern region of the Nunavut Territories.

There is an existing system of polar bear management under international conventions, federal, territorial and provincial governments, First Nations, Northwest Territories and Nunavut Territory. Despite its responsibilities for fish and marine management, the Department of Fisheries and Oceans does not seem to be actively involved in the polar bear management regime.

### First Nations use of fish and marine mammals

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#### Subsistence harvesting of fish and marine mammals

The Inuit harvest wildlife in northern Manitoba for subsistence purposes both on the coast and inland, based on traditional uses, aboriginal rights and the Inuit Final Agreement.

Manitoba First Nations harvest wildlife in northern Manitoba pursuant to the *Manitoba Natural Resources Transfer Agreement* and treaty rights.

There is no commercial harvesting of fish or off the Manitoba coast by First Nations or any other parties at this time, though many species migrate between this jurisdiction and other areas in Hudson Bay.

Polar bears, beluga whales, walrus and seals are harvested throughout the Northwest Territories and the Nunavut Territory by the Inuit and Inuvialuit. The seals and beluga whales are harvested for

subsistence purposes. Polar bears are commercially harvested but only within the Northwest and Nunavut Territories.

The Inuit may also harvest some of these marine mammal species for subsistence purposes in the coast of northern Manitoba, though it is not clear which species are harvested or where that harvest occurs. None of these marine mammal species appear to be harvested by Manitoba First Nations.

It is not clear how or in what fashion Manitoba First Nations rights extend to national parks and wildlife management areas, or to fish and marine mammals in offshore waters. Lastly it is not clear how Manitoba First Nations rights interact with Inuit rights.

### **Tourism potential of marine mammals**

There are considerable tourism uses of polar bears in northern Manitoba, particularly in the area around Churchill and to Wapusk National Park. Manitoba First Nations provide guiding and naturalist services, but there is no commercial hunting by First Nations. Whale watching is also a popular pastime.

Presumably, tourism impacts on wildlife species, including polar bears and beluga whales, and could adversely affect the population available for harvesting in the Nunavut Settlement Area.

## **Potential future impact on fish and marine mammals**

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### **Present and future hydroelectric development**

Hudson Bay and James Bay have been and continue to be affected by hydroelectric developments in Manitoba, Ontario and Quebec. The primary effect of damming is to change the flow regime with an increase in winter flows and a decrease in summer flows.

This damming may also change ocean current, near-shore ice conditions, nutrient availability, the timing and magnitude of ice, algae and phytoplankton production, feeding of larval fish, the use of estuaries by marine mammals and anadromous fish, and patterns of sea and land use along the coast.

Hydroelectric developments cause measurable changes to marine ecosystems; increased mobilization of mercury is also a concern. Most of these changes are probably concentrated in the near shore. While more subtle changes are actually occurring, current knowledge of the Hudson Bay and James Bay ecosystems is limited.

Apparently, the Department of Fisheries and Oceans has designed, but not implemented, a comprehensive research program to provide information on the structure and function of the Hudson Bay ecosystem and the results of river damming on downstream marine ecosystems.<sup>44</sup>

Present hydroelectric projects in Manitoba resulted in the reduction of water

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<sup>44</sup> H Welch, "Marine conservation in the Canadian Arctic: a regional overview," 3.

flows, the release of mercury and contamination of fish consumed by First Nations. Manitoba Hydro is currently compensating Manitoba First Nations for some of these impacts under the Northern Manitoba Flood Agreement. Manitoba Hydro is also compensating the town of Churchill through the construction of a weir for recreational purposes and to increase fish habitat.

Several more river diversions are planned for hydroelectric projects. These diversions could affect similarly in-stream water flows and fish habitat. The Department of Fisheries and Oceans does not appear in the past to have actively protected fish habitat from the impacts of hydroelectric development in Manitoba. The Department's role is not clear with respect to future projects.

### **Projects to divert waters flowing into Hudson Bay**

Several projects have been proposed in the past to divert water flowing into Hudson Bay or James Bay to southern Canada for irrigation or export. One example is the Grand Canal Project. This \$100-billion project called for the construction of a dike across James Bay to create a huge lake. Freshwater from this lake would be diverted south through existing water courses and new canals to the Great Lakes, for export to the US and the Canadian prairies.

### **Proposed navigation, transportation, marine construction and dredging activities**

A weir is being constructed in Churchill, and dredging is proposed for the

Port of Churchill. As well, there are proposals to extend the season for commercial shipping from this port, requiring further ice-breaking activities by the Coast Guard and facilitating increased traffic and related impacts.

These activities by the private parties could be subject to environmental assessment under *Canadian Environmental Assessment Act*, and potentially to provincial environmental assessment, and environmental assessment under the Inuit Final Agreement.

### **National and international pollution**

Air and water-borne pollution is increasing throughout the Arctic. This pollution is arising from land-based sources downstream of Hudson Bay, and is airborne from sources based in North America and throughout the globe.

Long-range transport of pollutants in the Arctic occurs as a result of agricultural and industrial activities. There are two important groups of pollutants: persistent organic pollutants such as chlorine, bromine and fluorine; and heavy metals, particularly mercury and cadmium. These substances tend to accumulate in the food chain, in marine mammals, and sea-birds.

Other compounds such as DDT and PCB are more volatile. They may enter the Arctic via ocean transport and the atmosphere. Winter air flows from Eurasia over the pole deposit thousands of tonnes of soil, ash and pollutants on sea and land. They enter the ocean when the ice melts, enter the food chain through algae and phytoplankton, and move up the food chain,

concentrating again in marine mammals, sea-birds and humans.<sup>45</sup>

### **Climate change**

Climate change is an important influence in Hudson and James Bay. Apparently, Hudson Bay and James Bay are experiencing the impact of climate change with ice breakup occurring six weeks earlier than normal this year.

It is believed that climate change will occur most strongly at high latitudes, with increases in winter temperatures and snowfall and probable reductions in the extent and thickness of sea ice. The physical effects will result in a gradual transformation of arctic to subarctic, with a northward movement of ice edges. At the very least, it will result in a shift in animal populations.<sup>46</sup>

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<sup>45</sup>Ibid,3.

<sup>46</sup>Ibid,4.

## **FutureroleofDepartmentofFisheriesandOceans**

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The Department of Fisheries and Oceans is the party within the federal government with the most responsibility for fish, marine mammals and habitat protection for the rivers, estuaries, coasts and offshore waters of Manitoba.

The Coast Guard, a division within the Department of Fisheries and Oceans, is responsible for navigation and shipping within Manitoba and the offshore. The Coast Guard may also be a proponent for dredging and navigation projects, and involved in the construction and expansion of weirs and ports.

The Department of Fisheries and Oceans and other federal government departments share responsibility over marine pollution. This responsibility extends beyond marine water to pollution occurring at a national and international level.

Arguably, significant changes have recently occurred for fish and marine management in offshore waters of Hudson Bay and the Arctic, including the coastal waters off Manitoba. These changes include: the recent negotiation and ratification of numerous international agreements and conventions affecting the marine environment; development pressures and increasing impacts from air and water born pollution; and the recognition of rights and processes under the Inuit Final Agreement that apply to northern Manitoba, and throughout the Canadian Arctic. While these changes should not solely drive the activities of government, these changes necessitate a unified approach on behalf of the federal

government to provide a focus for action or consultation.

The Department of Fisheries and Oceans is the most appropriate department to take a lead and coordinating role. The Department of Fisheries and Oceans will need to take an active role for coast lands and adjacent waters for northern Manitoba, both in carrying out its own legislative responsibilities, and coordinating the activities of other federal departments, levels of government and First Nations.

The current times also provide an opportunity for the Department to fulfill its own increasing responsibilities for northern Manitoba, and throughout the Hudson Bay and Arctic waters. Many of the jurisdictional and scientific issues for species and marine management will be consistent throughout the entire region. It is also a region that will benefit strongly from an integrated approach to fish and marine management.

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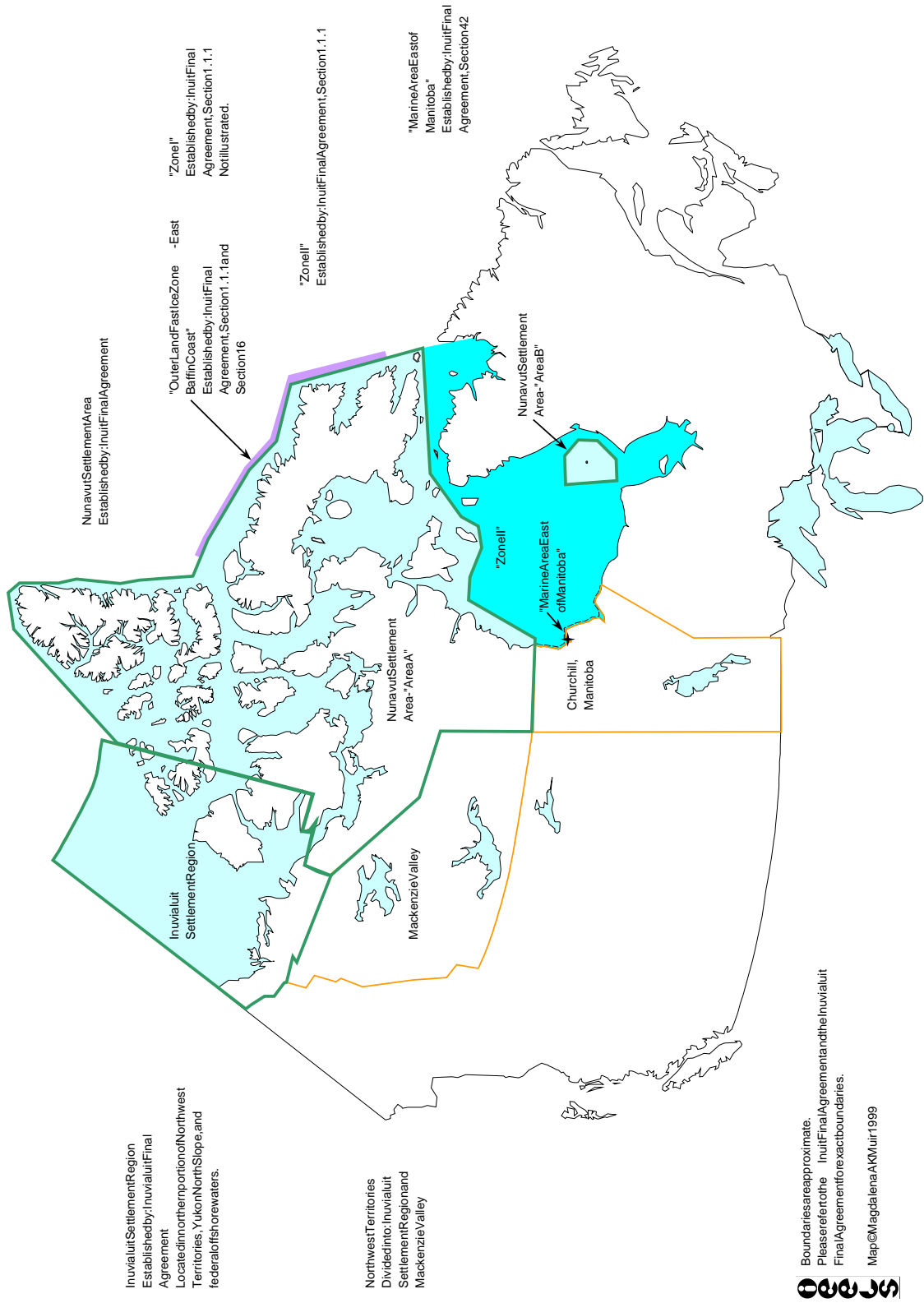
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# Marine zones from the Inuit Final Agreement and the Inuvialuit Final Agreement



Boundaries are approximate. Please refer to the Inuit Final Agreement and the Inuvialuit Final Agreement for exact boundaries.  
 Map © Magdalena AK Muir 1999

## Notes

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