ʔEHDZO GOT'Į NĘ GOTS'Ę NÁKEDI/SAHTU RENEWABLE RESOURCES BOARD

Public Listening: Sahtú Ragóɔa and Approaches to Wildlife Harvesting

CRITIQUE OF MINISTER'S RESPONSE TO THE BOARD REPORT AND REASONS FOR DECISION

February 25, 2021

Colville Lake Renewable Resources Council

Ayoni Keh Land Corporation

Behdzi Ahda" First Nation

(collectively, "Dehlá Got'ıne")

OVERVIEW AND ACTIONS REQUESTED OF THE SRRB

1. The Dehlá Got'ıne have reviewed the Minister's January 29, 2021 response ("the Response") to the ʔehdzo Got'ı nę Gots'ę Nákedı/Sahtú Renewable Resources Board (SRRB) report and reasons for decision of October 31, 2020 concerning *Sahtú Ragóɔa and Approaches to Wildlife Harvesting* ("the Report").
2. The purpose of the Public Listening was to listen to Sahtu participants, scientific experts, wildlife managers, Indigenous knowledge holders, and neighbouring authorities and communities and to consider evidence and argument in order to make decisions about the most effective way to regulate the harvest of caribou.
3. The Minister's Response proposes to vary or set aside a number of the key decisions made by the SRRB in the Report under s. 13.8.25 of the *Sahtu Dene Metis Comprehensive Land Claim Agreement ("SDMCLCA").*
4. As set out in more detail in this critique, the Dehlá Got'ıne believe that many of the reasons advanced by the Minister in the Response for setting aside or varying the Board's decisions cannot be supported on the basis of evidence or as a matter of law.
5. The Dehlá Got'ıne therefore request the SRRB to make final decisions in accordance with 13.8.27(a) of the *SDMCLCA* that are consistent with the evidence and argument presented during the *Public Listenin*g hearing in 2020, and that uphold the decisions made by the SRRB in their Report.

DECISION 1.1

SRRB Decision:

The SRRB decided that "harvest regulation for all caribou populations within the Sahtú region must be subject to community conservation planning measures."

Minister Response:

Harvest regulation for all caribou populations within the Sahtú region will reflect community conservation planning measures where appropriate.

Dehlá Got'ıne Critique:

6. The Minister states that "wording of this decision would preclude any regulation of any caribou population unless there are community conservation planning measures in effect."
7. The Minister's interpretation of the SRRB decision is unreasonable, and the Minister's proposed language does not properly reflect the roles and responsibilities of the SRRB, the RRC, and the Minister under the *SDMCLCA* and the *Wildlife Act*.
8. Validly made and enacted laws and regulations are generally assumed to operate concurrently unless there is an express intention of exclusivity or an actual conflict in operation. By way of example, the fact that motor vehicle use within municipal boundaries is subject to municipal bylaws does not preclude the GNWT from making "any regulations" over this subject matter. Indeed, the regulation of motor vehicles is exceptionally complex, and involves regulations made at the national, territorial and local level.
9. The regulation of wildlife in the NWT is complex, involving an interplay between the rights and responsibilities of Indigenous peoples as set out modern treaties or otherwise protected under

s. 35 and the authorities and responsibilities of public governments and modern land claims institutions, including the SRRB and the RRCs constituted under the *SDMCLCA*.

10. This is expressly recognized in the *Wildlife Act*, which states:

> 2. The Government of the Northwest Territories and all persons and bodies exercising powers and performing duties and other functions under this Act shall do so in accordance with the following principles:
>
> (c) the conservation and management of wildlife and habitat is to be conducted in an integrated and collaborative manner;

11. Nothing in the SRRB decision affects the ability of the Minister to propose and implement harvesting regulations on all caribou harvesting, provided that the Minister does so in accordance with the processes set out under the provisions of the applicable land claim agreements and in accordance with the *Wildlife* Act. This would include respecting the requirements of community conservation planning measures that have been approved in accordance with the *SDMCLCA*.
12. The Minister's proposal to vary the SRRB decision is not supported either by the record before the SRRB or reasons set out in the Minister's response.
13. The SRRB made a finding on the basis of evidence presented in both the 2016 and 2020 hearings that community-led conservation planning incorporating harvest monitoring remains the most effective approach for caribou regulation and conservation. (Report, para 56)
14. The Minister's Response does not challenge the SRRBs finding, and acknowledges that community conservation plans are part of overall caribou management efforts.
15. The Minister also asserts that "anything in a community conservation plan that is "not enforceable or is inconsistent with court decisions, the SDMCLCA or a matter for which a consistent approach across the Northwest Territories has been taken in the *Wildlife Act* is not appropriate for inclusion in regulations under the *Wildlife Act*."
16. Nothing in the SRRB decision requires the Minister to give effect to a community conservation plan that is not enforceable, inconsistent with court decisions, or the SDMCLCA in regulations under the Wildlife Act.
17. The Minister's assertion that community conservation plans must also be consistent on "matters for which a consistent approach across the Northwest Territories has been taken in the *Wildlife Act"* appears to be a statement of a GNWT policy position, as there is no such requirement in the SDMCLCA or the *Wildlife Act*.
18. In contrast, the s. 11 of the *Wildlife Act* obligates the Minister to "exercise his or her powers and perform his or her duties in a manner that is not inconsistent with land claims agreements" and to "develop and implement policies and programs in a manner that promotes a coordinated, collaborative and integrated approach to the conservation and management of wildlife and habitat in the Northwest Territories."
19. It is therefore the Minister's obligation to respect the roles and responsibilities of land claim institutions, including the SRRB and RRCs, and to work collaboratively with such bodies to promote cooperative and collaborative relationships for effective wildlife management at the local, regional and territorial levels.

20. The Minister has not given due consideration to how community conservation measures might fit within the collaborative framework for effective wildlife management set out under the *Wildlife Act,* and instead merely asserts without evidence that providing for "community conservation measures would preclude any regulation unless there are community conservation planning measures in effect."
21. The Minister's assertions appear to be rhetorical, rather than well-reasoned. They are not supported on the basis of the evidence before the board, or as a matter of law.
22. The Minister's proposal to vary this requirement is therefore unreasonable and should be rejected by the SRRB.

DECISION 1.2

SRRB Decision:

The SRRB recognizes the importance of having a comprehensive intraregional community conservation planning system based on Sahtú Indigenous governance systems. In this context, the SRRB has decided that Colville is the Sahtú community with primary responsibility for ɔədə (barren-ground caribou) stewardship in Sahtú Barren-ground caribou Area 01 (S/BC/01). Colville shares stewardship with Fort Good Hope within Area S/BC/02 where there may also be ʔədə. Délıŋę is the Sahtú community with primary responsibility for ɔekwę́ (barren-ground caribou) stewardship within Area S/BC/03.

Minister's Response:

The SRRB recognizes the importance of having a comprehensive intraregional community conservation planning system based on Sahtú Indigenous governance systems. In this context, the SRRB has decided that communities have a responsibility for stewardship of wildlife and habitat, and Colville is the Sahtú community who primarily harvests and shares a stewardship role for ɔədə (barren-ground caribou) in Sahtú Barren-ground caribou Area 01 (S/BC/01). Both Colville and Fort Good Hope have a stewardship role and harvest within Area S/BC/02 where there may also be ʔədə. Délıŋę is the Sahtú community who primarily harvests and shares a stewardship role for ɔekwę́ (barren-ground caribou) stewardship within Area S/BC/03. All Sahtú communities work together with the SRRB, other co-management partners and ENR to responsibly manage caribou.

Dehlá Got'ıne Critique:

23. For reasons further set out below in respect to Recommendation 4.1, the Minister's Response is founded on an incorrect interpretation of the *SDMCLCA.*
24. The Minister's Response also unreasonably assumes that "primary responsibility" is equivalent to "exclusive responsibility." This interpretation is not supported by the evidence before the SRRB of a mutually reinforcing system of shared responsibilities among Sahtu Dene and Metis.
25. The Minister's Response to vary this decision unreasonably diminishes the roles and responsibilities of the SRRB and the RRCs as set out under the *SDMCLCA* and rejects "the evidence of a Sahtú stewardship system for land and wildlife expects that land users and harvesters (families and communities) to play a governing role, while maintaining a strong sharing approach to ensuring food security for all" noted by the SRRB.

26. Further, there is no inconsistency between a particular Sahtu community having primary responsibilities for stewardship, including governance and management responsibilities, over particular areas within the Sahtu region under the *SDMCLCA*. This is in fact how many of the treaty responsibilities within the *SDMCLCA* are allocated among various Sahtu institutions. The Minister's Response does not acknowledge these arrangements or the evidence of consensus noted by the SRRB that there is support from the other three Sahtú communities for the Colville and Délı̨nę plans (Report, para 58)
27. There is no inherent inconsistency or conflict between shared responsibilities between wildlife management authorities at the local, regional or territorial scale. As noted in the Dehlá Got'ı̨ne critiques of the Minister's Response to Decision 1.1, the *Wildlife Act* expressly recognizes that there are multiple authorities with responsibilities for wildlife management within the NWT, and requires the Minister to promote cooperative and collaborative relationships for effective wildlife management at the local, regional and territorial levels.

DECISION 2.1

SRRB Decision:

The SRRB will approve Colville's Plan as a Sahtú community conservation plan following Colville's submission and the SRRB's subsequent assessment of the outstanding components of the community conservation plan: outline of ɂədə (caribou) monitoring and harvest monitoring information to be provided and reporting timelines; the plan for caribou conservation and food security (alternative harvest); and an evaluation framework.

Minister's Response:

The SRRB will approve Colville's Plan following Colville's submission and the SRRB's subsequent assessment of the outstanding components of the community conservation plan: outline of ɂədə (caribou) monitoring and harvest monitoring information to be provided and reporting timelines; the plan for caribou conservation and food security (alternative harvest); and an evaluation framework. The SRRB will forward the approved Colville Plan to the Minister of ENR for review and, subject to any required changes, approval. Upon approval by the Minister of ENR, Colville's Plan will be in effect as a Sahtú community conservation plan.

Dehlá Got'ı̨ne Critique:

28. The Minister's proposals to vary this decision are unnecessary, given the express requirements under the *SDMCLCA* for decisions of the Board to be approved by the Minister in accordance with s. 13.8.25 and 13.8.28 of the *SDMLCA.*
29. The Minister's Response describes additional conditions and considerations that the Minister will consider in relation to the Colville Plan. Such matters should be expressly proposed by the Minister as variations of the SRRB decision so that the "required changes" that the Minister believes are necessary for any approval are known in advance by Colville. It is not reasonable for Colville to put forward plans without knowing what additional criteria the Minister will consider in respect of an approval.

RECOMMENDATION 4.1

SRRB Recommendation:

The SRRB recommends to the Minister that the Colville Lake Renewable Resources Council be granted the power to issue authorizations to all types of harvesters in the entire Sahtú Barren-ground caribou area 01 (S/BC/01), subject to a periodic review of the status and location of ɔədə (Bluenose-West caribou).

Minister's Response:

It is recommended to the Minister that the Colville Lake Renewable Resources Council be granted the power to issue barren-ground caribou authorizations to Dehlá Got'ıne and non-participant harvesters in the entire Sahtú Barren-ground caribou area 01 (S/BC/01).

Dehlá Got'ıne Critique:

Interpretive framework

30. The Minister's Response is based on an unreasonable or incorrect understanding of the *SDMCLCA* and the common law applicable to modern treaty interpretation. The *SDMCLCA* sets out the roles and responsibilities of the GNWT, the SRRB, and the RRCs. However, the Minister has taken an overly narrow and formalistic approach to interpreting the provisions of the *SDMCLCA,* resulting in and interpretation that takes an impoverished view of the RRCs, including the Colville Lake Renewable Resources Council (CLRRC).
31. The Supreme Court of Canada in *First Nation of Nacho Nyak Dun v Yukon* gave guidance on the proper way to interpret modern treaties, including the *SDMCLCA*. It urged deference to the text of the treaties as well as to the underlying purposes of s. 35. The Court explained that:

> Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text *as a whole* and the treaty's objectives. Indeed, a modern treaty will not accomplish its purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if it is interpreted "in an ungenerous manner or as if it were an everyday commercial contract".[1]

32. The Court continued:

> By applying these interpretive principles, courts can help ensure that modern treaties will advance reconciliation. Modern treaties do so by addressing land claims disputes and "by creating the legal basis to foster a positive long-term relationship". Although not exhaustively so, reconciliation is found in the respectful fulfillment of a modern treaty's terms.[2]

33. A modern treaty is based on mutuality between the signatory Indigenous nations and the Crown. As the Court cautioned, it should not be read like an everyday commercial contract. Nor should it be read like a statute, whose interpretation is based only on discerning the intention of

[1] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 SCR 576, para 37 (citations omitted).
[2] *Ibid*, para 38 (citations omitted).

the Crown. Rather, a treaty must be interpreted in a manner that gives effect to the intentions of *both* the Indigenous parties and the Crown, and always in a way that will foster positive, long-term relationships between them.

34. As the Court said, the way to do this is to read any disputed provisions "in light of the treaty text *as a whole* and the treaty's objectives"[3]. The objectives of the *SDMCLCA* are stated in section 1.1.1, and include the following:

> (c) to recognize and encourage the way of life of the Sahtu Dene and Metis which is based on the cultural and economic relationship between them and the land; […]
>
> (f) to provide the Sahtu Dene and Metis with wildlife harvesting rights and the right to participate in decision making concerning wildlife harvesting and management;
>
> (g) to provide the Sahtu Dene and Metis the right to participate in decision making concerning the use, management and conservation of land, water and resources;

35. Any construal of the provisions of the *SDMCLCA* must be done through the lens of these objectives. The Minister's Response fails to do so.

Minister's Response interprets the Treaty in an unduly restrictive way

36. The Minister's Response to vary this Recommendation is contrary to the powers already granted the RRCs under s. 13.9.4(b) of the *SDMCLCA* to manage "the local exercise of participants' harvesting rights."
37. The Minister's Response is in part based on an incorrect and unreasonable rejection of the consensus reached among Sahtu participants in the Public Listening and by the SRRB concerning the interpretation of the 13.9.4 (b) roles and responsibilities of RRCs as including powers to manage the "the local exercise of participants' harvesting rights."
38. As discussed above, one of the key objectives of the *SDMCLCA* is to recognize the way of life of the Sahtu Dene, and to provide the Sahtu Dene with the right to participate in decision making concerning wildlife harvesting and management. The interpretation of 13.9.4(b) must begin with those objectives.
39. The evidence and submissions before the SRRB contained extensive canvassing of the how the Dehla Ede Plan of the CLRRC is an expression of Sahtu Dene culture and the desire of the Dehlá Got'ıne to regulate the caribou harvest in a culturally appropriate way.
40. The Board heard evidence in the hearings that in accordance with ts'ıduweh ʔeʔá (the original laws and protocols of the Sahtu Dene), seeking permission from the responsible group to harvest in an area is the expectation under Sahtu laws and customs. If a participant from an outside harvest area is not welcomed into a harvest area by participants responsible for that area, there is a shared understanding that the participant from an outside area simply would not go there, as the risks of venturing out onto the land without the approval and support of local participants who can act as guides and guardians in their own area is too high.[4]
41. The SRRB's decision recognized the ways in which the pre-existing Indigenous governance systems of the Sahtu Dene relate to the caribou management areas established by the GNWT. In

[3] *Ibid*, para 37 (italics in original).
[4] Dehla Closing Submission, dated Feb 11, 2020, para 76.

Decision 1.2, it decided that "Colville is the Sahtú community with primary responsibility for ɔədə (barren-ground caribou) stewardship in Sahtú Barren-ground Caribou Area 01 (S/BC/01). Colville shares stewardship with Fort Good Hope within Area S/BC/02 where there may also be ɔədə. Déline is the Sahtú community with primary responsibility for ɔekwǫ́ (barren-ground caribou) stewardship within Area S/BC/03."[5]

42. The CLRRC has proposed to formalize these traditional laws and protocols into a requirement for all participants who wish to exercise their harvesting rights within the Colville Lake area to obtain an authorization from the CLRRC. The final submissions of the Dehlá Got'ıne to the SRRB in February 2020, especially at paras 34-42 and 73-83, contain extensive discussion of how the CLRRC proposal is consistent with Sahtu Dene and Metis culture, and how the CLRCC proposal is an exercise of Treaty rights that is consistent with a harmonious reading of the *SDMCLCA* as a whole.
43. The Minister's Response ignores this important evidence. The Minister also ignores the Board's finding that Colville is the community with primary responsibility for ɔədə within S/BC/01, which formed the evidentiary basis for the Board's acceptance of the CLRRC proposal. The Minister's decision to vary this Recommendation is therefore unreasonable.
44. Moreover, the Minister's Response misreads the actual text of 13.9.4(b) of the *SDMCLCA*.
45. 13.9.4(b) of the *SDMCLCA* reads as follows: "to manage, in a manner consistent with legislation and the policies of the Board, the *local exercise of participants' harvesting rights* including the methods, seasons and location of harvest (italics added).
46. This provision clearly empowers the RRCs to manage the "the local exercise of participants' harvesting rights." "Participants" is a defined term in the Treaty, referring to any "person enrolled in the Enrolment Register" as a beneficiary to the *SDMCLCA*. The power is therefore not restricted to apply only to participants from the local community, but rather to all participants.
47. Indeed, the placement of the word "local" in 13.9.4(b) clearly modifies "exercise", not "participant". The provision reads "local exercise", not "local participant".
48. It is therefore clear from the actual text of the treaty that 13.9.4(b) intends to empower the RRC to deal with the "local exercise" of harvesting rights by participants, not simply with "local participants".
49. However, the Minister's Response offers an interpretation of this clause which the Minister says restricts the RRC's powers to manage the exercise of rights by participants residing in a particular community.
50. In effect, the Minister's interpretation seeks to rearrange the wording of 13.9.4(b) in order to read down the RRC's powers as being limited to managing the "exercise of harvesting rights of participants from that community." That is pointedly not the wording of the actual 13.9.4(b).
51. As pointed out by the SCC in *Nacho Nyak Dun*, modern treaties are a product of careful drafting.[6] It is not open to the Minister to substitute the Minister's own words in place of the actual wording of the *SDMCLCA*.
52. There is an obligation on the Minister to interpret the *SDMCLCA* broadly, liberally, in the spirit and intent of the Sahtu Agreement and to uphold the honour of the Crown as per the principles of modern treaty interpretation.

[5] SRRB Decision, para 57.
[6] *Nacho Nyak Dun*, para 36.

53. Even without the guidance of the principles of modern treaty interpretation, using general statutory interpretive principles, which may be applied to interpret a modern treaty,[7] such as a plain reading, the ordinary grammatical meaning of words based on common sense expectations about how laws are drafted[8] may be relied upon to understand that the words "local exercise of participants' harvesting rights" in s. 13 .9.4(b).
54. The first definition of "local" in the *Meriam Webster* dictionary states, "local" means "characterized by or relating to position in space: having a definite spatial form or location."
55. Applying the dictionary definition of "local" to s. 13.9.4(b), the plain and simple meaning of this clause is that Renewable Resource Councils have the power to manage the exercise of harvesting rights in a local area by any or all participants using that local area.
56. The *SDMCLCA* contains interpretive provisions including s. 3.1.18 which states "this agreement may be examined as an aid to interpretation where there is any doubt in respect of the meaning of any legislation implementing the provisions of this agreement." While s. 3.1.18 refers to interpreting the meaning of legislation, it may be broadly applied to mean that the *SDMCLCA* itself may be examined as an interpretation aid.
57. An examination of the *SDMCLCA* reveals:

    a. the word "local" appears in approximately 97 instances;

    b. the word "participant" appears approximately 52 instances;

    c. the word "government" appears approximately 455 instances;

    d. the phrase "local government" appears approximately 61 instances and as noted earlier, is a defined term;

    e. the phrase "local participant(s)" appears in 0 instances.

58. Based on the above examination, it is logical to infer that if the parties who negotiated the *SDMCLCA* had intended to set up the RRCs to manage only local participants as the Minister envisions, then the drafters would have clearly referred to "local participants". The *SDMCLCA* does not use the term "local participants". Therefore, using both the general interpretive principles applicable to treaties as well as the direct examination of the text of the *SDMCLCA* itself, the only possible interpretation of 13.9.4(b) supports the positions of the SRRB and the CLRRC that Renewable Resource Councils have authority to manage the *local exercise of participants' harvesting rights* including the methods, seasons and location of harvest, which is precisely what the treaty says.
59. The Minister's analysis is furthermore inconsistent with the approaches that the Minister has taken in interpreting treaties applicable to regions of the NWT.
60. The principle of *in pari materia* is relevant here. As an interpretative principle, it requires that laws relating to the same matters and the same subjects should be considered in relation to each other. "Where there are different statues *in pari materia* though made at different

[7] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] SCC 53, para 125.
[8] *Musqueam First Nation v. British Columbia (Assessor of Area #09)*, 2012 BCCA 178 (CanLII), para. 13.

times...they shall be taken and construed together...and as explanatory of each other".[9] The intent is to promote uniformity and predictability in the law.

61. Therefore, when considering the roles that RRCs may play not only under the *SDMCLCA,* but as co-management partners within the cooperative context set out in the *Wildlife Act*, the Minister should seek to give similar effect to similar provisions in different treaties.
62. HTCs under the *Inuvialuit Final Agreement* and RRCs in the *SDMCLCA* have similar roles and responsibilities for the management of the local exercise of participant's harvesting rights.
63. It is therefore inconsistent for the Minister, in the absence of clear contrary intentions in the respective treaties, to advance an interpretation of the *SDMCLCA* in which RRCs can only regulate "local participants" when the Minister is prepared to not only recognize the authority of Hunter and Trapper Committees to govern the exercise of rights by Inuvialuit but of "other Native peoples" for harvesting in community hunting and trapping areas under the *Inuvialuit Final Agreement*, but to enact HTC bylaws as regulations under the *Wildlife Act*.
64. It is therefore both incorrect and unreasonable for the Minister to "read down" the clear meaning and intent of the relevant provisions of the *SDMCLCA* and to refuse to give effect to community-based authorizations and regulations proposed by RRCs in the Sahtu region when the Minister does not take a similar approach to the interpretation of other treaties, or refuse to enact similar regulations when proposed by similar bodies.

Minister's response misconstrues the potential for infringement of treaty rights

65. The Minister further justifies the proposed variation of the SRRB recommendation on the basis that a TAH is the only measure that can be justified as a 'minimal infringement' of participant rights. Both legally and logically, the Minister's position cannot be sustained.
66. The Minister's Response makes a mistake in law by jumping directly to a minimal infringement analysis before considering whether there is a potential infringement at all. The harvesting right that in the Minister's view is at risk of being infringed is not a "free-standing" Aboriginal right to harvest, but rather a treaty right enshrined in the *SDMCLCA* that is subject to inherent limitations set out in accordance with the treaty. The *SDMCLCA* states this clearly in 13.4.1:

> Participants have the right to harvest all species of wildlife within the settlement area at all seasons of the year subject to limitations which may be prescribed in accordance with this agreement.

67. As described in the Treaty, the harvesting right is not unlimited, but is always subject to inherent limitations prescribed in accordance with the Treaty. In other words, validly enacted regulation on harvesting by bodies established by the Treaty, such as the CLRRC or the SRRB, do not infringe the harvesting right. Rather, the harvesting right under the *SDMCLCA* is regulated by the Treaty. As such, there is no "infringement" of harvesting rights by the CLRRC or SRRB decisions when those rights are subjected to the validly enacted limitations prescribed in accordance with the *SDMCLCA.* No minimal infringement analysis is necessary.
68. Moreover, the Minister is simply reciting arguments previously made by ENR, without due consideration for the SRRB's findings. The exercise of an authority granted to RRCs under the

[9] *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 (CanLII), para. 194

treaty to manage the local exercise of participants' harvesting rights is not an infringement of a treaty right – it is the fulfillment of one. Further, the law has been clear since *Sparrow* that in circumstances where there is an effective alternative measure that is able to meet the intended conservation objective, the measure that has the least impact or impairment of the preferred form of exercising the right is to be preferred over measures that have a greater degree of impairment over the preferred form of exercise of the right.[10]

69. The Minister's analysis of minimal infringement is fundamentally flawed by the fact that the Minister is seeking to invoke minimal impairment as a reason for disallowing local harvesting authorizations in a circumstance where that is both the preferred measure of Sahtu participants, and where the SRRB has already determined that local harvesting regulations are *more effective and less impairing* than a TAH.
70. As the SRRB notes as a matter of law, the common law has been clear since *Sparrow* and *Badger* that it is never a question of whether there can be *any impairment* of the treaty right – it is always a question of how an impairment may be justified in the circumstances, given the relative effectiveness of the available alternatives in meeting a valid objective while minimally impairing the underlying rights. (Report, para 186-188).
71. The Minister's Response to vary this Recommendation is also premised on an incorrect and unreasonable interpretation of 13.5.2 of the *SDMCLCA* as precluding any type of harvesting authorization other than a TAH. The Minister's Response also relies on a mischaracterization of the SRRB's findings.
72. Citing paragraphs 124-126 of the Report, the Minister states that "Colville's Plan has the clear and direct effect of limiting the quantity of BNW caribou that may be harvested was not considered" by the SRRB.
73. In fact, the SRRB expressly considered and rejected this premise, finding that "there are numerous provisions within *SDMCLCA* that empower the SRRB and RRCS to manage the various aspects of the harvest of wildlife in the settlement area", concluding logically that "if every form of management of wildlife was considered to be a limitation on the quantity of the harvest, all such provisions would be rendered in conflict with 13.5.2…This cannot be what is intended by *SDMCLCA*." (Report, para 124)
74. The SRRB additionally outlined a range of other culturally appropriate measures beyond a "head count", including protocols for minimizing wounding without killing and prohibiting wastage, hunter education and maintenance of critical cultural connections between Dene and caribou. (Report, para 125)
75. The SRRB finally noted that "simply focusing on quantities of harvest and assuming that quotas are the only legally valid mechanism for ensuring appropriate harvest overly constrains the full toolbox of conservation approaches, which would inhibit the intended conservation outcomes of the *SDMCLCA*." (Report, para 126).
76. The Minister's Response does not engage with the SRRB's findings or determinations, but simply recites the positions set out in ENR's original submissions to the SRRB.
77. Moreover, as noted above, 13.5.2 must be read in light of the objectives of the *SDMCLCA*, which is to recognize and encourage the Sahtu Dene way of life, and to provide the Sahtu Dene with a right to participate in wildlife management decisions.

[10] *R. vs Sparrow* [1990] 1 SCR 1075

78. There was extensive evidence and argument put before the SRRB that a "headcount" approach to caribou management, based on a TAH, is not as culturally appropriate as the mechanism proposed by the CLRRC. Evidence and argument to that effect was put before the Minister by the Dehlá Got'ıne at paragraphs 21-29 of our February 2020 submissions to the SRRB. None of this appears to have been considered in the Minister's response. Further, the Minister has failed to take into account the increasing evidence that a simple "headcount" approach is failing to protect the Bathurst caribou. By enabling Indigenous hunters to substitute ENR regulations and tag requirements without corresponding community authorizations, some individuals behave as though they are not required to observe cultural cultural norms or respect community authorities. The evidence shows ENR's approaches to be ineffective in securing compliance, resulting in a tragic failure on the part of individual hunters and ENR's regulatory approaches to caribou conservation .[11]
79. The language of 13.5.2 is clearly intended to make a TAH a mechanism of last resort. This is consistent with the objective of the *SDMCLCA* to recognize and encourage the Sahtu Dene way of life. The Treaty makes a TAH available as a mechanism, but the totality of the Treaty also makes a variety of other regulatory mechanisms available to RRCs, such as the one being proposed by the CLRRC. The Treaty contemplates CLRRC having the discretion to weigh when a TAH should be imposed, even though it is not a culturally appropriate mechanism, and when other methods should be tried first. CLRRC weighed extensive cultural evidence and evidence as to what kind of regulatory mechanism would be most effective before making this decision. CLRRC's proposals are therefore consistent with the totality of the *SDMCLCA*.
80. On the other hand, the Minister's Response interprets 13.5.2 in a way divorced from its context, and the Minister has not adequately considered the reasons given for the CLRRC proposals or the SRRB decisions and recommendations. In particular, the Minister has not given due consideration to the SRRB's findings that an appropriate harvest level may be maintained through means other than a quota in accordance with a community conservation plan, and has otherwise failed to reasonably weigh the evidence concerning community conservation planning that was presented during the 2016 hearing in Deline or the 2020 hearing in Colville Lake that it is a less intrusive, more effective and culturally appropriate form of regulation than a TAH.

DECISION 6.1

SRRB Decision 6.1

The SRRB has decided that it will remove the total allowable harvest in Sahtú Barren-ground caribou hunting Area 01 (S/BC/01), once Colville's community conservation plan has been completed and approved. The SRRB will regularly review the conservation outcomes under the community conservation planning approach. The SRRB reserves the right to re-apply the total allowable harvest if required for effective conservation.

[11] https://cabinradio.ca/56529/news/environment/enr-issues-warning-over-illegal-caribou-harvesting/; https://cabinradio.ca/33893/news/environment/more-than-80-caribou-killed-in-no-hunting-zone-nwt-says/

Minister's Response:

In addition to measures put in place under the community conservation planning approach, the previously approved total allowable harvest in Sahtú Barren ground caribou hunting Area 01 (S/BC/01) will remain in effect. The SRRB will regularly review the conservation outcomes under the community caribou conservation planning approach.

Dehlá Got'ı̨ne Critique:

81. As outlined above, the Minister proposes to vary, set aside and replace the SRRB's decisions and recommendations with respect to community conservation planning and local authorizations, and to maintain the TAH in S/BC/01, in addition to any measures implemented under the community conservation planning approach.
82. The Minister's rationale for setting aside and varying the SRRB's decision appears to be in large part based on two incorrect and unreasonable determinations already addressed above.
83. First, we have shown in paragraphs 65-70 of this critique that the Minister's determination that a TAH is the only measure that can be used to regulate the quantity of harvesting by participants under the *SDMCLCA* is incorrect as a matter of law.
84. Further, we have shown in paragraphs 71-80 of this critique, the Minister's position that the TAH is the measure that is least likely to impair harvesting by participants is both incorrect as a matter of law and unreasonable as an exercise of the Minister's decision.
85. A correct interpretation of the *SDMCLCA* must proceed from the general provision set out in 13.3.1: that participants rights to harvest all species of wildlife within the settlement area at all seasons of the year, subject to limitations which may be prescribed in accordance with this agreement and to legislation in respect of conservation, public health or public safety.
86. The Minister's Response clearly gives much greater weight to the views of WMAC and the IGC concerning the continued implementation of a TAH for ɔədə (barren-ground caribou) in the Sahtu region than to the findings of the SRRB, or the views of the RRCs or Sahtu participants.
87. The Dehlá Got'ı̨ne fully recognize that ɔədə (barren-ground caribou) migrate between the Sahtu and the Inuvialuit region, and that there are shared responsibilities for stewardship and conservation between the regions.
88. The IGC and WMAC letter of January 25, 2021 expresses concerns about the SRRB decisions to remove of the TAH and to implementation of community caribou plans. IGC and WMAC say this will "result in overharvesting of the BNW herd" because there will be "no harvesting restrictions or corresponding enforcement", and ultimately, lead to the collapse of the "collaborative co-management framework enshrined in the land claims and in the *Wildlife Act*." IGC and WMAC also say that this will "undermine reconciliation in the NWT".
89. Respectfully, IGC and WMAC provide argument but no evidence for the concerns they have expressed. No evidence was presented in the hearings nor advanced by IGC or WMAC in their letter that establishes that a TAH is the only effective conservation measure, or that the dire consequences that IGC and WMAC fear will occur. It is not reasonable for the Minister to treat opinion as fact, or speculation as evidence.
90. Further, nothing in the *Wildlife Act* requires that there must be a single uniform approach taken to achieve effective the conservation and management of wildlife. To the contrary, the *Wildlife Act* recognizes that there are a number of responsible bodies, and requires the Minister to

respect the roles and responsibilities of each of them, and to develop policies in a manner that promotes a coordinated, collaborative and integrated approach.

91. However, by giving the opinions and speculations set out in the WMAC and the IGC submissions greater weight than the evidence and findings of the SRRB and the consensus views of Sahtu participants regarding local management of caribou within the Sahtu region, the Minister is failing to honour the *SDMCLCA* and the treaty relationship with Sahtu participants.
92. Further, by reading the *SDMCLCA* in a manner that discounts the roles of RRCs to exercise authority over local harvesting by participants, the Minister is failing to respect the roles and responsibilities set out in the land claim that are clearly intended to empower the RRCs to exercise effective local regulation over wildlife harvesting.
93. The Minister's conclusion that the "the TAH and allocations for the BNW herd to applicable Sahtú communities must therefore be maintained to provide a means of regulating the harvest of BNW caribou" must therefore be rejected as a logical and rhetorical tautology, as it can only be true if the Minister's premise that there is no other alternative to a TAH is accepted.

RECOMMENDATION 6.1

SRRB Recommendation

The SRRB recommends that the *Big Game Hunting Regulations* be amended to remove the tag required for Aboriginal harvesters in Sahtú Barren-ground Caribou Area 01 (S/BC/01) and Area S/BC/03 (as they are currently named), as the tagging requirement will be replaced by the authorization and permissions system under *Hı̨dó Gogha Sę́né́gots'ıɔ́á ʔeɔa (Community Conservation Planning Regulation)*, described in Recommendation 4.2 of this report.

Minister's Response:

It is recommended that the *Big Game Hunting Regulations* as they apply to Aboriginal harvesters in Sahtú Barren-ground Caribou Area 01 (S/BC/01) and Area S/BC/03 (as they are currently named) will reflect the use of an Authorization for Dehlá Got'ı̨nę harvesters as identified in the Interim Management Agreement and a sampling kit as identified in the Délı̨nę plan.

Dehlá Got'ı̨ne Critique:

94. As outlined above, the Minister has proposed to vary the use of local authorizations by the CLRRC, and to maintain the TAH in S/BC/01.
95. The amendments proposed by the Minister to the *Big Game Hunting Regulations* would only be applicable to Dehlá Got'ı̨nę harvesters as identified in the Interim Management Agreement.
96. Such arrangements are already in place without amendments to the Big Game Hunting Regulations.
97. The SRRB's recommendation to replace the tagging requirement under the *Big Game Hunting Regulations* with reference to the CLRRC authorization and permission system would resolve any legal uncertainty about authorization to harvest, and provide the basis for a much more effective caribou monitoring and compliance enforcement regime than is currently in place with the use of tags.

98. Dehlá Got’įnę recognize that the development of a *Community Conservation Planning Regulation* will take additional time, and are prepared to continue to work with the SRRB and ENR to develop effective regulations to implement the authorization and permission system proposed by CLRRC.
99. The Recommendation as proposed by the SRRB in the Report is consistent with the evidence and argument presented during the hearing, and should be upheld by the Minister and the Board.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.