

**Brief presented to the House of Commons
Standing Committee on the Environment and
Sustainable Development**

Concerning

Bill C-65

*An Act Respecting the Protection of Wildlife Species in Canada from
Extirpation and Extinction*

Submitted by:

Makivik Corporation

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**FOR FURTHER INFORMATION
CONCERNING THIS BRIEF**

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INTRODUCTION

The federal government tabled the Act respecting the Protection of Wildlife Species in Canada from Extirpation or Extinction (hereinafter referred to as "Bill C-65") on October 31, 1996. The purpose of this enactment is to prevent Canadian wildlife species from becoming extirpated or extinct and to provide for the recovery of those that are extirpated, endangered or threatened as a result of human activity. Species at risk, either extirpated, endangered, threatened or vulnerable, may be listed as such by the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC"). Once listed as an endangered species, a recovery plan for that species must then be established.

Nunavik Inuit support the spirit and the intent of Bill C-65 in its efforts to address the issue of protection of wildlife endangered species. However, Makivik Corporation believes it is essential to identify and resolve any potential conflicts or ambiguities which may exist between the proposed legislation and constitutionally Nunavik Inuit protected rights, most particularly Inuit rights to harvest and other rights guaranteed under the James Bay and Northern Quebec Agreement (hereinafter JBNQA). Parliament must ensure that any legislation, such as Bill C-65, is compatible with the aboriginal and treaty rights of the Nunavik Inuit.

In order to effectively represent the rights and the interests of Nunavik Inuit with respect to the proposed legislation, Makivik Corporation is submitting the present brief to the House of Commons Standing Committee on the Environment and Sustainable Development concerning Bill C-65.

The present Brief is divided into the following five sections:

- I. The territory and the harvesting and commercial hunting activities of Nunavik Inuit;
- II. James Bay and Northern Quebec Agreement;
- III. Canadian Charter of Rights and Freedom

IV. Nunavik Inuit concerns with Bill C-65

I. **The territory and the harvesting and commercial hunting activities of Nunavik Inuit**

'Nunavik' is comprised of an area of more than 560,000 km², located north of the 55th parallel in northern Québec, an area equivalent to one-third of the Province of Québec. The geographic isolation and the climate represent a unique challenge in terms of providing products and services to the residents of Nunavik.

Nunavik, with a 90% Inuit population¹, is comprised of fourteen corporations of northern villages² located along the coast of Ungava Bay, Hudson Strait and Hudson Bay.³ There are no roads linking these communities to each other; the communities are accessible only by air or by sea during a limited ice-free shipping season. The first language of Nunavik Inuit is 'Inuktitut', with many being unilingual speakers.

Today, and throughout history, Nunavik Inuit depend on the resources provided by the territory. Hunting, fishing and trapping activities are central to the identity of Nunavik Inuit and to their customary and traditional way of living. Virtually all Nunavik Inuit, men and women alike, are engaged in some form of harvesting activities. Many continue to depend on hunting and fishing as their primary source of subsistence.⁴ In addition, according to recent amendments to the *James Bay and Northern Québec Agreement*, Nunavik Inuit have in this territory the exclusive right to commercially hunt certain animal species.

¹ According to the Inuit beneficiary list kept by the *Québec Ministry of Health and Social Services*, a number of 7,914 Inuit are presently living in Nunavik.

² *An Act respecting Northern Villages and the Kativik Regional Government*, Q.R.S. c. V-6.1.

³ Those communities are Kuujjuarapik, Umiujaq, Inukjuak, Puvirnituaq, Akulivik, Ivujivik, Salluit, Kangiqsujuaq, Quaqaq, Kangirsuk, Aupaluk, Tasiujaq, Kuujjuaq and Kangiqsualujjuaq [see map - Annex 1].

⁴ On this specific issue, we refer the reader to : James Bay and Northern Québec Native Harvesting Research Committee, *Research to Establish Present Levels of Native Harvesting for the Inuit of Northern Québec*, Québec, 1988.

II *The James Bay and Northern Québec Agreement*⁵

The Nunavik Inuit signed the *James Bay and Northern Québec Agreement* in November 1975. This land claim settlement establishes the legal and administrative framework for the territory north of the 55th parallel and defines the benefits, rights and responsibilities of the Inuit who occupy the mainland area of Québec north of the 55th parallel, namely, the region of Nunavik. More specifically, the *James Bay and Northern Québec Agreement* contains specific obligations affirming the right of Nunavik Inuit to harvest with minimal governmental interference.

The Nunavik Inuit are also one of the Native members to the Hunting, Fishing and Trapping Coordinating Committee created under sub-section 24.4 of the JBNQA as an expert body to review, manage and in certain cases, supervise and regulate the Hunting, Fishing and Trapping Regime established under section 24 of the JBNQA. The following provisions of the *James Bay and Northern Québec Agreement* establish the list of constitutionally protected treaty rights of Nunavik Inuit relevant to the present submission.

- Section 24.1.5 “Conservation” means the pursuit of the optimum natural productivity of all living resources and the protection of the ecological systems of the Territory as to protect endangered species and to ensure primarily the continuance of the traditional pursuits of the Native people...
- Section 24.2.1 The Hunting, Fishing and Trapping Regime established by and in accordance with this Section shall be subject to the principle of conservation
- Section 24.3.3 The Native people shall enjoy the sole and exclusive exercise of the right to harvest in accordance with the provisions of this Section.
- Section 24.3.11 [...] a) Subject to the principle of conservation, the right to harvest refers to harvesting activity pursued within the Territory, for personal and community use, commercial trapping and commercial fishing. [...]
- c) Community use shall include the gift, exchange and sale of all products of harvesting consistent with present practice between Native communities and/or members of the Native community or communities. For greater clarity, community use shall not exclude the gift, exchange and sale of all products of harvesting between Native communities and members of the Native community or communities not

⁵ The James Bay and Northern Québec has been specifically ratified by the Federal Government with the *James Bay and Northern Québec Native Claims Settlement Act*, 25-26 Eliz. II, Ch. 32.

presently conducting such activity. For Native people living in non-Native settlements such as Schefferville, Matagami, Chibougamau, etc., community use shall be restricted to the gift, exchange and sale of all products of harvesting consistent with present practice between such Native people and shall not include gift, exchange and sale with Native communities. In the case of migratory birds, community use shall be limited to the gift or exchange of meat and eiderdown consistent with present practice between Native communities and/or members of the Native community or communities, subject to the undertakings of Canada contained in Sub-Section 24.1.14. Community use shall not include the exchange or sale of fish and meat to non-Natives except in the case of commercial fisheries.

- Section 24.4.1 A Hunting, Fishing and Trapping Coordinating Committee (hereinafter referred to as the "Coordinating Committee"), an expert body made up of Native and government members, is established to review, manage, and in certain cases, supervise and regulate the Hunting, Fishing and Trapping Regime established by and in accordance with the provisions of this Section.
- Section 24.4.23 The Coordinating Committee shall be a consultative body to responsible governments [...] and as such shall be the preferential and exclusive forum for Native people and governments jointly to formulate regulations and supervise the administration and management of the Hunting, Fishing and Trapping Regime.
- Section 24.4.26 All regulations relating to the Hunting, Fishing and Trapping Regime proposed by responsible governments shall be submitted to the Coordinating Committee for advice before enactment. [...]
- Section 24.5.2 In Categories I and II lands, the responsible Provincial and Federal Governments shall exercise their powers with respect to matters referred to in paragraph 24.5.1 in the same manner as those powers are exercised with respect to Category III lands, namely they shall exercise those powers only upon advice of or after consulting with the Coordinating Committee as the preferential and exclusive spokesman empowered to formulate procedures, recommendations, positions and views respecting these matters.
- Section 24.6.2 The principle of priority of Native harvesting shall mean that in conformity with the principle of conservation and where game populations permit, the Native people shall be guaranteed level of harvesting equal to present levels of harvesting of all species in the Territory.
- a) Such guaranteed levels shall be established by negotiation between the Native parties and the responsible Provincial or Federal Government through the Coordinating Committee (and the normal voting procedures shall not apply in such case) and shall be based principally upon the results of the "Research to Establish Present Levels of Native Harvesting" projects presently under way and to be continued during the four (4) years following the execution of the Agreement. The said parties shall establish such guaranteed levels within five (5) years of the execution of the Agreement.
 - b) Upon the execution of the Agreement, the said parties referred to in the above subparagraph shall forthwith establish by negotiations interim guaranteed levels of Native harvesting based principally upon the available results of the said research projects. Such interim guaranteed levels shall be reviewed periodically and may by agreement be revised.

- c) The said guaranteed levels shall be without prejudice to the rights and obligations of the said parties in the establishment of the guaranteed levels of harvesting.
- d) The establishment of the guaranteed levels referred to in sub-paragraphs a) and b) hereof shall be subject to the approval of the interested Naive parties and the interested government parties.

III. Canadian Charter of Rights and Freedoms, Canada Act, 1982, c. 11 (U.K.) in R.S.C., 1985, App.II, no 44

The rights established pursuant to the *James Bay and Northern Québec Agreement* are constitutional rights entrenched in the Constitution of Canada in virtue of section 35 of the *Canadian Charter of Rights and Freedoms* and as such have priority over all federal and provincial legislation. Section 35 of the *Canadian Charter of Rights and Freedoms* provides for the context in which aboriginal rights shall be evaluated in Canadian law:

Section 35. RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

- (1) [Recognition of existing aboriginal and treaty rights] The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) [Definition of "aboriginal peoples of Canada"] In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (3) [Land claims agreement] For greater certainty, in subsection (1) "treaty rights" includes rights that now existing by way of land claims agreement or may be so acquired.
- (4) [Aboriginal and treaty rights are guaranteed equally to both sexes] Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 52.

- (1) The Constitution of Canada is the supreme law of Canada, and any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect

IV. The Nunavik Inuit concerns with Bill C-65

1. Definitions

a) Status Report

There exists a discrepancy between the French and English versions of the Act regarding the definition of "Status Report" and its French counterpart "*Rapport de situation*".

In defining "Status Report", Bill C-65 states, in the English version, that it is a report "*containing a summary of the best available scientific information or traditional or community knowledge on the status of a wildlife species*". It implies by the use of wording "*scientific information or traditional or community knowledge*" that scientific information and traditional knowledge are mutually exclusive from one to other, which is a position totally unacceptable to Nunavik Inuit. Traditional or community knowledge is an essential component to achieve a comprehensive knowledge of any wildlife species.

It is important to underline the fact that the equivalent definition in the French version of the Act uses the wording "*sommaire des meilleures données scientifiques et connaissances traditionnelles ou communautaires disponibles*", which would reflect the understanding and desire of the Nunavik Inuit.

Modification should consequently be made to the English version to render the text identical to the French version to ensure that both scientific and traditional knowledge are considered as complementary rather than mutually exclusive.

b) Absence of definition for the notion of "imperiling the survival of the species" found in section 46 (2) c)

In itself, section 46 of the Act constitutes a rather surprising provision to be found in a piece of legislation such as the *Act respecting the Protection of Wildlife Species in Canada from Extirpation or Extinction*. Said section 46 allows the responsible minister to make an agreement or to issue a permit to a person, authorizing them to carry out an activity affecting a listed endangered or threatened species or its critical habitat, the whole subject to

the condition that the minister must be satisfied that all reasonable alternatives to the activity have been considered, that all feasible measures will be taken to minimize the impact of the activity on the species or its habitats and that the activity will not "*imperil the survival of the species*".

One source of concern in regard of said section 46 is the absence of definition for that notion of "*imperiling the survival of the species*". While "*endangered*" and "*threatened*" species are defined, the notion of "*imperiling the survival*" of the species nor the notion of "*imperil*" are defined anywhere in the Act. It is consequently not absolutely clear whether this refers to "*survival*" of the species in Nunavik, in all Canada or across the world. Could section 46 mean that as long as there will be a few breeding pairs somewhere in the world, an activity resulting in the destruction of a species can be authorized?

2. Conflict between section 46 of the Act and section 23 JBNQA

JBNQA Section 23 establishes the environmental and social protection regime applicable to the Territory. Said environment regime provides mechanisms to review proposed development activities in the Territory to determine what impact a development proposal may have on wildlife.

Section 23.2.2 The said regime provides for:

- d) the protection of the rights and guarantees of the Native people established by and in accordance with section 24;
- e) the protection of the Native people, their economies and the wildlife resources upon which they depend

Section 23.2.4 The concerned responsible governments and the agencies created in virtue of this Section shall within the limits of their respective jurisdictions or functions, as the case may be, give due consideration to the following guideline principles:

- d) the protection of wildlife resources, physical and biotec environment and ecological systems in the Region with respect to developmental activity affecting the region
- e) the involvement of the Native people and other inhabitants of the region in the application of this regime.

It is Makivik's submission that section 23 of the JBNQA guarantees to Nunavik Inuit the right to be consulted in regard to proposed developmental activities in the territory

3. **Composition of COSEWIC and Qualification of Members**

Section 13 establishes the composition of COSEWIC which is to be comprised of not more than nine (9) members appointed by the Minister.

Section 14 stipulates that members of COSEWIC must have expertise drawn from various scientific disciplines or from traditional or community knowledge of the protection of species at risk. As presently drafted, said section offers no guarantee of any kind that traditional knowledge of species would be adequately considered and understood in any discussions and decisions to be made by COSEWIC. It is strongly felt that such a goal can only be achieved by modifying section 14 to insert a provision which would guarantee aboriginal membership to COSEWIC.

4. **Hunting, Fishing, Trapping Coordinating Committee**

The Hunting, Fishing and Trapping Coordinating Committee was established pursuant to Sub-section 24.4 of the JBNQA. The Committee is an expert body whose principal function is to review, manage and in certain cases, supervise and regulate the Hunting, Fishing and Trapping Regime established under Section 24 of the JBNQA. Nunavik Inuit is one of the Native members to said Committee.

Under paragraph 24.4.23 of the JBNQA, the Coordinating Committee is guaranteed the role as being:

"...the preferential and exclusive forum for Native people and governments jointly to formulate regulations and supervise the administration and management of the Hunting, Fishing and Trapping Regime."

The following provisions of the JBNQA illustrate in detail how the Coordinating Committee plays the preferential consultative and advisory role to government as guaranteed to it under paragraph 24.4.23:

24.4.25

"The Coordinating Committee shall have the right to initiate, discuss, review and propose all measures relating to the Hunting, Fishing and Trapping Regime in the Territory. The Coordinating Committee may propose regulations or other measures relating to the regulation, supervision and management of the Hunting, Fishing and Trapping Regime.

24.4.26

"All regulations relating to the Hunting, Fishing and Trapping Regime proposed by responsible governments shall be submitted to the Coordinating Committee for advice before enactment."

24.4.27

"The Coordinating Committee may submit recommendations to the responsible Provincial or Federal Minister, who shall have discretion to act upon such recommendations in accordance with paragraphs 24.4.36 and 24.4.37 concerning the following:

(...) (j) species of fauna requiring complete protection from time to time."

24.4.36

"Before submitting a new regulation or other decision for enactment or taking a new action and before modifying or refusing to submit for enactment draft regulations or other decisions from the Coordinating Committee, the responsible Provincial or Federal Minister shall consult with the Coordinating Committee and shall endeavor to respect the views and positions of the Coordinating Committee on any matter respecting the Hunting, Fishing and Trapping Regime, the whole subject to the provisions of paragraph 24.4.37..."

24.4.37

"In all cases where the responsible Minister modifies or decides not to act upon the recommendations of the Coordinating Committee or decides to take new actions, he shall, before acting, consult with the Coordinating Committee when his decisions relate to Native and non-Native activities and the wildlife resources in the Territory..."

24.5.2

In Categories I and II lands, the responsible Provincial and Federal Governments shall exercise their powers with respect to matters referred to in paragraph 24.5.1 in the same manner as those powers are exercised

with respect to Category III lands, namely they shall exercise those powers only upon advice of or after consulting with the Coordinating Committee as the preferential and exclusive spokesman empowered to formulate procedures, recommendations, positions and views respecting these matters.

The Nunavik Inuit understand these provisions to ensure them, through their participation to the Coordinating Committee to a constitutionally protected right to be consulted on those matters relating to, for example, the designation of species at risk and the creation and implementation of recovery and management plans.

The proposed legislation should be amended to include a provision requiring the responsible Federal Minister to obtain the advice of or to consult with the Coordinating Committee prior to listing a species at risk in the James Bay and Northern Quebec Territory.

The consultative role of the Coordinating Committee as the preferential and exclusive body empowered to formulate procedures, recommendations, positions and views, respecting the determination of species requiring protection in the Territory is an important treaty right by virtue of the JBNQA. Legislation that purports to designate and list species at risk in the Territory covered by the Agreements before first obtaining the advice of or after consulting with the Coordinating Committee would be in contradiction with treaty rights guaranteed to the Inuit under the JBNQA.

Nunavut Wildlife Management Board

Nunavik Inuit are also members to the Nunavut Wildlife Management Board (“NWMB”) and in that capacity had the opportunity to review the submission tabled by the NWMB to the Standing Committee on Environment and Sustainable development. Makivik supports the content of said document which, in many aspects, reiterates the concerns expressed in the present brief.

Offshore negotiation process

The Nunavik Inuit are currently involved in a land claim negotiation process encompassing the *Nunavik Marine Region* and commonly known as the offshore negotiation. Creation of a Wildlife Management Board is foreseen within such negotiation to have jurisdiction over said *Nunavik Marine Region*. The final Offshore agreement shall be a land claim agreement within the meaning of section 35 and Part II of the Constitution Act 1982.

The significant role of any Wildlife Management Board to be created as a result of any land claim negotiation such as the Offshore negotiations should be acknowledged in the proposed legislation.