ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT AND REVIEW UNDER SECTION 23 OF THE *JAMES BAY AND NORTHERN QUEBEC AGREEMENT*

AND

THE FIVE-YEAR REVIEW OF THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

MAKIVIK CORPORATION

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1.0 INTRODUCTION

This is the contribution of Makivik Corporation, representing the Inuit of Nunavik, to the consultations on the five-year review of the *Canadian Environmental Assessment Act* ("*CEAA*"). Nunavik Inuit are also contributing to the five-year review through the Inuit Tapirisat of Canada.

Although Makivik Corporation is pleased to participate in these consultations, we also wish to register our concern that the five-year review and its public consultations have not respected the role of the Kativik Environmental Advisory Committee. Under sub-Section 23.5 of the *James Bay and Northern Quebec Agreement* ("*JBNQA*"), the intergovernmental Advisory Committee is to be the "preferential and official forum" with respect to the development and reform of environmental and social laws and regulations for that part of Nunavik constituting the "region" contemplated by Section 23 of the *JBNQA*.

This brief is under reserve of and without prejudice to the Aboriginal and treaty rights, positions, negotiations, claims and interests of Nunavik Inuit and the constitutional and fiduciary obligations of Canada and Quebec.

1.1 Summary of Makivik Position

In summary form, the position of Makivik Corporation is that the applicable and appropriate impact assessment process for the Inuit region is that set out in Section 23 of the *JBNQA*. In accord with the guiding principles of Section 23 and always with a view to the perpetual protection Nunavik Inuit and our environment, ecosystems, wildlife resources, society, communities and economies, our position is that:

a) Inuit rights under *JBNQA* are constitutionally protected and paramount by virtue of section 35 of the *Constitution Act, 1982* and under federal legislation.

b) The regime of environmental and social protection for Nunavik under the *JBNQA*, including the environmental and social impact assessment and review procedure, is established by and in accordance with Section 23 thereof.

c) The *JBNQA* recognises substantive Nunavik Inuit constitutional rights to:
   i. an adapted and effective regime of environmental and social protection, including impact assessment; and
   ii. special status for Nunavik Inuit through full involvement in the implementation, administration and ongoing review and development of that regime.

d) *CEAA* and its five-year review must yield to the environmental and social impact assessment procedure established by and in accordance with Section 23 of the *JBNQA*.

e) Although the mechanics of *CEAA* can be married with the land claims regime, the purposes and institutions of the two are quite different and *CEAA* does not provide sufficient guarantee of Aboriginal involvement in the assessment. Therefore, harmonizing with *CEAA* dilutes Inuit rights.

f) Nunavik Inuit rights are not frozen by the *JBNQA*. Nunavik Inuit have the right to benefit fully from evolution and improvement in environmental and social impact assessment and review by amendment of Section 23 or changes in practice thereunder, without requiring that we embrace the supplanting of Section 23 by *CEAA*.

g) Nunavik Inuit seek appropriate federal legislation, including amendments to *CEAA*, to recognize and give effect to the paramount application of the Section 23 as providing for the environmental and social impact assessment and review procedure applicable in the region.

h) The federal Crown must vindicate Inuit rights and the achievement of the protection promised under the *JBNQA* by wholeheartedly embracing the Section 23 assessment procedure. Beyond legislation, this requires a fundamental change in federal policy. Concretely, this means:

   i. the commitment of substantial resources for scientific, technical, legal and administrative functions under Section 23; and,

   ii. ensuring that development is subjected as required to the federal side of the Section 23 procedure.

i) The Five-Year Review Discussion Paper assumes the layering and the marrying of multiple processes and does not recognize the primacy of the Section 23 procedure. Subject to this, some of the reforms suggested and others would be useful where *CEAA* applies.

1.2 Nunavik: Territory, People and Institutions

A few words of introduction and history may be useful. More detail may be found at www.makivik.org

The territory of the Nunavik Inuit is on and around the Quebec-Labrador Peninsula. It occupies approximately 500,164 km^2 in the northern third of what is now the province of Quebec (see map). Our coastline stretches for some 2,500 km.

We have made Nunavik our homeland for more than 4,000 years. As nomadic hunters, we inhabited and used the whole territory, including offshore areas of Hudson Bay, Hudson Strait and Ungava Bay and as far as the Labrador Coast.

There are now approximately 9,000 Inuit in Nunavik. Our population is young and growing rapidly. More than 60% of Inuit population is under the age of 30, twice that of southern Quebec. Nunavik Inuit live in 15 villages along the Ungava Bay, Hudson's Straight,

and Hudson's Bay coasts. The communities are between 1,000 and 1,900 kilometres north of Montreal. All but three of these communities have less than 1,000 inhabitants. The largest communities are Kuujjuaq, Puvirnituq, and Inukjuak. Inuit are Canadian citizens, and pay all federal and provincial sales and income taxes. There are approximately 900 non-Inuit residents living in Nunavik. The level of language retention in Nunavik is over 95% among Inuit—Inuktitut remains the dominant language spoken.

Makivik Corporation ("Makivik") was created in 1978 pursuant to the signing of the *JBNQA*. Makivik is the recognized Inuit Party to the Agreement. In Inuktitut, Makivik means "advancement". It is a non-profit organization owned by the Inuit of Nunavik. The central mandate of Makivik Corporation is the protection of the integrity of the *JBNQA*, and the political, social, and economic development of Nunavik and Nunavik Inuit.

Makivik represents Nunavik Inuit with respect to all matters relating to our social, cultural, economic and political rights, including treaty amendments and negotiations, environmental and social impact assessment, negotiation of impact and benefit agreements, social and environmental research, renewable resources development and various local and regional economic development activities.

The Kativik Regional Government ("KRG") was established in 1978 and has jurisdiction on the territory north of the 55th parallel. It provides technical assistance in a variety of fields to the municipalities of Nunavik and exercises municipal powers over the lands where there are no legally-constituted northern village corporations. For present purposes, it is important to note the constitutive role of the Kativik Regional Government in naming members of the various bodies provided for in Section 23 of the *JBNQA*.

2.0 THE *JAMES BAY AND NORTHERN QUEBEC AGREEMENT* AND SECTION 23 ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT

2.1 The *JBNQA*

Nunavik territories were added to Quebec by the *Quebec Boundaries Extension Acts, 1912* (S.C.1912, c.45 and S.Q. 1912, c.7), subject to Crown obligations to the native population.

However, there were no treaty negotiations with Nunavik Inuit until the early 1970s when the Quebec government announced its intention to construct a massive hydroelectric project in the James Bay region.

Indians and Inuit were granted an interlocutory injunction by Mr. Justice Albert Malouf on November 15, 1973. Thus the work on the James Bay project was stopped, temporarily. On November 19, 1973, Premier Robert Bourassa announced the decision to negotiate a settlement with Inuit of northern Quebec. On November 22, 1973, the Quebec Court of Appeal reversed the decision of Mr. Justice Malouf and permitted the work on the project to continue. The Supreme Court of Canada granted leave to appeal, but negotiations continued, resulting in the *James Bay and Northern Quebec Agreement*, signed on November 11, 1975.

The *JBNQA* is the first modern land claims agreement in Canada. The *JBNQA* and the ongoing treaty relationship it establishes are the cornerstones of Nunavik Inuit relations with Canada and Quebec.

Pursuant to *JBNQA* sub-Section 2.5, federal and provincial legislation is required. The *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, approves, gives effect to and declares valid the *JBNQA*, making it paramount federal law, and ensuring to the Inuit beneficiaries the rights, privileges and benefits provided for therein. Section 8 is as follows:

> **8.** Where there is any inconsistency or conflict between this Act and the provisions of any other law applying to the Territory, this Act prevails to the extent of the inconsistency or conflict.

Recognized and affirmed under section 35 of the *Constitution Act, 1982*, Inuit rights reflected in the *JBNQA* are constitutionally entrenched treaty rights.

There are farreaching implications for the *Canadian Environmental Assessment Act* and its five-year review. Neither Section 23 and its impact assessment procedure nor *CEAA*, its reform and interaction with the *JBNQA* regime of environmental and social protection can be considered in isolation from this legal and constitutional context. Nunavik Inuit rights under the *JBNQA* must all be given broad, liberal and remedial effect. We turn to them now.

2.2 Section 23 Environment and Future Development

2.2.1 Scope and purpose of Section 23

Section 23 encompasses far more than just impact assessment. Paragraphs 23.2.1 and 23.2.2 describe the farreaching and comprehensive regime it establishes:

> 23.2.1 The environmental and social protection regime applicable in the Region shall be established by and in accordance with the provisions of this Section.
>
> 23.2.2 The said regime provides for:
>
> a) A procedure whereby environmental and social laws and regulations and land use regulations may from time to time be adopted if necessary to minimize the negative impact of development in or affecting the Region upon the Native people and the wildlife resources of the Region;
>
> b) An environmental and social impact assessment and review procedure established to minimize the negative environmental and social impact of development on the Native people and the wildlife resources of the Region;

c) A special status and involvement for the Native people and the other inhabitants of the Region over and above that provided for in procedures involving the general public through consultation or representative mechanisms wherever such is necessary to protect or give effect to the rights and guarantees in favor of the Native people established by and in accordance with the Agreement;

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;

f) The right to develop in the Region;

g) The protection of the rights and guarantees of the Naskapis of Quebec established by and in accordance with the Hunting, Fishing and Trapping Regime referred to in paragraph 15.2.1 of the Northeastern Quebec Agreement. [emphasis added]

Due regard must also be given to the protection of our rights under *JBNQA* Section 24 - Hunting, Fishing and Trapping, referred to in d) above. Paragraph 24.11.1 provides:

24.11.1 The rights and guarantees of the Native people established by and in accordance with this Section shall be guaranteed, protected and given effect to with respect to environmental and social protection by and in accordance with Section 22 and Section 23. [emphasis added]

Eight guiding principles form part of the treaty promises of the Crown. They must be considered in interpreting and applying Section 23, including the environmental and social impact assessment and review procedure and in considering its relationship to *CEAA* and the five-year review. The guiding principles are laid down in paragraph 23.2.4:

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 guiding principles:

> a) The protection of Native people, societies, communities and economies, with respect to developmental activity affecting the Region;
>
> b) The environmental and social protection regime with respect to minimizing the impacts on the Native people by developmental activity affecting the region;
>
> c) The protection of the hunting, fishing and trapping rights of Native people in the Region and their other rights therein with respect to developmental activity affecting the Region;
>
> d) The protection of wildlife resources, physical and biotic 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;
>
> f) The rights and interests of non-Native people, whatever they may be;
>
> g) The right to develop, in accordance with the provisions of the Agreement, by persons acting lawfully in the Region;
>
> h) The minimizing of negative environmental and social impacts of development on Native people and non-Native people and on Native and non-Native communities by reasonable means with special reference to those measures proposed, recommended or determined by the impact assessment and review procedures. [emphasis added]

Thus, Section 23 does not simply provide for the protection of the biophysical environment.

Rather, it holds out the substantive promise of vindication of Nunavik Inuit rights, way of life and economies through effective social and environmental protection and sustainability of management and use of land and resources.

Our rights are articulated in Section 23 notably as rights to appropriate processes and institutions which are to produce a promised result in terms of the quality of the environment and

the protection of resources, always with special regard for the involvement and protection of Inuit.

2.2.2 Environmental and social impact assessment and review procedure

The oversight, application, operation and ongoing evolution of the Section 23 impact assessment procedure is comprehensively provided for in subsections 23.3, 23.4, 23.5 and 23.7 of the *JBNQA*.

The Section 23 procedure has many features in common with other regimes. Notably, impact assessment under Section 23 is a planning tool to inform decisions on whether, and on what terms, development should proceed.

However, reflecting the guiding principles, there are a number of key distinctions from other assessment procedures, including *CEAA.* Notably:

- ✓ Section 23 involves decisions and project authorisations on the basis of impact assessment, not just information for decisions taken outside of the procedure;
- ✓ Social impact assessment is not just an accessory afterthought, but rather an integral and co-equal requirement;
- ✓ The procedure is a key element in reconciling development with the perpetual protection of Nunavik Inuit and our environment, ecosystems, wildlife resources, society, communities and economies;
- ✓ A special status and role of Nunavik Inuit, as manifested notably through Inuit representation on all of the bodies created under Section 23 and at every stage of the procedure.

In terms of territorial application, the Section 23 procedure applies to all development or development projects "which might affect the environment or the people of the Region" (par. 23.1.1). Thus, it is not restricted to projects physically located in the territory or even in the province of Quebec. Section 23 is thus adapted to transboundary assessment and *CEAA* is superfluous in this regard.

In contrast to *CEAA*, the development subject to assessment under Section 23 is open-ended. Certain development is either automatically subject or automatically exempt from the procedure (Schedules 1 and 2). In addition, Section 23 provides for screening of "grey zone" development not listed on either Schedule in order to determine whether assessment is required.

2.2.3 Federal abdication

Section 23 establishes the comprehensive environmental and social impact assessment and review procedure to which Nunavik Inuit have a constitutional right. In its details and institutions, the procedure makes distinctions on the basis of matters involving federal or provincial jurisdiction.

Where matters of provincial jurisdiction are involved, it is the Quebec Administrator (in practice the Minister or Deputy Minister of the Environment) and the Kativik Environmental Quality Commission ("KEQC") who conduct the environmental and social impact and assessment review from submission of the project by the proponent, screening of grey-area projects, determination of the contents of the impact assessment and its adequacy, through to a decision allowing the development to proceed or not. The KEQC has nine members, four appointed by the Kativik Regional Government and four appointed by Quebec. The Chairman is also appointed by Quebec, but must be acceptable to the KRG.

For matters of federal jurisdiction, Section 23 establishes two bodies.

The Screening Committee with four members, two appointed by Canada and two appointed by the Kativik Regional Government, is responsible for advising the federal Administrator (in practice the president of the Canadian Environmental Assessment Agency) as to whether grey-area development should be subject to the environmental and social impact assessment and review procedure.

At the review stage, Section 23 establishes the Environmental and Social Impact Review Panel (commonly known by the acronym COFEX-North). The Review Panel is composed of five members, three (including the chairperson) appointed by Canada and two appointed by the KRG.

As already mentioned, Section 23 also provides for the establishment of the Kativik Environmental Advisory Committee, a parity body with equal number of members named by the Kativik Regional Government, Quebec and Canada. With voting rules adjusted to whether matters of exclusive provincial jurisdiction, exclusive federal jurisdiction or shared jurisdiction are being discussed, the Advisory Committee is a consultative body and is the preferential and official forum for responsible governments concerning the development and oversight of the Section 23 environmental and social protection regime. With specific respect to impact assessment, paragraph 23.5.27 provides:

> 23.5.27 The Advisory Committee shall examine and make recommendations respecting the Environmental and Social impact assessment and review mechanisms and procedures for the Region.

In accord with the historical and constitutional role and responsibilities of the Government of Canada and its status as a party to the *James Bay and Northern Quebec Agreement*, a fundamental premise and condition of the *JBNQA* is an ongoing federal presence in giving effect to the regime of environmental and social protection provided for in Section 23. In practice, the Government of Canada has not respected Nunavik Inuit rights in this regard.

It has neglected the application of the federal impact assessment and review under Section 23, with the result that the Screening Committee and the Environmental and Social Review Panel have been largely inactive. The failure to involve the Kativik Environmental Advisory Committee in a timely and meaningful way in the consultations on the five-year review of *CEAA* illustrates the prevailing federal approach.

The Government of Canada has not provided adequate political, financial, scientific and administrative support under Section 23. Starving the Section 23 procedure and institutions of

adequate resources has ensured the ineffectiveness of the constitutionally-protected right to federal impact assessment under Section 23. The *de facto* effect is to substitute *CEAA* for the Section 23 procedure.

Thus, instead of respecting the *JBNQA*, the federal government has sporadically and disruptively applied *CEAA*, providing no value-added for Nunavik Inuit and effectively denying Nunavik Inuit the constitutionally protected process and substantive rights provided for in Section 23.

2.3 Paramount Application of Section 23 Environmental and Social Impact Assessment and Review

As seen, the general provisions of Section 23 state that:

> 23.2.1 The environmental and social protection regime applicable in the Region shall be established by and in accordance with the provisions of this Section.
>
> 23.2.2 The said regime provides for:
> […]
> b) An environmental and social impact assessment and review procedure established to minimize the negative environmental and social impact of development on the Native people and the wildlife resources of the Region;

Thus, Section 23 establishes the regime applicable, including for impact assessment.

The *JBNQA* also provides for the interrelation between the Section 23 regime of environmental and social protection and other regimes. As we have already seen, *JBNQA* Section 2 Principal Provisions includes in sub-Section 2.5 the requirement that legislation to give effect to and implement the *JBNQA* prevails over any other law to the extent of any inconsistencies or conflicts. Section 8 of the federal *Settlement Act*, already quoted, so provides.

Pursuant to Section 23, the environmental and social impact assessment and review procedure must be applied, while a general federal environmental impact assessment such as

CEAA may apply only in certain narrow circumstances under specific conditions and subject always to the paramount application of the *JBNQA* regime.

Section 23 provides a complete code for impact assessment, while other environmental and social protection measures were to be developed. In the meantime, federal environmental and social protection laws other than impact assessment legislation were to apply. Thus, paragraph 23.2.3 provides that:

> 23.2.3 All applicable federal and provincial laws of general application respecting environmental and social protection shall apply in the Region to the extent that they are not inconsistent with the provisions of the Agreement and in particular of this Section. If necessary to give effect to this Section of the Agreement, Quebec and Canada shall take the required measures to adopt suitable legislation and regulations for such purpose.

Paragraph 23.4.1 establishes clearly the obligatory nature of Section 23 impact assessment. It is the procedure, even for the projects of the Government of Canada:

> 23.4.1 All developments or development projects in the Region, subject to federal jurisdiction, including those of Canada, its agencies and those acting on their behalf, shall be subject to the federal impact assessment process in accordance with the provisions of this Sub-Section except when, in the opinion of the federal administrator, the same assessment process provides for Native involvement to at least the degree provided in this Section, or when the provisions of paragraph 23.7.5 are applied.

The reference to "the same assessment process" is confusing, but the second part of the paragraph provides for a narrow exception to the rule only on the basis of a formal finding and decision of the federal administrator that the other process is the "same" as federal assessment under Section 23, including as regards Native involvement. The exception has never to our knowledge been used. As will be seen below, the provisions of paragraph 23.7.5 do not involve the application of *CEAA*.

Paragraph 23.7.3 confirms that the application of general federal assessment procedures was contemplated only as a transitional measure, not as an ongoing practice:

> 23.7.3 Notwithstanding anything in this Section with respect to development projects falling under the Federal review process, Canada shall, during the transitional period referred to in this Sub-Section, continue in respect to Federal projects and Federal jurisdictions to exercise unilaterally existing Federal review processes and procedures with Inuit participation.

Paragraph 23.7.5 allows for measures of harmonisation, but only if it is without prejudice to Inuit rights. It refers to federal-provincial harmonization within Section 23, not the application of legislation like *CEAA*:

> 23.7.5 Canada and Quebec may by mutual agreement combine the two (2) impact review by the EQC and the Federal Review Panel referred to in this Section provided that such combination shall be without prejudice to the rights and guarantees in favour of the Inuit and other inhabitants of the Region established and in accordance with the provisions of this Section and to the rights and guarantees in favour of the Naskapis…

Paragraph 23.7.6 set out below defines the circumstances for the application of more than one procedure. It contemplates the application of: (a) both federal and provincial Section 23 assessment if the project falls within the jurisdiction of both Quebec and Canada; or (b) a non-Section 23 procedure for the parts of straddling projects which are outside of the Region. The second part of the paragraph refers notably to *JBNQA* Section 22 assessment.

> 23.7.6 Notwithstanding the above paragraph, a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Quebec and Canada or unless such project is located in part in the Region and in part elsewhere where an impact review process is required.

Paragraph 23.7.7 is a vestige of the pre-legislative history of federal assessment when the federal government did not wish to legislate:

> 23.7.7 Nothing in the present Section shall be construed as imposing an impact assessment review procedure by the Federal Government unless required by Federal law or regulation. However, this shall not operate to preclude Federal requirement for an additional Federal impact review process as a condition of Federal funding of any development project.

Now the *James Bay and Northern Quebec Native Claims Settlement Act* does impose Section 23 procedure as federal law and as the applicable impact assessment and review procedure.

Finally and fundamentally, paragraph 23.7.10 recognizes absolute Inuit veto over changes to the provisions of Section 23. The federal and provincial legislative role is limited to giving effect to Section 23:

> 23.7.10 The provisions of this Section can only be amended with the consent of Canada and the interested Native party, in matters of federal jurisdiction, and with the consent of Quebec and the interested Native party, in matters of provincial jurisdiction. In addition, the written consent of the Naskapi Native party will be required […]
>
> Legislation enacted to give effect to the provisions of this Section may be amended from time to time by l'Assemblée nationale in matters of provincial jurisdiction and by Parliament in matters of federal jurisdiction.

Thus, the *JBNQA* sets out clear and controlling rules for the interaction of Section 23 with *CEAA*:

- The environmental and social impact assessment and review procedure for the Inuit region under the *JBNQA* is the procedure established by and in accordance with Section 23;
- Other processes, such as *CEAA*, may apply in certain narrow circumstances, subject always to the paramountcy of the *JBNQA* procedure in case of any inconsistency or conflict;

- The procedure may not be amended without Inuit consent. This is so whether the modification is: direct and explicit; or *de facto* by way of non-application of the *JBNQA* regime, or the failure to finance and support it, or by the establishment of a competing process like *CEAA*.

3.0 NEW REALITIES AND NEW DEVELOPMENTS TO WHICH INUIT HAVE A RIGHT

The *JBNQA* did not freeze all conceptions of Nunavik Inuit rights in 1975. To so argue would be to deny the nature of our rights and their constitutional protection.

From a broad perspective, implementation of Section 23 and its interface with *CEAA* must at least take account of such new realities as:

- the inherent right to Aboriginal self-government (recognized as a matter of Canadian government-wide policy);
- the recognition of and recourse to traditional ecological knowledge (TEK) for the purposes of impact assessment;
- the work of the Royal Commission on Aboriginal Peoples and Canada's response to it;
- systematic provision for co-management and Aboriginal access to the employment, revenue sharing and other benefits of economic development, notably through Impact and Benefit Agreements.

In addition, certain developments in the case law are of note. Decisions from the Supreme Court of Canada have:

- ✓ given legal requirements of environmental assessment a new importance - *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 3 S.C.R.;

- ✓ begun to articulate limits on Crown action in resource management and allocation and to recognize requirements of Aboriginal participation in such decisions - *R. v. Sparrow*, [1990] 1 S.C.R. 1075, *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010.

In *Delgamuukw*, it was held that mere consultation of Aboriginal peoples is only rarely sufficient for justification of infringement of Aboriginal title. Then Chief Justice Lamer said:

> […] There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. [p. 1113, par. 168]

Therefore, *CEAA* cannot fulfil federal obligations regarding Inuit participation in resource allocation, land use and development decisions. At a minimum, the broad and integrated regime of the *JBNQA* must be fully applied.

As seen, Section 23 provides a substantive promise of effective and sustainable environmental and social protection for Nunavik Inuit. Therefore, with respect to specifics, we have a right to the benefit of positive developments in impact assessment which have emerged or have become more prominent since the 1975 conclusion of the *JBNQA*. Without any attempt at a comprehensive enumeration, we refer to:

- class, program, policy and strategic assessment;
- elaborate scoping prior to determining the focus and content of the statement of environmental and social impact, including scoping hearings;
- enhanced consideration of the justification for development and of alternatives thereto;

- assessment of cumulative effects;
- elaborate public hearings permitting both adopted community involvement and the testing of evidence and the presentation of competing proof, all supported by funding for participants.

4.0 *CEAA* AND SECTION 23

4.1 General Characteristics of *CEAA*

It is useful to begin by considering the general characteristics of *CEAA* in order to identify the major similarities and divergences of the two processes.

4.1.1 Objectives

In terms of declared objectives, *CEAA* has a focus on environmental quality, sustainable development, integration of environmental factors into early planning and decision-making, and access to information and public participation (Preamble and ss. 4 and 11). In practice, the provisions of *CEAA* and assessment under the federal law largely are disconnected from any strong sustainability focus (the exception is s. 16(2) (d) - effect on capacity of renewable resources to meet needs of the present and future).

It is certainly clear that *CEAA* would offer Nunavik Inuit nothing remotely comparable to the substantive and process protections offered by the guiding principles of Section 23.

4.1.2 “Environment” and “environmental effects” and “environmental assessment”

The definitions of “environment” and “environmental effects” and “environmental assessment” in section 2 of *CEAA* are the heart of the regime:

> "environment" means the components of the Earth, and includes

> (*a*) land, water and air, including all layers of the atmosphere,
> (*b*) all organic and inorganic matter and living organisms, and
> (*c*) the interacting natural systems that include components referred to in paragraphs (*a*) and (*b*);
>
> "environmental effect" means, in respect of a project,
> (*a*) any change that the project may cause in the environment, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, and
> (*b*) any change to the project that may be caused by the environment,
>
> whether any such change occurs within or outside Canada;
>
> "environmental assessment" means, in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations;

Specifically, these definitions determine the object of the Act and the nature of the assessment factors studied pursuant to s.16 and weighed in decisions regarding projects during and at the end of the *CEAA* process (ss. 20, 23 and 37).

It will be seen that these definitions are biophysical. Socio-economic conditions, heritage and use of lands and resources by Aboriginal persons are considered only where and insofar as they are affected by primary environmental change. In other words, no direct social considerations enter into *CEAA* assessment. This is of course in stark contrast to the equal weight given to both the environmental and social in all aspects of the Section 23 procedure.

4.1.3 Public participation

Public participation in assessment is an important tenant of *CEAA* (Preamble, s.4). This is of course laudable. However, the relevant *CEAA* provisions (ss.2 (“interested parties”), 16(1)(c),

18(3), 20(1)(c)(iii), 22, 23, 34) do not accommodate the special status and involvement which lies at the heart of Section 23.

4.1.4 Self-assessment

Self-assessment by federal authorities is a fundamental organising principle of *CEAA*. It is often dressed up as the ultimate in the institutionalisation of sustainable development through the general integration of environmental considerations into decision-making. In fact, it long predates the Bruntland Commission and may have more to do with the protection of departmental decision-making prerogatives than environmental idealism.

Again, self-assessment does not accord well with the requirement under Section 23 of "special status and involvement for the Native people and other inhabitants of the Region" (par. 23.2.2(c)) as reflected in the presence of Inuit representatives on the advisory, assessment and review bodies under the *JBNQA*. This defect is not curable by the naming of Inuit members to *CEAA* public review panels because *CEAA* assessment, in the vast majority of cases, does not ever reach the panel phase. Furthermore, s.33 of *CEAA* contemplates independent *ad hoc* panels, not the permanent parity bodies which exist under Section 23.

4.1.5 Decision-making

Decision-making under *CEAA* to allow federal powers to be exercised and to allow projects to proceed is on the self-assessment model (ss. 20 and 37) by federal authorities. Such authorities are often proponents, partners in projects or the line department involved. Furthermore, at the end of the day, *CEAA* makes it rather easy to put aside environmental concerns on the basis of it being "justified in the circumstances".

In contrast, the Section 23 procedure involves Inuit representation in the decision-making process, and structures discretion by reference to the *JBNQA* Section 23 guiding principles (par. 23.3.20) and to environmental and social impact considerations (par.23.4.23b)).

Furthermore, there is a presumption that the review decision or recommendation will be followed and an Inuit role is ensured by process requirements prior to any deviations therefrom (par. 23.3.21, 23.3.24, 23.4.23b), 23.4.25 and 23.4.29).

4.2 *CEAA* and Land Claims Assessment Procedures: Cooperation, Delegation and Substitution

Beyond the topics already treated, a number of *CEAA* provisions deal with the participation of Aboriginal peoples in *CEAA* assessment; others provide for the relationship between *CEAA* and land-claims based assessments. None is sufficient to justify the supplanting of Section 23, including the federal side of its process of environmental and social impact assessment and review.

Section 12 of *CEAA* provides for cooperation in environmental assessment between responsible authorities in screening or comprehensive study and *Constitution Act, 1982*, s. 35 assessment bodies. This would certainly cover the bodies under Section 23 of the *JBNQA*. However, it does not meet our fundamental concern that the addition of the *CEAA* process for projects in the *JBNQA* Inuit Region dilutes Inuit rights by forcing the bodies on which there is guaranteed and direct Inuit representation to share assessment responsibilities with *CEAA* "federal authorities".

Section 17 of *CEAA* both recognizes and limits delegation of screening or comprehensive study functions. Specifically, it allows delegation of the preparation of the relevant reports, but preserves decision making at the end of the day to the responsible authority in question. Note that unless designated by regulation, a section 35 assessment body is not a "federal authority" which may be a "responsible authority" (*CEAA*, ss.2 and 59(e)).

Section 40 to 42 of *CEAA* provide for consultation, cooperation regarding assessment and for agreements or arrangements for a joint review panel between the federal Minister of the Environment and section 35 land-claims assessment bodies.

By virtue of section 41, such arrangements or agreements must include consideration of the *CEAA* section 16 factors and meet certain standards, including those regarding the naming of panel members and public participation. The naming of panel members on an *ad hoc* basis with no guarantees of Inuit membership is in contradiction with the fundamental nature of the Section 23 parity bodies. Furthermore, section 41(e) provides for public participation, but no special status is recognized for Inuit.

Sections 43 to 45 of *CEAA* would allow substitution of Section 23 assessment for a federal panel review. This has some potential to give effect to the primacy of the Section 23 procedure. However, substitution is subject to case-by-case exercise of the discretion of the federal Environment Minister. More fundamentally, panel review is a rare occurrence under *CEAA*, so substitution must necessarily be equally rare.

At first blush, the section 48 of *CEAA* appears to be of interest. But the discretionary referral of a project to panel review or mediation is so circumscribed as to be stillborn.

5.0 NUNAVIK INUIT EXPERIENCE WITH *CEAA* IN *JBNQA* REGION

No attempt is made here at complete treatment of the subject. In general terms, federal assessment, whether under Section 23 or *CEAA*, has not played an important role. The Kativik Environmental Quality Commission has been the dominant force in impact assessment in the region. The experience with the KEQC has proven to be for the most part very positive. There has been continuity in both its membership and its approach to assessment.

The federal process Review Panel (COFEX-North) and the Screening Committee were for the most part inactive through the 1970s and the 1980s.

Notably, for the period 1980 to1990, the experience in Nunavik with environmental assessment was almost exclusively with the KEQC and the review of community infrastructure

projects. These included water treatment facilities, solid waste disposal sites, wastewater treatment systems, airports and the construction of a new community.

Of the projects subject to environmental assessment under Section 23, the only non-community based projects have been the review of the Raglan Mine project by KEQC and the unique case of the proposed Great Whale Project.

Although not entirely reliable, a search of the Federal Environmental Assessment Index (www.ceaa.gc.ca and click on "Public Registry") reveals some 25 *CEAA* assessments since 1995 (all screenings) in the "northern Quebec" region relevant to Nunavik Inuit. It is possible that more screenings have been conducted, especially as a result of federal funding of projects in Nunavik.

The experience with *CEAA* is best understood with some historical context and by considering the assessment of a range of individual projects or types of development.

5.1 No Legally-Binding Federal Process and the Negotiation of Section 23

At the time of the negotiation of Section 23 and right up until the 1984 adoption of the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 (the "*EARP Order*"), federal impact assessment existed only as a matter of Cabinet policy and was not obligatory or legally binding. Thus, federal assessment was discretionary and very flexible in its application.

Even after 1984, the *EARP Order* was largely unapplied until a series of cases beginning in 1989 whereby the federal government was ordered by the Federal Court and the Supreme Court to recognize the legally-binding and obligatory nature of the *EARP Order*.

In this context, the federal stance in negotiating the *JBNQA* was to resist any suggestion that federal impact assessment should be legislated as a law of general application. Instead

Nunavik Inuit negotiated to obtain protection through the establishment of the federal environmental and social impact assessment procedure under Section 23. The ill-adapted and duplicative application of *CEAA* today is clearly disruptive. It can only be regarded by Nunavik Inuit as a late conversion by Canada to the merits of impact assessment which effectively dilutes or supplants the Section 23 process.

5.2 The Special Case of the Great Whale River Project

The impact assessment of the Great Whale River ("GWR") Project in the late 1980s and early 1990s until the shelving of the project in the fall of 1993 is a long and complex story. However, certain points merit recalling.

Impact assessment involving five impact assessment bodies (federal and provincial under each of Section 22 and Section 23 of the *JBNQA* and a federal *EARP Order* panel) was eventually agreed to by way of the *Memorandum of Understanding: Environmental Assessment of the Great Whale Project* of 23 January 1992. Makivik was a party thereto.

However, this arose in a climate of Canada and Quebec attempting to avoid their obligations under the *JBNQA.*

The federal and provincial governments had illegally agreed between themselves on an assessment which excluded the federal procedures and assessment bodies under Sections 22 and 23 of the *JBNQA* in favour of assessment under provincial processes plus the *EARP Order*. In *Cree Regional Authority v. Canada (Federal Administrator)*, [1992] 1 F.C. 440 (T.J.), Makivik was an intervenor. The Court said at page 465:

> The federal/provincial Agreement entered into some sixteen years subsequent to the JBNQ Agreement purports to substitute the federal environmental review process and to proceed with an assessment in accordance with the EARP Guidelines. It is apparent that this Agreement was intended both to appease and circumvent the native populations who desired to have a separate federal

> review of matters within federal competence as required by the 1975 understanding; moreover, it appears to have been negotiated in an attempt to free themselves from the duties and responsibilities imposed under the JBNQ Agreement.
>
> In my opinion, the new bipartite (November 15, 1990) agreement cannot legally be substituted by the federal authorities as an answer to their obligations under the JBNQ Agreement.

Similarly, the direct catalyst for the *Memorandum of Understanding* was the October 25, 1991 out-of-court settlement of litigation to contest Quebec's proposed segmentation of the GWR project for the purposes of impact assessment: *Chief Robbie Dick v. The Honourable Pierre Paradis*, C.S.M. No. 500-05-013324-908.

Makivik was concerned that : (i) the application of the Section 23 procedure to impacts of the GWR project in the offshore would be contested; (ii) the institutions and processes under Section 23 would not be provided with the resources necessary to carry out an effective assessment of the mega-project and to ensure funding of participants.

In this context and in view of its concerns, Makivik called for the application of federal assessment under the *EARP Order* and agreed to the processes provided for in the *Memorandum of Understanding*.

5.3 Municipal, Community and Transportation Projects

The bulk of *CEAA* assessments to date fall into this category. By reason of their nature (repair, maintenance), location (within communities) or listing in Schedule 2 of Section 23, most of these projects are probably exempt from Section 23 assessment.

Seven *CEAA* screenings from 1996-1997 were for federal-funded municipal and community facilities or infrastructure in Inukjuak, Kangiqsualujjuaq, Kuujjuaq, Kuujjuarapik, Quaqtaq, Salluit and Umiujuaq. All concluded that effects were not likely to be significant.

Federal funding in 1996 also triggered a *CEAA* screening (FEAI 13205) for a dump site in Kangiqsujjuaq. The screening led to a decision allowing the funding to go ahead. In accordance with Section 23, Schedule 1, item 5(b), the project was automatically subject to the Section 23 environmental and social impact procedure. Under the *JBNQA*, only provincial impact assessment was applied.

Since 1995, nine further *CEAA* screenings have been conducted by Transport Canada with respect to various repair, restoration and maintenance operations at Kuujjuaq Airport (FEAI 568, 1020, 4633, 6152, 9640, 10420, 11747, 14907 and 17912).

5.4 Marine Infrastructure

By far, the most significant impact of *CEAA* for Nunavik Inuit has been with regard to marine infrastructure contemplated by paragraph 29.0.36 of the *JBNQA.* The Northern Quebec Marine Infrastructure Program is funded notably under a June 1, 1998 agreement with Canada providing for $ 30 million over ten years in equal shares from the Departments of Indian Affairs & Northern Development, Transport and Fisheries & Oceans. Makivik Corporation is the primary proponent.

In late 1997, Makivik submitted preliminary information on marine infrastructure in Kangiqsujjuaq, Quaqtaq and Puvirnituq for Quebec and federal assessment under Section 23.

The first development put through assessment was phase 1 of the infrastructure for Kangiqsujjuaq. The Kangiqsujjuaq project was subject to the following authorizations: KEQC; COEFX-North; *Fisheries Act* (habitat protection); *Navigable Waters Protection Act*; Quebec *Environment Quality Act*, chapter 1 certificate of authorization; and Quebec Ministry of Natural Resources, category 3 land use permit.

Layered on top of this was a *CEAA* assessment involving three “responsible authorities” (DIAND, DFO and Transport Canada).

The May 17, 1999 COFEX-North recommendations regarding the approval of the development referred to the two overlapping federal processes and recommended for the future that "special administrative arrangements be put in place to avoid duplication and delay". Specifically, COFEX-North noted the supremacy and constitutional protection of the *JBNQA*, and the rights provided to Inuit beneficiaries therein. It suggested that through *CEAA* section 17 delegation, it could conduct screenings and comprehensive studies itself.

In this context, early in September 1999, the Quebec Regional Office of the Canadian Environmental Assessment Agency sent the Kativik Environmental Advisory Committee a proposed coordinated approach for parallel Section 23 federal assessment and *CEAA* screening. The proposed process would involve a single EIS directive, a single EIS and synchronized decisions.

In October 1999, the EIS for the Quaqtaq Marine Infrastructure Project was transmitted by Makivik to the Quebec and federal administrators. The COFEX-North Secretariat transmitted copies to the federal authorities in at least three departments. This project is currently being assessed.

5.5 Section 23, Not *CEAA*

On the basis of our experience with the *EARP Order* and now *CEAA*, we conclude that in addition to the binding requirements of the *JBNQA*, good policy dictates that the appropriate regime of environmental and social protection for Nunavik Inuit, including impact assessment, is that set out in Section 23.

Specifically, Section 23 offers an integrated procedure of impact assessment in which rules and mechanisms are set out for coordination of the carrying out of assessment depending on whether matters of federal or provincial jurisdiction, or both, are involved. With direct Inuit presence and continuity in membership, the Section 23 bodies are far better suited than *CEAA*

federal authorities or *ad hoc CEAA* panels to adjusting assessment to suit the circumstances, scale and specificities of development.

For example, the guiding principles set out in paragraph 23.2.4 focus on Inuit people, society, communities, economies and wildlife harvesting rights. This means that community projects with Inuit proponents may well merit different treatment than mining, hydroelectric or other major development with non-Inuit proponents. Our experience with *CEAA* has demonstrated its ill-adapted rigidity. *CEAA*, with its almost exclusive biophysical focus, has been applied to Inuit projects in a late and disruptive way, duplicating assessment requirements and providing little value added.

6.0 THE FIVE-YEAR REVIEW

We have already stated our difficulties with the process of the five-year review.

It certainly does not provide an adequate context for the long-overdue true implementation of Section 23 and for bringing federal law, policy, budgetary allocations and practice under *CEAA* and otherwise into conformity with the *JBNQA*.

However, the Five-Year Review Discussion Paper does broach questions of importance. It also offers the potential for limited improvements in *CEAA* (where it applies) and touches on the role of the courts in ensuring compliance with assessment obligations.

6.1 The Discussion Paper and Aboriginal Peoples

Several major themes run through the treatment of Aboriginal issues in the Discussion Paper. There is some acknowledgement of the unique and important nature of the Aboriginal role. At the same time and without reference to section 35 of the *Constitution Act, 1982*, the Paper quietly but firmly reasserts paramount federal authority. It promotes harmonisation of

CEAA and land-claim assessment processes and adapting and improving mechanisms for involvement of Aboriginal peoples in assessment.

Chapter 3 of the Discussion Paper deals at page 16 with the impact of Aboriginal self-government on environmental assessment. Makivik notes with satisfaction and some impatience the acknowledgement of the need to "clarify the administration" of pre-*CEAA* land claims assessment regimes "and their relationship with the Act". It would be more encouraging if the *JBNQA* and the paramount nature of its Section 23 assessment procedure were given explicit consideration in this connection.

Instead, the Discussion Paper appears to focus on *CEAA* as if it were the centre of the universe. No notice of or effect is given to the constitutional nature and protection of the rights of Nunavik Inuit under Section 23. Rather, in dealing with harmonisation, discussion appears to proceed from the precept of uniformity in environmental assessment (see *CEAA*, s. 62(b)), to the detriment of the specificity of the Section 23 procedure of environmental and social impact assessment.

At pp. 65-67 of the paper, the Aboriginal role is dealt with in a context of "public" participation. Although this classification is highly inappropriate, to the extent that *CEAA* may apply, some of the issues as set out at p. 65 are appropriate and of concern to Nunavik Inuit.

It will be obvious that Inuit demand not a "separate approach", but rather implementation of <u>the</u> applicable regime of social and environmental protection, i.e. that provided for by and in accordance with Section 23. Requiring the constitutionally protected and paramount Section 23 impact assessment process with its federal <u>and</u> provincial facets, rather than *CEAA*, is in no way comparable to provincial or industry demands, in southern Canada, that no federal assessment be applied.

Regarding "consultation obligations" and *Delgamuukw*, it has already been pointed out that for Nunavik Inuit, involvement in resource and development management goes beyond environmental assessment as a type of consultation.

At pp. 65-66, the Discussion Paper deals with the definition of "environmental effect". Again, insofar as *CEAA* may apply, we support a move to broaden this definition to include direct social effects.

6.2 General Improvements in *CEAA*

The Discussion Paper deals with a number of other discrete issues. Under reserve of our general position on *CEAA*, Makivik supports:

- Making prior public and Aboriginal public consultation obligatory in all comprehensive studies and non-discretionary, in pre-determined cases, for screening (pp. 35 and 63-64).
- Requiring public and Aboriginal participation in project scoping (all three aspects mentioned at p. 49) and an obligatory scoping phase in panel review (hearings and other methods).
- As regards the coverage of *CEAA*, eliminating the distinction between physical works and physical activities in the s. 2 definition of "project". It serves only to limit in an arbitrary fashion the coverage of the Act.
- Measures to improve the frequency and effectiveness of the consideration of cumulative effects (p. 57).
- Measures to improve follow-up (p. 59).
- Greatly improved funding for participation in assessment. Such funding should be extended at least to comprehensive study (p. 65).

6.3 No Privative Clause

Finally, the Discussion Paper touches on the question of judicial review. Nunavik Inuit strongly condemn as ill-advised and unworkable any move to insert a privative clause into *CEAA*. This would amount to an attempt to immunise illegal government and proponent action and inaction from judicial review. Privative clauses are typically for expert boards. Due to the self-

assessment model of *CEAA* and the *ad hoc* nature of *CEAA* panels, a privative clause in *CEAA* would amount to protecting government actors in their thousands and *ad hoc CEAA* panels from judicial review. Recourse to the Courts has been absolutely essential for Aboriginal people in countering the abusive circumventing of assessment obligations.

7.0 CONCLUSION AND RECOMMENDATIONS

In summary form, the position of Makivik Corporation is that the applicable and appropriate impact assessment process for the Inuit region is that set out in Section 23 of the *JBNQA*. In accord with the guiding principles of Section 23 and always with a view to the perpetual protection Nunavik Inuit and our environment, ecosystems, wildlife resources, society, communities and economies, our position is that:

a) Inuit rights under *JBNQA* are constitutionally protected and paramount by virtue of section 35 of the *Constitution Act, 1982* and under federal legislation.

b) The regime of environmental and social protection for Nunavik under the *JBNQA*, including the environmental and social impact assessment and review procedure, is established by and in accordance with Section 23 thereof.

c) The *JBNQA* recognises substantive Nunavik Inuit constitutional rights to:
   i. an adapted and effective regime of environmental and social protection, including impact assessment; and
   ii. special status for Nunavik Inuit through full involvement in the implementation, administration and ongoing review and development of that regime.

d) *CEAA* and its five-year review must yield to the environmental and social impact assessment procedure established by and in accordance with Section 23 of the *JBNQA*.

e) Although the mechanics of *CEAA* can be married with the land claims regime, the purposes and institutions of the two are quite different and *CEAA* does not provide sufficient guarantee of Aboriginal involvement in the assessment. Therefore, harmonizing with *CEAA* dilutes Inuit rights.

f) Nunavik Inuit rights are not frozen by the *JBNQA*. Nunavik Inuit have the right to benefit fully from evolution and improvement in environmental and social impact assessment and review by amendment of Section 23 or changes in practice thereunder, without requiring that we embrace the supplanting of Section 23 by *CEAA*.

g) Nunavik Inuit seek appropriate federal legislation, including amendments to *CEAA*, to recognize and give effect to the paramount application of the Section 23 as providing for the environmental and social impact assessment and review procedure applicable in the region.

h) The federal Crown must vindicate Inuit rights and the achievement of the protection promised under the *JBNQA* by wholeheartedly embracing the Section 23 assessment procedure. Beyond legislation, this requires a fundamental change in federal policy. Concretely, this means:

   i. the commitment of substantial resources for scientific, technical, legal and administrative functions under Section 23; and,
   ii. ensuring that development is subjected as required to the federal side of the Section 23 procedure.

i) The Five-Year Review Discussion Paper assumes the layering and the marrying of multiple processes and does not recognize the primacy of the Section 23 procedure. Subject to this, some of the reforms suggested and others would be useful where *CEAA* applies.

Section 23 contemplates changes in federal law and policy to accommodate and vindicate Inuit rights. Nunavik Inuit suggest that a range of options are possible and merit further study and discussion.

Possible options, some of which may be used in combination, include:

a) In the fashion of Chapter II of Quebec's *Environment Quality Act* and in close consultation with Nunavik Inuit, fully legislate Section 23 as federal legislation within or separate from *CEAA*.

Such federal legislation would ensure that the status of Section 23 as establishing the regime for the part of Nunavik covered by the *JBNQA* would be unequivocally understood by all proponents and federal actors.

b) A declaratory amendment to *CEAA* of the following nature, recognizing the primacy of Section 23:

> *JBNQA* SECTION 23 PREVAILS
>
> For greater certainty, it is declared, pursuant to the *James Bay and Northern Quebec Agreement*, the *James Bay and Northern Quebec Native Claims Settlement Act* and the *Constitution Act, 1982*, s. 35, that this *Act*, and environmental assessment or assessment of environmental effects by or in accordance herewith, is only applicable to the extent that it does not conflict with and is not inconsistent with the environmental and social impact assessment and review procedure established by and in accordance with Section 23 of the *James Bay and Northern Quebec Agreement.*

This amendment would signal to all concerned the existence of Section 23 and its hierarchical superiority.

c) An amendment to automatically substitute Section 23 assessment for *CEAA* assessment:

SUBSTITUTION OF ASSESSMENT

i. Where an environmental assessment or assessment of environmental effects is required under this Act and the project might affect the environment or people of that part of Nunavik defined in paragraph 23.1.8 of the *James Bay and Northern Quebec Agreement* ("*JBNQA*"), then the applicable assessment process shall be the environmental and social impact assessment and review procedure established by and in accordance with Section 23 of the *JBNQA*.
ii. In order to comply with the requirements of section 11 of the Act, the responsible authority shall forthwith refer the project to the Federal Administrator.
iii. All such projects which are then subject to assessment and review pursuant to paragraphs 23.4.1 and 23.4.9 of the *JBNQA* shall be referred to the Environmental and Social Impact Review Panel established pursuant to paragraphs 23.4.11 and 23.4.12 of the *JBNQA*.
iv. The proponent shall be bound by the decision pursuant to paragraph 23.4.23 of the *JBNQA.*
v. Prior to a determination for the purposes of ss. 20 or 37, the responsible authority shall consider the results of the *JBNQA* Section 23 assessment.
vi. The responsible authority may not exercise any power or perform any duty or function which would allow the project to be carried out in whole or in part unless the assessment steps set out in this section have been respected.
vii. The assessment conducted pursuant to this section shall be deemed to satisfy any requirements for environmental assessment or assessment of environmental affects by or in accordance with of this *Act* and its regulations.

Substitution would only be viable if the Section 23 procedure is properly funded and provided with adequate technical, scientific, legal and administrative support. This amendment would also require consequential adjustments to the regulations and guides under *CEAA*, most notably the *Federal Coordination Regulations*.

d) An amendment to *CEAA* making it clear that the applicable procedure is as provided for in Section 23.

APPLICABLE PROCEDURE

Notwithstanding anything in this Act or any other law, the environmental and social protection regime, including the environmental and social impact assessment and review procedure, applicable to projects which might affect the environment or people of that part of Nunavik defined in paragraph 23.1.8 of the *James Bay and Northern Quebec Agreement*, shall be as established by and in accordance with Section 23 of the *James Bay and Northern Quebec Agreement*.

Finally, amending legislation is not enough. The second leg of any effective reform must necessarily be a major policy and budgetary commitment of the administrative, scientific, legal and technical services necessary for the vindication of the Inuit right to implementation of Section 23. This means devoting significant federal effort and resources to the Kativik Environmental Advisory Committee and to COFEX-North and ensuring that development is subjected as required to the federal side of the Section 23 procedure. Any other course by the Government of Canada amounts to a failure to honour the solemn commitment made to the unique principles, objects, institutions and process of the Section 23 impact assessment procedure.