HOUSE OF COMMONS
STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT

BRIEF RESPECTING REQUIREMENT OF CASH COMPENSATION AS PART OF THE NUNAVIK INUIT OFFSHORE LAND CLAIM PROCESS AND TREATY

Makivik Corporation
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Prepared and Submitted Without Prejudice

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INTRODUCTION

Makivik Corporation represents Nunavik Inuit (Inuit of northern Québec). Makivik's predecessor, the Northern Québec Inuit Association, was a signatory to the James Bay and Northern Québec Agreement ("JBNQA") executed on November 11, 1975. Nunavik Inuit also assert rights and jurisdiction in the areas offshore of Québec, and Labrador and onshore Labrador and negotiations on these matters are underway with the Government of Canada. Nunavik Inuit are in the position of having part of their Territories covered by treaty and part not yet subject to treaty. The present Brief addresses specifically the current main impediment to offshore treaty negotiations with the Government of Canada, namely, the issue of cash compensation. (See Annex 1 to this Brief for a Map depicting the "Nunavik Marine Region" which is the offshore area under negotiation pursuant to the Makivik offshore treaty negotiation process.)

A. THE PROBLEM

The negotiations towards achieving a treaty concerning Nunavik aboriginal rights, titles and interests to an offshore area surrounding Québec and Labrador are being frustrated by the position of the Chief Federal Negotiator, on behalf of the Government of Canada, that Nunavik Inuit are not due any direct financial compensation. All that may be offered by Canada is an amount in the region of Makivik's negotiation costs as financed through their loans from Canada. The stated rationale for this position is that the financial compensation paid to Nunavik Inuit under the JBNQA satisfied any financial obligations of Canada regarding the entire traditional territory of Nunavik Inuit.

B. CANADA'S POSITION

More particularly, Canada has advanced three arguments to justify its refusal to include cash compensation as part of the Nunavik Inuit Offshore Treaty.

(i) Compensation already paid to Nunavik Inuit under the JBNQA

Canada argues that Makivik has already received compensation money (approximately $90 Million) pursuant to the JBNQA of 1975. More particularly, Canada argues that unwritten DIAND claims policy dictates clearly that an aboriginal group cannot divide up its "traditional territory" for the purposes of receiving compensation. Nunavik Inuit traditional territory includes areas of Labrador, the Labrador offshore, the offshore area surrounding Québec and the Québec territory itself. Although the JBNQA was a treaty addressing only Nunavik Inuit claims in that portion of Nunavik territory included in Québec, Canada argues that Makivik cannot multiply cash compensation on a per capita basis for every part of its "traditional territory" unsettled by the JBNQA.

(ii) JBNQA was a model land claim settlement followed subsequently by all other federal modern treaties

Canada argues that the JBNQA and all the rights and benefits provided thereunder to the aboriginal signatories including cash compensation set a bench mark for all federal comprehensive land claim settlements that followed and for that reason, Canada cannot now retroactively increase compensation payable to Nunavik Inuit for parts of their traditional territory not yet settled through treaty. That is, Canada argues that the cash compensation received by Nunavik Inuit in the context of the JBNQA is equal to the amounts of cash compensation received under other modern land claim treaties. To now provide "additional" compensation to Nunavik Inuit for the unsettled offshore area around Québec and for their unsettled claims in Labrador and the Labrador offshore would create an "imbalance" in the compensation paid to Nunavik Inuit under the JBNQA in comparison to the amount of cash compensation paid to other aboriginal groups under other modern land claims settlements.

(iii) That Nunavik offshore claim is a transboundary claim

The Nunavik Inuit offshore claim (and by reference the Nunavik Inuit Labrador claim) is no more than a transboundary land claim. There is no precedent for federal payment of compensation monies for a transboundary claim. In support of this argument, Canada points to sections 42.1.1 and 42.1.2 of the Nunavut Final Agreement which specifically provides for no compensation to be paid for Nunavut Inuit aboriginal claims in and to the Province of Manitoba.

C. NUNAVIK INUIT POSITION

(i) The spirit and intent of the JBNQA

(a) The territorial purpose of the JBNQA

The JBNQA was intended to be and by its terms clearly was a modern treaty covering only those portions of the Province of Québec annexed through the 1898 and *1912 Boundaries Extension Acts*. The Preamble includes the following:

> WHEREAS it is desirable for the Province of Québec to take measures for the organization, reorganization, good government and orderly development of the areas within the purview of the 1898 Acts respecting the Northwestern, Northern and Northeastern Boundaries of the Province of Québec and the 1912 Québec Boundaries Extension Acts;
>
> ...
>
> WHEREAS, in particular, it is expedient to agree upon the terms and conditions of the surrender of the rights referred to in the 1912 Québec Boundaries Extension Acts;

The Territory covered by the JBNQA is defined clearly in terms of the Boundaries Extension Acts. Par. 1.16 reads:

> 1.16 "Territory": the entire area of land contemplated by the 1912 Québec boundaries extension acts (an Act respecting the extension of the Province of Québec by the annexation of Ungava, Qué. 2 Geo. V c.7 and the Québec Boundaries Extension Act, 1912, Can. 2 Geo. V c.45) and by the 1898 acts (an Act respecting the delimitation of the Northwestern, Northern and Northeastern boundaries of the Province of Québec, Qué. 61 Vict. C.6 and an Act respecting the Northwestern, Northern and Northeastern boundaries of the Province of Québec, Can. 61 Vict. C.3).

(b) The litigation purpose of the JBNQA – settlement out of court

The negotiations resulting in the JBNQA commenced as a result of the legal proceedings brought against the first James Bay hydroelectric project and the JBNQA was in large measure a settlement out of court of those proceedings (see par. 2.4 of Section 2 JBNQA). This distinguished it from other modern treaties and suggests that the compensation paid was at least in some measure connected to "buying the peace" through an out-of-court settlement.

(ii) Policy context

(a) No federal claims policy applicable at the time of the JBNQA

The JBNQA was not negotiated within the framework of a federal claim policy. It was not initiated as a land claim; it was not pursued as a land claim; aside from the litigation purpose referred to above, the JBNQA was seen as an attempt by Québec to fulfil its obligations under the *1912 Boundaries Extension Act.*

The Act provided that Québec would:

> ... recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders; (See s. 2(c) of the federal legislation and s. 2(c) of the schedule to the provincial legislation; See also Sub-Section 2.5 of the JBNQA).

In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 the Supreme Court of Canada while commenting on the lack of a substantive federal government aboriginal claims policy, made specific reference to the Northern Québec situation (at 1103 – 1104).

> By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Québec Hydro was originally initiated without regard to the rights of the Indians who live there, even though these were expressly protected by a constitutional instrument; see *The Québec Boundaries Extension Act*, 1912, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government.

(b) Claims policy applying to Nunavik Inuit offshore negotiations

In 1986, the federal government adopted a revised *Comprehensive Land Claims Policy*. As one of its objectives, the Policy states that:

> In this process (the settlement of aboriginal land claims) the claimant group will receive defined rights, compensation and other benefits in exchange for relinquishing rights related to the title claims over all or part of the land in question. (emphasis added)

The *Policy* continues:

> Monetary compensation may comprise various forms of capital transfers, including cash, resource revenue-sharing, or government bonds. Where applicable, the amount will be clearly defined in the agreement, and no advance on the monetary compensation components of settlements will be provided before final settlement is reached. The amount of compensation may be adjusted depending upon other arrangements negotiated in settlement agreements. For example, the amount of cash compensation may be reduced in accordance with arrangements concerning resource revenue-sharing. Outstanding debts owed by the claimant group to the federal Crown will be deducted from final settlements.

The *Policy* further states:

> In addition, an equitable application of the policy means that the overall fairness of settlements must be ensured.

This approach was reinforced at the negotiating table where it has been stated by federal officials that parity and equality among claims is required. In addition, Makivik Corporation has been told at the negotiating table that money obtained by an aboriginal group through other processes, such as impact and benefit agreements, is not taken into account when compensation for their comprehensive claims is considered by government.

There has not been a comprehensive land claims settled under this new policy absent cash compensation. There is no policy basis to argue that this claim not benefit from cash compensation at least equivalent to the levels paid out in other comprehensive land claims settlements across the country.

(iii) Monetary compensation in the JBNQA

(a) Canada's minimal monetary contribution

The JBNQA was not negotiated or concluded pursuant to any federal land claims policy. The federal government, in fact, played a minor role in negotiating the treaty save for matters affecting directly federal jurisdiction such as Category IA lands of the Crees under Sections 4 and 5 of the JBNQA and the Cree self-government legislation under Section 9 of the JBNQA.

Specifically, on the matter of monetary compensation paid under the JBNQA, of the first $75 Million, Canada paid only 43.6% (see par. 25.1.4 and Schedule 1 to Section 25). Canada paid none of the second $75 Million, this being paid by the James Bay Energy Corporation and/or Hydro-Québec (see par. 25.1.7). Once again, Canada paid none of the third $75 Million, this being paid by Québec in respect of royalties and other benefits and revenues derived and resulting from the development and exploitation of the territory (see par. 25.2.2). Canada, therefore, paid only approximately 14.5% of the total amount of compensation paid under Section 25 of the JBNQA. One third of that compensation was paid by the proponents of the James Bay Project, clearly for the purpose of settlement out of court or "buying the peace".

(b) Comparability with modern treaties

Makivik has already explained at the negotiation table on numerous occasions that the amount of compensation monies payable under the JBNQA are in no way equivalent to those paid under subsequent modern land claim treaties in Canada. The main JBNQA cash compensation included no interest factor and no

factor for inflation as part of the cash compensation settlement. More particularly, Nunavik Inuit received approximately $90 Million paid out over 20 years commencing in 1975 with no interest factor payable and with no factor payable to counteract the effects of inflation during that period. In sharp contrast to this, the Nunavut Final Agreement provided for in its subsection 29.1.2 payments of TFN cash compensation over a 14-year period including a factor for interest and inflation during that period resulting in a total cash compensation of $1,173,430,953.00.

	JBNQA (1975)	Nunavut Final Agreement (1993)
Total compensation paid (approx)	$90 Million *	$1.173 Billion
Period over which paid	20 years	14 years
Population	4,500 (in 1975)	17,500 (in 1993)
Interest paid by governments on cash compensation	0	$593 Million
Compensation per capita (approx.)	$20,000	$67,000 * *

* *Nunavik Inuit portion of the approximately $225 Million compensation paid to Crees and Inuit under Section 25 of the JBNQA*

** *With interest calculated*

(iv) Nunavik offshore claim is not a transboundary claim

The Nunavik offshore claim and claim to Labrador is not a transboundary claim. It is an assertion of rights to Nunavik Inuit homeland.

Many Inuit of Nunavik were born on the islands offshore of Québec and continue to live on and consider those islands and Arctic waters to be their homeland. The offshore area is

an integral part of Inuit life and culture. Inuit of Nunavik extensively use the Arctic waters and depend for subsistence on the resources in such waters. These waters are a substantial source of food for Nunavik Inuit with at least 75% of the food consumed by Nunavik Inuit coming from the sea. Marine resources are central to the continuance and long-term stability of Inuit subsistence economy and culture.

The example raised by Canada in the Nunavut Final Agreement 1993 dealing with transborder claims of Nunavut Inuit in Manitoba is not applicable to the JBNQA situation. In the Nunavut Final Agreement, Canada explicitly excluded any compensation payable to Nunavut Inuit for the land claims in and to Manitoba. The language of the Nunavut Final Agreement is explicit:

> 42.1.1 Notwithstanding anything in the Agreement, Section 2.7.1 shall not apply in and to lands and waters in Manitoba.
>
> 42.1.2 Inuit shall not be entitled to seek or secure from the Government of Canada any consideration other than a definition of Inuit wildlife harvesting rights in Manitoba in exchange for any Inuit aboriginal claims, rights, titles and interests in and to the lands and waters in Manitoba.

The JBNQA has no such language with respect to Nunavik Inuit claims to the offshore area or Labrador. In fact, the federal letter of undertaking in favour of the James Bay Crees and Nunavik Inuit dated November 15, 1974 (Schedule B) makes it clear that the JBNQA does not contain any treatment of aboriginal claims in and to the offshore area, but in fact suggests it remains as an outstanding matter to be dealt with posterior to execution of the JBNQA.

(v) <u>Canada's position suggests fraudulent misrepresentation on the part of the Government of Canada during the negotiations leading up to the JBNQA</u>

Fraudulent misrepresentation occurs either actively (stating information which one knows to be false) or passively (deliberately omitting information) in an attempt to induce someone to do something.

Any position by Canada suggesting that Nunavik Inuit have already been paid cash compensation for their aboriginal rights and title in the offshore areas and Labrador through the compensation monies paid to them under the JBNQA raises the question of the validity of the JBNQA. It suggests that the consent of the Nunavik Inuit signatories to the JBNQA was not "informed consent". Nunavik Inuit understood that they were agreeing to treaty terms and conditions relating to the "Territory" as defined and not areas of their traditional use and occupancy beyond the "Territory" as defined. For Canada to now take the position *ex post facto* that compensation monies were to address all Nunavik Inuit claims, whether settled or unsettled, whether within Québec or outside of Québec, whether onshore or in the offshore area, suggests fraudulent misrepresentation on the part of Canada vis-à-vis Nunavik Inuit.

Federal negotiators during negotiations leading to the JBNQA never mentioned the fact that the minimal federal monetary contribution (14.5%) constituted monetary compensation for Inuit or Cree interests outside of Québec and nothing in the written terms of the JBNQA would suggest such a result. If this indeed was the intention of the federal government at the time of the JBNQA, it was not disclosed and this would constitute fraudulent misrepresentation.

(vi) The federal position constitutes bad faith negotiations in the context of Nunavik Inuit treaty negotiations respecting Labrador and the area offshore of Labrador and Québec

(a) The offshore treaty commitments

The Nunavik Inuit claim to an offshore area surrounding Québec and Labrador was submitted to the Federal Office of Comprehensive Claims on June 25, 1991 in accordance with the *Comprehensive Land Claims Policy*. There was conditional acceptance of this claim by the federal government offered on January 7, 1992. Pre-negotiation discussions on timing and process were authorized on June 23, 1992. Acknowledgment from the federal government that

the conditions had been fulfilled was received by Makivik Corporation on November 27, 1992. The claim was formally accepted by the federal government on January 7, 1993 and Cabinet approved a negotiations mandate on June 23, 1993. A Framework Agreement was signed by the parties on August 19, 1993 (See Annex 2 to this Brief). Compensation was identified as one of the several subject-matters for negotiations.

The Nunavik Inuit offshore claim is, and always has been, separate and distinct from the JBNQA. It was submitted and accepted as such. The then Minister, Pierre Vincent, wrote to the President of Makivik on June 23, 1993 as follows:

> On January 27, 1992 Minister Siddon wrote to you indicating that the Government of Canada accepted for negotiation the claim submission of Makivik Corporation to aboriginal rights in certain offshore marine areas. I am pleased to inform you that the Government of Canada has approved a mandate for this negotiation and wishes to move into substantive negotiations ... The federal government is committed to resolving land claims as expeditiously as possible in a fair and reasonable manner.

The contention of Makivik is that in refusing to negotiate a compensation component to the proposed Nunavik Inuit offshore treaty, Canada is in breach of its duty to negotiate in good faith and in breach of its fiduciary duty towards Nunavik Inuit.

(b) Duty to negotiate in good faith

The Crown, having agreed to negotiate with Nunavik Inuit in regard to treaty arrangements respecting Nunavik Inuit rights and interests in the offshore areas including the signing of the Negotiation Framework Agreement on August 19, 1993, engaged the duty of the Crown to negotiate in good faith. Indeed, the

Negotiation Framework Agreement itself provided *inter alia* in its preamble that the parties were undertaking the negotiations in good faith.

Recently, Chief Justice Lamer writing for the majority in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 said this about the importance of good faith negotiations:

> ... As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at par. 31, to be a basic purpose of s. 35(1) — "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.
>
> *Delgamuukw, supra, par. 186 at p. 1123*

In his concurring judgment in *Delgamuukw*, Justice La Forest explained (at para. 203) the content which the Crown must give to the accommodation of the aboriginal peoples' interest:

> This accommodation must always be in accordance with the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of 'aboriginal title' is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of

> expropriation, one asks whether fair compensation is available to the aboriginal peoples; see *Sparrow, supra*, at p. 1119. Indeed, the treatment of 'aboriginal title' as a compensable right can be traced back to the Royal Proclamation, 1763.
>
> ...
>
> Clearly, the Proclamation contemplated that aboriginal peoples would be compensated for the surrender of their lands; see also Slattery, *supra*, ["Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727] at pp. 751-52. It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. (emphasis added)

Thus, fair compensation for the access to and use of aboriginal territories is an essential part of the Crown's fiduciary duty towards aboriginal peoples under the *Constitution Act, 1982*, s.35(1).

(c) Refusal to discuss a basic or standard term

Every Crown aboriginal treaty dealing with aboriginal title or aboriginal rights throughout the long historical treaty process in Canada has involved, as one component, monetary compensation paid to the aboriginal signatories.

In this instance, the Crown's refusal to include such a component in a Nunavik Inuit offshore treaty constitutes refusal to discuss a term which is basic and standard in similar treaties or agreements. In the context of labour negotiations, the Supreme Court of Canada has held that such conduct constitutes a breach of the duty to bargain in good faith. *Royal Oak Mines v. Canada (Labour Relations Board)* (1996), 133 D.L.R. (4th) 129 (S.C.C.)

In *Royal Oak Mines*, Justice Corey writing for the majority had this to say at pp. 146-147:

> ... There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.
>
> ... Since the concept of "reasonable effort" must be assessed objectively, the board must by reference to the industry determine whether other employers have refused to incorporate a standard grievance arbitration clause into a collective agreement. If it is common knowledge that the absence of such a clause would be unacceptable to any union, then a party such as the appellant, in our case, cannot be said to be bargaining in good faith ....
>
> ...
>
> If a party proposes a clause in a collective agreement, or conversely, refuses even to discuss a basic or standard term, that is acceptable and included in other collective agreements in comparable industries throughout the country, it is appropriate for a labour board to find that the party is not making a "reasonable effort to enter into a collective agreement". If reasonable parties have agreed to the inclusion of a grievance arbitration clause in their collective agreement, then a refusal to negotiate such a clause cannot be reasonable .... In those circumstances it would be reasonable for a board to infer that no reasonable union would accept a collective agreement which lacked a grievance arbitration clause and that the employer's failure to negotiate the clause indicated a lack of good faith bargaining. (emphasis added)

Continuing with the analogy of labour law, the content of the duty to negotiate in good faith would exclude such conduct as refusing to follow through on matters already agreed to [1] or changing conditions throughout the negotiation

[1] Nolisair International Inc. (Unreported) September 29, 1992, CLRB 796.

process.[2] This is exactly what Canada has done with respect to the compensation issue. Compensation was one of the matters agreed upon through the Negotiation Framework Agreement. If Canada intended to exclude this vital and common component from the treaty process, that should have been dealt with and agreed upon at the time of the conclusion of the Negotiation Framework Agreement.

(d) Fiduciary Duty

It is now well established law that there exists a fiduciary relationship between the Crown and aboriginal peoples from which fiduciary duties flow.

The Supreme Court has identified the direct link between the legal relationship of the Crown to aboriginal peoples and an appropriate and principled way of analyzing and interpreting the effect of section 35(1). That link is established through the fiduciary character of the Crown relationship with aboriginal peoples and the resulting duties that flow from that relationship.

In *Van der Peet*, the Chief Justice wrote:

> The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: *R. v. George*, [1966] S.C.R. 267, at p. 279. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

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2 DeVilbiss (Canada) Ltd., [1976] 2 Can. L.R.B.R. 101 (Ont. at 114-115).

> The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favor of aboriginal peoples ... (emphasis added)
>
> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at pp. 536-537.

In the light of a consistent historical pattern of including monetary compensation as part of treaty arrangements, the continuing representations in federal claims policy that compensation is an integral element of modern treaties as well as the explicit undertaking by Canada in the Nunavik Negotiation Framework Agreement of August 19, 1993 that compensation was a subject-matter for negotiations, there certainly should be no ambiguity on the matter. Should anyone suggest that there is, however, the Supreme Court's direction in *Van der Peet* leaves no doubt that section 35(1) of the Constitution Act, 1982 requires good faith negotiations on the part of the Crown and this in turn requires the Crown to include compensation as an integral part of treaty-making.

The obligation of good faith incumbent on the Crown in its treaty process with aboriginal peoples is similar to that found in international law during negotiation of an agreement.

> ... but the reality of the obligations (to seek by negotiations terms of an agreement) thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interest, and, more generally, in cases of violation of the rules of good faith *(Tacna-Arica Arbitration: Reports of International Arbitral Awards, vol II, pp. 921 et seq.; Case of Railway Traffic between Lithuania and Poland: P.C.I.J.*, Series A/B, No. 42, pp. 108 *et seq.*).
>
> *Lac Lanoux Arbitration (France v. Spain)*, [1957] I.L.R. 101 (Arb. Trib) at 128 (emphasis added)

Moreover, treaty partners, as Nunavik Inuit and Canada are under the JBNQA, owe each other a duty of utmost good faith. In *New Zealand Maori Council v. Attorney-General*, [1987], 1 NZLR 641, Cook P. referred to the fiduciary duties of treaty partners (at 664):

> What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.

The recent position of Canada in regard to its position on the compensation arrangements under the JBNQA amounts to a breach of the fiduciary duty of a treaty partner in revealing 25 years after the fact a position that we never disclosed and never discussed at the time of the negotiation of the treaty.

(e) Monetary compensation as one of the few new elements in the treaty relationship

Treaty provisions largely concern the mutual acknowledgment by the parties of pre-existing conditions. The Supreme Court of Canada has referred in several recent decisions to the important role of section 35(1) in reconciling aboriginal claims with Crown's sovereignty. In *Delgamuukw* the Chief Justice wrote:

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in Van der Peet, supra, at par. 31, to be a basic purpose of s. 35(1) — "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.
>
> Delgamuukw, supra, par. 186 at p. 1123

One author has referred to treaties as "the first constitutional remedies" and the primary means for definition, clarification and enforcement of aboriginal rights:

> ... the first constitutional remedies were treaties negotiated between aboriginal peoples and then between aboriginal people and representatives of colonial governments. The Royal Proclamation of 1763 recognized this treaty process by stating that aboriginal rights could only be ceded to the Crown. A treaty-making or consensual political process remains the primary means for definition, clarification and enforcement of aboriginal rights.
>
> Kent Roach, "Constitutional Remedies in Canada", Canada Law Book 1997, p. 15-2

In *Delgamuukw*, the Supreme Court of Canada characterized aboriginal title as a right in land. It is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather it confirms the right to use land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinct cultures of the aboriginal societies. The land may be used for a variety of modern purposes not just traditional activities.

When one examines the subject-matters dealt with in treaty negotiations and usually included in modern treaty instruments, especially in light of *Delgamuukw*, the fact of the matter is that the vast majority of these matters do not involve the Crown conferring rights or benefits on the aboriginal signatories but rather involve the Crown recognizing and securing pre-existing rights. Monetary compensation is one of the few treaty elements where something new is being provided by the Crown. It, therefore, takes on a special standing among the usual range of subject-matters for inclusion in treaties.

For the Crown to refuse to include compensation as an element in the Nunavik Inuit Offshore treaty negotiation is, therefore, a particularly serious breach of its constitutional duties.

RECOMMENDATION

That the Standing Committee support a speedy resolution of the Makivik offshore treaty negotiations which will include an adequate cash compensation component.

Annex 1


LEGEND:
Nunavut Marine Region
Areas of equal use and occupancy
APPROXIMATE SCALE:
100 200 km
50 100 miles
N
Iqaluit
BAFFIN ISLAND
Frobisher Bay
HALL PENINSULA
NOTTINGHAM
COATS ISLAND
MANSEL
RESOLUTION I.
SUTTON ISLANDS
Labrador Sea
Hebron
Tasiujaq
Kuujjuaq
Kogaluk R
Payne R
Leaf R
Koksoak R
Whale R
Larch R
Lake Minto
Nastapoka R
Clearwater L.
Little Whale River
Great Whale R
Lake Bienville
Harrison L.
SLEEPER ISLANDS
BELCHER ISLANDS
Chisasibi
Produced by Makivik Corporation August 1993

Annex 2

INUIT OF NORTHERN QUEBEC OFFSHORE CLAIMS

NEGOTIATION FRAMEWORK AGREEMENT

BETWEEN

THE INUIT OF NORTHERN QUEBEC

as represented by

MAKIVIK CORPORATION

(hereinafter referred to as "Makivik")

AND

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

(hereinafter referred to as "Her Majesty")

August 19, 1993

PREAMBLE

WHEREAS there has never been a treaty or land claims agreement between Inuit of Northern Quebec and the British Crown or Her Majesty the Queen in Right of Canada with respect to the offshore area surrounding Quebec and Labrador;

WHEREAS Inuit of Northern Quebec, as represented by Makivik and Her Majesty in Right of Canada (hereinafter referred to as the "Parties") intend to undertake negotiations to conclude a comprehensive land claims agreement for settlement of aboriginal claims, if any, of the Inuit of Northern Quebec with respect to the offshore area surrounding Quebec and Labrador (hereinafter referred to as the "negotiations");

WHEREAS the Parties are committed to conducting the negotiations on a timely and expeditious basis;

WHEREAS the Parties intend to conclude a Framework Agreement to govern the conduct of their negotiations, which Agreement is without prejudice to their respective legal positions and is under reserve of all their respective rights and recourses in this regard;

WHEREAS the Parties are undertaking the negotiations in good faith;

NOW, THEREFORE THE PARTIES AGREE AS FOLLOWS:-

1. **PURPOSE OF THE FRAMEWORK AGREEMENT ("Agreement")**

1.1 The purpose of this Agreement is to promote efficient, effective, timely and orderly negotiations towards an Agreement-in-Principle;

1.2 This Agreement provides for:

(a) parameters of the negotiation process;
(b) scope of the negotiations;
(c) agenda, funding and timetable of the negotiations.

2. **PARTIES**

2.1 The only Parties to the Agreement-in-Principle and to the final comprehensive land claims agreement (the "Final Agreement") will be Inuit of Northern Quebec as represented by Makivik Corporation and Her Majesty in Right of Canada, unless the Parties agree otherwise.

3. SCHEDULING AND TIMING

3.1 The Parties will use their best efforts to reach an Agreement-in-Principle with respect to the Subject-Matters listed in Section 4 of the present Agreement within three (3) years of the date of execution of this Agreement.

3.2 The Agreement-in-Principle will provide the substance under the Subject-Matters established by the Framework Agreement.

4. SUBJECT-MATTERS FOR NEGOTIATION

4.1 Any Party may raise for discussion any Subject-Matters in addition to the list referred to in sub-section 4.3 and additional Subject-Matters may be added by agreement in writing of the chief negotiators.

4.2 The Parties will negotiate in good faith and use reasonable efforts to reach an agreement-in-principle on each of the listed Subject-Matters. It is acknowledged, however, that the Parties may not succeed in reaching an agreement-in-principle on all such Subject-Matters.

4.3 The following are Subject-Matters for the negotiations. The following list is not intended to be restrictive nor in any order of priority, and each of the Parties may raise a broad range of topics for negotiations under each Subject-Matter:

4.3.1 Wildlife use and management, including compensation for future losses associated with development;
4.3.2 Land ownership;
4.3.3 Land and water use and management (land-use planning; etc.);
4.3.4 Economic development, including employment and contract priority;
4.3.5 Marine area use and management;
4.3.6 Environmental protection;
4.3.7 Compensation;
4.3.8 Rationalization of arrangements between various governments;
4.3.9 Social and cultural protection and development;
4.3.10 Overlap claims, issues and other matters regarding other aboriginal peoples;

4.3.11 Certainty and finality;
4.3.12 Third party interests;
4.3.13 General provisions including:

(a) interim protection measures;
(b) interpretation and definitions;
(c) preamble and objectives;
(d) geographic delimitations of claim;
(e) ratification;
(f) languages of agreement;
(g) enforceability;
(h) implementation mechanisms including monitoring and evaluation;
(i) periodic revision and updating;
(j) costs of negotiations and implementation;
(k) eligibility;
(l) constitutional protection;
(m) amendment formulae;
(n) dispute resolution mechanism;
(o) signatories.

4.4 Negotiations related to areas under Newfoundland's jurisdiction will not take place without Newfoundland's concurrence and participation in accordance with an understanding to be reached between Canada and Newfoundland.

5. INTERIM PROTECTIVE MEASURES

The purpose of any interim protective measures established pursuant to this agreement, is to protect the rights and interests of Northern Quebec Inuit in the offshore area pending a final land claims agreement and these measures may include processes for assessing the impact of resource, marine and land use on Northern Quebec Inuit rights and interests.

6. PUBLIC INFORMATION, COMMUNICATION, CONSULTATION

The Parties agree that the public, including individuals, groups or organizations having a particular interest in the outcome of the negotiations should be kept informed regarding the general status, objectives and progress of the negotiations and for that purpose:

(a) The Parties will, together, develop and implement a process of public information and consultation and will attend meetings with such select individuals, groups or organizations, as they may agree are necessary to maintain public awareness;

(b) Each Party may, separately, carry out such additional consultation and communication initiatives as it sees necessary;

(c) Except to the extent that the chief negotiators agree that disclosure is necessary or desirable to achieve the objectives of keeping the general public informed as described above, details of positions and documents exchanged or developed during negotiations shall be confidential.

7. OVERLAPPING CLAIMS

7.1 Makivik Corporation shall attempt to resolve overlapping issues, if any, with other First Nations who have an overlap. To the extent that government agrees to be bound, it will give effect to any agreement resolving such issues.

7.2 In the event that the First Nations referred to in sub-section 7.1 do not reach agreement on overlapping issues, the Parties hereto shall consider other options to resolve the issues.

7.3 Any party or parties holding discussions or negotiations pursuant to this section with an overlap group must make it a condition of such discussions and/or negotiations that the overlap group maintain confidentiality with respect to the negotiations.

8. THE NEGOTIATION PROCESS: GENERAL

8.1 There shall be a main negotiation table to which the Parties will send their designated negotiators. This main negotiation table shall be responsible for the conduct, coordination and orientation of the negotiations.

8.2 The main negotiation table will have the authority to establish sub-committees or adhoc working groups to research and report on specific issues or concerns related to the Subject-Matters to be negotiated, as it may see fit.

8.3 The Parties will negotiate the Subject-Matters in a sequence to be determined by the Parties which sequence, may from time to time, be re-ordered by the mutual agreement of the Parties. The Parties may work on and negotiate more than one (1) Subject-Matter at the same time.

8.4 The Chief Negotiators will signify their agreement on a Subject-Matter by initialing the Sub-Agreement thereon. Initialing signifies that the Chief Negotiators are prepared to recommend Sub-Agreements to their principals for approval.

8.5 The Sub-Agreements which have been initialed may, with the consent of the Parties, be reconsidered and amended.

8.6 Once all Sub-Agreements have been initialed, the Parties shall take the necessary steps to complete the Agreement-in-Principle by consolidating all Sub-Agreements and such other provisions as may be deemed necessary for completion of the Agreement-in-Principle.

8.7 The Agreement-in-Principle will be concluded upon having been executed and ratified by the Parties. Ratification by all the Parties is a condition precedent to the validity of the Agreement-in-Principle and, in the absence of such ratification, the Agreement-in-Principle shall not be considered concluded.

8.8 After the Agreement-in-Principle has been concluded, the Parties will negotiate in good faith and on a timely basis a final agreement based on the Agreement-in-Principle.

8.9 The Final Agreement will come into force once it has been executed and ratified by the Parties. Ratification of the Final Agreement by the Parties is a condition precedent to the validity of the Final Agreement and, in the absence of such ratification, the Final Agreement shall be null and void and of no effect.

9. NEGOTIATION PROCESS: SPECIFIC PROCEDURES

9.1 Negotiating Teams

9.1.1 Canada and G.N.W.T. will each be represented by a Chief Negotiator and Makivik by two (2) Co-Chief Negotiators.

9.1.2 The G.N.W.T. will participate fully in the negotiations as a member of the federal negotiating team.

9.1.3 The Chief Negotiators will advise the main negotiating table of the composition of their respective negotiating teams.

9.1.4 Each Party's negotiating team will consist of a reasonable number of members for the purpose of cost and efficiency.

9.1.5 Members of negotiating teams will speak only with concurrence of the Chief Negotiator of the team to which they belong.

9.2 **Meeting Arrangements**

9.2.1 Meetings will be held in Ottawa, Montréal and Northern Quebec, or in other places as the Chief Negotiators may from time to time agree.

9.2.2 Meetings will generally be held on a monthly basis and will normally be of five (5) days' duration each including travel time.

9.2.3 Cost of negotiating meeting facilities will be paid by the hosting party.

9.2.4 Negotiating meetings will not be formally chaired by any Party or person;

9.2.5 There will be no smoking at the negotiating table. There will be smoke breaks, as necessary.

9.2.6 There will be no observers during the negotiating meetings.

9.2.7 When additional accredited team members are required for the discussion of a specific agenda item, a tentative time for that item will be agreed upon.

9.2.8 Negotiating meetings will be closed to the public.

9.2.9 At the end of each meeting, the date and location of the next meeting and the agenda will be agreed upon.

9.3 **Sub-Committees**

Sub-committees may be struck by the Chief Negotiators as needed, with specific mandates and time frames, and will report to the main negotiating table.

9.4 **Common Record of Meetings**

9.4.1 The Government of Canada will be responsible for the maintaining of the common record of each meeting of the main negotiating table. The common

record shall consist of the agenda, attendance, tabled and exchanged documents and texts, decisions and action items.

9.4.2 The common record of the previous meeting will be distributed prior to the next meeting at which time it will be reviewed and approved and can be amended and corrected, if necessary.

9.5 **Production of Documents and Proposals**

9.5.1 As a general rule, the method of work shall consist of formulating proposals and counter-proposals on each Subject-Matter to be negotiated, with Makivik normally initiating proposals. Discussions shall begin, in general, on the basis of Makivik proposals. Notwithstanding the foregoing, Her Majesty may also table proposals.

9.5.2 To the extent possible, relevant documents and the common record will be circulated by telecopier or other appropriate means to the Parties at least ten (10) working days prior to the meeting at which those documents are to be discussed.

9.5.3 All correspondence and documents will be exchanged through the Chief Negotiators.

9.6 **Language, Interpretation and Translation**

9.6.1 Negotiations will be conducted in English.

9.6.2 All documentation, proposals and the common record will be in English.

9.6.3 Makivik will normally have an Inuit interpreter/translator present at negotiating meetings to provide interpretation/translation services required by Makivik.

9.6.4 The authoritative text of this Agreement, the Agreement-in-Principle and the Final Agreement shall be in English and French, but Canada will fund an official Inuktituut translation.

9.7 **Drafting of Agreements**

9.7.1 The Chief Negotiators will initial texts as agreed at negotiating meetings.

9.7.2 Canada will maintain a consolidated working version of all initialed texts. Canada will circulate

these texts and revisions thereof to the Parties and new entries or amendments will be verified by Makivik.

9.7.3 The parties will prepare the legal text of agreements based on the consolidated working versions.

9.8 **List of Tabled Documents**

Canada will prepare and distribute a list of documents exchanged since the last meeting which will become part of the common record for that meeting.

9.9 **Production of Agreement-in-Principle and Final Agreement**

Canada undertakes to produce all the necessary copies of both the draft and executed versions of the Agreement-in-Principle and both draft and executed versions of the Final Agreement.

10. INTERPRETATION OF THIS AGREEMENT

This Agreement is made on a 'without prejudice' basis and nothing in this Agreement is to be interpreted as creating, recognizing or denying rights of the Parties.

11. FUNDING OF THE NEGOTIATIONS

Canada formally undertakes to ensure adequate loan funding to Makivik Corporation for the duration of active negotiations subject to yearly appropriations of funds by Parliament for this purpose. The budget will be established annually by agreement between Makivik and Canada to support the level of activity of the negotiations.

12. LEGAL NATURE OF THE FINAL AGREEMENT

The Final Agreement shall constitute a land claims agreement within the meaning of Section 25 and Section 35 of the *Constitution Act, 1982*, as amended.

13. CONTINUATION OF PROGRAMS AND FUNDING

During the negotiations, the Parties agree that government programs and funding, and the obligations of government shall continue to apply to the Northern Quebec Inuit on the same basis as to other Inuit of Canada, subject to the criteria established from time to time for the application of such programs.

14. RIGHTS OF CITIZENS

Nothing contained in this Agreement shall prejudice the rights of Inuit of Northern Quebec as Canadian citizens of Quebec, and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as those resulting from any other legislation applicable to them from time to time.

15. AMENDMENTS

Section 9 of this Agreement can be amended by the Chief Negotiators but Sections 1 to 8 and 10 to 16 can only be amended by the Parties.

16. DEFINITIONS

The term "government" can be defined as meaning:

(a) the Government of Canada;

(b) the Government of the Northwest Territories or its successor or successors, or

(c) both,

depending upon which government or governments have responsibility, from time to time, for the matter in question, and this term shall include departments, agencies or officials duly authorized to act on behalf of the bodies named above.

SIGNED in Toronto, on the 19 day of AUGUST, 1993.

FOR:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

On behalf of the Government of Canada

On behalf of the Government of the Northwest Territories

FOR:

THE INUIT OF NORTHERN QUEBEC

On behalf of Makivik Corporation

WITNESSES

ENTENTE-CADRE SUR LA NÉGOCIATION DU RÈGLEMENT DES REVENDICATIONS DES INUIT DU NORD QUÉBÉCOIS VISANT LA ZONE SITUÉE AU LARGE DES CÔTES

ENTRE

LES INUIT DU NORD QUÉBÉCOIS

représentés par

LA SOCIÉTÉ MAKIVIK

(ci-après appelée "Makivik")

ET

SA MAJESTÉ LA REINE DU CHEF DU CANADA

(ci-après appelée "Sa Majesté")

Le 19 août 1993

PRÉAMBULE

ATTENDU QUE ni traité ni entente sur des revendications territoriales n'ont jamais été conclus entre les Inuit du Nord québécois et la Couronne britannique ou Sa Majesté la Reine du chef du Canada quant à la zone située au large des côtes du Québec et du Labrador;

ATTENDU QUE les Inuit du Nord du Québec, représentés par la société Makivik, et Sa Majesté la Reine du chef du Canada (ci-après appelés les "parties") ont l'intention d'entreprendre des négociations en vue de conclure une entente sur des revendications territoriales globales en règlement des revendications autochtones, quelles qu'elles soient, des Inuit du Nord québécois quant à la zone située au large des côtes du Québec et du Labrador (ci-après appelées les "négociations");

ATTENDU QUE les parties s'engagent à entreprendre ces négociations en temps opportun et à les mener d'une façon expéditive;

ATTENDU QUE les parties ont l'intention de conclure une entente-cadre régissant la tenue de leurs négociations, entente qui ne portera pas atteinte à leurs positions juridiques respectives et sera assujettie à tous leurs droits et recours respectifs à cet égard;

ATTENDU QUE les parties entreprennent ces négociations de bonne foi;

POUR CES MOTIFS, LES PARTIES CONVIENNENT DE CE QUI SUIT :-

1. **OBJET DE L'ENTENTE-CADRE ("entente")**

1.1 La présente entente a pour but de favoriser des négociations efficaces, expéditives et ordonnées en vue de la conclusion d'une entente de principe.

1.2 La présente entente précise :

a) les paramètres du processus de négociation;
b) la portée des négociations;
c) le programme, le financement et le calendrier des négociations.

2. PARTIES

2.1 Les seules parties à l'entente de principe et à l'entente finale sur les revendications territoriales globales ("entente finale") seront les Inuit du Nord québécois, représentés par la Société Makivik, et Sa Majesté la Reine du chef du Canada, à moins que les parties n'en conviennent autrement.

3. DÉLAI

3.1 Les parties feront de leur mieux pour conclure, dans les trois (3) années suivant la date d'exécution de la présente entente, une entente de principe portant sur les points énumérés à l'article 4.

3.2 Le contenu des ententes conclues sur les points énumérés dans l'entente-cadre sera précisé dans l'entente de principe.

4. POINTS À NÉGOCIER

4.1 Les parties peuvent soulever d'autres points outre ceux qui figurent au paragraphe 4.3. Ils pourront être ajoutés à la liste avec le consentement écrit des négociateurs en chef.

4.2 Les parties négocieront de bonne foi et feront des efforts raisonnables pour conclure une entente de principe à l'égard de chacun des points énumérés. Toutefois, il est reconnu que les parties n'arriveront peut-être pas à conclure une entente de principe à l'égard de tous ces points.

4.3 Les négociations porteront sur les points suivants. Cette liste n'est ni limitative ni présentée dans un ordre de priorité quelconque, et chacune des parties pourra soulever un large éventail des questions connexes à être négociées dans chacun des domaines suivants.

4.3.1 Utilisation, exploitation et gestion des ressources fauniques, y compris indemnités pour pertes futures liées aux activités de développement.
4.3.2 Propriété des terres.
4.3.3 Utilisation, exploitation et gestion des terres et des eaux (aménagement des terres, etc.).
4.3.4 Développement économique, y compris priorité en matière d'emplois et de contrats.
4.3.5 Utilisation, exploitation et gestion des zones marines.
4.3.6 Protection de l'environnement.

4.3.7 Indemnisation.
4.3.8 Rationalisation des arrangements conclus entre les différents gouvernements.
4.3.9 Protection et développement du milieu social et de la culture.
4.3.10 Chevauchement de revendications et autres questions concernant d'autres peuples autochtones.
4.3.11 Certitude et irrévocabilité.
4.3.12 Intérêts des tiers.
4.3.13 Dispositions générales, notamment:
a) Mesures de protection provisoires;
b) Interprétation et définitions;
c) Préambule et objectifs;
d) Délimitation géographique de la région visée par la revendication;
e) Ratification;
f) Langues de l'entente;
g) Caractère exécutoire;
h) Mise en oeuvre, y compris mécanismes de surveillance et d'évaluation;
i) Révision et mise à jour périodiques;
j) Coût des négociations et de la mise en oeuvre;
k) Admissibilité;
l) Protection constitutionnelle;
m) Modification de l'entente;
n) Mode de résolution des conflits;
o) Signataires.

4.4 Les négociations portant sur des questions relevant de la compétence de Terre-Neuve n'auront pas lieu sans le consentement et la participation de cette province, conformément à un protocole d'entente que le Canada doit conclure avec Terre-Neuve.

5. MESURES DE PROTECTION PROVISOIRES

Les mesures de protection provisoires établies en vertu de la présente entente visent à protéger les droits et les intérêts des Inuit du Nord québécois dans la zone située au large des côtes en attendant la conclusion d'une entente finale sur des revendications territoriales. Elles peuvent comprendre des processus pour évaluer les répercussions de l'utilisation et de l'exploitation des ressources, des terres et des zones marines sur les droits et les intérêts des Inuit du Nord québécois.

6. INFORMATION, COMMUNICATIONS ET CONSULTATION PUBLIQUES

Les parties conviennent que le public, y compris les personnes, les groupes et les organismes ayant un intérêt particulier dans l'issue des négociations, devrait être tenu au courant de l'état général, des objectifs et de

l'évolution des négociations, et à cette fin :

a) Les parties élaboreront et mettront en oeuvre conjointement un processus d'information et de consultation publiques. Les parties assisteront, avec les personnes, groupes ou organismes concernés, à autant de réunions que les parties estimeront nécessaires pour maintenir le public bien informé.

b) Chaque partie pourra prendre d'autres mesures individuelles de consultation ou de communication qu'elle aura jugées nécessaires.

c) Les détails des positions et des documents échangés ou élaborés au cours des négociations seront confidentiels, sauf si les négociateurs en chef conviennent que leur divulgation est nécessaire ou désirable pour atteindre les objectifs en matière d'information publique décrits ci-dessus.

7. CHEVAUCHEMENT DE REVENDICATIONS

7.1 La société Makivik essaiera de résoudre les questions de chevauchement, le cas échéant, avec les autres premières nations concernées. Le gouvernement, prendra les mesures appropriés, dans la mesure où il conviendra d'être lié par toute entente visant à résoudre ces questions.

7.2 Si les premières nations dont il est question au paragraphe 7.1 ne concluent pas d'entente sur les questions de chevauchement, les parties à la présente entente devront envisager d'autres options en vue de régler ces questions.

7.3 Toute partie tenant des discussions ou des négociations avec un groupe concerné, conformément au présent article, doit établir comme condition préalable à de telles discussions ou négociations que le groupe en question en assure le caractère confidentiel.

8. PROCESSUS DE NÉGOCIATION : GÉNÉRALITÉS

8.1 Il y aura une table centrale de négociation à laquelle les parties enverront leurs négociateurs désignés. Elle sera chargée de mener, de coordonner et d'orienter les négociations.

8.2 La table centrale de négociation sera autorisée à établir des sous-comités ou des groupes de travail spéciaux qui effectueront des recherches sur des questions ou des préoccupations particulières liées aux points à négocier et présenteront des rapports sur ces sujets, comme bon lui semblera.

8.3 Les parties négocieront les points dans l'ordre qu'elles détermineront et qu'elles pourront modifier d'un accord mutuel de temps à autre. Les parties pourront examiner et négocier plus d'un (1) point à la fois.

8.4 Les négociateurs en chef se prononceront en faveur d'un point en paraphant l'entente auxiliaire connexe. Ils indiqueront ainsi qu'ils sont disposés à recommander l'approbation des ententes auxiliaires à leurs commettants.

8.5 Avec l'accord des parties, les ententes auxiliaires paraphées pourront être réexaminées et modifiées.

8.6 Dès que toutes les ententes auxiliaires auront été paraphées, les parties prendront les mesures nécessaires pour conclure l'entente de principe en réunissant toutes les ententes auxiliaires et autres dispositions semblables jugées essentielles.

8.7 L'entente de principe sera conclue lorsqu'elle sera exécutée et ratifiée par les parties. Elle ne sera valide que si elle est ratifiée par toutes les parties; sinon, elle ne sera pas considérée comme étant conclue.

8.8 Les parties négocieront de bonne foi et en temps opportun une entente finale fondée sur l'entente de principe, une fois celle-ci conclue.

8.9 L'entente finale entrera en vigueur dès qu'elle sera exécutée et ratifiée par les parties. Elle ne sera valide que si elle est ratifiée par les parties; sinon, elle sera nulle et non avenue.

9. PROCESSUS DE NÉGOCIATION : FORMALITÉS PARTICULIÈRES

9.1 Équipes de négociation

9.1.1 Le Canada et le GTNO seront chacun représentés par un négociateur en chef et Makivik, par deux (2) co-négociateurs en chef.

9.1.2 Le GTNO participera pleinement aux négociations à titre de membre de l'équipe de négociation fédérale.

9.1.3 Les négociateurs en chef aviseront la table centrale de négociation de la composition de leur équipe de négociation respective.

9.1.4 L'équipe de négociation de chaque partie comprendra un nombre raisonnable de membres pour des raisons de coût et d'efficacité.

9.1.5 Les membres des équipes de négociation ne prendront la parole qu'avec l'assentiment du chef négociateur de leur équipe.

9.2 <u>Dispositions relatives aux réunions</u>

9.2.1 Les réunions se tiendront à Ottawa, à Montréal et dans le Nord du Québec, ou à d'autres endroits dont les négociateurs en chef pourront convenir de temps à autre.

9.2.2 Les réunions auront généralement lieu chaque mois et dureront normalement cinq (5) jours, le temps de déplacement étant compris dans cette période.

9.2.3 Le coût des installations lors des sessions de négociation sera assumé par la partie responsable de l'accueil.

9.2.4 Les réunions ne seront pas présidées officiellement par une partie ou par une personne, quelle qu'elle soit.

9.2.5 L'usage du tabac sera interdit à la table de négociation. À cet effet, il y aura toutefois des pauses, selon les besoins.

9.2.6 Aucun observateur ne sera admis aux réunions.

9.2.7 Si la présence d'autres membres autorisés est nécessaire pour l'examen d'un point précis à l'ordre du jour, on conviendra du moment voulu pour en faire l'étude.

9.2.8 Le public ne sera pas admis aux réunions.

9.2.9 À la fin de chaque réunion, on conviendra de la date et du lieu de la prochaine réunion ainsi que de l'ordre du jour.

9.3 **Sous-comités**

Les chefs négociateurs pourront constituer des sous-comités selon les besoins et leur imposer des mandats et des délais précis en vue de la présentation de rapports à la table centrale de négociation.

9.4 **Procès-verbal commun des réunions**

9.4.1 Le gouvernement du Canada sera chargé de tenir le procès-verbal commun de chaque réunion de la table centrale de négociation. Ce procès-verbal comprendra l'ordre du jour, la liste des présences, les documents et les textes déposés ou échangés, les décisions et les mesures de suivi.

9.4.2 Le procès-verbal commun de la réunion précédente sera distribué avant la réunion suivante pour qu'il soit alors examiné et approuvé ou modifié et corrigé au besoin.

9.5 **Production de documents et propositions**

9.5.1 En règle générale, la méthode de travail consistera à formuler des propositions et des contre-propositions sur chaque point à négocier, Makivik prenant normalement l'initiative des propositions. Les échanges porteront généralement sur les propositions de Makivik. Néanmoins, Sa Majesté pourra également déposer des propositions.

9.5.2 Dans la mesure du possible, les documents pertinents et le procès-verbal commun seront communiqués aux parties par télécopieur ou par un autre moyen approprié au moins dix (10) jours ouvrables avant la réunion à laquelle ces documents seront examinés.

9.5.3 Toute la correspondance et tous les documents seront échangés par l'entremise des négociateurs en chef.

9.6 **Langue, interprétation et traduction**

9.6.1 Les négociations se dérouleront en anglais.

9.6.2 Tous les documents, les propositions et le procès-verbal commun seront en anglais.

9.6.3 Makivik aura normalement un traducteur-interprète inuit aux réunions qui assurera les services de traduction et d'interprétation dont Makivik aura besoin.

9.6.4 Les versions anglaise et française de la présente entente, de l'entente de principe et de l'entente finale feront autorité. Le Canada financera la préparation d'une traduction officielle de ces documents en langue inuktitut.

9.7 **Rédaction des ententes**

9.7.1 Les négociateurs en chef parapheront les textes approuvés aux réunions.

9.7.2 Le Canada tiendra une version provisoire de tous les textes paraphés. Il transmettra ces textes et les révisions connexes aux parties, et Makivik vérifiera les nouvelles inscriptions ou les modifications.

9.7.3 Les parties produiront le texte juridique des ententes à partir des versions provisoires.

9.8 **Liste des documents déposés**

Le Canada produira et distribuera une liste des documents échangés depuis la dernière réunion, lesquels seront insérés dans le procès-verbal commun de celle-ci.

9.9 **Production de l'entente de principe et de l'entente finale**

Le Canada s'engage à produire tous les exemplaires de l'ébauche et de la version exécutoire de l'entente de principe et de l'entente finale.

10. INTERPRÉTATION DE LA PRÉSENTE ENTENTE

La présente entente ne porte pas atteinte aux droits des parties. Rien dans l'entente ne doit être interprété de façon à créer, reconnaître ou dénier des droits aux parties.

11. FINANCEMENT DES NÉGOCIATIONS

Le Canada s'engage officiellement à consentir à la société Makivik des prêts suffisants pour la durée des négociations actives, sous réserve des sommes affectées annuellement à cette fin par le Parlement. Le budget sera établi chaque année avec l'accord de Makivik et du Canada afin d'assurer l'appui financier nécessaire à la poursuite des

négociations.

12. **NATURE JURIDIQUE DE L'ENTENTE FINALE**

L'entente finale constituera un accord sur des revendications territoriales au sens de la *Loi constitutionnelle de 1982* (articles 25 et 35), telle que modifiée.

13. **MAINTIEN DES PROGRAMMES ET DU FINANCEMENT**

Les parties conviennent que durant les négociations les programmes et le financement ainsi que les obligations du gouvernement continueront de s'appliquer aux Inuit du Nord québécois tout comme pour les autres Inuit du Canada, sous réserve des critères établis de temps à autre pour l'application de pareils programmes.

14. **DROITS DES CITOYENS**

Rien dans cette entente ne doit porter atteinte aux droits des Inuit du Nord québécois en tant que citoyens canadiens vivant au Québec. Ces Inuit continueront de bénéficier de tous les droits et avantages des autres citoyens ainsi que de ceux qui découlent de toute autre législation à laquelle ils pourraient être assujettis de temps à autre.

15. **MODIFICATIONS**

L'article 9 de la présente entente peut être modifié par les négociateurs en chef. Toutefois, les articles 1 à 8 et 10 à 16 ne peuvent être modifiés que par les parties.

16. **DÉFINITIONS**

Le terme "gouvernement" peut vouloir dire :

(a) le gouvernement du Canada,

(b) le gouvernement actuel ou futur des Territoires du Nord-Ouest,

(c) ou les deux,

selon que l'un ou l'autre, ou les deux, seront responsables de temps à autre du point à négocier. Par "gouvernement", on entend également les ministères, les organismes ou les fonctionnaires dûment mandatés par les organismes susnommés.

SIGNÉ à Toronto, ce 19 jour d'août 1993.

POUR :

SA MAJESTÉ LA REINE DU CHEF DU CANADA

Au nom du gouvernement du Canada

Au nom du gouvernement des Territoires du Nord-Ouest

POUR :

LES INUIT DU NORD QUÉBÉCOIS

Au nom de la société Makivik

TÉMOINS

Edgerbeck Snider

SUPPLEMENTARY ANNEXES

BRIEF
TO THE HOUSE OF COMMONS STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT RESPECTING REQUIREMENT OF CASH COMPENSATION AS PART OF THE NUNAVIK INUIT OFFSHORE LAND CLAIM PROCESS AND TREATY
[November 19, 1998]

SUPPLEMENTARY ANNEXES

BRIEF
TO THE HOUSE OF COMMONS STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT
RESPECTING REQUIREMENT OF CASH COMPENSATION AS PART OF THE NUNAVIK INUIT OFFSHORE LAND CLAIM PROCESS AND TREATY

[November 19, 1998]

Annex 1: Letter from the Honourable Clyde Wells, then Premier of the Government of Newfoundland and Labrador, dated June 6, 1994 regarding the Inuit Statement of Claim to Labrador.

Annex 2: Letter from the Honourable Brian Tobin, Premier of the Government of Newfoundland and Labrador, dated July 17, 1996 stating that the Government of Newfoundland and Labrador does not recognize the Inuit offshore claim in Labrador.

Annex 3: Letter from the Honourable Jane Stewart, Minister of Indian and Northern Affairs (DIAND) to Zebedee Nungak, then President of Makivik Corporation, dated January 5, 1998 regarding resumption of tripartite negotiations with Nunavik Inuit; housing in Nunavik; and federal funding for marine infrastructure in Nunavik and the Nunavik offshore negotiations.

Annex 4: Letter to the Honourable Jane Stewart, Minister of Indian and Northern Affairs (DIAND) – and – the Honourable David Anderson, Minister of Fisheries and Oceans Canada, from Sam Silverstone, Legal Counsel of Makivik Corporation dated October 16, 1998 regarding the Decision of the Federal Court of Appeal of July 13, 1998 in the *Nunavut Tunngavik Inc. v. Minister of Fisheries and Oceans* case.

Annex 5: Decision in *Nunavik Inuit (as represented by Makivik Corporation)* and *The Minister of Canadian Heritage* and the *Attorney General of Canada* and *Her Majesty the Queen in Right of Newfoundland* (Federal Court of Canada, Trial Division) in the Torngat National Park case dated August 4, 1998..

Annex 6: Letter to the Honourable Sheila Copps from Pita Aatami, President of Makivik Corporation dated October 26, 1998, regarding the Decision in *Nunavik Inuit (as represented by Makivik Corporation)* and *The Minister of Canadian Heritage* and the *Attorney General of Canada* and *Her Majesty the Queen in Right of Newfoundland* (Federal Court of Canada, Trial Division) in the Torngat National Park case.

Annex 1

THE PREMIER

GOVERNMENT OF
NEWFOUNDLAND AND LABRADOR

June 6, 1994

Mr. Simeunie Nalukturuk
President
Makivik Corporation
650-32nd Avenue
Lachine, Quebec
H8T 1V4

Dear Sir:

This is in response to *The Inuit of Nunavik Statement of Claim to Labrador* submitted to the province on December 1, 1992 and referenced as "Northern Inuit Statement of Claim in and to Labrador and the offshore surrounding Labrador including supplementary data requested by D.I.A.N.D. on November 7, 1990". Over the past year, the province has undertaken an assessment of this documentation.

Our assessment has determined that the Makivik land use and occupancy documentation is insufficient to substantiate a valid aboriginal claim to areas of onshore Labrador, or to form the basis of land claim negotiations with the province. The evidence fails to satisfactorily establish a traditional and continuing interest of the Quebec Inuit to the land and resources of Labrador. Particular areas of concern include, but are not limited to the following:

1. The sources used for archaeological and cultural history information are sparse, incomplete, inadequate and mostly secondary. All other categories of information (current land use and occupancy, environmental knowledge, harvesting, family history) are contemporary and fail to demonstrate a historical connection to the claimed areas.

.../2

2. There is no indication of how many, and what percentage, of Quebec Inuit actually claim to have used lands and resources in Labrador. Nor is there any indication of where they presently live.

3. The number of people interviewed in the land use and occupancy research studies was very small (15 participants in the 1974 Killiniq land use and occupancy study, 23 participants in the 1981-85 Makivik study and 8 participants in the 1986-87 study). The province also finds it impossible to judge how accurately the composite land use maps in the Statement of Claim reflect information gathered in the research program.

4. Very little effort appears to have been directed at researching the records of the Moravian Church, which would have been likely to yield the best first contact information for northern Labrador. Annex 3 (on pp. 119-121) describes the results of a mere one month's examination of the Moravian publication Periodical Accounts Relating to the Church of the United Brethren Established Among the Heathen. It appears only the years 1789-1818 and 1841-1854 were researched and little material was copied. As well, it appears only the Periodical Accounts were examined rather than the original Moravian records, which are extensive and unedited and would presumably be a more complete and reliable source of information.

5. Evidence of kinship ties, particularly in the section of the document dealing with Social Linkages, Family History and Land Use (pp. 41-51), is not persuasive. There is little evidence and no guidance to the interpretation of the genealogical chart following p. 42 (Fig. 2.1.10). The chart itself provokes the thought that tenuous kinship links are put forward as supporting a very large claim.

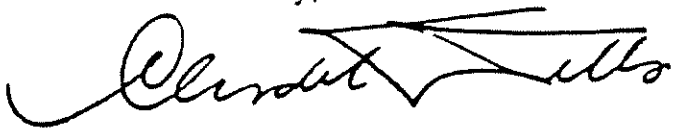
We consider that many of the conclusions made in the Makivik document to substantiate the use of Labrador by Quebec Inuit are of a generalized and undocumented nature and that the document, in its present form, leaves much doubt regarding its conclusions. It is this province's position that resolution of all Inuit claims to rights respecting Labrador must be accommodated in the current tripartite negotiations with the Labrador Inuit Association. Settlement of

.../3

the Labrador Inuit claim must address the entirety of Inuit aboriginal claims in Labrador. Should a portion of the Inuit aboriginal claim in Labrador be accounted for by Makivik, then that will be a matter for negotiation and settlement between the Inuit of Labrador and Makivik. Presumably as part of these negotiations, it would also be necessary to resolve the claims of Labrador Inuit to aboriginal rights in Quebec. In recent correspondence (May 30, 1994) to Mr. Irwin and myself, we were advised of LIA's preparedness to engage in overlap negotiations with Makivik.

I must also advise you that I have reminded Minister Irwin that the federal government does not have the constitutional authority to include provincial land and resources in the Framework Agreement it has concluded with the Makivik or in negotiations flowing from that agreement. I have also asked the Minister to take whatever steps are necessary to ensure that negotiations between the federal government and the Makivik are limited to matters or areas clearly falling within federal jurisdiction.

Sincerely,



Annex 2

THE PREMIER

GOVERNMENT OF
NEWFOUNDLAND AND LABRADOR

July 17, 1996

Mr. Zebedee Nungak
President
C.P. 179
Kuujjuaq (Québec)
JOM 1C0

Dear Mr. Nungak:

Thank you for your letter of May 2, 1996. I apologize for the delay in responding to the two matters you raise.

The federal government's acceptance of a comprehensive claim cannot be equated to an acknowledgement of the existence of Aboriginal rights within this Province. Also, I do not accept that the federal government has the authority to engage in such a process involving areas of exclusive Provincial jurisdiction without approbation of the Province.

I appreciate your intent to clarify the matter of Inuit rights and interests in Labrador. I understand it is your belief that Nunavik Inuit have extensive rights, interests and jurisdiction in Labrador and I appreciate your providing the "Synopsis" document to support your conviction. However, I must reiterate government's position that the documentation provided by Makivik to date does not justify recognition by the Province of Makivik's claim in Labrador.

Yours truly,

BRIAN TOBIN

Annex 3

Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

JAN - 5 1998

Mr. Zebedee Nungak
President
Makivik Corporation
650, 32nd Avenue
LACHINE QC H8T 3K5

Dear Mr. Nungak:

I am writing in response to your letter of September 30, 1997 in which you raised several issues, and to follow up on our meeting of December 11, 1997 at which several related subjects were discussed.

With respect to the resumption of tripartite negotiations, I recently wrote to the Minister Responsible for Aboriginal Affairs for Quebec, Mr.-Guy Chevrette, in which I mentioned our keen interest in the resumption of negotiations with the Inuit and how we intend to be very active in all future discussions. I understand that the process will be initiated by Quebec and that our officials will meet to outline the broad objectives to be pursued.

In my previous correspondence to you of July 8, 1997, I had indicated that we were expecting a proposal outlining the use of the remaining funds ($179,600) so that further work could be accomplished without any disruption while the larger negotiations were put on hold. Following your discussions with Quebec, I would be grateful if you could provide me with a document outlining the steps you plan to follow.

Regarding housing in Nunavik, I would like to confirm the position of my predecessor, the Honourable Ronald A. Irwin, in his letter of December 16, 1996 to Makivik that Canada has no legal obligation to provide a program of social housing to the Inuit of Nunavik. Under paragraph 29.0.2 of the James Bay and Northern Quebec Agreement, Canada's obligation in this regard is made

.../2

subject to the criteria established from time-to-time for the application of such programs, and to general parliamentary approval of such programs and funding. These conditions currently exclude the Inuit of Nunavik from access to Canada's social housing programs. There is no plan to establish a new social housing program for Nunavik residents. Rather, I would urge Makivik to discuss with the Canada Mortgage and Housing Corporation how existing housing programs may serve the needs of Nunavik Inuit.

Concerning Marine Infrastructure, the Department of Indian Affairs and Northern Development (DIAND), the Department of Transport (DOT) and the Department of Fisheries and Oceans (DFO) have identified a total of up to $30 million over the next 10 years which can be contributed toward the construction of such infrastructure. This latest effort is consistent with the Northern Quebec Marine Transportation Infrastructure Program (NQMTIP) contemplated in the 1990 Implementation Agreement. You will recall that a number of feasibility studies have previously been funded pursuant to the NQMTIP and that, in addition, the three departments recently funded studies, evaluations and other activities related to the construction of marine infrastructure for the communities of Puvirnituk, Quaqtaq and Kangiqsualujjuaq.

While I appreciate that Makivik would prefer funding at a level sufficient to complete all potential projects identified by the NQMTIP studies, current Canadian program funding is not available. I would therefore ask that you indicate no later than January 9, 1998 your acceptance or rejection of the above-noted contribution and the proposed agreement provided to your negotiators on December 23, 1997. A Treasury Board submission is required to effect the transfer of funds from DOT and DFO to DIAND in order to proceed with the contribution, which must be done within a very tight time-frame if we are to be successful.

Furthermore, we will continue to use our best efforts to identify additional funding, and I would encourage Makivik to identify other potential funding sources. I have been informed that the Federal Office of Regional Development (Quebec) (FORD-Q) has just received the economic study that was jointly funded by FORD-Q, Makivik and DIAND. FORD-Q will likely use this study to develop its position on this project.

With regard to the offshore negotiations, I can confirm that the federal government's position is as has been offered by the Chief Federal Negotiator. As I indicated at the meeting, it might be possible for the Chief Federal Negotiator to look at restructuring the settlement to emphasize certain parts of the draft

.../3

Agreement-in-Principle. However, any such restructuring would have to be negotiated with the Chief Federal Negotiator who, I believe, has indicated that negotiations will continue as long as the federal government believes that progress is being made at the negotiation table.

I trust that this information is of assistance to you.

Yours sincerely,

Jane Stewart

Jane Stewart, P.C., M.P.

Annex 4

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Makivik Corporation
Société Makivik

VIA TELEFAX
[Original to follow Priority Post]

October 16, 1998

The Honourable Jane Stewart
Minister of Indian and Northern Affairs
Les Terrasses de la Chaudière
10 Wellington Street
Room 2100
Hull, Québec
K1A 0H4

- and –

The Honourable David Anderson
Minister of Fisheries and Oceans
Government of Canada
200 Kent Street
Otawa, Ontario
K1A 0E6

Re: Nunavut Tunngavik Inc. v. Minister of Fisheries and Oceans

Dear Ministers:

We are writing to bring to your attention the recent decision of the Federal Court of Appeal of July 13, 1998 in *Nunavut Tunngavik Inc. v. Ministry of Fisheries and Oceans* and to raise with you its implications, particularly for the treaty process Nunavik Inuit and Canada are currently engaged in with respect to Nunavik Inuit rights, title and interests in the offshore of Quebec and Labrador.

This matter was an appeal from the decision of Campbell J., the trial judge, setting aside the decision of the Minister of Fisheries and Oceans establishing the quotas for the fishing of turbot in Davis Strait for 1997.

Head Office • Siège Social
C.P. 179
Kuujjuaq (Quebec)
J0M 1C0
Tél. (819) 964-2925
Fax (819) 964-2613

Inukjuak
Inukjuak (Quebec)
J0M 1M0
Tél. (819) 254-8878
Fax (819) 254-8706

Montréal
650, 32e avenue
Lachine (Quebec)
H8T 3K5
Tél. (514) 634-8091
Fax (514) 634-3817

Québec
555, Grande-Allee E.
Quebec (Quebec)
G1R 2J5
Tél. (418) 522-2224
Fax (418) 522-2636

Makivik intervened in the Appeal, filed a Memorandum of Fact and Law and made submissions to the Court. The principal reason for Makivik's intervention in the Appeal was that considerable problems were being caused for Nunavik Inuit by Campbell J. finding that Article 15.3.7 of the *Nunavut Agreement* gave Nunavut Inuit "priority" access to the commercial turbot stocks in Zones I and II offshore of Quebec, Labrador and Baffin Island.

Among other things, this had led your negotiators at the negotiation table of our offshore claim to take the position, which was repeatedly confirmed, that they could not negotiate principles of adjacency or economic dependence in favour of Nunavik Inuit in Zones I or II (as had already been done for Nunavut Inuit in the negotiation of the *Nunavut Agreement*), on the grounds that the Court had directed that "priority" must be given to Nunavut Inuit.

In its judgment, the Federal Court of Appeal dismissed the appeal of the Minister of Fisheries and Oceans on the grounds that the turbot allocation did not appear to conform to the substantive conditions imposed by Article 15.3.7 of the *Nunavut Agreement*, in the light of a number of factors including the reduction of Nunavut's share of the total allowable catch while that of other parties, including southern based commercial fishermen, was increased. However, at the same time, the Court overturned almost all of Campbell J.'s findings, including his finding that in Article 15.3.7 "special consideration" meant that "priority access" had to be given to Nunavut Inuit.

Although as a result of that latter finding the Court felt that it did not need to deal specifically with Makivik's intervention, the Court recognized and addressed Makivik's principal concerns in intervening in the Appeal. Not only did the Court reject the interpretation of Article 15.3.7 which would have given Nunavut Inuit priority access in the allocation of commercial fishing licenses over all other parties including Nunavik Inuit, it also explicitly stated that the benefit of the principles of adjacency and economic dependence are open to negotiation for inclusion in other land claims settlements, including Nunavik's offshore claim:

> Counsel for the intervenor submitted at the hearing that the Nunavik Inuit also are entitled to benefit from the adjacency and economic dependence principles ... . the definitions of Zones I and II in Article 1.1.1 of the Agreement [The Nunavut Agreement] refer to waters that "are not part of another land claim settlement area." This means that these principles are open to, or the subject of, negotiations in other land claims settlements. (at para 68-69)

In the light of this holding, it is no longer open to Canada and to your negotiators in particular, to refuse to discuss with Makivik the issue of adjacency rights or treaty provisions based on the principle of economic dependence. Furthermore, the judgment of the Federal Court of Appeal implicitly recognizes the fact that Nunavik Inuit are adjacent to both Zone I and Zone II and therefore have an interest in license allocations in both areas.

In our view, respect for these directions from the Court requires you to direct your representatives at the Makivik offshore claim negotiating table to commence serious discussion regarding these important matters with Makivik's representatives and to engage in serious good faith negotiations of these principles for inclusion in an eventual Nunavik Inuit offshore treaty. We request that you direct them

to negotiate with respect to both Zone I and Zone II and for said negotiations to clearly reflect the fact that Nunavut Inuit do not have "priority" for those areas.

Moreover, in our view, these directions must be read bearing in mind the clear directions consistently given by the courts, at least since the decision of the Supreme Court of Canada in the *Sparrow* decision, that the Crown is required to take seriously the rights of Aboriginal peoples. These directions must be read as well bearing in mind the direction of the Supreme Court as stated in *Delgamuukw* that:

> ... the Crown is under a moral, if not a legal duty to enter into and conduct ... negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve what I stated in Van Der Peet, supra, at para. 31, to be a basic purpose of s. 35(1) - "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

Makivik would expect the parties to these proceedings now to respect the direction of the Court and the opportunity it gives to proceed with constructive negotiations towards equitable treaty arrangements for Nunavik Inuit.

Makivik has consistently shown its willingness to resolve issues through negotiations and its commitment to the modern treaty process. As you know, Nunavik Inuit are a party to the first modern comprehensive treaty in Canada, the *James Bay and Northern Quebec Agreement*. Since 1975, Nunavik Inuit have worked with the Government of Canada to ensure successful implementation of that treaty. They are equally committed to achieving an offshore treaty through good faith negotiations. They have resorted to the courts only when they have been faced by intransigent positions on the other side threatening Nunavik Inuit essential interests or core issues in the negotiations. Even when resorting to Court, Makivik has adopted a non-aggressive litigation strategy involving seeking declaratory relief rather than injunctive relief or damages.

We look forward to your confirmation that the previous impediments to the negotiations of adjacency rights or treaty provisions based on the principle of economic dependence in respect of both Zone I and Zone II have been removed. We also request that you kindly confirm to us that you have instructed your negotiators, in conformity with the decision of the Federal Court of Appeal, to now proceed to negotiate with Nunavik Inuit on the basis of the principles of adjacency and economic dependence in favour of Nunavik Inuit in Zones I and II.

Sincerely yours,

Sam Silverstone
Legal Counsel

Annex 5

Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Date: 19980804

Docket: T-545-97

OTTAWA, ONTARIO, THE 4th DAY OF AUGUST 1998

PRESENT: THE ASSOCIATE CHIEF JUSTICE

BETWEEN:

NUNAVIK INUIT as represented by MAKIVIK CORPORATION, a corporation duly incorporated by special Act of the National Assembly of Quebec, the *Act respecting the Makivik Corporation*, R.S.Q. c. S-18.1 and having its head office in Kuujjuaq, Québec, J0M 1C0 and a place of business at 650, 32nd Avenue, Suite 600, Lachine, Québec, H8T 1Y4, suing for itself and on behalf of Nunavik Inuit (hereinafter "Makivik")

Applicant

- and -

THE MINISTER OF CANADIAN HERITAGE,
15 Eddy Street, Hull, Québec, K1A 0M5

- and -

THE ATTORNEY GENERAL OF CANADA, representing Her Majesty in Right of Canada, 200 René-Lévesque Blvd. West, Montréal, Québec H2Z 1X4

Respondents

- and -

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND

Intervenor

ORDER
(Order delivered orally on January 7, 1998,
at Ottawa, Ontario)

UPON oral request by counsel for Labrador Inuit Association for the status of intervenor during the January 6, 1998 hearing:

THIS COURT ORDERS THAT:

The Labrador Inuit Association is hereby granted the status of intervenor in the hearing of this Originating Notice of Motion, which status is to be exercised by the Labrador Inuit Association as follows:

1) The scope of its intervention shall be limited to addressing this Court on the issue of its jurisdiction to make orders or issue declaratory relief which might have the effect of preventing the creation of a national park reserve in the Torngat Mountains in Northern Labrador;

2) Counsel for the Labrador Inuit Association shall proceed to make oral submissions immediately after counsel for the province of Newfoundland;

3) The Labrador Inuit Association shall not have any right to appeal any decision rendered herein.

J. Richard
Associate Chief Justice

Section de première instance de
la Cour fédérale du Canada

Federal Court of Canada
Trial Division

Date : 19980804

Dossier : T-545-97

OTTAWA (ONTARIO), LE 4ième JOUR D'AOÛT 1998

EN PRÉSENCE DE M. LE JUGE EN CHEF ADJOINT

ENTRE :

NUNAVIK INUIT, représenté par
MAKIVIK CORPORATION

Demanderesse

- et -

THE MINISTER OF CANADIAN HERITAGE

- et -

THE ATTORNEY GENERAL OF CANADA

Défendeurs

- et -

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND

Intervenante

ORDONNANCE
(Prononcée à l'audience le 6 janvier 1998,
à Ottawa, Ontario)

SUR requête pour faire rejeter la demande de contrôle judiciaire des requérants, présentée à la Cour fédérale siégeant à Ottawa dès l'ouverture de l'audition le 6 janvier 1998;

LA COUR ORDONNE CE QUI SUIT :

La demande est rejetée sans préjudice à ce que les arguments soient soulevés en réponse à la demande de la demanderesse.

J. Richard
Juge en chef adjoint

Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Date: 19980804

Docket: T-545-97

OTTAWA, ONTARIO, THE 4th DAY OF AUGUST 1998

PRESENT: THE ASSOCIATE CHIEF JUSTICE

BETWEEN:

NUNAVIK INUIT as represented by MAKIVIK CORPORATION, a corporation duly incorporated by special Act of the National Assembly of Quebec, the *Act respecting the Makivik Corporation*, R.S.Q. c. S-18.1 and having its head office in Kuujjuaq, Québec, J0M 1C0 and a place of business at 650, 32nd Avenue, Suite 600, Lachine, Québec, H8T 1Y4, suing for itself and on behalf of Nunavik Inuit (hereinafter "Makivik")

Applicant

- and -

**THE MINISTER OF CANADIAN HERITAGE,
15 Eddy Street, Hull, Québec, K1A 0M5**

- and -

THE ATTORNEY GENERAL OF CANADA, representing Her Majesty in Right of Canada, 200 René-Lévesque Blvd. West, Montréal, Québec H3Z 1X4

Respondents

- and -

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND

Intervenor

- and -

LABRADOR INUIT ASSOCIATION

Intervenor

ORDER

GIVEN that Canada's proposed Torngat Mountain National Park is being planned within the area which is the subject of negotiations pursuant to the treaty process between the applicants and the Government of Canada;

AND GIVEN that the Federal Government policy respecting the establishment of National Parks purports to operate within the framework of protection for Aboriginal interests as prescribed by the Courts and the Constitution;

THIS COURT ORDERS THAT:

The following declaratory relief is granted:

1. The respondents have a duty to consult with the applicant prior to establishing a park reserve in Northern Labrador. The duty to consult includes both the duty to inform and to listen.

2. The respondents have a duty to consult and negotiate in good faith with the applicant its claims to aboriginal rights in certain parts of Labrador, prior to the establishment of a national park in Northern Labrador.

3. If an agreement between the Government of Canada and the Government of Newfoundland and Labrador to establish such a national park is reached before final land claim settlement, the lands are to be set aside as a national park reserve, pending land claim negotiations.

No costs are awarded.

J. Richard
Associate Chief Justice

Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Date: 19980804

Docket: T-545-97

BETWEEN:

NUNAVIK INUIT as represented by MAKIVIK CORPORATION, a corporation duly incorporated by special Act of the National Assembly of Quebec, the *Act respecting the Makivik Corporation*, R.S.Q. c. S-18.1 and having its head office in Kuujjuaq, Québec, J0M 1C0 and a place of business at 650, 32nd Avenue, Suite 600, Lachine, Québec, H8T 1Y4, suing for itself and on behalf of Nunavik Inuit (hereinafter "Makivik")

Applicant

- and -

**THE MINISTER OF CANADIAN HERITAGE,
15 Eddy Street, Hull, Québec, K1A 0M5**

- and -

THE ATTORNEY GENERAL OF CANADA, representing Her Majesty in Right of Canada, 200 René-Lévesque Blvd. West, Montréal, Québec H2Z 1X4

Respondents

- and -

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND

Intervenor

- and -

LABRADOR INUIT ASSOCIATION

Intervenor

REASONS FOR ORDER

RICHARD A.C.J.:

I. Nature of the Proceedings

[1] This proceeding, commenced by an originating notice of motion dated March 26, 1997, raises serious issues concerning the negotiation of aboriginal land claims in the context of the treaty process. It involves consideration of the division of powers between the federal government and the provinces and the applicability and scope of section 35 of the *Constitution Act, 1982*. It does not involve, at this stage, the determination of substantive rights. As counsel for the applicant stated, this proceeding is about process. Counsel for the applicant advances the proposition that section 35 of the *Constitution Act, 1982* not only recognizes and affirms aboriginal and treaty rights but also enshrines the treaty process itself in the Constitution. The treaty process and the duties of the parties arising out of that process, according to counsel, are constitutionally protected by section 35. This proceeding also raises the issue of the role of the courts in ensuring that negotiations within the treaty process are respectful of the duties and obligations of the parties.

[2] The decision, or more specifically the failure to act, which gives rise to this application is defined by the applicant as follows:

> On February 19, 1997, Zebedee Nungak, the president of Makivik Corporation, wrote to the Respondent Minister of Canadian Heritage requesting within two weeks her confirmation that Canada would only proceed with the creation of the Torngat Mountains National Park with the consent of Nunavik Inuit and as part of the treaty process which Canada is engaged in with the representatives of Nunavik Inuit, the whole as appears from Exhibit 8 to the Affidavit of Sam Silverstone.

The Respondent Minister of Canadian Heritage has failed to provide the Applicants with the undertaking required by them in the letter of February 19, 1997.

[3] The issues framed by the applicant are as follows:

i) Do parties, having undertaken to engage in a treaty process in the current constitutional and policy context prevailing in Canada, thereby incur legally enforceable positive duties towards their partners in the treaty process and legally enforceable constraints on their conduct with respect to the issues and interests which are the object of the treaty negotiations?

ii) If the answer to i) is in the affirmative, has the Crown in Right of Canada breached its legally enforceable positive duties towards Makivik and Nunavik Inuit in the treaty process:

a) by doggedly continuing towards the establishment of the Torngat National Park in Northern Labrador notwithstanding the treaty process engaged with Nunavik Inuit, and

b) by systematically allowing Nunavik Inuit to be excluded from the substantive process leading to the establishment of the Park, and

c) by refusing at the same time to discuss the establishment of the Park within the context of the treaty negotiations with Nunavik Inuit?

[4] The relief sought by the applicant is as follows:

Declare that the Crown in Right of Canada has a duty to negotiate treaties with Aboriginal peoples in good faith and that the Respondent Minister of Canadian Heritage, as a Minister of the Crown, is bound by such duty.

Declare that the Crown in Right of Canada, by accepting for negotiation the Nunavik Inuit assertion of rights in and the resulting claims to Labrador, by advising Nunavik Inuit that the Government of Canada wished to begin substantive negotiations, and by commencing negotiations pursuant to a Negotiation Framework Agreement with Makivik, recognized the assertion of rights by and the resulting claim of the Nunavik Inuit and engaged its

responsibility to negotiate a treaty in good faith with Nunavik Inuit and to make every reasonable effort to conclude and sign a treaty with Nunavik Inuit.

Declare that the Crown in right of Canada recognized a Nunavik Inuit Aboriginal interest in the lands at issue by accepting for negotiation the Nunavik Inuit assertion of rights in and the resulting claims to Labrador, by advising Nunavik Inuit that the Government of Canada wished to begin substantive negotiations, and by commencing negotiations pursuant to a Negotiation Framework Agreement with Makivik.

Declare that the Respondent Minister of Canadian Heritage is in breach of the Crown's fiduciary duty to the Applicants by refusing to confirm to them that in territory covered by their treaty process with the government of Canada a national park will only be created pursuant to their treaty process.

Declare that section 91(24) of the *Constitution Act, 1867* and subsection 35(1) of the *Constitution Act, 1982* impose on the Crown an obligation to treat with Nunavik Inuit before creating a park on the territory concerning which the parties are involved in a treaty process with respect to Nunavik Inuit's Aboriginal rights.

Declare that the creation of a national park in the Torngat Mountains without the consent of the Nunavik Inuit would be a violation of their treaty process and therefore offends the rule against bad faith and is *ultra vires*.

Declare that for the Respondents to allow the designation for any purpose related to the establishment of a national park of lands under negotiation as part of the Applicants' treaty process is contrary to the Crown's duty to negotiate in good faith, endangers the integrity of the process and would substantially nullify its objective.

Declare that the Crown in Right of Canada cannot proceed with the creation of the proposed Torngat National Park until it has concluded a treaty with Nunavik Inuit in respect of their assertion of rights and resulting claim in Labrador which Canada has accepted for negotiation, or other arrangements satisfactory to them have been made.

II. Background

[5] The events giving rise to this proceeding can be summarized as follows.

a) Treaty Negotiations

[6] Nunavik Inuit through Makivik Corporation are currently engaged in treaty negotiations with the Crown in Right of Canada.

[7] In 1987, Nunavik Inuit through Makivik Corporation submitted their comprehensive claim pursuant to the Federal Government *Comprehensive Claims Policy* of 1987.

[8] The Crown in Right of Canada in the *Federal Policy for the Settlement of Native Claims*, March 1993, has identified the purpose of treaty negotiations as follows:

> Comprehensive claims settlements are negotiated to clarify the rights of Aboriginal groups to lands and resources, in a manner that will facilitate their economic growth and contribute to the development of Aboriginal self-government. Settlements are intended to ensure that the interests of Aboriginal groups in resource management and environmental protection are recognized, and that claimants share in the benefits of development.

[9] The decision by the Federal Government to accept a comprehensive claim for negotiation is not taken lightly but in fact only after the Aboriginal claimant has met the tests for establishing Aboriginal rights or title as directed by the Courts. This is expressly acknowledged in the *Federal Policy for the Settlement of Native Claims*, March 1993.

[10] For the Federal Government to accept a comprehensive claims submission under the *Federal Policy for the Settlement of Native Claims*, March 1993, an Aboriginal group must demonstrate all of the following:

1. The Aboriginal group is, and was, an organized society.

2. The organized society has occupied the specific territory over which it asserts Aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.

3. The occupation of the territory by the Aboriginal group was largely to the exclusion of other organized societies.

4. The Aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes.

5. The group's Aboriginal title and rights to resource use have not been dealt with by treaty.

6. Aboriginal title has not been eliminated by other lawful means.

[11] The *Federal Government Comprehensive Land Claims Policy* of 1987 includes procedures involving the following steps:

1. Statement of Claim;
2. Acceptance of claims;
3. Preliminary negotiations;
4. Framework agreements;
5. Agreements-in-Principle;
6. Final agreements.

[12] The *Comprehensive Land Claims Policy 1987* states with respect to the "framework agreements":

> Negotiations towards the development of a framework agreement will be initiated when the Minister of Indian Affairs and Northern Development judges the likelihood of successful negotiations to be high,...

> Framework agreements will be negotiated and will determine the scope, process, topics, and parameters for negotiation. Approaches to obtaining certainty with respect to lands and resources, and the order and timeframe of negotiations will also be provided for in the framework agreements.
>
> Framework agreements, and substantial changes to them, will be considered and approved by the federal government.

[13] In the case of Nunavik Inuit, preliminary negotiations were initiated and concluded in the signing of a Framework Agreement.

[14] The steps taken in this process can be summarized as follows:

1) Formal notice of the rights of Nunavik Inuit in Labrador and the Offshore as recognized and affirmed in section 35 of the *Constitution Act, 1982* was given to the Government of Canada on April 1, 1985.

2) On June 18, 1987, Makivik tabled on behalf of Inuit of Nunavik before the Office of Comprehensive Claims, Department of Indian Affairs and Northern Development, an Initial Statement of Claim with respect to Northern Quebec Inuit land use and occupancy in Labrador and the offshore area surrounding Labrador.

3) By letter dated November 7, 1990, the Honourable Tom Siddon, Minister of Indian Affairs and Northern Development, informed Senator Charlie Watt, President of Makivik Corporation that the Department had completed its review of Inuit of Nunavik's Statement of Claim and supporting documentation and that the Department in conjunction with the Department of Justice had concluded that the documentation submitted "did not meet the criteria of the department for acceptance of a comprehensive claim for negotiation"

4) The Office of Comprehensive Claims notified Makivik that further additional data was required and identified six (6) additional areas of information that would be required before the Makivik Statement of Claim to Aboriginal rights in Labrador would be considered for acceptance for negotiations under the claims policy. The six (6) topics that needed to be addressed were:

- the archeology and pre-historic occupancy of the region identified in the comprehensive claim;

- the utilization of Labrador by the Inuit of Nunavik during historical time as defined by the Office of Comprehensive Claims to be from first European contact to the year 1930;

- the family histories or genealogical linkages that establish relationships between present day Inuit of Nunavik and the lands and offshore waters of Labrador;

- the historical development of the Port Burwell/Killiniq area in relationship to original settlement and relocations;

- the descriptions and analysis of the patterns of land use and occupancy in Labrador by the Inuit of Nunavik;

- a map that clearly identifies the claim area.

5) Supplementary data integrated into the original Statement of Claim was provided to the government on October 27, 1992, in the integrated Statement of Claim.

6) The 1992 integrated Statement of Claim submitted by Makivik includes detailed mapping of Nunavik Inuit land and resource use and occupancy in Labrador indicating extensive and intensive land and resource use and occupancy throughout the area of the proposed national park.

7) On June 23, 1993, the Minister of State for Indian Affairs and Northern Development confirmed that the claims of Nunavik Inuit to Aboriginal rights in certain parts of Labrador had been accepted for negotiation and advised that the Government of Canada wished to begin substantive negotiations.

8) On August 19, 1993, the Government of Canada and Makivik executed a Negotiation Framework Agreement, the stated purpose of which was to "promote efficient, effective, timely and orderly negotiations towards an Agreement-in-Principle" (par. 1.1), set out the parameters of the negotiation process, the scope of the negotiations and the agenda, funding and timetable of the negotiations (par. 1.2) and which provided *inter alia* in its Preamble that the Parties were undertaking the negotiations in good faith.

[15] The Government of Canada has recently reaffirmed that Makivik has "an accepted comprehensive claim in Northern Labrador" and that a treaty process is engaged between Canada and Nunavik Inuit, as appears more fully from the letters from Minister Ronald Irwin dated October 3, 1996, and October 26, 1996[1].

> The Government of Canada wishes to confirm that Makivik has an accepted comprehensive claim in northern Labrador as outlined in the June 23, 1993 letter from the Honourable Pierre Vincent, then Minister of State of Indian Affairs and Northern Development, to Senator Charlie Watt, then President of Makivik Corporation. A copy of this letter is enclosed for ease of reference.

b) Torngat National Park Process

[16] The Torngat Mountains area of Labrador was first proposed by Parks Canada as a potential national park in the mid-1970's, but further consideration was delayed until Aboriginal land claims in the areas were addressed.

[17] Canada's proposed Torngat Mountain National Park is being planned within the area which is the subject of negotiations pursuant to the treaty process between the applicant and the Government of Canada.

[18] The Torngat Mountains include the lands within the northernmost part of the Ungava-Labrador Peninsula, they are divided by the border with Quebec and extend eastward to the Labrador Sea.

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[1] Exhibit 9 to the Affidavit of Lorraine Brooke, Application Record at p. 224.

[19] The Federal Government policy respecting the establishment of National Parks purports to operate within the framework of protection for Aboriginal interests as prescribed by the Courts and the Constitution.

[20] The guiding principles in the *Parks Guiding Principles and Operational Policies* dated 1994 and operational policy of Parks Canada when selecting and assessing new National Parks are as follows:

> 1.2.2.
>
> In selecting potential national parks, consideration will be given to a wide range of factors, including:
>
> [...]
>
> xi) the implications of Aboriginal rights, comprehensive land claims and treaties with Aboriginal peoples;
>
> 1.2.3.
>
> Potential national parks will be selected in consultation with provincial or territorial governments, other federal agencies, non-government organizations, affected Aboriginal peoples and the interested public.
>
> [...]
>
> 1.3.1.
>
> Parks Canada, in conjunction with provincial or territorial governments, will undertake an assessment of the feasibility of a new park proposal; where there are opportunities, this will be undertaken as part of other processes such as regional land use planning, provincial protected area strategies or Aboriginal comprehensive land claim negotiations.

[21] On November 23, 1992, a study to determine the feasibility of establishing a new national park in the Torngat Mountains was announced by the federal Minister of State for the

Environment, the Newfoundland and Labrador Minister of Tourism and Culture and the President of the Labrador Inuit Association.

[22] The first meeting of the Torngat Mountains National Park Feasibility Assessment Working Group was held on February 16, 1993.

[23] Throughout the period from 1995 through 1997, Makivik attempted through both formal and informal means to obtain assurances that the park would not be created without Nunavik Inuit consent.

[24] From late 1993 through early 1996, Makivik attempted to reach an overlap agreement with the Labrador Inuit Association which would have, *inter alia*, addressed the park planning process.

[25] On September 28, 1995, Makivik sent a letter, to all three members of the Torngat Mountains National Park Feasibility Assessment Steering Committee advising that the Labrador Inuit did not constitute the sole Aboriginal group with recognized rights and interests in the area and requesting that Makivik be invited to participate, as a member, in both the Steering Committee and the Working Group.

[26] Parks Canada refused to allow Makivik Corporation to participate in the feasibility study at the Working Group or Steering Committee level following the Government of Newfoundland and Labrador's indication that it did not support Makivik's request.

[27] The area which the Torngat Mountains National Park Feasibility Assessment Working Group set out for study as well as the area within the boundaries proposed for the creation of the Torngat Mountains National Park form 80% of the territory which is the subject of the claim by Nunavik Inuit and accepted for negotiation by the Government of Canada.

[28] On November 5, 1997, Canada, the Government of Newfoundland and the Labrador Inuit Association announced that those three parties had ratified an agreement concerning settlement of the Labrador Inuit Association's comprehensive land claim.
The agreement provides, *inter alia*, for the inclusion of the proposed Torngat Mountains National Park in a Labrador Inuit Settlement Area over which the Labrador Inuit Association and its members are to enjoy, amongst other rights and benefits, priority subsistence harvesting rights and the right to participate with governments in the management of wildlife, fish, plants and environmental assessment.

[29] In a News Release of November 5, 1997, from the Government of Newfoundland entitled "Details of LIA's land claim agreement released" and the attached Backgrounders concerning land claims negotiations in Labrador it is stated:

> Senior officials of the federal and provincial governments and the LIA have reached agreement on major outstanding issues that will serve to facilitate the

completion of an Agreement-in-Principle. The agreed Negotiators' Text includes the following elements.

1) *Land Regime*

> The Agreement sets out two categories of land affecting a total of 28,000 square miles in northern Labrador:
>
> > (a) Labrador Inuit Lands (LIL) - Labrador Inuit will receive surface title to 6,100 square miles of land where Inuit will enjoy a substantial package of rights and benefits including exclusive harvesting rights and control of new developments.
> >
> > (b) Labrador Inuit Settlement Area (LISA) - This area comprises a total of 21,900 square miles and will include the proposed Torngat Mountains National Park of approximately 3,000 square miles. Within LISA, Labrador Inuit will enjoy, among other rights and benefits, priority subsistence harvesting rights and the right to participate with governments in the management of wildlife, fish, plants and environmental assessment[2].

[30] According to Premier Brian Tobin of Newfoundland, the agreement will form the basis of an Agreement in Principle to be completed within months[3].

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[2] Exhibit 2 to the Affidavit of Sam Silverstone on the Motion to Expedite Hearing of the Application.

[3] Statement by Premier Brian Tobin of Newfoundland concerning acceptance of the basis for an Agreement-in-Principle in the Labrador Inuit land claim negotiations, Exhibit 3 to the Affidavit of Sam Silverstone on the Motion to Expedite Hearing of the Application.

[31] The applicant alleges that, in addition to Canada's refusal to include Nunavik Inuit in the park planning process, Canada has also refused to discuss the establishment of the Torngat Park at the Nunavik Inuit treaty negotiating table.

[32] The applicant alleges that both the province of Newfoundland and the Labrador Inuit Association have been able to use their position on the Feasibility Assessment Steering Committee and Working Group in order to ensure that the proposed boundaries of the park would not include certain lands deemed crucial to their interests. The applicant alleges more specifically that:

1) With respect to the mining industry, and as a result of the decision by the Government of Newfoundland and Labrador that the Ramah Group and lands immediately adjoining it to the east remain accessible to mineral exploration and extraction, these lands were excluded from the park boundaries proposed by the Working Group.

2) With respect to the Labrador Inuit Association, the lands between Saglek and Hebron Fiords were also excluded from the proposed boundaries of the park because the Labrador Inuit Association was of the view that this entire area should remain available to future Labrador Inuit land use, unencumbered by a national park.

3) The fiords which form the coast of the Torngat Mountains were also excluded from the proposed final boundaries of the park because the Labrador Inuit Association wanted to retain the option of commercial fishing in the fiords.

4) The northernmost portion of the proposed park - comprising 806 square kilometres clearly within the territory for which the Government of Canada acknowledged Nunavik Inuit use and occupancy - was added to the proposed boundaries very late in the planning process, once southern lands had been withdrawn in order to protect Newfoundland's mineral interests and the LIA's commercial fishing aspirations.

III. Position of the Applicant

[33] The applicant asserts that:

1) This proceeding does not affect the rights of the Province.

2) For the purpose of this proceeding the Applicants have not asked for any determination of their Aboriginal rights to lands and waters in Labrador within the meaning of subsection 35(1) of the *Constitution Act, 1982*.

3) This proceeding concerns the obligations of the Crown in right of Canada flowing from its agreement to negotiate a treaty with the Applicants in settlement of a comprehensive land claim pursuant to the *Negotiation Framework Agreement* of August 19, 1993 as well as the *Federal Government Comprehensive Claims Policy* of 1987 and the *Federal Policy for the Settlement of Native Claims*, March 1993.

[34] The applicant argues that the importance of good faith negotiations with all aboriginal nations having a stake in the territory claimed was emphasized by the Supreme Court of Canada in its recent judgment in *Delgamuukw v. British Columbia (A.G.)*[4]:

> ... Moreover, the Crown is under a moral, if not a legal duty, to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) - "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

[35] Moreover, there is a duty on respondents for good faith performance of their contractual obligations incurred under the *Negotiation Framework Agreement* of August 19, 1993.

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[4] [1997] 3 S.C.R. 1010 at par. 186, Lamer C.J.

[36] The applicant contends that acceptance of rejection by the Province of rights within the meaning of section 35(1) of the *Constitution Act, 1982*, as asserted by an Aboriginal people, is not determinative of the existence of the rights.

[37] It would be equally perverse to use the refusal of the Intervenor to acknowledge applicant's rights in Newfoundland as a reason for denying the applicant the relief sought in these proceedings, a declaration of its right to engage in a treaty process unencumbered by prior designation of the territory in question, a treaty process aimed at achieving protection for the applicant's rights and greater certainty for all.

[38] The applicant quotes from a federal policy paper:

> It is often stated that the federal government is seeking to end, or extinguish, all Aboriginal rights through claims settlements. This is not the case. The government's objective is to negotiate agreements that will provide certainty of rights to lands and resources in areas where aboriginal rights have not yet been dealt with by treaty or other legal means. In doing so, the special rights of Aboriginal groups that are agreed upon are set out in constitutionally protected agreements or treaties[5].

[39] For the purposes of these proceedings, the applicant invokes its claim to Aboriginal rights in and over Labrador and the offshore only to the extent that these were recognized by Canada for the purposes of negotiation.

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[5] *Federal Policy for the Settlement of Native Claims, 1993.*

[40] The Federal Government through its *Comprehensive Claims Policies*, the courts, including the Supreme Court of Canada, and the Royal Commission on Aboriginal Peoples, have all acknowledged that judicial determination is not the sole and unique way in which to have Aboriginal and treaty rights recognized and affirmed; indeed it may not be the preferred manner of doing so.

[41] The Chief Justice in *Delgamuukw* has so directed. Similar direction was given by the British Columbia Court of Appeal in *MacMillan Bloedel*.

> I think it fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole between governments and the Indian nations[6].

[42] Mr. Justice La Forest in *Delgamuukw*, referred with approval to the statements by the Royal Commission on Aboriginal Peoples respecting the relative merits of negotiated recognition of Aboriginal rights and title over court-imposed solutions. In the passage referred to by Mr. Justice La Forest, the Royal Commission states:

> The courts can be only one part of a larger political process of negotiation and reconciliation. As noted in a recent report by a task force of the Canadian Bar Association, "While the courts may be useful to decide some native issues or to bring pressure on the parties to settle by some other means, it appears clear that judicial adjudication will not provide all of the answers to the issues surrounding native claims".
>
> [...]
>
> Negotiations are clearly preferable to court-imposed solutions. Litigation is expensive and time-consuming. Negotiation permits parties to address each other's real needs and make complex and mutually agreeable trade-offs. A

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[6] *MacMillan Bloedel v. Mullin* [1985] 2 C.N.L.R. 58 (B.C.C.A.) at 77; see also: *Delgamuukw*, *supra* note 4.

negotiated agreement is more likely to achieve legitimacy than a court-ordered solution, if only because the parties participate more directly and constructively in its creation. Negotiation also mirrors the nation-to-nation relationship that underpins the law of Aboriginal title and structures relations between Aboriginal nations and the Crown.

[43] The applicant cites *R. v. Sparrow*[7], wherein Dickson J. stated:

> It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the *Guerin* case, *supra*, but for a proper understanding of the situation, it is essential to remember that the *Guerin* case was decided after the commencement of the *Constitution Act, 1982*. In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights (see Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada," in Beaudoin and Rathushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed., especially at p. 730).
>
> In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95, says the following about s. 35(1), at p. 100:
>
> > . . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

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[7] [1990] S.C.R. 1075 at 1105-06.

[44] The applicant also cites *R. v. Van der Peet*[4], where Lamer C.J. discussed the general principles applicable to legal disputes between aboriginal peoples and the Crown.

> Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In *Sparrow*, *supra*, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples:
>
> > When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. [Emphasis added].
>
> This interpretive principle, articulated first in the context of treaty rights - *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 402; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1066 - arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: *R. v. George*, [1966] S.C.R. 267, at p. 279. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.
>
> The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples. In *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 464, Dickson J. held that paragraph 13 of the Memorandum of Agreement between Manitoba and Canada, a constitutional document, "should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph". This interpretive principle applies equally to s. 35(1) of the *Constitution Act, 1982* and should, again, inform the Court's purposive analysis of that provision.

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[4] [1996] 2 S.C.R. 507 at 536-37.

[45] The applicant also relies on the most recent decision of the Supreme Court of Canada in *Delgamuukw*. Lamer C.J. discussed the jurisdiction of the federal government[9]:

> I conclude with two remarks. First, even if the point were not settled, I would have come to same conclusion. The judges in the court below noted that separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result - the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests - their interest in their lands. Second, although the submissions of the parties and my analysis have focussed on the question of jurisdiction over aboriginal title, in my opinion, the same reasoning applies to jurisdiction over any aboriginal right which relates to land. As I explained earlier, *Adams* clearly establishes that aboriginal rights may be tied to land but nevertheless fall short of title. Those relationships with the land, however, may be equally fundamental to aboriginal peoples and, for the same reason that jurisdiction over aboriginal title must vest with the federal government, so too must the power to legislate in relation to other aboriginal rights in relation to land.
>
> The extent of federal jurisdiction over Indians has not been definitively addressed by this Court. We have not needed to do so because the *vires* of federal legislation with respect to Indians, under the division of powers, has never been at issue. The cases which have come before the Court under s. 91(24) have implicated the question of jurisdiction over Indians from the other direction - whether provincial laws which on their face apply to Indians intrude on federal jurisdiction and are inapplicable to Indians to the extent of that intrusion. As I explain below, the Court has held that s. 91(24) protects a "core" of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.
>
> It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. That core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of

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[9] *Supra* note 4 at 1118-19.

> the core can be traced to federal jurisdiction over "Indians". Provincial governments are prevented from legislating in relation to both types of aboriginal rights.

[46] Counsel for the applicant asserted that it is the role of the court to assist and further the negotiating process. Counsel relied on the case of *MacMillan Bloedel*[10] in which it is said:

> The fact that there is an issue between the Indians and the province based upon aboriginal claims should not come as a surprise to anyone. Those claims have been advanced by the Indians for many years. They were advanced in Calder, and half the court thought that they had some substance. The Constitution Act, 1982 recognized and affirmed "the existing aboriginal and treaty rights of the aboriginal peoples of Canada". The federal government has agreed to negotiate some claims. Other claims are being advanced. Another action has been started by other Indian bands concerning lands in the northwestern part of the province. It is significant that no injunction has been sought in that action. I think it fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations. Viewed in that context, I do not think that the granting of an interlocutory injunction confined to Meares Island can be reasonably said to lead to confusion and uncertainty in the minds of the public.

[47] Counsel for the applicant also cited the following extract from the decision of the Federal Court of Appeal in *Montana Band of Indians v. Canada*[11]:

> The Court is of the view also that the subject matter of dispute, inasmuch as it involves the constitutionality of legislation ancillary to the *Manitoba Act, 1870* is justiciable in the courts and that declaratory relief may be granted in the discretion of the court in aid of extra-judicial claims in an appropriate case.
>
> The situation at bar is not dissimilar. As noted by the Associate Chief Justice, the appellants rely on a complex series of constitutional instruments in support of the declarations sought.

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[10] *Supra* note 6 at 77.

[11] [1991] 2 F.C. 30 at 38-39.

> This is also a case where counsel for the appellants has stated clearly that if the declarations sought are obtained, they might well be used in support of "extra-judicial claims." In such an eventuality, there might never be a second phase to the process as visualized by the Associate Chief Justice. Negotiated settlements of aboriginal claims are a distinct possibility in today's reality.

[48] Counsel drew the Court's attention to the following passages taken from the *Report of the Royal Commission on Aboriginal Peoples*[12].

> The courts can be only one part of a larger political process of negotiation and reconciliation. As noted in a recent report by a task force of the Canadian Bar Association, "While the courts may be useful to decide some native issues or to bring pressure on the parties to settle by some other means, it appears clear that judicial adjudication will not provide all of the answers to the issues surrounding native claims". Similarly, Chief Edward John of the First Nations Summit of British Columbia stated at our hearings:
>
> It has never been the role of the Courts to define the detailed terms of the accommodation between the Crown and the First Nations. We have gone to the Courts in our own defence. We view them as a source of guidance for government, as to the rights of Aboriginal peoples and the resulting duties of government.
>
> Chief Edward John
> First Nations Summit of British Columbia
> Prince George, British Columbia, 1 June 1993
>
> [...]
>
> The availability of interim relief is closely related to the broader process of nation-to-nation negotiation. Interim relief against Crown and third-party activity on disputed territory is bound to serve as an incentive for the Crown to reach an agreement concerning lands and resources. Because negotiation is preferable to litigation as a means of resolving disputes between the Crown and Aboriginal nations, "courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests". Aboriginal peoples will secure substantive gains in negotiations only if courts

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[12] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Queen's Printer, 1996) Vol. 2 ("Restructuring the Relationship"), Part 2 at 566.

order remedies that give Aboriginal parties more bargaining power than they have under Canadian law at present.

[49] Based on these authorities, counsel for the applicant invites the Court to conclude that:

> The Federal Government through its *Comprehensive Claims Policies*, the courts, including the Supreme Court of Canada, and the Royal Commission on Aboriginal Peoples, have all acknowledged that judicial determination is not the sole and unique way in which to have Aboriginal and treaty rights recognized and affirmed; indeed it may not be the preferred manner of doing so.
>
> While the courts have directed that complex substantive issues are often better resolved through negotiations than through litigation, they have also made clear that there is a useful role for the courts in assisting the negotiation process.
>
> The Royal Commission on Aboriginal Peoples has urged courts to "design their remedies to facilitate negotiations".

[50] The Royal Commission on Aboriginal Peoples asserts that government and Aboriginal action in the form of nation-to-nation negotiations "is central to the constitutional recognition and affirmation of Aboriginal rights" under section 35 of the *Constitution Act, 1982*.

[51] The treaty process is primarily a process which is federal in nature and it is the Government of Canada which is, under the Constitution, ultimately responsible for the conduct of negotiations.

[52] Clearly, if there is any doubt as to whether the treaty process itself falls within the scope and definition of section 35(1), such doubt or ambiguity must be resolved in favour of Nunavik Inuit.

[53] The applicant contends that it is now well established law that there exists a fiduciary relationship between the Crown and Aboriginal peoples from which fiduciary duties flow. In support of this argument, reliance is placed on the *Sparrow* decision, at page 1108:

> In *Guerin*, *supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[54] It is well established that the categories of relationships that give rise to fiduciary obligations are not closed and the content of the fiduciary duty varies with the type of relationship to which it is applied. In the present proceeding, the applicant is asking this Court to confirm that the duty flows from the relationship established through the treaty process.

[55] The applicant contends that there are constraints on Crown behaviour towards aboriginal peoples. This constraint is not only applicable to Crown action but also Crown inaction. As the Supreme Court stated in *Sparrow*[13]:

> ... Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status

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[13] *Supra* note 7 at 1110.

> and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. ...

[56] Moreover, the Government of Canada and Makivik have entered into the Framework Agreement in which they promised each other to undertake negotiations in good faith to conclude a comprehensive land claims agreement on a timely and expeditious basis. This Court is entitled to determine whether the respondents have fulfilled that obligation.

[57] Any contention by Canada or Newfoundland in this case that the Crown's promise to engage in a treaty process does not include enforceable duties towards Nunavik Inuit and their Aboriginal rights must be judged against the evolution of the law in regard to the fiduciary duties on the Crown.

[58] Nunavik Inuit submits that any doubt or ambiguity surrounding the Crown's responsibilities in the treaty process must be resolved in such a way as to fulfil the fiduciary duty owed by the Crown to the applicant which duty includes an obligation to protect its interests and which is enforceable by the Courts.

[59] By agreeing with the Government of Newfoundland to negotiate the creation of the proposed Torngat Mountains park in the absence of Nunavik Inuit, the respondent has preferred Newfoundland's wishes and its own goal of park creation to the successful completion of the treaty process in which it is engaged with the applicant contrary to the respondent's fiduciary duty owed to the applicant.

[60] It is entirely appropriate for this Court to intervene to constrain the Crown from acting in conflict with its fiduciary duty towards the applicant.

[61] The applicant concludes that, having accepted the applicant's offer to negotiate a treaty and having commenced treaty negotiations with the applicant, the Government of Canada has a duty to conduct its negotiations with the applicant in good faith in order to attempt to settle issues relating to their rights.

IV. Position of the Respondent

[62] In the affidavit evidence of Michael W. Porter, the Acting Director General, National Parks Directorate, dated May 26, 1997, the Government of Canada provided the following information concerning the park process:

> Pending any transfer of administration and control of lands to the Crown in right of Canada for national park purposes, the Government of Newfoundland and Labrador has jurisdiction over all lands and resources within the area of the proposed national park. Accordingly, beginning with the provincial government's indication in October 1995 that it would not agree with Makivik's request that it be invited to participate as a member of the park feasibility study Steering Committee or Working Group, I and my staff have endeavoured to identify an alternate approach that would provide Makivik and Nunavik Inuit with the opportunity to have a meaningful role in the park establishment process, while working within the constraints imposed by Newfoundland's position.
>
> Thus, in my February 23, 1996 letter to Mr. Silverstone I also indicated that "...Parks Canada is prepared to meet in a parallel process with Makivik, and LIA if it wishes, to consider those matters that are within federal jurisdiction in so far as they pertain to concluding a park agreement for the Torngat Mountains area, without prejudice to aboriginal land claims", the whole as incorporated in Exhibit 6 already attached to this Affidavit.
>
> Mr. Zebedee Nungak, President of Makivik Corporation wrote to the Honourable Sheila Copps, Minister of Canadian Heritage on

> September 18, 1996. Among other matters, he indicated that Makivik and Nunavik Inuit had concluded that the proposed parallel consultation process proposed in my letter to Mr. Silverstone of February 23, 1996 was not acceptable to them. Mr. Nungak's letter of September 18, 1996 is attached to this Affidavit as Exhibit 10.
>
> Parks Canada's offer to discuss the possibility of a parallel process in which to address Makivik's concerns and interests in the proposed national park has not been revoked. However, Makivik's refusal to consider the matter has prevented any substantive discussion of the form it might take. Parks Canada remains willing and interested in working with Makivik to identify a means by which Makivik can have a substantive role in the park establishment process.
>
> Parks Canada accepted Makivik's invitation to meet with the residents of the two northern Quebec communities located most closely to northern Labrador, to provide information regarding the study. At those meetings, Parks Canada representatives emphasized their willingness to return to consult with the communities, whenever requested. When Makivik's request to participate formally in the study, within the existing Steering Committee/Working Group framework, proved unworkable due to the position of the Government of Newfoundland and Labrador, Parks Canada developed and proposed a parallel process to facilitate direct consultation with Makivik and Nunavik Inuit in the feasibility study. Makivik has refused to discuss further with Parks Canada its possible participation in such a parallel consultation process. The President of Makivik Corporation did not respond to the opportunity presented by Minister Copps' invitation to meet personally with him to discuss Makivik's concerns.

[63] In a further affidavit of Gregory Gauld, the Director General - Comprehensive Claims, dated December 2, 1997, it is further stated:

> The Inuit of Labrador, represented by the Labrador Inuit Association (L.I.A.), in 1977 filed with the Government of Canada a comprehensive claim in respect of lands in northern Labrador in the Province of Newfoundland.
>
> The claim referred to above in paragraph 2 has been accepted for negotiation by both the Government of Canada and the Government of Newfoundland and Labrador.
>
> To my information and belief, extensive negotiations with a view to concluding a comprehensive claim agreement concerning the claim referred to above in paragraph 2 have taken place among the LIA, the Government of Canada and the Government of Newfoundland and Labrador and are still taking place.

> To my information and belief, the negotiations referred to above in paragraph 4 have, amongst other things, dealt with general principles concerning the proposed establishment of a national park in the northern portion of the area claimed by the Inuit of Labrador.
>
> The Nunavik Inuit, represented by Makivik Corporation, filed with the Government of Canada a comprehensive claim in respect of the offshore area surrounding northern Quebec and northern Labrador and in respect of lands in northern Labrador in the Province of Newfoundland.
>
> The claim referred to above in paragraph 6 has been accepted for negotiation by the Government of Canada but the Government of Newfoundland and Labrador has rejected for negotiation the claim of Nunavik Inuit to areas within the Province of Newfoundland.
>
> To my information and belief, extensive negotiations with a view to concluding a comprehensive claim agreement in respect of that part of the claim referred to above in paragraph 6 concerning the offshore area surrounding northern Quebec have taken place between the Government of Canada and Makivik Corporation and are still taking place. To my information and belief the Government of the Northwest Territories is also represented in those negotiations.
>
> The proposed park referred to above in paragraph 5 would be located on land claimed by both the Nunavik Inuit and the Inuit of Labrador.
>
> The position of the Government of Canada is that a comprehensive claim agreement provide that nothing in the agreement shall be construed to affect, recognize or provide any rights under section 35 of the *Constitution Act, 1982* for any aboriginal peoples other than those who are party to the agreement.

[64] In a further affidavit by Douglas B. Yurick, the Chief, New Park Proposals (Southern Canada) for Parks Canada, dated May 26, 1997, the Government of Canada explained more fully the process for the establishment of a national park.

> The establishment of a national park is a five-step process that is guided by the Cabinet-approved Parks Canada's Guiding Principles and Operational Policies, *the relevant extracts are attached as Exhibit 1 to this Affidavit*:
>
> > Step 1 is the identification of up to several representative natural areas that portray the diversity of a subject "natural region" (one of 39 across Canada) and that are in a natural state;

Step 2 is the selection of a preferred park candidate from among these representative natural areas, taking into account a number of natural heritage and other factors;

Step 3 toward park establishment is a detailed assessment of the feasibility of establishing it. Public consultation with the full range of stakeholders in the area of a proposed national park is an important part of such a feasibility study. In situations where Aboriginal comprehensive claims have been accepted for negotiation or where there are existing Aboriginal and treaty rights, it is Parks Canada's practice to seek the involvement of the claimants of such rights, and/or the negotiating claimant group(s), as participants in the park feasibility assessment. *In southern Canada, where lands and resources remain under provincial jurisdiction pending any agreement to transfer their administration and control to the Crown in right of Canada for the purpose of establishing a national park, as is the case in the Torngat Mountains, achieving this participation of all claimant Aboriginal groups can be hampered by provincial policy positions.*

If the Step 3 assessment demonstrates that a national park is feasible and that there is public support for this, *it is often followed by interim protection in the form of a withdrawal of the proposed park lands from availability for any new commercial resource uses. In the case of lands and resources under provincial jurisdiction, such a land withdrawal is enacted by the provincial government, using provincial legal instruments.*

Step 4 involves, in the case of lands under provincial jurisdiction, the negotiation of a federal-provincial agreement to establish the park. *Both governments seek the approval of their respective Cabinets prior to signing such an agreement. It is a standard feature of such agreements that they incorporate provision for the subsequent Order-in-Council transfer of the administration and control of park lands from the Crown in right of the province to the Crown in right of Canada for purposes of establishing and managing a national park. Only when that transfer has been completed are park lands under the administration and control of the federal government and available for addition, by act of Parliament, to the Schedule of the National Parks Act.*

> Information provided in paragraphs 30 to 36 of this affidavit outlines the distinctions between national parks and reserves for national parks, the latter being an interim stage in situations where there are unresolved aboriginal claims at the time of completing a federal-provincial park agreement.
>
> *Where a comprehensive claim settlement provides for an Impact and Benefit Agreement pursuant to the establishment of a national park, this agreement is negotiated prior to the final park establishment step, described below.*
>
> Step 5, which may follow some years after a park agreement is signed, entails adding the lands of the national park to the Schedule of the National Parks Act. *Presently, this requires that the Parliament of Canada pass an amendment to the Act.*

In the Northern Labrador Mountains Natural Region, steps 1 and 2 toward park establishment were completed by the mid-1970s, with the Torngat Mountains area emerging as the preferred site for a national park. A Step 3 assessment of park feasibility began in the late 1970s but was suspended in 1979.

The Step 3 park feasibility assessment resumed formally on November 23, 1992, when the Minister of State (Environment) for Canada, the Minister of Tourism and Culture for Newfoundland and Labrador, and the President of the Labrador Inuit Association (hereinafter "LIA") announced jointly a study to consider the feasibility of establishing a national park in the Torngat Mountains of northern Labrador, the whole as indicated in a press release issued by the three of them on the same day, a copy of which is attached as **Exhibit 2** to this Affidavit.

[65] At this time, Step 3 has also been completed.

[66] This affidavit also explained the distinction between the establishment of a national park and of a reserve for a national park and their impact on aboriginal land claims.

> National Parks are public lands set aside by the Parliament of Canada, under the National Parks Act, that are dedicated to the people of Canada for their benefit, education and enjoyment, subject to the Act and regulations thereunder, and that are to be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

Beginning at page 10 of the first public newsletter for the Torngat Mountains national park feasibility study, dated April 1994, Parks Canada has indicated that the feasibility study is being undertaken without prejudice to land claim negotiations, and that if an agreement to establish a national park were to be reached before final land claim settlement, lands would be set aside as a national park reserve, pending claim settlement legislation.

Where, prior to park establishment, proposed national park lands are within the jurisdiction of a province, a federal-provincial park establishment agreement is negotiated, providing for the transfer of administration and control of the park lands to the Crown in right of Canada for national park purposes. Accordingly, there is no federal jurisdictional interest in the lands and resources of such an area until a federal-provincial agreement for their transfer to the Crown in right of Canada has been signed. (A revisionary clause in such agreements stipulates the return of administration and control to the Crown in right of the province if Parliament should at any time determine that the lands are no longer required for national park purposes.)

Since 1974, in several situations where lands deemed appropriate for the establishment of a national park have been overlapped by (an) unsettled Aboriginal land claim(s), Parliament has set the lands aside as a reserve for a national park pending resolution of the land claim(s). Examples include Kluane National Park Reserve in Yukon, Nahanni, Auyuittuq and Ellesmere Island national park reserves in the Northwest Territories, and Gwaii Haanas National Park Reserve in British Columbia.

Such "national park reserves" are managed under the National Parks Act, without prejudice to unresolved land claims. Traditional hunting, fishing and trapping activities of Aboriginal people continue. Standard land reversionary clauses are in place so that lands may be removed from park status if necessary to resolve land claims. Other interim measures may include aboriginal peoples' involvement in park reserve management.

Subsequently, legislation passed by Parliament to confirm a negotiated settlement of the land claim(s) will either incorporate, or provide for the future resolution of, matters such as benefits to aboriginal people from park establishment (generally in the areas of preferential hiring and contracting opportunities), their role in co-operatively managing the park, and the extent and management of wildlife harvesting rights. *Where such matters are resolved after the negotiated land claim settlement, they are generally incorporated in a negotiated impact and benefit agreement or some similar document, jointly signed.*

> The sole extant situation in which lands set aside originally as a national park reserve have subsequently achieved full national park status is the central portion of Kluane National Park Reserve, pursuant to passage by Parliament of the Yukon First Nations Land Claims Settlement Act in 1994. (Confirmation of the final extent of the park reserve as a national park awaits the final resolution of adjoining land claims.) Final boundaries of the Ellesmere Island and Auyuittuq national park reserves were confirmed by the Nunavut Land Claims Agreement Act, 1993. Inuit impact and benefit agreements required by the latter settlement are presently under negotiation, with final confirmation of both national parks to be achieved by amendment of the National Parks Act within one year of completing the Inuit impact and benefit agreements.

V. Position of the Intervenor, Province of Newfoundland

[67] The Province of Newfoundland was granted the status of intervenor and the scope of its intervention at the hearing was limited to the issues of fact raised by the parties in their respective individual records.

[68] The Province of Newfoundland takes no position with respect to the conduct of the land claim negotiations between the applicant and respondents. The Province articulated two issues raised in this proceeding which are of particular concern to it:

(a) The assumption implicit in the Applicants' argument that they have existing aboriginal rights in the Province, when such rights have not been determined, and in fact have been rejected by the Province; and

(b) The jurisdiction of this Court to grant relief impacting either directly, or indirectly, on the Province's constitutional authority over its lands and resources.

[69] The Province acknowledges that the applicant claims aboriginal rights to lands and resources in Labrador. However, the question of whether or not the applicant actually has

existing aboriginal rights in Labrador, within the meaning of section 35 of the *Constitution Act, 1982*, has not been judicially determined.

[70] The Province argues that a "claim" of aboriginal rights is not itself an "aboriginal right" within the meaning of subsection 35(1). Rather, subsection 35(1) provides constitutional protection for "existing aboriginal and treaty rights".

[71] Where aboriginal claimant groups and governments successfully conclude a modern land claims agreement, that agreement, once duly ratified, is a "*treaty*" within the meaning of section 35. Subsection 35(3) is clear in its recognition that governments and Aboriginal peoples may enter negotiations to reach a land claims agreement. What is protected under section 35 is the concluded land claims agreement, that is, the treaty, not the process.

[72] It follows that the Government of Canada's decision to accept the applicant's land claim submission for the purpose of negotiation, pursuant to Federal Land Claims Policy, cannot of itself create or entrench aboriginal or treaty rights within the meaning of subsection 35(1).

[73] While the Government of Canada has accepted the applicant's land claim submission for negotiation, this submission has been rejected by the Province. On October 16, 1995, Mike Buist, Assistant Deputy Minister, Parks and Recreation, confirmed that Province's position in a letter to the applicant, as follows:

> In 1994, the provincial assessment of The Inuit of Nunavik Statement of Claim to Labrador determined Makivik's land use and occupancy documentation was insufficient to substantiate an aboriginal land claim to areas of on-shore Labrador by Nunavik Inuit.

[74] The Province claims that to date it has not received any information from the applicant to change the Province's position regarding the applicant's claim to land and resources in Labrador.

[75] The Federal Court's jurisdictional limitations preclude the applicant from embarking upon issues which impact upon the Province.

[76] Both the *Comprehensive Land Claims Policy 1987* and the *Federal Policy for the Settlement of Native Claims* 1993 clearly recognize the inability of the Government of Canada to negotiate matters within the Province's exclusive constitutional jurisdiction. The 1987 Policy states:

> The federal government has jurisdiction in relation to Indians and Indian lands. Most other lands and resources, except in the territories, fall under provincial jurisdiction. For this reason, the participation of provincial governments in the negotiation of claims within their jurisdiction will be strongly encouraged and is essential to any negotiation of settlements involving areas of provincial jurisdiction or provincial lands and resources.

[77] In the 1993 Policy's Executive Summary, it is stated to the same effect:

> In the provinces, most of the lands and resources which are the subject of comprehensive claim negotiations are under provincial jurisdiction.

[78] The applicant entered into the negotiations with the respondents with this knowledge and, through the Negotiating Framework Agreement, agreed that lands and resource issues could not be advanced without the participation of the Province.

[79] Section 4.4 of the Negotiation Framework Agreement provides:

> Negotiations related to areas under Newfoundland's jurisdiction will not take place without Newfoundland's concurrence and participation in accordance with an understanding to be reached between Canada and Newfoundland.

[80] The Province owns the lands and natural resources comprising the proposed National Park and has exclusive constitutional jurisdiction to deal with these lands and resources.

VI. Position of the Intervenor, Labrador Inuit Association

[81] Counsel for the Labrador Inuit Association submitted that the Court must take into account the following realities:

1) the constitutional context, that is, the division of powers between the federal and provincial governments;

2) aboriginal claims are not consistent with current provincial borders; and,

3) there are many cases in Canada of overlapping claims by different aboriginal groups.

[82] More particularly, the Labrador Inuit Association submitted that any order made by this Court must be made in the context of section 18.1 of the *Federal Court Act*, and that any such order should not grant relief in broad terms as sought by the applicant. Further, any such order should not jeopardize the establishment of a national park reserve on the territory.

VII. Obligation to Consult and Negotiate

[83] The jurisprudential development of the past three decades has more clearly defined and given direction to the courts concerning the role of the Crown in protecting the rights of aboriginal peoples.

[84] In this respect, I would note that the "Crown" refers both to Her Majesty in right of Canada and Her Majesty in right of each of the Provinces.

[85] One of the key elements of aboriginal rights and aboriginal title, is their existence prior to European contact. For the first time, in *R v. Sparrow*[14], the Chief Justice and Mr. Justice LaForest, dealt with the protective and remedial scope of subsection 35(1) of the *Constitution Act, 1982*[15], and its strength as a promise to the aboriginal peoples of Canada. They gave directions as to the duties, rights and protection inherent in the treaty process.

[86] Subsection 35(1) has a significant impact when the governments or the courts recognize that the aboriginal peoples have rights. It represents a specific constitutional basis upon which subsequent negotiations can take place and it requires a just settlement for aboriginal peoples.

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[14] *Supra* note 7.

[15] being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

[87] The historical attitudes of the governments prior to the coming into force of subsection 35(1) are as follows.

[88] The *Statement of the Government of Canada on Indian Policy (1969)*[16] contained the assertion that:

> Aboriginal claims to land [...] are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community.

[89] A number of judicial decisions of the Supreme Court of Canada prompted a reassessment of the position being taken by the government[17], urging the government towards the recognition of aboriginal rights. The Honourable Jean Chrétien, then Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People, made a statement (August 8, 1973) which expressed the government's willingness to negotiate regarding claims of aboriginal title. The policy reads as follows:

> The Government is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest.

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[16] Canada (Ottawa: Department of Indian Affairs and Northern Development, 1969).

[17] *Calder v. British Columbia (Attorney General)* (1970), 74 W.W.R. 481 (B.C. C.A.) aff'd [1973] S.C.R. 313.

[90] The statement constituted an expression of a policy rather than a legal recognition[18]. The federal government took the position that any federal obligation was of a political character[19].

[91] In *MacMillan Bloedel*[20], the Court of Appeal concluded that it is the role of the court to assist and further the negotiating process. Where the federal government has agreed to negotiate claims, the public anticipates that the claims will be resolved by negotiations and by settlement.

[92] The Chief Justice and Mr. Justice LaForest opined that subsection 35(1) of the *Constitution Act, 1982* represents the recognition of aboriginal rights in the treaty process and in the government's obligations within that process. It provides the constitutional basis upon which subsequent negotiations can take place. Therefore, section 35 requires a just settlement for aboriginal peoples. Also, it affords aboriginal peoples constitutional protection against provincial legislative power.

[93] Since 1985, the Supreme Court of Canada has developed, both in the wording and in the spirit of the constitutional entrenchment, the implications of section 35. It promised a reassessment of the position taken by the government towards aboriginal peoples.

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[18] *Sparrow, supra* note 7 at 1105.

[19] *Guérin v. R.* [1984] 2 S.C.R. 335.

[20] *Supra* note 6 at 77.

[94] In *Simon v. The Queen*[21], Mr. Justice Dickson found that a treaty process was entered into for the mutual benefit of both the Crown and the aboriginal peoples, and should therefore be solemnly respected. Treaties need to be recognized as a source of protection for pre-existing aboriginal rights.

[95] In *R v. Sioux*[22], Mr. Justice Lamer concluded that a treaty is characterized by the intention of the parties to create mutually binding solemn obligations.

[96] In *Montana Band of Indians v. Canada (A.G.)*[23] the Court of Appeal opined that the negotiated settlements of aboriginal claims are a distinct possibility in today's reality.

[97] In *R v. Van Der Peet*[24], the Chief Justice determined that the relationship between the Crown and aboriginal peoples, and the dealings between the parties should be given a generous interpretation in favour of the aboriginal peoples. Because of the nature of the relationship, the Crown has a fiduciary obligation to aboriginal peoples where the honour of the Crown is at stake. It is because of this relationship and its implications, subsection 35(1) and other statutory and constitutional provisions protecting the aboriginal interests, that a generous and liberal interpretation must be applied.

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[21] [1985] 2 S.C.R. 387 at 401-02 and 410.

[22] [1990] 1 S.C.R. 1025 at 1044.

[23] [1991] 2 F.C. 30 (C.A.) at 38-39.

[24] [1996] 2 S.C.R. 507 at 536.

[98] In *R v. Badger*[25], Mr. Justice Cory opined that the honour of the Crown is at stake in its dealings with the Indian people; that it is always assumed that the Crown intended to fulfil its promises and that no appearances of sharp dealings will be sanctioned.

[99] The Royal Commission on Aboriginal Peoples[26] concluded that the government's task is to determine, define, recognize and affirm whatever aboriginal rights existed.

> The fact that the relationship between the government and Aboriginal peoples is trust-like, rather than adversarial has important implications for the role of government with respect to Aboriginal lands and resources. It requires institutional arrangements to protect them, and it requires government not to rely simply on the 'public interest' as justification for limiting the exercise of Aboriginal rights with respect to them. Moreover, it requires government to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources.

[100] The Commission has urged the courts to design their remedies to facilitate negotiations[27]. The Commission further asserts that government and aboriginal action in the form of nation-to-nation negotiation is central to the constitutional recognition and affirmation of aboriginal rights under section 35. Therefore, there is a need for remedies to assist the parties where negotiations are not progressing.

[101] In the opinion of the Commission, while the courts may be useful to decide some native issues or to bring pressure on the parties to settle by some other means, it appears that

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25 [1996] 1 S.C.R. 771 at 794.

26 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Queen's Printer, 1996) Vol. 2 ("Restructuring the Relationship"), Part 2 at 566.

27 *Ibid.*, at 564.

judicial adjudication will not provide all of the answers to the issues surrounding native claims[28].

[102] In *Union of Nova Scotia v. Canada (A.G.)*[29], Mr. Justice MacKay concluded that there are additional considerations in cases involving aboriginal rights. The fiduciary duty is enforced and includes protection against unwarranted effects upon the aboriginal interests.

[103] In *Delgamuukw*, the Chief Justice opined that the government's responsibility to safeguard the aboriginal peoples' interest is equally applicable to the rights which relate to the land and the native interest in the land. The government has vested interests in the security and the welfare of Canada's aboriginal peoples. Their most central interest is their interest in their lands.

[104] The Chief Justice further determined that the scope of federal jurisdiction and responsibilities, pursuant to subsection 91(24), are tied to section 35 as well. The treaty process encompasses the transaction of aboriginal rights as well as aboriginal title. Such rights include both rights in relation to the lands, as well as practices, customs and traditions which are not tied to land.

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[28] *Supra* note 19, at 562.

[29] [1997] 1 F.C. 325 (T.C.).

a) General Principles

[105] The following principles can be drawn from the jurisprudence:

a) It is the role of the court to assist and further the negotiating process. Where the federal government has agreed to negotiate claims, the public anticipates that the claims will be resolved by negotiation and by settlement.

b) Subsection 35(1) represents the recognition of aboriginal rights in the treaty process and the government's obligation within that process; it is a specific constitutional basis upon which subsequent negotiations can take place and requires a just settlement for aboriginal peoples.

c) A treaty process is entered into for the mutual benefit of both the Crown and the aboriginal peoples; it should be solemnly respected.

d) The relationship between the Crown and the aboriginal peoples, as well as the dealings between the parties should be given a generous interpretation in favour of the aboriginal peoples.

e) The honour of the Crown is at stake in its dealings with the aboriginal people.

f) There are additional considerations in cases involving aboriginal rights. The fiduciary duty is enforceable and includes protection against unwarranted effects upon the aboriginal interests.

g) The government's responsibility to safeguard the aboriginal peoples' interests is equally applicable to the rights which relate to the land and the native interest in the land.

b) The federal jurisdiction and responsibilities pursuant to subsection 91(24) are tied to section 35 as well. The treaty process encompasses the transactions of aboriginal rights as well as aboriginal title.

[106] The Royal Commission on Aboriginal Peoples has concluded as follows:

a) The government's task is to determine, define, recognize and affirm whatever aboriginal rights existed.

b) The courts should design their remedies to facilitate negotiations.

b) Analysis

[107] The fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands.

[108] There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal rights is justified.

[109] The nature and scope of the duty will vary with the circumstances. Even where 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 rights and lands are at issue.

[110] Any negotiations should also include other aboriginal nations which have a stake in the territory claimed. The Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.

[111] In this instance, the applicant has signed an agreement-in-principle with the respondents. The respondents assert that they are ready to negotiate and fulfil their duty to conduct negotiations in good faith. However, due to the division of powers between the federal and provincial governments, and the refusal to date of the Government of Newfoundland and Labrador to consult and negotiate with the applicant, the respondents claim that they are without means to rectify the situation. Counsel for the respondents stated in oral argument:

> Regardez, Votre Seigneurie. Parce que Terre-Neuve refuse la présence de Makivik, nous, nous avons l'obligation de nous retirer. On a des obligations qui découlent du refus d'un autre. C'est ça, Votre Seigneurie, qui n'a pas de bon sens dans notre dossier.
>
> Nous, nous voulons que Makivik soit là.
>
> Nous, nous avons accepté la revendication territoriale de Makivik. On a commencé à négocier. On négocie encore et on va négocier encore cette revendication. Sauf que quand vient le temps de parler de juridiction provinciale, on ne peut pas le faire parce que Terre-Neuve n'est pas à la table. Ce n'est pas de notre faute si Terre-Neuve n'est pas à la table.
>
> Maintenant, vous me demandez: Pourquoi vous n'invitez pas Makivik à la table quand vous parlez avec le LIA et Terre-Neuve de la création d'un parc? On les invite, Votre Seigneurie, on veut qu'ils soient là. Nous, nous les avons reconnues, leurs revendications. On aimerait bien qu'ils soient là et qu'ils disent: Nous aussi, nous en voulons un parc, nous voulons une réserve de parc. On voudrait qu'ils soient partie prenante complètement.
>
> Sauf que si on fait ça, on part ensemble; je vais chercher mon confrère maître Hutchins; on se rend à Terre-Neuve; mon confrère maître Hutchins entre dans la salle, il s'assoit. J'ai les

> négociateurs de Terre-Neuve qui se lèvent et qui s'en vont. Ils disent: Nous, on ne parle plus.
>
> Qu'est-ce que je peux faire là-dedans, Votre Seigneurie? Je ne peux pas contraindre les autorités terre-neuviennes de rester assis à la table avec Makivik. Je ne suis pas capable de faire ça, Votre Seigneurie.
>
> Soit dit bien respectueusement, Votre Seigneurie, je pense même qu'un tribunal ne serait pas capable de faire cela.
>
> On ne peut pas forcer une partie à négocier si elle ne veut pas négocier. Ce sera à elle, éventuellement, à assumer les conséquences. Quand on refuse de négocier, on assume des risques.

[112] Counsel for the respondents added:

> Ce n'est pas de ma faute si Terre-Neuve ne veut pas leur parler. Je n'ai pas de pouvoir sur eux. Si ça dépendait juste de moi, je leur dirais: Asseyez-vous à la table, on va parler. Je n'ai pas ce pouvoir-là. Le ministre des Affaires indiennes n'a pas ce pouvoir-là, Votre Seigneurie, et je pense même que la Cour n'a pas ce pouvoir-là. Si Terre-Neuve ne veut pas négocier, elle ne veut pas négocier!
>
> [...]
>
> [D]u seul fait qu'on ait accepté, il faudrait se retirer de la table où ils ne peuvent participer. C'est ça le "treaty process". Si eux ne peuvent pas participer, il faudrait que nous nous retirions. Ce n'est pas de notre faute[30].

[113] The Province of Newfoundland has full constitutional authority over the lands in issue.

Counsel for the Government of Newfoundland and Labrador asserted in oral argument:

> There are matters which the federal government simply cannot negotiate constitutionally. The provinces, of course, including Newfoundland, by virtue of the Constitution, 109 and section 92, have exclusive constitutional jurisdiction over their lands and resources.
>
> It is trite to say that but it needs to be said.

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[30] Transcripts (7 January 1998) at 25.

> It is easy to lose sight of the fact that unless and until the province of Newfoundland transfers administration and control to the federal government, the lands that are shown on the map that our friend put over here are lands in Labrador which belong to the province of Newfoundland. They are lands and resources of the province unless and until administration and control of those lands is passed to the federal government[31].

[114] National Parks are public lands set aside by the Parliament of Canada, under the *National Parks Act*, that are dedicated to the people of Canada for their benefit, education and enjoyment, subject to the Act and regulations thereunder. They are to be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

[115] National park reserves are managed under the *National Parks Act*, without prejudice to unresolved land claims. Traditional hunting, fishing and trapping activities of Aboriginal people continue. Standard land reversionary clauses are in place so that lands may be removed from park status if necessary to resolve land claims. Other interim measures may include aboriginal peoples' involvement in park reserve management. Subsequently, legislation passed by Parliament to confirm a negotiated settlement of the land claims will either incorporate, or provide for the future resolution of, matters such as benefits to aboriginal people from park establishment.

[116] Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. The content of aboriginal title confers the rights to use the land for a variety of activities, not all of which need be aspects

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[31] Transcript, January 7, 1998, at 76.

of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies.

[117] Pursuant to subsection 35(1), aboriginal rights which existed and were recognized under the common law are elevated to constitutional status. The existence of an aboriginal right at common law is sufficient, but not necessary, for the recognition and affirmation of that right by subsection 35(1).

[118] Aboriginal rights which are recognized and affirmed by subsection 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, are the practices, customs and traditions that are integral to the distinctive aboriginal culture. Although these activities are not sufficient to support a claim for title to the land, they would receive constitutional protection. In the middle, there are necessary activities which are usually intimately related to a particular piece of land. At the other end of the spectrum, is aboriginal title which is the right to the land itself.

[119] Since the purpose of subsection 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear that subsection 35(1) must recognize and affirm both aspects of that prior presence - first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land.

[120] The possibility of joint title has been recognized by American Courts[32]. There may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's.

[121] Where a national park reserve is established, there is a minimal impact on the rights and the use of lands. There is in my view however, a duty to consult in such circumstances. Any consultation must be meaningful.

[122] Where a national park itself is established, the impact will occur on the title, the rights and the use of land. There is, therefore, a duty to consult and negotiate in good faith in such circumstances.

[123] The agreement-in-principle between the federal government and the applicant recognizes that a park cannot be established until negotiations are completed.

VIII. Federal Court Act

[124] A question arose concerning the scope of remedies available on an application for judicial review, in particular, whether declaratory relief is available.

[125] Subsection 18(3) of the *Federal Court Act* mandates that the remedies provided for in subsection 18(1) and subsection 18(2) may be obtained only on an application for judicial

---

[32] *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941).

review made under section 18.1 of the Act. Section 18.1 of the Act sets out the standing requirements, the grounds of review and the powers of the court on an application for judicial review. The threshold question is whether review is being sought against a "federal board, commission or other tribunal" as that expression is defined in section 2 of the Act. Prior to 1992, judicial review in the Trial Division could, at the option of the applicant, be sought by way of an action commenced by statement of claim or by way of originating motion. However, an application for a declaration was available only by way of an action. Subsection 18.4(2) empowers the Trial Division to direct that an application for judicial review proceed by way of an action. No such order was sought in this case.

[126] The purpose of section 18 of the Act is to grant exclusive judicial review jurisdiction over federal administrative tribunals to the Federal Court. However, it cannot deprive provincial superior courts of their jurisdiction to determine the constitutional validity and applicability of legislation.

[127] Subsection 18.1(3) describes the relief that the Court may grant on an application for judicial review. It includes the relief which could be granted under paragraph 18(1)(a) of the Act, which includes the grant of declaratory relief. It also preserves the traditionally discretionary nature of judicial review.

IX. Disposition

[128] Canada's proposed Torngat Mountain National Park is being planned within the area which is the subject of negotiations pursuant to the treaty process between the applicant and the Government of Canada. The Federal Government policy respecting the establishment of National Parks purports to operate within the framework of protection for Aboriginal interests as prescribed by the Courts and the Constitution. For the reasons given above, I grant the following declaratory relief:

1. The respondents have a duty to consult with the applicant prior to establishing a park reserve in Northern Labrador. The duty to consult includes both the duty to inform and to listen.

2. The respondents have a duty to consult and negotiate in good faith with the applicant its claims to aboriginal rights in certain parts of Labrador, prior to the establishment of a national park in Northern Labrador.

3. If an agreement between the Government of Canada and the Government of Newfoundland and Labrador to establish such a national park is reached before final land claim settlement, the lands are to be set aside as a national park reserve, pending land claim negotiations.

J. Richard
Associate Chief Justice

Ottawa, Ontario
August 4, 1998

Annex 6

Makivik Corporation
Société Makivik

VIA TELEFAX
[Original to follow by mail]

October 26, 1998

The Honourable Sheila Copps
Minister of Canadian Heritage
Heritage Canada
15 Eddy Street, 12th Floor
Hull, Quebec
K1A 0M5

Re: *Nunavik Inuit v. Canada* - Federal Court No. T-545-97 - Nunavik Inuit treaty processes with Canada

Dear Minister Copps:

Nunavik Inuit as represented by Makivik Corporation are conducting treaty negotiations with the Government of Canada in respect of Nunavik Inuit rights and interests in Northern Labrador. Nunavik Inuit rights and interests in Labrador have over the past number of years been frustrated by a number of factors including:

1. The refusal of the Government of Newfoundland and Labrador to recognize Nunavik Inuit rights and interests in Labrador and to participate in treaty negotiations with Nunavik Inuit;

2. Canada's failure to confront the Government of Newfoundland and Labrador on this issue and to insist that the Province participate in the treaty process;

3. Canada's insistence in continuing the planning, together with the Government of Newfoundland and Labrador and the Labrador Inuit Association, of the proposed Torngat National Park covering something in the order of 80% of the territory currently under negotiation between Nunavik Inuit and Canada;

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4. Canada and Newfoundland's determination to continue negotiation towards an Agreement-in-Principal and a treaty with Labrador Inuit Association without Makivik's participation, without any commitment to formal overlap arrangements and in total disregard of the potential impact on Nunavik Inuit right and interests in Labrador;

5. The ongoing discussions between Canada, Newfoundland and the Labrador Inuit Association in regard to the Voisey's Bay Project in total disregard of the representations made by Makivik as to Nunavik Inuit interests and the impact of the proposed project on Nunavik Inuit interests.

All this led to the conclusion by Nunavik Inuit that Canada was not dealing with Makivik and Nunavik Inuit in good faith. On February 19, 1997, Makivik wrote to you in your capacity as Minister of Canadian Heritage and responsible for Parks Canada seeking assurances that Canada would only proceed with the creation of the Torngat Mountains National Park with the consent of Nunavik Inuit and as part of the treaty process which Canada is engaged in with the representatives of Nunavik Inuit. As a result of your failure to provide Nunavik Inuit and Makivik Corporation with the undertakings required, they had no other choice but to seek relief from the Federal Court of Canada in the proceedings *Nunavik Inuit v. Canada*, Federal Court No. T-545-97.

As you know on August 4 last, the Associate Chief Justice of the Federal Court of Canada, the Honourable John Richard, rendered judgment in the above-referenced proceedings.

These proceedings instituted by Makivik Corporation with the specific objective of seeking direction from the Court as to the duties on the Crown to negotiate treaties in good faith and what constraints on Crown conduct flow from any such duty.

The Associate Chief Justice thought fit to repeat in his judgment at paragraph [3] the issues as framed by Nunavik Inuit and Makivik:

i) do parties, having undertaken to engage in a treaty process in the current constitutional and policy context prevailing in Canada, thereby incur legally enforceable positive duties towards their partners in the treaty process and legally enforceable constraints on their conduct with respect to the issues and interests which are the object of the treaty negotiations

(ii) If the answer to i) is in the affirmative, has the Crown in Right of Canada breached its legally enforceable positive duties towards Makivik and Nunavik Inuit in the treaty process:

a) by doggedly continuing towards the establishment of the Torngat National Park in Northern Labrador notwithstanding the treaty process engaged with Nunavik Inuit, and

b) by systematically allowing Nunavik Inuit to be excluded from the substantive process leading to the establishment of the Park, and

c) by refusing at the same time to discuss the establishment of the Park within the context of the treaty negotiations with Nunavik Inuit?

While the matter of the Federal Court decision was raised in our treaty negotiations in the presence of an official from your Department, there has been no substantive discussion at the table on its import for our negotiations.

We are writing to remind you and your officials that the proceedings brought in the Federal Court of Canada by Nunavik Inuit and Makivik were first and foremost about the Aboriginal/Crown treaty process and the conduct of the Crown towards Aboriginal peoples with whom it is negotiating. The matter of the proposed Torngat National Park was incidental to this central issue and was put before the Court as an example of Crown conduct that, in Makivik's view, clearly breached the duty of good faith negotiations.

There is no doubt that the Associate Chief Justice understood the essential issue of these proceedings. He set it out in the first paragraph of his Reasons for Order as follows:

> This proceeding, commenced by an originating notice of motion dated March 26, 1997, raises serious issues concerning the negotiation of aboriginal land claims in the context of the treaty process. It involves consideration of the division of powers between the federal government and the provinces and the applicability and scope of section 35 of the *Constitution Act, 1982*. It does not involve, at this stage, the determination of substantive rights. As counsel for the applicant stated, this proceeding is about process. Counsel for the applicant advances the proposition that section 35 of the *Constitution Act, 1982* not only recognizes and affirms aboriginal and treaty rights but also enshrines the treaty process itself in the Constitution. The treaty process and the duties of the parties arising out of that process, according to counsel, are constitutionally protected by section 35. This proceeding also raises the issue of the role of the courts in ensuring that negotiations within the treaty process are respectful of the duties and obligations of the parties.

After an extensive review of the jurisprudence and legal principles applicable, the Associate Chief Justice concluded that even in the case of actions by the Crown resulting in a minimal impact on the rights and the use of lands by interested Aboriginal peoples, (in this case the establishment of a National Park Reserve), there is a duty on the Crown to consult and that any such consultation must be meaningful (paragraph 121).

The Associate Chief Justice went on to direct that where as a result of the actions of the Crown there is an impact on the title, rights and the use of lands of interested Aboriginal peoples, there is a duty to consult and negotiate in good faith. He concluded that the establishment of a National Park involved such an impact and could not proceed until treaty negotiations are completed. He wrote:

... For the reasons given above, I grant the following declaratory relief:

1. The respondents have a duty to consult with the applicant prior to establishing a park reserve in Northern Labrador. The duty to consult includes both the duty to inform and to listen.

2. The respondents have a duty to consult and negotiate in good faith with the applicant its claims to aboriginal rights in certain parts of Labrador, prior to the establishment of a national park in Northern Labrador.

3. If an agreement between the Government of Canada and the Government of Newfoundland and Labrador to establish such a national park is reached before final land claim settlement, the lands are to be set aside as a national park reserve, pending land claim negotiations.

As Minister of Canadian Heritage, your involvement in this matter relates primarily to the determination by your Department to establish a National Park in Northern Labrador. It should not be forgotten, however, that the Attorney General of Canada representing Her Majesty in Right of Canada was a party to these proceedings and that, in fact, Her Majesty the Queen in Right of Newfoundland was an intervener before the Court. Nunavik Inuit through Makivik Corporation in their treaty negotiations regarding Northern Labrador are negotiating with the Crown in Right of Canada. It is to the Crown generally and not just to your Department that the judgment of Associate Chief Justice Richard is directed.

Of considerable importance in the decision was the conclusion reached by the Court that section 35 of the *Constitution Act, 1982* represents the recognition of Aboriginal rights in the treaty process and the government's obligations in that process. This is a very significant finding, not only for Makivik's treaty process but for the treaty process across Canada. While the immediate and direct effect of the judgment is that the Court has ordered the Crown to negotiate with Nunavik Inuit in good faith and not to proceed to the creation of a National Park in Northern Labrador until treaty negotiations have been concluded with Nunavik Inuit, there are larger implications. What the Court has actually implied is that the Crown cannot proceed with any actions in Northern Labrador that might have an impact on Nunavik Inuit rights and interests until treaty negotiations are concluded with Nunavik Inuit. This goes well beyond the creation of a National Park and would include the conclusion of treaty arrangements with the Labrador Inuit Association in the area of any overlap or allowing development such as the Voisey's Bay Project to proceed to the extent that such development might affect the rights and interests of Nunavik Inuit.

Furthermore, the Court has generally directed that in all these matters the Federal Crown cannot not use as an excuse for not dealing the Nunavik Inuit in good faith the refusal of the provincial government to recognize Nunavik Inuit rights or to negotiate treaty arrangements with Nunavik Inuit.

Given Canada's acceptance of Nunavik Inuit's claims in Northern Labrador and the existence of a treaty negotiation process, the clear implication of the judgment of Associate Chief Justice Richard is that the consultations that you are ordered to conduct with Nunavik Inuit prior to establishing a

Park Reserve in Northern Labrador and the negotiations in good faith that you are ordered to conduct to with Nunavik Inuit prior to the establishment of a National Park in Northern Labrador can only properly take place through Nunavik Inuit's treaty process and at the treaty table. Consequently, any consultations undertaken to date with the Labrador Inuit and the Government of Newfoundland and Labrador in the context of the Torngat Mountain National Park Feasibility Study Working Group or Steering Committee are invalid and of no effect.

Nunavik Inuit are open to discussing these matters as part of their treaty process but will not accept any further attempts by your Department to exclude them from the crucial decisions regarding a possible National Park in their Labrador homeland. They now have a final judgment of the Federal Court of Canada supporting their position. We would appreciate confirmation from you that you have instructed your officials to proceed accordingly.

Sincerely yours,

Pita Aatami
President

c.c.: *Hon. Jane Stewart, DIAND Minister*
Hon. Chris R. Decker, Minister of Justice, Newfoundland & Labrador