

# The Nunavut Agreement-in-Principle and Section 35 of the *Constitution Act, 1982*<sup>1</sup>

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THE NEGOTIATION AND SETTLEMENT of outstanding Aboriginal claims is one of the most important issues facing Canada in the 1990s. Indeed, with the failure of the 1992 Charlottetown Accord, negotiated agreements may be the only means for Aboriginal peoples to secure self-government. One means of dealing with Aboriginal claims has been by way of land claims agreements such as the 1975 *James Bay and Northern Quebec Agreement*<sup>2</sup> and the 1984 *Inuvialuit Final Agreement*.<sup>3</sup> The land claims' mechanism is a means for the federal government to negotiate the extinguishment and surrender of whatever rights a particular group of Aboriginal peoples may possess. Aboriginal peoples, in turn, receive monetary compensation, land and other valuable consideration in return for their extinguished rights.<sup>4</sup>

This article will examine the impact of s. 25 of the *Canadian Charter of Rights and Freedoms*<sup>5</sup> and s. 35 of the *Constitution Act, 1982* on the *Nunavut Agreement-in-Principle*. Part of the analysis will focus on the Supreme Court of Canada's decision of *R. v. Sparrow*.<sup>6</sup>

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<sup>1</sup> Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

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<sup>2</sup> Canada, *James Bay and Northern Quebec Agreement*, (Quebec: Editeur du Quebec, 1976).

<sup>3</sup> Canada, Indian Affairs and Northern Development, *The Western Arctic Claim: The Inuvialuit Final Agreement*, (Ottawa: 1984).

<sup>4</sup> The federal government outlined its policy for dealing with Aboriginal comprehensive claims in: Canada, Indian Affairs and Northern Development, *In All Fairness: A Native Claims Policy*, (Ottawa: 1981). This publication as updated with: Canada, Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: 1986). This was in response to: Canada, Indian Affairs and Northern Development, *Living Treaties: Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: 1985) (a.k.a. Coolican Task Force).

<sup>5</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>6</sup> [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160 [hereinafter *Sparrow* cited to D.L.R. (4th)].

Finally, a brief discussion of some possible amendments to the agreement will be put forward with the intention of maximizing the constitutional implications of the agreement.

## I. THE NUNAVUT AGREEMENT-IN-PRINCIPLE

ON DECEMBER 16, 1991 Indian Affairs and Northern Development announced that the Government of Canada and the Tungavik Federation of Nunavut (TFN) resolved the remaining outstanding issues with respect to the agreement-in-principle<sup>7</sup> on the comprehensive claim by Inuit over the Nunavut settlement area. The Aboriginal claim covers more than 2 million sq. km. in the central Northwest Territories and eastern Arctic. The agreement affects more than 17,000 Inuit who live in the settlement area.<sup>8</sup>

The TFN claim was submitted to the federal government initially, by the Inuit Tapirisat of Canada (ITC) in February 1976. The claim was amended and resubmitted to the federal government in December 1977. The Inuit proposals for a new territory (Nunavut) resulted in little progress being made during 1978 and 1979. By 1980, negotiations resumed on the understanding that the issue of a new territory would be negotiated outside of the comprehensive claims framework. The ITC was replaced by the TFN as the negotiating vehicle for the Inuit in 1982. Although a number of sub-agreements were in place by

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<sup>7</sup> Canada, Indian Affairs and Northern Development, *Agreement-in-Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada*, (Ottawa: 1990) [hereinafter "the agreement"]. There is a final agreement, but at the time of writing the author was unable to obtain a copy. The author was assured by the Tungavik Federation of Nunavut in October 1992 that changes to the agreement-in-principle were nominal. For additional literature on Nunavut see D. Purich, *The Inuit and Their Land: The Story of Nunavut* (Toronto: James Lorimer & Co., 1992); R.Q. Duffy, *The Road to Nunavut* (Montreal: McGill-Queen's University Press, 1988); G. Dacks, "The Case Against Dividing the Northwest Territories" (1986) 12 Canadian Public Policy 202; and J. Merritt & T. Fenge, "The Nunavut Land Claims Settlement: Emerging Issues in Law and Public Administration" (1990) 15 Queen's L.J. 255. "Nunavut" means "our land" in Inuktitut.

<sup>8</sup> A summary of the agreement-in-principle can be found in: Canada, Indian Affairs and Northern Development, "Resolution of Outstanding Issues Opens Way to Final Agreement on TFN Claim and Creation of Nunavut Territory" *Communique* (Ottawa: 16 December 1991: #1-91115)

1986, it was not until April 30, 1990 that the agreement-in-principle was signed at Igloodik, Northwest Territories.<sup>9</sup>

The stated purpose of the federal government's comprehensive land claims policy, under which the agreement was negotiated, ... is to provide certainty and clarity of rights to ownership and use of land and resources in those areas of Canada where Aboriginal title has not been dealt with by treaty or superseded by law. ... Land claims negotiations should look to the future and should provide a means whereby Aboriginal groups and the federal government can pursue shared objectives such as self-government and economic development.<sup>10</sup>

Therefore, in keeping with the broad mandate of the claims policy, the agreement is comprehensive in nature. The agreement covers land title,<sup>11</sup> economic development,<sup>12</sup> wildlife management and conservation,<sup>13</sup> land, resource and environmental management,<sup>14</sup> social and cultural provisions,<sup>15</sup> and political development.<sup>16</sup>

Nunavut will divide the existing Northwest Territories in half, with the western portion remaining the Northwest Territories, and the eastern portion becoming Nunavut. The agreement provides that the Inuit receive bare title to approximately 350,000 sq. km. of land including 36,300 sq. km. of land over which they have mineral rights. The Inuit shall receive \$580 million to be paid over 14 years to the beneficiaries of the agreement. A Nunavut Wildlife Management Board<sup>17</sup> with equal public and Inuit representation is created. As well, three national parks are proposed for the area affected.<sup>18</sup> The Inuit are guaranteed equal representation on a number of administrative boards responsible for land management, environmental and

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<sup>9</sup> Canada, Indian Affairs and Northern Development, "Tungavik Federation of Nunavut (TFN) Comprehensive Claim: Northwest Territories" *Information Sheet No. 8* (Ottawa: August 1990).

<sup>10</sup> Canada, Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: 1987) at 9-10.

<sup>11</sup> *Supra* note 7 at arts. 2, 3, 17-20.

<sup>12</sup> *Ibid.* at arts. 25-31.

<sup>13</sup> *Ibid.* at arts. 5-9.

<sup>14</sup> *Ibid.* at arts. 10-16.

<sup>15</sup> *Ibid.* at arts. 35-37.

<sup>16</sup> *Ibid.* at art. 4.

<sup>17</sup> *Ibid.* at arts. 5(5) to 5(14).

<sup>18</sup> *Ibid.* at art. 8.

socio-economic reviews, wildlife management and water use. Finally, the agreement ensures that the federal government will recommend legislation to Parliament to create a Nunavut territory, in addition to the Yukon and Northwest Territories.

The Nunavut Agreement is like other land claims agreements in that the Inuit agree to

... cede, release and surrender to Her Majesty in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada.<sup>19</sup>

In addition, the Inuit also agree not to assert any legal action against Canada based on Aboriginal rights, claims, title or interests.<sup>20</sup>

## II. THE CONSTITUTIONAL NATURE OF THE AGREEMENT

WHEN THE FINAL AGREEMENT is ratified and enacted by the appropriate federal legislation, it will take on a character which is more than simply that of a statute or a contract. The provisions of the agreement become constitutionally entrenched. Indeed, to some degree, the agreement will become a constitutional document by way of s. 35 of the *Constitution Act, 1982*,<sup>21</sup> Which reads as follows:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis Peoples of Canada.

(3) For greater certainty in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35(3) is of particular importance to the agreement because it clearly provides that land claims agreements, like the Nunavut agreement, are "treaty rights" within the meaning of s. 35(1) and are, therefore, to be treated as such. The effect of s. 35(3) on the agreement is that it constitutionalizes the agreement and thereby strengthens the

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<sup>19</sup> *Ibid.* at art. 2.8.1(a).

<sup>20</sup> *Ibid.* at art. 2.8.1.(b).

<sup>21</sup> *Constitution Act, 1982*, as am. *Constitution Amendment Proclamation, 1983*, R.S.C. 1985, App. II, No. 46, s. 2.

rights in the agreement by giving them constitutional status.<sup>22</sup> The result is that the agreement, when ratified, is not subject to extinguishment or amendment by Parliament exclusively. Rather, any amendment to the agreement must be mutual as outlined in the agreement.<sup>23</sup> The agreement makes provision for the explicit recognition of s. 35(3). It reads as follows:

Based on this Agreement, the parties shall continue negotiations in good faith, to conclude a Final Agreement within eighteen months of the ratification of the Agreement, which Final Agreement will be a land claims agreement within the meaning of s. 35 of the *Constitution Act, 1982*.

In order to understand the significance of the agreement being incorporated into s. 35, a brief discussion of s. 35 is in order. To date, the only decision rendered by the Supreme Court of Canada on s. 35 is that of *Sparrow*.

### III. R. v. SPARROW

THE SUPREME COURT OF Canada's May 1990 decision in *Sparrow* outlines a framework of analysis for s. 35. Since the facts of *Sparrow* are not relevant to this discussion, the following will outline briefly only the analytical framework provided in the decision.<sup>24</sup>

The court held that the term "existing" in s. 35(1) refers to those rights that existed when the *Constitution Act, 1982* came into effect. Rights extinguished before April 17, 1982 are not revived by s. 35.<sup>25</sup>

<sup>22</sup> See an articulation of this argument in T. Isaac, "The *Constitution Act, 1982* and the Constitutionalization of Aboriginal Self-Government in Canada: *Cree-Naskapi (of Quebec) Act*" [1991] 1 C.N.L.R. at 1.

<sup>23</sup> *Supra* note 7 at art. 2.14.1 reads: "Except where otherwise permitted in the Final Agreement, amendment of the Final Agreement shall require the consent of the parties by the process to be set out in the Amendment Provisions of the Final Agreement."

<sup>24</sup> For a general discussion of *Sparrow* see; W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; T. Isaac, "Understanding the *Sparrow* Decision: Just the Beginning" (1991) 16 Queen's L.J. 377; M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498; D.W. Elliot, "In the Wake of *Sparrow*" (1991) 40 U.N.B. L.J. 23; T. Isaac, "The Honour of the Crown: Aboriginal Rights and the *Constitution Act, 1982*: The Significance of *R. v. Sparrow*" (1992) 13:1 Policy Options/Politiques 22.

<sup>25</sup> *Supra* note 6 at 395.

It also held that the phrase “existing aboriginal rights” is to be “interpreted flexibly so as to permit their evolution over time.”<sup>26</sup>

The phrase “recognized and affirmed” in s. 35(1) is to be interpreted in a “purposive” manner. That is, it ought to be given a “generous, liberal interpretation.”<sup>27</sup> The court notes that rights which are recognized and affirmed are not absolute and therefore, federal legislative powers continue pursuant to s. 91(24) of the *Constitution Act, 1867*.<sup>28</sup> However, any federal legislation that affects the exercise of s. 35 rights is subject to the justificatory analysis provided by the court. That analysis has two steps.

Before the justificatory analysis is applied, it must first be determined whether the legislation in question interferes with the enjoyment of s. 35. Is the limitation of the right unreasonable? Does it impose undue hardship? Does it deny to the possessors of the right their preferred means of exercising the right? If the legislation does interfere with the enjoyment of a right, then it is a *prima facie* infringement.<sup>29</sup>

Once an infringement of s. 35 is determined, the next step requires the government to justify the legislation (or regulation) in question. The first part of the justificatory analysis calls for the government to demonstrate a valid legislative objective. The court held in *Sparrow* that conservation and resource management was a valid legislative objective.<sup>30</sup>

If a valid legislative objective is determined, the second stage of the analysis, concerning the honour of the Crown in its relationship with Aboriginal peoples, is applied. The court writes:

The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.<sup>31</sup>

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<sup>26</sup> *Ibid.* at 397.

<sup>27</sup> *Ibid.* at 407.

<sup>28</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24) reads: “... it is hereby declared that ... the exclusive Legislative Authority of the Parliament of Canada extends to ... 24. Indians, and Lands reserved for the Indians.”

<sup>29</sup> *Supra* note 6 at 411.

<sup>30</sup> *Ibid.* at 412.

<sup>31</sup> *Ibid.* at 413.

With respect to the *Sparrow* decision in particular, the court held that Aboriginal peoples have priority over fish resources subject to reasonable conservation concerns and measures. Other questions can arise in the justificatory analysis, such as whether the Aboriginal peoples in question were consulted in the conservation measures and whether there has been as little infringement as possible in order to achieve the desired result (among other questions).<sup>32</sup>

The *Sparrow* decision solidifies Aboriginal rights recognized and affirmed by s. 35. Section 35 is a substantive guarantee of Aboriginal rights.<sup>33</sup> Although the rights contained in s. 35 are not absolute in nature, the section places a heavy onus on the Crown to justify interference with the enjoyment of s. 35 rights. Therefore, the rights contained in land claims agreements, which are incorporated into s. 35(1) by virtue of s. 35(3), are accorded the meaning attributed to those rights as outlined by the *Sparrow* decision. With this in mind, what is the effect of s. 35 on the Nunavut agreement-in-principle?

#### IV. THE EFFECT OF S. 35 ON THE NUNAVUT AGREEMENT

THE CONSTITUTIONALIZATION OF THE agreement would effect the potential implementation of the provisions of the agreement. That is, because the rights outlined in the agreement receive constitutional status by virtue of s. 35(3), they are accorded more legal weight than simply legislative or contractual provisions. The result is that any rights outlined in the agreement are permanent unless the Inuit decide, along with the federal government, that they must be amended. As well, if there are difficulties with the implementation of the agreement, on the part of the government, the Inuit can use the constitutional status of the agreement in their favour by arguing that the lack of implementation is more than the non-fulfilment of a contractual obligation. Rather, the lack of implementation would be tantamount to a violation of a constitutional right. The lack of implementation is mentioned here because of the federal government's past reputation in being unable or unwilling to implement the 1975

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<sup>32</sup> *Ibid.* at 416-417.

<sup>33</sup> For discussion of s. 35 see: K. McNiel, "The Constitution Act, 1982, Sections 25 and 35" [1988] 1 C.N.L.R. 1; W. Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982; Part II — Section 35: The Substantive Guarantee" (1988) 22 U.B.C. L. Rev. 207; and B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727.

*James Bay and Northern Quebec Agreement*.<sup>34</sup> It is submitted that all groups negotiating comprehensive claims must make certain that the implementation, which usually means appropriate funding mechanisms, is guaranteed and unambiguous in construction.

Assuming that the amendment process in the final agreement will be one which is based on mutual agreement, which will most likely be the case, the Inuit are assured that the federal government will not change the agreement without their consent. Notwithstanding the agreement's constitutional standing, it will simply be another statute subject to Parliament's authority. The agreement could be amended or repealed by Parliament but for its constitutional status. However, once the agreement becomes constitutionalized by way of s. 35(3), parliamentary sovereignty becomes subject to the law of the Constitution. Section 52 of the *Constitution Act, 1982* states clearly that the Constitution is the "... supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

Therefore, the provisions in the agreement are permanent unless both parties agree to their amendment. This is beneficial for the Inuit in that it provides a level of security in knowing the nature of their relationship with the federal government. In effect, it constitutionalizes a sixth form of amending the Constitution. Sections 38, 41, 42, 43 and 44 of the *Constitution Act, 1982* outline the existing forms of amendment for the Constitution. These sections do not provide for a right of Aboriginal peoples to take part in the process. Thus, the Nunavut Agreement, as a constitutional document, will create a new amending formula in addition to those listed above.

Another aspect which is beneficial to the Inuit is that in the case of a conflict between a federal, territorial or local law and the agreement, the agreement makes it clear that it shall take precedent.<sup>35</sup> The constitutional status of the agreement will clear any doubts about the status of this provision. Once the agreement is ratified it becomes a

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<sup>34</sup> *Supra* note 2; see also W. Moss, "The Implementation of the James Bay and Northern Quebec Agreement" in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, (Ottawa: Carleton University Press, 1989) 684; Canada, Indian Affairs and Northern Development, *James Bay and Northern Quebec Agreement Implementation Review*, (Ottawa: February 1982); and W. Moss, *Practically Millionaires?: A Report on the Implementation of the James Bay and Northern Quebec Agreement* (Ottawa: National Indian Brotherhood, 1981).

<sup>35</sup> *Supra* note 7 at art. 2.13.2.



constitutional document and any statutes that conflict with the agreement do not apply to it.

The *Sparrow* decision may play an important role in the interpretation of land claims agreements in that it sets out certain means by which Aboriginal and treaty rights in s. 35 are to be interpreted. For example, art. 2.10.3 of the agreement states that "[T]here shall not be any presumption that doubtful expressions in the Final Agreement be resolved in favour of Government or Inuit." Although the above clause appears to be clear in its intent, *Sparrow* may have an effect, nevertheless, on how the agreement will be interpreted. Because land claims agreements are "treaty rights" for the purposes of s. 35(1), the Supreme Court's statement that the phrase "recognized and affirmed" is to be interpreted in a "purposive" way is noteworthy. When the purposes of the recognition and affirmation of Aboriginal and treaty rights is considered, the Supreme Court states that it is clear that these rights are to be given a "generous, liberal interpretation."<sup>36</sup> As well, in determining whether or not an infringement of s. 35 is justified as a valid legislative objective, the "honour of the Crown"<sup>37</sup> is to be maintained with regard to the Crown's "special trust relationship"<sup>38</sup> with Aboriginal peoples.

The result of these statements from *Sparrow* is to give an interpretive advantage to the Inuit with regard to the agreement. Thus, "doubtful expressions" in the agreement may not necessarily be presumed in favour of the Inuit, but they will be interpreted purposively, generously, liberally and in a manner in keeping with the "honour of the Crown." To this extent, *Sparrow* offers a significant degree of interpretive security to the Inuit in the case of judicial/quasi-judicial interpretation.

Although self-government is not mentioned explicitly in the agreement, the political development strategy outlined in the agreement-in-principle is noteworthy. As mentioned earlier, the agreement calls upon the federal government to recommend legislation to Parliament to establish a Nunavut territory. On the face of it, the Nunavut territory would provide self-governing status to the Inuit who live in the settlement area to the extent provided by normal territorial government. This is laudable. However, a problem with this arrangement is that territorial governments do not have their own constitution and,

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<sup>36</sup> *Supra* note 6 at 407.

<sup>37</sup> *Ibid.* at 410.

<sup>38</sup> *Ibid.* at 413.

because they are created by federal statute, are subject to federal legislative authority. It is submitted that this aspect of the agreement, the fact that Nunavut would be ultimately subject to federal jurisdiction seriously curtails Aboriginal (in this case, Inuit) aspirations for self-government. Notwithstanding the agreement, the territorial form of self-government places the Inuit under direct federal authority with no assurance of an adequate financial base (for government).<sup>39</sup>

Section 146 of the *Constitution Act, 1867* provided for the admission of Rupert's Land and the North-Western Territory to Canada. This section was used in 1870 to admit both of these territories.<sup>40</sup> After the creation of Manitoba in 1870, the remainder of Rupert's Land and the North-West Territory was created and called the Northwest Territories.<sup>41</sup>

Although the agreement states that the creation of a Nunavut territory would take place "outside of the claims agreement,"<sup>42</sup> it is submitted that because the Nunavut territory is an essential component to the agreement, it is, to the extent that it fulfills the political development components of the agreement, a part of the agreement and constitutionalized along with it. The Inuit have held consistently that the creation of a Nunavut territory is "the core demand of the Inuit agenda, with the claim as a means of attaining it."<sup>43</sup> Therefore, because the creation of the territory is an integral part of the agreement, the territory itself will become constitutionalized. It is too early to say what the results of this would be, suffice it to say that once Nunavut is created, it could not be dismantled unilaterally by the federal government. To this extent, Nunavut represents something more than a traditional territory (like the Yukon) and something less than

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<sup>39</sup> The importance of an adequate financial base for Aboriginal governments is discussed in T. Isaac, "Authority, Rights and an Economic Base: The Reality of Aboriginal Self-Government" (1991) 7 *Native Stud. Rev.* [forthcoming].

<sup>40</sup> See *Constitution Act, 1871* (U.K.), 34 & 35 *Vict.*, c. 28., reprinted in R.S.C. 1985, App. II, No. 11.

<sup>41</sup> *Manitoba Act, 1870* (Can.), 33 *Vict.*, c. 3, s. 35, reprinted in R.S.C. 1985, App. II, No. 8:

And with respect to such portion of Rupert's Land and the North-Western Territory, as is not included in the Province of Manitoba, it is hereby enacted, that the Lieutenant-Governor of the said Province shall be appointed, ... to be the Lieutenant-Governor of the same, under the name of the North-West Territories ....

<sup>42</sup> *Supra* note 7 at art. 4.1.1.

<sup>43</sup> As quoted in R. Doering, "In politics, as in comedy, timing is everything" *Arctic Circle* (January/February 1992) 17.

a province. However, without a guaranteed financial base for government, any constitutional status may be fruitless.

Notwithstanding the above, the agreement makes special reference to the new territory and the transfer of powers between governments. It reads:

Nothing in the Final Agreement shall restrict the authority of the Government of Canada to devolve or transfer powers or jurisdiction to the Territorial Government, provided that the devolution or transfer shall not abrogate or derogate from any rights of Inuit in the Final Agreement.<sup>44</sup>

The above clause is a self-contradiction in that the creation of Nunavut is a central component of Inuit goals and aspirations.<sup>45</sup> It is difficult to envisage any devolution of powers, or transfer of powers to other governments in Canada, that would not abrogate or derogate from Inuit rights in the agreement since Nunavut itself is a central goal for the Inuit.

The Nunavut governmental apparatus would be public in nature. As one commentator has noted:

... Inuit have always insisted that Nunavut would be a public government consistent with Canadian constitutional traditions, and with guaranteed political and human rights for the 15 percent of the population who are non-Inuit.<sup>46</sup>

However, the above is not as simple as it appears. First, because the agreement is constitutional in nature and consists of Aboriginal rights, any public government is automatically bound within the confines of the agreement. For example, a Nunavut government could not change unilaterally aspects of the wildlife management system without Inuit support.

## V. THE EFFECT OF S. 25 OF THE *CHARTER* ON THE NUNAVUT AGREEMENT

SECTION 25 OF THE *Charter* reads:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal rights or freedoms that pertain to the aboriginal peoples in Canada, including

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<sup>44</sup> *Supra* note 7 at art. 2.11.2.

<sup>45</sup> See *supra* note 43.

<sup>46</sup> J. Bell, "Nunavut: The Quiet Revolution" *Arctic Circle* (January/February 1992) 21.

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and  
 (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 25 has a direct effect on the Nunavut agreement in that it ensures that Aboriginal and treaty rights, including those rights in land claims agreements, are not negatively affected by *Charter* rights. One commentator on the *Charter* submits that s. 25 serves as "... a shield which protects Aboriginal, treaty and other rights from being adversely affected by other *Charter* rights."<sup>47</sup> Section 25 is an interpretive clause that does not grant any new rights. Rather, it protects existing rights.

Thus, the rights set out in the agreement cannot be affected negatively by *Charter* rights. To this extent, Aboriginal and treaty rights supersede *Charter* rights. Neither s. 25<sup>48</sup> nor s. 35<sup>49</sup> is subject to the *Charter's* s. 1 limitation clause and its corresponding analysis.<sup>50</sup>

At this point in time and because of a lack of substantive judicial comment on s. 25, it is difficult to ascertain the precise effect of the provision<sup>51</sup> of rights in the agreement. However, what is missing from the agreement is any inclusion of self-government provisions other than the territory clause. This substantially limits the affect of s. 25. If local government provisions were set out in the agreement for example, those provisions would then be protected by s. 25, thereby giving forms of Aboriginal government protection above and beyond that mentioned in s. 35. However, because the only form of government mentioned in the agreement, that of a new territory, is being

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<sup>47</sup> W. Pentney, "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*; Part I — The Interpretive Prism of Section 25" (1988) 22 U.B.C. L. Rev. 21 at 28.

<sup>48</sup> Because s. 25 is an interpretive clause and does not grant rights, it is not subject to the s. 1 limitation clause of the *Charter* which applies to "rights and freedoms" set out in the *Charter*.

<sup>49</sup> In *Sparrow*, *supra* note 6 at 403-404, the Supreme Court noted that s. 35 is not subject to the s. 1 limitation clause of the *Charter*.

<sup>50</sup> See *R. v. Oakes*, [1986] 2 S.C.R. 103, 26 D.L.R. (4th) 200.

<sup>51</sup> For discussion of s. 25 see B.H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan, Native Law Centre, 1988); and Pentney, *supra* note 47.

created outside the scope of the agreement, it is subject, like all governments, to the direct affects of the *Charter*.<sup>52</sup>

## VI. CONCLUSION

ON MAY 4, 1992 a plebiscite on the boundary of Nunavut was held in the Northwest Territories. That vote resulted in the 14,000 eligible Inuit voters supporting the boundary outlined in the agreement.<sup>53</sup> On November 3, 4 and 5, 1992 another vote will take place to determine whether or not the Inuit from Baffin, Keewatin and the Kitikmeot shall ratify the land claim agreement. If ratified, all that remains is the federal legislation to create Nunavut.<sup>54</sup>

On October 30, 1992 a political accord was signed by the governments of Canada, the Northwest Territories and the Tungavik Federation of Nunavut. The accord outlines how the creation of Nunavut will occur and sets 1999 as the target date for the creation of Nunavut to be complete. The accord also creates the Nunavut Implementation Commission. The mandate of this 10 member Commission is responsibility for the transition period between now and 1999. The Commission is also responsible for human resource training, fiscal transfers, administration and infrastructure development.<sup>55</sup>

The preceding discussion has attempted to outline the constitutional implications of the agreement, especially as they relate to s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*. However, notwithstanding the positive attributes of the agreement-in-principle, there is room for improvement.

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<sup>52</sup> Section 32 of the *Charter* states that its application is limited to Parliament and the government of Canada and to the legislatures and governments of each province. R. Tasse has stated that: "[T]he legislative councils of the Territories, ... indeed all who receive the power to legislate from Parliament or the legislatures, are bound by the *Charter*." R. Tassé, "Application of the Canadian Charter of Rights and Freedoms" in G. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 65 at 77.

<sup>53</sup> 54 per cent of northerners voted in favour of the boundary. See M. Cernetig, "The Death of Denendeh" *The [Toronto] Globe and Mail* (9 May 1992) D1.

<sup>54</sup> Rouleau J. of the Federal Court of Canada refused to grant a request by three northern Saskatchewan Indian bands to have the ratification vote halted. These three Athabasca bands claimed that the Nunavut Agreement was giving the Inuit control over a portion of their traditional territory. "Judge refuses bands' bid to stop vote on Nunavut" *The [Saskatoon] Star Phoenix* (22 October 1992) A12.

<sup>55</sup> M. Cernetig, "Accord sets up new Inuit territory" *The Globe and Mail* (31 October 1992) A4.

Wildlife management and conservation are crucial components to an Aboriginal way of life and indeed lie at the heart of many Aboriginal claims and rights. The agreement calls for the establishment of the Nunavut Wildlife Management Board (NWMB) to be the main instrument of wildlife management and conservation in the settlement area. However, all decisions made by the NWMB are subject to the approval of the appropriate federal minister.<sup>56</sup> This represents a significant shortcoming in this important aspect of the agreement. By making all decisions of the NWMB subject to federal approval, it has the affect of displacing any guarantee of Inuit control over their territory with respect to wildlife management and conservation. This is not to imply that no check should exist on the NWMB. However, whatever that check is, it should have a significant Inuit representation. The procedure, as it stands now, flies in the face of most suggestions for Aboriginal self-government which demand that Aboriginal peoples have increased and substantial control over their lives and destiny. This includes wildlife management and conservation.

Article 2.10.3 of the agreement states that if there exists a doubtful expression in the agreement, that expression shall favour neither side in the agreement. Time and time again, the federal government has attempted to use doubtful expressions in the *James Bay and Northern Quebec Agreement* to such an extent that the full spirit of that agreement has never been implemented by the federal government. The Inuit must make certain that whatever they receive as a result of the agreement, will be interpreted in a manner that is in their favour. The Supreme Court in *Sparrow* stated that Aboriginal rights in s. 35 should be interpreted in a "purposive" manner, thereby being liberal and to the benefit of Aboriginal peoples. This interpretive approach should be recognized explicitly in the agreement.

The agreement confirms that it shall be interpreted as being a "land claims agreement" as per s. 35(3) of the *Constitution Act, 1982*. This has the affect of constitutionalizing the agreement to the extent that it represents Aboriginal rights which are "recognized and affirmed" by s. 35(1) of the Constitution. Therefore, to ensure that the full benefit of s. 35 is guaranteed, there should exist an explicit clause that outlines certain Aboriginal rights so that they can be constitutionally recognized without any doubt. For example, Aboriginal religious rights, hunting and fishing rights, cultural rights, language rights, etc., should all be included in an explicit manner in the

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<sup>56</sup> *Supra* note 7 at art. 5, Part 9.

agreement. Based on the federal government's track record with respect to Aboriginal rights, failure to recognize these rights explicitly is simply asking for trouble.

The creation of a Nunavut territory is laudable. However, with respect to the concept of Aboriginal self-government, it is important to note that a territorial government is subject to the direct jurisdiction of the federal parliament. A territory does not have its own constitution (to the extent that it is independent of the federal government). This creates another dilemma. How significant or "self-governing" can an Inuit government be if it is ultimately subject to the federal government? In this way, the agreement is not progressive in its enunciation of Aboriginal self-government aspirations. There are two means of ensuring a more significant guarantee of Aboriginal self-government in Nunavut. First, the legislation creating Nunavut could be incorporated into s. 35(3), thereby ensuring that no unilateral action by the federal Parliament could change its creation. In addition, provisions could be made in the legislation to provide that Nunavut would be wholly independent. The result would be constitutional status similar to that of a province.

The second and less preferred means is to outline specifically in the agreement the powers of each Inuit community with respect to their by-law making authority. The powers granted should be very broad and include such matters as health and social welfare. Since the agreement would be constitutionalized by virtue of s. 35(3), these powers would ensure a minimum level of self-governing power to the communities that would be outside of the federal government's direct jurisdiction.<sup>57</sup>

The Nunavut agreement is an improvement on past land claims agreements. However, there are a number of areas in which significant improvements can be made to make the agreement amiable to the climate which now exists in Canada with respect to Aboriginal rights and claims. The Aboriginal peoples of Canada want, and have a right, to control over their lives. To this extent, the Nunavut final agreement should be amended to ensure that the Inuit have their

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<sup>57</sup> For example, s. 9 of the *James Bay and Northern Quebec Agreement*, *supra* note 2, establishes a governmental obligation to recommend to Parliament "special legislation concerning local government" for the Cree and Naskapi. The federal government fulfilled this obligation by enacting the *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18. This act has been described as offering to the Cree and Naskapi "... a unique and autonomous level of government within Canada and is able to satisfy the native aspirations for power and control." See *supra* note 22 at 2 n. 6.

Aboriginal rights, culture, way of life and self-government aspirations constitutionally guaranteed.