

THE QUEBEC INNU NATION EXAMPLE:

NEW APPROACHES TO ABORIGINAL RIGHTS IN TREATIES

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THE QUEBEC INNU NATION EXAMPLE: NEW APPROACHES TO ABORIGINAL RIGHTS IN TREATIES

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This paper, drafted for the National Forum on Treaties organized by the Pacific Business & Law Institute, proposes an overview of the negotiations undertaken by certain Innu First Nations of Quebec over the last thirty years. Negotiations have led to the conclusion of an Agreement-in-Principle of a General Nature between the First Nations of Mamuitun mak Nutashkuan, the Government of Quebec and the Government of Canada in 2004. Treaty negotiations are currently underway. Particular attention shall focus on the innovative formula developed for recognition of aboriginal rights and certainty as well as the general powers granted to First Nations in the exercise of their inherent right to self-government.

Cet article, rédigé en vue du Forum national sur les traités, organisé par le Pacific Business & Law Institute, propose un survol des négociations entreprises par certaines Premières Nations innues du Québec au cours des trente dernières années. Ces négociations ont mené à la signature d'une Entente de principe d'ordre général entre les Premières Nations Mamuitun mak Nutashkuan et le gouvernement du Québec et le gouvernement du Canada en 2004. Les négociations en vue d'un traité sont présentement en cours. Une attention particulière sera portée sur la formule innovatrice développée pour assurer la reconnaissance des droits ancestraux et la certitude ainsi que les pouvoirs généraux accordés aux Premières Nations dans l'exercice de leur droit inhérent à l'autonomie gouvernementale.

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I. INTRODUCTION

The Quebec Innu Nation is composed of nine First Nations that have formed various tribal councils over the years in order to negotiate land claims with the federal and provincial governments. The First Nations that are currently negotiating within the Mamuitun Tribal Council are the Essipit First Nation, the Mashteuiatsh First Nation and, the Nutashkuan First Nation, hereinafter designated as the “Mamuitun First Nations”.

The current presentation shall initially begin with a brief introduction of the Innu First Nations within Quebec and describe their efforts towards conclusion of a treaty that promotes peaceful coexistence between Innu Nations and modern Quebec society. Subsequently, particular attention shall be focused on the innovative formula for recognition of aboriginal rights and certainty developed in the *Agreement-in-Principle of a General Nature between the First Nations of Mamuitun mak Nutashkuan, the Government of Quebec and the Government of Canada*, including the general powers granted to First Nations with respect to their inherent right to self-government. Finally, the authors propose a brief overview of the status of lands according to said Agreement-in-Principle.

II. THE INNU

The Innu Nations are a semi-nomad people whose traditional lands range from central Quebec extending east and comprising one third of the total area of Labrador. The Quebec Innu First Nations are located in urban, semi-urban and rural areas and are composed of the following First Nations ranging from west to east: Mashteuiatsh, Essipit, Pessamit, Uashat-Mani-Utenam, Matimekosh, Ekuanitshit, Nutashkuan, Unamen Shipu and Pakua Shipi, identified on the map produced by the Indian Affairs and Northern Canada and attached hereto under Schedule A.

Trading posts were established on their traditional lands, called “Nitassinan”, in the mid-nineteenth century. Nitassinan was significantly affected by colonial development at the end of the twentieth century due to acceleration in forestry and mining activities after the

Second World War however, certain First Nations remain isolated today, without any connection to the provincial land transportation system.

Land claim negotiations were first initiated in 1979 by the Atikamekw and Montagnais Council, established in 1975, representing the nine Quebec Innu Nations and three Atikamekw Nations. Due to differences of opinion, mainly with respect issues pertaining to recognition of aboriginal rights and certainty, the Atikamekw and Montagnais Council was dissolved and the Mamuitun Tribal Council was formed in 1994. In November 1999, the Nutashkuan First Nation decided to join First Nations negotiating under the Mamuitun Tribal Council. The Mamuitun mak Nutashkuan Tribal Council completed negotiations on the final draft of the *Agreement-in-Principle of a General Nature between the First Nations of Mamuitun Mak Nutashkuan, the Government of Quebec and the Government of Canada*² (hereinafter designated “Agreement-in-Principle” or “AIP”) in April 2002.

The Agreement-in-Principle was signed in March 2004 by Chief Denis Ross of the Essipit First Nation, Chief Gilbert Dominique of the Mashteuiatsh First Nation, Chief Richard Malec of the Nutashkuan First Nation, and Chief Raphaël Picard of the Pessamit First Nation as well as Mr. Benoît Pelletier, minister responsible for Aboriginal Affairs in Quebec and Mr. Andy Mitchell, minister responsible for Indian and Northern Affairs Canada.

Following more than thirty years of negotiations, together with changes in political representatives, negotiators, and other important actors, the Essipit, Mashteuiatsh and, Nutashkuan First Nations, representing a total population of approximately 5 900 Innus, continue negotiations today in the hope of concluding a treaty in the near future.

² A note of caution: the French version of the Agreement-in-Principle entitled "*Entente de principe d'ordre général entre les Premières Nations de Mamuitun et de Nutashkuan et le Gouvernement du Québec et le Gouvernement du Canada*" is considered to be the only official version of the Agreement-in-Principle. Treaty negotiations have been entirely carried out in French and are based upon the original French text. The English version of the Agreement-in-Principle was translated solely for consultation purposes.

III. AGREEMENT-IN-PRINCIPLE OF A GENERAL NATURE

The current presentation will focus primarily on the third chapter, entitled “General Provisions”, containing the section “Recognition of Aboriginal Rights and Certainty” and the eighth chapter, entitled “Self-Government”, of the Agreement-in-Principle.

In drafting the Agreement-in-Principle, negotiators agreed that the future treaty was to be drafted in substantially the same terms as the Agreement-in-Principle (section 3.1.2 AIP).

The Agreement-in-Principle is said to be of a general nature since parties chose not to include as much detail as often found in other modern Agreements-in-Principle. The current text establishes a general structure enabling the parties to take more time in drafting the text of a treaty that reflects the innovative formula for the recognition of aboriginal rights, including aboriginal title. The effects of aboriginal rights and the manner in which they are exercised must be properly described in order to avoid insertion of a formula for surrender, extinction, modification or other similar certainty model.

A. Development of a Formula for Recognition and Certainty

Negotiations for an Agreement-in-Principle were compromised namely, but not limited to, conflicting views with respect to adoption of a general formula for the recognition of aboriginal rights, including aboriginal title, while achieving sufficient certainty. Moreover, the extent of the general powers granted to First Nations with respect to self-government was problematic. Consequently, following the establishment of the Mamuitun Tribal Council, a “common approach” was adopted in early 1999 whereby negotiations were to be based upon the concept of mutual recognition.

Differences in opinions arose regarding current formulas for recognition and certainty used in various treaties involving direct or indirect surrender, extinction, or modification of aboriginal rights. As a result, a letter of agreement was signed in January 2000 between negotiators mandating a special committee of legal specialists (hereinafter designated the “Committee”) to try to find solutions using an “out of the box” approach. The Committee was composed of the following members:

- Mr. Roger Tassé, from the firm Gowling Henderson, deputy minister of the Department of Justice Canada during negotiations surrounding the adoption of section 35 of the *Constitutional Act of 1982*, representing the government of Canada;
- Mr. Jules Brière, from the firm Lavery de Billy, legal consultant for the government of Quebec for over forty years in questions pertaining to constitutional, aboriginal and administrative law, representing the government of Quebec;
- Mr. François G. Tremblay, senior partner from the firm Cain Lamarre Casgrain Wells, external legal advisor for the Mamuitun Tribal Council; and later,
- Mr. Ghislain Otis, law professor and well-known author, external legal advisor for the Mamu Pakatatau Mamit Assembly, representing the Innu First nations of Ekuanitshit, Unamen Shipu and Pakua Shipi, equally negotiating an Agreement-in-Principle.

The mandate of the Committee was to develop a new formula for the recognition of aboriginal rights, including aboriginal title, while ensuring a sufficient level of certainty, acceptable to all parties to the Agreement-in-Principle and future treaty. Early in its deliberations, the Committee decided not to submit a report with its conclusions to the negotiation table but rather, immediately begin work on drafting the text for a legal formula that could be integrated directly into the future treaty.

In developing its formula for recognition and certainty, the Committee consulted numerous legal professionals representing aboriginal communities, the Department of Justice Canada and the Department of Justice Quebec. Amongst others, professor Brian Slattery was consulted and participated in the deliberations of the Committee in order to validate certain key aspects of the innovative formula developed for the recognition of aboriginal rights and certainty.

B. Recognition of Aboriginal Rights and Certainty

1. Fundamental Principle: Treaty Protection of Aboriginal Rights

The formula is based on the principle that the future treaty shall grant recognition of aboriginal rights and certainty and shall protect all aboriginal rights, including aboriginal title, of the Mamuitun First Nations. Aboriginal rights are recognized, affirmed, protected and remain, as they exist today; the Agreement-in-Principle simply describes the effects of aboriginal rights and the manner in which they shall be exercised. The fundamental principle behind the formula for recognition of aboriginal rights and certainty is formulated in section 3.3.1 of the AIP:

3.3.1 The aboriginal rights, including aboriginal title, of each First Nation shall be recognized, affirmed and continued on Nitassinan by the Treaty and the implementation legislation. Henceforth, these rights shall also be protected by the Treaty. They shall have the effects and shall be exercised in the manner provided for in the Treaty in Nitassinan and, when the Treaty so provides, outside Nitassinan.

The rights of the Crown covered by the Treaty shall henceforth be exercised with respect to the lands of Nitassinan in accordance with the provisions of the Treaty as regards these rights. [...]

An essential element of the formula is that all aboriginal rights, including aboriginal title, shall be protected on the whole of the Nitassinan of each First Nation following the conclusion of a treaty. Aboriginal rights shall not be listed, defined or modified by the future treaty; they are recognized, affirmed, protected and continued. The terms of the treaty are limited to a description of the effects of aboriginal rights and manner in which they shall be exercised in a contemporary and dynamic context. Therefore, the formula provides an opportunity for First Nations to negotiate the text, of the description of the effects of aboriginal rights and manner in which they shall be exercised, in a large and liberal fashion. Where necessary in order to meet certainty objectives, the future treaty may provide further details with respect to the description of certain effects of aboriginal rights and manner in which they shall be exercised.

Assuming a tribunal declares, in the future, that an aboriginal right does not exist, additional protection is granted to said rights involving the conversion of former

“aboriginal rights” into treaty rights. Thenceforth, said rights shall be protected and continued as treaty rights according to the terms of section 3.3.2 of the AIP:

3.3.2 The Treaty shall not seek to exhaustively enumerate or replace the aboriginal rights, including aboriginal title, of each First Nation with treaty rights. It shall ensure that these rights, as well as the rights it creates, receive protection under section 35(1) of the *Constitution Act, 1982*.

If, by final judgment, a court of law decides that, despite the provisions of the Treaty, a right of the First Nations, for which the Treaty provides the effects and manner in which it should be exercised does not form part of the aboriginal rights, including aboriginal title, of these First Nations, this right shall be maintained as a treaty right as of the effective date of the Treaty.

The current formula provides constitutional protection of existing aboriginal rights according to section 35 of the *Constitution Act, 1982*, and ensures that First Nations shall continue to exercise their rights notwithstanding the fact that a tribunal has decided that said right is not an existing aboriginal right. The formula aims at discouraging litigation since, by establishing that an aboriginal right does not exist, said right is automatically converted into a treaty right – therefore rendering litigation futile.

Professor Slattery analysed the relationship between treaty rights and aboriginal rights as follows:

What is the relationship between treaty rights and aboriginal rights? Clearly, the relationship may vary, depending on the precise terms of the treaty and the overall context. In some cases, the treaty may recognize and guarantee certain existing aboriginal rights. In other instances, it may alter aboriginal rights, as by consolidating them, redefining them, sharing them, ceding them, or reshaping them in some other fashion. Where a treaty recognizes and guarantees aboriginal rights, it does not convert them into treaty rights, in the absence of very clear language to that effect. Treaty rights throw a protective mantle over aboriginal rights, providing an extra layer of security. The latter become "treaty-protected" aboriginal rights.

What does this additional layer of protection entail? First, where the Crown guarantees certain aboriginal rights in a treaty, it forfeits any asserted power to alter those rights by a unilateral prerogative act - that is, a Crown act not supported by legislation enacted in Parliament or by a treaty with the affected aboriginal group. According to some views, the Crown held special prerogative powers to deal with aboriginal peoples, which it could exercise by simple royal act, such as letters-patent or order-in-council. Whatever the

accuracy of these views, it is submitted that the Crown cannot exercise unilaterally any residual prerogative powers in a manner inconsistent with an historic treaty.

Second, treaty undertakings made by the Crown to aboriginal peoples give rise to particular fiduciary obligations to honour those undertakings—obligations that represent concrete instances of the Crown's more general fiduciary duties. So, as noted above, legislation passed by the Crown in Parliament should be construed as respecting the Crown's treaty undertakings, in the absence of language that specifically overrides the treaty provision. It is submitted that the requisite degree of legislative clarity is significantly higher in relation to treaty rights than it is to aboriginal rights, otherwise the treaty undertakings would not have the effect of reinforcing aboriginal rights, which are already protected by a rule of interpretation requiring "clear and plain" legislation.³ [Emphasis added]

The solemn nature of treaties as opposed to aboriginal rights is confirmed by the Supreme Court of Canada in the following extracts:

[...] it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. [...] the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.

There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in *Calder, supra*, at p. 328, they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.⁴ [Emphasis added]

³ Slattery, Brian, *Making Sense of Aboriginal Rights*, 2000, Canadian Bar Review, Volume 79, pages 197-224, at page 210

⁴ *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41, 76, confirmed in: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 19; *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*, 2008 YKCA 13, at para. 37

[...] it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.⁵

The Agreement-in-Principle can therefore be described as setting the foundation for a new generation of treaties. A brief overview of treaties in Canada illustrates the various forms of treaties that have been concluded in the past including, but not limited to, peace and friendship treaties; historical treaties; numbered treaties; treaties concluded in exchange for the surrender of aboriginal rights; treaties concluded with modified aboriginal rights; and, in the Agreement-in-Principle, a future treaty granting full protection of aboriginal rights.

Considering the experience of their neighbours, the Cree, that signed the *James Bay and Northern Quebec Agreement*, the Mamuitun First Nations decided that such a model did not meet the expectations of their First Nations. Due to the presence of the surrender, extinguishment, or modification models, courts and the Crown are no longer capable of recognizing or reviving existing aboriginal rights, only treaty rights remain. Consequently, aboriginal rights that may have been unintentionally omitted in drafting a treaty can never be recognized, only treaty rights remain. The distinction may appear purely theoretical however, one must recall that aboriginal rights are *sui generis* rights that arise out of prior and continuous occupation of ancestral lands whereas treaty rights are rights that have been granted by the Crown.

2. Self-government

Upon drafting the Agreement-in-Principle, the law, as described in *Delgamuukw* and *Pamajewon*⁶, was unclear as to the inclusion of the inherent right to self-government within the definition of aboriginal rights. In order to avoid any misinterpretations, section 3.3.3 of the AIP states:

3.3.3 Self-government, as an inherent right, is included among the aboriginal rights of the First Nations. It shall have the effects and be exercised by each First Nation according to the manner set out

⁵ *R. v. Sioui*, [1990] 1 S.C.R. 1025

⁶ *Delgamuukw v. British Columbia*, [1997] 3 R.C.S. 1010; *The Queen v. Pamajewon*, [1996] 2 R.C.S. 821

in the Treaty on Innu Assi and, when the Treaty so provides, outside of Innu Assi, in accordance with Chapter 8.

In drafting the formula for recognition of aboriginal rights and certainty, the main objective was to include a large and general description of the effects of aboriginal rights and manner in which they are exercised. However, with respect to self government, a more restrictive approach is necessary in order to define the division of powers between each order of government and establish conflict of laws rules. These powers, presently included within the eighth chapter of the Agreement-in-Principle, shall be described in greater detail within the future treaty in order to ensure that supremacy issues are addressed and to avoid litigation.

The inherent right to self-government grants general powers to the future aboriginal government, or Innu Tshishe Utshimau, of each First Nation to legislate in any matter related to the organization, general welfare, development and good governance of their communities, members and institutions. The objective was to use a formula similar to that of the division of powers in the *Constitutional Act of 1867*:

8.3.1 General Powers

8.3.1.1 The Treaty shall confirm the power of the legislative assemblies of the First Nations to enact laws on any matter related to the organization, general welfare, development and good government of their communities, members and institutions. The Treaty shall specify that these laws shall not be inconsistent with the provisions of the Treaty and with the Innu Constitutions.

Areas where the Mamuitun First Nations are granted exclusive powers are described in further detail. For example, sections 8.3.3.3 and 8.4.4.1(iii) of the Agreement-in-Principle provide Mamuitun First Nations with exclusive jurisdiction over all members of the First Nations that practice Innu Aitun, traditional activities of the Innu, on Nitassinan. Consequently, conflict of laws rules provide that Innu laws regarding the practice of Innu Aitun by its members shall prevail over any incompatible provincial or federal laws. Innu Aitun is defined in section 1.2 of the AIP according to the following terms:

1.2 Innu Aitun designates all activities, in their traditional or modern manifestation, relating to the national culture, fundamental values and traditional lifestyle of the Innus associated with the occupation and use of Nitassinan and to the special bond they have with the

land. These include in particular all practices, customs and traditions, including hunting, fishing, trapping and gathering activities for subsistence, ritual or social purposes. All spiritual, cultural, social and community aspects are an integral part thereof. The commercial aspects are, however, governed by the prevailing legislation of Canada and Quebec.

- 1.3** Innu Aitun entails the utilization of animal species, plants, rocks, water and other natural resources for food, ritual or social purposes and for subsistence purposes in accordance with section 5.2.4.

Although the exclusive power granted to Mamuitun First Nations regarding Innu Aitun limits jurisdiction to the practice of traditional activities by its members on Nitassinan, the definition of Innu Aitun is drafted in more general terms. This example illustrates how a specific aboriginal right can be granted a more generous interpretation when describing the effects of said aboriginal right and the manner in which it is exercised.

Hence, negotiations for the future treaty shall not revolve around the formula for recognition of aboriginal rights and certainty. The formula simply states that aboriginal rights are recognized, affirmed and continued, it does not impose a specific technique for describing the effects and manner in which aboriginal rights are exercised. Negotiators of future treaties shall be called upon to develop strategies for describing the effects of aboriginal rights and the manner in which they are exercised according to the priorities of the First Nations they represent. First Nations shall generally opt for a large and liberal description of the effects of an aboriginal right and manner in which it is exercised whereas as the Crown shall be inclined to adopt a more restrictive approach. Thus, by applying the same formula for recognition of aboriginal rights and certainty, different descriptions of the effects and exercise of aboriginal rights shall give rise to distinct treaties, adapted to realities of each First Nation.

3. Suspension of the Effects of an Aboriginal Right or the Manner in Which it is Exercised

What happens if the effect of an aboriginal right or the manner in which it is exercised is not described in the Agreement-in-Principle? The aboriginal right continues to exist and is not extinguished. However, since an aboriginal right can only be exercised according to the terms of the future treaty, the absence of a description of the effects of an aboriginal

right and the manner in which it is exercised leads to the suspension of the effects and the exercise of said aboriginal right, as stated in section 3.3.4 of the AIP:

3.3.4 The fact that the Treaty does not mention an effect or a manner in which an aboriginal right of a First Nation is to be exercised shall not result in the surrender or extinguishment of such an effect or such a manner to exercise the right. However, as of the effective date of the Treaty, the effects and manner in which the aboriginal rights of these First Nations are exercised other than those set out in the Treaty shall be suspended.

Any question regarding such suspended effect or manner shall be settled, having regard to section 3.3.15, solely by the application of sections 3.3.10 to 3.3.13.

Suspension of the effects of an aboriginal right and the manner in which it is exercised is not permanent. Said suspension may be lifted in accordance with sections 3.3.10 to 3.3.13 of the AIP upon amendment of the treaty, amendment of the Canadian constitution, and an international convention or with respect to “new” aboriginal rights, as described below in section 4.

The distinction between the suspension of the effects and the exercise of an aboriginal right described here above and the non-assertion fallback model contained in certainty formulas found in other treaties, resides in the temporal aspect of the suspension. Since the formula for recognition of aboriginal rights and certainty does not affect the aboriginal right per se, it is possible that the future treaty be amended, to later provide a description of the effects of the aboriginal right and the manner in which it is exercised.

The major challenge for negotiators representing First Nations and the Crown shall be to describe the effects of aboriginal rights and the manner in which they are exercised in an extensive and generous fashion while keeping in mind the large and liberal interpretation granted to the terms of the future treaty as stated in section 3.3.14 of the AIP.

4. Protection Mechanisms Aimed at Updating the Future Treaty

a) Amendment to the Future Treaty, the Canadian Constitution or as a Result of an International Convention

Protection mechanisms were inserted into the formula for recognition of aboriginal rights and certainty in sections 3.3.10 to 3.3.12 of the AIP. These mechanisms have been drafted to guarantee that the aboriginal rights of the Mamuitun First Nations remain protected and to ensure that the treaty does not cause prejudice to Mamuitun First Nations in comparison with First Nations that have chosen not to enter into a treaty with the governments of Quebec and Canada. Thus, Mamuitun First Nations shall, according to the terms of the following sections, benefit from the amendment of the treaty, the amendment of the Canadian constitution, or from the ratification and implementation of current or future international conventions:

- 3.3.10** The Treaty shall be of an indefinite duration and may not be repudiated by either Party. It shall, however, be reviewed at regular intervals and may be amended in accordance with the terms set out in Chapter 17.
- 3.3.11** The Treaty shall not prevent the First Nations from benefiting from any constitutional amendment related to the aboriginal peoples nor from exercising the rights recognized or created by such amendment as of its effective date. In the event that such an amendment is made to the Constitution of Canada, the Parties shall, if required, conduct, negotiations with a view to updating the Treaty to take into account the constitutional amendment.
- 3.3.12** Nothing in the Treaty shall prevent the First Nations from benefiting from current or future international conventions regarding aboriginal peoples, ratified and implemented in accordance with the constitutional framework of Canada.

b) “New” Aboriginal Rights

The formula for recognition of aboriginal rights and certainty contains a special treaty review mechanism where a “new” aboriginal right is recognized by a court of law whose effects and manner of exercise would normally have been described within the treaty, had said right been known by the parties upon conclusion of the treaty, to be a distinct

aboriginal right. An example of a “new” aboriginal right is the intellectual property of traditional aboriginal knowledge.

The essential difference between this special treaty review mechanism and the regular amendment provisions found in the seventeenth chapter of the Agreement-in-Principle resides in the absence of consent. Where the specific conditions mentioned in section 3.3.13 of the AIP are met, and upon reception of a notice from one of the parties, good faith negotiations are immediately undertaken to amend the treaty by describing the effects of the “new” aboriginal right and the manner in which it shall be exercised.

Furthermore, where the parties do not consent to the proposed amendment for a description of the effects of an aboriginal rights and the manner in which it is exercised, an independent third party shall be called upon to draft said amendment, as explained in greater detail in section 3.3.13 of the AIP:

3.3.13 Where, following the signing of the Treaty and the coming into force of the implementation legislation, a court of law of appellate jurisdiction confirms definitively the existence of an aboriginal right as regards a matter which the provisions of the Treaty are not truly designed to settle, the Parties, upon the request of a First Nation, shall have the obligation to initiate and conduct negotiations in good faith and make all reasonable efforts to determine whether the existence of this aboriginal right may be established in favour of the First Nations and, as required, to examine whether the Treaty should be amended. A First Nation may apply to a court of law to obtain a declaratory judgment on the existence, to its benefit, of such an aboriginal right.

The provisions to be included in the Treaty to set out the effects and manner in which to exercise a right, the existence of which is recognized by the Parties or established by a court of law pursuant to the preceding paragraph are to be negotiated and agreed upon by the Parties. A Party interested in initiating negotiations must notify the other Parties in writing of its intention to conclude an agreement and of the time and location it is prepared to meet them for this purpose.

Each Party shall then negotiate in good faith and make all reasonable efforts to develop provisions to be included in the Treaty. Failing an agreement within six months of the date of transmission of the first negotiation notice, a Party may notify the

other Parties in writing of its intention to submit the dispute to arbitration in accordance with Chapter 15.

The arbitrator will then act, according to the procedures and time schedule provided for in section 15.5, as an "amiable compositeur" in connection with the provisions to be included in the Treaty.

Each First Nation exercises a right the existence of which shall have been recognized or established pursuant to this section as soon as the provisions of the Treaty set out the effects and manner in which the right is to be exercised.

The act of remitting a question to an amiable compositeur is a concept originating from the Quebec *Code of Civil Procedure*, R.S.Q. c. C-25, at section 944.10. Such a vehicle is a powerful incentive for all parties to negotiate since, upon disagreement between the parties, the amiable compositeur is entrenched with the power to draft the future amendment. This mechanism obliges the amiable compositeur to take the whole treaty into consideration when describing the effects of a "new" aboriginal right and the manner in which it shall be exercised.

5. Living Tree Doctrine

The constitutional "living tree" doctrine⁷ is encompassed within the text of the future treaty through various mechanisms, such as the suspension of the effects of an aboriginal right or manner in which it is exercised, as well as the application of sections 3.3.10 to 3.3.13 of the AIP, in order to ensure a dynamic interpretation of the future treaty. Moreover, said doctrine of interpretation is crystallised in the future treaty in sections 3.3.14 and 3.3.15 of the AIP as follows:

3.3.14 The provisions of the Treaty shall receive a large and liberal interpretation, ensuring the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.

⁷ For further reference on the living tree doctrine see: *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.); *Reference re Same-Sex Marriage*, 2004 SCC 79, at para. 22; *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, at p. 1029; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at p. 723; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at p. 365; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155. *Canada (Attorney General) v. Hislop*, 2007 SCC 10, at para. 94-95; *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, at para. 27; Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (updated 2009), p. 33-16.

Each time a provision is expressed in the present tense, it shall be applied to the circumstances as they arise in order to carry it into effect pursuant to the first paragraph.

3.3.15 The Treaty shall bind the Parties and protect their rights not only as regards what they have expressed therein, but also shall protect that which flows there from according to practice and equity.

Actions undertaken by the Parties, according to the first paragraph, which are not mentioned in the Treaty, particularly as regards the exercise of aboriginal rights, including aboriginal title, of the First Nations, shall be consistent with its provisions.

The living tree doctrine, one of the most fundamental principles of constitutional interpretation, entails that the language of the treaty is to be given a progressive interpretation, rather than applying the “frozen rights” approach, in order ensure that the future treaty is adapted to reflect contemporary realities, new conditions and ideas. The living tree doctrine was first developed by the Lord Sankey, speaking for the Privy Council:

The B.N.A Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.

Their Lordships do not conceive it to be the duty of this Board it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but with certain fixed limits, are mistresses in theirs.⁸ [Emphasis added]

Subsequently, the living tree doctrine was confirmed in numerous decisions, it remains an underlying principle in interpreting constitutional documents:

It has been stated repeatedly on high authority that a constitutional document must remain flexible and elastic, in the words of Lord Sankey in *Edwards v. Attorney General of Canada*, at p. 136, “a living tree capable of growth and expansion within its natural limits”. There is nothing static or frozen, narrow or technical, about the Constitution of Canada.⁹ [Emphasis added]

⁸ *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136

⁹ *Attorney General of British Columbia v. Canada Trust Co. et al.*, [1980] 2 S.C.R. 466, at p. 478

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. [...] Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.¹⁰ [Emphasis added]

The Constitution must be interpreted flexibly over time to meet new social, political and historic realities¹¹ [Emphasis added]

The “frozen concepts” reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. [...] A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada’s constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted.¹² [Emphasis added]

As is true of any other part of our Constitution — this “living tree” as it is described in the famous image from *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136 — the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society. It is also important to note that the fundamental principles of our constitutional order, which include federalism, continue to guide the definition and application of the powers as well as their interplay. Thus, the very functioning of Canada’s federal system must continually be reassessed in light of the fundamental values it was designed to serve.¹³ [Emphasis added]

In a case regarding Métis rights, the Supreme Court has however placed certain limits on the application of the living tree doctrine in declining interpret “Indian” as including the Métis:

¹⁰ *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155

¹¹ *Ward v. Canada (Attorney General)*, 2002 SCC 17, at para. 30

¹² *Reference re Same-Sex Marriage*, 2004 SCC 79, at para. 22, 23

¹³ *Canadian Western Bank v. Alberta*, 2007 SCC 22, at para. 23

This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. Constitutional provisions are intended to provide “a continuing framework for the legitimate exercise of governmental power” [...] But at the same time, this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. As emphasized above, we must heed Dickson J.’s admonition “not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts”: *Big M Drug Mart, supra*, at p. 344¹⁴ [Emphasis added]

The “frozen rights” approach was dismissed with respect to aboriginal and treaty rights as illustrated in the following passages:

The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow, supra*, at p. 1093, that “the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time”. The concept of continuity is, in other words, the means by which a “frozen rights” approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.¹⁵ [Emphasis added]

Of course, treaty rights are not frozen in time. Modern peoples do traditional things in modern ways. The question is whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made [...] Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology.¹⁶ [Emphasis added]

The living tree doctrine has also been applied to modern treaties:

¹⁴ *R. v. Blais*, 2003 SCC 44, at para. 40

¹⁵ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 64

¹⁶ *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, at para. 25

I conclude that the Constitution of the Ta'an Kwäch'än Council should be interpreted as a constitutional document rather than a statute. The result is the application of a number of principles of interpretation that would not necessarily apply to the interpretation of statutes. What follows is not an exhaustive list, but some principles of interpretation that may assist in this case.

The first is the application of the "living tree doctrine".¹⁷ [Emphasis added]

Questions surrounding drafting of future treaties and interpretation of modern treaties are dependant upon the outcome of the decision of the Supreme Court of Canada in the *Little Salmon/Carmacks* case. It would be regrettable that, though an unnecessarily restrictive interpretation of modern treaties, the living tree doctrine be set aside, especially when one considers that it is a key factor in ensuring the constant evolution of a treaty and its flexibility to adapt in a contemporary context. The approach adopted by the government of Newfoundland and Labrador as intervener in the *Little Salmon/Carmacks* case raises many concerns due to the Attorney General's blatant dismissal of the living tree doctrine in modern treaties.

Adoption of an overly technical and detailed approach in drafting treaties increases the risk of not ensuring intended protection to all aboriginal rights. A treaty is concluded for future generations. Although First Nations negotiating a treaty attempt to foresee all possible outcomes and ensure an appropriate level of protection of aboriginal rights, omissions are bound to be discovered. Consequently, it is important that treaties be granted a certain level of flexibility and evolution in their interpretation.

C. Brief Note on the Status of Lands

In order to attain an enhanced understanding of the formula for recognition of aboriginal rights and certainty, a brief introduction on the status of lands is essential. The core principle is that the description of the effects of aboriginal rights, including aboriginal title, and the manner in which they are exercised on the whole of the Nitassinan of each First Nation, including Innu Assi, lands within the exclusive use of the First Nations,

¹⁷ *Harpe v. Massie*, 2005 YKSC 54, at para. 37-40, 55; *Harpe v. Massie and Ta'an Kwäch'än Council*, 2006 YKSC 1, at para. 94

shall be recognized and protected by section 35 of the *Constitutional Act of 1982* and the future treaty (section 4.4.1 AIP).

Section 3.3.22 and 4.4.2 of the AIP confirm that aboriginal rights, including aboriginal title, recognized, affirmed and continued on Nitassinan, as well as Innu Assi, are encompassed within the core of “Indianness” of the Mamuitun First Nations. Moreover, said provisions state that all or parts of Nitassinan or Innu Assi, as described within the future treaty, shall not be interpreted as being “lands reserved for Indians”, in accordance with subsection 91(24) of the *Constitutional Act of 1867*.

IV. CONCLUSION

In the course of their negotiations, Mamuitun First Nations chose to develop an innovative approach that would ensure peaceful coexistence and reconciliation of aboriginal peoples and non-aboriginal peoples on Nitassinan. In light of the affluence of younger generations within the total population of the Mamuitun First Nations, it was important that the future treaty recognize and protect aboriginal rights whilst providing enough flexibility to adapt to constantly evolving modern realities.

The formula for recognition of aboriginal rights and certainty developed in the Agreement-in-Principle is not perfect, it is a compromise; the result of long and difficult negotiations in order to find a solution that would be acceptable to all parties. However, it is an innovative formula that has the advantage of offering an adequate level of certainty to the Crown, without having to resort to the extinction models, modification models, or a fallback surrender model.

Moreover, the spirit of the future treaty and, in particular, the self-government provisions that grant general powers to the Innu Tshishe Utshimau, reflect the aspiration and determination of the Mamuitun First Nations to eventually reach a level of self-sufficiency.

The formula for recognition of aboriginal rights and certainty is a complex formula that should be revisited once the final draft of the treaty is completed in order to ensure it

meets the concerns raised, to the satisfaction of all parties involved in the negotiation of the future treaty.

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SCHEDULE A

MAP OF THE FIRST NATIONS OF QUEBEC



Source : http://www.ainc-inac.gc.ca/ai/scr/qc/aqc/Nations_2007.pdf