

APPENDIX

A SUBMISSION TO THE
ROYAL COMMISSION ON ABORIGINAL PEOPLES
BY NUNAVUT TUNNGAVIK

November 29, 1993

Introduction and Overview

On behalf of Nunavut Tunngavik, we would like to thank members of the Royal Commission on Aboriginal Peoples for the opportunity to appear before you today.

With a view to reserving time for informal exchange with Commissioners, we will keep our opening remarks as brief as possible.

Commissioners have been supplied with some background information as to the make-up, role, and objects of Nunavut Tunngavik. Put succinctly, Nunavut Tunngavik is a not-for-profit corporation representing some 17,500 Inuit of the Nunavut area for two purposes: (1) the effective implementation of the Nunavut Agreement signed on May 28, 1993 and given force of law on July 9, 1993 (formally called "An Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada"); and (2) the successful launching of the new Nunavut Territory and Government on or before April 1, 1999.

The sheer size of the Nunavut area, combined with lessons garnered from past land claims agreements, has resulted in the Inuit of Nunavut distributing implementation responsibilities among Inuit organizations in a way different from other parts of Canada. In the event that Commissioners wish to hear more about the way in which the Nunavut Tunngavik has been structured, and how Nunavut Tunngavik is connected with other Inuit organizations in the Nunavut area, we would be happy to elaborate later.

The focus of this presentation is not on how the Inuit of Nunavut are organizing themselves to maximize the benefits of the Nunavut Agreement and the creation of the Nunavut Territory and Government. Rather, the presentation attempts to identify certain parts of federal government policy in relation to land claims and self-government that should be changed so as to bring about

better results for both aboriginal and non-aboriginal Canadians. It is the hope of Nunavut Tunngavik that clear, well-founded and pragmatic recommendations set out in the Royal Commission's final report may result in a public policy environment that supports an enhanced level of aboriginal self-determination and self-sufficiency.

We are conscious of the obligation of the Royal Commission to review the history of relations between aboriginal and non-aboriginal societies in Canada. The Commission will, no doubt, examine the mistakes that have sometimes warped those relations, and underscore the tangible and hidden costs of such mistakes. Where past injustices, such as the hardships imposed on the High Arctic Inuit exiles, demand forthright acknowledgment, we urge the Royal Commission to say bluntly what needs to be said. It is this aspect of the Royal Commission's work that may serve to persuade contemporary Canadian society of the need for new ways of looking at and doing things, and dissuade future generations from forgetting the lessons of the past.

We cannot forget history. At the same time, we hope that the main message of the Royal Commission's final report will be that there are many concrete ways of building better relations between the aboriginal and non-aboriginal realities within Canada. The main impact of the Commission's work will be what it says about the choices that are ahead of us, not the missed opportunities that are behind. We encourage the Commission to be as specific as possible in formulating its recommendations. We also encourage the Commission to anticipate and address the arguments of those who may object to various recommendations. It is obvious that the reception afforded the Royal Commission's recommendations will be coloured by broadly and deeply held concerns about a variety of topics. These topics will include the size of the public debt and the state of public finances, the toll of the economic recession

and the weakness of the economic recovery, and the tightening interdependence between Canada and the global economy. It would be advisable for the Royal Commission to supply compelling arguments about the workability of its recommendations, as well as about their moral weight.

The mandate of Nunavut Tunngavik does not extend to the Inuit of Labrador, Nunavik or the Beaufort Sea Region. As Commissioners realize, the primary responsibility for co-ordinating and presenting the views of Inuit to the Royal Commission has been taken up by Inuit Tapirisat of Canada. The efforts of Inuit Tapirisat in this regard have been particularly welcome for Inuit leaders in the Nunavut region, as we have been preoccupied in the past year with the many demands associated with concluding the Nunavut Agreement and putting a firm legislative footing to the new Nunavut Territory and Government. Accordingly, in making this presentation, it is the intention of Nunavut Tunngavik to build on the presentation already made by Inuit Tapirisat. Instead of attempting to cover the range of issues dealt with in the presentation by Inuit Tapirisat, we would like to speak to five topics of particular concern to us. They are:

1. the issues of legal certainty and finality in land claims agreements;
 2. the relationship between land claims agreements and aboriginal self-government;
 3. the establishment of the new Nunavut Territory and Government;
 4. adequate support for traditional land-based economies;
- and

5. measures important to neighbouring northern aboriginal groups.

We will speak to each of these topics in turn.

The Issues of Legal Certainty and Finality in Land Claims Agreements

Like the numbered treaties entered into by the Crown and Indian nations in the nineteenth and early twentieth centuries, and like other modern comprehensive land claims agreements, the Nunavut Agreement contains a provision whereby the Inuit of Nunavut, in consideration of the rights and benefits in the Agreement, cede to the Crown any aboriginal title in and to the lands and waters of Nunavut that may have arisen under Canadian common law.

Needless to say, this provision of the Agreement was not suggested by Inuit. Inuit negotiators argued that an adequate level of legal certainty could be obtained through an appropriately worded Agreement without the inclusion of this provision. Nonetheless, this provision was ultimately included on the insistence of the Government of Canada that no agreement could be concluded without it. Inuit leaders agreed to inclusion of this provision only with the greatest reluctance and only upon concluding that the rights and benefits set out in the Agreement are, on objective assessment, greater than the rights that could likely be secured through the courts in the foreseeable future based on assertions of aboriginal title.

It should be pointed out that the "cede, release and surrender" language in the Nunavut Agreement does not bring about

complete legal certainty. This conclusion flows from factors such as the following:

- the "cede, release and surrender" provision does not relate to non-proprietary rights of the Inuit, such as the right to self-government;
- the provision does not purport to alter the fiduciary or trust relationship between Inuit and the Crown (indeed, it arguably could be at odds with it);
- the provision could be affected by emergence of a judicial doctrine characterizing aboriginal rights as a species of fundamental human rights incapable of complete or permanent alienation (it is possible to see elements of such a doctrine in the Mabo decision of the Australian High Court); and
- the provision is part of a contract between Inuit and the Crown, thereby raising questions about what might happen in the event of circumstances amounting to fundamental breach of the contract by the Crown or to frustration of the contract.

Just as the Nunavut Land Claims Agreement does not bring about complete legal certainty, the Agreement does not constitute a final word on the nature and scope of Inuit rights in Nunavut or on the organization and operation of land and resource management bodies operating under the Agreement. This is evident in a number of aspects of the Agreement:

- there is a schedule for enactment of additional legislation by Parliament in relation to a set of land and resource management boards made up of Inuit, federal government and territorial government nominees (this

additional legislation cannot detract from the force of law given to the various provisions in the Agreement dealing with these boards);

- flexibility is allowed in the initial design and subsequent legislative evolution of the Nunavut Territory and Government (the commitment to the creation of the new Nunavut Territory and Government described in Article 4 of the Nunavut Agreement is Constitutionally guaranteed;

- there is a requirement that the parties to the implementation contract accompanying the Nunavut Agreement revise, at predictable intervals, the budget allocations of various bodies set up under the Agreement; this requirement is an on-going one; and

- the Nunavut Agreement provides a simple mechanism for its own amendment.

In many respects, the Nunavut Agreement can be said to achieve neither complete legal certainty nor finality. But the federal government's preoccupation with achieving these two things has been unfortunate.

It is understandable that any agreement between the Crown and an aboriginal party in relation to the ownership and management of lands and resources would be required to provide enough legal certainty to allow the parties to the Agreement, and third parties relying upon it, to be confident that the fundamental features of the Agreement would be implemented and honoured. It would not be possible for either Inuit, public agencies, or private sector investors to make intelligent economic choices in a post-land claims agreement context in the absence of some predictability about the "rules of the game". Accordingly, the objective of achieving an acceptable level of

legal certainty through a land claims agreement in relation to the ownership and administration of lands and resources is not offensive in principle. Provisions supplying legal certainty should, however, be realistic in their limits and be equally respectful of the needs of aboriginal peoples and the Crown.

Under the federal government's current comprehensive land claims policy, the federal government regrettably insists on incorporating the provocative vocabulary of "cede, release and surrender" into agreements. It is possible to imagine a formula for achieving adequate legal certainty which would employ an alternate vocabulary of "recognition". For example, in consideration of rights defined for an aboriginal party to an agreement, the aboriginal party could "recognize" the status of certain lands as Crown lands governed by laws of general application relating to the administration of Crown lands.

With respect to finality of results, it is self-deluding and self-defeating for the Government of Canada to pursue a comprehensive land claims policy that supposes that the terms of land claims agreement, once entered into, can be fixed for all time. There can be no acceptable final definitions of the compromises that must be made between societies over succeeding generations. The conclusion of a modern land claims agreement must be seen as a beginning, not an end. All aspects of federal government policy towards aboriginal peoples must reflect both the determination of aboriginal peoples to retain distinct identities and the willingness of the Canadian public to reach a workable and enduring accommodation of this determination. The emphasis on finality in the current federal land claims policy is at odds with the federal government's expressed support for aboriginal self-government. In the event that comprehensive land claims agreements are to serve as a central reference point in the balancing of the distinctiveness of aboriginal societies and the demands of a common Canadian citizenship, then the agreements

must be open to periodic review, re-negotiation and amendment. It is ambitious enough for the representatives of the Crown and an aboriginal people to achieve a mutually beneficial agreement for the foreseeable future; it is ludicrous to try to anticipate with precision the circumstances and need of all future generations.

The expectation that land claims agreement create short-term and medium-term legal certainty only makes sense if there is acceptance of the requirement for flexibility, not finality, in the long-term. Mechanisms providing for greater long-term flexibility, such as mandatory periodic review and access to compulsory arbitration, do not, of course, have to impose unfair risks on third parties. Such mechanisms for long-term flexibility can stipulate that all third party interests, whether enjoyed by corporations or by individuals, shall be respected in any revisions of a previously concluded land claims agreement.

This need for the periodic review and re-negotiation of land claims agreements has been widely recognized for some time, as has been the need for an independent, objective body to provide advice and assistance. The report of the Coolican Task Force in the mid-1980s recognized these needs. The package of Constitutional reforms contained in the Charlottetown Accord contained provisions dealing with treaty renovation. As recently as October, 8, 1993, the Liberal Party of Canada called for the creation of a Claims Commission with the following functions:

"... to report regularly to Parliament; to facilitate claims negotiations; to establish time frames; to develop criteria for validating claims; to inquire into the need to clarify or renovate treaties to make their express terms consistent with their spirit and intent; and to have an ongoing role in the implementation of claims agreements".

Nunavut Tunngavik recommends that the Royal Commission make

the creation, mandate, and operation of such a Claims Commission a central part of its work and final report. In light of the importance of such a body, we suggest that the Royal Commission be as specific as possible with respect to the role of a Claims Commission, indicating its views with respect to the legal basis of such a commission, reporting relationships, precise powers, and administrative organization and resources. We also suggest that the Royal Commission review carefully the need for assurances to non-aboriginal Canadians against any legal or financial uncertainties that might follow from the work of a Claims Commission.

The Relationship between Land Claims Agreements and Aboriginal Self-Government

There is no compelling reason to try to exclude issues of aboriginal self-government from land claims negotiations or agreements, and there are many good reasons for including them.

A review of northern land claims agreements reveals many provisions intended to provide aboriginal peoples with greater involvement and control over law making and public administration within aboriginal homelands. Joint aboriginal/senior government land and resource management boards are an example of this. Northern land claims agreements have given rise to new school boards, regional governments, and, in the case of the Nunavut Agreement, a new territory and territorial government. Attempts to divorce issues of land rights and self-government have only served to distract from an honest evaluation of the overlaps between land rights and self-government issues without in any way deflecting aboriginal peoples from insisting on the need for progress on both fronts. It is time to acknowledge, particularly in the North, that responding to aboriginal demands by drawing abstract black and white distinctions between "public government"

and "private rights", and between "ethnic" and "non-ethnic" government, has often been unhelpful and unproductive.

The way in which commitments with respect to the creation of the new Nunavut Territory and Government have been negotiated and secured is a case in point. The commitment to create the new Nunavut Territory and Government is contained in Article 4 of the Nunavut Agreement and is thereby protected by section 35 of the Constitution Act, 1982. At the same time, the commitment to create the new Nunavut Territory and Government is expressed in such a way as to allow non-Inuit to play an active role in the political life of the new territory, and also to provide Parliament with considerable legislative discretion in the design and operation of the new territorial government. In this way, Article 4 is a triumph of pragmatism over preconceived policy. Land claims agreements provide an effective place to situate any further areas of agreement reached by aboriginal and Crown representatives with respect to enhanced level of aboriginal self-determination. If, for example, the Inuit of Nunavut and the Government of Canada were to reach an understanding in the coming years about a funding formula for the Nunavut Government, or the acquisition to greater natural resource jurisdiction by the Nunavut Legislative Assembly, or residency requirements for voting for members of the Assembly, then these understandings could be expressed in the form of amendments to Article 4 of the Nunavut Agreement. In this way, the protection of further understandings as to the best ways for promoting a satisfactory level of self-government by aboriginal peoples could be achieved by making full use of the opportunities provided in the existing Canadian Constitution.

Nunavut Tunngavik recommends that the Royal Commission support a policy that land claims and self-government issues should be open to negotiation in unison and that amendments to already concluded land claims agreements be regarded as an

appropriate way to achieve a greater degree of self-government by aboriginal peoples. We should point out that, in the case of the Inuit of Nunavut, we are fully occupied with the challenges already in front of us relating to the establishment of the Nunavut Government by 1999, and we do not foresee making any early requests for the elaboration of the guarantees already set out in Article 4 of the Nunavut Agreement.

The Establishment of the New Nunavut Territory and Government

The commitments made by the Government and Parliament to the creation of the new Nunavut Territory and Government have generated a great deal of excitement and optimism in Nunavut, particularly among the youth. For Inuit, the fixing of a firm timetable for the establishment of the Nunavut Territory and Government has been the result of almost twenty years of Inuit persistence and patience. It should also be said that the success of "the Nunavut project" in recent years has been greatly assisted by the efforts of a number of supportive non-Inuit Ministers and officials within the federal and territorial governments.

Excitement over the prospect of the new Nunavut Territory and Government is not confined to the Arctic. The commitments made by the Government and Parliament of Canada have also been viewed very positively by Canadians outside Nunavut and, indeed, by the international community. For many, Nunavut represents an example of how, with hard effort, open ears and open minds, and a will to compromise, it is possible to give concrete expression to the aspirations of aboriginal peoples in Canada to become active political partners in Confederation, not passive objects of administration by outsiders.

The smooth setting up and early operation of the new Nunavut

Government will entail an enormous amount of work in the coming years. Eagerness will result in mistakes as well as accomplishments. But it is vital to Inuit, and equally vital to Canada, that our efforts succeed. The enormous challenges associated with ensuring that the new Government is set up in an orderly and timely way, with a maximum of Inuit participation in the new territorial government work force, must not be hampered by unrealistically drawn financial parameters.

Nunavut Tunngavik suggests that the Royal Commission emphasize the following in its final report:

- the successful establishment of the Nunavut Territory and Government is vital to Inuit and all Canadians, both for its intrinsic importance and as an inspiration for other parts of Canada and the world;
- the Government of Canada has a very high moral obligation to ensure that financial arrangements leading to and following the establishment of the new Nunavut Government are adequate; and
- every effort should be made under existing and new education and training programs to ensure that the work force of the new Nunavut Government is made up of a high and growing proportion of Inuit, as stipulated in relevant provisions of the Nunavut Agreement.

Adequate Support for Traditional Land-Based Economies

"Living on the land", and the "country food" obtained from doing so, are key issues for many, if not most, aboriginal peoples and communities in Canada. Numerous studies over the last ten years by a range of governments, non-governmental

organizations, academics, and aboriginal organizations have documented the economic, social and cultural importance of traditional land-based economies, centred around hunting, fishing, trapping and gathering activities. These studies have consistently and graphically revealed the large cash value of the food and other goods produced by traditional land based economies and the critical role of food production and distribution networks in maintaining cultural continuity and social cohesiveness.

In contrast with some other forms of primary production activity in Canada, like small scale commercial fishing and the family farm, the hunting, trapping, fishing and gathering economies so important to aboriginal peoples have been largely undervalued and ignored. Little serious attention has been given by public policy makers to finding ways of reinforcing the viability of these economies in the form of well considered economic development, income assistance, and taxation policies and programs.

The hunter support program established for James Bay Crees through the James Bay and Northern Quebec Agreement has demonstrated the very favourable impacts of putting a more secure financial footing underneath traditional land-based economies. Some observers have calculated that hunter support programs can be rationalized on cost recovery as well as other grounds, if accurate assessment is made of health, welfare, justice and other public sector costs associated with hunters being forced to live sedentary lives away from the land. Unfortunately, apart from the James Bay Cree and northern Quebec Inuit programs established in the 1970s, there is little practical basis for guiding the design and costing of programs. The federal government's comprehensive land claims policy has been hostile to the introduction of new hunter support programs through the provisions of land claims agreements; concerted attempts by the Inuit of Nunavut to change

this policy throughout the 1980s were unsuccessful. Despite a lack of federal government involvement, both the Inuit of Nunavut and the Government of the Northwest Territories are committed to developing a hunter support program taking best advantage of resources available. Each has pledged contributions of \$15 million over five years towards a special trust fund for this purpose. Despite these tangible investments, initial research indicates that federal income tax law and other constraints may greatly restrict the positive impact that even a non-federally funded program might have.

Given the importance of traditional land-based economies to aboriginal peoples throughout Canada, and the vulnerability of those economies to the anti-fur movement and other international and domestic factors, Nunavut Tunngavik urges the Royal Commission to devote careful attention to how comprehensive hunter support programs might be established for the various aboriginal peoples and communities in Canada, mindful of the important differences in their land-based economies. Given the fundamental overhaul that may be in store for all of Canada's income maintenance and other social programs due to our shared fiscal problems, there may be an opportunity for the Commission to have a significant impact on an intensifying social policy debate. Nunavut Tunngavik would be willing to participate as actively as possible in the design and pursuit of any research initiatives or other efforts that the Royal Commission may make in support of recommendations in its final report concerning traditional land-based economies.

Measures Important to Neighbouring Northern Aboriginal Groups

The aboriginal peoples and communities of Canada face a diversity of challenges. Geographic, demographic, economic, and jurisdictional circumstances vary enormously. The Inuit of

Nunavut hope that other aboriginal peoples in Canada, particularly those whose situations the Inuit of Nunavut are most familiar with, will have appropriate attention devoted to their concerns. Without in any way claiming to speak for any aboriginal people outside Nunavut, Nunavut Tunngavik invites the Royal Commission to shape its final report and recommendations to reflect the following:

- the importance of offshore negotiations to the Inuit of northern Quebec;
- the need for priority to be attached to the conclusion of a comprehensive land claims agreement benefitting the Labrador Inuit; and
- the special rights and roles of aboriginal peoples in the adoption of a new constitution for the Mackenzie Valley.

In addition, Nunavut Tunngavik encourages the Royal Commission to take note of the unnecessary hardships created by the current federal government policy that prohibits any individual from being enrolled under more than one land claims agreement at the same time. As the world shrinks, and many Inuit in Nunavut form families with aboriginal citizens from areas neighbouring Nunavut and from further afield, it is offensive for parents and children to be compelled to deny a part of who and what they are. We hope the Commission's final report will emphasize that identity is a matter of personal choice and community acceptance, not inflexible policy pronouncements from on high.

Conclusion

Before concluding, we would like to make a note about the

term "land claims agreements". Nunavut Tunngavik has avoided using the words "land claims" in the formal name of the Nunavut Agreement. At the same time, Nunavut Tunngavik did not object to reference to the "Nunavut Land Claims Agreement" in the short title of the recent federal ratification legislation, due to the use of the term "land claims agreement" in the Constitution Act, 1982. It is for this same reason of conformity with Constitutional usage that we have used the generic term "land claims agreement" in this presentation.

We thank you for your attention and would be happy to try to answer any questions that you may have for us.

