Federal Court Cour fédérale

Date: 20240612

Docket: T-1606-19

Citation: 2024 FC 896

Ottawa, Ontario, June 12, 2024

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

INNU NATION INC.

Applicant

and

THE ATTORNEY GENERAL OF CANADA (Representing The Minister Of Crown-Indigenous Relations) and NUNATUKAVUT COMMUNITY COUNCIL INC.

Respondents

and

NUNATSIAVUT GOVERNMENT

Intervener

JUDGMENT AND REASONS

[1] This is an application for judicial review of the September 5, 2019, decision of the Minister of Crown-Indigenous Relations [Minister] to enter into a *Memorandum of*

Understanding on Advancing Reconciliation [MOU] with the Respondent, the Nunatukavut Community Council [NCC].

The Parties

Innu Nation Inc. – Applicant

[2] The submission of the Applicant, Innu Nation Inc. [Applicant or Innu Nation Inc.], describes the Innu people as belonging primarily to Mushuau Innu First Nation and Sheshatshiu Innu First Nation, referring collectively to these peoples as the "Innu of Labrador," who the Applicant states are an Aboriginal people under section 35 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]. Innu Nation Inc. is described as a corporation incorporated under the laws of the Province of Newfoundland and Labrador [Province] to represent the rights and interests of the Innu, including in ongoing land claim and self-government negotiations.

[3] Innu Nation Inc. indicates that treaty negotiations between Canada, the Province and Innu Nation started in 1978, after Innu Nation submitted a claim under the *Comprehensive Land Claims Policy*, and that negotiations toward a final agreement are ongoing. Innu Nation Inc. submits that a final agreement, once ratified, will recognize a range of rights to lands and waters in Labrador, including ownership and jurisdiction over lands in some areas and rights to hunt, harvest, fish and benefit from economic developments in others. In that regard, Canada's submissions indicate that the Innu Nation, Canada and the Province have been engaged in modern treaty negotiations since 1997 and, as a part of that process, those parties signed a

Framework Agreement on March 29, 1996, and an Agreement-in-Principle on November 18, 2011, and are now at the stage of completing negotiations for a Final Agreement.

NunatuKavut Community Council Inc. – Respondent

[4] The Respondent, NCC, describes itself as an Inuit governing body. It indicates that it was formed in 1981 as the Labrador Métis Association [LMA] and incorporated into a society in 1985 to advocate for the recognition and protection of its people's rights as Indigenous people. LMA changed its name in 1998 to Labrador Métis Nation and, finally, to NCC in 2010.

[5] NCC indicates that it has been in the process of seeking recognition from Canada of its rights since 1991, when it submitted its first claim application as an "Inuit descendants claim" under the *Comprehensive Land Claims Policy* as it existed at that time. NCC subsequently applied on at least two other occasions under that policy, but these applications were also unsuccessful.

[6] NCC indicates that in late 2016, Canada invited NCC to participate in a reconciliation engagement process to advance the acceptance of NCC's comprehensive land claim, which concluded in 2017. In July 2018, the Minister established a Recognition of Indigenous Rights and Self-Determination [RIRSD] discussion table with NCC to advance reconciliation. Subsequently, NCC and Canada, as represented by the Minister, entered into the MOU.

Attorney General of Canada – Respondent

[7] The Attorney General for Canada [Attorney General] represents the Minister of Crown-Indigenous Relations in this application for judicial review. The Minister's powers, duties, functions and responsibilities are described in the *Department of Crown-Indigenous Relations and Northern Affairs Act*, SC 2019, c 29 (cif July 15, 2019) [CIRNA Act].

Nunatsiavut Government – Intervener

[8] The Nunatsiavut Government [NG] was granted leave to intervene in this application by Order of the Case Management Judge on May 2, 2023. The NG was permitted to file a memorandum of fact and law not to exceed 10 pages in length. The Order also states that, subject to the discretion of the applications judge, the NG shall not present oral submissions at the hearing of the application. I declined a subsequent request by NG to be permitted to make oral submissions.

[9] The NG describes itself as the successor to the Labrador Inuit Association, which completed a land claims agreement with Canada and the Province that came into force in 2005. The *Labrador Inuit Land Claims Agreement* is a land claims agreement protected by section 35 of the *Constitution Act, 1982* (*Labrador Inuit Land Claims Agreement Act*, SC 2005, c 27, ss 3 and 11).

The Challenge to the MOU

[10] The content of the MOU is described below and a copy of the MOU is attached as Schedule A to these reasons. The decision of the Minister to enter into the MOU is challenged by the Applicant.

[11] The Applicant, in essence, asserts that the MOU recognizes NCC as "an Indigenous collective capable of holding section 35 Aboriginal rights for the purpose of entering into discussions regarding rights recognition and self-determination," committing Canada and NCC to discussing what Aboriginal rights NCC may have; the beneficiaries of those rights; NCC jurisdiction over land, sea and ice; and, the exercise of NCC rights over land, sea and ice. However, that the lands to which NCC asserts Aboriginal title and rights are the subject of treaty negotiations between the Innu Nation, Canada and the Province. That treaty will, once concluded, recognize and protect the Innu of Labrador's Aboriginal rights and title to those lands. Given that NCC's Aboriginal rights and title claim overlaps with the Innu's, the Applicant asserts that the MOU threatens to impact the Innu's *Constitution Act, 1982,* section 35 rights [Section 35 Rights], delay the completion of the Innu's treaty and/or undermine the recognition or scope of the Innu's rights and title under the treaty. The Applicant submits that the MOU adversely impacts the Innu's Section 35 Rights and, therefore, is reviewable by this Court.

[12] The Applicant also submits that the decision was incorrect. The Applicant says that this is because the MOU is inconsistent with section 35 of the *Constitution Act, 1982*. Section 35(1) only recognizes and affirms the rights of the "Aboriginal peoples of Canada." Section 35(2)

identifies the "Aboriginal peoples of Canada" as Indian, Inuit and Métis peoples. NCC claims to be Inuit, but Canada has previously found that there is insufficient evidence supporting NCC's claim to be Inuit. Despite this, the MOU states that NCC is "capable of holding" Section 35 Rights as an "Indigenous collective." This gives NCC a legal recognition to which it is not entitled: only the Aboriginal peoples of Canada are "capable of holding" Section 35 Rights. NCC is not one of the Aboriginal peoples of Canada, and it cannot hold Section 35 Rights as an "Indigenous collective." The decision is therefore inconsistent with section 35 of the *Constitution Act, 1982*. It also exceeded the Minister's statutory authority, which is limited to relations with the Aboriginal peoples of Canada. Because NCC is not one of the Aboriginal peoples of Canada, the Minister had no authority to conclude the MOU with them.

[13] The Applicant also submits that the decision is unreasonable. This is because it cannot be justified in relation to the governing statutory scheme, the CIRNA Act. NCC is not one of the Aboriginal peoples of Canada, and the Minister's powers, duties, functions and responsibilities under the CIRNA Act do not extend to relations with the NCC. Further, the decision cannot be justified in relation to the facts constraining the Minister's decision making, including Canada's previous findings that there is insufficient evidence that NCC is one of the Aboriginal peoples of Canada. Nor can the MOU be justified in relation to common law tests for determining whether a group is one of the Aboriginal peoples of Canada.

[14] Finally, the Applicant submits that, because the MOU adversely impacts their Section 35 Rights, the Minister was obligated to consult with them prior to deciding to enter into the MOU, but the Minister failed in their duty to consult.

[15] The Applicant requests that the Court grant an order quashing the MOU and declaring that the Minister did not have the statutory authority or jurisdiction to enter into the MOU. In the alternative, that the Court grant an order quashing the MOU and declaring that the Minister failed to discharge the Crown's duty to consult and accommodate the Applicant and directing the Minister to promptly initiate and engage in deep, meaningful and adequate consultation.

The MOU

[16] By way of summary, the MOU is a six-page document. It starts with a preamble that, among other things, states that, by entering into the MOU, Canada and NCC commit to renewing and strengthening their nation-to-nation relationship; that the parties wish to explore new ways to advance reconciliation based on recognition of rights, respect, co-operation and meaningful partnership; that NCC identifies as an Inuit collective and has a longstanding assertion of Indigenous rights (including Aboriginal Title and Treaty Rights) to their asserted traditional territory of NunatuKavut; that Canada has recognized NCC as an Indigenous collective capable of holding section 35 Aboriginal rights, for the purpose of entering into discussions regarding rights recognition and self-determination; that the parties wish to work towards a common understanding of the scope and nature of the legal rights of NCC's membership; and, that the Minister is representing Canada in these RIRSD discussions and will invite other federal departments and agencies to participate, as appropriate, in the RIRSD discussion-table process.

[17] The MOU acknowledges that an RIRSD discussion table has been established and identifies its objectives. These objectives are (a) to identify the nature of the rights that NCC may hold, identify the beneficiaries of those rights and include this information for consideration in

any Joint Mandate Proposal, and (b) to develop one or more mutually acceptable joint negotiation mandates [Joint Mandates] for approval through each party's internal process, to serve as the basis for negotiations between the parties to advance reconciliation (MOU, para 2).

[18] The MOU states that, when approved by both parties, the Joint Mandate(s) will identify NCC priorities, which are not limited to but may include, among other topics, "[j]urisdiction over land, sea and ice and exercise of rights over land, sea and ice, where established" (MOU, para 3(a)). Where approved by both parties, any Joint Mandate(s) will also define the process for negotiations (MOU, para 4).

[19] The MOU addresses its legal status and states that, except for paragraphs 13, 14-15, 17-19, 22 and 25, the MOU is not legally binding and is "intended only as an expression of good will and political commitment, and does not create, amend, recognize or deny any legal or constitutional right or obligation on the part of either Party" (MOU, paras 13 and 25).

[20] The MOU states that the parties acknowledge that Canada may have a duty to consult an Indigenous group other than NCC which has or may have rights that are protected by section 35 of the *Constitution Act, 1982* and that may be adversely affected by a product of the RIRSD discussion table. And, in order to ensure that such duty is fulfilled, Canada may disclose to the other Indigenous group all or part of such product (in final or draft form) (MOU, para 19(a)). Similarly, the parties acknowledge that Canada may have a duty to consult NCC in respect of a product (final or draft) of negotiations between Canada and another Indigenous group which may adversely affect the asserted or established Section 35 Rights of NCC (MOU, para 20). The parties also acknowledge that where there is any overlap between the asserted rights of NCC, and

the asserted or established rights of other Indigenous groups, it is desirable that the overlap be addressed by discussions between NCC and the other Indigenous group (MOU, para 21(a)).

Issues

[21] The Applicant identifies the issues in this matter as whether the Minister's decision to enter the MOU was correct and reasonable and whether the Minister discharged their constitutional duty to consult the Applicant prior to entering the MOU.

[22] Having reviewed the submissions of the parties, I would frame the issues as follows:

i. Is the challenged Crown conduct, the entering into the MOU, justiciable?

ii. Does the Applicant have standing to bring this application for judicial review?

iii. Did the Minister have a duty to consult with the Applicant prior to entering into the MOU?

iv. Was the Minister's decision to enter the MOU correct or reasonable?

Preliminary Observation

[23] It may add some context and clarity to the reasons that follow to state, at the outset, what is and is not the subject matter of this judicial review. This judicial review is concerned solely with the Minister's decision to enter into the MOU. Questions as to whether the NCC is, or is not, an "aboriginal peoples of Canada" as defined in section 35(2) of the *Constitution Act, 1982* or what, if any, Aboriginal rights NCC may or may not have, and the relative strengths of any

asserted rights of the Applicant and NCC with respect to any overlapping claims, are well beyond the scope of this judicial review.

[24] In that regard, I acknowledge that the Applicant has expended considerable effort in asserting its view that NCC has previously failed to establish, under the *Comprehensive Land Claims Policy*, that NCC is an Aboriginal people of Canada.

[25] For its part, the NCC has expended considerable effort in asserting its view that its efforts to establish itself as an Aboriginal people of Canada, with associated rights, have been ongoing, and that various courts have recognized its claim as credible.

[26] It is not in dispute that the NCC has previously made unsuccessful claims under Canada's *Comprehensive Land Claims Policy*.

[27] In that regard, the background to NCC's claims is described in the affidavit of Mr. Casiel Rosenberg, Manager of Federal Negotiations, Northwest Territories Negotiations Directorate, Treaties and Aboriginal Government, Department of Crown-Indigenous Relations and Northern Affairs [Rosenberg Affidavit], filed by Canada in response to this application for judicial review. The Rosenberg Affidavit states that it provides background information about Canada's *Comprehensive Land Claims Policy* and the Recognition of Indigenous Rights and Self-Determination (RIRSD) Framework, as well as information about the status of modern treaty negotiations with the Innu Nation and background information about the development of the MOU.

[28] With respect to the NCC, the Rosenberg Affidavit states that the NCC is a corporate body under the laws of the Province and self-identifies as an Inuit organization. The NCC represents communities of people in central and southern Labrador who identify as southern Inuit. The NCC, or its predecessor, submitted a claim under Canada's *Comprehensive Land Claims Policy* on November 8, 1991. Following the initial claim submission, NCC, or its predecessor, filed two additional claim submissions. The claim was reviewed by Canada under the presumption that the claim was being made by an Inuit group. On several occasions from 1998 onward, Canada informed the NCC, or its predecessors, that the claim did not contain sufficient evidence to be accepted as a comprehensive land claim.

[29] However, as NCC and Canada point out, there have also been a number of court decisions involving NCC.

[30] The most significant of these is *Labrador Métis Nation v Newfoundland & Labrador*, 2007 NLCA 75 [*Labrador Métis Nation*]. The Newfoundland and Labrador Court of Appeal [NLCA] addressed the underlying issue of whether individuals of aboriginal descent living in southern Labrador had a sufficiently credible claim to communal aboriginal rights to trigger an obligation on the Crown to consult with them concerning wetland and watercourse crossings affected by Phase III of the Trans-Labrador Highway [TLH]. The applications judge had concluded they did. The Crown based its appeal primarily on the grounds that the LMN failed to produce sufficient evidence of a continuing aboriginal community and that neither it nor an individual representing the LMN should have standing to pursue the claim.

[31] The NLCA held that it was not always necessary to self-identify as either Inuit or Métis before the Crown's duty to consult and accommodate was triggered and that there had been sufficient evidence before the applications judge to support a credible claim that the claimants belong to an aboriginal people within section 35(1) of the *Constitution Act, 1982*:

> 36 I do not accept the appellants' submission that claimants always have to self-identify as either Inuit or Métis before the Crown's duty to consult and accommodate is triggered. I agree with the respondents that it was sufficient in the present case to assert a credible claim that the claimants belong to an aboriginal people within s. 35(1) of the *Constitution Act, 1982*. The respondents have established this by the affidavit evidence of Carter Russell, Todd Russell and Trent Parr, showing they are of mixed Inuit and European ancestry whose Inuit bloodlines have originated from those Inuit ancestors that resided in south and central Labrador prior to European contact. The unrefuted evidence before the applications judge was sufficient to demonstrate a credible claim that the members of the 24 LMN communities know they have genetic, cultural and land use continuity with their Inuit forebears, have a regional consciousness of a regional community, and occupy and use, for traditional hunter/gatherer purposes, lands and waters threatened with adverse effects by construction of the TLH.
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> 37 Whether the present day LMN communities are the result of an ethnogenesis of a new culture of aboriginal peoples, that arose between the period of contact with Europeans and the date of the effective imposition of European control, is not yet established, although it is possible that such an ethnogenesis occurred. If so, the members of the LMN communities could be, in law, constitutional Métis.
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> 38 However, it is also possible that the LMN communities are simply the present-day manifestation of the historic Inuit communities of south and central Labrador that were present in the area prior to contact with the Europeans. Or they may be the manifestation of a culture which developed only after effective European control in Labrador had occurred, in which case, on the basis of *Powley*, the culture could be viewed as involving non-aboriginal customs and practices, unprotected by s. 35(1). The fact that the actual bloodlines of the present-day aboriginal persons may have a mix of European and Inuit ancestry does not detract from the argument that the LMN communities may have "Inuit" aboriginal rights. The present-day manifestation of this authentic

> Inuit culture may simply have been impacted by centuries of Euro-Canadian encounter and influence.
>
> 39 The LMN communities have not refused to self-identify with a specific constitutional definition but they reasonably say they are unable, at the present time, to do so definitively. This position may change as further historical, archeological, anthropological and other information is obtained and as the law provides further guidance on these complex issues. In any event, definitive and final self-identification with a specific aboriginal people is not needed in the present circumstances before the Crown's obligation to consult arises. All the respondents had to do was establish, as they did, certain essential facts sufficient to show a credible claim to aboriginal rights based on either Inuit or Métis ancestry. The situation might be different if the right adversely affected only flowed from one of the Inuit or Métis cultures. But that is not the case. Here fishing rights are in issue. Those rights are not dependent upon whether the claim is Inuit or Métis-based. Fishing rights flow from both types of claims. The applications judge did not need to determine the issue of ethnicity.

[32] The NLCA also found that while the evidence before the applications judge was insufficient to establish an ethnogenesis or the actual date of effective control, the judge's other findings were sufficient to satisfy the test from *R v Van der Peet*, [1996] 2 SCR 507 and establish a credible claim based upon Inuit ancestry. Accordingly, that the Crown's analysis should have arrived at the same result, namely, that the LMN had a credible claim which triggered a duty to consult (paras 43-45).

[33] With respect to the scope of the duty to consult, a "preliminary evidence-based assessment" of the strength of the respondents' claim, such as discussed in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] at paras 37 and 39, supported the view that the LMN was more than a "dubious" or "peripheral" or "tenuous" one, which would attract merely a duty of notice. Rather, the LMN had "established a prima facie connection with

pre-contact Inuit culture and a continuing involvement with the traditional Inuit lifestyle. They have presented sufficient evidence to establish that any aboriginal rights upheld will include subsistence hunting and fishing" (para 51).

[34] The NLCA concluded, among other things, that: the LMN need not ethnically identify themselves definitively as Inuit or Métis before the Crown's duty to consult and accommodate arises; the applications judge erred in identifying the respondents as Métis, when the parties had made their submissions on the basis of Inuit rights, but this error did not invalidate his ultimate conclusion; the applications judge did not err in concluding that the respondents had a credible but unproven claim, giving rise to the Crown's duty to consult; and, the LMN's claim was at least strong enough to trigger a duty to consult at the low level requested.

[35] Other cases cited by NCC and Canada include *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981. There, the NCC challenged a decision of the Minister of Fisheries and Oceans authorizing impacts to fish and fish habitat arising from the construction of the proposed Muskrat Falls hydro-electric generating station. In that case, I noted that the NCC described itself as the self-governing organization representing the interests of the Inuit descendants (sometimes referred to as Inuit-Métis) of central and southern Labrador; that the NCC was formed in 2010; that, in 1991, the NCC's predecessor, the LMA (later known as the LMN), filed a land claim document with Canada; and that it filed additional research in 1996 and did so again in 2010 in the form of a document entitled *Unveiling NunatuKavut, Describing the Lands and People of South/Central Labrador, document in Pursuit of Reclaiming a Homeland, NunatuKavut, 2010* [*Unveiling NunatuKavut*]. In the matter then before me, there was no dispute

as to whether the Crown owed a duty to consult with NCC with respect to the project. Rather, at issue was the scope of that duty and, therefore, the depth of the consultations required. I noted that, generally speaking, the scope of the duty is proportional to a preliminary assessment of the strength of the case supporting the existence of the right or title claimed, and the seriousness of the potential adverse effects on that right or title (*Haida* at para 39). At that time, NCC's claim, although originally rejected by Canada, was being re-assessed. Before me, the NCC had not made substantive submissions supporting the strength of its claim in the context of a spectrum analysis. And, while *Unveiling NunatuKavut* was in the record, the Court had not been asked to and was not in a position to assess that document so as to determine the strength of the NCC's claim. Accordingly, I found that the best that could be done in those circumstances was to adopt the finding of the NLCA in *Labrador Métis Nation*, being that the claim was at least strong enough to trigger a duty to consult at the lower level.

[36] Canada and NCC also refer to cases pertaining to injunctive relief. These include *Nalcor Energy v NunatuKavut Community Council Inc*, 2014 NLCA 46 and *Nunatukavut Community Council Inc v Newfoundland & Labrador Hydro-Electric Corp*, 2011 NLTD 44.

[37] In sum, the 2007 decision of the NLCA in *Labrador Métis Nation* is the only case of those cited by Canada and the NCC that actually substantively engaged (at the applications level) with NCC's asserted rights. I described it in some detail above to demonstrate what that decision actually determined. Specifically, that LMN (now NCC) had a credible but unproven claim that was at least strong enough to trigger a low level of consultation. Subsequent case law has also recognized this. However, NCC's claim to be an Aboriginal people of Canada with attendant

Section 35 Rights has not been otherwise litigated. All efforts to resolve the claim have been by way of negotiation.

Preliminary Evidentiary Issues

[38] The jurisprudence is clear that, as a general rule, the evidentiary record before a reviewing court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]. The exceptions are an affidavit that: provides general background in circumstances where that information might assist the court in understanding the issues relevant to the judicial review; brings to the attention of the reviewing court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness; or, highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding (*Access Copyright* at paras 19-20; *Bernard v Canada Revenue Agency*, 2015 FCA 263 [*Bernard*] at para 30).

i. NCC Evidentiary Challenge

[39] NCC submits that Exhibit G of the Affidavit of Grand Chief Etienne Rich, a member of Sheshatshiu Innu First Nation and Grand Chief of Innu Nation Inc. [Chief Rich Affidavit], affirmed on November 3, 2022, and submitted by the Applicant in support of the application for judicial review, is inadmissible or should be afforded no weight.

[40] Exhibit G is a document obtained by the Applicant by way of an *Access to Information Act* request made in 2003. It is a review of LMN's *Comprehensive Land Claims Policy* submission. It is partially redacted and conducts a review of academic articles. It is undated and unsigned. The Applicant, and Chief Rich in his affidavit, rely on this document to support their view that NCC is not an Aboriginal collective capable of holding Section 35 Rights.

[41] This document is not contained in the certified tribunal record [CTR] and, therefore, is inadmissible on judicial review unless it falls within one of the above-described exceptions. The Applicant makes no submissions in that regard in their written submissions. When appearing before me, the Applicant asserted that the document supported their contention that the Minister's decision to enter the MOU was not justified, as the document was not found in the CTR or considered by the Minister. Even if I were to consider the document to be general background information or to provide factual or contextual matters not explicitly evident elsewhere in the CTR, but which was obviously known to the Minister (*Leahy v Canada (Citizenship and Immigration)*, 2023 FCA 227 at para 145), nothing turns on this document. It is not disputed that NCC has, in the past, submitted claims under the *Comprehensive Land Claims Policy* that were not accepted because of insufficient information. Accordingly, I afford Exhibit G little weight.

ii. Canada's Evidentiary Challenge

[42] Canada submits that Exhibits G, O, P, R, S, V and T of the Chief Rich Affidavit are inadmissible.

[43] I have dealt with the admissibility of Exhibit G above.

[44] Exhibits O and P do not match their descriptions in the Chief Rich Affidavit. The Chief Rich Affidavit and the Attorney General both say Exhibits O and P are letters to the Province from counsel for the Applicant concerning a provincial consultation process. However, Exhibit O is a letter from NCC's counsel to the Province responding to an invitation by the Province to address any concerns arising from a commercial cutting permit application. Exhibit P is a copy of the MOU, the decision under review. To the extent that the Applicant takes issue with NCC's involvement in the Province's commercial cutting permit application – the Chief Rich Affidavit asserts that this is interference with a benefits agreement entered into by the Applicant and the project proponent – that issue is not relevant to the matter before me, nor is Exhibit O found in the CTR. Accordingly, Exhibit O is not admissible.

[45] Exhibits R, S, and V are copies of news articles that report about the signing of the MOU. They post-date the signing of the MOU. Generally speaking, newspaper articles are inadmissible as they are hearsay and because they lack the necessary reliability to be admitted as evidence before a court (*Democracy Watch v Canada (Attorney General)*, 2024 FCA 75 at para 7).

[46] Exhibits R and S are referred to in support of Chief Rich's understanding of what the scope of the negotiations between NCC and Canada might be, including creating a formal process with Canada that may give rise to agreement about NCC's rights. However, the MOU is the decision under review. Thus, it is the terms of the MOU, and not a newspaper article discussing the MOU, that may delimit the scope of any negotiations.

[47] Exhibit V reports that Ms. Yvonne Jones, a Member of Parliament [MP], was named as a respondent in the subject application for judicial review and that she took issue with the Innu Nation's position. The Chief Rich Affidavit is unclear as to what the news article demonstrates. He refers to a conversation between his predecessor and Ms. Jones (to which Chief Rich was not a party) and his belief that she stated during that conversation that discussions with NCC did not involve land claims. Chief Rich asserts this was not correct because a month later the MOU was signed. Further, that Ms. Jones used her position as an MP to criticize the Innu Nation's leadership.

[48] It is possible that Exhibit V was intended to support the allegation found in the Amended Notice of Application that the MOU is "based on the political interest of Ms. Jones and the Minister," which are improper considerations that would render the decision to enter into the MOU *ultra vires*. However, the claim that the decision was made for an improper purpose was not pursued in the Applicant's written or oral submissions. The article is therefore irrelevant.

[49] I agree with the Attorney General that these news articles are inadmissible hearsay and that they are extrinsic to the record without falling into any of the exceptions to admissibility on judicial review. They are inadmissible.

[50] Exhibit T is a bundle of documents apparently obtained in response to another *Access to Information Act* request. The documents contained in the bundle are partially redacted and are comprised mostly of email communications setting meeting dates and agendas as well as entirely redacted RIRSD meeting notes. Chief Rich attests that the Applicant is shocked and frustrated at the apparent urgency with which Canada is treating NCC's claim as opposed to the Innu

Nation's claim. Chief Rich states that he is advised by counsel that these documents "appear to show" negotiations between NCC and Canada continue even after the application for judicial review was filed. However, the Applicant did not seek an injunction to stay any RIRSD discussion table discussions or other interactions between Canada and NCC pending the outcome of this judicial review. Therefore, in that regard, the documents are not relevant as NCC and Canada were free to continue the RIRSD discussions. With the exception of the question of the duty to consult, I agree with the Attorney General that this exhibit is irrelevant to the matters at issue, as well as being extrinsic to the record without falling into any of the exceptions. With respect to the duty to consult, the bundle is admissible as the documents could, potentially, demonstrate events triggering that duty. However, as in fact they do not demonstrate any developments in the RIRSD discussion table process, I afford them little weight.

iii. Applicant's Evidentiary Challenge

[51] The Applicant takes issue with paragraphs 4-7, 21-22, 26, and 30 of the affidavit of Todd Russell, President of NCC, sworn on May 25, 2023 [Russell Affidavit], and filed in response to this application for judicial review. The basis of the Applicant's challenge is that these paragraphs are not restricted to the affiant's personal knowledge and attempt to bootstrap the CTR.

[52] Paragraphs 4-7 of the Russell Affidavit describe who the NunatuKavut Inuit are, how they are descended from pre-contact Inuit, where their territory was located, and the activities they engaged in (and continue to engage in) with respect to that territory. Paragraphs 21-22 and 26 provide an explanation of the former use of the term "Métis" by the LMA and assert that the

NCC have always been Inuit with an unbroken line of continuity with respect to living on the lands, to the heritage and to the culture of the NunatuKavut Inuit. Paragraph 30 explains that, at the time the original land claim was made 32 years ago, the necessary evidence to advance the NCC's claim did not exist.

[53] It is true that Rule 81(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*] requires that affidavits be confined to facts within the deponent's personal knowledge. It is also obvious that Mr. Russell cannot have personal knowledge of the ancestral history of the NCC. Nor does he purport to provide expert opinion evidence. I am also not persuaded, as NCC proposes, that this is a circumstance where the Federal Court's *Practice Guidelines for Aboriginal Law Proceedings* (September 2021, 4th Edition) are appropriately applied. Here, testimony is not being given orally by an Elder (there is no evidence that Mr. Russell is an Elder or an equivalent thereof) or as to an oral history of NCC.

[54] However, for purposes of this application for judicial review, what is relevant and what is not disputed is that NCC has, in the past, submitted claims under the *Comprehensive Land Claims Policy* that were not accepted because of insufficient information. Accordingly, I accept these paragraphs as general background information providing only NCC's perspective as to its claim to be entitled to be recognized as an Aboriginal people of Canada with associated rights, and afford them little weight.

Justiciability

Applicant's Position

[55] The Applicant submits that the Crown's conduct in the present case is justiciable because it affects the legal rights of NCC, and because it affects the legal rights of and causes prejudicial effects to the Innu Nation. According to the Applicant, the MOU affects NCC's rights because it determines that NCC, as an Indigenous collective, is capable of holding Section 35 Rights. And, even if Canada reaffirms that NCC does not have Section 35 Rights or title, giving NCC "a seat at the table" to discuss what Section 35 Rights it may have is a "legal benefit" to which NCC, as a mere Indigenous collective, has no constitutional entitlement. Canada has previously found that NCC is incapable of holding Section 35 Rights.

[56] Further, that the MOU affects the Applicant's rights. This is because it is a strategic high-level decision that may impact the Applicant's claims and rights, which triggered the duty to consult. The obligation to consult includes an obligation by the Crown to consult with Indigenous groups when it signs preliminary agreements to negotiate with another Indigenous group that has an overlapping rights or title claim, even if, like the MOU, such an agreement is not legally binding and its impacts may not be immediate (citing *Sambaa K'e Dene Nation v Duncan*, 2012 FC 204 at paras 164-170 and 174 [*Sambaa*]).

[57] According to the Applicant, any discussion of NCC's jurisdiction over land, sea and ice and the exercise of such rights, which discussions the MOU commits Canada and NCC to having, will invariably encroach on the Innu's claim area. Recognition of NCC's rights will also lead to greater competition for economic benefits from development in that territory. The MOU therefore adversely impacts the Innu's Section 35 Rights, making the decision to enter into the MOU justiciable.

Intervener's Position

[58] The NG did not make submissions specific to the issue of justiciability.

NCC's Position

[59] The NCC submits that the Crown conduct at issue does not affect legal rights, impose legal obligations or cause prejudicial effects (citing *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133 at para 23 [*Democracy Watch*]). The Minister's decision to enter the MOU is a political commitment and does not have an impact on the rights of the parties. Nor does the MOU create or recognize rights or obligations. It also does not recognize NCC as an Aboriginal people under section 35 of the *Constitution Act, 1982*. Accordingly, any impact on NCC's, Canada's or the Applicant's rights are entirely speculative and do not arise from the MOU.

[60] The NCC suggests that the Applicant is really attacking Canada's decision to enter into discussions with NCC in the first place – but that decision pre-dates the MOU and does not impact the Applicant's rights. NCC was invited to join the RIRSD discussion table in July 2018. The Applicant is, according to the NCC, attempting to use the MOU to bring Canada's earlier decision to enter discussions before the Court. This should not be permitted (citing *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paras 29, 35, 42-43 [*Air Canada*]).

Canada's Position

[61] On justiciability, the Attorney General says that the decision to enter into the MOU is not adjudicative in nature and is therefore not amenable to judicial review. The MOU does not create, recognize or deny any legal or constitutional right or obligation on the part of either party. The MOU does not recognize the NCC as "Aboriginal peoples of Canada" pursuant to section 35 of the *Constitution Act, 1982*. Rather, the MOU is a policy decision to engage in without-prejudice discussions with NCC. It is intended as an expression of goodwill and a political commitment to discussion. This distinction – whether the decision is political or adjudicative in nature – is what determines whether an issue is justiciable. The Attorney General also voices concern that the Applicant fuses the distinct roles that negotiation and litigation play in advancing reconciliation. The outcomes of negotiated arrangements need not be resolved as they would through judicial proceedings. A finding that the MOU is amenable to review on substantive grounds would undermine the reconciliatory object of section 35 of the *Constitution Act, 1982* and would have a chilling effect on negotiations between the Crown and Indigenous peoples.

Analysis

[62] Whether a matter is justiciable, that is, whether it is subject to judicial review, depends on whether the matter affects legal rights, imposes legal obligations or causes prejudicial effects. Thus, in this analysis, it must be determined if the decision to enter into the MOU affects legal rights, imposes legal obligations or causes the Applicant prejudicial effects (*Democracy Watch* paras 23, 29, 40, 44; *Air Canada* at paras 26-30, 32).

a) Wording of the MOU

[63] It is of note that the entirety of the Applicant's arguments stem from the fifth (of ten) recitals found in the MOU. Specifically:

> **AND WHEREAS** Canada has recognized NCC as an Indigenous collective capable of holding section 35 Aboriginal rights, for the purpose of entering into discussions regarding rights recognition and self-determination;

The Applicant argues that the MOU affects their legal rights by "deciding" – by way of this recital – that NCC, as an Indigenous collective, is capable of holding Section 35 Rights.

[64] However, the MOU, in its preamble, states that Canada has recognized NCC as an Indigenous collective "*capable* of holding section 35 Aboriginal rights, *for the purpose of entering into discussions regarding rights recognition and self-determination*" (my emphasis). Further, the recital cannot be viewed in isolation. For example, the recitals immediately before and after the one in issue provide further context:

> **AND WHEREAS** NCC identifies as an Inuit collective, and has a longstanding assertion of Indigenous Rights (including Aboriginal Title and Treaty Rights) to their asserted traditional territory of NunatuKavut;
>
> **AND WHEREAS** Canada has recognized NCC as an Indigenous collective capable of holding section 35 Aboriginal rights, for the purpose of entering into discussions regarding rights recognition and self-determination;
>
> **AND WHEREAS** the Parties wish to work towards a common understanding of the scope and nature of the legal rights of NCC's membership;

[65] And, more significantly, within the body of the document, the MOU explicitly states that it is not legally binding and that it "is intended only as an expression of good will and political commitment, *and does not create, amend, recognize or deny any legal or constitutional right or obligation on the part of either Party*" (para 13, my emphasis). In my view, nothing in the MOU recognizes NCC as an "aboriginal peoples of Canada" or is a determination that NCC holds Section 35 Rights.

[66] This is also apparent from the stated objectives of the RIRSD discussion table:

> **Discussion table and its objective**
>
> 1. The Parties have established a Recognition of Indigenous Rights and Self-Determination (RIRSD) discussion table.
>
> 2. The objectives of the RIRSD discussion table will be to:
>
> (a) Identify the nature of the rights that NCC may hold, identify the beneficiaries of those rights, and include this information for consideration in any Joint Mandate proposal.
>
> (b) Develop one or more mutually acceptable joint negotiation mandates (the "Joint Mandate(s)") for approval through each Party's internal process, to serve as the basis for negotiations between the Parties to advance reconciliation.

[67] Thus, the objectives are to identify the nature of the rights that NCC "may hold," as well as the beneficiaries of those rights, to be included for consideration in any joint mandate proposal. Any such joint mandate would then serve as the basis for negotiations between the parties to advance reconciliation.

[68] And while the Applicant emphasizes paragraph 3(b) of the MOU as demonstrating that NCC rights have been decided and that this determination will, in turn, affect their rights, this

paragraph states that approved joint mandates will identify NCC priorities, which may include, but are not limited to, the items listed, one of which is “jurisdiction over land, sea and ice and exercise of rights over land, sea and ice, *where established*” (my emphasis). The MOU itself does not establish those rights.

b) Intent of MOU

[69] Canada, in response to the application for judicial review, filed the Rosenberg Affidavit. This explains that Canada’s *Comprehensive Land Claims Policy*, as well as Canada's *Inherent Right Policy*, were historically the main negotiation processes for addressing unresolved Aboriginal rights and title, and for the establishment of self-government arrangements outside of the *Indian Act*. The process for modern treaty negotiations or comprehensive land claims agreements involves a claim submission that requires the identification of the Indigenous group and a statement of its traditional territory, land use and occupancy. However, these policies were criticized for being inflexible, disproportionately geared towards federal interests and unable to acknowledge and respond to the unique circumstances of Indigenous groups.

[70] Therefore, in addition to negotiating comprehensive land claims agreements and modern treaties, Canada is also working with Indigenous groups to explore new and more flexible ways of working together to advance the recognition of Indigenous rights and self-determination, including the RIRSD framework. The Rosenberg Affidavit states that RIRSD discussions focus on the unique rights, needs and interests of First Nations, Inuit and Métis groups, and can respond to their interests where existing federal policies have not been able to do so. As such, in certain cases, RIRSD discussion tables may be launched without Canada having formally

recognized a respective group as an “Aboriginal peoples of Canada" under section 35(2) of the *Constitution Act, 1982* or without Canada having formally recognized a respective group’s “Aboriginal rights" under section 35(1) of the *Constitution Act, 1982*.

[71] Once an RIRSD table is established, the parties enter into preliminary-type discussions that may result in preliminary-type agreements. Under the RIRSD framework, preliminary-type agreements are process documents setting out the parties’ agenda for subsequent discussions. These process documents may take the form of a memorandum of understanding or a framework agreement. Insofar as any substantive issues are mentioned in these process documents, they are raised as the parties’ mutual understanding of priorities for discussion. The process documents do not provide for substantive commitments to do more than enter discussions about the listed priorities.

[72] The Rosenberg Affidavit states that, with the exception of provisions related to the confidential and without-prejudice nature of discussions, these process documents are non-legally binding agreements that provide a list of the scope of and topics for discussion, as well as the parameters for and limits to those topics. The process documents also provide for the order and time frame in which these items will be discussed and are a demonstration of good will and cooperation between the parties.

[73] In relation to the NCC, the Rosenberg Affidavit states that in July 2018, the Minister established the RIRSD discussion table with the NCC. On September 5, 2019, the Minister entered into the MOU. With respect to the preamble clause in the MOU that sets out that “Canada has recognized NCC as an Indigenous collective capable of holding section 35

Aboriginal rights, for the purpose of entering into discussions regarding recognition and self-determination," this wording evolved through RIRSD discussions to reflect Canada and the NCC's interests. It was not the intention of the Department of Crown-Indigenous Relations and Northern Affairs [CIRNA], through the MOU, to recognize the NCC as an "Aboriginal peoples of Canada" pursuant to section 35(2) of the *Constitution Act, 1982*. Rather, additional discussions with the NCC would clarify pending queries about the NCC's beneficiaries and their status under section 35 of the *Constitution Act, 1982.* The language "capable of holding section 35 Aboriginal rights" was language that was included to convey that the matter was uncertain. From CIRNA's perspective, the wording of the MOU meant that the NCC could potentially, but not necessarily, be an "Aboriginal peoples of Canada" capable of holding rights pursuant to section 35 of the *Constitution Act, 1982.* Following the signing of the MOU, CIRNA shifted its focus to undertaking work with the NCC to identify the nature of the rights that NCC may hold and identify the beneficiaries of those rights. The outcomes of that work would inform the content of any future negotiation mandate.

[74] When cross-examined on his affidavit, Mr. Rosenberg confirmed repeatedly that the MOU does not recognize NCC as an Aboriginal people under section 35(2) of the *Constitution Act, 1982*. Further, that Canada had recognised NCC as an Indigenous collective in 2018, which decision was approved by Cabinet. That recognition was extended to the MOU because that was the state of Canada's recognition of NCC at that point in time.

[75] It is also of note that the evidence of Mr. Rosenberg was that Cabinet made the decision to recognise NCC as an Indigenous collective in 2018, prior to the execution of the MOU. There is no evidence in the records before me as to the nature of that decision, and that decision is not

the subject of this judicial review. What is relevant is that the designation as a collective pre-dated and did not arise from the MOU. And, in any event, and as noted above, the MOU qualifies Canada's recognition of NCC as an Indigenous collective "capable" of holding section 35 Aboriginal rights "for the purpose of entering into discussions regarding rights recognition and self-determination."

[76] I note that the CTR contains a redacted version of a *Memorandum for the Minister of Crown-Indigenous Relations* addressing the proposed MOU. The memorandum identifies that some federal departments and central agencies had raised concerns about the proposed signing of the MOU. Specifically, that it should not be signed prior to confirming the nature of NCC's rights and defining the rights-bearers and that this work should be done prior to the co-development of a negotiation mandate through the discussion process. The concerns were described as follows:

> The concerns of other departments were: (1) the risk of creating a precedent with other groups whose status as Section 35 rights-holders is subject to doubt should CIRNAC [CIRNA] co-develop a negotiation mandate with NunatuKavut Community Council; (2) the risk that co-developing a negotiation mandate with the group before a determination is made with respect to the nature of their rights will create expectations on the groups part which may not be fulfilled; (3) concerns with respect to other groups in the same area which may have overlapping interests; and (4) that the Memorandum of Understanding should be modified to focus on NunatuKavut' s interests and needs, given the lack of clarity with respect to their rights.

[77] Ultimately, the Minister was presented with three options. The recommended option, option 1, was selected, being a "sequenced approach." This entailed the Minister signing the MOU. CIRNA would then inform the Federal Steering Committee and NCC that it would

continue its work to confirm the nature of NCC's rights and define the rights-bearers before considering a negotiation mandate. CIRNA would then return to the other government departments and central agencies to present its findings. Should the findings demonstrate that rights exist, CIRNA would then start discussions with NCC to develop a joint negotiation mandate.

[78] In my view, the memorandum also demonstrates that the MOU was not intended to decide or confirm any NCC Section 35 Rights. Rather, the nature of any such rights and defining of any rights holders would first have to be confirmed before the next step – a negotiation mandate – would be pursued.

[79] Canada's position as to NCC's status (as an Aboriginal peoples of Canada) is also reflected in the materials filed by the Applicant. The Chief Rich Affidavit refers to meetings with CIRNA representatives in September 2018 and attaches as an exhibit copies of questions Innu Nation posed on August 14 and September 25, 2018, and the related answers received from CIRNA. These included:

> Main Table - August 14, 2018
>
> > 1. Please confirm Canada's response that negotiations on the recognition of indigenous rights and self-determination of NCC will take place under the premise they are an Inuit group.
> >
> > Response: Canada has recognized the NunatuKavut Community Council (NCC) as an Indigenous collective, without stating any further recognition specifics. NCC self-identifies as an Inuit descendant group. The parties have initiated Recognition of Indigenous Rights and Self-Determination (RIRSD) discussions to explore NCC's interests and needs.

2. Under what policy did Canada recognize NCC as an Indigenous collective under s. 35?

Response: Canada's recognition of NCC as an Indigenous collective, and Canada's decision is part of broader efforts to advance reconciliation by engaging in such RIRSD discussions with numerous Indigenous groups throughout the country.

3. On what evidence, information or other bases did Canada provide this recognition?

Response: Information provided by NCC and information about Canada's deliberations regarding the NCC matter are confidential. While it would be inappropriate for Canada to share specifics with a third party, Innu Nation may wish to establish a dialogue with NCC.

……

10. Can Canada put in writing that Innu rights won't be affected by NCC exploratory discussions?

Response: Canada can confirm it will consult with Innu Nation if any contemplated Crown conduct has the potential to adversely affect Labrador Innu rights, whether asserted, established or planned for the Labrador Innu's land claim and self-government agreement.

Main Table - September 25, 2018

13. Could you confirm that Canada intends to commit to consult Innu Nation prior to signing any Memorandum of Understanding (MOU) or similar arrangement or agreement that Canada may negotiate with NunatuKavut Community Council in the course of the negotiations taking place as a result of the exploratory table that has been set up between Canada and NunatuKavut Community Council?

Response: Canada can confirm it will consult with Innu Nation if any contemplated Crown conduct has the potential to adversely affect Labrador Innu rights, whether asserted, established or planned for the Labrador Innu's land claim and self-government agreement.

[80] It is also significant to note that NCC, a party to the MOU, does not assert in its submissions to this Court that the MOU afforded it any legal rights or that the MOU recognized NCC as an Aboriginal people under section 35 of the *Constitution Act, 1982.* NCC makes it clear that it considers the MOU to be a very important document. However, while it has always asserted and continues to assert that it is a Section 35 Rights holder, and while NCC hopes that Canada will recognize that NCC is a Section 35 Rights holder as the RIRSD Framework process progresses, Canada did not make such a commitment in the MOU. NCC submits, therefore, that any impact on NCC's, Canada's or the Applicant's rights are entirely speculative and do not arise from the MOU.

c) *Métis Settlements General Council v Canada (Crown-Indigenous Relations)*

[81] Subsequent to the hearing of this judicial review, *Métis Settlements General Council v Canada (Crown-Indigenous Relations)*, 2024 FC 487 [*Métis Settlements*] was issued. The Attorney General proposed that the parties be afforded the opportunity to make brief submissions as to the applicability and relevance, if any, of that decision to the matter before me. I agreed. I received submissions from NCC, which I have considered. The Attorney General submitted a letter stating its position is that *Métis Settlements* addresses a very different legal and factual matrix and has little, if any, relevance to the application before me. Further, that the rationale for distinguishing *Métis Settlements* from the present matter was aptly described in NCC's supplemental submissions and the Attorney General had nothing further to add to provide assistance to the Court. No supplemental submissions were received from the Applicant or NG.

[82] In *Métis Settlements*, Canada and the Métis Nation of Alberta [MNA] entered into an agreement entitled *Métis Nation Within Alberta Self-Government Recognition and Implementation Agreement* [Agreement], which was the subject of the judicial review. The Agreement recognized the MNA as the exclusive representative of the Métis Nation within Alberta, particularly for the exercise of its rights protected by section 35 of the *Constitution Act, 1982*. The applicants each asserted Section 35 Rights independently of the MNA. They claimed that they were affected by the Agreement because it included them, against their will, in the definition of the Métis Nation within Alberta and therefore granted the MNA the exclusive power to assert their section 35 rights vis-à-vis Canada. They applied for judicial review of the Agreement, based on Canada's breach of its duty to consult them.

[83] Justice Grammond found that in the ordinary meaning of its terms, the Agreement defined the Métis Nation within Alberta as including the applicants. Consequently, it granted the MNA a monopoly over the applicants' asserted Section 35 Rights. What it exclusively granted to the MNA, it necessarily withheld from the applicants. It prevented the applicants from negotiating separately with Canada for the recognition of their rights, effectively forcing them to assert their rights before the courts. Those effects were not speculative, and they triggered Canada's duty to consult the applicants before entering into the Agreement.

[84] In terms of justiciability, Justice Grammond noted that there may be circumstances in which recognizing rights of one Indigenous community affects the exercise of another community's Section 35 Rights. He found that, to that extent, decisions concerning recognition are amenable to judicial review in the same manner as other decisions affecting Section 35 Rights (para 65).

[85] In my view, *Métis Settlement* is distinguishable on its facts. Unlike the MOU in the matter before me, the agreement at issue in *Métis Nation* made determinations recognizing MNA and also afforded it the exclusive right to address the Section 35 Rights of other Métis communities – thus excluding them from that possibility – and thereby affecting their legal rights. Here, the MOU does not recognize the NCC, does not afford NCC any rights and does not deprive the Applicant, the Intervener or any other group of any rights. Accordingly, while the agreement in *Métis Nation* was found to be justiciable, that finding is distinguishable from the circumstances before me.

[86] In that regard, it is also of note that, prior to entering into the agreement which was the subject of the judicial review in *Métis Settlement*, Canada and MNA had first entered into a memorandum of understanding in 2017, which committed the parties to exploratory discussions. Later that year they entered into a Framework Agreement setting a roadmap for comprehensive negotiations. In June 2019, the parties signed a Métis Government Recognition and Self-Government Agreement. That agreement set out a process leading to the federal legislative recognition of a government for the Métis Nation within Alberta. This included the development of a Constitution for the Métis Government and the enactment of legislation implementing a future intergovernmental relations agreement. Canada and the MNA entered into the agreement which was the subject of the judicial review in February 2023. All of which is to say that the agreement at issue in *Métis Settlement* was a far more developed process and document than the MOU at issue in this matter.

d. Legal Benefit

[87] The Applicant also submits that "[e]ven if Canada reaffirms its longstanding position that NCC does not have s. 35 rights or title – which is a distinct possibility, since the MOU states that 'it is intended only as an expression of good will and political commitment and does not create, amend, recognize or deny any legal or constitutional right or obligation on the part of either Party' – giving NCC a seat at a table to discuss what s. 35 rights it may have is a significant legal benefit" to which NCC has no constitutional entitlement since a mere Indigenous collective cannot hold Section 35 Rights and Canada has confirmed on multiple occasions that NCC is incapable of holding Section 35 Rights.

[88] This "seat at the table" argument is premised on the Applicant's views on two points.

[89] First, that an Indigenous collective cannot hold Section 35 Rights. That may or may not be so. Section 35 of the *Constitution Act, 1982* states:

> **Recognition of existing aboriginal and treaty rights**
>
> **35 (1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> **Definition of aboriginal peoples of Canada**
>
> **(2)** In this Act, **aboriginal peoples of Canada** includes the Indian, Inuit and Métis peoples of Canada.

[90] "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. Presumably, if an Indigenous collective is made up Indian, Inuit and Métis peoples of Canada, it would fall within the definition (NCC self-identifies as an Inuit collective). However, I need not

– and, based on the evidence before me, cannot – decide this point. Here, the NCC has been recognized by Canada in the MOU as an Indigenous collective “capable” of holding Section 35 Rights for a limited purpose – the purpose of entering into discussions regarding rights recognition and self-determination. This recognition as an Indigenous collective – which term is not defined – is qualified in two ways. It is limited to the purposes of the MOU, being to explore and advance reconciliation by way of the RIRSD discussion table process. And, as discussed above, the MOU does not create or recognize any legal or constitutional rights or obligations on the part of either party. The MOU simply serves to confirm a process which may, or may not, ultimately result in the recognition of NCC as an Aboriginal people of Canada and as holding identified Section 35 Rights. Based on the wording of the MOU and the records before me, if and how the NCC would be so recognized – as a collective or otherwise – is yet to be determined.

[91] Second, the Applicant appears to be of the view that, because NCC has previously been unsuccessful in its submissions under the *Comprehensive Land Claims Policy*, NCC is disqualified from any further efforts, interactions and negotiations with Canada, and that NCC has not and can never establish such a claim. But there is no evidence before me that Canada ever made such a final decision. Further, when cross-examined on his affidavit, Mr. Rosenberg was asked if, as a matter of policy, Canada ever tells a group that they are not welcome to reapply with further information in support of a *Comprehensive Land Claims Policy* claim. His response was no, he did not think that was likely. He also confirmed that it was fair to say that Canada has never told NCC that it is not welcome to submit another claim. He indicated that when the dialogue between NCC and Canada was through the *Comprehensive Land Claims Policy* process, Canada had indicated to NCC that the reason the NCC claim did not succeed was

because there was insufficient evidence at those times to support its claim. This reason is also supported by a Government of Canada webpage extract attached as Exhibit I to the Chief Rich Affidavit. This extract provides background on NCC's 1991 *Comprehensive Land Claims Policy* submission, which was not accepted for negotiations. It states that, on several occasions from 1987 onward, Canada informed LMA (now NCC) that the claim did not contain sufficient evidence to be accepted as a comprehensive claim, which, the extract states, was a decision the LMA (then LMN) strongly opposed. There is nothing in the records before me that supports the Applicant's assertion that Canada has made a final determination that NCC "is incapable of" holding Section 35 Rights.

[92] The current process is the RIRSD discussion table process. The content of the discussions between Canada and NCC are unknown but, presumably, will require NCC to establish the nature and existence of its asserted rights and to define the rights beneficiaries before moving forward with developing any joint negotiating mandate and, ultimately, if successful, receiving formal recognition by Canada that the NCC and/or its defined rights beneficiaries are an Aboriginal people of Canada. The purpose of the MOU is to permit NCC and Canada to explore NCC's status and the nature of any Section 35 Rights.

[93] In any event, the Applicant submits no authority to support that what it calls a "legal benefit" can be considered to be a "legal right" for purposes of determining if a decision is justiciable. In my view, it would be concerning if a decision by Canada to enter into a discussion process with a group that self-identifies as an Aboriginal people could attract challenge, at that stage, on the basis that such discussions conferred a "legal benefit."

[94] By way of context, I note that the Chief Rich Affidavit sets out why the affiant believes that the MOU has the potential to impact Innu Nation's Aboriginal rights, land claim and land claim negotiations. In essence: NCC has made statements that its has a stronger claim than the Innu to large areas of Labrador, and such statement are "profoundly offensive"; the overlapping land claim will diminish or delay recognition of the rights and title of the Innu of Labrador, specifically ownership rights, harvesting rights and co-management rights; and, Canada's position with respect to NCC would affect, and likely lengthen, negotiations of the Innu Nation modern treaty because "Canada may believe it has a duty to consult and possibly accommodate NCC based on it recognition of NCC as an Indigenous collective capable of holding s 35 rights."

[95] The Chief Rich Affidavit also attaches as an exhibit a letter dated August 2, 2018, sent by Grand Chief Gregory Rich and (then) Deputy Grand Chief Etienne Rich of the Innu Nation to the (then) Minister of Crown-Indigenous Relations and Northern Affairs. This expresses the Innu Nation's outrage about a lack of consultation about Canada's decision to enter into "exploratory talks" with NCC and:

> Innu Nation has spent over forty years negotiating our land claims to protect Nitassinan. Now, at the eleventh hour, Canada is proposing to dramatically complicate and potentially delay matters by engaging in negotiations with an illegitimate organization about their "rights" to *our* lands, without even discussing the matter with us beforehand. This is unacceptable.
>
> Canada is free to have discussions with whoever it wants. However, Canada is not free to discuss the possibility of implementing rights for a settler group on Innu lands before dealing with the protection for our rights to lands and waters Innu have occupied for thousands of years.
>
> NCC is not a legitimate holder of any s. 35 rights. NCC has no legitimate claim to any land rights or harvesting rights in Nitassinan.

> Simply because some members of the NCC may have Aboriginal ancestry from various sources does not make the NCC an organization that holds collective Aboriginal rights. There is no evidence to support NCC as a collective s. 35 rights-holder. It's not even clear the basis on which NCC asserts its s. 35 rights.
>
> Innu Nation has spent a great deal of time and money to vindicate our rights through the treaty process. This process should not be derailed, slowed down, or unduly complicated by Canada's attempt to give Innu rights and lands away to political organization with no legitimate claim to s. 35 rights.
>
> Innu Nation seeks an immediate explanation about the basis for Canada's talks with NCC and how the NCC talks will affect the conclusion of Innu's land claim and self-government agreement
>
> Innu Nation we will be pursuing these matters in detail at the land claims negotiation table, which now has been diverted from intense efforts to complete our final agreement in the near future because of Canada's decision.

[96] In another letter, dated August 31, 2018, from Grand Chief Gregory Rich and (then) Deputy Grand Chief Etienne Rich to the (then) Minister, they expressed concern about Canada's Recognition and Implementation of Rights Framework and the potential for the framework to negatively impact Innu rights and the Labrador Innu treaty. They asserted that the Framework would cause serious harm to Innu's rights by "arbitrarily granting recognition and rights to groups of individuals who do not hold any rights – such as" the NCC. The writers expressed the view that Canada should not be creating a system that recognizes the rights of illegitimate groups at the expense of First Nations who have lived on and governed their lands for thousands of years. And, while some NCC members may have some Indigenous ancestry, this did not make NCC a people or a rights-holding entity. Further, that NCC continued to make "wild and unsubstantiated claims," including that it has a greater claim than the Innu to core areas of Innu territory. In the writers' view, a Framework that encouraged such behaviour was damaging to the

Innu. The writers also expressed frustration that the Innu were forced to prove to Canada that they had rights, but Canada wanted to recognise NCC claims "without evidence."

[97] It is apparent that what is really at issue here is Innu Nation's view that NCC has no legitimate claim to Section 35 Rights; that it has skipped the queue insofar as it may benefit from a new negotiation policy with which Innu Nation takes issue; and that, if NCC is successful in establishing its status and any Section 35 Rights, then this will negatively impact Innu Nation's overlapping land claim. However, as discussed above, the MOU does not establish NCC status or rights. As it does not, those rights cannot conflict with any rights asserted or held by the Applicant. The legitimacy or the strengths of competing claims are not matters that are before this Court.

[98] Any future impact of the RIRSD discussion table process as set out in the MOU is discussed below in the context of the duty to consult.

e. Prejudicial Effects

[99] Finally, as to prejudicial effect, in *Democracy Watch*, the Federal Court of Appeal held that:

> … the requirement of a "prejudicial effect" asks whether the impugned act *caused* prejudicial effects. In this case, the question is whether the decision not to investigate caused prejudicial effects, and not whether an investigation would cause prejudicial effects to the office holders (para 43, italic original).

[100] Here, entering into the MOU did not cause the Applicant to suffer any prejudicial effects. The MOU is in an expression of good will and political commitment and serves to confirm a go-forward RIRSD discussion table framework. The MOU did not determine NCC's status as an Aboriginal people of Canada nor did it determine that NCC holds any Section 35 Rights. As it moves forward, the RIRSD process may, or may not, lead to the recognition of NCC as an Aboriginal people of Canada having Section 35 Rights.

Conclusion

[101] In summary, the wording of the MOU, when reading that document in its entirety; the fact that neither party to the MOU understands that document to afford NCC any legal rights or to recognize NCC as an Aboriginal people under section 35 of the *Constitution Act, 1982*; and, the evidence in the records before me which indicates that the MOU did not, nor was it intended to, determine NCC status or recognize NCC as an Aboriginal people of Canada or determine the existence of any NCC Section 35 Rights, demonstrate that the Minister entering into the MOU did not affect any legal rights, impose any legal obligations or cause any prejudicial effects. While NCC, acknowledged as recognized as an Ingenious collective for the purposes of the MOU, may be "capable" of holding such rights, the nature and existence of those rights, if any, and who may be the beneficiaries of those rights has yet to be determined.

[102] Accordingly, the decision to enter into the MOU is not justiciable.

[103] Given that I have found that the decision to enter into the MOU is not justiciable, the question of whether the Applicant has private or public interest standing to challenge that

decision need not be addressed. It is similarly not necessary to engage with the Applicant's arguments as to the reasonableness or correctness of that decision.

[104] What remains to be considered is the Applicant's submission that the Minister breached the duty to consult. The Attorney General concedes that that issue is justiciable.

Duty to Consult

[105] The Applicant has not challenged an actual decision by the Minister not to consult with it. However, the Applicant's alternate submission is that the decision to enter into the MOU was made contrary to the Crown's duty to consult. The Applicant submits that Canada erred in deciding that the duty was not triggered by the decision to enter into the MOU and failed to discharge that duty by failing to consult prior to entering the MOU.

[106] In *Haida*, the Supreme Court held that the existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It followed that a degree of deference to the findings of fact of the initial adjudicator may be appropriate in some circumstances (*Haida* at para 61).

[107] Subsequently, in '*Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2020 FCA 122 at para 21:

> [21] …..The scope of Aboriginal and treaty rights under section 35 of the Constitution Act, 1982, is reviewable on the correctness standard: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 55, 441 D.L.R. (4th) 1 [*Vavilov*]. Where the existence or extent of the duty to consult is "premised on an assessment of the facts", the tribunal's factual findings are entitled to deference: *Haida Nation v. British Columbia (Minister*

> *of Forests)*, 2004 SCC 73 at para. 61 [2004] 3 S.C.R. 511 [*Haida Nation*]. The adequacy of consultation is reviewable on the standard of reasonableness: *Haida Nation* at para. 62; *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34 at para. 27.

(see also *Haida* at para 37; *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at para 30). In *Roseau River First Nation v Canada (Attorney General)*, 2023 FCA 163 at para 8, the Federal Court of Appeal held that the issue of the existence or scope of the duty to consult is reviewed for correctness.

[108] The Attorney General submits that whether the MOU adversely impacts the Applicant's asserted Aboriginal rights, so as to trigger the duty to consult, is a factual question, attracting deference on judicial review. However, the question of whether the MOU might adversely impact the Applicant's rights turns on whether the MOU itself creates any legal rights and obligations – which would seem to be a legal question attracting the correctness standard. In any event, in my view, in this case nothing turns on whether the standard of review is correctness or reasonableness. It was both correct and reasonable to find that the duty to consult was not legally triggered.

[109] The general principles pertaining to the duty to consult are well established and are not in dispute in this matter.

[110] In a nutshell, these include that:

- the duty arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Rio Tinto* at para 31, citing *Haida* at para 35). This test has three

elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right (*Rio Tinto* at para 31);

- The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation (*Rio Tinto* at para 32, citing *Haida* at para 20):

  > Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests (*Haida* at para 25);

- The duty to consult described in *Haida* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right (*Rio Tinto* at para 33);

- *Haida* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into

account before making a decision that may have an adverse impact on them. The duty is prospective, fastening on rights yet to be proven (*Rio Tinto* at para 35);

- The nature of the duty varies with the situation. The depth of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right (*Rio Tinto* at para 36, citing *Haida* at paras 43-45, and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 32);

- The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct (*Rio Tinto* at para 37, citing *Haida* at paras. 13-14).

[111] As to the second aspect of the test, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question. *Rio Tinto* goes on to say:

> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1

> C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

[112] The third aspect of the test is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights (*Rio Tinto* at para 45), and:

> [46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.
>
> [47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The

> Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

Applicant's Position

[113] The Applicant asserts, relying on *Sambaa*, that its legal rights are affected because the Minister's decision to sign the MOU is the type of strategic, higher-level decision that may have an impact on Aboriginal claims and rights, even if the decision is not legally binding and its effect is not immediate. Further, that the reasoning in *Sambaa* is equally applicable in this case. The Applicant submits that "[i]nitial decisions made by Canada and NCC – such as the lands that may be made available to NCC for the exercise of its 'jurisdiction over land, sea and ice and exercise [sic] of rights over land, sea and ice' – will inevitably set the stage for later discussions between Canada and NCC." The Applicant says that they must be consulted before those decisions are made and the negotiations between Canada and NCC take on momentum and their positions become entrenched, rendering any further consultation with the Innu Nation meaningless (referencing *Sambaa* at paras 150, 165).

[114] Further, based on *Whiteduck v Ontario*, 2023 ONCA 543 [*Whiteduck*], that if Canada failed to consult with the Applicant before signing the MOU, then the Applicant has standing to challenge that decision and to seek consequential relief, including orders quashing the MOU and requiring the Minister to consult with the Applicant. To the extent that Canada failed to consult with the Applicant, the decision to sign the MOU is justiciable.

Intervener's Position

[115] NG also relies upon *Sambaa* to assert that the duty to consult must be exercised as early in the decision-making process as possible, even if the decision is preliminary to the negotiations and no rights are immediately affected.

NCC's Position

[116] NCC does not take issue with the principles of law set out in *Sambaa* but submits that the negotiations in this case are at an entirely different stage than they were in that case. In *Sambaa*, Canada and the Acho Dene Koe First Nation [Acho] had already negotiated and reached agreements with respect to land that had an obvious and non-speculative impact on the applicants' rights. In contrast, NCC and Canada are at the very early stages of discussions under the RIRSD framework process. There have been no commitments made in the MOU and they have not entered negotiations or reached decisions with respect to the issues that may impact the Applicant. NCC and Canada have not even determined what topics they will discuss. Further, the MOU is different in nature and content from the Acho framework agreement, which set out specifics with respect to topics of negotiations and timelines and made commitments as to land. The MOU does none of these things. Thus, the duty to consult is not yet engaged. At this stage, any potential impact on the Applicant's asserted rights is speculative.

Attorney General's Position

[117] The Attorney General concedes that the duty to consult is a procedural ground of review that is justiciable. However, it submits that the Applicant lacks standing to challenge the decision on this basis, as the application is premature.

[118] The Attorney General submits that the Minister's decision to enter into the MOU did not give rise to a duty to consult the Applicant. The MOU simply sets out a framework for discussions and contains an acknowledgement that Canada may have a duty to consult should those discussions lead to a product that may adversely affect Indigenous groups that have or may have rights that are protected by section 35 of the *Constitution Act, 1982*. Any declaration of a breach of the duty to consult is premature: establishing a framework for discussions, in and of itself, does not adversely impact the Applicant's Section 35 Rights.

[119] The Attorney General submits that the decision to enter into the MOU, which establishes a without-prejudice framework for discussions only, is not contemplated Crown conduct that gives rise to the legal duty to consult. The framework in the MOU sets out two issues to be discussed in sequence. The parties will discuss the rights NCC may hold as well as the beneficiaries of those rights, and the parties may then decide to co-develop a joint negotiation mandate, which will set parameters for any future negotiations. Establishing this framework for discussions does not adversely impact the Applicant's asserted Section 35 Rights.

[120] Decisions of this nature, which are conceptual, do not attract a duty to consult, as they do not cause an appreciable adverse impact on the Applicant's asserted rights. Both Canada and the

NCC acknowledge that the product of discussions may, however, give rise to consultation obligations. Consultation, if and when it occurs, must be related to the contemplated Crown conduct and its potential adverse effects. It is too early to foresee the potential adverse effects of the Crown conduct without knowing what rights the NCC may hold and without identifying the beneficiaries of those rights, and how those rights might intersect with the Applicant's asserted rights. It would be meaningless to propose mitigation or accommodation efforts about a framework for discussions.

[121] The Attorney General also submits that there is no causal connection between the decision and any potential adverse effects on the Applicant's asserted Aboriginal harvesting rights and title, or their reserve lands. To the extent that the Applicant asserts a delay in their negotiations leading to a final modern treaty agreement, this is not an adverse impact on Aboriginal rights that gives rise to the legal duty to consult, as the function of the duty is to preserve rights pending proof of claim. In any event, Canada's consultations with the NCC concerning the Labrador Innu's final modern treaty agreement long pre-dates the MOU.

[122] Finally, the Attorney General submits that the Applicant's reliance on *Sambaa* ignores that the duty to consult is fact specific and can be distinguished on the facts.

Analysis

[123] Here, the first element of the test for when a duty to consult arises is established by the record. Canada is very aware of the Applicant's asserted rights (as demonstrated by Canada's entry into an Agreement-in-Principle with the Applicant) and of its view that NCC does not have

a valid claim to Section 35 Rights, including an overlapping land claim. Canada is also well aware, as reflected in the record and in a recital to the MOU, that NCC has a longstanding assertion of Indigenous rights (including Aboriginal Title and Treaty Rights) to their asserted traditional territory of NunatuKavut.

[124] However, the second element of the test, contemplated Crown conduct or a Crown decision that engages an asserted Aboriginal right by potentially impacting the claim or right in question, and the third element of the test – the potential that the contemplated conduct may adversely affect the Applicant's Aboriginal claim or rights – cannot be established for the reasons set out above.

[125] That is, the MOU is an expression of good will and political commitment and does not create, recognize or deny any legal or constitutional right or obligation on the part of either party. It is a six-page document that: sets out the objectives of the RIRSD discussion table, which was established prior to Canada's entering into the MOU; acknowledges that having the Province participate in the RIRSD discussion table is important; speaks of the structure and frequency of meetings; recognizes that NCC requires the financial means to participate in the RIRSD discussion table and contemplates that the parties will work to develop a work plan and budget; sets out the legal status of the MOU; sets out a joint communications approach, including the duty to consult; and, states the term of the MOU, which will remain in effect until it is replaced by a subsequent agreement of the parties. In other words, the MOU is a not a comprehensive document. Rather, it serves to generally acknowledge and facilitate the RIRSD discussion table process.

[126] In my view, the MOU *itself* is therefore not a "strategic, higher level decision" that may have an impact on the Applicant's Aboriginal claims and rights. In these circumstances something more, some further Crown conduct, is required in order for any potential impact to arise. As the MOU contemplates, the duty to consult may be triggered if the Applicant's or other Indigenous groups' rights may be affected by a product of the RIRSD discussion table.

[127] Similarly, the Applicant has not demonstrated a causal relationship between the Minister's decision to enter the MOU and a potential for adverse impacts on its asserted Aboriginal claims or rights: "Mere speculative impacts, however, will not suffice.... there must an 'appreciable adverse effect on the First Nations' ability to exercise their aboriginal right'. The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice" (*Rio Tinto* at para 46). In my view, the record demonstrates that it is, in essence, the Applicant's future negotiating rights that it seeks to protect. Further, at this very early stage of the RIRSD discussion table process, any potential for adverse impacts on the Applicant's asserted Aboriginal rights remains speculative.

[128] In *Hupacasath First Nation v Canada (Foreign Affairs and International Trade)*, 2015 FCA 4, the Federal Court of Appeal observed that the line between the possibility of harm as opposed to speculation may, in some cases, be a fine one. However, that the duty to consult is intended to protect Aboriginal rights from injury, to protect against irreversible effects and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests. The Court stated that "[a]n impact that is, at best, indirect, that may or may not happen at all (such that we cannot estimate any sort of probability), and that can be fully addressed later is one that falls on the speculative side of the line, the side that does not

trigger the duty to consult" (at para 102). In the matter before me, the entry into the MOU does not preclude the Applicant's concerns from being addressed if and when the duty to consult is triggered. Further, and as will be discussed later in these reasons, nor is this a situation where either the agreement at issue or the surrounding conduct recognizes an Indigenous group and identifies its rights, to the exclusion of others.

[129] In *Buffalo River Dene Nation v Saskatchewan (Energy and Resources)*, 2015 SKCA 31, the Saskatchewan Court of Appeal considered whether the duty to consult was triggered in circumstances where the Crown had granted exploration permits in respect of subsurface oil sands minerals located under Treaty 10 lands. It dismissed the appeal, finding that the duty to consult had not been triggered because any possible impact on the rights of the First Nation members amounted to no more than speculation at that stage.

[130] There, the Saskatchewan Court of Appeal found that the issuance of the exploration permit was the first stage in a two-stage decision-making process. The first-stage decision did not in any way impact the lands themselves. This could only occur if and once the Crown granted a permit-holder access to the surface under the second-stage decision-making process. While the duty to consult is triggered at a low threshold, appreciable or discernible impact flowing from the impugned Crown conduct has to be established before a duty to consult in relation to that impact will arise – that is, there must be something to consult about. The Crown conduct of posting and issuing exploration permits would not have an appreciable or current impact on treaty rights until second-stage approval was contemplated (at paras 91-92).

[131] The Saskatchewan Court of Appeal agreed with the Crown that the First Nation's application seeking to force the Crown to consult was premature. This was because, at the first stage in the regulatory process, there was no evidence of a causal relationship between the decision to issue the permits and future adverse impact of exploration and development on Treaty 10 rights (para 93).

[132] The Saskatchewan Court of Appeal concluded that:

> 104 The jurisprudence is clear: there is a meaningful threshold for triggering the duty to consult. To trigger it, actual foreseeable adverse impacts on an identified treaty or Aboriginal right or claim must flow from the impugned Crown conduct. While the test admits possible adverse impacts, there must be a direct link between the adverse impacts and the impugned Crown conduct. If adverse impacts are not possible until after a later-in-time, independent decision, then it is that later decision that triggers the duty to consult.

And, as speculation does not satisfy the third element of the test in *Rio Tinto*, the duty to consult was not triggered in that case (see also *Blueberry River First Nations v British Columbia (Minister of Natural Gas Development)*, 2017 BCSC 540 [*Blueberry River*]).

[133] I agree with NCC that there is no direct link or causal connection between the Crown conduct, the entering into the MOU, and any possible adverse impacts to the Applicant's Section 35 Rights. First, the MOU itself does not impact those rights. It simply acknowledges and generally facilitates the RIRSD discussion table process. The duty to consult is confined to addressing the adverse impacts resulting from the specific Crown decision or action under consideration (*Rio Tinto* at para. 53; *Blueberry River* at para 72). In this case, that decision is the

MOU, not the decision to enter into the RIRSD discussion table (which pre-dated the MOU) or the decision to implement the policy underlying the RIRSD discussion table process.

[134] Second, although not a resource decision, the RIRSD discussion table process contemplated by the MOU is analogous to *Buffalo River* in that it contemplates a two-stage process. Stage one is the exploratory discussions aimed at identifying the nature of any rights that NCC may hold and the beneficiaries of those rights. However, until the nature of any NCC rights has been determined and a decision is made to acknowledge or recognize that NCC (or some portion of its claimed members/beneficiaries) is an Aboriginal people of Canada and, as such, is entitled to potential Section 35 Rights, any impact on the Applicant's or other Indigenous groups' Section 35 Rights is speculative. And, "[w]ithout a clear understanding of the actual, appreciable impacts on a First Nation's rights, it is not possible to engage in meaningful consultation or to develop appropriate accommodations" (*Blueberry River* at para 70).

[135] It is on the basis of recognition that *Métis Settlements* is distinguishable from the matter before me. In *Métis Settlements*, Justice Grammond held that cases such as *Sambaa* "show that the duty to consult is triggered when *recognition* of section 35 rights to one group potentially leads to the infringement of another group's section 35 rights" (my emphasis). Here, unlike *Métis Settlements* and *Sambaa*, where the agreements at issue recognized the rights of one Aboriginal people of Canada that could impact the rights of another, NCC's Section 35 Rights have not been recognized by the MOU – which is the decision under review. It is the RIRSD discussion table

process that may give rise to Crown conduct that will trigger the duty to consult based on recognition.

[136] In that regard, *Métis Settlements* referred to *Sambaa*, where the contemplated Crown action was found to potentially put current claims of the applicants in that matter in jeopardy. Justice Grammond stated that was equally true in the matter before him because the agreement at issue in *Métis Settlements* jeopardized the applicants' asserted section 35 rights by giving the MNA the exclusive mandate to deal with them. This impact resulted from the wording of the agreement, which was "immediate legally effective" and not speculative, as "the impact of a denial of *recognition* are not remote or speculative" (para 147, my emphasis).

[137] Justice Grammond found that the agreement at issue "potentially affects the applicants' section 35 rights, because Canada binds itself contractually to recognize the MNA as the sole representative of an Indigenous group that includes the applicants, for the purposes of these rights. Therefore, Canada will no longer be able to entertain the applicants' assertion of their rights independently of the MNA" (at para 90). This is not is similar situation. The MOU does not recognize NCC as an Aboriginal people of Canada, nor does it restrict the rights of the Applicant or of any other Indigenous group and, therefore, it does not potentially affect their Section 35 Rights.

[138] As to *Whiteduck*, I note that all parties made supplemental written submissions after the Ontario Court of Appeal issued its decision in *Whiteduck.*

[139] *Whiteduck* was an appeal and cross appeal of the Ontario Superior Court decision with respect to a motion to strike out the Algonquins of Ontario's [Algonquins] statement of claim, which challenged Ontario's recognition of Métis harvesting rights in Algonquin territory.

[140] The background to *Whiteduck* was that the Algonquins had been negotiating with Ontario and Canada under a 1994 framework to arrive at a modern day treaty concerning, among other matters, the harvesting rights of the Algonquins to fish, hunt and trap wildlife resources within the settlement area. An agreement in principle was reached in 2016. In 2017, Ontario recognized six Métis communities and, under a 2018 Framework Agreement, extended harvesting rights to them in an area that overlapped the Algonquin settlement area. In their statement of claim, the Algonquins sought a declaration that Ontario breached its duty to consult and accommodate its interests before it recognized the Métis communities and gave them unlimited harvesting rights, as well as various other declarations, including that Ontario could not recognize or purport to recognize any Métis harvesting rights within that area or take any other steps tantamount to such recognition without Algonquin consent. The motions judge struck all of the claims for declarations in the statement of claim, except for the claim that Ontario breached the duty to consult.

[141] The Ontario Court of Appeal found that, in the context of the motion to strike the pleadings, the allegation that there had been a breach of the duty to consult could proceed. Whether the Crown had actually breached its duty to consult and accommodate, whether the Algonquins could prove they were entitled to the deep consultation and accommodation that they claimed and whether they were entitled to the remedies that they sought were all appropriate

matters, not for a pleadings motion, but for a trial – and, more hopefully, settlement negotiations, which were much to be preferred (para 39).

[142] Thus, the Ontario Court of Appeal did not make any findings on the merits of the allegation of the duty to consult. To the extent that the Applicant relies on *Whiteduck*, I would also note that there are significant factual differences in *Whiteduck* and the matter before me. In *Whiteduck,* Ontario had recognized six Métis communities as Aboriginal peoples and, under the 2018 Framework Agreement, had actually extended harvesting rights to them in an area that overlapped the Algonquin settlement area. Here, the MOU acknowledges that RIRSD discussion table discussions will proceed. That process will determine the nature of any rights NCC may potentially have and who the beneficiaries of those rights might potentially be. Once such potential rights and beneficiaries have been identified, then these can be considered in any Joint Mandate proposal. Thus, unlike the situation in *Whiteduck*, NCC's status and rights have not been recognized at this stage, nor have the Applicant's Section 35 Rights been impacted by a grant of any rights over an overlapping area. That is, there is no causal connection between the entering into the MOU and any potential adverse effects on the Applicant's Section 35 Rights.

[143] As to *Sambaa*, the applicants, Sambaa K'e Dene Band and the Nahanni Butte Dene Band [together the Bands], sought judicial review of the Minister's decision to postpone consultations with them until such time as an agreement in principle was reached with the respondent, Acho, with whom they had overlapping land claims, in relation to an ongoing comprehensive land claims negotiation. The applicants argued that by delaying the consultation until after an agreement in principle between Canada and Acho was entered into, Canada failed to comply

with its legal and constitutional duty to consult with and properly accommodate the applicants. Based on the jurisprudence and the facts before it, the Court agreed.

[144] The Comprehensive Land Claims process that was in play in that matter was such that once Canada agreed to negotiate a comprehensive land claim, three phases of agreements were to follow. The first was a "framework agreement" which delineated the process to be followed in the negotiations. If the initial negotiations revealed sufficient common ground, then the parties would sign an "agreement in principle" outlining the essential points of agreement. A third, final agreement would then be prepared, which could include agreements with respect to matters such as land ownership, financial benefits, governance issues and land overlaps. Should the final agreement be ratified by all of the parties, it would become constitutionally protected and be recognized as a Treaty under section 35 of the *Constitution Act, 1982*.

[145] Acho and Canada entered into the first phase, a framework agreement. The recitals to the Acho framework agreement provided that the parties intended to negotiate a comprehensive land claim to define and provide clarity to certain asserted lands, resources and governance rights of the Acho within the Northwest Territories [NWT]. It also outlined the objectives and timetables for the parties' negotiations, the subject matters of those negotiations and the approvals process for an eventual agreement in principle and final agreement. The Acho framework agreement related to lands described as "[Acho] Asserted Territory" and identified on a map appended to the Agreement. These lands included areas claimed as primary use areas by the Bands – lands which had been accepted as their primary use areas in 2006.

[146] In *Sambaa*, there was no issue with respect to the existence of the duty to consult. What was in dispute was the timing, scope and content of that duty. The Court reviewed the jurisprudence as to the duty to consult, particularly *Rio Tinto*.

[147] As to Canada's knowledge, there was no issue as to the existence of Sambaa's treaty rights or that Canada had sufficient knowledge to trigger a duty to consult. Canada also conceded that the conclusion of the Acho Framework Agreement and the commencement of negotiations with the Acho with respect to its comprehensive land claim may ultimately affect the Bands' Treaty rights.

[148] As to the potential effect of the proposed Crown conduct on the Aboriginal claim or Treaty right, Justice Mactavish found that the seriousness of that impact was not speculative in light of decisions that had already been made by Canada in the context of its negotiations with the Acho – decisions that were made without any consultation with the Bands. These included a decision to limit the Acho land claim to territory within the NWT. This was highly significant given that two thirds of Acho's asserted traditional territory lay outside the NWT. Further, as the basis for negotiating an agreement in principle that would address land quantum, Acho had accepted an offer from Canada allowing it to select a total of 6474 square kilometres of land from within the NWT in satisfaction of its land claim. Justice Mactavish found that "[g]iven the dynamics of the negotiating process, it is hard to imagine that the agreement in principle will be less generous to the [Acho] than Canada's initial offer." She found that the acceptance of that offer would inevitably result in an encroachment on Sambaa's claimed territory (paras 171-174), as there was simply not enough land available in the NWT to satisfy the Acho's claims and Canada's offer without encroaching on the primary land use areas claimed by the Bands, and thus infringing their Aboriginal and Treaty rights. She found this impact was not speculative.

[149] Additionally, as part of the Acho's Framework Agreement, Canada and Acho had agreed to adopt the resource management regime operating under the *Mackenzie Valley Resource Management Act* [*MVRMA*], which the Bands asserted was inconsistent with the land management process advanced through a different process pertaining to all three First Nations, namely collective co-management through a single management authority. Justice Mactavish found that while the adverse impact of the adoption of this regime in relation to lands potentially falling within the Bands' primary land use areas may not be immediately felt by the Bands, the prospective potential infringement of asserted Aboriginal governance rights was nevertheless serious.

[150] Finally, the offer made by Canada to the Acho had also had immediate consequences for the Bands, as it resulted in Canada proportionately reducing the offer that it made to the Dehcho First Nations, including the Bands.

[151] In my view, *Sambaa* is factually distinguishable from the matter before me. As discussed above, the MOU is a six-page document that serves to generally acknowledge and facilitate the RIRSD discussion table process. It does not recognize NCC as an Aboriginal people of Canada or acknowledge any Section 35 Rights. Further, the RIRSD discussion table process itself is in its infancy. A comprehensive agreement such as the framework agreement entered into in *Sambaa* has not been reached. There is also no evidence before me that any agreements as to land or other rights have been reached with NCC as a result of the MOU, or at all.

[152] However, to my mind, what *Sambaa* demonstrates is that in some circumstances it is possible, when there are known overlapping land claims, for the duty to consult to be triggered

prior to a non-binding but comprehensive agreement such as an agreement in principle being completed.

[153] In that regard, it is also significant to note that in this matter the MOU expressly acknowledges that Canada may have a duty to consult an Indigenous group other than NCC which has or may have Section 35 Rights that may be adversely affected by a product of the RIRSD discussion table. Further, as seen from the record, Canada has confirmed it will consult with the Applicant if any contemplated Crown conduct has the potential to adversely affect its rights, whether asserted, established or planned for the Labrador Innu's land claim and self-government agreement.

[154] If, as a part or as a result of the RIRSD discussion table process, Canada identifies the nature of the potential rights that NCC may hold and the beneficiaries of those potential rights and makes a determination that the NCC (or identified members thereof) is to be recognized as an Aboriginal people of Canada, then Canada will have to consider whether those potential rights may potentially conflict with the Section 35 Rights of other Indigenous groups, including the Applicant. If so, at that point in time, the impact on those parties' potential rights will no longer be speculative, and the duty to consult will be triggered. However, based on the wording of the MOU and the record before me, I agree with the Attorney General that that duty has not yet been engaged or triggered.

[155] It is also not possible for this Court to determine when that duty may be triggered. The Court is not privy to the discussions between NCC and Canada and the record does not indicate their progress.

[156] However, as the Applicant points out, it is possible that the duty may be triggered before any agreement in principle or similar agreement is reached with the NCC. As seen from the record, the Labrador Innu Land Claims Agreement-in-Principle is over 400 pages in length and represents a very considerable volume of work and negotiation. It is highly detailed and addresses land and non-renewable resources, resource management, wildlife, migratory birds, fisheries, harvesting compensation, forest resources and plants, water management and Innu water rights, among other things. It specifically describes the Labrador Innu Settlement Areas and the Labrador Innu Lands.

[157] Assuming that the goal of the NCC discussion process is to achieve a similar document (both processes ultimately leading to treaties), then, should NCC status and potential overlapping Section 35 Rights be established to Canada's satisfaction, a further agreement to negotiate an agreement-in-principle, or a similar document, could potentially have the effect of triggering the duty to consult.

[158] The challenge for Canada will be to determine when, in the circumstances before it, that duty is triggered.

[159] In conclusion, and for the reasons above, in these circumstances the duty to consult has not yet been triggered. Accordingly, the Crown did not breach the duty to consult with the Applicant before signing the MOU. And, therefore, the Applicant does not have standing to challenge the decision on that basis.

Conclusion

[160] The decision to enter into the MOU is not justiciable. Accordingly, it is not necessary for me to address the Applicant's arguments as to the correctness or reasonableness of the MOU or standing.

[161] The duty to consult has not yet been triggered.

Costs

[162] The Attorney General sought to have the application dismissed on a without-costs basis. I am dismissing the application and there will be no order for costs in the favour of the Attorney General.

[163] The NCC sought to have the application dismissed with costs. No submissions as to the quantum of costs was made by any party. Rule 400 affords the Court full discretion in the awarding of costs. Rule 407 states that unless the Court otherwise orders, costs shall be assessed in accordance with column III of the table to Tariff B. Given that I have not been directed to any circumstances that would warrant an exceptional costs award, NCC shall have its costs based on column III of Tariff B.

JUDGMENT IN T-1606-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed; and

2. There is no order for costs in the favour of the Attorney General. NCC shall have its costs, based on column III of Tariff B, payable by the Applicant.

"Cecily Y. Strickland"
Judge

Schedule "A"

MEMORANDUM OF UNDERSTANDING ON ADVANCING RECONCILIATION

This Memorandum of Understanding is made in duplicate this 5th day of September, 2019.

BETWEEN:

NUNATUKAVUT COMMUNITY COUNCIL
as represented by its President
("NCC")

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of Crown-Indigenous Relations
("Canada")

(hereinafter referred to collectively as the "Parties" and individually as a "Party")

WHEREAS by entering into this Memorandum of Understanding ("MOU"), Canada and NCC commit to renewing and strengthening their nation-to-nation relationship;

AND WHEREAS the Parties wish to explore new ways to advance reconciliation based on recognition of rights, respect, co-operation and meaningful partnership;

AND WHEREAS Canada has fully endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* without qualification and is committed to implementing the *Declaration* in partnership with Indigenous Peoples, and in accordance with Canada's Constitution.

AND WHEREAS NCC identifies as an Inuit collective, and has a longstanding assertion of Indigenous Rights (including Aboriginal Title and Treaty Rights) to their asserted traditional territory of NunatuKavut;

AND WHEREAS Canada has recognized NCC as an Indigenous collective capable of holding section 35 Aboriginal rights, for the purpose of entering into discussions regarding rights recognition and self-determination;

AND WHEREAS the Parties wish to work towards a common understanding of the scope and nature of the legal rights of NCC's membership;

AND WHEREAS the Parties wish to discuss how best to support and ensure the physical, emotional and spiritual safety and well-being of the people of NunatuKavut;

AND WHEREAS NCC wishes to discuss how best to support and preserve the culture of the Inuit of NunatuKavut, their kinship ties, families and communities, and their connection to their asserted traditional territory;

AND WHEREAS the Parties agree to act in an open, good faith and transparent manner, and to undertake a joint solution-oriented approach that is cooperative, collaborative, and consensus-based; and

WHEREAS the Minister of Crown-Indigenous Relations is representing Canada in these RIRSD discussions, and will invite other federal Departments and Agencies to participate, as appropriate, in the RIRSD discussion-table process;

NOW THEREFORE the Parties agree as follows:

Discussion table and its objective

1. The Parties have established a Recognition of Indigenous Rights and Self-Determination (RIRSD) discussion table.

2. The objectives of the RIRSD discussion table will be to:

   (a) Identify the nature of the rights that NCC may hold, identify the beneficiaries of those rights, and include this information for consideration in any Joint Mandate proposal.

   (b) Develop one or more mutually acceptable joint negotiation mandates (the "Joint Mandate(s)") for approval through each Party's internal process, to serve as the basis for negotiations between the Parties to advance reconciliation.

3. Where approved by both Parties, the Joint Mandate(s) will identify NCC priorities which may include, but are not limited to the following:

   (a) Community-based confidence building measures such as programs and services needs and interests;

   (b) Jurisdiction over land, sea and ice and exercise of rights over land, sea and ice, where established;

   (c) Governance processes, structures and accountabilities;

   (d) Health, social and economic betterment;

(e) Financial arrangements; and

(f) Other items as agreed upon.

4. Where approved by both parties, any Joint Mandate(s) will also define a process for negotiations.

5. The Parties will develop an agreed-upon work plan referred to in paragraph 11.

Province of Newfoundland and Labrador

6. The Parties recognize the importance of having the Province of Newfoundland and Labrador's participation in the RIRSD discussion table to advance reconciliation, and will, when and where appropriate, encourage the Province to contribute to the RIRSD discussion table as an active participant.

Structure and Meetings

7. Each Party will determine who will represent it at the RIRSD discussion table.

8. The RIRSD discussion table will meet once per calendar month unless otherwise agreed by the Parties. The Parties will jointly select a suitable time and place for each meeting.

9. The Parties will establish such technical working groups as are deemed necessary to advance discussions.

10. Where a persistent issue of concern arises during RIRSD discussions, the Parties may refer the issue to the President of NCC and the Senior Assistant Deputy Minister of Treaties and Aboriginal Government (in Crown-Indigenous Relations and Northern Affairs Canada) for resolution.

Funding and Resources

11. Canada recognizes that NCC requires reasonable capacity to participate in the RIRSD discussion table contemplated in this MOU. The Parties will work to develop a mutually acceptable work plan and budget to support NCC's participation in the RIRSD discussion table. The work plan and budget will be consistent with the terms and conditions approved by *Treasury Board of Canada* and will be subject to an appropriation of applicable funds by Parliament for the fiscal period(s) in which funds would be provided to NCC.

12. This MOU does not preclude NCC from accessing any funding under existing federal programs or initiatives that Canada might normally make available to other Indigenous groups or organizations. However, the access to such funding

is subject to the eligibility criteria of each program or initiative, unless otherwise modified by Canada.

Legal Status

13. Except for this paragraph 13, paragraphs 14-15, 17, 18, 19, 22 and 25, this MOU is not legally binding, is intended only as an expression of good will and political commitment, and does not create, amend, recognize or deny any legal or constitutional right or obligation on the part of either Party.

14. Whether or not disclosed to any person or persons,

    (a) this MOU (other than paragraphs 13, 14-15, 17, 18, 19, 22 and 25),

    (b) all discussions of the RIRSD discussion table, and

    (c) all records, information and communications that disclose the content of discussions or the content of a Party's positions or views

    will be without prejudice to the legal rights of, and to the positions which may be taken by, either Party in any legal proceeding, negotiation or otherwise.

15. Except for the purpose of enforcing paragraphs 13, 14-15, 17, 18, 19, 22 or 25, the Parties will not seek admission of or voluntarily tender, in a court of law or in any proceeding before a tribunal or board, evidence respecting this MOU or respecting any item mentioned in (b) or (c) of paragraph 14.

16. The Parties acknowledge and agree that this MOU and the discussions conducted pursuant to the MOU do not constitute consultation or accommodation by Canada.

Joint Communications Approach

17.
    (a) Subject to (b), the Parties may inform the public or the media of this MOU's existence or of the MOU's contents, and may give the public or the media information of a general nature about the progress of the RIRSD discussion table pursuant to the MOU.
    (b) The Parties will discuss the possibility of establishing a joint communications approach in relation to this MOU, and such an approach may include provision for joint action by the Parties to inform the public or the media regarding the matters referred to in (a).

18. Unless the Parties agree otherwise, in advance and in writing, and subject to paragraph 19:

(a) all discussions of the RIRSD discussion table will be held in camera and remain confidential; and

(b) a Party will not disclose any records, information or communications that reveal the content of discussions or the other Party's positions or views.

19. The Parties acknowledge that:

(a) Canada may have a duty to consult an Indigenous group other than NCC which has or may have rights that are protected by section 35 of the *Constitution Act, 1982* and that may be adversely affected by a product of the RIRSD discussion table, and in order to ensure such duty is fulfilled, may disclose to the other Indigenous group all or part of such product (in final or draft form);

(b) prior to disclosing any material under paragraph 19(a), Canada will consult NCC about the contemplated disclosure, subject to any confidentiality obligations of Canada to the other Indigenous group; and

(c) where a disclosure under 19(a) is contemplated, Canada will take reasonable steps to oblige the other Indigenous group to maintain the confidentiality of the material to be disclosed.

20. The Parties acknowledge that Canada may have a duty to consult NCC in respect of a product (final or draft) of negotiations between Canada and another Indigenous group which may adversely affect the asserted or established section 35 rights of NCC.

21. The Parties acknowledge that:

(a) where there is any overlap between the asserted rights of NCC, and the asserted or established rights of other Indigenous groups, it is desirable that the overlap be addressed by discussions between NCC and the other Indigenous group; and

(b) Canada may have a role in facilitating and/or providing funding to support such discussions.

22. Understanding the need for confidentiality, NCC may share information about the content of discussions pursuant to this MOU with NCC's membership. NCC will give Canada an opportunity to provide its views in advance of any such sharing of information.

Term, Suspension and Termination of the MOU

23. This MOU comes into force when signed and, subject to paragraph 25, will remain in effect until it is replaced by a subsequent agreement between the Parties.

24. Either Party may suspend or terminate this MOU by providing 30 days' written notice to the other Party, such notice providing the reasons for suspension or termination.

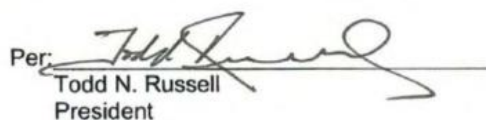
25. Unless the Parties agree otherwise in writing, the provisions of paragraphs 13, 14-15, 18, 19, 22, and this paragraph 25 will survive the conclusion of the RIRSD discussion table's activities and any suspension or termination of this MOU.

IN WITNESS WHEREOF this MOU has been executed by the Parties as of the date first written above.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Per:
The Honourable Carolyn Bennett
Minister of Crown-Indigenous Relations

NUNATUKAVUT COMMUNITY COUNCIL



Per:
Todd N. Russell
President

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1606-19
STYLE OF CAUSE:	INNU NATION INC. v THE ATTORNEY GENERAL OF CANADA (Representing The Minister Of Crown-, Indigenous Relations) and NUNATUKAVUT COMMUNITY COUNCIL INC. AND NUNATSIAVUT GOVERNMENT
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 19, 2024, MARCH 20, 2024
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JUNE 12, 2024

APPEARANCES:

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