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Joint Press Release of Makivik Corporation, Grand Council of the Crees (Eeyou Istchee) and the Naskapi Nation of Kawawachikamach

QUÉBEC COURT OF APPEAL UPHOLDS CREE, INUIT AND NASKAPI TREATY RIGHTS

The Cree, Inuit and Naskapi scored an important victory on August 4, 2014, when the Québec Court of Appeal declared the provincial government had violated their treaty rights when it set caribou sport hunting levels and dates in Northern Québec for the 2011-2012 season.

If governments fail to respect the *James Bay and Northern Québec Agreement* (JBNQA) with the Cree and the Inuit or the *Northeastern Québec Agreement* (NEQA) with the Naskapi – land claims agreements signed in 1975 and 1978 – their decisions will usually be struck down, the province’s highest court ruled.

“Such is the price to be paid for preserving the honour of the Crown in carrying out treaties and in the protected nature of treaty rights,” wrote Justice Pierre Dalphond for a unanimous court.

In March 2011, Québec’s Minister of Natural Resources announced he would change the sports hunting season for the Leaf River caribou herd and set the level for the George River herd in JBNQA territory without waiting for the advice of the Hunting, Fishing and Trapping Coordinating Committee, an advisory body created under the JBNQA with equal representation by the Native parties and the federal and provincial governments.

Caribou are a very important wildlife resource in the JBNQA territory and the Cree, Inuit and Naskapi all rely on it. Both the Leaf River and the George River herds are in decline and the Native parties wanted Québec to close or reduce the sports hunt.

The Court of Appeal held that the Minister’s decision to flout the process set out in the JBNQA stemmed from administrative priorities and a desire to accommodate the outfitters that serve the non-Native sports hunters. But the Court held that, under the JBNQA treaty, the traditional way of life of the Aboriginal peoples takes clear

precedence over sports hunting.

“Makivik is very pleased that the appeal court strongly reiterated the obligations of the federal and provincial governments in regards to hunting, fishing and trapping provisions,” said Makivik Corporation’s Vice-President for Renewable Resources, Adamie Delisle Alaku. “Hunting caribou forms an integral part of traditional and current Inuit livelihood and must be protected.”

“The Cree Nation welcomes this clear affirmation by the Court of Appeal of the primacy of the treaty rights of the Cree, Inuit and Naskapis. It shows that Government must respect its treaty promises. It recognizes the priority of the Aboriginal peoples’ treaty rights to hunt, fish and trap over non-Native sports hunting and to co-manage the wildlife resources in Northern Québec. This judgment charts a clear course for the respect of the *James Bay and Northern Québec Agreement* in the years to come”, states the Grand Chief of the Grand Council of the Crees (Eeyou Istchee), Dr. Matthew Coon Come.

“The Naskapi Nation of Kawawachikamach welcomes the Court of Appeal’s judgment as the unequivocal recognition of the constitutional nature of the rights of the Naskapi under the *Northeastern Québec Agreement*. The George and Leaf River caribou herds are of paramount importance to our culture and traditions and we will always strive to ensure their protection”, says Noah Swappie, Chief of the Naskapi Nation of Kawawachikamach.

Judgment:

Corporation Makivik c. Québec (Procureure générale), 2014 QCCA 1455, <http://canlii.ca/t/g8gdt>

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BACKGROUNDER: QUÉBEC COURT OF APPEAL JUDGMENT IN CORPORATION MAKIVIK C. QUÉBEC (PROCUREURE GÉNÉRALE)

About Makivik Corporation:

Makivik Corporation is a non-profit corporation created pursuant to the James Bay and Northern Québec Agreement (1975) and mandated to represent the social, political and economic interests and well-being of Nunavik Inuit. Makivik promotes the preservation of Inuit culture and language as well as the health, welfare, relief of poverty and education of Inuit in Nunavik communities. Makivik is a signatory of the Nunavik Inuit Land Claims Agreement (2008).

About the Grand Council of the Crees (Eeyou Istchee):

The Grand Council of the Crees (Eeyou Istchee) represents the approximately 19,000 Crees of eastern James Bay and southern Hudson Bay in Northern Quebec. The Grand Council has twenty members: a Grand Chief and Deputy-Grand Chief elected at large by the Eeyouch, the chiefs elected by each of the nine Cree communities, and one other representative from each community.

About the Naskapi Nation of Kawawachikamach:

The Naskapi Nation of Kawawachikamach's traditional territory spans across part of Northern Québec and Western Labrador. The Naskapi Nation has a population of approximately 1,056 registered members, most of whom live permanently in the community of Kawawachikmach, located 14 km northeast of the Town of Schefferville on the Québec-Labrador border. The Naskapi Nation is a signatory of the Northeastern Québec Agreement (1978).

On August 4, 2014, the Court of Appeal of Québec issued an important judgement upholding the priority of the treaty rights of the Cree, Inuit and Naskapis of Québec under Section 24 of the *James Bay and Northern Québec Agreement* (JBNQA).

The Court of Appeal strongly endorsed the primacy of the treaty rights of the Cree, Inuit and Naskapis under the JBNQA as protected by the *Constitution Act, 1982*. Laws or acts of the Crown that violate these treaty rights are generally without effect. The judgement recognizes the priority of Aboriginal harvesting rights under the JBNQA over sports hunting. It holds that consultation by the Crown must be meaningful, carried out in good faith and with an open mind. Failure by the Crown to meet these obligations is a breach of its constitutional obligations and the honour of the Crown and gives rise to reparation for the Aboriginal parties affected.

The Court of Appeal granted the appeal of Makivik Corporation, the Grand Council of the Crees (Eeyou Istchee)/Cree Nation Government, and the Naskapi Nation of Kawawachikamach in the case of *Makivik et al v. Québec* regarding the violation by

Québec of the consultation process set out in Section 24 of the JBNQA in its decisions regarding the 2011-2012 sports hunt of the Leaf River and George River caribou herds.

Given a dramatic decline in the population of the Leaf River and George River caribou herds, the Hunting Fishing Trapping Coordinating Committee, a body comprising representatives of the Cree, Inuit, Naskapi, Québec and Canada established by Section 24 of the JBNQA, recommended certain restrictions on the sport hunt for the 2011-2012 season.

The Québec Minister responsible for wildlife disregarded the recommendations of the Committee. Without consulting the Committee, as provided for in Section 24, the Minister unilaterally changed the start date for the sports hunt for the Leaf River herd recommended by the Committee and allowed the sports hunt of the George River herd, contrary to the total prohibition recommended by the Committee. The Native Parties took legal proceedings to challenge these acts by the Minister.

At trial, the Superior Court of Québec found that the Minister had failed to comply with the consultation requirements of Section 24 of the JBNQA. However, it held that this noncompliance was merely a procedural irregularity and so declined to declare that the Minister had breached his obligations under the JBNQA.

The Court of Appeal set aside the decision of the Superior Court and found that the Minister had breached his constitutional obligations and the honour of the Crown by violating the rights of the Aboriginal parties to be consulted under Section 24 of the JBNQA.

In reasons for judgement written by Mr. Justice Dalphond, the Court of Appeal held that the JBNQA, as a land claim agreement and treaty, creates rights for the Aboriginal peoples that are protected by section 35 of the *Constitution Act, 1982*. Any law violating these treaty rights will generally be without effect, unless justified by government.

The Crown's obligation to consult regarding Aboriginal rights is not merely procedural; it demands, as well, the openness of mind necessary to make it meaningful. This also applies to any consultation prescribed by a treaty in a manner respectful of the honour of the Crown codified by section 35 of the *Constitution Act, 1982*. Non-compliance by the Minister with the consultation process set out in Section 24 on the basis that it would not be useful or would not change the final result therefore violated his constitutional obligations.

This was not a purely procedural defect, but a breach of the honour of the Crown by failing to consult with an open mind in implementing a treaty that provides for a mechanism to reconcile the interests of the Aboriginal peoples. The Minister was bound to consult in good faith before exercising his regulatory power, and to be receptive to the opinions and recommendations of the Coordinating Committee.

Québec did not demonstrate that these violations were justified within the meaning of the *Sparrow* judgement of the Supreme Court. Treaty rights may not be violated lightly;

the proof of justification must be clear and convincing.

This is particularly true when, as in the case of the George River herd, the way of life of the Aboriginal peoples is in opposition to the financial interests of outfitters offering a recreational activity to non-Natives. The Court of Appeal stated that these interests do not have to be reconciled, as the way of life of the Aboriginal peoples clearly takes precedence over recreational hunting, as provided for in the Agreement.

The Minister's position that there was a need for urgent conservation measures was therefore contrary to the priority recognized for the Aboriginal peoples by the JBNQA (and the Aboriginal rights in the absence of such a treaty, as held in *Tsilhqot'in Nation*). To try to reconcile the conservation of a herd necessary for the survival of Aboriginal peoples and the interests of outfitters was an operation forbidden by the Agreement and contrary to its spirit.

The Court of Appeal reserved the rights of the Native Parties to claim compensation for any harm suffered by the breaches.