CHAPTER 11

INUIT SUBSISTENCE RIGHTS UNDER THE JAMES BAY AND NORTHERN QUEBEC AGREEMENT: A LEGAL PERSPECTIVE ON FOOD SECURITY IN NUNAVIK

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Abstract: This chapter outlines some of the key issues relating to the security of the subsistence rights of the Inuit in Nunavik. It is as part of a broader research question aimed at achieving a better understanding of how food security relates to legal security with regard to access to and use of country-food resources by Aboriginal people. Existing research underscores the importance of subsistence economies in the quest for sustainable development and food security in the Arctic. It also acknowledges the critical role played by Aboriginal land rights regimes in securing access to the land and its renewable resources. This chapter thus ascertains the legal foundations and scope of Inuit subsistence rights in Nunavik under the *James Bay and Northern Quebec Agreement*. It also briefly examines how these rights interact with other uses of the land and identifies potential insecurity-generating features of the *Agreement*'s subsistence regime, which will require further analysis. Aspects of the broader legal environment likely to impact on the security of Inuit subsistence rights are also identified and targeted for more in-depth study.

1. THE NUNAVIK STUDY WITHIN THE LEGAL PROJECT ON LAND AND RESOURCES

1.1 Connecting Food Security and Legal Security

Although this paper focuses on subsistence rights in Nunavik, it is part of a broader investigation of the conditions for food security in the Arctic, that focuses on the legal framework governing indigenous access to and use of country-food resources in Nunavik and Alaska. The central aim of the research is to achieve a better understanding of how food security can relate to legal security as regards access to and use of country food resources by indigenous people of country-food resources for subsistence and non-subsistence purposes. One of the key issues examined, therefore, is the ability of the systems to provide a secure, effective, and reliable regime regarding the subsistence and non-subsistence rights of the indigenous people in the Arctic.

Legal authorities are ill equipped to determine precisely which level of legal security is desirable with regard to native subsistence use of resources from a social and economic policy viewpoint. Therefore, a rather modest goal of the research is a purely legal assessment of the level of formal normative security that characterizes indigenous rights to country food resources in Nunavik and Alaska, with a view to assisting social scientists and economists in considering the need for policy prescriptions.

The work undertaken with regard to Nunavik and Alaska is centered on the interplay between indigenous rights to country-food resources and other legal land tenure or interests in land. It does not address environmental law issues, which constitute one of the chief legal determinants of a secured access to sufficient and wholesome country-food. This very important task is left to our environmental law team.

Our chosen method is typical of positivistic legal science, which identifies and critically analyses the principles and rules both recognized and enforced by the state's institutional machinery. Legal security in this context can be summarily defined as 'the existence of stable and clearly-defined legal entitlements that are actually enforced through state institutions as against the whole world.' Positivistic methodology draws on normative sources such as international norms, constitutional instruments, legislation, case law and the writings of legal specialists.

1.2 Food Security and Subsistence Use of Resources in the Arctic

In remote northern regions, the indigenous population relies on a combination of traditional subsistence activity, wage employment and transfer payments (Huskey & Morehouse 1992). Although the harvesting of traditional country-food is no longer the main source of food resources for many households in aboriginal Arctic communities (Duhaime 1998:107) guaranteed indigenous access to these resources over time is often cited as a key component of a food security strategy (Rio Declaration, Agenda 21 in Otis and Melkevik 1996:116, Rome Declaration).

Some of the existing research underscores the importance of supporting traditional subsistence economic activity as one of the means of promoting culturally appropriate and community-based development in the Arctic (Berkes & Fast 1966:254-255). Subsistence is seen as compatible with indigenous social institutions, the preservation of traditional knowledge, and the quest for greater economic self-reliance (Chaturvedi 1996:233). The preference for subsistence practices in the use of renewable country-food resources has even been characterized as a primary principle for sustainable development in the circumpolar world (Young, quoted in House of Commons 1997:102).

The impact of indigenous rights to land and renewable resources on the pursuit of sustainable development is acknowledged. The clear recognition and effective implementation of such rights by states are commonly seen as critical to the development of subsistence economies for northern indigenous communities as part of a larger development agenda (Morehouse 1989, Berkes & Fast 1996). In complex nation-states that have elaborate and highly developed legal systems, state recognition of native claims to land and resources constitutes a basic requirement for secured access to these resources, as it may provide an indispensable defense against countervailing interests in the broader society.

Legal authorities, however, must keep in mind that an adequate level of legal security with respect to subsistence use of food resources would only be one of several determinants of such use. Factors unrelated to the subsistence rights regime such as, for example, the vitality of subsistence values in the Inuit communities, the cost of harvesting country-food, and the availability of alternative food supplies will, in the end, prove decisive.

2. LEGAL SECURITY AND INUIT SUBSISTENCE RIGHTS IN NUNAVIK

This paper ascertains the legal foundations and scope of Inuit subsistence rights in Nunavik, and how these rights interact with other uses of the land. It also identifies potential insecurity-generating features of the subsistence regime, as security is influenced by broader systemic factors that must be taken into account.

2.1 The *James Bay and Northern Quebec Agreement* (JBNQA) as the Sole Legal Source of Subsistence Rights: The Extinguishment of Common Law Aboriginal Rights

Inuit aboriginal rights originated in pre-colonial customary legal systems and were later recognized by colonial law, on the basis of prior aboriginal occupation, at the time of the assertion of European sovereignty over present-day (McNeil 1997, Slattery 1987). They thus became legally enforceable rights in the Canadian courts (*Calder 1973, Guerin 1984, Van Der Peet 1996, Delgamuukw 1997*). Although the legal system has only recently begun to explore their content, it is already well established that aboriginal rights may include cultural, religious, and social rights, that may or may not be based on land and natural resource rights or any other land-based right such as, for example, subsistence harvesting rights over state-owned land or even exclusive title to the land itself (*Delgamuukw* 1997).

From the earliest days of European colonization, Aboriginal people have been permitted, and indeed strongly encouraged, through sometimes dubious, means (Fumoleau 1994), to cede their common law rights over their traditional territory to make way for colonial expansion and non-native settlements. As is shown by the commitment solemnly expressed in the *Royal Proclamation of 1763*, however, British imperial policy was to settle native land claims before allowing European occupation, migrant settlement, and resource development (Royal Commission on Aboriginal Peoples 1993). This policy, which was notoriously disregarded in some parts of British North America (Fisher 1997), was reiterated in the *Quebec Boundary Extension Act, 1912* which shifted the province's boundaries further north to embrace Nunavik.

The *James Bay and Northern Quebec Agreement* (hereafter JBNQA or 'the *Agreement*') embodies the claims of the Cree and the Inuit of Quebec, which are grounded on the aboriginal rights doctrine. In accordance with long-standing government policy, it

contains a clause stating that the native signatories, in consideration of the rights and benefits set forth in the *Agreement*, "cede, release, surrender, convey all their Native claims, rights, title and interests whatever they may be, in and to land in the Territory and in Quebec" (2.1). The extinguishment of common law native claims in and to the land was confirmed legislatively through the enactment by Parliament of the *Native Claims Settlement Act* in 1977. Although the validity of the surrender clause of the *Agreement* has been questioned by some, similarly worded provisions found in older Indian treaties have been held valid by the Supreme Court of Canada, which has also ruled that such clauses effectively abrogate aboriginal rights to land as well as fishing, hunting rights or trapping rights (*Bear Island Foundation 1991, Howard 1994*). In addition, there does not seem to be any solid ground for challenging the federal extinguishment statute which expresses a clear and plain intention to terminate all land-connected aboriginal rights in Nunavik (*Sparrow 1990, Gladstone 1996, Delgamuukw 1997*).

The chief purpose of native claims, historically, was to give the state a clear and secure title to most of the settlement land (Royal Commission on Aboriginal Peoples 1993). This is no doubt true of the *JBNQA* so that, from the state's viewpoint, the *Agreement* is very much about legal security. But analysts are increasingly willing to acknowledge that a land claim agreement can also give legal security to the native party by establishing well-defined and legally enforceable entitlements to land and resource use (Otis & Emond 1996:562-564, Asch & Zlotkin 1997:219-220). Current aboriginal rights litigation vividly illustrates the fact that the substantive scope, and perhaps more importantly the territorial basis, of non-treaty aboriginal rights are still quite uncertain (*Adams 1996, Delgamuukwb 1997*). Because of the uncertainty of common law rights, even aboriginal people who oppose extinguishment clauses now admit that jettisoning the treaty process would not necessarily be conducive to a secure and effective access to, and use of, resources over an adequate land base.

Since any Inuit right to, and in, the land of Nunavik can be derived solely from the *Agreement*, our research seeks to measure the extent to which the regime created by the *Agreement* actually guarantees legal security to the Inuit with regard to the subsistence use of country-food resources. Most of the relevant provisions of the *Agreement* are contained in Section 24, which sets forth the *Native Hunting, Fishing and Trapping Regime* and in Section 7, which pertains to the land regime applicable to the Inuit. The existing legal literature offers only summary references to the land regime and subsistence rights of the Inuit (Bartlett 1990, Coates 1992, Lavallée 1994, McAllister 1985). There exists no clearly focused legal research exploring this intricate web of provisions upon which the Inuit depend to enjoy a legally secure and stable access to their traditional country-food. No apparent in-depth study of the *Agreement* has yet been conducted into the possible links between legal security and food security in Nunavik.

2.2 Built-in Settlement Insecurity *vs.* External Systemic Insecurity

Much of our research will be devoted to identifying potential or actual insecurity-generating features of the settlement provisions found in the *Agreement* itself. Insecurity can in fact be built in the interest-balancing mechanism, at the core of the *Agreement*.; the result either of either deliberate policy or mere defective drafting technique. But extensive scrutiny of the land and subsistence rights regime established by the *Agreement* only represents one part of the legal investigation required to draw a complete picture of legal security for Inuit subsistence rights, because the *Agreement* has to fit within a broader legal framework, which will impact on its effectiveness, its stability and perhaps even its very validity. This systemic environment may itself either reinforce Inuit subsistence rights or produce additional insecurity. This kind of systemic insecurity may be termed 'external' because it does not derive from terms of the Agreement itself.

Important issues arising from the constitutional division of powers pursuant to Canadian federal arrangements will have to be addressed, as they likely will affect the continued existence and implementation of Inuit rights. A detailed assessment of the consequences of the constitutionalisation of aboriginal and treaty rights in 1982 is also called for. Since there can be no legal security without effective remedies, the ability of the legal system to guarantee full judicial redress for any infringement of the Agreement must be evaluated.

The following sections of the paper present an overview of legal security issues related to the co-existence of Inuit subsistence rights and other interests in land.

3. INUIT SUBSISTENCE HARVESTING AND OTHER INTERESTS IN LAND: OVERVIEW OF SECURITY PROBLEMS IN NUNAVIK

3.1 The Native Right to Harvest under Section 24 of the JBNQA

The Inuit are granted, in the settlement area, an exclusive 'right to harvest' (24.3.3.), defined as the right to hunt, fish and trap any species of wild fauna (24.3.1) for personal and community use, as well as commercial trapping and fishing (24.3.11a). For residents of native settlements, community use extends to gifting, exchange, and sale of all products of harvesting between native communities and members of native communities (24.3.11c). The right to harvest also includes the right to trade and conduct commerce in all of the by-products (24.3.16).

The general rule is that the right to harvest may be exercised at all times of the year (24.3.10) without prior administrative authorization (24.3.18). Harvesting activities are, however, subject to two overarching limitations of general application: conservation (24.2.1) and public safety (24.3.5). Such limitations will allow competent regulatory bodies to impose restrictions pertaining, among other things, to harvesting methods and material (24.3.9, 24.3.12, 24.3.14), the level of harvesting (24.6.2), and the complete protection of particularly endangered species (24.3.2). However, regulatory controls will have to be minimal so as to affect harvesting activities as little as possible and not amount to actual infringement of native rights (24.3.30, 24.3.31).

The right to harvest also comprises a bundle of ancillary operational rights. It thus includes the right to travel and establish such harvesting camps as are necessary (24.3.13), the right to use traditional or modern methods of harvesting (24.3.14) and the right to possess and transport the products of harvesting activity (24.3.15). Such ancillary entitlements may well appear self-evident, but aboriginal communities governed by older treaties that contain no explicit recognition of incidental rights have had to challenge legislative prohibitions as far as the Supreme Court of Canada in order to be allowed to build hunting cabins as an implied treaty right (*Sundown*, unreported [1999]).

But the actual scope and practical significance of the native right to harvest will very much hinge on the way it interacts with the other uses of the land. In other words, the security of Inuit subsistence rights will depend on whether access to and use of country-food resources is shielded from interference caused by competing tenures or interests in land.

3.2 Harvesting Rights on Inuit-Owned Land

Tracts of land have been granted to the Inuit in ownership for Inuit community purposes in accordance with section 7.1 of the *Agreement*. These tracts of land are located within a geographical area designated as Category I lands although that area encompasses various parcels of land that are actually excluded from Inuit ownership. These include, for example, land subject to various third party interests at the time of the signing the *Agreement* (7.1.8, 7.1.7b), government properties such as main roads, landing strips, airport installations and maritime structures (7.1.9). Land can also be taken up by provincial public authorities for the purpose of providing various public services, in which case compensation in land or money, at the option of the Inuit, will normally have to be awarded to the Inuit (7.1.10). In addition, the federal government has the power to expropriate Inuit-owned land for a public purpose (7.1.13).

Quebec has retained the ownership of mineral and other subsurface resources in Inuit-owned land but no extraction and development of these resources can be carried out without the consent of the Inuit and then only upon payment of agreed-upon compensation (7.1.7).

Subject to the principle of conservation, and provided harvesting activities do not conflict with some other physical activity or with public safety (24.3.5), the harvesting rights of the Inuit extend to all Inuit-owned land except for areas where non-Inuit persons have a right of access under the *Agreement* (7.1.16) or have been otherwise granted a right of use or occupation by the community (7.1.5, 24.3.32).

Because it empowers the Inuit to control access to and use of their property, ownership of the land base itself provides them with a significant degree of security as regards the subsistence use of country-food resources. It is apparent, however, that some features of the regime applicable to category I lands nevertheless generate insecurity. For example, the federal power of expropriation is framed in exceedingly broad terms, which seems to result in extensive governmental discretion as to when and how a unilateral taking of Inuit land can be effected. It is nowhere provided that the Inuit must be consulted and offered compensation with alternative land of equivalent significance and value.

Another source of insecurity for Inuit subsistence rights lies in Quebec's right to deny replacement of land taken up for a public service when the service is one that affords a 'direct benefit' to the community or to category I lands (7.1.10A). The notion of 'direct benefit' is only partially defined (7.1.10A-B) in the *Agreement,* which may mean that the community will be forced to challenge in court the government's view of what is directly beneficial to the community or to Inuit land.

The body of general rules of public law relating to the Crown's fiduciary duty to aboriginal peoples and the rules of interpretation of aboriginal treaties will have to studied to determine just how insecure the rights of the Inuit are. It may well be, on the other hand, that these apparent insecurities have little practical significance given the relatively limited extent of Inuit-owned lands.

3.3 Inuit Harvesting Rights on State-Owned Land

By far the most substantial part of the land mass included in the settlement area is owned by the state. The Inuit consequently have no discretionary control over access to and use of these lands, even though their exclusive subsistence rights extend to them. The potential for the coexistence or overlap of Inuit harvesting rights and non-Inuit interests over the same land base thus becomes a general rule. Such a joint use regime, by its very nature, is likely to generate a measure of insecurity because of the constant risk of clashing interests and uses, and the difficulty of devising effective rules for resolving conflicts.

The *Agreement* creates two discrete regimes organizing the relationship between Inuit harvesting rights and other land uses and tenures on state-owned land. These regimes, territorially designated as Category II and III lands, do not provide the same level of legal security for Inuit subsistence rights. They are outlined separately.

3.3.1 Category II lands

Section 7.2.1 of the *Agreement* affirms the exclusive harvesting rights of the Inuit and provides that other uses of Category II lands "for purposes other than hunting, fishing and trapping shall be subject to the provisions set forth below." The provisions that follow only permit interference with Inuit rights in specifically enumerated cases. It therefore means that no activity that interferes with the free exercise of Inuit subsistence rights can be carried out on Category II lands, unless such activity is specifically contemplated in Section 7.2 of the *Agreement.*

Conversely, the government can authorize, without the consent of the Inuit and without any monetary compensation or land replacement, any land use or tenure that is not incompatible with the continued exercise of Inuit harvesting rights. Quebec has, however, undertaken to control any such authorized use or activity in order to prevent interference with the rights granted to the Inuit pursuant to Section 24 of the *Agreement* (7.2.3).

Quebec can only occupy or use the land for "any act or deed that precludes the hunting, fishing and trapping activities by Native people" if it replaces the land or, should it be the wish of the Inuit, gives a mutually agreed upon monetary compensation (7.2.3). The procedure for taking Category II lands, which is referred to in the *Agreement* as appropriation for 'development,' thus is intended to allow the state to develop tracts of land without undermining the land base for Inuit harvesting activities.

But the Agreement nevertheless allows for some degree of interference with harvesting activities. Public servitudes can be established on Category II lands without compensation to the Inuit (7.2.5.). Furthermore, a number of specified uses can validly be made of the land as long as they do not result in an 'unreasonable conflict' with harvesting activities. Such uses include mineral exploration, technical surveys, mapping, diamond drilling (7.2.5a), exploration, pre-development activities, scientific studies, and administrative duties (7.2.6b). All persons exercising rights that are compatible with the harvesting of the Inuit, or persons fulfilling a duty imposed by law, have access to the land, and may remain and erect ancillary infrastructures on the land (7.2.6). Forestry operations on Category II lands will be defined in accordance with management plans devised by Quebec and 'taking into consideration' the hunting, fishing and trapping activities (7.2.5c). The duty to take harvesting rights 'into consideration' apparently allows for some interference with these rights. Once a non-Inuit use of the land falls within the situations specified in Section 7.2., the Inuit may not harvest if their activity conflicts with any lawful physical activity (24.3.5).

The legal security of Inuit subsistence rights on category II lands will, to a great extent, hinge on the meaning that is ascribed to such key phrases as 'preclusion of harvesting,' 'compatible rights,' 'unreasonable conflict' and 'taking into consideration. Preclusion is a particularly decisive concept since it is the sole legal basis for guaranteed replacement of the land base affected by non-harvesting uses. A finding of preclusion will, in other words, trigger a vital security-

enhancing mechanism although, it must be said that the procedure is by no means without defect (i.e., no dispute settlement mechanism is created to ensure that the land offered as replacement is satisfactory). On the other hand, if a planned use or occupation by the state, or any private party to whom an interest in land may be granted, does not amount to preclusion, such use or occupation may be held 'compatible' with the rights of the Inuit even though it would 'reasonably conflict' with such rights. No land replacement and no compensation can be claimed when a conflict is shown to be 'reasonable.'

There is a growing body of case law not directly related to the JBNQA which deals with the difficult issue of co-existence of Indigenous rights and other interests in land. For example, the courts have drawn a distinction between the 'extinguishment' of indigenous rights and a mere 'infringement' of such rights (*Sparrow 1990, Gladstone 1996*). They have dealt with the question of 'inconsistent' rights (*Wik*) and have laid down general rules to determine what constitutes a 'reasonable' or 'justifiable' impairment of hunting and fishing rights (*Sparrow 1990, Gladstone 1996, Delgamuukw 1997*). A thorough analysis of these cases will yield information that may be very useful in assessing the security of Inuit subsistence rights on Category II lands.

3.3.2. Category III lands

The *Agreement* explicitly states that 'Quebec and Hydro-Quebec, and their nominees and such other persons acting lawfully authorized shall have the right to develop the land and resources in Category III lands' (7.4.1.). Monetary compensation or land replacement is not required, which means that the issue of preclusion, which is so critical for Category II lands does not arise here, and that 'development' refers to any use and occupation of the land. The harvesting rights of the Inuit on these lands exist only where access to the land is authorized by the general laws applicable to public lands (7.3.1.) and are confined to areas intended 'for the joint use of Native people and non-Natives' (24.3.32). It must also be noted that the Inuit may not hunt, fish or trap if such activities conflict with other physical activity (24.3.5. 24.3.6). The basic rule of co-existence and conflict resolution applicable Category III lands is, therefore, that Inuit subsistence rights will have to yield to any inconsistent legislation and regulation that governs access to and use of the land.

Although Inuit subsistence rights s insecure, it should not be assumed that an 'inconsistency' between non-Inuit use and occupation of Category III lands is a straightforward operation in terms of legal analysis. Put differently, the harvesting rights of the Inuit may be more secure than they first appear if a narrow definition of inconsistency is favoured. This is another issue that needs to be further canvassed in light of the relevant case law and learned commentary.

3.4 Inuit Harvesting Rights on Privately-Owned Land

Parcels of land owned by third parties when the *Agreement* came into force are clearly removed from all categories of land (7.1.8, 7.2.2., 7.3.1). If the state has since then granted full ownership in the land to third parties, in compliance with the *Agreement,* which sometimes requires compensation or land replacement (7.2.3), that land is not subject to the harvesting rights of the Inuit. It follows that the Inuit may not lawfully harvest country-food resources in any privately-owned are of land located within the settlement territory. The security of third party ownership has precedence over Inuit subsistence activity.

4. THE NEXT STEP IN THE NUNAVIK STUDY

This brief overview of legal security issues arising from the interaction of Inuit subsistence rights and other interests in land indicates that a more refined examination of all relevant case law concerning the co-existence of rights and conflict resolution is in order. The resource allocation regime established in Section 24 of the *Agreement* (24..6, 24.7, 24.8, 24.9) will also have to be studied in order to arrive at definite conclusions on the issue of legal security in Nunavik.

Our findings pertaining to security within the settlement regime itself will then have to be completed with the analysis of external systemic security-related factors.

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