

# Diversity in Drafting: The Labrador Inuit Land Claims Agreement and the Interaction of Inuit and Provincial Laws

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Mary E. HATHERLY\*

## Introduction

The concept of ‘diversity in drafting’ is a complex one which may be understood in many ways and which speaks to both the process of legislative drafting and its final product — statute law or regulation. From the former perspective, adherence to the principle of diversity in drafting suggests that the preparation of legislative instruments be guided not only by reference to well-established drafting conventions relating to the form, structure and terminology but by substantive considerations relating to the impact of those laws upon a range of identifiable groups and communities within Canadian society. In this sense ‘diversity in drafting’ may be viewed as connoting a specific type of impact analysis, the content of which derives from the rights accorded certain enumerated groups under the *Charter of Rights and Freedoms*<sup>1</sup> and federal and provincial human rights legislation. Examples of this type of diversity analysis are provided by the screening devices which have been employed by various jurisdictions at various times to assess the impact of a proposed policy, programme or law upon groups such as women, persons with disabilities, and racial, religious and ethnocultural communities. In these cases, the application of diversity analysis should be undertaken at as early a stage in the process as possible, ideally at the initial phase of policy development, and carried throughout the legislative process. Application of diversity analysis in this sense requires a consideration of the foreseeable impacts of an initiative upon members of the enumerated groups and where an impact is adverse or disproportionate, seeks ways in which the initiative could be

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\* Office of the Legislative Counsel, Department of Justice of Newfoundland and Labrador. The opinions expressed in this paper are those of the author and do not represent the policy of the Office of Legislative Counsel, the Department of Justice or the Government of Newfoundland and Labrador.

<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

modified to reduce such impacts without impeding the attainment of the underlying policy goals.<sup>2</sup>

However, the concept of ‘diversity in drafting’ is not exhausted simply by its methodological implications. ‘Diversity in drafting’ may also be understood as functioning as an end or standard to which law aspires, which objective may find expression variously in uniformity, harmonization or the enactment of distinct legal regimes. This may be the less common understanding of the concept. However, it underlies the federal policy on bijuralism and bilingualism in the drafting process as is evident in the 1999 federal *Cabinet Directive on Law-Making*<sup>3</sup> which establishes as certain objectives of the drafting process

- “that proposed laws are properly drafted in both official languages and that they respect both the common law and civil law legal systems”;<sup>4</sup> and
- “that bills and regulations respect both the common law and civil law legal systems since both systems operate in Canada and federal laws apply throughout the country. When concepts pertaining to these legal systems are used, they must be expressed in both languages and in ways that fit into both systems.”<sup>5</sup>

I would like to explore the operation of ‘diversity in drafting’ as both a method of analysis and as a legislative objective by examining the impact of the *Labrador Inuit Land Claims Agreement* upon the legislative process and by assessing the extent to which the recognition of Inuit self-government in the treaty may mandate a particular approach to the pursuit of ‘diversity in drafting’ in both the formulation of legislative policy and the expression of that policy in legislative form. However, I must sound several cautionary notes. First, the *Labrador Inuit Land Claims*

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<sup>2</sup> See, for example, “IDEAS: Integrated Diversity and Equality Analysis Screen”, developed by the Federal-Provincial-Territorial Working Group on Diversity, Equality and Justice (1997). The instrument is structured as a series of questions to be addressed at stages in the legislative process, relating to the status and impacts of the proposal.

<sup>3</sup> Privy Council Office, Government of Canada, available on the Internet at <http://www.pco-bcp.gc.ca>.

<sup>4</sup> *Supra* not 3 at section “1. Introduction”.

<sup>5</sup> *Supra*, note 3, at section “2. Fundamentals of the Government’s Law-Making Activity — Importance of bilingual and bijural drafting”.

*Agreement* was not fully ratified by Canada, the Province and the Labrador Inuit Association until January 22, 2005. Secondly, while since that time a transitional Inuit government has been established, a permanent Inuit government will not have been elected until September 5, 2006. As a consequence, only a handful of Inuit laws have been passed as yet and those concern the structures, roles and responsibilities of the future governing bodies. As a result, it is impossible to be definitive or conclusive respecting the consequences of the treaty and the emergence of Inuit self-government either upon the legislative drafting process or upon the interaction of Inuit and non-Inuit laws. Finally, the substance of my remarks will be from the perspective of an individual involved in the provincial drafting process. I cannot, for obvious reasons, speak to what either Canada or the new Inuit government may perceive to be the impact of the treaty and the recognition of aboriginal self-government upon either of their respective drafting processes. With these caveats in mind, I would like to examine how the ratification of the treaty has changed and may change the legislative drafting process and what, if any, will be the influence of the treaty upon the substance and form of provincial law.

### **The Office of the Legislative Counsel of Newfoundland and Labrador**

Assessment of the impact of the treaty requires some understanding of the drafting process as it is currently conducted in Newfoundland and Labrador. The drafting of bills and regulations is performed in this province by the Office of the Legislative Counsel which is, by virtue of section 17 of the *Statutes and Subordinate Legislation Act*<sup>6</sup>, a division of the Department of Justice. Section 18 of that Act defines the functions of the legislative counsel as follows:

“18. The legislative counsel shall

- (a) draft laws that are entrusted to the legislative counsel and intended for introduction into the House of Assembly;

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<sup>6</sup> RSNL 1990, c.S-27, as amended.

- (b) draft amendments of proposed laws that are being considered by the House of Assembly;
- (c) prepare a consolidation and revision of the public general laws of the province or statutes of the province that are authorized by this Act or that may be directed by the Lieutenant-Governor in Council; and
- (d) perform other duties related to or incidental to legislation that may be prescribed by the Lieutenant-Governor in Council.

In addition to its legislative duties, the Office of Legislative Counsel also serves as a table officer to the House of Assembly and provides legal advice upon request to the Speaker of the House. However, its primary responsibilities are to the legislative process.

The office consists of a chief legislative counsel who is also the Law Clerk to the House of Assembly and who is assisted by three legislative counsels, of which I am one.

As a division of the Department of Justice, the Office is a centralized one, providing drafting services on a government-wide basis. As such, the responsibilities of the office “go beyond the interests of a particular client and embrace the functioning and maintenance of legislation as a system of law. One of its purposes is to ensure the system’s coherence, intelligibility and efficiency in achieving policy objectives. These responsibilities may also include the protection of values associated with the entire legal system, such as fairness and equality.”<sup>7</sup>

In contrast to certain other jurisdictions<sup>8</sup>, while there exist a set of drafting guidelines respecting terminology and structure, the Office has not developed a comprehensive ‘drafter’s checklist’<sup>9</sup> enumerating the criteria which must be applied to determine whether a proposed bill or

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<sup>7</sup> K. MacCormick, J. M. Keyes “Roles of Legislative Drafting Offices and Drafters”, Department of Justice (Canada).

<sup>8</sup> See, for example, “A Guide to the Legislative Process – Acts and Regulations”, prepared by the Department of Justice, Alberta, 2005

<sup>9</sup> See, for example, MacCormick and Keyes, *supra* note 8, Appendix 4.

draft regulation complies with governmental policies. However, it is fair to say that in the preparation of legislation, the Office of Legislative Counsel in Newfoundland and Labrador functions in much the same way as any other similar office in Canada. The drafter will work from a set of drafting instructions, set out in a cabinet minute, which ideally will, at a minimum, contain sufficiently detailed information to enable the drafter to understand the problem which the proposed legislation is intended to address, describe the policy objectives of the proposed legislation and set out a recommended course of action which may include, where appropriate, directions as to consultation with other government bodies and agencies and occasionally with non-governmental groups or communities. In preparing the text, the drafter is guided by a number of conventions respecting the ultimate legislative form of the proposed policy, choice of language and format, many of which are set out in the provincial *Interpretation Act*<sup>10</sup> and the *Statutes and Subordinate Legislation Act*, others of which have developed as matters of practice over time, such as the use of gender-neutral language and plain English.

However, this brief description should not be interpreted as suggesting that the drafter's role is a passive one or that drafting is a mechanical exercise. Rather, the process of drafting is a collaborative and consultative one which places a variety of demands upon the drafter, particularly in systems such as that of Newfoundland and Labrador, in which drafting is not undertaken by departmental personnel, but by a centralized office. The drafting process is inevitably a dynamic one. However complete and comprehensive the drafting instructions, such instructions reflect policy and it is the drafter's responsibility to translate that governmental policy into a law which is coherent and intelligible and an accurate rendering of the underlying policy objectives. Drafting is not simply an exercise in syntax and terminology.<sup>11</sup>

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<sup>10</sup> RSNL 1990, c. I-19.

<sup>11</sup> MacCormick and Keyes, *supra* not 8, at 11. Two recent examples will suffice to illustrate the critical role played by a drafter in selecting the most appropriate structure, terminology and grammar to transform policy into the language of legal rights and obligations which faithfully reproduce the instructing party's intent and objectives. The first example is that of the July 28, 2006 decision of the Canadian Radio-Television and Telecommunications in Part VII application by Rogers Cable communications Inc. regarding Aliant Telecom Inc.'s termination and assignment of

The drafter exerts ultimate control over the selection of the grammatical rules, mode of expression and terminology to translate policy into law. While the legislative counsel may have little or no participation in the formulation of government policy underlying a statutory or regulatory scheme, the drafter, in collaboration with his or her departmental contact, is vital in ensuring that the policy decisions of government are implemented effectively. The choices made by a drafter are not arbitrary or capricious. They are the result of research, deliberation and ongoing dialogue with departmental contacts to ensure that the structural framework which is adopted is best suited to implement the policy and that the proposed law conforms to the drafting instructions, is internally consistent and compatible with other provincial laws.

However, the drafter's functions are not limited to ensuring that the form and text of the proposed law is in alignment with drafting instructions. Although a drafter will not normally be involved in the development of cabinet policy, there is a significant policy dimension to the drafter's role. While ideally the cabinet submission will have explored the various legal risks associated with the enactment of proposed legislation, policy issues may not have been completely canvassed. And, inevitably, issues of policy will arise in the course of drafting. As a consequence, it is the drafter's responsibility, in conjunction with departmental legal counsel, to be sensitive to the legal and policy matters

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a support structure agreement. At issue was the right of Aliant Telecom Inc. to terminate its Support Structure Agreement with Rogers Cable communications Inc. at any time without cause and with one year prior notice in writing. Critical to the outcome of this application was the interpretation of section 1 of the Support Structure Agreement which provided: "Subject to the termination provisions of the [SSA], [the SSA] shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party." The ambiguity in interpretation of the section was created by the placement of a comma preceding the phrase "unless and until terminated by one year prior notice in writing by either party". In ruling in favour of Aliant, the Commission relied on basic rules of punctuation to conclude that the phrase under review modified both parts of the section, a ruling which has caused many commentators to assess the value of the misplaced comma at \$21 million dollars. See also *R. v. Aisthorpe* (2006) NLCA 40 which involved the statutory interpretation of the word 'use' in the context of the provincial offence of driving while using a cell-phone.

which are generated in and by the drafting process. In this regard, it is the drafter who is ultimately responsible to ensure that the proposed legislation respects the constitutional division of powers, is consistent with the *Charter of Rights and Freedoms*, human rights legislation and other relevant provincial legislation and international conventions such as NAFTA and is, moreover, compatible with governmental policies of more general application, such as those, for example, respecting gender equality.

The success of the drafter in ensuring the conformity of law with the legal regime will depend upon two factors: first, the training and experience of the drafter and his or her familiarity with diverse areas of law, including the laws of other jurisdictions; secondly, the types of institutional supports which are in place to facilitate collaboration and co-operation between the office of the legislative counsel, the department sponsoring the proposed legislative initiative, cabinet and affected stakeholders.

With respect to institutional policy supports, the process of drafting requires that all proposed legislation be scrutinized to ensure its conformity with existing law, including the constitution. As a consequence, every cabinet submission must contain a statement from the Department of Justice which identifies and evaluates the level of legal risk associated with the proposed course of action and any alternatives offered by a sponsoring department or departments. In addition, each cabinet submission must be referred to the Department of Labrador and Aboriginal Affairs which is responsible for identifying any aboriginal-specific considerations associated with or arising from the proposed course of action. Finally, all drafts are subjected to an ultimate review by cabinet officers who are responsible for ensuring that the text is clear and internally consistent, conforms to drafting instructions and consonant with the constitution and provincial laws.

Recourse to internal policy supports has expanded in recent years in recent years to include external consultation with third parties at various stages of the drafting process. This consultation may assume many forms. At one end of the spectrum, the role of third parties in the development of legislation may be limited to the preliminary stages of policy consultation with stakeholders or interest groups with a particular expertise or familiarity with the policy issues under consideration. Such groups might

include consumers of mental health services, women's groups, environmental associations and the like — in short, any group, organization or community that is likely to be adversely or disproportionately affected by the proposed legislation or which enjoys a special expertise which is essential to the effective development and implementation of government policy. At the other end of the spectrum, government may share drafts of proposed legislation with affected groups. This latter practice is relatively infrequent and tends to occur on an *ad hoc* basis, normally as the result of specific drafting instructions to this effect (which instructions may be issued to either the sponsoring department or the Office of Legislative Counsel), a prior contractual commitment or undertaking or as the exercise of departmental discretion.

The participation of non-governmental bodies in the review of draft legislation is no doubt rare and somewhat problematic because it is seen to conflict with the principle of confidentiality of draft legislation. Convention dictates that until a bill has received first reading and has been tabled in the House of Assembly, it is not accessible to the public. This convention has on occasion been explained as an aspect of solicitor-client privilege<sup>12</sup>, although such a justification seems tenuous, and more persuasively, as a function of cabinet confidentiality.

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<sup>12</sup> Mr. Justice Burnyeat of the British Columbia Supreme Court was willing to assume the protected status of draft legislation on the basis of solicitor client privilege in *The Health Services and Support-Facilities Subsector Bargaining Association et al. v. British Columbia*, (2002) BCSC 1509, but only to the extent that the draft legislation contained a number of comments by counsel. Similar reasoning was applied by Mr. Justice Tysoe in *Cooper v. British Columbia* (unreported, February 3, 1999, Supreme Court of British Columbia Action No. C984069 – Vancouver Registry) in which the court held that a draft of the Mortgage Brokers Act was not subject to non-disclosure on the basis of solicitor-client privilege since “although the document may have been prepared by legislative counsel, it does not disclose the seeking or giving of legal advice. It is not privileged and shall be disclosed.” (at para.20). However, a similar draft containing comments by legislative counsel was withheld from disclosure on the basis that “It reflects the giving of legal advice and it is privileged to that extent” (at para. 25). However, the contrary view has been expressed by D. Brown and D. Cartin, “Position statement on the attorney-client relationship in the legislative employment setting” (1996), 10 *The Legislative Lawyer* 3. and certainly in a jurisdiction in which drafting services are centralized and offered on a government-wide basis, it would be difficult to conclude that draft legislation is encompassed within the concept of solicitor-client privilege. As noted by MacCormick and Keys, *supra* note 8 at 7: “...when the mandate of a drafting office is government-wide, its clients are institutions like government departments. Its responsibilities usually go

Draft legislation and draft regulations are, prior to tabling in the House of Assembly or introduction to Cabinet, regarded as a species of advice to Cabinet and thus subject to confidentiality. Certainly, that is how draft legislation and regulations are characterized in contemporary access to information legislation. Subsection 18(1) of the Newfoundland and Labrador *Access to Information and Protection of Privacy Act*<sup>13</sup> is typical of the approach taken by all other Canadian jurisdictions in attaching a guarantee of non-disclosure to draft legislation and regulations, although the guarantee may be discretionary<sup>14</sup>, rather than mandatory, and the statutory exceptions to non-disclosure will vary from one jurisdiction to another. Section 18 provides in part:

“18.(1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Cabinet.” [emphasis added]

This prohibition has been justified as “intended to allow full and frank discussion of policy issues within the public service, preventing the harm which would occur if the deliberative process were subject to excessive scrutiny, while allowing information to be released which would not cause real harm”.<sup>15</sup> In recent years, the reach of the principle of cabinet confidentiality has been qualified by a number of exceptions<sup>16</sup> so

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beyond the interests of a particular client and embrace the functioning and maintenance of legislation as a system of law”.

<sup>13</sup> SNL 2002, c.A-1.1.

<sup>14</sup> See, for example, the *Nova Scotia Freedom of Information and Protection of Privacy Act*, SNS 1993, c. 5, s. 13 in which the guarantee is discretionary.

<sup>15</sup> ATIPPA Policy and Procedure Manual, at section 4.2.3.

<sup>16</sup> One technique to is distinguish between matters related to “substance” and those related to “deliberations” and thus allowing in an appropriate case the release of factual information. See, for example, *Aquacourse Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1999] 6 W. W.R. 1, holding that “‘substance’ is the essence of what was considered and ‘deliberations’ are the act of weighing and examining reasons for and against a contemplated action or course of action’.” A similar conclusion as to the scope of subsection 20(1) of the Newfoundland and Labrador *Access to Information and Protection of Privacy Act*

that while cabinet secrecy remains an important and essential element of parliamentary democracy, “this secrecy should be extended only as far as is necessary to protect the ability of Cabinet to deliberate confidentially on sensitive matters.”<sup>17</sup>

However, notwithstanding the contraction of the range of circumstances justifying non-disclosure, draft legislation and regulations continue to be presumptively secret. The view persists that it would be inappropriate and contrary to the public interest to release legislation in draft form for purposes of review, prior to its introduction in the House of Assembly. And, as a consequence, the participation by third parties in the review of draft legislation continues to be exceptional.

This then describes the essential elements of the pre-treaty drafting process from the perspective of our office and has controlled the participation of aboriginal groups in the formulation of legislative policy and the review of legislative proposals. Prior to the conclusion of the

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was reached by the Information and Privacy Commissioner in Report 2005-005. At issue was the right of the applicant to access briefing notes prepared for the Minister of Labrador and Aboriginal Affairs.. In allowing limited disclosure, the Commissioner concluded “There is a clear understanding that advice or recommendations in the context of access to information legislation is directly associated with the policy-making process within government. It is entirely reasonable to assume that such a process would involve some form of deliberation meant to generate discussion and consideration and, ultimately, a decision. In the absence of these essential elements, I do not believe that [factual] information would invite the protection [at para. 40]”. An alternative approach has shifted the focus from the type of information under review to an assessment of the impact of release. The test for determining whether the information requested falls within the purview of ‘advice to Cabinet’ has been stated by Mr. Justice Saunders in *O’Connor v. Nova Scotia* (2001), 209 D.L.R. (4th) 429: “Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption...”.

<sup>17</sup> See, for example the decision of Mr. Justice La Forest in *Carey v. Ontario*, [1986] 2 S.C.R. 637: “Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought even more important.”

treaty, the extent of the participation of any of the three recognized aboriginal communities in Newfoundland and Labrador in the drafting process — the Inuit, the Innu, and the Mi'kmaq — was fluid, depending upon factors such as the identity of the aboriginal group in question, the state of government's relations with that group and the substance of the legislative policy.

The pattern of consultation with the Labrador Innu and Inuit illustrates the nature of aboriginal participation. The provincial government has been engaged in comprehensive land claims negotiations with both the Innu and Inuit since the late 1970's and incident to those negotiations, it has been long-standing government policy to consult both the Innu and Inuit with respect to proposed developments in Labrador. This policy has been interpreted as mandating some degree of involvement in the development and preparation of legislation. Both the Innu and Inuit have been regularly consulted during the drafting process when it is anticipated that the proposed legislation will affect or is otherwise be related to matters under land claims negotiation and on occasion, either or both groups have been provided with copies of draft legislation for purposes of review and comment. For example, both groups were provided with copies of draft legislation concerning the protection of endangered species since it was recognized by government that provisions of the legislation respecting the setting aside of habitat areas and other matters could well have an impact upon rights being negotiated in relation to land ownership and species management. The participation of the Innu and Inuit in policy development and review of draft legislation in this and similar instances can be seen as a derivative of the more general governmental policy respecting consultation with these two groups as an incident of ongoing comprehensive land claims negotiations.

Outside the land claims process, the process of consultation has been less regularized, tending to occur on a relatively infrequent basis and only when proposed legislation of general application would have a particular impact upon an aboriginal community. For example, in 2005, the provincial government enacted the *Family Violence Protection Act*<sup>18</sup> which established a new civil remedy for victims of domestic violence.

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<sup>18</sup> SNL 2005, c.F-3.1

The Innu, Inuit and Mi'kmaq were provided with a copy of the draft legislation by the Department of Labrador and Aboriginal Affairs on the basis that family violence had been identified as a particularly pressing problem in several of the aboriginal communities. It is also worth mentioning that the consultation has not been limited to the formulation of policy and the preparation of legislation but to its implementation within the various aboriginal communities.

Finally, there has been one instance of aboriginal involvement in the drafting process in which the both the initial policy proposal and draft legislation were prepared and submitted to government by the aboriginal community. In 2000, the province passed a series of amendments to the *Liquor Control Act* designed to provide the five Inuit communities with certain powers in relation to the licensing of establishments, the creation of local alcohol committees and the control of possession and consumption of alcohol in the communities.<sup>19</sup> Although the amendments which were ultimately enacted were prepared by the Office of the Legislative Counsel and differed in form and content from the initial Inuit proposal, this does represent an interesting departure from what is, at least for Newfoundland and Labrador, the conventional drafting process, initiated and controlled by government. And in this respect, the regulations establishing a local alcohol committee in one of the Inuit communities were developed as a result of co-operative process involving the community, the Departments of Finance and Labrador and Aboriginal Affairs and the Office of Legislative Counsel in which draft regulations were circulated among the parties for review, comment and revision.

### **Inuit Self Government and the Labrador Inuit Land Claims Agreement**

The ratification of the Labrador Inuit Land Claims Agreement was the culmination of a tripartite land claim negotiation between the Labrador Inuit, Canada and the province that commenced in 1978. The treaty represents the settlement of the last outstanding Inuit claim in Canada and the negotiation of the first modern comprehensive land claims agreement in Atlantic Canada. It is intended to establish a new relationship,

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<sup>19</sup> RSNL 1990, c.L-18, ss. 128 - 134.

characterized by equality, partnership and co-operation, between the Inuit and non-aboriginal residents of Labrador and between the Inuit and the governments of Canada and the province. The treaty exhaustively defines the rights of the Labrador Inuit which are confirmed and protected by section 35 of the *Constitution Act, 1982*. It is a complex document, prescribing a new legal regime of land ownership and management, resource and revenue sharing, financial administration and, most importantly for purposes of this presentation, Inuit self-government.

Briefly, the treaty creates two categories of lands: the Labrador Inuit Settlement consisting of approximately 28,000 square miles of land and 18,000 square miles of ocean extending to the limit of the territorial sea; and within the Settlement Area, a special category of lands referred to as Labrador Inuit Lands which comprise approximately 6100 square miles. Surface title to Labrador Inuit Lands is vested in the Labrador Inuit, which surface title extends to a 25% interest in subsurface resources and exclusive ownership of carving stone and quarry materials.

Self-governing authority in relation to both Labrador Inuit Lands and the approximately 5300 beneficiaries is divided between two levels of government: the Nunatsiavut Government, which will be the regional government and five Inuit Community Governments. The structure of the Nunatsiavut Government is prescribed by the Inuit constitution and will consist of a President, Executive Council, Assembly and political, social, cultural institutions created by the Assembly. The President and members of the Assembly are elected by Inuit to four-year terms. Members of the Assembly will represent seven Inuit constituencies (the five Inuit Communities, Upper Lake Melville and Inuit resident elsewhere in Canada) and from these members, the President will appoint a First Minister who will in turn appoint members of the Assembly to an Executive Council. The division of responsibility and authority as between the Assembly and the Executive Council is similar to that between a provincial legislature and cabinet. Local government will be administered by five Inuit Community Governments headed by an AngajukKak. The AngajukKak will be elected by Inuit only; the remaining members of each community council will be elected by residents of the community. The AnjajukKak will represent his or her community in the regional Assembly.

The Nunatsiavut Government enjoys law-making authority over the establishment and management of its own governmental institutions and in relation to those matters which are vital to the day to day life of Inuit residents in Labrador Inuit Lands and to the maintenance of Inuit society: culture and language, health, education, family relations (including adoption, the solemnization of marriage and child protection), income support, housing, child, youth and family services, wills, estates and the descent of property, regulation of intoxicants, the administration of justice (including the establishment of courts, correctional services and enforcement agencies), the imposition of direct taxes and the establishment of a penalty structure in support of these laws. In addition, as an incident of Inuit ownership of Labrador Inuit Lands, the Nunatsiavut Government will also exercise self-government jurisdiction over the management of those lands, including the legal regime for the administration and control, alienation and issuance of rights, access by non-Inuit and the imposition of fees, charges and rents. Land-based law-making authority will extend to the management of wildlife and forestry resources, the establishment of protected areas, the selection and registration of place names, land-use planning, archaeological activity and environmental assessment. The Inuit Community Governments, which will replace the existing municipal governments, are vested with by-law making authority equivalent to that exercised by municipalities in the province. Inuit laws will be drafted in both Inuktitut and English and the Nunatsiavut Government is required by Part 17.5 of the treaty to maintain a registry of laws, including community by-laws and customary laws, and to make copies of those laws available to both Canada and the Province.

This brief summary does not exhaustively describe the contents of the treaty. There are a number of chapters dealing with matters within federal jurisdiction, such as ocean management and fisheries, as well as other chapters respecting financial matters and dispute resolution. However, I have spent some time enumerating the primary heads of Inuit law-making authority since it these types of powers which constitute the main body of Inuit self-government. And since these powers are roughly equivalent to those which are exercised by provincial governments, it is this aspect of self-government which is likely to have the greatest impact upon the provincial legislative process.

### **The Interaction of Inuit and Non-Inuit Laws**

I believe that the conclusion of the treaty and the recognition of Inuit self-government will have important implications for the content of provincial laws both in themselves and in interaction with Inuit laws and for the structure and operation of the drafting process although these implications cannot as yet be fully appreciated. The principal consequences of the treaty are:

- The requirement to enact ratification legislation and to amend existing provincial laws to ensure compliance with the treaty
- Substantive harmonization of Inuit laws with provincial laws in specific fields
- Development of drafting guidelines and conventions applicable to provincial and Inuit laws in areas of substantive harmonization
- Development of a regularized framework of bilateral consultation between the province and the Inuit throughout all stages of the drafting process

These consequences are inextricably interrelated and are derived from the relationship between Inuit laws and federal and provincial laws that is established by the treaty. This relationship is relatively complex. The treaty contemplates the continued application of federal and provincial laws to the Inuit in Labrador Inuit Lands, notwithstanding the recognition of Inuit self-government. The mandated co-existence of federal and provincial laws with Inuit Laws is subject to specific qualifications, the most important of which is the preclusion of the application of provincial land laws in whole or in part from the administration of Labrador Inuit Lands<sup>20</sup>.

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<sup>20</sup> See, for example, section 4.4.17 which provides “The *Mineral Act* and the *Quarry Materials Act* do not apply to Specified Materials in Specified Material Lands”. See also section 4.4.12 which contains an inventory of provincial laws which will not apply to Labrador Inuit Lands.

However, the ouster of federal or provincial laws is the exception rather than the rule and the treaty is characterized by a pervading emphasis upon concurrency in the operation of Inuit and non-Inuit laws. Inevitably, the exercise of concurrent powers will create the possibility of conflict. To minimize this occurrence, 'conflict' is defined in extremely narrow terms as 'actual conflict in operation' but nevertheless it is to be anticipated that there will be instances in which it will be impossible to comply with both applicable laws.

The solution adopted in the treaty for the resolution of such conflicts is, generally, the application of the doctrine of paramountcy. The selection of the paramount jurisdiction is variable, rather than uniform, contingent upon the type of jurisdiction at issue. For example, Inuit laws respecting matters considered integral to Inuit identity, such as language and culture and archaeological artifacts and activities on Inuit lands, and social relations, such as family-related matters, will normally prevail over conflicting provincial laws. Conversely, with respect to matters in which there is a strong interest in the maintenance of universal public health and safety standards, such as public health and environmental assessment, or in ensuring parity between Inuit and non-Inuit with respect to rights to social programmes, such as income support and dependent's relief, paramountcy will normally be resolved in favour of provincial jurisdiction.

In its reliance upon the doctrine of paramountcy as the solution to conflicts, the treaty particularizes the more general constitutional doctrine which has been developed and applied to resolve conflicts arising from the interaction of federal and provincial laws in functionally or legally concurrent fields of authority. However, the availability of paramountcy as a technique of conflict-resolution depends conceptually upon an identification of the legal regime with a stronger or more compelling interest in the subject-matter of the dispute. With respect to those matters in which the provincial and Inuit interests are presumed to be of equivalent force, conflicts are to be avoided by the enactment of uniform or parallel laws.

## **The Impact of the Treaty upon the Legislative Process**

### **(a) The Enactment and Amendment of Provincial Law**

The most immediate impact of the treaty has been felt in the requirement to enact new provincial law and to amend existing provincial law. The treaty has necessitated the enactment of ratification legislation. The requirement to enact ratification legislation flows from section 22.8.2 of the treaty which prescribes the minimum content of the ratification legislation as including a statement of the paramount status of the treaty over inconsistent or conflicting provincial law and a statement of the paramount status of ratification legislation over inconsistent or conflicting provincial law. In compliance with these provisions, in 2004 the province enacted the *Labrador Inuit Land Claims Agreement Act*<sup>21</sup> which consists of two parts — Part I which addresses the legal status of the treaty and related matters and Part II which contains an inventory of consequential amendments — and the treaty itself, which is appended as a Schedule.

The consequential amendments to provincial laws which are effected by Part II of the ratification legislation are somewhat atypical in form. Instead of the normal pattern of specific and targeted revisions to various provisions in the affected enactments, the drafter elected to identify and enumerate 54 provincial laws, each of which are amended by the inclusion of a general statement as to the interaction of the statute and the ratification legislation which is in the following form:

“This Act and regulations made under this Act shall be read and applied in conjunction with the *Labrador Inuit Land Claims Agreement Act* and where a provision of this Act or regulations made under this Act is inconsistent or conflicts with a provision, term or condition of the *Labrador Inuit Land Claims Agreement Act*, the provision, term or condition of the *Labrador Inuit Land Claims Agreement Act* shall have precedence over the provision of this Act.”

This drafting technique was employed for several reasons. First, it was concluded that the usual approach of an itemized listing of individual

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<sup>21</sup> SNL 2004, c. L-3.1

provisions to be amended carried with it a high degree of risk that certain inconsistencies or conflicts with the ratification legislation might be overlooked. Secondly, it was felt that it would be impossible to identify or predict all future possible situations of conflict or inconsistency. Finally, from a philosophical perspective, the inclusion of the general amending provision was regarded as sending an important signal to each responsible department to engage in a continual process of internal review to ensure conformity with the treaty. In addition, as a result of specific undertakings given to the Inuit by the province, more specific amendments to the *Human Rights Code*<sup>22</sup> and the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*<sup>23</sup> have been passed.

The impact of the treaty upon provincial law has not been confined to the content of that law. There has as well been a demonstrated willingness to forego reliance on cabinet secrecy and to involve the Inuit in the review of draft legislation. With respect to the text of ratification legislation, consultation on draft language occurred as a result of a specific provision in the agreement itself<sup>24</sup>. However, even in the absence of a specific direction in the treaty, the province has evidenced its endorsement of Inuit involvement in the review of drafting. For example, the Inuit were supplied with a copy of the draft amendments to the *Human Rights Code* and the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act* referred to previously. The purpose of providing a copy of draft text in these cases was not only to ensure substantive consistency with the treaty but also to ensure congruence between the treaty and proposed amendment at the level of terminology and form.

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<sup>22</sup> RSNL 1990, c. H-14. The provision in question provided for the priority of Inuit hiring and contracting preferences set out in the Voisey's Bay Inuit Impact and Benefits Agreement, notwithstanding the Act's guarantee of equality in employment practices.

<sup>23</sup> RSNL 1990, c. C-2. Section 4 of this Act was amended by the addition of subsection (2) confirming the paramountcy of the *Labrador Inuit Land Claims Agreement Act* over the Act notwithstanding subsection (1) of the Act which provided for its paramountcy over other provincial statutes.

<sup>24</sup> Section 22.8.3 of the treaty provides: "The Legislation referred to in subsections 22.8.1(b) and 22.8.2(c) [federal and provincial ratification legislation] shall be prepared in Consultation with Labrador Inuit Association."

The enactment of new provincial law and the amendment of existing provincial law has been the more predictable and perhaps less interesting aspect of the treaty. After all, the comparison of draft provincial law with the provisions of a treaty to ensure compliance is essentially a species of the normal exercise of constitutional review which is regularly conducted by the drafter. What may be a more interesting, if only because more novel, consequence of the treaty consists in the interaction of provincial and Inuit laws.

### **(b) Substantive Harmonization of Inuit and Provincial Laws**

With respect to the interaction of Inuit and provincial law, it is likely that the treaty will be a force in favour of harmonization and initially this influence will be experienced as the harmonization of Inuit laws with provincial laws, rather than the converse. From a substantive perspective, the tendency toward harmonization may not appear at first glance to be immediately self-evident. After all, one of the purposes of the treaty is to establish an Inuit Government, which, if not a third order of government, is certainly envisaged as a relatively autonomous agency, with a defined sphere of authority that is confirmed and protected by section 35 of the *Constitution Act, 1982*. The establishment of self-government might be viewed as mandating normative diversity and cultural distinctiveness in the content of aboriginal laws since as the Uniform Law Conference has noted in this context, "...Aboriginal jurisdiction is not just a question of who gets to make the laws; it includes an assumption that if Aboriginal peoples make their own laws, the laws will both derive from and reinforce Aboriginal culture and identity. It would make no sense, then, for Aboriginal peoples to simply pass the laws that have been passed up until now by non-Aboriginal governments".<sup>25</sup> Certainly in several key areas, most particularly the management and administration of Labrador Inuit Lands and the management of allocations of wildlife and plant resources, the regime established by the treaty is one of either exclusive or principal Inuit control. Diversity in the sense of uniqueness is also characteristic of the grant of law-making authority in

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<sup>25</sup> Uniform Law conference of Canada, Civil Section "The Role of the Uniform Law Conference in Relation to Aboriginal Laws", Yellowknife, August 18 -22, 2002.

relation to the institutions of Inuit government and the protection of cultural and linguistic matters which are unique or particular to Inuit traditions and society.

At the same time, however, there are numerous instances in which Inuit and provincial laws will function concurrently and simultaneously in respect of the same subject matter, a phenomenon militating in favour of harmonization. The type of harmonization envisaged is not tantamount to uniformity but rather denotes a compatibility which is in certain respects conceptually analogous to the harmonization of federal legislation with the civil law of Quebec. As noted by the Department of Justice *Policy on Legislative Bijuralism* (1995):

“It is imperative that the four Canadian legal audiences (Francophone civil law lawyers, francophone common law lawyers, Anglophone civil law lawyers and Anglophone common law lawyers) may, on the one hand read federal statutes and regulations in the official language of their choice and, on the other, be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal system (civil law or common law) of their province or territory.”

That harmonization in this sense does not simply refer to a question of terminology but also embraces the substance of laws is made clear by the 1999 federal *Cabinet Directive on Law-Making* which in relation to bijural and bilingual drafting has been interpreted as embodying the requirement that “each of the two versions of every statute or regulation equally reflect the terminology, concepts, notions and institutions of Canada’s two private law systems so that everyone can find, in the official language of his or her choice, wording that is respectful of the legal system in force in his or her province or territory”<sup>26</sup> While bijuralism in this context is not an explicit constitutional requirement in contrast to the constitutional obligation relating to bilingualism<sup>27</sup>, as one

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<sup>26</sup> A. Morel, “Drafting Bilingual Statutes Harmonized with the Civil Law”, Department of Justice Canada, 1997, at 2.

<sup>27</sup> Section 133 of the *Constitution Act, 1867* requires that Parliament use both official languages in all enactments, a directive which is reiterated in section 6 of the *Official Languages Act*, RSC 1985, c. 31. Section 18 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, constituting Schedule B of the

commentator has noted it is certainly taken into account by Parliament “when it sets out standards, the application of which intersects with provincial private law”.<sup>28</sup> Simply put, “the goal of legislative bijuralism is to ensure respect for the essence of each legal tradition in both language versions of the Act”.<sup>29</sup>

The analogy between the legal regime created by the Labrador Inuit Land Claims Agreement and the bijural nature of the Canadian legal regime is admittedly not a perfect one. An aboriginal government is not legally equivalent to the federal or provincial governments. However, the justifications which have been advanced in support of substantive harmonization in a bijural state may be even more imperative in the context of the exercise of treaty jurisdiction by an aboriginal government. Since treaty rights, including self-governing capacity, are constitutionally protected, it is at least arguable that it is the obligation of both provincial and federal governments not only to respect the language of the treaty but to attempt in their respective legislative processes to ensure the compatibility of federal and provincial law with Inuit law. Otherwise, given the operation of the treaty’s conflict resolution rules, the objectives of self-government and autonomy could be significantly undermined. Preservation of treaty rights in the context of self-government is even more pressing, obviously, in the context of provincial law, given the wide range of Inuit law-making authority and the high degree of concurrency between that authority and provincial legislative powers. In short, the treaty may be regarded as an instrument of reconciliation intended to establish a new and cooperative relationship between the Inuit and the province in a specific territory in the province. Consistent with this overriding objective, harmonization of provincial and Inuit laws is both desirable and inevitable.

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*Canada Act, 1982*, RSC 1985, App. II, No. 44) also provides that both linguistic versions of a statute are equally authoritative.

<sup>28</sup> L. Levert “Harmonization and Dissonance: language and Law in Canada and Europe — The Cohabitation of Bilingualism and Bijuralism in Federal Legislation in Canada: Myth or Reality?” in *The Harmonization of Federal Legislation with the Civil Law in the Province of Quebec and Canadian Bijuralism (2nd)*, Department of Justice Canada, 2001, at 5.

<sup>29</sup> Marie-Claude Gaudreault, “Legislative Bijuralism: Its Foundations and its Application”, Department of Justice Canada 2006,

The treaty establishes two mechanisms to promote harmonization: the requirement for Inuit law to comply with provincial standards; the requirement for both the province and the Inuit to enact uniform or parallel laws.

### **1. Compliance of Inuit Laws with Provincial Standards**

The harmonization of Inuit and provincial laws contemplated by the treaty is the type of harmonization described by the Uniform Law Conference in which “The objective is to achieve the same result from either language version of the law and there is a recognition that that result may flow from formulations of words that are not exactly the same. This focus on outcome provides equal respect to both languages by privileging neither specific version.”<sup>30</sup>

The approach to harmonization described in the preceding passage is clearly directed by specific provisions of the Inuit treaty and lends support to the conclusion that one substantive impact of the treaty will be a certain convergence between provincial law and Inuit law from the perspective of content. In other words, the operation of the treaty itself will be such as to demand substantive harmonization in defined areas. Explicit examples of this species of substantive harmonization are provided by the various provisions of the treaty which require, as a precondition to the validity of Inuit laws, compliance with standards which are comparable to those contained in provincial laws.

This requirement is formulated in a number of ways throughout the treaty but is most characteristic of the self-government powers contained in Chapter 17 which addresses the authority of both the Nunatsiavut Government and the Inuit Community Governments in relation to Inuit and other residents of the territory, business and social relations and governing institutions. A few examples will suffice to illustrate this process of harmonization. For example, section 17.10.1 of the Agreement authorizes the Nunatsiavut Government to make laws in relation to the issuance, suspension and renewal of liquor licences in Labrador Inuit Lands and the Inuit communities. However, law-making authority in this

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<sup>30</sup> *Supra* at note 25.

respect is not unfettered but is subject to the qualification contained in section 17.10.2 which requires that such Inuit laws “contain criteria that are comparable to the criteria applied to the issuance, suspension, cancellation, refusal and renewal of the classes of Alcoholic Beverage licences referred to in section 17.10.1 by the board of the Newfoundland and Labrador Liquor Corporation under the *Liquor Control Act*.”

Similarly in the fields of both health, and primary, elementary and secondary education, Inuit laws must require that professionals delivering services are licensed in accordance with provincial laws and that, at least in respect of certain matters, that Inuit laws incorporate standards equivalent to those contained in provincial laws. Accordingly, while under section 17.13.1, the Nunatsiavut Government will enjoy a fairly expansive authority in relation to health which extends to services, facilities, professional qualifications and administrative boards and agencies, the exercise of this power is subject to two significant limitations. First, Inuit health laws must ensure that health care professionals are licenced by the Province and that immunization and reporting of communicable diseases continue to be governed by provincial law. Secondly, any health care facilities that are established under Inuit Law must conform substantially to design and program standards applicable to health care facilities in communities of similar size and circumstance in the province. A similar qualification pertains to the exercise of law-making authority in relation to education. Inuit laws must ensure the transferability of students between Inuit school systems and the provincial system, a qualification which implicitly requires a degree of uniformity in curricula and testing design.

The need for Inuit law to comply with provincial standards in these and analogous areas may be justified on several bases. First, Inuit continue to be residents of the province and are entitled to demand the same level of rights and social protections as are afforded to non-Inuit residents. This justification is clearly evident in those provisions respecting familial relations. Thus for example, while section 17.18.2 vests the Nunatsiavut Government with considerable latitude to make laws respecting the rights and obligations of family members and dependents in relation to support, marital property and domestic contracts, such laws must satisfy section 17.18.3 which requires that such Inuit laws “accord right to and provide for the protection of spouses, cohabiting partners, children, parents, vulnerable family members and individuals defined as

dependents under Inuit Laws that are comparable to the rights and protections enjoyed by similarly situated individuals under laws of general application.” A second justification relates to the overriding interest in maintaining public order and health and safety. For example, while section 17.19.1 authorizes the Nunatsiavut Government to make laws respecting housing and the provision of public housing, Inuit Laws on this subject must meet or exceed federal and provincial building code standards.

While the test for validity of Inuit laws in these and related instances will involve a comparison of Inuit with provincial laws, this should not be construed as compulsory uniformity or normative identity. What is demanded is merely that Inuit laws comply with certain minimum standards related to public health and safety and individual rights.

## **2. Requirement of Uniformity or Parallelism**

The examples referred to in the preceding section are illustrative of a particular type of harmonization — that which is intended to “produce positive generic results that are generally speaking the same outcomes sought by non-Aboriginal legislation”.<sup>31</sup> However, it would be a mistake to assume that the treaty preference is only for a type of harmonization which requires Inuit law to conform to provincial laws. The situation is otherwise in relation to laws, the subject matter of which does not engage public health and safety considerations or individual equality rights. In such instances, harmonization does not function so as to require a level of conformity of Inuit with provincial law. Rather what is contemplated is the development of consensus, through a process of negotiation and compromise, resulting in the development of a uniform laws, or alternatively in the development of distinct, but parallel laws.

Two examples illustrate this form of substantive harmonization. First, there is a requirement contained in section 4.11.6 that

“4.11.6 The Nunatsiavut Government and the Province shall negotiate the standards for Exploration in Labrador Inuit Lands and for quarrying in Labrador Inuit Lands outside Specified

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<sup>31</sup> *Supra*, at note 25.

Material Lands within one year from the Effective Date or within some other time agreed by both Parties.”

Section 4.11.7 provides that these negotiated standards are to be given the force of law by both parties, an instance of uniformity in content that derives from the legal interest of both the Inuit and the Province in the ownership of subsurface mineral resources and in the common objective to ensure orderly development of those resources. Analogous provisions respecting the negotiation of uniform standards occur in relation to joint environmental assessment processes and the maintenance and disposition of archaeological resources.

A similar mechanism for promoting harmonization may be found in chapter 10 respecting land use planning, although harmonization will be achieved not through uniformity but what might be described as parallelism. As a result of its ownership of a defined territory, the Nunatsiavut Government is authorized to enact laws relating to land use planning. However, because the ownership interest of the Inuit applies only to land and does not extend to overlying waters and because there is a common desire on the part of both the province and the Inuit to ensure the rational development and management of a region which will encompass both Crown and Inuit property, the treaty requires the development of a single regional land use plan to apply to the Labrador Inuit Settlement Area, including Labrador Inuit Lands. The regional land use plan will be developed by a planner working under the direction of a joint management committee. In order for the plan to be implemented, each level of government must consult the other and when both parties have approved the plan, each government must enact a law adopting the plan to the extent that it is applicable within its jurisdiction.<sup>32</sup>

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<sup>32</sup> The treaty describes this process as follows:

“10.7.1 For matters within Provincial jurisdiction in the Labrador Settlement Area, outside Labrador Inuit Lands, including the Inuit Communities, and with respect to Water Use in Labrador Inuit Lands, the Land Use Plan shall come into effect upon compliance by the Minister with the requirements of the *Urban and Rural Planning Act, 2000* for bringing a plan into force after which the Land use Plan, as it applies in such lands, shall be binding for purposes of Provincial law on all Persons other than Canada.

Finally, the management of wildlife resources will be entrusted in the first instance to a joint wildlife management board with the power to make recommendations to both the Inuit government and the provincial government. It is not unrealistic to suppose that a certain convergence of substantive law will be the result.

### **3. Provincial Incorporation of Inuit Laws**

The treaty explicitly recognizes and in fact encourages harmonization of two types: the growing convergence of Inuit law with provincial law through the requirement that certain species of Inuit law meet or exceed provincial standards and less commonly, the requirement that Inuit and the province jointly develop uniform or parallel laws flowing from a common agreed-upon standard. Since the determination of the validity of the first body of Inuit law will depend upon a comparison with the relevant provincial standard, it is likely that the substantive harmonization will encourage Inuit incorporation of provincial laws. This may be true of the immediate future but it remains to be determined whether the process of substantive harmonization work ‘in reverse’ as it were to ensure the closer identity of provincial with Inuit law. Will it ever be the case that the mores and values which underlie Inuit laws and which are presumptively culturally specific, will be incorporated into provincial laws? This result is perhaps unlikely, although not unrealistic. However, there may well emerge situations in concurrent fields in which the content of Inuit law may be adapted and incorporated into provincial law.

There is one example of this phenomenon in the treaty. Chapter 16 vests in the Nunatsiavut Government the exclusive power to select place names in Labrador Inuit Lands and the Inuit Communities. While the minister retains the power to disallow a decision of the Inuit Government

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10.7.2 The Land Use Plan shall come into effect in Labrador Inuit Lands when it has been proclaimed and published as an Inuit law...after which the Land Use Plan, as it applies in Labrador Inuit Lands, shall be binding for purposes of Inuit Laws, on all Persons other than Canada”.

on this point, once approved, the Inuit determined place name will become the official place name for purposes of provincial law and all government publications.

While there are no other express instances in which Inuit law will dictate the content of provincial law, the treaty does not foreclose the possibility. While this is purely speculative, the treaty does require a high degree of bilateral or reciprocal consultation on virtually the entire range of matters associated with Inuit self-government authority, including economic laws and policies, environmental assessment processes, enforcement of certain harvesting liability laws and the operation of child protection legislation, all matters in which the Inuit enjoy a treaty-guaranteed jurisdiction. And even with respect to those matters in which Inuit law is initially required to adhere to provincial standards, the treaty endorses ongoing bilateral consultation and the development of intergovernmental arrangements respecting standards, programme delivery and reciprocal enforcement. The future amendment of provincial laws in concurrent areas will demand a corresponding amendment of Inuit law to reflect changing standards. It is neither unreasonable nor unrealistic to imagine that adjustment of provincial standards may be influenced by the content of Inuit laws.

### **(c) Harmonized Drafting Guidelines**

The impact of the treaty will not, however, be confined to interaction of the substance of Inuit and provincial laws but will also have an effect upon drafting processes and procedures. There is a necessary interrelationship between the form and substance of legislation. If the assertion that the treaty, both in its structure and its specific provisions, is a profound influence toward substantive harmonization, and if it is agreed that some degree of substantive harmonization is agreed to be both necessary and desirable, harmonization of the Inuit and provincial drafting processes is required. Without some degree of unity between form and substance, the objectives of the treaty could be undermined. This congruence cannot be achieved simply by a method of analysis which, analogous to current gender and diversity analysis, is directed at introducing linguistic and terminological changes to make the language of provincial laws consistent with the treaty. And congruence does not

simply mean an ongoing review of the impact of the treaty upon current and proposed provincial legislation to ensure consistency with the treaty. Obviously, these are exercises which must be undertaken. However, because one important consequence of the treaty is to establish a governing body with distinctive powers which is intended to operate with some degree of concurrency with the provincial government, it is arguable that the drafting process applicable to both provincial law and Inuit laws should reflect this fact.

Since Newfoundland and Labrador is not an officially bilingual jurisdiction, it has no experience in the drafting of legislation in both official languages. Moreover, prior to the passage of the treaty, our experience in bijural drafting has been somewhat limited, although arguably legislation implementing integrated federal/provincial tax regimes and the federal/provincial Atlantic Accord may be viewed as exercises in bijuralism.<sup>33</sup> As a result, the guidelines and techniques which have been developed to accommodate and facilitate the interaction of federal legislation and the civil of Quebec will no doubt be instructive.

Many of the objectives underlying the harmonization of federal laws with the civil law of Quebec apply with more or less equal force to the interaction of provincial and Inuit law. In a 1997 speech delivered at the Conference on the Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism<sup>34</sup> the then Minister of Justice identified three goals advanced by harmonization:

- To reaffirm the unique bijural nature of Canadian federalism;
- To strengthen the legitimate place of civil law beside the common law in the statutes of Canada; and
- To ensure that federal statutes would continue to have the desired effect in Quebec.

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<sup>33</sup> The *Tax Agreement Act*, SNL 1996, c. T-0.01.

<sup>34</sup> Montreal, November 24, 1997. See also Department of Justice “Harmonization of Federal Statutes with Quebec Civil Law: Background”, Ottawa, June 1998.

These objectives were restated in the preamble to the *Federal Law — Civil Law Harmonization Act, No. 1*<sup>35</sup> in the following terms:

- All Canadians are entitled to have access to federal laws in keeping with their legal tradition;
- The civil law reflects the unique character of Quebec society; and
- The harmonious interaction of federal and provincial legislation is essential.

Such objectives apply with more or less equal force, albeit with some modification, to the interaction of provincial and Inuit laws and in this context may be expressed as follows:

- Residents of the province are entitled to have access to provincial laws in keeping with their legal tradition and as prescribed by the treaty;
- Inuit law will reflect the unique character of Inuit society;
- The harmonious interaction of provincial and Inuit law is not only essential but is both an implicit and explicit requirement of the treaty itself.

And, as is the case with harmonization of federal and civil law, harmonization of provincial and Inuit law should be directed at:

- reaffirming the unique characteristics of the legal regime established by the treaty;
- strengthening the place of Inuit law; and
- ensuring that provincial laws will continue to have the effect in the territorial area subject to the treaty that is contemplated by the treaty.

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<sup>35</sup> S.C. 2001, c. 4.

Harmonization in drafting is required to assist the courts, both Inuit courts and the provincial and Supreme Courts, which will be responsible for interpreting and applying Inuit and provincial law. Consistency in drafting methodology and technique will reduce interpretive difficulties and ensure the development of a stable, certain and coherent body of law. Since Inuit will be subject to both Inuit and provincial laws and since non-Inuit may be subject to Inuit laws, harmonization at the level of drafting should contribute to clarity and consistency in legal expression and improve access to justice.

However, while it will be necessary to harmonize the drafting process to eliminate ambiguity and confusion and to assist in the realization of the underlying purposes of the treaty, how this will be achieved is less certain. While the treaty itself contains several interpretive provisions, these are intended to apply to the treaty itself and not to the drafting of provincial and Inuit laws<sup>36</sup>, although there is an obvious value in extending these interpretive principles to the drafting of provincial and Inuit laws in situations where the two legal regimes co-exist.

A number of techniques have been developed to implement bijuralism and bilingualism in the drafting of federal statutes.<sup>37</sup> These techniques may be summarized as follows:

- use of juridically neutral language to express a term which refers to concepts or institutions belonging to both legal systems. For example, the use of terms such as ‘assignment’, ‘fee simple’ and ‘charges’ in reference to the Inuit interest in and rights in relation to Labrador Inuit Lands may be regarded as juridically neutral language;
- use of a definition which is given a specific meaning understandable in both legal regimes, the effect of which is

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<sup>36</sup> The general interpretive provisions are set out in Part 1.2 and address such matters as the legal status of maps, appendices and schedules, the applicability of the *Provincial Interpretation Act*, the legal effect of headings and whether legislative references are ambulatory or static.

<sup>37</sup> See, for example, the Report of the Committee appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada, available on the Internet at: [www.ulcc.ca/en/us/drafting.wpd](http://www.ulcc.ca/en/us/drafting.wpd).

to neutralize vocabulary. Application of this principle may involve the joint use of terms which are given a particular and unique meaning in the treaty itself such as ‘Mineral’ which is defined in terms slightly different from its definition in provincial law;

- use of a ‘doublet’, the effect of which is to reflect the specificity of each legal system by using terms which are particular to each regime without giving a priority to either. For example, legislation may be structured to refer to ‘Mayor’ (the provincial term) and ‘AngajukKak’ (the Inuit term) or to ‘cabin’ (provincial) and ‘Aullasimavet’ (Inuit);
- delineation of separate regimes, which technique may be regarded as an extension of the doublet and involves the application of norms to separate regions, and which may find expression in either asymmetrical or parallel provisions. For example, as a result of the requirement for both the province and Inuit to enact agreed-upon mineral exploration standards, it is not difficult to imagine that provincial mining legislation may be so structured as to contain a separate legal regime applicable only to Labrador Inuit Lands.<sup>38</sup>

While it would be premature to comment on the efficacy or appropriateness of these and other techniques in the context of the interaction of Inuit and non-Inuit laws, there is obvious merit in the development of some common drafting guidelines applicable to provincial and Inuit drafters.

#### **(d) A New Consultation Framework**

Finally, regardless of the content of the drafting guidelines which will need to be developed, the conclusion of the treaty will no doubt

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<sup>38</sup> The operation of these techniques is discussed by André Morel, “Drafting Bilingual Statutes Harmonized with the Civil Law”, Department of Justice Canada, 1997.

promote greater co-operation and openness in the drafting process. This may result in the development of a more regularized process of consultation as opposed to the relatively informal and ad hoc approach which has been employed in the past.

The treaty is certainly replete with examples of mandated consultation by the province with the Nunatsiavut Government with respect to the development and content of legislative policy.<sup>39</sup> Nor is the obligation to consult imposed solely upon the province. For example, section 17.10.8 allows the Nunatsiavut Government to make laws in relation to the detention of intoxicated persons but requires that prior to enacting such laws, the Nunatsiavut Government is to consult the Province in relation to the substance and implementation of such laws and their coordination with provincial laws. And often, the duty to consult is expressed in reciprocal terms that require each government — Inuit and provincial — to cooperate on the development of policy over a wide range of subjects of common interest, such as a regional land use plan, child protection notification protocols, exploration standards, and archaeological standards.

In addition to consultation on the substance of proposed policy there are instances in the treaty in which the validity or operability of Inuit laws will be contingent upon prior or subsequent approval of the province. For example, section 12.7.3 requires the Nunatsiavut Government to promptly submit a copy of an Inuit law respecting harvesting of plants and access by third parties to Labrador Inuit Lands to the minister for approval. The minister has 60 days following receipt within which to disallow the laws. The Nunatsiavut Government may make laws in relation to the establishment of an Inuit Court, rules of court and reception of evidence but this jurisdiction may not be exercised until the Lieutenant-Governor in Council has approved the proposed court structure and

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<sup>39</sup> For example, section 12.14.15 requires the province to “seek the advice of the Nunatsiavut Government prior to the preparation of any Legislation that relates to this chapter [Wildlife and Plants] and is intended to effect the implementation of a Domestic Interjurisdictional Agreement”. Similarly, in respect of liability for damage to harvesting resources caused by developments, section 14.6.3 provides “Recognizing Inuit concerns regarding collection of Compensation, Governments shall give consideration to including enforcement mechanisms in Legislation to implement this chapter.”

procedures and methods for the selection of judges.<sup>40</sup> And finally, as noted previously, there are several instances in which the treaty contemplates the enactment of a uniform law, as is the case with the development of exploration standards which are to be given the force of law by both the Province and the Inuit.

Can a more generalized duty to consult on the form and substance of draft legislation be extrapolated from these particularized occasions? Certainly the treaty does not contain an express and general requirement of consultation. The treaty's silence on this point may be contrasted with sections 30 and 31 of the Nisga'a Final Agreement which require British Columbia to consult with Nisga'a Lisims Government before enacting an amendment to provincial law in areas of Nisga'a authority when the provincial law might have the effect of rendering the Nisga'a law invalid.

However, even in the absence of such a general duty, it may be argued that a general duty to consult and to disclose relevant information with respect to drafting is an incident of the recognition of self-government rights in the treaty and can be justified by reference to the constitutional requirement of consultation confirmed by section 35 of the *Constitution Act, 1982*. Case law has consistently imposed upon the Crown as a fiduciary the duty to act honourably in its dealings with aboriginal peoples.<sup>41</sup> The honour of the Crown is implicated at all phases of its dealings with aboriginal peoples: "from the assertion of sovereignty to the resolution of claims and the implementation of treaties".<sup>42</sup> And the

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<sup>40</sup> Section 17.31.4.

<sup>41</sup> It is acknowledged that the caselaw associated with the elaboration of a 'duty to consult' on the part of the federal and provincial governments has been generated in the context of the assertion of aboriginal rights in which context it has been explained on the following basis by Chief Justice MacLachlin in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 in which she stated at para. 25: "...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...have yet to do so. The potential rights embedded in these claims are protected by section 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."

<sup>42</sup> *Supra* note 41 at par. 17.

duty to consult to which the Crown is subject may entail disclosure of information which is otherwise subject to confidentiality under legislation governing access to information. Thus for example, in the recent decision of the Federal Court in *Canada (Information Commissioner) v. Canada (Minister of Industry)*<sup>43</sup> Kelen J. ordered the release of census information notwithstanding the prohibition against disclosure in subsection 17(1) of the *Statistics Act*<sup>44</sup> on the basis that:

“the Crown’s duty to act honourably with respect to the Algonquin Bands’ land claim in this case means that the Crown disclose the census records in the possession of the Crown which may prove continuity of occupation between present and pre-sovereignty occupation [at para.43]...The duty to act honourably, in good faith and as a fiduciary are common law duties that have now been constitutionalized to the extent that they relate to the Crown’s legal obligations under section 35 of the *Constitution Act, 1982*”. [at para. 47].

It is arguable that the principle of disclosure in the context of aboriginal rights may also apply in the treaty context since treaty rights also enjoy the protection of section 35 of the *Constitution Act, 1982* and form the basis for a generalized duty of consultation between the provincial government and the Inuit, to at least the extent contemplated by the Nisga’a Land Claims Agreement.

However, even if there is no implied and generalized duty of consultation as a matter of legal right, the adoption of a practice of consultation on legislative development is desirable. Such consultation should be bilateral. That the province should engage in consultation at least with respect to amendments to provincial laws which may have the effect of invalidating Inuit laws is perhaps an obvious proposition. However, such consultation should be reciprocal as the Inuit have an interest in ensuring the continued validity and operation of their laws. The consultation referred to should be not only bilateral but meaningful; intended to ensure that both parties are fully informed and aware of the nature and purpose of the legislative proposal and its impact upon the

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<sup>43</sup> 2006 FC 132.

<sup>44</sup> RSC 1985, c. S-19.

current law. Regularized consultation on draft legislation should reduce the instances in which Inuit law may be determined to be invalid for failure to comply with provincial standards and minimize the occasions on which the application of the treaty's conflict/paramountcy rules will suspend the operation of Inuit law. Such consultation may assume many forms from simple notice of an intent to explore new policy, to joint consultation on such policy, to review of draft legislation and even, in certain instances, to co-drafting.

The treaty represents a new economic, legal and social partnership between governments and the Labrador Inuit. It creates a new legal reality which no doubt will profoundly affect the content of future laws, both Inuit and provincial and the manner in which those laws are developed and drafted.