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INDIGENOUS PEOPLES

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Related subject: Constitutional Law

Application for judicial review of decision by Minister of Crown-Indigenous Relations and Northern Affairs (Minister) to enter into *Memorandum of Understanding on Advancing Reconciliation* (MOU) with respondent Nunatukavut Community Council (NCC) — NCC describing itself as Inuit governing body — In 2016, Canada invited NCC to participate in reconciliation engagement process to advance acceptance of NCC's comprehensive land claim — Subsequently, NCC and Canada, as represented by the Minister, entered into MOU — Applicant asserted, *inter alia*, that MOU recognizes NCC as "an Indigenous collective capable of holding section 35 Aboriginal rights for the purpose of entering into discussions regarding rights recognition and self-determination" — Submitted that MOU adversely impacts Innu Nation's *Constitution Act, 1982*, s. 35 rights, therefore reviewable by Federal Court — Also submitted, finally, that Minister obligated to consult with them prior to deciding to enter into MOU, but failed in their duty to consult — Requested that Court grant order quashing MOU and declaring that Minister did not have statutory authority or jurisdiction to enter into MOU — In alternative, applicant requested that Court grant order quashing MOU and declaring that Minister failed to discharge Crown's duty to consult, accommodate applicant — MOU six-page document acknowledging that Recognition of Indigenous Rights and Self-Determination (RIRSD) discussion table established, identifies its objectives — Stating that parties acknowledge that Canada may have duty to consult Indigenous group other than NCC which has or may have rights protected by s. 35 and that may be adversely affected by product of RIRSD discussion table — Main issues whether challenged Crown conduct, i.e. entering into MOU, justiciable; whether Minister having duty to consult with applicant prior to entering into MOU; whether Minister's decision to enter MOU correct or reasonable — Decision to enter into MOU not justiciable — Whether matter justiciable depending on whether matter affecting legal rights, imposing legal obligations or causing prejudicial effects — Applicant argued that MOU affecting their legal rights by "deciding" that NCC, as Indigenous collective, capable of holding s. 35 rights — However, MOU preamble stating that Canada has recognized NCC as Indigenous collective "*capable of holding section 35 Aboriginal rights, for the purpose of entering into discussions regarding rights recognition and self-determination*" — MOU explicitly stating that it is not legally binding — Nothing in MOU recognizing NCC as "aboriginal peoples of Canada" or is a determination that NCC holding s. 35 rights — MOU not intended to decide or confirm any NCC s. 35 rights — Recognition of NCC as Indigenous collective limited to purposes of MOU — Nothing supporting applicant's assertion that Canada has made final determination that NCC "is incapable of" holding s. 35 rights — Purpose of MOU is to permit NCC, Canada to explore NCC's status, nature of any s. 35 rights — It would be concerning if decision by Canada to enter into discussion process with group self-identifying as an Aboriginal people could attract challenge, at that stage, on basis that such discussions conferred a "legal benefit" — Apparent that issue herein is Innu Nation's view that NCC having no legitimate claim to s. 35 rights; that it has skipped the queue insofar as it may benefit from new negotiation policy with which Innu Nation taking issue — Entering into MOU did not cause applicant to suffer any prejudicial effects — Crown did not breach duty to consult with applicant before signing MOU — Test to determine whether duty to consult arising having three elements: (1) Crown's knowledge of potential

Aboriginal claim or right; (2) contemplated Crown conduct; (3) potential that contemplated conduct may adversely affect Aboriginal claim or right — Here, first element of test for when duty to consult arising established by record — MOU *itself* not a “strategic, higher level decision” that may have impact on applicant’s Aboriginal claims, rights — Something more, some further Crown conduct required in order for any potential impact to arise — As contemplated by MOU, duty to consult may be triggered if applicant’s rights affected by product of RIRSD discussion table — At this very early stage of RIRSD discussion table process, any potential for adverse impacts on applicant’s asserted Aboriginal rights remaining speculative — Entry into MOU not precluding applicant’s concerns from being addressed if, when duty to consult triggered — No direct link or causal connection between Crown conduct, entering into MOU, any possible adverse impacts to applicant’s s. 35 rights — Duty to consult confined to addressing adverse impacts resulting from specific Crown decision or action under consideration — Here, that decision is the MOU, not decision to enter into RIRSD discussion table or decision to implement policy underlying RIRSD discussion table process — RIRSD discussion table process may give rise to Crown conduct that will trigger duty to consult based on recognition of rights — MOU acknowledging that RIRSD discussion table discussions will proceed — No causal connection between entering into MOU, any potential adverse effects on applicant’s s. 35 rights — No evidence here that any agreements as to land or other rights reached with NCC as result of MOU, or at all — In conclusion, duty to consult not yet triggered — Accordingly, Crown did not breach duty to consult with applicant before signing MOU — Application dismissed.

INNU NATION INC. V. CANADA (CROWN-INDIGENOUS RELATIONS) (T-1606-19, 2024 FC 896, Strickland J., reasons for judgment dated June 12, 2024, 66 + 6 pp.)