THE WESTERN NWT ABORIGINAL SUMMIT

March 18, 1999

The Honourable Jim Antoine
Premier of the Northwest Territories
Government of the NWT
Yellowknife, NT
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Dear Premier Antoine:

Re: Aboriginal Summit request for GNWT to appeal decision on electoral boundaries

Further to our breakfast meeting on March 16, and to the meeting March 11 between Summit members and MLAs, I am writing on behalf of the Intervenors, and the Aboriginal Summit, to urge your Government to appeal from the judgment of Mr. Justice de Weerdt of March 5, 1999 in *Friends of Democracy et al. v. The Commissioner of the N.W.T.*

You have asked us to supply you with compelling reasons why the Government of the Northwest Territories should appeal. The quick answer to your question is that the constitutional future of the Northwest Territories and the place of the Northwest Territories in the Canadian federation are at issue; the integrity of constitutional negotiations with the Aborigina/First Nations governments of the western territory in the context of treaty, land, resources and governance negotiations and discussions, is at issue; the fiduciary duty of the Crown and of the Government of the Northwest Territories as an agent of the Crown towards Aboriginal/First Nations peoples and Aboriginal/First Nations governments in the Northwest Territories is at issue; the honour of the Crown and the duty of the Crown to negotiate with Aboriginal/First Nations governments, in good faith in the treaty, land, resources and governance negotiations are at issue; the duty of the Crown and the Government of the Northwest Territories to ensure respect for the spirit and intent of Crown Aboriginal treaties and the Crown undertakings under those treaties is at issue; important principles of constitutional interpretation are at issue; the matter of the appropriate balance between individual rights as reflected in section 3 of the *Charter of Rights and Freedoms* and collective rights as reflected in section 25 of the *Charter* and section 35 of the *Constitution Act, 1982* is at issue; and the appropriate role of the courts in ensuring that nothing be allowed to transpire that would frustrate the ability of the Crown to honour its commitments towards Aboriginal peoples, to negotiate in good faith with Aboriginal/First Nations governments and to honour its treaty commitments is at issue.

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This summary list of the important issues involved in this case provide sufficiently compelling reasons to have the judgment of Mr. Justice de Weerdt reviewed by an appeal court and to justify having the Government of the Northwest Territories take the initiative in ensuring that the judgment is reviewed on appeal.

We refer you to paragraph 29 of our amended Brief of Fact and Law:

> The Government of the Northwest Territories is an emerging and transitional government which must continue its evolution in order to adequately reflect and express the unique social structure and political culture of the western Northwest Territories. Aboriginal peoples challenge its political legitimacy because they did not give their consent to its creation, and the present constitutional development process which seeks to integrate public government and aboriginal self-government structures must continue if the present legislature and government of the Northwest Territories is to emerge as a fully legitimate, representative and responsible government for the new, post-division Northwest Territories. In the words of NWT Cabinet Minister Stephen Kakfwi:
>
> > We have...a government that was set up without the blessing of the Dene chiefs and Metis leaders, without the Inuit and the Inuvialuit and without the blessing of the non-Aboriginal people as well here in the North...(we need) to focus on the fact that this government has to change and we have to work towards a day when all people will give their blessing to a new form of government that we have all agreed will be ours.
> >
> > Stephen Kakfwi, addressing the Royal Commission on Aboriginal Peoples in Yellowknife on December 8, 1992, as quoted in Dacks at p. 28

An acceptable form of government must reflect Aboriginal rights and title recognized by the Royal Proclamation of 1763, in existing treaties and land claims agreements and those being discussed and negotiated. These are the collective rights embraced by section 25 and section 35.

With respect, we believe that the fundamental error in law of Mr. Justice de Weerdt is found at paragraph 25 of his judgment where his Lordship states that he is unpersuaded that section 3 of the *Charter* is in any sense to be understood as qualified by section 25 of the *Charter* or section 35 of the *Constitution Act, 1982*, at least in the context of the present case. This flies in the face of the very wording of section 25 and the reasons for its inclusion in the *Charter* during negotiations leading up to the patriation of the Constitution, a process in which the Government of the Northwest Territories was involved. It also contradicts, we suggest, the words of Minister Stephen Kakfwi referred to in paragraph 29 of our Brief.

Section 25 is included in the part of the *Charter* entitled *General* which sets out the manner in which the *Charter* rights are to be understood and applied. Section 25 provides that the guarantee of democratic rights of citizens set out in section 3 must not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada. To say that section 3 of the *Charter* is not to be understood as qualified by section 25 is tantamount to reading section 25 out of the *Charter*. It also implies a breach of the undertakings given to the Aboriginal peoples during the negotiations leading up to the *Constitution Act, 1982* in particular with respect to their concerns regarding the impact of the *Charter* and its focus on individual rights on their Aboriginal and treaty rights including, of course, their collective rights as Aboriginal peoples of Canada.

It must not be forgotten that during the patriation of the Constitution, in 1982, the Aboriginal Peoples of Canada were reassured by the Court of Appeal of England that their concerns over patriation were not necessary, as full protection of their rights had been provided through section 25 of the *Charter* and section 35. Lord Denning stated in *The Queen v. Secretary of State*, [1981] 4 C.N.L.R. 86 at pages 98-99:

> ...This new constitution contains a Charter of Rights and Freedoms. It specifically guarantees to the aboriginal peoples the rights and freedoms which I have discussed earlier. These are the relevant clauses: ...
>
> (he then cites sections 25 and 35)
>
> Lord Denning concluded as follows [at page 99]:
>
> It seems to me that the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the Constitution, so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities. ...
>
> There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown -- originally by the Crown in respect of the United Kingdom -- now by the Crown in respect of Canada -- but, in any case, by the Crown. <u>No Parliament should do anything to lessen the worth of these guarantees.</u> They should be honoured by the Crown in respect of Canada "so long as the sun rises and the river flows". That promise must never be broken. (emphasis added)

With respect to section 35 of the *Constitution Act, 1982*, again it is a serious error to suggest that section 3 of the *Charter* is not to be understood as qualified by section 35. The courts have consistently held, in accordance with well-known and age-old principles of statutory and constitutional construction, that constitutional provisions are to be read together, as a unified whole. In *Re Provincial Court Judges*, [1997] 3 S.C.R. 3, a judgment rendered in 1997, Chief Justice Lamer of the Supreme Court of Canada stated [at para. 107]:

> ... As I said earlier, the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Even though s. 11(d) is found in the newer part of our Constitution, the *Charter*, it can be understood in this way, since the Constitution is to be read as a unified whole: *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1206. ... (emphasis added)

More recently in the *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, the Supreme Court spoke eloquently of the underlying constitutional principles to be applied in constitutional negotiations. A unanimous Supreme Court held [at para. 148]:

> ...the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority.

In regard to section 35 itself, the courts have increasingly recognized that this constitutional provision entrenches promises to negotiate in good faith with the Aboriginal peoples of Canada.

In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 at 273 (S.C.C.), the Chief Justice affirms a quote from *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) to the effect that s. 35(1) "provides a solid constitutional basis upon which subsequent negotiations can take place " and goes on to say that the "The Crown is under a moral, if not a legal duty to enter into and conduct these negotiations in good faith."

Associate Chief Justice Richard of the Federal Court of Canada in the recent case of *Nunavik Inuit v. Canada (Minister of Canadian Heritage)* [1998] 4 C.N.L.R. 68 reasserted this proposition stating [at para. 105]:

> b) Subsection 35(1) represents the recognition of Aboriginal rights in the treaty process and the government's obligations within that process; it is a specific constitutional basis upon which subsequent negotiations can take place and requires a just settlement for Aboriginal peoples.

Mr. Justice de Weerdt clearly erred in excluding the constitutional protections, guarantees and rights reflected in section 25 of the *Charter* and section 35 of the *Constitution Act, 1982*. Should the constitutional development of the Northwest Territories proceed forward on the basis of that understanding, it will be fundamentally flawed.

In our opinion, it is absolutely crucial that the Government of the Northwest Territories identify this error and seek further and corrected directions from the appellate courts. For the government to fail to do so, would not only be to break faith with the Aboriginal Peoples indigenous to the western territory but also to abdicate its responsibility to ensure that constitutional development of the Northwest Territories goes forward in compliance with the constitution "read as a unified whole".

We understand that the Western MLAs have recommended that there not be an appeal on the part of the GNWT. We strongly urge you to reconsider, for the above compelling reasons, and have our respective legal counsel continue to discuss this option. We will also make ourselves available, as representatives of Aboriginal/First Nations governments publicly recognized as such by your predecessor, the Honourable Don Morin, to assist you in making the best decision possible for all the people of the western territory.

Yours sincerely

Bill Erasmus, Co-chair

c.c. Western Caucus of MLAs, Legislative Assembly of the NWT
The Honourable Jane Stewart, P.C., M.P., Minister of DIAND

Western NWT Aboriginal Summit members and mandated representatives:

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