

IN THE NUNAVUT COURT OF JUSTICE

BETWEEN:

THE INUIT OF NUNAVUT AS REPRESENTED BY
NUNAVUT TUNNGAVIK INCORPORATED

Plaintiff

– and –

THE ATTORNEY GENERAL OF CANADA

Defendant

– and –

THE COMMISSIONER OF NUNAVUT AS REPRESENTED BY THE
GOVERNMENT OF NUNAVUT and the GOVERNMENT OF NUNAVUT

Third Parties

**STATEMENT OF DEFENCE OF THE THIRD PARTIES
TO THE AMENDED THIRD PARTY NOTICE**

1. The Third Parties (hereinafter referred to collectively as the “Government of Nunavut”) admit the allegations contained in paragraphs 1, 2, 4, 6, 8, 9, 11, and 15 to 20 of the Amended Third Party Notice.
2. Except as hereafter expressly admitted, the Government of Nunavut denies each and every other allegation in the Amended Third Party Notice and puts the Defendant to the strict proof thereof.

3. In particular, contrary to the allegations in paragraph 21 of the Amended Third Party Notice, the Defendant's Statement of Defence does not plead that any obligations that the Plaintiff, the Inuit of Nunavut as represented by Nunavut Tunngavik Incorporated ("NTI"), has alleged the Crown in Right of Canada ("Canada") has breached are obligations which, if owed to NTI at all, are owed jointly and severally to NTI by both Canada and the Government of Nunavut.

4. Nor does NTI plead in the Amended Statement of Claim that any obligations that it has alleged Canada has breached are obligations which are owed jointly and severally by both Canada and the Government of Nunavut. NTI does not allege, in the Amended Statement of Claim, that the Government of Nunavut has breached any obligation at all.

5. The Government of Nunavut denies that any of its obligations under Articles 8 and 23 of the NLCA (as defined below) and the provisions of the Implementation Contract related thereto are shared jointly and/or severally with Canada. The various obligations under these articles are each specific to either the Government of Nunavut or Canada, and the responsibility borne by Canada is separate and apart from any responsibility borne by the Government of Nunavut.

6. Neither the NLCA nor the Implementation Contract related thereto give rise to any obligations by the Government of Nunavut to Canada in respect of the claims advanced against Canada by NTI in the Amended Statement of Claim.

7. Following the agreement in principle for the NLCA, on or about July 9, 1992, Canada and the Government of the Northwest Territories ("GNWT") agreed to the

“Memorandum of Understanding Between the Government of Canada and the Government of the Northwest Territories on Comprehensive Land Claim Implementation” (hereinafter the “MOU”) which recognized that Canada had entered into negotiations with, among others, the Tungavik Federation of Nunavut (Inuit) of the Eastern Arctic (“TFN”) to resolve outstanding land claims in the Northwest Territories and that there was a requirement to establish principles that would be the basis for an agreement between Canada and the GNWT concerning the funding to be provided by Canada.

8. The MOU established the principle, among others, that Canada would provide incremental funding for costs incurred by the GNWT or its successor government to implement obligations contained in comprehensive land claim final agreements or which, in the absence of a comprehensive land claim final agreement, were costs that would not have been incurred by the GNWT or its successor government.

9. The principles of the MOU, which were based on the obligations in the NLCA agreed to in principle by the parties, served as the basis for the Implementation Contract associated with the NLCA

The Nunavut Land Claims Agreement

10. On May 25, 1993, Canada and TFN, succeeded by NTI, executed the Agreement Between the Inuit of Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (hereinafter the “NLCA”). The GNWT was not a party to the NLCA, but it was a signatory.

11. Canada ratified the NLCA as a result of the signing of the agreement by the Right Honourable Brian Mulroney, the Prime Minister of Canada, on May 25, 1993, and the enactment of the *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29, which received Royal Assent on June 10, 1993.

12. Pursuant to Article 2.2.1 thereof, the NLCA is a land claims agreement within the meaning of Section 35 of the *Constitution Act, 1982*.

13. Canada was, and is currently, under an obligation, in its application of the NLCA, to act in good faith and with honour and integrity in a process of fair dealing and reconciliation.

14. The Preamble of the NLCA provides that the Parties to the NLCA negotiated the land claims based on several objectives, including providing Inuit with financial compensation and means of participating in economic opportunities and encouraging self-reliance and the cultural and social well-being of Inuit.

15. Canada is required, pursuant to the NLCA, to provide incremental funding to the Government of Nunavut to allow it to implement its obligations which it would not have had but for the NLCA.

16. As a matter of law, the provisions of the NLCA prevail over any other law or agreement which is inconsistent or in conflict with it. Article 2.12.2 of the NLCA recognizes this by providing that, where there is any inconsistency or conflict between any

federal, territorial or local government laws, and the NLCA, the NLCA shall prevail to the extent of the inconsistency or conflict.

Inuit Impact and Benefit Agreements – IIBAs

17. Article 8 of the NLCA requires the Government of Nunavut to conclude an Inuit Impact and Benefit Agreement (“IIBA”) before establishing a territorial park.

18. The obligations of the Government of Nunavut pursuant to Article 8 in respect of IIBAs are separate and apart from, and not shared with, the obligations of the Government of Canada thereunder.

19. On May 13, 2002, the Government of Nunavut entered into an Umbrella IIBA with the Inuit of the Nunavut Settlement represented by designated Inuit organizations including NTI, which contains obligations on the Government of Nunavut to institute measures for the development, co-management with designated Inuit organizations and operation of territorial parks.

20. As of 2004, the incremental cost of implementing the Umbrella IIBA was approximately \$2.2 million per year.

21. As is set out below, Canada has refused to provide the necessary funding to implement the Umbrella IIBA. To the extent that the Government of Nunavut has only been able to partially implement its obligations in respect of the Umbrella IIBA, that is a result of Canada’s failure to comply with its funding obligations under the NLCA.

22. Despite Canada’s failure to provide funding in accordance with its obligations, the Government of Nunavut has carried out initiatives to implement as much of the Umbrella IIBA as possible. These initiatives include: completing a Territorial Park Legislative Review and Best Practices Report, a Park-Specific Contracting Procedures Policy, a Draft Implementation Plan and Work Plan, Draft park-specific appendices to the Umbrella IIBA, Draft Master Plan, Draft Management Plan and Draft Cultural Landscape Resource Inventory Frameworks; taking steps towards the creation of the Nunavut Joint Park Management Committee and Parks Contract Working Group, such as developing discussion papers; taking steps to actively involve Inuit and other residents in resolving co-management and planning issues for territorial parks; conducting in-depth background research for a Nunavut Parks Program planning model; and issuing all signs, publications, kiosks and interpretation material related to territorial parks in Inuktitut, Inuinnaqtun and English and/or French as required by the language provisions of the Umbrella IIBA.

Article 23 – Employment Within Government

23. Article 23.2.1 of the NLCA provides that the objective of Article 23 is to increase Inuit participation in government employment in the Nunavut Settlement Area to a representative level, and explicitly recognizes that the achievement of this objective will require initiatives by Inuit and “Government”.

24. Article 23.2.2 provides that, in pursuit of that objective, “Government” and the NTI shall cooperate in the development and implementation of employment and training as set out in the Agreement.

25. Articles 23.4.1 to 23.4.4 require “each government organization” to prepare an Inuit employment plan to increase and maintain the employment of Inuit at a representative level.

26. Articles 23.5.1 and 23.5.2 require “government” to develop and implement pre-employment training plans. These plans are required, to the extent possible, to meet the special needs of Inuit by various means, including instruction in Inuktitut, training within Nunavut, distribution of training sites among communities, and the taking into account of Inuit culture and lifestyle.

27. The word “government” is defined by Article 1.1.1 to mean “the Government of Canada or the Territorial Government or both, as the context requires, depending on their jurisdiction and the subject matter referred to”.

28. The obligations of the Government of Canada pursuant to the provisions of Article 23 are separate and apart from, and not shared with, the obligations of the Government of Nunavut thereunder.

29. Inuit currently make up approximately 85% of the population of Nunavut. As of December 2009, approximately 51% of the positions within the Government of Nunavut are occupied by Inuit. As of 2006, less than 40% of the positions within the Government of Canada in Nunavut are occupied by Inuit.

30. As is described below, Canada has refused to provide to the Government of Nunavut the necessary funding, required by the NLCA, to allow it to develop and

implement the necessary training and other measures required to increase Inuit participation in government employment to a representative level. To the extent that the Government of Nunavut has been unable to comply with all of its obligations in respect of Article 23, that is a result of Canada's failure to comply with its funding obligations.

31. As further elaborated below, the Government of Nunavut received only \$10,000 per year for 4 years to implement its obligation under Article 23.

32. Despite the insufficient resources provided by Canada, the Government of Nunavut has established and implemented numerous initiatives and programs in keeping with its obligations under Article 23. These initiatives include, among other things, the Summer Student Employment Equity Program, Akitsiraq I Law Program, Sivuliqtiksatsat – Internship Program, Financial Internship Program, Adult Learning Strategy, Nunavut Community Skills Information System, Inuit Education Leadership Program, Inuit Studies Program, Nunavut Teachers Program, Nunavut Nursing Program, the *Inuit Language Protection Act*, S. Nu. 2008, c. 17 and the Young Parents Stay Learning Initiative.

33. The Government of Nunavut, in keeping with its obligations under Article 23, has developed a Priority Hiring Policy and Inuit Employment Plan, revised the *Education Act*, created a long-range curriculum plan and curriculum strategy and conducted monitoring and additional programs through an Article 23 Working Group. In addition, the Government of Nunavut regularly carries out Inuit Employment Statistical Reports.

34. Article 23.3.1 of the NLCA provides that Canada will conduct, within six months of the ratification of the NLCA a detailed analysis of the labour force of the Nunavut

Settlement Area to determine the availability, interest and level of preparedness of Inuit for government employment (“Labour Force Analysis”). No detailed labour force analysis has been conducted by Canada. Despite the fact that the conduct of a Labour Force Analysis is the obligation of Canada, in order to have the necessary data to develop its Inuit Employment Plan, the Government of Nunavut took various steps towards the development of a Labour Force Analysis.

35. The Government of Nunavut has taken steps to ensure that the initiatives it carries out are as effective as possible in discharging its obligations under Article 23, given the limited funding provided by Canada and the resources it has available. These steps include, for example, responding to and addressing all of the recommendations set out in the 2010 Report of the Auditor General of Canada to the Legislative Assembly of Nunavut.

36. The Government of Nunavut has no obligation or responsibility, either alone or jointly and/or severally with Canada, for the implementation of Canada’s obligations under Article 23.

Implementation Contract

37. Article 37 of the NLCA required that an Implementation Plan be developed, approved, and consolidated into a contract to identify, among other things, the funding levels for implementing the NLCA for the 10-year period following ratification. Article 37.2.6 provided that the provisions of that Article or of the Implementation Plan identifying the obligations and responsibilities of any Minister, official or agent of the

Crown acting on behalf of the Government of Canada shall not be interpreted so as to derogate from the obligations of Her Majesty under the NLCA.

38. On May 25, 1993, the Implementation Contract, which by Article 2.1 thereof constituted the Implementation Plan required by Article 37 of the NLCA, was executed on behalf of Canada, the GNWT and the Inuit of the Nunavut Settlement Area, as represented by the TFN.

39. The amounts which Canada agreed, in the Implementation Contract, to provide for the first 10-year period following ratification of the NLCA were, to its knowledge, completely inadequate to allow the territorial government to implement its obligations pursuant to the NLCA which it would not have had but for the NLCA. The inadequate funding was provided by Canada despite having been provided with numerous requests, detailed submissions and funding estimates since at least 1992 from NTI, the Government of Nunavut, the Institutions of Public Government and external consultant reports, some of which were commissioned by Canada itself.

40. Canada was made aware, in 1992, prior to entering into the Implementation Contract, that the cost to the territorial government of implementing Article 23 between 1992 and 2008 was, at that time, expected to be \$212 million in 1992 constant dollars. Despite this, in the Implementation Contract, Canada agreed to provide only \$160,000 for the purpose of implementing Article 23 in the first 10-year planning period (hereinafter the "First Funding Arrangement") an average of \$16,000 per year. Of this total amount of

\$160,000, \$120,000 was paid to the GNWT prior to the coming into force of the Territory of Nunavut on April 1, 1999, so the Government of Nunavut only received \$40,000.

41. In agreeing to provide only this funding, Canada was in breach of its obligations to the Government of Nunavut.

Negotiation of Implementation Funding for the Second 10-Year Period

42. Section 8.1 of the Implementation Contract required NTI, Canada and the Government of Nunavut to begin negotiations to renew the funding provisions of the Implementation Contract at least one year prior to expiry of the First Funding Arrangement in 2003.

43. Article 37.3.3 of the NLCA established a tripartite Implementation Panel composed of representatives from NTI, Canada and the Government of Nunavut. Article 37.3.3(g) required the Implementation Panel to recommend the funding required to implement the NLCA beyond the expiry of the First Funding Arrangement under the Implementation Contract.

44. On or about July 4, 2001, the Implementation Panel established terms of reference for a Working Group on Updating the Implementation Contract (hereinafter the “Working Group”) consisting of chief negotiators designated by NTI, Canada and the Government of Nunavut. The Working Group’s mandate was to recommend to the Implementation Panel adequate levels of funding required to implement the obligations and responsibilities in the NLCA in the planning period following expiry of the First Funding Arrangement.

45. Negotiations among NTI, Canada and the Government of Nunavut began in May of 2001 within the Working Group. Canada was under a legal obligation to conduct these negotiations in good faith and with honour and integrity in a process of fair dealing and reconciliation.

46. As part of the negotiation process, the Government of Nunavut submitted a funding proposal to the Working Group on February 4, 2002. Despite numerous requests from both the Government of Nunavut and NTI, Canada never provided a comprehensive response to the proposal put forward by the Government of Nunavut and refused to engage in meaningful discussions on its merits.

47. Canada refused to grant sufficient authority to its Chief Negotiator to allow him to carry out meaningful negotiations respecting any of the funding issues faced during the negotiation process.

48. The funding commitments made by Canada in the Implementation Contract for the first 10-year period expired in 2003 without any agreement in respect of funding by Canada for the second 10-year planning period.

49. In 2004, the Government of Nunavut provided to Canada a detailed funding submission, which estimated that implementing Article 23 for the period following expiry of the First Funding Arrangement would cost \$37 million in short-term, start-up initiatives, excluding ongoing implementation costs. Canada refused to revisit its funding allocations.

50. That same year, more than three years after the commencement of what purported to be negotiations within the Working Group, the parties reached an impasse as a result of the refusal of Canada to engage in meaningful negotiations.

51. In the Fall of 2004, NTI proposed that the parties submit to binding arbitration, pursuant to Article 38 of the NLCA. This request was supported by the Government of Nunavut. Canada repeatedly and systematically refused to submit any issues respecting implementation funding to arbitration.

52. In 2005, Canada, NTI and the Government of Nunavut agreed to a process whereby they would each make submissions to a conciliator who would provide recommendations to the parties in order that they could attempt to resolve the breakdown in negotiations. All parties agreed to appoint Mr. Thomas Berger, O.C., Q.C., to act as the conciliator.

53. Nunavut submitted detailed submissions to Mr. Berger outlining the measures it proposed to undertake to comply with its obligations pursuant to the NLCA. As of 2002, the estimated incremental costs of complying with all obligations other than those pursuant to Article 23, over the next 10 years, amounted to \$236,544,322. As per 2005, the estimated cost of complying with Article 23 amounted to \$25,931,603 per year.

54. Mr. Berger received submissions from all three parties and rendered two reports: an Interim Report in 2005 and a Final Report the following year. It was his conclusion that the only way in which the objectives of Article 23 alone could be fulfilled was by adopting, as pre-conditions, specific measures in the near term to increase Inuit representation in the

public service and, for the long term, establishing in Nunavut a comprehensive program of bilingual education in Inuktitut and English. He recommended that Canada fund the Government of Nunavut in the amount of approximately \$20 million per year to allow it to adopt the near term specific measures, plus a further unspecified amount to establish the bilingual education program. He further concluded that the details of the programs to be implemented under Article 23 must be worked out between Canada and the Government of Nunavut on a shared basis.

55. To date, Canada has refused to issue a response to Mr. Berger's recommendations or engage in meaningful negotiations in good faith.

56. The cost of implementing the Umbrella IIBA which the Government of Nunavut has entered into in accordance with its obligations under Article 8 of the NLCA is approximately \$2.2 million per year. Canada has offered to provide no more than \$230,000 per year for its implementation.

57. Throughout the negotiation process, the Government of Nunavut has requested approximately \$500 million from Canada for the second 10-year planning period (approximately \$50 million per year), including approximately \$260 million to implement its Article 23 initiatives and \$22 million to fulfill its obligations under Article 8 in respect of the implementation of the Umbrella IIBA.

Canada has Failed in its Obligations Pursuant to the NLCA

58. To date, Canada has failed to respond to funding requests by the Government of Nunavut and has effectively refused to provide the Government of Nunavut with adequate funding to allow it to implement the NLCA.

59. The total cost to the Government of Nunavut to fund its obligations under the NLCA for the second 10-year planning period is at least \$50 million per year. From 2003 to the end of the 2009-2010 fiscal year, Canada has only provided approximately \$2 million per year. The Government of Nunavut has consistently made it clear to Canada that the funding being provided is wholly inadequate to permit the Government of Nunavut to fully implement the obligations that Canada has placed on it pursuant to the NLCA.

60. Canada's failure to respond to Mr. Berger's recommendations, failure to negotiate in good faith, and failure to provide funding to the Government of Nunavut in an amount sufficient to allow it to meet its obligations pursuant to the NLCA are breaches of its obligations to the Government of Nunavut.

61. Canada cannot benefit from its own wrongs.

Indemnification Clauses in Funding Agreements

62. Despite the failure of Canada to comply with its obligations and its failure to reach agreement with the parties to the NLCA in respect of its ongoing funding obligations, Canada and the Government of Nunavut entered into a series of bilateral funding agreements (one for each fiscal year) which, among other things, set out the amount of

money which Canada did agree to provide to the Government of Nunavut to assist with respect to fulfilling its obligations under the NLCA and outlined the way in which the Government of Nunavut would spend the funding which Canada did provide.

63. Commencing with the funding agreement for the fiscal year April 1, 2002 to March 31, 2003, up to and including the funding agreement for the fiscal year April 1, 2007 to March 31, 2008, those agreements included the following clause:

The Government of Nunavut will save harmless and fully indemnify the Minister, his officers, employees, servants and agents, successors and assigns from and against all claims, liabilities, and demands arising directly or indirectly from any act, omission, or negligence of the Government of Nunavut, any breach of this Agreement by the Government of Nunavut, and performance or non-performance (in whole or in part) of the Government of Nunavut's obligations under this Agreement, and any claims, liabilities, and demands that may arise from the Government of Nunavut entering into any loan, capital lease or other long term obligations and such indemnification will survive the termination or expiration of this Agreement.

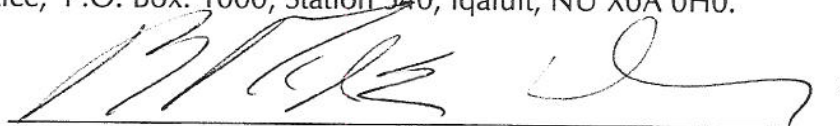
64. This clause is wholly inapplicable to the matters giving rise to the Amended Statement of Claim and the Amended Third Party Notice. More specifically, the clause is only related to the obligations of the Government of Nunavut under those specific funding agreements and not the NLCA. In any event, the Government of Nunavut has not acted or failed to act in any way which would give rise to any liability on its part pursuant to this clause of those agreements.

Place of Trial

65. The Third Parties agree that the trial of this matter be held in Iqaluit, NU.

WHEREFORE the Third Parties pray that this Amended Third Party Notice against them be dismissed with costs against Canada.

DATED at the City of Ottawa, in the Province of Ontario, this 2nd day of September, 2010 and **DELIVERED** by the Commissioner of Nunavut as Represented by the Government of Nunavut and the Government of Nunavut, whose address for service is in care of Erin George, Department of Justice, P.O. Box. 1000, Station 540, Iqaluit, NU X0A 0H0.

A handwritten signature in black ink, appearing to be "B. McIsaac" followed by a flourish, written over a horizontal line.

Barbara A. McIsaac, Q.C. & Peter K. Doody, Legal Counsel
for the Commissioner of Nunavut as Represented by the
Government of Nunavut and the Government of Nunavut

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Court File No.: 08-06-713-CVC

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Third Parties

**STATEMENT OF DEFENCE OF THE THIRD
PARTIES TO THE AMENDED THIRD PARTY
NOTICE**

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