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Implementing the 1993 Nunavut Land Claims Agreement

Alastair Campbell, Terry Fenge and Udloriak Hanson

Abstract: Following more than 20 years of research and negotiation, the Nunavut Land Claims Agreement (NLCA) was ratified by Inuit and the Government of Canada in 1993. The territory of Nunavut and the Government of Nunavut were established in 1999 pursuant to the Agreement. In exchange for a wide range of constitutionally protected rights and benefits, the Inuit of Nunavut ceded to the Crown «all their aboriginal claims, rights, titles and interests ... to lands and waters anywhere within Canada ...» While much has been accomplished through the Agreement, huge implementation challenges remain. Successful implementation of the Agreement requires a firm and enduring partnership between the Inuit of Nunavut and the governments of Canada and Nunavut. To ensure that this partnership is effective and to safeguard the «honour of the Crown,» the Government of Canada should adopt policies and inter-agency and inter-governmental processes to ensure the Agreement is fully implemented.

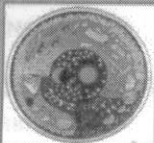
Keywords: Inuit, Nunavut Agreement, Implementation, Government of Canada, Litigation.

1. Introduction

The 282-page Nunavut Land Claims Agreement¹ – a modern treaty that applies to more than 20 percent of Canada – was approved in November 1992 by Inuit through a Nunavut-wide vote, and in 1993 through legislation passed by the

1. *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada*, The Tungavik and the Minister of Indian Affairs and Northern Development, Ottawa 1993.

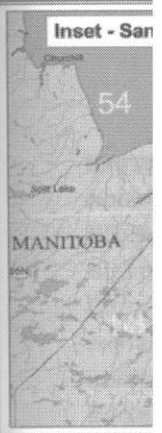
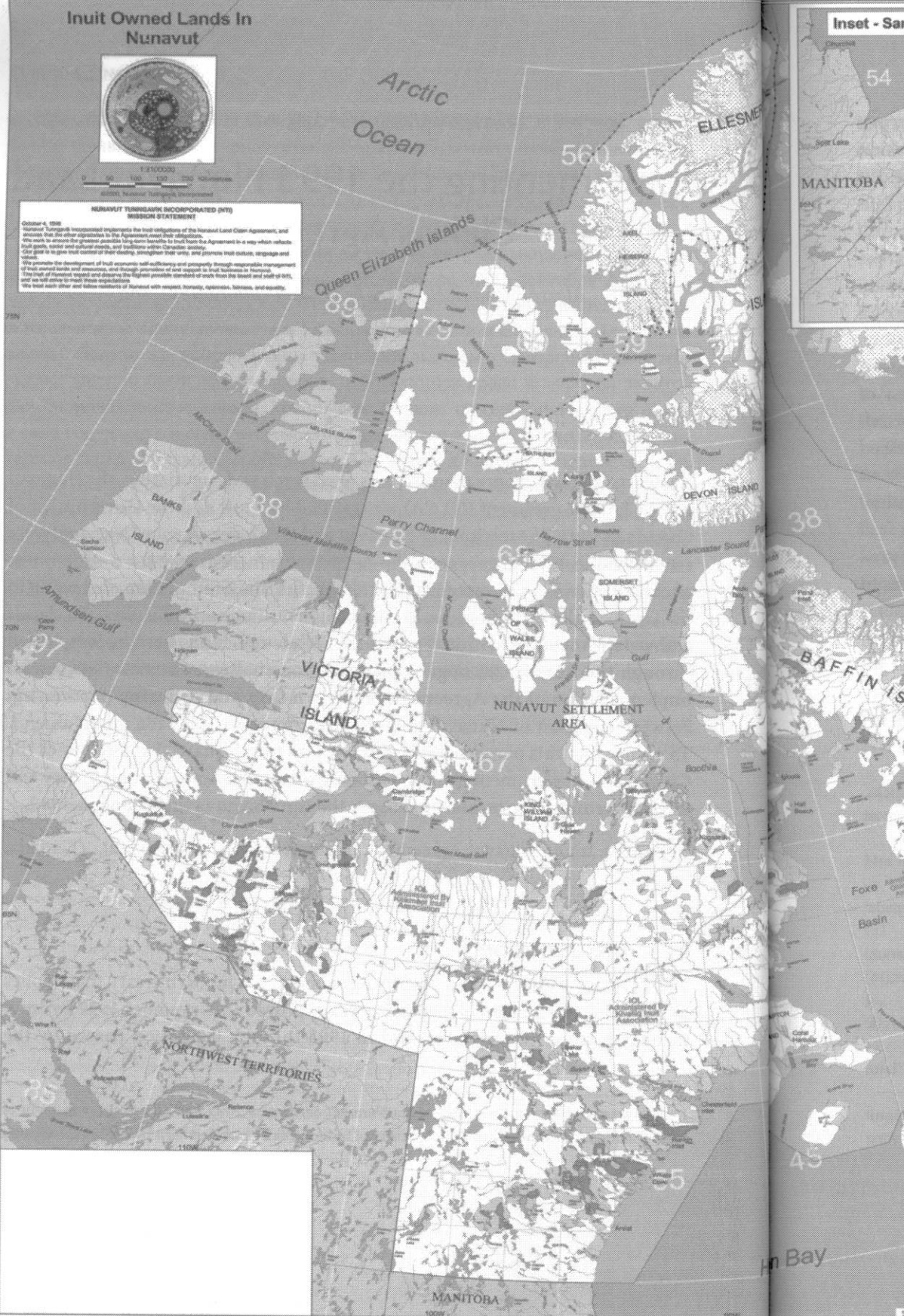
Inuit Owned Lands In Nunavut



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NUNAVUT TUNNGAVIK INCORPORATED (NTI) MESSAGE STATEMENT

October 4, 1998
 Nunavut Tunngavik Incorporated implements the final obligations of the Nunavut Land Claim Agreement, and announces that the other signatories to the Agreement meet their obligations.
 We work to ensure the greatest possible long-term benefits to Inuit from the Agreement in a way which respects Inuit goals, needs and cultural needs, and traditions within Canadian society.
 Our goal is to give Inuit control of their destiny, strengthen their skills, and promote their culture, language and health.
 We promote the development of Inuit economic self-sufficiency and prosperity through responsible management of Inuit owned lands and resources, and through promotion of and support to Inuit business in Nunavut.
 The bulk of Nunavut's land and mineral rights are provided to Inuit from the North and West of 90°W, and we will continue to work towards equalization.
 We trust each other and believe contracts of Nunavut with respect, honesty, openness, fairness, and equality.



Map compiled by Glen Hillier, GIS Coordinator - NTI Lands and Resources Department - For more information, or to report errors, please contact NTI's Lands and Resources Department.

Parliament of Canada. Pursuant to Article Four of the Agreement, the territory of Nunavut and the Government of Nunavut were established in 1999. Under Section 35 of Canada's 1982 *Constitution Act*, promises in modern treaties confer justiciable rights protected by the constitution from unilateral action by the Parliament or Government of Canada, and territorial and provincial governments.²

Ratification of the Nunavut Agreement attracted favourable if momentary comment in newspapers in Canada and elsewhere. Prime Minister Mulroney characterized the Agreement as «nation building.»³ Writing from the perspective of a negotiator with the Tungavik Federation of Nunavut (TFN), the Inuit organization that represented the Inuit of Nunavut, Fenge⁴ identified several reasons to explain the conclusion of the Agreement, and Légaré⁵ addressed the process of negotiation. Selection of Inuit owned lands – Inuit now own outright approximately 356,000 square kilometres, 15 percent of Nunavut – has been addressed by McPherson, who advised TFN on subsurface land selections.⁶ Negotiation of the parks and conservation provisions of the Agreement has been examined by Fenge.⁷

Commentary and analyses by academics has focused on the 1993 to 1999 process to plan the establishment of the Government of Nunavut, and initiatives to promote gender equality in the territorial legislature, to devolve government operations to the regions, and to bring Inuit values and objectives, and use of Inuktitut, to the heart of decision-making through application of Inuit Qaujimajatuqangit, broadly understood as «Inuit traditional knowledge.»⁸ Implementation of the political development provisions of the Agreement has attracted considerable atten-

2. For a good introduction to the creation of Nunavut, see the articles in Dahl, Jens; Hicks, Jack; and Jull, Peter, (eds.) *Nunavut: Inuit Regain Control of their Lands and their Lives*, International Work Group for Indigenous Affairs, Copenhagen, Denmark 2000.
3. Prime Minister Mulroney's 25 May 1993 speech is reprinted in «Creating Nunavut and Breaking the Mold of the Past» in *Northern Perspectives*, (21) 3, 1993 p. 4.
4. Fenge, Terry, «Political development and environmental management in Northern Canada: The case of the Nunavut Agreement» in *Inuit Studies*, (16) 1–2, 1992 pp. 115–141.
5. Légaré, André, «The process leading to a Land Claims Agreement and its Implementation: The Case of the Nunavut Land Claims Settlement» in *Canadian Journal of Native Studies*, (16) 1, 1996 pp. 139–163.
6. McPherson, Robert, *New Owners in their Own Land: Minerals and Inuit Land Claims*, Arctic Institute of North America, Calgary 2003.
7. Fenge, Terry, «National Parks in the Canadian Arctic: The Case of the Nunavut Land Claim Agreement» in *Environments*, (22) 1, 1993 pp. 21–36.
8. See for example, Timpson, Annis May, «Rethinking the Administration of Government: Inuit Representation, Culture, and Language in the Nunavut Public Service,» in *First Nations, First Thoughts*, University of British Columbia Press, Vancouver 2009.

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tion as exemplified by the work of White,⁹ Légaré,¹⁰ and Loukacheva.¹¹ Yet while of central importance to the Nunavut project as conceived by Inuit leaders in the 1970s,¹² at a scant three paragraphs Article Four is the shortest of the Agreement's 42 Articles. John Ralston Saul, a Canadian philosopher, suggests that the establishment of Nunavut, and by this he means the Government of Nunavut, «properly recognized» the role and place of Inuit in Canada, and by implication helps to bring to a close what can only be described as a colonial relationship between Canada and Inuit.¹³ Dewar, however, contends that there is a continued unresolved relationship between implementation of Article Four and the broader intent of the Nunavut Land Claims Agreement,¹⁴ while Cameron and Campbell look forward to further political and economic development in Nunavut through devolution to the Government of Nunavut of remaining federal responsibilities in the territory.¹⁵

Those articles of the Agreement that address economic, social and cultural development and management of land and natural resources have not attracted the same level of interest or commentary as political development,¹⁶ and neither have ongoing challenges to implement the Agreement as a whole. This article seeks to redress this imbalance by outlining processes involving Nunavut Tunngavik Incorporated (NTI), the successor organization to TFN, and the Government of Canada to implement the Agreement. It is the hope of the authors that discus-

9. White, Graham, «Nunavut: Challenges and Opportunities of Creating a New Government» in *Public Sector Management*, (9) 3, 1999 pp. 3–7.
10. Légaré, André, «An Assessment of Recent Political Development in Nunavut: the Challenges and Dilemmas of Inuit Self-Government» in *Canadian Journal of Native Studies*, (18) 2, 1998 pp. 271–299; and «Canada's Aboriginal Self-Determination in Nunavut: From Vision to Illusion» in *International Journal of Minority and Group Rights*, (15) 2008 pp. 335–367.
11. Loukacheva, Natalia, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut*, University of Toronto Press, Toronto 2007.
12. Amagoalik, John; Green, Peter; Semmler, Agnes; Patterson, Dennis; Tologanak, Kane; and Kadlun, Bob, «Building Nunavut,» in *National and Regional Interests in the North*, Canadian Arctic Resources Committee, Ottawa 1983 pp. 141–155.
13. Saul, John Ralston, *A Fair Country*, Viking Canada, Toronto 2008 p. 99.
14. Dewar, Barry, «Nunavut and the Nunavut Land Claims Agreement – an Unresolved Relationship» in *Policy Options*, (30) 7, 2009 pp. 74–79.
15. Cameron, Kirk; and Campbell, Alastair, «The Devolution of Natural Resources and Nunavut's Constitutional Status» in *Journal of Canadian Studies*, (43) 2, 2009 pp. 198–219.
16. Land claims boards have received some discussion and evaluation, particularly by Graham White. See «Treaty Federalism in Northern Canada: Aboriginal-government land claims boards» in *Publius: The Journal of Federalism*, (32) 3, 2002 pp. 89–114; «Cultures in Collision: Traditional Knowledge and EuroCanadian Governance Processes in Northern Land-Claim Boards» in *Arctic*, (59) 4, 2006 pp. 401–414; and «'Not the Almighty': Evolving Aboriginal Influence in Northern Land Claim Boards» in *Arctic*, (61) Suppl. 1, 2008 pp. 71–85.

sion of the processes, positions and perspectives, vis-à-vis implementation of the Nunavut Agreement in this paper will result in a broader appreciation by academics of the place of the Agreement and other modern treaties, in Canadian public policy.¹⁷

2. Historical Background

Making treaties with Indigenous peoples was, from the early seventeenth century, a central feature of the Crown's approach to North America. Initial treaties, both written and oral, stressed peace and friendship and established military alliances with First Nations as the French and British fought for possession of the continent. Following the British victory in the Seven Years War (called «the French and Indian Wars» in the United States) King George III issued in 1763 a Proclamation to provide for the government of Quebec, East Florida, West Florida and Grenada, now within the Crown's North American possessions. This Proclamation also reserved unsold or unsurrendered Aboriginal lands to the exclusive use of Aboriginal peoples, and required formal cession to the Crown of unsurrendered Aboriginal lands and natural resources. Only following such cession, achieved through treaties, would the Crown, in turn, issue rights to third parties allowing settlement and development on ceded territory. Treaty-making was continued in the Crown's remaining North American possessions following the American Revolution and in the Dominion of Canada following confederation in 1867.¹⁸

Treaties were concluded with Aboriginal peoples in southern Canada in the late eighteenth and throughout the nineteenth centuries as settlement and development moved west. The last major treaties included Treaty 11, signed in 1921 with Dene in the Mackenzie Valley, the 1923 Williams treaties in central Ontario, and the 1929–1930 adhesions to Treaty 9 in northern Ontario. Most of northern Canada was not subject to treaty-making and it was not until a 1973 decision by the Supreme Court of Canada on the land rights of the Nisga'a in British Columbia, that the Government of Canada resumed treaty-making.¹⁹ Twenty-three compre-

17. When this paper was written, the authors were full or part-time employees of Nunavut Tunngavik Incorporated, the Inuit organization mandated to implement the Nunavut Land Claims Agreement. This paper reflects their personal experiences in negotiation and implementation processes.

18. Miller, James Rodger, *Compact, Contract, Covenant: Aboriginal Treaty Making in Canada*, University of Toronto Press, Toronto 2009.

19. *Calder v. Attorney General of British Columbia*, [1973] SCR 313, also reproduced in Brian Slattery and Sheila E. Steick (eds.) *Canadian Native Law Cases 7 1971–1973*, pp. 17–173, Saskatoon 1988.

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hensive land claims agreements, or «modern» treaties, have been concluded in northern Canada and British Columbia in the last 35 years, five of which, including the Nunavut Agreement, have been negotiated and ratified by Canadian Inuit.²⁰

3. The Nunavut Land Claims Agreement

Inuit were obvious candidates to negotiate a comprehensive land claims agreement with the Government of Canada when, in 1973, the federal Minister of Indian Affairs and Northern Development announced Ottawa's willingness to negotiate modern treaties with Aboriginal peoples who had not signed historic treaties, or whose Aboriginal title had not been superseded by law. In light of the Government of Quebec's intent to develop the hydroelectric potential of the Le Grand river in northern Quebec, and as a result of an interlocutory injunction obtained by the Crees and Inuit of the region in 1973 temporarily halting the project, negotiation of the first modern treaty, the James Bay and Northern Quebec Agreement, proceeded rapidly and was finalized in 1975.²¹ Although the Government of Canada initiated negotiations with six northern aboriginal peoples, it was not until 1981 that it released a formal land claims policy.²²

In the absence of imminent development to spur negotiations, the Nunavut case was rather different from that in James Bay and Northern Quebec. Inuit in the Northwest Territories sought an agreement that would provide for self-determination through the creation of a Nunavut territory with its own government, ownership of land, and involvement in land and wildlife management to support their wildlife-based culture and harvesting economy. Protecting the natural environment, including through the establishment of national parks, and promoting culturally and environmentally responsible economic development in which they would participate, were central objectives adopted in the initial Nunavut proposal, tabled with Prime Minister Trudeau in 1976.²³ Although withdrawn for revision and additional community consultation, this proposal remained a statement of intent that influenced Inuit negotiators in subsequent years.²⁴

20. The texts of modern treaties are available at <http://www.ainc-inac.gc.ca/al/lcdc/ci/fagr/index-eng.asp>

21. *The James Bay and Northern Quebec Agreement*, Éditeur officiel du Québec, 1975.

22. «In All Fairness: A Native Claims Policy, Comprehensive Claims» Indian Affairs and Northern Development, Ottawa 1981.

23. *A Proposal for the Settlement of Inuit Lands in the Northwest Territories*, Inuit Tapirisat of Canada, Ottawa 1976.

24. Merritt, John; Fenge, Terry; Ames, Randy; and Jull, Peter, *Nunavut: Political Choices and Manifest Destiny*, Canadian Arctic Resources Committee, Ottawa 1989.

Faced with the prospect of rapid exploration and potential development of hydrocarbons in the Beaufort Sea region, and needing quickly to define their rights in advance of such development, the Inuvialuit withdrew from the Nunavut project in the mid-1970s, and negotiated a discrete land claims agreement which was finalized in 1984.²⁵ The James Bay and Northern Quebec Agreement, and the Inuvialuit Final Agreement, provided models and concepts for the Nunavut negotiations. Inuit Tapirisat of Canada (ITC), the national Inuit organization, represented the Inuit of Nunavut in land claims negotiations with the Government of Canada until 1982, when the mandate to negotiate a land claims agreement in Nunavut was assumed by TFN. The 1971 Alaska Native Claims Settlement Act and the adoption of Home Rule in Greenland in 1979 also provided impetus to the Nunavut negotiations.

In addition to its constitutional nature, perhaps the most important aspect of the Agreement is its scope and ambition. Its 42 articles deal with economic development, employment, environmental protection, wildlife management, social and cultural affairs, and ownership and management of land and natural resources, as well as political development. The broad intent of the Agreement is «to encourage self-reliance and the cultural and social well-being of Inuit,» and this intent is contextualized in a preambular clause that recognizes «the contribution of Inuit to Canada's history, identity and sovereignty in the Arctic.»

From the very beginning of negotiations, ITC and then TFN insisted that a Nunavut Agreement embrace and give expression to Inuit self-determination. This largely explains the breadth of the Agreement and the links it forges between economic, social, cultural and environmental considerations in decision-making, and political development through the creation of a Nunavut territory with its own territorial government. Inuit did not attempt to inject into the Agreement the term «sustainable development», as popularized by the 1987 report of the World Commission on Environment and Development, but rather they negotiated from the premise that an Agreement should enable them to sustain their culture and wildlife-based economy, and bring their traditional values to bear in a modern, democratic state.

This intent was very much at odds with the manner in which the Government of Canada approached the region in the 1970s when the Nunavut project was being defined, or in the 1980s and early 1990s when it was being negotiated. During these years, although the federal government did support the development of rep-

25. *Inuvialuit Final Agreement Between the Committee for Original People's Entitlement and the Government of Canada*. Department of Indian Affairs and Northern Development, Ottawa 1984.

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representative and responsible government, its overall approach to the north was to encourage exploration and development by the mineral and energy industries through lenient tax and royalty regimes and other incentives, and to regulate these activities in reaction to the professed needs of industry, with little involvement by northerners.²⁶

In approaching land claims negotiations with the Government of Canada, Inuit realized that to protect their culture and economy, and the region's fragile natural environment, would require a different approach to northern development. Instead of relying solely on a reactive and regulatory approach, Inuit sought to put in place a forward looking, planning approach to the use and development of land, water resources, marine areas, wildlife, and renewable and non-renewable natural resources. Negotiators from ITC and subsequently TFN drew upon the principles of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment and the 1992 Rio Declaration on Environment and Development.

From a legal perspective, the Nunavut Agreement is structured as an exchange between the Inuit of Nunavut and the Crown in Right of Canada. Through the Agreement, Inuit cede, release and surrender to the Crown all their Aboriginal claims, rights, title and interests, if any, in and to lands: «and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada».²⁷

In return, Inuit receive constitutionally protected rights and benefits, including:

- the right to harvest wildlife throughout the settlement area regardless of land ownership;
- compensation if development affects the Inuit harvesting economy;
- representation on the Nunavut Wildlife Management Board, a new instrument of public administration to manage terrestrial and marine wildlife;
- representation on new boards to manage and plan for the development of land and water and to evaluate the impact of development;
- establishment of three national parks and provisions governing establishment of additional national and territorial parks and conservation areas, and involvement in managing parks and conservation areas;
- the exclusive right to use water on, in or flowing through Inuit owned land;

26. Beauchamp, Kenneth, *Land Management in the Canadian North*, Canadian Arctic Resources Committee, Ottawa 1976. The Mackenzie Valley Pipeline Inquiry of the 1970s stands out as the first instance in which the voices of Aboriginal peoples were seriously considered in relation to major resource developments.

27. Article 42 of the Nunavut Land Claims Agreement provides that the cession and surrender provisions do not apply to lands and waters in Manitoba.

- fee simple surface title to approximately 356,000 km² of land (15 percent of Nunavut), of which 38,000 km² included subsurface title;
- 50 % of the first \$ 2 million and 5 % thereafter of federal royalties from development of Crown-owned natural resources;
- the right to negotiate impact and benefits agreements with proponents of major development projects wholly or partly under Inuit owned lands, or of water power generation or exploitation anywhere in Nunavut;
- cash compensation totalling \$ 1.148 billion to be paid over 14 years;
- establishment of a Nunavut Social Development Council; and
- inclusion of Inuit in preserving and displaying the Inuit archaeological heritage.

Upon ratification of the Agreement, the Government of Canada was able to issue permits, leases, licenses and other rights to third parties to explore for and develop natural resources within the settlement area, without serious risk of litigation based upon continuing Aboriginal title. In this fashion the Agreement provided a favourable legal climate for economic development, with the potential to expand the taxation, rent and royalty revenues that accrue to Ottawa.²⁸

Inuit make up 85 percent of the population of the territory, but the Government of Nunavut is a public government that serves all residents of Nunavut regardless of ethnicity, reflecting a Nunavut-wide rather than an Inuit-only franchise. Upon its establishment in 1999 the jurisdiction of the Government of Nunavut was similar to that of Yukon and the Northwest Territories. Unlike Canadian provinces, the vast majority of Crown land and natural resources in the territories is owned by the federal Crown. In principle, the federal government is committed to transfer most Crown lands and resources to the territorial governments, and has completed this devolution process in Yukon. With Nunavut, however, formal negotiations on this subject have yet to begin.²⁹

28. NTI has argued that the cede, release and surrender provisions of the Nunavut Agreement may not provide «final and complete» legal certainty: «the provision is part of a contract between Inuit and the Crown, thereby raising questions about what might happen in the event of circumstances amounting to fundamental breach of the contract by the Crown or to frustration of the contract,» in «A Submission to the Royal Commission on Aboriginal Peoples,» Nunavut Tunngavik, 1993, p. 5.

29. The Government of Canada, the Government of Nunavut and NTI signed a «Lands and Resources Devolution Negotiations Protocol» on September 8, 2008. Available at <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nuna/nti/nti-eng.asp>

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4. Implementing the Nunavut Agreement: First Steps

The 1986 federal policy under which the Nunavut Agreement was negotiated includes only one sentence on implementation – a requirement that implementation plans be in place when modern treaties are ratified.³⁰ In the Nunavut case, a 10-year plan with formal contractual status, but not protected under Canada's constitution, was negotiated following conclusion of the April 1990 Nunavut Agreement-in-Principle, and signed by the governments of Canada and the Northwest Territories, and TFN in 1993.³¹ Importantly, the Government of the Northwest Territories and after 1999 the Government of Nunavut, were full parties to the Nunavut Implementation Contract. Later in 1993 the governments of Canada and the Northwest Territories signed a bilateral funding agreement,³² reflecting a Memorandum of Understanding they had concluded in 1992,³³ to enable the territorial government to fulfill its responsibilities under the implementation contract.

A weighty document in its own right – more than 200 pages – the Implementation Contract identified obligations in the Agreement and specified agencies of the Government of Canada to fulfill those obligations. It also laid out budgets for resource management boards, called Institutions of Public Government (IPGs), established pursuant to the Agreement and upon which Inuit are represented, to plan for and manage the use of wildlife, land, freshwater, marine areas and to evaluate the impacts of proposed development, and terms of reference for transition teams to set-up these IPGs.³⁴

The implementation provisions of the Agreement establish a four-person Nunavut Implementation Panel (NIP), composed of representatives of the federal and territorial governments and NTI to «oversee and provide direction on the

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30. *Comprehensive Land Claims Policy*, Minister of Supply and Services Canada, Ottawa 1987.
31. *A Contract Relating to the Implementation of the Nunavut Final Agreement*, Minister of Supply and Services Canada, Ottawa 1993, available at www.tunngavik.com/documents/publications/1993-00-00-Implementation-Contract-of-the-Nunavut-Land-Claims-Agreement-English.pdf
32. «Bilateral Funding Agreement Respecting the Implementation of the Nunavut Final Agreement between the Government of Canada (Canada) and the Government of the Northwest Territories (GNWT)» Ottawa, November 19, 1993.
33. «Memorandum of Understanding Between the Government of Canada and the Government of the Northwest Territories on Comprehensive Land Claim Implementation» Ottawa, July 7, 1992.
34. Total funding for the five Institutions of Public Government established pursuant to the Nunavut Land Claims Agreement – Nunavut Wildlife Management Board, Nunavut Water Board, Nunavut Impact Review Board, Nunavut Planning Commission, and a Surface Rights Tribunal – in year one of the 10-year implementation contract was \$4,394,926 CAD, rising to \$9,961,814 CAD in years three to seven, and ending in \$8,961,814 in years nine and ten.

implementation of the Agreement.» The panel is required to organize independent reviews of implementation every five years. NTI's brief to the consultants who conducted the review of implementation from 1993 to 1998 stressed problems with implementing government contracting provisions, the quota of turbot (Greenland halibut) allocated by the Government of Canada to Nunavut fishers, the lack of progress in hiring Inuit by the territorial and federal governments, and delays by the Government of Canada in introducing proposed legislation dealing with management of land, water, and renewable resources.³⁵

Published in 2000, the review concluded that of 193 specific obligations, 98 were «substantially complete,» 46 were «partially complete,» and 49 were «largely unmet.» These bald figures tell only part of the story. Relatively simple, discrete tasks such as transfer of cash and land to Inuit had been carried out on time, but the review identified significant problems in the implementation of more complex obligations that require innovative, co-ordinated action on the part of federal agencies. The review team reported «a pattern of missed deadlines, and slow starts, a lot of unproductive and extended discussions, backsliding on obligations, loss of corporate memory and capacity, and the consumption of resources without a full result.»³⁶

The review recommended that the NIP be reinvigorated, and it urged the parties to agree on the panel's «central role in managing the implementation effort.» While many problems were identified, this was perhaps a mildly encouraging beginning.

A second independent review dealing with implementation from January 1999 to July 2005 reported a number of accomplishments, including «inclusive drafting» of legislation to implement the wildlife provisions, and the conclusion of impact and benefit agreements for national parks and Nunavut's first diamond mine. The review also commented that the Government of Canada was not fully meeting its obligations under Article 24 regarding government contracting, and raised major questions about the ineffective resolution of disputes between the parties.³⁷ Covering the start-up period of the Government of Nunavut, the review identified

35. «Taking Stock: A Review of the First Five Years of Implementing the Nunavut Land Claims Agreement,» Iqaluit, Nunavut; Nunavut Tunngavik Incorporated, Iqaluit 1999. Available at www.tunngavik.com/category/publications/implementation/

36. Vertes, Louise; Connelly, David; and Knott, Bruce, *Implementation of the Nunavut Land Claims Agreement: an Independent 5-Year Review, 1993 to 1998* Innirvik Support Services Ltd. Iqaluit, Nunavut 2000, pp. 4–5. Available at www.tunngavik.com/category/publications/implementation/

37. PriceWaterhouseCoopers, «Second Independent Five Year Review of Implementation of the Nunavut Land Claims Agreement,» Ottawa May 2006. Available at www.tunngavik.com/wp-content/uploads/2010/02/second-five-year-review-of-the-nunavut-land-claims-agreement.pdf

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several barriers to effective implementation, including differences in interpretation of obligations, disputes over funding, a lack of collaboration, and the absence of a process to monitor implementation.

This review again recommended reinvigorating the NIP and urged the parties to develop collaborative processes enabling resolution of disputes.

5. Renewing the Implementation Contract

Negotiations commenced in 2001 to renew the implementation contract for the period 2003 to 2013, but the Government of Canada, the Government of Nunavut, and NTI were unable to come to an agreement. The Government of Canada seemed committed to the 1992 Land Claims Implementation MOU and 1993 Bilateral Funding Agreement as the basis to calculate funds to renew the Nunavut Implementation Contract. This would essentially repeat the budgets in the first implementation contract, but with an inflation adjustment. The Government of Canada was not persuaded by NTI or the Government of Nunavut that these assumptions should be revisited, based on actual implementation experience. As a result of its weak tax base and heavy reliance on funds transferred from Ottawa to pay for services to its citizens, the Government of Nunavut wanted to ensure that the renewed implementation contract would identify and fully cover its incremental costs in carrying out its responsibilities under the Agreement.

The 1993–2003 Implementation Contract had identified \$ 1.47 million in year one, decreasing to \$ 728,000 in year ten, to cover the territorial government's incremental costs. In 2002 the Government of Nunavut tabled a position seeking more than \$ 200 million to cover its incremental costs for the 2003–2013 period. Clearly the parties were very far apart, not just on budgets, but on what constituted an incremental cost.

NTI's position that the contract be renewed to reflect the conclusions and recommendations of the first five-year implementation review was not accepted by the Government of Canada, which also argued for removal of the contractual status of the implementation plan. NTI interpreted this position as a weakening of resolve on the part of the Government of Canada to fulfill its obligations. NTI rejected this position and criticized the mandate of the Government of Canada's implementation negotiator who suggested in turn that NTI was inappropriately seeking to enrich the Agreement through implementation negotiations.

Tensions developed during these negotiations were played out in meetings of the NIP, which became increasingly unproductive as a result. The Government of Canada's blanket refusal to refer any disputes to arbitration as provided for in

Article 38 of the Agreement, came to epitomize the impasse.³⁸ The Government of Canada suggested that arbitration of disputes involving financial matters would detract from Parliament's exclusive role in appropriating money.³⁹ In light of Parliament's legislative ratification of the Agreement in 1993, including its arbitration provisions, and the constitutional nature of the rights defined, NTI strongly objected to this position.

Lack of progress in hiring Inuit in government was also a difficult and politically contentious issue. While not specifying a target date, Article 23 of the Agreement aimed for a «representative» civil service which would require approximately 85 percent of the positions within all occupational groupings to be held by Inuit. By 2003 less than 50 percent of the workforce of the Government of Nunavut was Inuit, and federal agencies operating in the territory were below 40 percent. Moreover most Inuit employed in government were in secretarial and administrative support, non-professional categories, although some held senior management positions. Research conducted for NTI and the Government of Nunavut by the consulting firm PriceWaterhouseCoopers estimated that Inuit were losing approximately \$ 123 million dollars annually in wages and salaries, and that additional millions were being spent by the federal and territorial governments to relocate personnel hired from the south to carry out administrative duties in Nunavut.⁴⁰

Significant funding to train Inuit to qualify and assume positions in government would be required if the objective in the Agreement of a representative civil service were ever to be reached. Related to the attainment of this objective, the Government of Nunavut had requested nearly \$ 60 million for the 2003–2013 implementation period to promote use of Inuktitut, but the Government of Canada was not prepared to provide funding for this purpose.

With implementation contract negotiations at a standstill, the federal and territorial governments and NTI agreed that Thomas Berger, a former Justice of the British Columbia Supreme Court and former Commissioner of the Mackenzie Valley Pipeline Inquiry, be appointed as a conciliator. His August 2005 Interim

38. Article 38.2.1. (a) of the Nunavut Agreement requires the parties to agree to refer a dispute to arbitration. The Inuvialuit Agreement enables either party to refer a dispute to arbitration.

39. The Government of Canada conveyed its position on arbitration to the NIP in a February 21, 2003 memo. For commentary on this position see, *Report of the Auditor General of Canada to the House of Commons, November 2003*, Minister of Public Works and Government Services Canada, Ottawa, chapter 8; and Berger, Thomas, «Conciliator's Interim Report: Nunavut Land Claims Agreement Implementation Contract Negotiations for the Second Planning Period,» Vancouver August 31 2005, p. 37.

40. PriceWaterhouseCoopers, «The Cost of Not Successfully Implementing Article 23,» Ottawa February 2003, p.9. Available at www.tunngavik.com/category/publications/implementation/

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Report dealt in part with funding of the Institutions of Public Government (IPGs), and enabled the parties to agree to relatively modest increases in the IPGs' budgets for the remainder of the 2003–2013 period.⁴¹ His eloquent but hard-hitting Final Report, in which he said that Nunavut «faces a moment of change, a moment of crisis,» was presented in March 2006.⁴²

Focusing on the underlying context rather than week-by-week challenges of implementation, Berger concentrated on the need to significantly improve the education system in Nunavut to educate and train Inuit to take up employment in Nunavut. He noted:

The language spoken by Inuit is Inuktitut. Indeed for 75 percent of the Inuit, Inuktitut is still the first language spoken in the home, and fully 15 percent of Inuit (mostly living in the smaller communities) have no other language. Given the demographics of the new territory Inuktitut ought, generally speaking, to be the language of the governmental workplace in Nunavut and the language of the delivery of government services. But it is not. The principal language of government in Nunavut is English. So the people of the new territory speak a language which is an impediment to obtaining employment in their own public service.⁴³

The key to success, he suggested, was to ensure that Inuit were functionally literate in Inuktitut and English. Therefore «we must undertake nothing less than a new program of bilingual education – starting in the pre-school years, and from kindergarten through Grade 12.»⁴⁴

NTI welcomed Berger's Final Report and urged the Conservative Government of Canada, which in the federal election of January 2006 replaced its Liberal predecessor, to endorse it.⁴⁵ But Berger apparently was never asked by the Minister of Indian Affairs and Northern Development to explain his report, and there has been no formal response to it by the Government of Canada.

41. Thomas R. Berger, «Conciliator's Interim Report: Nunavut Land Claims Agreement Implementation, Contract Negotiations for the Second Planning Period,» August 31, 2005. Available at www.tunngavik.com/category/publications/implementation/

42. Thomas R. Berger, «Conciliator's Final Report: Nunavut Land Claims Agreement Implementation, Contract Negotiations for the Second Planning Period» (March 1, 2006). Available at www.tunngavik.com/category/publications/implementation/

43. *Ibid* p. iii.

44. *Ibid* p. vi.

45. «Berger calls for Bilingual Education System in Nunavut,» press release issued by Nunavut Tunngavik Incorporated, April 5, 2006. Available at www.tunngavik.com/2006/04/05/berger-calls-for-bilingual-education-system-in-nunavut/

6. Persuading the Government of Canada to Implement the Nunavut Agreement

6.1 The Auditor General of Canada

As part of her ongoing responsibilities, the Auditor General of Canada in 2003 released an audit of the transfer of federal responsibilities to the North by the Department of Indian Affairs and Northern Development (DIAND). The audit examined implementation of the Nunavut Agreement and the 1992 Gwich'in Agreement in the Northwest Territories.⁴⁶ The audit concluded:

INAC seems focused on fulfilling the letter of the land claims' implementation plans but not the spirit. Officials may believe that they have met their obligations, but in fact they have not worked to support the full intent of the land claims agreements.⁴⁷

... the various mechanisms for managing the claims are not effective in resolving all disputes. Land claims arbitration panels have not dealt with any of the long-standing disagreements since the claims were settled over 10 years ago.⁴⁸

Once land claims agreements are signed, managing them well means focusing on not only meeting the specific obligations of the claims but also achieving measurable results against the objectives.⁴⁹

The audit noted that DIAND «fundamentally disagreed» with the Auditor General's view on how success for implementing land claims agreements should be measured. DIAND, she reported, defines success as fulfilling specific obligations set out in agreements and implementation plans.

In 2007 the Auditor General also audited implementation of the 1984 Inuvialuit Final Agreement which covers the Beaufort Sea region. In expressing strong support for her findings, and recalling her 2003 report, the Inuvialuit Regional Corporation remarked that:

... the federal government continues to focus narrowly on the letter of its obligations under land claim agreements while refusing to accept any responsibility to work with

46. Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons: Chapter 8 Indian and Northern Affairs Canada – Transferring Federal Responsibilities to the North*, Minister of Public Works and Government Services Canada, Ottawa 2003.

47. *Ibid.* p. 1.

48. *Ibid.* For an examination of the dispute resolution provisions of three northern land claims agreements, including the Nunavut Agreement, see Bankes, Nigel, «The Dispute Resolution Provisions of Three Northern Land Claims Agreements» in *Intercultural Dispute Resolution in Aboriginal Contexts*, University of British Columbia Press, Vancouver 2004 pp. 299–328.

49. Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons: Chapter 8 Indian Affairs and Northern Affairs Canada – Transferring Federal Responsibilities to the North*, Minister of Public Works and Government Services Canada, Ottawa 2003 p. 1.

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the respective claimant groups in identifying measures that would support achievement of the spirit and intent and overall goals of the agreements.⁵⁰

In light of the Auditor General's 2003 report, and in recognition of the media and political attention such reviews invariably generate, in 2004 NTI petitioned the Commissioner of the Environment and Sustainable Development, a component of the Office of the Auditor General, concerning implementation failures by DIAND.⁵¹ Specifically NTI alleged that DIAND was failing in its responsibility to ensure development was environmentally sustainable by neglecting to monitor the ecosystemic and socio-economic environment of Nunavut, as required in Article 12 of the Agreement, which reads: «Government, in co-operation with the Nunavut Planning Commission, shall be responsible for developing a general monitoring plan and for co-ordinating general monitoring and data collection.»

The response of the Minister of Indian Affairs and Northern Development to the petition did not dispute the fact that a general monitoring plan had yet to be developed, more than a decade after the Agreement was ratified. Instead the Minister listed ongoing research and administrative activities by federal agencies to protect the northern environment, promised consultations and workshops, and suggested that the Nunavut Planning Commission, rather than the federal and territorial governments, was responsible for implementing the general monitoring plan.⁵²

6.2 The Land Claims Agreements Coalition

In 1985 Aboriginal peoples negotiating modern treaties with the Crown formed a coalition to press for changes to the policy under which the Government of Canada entered into negotiations.⁵³ The resulting 1987 Comprehensive Land Claims Policy⁵⁴ broadened the rights and benefits that could be included in modern treaties, for example, by allowing Aboriginal signatories to negotiate a share of royalties accruing to the Government of Canada as a result of development of federal Crown land. These policy changes owed much to the effective lobbying of the coalition. Fifteen years later it was clear to Aboriginal peoples who had rati-

50. «Report of the Auditor General of Canada: Chapter 3, Inuvialuit Final Agreement,» Press Release issued by the Inuvialuit Regional Corporation, October 31, 2007. Available at www.irc.inuvialuit.com

51. The petition is available at www.tunngavik.com/category/publications/implementation/

52. Hon. Andy Scott, Minister of Indian Affairs and Northern Development, in a letter to Richard Paton, Chief Operating Officer, Nunavut Tunngavik Incorporated, February 9, 2005.

53. Fenge, Terry; and Barnaby, Joanne; «From Recommendations to Policy: Battling Inertia to Obtain a Land Claims Policy» in *Northern Perspectives*, (15) 1, 1987 pp. 12-15.

54. «Comprehensive Land Claims Policy» Minister of Supply and Services Canada, Ottawa, 1987.

fied modern treaties that many implementation problems were systemic in nature, rather than the result of local or regional circumstances, and that collective action on their part was needed to persuade the Government of Canada to fulfill its responsibilities.

In November 2003 those Aboriginal peoples with modern treaties convened in Ottawa a national conference entitled «Redefining Relationships.»⁵⁵ An extraordinarily successful event with approximately 350 participants, including observers from a number of countries, the conference gave birth to a new coalition, the Land Claims Agreements Coalition, with a mandate to press the Government of Canada to live up to its obligations and fully implement modern treaties. NTI and the Nisga'a Nation of British Columbia were chosen to jointly chair the Coalition.

At its founding conference the Coalition released a discussion paper inviting the Government of Canada to commit to an implementation policy founded on four principles:

1. Recognition that the Crown in Right of Canada, not the Department of Indian Affairs and Northern Development, is party to our land claims agreements and self-government agreements;
2. There must be a federal commitment to achieve the broad objectives of the land claims agreements and self government agreements within the context of the new relationships, as opposed to mere technical compliance with narrowly-defined obligations. This must include, but not be limited to, ensuring adequate funding to achieve these objectives and obligations.
3. Implementation must be handled by appropriate level federal officials representing the entire Canadian government; and
4. There must be an independent implementation audit and review body, separate from the Department of Indian Affairs and Northern Development. This could be the Office of the Auditor General or another office reporting directly to Parliament. Annual reports would be prepared by this office in consultation with groups with land claims agreements.⁵⁶

The Coalition held additional national conferences in 2006 and 2009. Systemic problems bedeviling implementation were seen by Coalition members as largely Ottawa-based, and it was for this reason that a formal Cabinet-approved implementation policy was thought necessary and became the Coalition's key recommendation.

55. *Redefining Relationships: Learning from a Decade of Land Claims Implementation November 11-14 2003, Ottawa*. Available at www.consilium.ca

56. www.landclaimscoalition.ca/pdf/LCAC/Discussion_paper_040416.pdf

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In 2004 and accelerating in 2005, a small team of technical and legal representatives of Coalition members met regularly with civil servants from various federal agencies, chaired by the Aboriginal Secretariat of the Privy Council Office (PCO) which served the Cabinet Committee on Aboriginal Peoples. By late autumn 2005, these meetings had generated a preliminary draft implementation policy.

As mentioned earlier, the federal election of January 2006 resulted in a minority Conservative government. The Cabinet Committee on Aboriginal Peoples and the branch of the Privy Council Office Secretariat that served it were disbanded, and the new Government of Canada refused to negotiate with, or even to meet, representatives of the Coalition. Instead the Department of Indian Affairs and Northern Development was directed to consult on a regional basis with Aboriginal peoples regarding implementation difficulties. Coalition members rearticulated the analyses and position of the Coalition at these regional consultations. Rather than supplanting the Coalition and diverting its advocacy, DIAND's consultation exercise reinforced the conviction that implementation problems should be addressed in a comprehensive, policy-driven manner if modern treaties were to be fully implemented.

The Coalition continued to recommend to the Government of Canada the importance of implementing modern treaties as a means of improving the circumstances of many Indigenous peoples. In December 2006 the Coalition adopted a ten-point «Declaration of Dedication and Commitment,» which elaborated on the four principles contained in the Coalition's 2003 discussion paper, and which stressed the need for the full implementation of modern treaties as a means of upholding the «honour of the Crown» in its dealings with Aboriginal peoples. The Declaration further characterized Aboriginal and treaty rights as the most pressing human rights issue facing Canadians.⁵⁷

Having stressed the link between Aboriginal, treaty and human rights, in September 2008 the Coalition submitted an extensive brief to the United Nations Human Rights Council requesting it to conclude and recommend:

that the fulfillment of the broad socio-economic objectives of modern land claims agreements entered into with Indigenous peoples in Canada, and associated self-government agreements, must be undertaken not only because it is the obligation of the Government of Canada, but because it is in Canada's national and international interest to do so.⁵⁸

57. www.landclaimscoalition.ca/pdf/10_Points_Document_060925.pdf

58. This brief is available at www.landclaimscoalition.ca/pdf/080908%20CANADA%20-%20LCAC20Submission

6.3 The Senate Committee on Aboriginal Peoples

As a result of the activities of the Coalition, including commentaries by Coalition members in Canadian newspapers,⁵⁹ the Senate Committee on Aboriginal Peoples embarked in 2007 on a study of implementation of modern treaties, including public hearings in Ottawa. Coalition members presented well-articulated and well-received briefs.

While many federal agencies presented testimony, the study was not uniformly welcomed. The Privy Council Office for example, did not appear before the Committee, although requested to do so. Nevertheless the hearings generated considerable information, much of which supported the Coalition's position. For example, the Deputy Minister of Indian Affairs and Northern Development stated to the Committee that his department could not «compel» other departments of the Government of Canada to live up to duties and obligations, notwithstanding the constitutional nature of modern treaties.⁶⁰ The Coalition felt that presentations by the Treasury Board Secretariat and DIAND revealed a lack of co-ordination within the Government of Canada in efforts to address the costs of implementing modern treaties.

The Spring 2008 report of the Senate Committee entitled «Honouring the Spirit of Modern Treaties: Closing the Loopholes» strongly supported the Coalition's views and recommendations:

... the committee is troubled by the narrow approach to treaty implementation adopted by the federal government. Federal practices and policy in this regard have resulted in the diminishment of the benefits and rights promised to Aboriginal peoples under these agreements ... We believe much of the failure rests with the institutional role and mandate of the Department of Indian Affairs and Northern Development ... Failure to properly implement the provisions of modern treaties puts Canada at risk for generating new legions of broken promises. However, we are convinced that these challenges can be overcome. The honour of the Crown rests upon it.⁶¹

59. «It's the aboriginal peoples' turn,» *The Globe and Mail*, April 28 2005 p. A15.

60. *Proceedings of the Senate Committee on Aboriginal Peoples*, Issue No. 3, Evidence, February 12, 2008.

61. Standing Senate Committee on Aboriginal Peoples, «Honouring the Spirit of Modern Treaties: Closing the Loopholes» Interim Report: Special Study on the Implementation of Comprehensive Land Claims Agreements in Canada, Ottawa May, 2008. This report, and the response to it by the Government of Canada, is available at www.parl.gc.ca/39/2/parlbus/commbus/senate/

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From this unyielding interpretation of the nature of the problem, the Committee made the following sweeping recommendations to the Government of Canada:

- That it abandon its practice of systematically refusing to consent to arbitration;
- That, in collaboration with the Land Claims Agreements Coalition, it take immediate steps to develop a new national land claims implementation policy, based on principles endorsed by members of the Land Claims Agreements Coalition;
- That in collaboration with the Land Claims Agreements Coalition, it take immediate steps to establish an independent body, through legislation, such as a Modern Treaty Commission to oversee the implementation of comprehensive land claims agreements, including financial matters;
- That the Clerk of the Privy Council take immediate steps to establish a senior level working group to revisit the authorities, roles responsibilities and capacities respecting the coordination of federal obligations under comprehensive land claims agreements, with a view to establishing clear guidelines, and that the Clerk of the Privy Council Office table these guidelines with the Senate Committee by March 31, 2009; and
- That the periodic negotiation of implementation funding for Canada's obligations under modern land claims agreements be led by a Chief Negotiator, appointed jointly by the Minister of Indian Affairs and Northern Development and the Land Claims Agreements Coalition, reporting directly to the Minister of Indian Affairs and Northern Development.⁶²

The Government of Canada did not provide a formal response to the committee's report until a year later, in a two-and-a-half page letter from the Minister of Indian Affairs and Northern Development. This response stressed the intent to develop «guidelines» for implementing agreements, including the use of arbitration for matters having financial implications. The Coalition felt that the Minister was launching an administrative response to a political and policy problem, and that this approach would not change matters substantively.

In February 2009, DIAND released an evaluation it had prepared of the impacts of four comprehensive land claims agreements: the Northeastern Quebec Agreement with the Naskapi, the Inuvialuit Final Agreement, the Gwich'in Comprehensive Land Claims Agreement, and the Sahtu Dene and Metis Comprehensive Land Claims Agreement. While generally positive about implementation of these agree-

62. Standing Senate Committee on Aboriginal Peoples, «Honouring the Spirit of Modern Treaties: Closing the Loopholes» Interim Report: Special Study on the Implementation of Comprehensive Land Claims Agreements in Canada, Ottawa May, 2008 pp. ix – xi. Available at www.parl.gc.ca/39/2/parlbus/commbus/senate/

ments and characterizing the concerns of the Coalition as perceptual rather than substantive or proven, the evaluation nevertheless recommended that DIAND:

Consider leading the establishment of a policy for the implementation of comprehensive land claims which would clarify roles and responsibilities and the federal approach to implementing Comprehensive Land Claims Agreements.⁶³

Committed to following-up the report of the Senate Committee and to build on the momentum it had generated, the Coalition prepared a «model modern treaty implementation policy,» which it released in March 2009.⁶⁴ This 12-page document built upon the Coalition's 2003 discussion paper and reflected perspectives generated at the Coalition's national conferences. One week before its release, the Coalition met the Minister of Indian Affairs and Northern Development and provided him with the model policy, which he promised to review, and to provide a «considered response.» This has been the only meeting between the Coalition and a federal minister since the Coalition was formed in 2003. As of December 2010, the Government of Canada had not responded to the model implementation policy, nor have the promised implementation «guidelines» been produced.

In April 2010 the Deputy Minister of Indian Affairs and Northern Development released to the Coalition an Implementation Management Framework, providing for the establishment of interdepartmental committees to focus on implementation of modern treaties.⁶⁵ Although a useful administrative measure, this falls far short of the overhaul of federal implementation policy and practice sought by the Coalition.

6.4 NTI Goes to Court

In December 2006, NTI launched a lawsuit in the Nunavut Court of Justice against the Government of Canada for breach of contract regarding implementation of the Nunavut Agreement, and seeking damages of \$ 1 billion. The failure of negotiations to renew the implementation contract and the effective rejection by the

63. Department of Indian Affairs and Northern Development, «Impact Evaluation of Comprehensive Land Claim Agreements,» Ottawa February 17, 2009. Available at <http://www.ainc-inac.gc.ca/ai/arp/aev/pubs/ev/clca/clca-eng.asp>

64. www.landclaimscoalition.ca/pdf/C_LCAC_410.pdf

65. Michael Wernick, Deputy Minister of Indian Affairs and Northern Development in a letter to Mitchell Stevens, President, Nisga'a Lisims Government, and Paul Kaludjak, President, Nunavut Tunngavik Incorporated, April 16, 2010. The Implementation Management Framework is not posted on the web site of the Department of Indian Affairs and Northern Development.

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Government of Canada of the 2006 final report by conciliator Tom Berger, were important ingredients in persuading NTI to take this unusual step.⁶⁶

The most important aspect of NTI's Statement of Claim is its scope and breadth.⁶⁷ NTI alleges the agreement has been breached contractually in the following 16 respects:

- proper and adequate funding has not been provided to the IPGs;
- adequate funding has not been provided to Hunters and Trappers Organizations;
- a general monitoring plan has not been developed;
- initiatives to increase Inuit participation in government have not been taken;
- there has been no co-operation in the development and implementation of adequate employment and training initiatives;
- an Inuit labour force analysis has not been carried out;
- Inuit employment plans, to get Inuit employment in government at a representative level, have not been carried out;
- specific measures required under Inuit Employment Plans have not been undertaken;
- a second five-year review of Inuit employment plans has not been carried out;
- procurement policies have not been established or maintained;
- evaluation and monitoring of government contracts has not been carried out;
- funding levels allocated to implement the Agreement, as required in the implementation plan, have never been identified;
- Inuit Impact and Benefit Agreements have not been entered into;
- funding for Inuit Impact and Benefit Agreements has been withheld;
- funding for implementation after the initial 10-year period has not been agreed to; and
- consent to use the arbitration process has been unreasonably withheld.

When announcing the suit the President of NTI, Paul Kaludjak, said:

The Government of Canada keeps Inuit dependent and in a state of financial and emotional despair despite promises made when the Nunavut Land Claims Agreement was signed in 1993. The Government of Canada is not holding up its end of the bar-

66. «NTI Launches Lawsuit Against Government of Canada for Breach of Contract,» press release issued by Nunavut Tunngavik Incorporated, December 6, 2006. Available at www.tunngavik.com/2006/12/06/nti_launches_lawsuit_against_government_of_canada-for-breach-of-contract/

67. The «Statement of Claim» by Nunavut Tunngavik Incorporated, the Government of Canada's «Statement of Defence,» and the «Reply and Joinder of Issue» by Nunavut Tunngavik Incorporated are available at www.tunngavik.com/categories/publications/legal

gain. Canada got what it wanted immediately upon signing ... Inuit are still waiting for full implementation of the Agreement.

What is at stake here is whether the Nunavut Land Claims Agreement will continue to be a central factor in shaping the future of Nunavut and improving the lives of Inuit. We will do everything in our power to ensure the [agreement] benefits Inuit in the ways it was intended to.⁶⁸

At the time of writing, December 2010, NTT's lawsuit was proceeding through discovery hearings.

7. Concluding Thoughts and into the Future

Inuit approached negotiation of the Nunavut Agreement as their best opportunity to gain control over their own affairs and to design and create a path into an uncertain and rapidly-changing future. They were looking for an Agreement that would help them adapt to the wider world, yet also help them to alter the political and economic contexts in which they were adapting. This intent explains why the Agreement is structured around a partnership between Inuit and the governments of Canada and Nunavut. This paper suggests that this partnership is not in good shape and that, as a result, the Agreement is not delivering what it could and should.

When appearing before the Senate Committee on Aboriginal Peoples as a member of the Land Claims Agreements Coalition, the legal counsel to the Nisga'a Nation suggested that the Government of Canada treats modern treaties like divorce settlements or separation agreements, rather than marriage partnerships.⁶⁹ There is considerable evidence in the Nunavut experience to support this characterization.

That modern treaties could be used to achieve environmental, social, economic and cultural public policy objectives seems little understood by federal representatives, or if understood, does not seem to inform their approach toward implementation. Indeed it appears that instead of asking how to best use these agreements for broad public purposes, the operative question in Ottawa is how to satisfy minimal legal requirements to avoid litigation. In light of NTT's lawsuit, the Nunavut experience suggests that Ottawa is failing in answering even this question correctly.

68. «NTI Launches Lawsuit Against the Government of Canada for Breach of Contract,» press release issued by Nunavut Tunngavik Incorporated, December 6, 2006. Available at www.tunngavik.com/2006/12/06/

69. *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, Issue No. 2, Evidence, December 4, 2007.

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Modern treaties are between Aboriginal peoples and the Crown, not the Department of Indian Affairs and Northern Development – a «line department» with little authority in relation to, or leverage over, other government departments. The Nunavut Agreement impinges on the mandates and programmes of many federal departments, yet by and large these same departments are often ignorant of their obligations under the Agreement, and seem to prefer having government-wide obligations treated as the responsibility of DIAND.⁷⁰ To fully implement the Nunavut Agreement, and all modern treaties, requires departments and agencies of the Government of Canada to operate as a co-ordinated whole, rather than a set of disparate parts.

The Nunavut experience is not unique, and this is why the Coalition advocates political, institutional, policy and administrative solutions to ensure full implementation of modern treaties. The Government of Canada has yet to endorse the Coalition's analysis and remedies. While the recently-announced Implementation Management Framework, mentioned earlier, is likely a step in the right direction, it is insufficient to address implementation inadequacies identified by the members of the Land Claims Agreements Coalition. Problems and challenges outlined in this paper in implementing the Nunavut Agreement, and in implementing modern treaties elsewhere in Canada, are likely to continue. All those with an interest in implementing the Nunavut Agreement could usefully ponder the advice offered by Thomas R. Berger in his Conciliator's reports:

In the end, successful implementation depends far more on the goodwill of the parties and the honour of the Crown than any formal requirements derived from the Nunavut Land Claims Agreement, or the implementation Contract ... I think it is a mistake to speak solely of enforcing legal obligations, or for that matter designing new ones. Under the Nunavut Land Claims Agreement the parties should adopt a broader approach.

70. The Land Claims Agreements Coalition concludes that this is a problem with implementation of all modern treaties. The issue is addressed in *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, Issue No. 3, Evidence, February 12, 2008 pp. 20–24. See also Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons: Chapter 3, Inuvialuit Final Agreement*, Minister of Public Works and Government Services Canada, Ottawa 2007 pp.12–16. In considering an alleged breach of the Inuvialuit Final Agreement regarding the clean-up of Distant Early Warning-Line sites, the arbitration panel established under the Agreement found that clean-up obligations in the Agreement bound all departments of government. The Panel noted that the practices and procedures of the Department of Supply and Services needed to be revised to take account of the requirements of the Agreement, and further urged the Department of Indian Affairs and Northern Development to inform and educate other government departments about the Agreement. Banks, *op. cit.* pp. 314–316.

It is an approach found in the Nunavut Land Claims Agreement itself. Article 37 of the Agreement describes a number of principles underlying its implementation. Prominent among them are Articles 37.1.1. (a) and (b) which provide that the implementation planning process «shall mirror the spirit and intent of the Agreement and its various terms and conditions» and, moreover, that «implementation shall reflect the objectives of the Agreement of encouraging self-reliance and the cultural and social well-being of Inuit.» These are not narrowly technical requirements. As I read them, they describe an Agreement by the parties to employ a purposive approach to implementation.

The Nunavut Land Claims Agreement is a constitutional instrument. Although, like most constitutional instruments, it contains very specific provisions, its central purpose is to describe an *idea*. Its framers were drafting a document to establish a new relationship between Canada and the Inuit of Nunavut that would last for generations; they were not simply setting out performance requirements in a contract. A new approach requires that the parties be as constructive and creative in its implementation as the visionary men and women on both sides of the negotiating table who drafted the Agreement.⁷¹

Реализация Соглашения по земельным претензиям от 1993 года в Нунавуте

Алистер Кэмпбелл, Терри Фенге и Удлориак Хансон

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Краткое содержание

Спустя более 20 лет исследований и переговоров, в 1991 году инуитами и в 1993 году Парламентом Канады было ратифицировано Соглашение по земельным претензиям Нунавут (NLCA). В соответствии с Соглашением, в 1999 году были созданы Территория Нунавут с правительством Нунавут. В обмен на широкий круг конституционно защищаемых прав и преимуществ,

71. Thomas R. Berger, «Conciliator's Interim Report: Nunavut Land Claims Agreement Implementation, Contract Negotiations for the Second Planning Period 2003–2013,» August 31, 2005 p.13. Available at www.tunngavik.com/documents/publications/2005_08_31%20Thomas%20Berger%20Interim%20R/

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инуиты Нунавута уступили Короне «все свои аборигенные претензии и права, права собственности и интересы ... на земли и воду в территориальных пределах Канады ...» Хотя многое было достигнуто в результате подписания Соглашения, до сих пор остаются огромные проблемы в области его реализации. Успех его реализации требует прочных и устойчивых основ в партнерстве между инуитами Нунавута и правительствами Канады и провинции Нунавут. Для того, чтобы это партнерство стало эффективным и защищало «честь короны», правительство Канады должно принять политику и межведомственных и межправительственных процессов для обеспечения Соглашения в полном объеме.

Ключевые слова инуиты, Соглашение в Нунавуте, реализация, правительство Канады, судебное разбирательство.