

IN THE MATTER OF AN ARBITRATION UNDER ARTICLE 38 OF THE *AGREEMENT BETWEEN THE INUIT OF THE NUNAVUT SETTLEMENT AREA AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA*

BETWEEN:

NUNAVUT TUNNGAVIK INCORPORATED (“NTI”)

(CLAIMANT)

- AND -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA OF AS REPRESENTED BY
THE MINISTER OF CROWN-INDIGENOUS RELATIONS (“GOC”)

(RESPONDENT)

- AND -

THE COMMISSIONER OF NUNAVUT AS REPRESENTED BY THE GOVERNMENT OF NUNAVUT,
AND THE GOVERNMENT OF NUNAVUT AS REPRESENTED BY THE PREMIER OF NUNAVUT
 (“GN”)

(RESPONDENT)

THE GOVERNMENT OF NUNAVUT’S REPLY TO THE NOTICE OF REFERENCE TO ARBITRATION

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I. INTRODUCTION

1. This reply by the GN (the "Reply") is submitted in response to NTI's Notice of Reference to Arbitration dated April 8, 2020 ("Notice"). This Reply is pursuant to Article 38.6.5 of the *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* as amended ("Nunavut Agreement").
2. Unless expressly admitted, each paragraph of the Notice and all the claims of the Notice are denied by the GN. The GN especially denies any and all allegations, express or implied, that the GN has breached the Nunavut Agreement.
3. In the alternative that the GN should be proven to have breached the Nunavut Agreement, which is not admitted and is expressly denied, the GN states that NTI has not suffered any damages or any losses attributable thereto and puts NTI to strict proof of its claim.
4. In the further alternative that NTI should establish any damages or losses attributable to a breach of the Nunavut Agreement by the GN, which is not admitted and is expressly denied, the GN states that any such damages or losses on the part of NTI are not the liability of the GN.
5. In the further alternative that NTI is able to establish any damages or losses have been incurred to which the GN liable, which is not admitted and is expressly denied, the GN states that that NTI has failed to mitigate its damages and is thereby disentitled to recovery.
6. In the further alternative that NTI makes out that it mitigated any damages or losses proven, which is not admitted and is expressly denied, the GN asserts that a restitutionary remedy on the basis of disgorgement of benefits is not valid at law or equity.
7. This Reply addresses the following:
 - a. The correct name and description of the GN as a party (II);
 - b. The GN's comments as to the jurisdiction of the arbitrator (III);

- c. The GN's position as regards the nature, circumstances, and issues of the dispute (IV);
- d. The GN's comments concerning the proposed arbitrator (V);
- e. The GN's comments as to the place of arbitration and the language of arbitration (VI); and
- f. Relief sought (VII)

II. THE GOVERNMENT OF NUNAVUT AS A PARTY

(a) The nature of the Government of Nunavut

- 8. The GN is not a signatory of the Nunavut Agreement. Rather it was established by the *Nunavut Act*, S.C. 1993, c.28, in fulfillment of the federal government's obligation to create a new territory with a public government pursuant to Article 4 of the Nunavut Agreement, an agreement within the meaning of Section 35 of the *Constitution Act*, 1982.

(b) The proper naming of the Territorial Government

- 9. The Territorial Government, as a party to this arbitration, should properly be named as the "Government of Nunavut".

(c) The Commissioner of Nunavut is not a proper party

- 10. The Commissioner of Nunavut, as named in the Notice, is not a proper party to dispute resolution processes under the Nunavut Agreement and should be struck off as a party to this arbitration.

III. JURISDICTION OF THE ARBITRATOR

- 11. The May 4, 2015 Settlement Agreement ("Settlement Agreement") does not constitute part of the Nunavut Agreement, and is not amenable to adjudication under Article 38 of the Nunavut Agreement.
- 12. The Settlement Agreement is not intended to be a land claims agreement within the meaning of section 35 of the *Constitution Act*, 1982.

13. Pursuant to paragraph 38.5.2 of the Nunavut Agreement, the arbitrator's jurisdiction is restricted to matters concerning the interpretation, application, or implementation of the Nunavut Agreement.
14. The terms of the Settlement Agreement lie outside the scope of this arbitration and the jurisdiction of the arbitrator.

IV. THE NATURE, CIRCUMSTANCES, AND ISSUES OF THE DISPUTE

(a) The History and Characteristics of Nunavut

15. The Territory of Nunavut was created on April 1, 1999 as a result of the Nunavut Agreement signed in 1993. As a comprehensive, modern treaty, the Nunavut Agreement provided for the GN to be established as a public government on April 1, 1999.
16. Inuit currently make up approximately 85% of Nunavut's population and, in 2019, 32% of Nunavut's population was under the age of 15.
17. Nunavut has a fast-growing population. There were approximately 26,800 Nunavummiut (Inuit and non-Inuit residents of the territory) in 1999 and 38,800 in 2019.
18. Nunavut's rapid growth is largely the result of a high birth rate.
19. Nunavut's 25 communities are scattered throughout the territory. They range in size from Grise Fiord (population estimated at 175 in 2019) to the capital Iqaluit (population estimated at 7,600 in 2019).
20. The GN operates in a "decentralized" model that aims to maintain 60% of positions outside Iqaluit. Many of these are in the regulated education and health professions that serve each community.
21. The GN has been the largest employer in the territory since Nunavut was created. To maintain and improve local programs and services for a young and growing population, the GN must add positions and recruit qualified professionals from outside Nunavut each year.

(b) Nunavut Agreement, Funding, and Implementation Contracts

22. Article 23 of the Nunavut Agreement has two stated objectives:

23.2.1

The objective of this Article is to increase Inuit participation in government employment in the Nunavut Settlement Area to a representative level. It is recognized that the achievement of this objective will require initiatives by Inuit and by Government.

23.2.2

In pursuit of this objective, Government and the DIO shall cooperate in the development and implementation of employment and training as set out in the Agreement.

23. The Nunavut Agreement does not include or require a schedule for achieving and maintaining a public service that is representational of the population.

24. The GN is not a signatory to the Nunavut Agreement; its responsibility to implement the Nunavut Agreement, including Article 23, arises from its creation on division from the Government of the Northwest Territories.

25. The GN receives funding under Nunavut Agreement-implementation funding contracts, which span 10-years. The current implementation funding cycle ends on March 31, 2023. The subsequent contract is expected to run from 2023-2032.

26. The GN may access funding for Article 23 implementation as stipulated in the Settlement Agreement. The current funding period ends on March 31, 2023.

27. The GN also has access to funding towards Inuit employment training through a not-for-profit corporation constituted by NTI pursuant to the Settlement Agreement with \$175 million in capital from the settlement money provided to NTI. By virtue of its majority control of the board of the training corporation, NTI has refused or blocked any disbursement of these monies to the GN.

(c) History of GN Inuit Employment Plans and Implementation

28. Inuit employment planning began before the political division of the Nunavut Settlement Area (“NSA”) from the Northwest Territories.

29. In preparation for the political division of the NSA from the Northwest Territories, the GoC, the Government of the Northwest Territories and the Tunngavik Federation of Nunavut (now NTI) worked together as the Nunavut Implementation Commission.
30. The Nunavut Implementation Commission analysed the labour market and prepared Inuit employment and training plans (“IEPs”). Despite recognizing that there were too few Inuit who were qualified for government occupations that require post-secondary education, these plans focused on high school completion, employment preparation and on-the-job-training rather than post-secondary education.
31. Upon its creation in 1999, the GN implemented the IEPs in place while developing its first strategic government-wide, multi-year plan, approved in 2000. All departments and territorial corporations began preparing annual IEPs as part of the business planning process in 2006, guided by the GN-wide multi-year plan.
32. There has never been an interruption of the GN’s implementation of multi-year and annual IEPs, even during the period in which limited funding was provided for Article 23 implementation.
33. Prior to the Settlement Agreement, there was little data available on Nunavut’s labour force beyond what was routinely published by Statistics Canada after each census and Aboriginal Peoples Survey.
34. Subsequent to the Settlement Agreement, the GoC began producing a series of Nunavut Inuit Labour Force Analysis (“NILFA”) reports, starting in late 2016-17.
35. The NILFA reports provide a detailed view of the availability, preparedness, and interest of Inuit for government employment.
36. The GN has supplemented the NILFA reports with a detailed analysis of its own occupational groups and workforce over time.
37. The GN developed a comprehensive new Master Inuit Employment Plan (“Master IEP”) to provide strategic direction on Inuit employment and guide use of funds provided through the Settlement Agreement until March 31, 2023. Departments and large territorial corporations also prepared detailed IEPs to 2023.

38. These IEPs make use of data and insights from the NILFA reports and the GN's workforce analysis, and identify specific issues and opportunities in Inuit employment.
39. The labour market analysis incorporated in the current IEPs goes well beyond the use of NILFA that is required of the GN under Part 3 of Article 23.
40. The extensive data about labour-market supply and demand has enabled the GN to prepare IEPs that are evidenced-based by using strategic workforce planning, a process applied by public and private sector employers in Canada and around the world to understand and plan for further labour needs. The current multi-year IEPs, approved by Cabinet in February 2020 are the first evidence-based IEPs.
41. The GN views Inuit employment planning as an ongoing process and is currently reviewing the final NILFA report (received June 2020) to add data and insights in support of IEP implementation.
42. The advances in the IEPs since the Settlement Agreement will facilitate on-going evaluation and monitoring, including analysis of changing labour market factors and workforce requirements as well as, consequently, gaps between the labour market supply and demand. This will enable the GN to revise its plans to address gaps and target opportunities.

(d) Inuit employment in the GN public service over time

43. The GN was created on April 1, 1999. By the end of its first year of operation, the GN had 1,382 positions in 10 departments, the Office of the Legislative Assembly, Nunavut Arctic College, and Nunavut Housing Corporation. An additional 1,319 positions were in Divisional Educational Councils and Health Boards, as part of a broader public sector.
44. The GN describes "staffing capacity" as the percentage of approved positions that are filled by indeterminate or term employees ("filled positions"). Capacity is a measure of the human resources that are available and working to achieve the government's

- mandate and the operational priorities of each department and agency. Capacity does not include casual or relief workers. GN capacity was 66% in March 2000.
45. Since before Nunavut was created, “Inuit representation” (also called “Inuit employment”) has been calculated as the percentage of filled positions that are filled by Nunavut Inuit (i.e., beneficiaries of the Nunavut Agreement).
 46. The Nunavut Implementation Commission worked to establish the new territorial government with Inuit representation of 50% in all employment categories.
 47. The new government of Nunavut, the GN, was created with only 44% Inuit representation on April 1, 1999, or 833 Inuit.
 48. By 2003, the GN more than doubled its size by adding new positions, filling vacancies, and absorption of employees, including nurses and teachers, from education and health boards that were closed.
 49. Notably, the Nunavut Implementation Commission, of which NTI’s predecessor was a member, did not include the regulated professionals in education and health boards in its plans to recruit and develop Inuit for employment in the new territorial government.
 50. As of March 31, 2020, there were 5,142 positions (counted in full-time equivalents (“FTEs”)) in 11 departments, the Office of the Legislative Assembly, and four territorial corporations. Capacity in the GN was 70% in March 2020.
 51. The absolute number of Inuit employed in indeterminate and term positions in the GN has increased steadily from a total of 943 (headcount) as of March 31, 2001 to approximately 1,835 (FTEs) as of March 31, 2020.
 52. FTEs and headcount are not synonymous metrics, so the number of Inuit employed is substantially higher if considered through headcount.
 53. Nonetheless, treating FTEs and headcount as the same, the increase over the last 20 years is of 95%, which does not even include more than 3,000 Inuit who are political staff, Sivuliqtiksat interns, and casual and on-call workers.

54. Despite year-over-year increases in the number of Inuit employees, the representation rate of Inuit has remained relatively stable at 50% since 2012. Prior to 2013, Inuit were hired at a rate that was generally lower than that of non-Inuit. Since 2013, the number of positions filled by Inuit has increased at approximately the same rate as the increase in the total number of filled positions. This means that the GN has been successful in maintaining the representation of Inuit, despite routine turnover and continuing growth in the number of positions and positions filled.
55. The GN's detailed workforce analysis looked at trends in the occupations and the types of education or training ("skill type") within six broad employment categories: executive, senior management, middle management, professional, paraprofessional, and administrative support. Much of the GN's growth has been in the professional and administrative support employment categories.
56. The Inuit representation rate varies across employment categories and is consistently highest in paraprofessional and administrative support categories, respectively 62% and 85% as of March 31, 2020.
57. Since 2013, Inuit representation has been approximately 32% in positions involving education at the university level. In all other skill types, Inuit representation is well above the overall GN average of 50%.
58. Almost half of GN positions that require a university degree are in the regulated professions, including accountants, engineers, lawyers, nurses, and teachers. The qualifications for each regulated profession are determined by an external authority that licenses graduates to work in the profession. Inuit representation is only 26% in the GN's regulated professions.

(e) Nunavut's labour market

59. Nunavut's Inuit labour force is limited and is far from supporting a fully representative public service, particularly in certain occupational categories. As the

- 2018 NILFA shows, the supply of qualified, available, and interested Inuit does not come close to matching government demand.
60. Inuit participation in Nunavut's labour market remains low, with 28% of Inuit age 25-64 years in 2016 not employed or self-employed, and not actively looking for employment.
 61. There is a limited supply of educated Inuit to meet the GN's needs. Only 28% of Inuit (age 20 or over) had education beyond the high school level in 2016.
 62. The GN has a high demand for specific qualifications, including those associated with nursing, teaching and social service occupations in every community. Inuit who are educated and available for employment may not be prepared for employment in government. The 2018 NILFA confirmed that while Nunavut Inuit continue to express interest in government employment, relatively few have achieved the level of education that would prepare them for the many specialized occupations that are found in any Canadian public service. Among Inuit with post-secondary education, many popular fields of study lead to employment in mining or municipal operations rather than towards employment in GN occupations.
 63. Inuit have increasing choice in employers and types of employment. As Nunavut's economy continues to grow, Inuit who participate in the labour force have increasing choice in types of employment, conditions of work, and employers. Employers throughout the territory are competing actively for employment-ready Inuit with transferrable skills. As the largest employer in Nunavut, the GN places a great demand on the territory's Inuit labour supply and must increasingly compete with employers in a growing range of industries, as well as with others in the government sector and with Inuit organizations.
 64. The 2018 NILFA report found that, in 2016, "Nunavut wide, if all unemployed Inuit became employed, Inuit would represent 74% of all the employed Nunavummiut". The data suggest that, in most communities, the government vacancies far outnumber Inuit who have at least a high school diploma and who are looking for work.

65. The GN's Inuit employment plans describe Nunavut's labour market factors in detail, along with their implications for the public service. GN-wide and departmental action plans take into account the qualifications, availability, and interest of Inuit in government employment, as documented in the NILFA.

(d) Procedural steps of the Dispute Resolution Process

66. During the development of the new evidence-based Master and departmental IEPs to 2023, the GN has shared the iterations of the drafts with both NTI and the GoC, as required by the Nunavut Agreement.

67. The purpose was to cooperate in the development and implementation of the IEPs, providing the parties to the Nunavut Agreement an opportunity to review the drafts.

68. The GN has responded to NTI's feedback where feasible and appropriate, and prior to the IEPs' publication in March 2020.

69. During the period when the multi-year Master and departmental IEPs were in development, annual IEPs and priorities for action continued to be set out in departmental business plans each year.

70. NTI's perspective on the requirements for compliance on IEPs led it to refer the matter to dispute resolution under Part 3 of Article 38 of the Nunavut Agreement with the GN and GoC on February 25, 2019.

71. At a special meeting of the tripartite Nunavut Implementation Panel—which oversees, provides direction on, and monitors the implementation of the Nunavut Agreement, the GN engaged in good faith negotiations with NTI and the GoC on June 20, 2019 at a meeting held in Iqaluit.

72. At this meeting, the parties all agreed that the work of implementation of Article 23 must proceed apace, unaffected by the dispute resolution process.

73. On July 3, 2019, NTI referred the dispute to mediation under Part 4 of Article 38.

74. The GN participated in good faith in the mediation process, facilitating the meetings in Iqaluit.

75. On September 20, 2019, the parties had an initial meeting with the agreed-to mediator, the Honourable Thomas Cromwell, at his office in Ottawa.
76. During the month of November, the parties independently met with the mediator, with the GN's team meeting the mediator in Iqaluit on November 4, 2019.
77. A two-day mediation was held in Iqaluit on November 28 and 29, 2019, with the Honourable Thomas Cromwell facilitating the process.
78. While the parties did not come to a resolution, they agreed to keep communicating and working towards resolution. The GN voiced its commitment to keep implementing Article 23, regardless of the continuation of the dispute resolution process.
79. On January 13, 2020, NTI ended the mediation process.
80. On April 1, 2020, at a subsequent meeting of the Nunavut Implementation Panel, NTI said that, while it had finalized the legal work for the next stage of dispute resolution, it was paying attention to the unique situation of the COVID-19 pandemic and that the matter was with its leadership.
81. On April 8, 2020, NTI issued the Notice, to arbitration under Part 4 of Article 38 of the Nunavut Agreement.

(e) The Parties' Respective Legal Obligations

a. Article 23 does not require that IEPs include a date by which representative employment of Inuit will be achieved

82. The objective of representative-levels of Inuit in government cannot be achieved by government alone; success will require initiatives by both Inuit and government.
83. The goal of IEPs is to achieve and maintain representative employment of Inuit in government.
84. The GN's role is to create and implement an IEP that fulfills the requirements set out in paragraphs 23.4.2(a) through (f). The obligation to create and implement IEPs is procedural—the GN cannot and is not obligated to guarantee a substantive outcome.

85. The GN cannot be bound to achieve representative Inuit employment within a given time-frame when so many of the changes which will be necessary to achieve that outcome will depend on factors that lie outside of the purview of an IEP.

86. Demographic changes to Nunavut's youthful population, enhanced educational attainment on the part of Inuit, and individual decisions regarding whether to pursue work in government are just some of the constellation of factors that will impact the attainment of representative Inuit employment in the GN.

87. Further, representative Inuit employment will require measures, not just by the GN, but by Designated Inuit Organizations, other levels of government, and Inuit.

b. The GN's Inuit Employment Plans are compliant with Article 23

88. The GN's Inuit Employment Plans are compliant with Article 23.

89. The GN's IEPs include measures designed to meet each of the requirements of Article 23, including an analysis of barriers to Inuit employment, short- and medium-term goals for Inuit employment, measures designed to increase the recruitment and promotion of Inuit, and promotion of apprenticeship, internship and other relevant on-the-job training programs.

90. Article 23 does not require that the GN's IEPs contain every element set out in 23.4.2 (d).

91. The GN has complied with the expectations outlined in Part 4 of Article 23 by:

- a. Establishing a central Inuit employment and training office;
- b. Maintaining IEPs;
- c. Using NILFA findings in Inuit employment planning;
- d. Sharing draft IEPs with the parties to the Nunavut Agreement;
- e. Publishing IEPs;
- f. Implementing IEPs;
- g. Monitoring and reporting on Inuit employment; and

h. Increasing Inuit employment.

92. The GN is committed to continuing to meet its constitutional obligations under Article 23 of the Nunavut Agreement.
93. The GN has also gone beyond the requirements of Article 23 by instituting a priority hiring policy that requires public service managers to assess Inuit applicants before other applicants, and to offer employment to any Inuit candidate who meets the job qualifications.
94. The GN has statutorily entrenched its priority hiring policy by amending the statutory definition of “merit”, and incorporating priority hiring into section 10 of the *Public Service Act*, S.Nu. 2013,c.26.

c. The GN's IEPs were developed with reference to the Nunavut Inuit Labour Force Analysis

95. Each of the GN's departmental IEPs, along with its Master IEP, were developed with reference to the NILFA. Although early iterations did not have the benefit of the NILFA data, the GN re-opened and amended its IEPs as NILFA data became available.
96. The GN has gone beyond what is required in this regard, supplemented the NILFA with additional analysis of its own, including a labour-demand analysis of the occupations in the public service and a profile of the labour force of each large community.

d. An arbitrator may not prescribe Inuit employment levels or funding levels

97. Pursuant to paragraph 38.5.3 of the Nunavut Agreement, an arbitrator may not prescribe Inuit employment levels nor funding levels required to fulfill implementation obligations of Government.
98. By extension, it is not within the jurisdiction of the arbitrator appointed pursuant to Article 38 to make an order which would effectively compel the GN to predict when it will reach representative employment of Inuit. To do so would necessarily imply a

requirement that the GN reach representative employment, which lies outside the scope of the arbitrator's powers.

V. SELECTION OF THE ARBITRATOR

99. In its Notice, NTI proposed the Honourable Frank Iacobucci, CC, QC, LLD, LSM as arbitrator.

100. The GN nominates the Honourable Constance Darlene Hunt to service as arbitrator.

VI. THE GN'S COMMENTS AS TO THE PLACE OF ARBITRATION AND THE LANGUAGE OF ARBITRATION

(a) The Seat of Arbitration

101. Given that the subject matter of the dispute relates to Nunavut and the witnesses who are likely to testify are in Nunavut, the arbitration should take place in Nunavut. The GN proposes that the place of arbitration be in Iqaluit, Nunavut and it offers to coordinate logistics.

(b) The Languages of Arbitration

102. The procedures in place should allow witnesses to provide their evidence in the official language of their choice and comfort, whether Inuktitut, English or French. Arrangements to retain translators to allow for simultaneous interpretation will be needed. There are appropriate facilities in Iqaluit for such technical requirements, and the GN offers to coordinate logistics for this.

VII. RELIEF SOUGHT

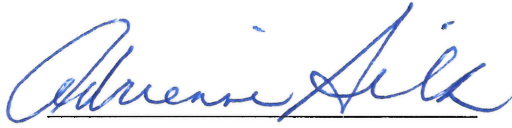
103. The GN seeks an order dismissing NTI's notice of arbitration.

104. The GN seeks a declaration that its Inuit Employment Plans comply with Part 4 of the Article 23 of the Nunavut Agreement.

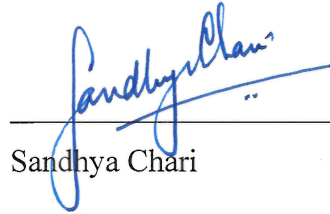
105. The GN requests that the parties bear their own costs and evenly divide the share of other costs of the arbitration, including remuneration and expenses of the arbitrator, simultaneous translators, and transcriptionists.

106. Any further or additional relief as the arbitrator may deem appropriate.

Respectfully submitted,



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