

Reply to Notice of Reference to Arbitration

Her Majesty the Queen in right of Canada

July 3, 2020

TO:

NUNAVUT TUNNGAVIK INCORPORATED (NTI)

AND TO:

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

I. Overview

1. Her Majesty the Queen in right of Canada (Canada) is a party to the Nunavut Land Claims Agreement (Nunavut Agreement), which is a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982*. Canada recognizes the Nunavut Agreement as an act of reconciliation between Canada and the Inuit people, based on mutual recognition and respect.
2. The stated objective of Article 23 of the Nunavut Agreement is to increase Inuit participation in government employment to a representative level. Canada diligently pursues this objective by performing its obligations under the Nunavut Agreement and by other means.
3. Canada has taken steps to increase Inuit representation in the federal Public Service, including by preparing Inuit Employment Plans (IEPs) as required by

Article 23 of the Nunavut Agreement. At issue is whether Canada's IEPs comply with Part 4 of Article 23 of the Nunavut Agreement

4. Canada has issued and is implementing IEPs that comply with Article 23, Part 4 of the Nunavut Agreement. Those IEPs include plans to increase Inuit employment in the short and medium term.
5. However, given the high number of government employment positions in Nunavut and a relative shortage of Inuit who are qualified, available, and interested for the positions within the federal Public Service in Nunavut, Inuit are not currently participating in the federal Public Service at a representative level. Due to present socio-economic and demographic factors in Nunavut, it is not possible to develop IEPs that reasonably project when Inuit will participate in the federal Public Service at a representative level.

II. Statement of Facts

Procedural Steps

6. On February 25, 2019, NTI referred its dispute with Canada and the Government of Nunavut to the dispute resolution process under Article 38 of the Nunavut Agreement.
7. In an effort to resolve the dispute, Canada engaged in good faith negotiations with NTI and the Government of Nunavut at a special meeting of the Nunavut Implementation Panel held on June 20, 2019.
8. On July 3, 2019, NTI issued a notice referring the dispute to mediation under Part 4 of Article 38.
9. Canada participated in good faith in the mediation process, including engagement at all-party sessions held on November 28 and 29, 2019 led by the Hon. Thomas Cromwell.

10. On January 13, 2020, NTI ended the mediation process, and on April 8, 2020, issued a Notice of Reference to Arbitration.

Government Employment in Nunavut

11. As defined in the Nunavut Agreement, government employment includes positions in the federal Public Service for which Treasury Board is the Employer.
12. Positions in the federal Public Service for which Treasury Board is the employer represent a small percentage of all government employment positions in Nunavut. The large majority of the government employment positions are comprised of positions in the territorial Public Service for which the Commissioner of Nunavut is the employer and those for which a Municipal Corporation is the employer.

Canada's Inuit Employment Plans

13. Canada has issued nine Inuit Employment Plans (IEPs) for the following Departments for which Treasury Board is the employer:
 - Canadian Northern Economic Development Agency (CanNor)
 - Department of Fisheries and Oceans (DFO)
 - Environment and Climate Change Canada (ECCC)
 - Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC)
 - Natural Resources Canada (NRCan)
 - Public Prosecution Service of Canada (PPSC)
 - Public Services and Procurement Canada (PSPC)
 - Royal Canadian Mounted Police (RCMP) - Public Service Employees
 - Service Canada, a part of Employment and Social Development Canada
14. Article 23 requires Canada to cooperate with NTI to develop and implement IEPs. Accordingly, Canada has shared these IEPs with NTI for review and feedback.

While the process of review, feedback and refinement continues, Canada's departments are implementing the IEPs as currently constituted.

15. Although not required by Article 23, Canada has also developed and shared with NTI a Federal Whole-of-Government IEP, and IEPs for Parks Canada Agency and Polar Knowledge Canada.
16. To aid in its efforts to increase Inuit participation in government employment, Canada has created Pilimaksaivik, a federal centre of excellence for Inuit Employment in Nunavut. As one part of its whole of government mandate, Pilimaksaivik supports federal departments in the creation and implementation of their IEPs.

Current Inuit Participation in the Federal Public Service

17. According to recent available data, Inuit participate in the federal Public Service at rates between 17 and 83 percent, depending on the department. At present, the average participation rate for the nine departments at issue is 44 percent.

III. Jurisdiction of the Arbitrator

18. The arbitrator of this reference has jurisdiction to arbitrate in respect of any matter concerning the interpretation, application or implementation of the Nunavut Agreement. The May 4, 2015 Settlement Agreement, titled *Moving Forward in Nunavut: An Agreement Relating to the Settlement of Litigation and Certain Implementation Matters*, referred to in NTI's Notice of Reference to Arbitration, by its own terms does not form part of the Nunavut Agreement, and accordingly the arbitrator has no jurisdiction in respect of its interpretation, application or implementation.
19. Arbitration of whether Canada's IEPs comply with Part 4 of Article 23 of the Nunavut Agreement will necessarily require interpretation of that part, but it is improper to issue the declarations sought by NTI, as those declarations would alter

and amend provisions of the Nunavut Agreement, which is expressly prohibited by Article 38.5.6.

IV. Issues

Legal Interpretation of Article 23

20. Canada is obliged by the Nunavut Agreement to pursue the objective of representative Inuit employment, not to achieve it. Article 23.2.1 and 23.2.2 clearly describe the achievement of representative levels of Inuit employment as an objective, not an obligation. In pursuing that objective, the Governments and NTI are to cooperate in meeting specific obligations under Parts 3 to 6, including that government organizations are to prepare IEPs. The language in 23.2.1 is aspirational, not mandatory like other clauses of Article 23.
21. Canada remains committed to pursuing the objective of achieving a representative Inuit employment in the federal Public Service. However, because there are so many factors that affect Inuit participation in the federal Public Service that are beyond Canada's control, no promise to achieve this objective has or could be made. Factors that are beyond Canada's control include:
 - (a) The number of working age Inuit;
 - (b) The number of government employment positions created by the Government of Nunavut or Municipal Corporations in Nunavut;
 - (c) The number of Inuit possessing the educational qualifications that qualify them for available positions;
 - (d) The number of Inuit pursuing training that matches the qualification requirements for available positions;
 - (e) The interest of Inuit in employment with the federal Public Service;
 - (f) The demand for labour in the private sector of the Nunavut economy; and,

(g) The establishment and maintenance of support measures required to be undertaken by NTI under part 6 of Article 23

22. Canada's IEPs cannot, and are not required, to address and remedy all of the challenges that limit Inuit participation in the federal Public Service. Accordingly, Article 23 does not require Inuit Employment Plans to identify "how and by when" each department will increase and maintain the employment of Inuit to and at a representative level. Article 23 must be interpreted in light of the current socio-economic and demographic situation in Nunavut.

Canada's Compliance with the Nunavut Agreement

23. For all nine federal departments for which Treasury Board is the employer, Canada has developed and is implementing IEPs. Those IEPs include:
- An analysis of Inuit representation in each department and an identification of areas of under-representation;
 - Phased approaches that make reasonable short and medium term goals;
 - An analysis of personnel systems, policies, practices, and procedures to identify those that may impede the recruitment and promotion of Inuit;
 - Appropriate measures consistent with the merit principle to increase the recruitment and promotion of Inuit;
 - Continuous updating of the IEPs based on the best available data from the Nunavut Inuit Labour Force Analysis (NILFA),
 - Identification of a senior official to monitor the IEP; and,
 - A reporting and monitoring system on the implementation of the IEP.
24. Given the current socio-economic and demographic situation in Nunavut, it is not reasonably possible to forecast Inuit participation in the federal Public Service beyond the short and medium term. Any target date set for the achievement of

representative employment would merely be speculative. Canada's IEPs are therefore compliant with the requirements of Part 4 of Article 23.

Remedies

25. The declarations sought by NTI would alter and amend the provisions of Article 23 of the Nunavut Agreement by changing and augmenting Canada's obligations. Article 38.5.3 expressly prohibits an arbitrator from making a decision that alters, amends, deletes or substitutes any provision of the Nunavut Agreement in any manner.
26. As Canada is not in breach of its obligations under the Nunavut Agreement, The Inuit have suffered no financial loss for which Canada is liable.
27. Article 38.5.3 of the Nunavut Agreement expressly prohibits an arbitrator from setting Inuit employment levels. The claim for expectation damages sought by NTI is predicated on an anticipated finding that Canada's IEPs are non-compliant, and that that breach has caused Canada to fail to achieve acceptable levels of Inuit participation in the federal Public Service. Such a finding would require the Arbitrator to prescribe retroactively Inuit employment levels.
28. Article 38.5.3 expressly prohibits an arbitrator from prescribing funding levels required to fulfill government obligations for implementation of the Nunavut Agreement. The remedy of disgorgement sought by NTI is predicated on an anticipated finding that Canada has failed to spend sufficient resources to develop and implement compliant IEPs. Such a finding would require the Arbitrator to determine that Canada has spent insufficient resources on the development and implementation of IEPs.

V. Relief Sought

28. Canada seeks a declaration that its Inuit Employment Plans comply with Part 4 of Article 23 of the Nunavut Agreement.



ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Prairie Regional Office
EPCOR Tower
300, 10423 – 101st Street
Edmonton, Alberta T5H 0E7

Facsimile: 780-495-2964

Per: Paul Shenher
Tel: (780) 495-2978
Email: paul.shenher@justice.gc.ca



ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Prairie Regional Office
EPCOR Tower
300, 10423 – 101st Street
Edmonton, Alberta T5H 0E7

Facsimile: 780-495-2964

Per: Michael Roberts
Tel: (780) 495-6419
Email: michael.roberts@justice.gc.ca