

**NOTICE OF REFERENCE TO ARBITRATION
UNDER ARTICLE 38 OF THE NUNAVUT AGREEMENT**

Nunavut Tunngavik Incorporated

April 8, 2020

TO:

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE
MINISTER OF CROWN-INDIGENOUS RELATIONS (henceforth the “GoC”);**

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 (henceforth the “GN”).**

TAKE NOTICE THAT:

THE INUIT OF NUNAVUT AS REPRESENTED BY NUNAVUT TUNNGAVIK INCORPORATED
(henceforth “NTI”) hereby initiate arbitration under section 38.6.4 of the Nunavut Agreement in respect of matters pertaining to the proper interpretation and implementation of Article 23 of the Nunavut Agreement, as set forth below.

I. PARTIES

The parties to the arbitration are NTI, the GoC, and the GN.

II. NATURE OF THE DISPUTE

The dispute concerns the proper interpretation and implementation of Article 23 of the Nunavut Agreement, including in particular sections 23.1.1 (specifically the definitions of “Inuit employment plan” and “representative level”), 23.2.1, 23.3.2, 23.4.1, and 23.4.2.

III. SUMMARY OF FACTS

1. The importance of Article 23 cannot be overstated. The fundamental objective of advancing Inuit self-determination objectives through the establishment of Nunavut with a public government was predicated on a commitment to achieve and maintain a public service that would be representative of the Inuit population as a whole.

2. According to recent reporting, today, twenty years after the creation of the Territory, overall Inuit employment is at 50% and 44% of filled positions in the GN and GoC, respectively. In both governments, levels remain well below 50% in senior and middle management, scientific and professional positions. In the GN, Inuit employment in senior management positions is at only 18%, and in middle management and professional positions, it is at 29%. In the GoC, Inuit employment in senior management is at the remarkably low level of 8% and in professional positions it is at 19%.

3. The failure of both governments to develop Inuit employment plans (“IEPs”) that conform to the requirements of Article 23 was one of the causes of action in NTI’s 2006 lawsuit against the federal Crown. The litigation was settled by way of a Settlement Agreement dated May 4, 2015.

4. The Settlement Agreement contains binding provisions setting out the parties’ mutual interpretation of and approach to certain of the requirements of Article 23. In particular, paragraph 25 includes, among other things, that each government must ensure that departments and agencies have IEPs and pre-employment training plans (PTPs) that are coordinated and “very precise and specific in laying out the steps that will be taken to achieve goals.”

5. Since the date of the Settlement Agreement, the GoC and the GN have each produced and are purporting to implement drafts and revisions of draft IEPs, including master IEPs.

6. These IEPs fail to comply with the Nunavut Agreement and the Settlement Agreement, especially in their failure to identify how and by when representative Inuit employment is planned to be achieved, and to be coordinated and “very precise and specific in laying out the steps that will be taken to achieve goals”.

7. NTI has consistently identified these failures to comply with Article 23 and the Settlement Agreement, and indicated that the IEPs are therefore unlikely to result in achieving the objective of increasing Inuit participation in government employment to a representative level. Neither government has remedied these or other defects in their IEPs.

8. Since May 2015, the level of Inuit participation in government employment has generally not increased or has declined. At least half of GN organizations have Inuit employment levels below 50%, with

four in the low 40%. Four GN organizations, namely Health, Education, Justice and Finance, have a lower level of Inuit employment than they did at the start of implementing their post-Settlement Agreement IEPs. Seven of eleven GoC organizations have Inuit employment levels below 50%, ranging from 11% to 44%. Five have significantly lower Inuit employment levels than they did at the start of implementing their IEPs.

9. By 2018, NTI was forced to conclude that fundamental disagreement on the following central questions underlies the lack of progress in developing adequate and effective IEPs: (i) whether IEPs must be plans to achieve the objective of a representative level of Inuit employment, or merely to partially meet or work towards that objective, and (ii) what is required by Article 23 and the Settlement Agreement in terms of coordinated, precise and specific IEPs and PTPs, including whether plans must be designed, implemented, monitored and adjusted so as to achieve their intended results.

10. In October 2018, NTI wrote to the other two parties describing, among other things, its view of the correct legal interpretation of section 23.4.1 and how it must inform the contents of IEPs, which continue, in its view, not to comply with either the mandatory provisions of the Nunavut Agreement or the Settlement Agreement. Both governments disagreed with NTI's views.

11. The GoC and the GN have each taken the position that, despite the definition of Inuit employment plans and the plain language of section 23.4.1, IEPs do not need to be plans to increase and maintain the employment of Inuit at a representative level. That is, they refuse to plan how and by when representative levels will be achieved. They instead take the position that IEPs need only set out short- and medium-term goals. It also now appears that the GoC and the GN may wish to reinterpret “representative level” in a manner that is clearly contrary to the definition in section 23.1.1.

12. NTI commenced dispute resolution under Article 38 of the Nunavut Agreement by letter dated February 25, 2019.

13. In accordance with Article 38, the Parties attempted to resolve the dispute through negotiations at a meeting of the Nunavut Implementation Panel on Thursday, June 20, 2019, without success.

14. On July 3, 2019, NTI referred the matter to mediation, and the parties retained the services of the Hon. Thomas Cromwell as mediator. Mr. Cromwell engaged in communications and meetings with the parties, culminating with a mediation session held in Iqaluit on November 28 and 29, 2019. The dispute was not resolved, and NTI formally concluded the mediation process on January 13, 2020, with the provision of notice of NTI's opinion under section 38.4.6 of the Nunavut Agreement that no resolution is likely to be reached through mediation.

15. On or about March 3, 2020, the GN made public its IEPs, which had been approved by the territorial cabinet notwithstanding the ongoing dispute under Article 38.

16. The GoC and the GN were each obliged to have their organizations develop and implement IEPs in accordance with the Nunavut Agreement within a reasonable period of time following the Settlement Agreement. They have both failed to do so, as a result of which there has been little or no progress towards achieving a representative level of Inuit employment. The Inuit of Nunavut have thereby suffered loss.

IV. ISSUES TO BE ARBITRATED

The issues to be arbitrated are, generally:

- i. the proper legal interpretation of Article 23 of the Nunavut Agreement, including but not limited to whether the definition of "Inuit employment plan" in section 23.1.1 and the terms of section 23.4.1 require Inuit employment plans to include how and by when each department will increase and maintain the employment of Inuit to and at a representative level;
- ii. whether compliance with the Nunavut Agreement and the Settlement Agreement obligates each government organization to include in its IEP all of the elements identified in sections 23.4.1 and 23.4.2 of the Nunavut Agreement and paragraphs 25(b) through (e) of the Settlement Agreement, utilizing the NILFA in accordance with section 23.3.2, and including, presumptively, all the measures identified in subsections 23.4.2(d)(i)-(x) of the Nunavut Agreement, and any others that may be needed – all of which, working together, must be designed, implemented, monitored and adjusted as needed, to increase and maintain the employment of Inuit at a representative level in all levels and occupational groupings, as well as to achieve the associated short- and medium-term goals of the IEP; and
- iii. in accordance with sections 38.5.10 to 38.5.12, appropriate remedies including such matters as:
 - a. declarations that the GoC and GN have failed to prepare IEPs in accordance with Article 23;
 - b. the timelines and other directions as necessary for the completion of a set of fully Article 23 compliant IEPs;

- c. the extent of any loss to the Inuit of Nunavut caused by failure by governments to develop and implement compliant IEPs;
- d. calculation of damages to be paid to the Inuit of Nunavut, including by way of expectation damages and disgorgement, as appropriate, arising from the past and continuing failures to develop and implement compliant IEPs; and
- e. other remedies as may be proposed or determined under sections 38.5.10 to 38.5.12.

V. PROPOSED ARBITRATOR

NTI proposes the Hon. Frank Iacobucci, CC, QC, LLD, LSM, to arbitrate the dispute.

VI. RELIEF SOUGHT AT THE INITIAL STAGE OF THE ARBITRATION

In accordance with section 38.5.9, which provides that the initial decision shall not include any remedial order other than a declaration or declarations concerning the interpretation of the Agreement and the rights and obligations of the Designated Inuit Organization or Government under the Agreement, NTI restricts the declarations that it is seeking at the initial stage of the arbitration to declarations that:

- i. the GoC and the GN have continuing obligations to comply with the requirements of Article 23 as set out below;
- ii. IEPs must set forth how and by when a representative level of Inuit employment in Government is planned to be achieved and maintained;
- iii. a "representative level" means a level of Inuit employment within Government reflecting the ratio of Inuit to the total population in the Nunavut Settlement Area – there are not "multiple ways" of interpreting representativeness, including by reference to such matters as Inuit participation in the labour force;
- iv. the phased approach required by subsection 23.4.2(b) must include short- and medium-term goals in addition to, not instead of, the goal of achieving and maintaining representativeness, in the form of numerical targets and timetables for employment of qualified Inuit in all levels and occupational groupings where under-representation has been identified;

- v. in order to be an IEP within the intended meaning of Article 23 and the Settlement Agreement, an IEP must be designed, implemented, monitored and adjusted as needed, with a focus on the achievement of its short- and medium- term goals and the objective of employment of Inuit at a representative level – it is not enough to merely list such things as available government programs without specifically designing and managing the IEP to achieve the immediate and ultimate intended employment results;
- vi. each government organization must include in its IEP all of the elements identified in sections 23.4.1 and 23.4.2 of the Nunavut Agreement and paragraphs 25(b) through (e) of the Settlement Agreement, utilizing the NILFA in accordance with section 23.3.2, and including, presumptively, all the measures identified in subsections 23.4.2(d)(i)-(x) of the Nunavut Agreement, and any others that may be needed – all of which, working together, must be designed and implemented to increase and maintain the employment of Inuit at a representative level in all levels and occupational groupings, as well as to achieve the associated short- and medium-term goals of the IEP;
- vii. IEPs must be very precise and specific as to the steps to be taken and how those steps are planned to achieve short-, medium- and overall goals;
- viii. IEPs must have express regard to the resources necessary to achieve their goals and how these resources are planned to be available;
- ix. IEPs and their contents must be honourably and diligently developed, given effect and implemented; and
- x. IEPs that comply with Article 23 and the Settlement Agreement must be sufficiently flexible to enable such adaptations as evidence demonstrates are needed, or as opportunities allow, for the purpose of maximizing the likelihood of successful implementation.

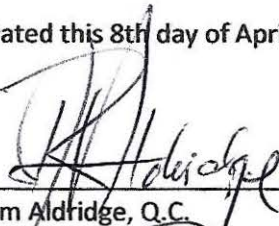
For certainty, NTI does not seek any declaration or declarations prescribing funding levels required to fulfill obligations of Government for implementation of the Agreement or prescribing Inuit employment levels required to be achieved by Government pursuant to Article 23.

VII. RELIEF TO BE SOUGHT AT THE SECOND STAGE OF THE SECOND STAGE OF THE ARBITRATION

Matters in respect of additional remedies as generally described in Part IV, paragraph iii, above, will

be dealt with in accordance with sections 38.5.10 to 38.5.12.

Dated this 8th day of April, 2020.

A handwritten signature in black ink, appearing to read "Jim Aldridge", written over a horizontal line.

Jim Aldridge, Q.C.
Counsel for Nunavut Tunngavik Inc.