

In the Matter of an Arbitration pursuant to Article 38 of the Nunavut Agreement

Between:

**The Inuit of Nunavut as represented by
Nunavut Tunngavik Incorporated (“NTI”)**

(Claimant)

- and -

**His Majesty the King in Right of Canada as represented by
the Minister of Crown-Indigenous Relations (“GoC”)**

(Respondent)

- and -

**The Commissioner of Nunavut as represented by the Government of Nunavut,
the Government of Nunavut as represented by the Premier of Nunavut,
and the Government of Nunavut (“GN”)**

(Respondent)

Arbitrator:

The Honourable C. D. Hunt

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INITIAL DECISION

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ABBREVIATIONS/ACRONYMS

ADM	Assistant Deputy Minister
ASF	Agreed Statement of Facts
Agreement	Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada
CITT	Canadian International Trade Tribunal
EIA	(Department of) Executive and Intergovernmental Affairs
Ex.	Exhibit
FTEs	Full-time Equivalents
GN	Government of Nunavut
GNWT	Government of the Northwest Territories
GoC	Government of Canada
HR	Human Resources
IEP	Inuit Employment Plan
ITC	Inuit Tapirisat of Canada
Master IEP	Master Inuit Employment Plan/Master Plan
NILFA	Nunavut Inuit Labour Force Analysis
NOC	National Occupational Classification
NTI	Nunavut Tunngavik Incorporated
Settlement Agreement	Settlement of 2006 Action (<i>NTI v Canada</i>)
TR1	Transcript 1: June 2022 Evidentiary Hearing
TR2	Transcript 2: September 2022 Legal Argument
TRPS	Towards a Representative Public Service
WoG IEP	Whole-of-Government Inuit Employment Plan
WS	Witness Statement

INTRODUCTION AND DECISION

Introduction

[1] In 1993, the Government of Canada (GoC) and the Inuit of the Nunavut Settlement Area signed a comprehensive agreement (Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada (*Agreement*)) to settle Inuit land claims in vast areas that are now part of the Territory of Nunavut. Article 23 of the *Agreement* included the objective that Inuit would be employed in government within all occupational groupings and grade levels at a level reflective of their percentage of the Nunavut population.

[2] The parties agree that Inuit make up approximately 85 percent of the population of Nunavut. There is little dispute that (with very limited exceptions) the representative level has not been achieved and, in some cases, has not improved significantly over time. All parties acknowledge that there are genuine impediments to achieving the representative level, many of which lie beyond the control of government. All parties also recognize that much effort has been put into the implementation of Article 23.

[3] In this arbitration, the Inuit claim that Inuit Employment Plans (IEPs) prepared pursuant to Article 23 by GoC and the Government of Nunavut (GN; collectively, the Governments) do not comply fully with the *Agreement*. The Governments disagree. The Inuit seek a series of declarations that specify IEP requirements, as well as a declaration that current IEPs are non-compliant.

[4] Their differing views about IEP requirements have been apparent for more than half the life of the *Agreement*. All parties hope that the clarification sought through the arbitration will facilitate future co-operation in implementing the *Agreement* and contribute to its overarching goal of reconciliation.

[5] I have considered the parties' many diverse and rich arguments, including any that are not specifically mentioned.

Decision

[6] Nunavut Tunngavik Incorporated (NTI) sought nine substantive declarations in the arbitration. The proposed declarations are examined beginning at para 177, and two are granted in either the original or a modified version.

[7] Deficiencies in some existing IEPs are identified beginning at para 233.

THE AGREEMENT: CONTEXT AND A BRIEF HISTORY

[8] The following is derived primarily from the parties' Agreed Statement of Facts (ASF).

[9] In late 1975, Inuit representatives authorized their national organization, Inuit Tapirisat of Canada (ITC), to commence land claims negotiations with the federal Crown. A few months later, ITC made an initial presentation to the Prime Minister and his cabinet. Beginning in 1976, the Inuit proposed that a new territory, Nunavut, be carved out of the Northwest Territories.

[10] Another early topic concerned Inuit public sector employment, which the parties understood to have financial value to Inuit over time. By 1989, the federal Crown took the position that *per capita* financial compensation in the *Agreement* should be less than that found in three comprehensive land claims agreements already concluded, due in part to public sector employment and government procurement provisions under negotiation (now Articles 23 and 24, respectively). GoC does not contest that the Inuit received less compensation than that found in other previously negotiated agreements: GoC Final Written Submissions, para 15.

[11] Since 1993, NTI (a corporation without share capital) has represented the Inuit for the purposes of the *Agreement*. NTI is authorized to enforce the *Agreement's* covenants.

[12] By 1993, the *Agreement* was ratified by the Inuit; much of the necessary legislation had received royal assent; and the *Agreement* became effective. After the new territory, Nunavut, came into existence on April 1, 1999, GN took the place of its predecessor, the Government of the Northwest Territories (GNWT).

[13] At an early stage, GoC commissioned reports to plan for the creation of Nunavut, which included information about the training and costs required for maximizing Inuit employment. Other steps taken toward implementing the *Agreement* included the creation of a Nunavut Implementation Commission to advise on the establishment of the new territory. Beginning in 1995, it issued comprehensive reports.

[14] GNWT also released reports about human resources planning and costs for a representative public service in Nunavut. Other planning steps were pursued by GoC under the auspices of the Coordinating Committee of Officials for Nunavut.

[15] By 1996, GoC and GNWT each prepared initial IEPs. In 1999, as required by the *Agreement*, the Implementation Panel created by Article 37 arranged for a five-year independent review of Article 23.

[16] In 2003, the Office of the Auditor General of Canada tabled a report that, among other things, considered how GoC had managed the transfer of federal responsibilities in the North and the implementation of the *Agreement*. The Office's 2010 report examined GN's management of its human resources needs.

[17] In December 2006, NTI filed a Statement of Claim against GoC in the Nunavut Court of Justice (2006 Action). Among other claims, NTI alleged that Article 23 had been breached. GoC joined GN as a third party to the action. NTI was granted summary judgment in the Nunavut Court of Justice as regards a breach other than of Article 23: *NTI v Canada (Attorney General)*, 2012 NUCJ 11.

[18] The majority of the Court of Appeal overturned an associated damages award because it concluded the evidence from the summary proceeding provided inadequate support: *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 at para 90 *et seq.* (Court of Appeal decision). The Court of Appeal underscored at para 67 that GoC was obliged to comply with the *Agreement's* covenants and could not use lack of funding as an excuse.

[19] The 2006 Action was settled in 2015 (*Settlement Agreement*). The *Settlement Agreement's* provisions regarding Article 23 led to important developments. For example, the parties formed a technical working group to oversee a detailed analysis of the Nunavut labour force (NILFA), which Article 23.3.1 had required Government to undertake within six months of the *Agreement's* ratification, in November 1992. Various NILFA-related reports and products were prepared between 2015 and 2020, and the Governments have updated their IEPs utilizing this data.

[20] GoC has prepared nine IEPs for federal departments, and a draft Whole-of-Government IEP (WoG IEP). Two additional federal agencies operating in Nunavut (Parks Canada and Polar Knowledge Canada) have prepared IEPs, even though they are not required to do so. Since 2019, GoC has issued implementation reports in its draft WoG IEP.

[21] GN has issued IEPs for its departments and large agencies, along with a Master Inuit Employment Plan 2017-2023 (Master IEP) and accompanying Technical Report. GN summarizes its employment statistics quarterly in *Towards a Representative Public Service* (TRPS) reports. GN's fiscal year-end statistics are provided each year in the *Public Service Annual Report*. GN reports are based on its six employment categories (Executive; Senior Management; Middle Management; Professional; Paraprofessional; Administrative Support). Inuit employment is reported as the number of Inuit employed in indeterminate and term positions and by representation rates (percentage of filled positions occupied by Inuit). Since 2015, GN reports have been based on full-time equivalents (FTEs).

[22] While both Governments operate in Nunavut, GoC public service positions account for approximately only 8 percent of the total; GN positions make up the remainder.

THE ARBITRATION AND THE PARTIES' POSITIONS

The Arbitration

[23] In October 2018, NTI wrote to the Governments explaining its views regarding the inadequacy of their IEPs (NTI's October 2018 letter). Other communications ensued, but in February 2019 NTI commenced dispute resolution under Article 38 of the *Agreement* (which had been amended as part of the *Settlement Agreement*). As required by Article 38, there were negotiations and mediation, but when these failed NTI referred the dispute to arbitration in April 2020 (Reference to Arbitration).

[24] Other steps taken culminated in a five-day evidentiary hearing in Iqaluit in late June 2022, where there was cross-examination of two lay witnesses (Ms. Kolola and Ms. Kilabuk-Cote, put forward by GN and GoC, respectively) and two (Dr. Prince and Mr. O'Riordan) of the three experts who prepared reports. The third expert, Ms. Merrin, gave only direct testimony. The parties' subsequent written briefs (Final Written Submissions) were argued orally at a virtual hearing on September 16, 2022. Additionally requested written submissions were all received by December 9, 2022.

[25] Transcripts from the two oral proceedings are referred to as TR1 (June evidentiary hearing) and TR2 (September legal argument).

[26] Under Article 38.5.9, the arbitrator's initial decision may not include "any remedial order other than a declaration or declarations concerning the interpretation of the Agreement and the rights and obligations" of the parties. If a declaration is issued, the parties may discuss remedies. If such discussions fail, the arbitration may be reconvened pursuant to Article 38.5.12.

[27] Although the arbitration process was triggered once before, this is the first matter that has proceeded past the negotiation stage: TR1, p 387, line 15 to p 388, line 8.

The Parties' Positions

[28] During legal argument, NTI clarified what it seeks from the arbitration. It no longer bases its claims on the *Settlement Agreement*: TR2, p 61, lines 21-23. It offered to remove the words "by when" from one of its proposed declarations: TR2, p 69, lines 4-11.

[29] NTI's proposed declarations are directed at the content of the IEPs. NTI seeks an accompanying declaration that current IEPs do not comply with these requirements. It does not seek declarations about funding levels or prescribing Inuit employment levels (both of which are prohibited by Article 38.5.3(a) and (b)). It does not consider that IEPs must "guarantee" a date by which a representative level must be achieved. See e.g., TR2, p 28, lines 12-17; p 33, lines 20-25; p 35, lines 5-14.

[30] The Governments request dismissal of the declarations sought by NTI, along with a declaration that their IEPs comply with the *Agreement*.

[31] A few preliminary matters require highlighting.

[32] First, although NTI stresses the interpretational and foundational importance of the concept of honour of the Crown, at this time it does not consider essential a ruling on whether it has been breached: TR2, p 66, line 11. The Governments acknowledge that the honour of the Crown infuses treaty interpretation.

[33] Second, in NTI's view, GoC is responsible for GN's compliance with the *Agreement*; GoC disagrees. At para 4 of its Reply to the Notice of Reference to Arbitration, GN suggests that if there is any damage or liability demonstrated by NTI, it is not GN's responsibility. In any event, NTI and GoC agree that the point need not be determined at this initial stage of the arbitration.

[34] Third, NTI does not seek a specific ruling that some of the Governments' evidence is irrelevant or unnecessary.

[35] Fourth, GoC asserts that the *Settlement Agreement* resolved any of its potential liability arising before May 4, 2015. That issue can likewise be put aside at this stage. Although NTI no longer relies on the *Settlement Agreement* to support its legal arguments, it may be helpful to set out briefly its terms pertaining to Article 23.

THE SETTLEMENT AGREEMENT

[36] Despite the Governments' position during the arbitration that interpreting the *Settlement Agreement* was beyond my jurisdiction, it was mentioned by many witnesses and counsel during legal argument; is in countless documents; and is part of the Agreement as to Documents. GoC acknowledged at para 35 of its Pre-hearing brief that the *Settlement Agreement* is useful for context and background.

[37] The preamble states that the parties wish to resolve certain matters concerning the implementation of the *Agreement*. Under para 1(c), NTI agrees to execute a release of its 2006 Action upon the payment of certain sums by GoC. Paragraph 3(a) provides that matters contained in Part II of the *Settlement Agreement* will be the focus of the parties'

ongoing implementation efforts for matters dealt with in the *Settlement Agreement* for “the planning period ending March 31, 2023.” Paragraph 3(b) states that ongoing implementation matters “not dealt with” in the *Settlement Agreement* will be dealt with through the Nunavut Implementation Panel and other mechanisms available under the *Agreement*, “as appropriate.”

[38] Under the heading “Article 23 of the Nunavut Agreement” in Part II, at para 9 GoC agrees to provide \$50 million up to March 31, 2023 to fund the implementation of Article 23. Part II, paras 19-24, concerns the design and implementation of NILFA.

[39] Paragraphs 25-27, under the heading “Inuit Employment Plans and Pre-Employment Training Plans,” relate to Parts 3, 4 and 5 of Article 23. Among other things, this requires Governments to establish central agencies for Inuit employment and training coordination; ensure the preparation of detailed action plans that include timelines and objectives; and ensure that IEPs are very precise and specific in laying out the steps that will be taken to achieve goals.

[40] In a section entitled “General,” para 32 confirms that the *Settlement Agreement* is not part of the *Agreement*. Paragraph 34 provides that the parties make no admission concerning their legal positions regarding the *Agreement*, and the measures in the *Settlement Agreement* are without prejudice to any party’s position as to whether GoC or GN “has an obligation to provide such measures or the adequacy of such measures.”

KEY PROVISIONS OF THE AGREEMENT; PRINCIPLES OF INTERPRETATION

[41] The parties to the *Agreement* are GoC and the organization (now replaced by NTI) that then represented the Inuit. Though not a party, GNWT was also a signatory. GN meets the definition of Territorial Government in Article 1.1.1, and the Governments together meet the definition of “Government” in the same Article.

[42] Article 2.1.1 states that the *Agreement* is based on the objectives set out in the Preamble. Two of the four objectives are especially noteworthy: “to provide Inuit with financial compensation and means of participating in economic opportunities” and “to encourage self-reliance and the cultural and social well-being of Inuit.”

[43] As required by the jurisprudence discussed below, these objectives are the lens through which the *Agreement* must be interpreted. It is apparent that Article 23 plays an important role in achieving these objectives.

Article 23: Inuit Employment Within Government

[44] Article 23, the heart of the arbitration, is reproduced here as Appendix 1. The following provisions are especially pertinent.

[45] *Part 1* contains definitions. Inuit employment plan (IEP) is defined in Article 23.1.1 as “a plan designed to meet the objective of these provisions in accord with the process set out in Part 4” [emphasis added].

[46] *Part 1* also defines “representative level” and “under-representation.” In each case the comparator is the ratio of Inuit to the total population of Nunavut. The definition of “representative level” applies “within all occupational groupings and grade levels.” As mentioned, the parties agree the current representative level is approximately 85 percent. The evidence is clear that, against this standard, there is significant under-representation of Inuit generally within the Governments’ public services. Moreover, representativeness is uneven across occupations and grade levels, with Inuit typically being employed at a higher rate in positions that require less education.

[47] *Part 2: Objective* states in Article 23.2.1 that the objective of the Article is “to increase Inuit participation in government employment” in Nunavut “to a representative level.” The same Article acknowledges that the achievement of this objective will require initiatives by Inuit and Governments; Article 23.2.2 requires the parties to cooperate with one another.

[48] *Part 3: Inuit Labour Force Analysis* required that, within six months of the *Agreement’s* ratification, Government undertake a detailed analysis of the labour force of Nunavut “to determine the availability, interest and level of preparedness of Inuit for government employment,” and to keep it updated on an ongoing basis: Article 23.3.1. This information is referred to as NILFA. Article 23.3.2 links NILFA directly to IEPs, stating that the purpose of such analysis is “to assess the existing skill level and degree of formal qualification among the Inuit labour force and to assist in formulating Inuit employment plans and pre-employment training” [emphasis added]. The NILFA process is detailed in Schedules D and E of the *Settlement Agreement*.

[49] The expert witnesses shared the view that NILFA has produced a wealth of highly useful material, while lay evidence outlined how Governments have used NILFA to prepare the current generation of IEPs.

[50] *Part 4: Inuit Employment Plans* is critical. Article 23.4.1 obligates Governments, within three years of ratification, to prepare an IEP to increase and maintain the employment of Inuit at a representative level. This opening provision essentially mirrors Article 23.2.1’s objective, a point to which I will return.

[51] Article 23.4.2 begins “An Inuit employment plan shall include the following” [emphasis added]. The parties agree that each of the six items ((a) to (f)) in its accompanying list must be addressed in IEPs. As discussed, beginning at para 136, they part company as to whether (as the Governments insist) this provision limits the mandatory scope of IEP contents or, as NTI maintains, permits the mandatory inclusion of other matters.

[52] One of the six items (Article 23.4.2(d)) deals with measures consistent with the “merit principle” designed to increase Inuit recruitment and promotion, and includes a sub-list of 10 points. The parties agree that the sub-list (which is introduced by the words “such as”) sets out examples that are not mandatory. Additional nuances in NTI’s position, not shared by the Governments, are explored beginning at para 221.

[53] While some of the final five parts of Article 23 (Pre-employment Training; Support; Review, Monitoring and Compliance; Canadian Forces and RCMP; and Saving) are related to issues in the arbitration, they are not its direct object nor were they the focus of submissions.

Modern Treaty Interpretation Principles and the Role of Adjudicators

[54] The parties agree on the relevant principles of interpretation but place different emphases on them.

[55] Principles of interpretation contained in Part 9 of Article 2 of the *Agreement* require that articles of the *Agreement* be read together and interpreted as one agreement; the *Agreement* is “the entire agreement”; there is no presumption that doubtful expressions are to be interpreted in favour of any party; and that the Articles be construed according to the *Interpretation Act*, RSC 1985, c I-21.

[56] Three sections of the *Interpretation Act* are especially applicable. Section 11 specifies that “shall” is imperative and “may” is permissive. Section 12 requires that every enactment shall be given “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.” Section 13 directs that the preamble of an enactment “shall be read as a part of the enactment intended to assist in explaining its purport and object.”

[57] Recent Supreme Court of Canada cases explain how modern treaties (such as the *Agreement*) should be interpreted. A useful summary was given by Justice Karakatsanis in *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 (*FNNND*). At para 36, Justice Karakatsanis observed that since modern treaties are “meticulously negotiated by well-resourced parties,” courts must pay close attention, and give deference to, their terms. Other key points Justice Karakatsanis underscored (at para 37) are that contentious provisions should be interpreted in light of the treaty as a whole and its objectives; a

modern treaty should be interpreted generously and not as though it were an everyday commercial contract; and although the handiwork of the parties should be respected, this is always subject to constitutional limitations such as the honour of the Crown. Modern treaties are intended to advance reconciliation and foster positive long-term relationships: para 38.

[58] Justice Karakatsanis also commented on the role of decision-makers in resolving treaty disputes, emphasizing the importance of judicial forbearance and pointing out at para 33 that courts should “generally leave space for the parties to govern together and work out their differences.” Nor should judges “closely supervise the conduct of the parties at every stage of the treaty relationship.” Nevertheless, the courts play a critical role in safeguarding the rights enshrined in modern treaties, which are constitutional documents: para 34. These observations apply to this arbitration.

[59] Another helpful guide is that the interpretation of a modern treaty should be “reasonable, yet consistent with the parties’ intentions and the overall context, including the legal context, of the negotiations.” Resort to a preamble can also be beneficial: *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 118.

Principles of Statutory Interpretation and Contract Interpretation

[60] Although the above principles are central, other interpretational issues can complicate the analysis. Specifically, in interpreting a modern treaty what reliance should be placed on principles governing the interpretation of statutes or contracts? Given the multi-faceted character of modern treaties, such questions are almost inevitable.

[61] As indicated above, modern treaties are negotiated by well-resourced parties with access to legal and other advice. In addition to their constitutional status, they are sometimes treated as contracts. Often, they are implemented by statute (here, the *Nunavut Land Claims Agreement Act*, SC 1993, c 29).

[62] The *Agreement’s* adoption of the *Interpretation Act* speaks to its legislative character. But that does not determine how general principles of statutory interpretation ought to come into play. Nor is it obvious how principles of contractual interpretation should be employed. Though sometimes touched on in modern treaty cases, the answers to such questions remain relatively unexplored.

[63] Several matters in the arbitration gave rise to these questions. For example, what evidence should be considered in interpreting the *Agreement*? As in contract law, should account be taken of the surrounding circumstances (or factual matrix) at the time the *Agreement* was entered into? Should the search for the intention of the parties be limited to their reasonable, objective view at that time, rather than the subjective view of one party? What consideration should be given to the parties’ subsequent conduct or today’s

circumstances? During the arbitration, submissions about these and similar matters were made.

[64] The jurisprudence contains more discussion about the role of contract law than of statutory interpretation. It is common, for example, to describe modern treaties as “contracts.” See e.g., Court of Appeal decision in *NTI* at para 61. In *FNNND* at para 46, the Supreme Court relied on comments by one of the treaty’s negotiators while determining an objective of the treaty. This suggests that, as in contract law, in seeking to understand the parties’ intentions, it is appropriate to take account of the surrounding circumstances.

[65] Another view is that principles of contract law may be “helpful markers in considering the appropriate interpretation,” but should not bind their interpretation: *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 at para 86 (*VGFN*). According to the Yukon Court of Appeal in *VGFN*, 2021 YKCA 5 (under appeal) at para 95, the chambers judge permitted opinion evidence about the negotiation process, despite objections that it reflected the parties’ subjective intentions. It appears that this trial ruling was not made a ground of appeal. A cautionary note has been struck about the potential complexity of relying on principles of contract law in modern treaty interpretation cases: Dwight Newman, “Contractual and Covenantal Conceptions of Modern Treaty Interpretations” (2011), 54 S.C.L.R. (2d) 475 at 484.

[66] This arbitration cannot provide comprehensive answers to these thorny problems, although it raises real issues that must be resolved. The approach I take below is to focus on the language of the *Agreement*, turning to other legal principles for guidance as appropriate.

THE EVIDENCE

[67] The Governments put forward extensive evidence in the form of Witness Statements (WS) with attachments. These statements were made by representatives of government departments, corporations or agencies (departments) that prepared IEPs. Two such individuals testified at the evidentiary hearing. The statements generally outline the process for preparing attached IEPs and the context of each department. For the most part, only passing reference to a few of these documents is required.

[68] Each party retained an expert to prepare a report and appear at the hearing.

[69] The parties prepared an Agreement as to Documents, each of which document begins with the number “2.” NTI put forward six additional documents, none of which gave rise to objections. A few exhibits (Ex.) were also entered into evidence at the hearing.

[70] The ASF has already been mentioned.

Lay Witnesses

Sheila Kolola, GN

[71] Ms. Kolola provided two Witness Statements (a third was withdrawn at the hearing: TR1, p 161, lines 3-7). The first concerns her overall responsibility for Inuit employment within GN, and the second for Inuit employment in the Department of Human Resources (HR). Since her testimony focused on the former, references herein are to that statement.

[72] Ms. Kolola has been employed in government for nearly 34 years, about half of which she has spent in training, human resources and Inuit employment. Since late 2018 she has been Deputy Minister of the GN's HR. When created in April 2019, HR became responsible for Inuit employment (previously housed at the Department of Executive and Intergovernmental Affairs (EIA)). She is accountable for GN's Master IEP to 2023 and for the central Inuit employment and training coordination office.

[73] Among other positions, she has been the Director of Training and Development for Sivumuaqatigiit. That organization was so named in 2013, and its predecessor was the division that looked after developing IEPs and training all public servants: TR1, pp 142-144; pp 145-147. It now has a division that focusses on Inuit training. It currently has 14 employees and plays a major role in GN's Article 23 endeavours.

[74] GN relies on federal funding to implement the *Agreement*: TR1, p 164, lines 8-11. There was a 10-year implementation contract beginning in 1993, but GN funded initiatives itself from 2003 to 2015 because there was no new contract in place: WS1, paras 44-49. The *Settlement Agreement's* \$50 million in implementation funding covered 2015-2023, so GN used those dates to draft its current generation of IEPs: TR1, p 144, lines 19-27.

[75] At TR1, pp 148-149, Ms. Kolola outlined the process for developing departmental IEPs, all of which follow the same template. They set short-term goals from 2017 to 2020 and medium-term goals from 2020 to 2023. The decision to use short- and medium-term goals rather than long-term goals was not communicated to NTI until after the decision was made: TR1, p 209, lines 19-23.

[76] There is a process for updating IEPs. In each department, a senior official is accountable for its IEP, while the Deputy Minister reports progress and the Minister answers questions in the Legislature.

[77] The current IEPs used NILFA for the first time: TR1, p 150, lines 22-27 to p 151, line 3. NILFA findings were delivered in 2018: WS1, para 51(g). Appendix B (para 26) to Ms. Kolola's WS1 suggests that the federal government only began to meet its obligation to produce NILFA after the *Settlement Agreement*.

[78] Ms. Kolola testified that GN has introduced about 12 new programs over the past four years, of which Amaaqtaarniq (which promotes Inuit to take post-secondary programs with full salary, recruitment and relocation) is the most successful: TR1, p 156, lines 26-27.

[79] During cross-examination Ms. Kolola explained that GoC maintains a National Occupational Classification (NOC) system to describe occupations or types of jobs in the Canadian labour market: TR1, p 169, line 23 to p 170, line 6. GN uses six employment categories that are different than the NOC occupational groups in that they are less detailed: TR1, p 170, line 25 to p 171, line 1; p 172, line 22 to p 173, line 6. GN positions are evaluated according to the NOC codes, then placed into its six employment categories: TR1, p 190, lines 21-25.

[80] Ms. Kolola was asked whether GN's IEPs show how under-representation in NOC categories will be addressed. The EIA's IEP (Ex. 2.71), used as an example, demonstrates the difficulty of determining this: one part employs NOC categories to report Inuit under-representation, while its goals and targets use GN's own employment categories (pp 17 and 25, respectively). Ms. Kolola acknowledged that many employees in the same occupational group could show up in different GN categories: TR1, p 192, lines 6-9. Issues created by GN's decision to report some information using its employment categories rather than NOC codes are examined beginning at para 201 of this Decision.

[81] The ratio of Inuit to total positions has remained constant at about 50 percent since 2012; the number of Inuit occupying GN positions has increased, but so have the number of GN's overall positions: TR1, p 171, line 24 to p 172, line 6. Ms. Kolola acknowledged that the objective of Article 23 is not expressed as the above ratio.

[82] Ms. Kolola stated that the latest TRPS (Ex. 2.96(a)) shows that, as of March 31, 2022 the Inuit representation rate was 51 percent, while the goals for the overall short- and medium-term found in the Master Plan (Master IEP) of 2020 are greater, at 54 percent and 58 percent, respectively: TR1, p 174, line 14 to p 175, line 25. Although the short-term goals of many departmental IEPs were not achieved, neither the short- nor medium-term goals will be changed, as they are in place only to 2023: TR1, p 205, line 7 to p 206, line 4.

[83] Ms. Kolola accepted that the representative rate under the *Agreement* applies in all occupational groupings and categories: TR1, p 182, line 23 to p 183, line 4. Two GN departments (Culture and Heritage, and EIA) have achieved a representative rate of 85 percent: TR1, p 184, lines 19-26.

[84] Ms. Kolola conceded that none of the other departmental IEPs “get to representativeness,” and none address how representativeness, once achieved, will be maintained: TR1, p 185, line 3 to p 186, line 1. Even where representativeness has been achieved on a departmental basis, there remains under-representativeness in certain occupation groupings (for example, in EIA, in management occupations): TR1, p 188, lines 12-19. She was questioned about whether GN’s IEPs set out areas of under-representation by regular full-time and regular part-time status (as required by Article 23.4.2(a)) but did not appear to answer: TR1, p 186, line 22 to p 189, line 5.

[85] Ms. Kolola pointed out that most of the departments’ IEPs include most of the matters listed in Article 23.4.3(d): TR1, p 198, lines 18-20. She did not know whether the IEPs were physically posted in all departments, but said they were available online: TR1, p 198, line 21 to p 199, line 27.

[86] Cross-examination also focused on Ex. 2.64, the Technical Report to the GN’s Master IEP, which, beginning at p 224, shows the definitions employed in all departmental IEPs. Inuit employment goals are the total number of Inuit employees in FTEs projected to be employed in a department; an Inuit employment target is a projected number of Inuit employees in the GN’s employment categories. In each case these are numbers rather than representation rates: TR1, p 212, lines 26-27. When asked why numbers of employees are used in the plans rather than the representation rate as a phased approach toward 85 percent as required by Article 23, Ms. Kolola’s response was difficult to understand. At TR1, p 216, lines 7-26 she suggested it was because the percentage changes with capacity (a term used by GN to describe the percentage of approved positions that are actually filled), and that “the goal fluctuates as the number of positions fill”: TR1, p 215, lines 19-21.

[87] Ms. Kolola was unable to explain why the list of factors that influence goals and targets in IEPs at p 225 of the Master IEP’s Technical Report does not include “the effects of departmental actions taken pursuant to the action plan” (TR1, p 218, lines 22-25), other than to say that when the department reports to the legislature or to HR, there will be an indication of how the proposed actions affected the numbers: TR1, p 223, line 9 to p 224, line 1.

Micheline Kilabuk-Cote, GoC

[88] Ms. Kilabuk-Cote is the Director of Pilimmaksaivik, an Inuktitut word for the Federal Centre of Excellence for Inuit Employment in Nunavut. She reports to the person

designated to monitor the GoC's draft WoG IEP. She has been employed by GoC since 2008 and engaged in Inuit employment matters for almost 10 years.

[89] Pilimmaksaivik was created in early 2016 as a central coordinating office to work with all federal departments having Article 23 obligations. It became permanent in 2019. As of late 2021, it had 12 staff positions in Nunavut. It played a key role in the preparation of the current generation of federal IEPs and the development of the draft WoG IEP.

[90] Ms. Kilabuk-Cote acknowledged the objective of Article 23 as the achievement of a representative public service: TR1, p 308, lines 15-17. Beginning at TR1, p 309, line 5, she explained that departmental IEPs are to take measures to complement the WoG IEP. Current IEPs cover 2018 to 2023, and contain short- and medium-term timelines. They are intended to be renewed in 2023.

[91] The GoC considered employing long-term goals but concluded it would be too difficult given the lack of available evidence (NILFA was still being developed); the complexity and specificity of GoC positions; choices made by Inuit; and the competitive demand for Inuit employees. In her view, the lack of an end date did not affect GoC's ability to undertake its work: TR1, p 312, lines 4-19.

[92] An ADM Steering Committee ensures senior-level oversight across departments. There is a willingness by senior officials to create new innovative approaches to Inuit employment and mitigate barriers: TR1, p 315, lines 20-23.

[93] Among Pilimmaksaivik's successes are an Inuit education fund and the fact that, in recent years, the level of Inuit participation across GoC has risen from 41 percent to 48 percent. This is a whole-of-government number, rather than an analysis as to each occupational grouping and level: TR1, p 339, lines 7-22. She acknowledged that the *Agreement* has the long-term goal of increasing and maintaining the representativeness of Inuit employment but explained that GoC believes Article 23.4.2 sets out what is mandatory in IEPs: TR1, p 325, lines 1-11.

[94] Ms. Kilabuk-Cote was unable to say who decided to employ only short- and medium-term goals or whether legal advice was sought on IEPs not being plans to increase and maintain employment to a representative level: TR1, p 327, line 4 to p 330, line 19. In setting targets, account was taken of the effect of actions in coming up with short- and medium-term goals: TR1, p 331, line 22 to p 332, line 4.

Expert Witnesses

[95] In my estimation, all three expert witnesses were fair and honest in their observations. Those who were cross-examined freely acknowledged if there were gaps or shortcomings in their views.

Dr. Michael Prince

[96] Dr. Prince, Lansdowne Professor of Social Policy at the University of Victoria, was qualified without objection to give opinion evidence in the areas of public administration, especially public policy, program implementation and employment equity. It should be underscored that his evidence about why IEPs should contain end-dates preceded NTI's later position that this was no longer required. Since "when" is not a live issue, I have tried to minimize references to his opinions regarding this matter.

[97] Dr. Prince examined all current governmental IEPs, the ASF, and other documents. In the Executive Summary to his report, he stated that the IEPs are "extensive human resource documents yet not comprehensive plans" that cover most but not all of the requirements of Article 23, "though not all the elements adequately or completely": p 2. Twelve of GN's fourteen IEPs have no summary of action plans for achieving long-term goals. GoC reports do not present actions with longer-term periods for implementing objectives. From his perspective, the most significant gaps in the Governments' IEPs are "(a) the identification of a target date and timetable for carrying out and accomplishing the objective of Article 23, and (b) tools for achieving effective accountability for actual results." Without these, they are not "operative Inuit equity plans": *Ibid.*

[98] Dr. Prince explained that, in the 1980s and 1990s, in Canadian public administration and employment equity, there was a generally understood meaning to the phrase "occupational groupings and grade levels," the term used in Article 23.1.1's definition of "representative level." This is now called the NOC system: TR1, p 48, lines 11-17.

[99] GoC IEPs take NOC codes into account both as regards the identification of under-representation of Inuit employment and a phased approach to the form of numerical targets and timetables: TR1, p 49, lines 14-18. In GN's IEPs, NOC codes are used to identify under-representation, but it is less clear that NOC is used to present a phased approach for addressing under-representation. *Id.* at lines 19-23. Rather, GN uses its six employment categories, which he considers to be a simplified, modified version of NOC: *Id.* at lines 23-25.

[100] At the time the *Agreement* was negotiated, in public administration there was a general understanding regarding the basic elements of an employment equity plan: there

should be numerical indicators and tracking and monitoring to achieve employment equity and a suite of actions or special measures, either short- or long-term, designed to achieve equity in employment. Measures should include the identification of a responsibility centre to oversee the administration and reporting of the results, with follow-up action: TR1, pp 50-52.

[101] Dr. Prince suggested that certain core equity values are at the base of Article 23, including indigenous self-determination; community economic development; and prosperity through government employment: TR1, p 52, line 24 to p 53, line 9. Article 23 is unique, given its constitutional status as part of a land claims agreement and the involvement of two levels of government. It also differs from other employment equity programs because it targets only one group (Inuit), with the whole Inuit population as its reference point for determining representativeness, rather than the labour force (which is typically used in other employment equity programs).

[102] While some IEPs show positive action, initiatives and innovation, they lack “a timetable and a more detailed itinerary...of what’s our estimated time of arrival on this journey”: TR1, p 55, lines 2-20. It is more challenging to achieve an objective “when there isn’t a clear set of milestones and indicators and time frames”: *Id.* at lines 23-26. Without a “clear pathway, it’s easy to focus on the short term and the crisis of today”: TR1, p 56, lines 1-4. Dr. Prince expressed concern about the continuing under-representation of Inuit at professional, senior management and executive group levels.

[103] Dr. Prince emphasized that planning involves constructing sequences of behavior that can be carried out: TR1, p 57, lines 10-15. Except for Employment and Climate Change Canada, this is generally lacking in the IEPs: TR1, p 58, line 9 to p 59, line 3. He underscored the difference between “objectives and goals” on one hand, and “projections” on the other, beginning at TR1, p 59, line 17. The former are stable and measurable and tied to public policy commitments. The latter are more ephemeral but not automatically connected to resource allocation and program implementation, being more akin to forecasts, predictions and scenarios: TR1, p 60, lines 2-5. In his view, the GN IEPs define goals and targets by presenting projections that lack the specificity required for objectives and goals, and “projections aren’t plans”: TR1, p 61, lines 10-11.

[104] The possible negative effects of what Dr. Prince considers deficiencies in the IEPs (such as short-term projections versus medium- or long-term goals or objectives) are that the short term may drive out the long term; encourage a focus on such things as writing reports instead of making sustained progress to an objective; result in isolation and tokenism if there are not critical masses of Inuit across all categories of occupations and levels; and cause a lack of progress on objectives, leading to frustration and disappointment: TR1, p 61, line 12 to p 63, line 12.

[105] While the Master IEPs are impressive, they are not “comprehensive strategies that take into account the short, medium and long term objectives”: TR1, p 64, lines 14-17.

[106] Dr. Prince suggested that governments have not lost their way as much as they are using incomplete maps. Without an officially-set end date and no itinerary of the time of arrival, there is the prospect of partial and uneven representative public service for the indefinite future: TR1, p 65, lines 17-25.

[107] In cross-examination by GoC, Dr. Prince acknowledged the uniqueness of the *Agreement*: as a negotiated document it would have involved give and take and it sets a higher bar than other plans: TR1, p 68, line 6 to p 69, line 27. But he expressed disappointment about the lack of transformational change over a 22-year period, without improvement in representative rates since the *Settlement Agreement*: TR1, p 79, line 21 to p 80, line 10.

[108] Dr. Prince agreed that goals should be attainable and evidence-based and that many factors beyond the control of government can affect its ability to set informed goals for a date of achieving representative Inuit employment: TR1, p 88, line 1 to p 91, line 2. In his view, however, such factors can offer opportunities as well as challenges: TR1, p 96, line 23 to p 97, line 4. He has not studied the impact of IEPs on the attainment of Inuit representative employment: TR1, p 100, lines 22-24.

[109] During cross-examination by GN, Dr. Prince agreed that GN’s analysis is informed by NOC codes even though there is no chart that expresses Inuit employment shortfalls in terms of NOC: TR1, p 112, lines 10-12. When questioned about the term “plans” and the significance of indicating long-term goals, he stated that the IEPs are not comprehensive plans because they lack a sequence of actions over the long term and when they refer to long term “there’s precious little in the way of substantive concrete measures that would give me confidence of...re-kick-starting the momentum because there’s been inertia for nine years”: TR1, p 114, lines 8-12. Under present arrangements he would not anticipate achieving 85 percent Inuit employment before the end of the century. *Id.* at lines 13-16. He added that challenging factors that are outside the control of governments (such as a dispersed population, young population, educational levels and lack of qualifications) were well known in the 1980s and 1990s: TR1, p 117, line 19 to p 118, line 2.

[110] Dr. Prince re-iterated that the “estimation of a projection” in GN IEPs lacks substance and that projections are not plans with concrete goals and objectives: TR1, p 124, line 14 to p 126, line 9.

Stephanie Merrin

[111] After an application by NTI concerning Ms. Merrin’s qualifications, I ruled that she was qualified as an expert in labour market supply and demand, and market gaps between the two in Nunavut: TR1, p 278, lines 10-12; p 284, lines 25-26. While acknowledging there was overlap and duplication between her evidence and the material in the Agreement as to Documents, I found her summaries and analyses of complex and technical material to be helpful: TR1, p 282, lines 5-11.

[112] Despite Ms. Merrin’s long professional relationship with GN, I was not persuaded this case was sufficiently clear to render her proposed evidence inadmissible, but I accepted that her evidence should be treated with caution: TR1, p 283, lines 23-24; p 284, lines 23-25. After reading her testimony, I have no concerns about her impartiality or independence. I ruled inadmissible parts of her report about the difficulty of GN predicting when representative employment might be achieved, but such questions are now moot due to NTI’s changed position about the need for end dates in IEPs.

[113] In Ms. Merrin’s brief direct testimony, she outlined the process by which she conducted a GN workforce analysis, explaining her use of the terms “labour force” and “workforce.” She outlined how the GN employs NOC codes, pointing out that “beneath the broad employment categories that the GN reports on in its workforce statistics there are detailed codes for occupations or groups of jobs that give us a great deal more information against a national standard about the nature of the work and the education, training, job experience, that is needed to do that work effectively”: TR1, p 287, line 12 to p 288, line 19.

[114] Ms. Merrin concluded that, since 2013, there has been little change in the types of occupations in Nunavut: about 54 percent of occupations have NOC codes that require university education or extensive experience leading to a management role; 25 percent require skill level B (post-secondary education at a college level including a trade certificate or college diploma); 17 percent require Grade 10 or completion of high school; and 5 percent require no high school education: TR1, p 290, lines 3-21. The GN has a high need for teachers and nurses, who make up about 20 percent of its professional workforce: TR1, p 291, lines 7-8. Therefore, they also make up a large proportion of the 55 percent of positions that require a university education. Inuit representation is highest in occupations that involve the least education: TR1, p 292, lines 3-6.

[115] Ms. Merrin pointed out that factors such as a high birth rate and the large number of elders means that the potential Inuit labour pool is very small: TR1, p 293, line 17 to p 294, line 22. On the other hand, educational attainment is increasing: TR1, p 296, lines 6-7.

Fred O’Riordan

[116] Mr. O’Riordan, an economist, was qualified to give expert evidence on the demographic labor force and socio-economic conditions in Nunavut affecting GoC’s planning and programming to train, recruit and retain Inuit at a representative level as defined in Article 23. NTI did not object to his expert qualifications, but GoC and NTI agreed to excise from his report paragraphs about the difficulty of predicting the future.

[117] Mr. O’Riordan concluded that, despite the GoC’s programs, policies and efforts, demographic and geographical realities suggest that getting to representative employment will happen through “incremental changes, consolidating the gains that the government has made through that incremental process, and then moving to try to achieve greater...stretch targets...moving towards representative employment”: TR1, p 362, lines 4-11. Without cooperation between the parties, representative employment will always be an aspiration rather than an achievement.

[118] Beginning at TR1, p 364, line 2, Mr. O’Riordan explained that, at a basic level, the results in a labour market arise from the interaction between supply and demand. His unsuccessful search for comparable programs with objectives involving an indigenous population in other countries (Australia, New Zealand and the USA) caused him to use the federal employment equity program as a benchmark.

[119] That program defines its requirements in terms of labour force availability, whereas the *Agreement* refers to the general Inuit population. Because of factors such as the age of the population, the feasible labour supply in Nunavut is significantly smaller than the entire Inuit population: TR1, p 366, lines 20-22. Gender factors can also play a role in labour supply (for example, the interest among Inuit males in pursuing a traditional lifestyle): TR1, p 367, line 19 to p 368, line 11.

[120] On the demand side, the educational requirements of certain jobs preclude many Inuit from employment, although the Governments’ programs are having a positive impact on their educational attainment: TR1, p 369, line 20 to p 371, line 6. Mr. O’Riordan noted that Pilimmaksaivik is enhancing departmental coordination at the federal level: TR1, pp 372-373. He stressed that buy-in at senior levels and having a critical mass of Inuit can both influence incremental change: TR1, p 371, line 19 to p 373, line 6.

[121] During cross-examination Mr. O’Riordan agreed that in assessing Article 23, it is the number of positions that matter, not whether they are filled or vacant: TR1, p 378, lines 12-19.

[122] Mr. O’Riordan confirmed that to achieve representative employment there must be incremental steps; consolidation of gains; and knowledge about how to reach the higher stretch level of achievement: TR1, p 381, lines 2-19. Incremental steps alone are not enough. You must know how the incremental steps will feed into consolidation of gains and stretch targets: *Id.* at lines 16-20. Mr. O’Riordan also agreed with the suggestion that Pilimmaksaivik’s second annual report shows that, although 6 of 11 departments had increased their overall percentage of representative employment, by March 31, 2020 (without any impact from COVID) 8 out of 11 federal departments had not achieved their short-term percentage goals for representative employment: TR1, p 386, lines 1-2. This shows the challenge between having short- and medium-term goals that are realistic and achievable, and “stretch targets.” “To the extent that you stretch, and that’s a good thing, we all want to be able to get there”: *Id.* at lines 7-9.

PRELIMINARY LEGAL ISSUES

[123] Brief comment is needed in regard to five matters.

[124] First, what use should be made, if any, of factual statements in NTI’s Final Written Submissions? Second, is GoC correct when it suggests that the *Agreement* should be interpreted through the lens of current social conditions? Third, in interpreting the *Agreement* should account be taken of the past implementation successes and failures? Fourth, should significance be attributed to the fact that the *Settlement Agreement* did not alter Article 23 or that its past review failed to mention deficiencies in Article 23? Fifth, what is the scope of the arbitrator’s jurisdiction?

Statements of Fact in NTI’s Final Written Submissions

[125] At para 14 of its Final Written Submissions, GoC asserts that historical information in paras 5-29 of the ASF and paras 14-38 of NTI’s Final Written Submissions does “not inform” the interpretation of Article 23. Specifically, it argues there is no clear evidence of the nature or extent of trade-offs made during negotiations (although it accepts at paras 15-17 that the Inuit received less compensation than that in previous land claims agreements; the parties understood that the public sector sub-agreement had financial value over time; and Article 23 has economic value). It takes issue with NTI’s assertion that all the parties understood Article 23 to be more than merely “aspirational.” It points out that para 4(b) of the ASF provides that setting out facts is not an admission that the facts are relevant.

[126] I agree there is no clear evidence of the extent of trade-offs made during negotiations and no evidence cited by NTI for whether both parties thought Article 23 went beyond being aspirational. That said, the objectives of the *Agreement* and Article 23 make it plain that Article 23 was expected to have long-term financial value to the Inuit. As for whether both parties thought Article 23 was more than aspirational, obviously they

intended the *Agreement* to be enforceable and effective. Perhaps GoC raises these matters in part because it does not consider that Article 23 contains guarantees of representativeness. But NTI acknowledges that.

[127] In any event, given the narrow issues in the arbitration (what must be included in IEPs), it is unnecessary to delve further into these points.

Is GoC Correct When It Suggests That the *Agreement* Should Be Interpreted Through the Lens of Current Social Conditions?

[128] GoC asserts that since the *Agreement* has been implemented through legislation, it is appropriate to take account of current socio-economic circumstances in its interpretation. The sole authority it offered refers only to consideration of the “larger context” when interpreting legislation. Ruth Sullivan, *Statutory Interpretation*, (3d ed) (Toronto: Irwin Law, 2016) at 49.

[129] GoC appears to take this position primarily so it can rely on evidence of the difficulties it faces in implementing Article 23. Such matters were discussed by all five witnesses and are acknowledged by NTI. As pointed out by Dr. Prince, these difficulties were known generally in the 1980s and 1990s and have remained constant since. They are thus a legitimate part of circumstances at the time of agreement that may be taken into account in interpreting the *Agreement*: *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at para 47. They are even reflected in the *Agreement*. For example, Article 23.4.2(b) requires that IEP goals take account of “the number of Inuit who are qualified or who would likely become qualified, projected operational requirements, and projected attrition rates.” Given all of this, consideration of current difficulties contributes very little if anything to the discussion.

In Interpreting the *Agreement* Should Any Weight Be Given to Past Successes and Failures in Its Implementation?

[130] GoC next argues that facts recited in NTI’s Final Written Submissions, s II(B) (entitled Implementation of Article 23: 1993 to 2015), are irrelevant. It relies on the *Settlement Agreement* as having resolved any issues up to 2015 and the fact that the arbitration concerns the current generation of IEPs developed thereafter.

[131] While the arbitration puts at issue compliance of the current IEPs, I cannot accept that everything that happened prior to 2015 should be ignored. Like the *Settlement Agreement* (as acknowledged by GoC), that background provides useful context without which it would be impossible to understand the evolution of Article 23’s implementation efforts. Much of the evidence reviewed what happened after the *Agreement* was signed, something GN’s closing arguments also emphasized (see e.g., TR2 beginning at p 85).

That said, post-treaty information must be treated with extreme caution: *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at paras 153-156.

Is It Significant That No Amendments Were Made to Article 23 in the *Settlement Agreement* or That the Five-year Independent Review of 1993-1998 Did Not Mention Deficiencies in Article 23?

[132] GoC also points out at paras 20-21 of its Final Written Submissions that, unlike Article 38, Article 23.2.4 was not amended by the *Settlement Agreement*, nor did the five-year independent review covering 1993-1998 discuss deficiencies in earlier IEPs. It is difficult to understand why this should be considered significant. There is no evidence about why certain things and not others were included in the *Settlement Agreement*, nor what information formed the basis of the independent review. Thus, no conclusions in that regard can or should be drawn.

The Arbitrator’s Jurisdiction

[133] Article 38.5.2 gives an arbitrator jurisdiction over “any matter concerning the interpretation, application or implementation of the Agreement.”

[134] This jurisdiction is subject to Articles 38.5.3(a) and (b), which prohibit an arbitrator from prescribing funding levels required to fulfill Government obligations for implementation of the Agreement or Inuit employment levels required to be achieved by Government under Article 23. I accept GN’s suggestion (GN Final Written Submissions, paras 13-14) that the latter provision means an arbitrator cannot “prescribe” the achievement of an 85-percent level. Nothing that NTI now seeks breaches the above limitations on an arbitrator’s jurisdiction.

[135] The Governments emphasize that Article 38.5.6 prohibits an arbitrator from making a decision “that alters, amends, deletes or substitutes any provision of the Agreement in any manner.” A key issue discussed below is whether what NTI seeks is best characterized as an interpretation of the *Agreement* or, as the Governments submit, a prohibited alteration, amendment or reading-in.

ANALYSIS

Is Article 23.4.2 Extending or Limiting?

[136] Although the parties agree that the six topics set out in Article 23.4.2 are mandatory in IEPs, they differ on this threshold issue: does Article 23.4.2 limit or extend what must be included in IEPs? To put the matter another way, do Government IEPs comply with the *Agreement* so long as they deal with each of the six listed topics? Or

does a proper interpretation of the *Agreement* permit the possibility that, to achieve compliance, other matters must be included in IEPs?

[137] In essence, the Governments' position is that requiring IEPs to include anything other than the six topics in Article 23.4.2 is a prohibited amendment of the *Agreement*. More specifically, since Article 23.4.2(b) mentions short- and medium-term goals, mandating the use of long-term goals is beyond an arbitrator's jurisdiction.

[138] In contrast, NTI asserts that Article 23.4.2 does not limit what must be included in IEPs: it argues that guidance about the required content of IEPs should be drawn from other provisions as well. In its view, this is a legitimate part of interpreting the *Agreement*, exactly what Article 38 authorizes an arbitrator to do.

[139] Resolving this fundamental matter requires an examination of the meaning of "shall include the following" in Article 23.4.2. The parties provided jurisprudence on this topic in written and oral submissions and referred briefly to the French version. Assistance can also be sought from the *Agreement* as a whole, including other provisions of Article 23.

Jurisprudence

[140] Three Supreme Court of Canada cases offer assistance: *Ricard v Lord*, [1941] SCR 1, [1941] 1 DLR 536; *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029; and *Canada (Attorney General) v Igloo Vikski Inc.*, 2016 SCC 38. In brief, they suggest that when a general proposition in a statute or contract precedes a list, usually the list should be treated as an extension of the general proposition rather than a limitation upon it. An opposite outcome can result when the context requires.

[141] The oldest case, *Ricard*, is the most useful. The issue was whether the mayor of a municipal council was disqualified from office under municipal bribery and corruption legislation that provided for the disqualification of a "member of a municipal council." The mayor claimed he was not subject to disqualification because a later part of the statute provided that municipal council "shall include municipal councillors, aldermen and delegates to the county council": [1941] 1 DLR 536 at 542 [emphasis added].

[142] Like the Governments in this case, the mayor argued that the later list (specifying who was a member of a municipal council) restricted the earlier general disqualification provision to the listed officials. On the other hand, NTI relies on the general statement in Article 23.4.1 ("each government organization shall prepare an Inuit employment plan to increase and maintain the employment of Inuit at a representative level") that precedes the detailed list in Article 23.4.2 for the proposition that the list is intended to expand the contents of IEPs rather than limit them.

[143] In rejecting the mayor’s argument, the Supreme Court held at 542 that the words “shall include” are not “ordinarily construed as implying a complete and exhaustive enumeration.” The Court noted that the legislation was patterned on English legislation where the construction of the words “shall include” was extensive rather than restrictive. It referred to three English cases.

[144] At 542-543 the Court quoted from *R v Hermann* (1879), L.R. 4 Q.B.D. 284 at 288, which underscored the difference between “shall mean” and “shall include.” “The definition does not purport to be complete or exhaustive. By no means does it exclude any interpretation which the sections of the Act would otherwise have, it merely provides that certain specified cases shall be included” [emphasis added].

[145] At 543 the Court relied on *Robinson v Local Board of Barton-Eccles* (1883), 8 App. Cas. 798, which stated that the words “shall apply to and include” were “not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable; but to enable the word...when there is nothing in the context or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable” [emphasis added].

[146] At the same page, the Court drew upon *Dyke v Elliott* (1872), L.R. 4 P.C. 184 at 191-2, where the relevant legislation’s use of both “shall mean” and “shall include” caused the observation that absurd consequences would follow if the two were treated as equivalent.

[147] The more recent *National Bank of Greece* concerned a standard insurance clause, where a general proposition was followed by a list introduced by the word “including” in English and “*notamment*” in French. At 1040-1041 the majority explained that the *ejusdem generis* rule of interpretation was inapplicable because it assumed a specific enumeration followed by a general statement. Like this case, the reverse existed: there was an initial general statement followed by examples. When a general statement is followed by specific enumerations “it is logical to infer that the purpose of providing specific examples from within a broad general category is to remove any ambiguity as to whether those examples are in fact included in the category. It would defeat the intention of the person drafting the document if one were to view the specific illustrations as an exhaustive definition of the larger category of which they form a part.”

[148] The Court also drew upon the definitions of “including” in English and “*notamment*” in French to “make it clear that these words are terms of extension, designed to enlarge the meaning of preceding words, and, not, to limit them...the natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it:” at 1041.

[149] In the third case, *Igloo Vikski*, the Court reviewed a decision of the Canadian International Trade Tribunal (CITT) concerning the classification for tariff purposes of ice hockey goaltender gloves. Because of the complex and technical nature of the rules interpreted by the CITT, the Court applied a review standard of reasonableness rather than correctness: paras 16-17.

[150] In concluding that the Tribunal's decision was reasonable, the Court noted at para 50 that the fact there was another way of interpreting a provision did not render the CITT decision unreasonable. Citing *National Bank of Greece* for the proposition that "the term 'include' typically denotes that a non-exhaustive list is to follow," it held that the non-exhaustive quality of each listed item could reasonably be seen as a distinct matter. It pointed out at para 3 that the legislation being interpreted implemented Canada's international obligations under a treaty and, at para 30, that because the resulting legislation bears little resemblance to ordinary legislation, care must be taken when reviewing CITT decisions interpreting "its unique and complex scheme."

[151] *Igloo Vikski* provides less insight than the previous two cases because it concerned the judicial review application of the reasonableness standard to a highly technical and specialized subject, in the context of an international treaty.

Other Parts of Article 23; the French Version; Other Parts of the Agreement

[152] Some of the cases discussed above underscore that there is normally a difference between the use of "means" and "includes" (the former being limiting and the latter being expansive). In Article 23.1.1, both words are used in various definitions. For example, "government organization means a department or similar body within Government in the Nunavut Settlement Area" but "government employment includes [described positions] in the federal Public Service...and territorial Public Service" [emphasis added]. This supports the view that "means" is definitional, while "includes" is illustrative rather than limiting.

[153] The parties offered brief argument about the French version of Article 23.4.2, which uses the word "*comporte*" in place of "shall include." In the French version of *Ricard*, [1941] SCR 1 at 10, the English words "shall include" are replaced with "*comprend*." In the Petit Robert dictionary, "*comporter*" is given as a synonym of "*comprendre*": *Le Petit Robert: Dictionnaire alphabétique et analogique de la langue française*. (Paris: Dictionnaires Le Robert, 2023). This suggests that "*comporte*" can also be used in place of "shall include."

[154] Other French words replace "shall include" elsewhere in the *Agreement*. For example, Articles 5.7.3 and 5.7.6 use "*notamment*" for "shall include." But it is not obvious that "*notamment*" implies something different than "*comporter*."

[155] In my view, the French version casts little light on this controversy.

[156] Given that Article 38.5.3(d) prohibits an arbitrator from determining “questions of law which are not strictly related to the issue that is the subject of the arbitration,” in the following I do not decide the meaning of words used outside Article 23. Rather, I look to other parts of the *Agreement* for guidance in determining whether Article 23.4.2 should be interpreted as extending or limiting.

[157] Article 1 of the *Agreement* (Definitions) employs both “means” and “includes.” Like Article 23.1.1, Article 1.1.1 reinforces the notion that while “means” is restrictive, “includes” is not.

[158] Elsewhere in the *Agreement*, “includes” appears to be expansive rather than limiting. Examples are Articles 5.7.3 (the powers of Hunters and Trappers Organizations) and Article 5.7.6 (the powers of Regional Wildlife Organizations). A similar point can be made about Articles 17.1.2 (the qualities expected to be found in Inuit lands) and Article 19.2.7 (the right of Government to protect land and water for public purposes). In Article 12.5.5 (matters to be taken into account by the Nunavut Impact Review Board), a list introduced by “including” is obviously not restrictive since the introductory clause requires the Board to take into account “all matters that are relevant to its mandate.” Likewise, in Article 12.7.3 (monitoring of development projects) it is clear that a list following a general proposition (Article 12.7.2, the purposes of a monitoring program) introduced by “may include” is expansive, since the list is stated not to limit the generality of what has preceded it.

[159] Although clearer language (such as that in Articles 12.7.2 and 12.7.3) could have helped determine whether the parties intended Article 23.4.2 to be expansive or limiting, nothing elsewhere in the *Agreement* signals a deviation from the general propositions in the jurisprudence discussed above.

Other Arguments

[160] During argument beginning at TR2, p 119, GN suggested that the jurisprudence was not especially helpful because the cases usually involved the use of “include” in definitions, whereas here “include” “is saying what physically and materially must be included in an Inuit Employment Plan”: *Id.* at lines 11-12. GN asserted that had the drafters intended the inclusion of long-term goals in IEPs, they likely would have said so when they mentioned short- and medium-term goals. According to GN, NTI’s approach renders meaningless the words of Article 23.4.2(b).

[161] I do not agree the cases are unhelpful. On the contrary, they provide cogent reasons why a specific list that follows a general statement usually should not be treated as limiting: the specific list refers to matters that otherwise might not have been

suggested by the general statement. I accept NTI's position: the general statement (Article 23.4.1) defines what an IEP is (and, by implication, what it must contain). Without the list in Article 23.4.2, Governments might not have thought to include short- and medium-term goals in IEPs. In other words, while Article 23.4.2 ensures IEPs contain matters that otherwise might have been omitted, it does not foreclose the possibility that other provisions might require the inclusion of additional elements in IEPs.

Overall Context

[162] The above analysis compels the conclusion that nothing in the general context of Article 23.4.2 suggests it was intended to be limiting. And there are other reasons to take the opposite view.

[163] First, the principles that modern treaties should be interpreted “generously” and take account of their objectives supports the notion that Article 23.4.2 was not intended to be a closed list. As NTI points out, the Governments’ narrow interpretational approach is not generous. Section 12 of the *Interpretation Act* dictates a large and liberal interpretation that best reflects the attainment of an enactment’s objects. The Governments’ arguments do not take into consideration two of the four objectives of the *Agreement* or indeed the objective of Article 23. The objects of the *Agreement* include Inuit financial compensation and means of participating in economic opportunities, as well as encouraging self-reliance and well-being. Such objectives are best reflected by an expansive view of what IEPs must contain.

[164] A second and related point is that when the *Agreement* was reached in 1993, it seems unlikely the parties had a clear vision of what IEPs would look like or how they would function. While other employment equity programs existed, as the experts underscored, those programs were different than Article 23 in content and context.

[165] There was little evidence about the early development of IEPs, but Appendix B to Ms. Kolola’s WS1 (Inuit Employment Planning from 1999 to 2015) illustrates how GN’s approach to IEPs has evolved. In 1999, the single IEP produced by GN was described as a “living document...with the intent of refining the strategies and prioritizing initiatives through subsequent implementation plans”: para 14. Beginning in 2006-2007, all departments were required to include annual IEPs in their business plans: para 21. Nearly 30 years after IEPs were first conceived, their journey is still underway. As Ms. Kolola observed at TR1, p 149, lines 8-9, “The Inuit Employment Plans are live documents.”

[166] I use this GN history not to show precisely what the parties intended, but to conclude there is nothing in the overall context of the *Agreement* to suggest that Article 23.4.2 was meant to be a closed list especially in the face of jurisprudence suggesting it should generally be considered expansive.

[167] This conclusion does not alone answer the major issues in the arbitration. However, it undermines the Governments' main argument against the declarations sought by NTI. They assert that the only mandatory IEP requirements are those listed in Article 23.4.2, and its reference in (b) to "a phased approach, with reasonable short and medium term goals" forecloses the possibility that longer goals need to be included. To put the point another way, Article 23.4.2 itself does not bar NTI's declarations because its list is not closed. Nevertheless, granting any of the declarations must be justified by the objectives of the *Agreement*, the language of Article 23, and the evidence.

[168] Before considering NTI's proposed declarations, I acknowledge GoC's position that no declarations are necessary. If I conclude that IEPs are non-compliant, GoC suggests that I simply specify how.

[169] I do not accept this argument because the evidence of Ms. Kolola and Ms. Kilabuk-Cote illustrates how longstanding interpretational differences have impacted negatively the parties' cooperation in implementing Article 23. Any declarations granted must not micro-manage the parties' relationships. On the other hand, by resolving intractable differences, high-level declarations ought to facilitate resumption of their joint implementation work. Progress toward achieving the promise of Article 23 is more likely if the path forward is clarified.

NTI's Proposed Declarations

When Should a Declaration Be Granted?

[170] The parties did not dwell on the legal principles applicable to declarations, perhaps because Article 38.5.9 authorizes an arbitrator to issue a declaration concerning the interpretation of the *Agreement* and the rights and obligations of the parties. Nevertheless, it is helpful to consider briefly what the courts have said about declarations. The following paragraph summarizes salient principles set out in cases, including *Solsky v The Queen*, 1979 CanLII 9 (SCC); *Makivik Corp. v Canada (Attorney General)*, 2021 FCA 184; and *Yahey v British Columbia*, 2021 BCSC 1287. These principles have guided my decision-making.

[171] Declaratory relief is a discretionary remedy that permits the determination of issues concerning the interests of those who share a legal relationship. The question must be real rather than theoretical, and there must be a good reason for resolving it by a declaration. The party seeking the declaration must have a genuine interest in the

resolution of the issue and the respondent an interest in opposing a declaration. Declarations should be capable of having a practical effect or utility in resolving issues. They should not go beyond the case or restate settled law. Courts should determine the detail required in a declaration, whether stated broadly and generally or with greater specificity.

Main Issues in Dispute

[172] A post-hearing review of the evidence and arguments confirms the need to resolve key differences among the parties about what IEPs must contain. Some, but not all, pertain to both Governments.

[173] I begin by summarizing the main issues. The discussion of the declarations that are granted elaborates on what IEPs must contain.

[174] The Governments resist the suggestion that IEPs have to contain long-term goals; NTI insists that they are an integral part of a “plan” required by the *Agreement*. NTI points out that IEPs must address how, once they are attained, representative levels will be maintained. It also argues that IEPs need to analyze how actions taken are expected to impact the attainment of goals.

[175] NTI asserts that GN’s IEP goals must employ “occupational groupings and grade levels” through the use of federal NOC codes; GN considers sufficient its underlying reliance on NOCs. NTI emphasizes the need to address part-time employment status as well as full-time employment.

[176] NTI suggests that Article 23 requires GN to employ “goals and targets” rather than “projections” or “estimates”; GN considers this semantic hair-splitting.

Examination of Declarations Sought by NTI

[177] I pass over NTI’s first proposed declaration (“the GoC and the GN have continuing obligations to comply with the requirements of Article 23 as set out below”). That statement or something similar can stand alone as an introduction to declarations that are granted. I have renumbered the other proposed declarations accordingly.

- i. IEPs must set forth how each department plans to increase and maintain Inuit employment at a representative level.

[178] At first glance it is difficult to understand why this declaration is controversial (although easier to understand why the Governments opposed NTI’s original wording, which included the words “by when”). Nevertheless, the Governments maintain that requiring them to explain “how” they plan to achieve and maintain representative levels

is a prohibited amendment or reading-in. GoC suggests that Article 23.2.1 expresses an objective rather than a binding legal obligation, pointing out that when the parties wished to signify obligations they used specific dates or mandatory words such as “shall”: GoC Final Written Submissions, paras 70-71.

[179] As now restated, this declaration reflects Article 23.4.1, which requires each government organization to prepare an IEP “to increase and maintain the employment of Inuit at a representative level.” The objective stated in Article 23.2.1 is in similar terms but without the words “and maintain.” As already discussed, the definition of “representative level” found in Article 23.1.1 is acknowledged by all parties. “Inuit employment plan” is defined in Article 23.1.1 as “a plan designed to meet the objective of these provisions in accord with the process set out in Part 4.”

[180] According to Dr. Prince’s report at p 10, a “plan” must include a suite of actions that includes proactive initiatives to promote equity. Surely that includes the “how” in the above declaration. The various provisions of Article 23 mentioned above would make little sense without an underlying requirement that Governments explain how their plans are “designed to meet” the objective of attaining representative employment; how they plan to increase employment to a representative level; and how, once achieved, they plan to maintain that level.

[181] Emphasizing the words “in accord with the process set out in Part 4” found in the definition of IEP, the Governments suggest that the required content of IEPs is limited to the specific matters listed in Article 23.4.2. This argument must fail.

[182] First, I have already concluded that Article 23.4.2 is extending rather than limiting. In other words, Article 23.4.2 does not close the list of what must be included in an IEP.

[183] Second, there is a nearly perfect marriage between Article 23.2.1’s overarching objective and Article 23.4.1’s description of what an IEP is to do. Since IEPs are a primary (though not the sole) tool for achieving a representative level of Inuit employment, it is difficult to imagine why the general description of IEPs agreed to by the parties should not govern: it matches the objective of the Article, which necessarily informs its meaning.

[184] Third, it is important that “Part 4” consists of three sub-articles in addition to Article 23.4.2. Article 23.4.1 is surely part of the “process set out in Part 4,” as it contains the obligation of governmental organizations to prepare IEPs. So is Article 23.4.3, which requires the posting of IEPs. Even Article 23.4.4 can be considered part of the “process,” because it acknowledges that the small size of some organizations may make the strict application of “the above measures” impracticable. Had the drafters intended to limit the meaning of “process” to only Article 23.4.2, they could easily have done so (instead of

employing the words “Part 4”). Thus, the Governments’ attempt to treat “Part 4” as meaning only one of its sub-articles is unpersuasive.

[185] Underlying part of the Governments’ resistance to this declaration is its view that IEPs need not include long-term goals. Central to the Governments’ position is its rejected position that Article 23.4.2(b)’s reference to short- and medium-term goals means that long-term goals are not contemplated. In various terms, they suggest it is enough that IEPs set out steps (or how) to aim at or work toward representative employment. But that is not what the *Agreement* says. Accepting their view would require a prohibited reading-in; for example, the definition of IEP would have to be interpreted as saying it is a plan to take steps or work toward the objective of the provisions.

[186] In fact, the *Agreement* mandates that Governments prepare IEPs that are, by virtue of the definition of IEP, designed to meet the objective of increasing Inuit participation to a representative level. “Meet” suggests getting to the objective. Article 23.4.1 obliges Governments to prepare a plan to increase and maintain Inuit employment at a representative level. The fact that the words “and maintain” follow “increase” shows that short- and medium-term goals are not the only matters the parties intended to be included: representative levels of employment must be attained before they can be maintained; therefore, the plans must include an explanation of how they expect to get to that level. Inevitably, this includes long-term goals.

[187] NTI acknowledges that Governments are not obligated to guarantee the achievement of representative levels. But the absence of a guarantee is not the same as not having to plan for success. The words chosen by the parties demonstrate their intention that Governments would be obligated to prepare plans for achieving and maintaining representative levels, which require going beyond the short- and medium-term.

[188] The controversy about long-term goals may have been exacerbated by the Governments’ decisions to focus on short- and medium-term goals in the current IEPs, without first consulting or notifying NTI (despite Article 23.2.2’s requirement for cooperation among the parties). The evidence suggests that, from the Governments’ perspective, NTI’s decision to trigger this arbitration made ongoing discussions more challenging. From NTI’s viewpoint, the Governments’ refusal to employ long-term goals made it nearly impossible to move forward with the IEP process. In any event, the parties’ longstanding disagreement about the content of IEPs needs to be resolved.

[189] The Governments consider that constantly changing demographics and the overall situation in Nunavut make it difficult to set long-term goals, which are less reliable and harder to achieve. Government witnesses suggested that frustration and disappointment

could result if long-term goals are not met. But two of the three experts addressed the desirability of employing long-term goals.

[190] Dr. Prince testified at TR1, p 55, line 23 *et seq.* that it is more challenging to achieve an objective without “a clear set of milestones and indicators.” Without a “clear pathway it’s easy to focus on the short term and the crisis of today”: TR1, p 56, lines 1-3. He added that the IEPs almost entirely lacked a “sequence of behaviours and intentional actions” for getting to 85 percent representation: TR1, p 58, lines 9-11.

[191] Mr. O’Riordan also underscored the importance of longer-term goals when he discussed the benefits of what he called “stretch targets”: TR1, pp 362-363 and 387.

[192] The evidence of these experts, as well as the provisions of the *Agreement* analyzed above, support the view that IEPs ought to include long-term goals with plans for achieving a representative level. While undoubtedly challenging, it is what cooperation between the parties is intended to accomplish. Mutual exchanges about the design of long-term approaches can strengthen the process of reconciliation.

[193] As for the argument that failure to achieve long-term goals may cause disappointment, the same point applies to the fact that short- and medium-term goals often have also not been achieved. Nonetheless, the parties have continued to seek to meet the objectives of Article 23.

[194] During legal argument, beginning at TR2, p 41, line 8, NTI also suggested that IEPs should explain how IEP action plans are expected to help achieve a representative level of Inuit employment (including such matters as how many jobs will be added and how the measures fit into the goal of increasing representative Inuit employment). Its position is that demonstrating a causal relationship between the actions and the achievement of the goals is a crucial element without which IEPs are not a plan.

[195] The lay witnesses were cross-examined briefly on this point. Ms. Kilabuk-Cote indicated that the effect of proposed actions was taken into account in setting targets; Ms. Kolola suggested that the relationship between the action plans and the targets would be found in departmental business plans and the bi-annual reports to HR: TR1, p 332, line 2 and p 223, line 9 to p 224, line 1.

[196] The link between plans and the impact expected from their actions was not addressed specifically by any expert. Perhaps most importantly, in his report and testimony Dr. Prince did not emphasize that showing such a causal connection was a basic criterion of a “plan.” Nor is Article 23 sufficiently explicit to demonstrate that causality was intended to be mandatory in IEPs. Governments are encouraged to highlight such a connection in their IEPs, but are not obligated to do so.

[197] The declaration as reworded is granted.

- ii. 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.

[198] The declaration proposed by NTI goes beyond the above statement by including the words “there are not ‘multiple ways’ of interpreting representativeness, including by reference to such matters as Inuit participation in the labour force.” The above language, on the other hand, reflects the definition of “representative level” acknowledged by all parties. The declaration as reworded is granted for the following reasons.

[199] GoC says the declaration is unnecessary because it merely repeats what is in the *Agreement*; NTI suggests it is required because the parties did not always accept the above definition. A possible illustration of the latter point is found at p 38, para 2 of GN’s Department of Education IEP (Ex. 2.69). It says that, in a practical sense, there are multiple ways to view what “representative” means. **Whatever the practicalities, the above declaration reflects the *Agreement*’s legal obligation.**

[200] Several issues concerning the definition of representative level arose during the arbitration. Each reflects a nuance beneath the definition that may not always be understood or that may lead to statistical reporting that is confusing or misleading. This may explain why NTI proposed language about there not being multiple ways of interpreting representativeness.

[201] First, the *Agreement* makes the representative level applicable within all occupational groupings and grade levels which, according to the evidence, refers to what are now the federal NOC codes. Dr. Prince opined that GN employs NOC codes in its assessment of under-representation but not in its presentation of how to address under-representation. Ms. Kolola confirmed that GN uses its own six employment categories, which are less detailed than the NOC codes.

[202] GN’s approach can make reports hard to analyze. For example, in the Department of Education’s IEP (Ex. 2.69), the Tables on page 31 show how NOC codes can cross over between the GN’s six employment categories. While the NOC-related information can perhaps be extracted, to do so would likely require a complex and time-consuming exercise. That IEP itself seems to recognize this shortcoming: at p 50, under “Inuit Employment Plan to 2023” item 5 contains the goal “Support the categorization of positions using NOC classification system” with an expected outcome “Enable more accurate planning and reporting.”

[203] During legal argument, beginning at TR2, p 105, GN’s counsel conceded that several NOC codes might fit under one of GN’s occupational categories. Counsel

explained that the six categories are based on the majority of public service jobs and that numerous NOC codes may not be relevant in Nunavut. This may be so, but GN's failure to use NOC codes in its goals and action plans does not comply with Article 23.4.2(b).

[204] Second, IEPs often present statistics in ways additional to the definition of representative level. For example, many IEPs show the percentage of Inuit employed in the whole government or the whole department, or without any reference to all levels and occupations.

[205] There may be reasons for this type of reporting. The Governments understandably wish to highlight their success in employing increased numbers of Inuit. For example, GN explained that servicing needs can necessitate the creation of an increased number of positions (for example, of teachers and nurses), when there may be an inadequate number of Inuit qualified to fill the new positions. In the result, despite employing larger numbers of Inuit nurses and teachers, GN draws no closer to achieving the representative level.

[206] However, an emphasis on matters such as a general increase in the numbers of Inuit employed can mask whether there has been meaningful progress toward attaining a representative level as defined in the *Agreement*. Reporting numbers in the whole government or whole departments may obscure the fact that representativeness in all occupational groupings and grade levels is uneven or that in some departments there has been little improvement.

[207] The *Agreement* was designed to ensure that the representative level would not be attained merely by hiring Inuit in parts of the public service where less education or skill is required. The evidence in the arbitration demonstrated the difficulties in gleaning from IEPs what is happening "on the ground." The Inuit are entitled to reports that clearly demonstrate the extent to which, and where, defined representativeness is, or is not, being achieved.

[208] Third, Article 23.4.2(a) requires IEPs to identify areas of under-representation in regular full-time and regular part-time employment. GN's IEPs do not appear to address part-time employment.

[209] These three matters raise legitimate concerns about the correct meaning and expression of "representative level" in IEPs. IEPs must employ NOC codes for goals and action plans as well as for analyzing under-representativeness; they must express Inuit employment levels and goals by department and by levels and occupations; and they must include information about part-time positions.

[210] This is not to say that the Governments must present statistics in only one way, and NTI says that is not what it seeks. The point is that IEPs must include an analysis of under-representation and how it will be addressed in all occupations and levels and by

full-time and part-time positions. They must employ NOC codes both in describing under-representativeness and in goals and action plans. In other words, IEPs must be structured to reflect the *Agreement's* definitions of representative level and under-representation. But Governments may also report statistics in additional ways if they wish.

- iii. 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.

[211] Most of this proposed declaration reflects Article 23.4.2(b). NTI's proposed wording may result from the parties' disagreement about the role of long-term goals and plans. Declaration (i) answers that question: an IEP that sets out "how" it plans to increase and maintain a representative level of Inuit employment must include long-term strategies. Therefore this declaration is unnecessary.

[212] A further point raised by NTI can be conveniently discussed here. It criticizes GN's IEPs because they define both Inuit employment goals and Inuit employment targets as the number of Inuit employees projected to be employed. These definitions are explicitly stated not to be the Inuit representation rate. The latter is expressed as an estimate of the percentage of Inuit employees associated with a goal or target, and not considered as a goal or target. See e.g., Department of Education IEP, Ex. 2.69, p 43.

[213] In his report, beginning at p 23, Dr. Prince drew attention to the wording of the 2019 Technical Report to GN's Master IEP (Ex. 2.64), which contains the template followed in departmental IEPs (such as the Department of Education's IEP, discussed in the previous paragraph). His testimony elaborated on this point beginning at TR1, p 58, line 21. He said the terms "objectives" and "goals" can be used interchangeably and are stable over time. By contrast, projections are like forecasts and predictions that are more ephemeral and not automatically assumed to be connected to resource allocation and program implementation. Thus they lack specificity and are not plans: TR1, p 61, lines 7-11.

[214] GN cross-examined Dr. Prince about this issue beginning at TR1, p 123, line 13. Beginning at TR1, p 125, line 1, he maintained that there is a clear difference between estimations and targets and that "an estimation of a projection" lacks substance and does not give the assurance that there is a plan of action and a sequence that will get there. As a result of this language, he lacked confidence that "there's a plan in place for sustained and maintained direction toward the objective": TR1, p 126, lines 2-4.

[215] Relying on Dr. Prince's views, NTI argued beginning at TR2, p 37 that GN's use of numbers in its IEPs fails to employ goals and targets that reflect the attainment of percentages implied by how representativeness is defined. NTI says that goals and targets need to be expressed as percentages to comply with the definition of a representative level.

[216] GN responds that the "numbers" in its IEPs are accompanied by Inuit representation rates, which have the effect of tethering the IEPs to a percentage that reflects the overall population. The representation rates can only be estimated since they depend on "highly variable factors such as the total number of positions (in FTEs) and the number of filled positions...at a point in time": GN Final Written Submissions, para 87. It adds that Article 23.4.2(b) requires the setting of goals that are "to take into account the number of Inuit who are qualified or who would likely become qualified, projected operational requirements, and projected attrition rates" [emphasis added]. It says this language obliges the GN to engage in forecasting.

[217] NTI's argument about estimates and projections as opposed to goals and targets has some legitimacy, but I am unable to conclude that GN's IEP definitions raise sufficient concern to justify further direction in this arbitration. Although the first part of Article 23.4.2(b) references "under-representation" (and thus alludes to representative levels which are percentages), the latter part requires a forecasting or estimation exercise. This lack of clarity prevents me from concluding that GN's way of expressing its goals falls outside the requirements of Article 23. I am also mindful of the admonition against micro-management in treaty interpretation.

- iv. 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.

[218] I am not persuaded this declaration is required. Matters such as IEP design, implementation and adjustment of IEPs are implied in the declarations granted above or addressed specifically in the *Agreement*. For example, Article 23.4.2(e) requires IEPs to identify a senior officer to monitor the plan, and Article 23.7.1 requires the Implementation Panel to arrange for an independent review of IEPs and other measures at five-year intervals. The Panel is thereafter required to "identify and recommend measures to correct any deficiencies in the implementation" of Article 23.

[219] These provisions make it obvious that IEPs are not static and will require adjustment based on experience with successes and failures. The *Agreement's* own oversight measures provide mechanisms for doing this, and the evidence does not demonstrate related problems that need to be addressed in this arbitration. In fact, it is

clear that Governments have continued to adjust IEPs throughout the life of the *Agreement*.

- v. Each government organization must include in its IEP all of the elements identified in Articles 23.4.1 and 23.4.2 of the *Agreement*, utilizing the NILFA in accordance with Article 23.3.2 and including, presumptively, all the measures identified in subsections 23.4.2(d)(i)-(x), 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.

[220] For several reasons I am not convinced this declaration is required. Again, some parts are already addressed by Declarations (i) and (ii) and the accompanying narrative.

[221] The middle part (using the word “presumptively” to refer to the measures in Article 23.4.2(d)(i)-(x)) was addressed to some extent in the parties’ Supplemental Written Submissions of November and December 2022. NTI there confirmed its view (shared by the Governments) that the items in the sub-list within Article 23.4.2(d) are not mandatory. At para 3 it stated that the main category in (d) (“measures consistent with the merit principle designed to increase the recruitment and promotion of Inuit”) is mandatory, but the ten paragraphs that follow “are examples of such measures to which the parties agreed.”

[222] NTI explained its use of the word “presumptively” in the following way at para 4 of its Supplemental Written Submissions. The ten listed items “must be presumed to be the best way to meet the requirements of sub-section 23.4.2(d), and so the exclusion of every one of these items without reasoned and effective replacement measures would constitute a breach” of the *Agreement*. NTI added that since the parties negotiated the list, they must have thought that these measures should be taken. Therefore, “[i]f an IEP fails to include one of those measures, there ought to be a reason for the omission”: para 6.

[223] NTI’s nuanced approach (the list is not mandatory but if any of the ten is not included there should be a reason) is difficult to fathom. Including nothing relating to (d) would be a breach, a point implicit in the Governments’ acceptance that (d) is mandatory. But if the sub-list is exemplary rather than mandatory, how could there be a breach if (for example) relevant methods other than the ones listed were employed in an IEP? Accepting NTI’s position would potentially create conflict between the parties that is not reflected in the evidence.

[224] Moreover, since the use of NILFA is specifically dealt with in Article 23.3.2 and there is no persuasive evidence of its misuse, additional directions about how to use it would be superfluous.

[225] Parts of the *Settlement Agreement* (Articles 19-24 and 25(d)) also deal with NILFA. When NTI opted, during argument, to withdraw its requests for interpretation of the *Settlement Agreement*, it observed that it had the option to seek enforcement of the *Settlement Agreement* itself. I agree. While the parties might have chosen the efficiency of combining its interpretation with that of the *Agreement* in this arbitration, they did not. I leave for other proceedings (if needed) the resolution of matters (including NILFA) that arise from the *Settlement Agreement*.

[226] The *Settlement Agreement's* clause 3(b) provides that the Implementation Panel and the *Agreement* will be used to deal with “ongoing implementation matters, particularly in relation to matters not dealt with in [the] *Settlement Agreement*” [emphasis added]. Under clause 3(a), commitments in the *Settlement Agreement* will be the focus of ongoing implementation efforts up to March 31, 2023. It therefore appears that the parties anticipated some bifurcation in how they would resolve implementation matters, and at least some parts of this proposed declaration are included in the *Settlement Agreement*.

- vi. IEPs must set out the steps to be taken and how those steps are planned to achieve short-, medium-, and overall goals.

[227] This declaration is unnecessary.

[228] Much of what it covers is already implicit or explicit in declarations granted above. Setting out “how” governments plan to achieve and maintain representative levels (Declaration (i)) requires setting out “steps,” which is endemic to the notion of a “plan.” The need for long-term (or overall) goals has also been addressed.

[229] Moreover, some of this language is reflected in the *Settlement Agreement* (specifically, in its clause 25(e)(i), which says that IEPs are to lay out the “steps” that will be taken to achieve goals). If required, NTI can seek enforcement of the *Settlement Agreement* in other proceedings.

- vii. IEPs must have express regard to the resources necessary to achieve their goals and how these resources are planned to be available.

[230] NTI said during argument that this declaration was not strictly necessary, and I agree. Article 38.5.3 of the *Agreement* prohibits an arbitrator from prescribing funding levels required to fulfill Government obligations for implementation of the *Agreement*, which at the least may raise questions about the extent to which such a declaration would be within my jurisdiction. Moreover, arrangements for implementation funding are

contained in the *Settlement Agreement* (clauses 9-12, 29, and Schedule G). Although the terms of the *Settlement Agreement* are time-limited, I am not convinced this declaration is required.

- viii. IEPs and their contents must be honourably and diligently developed, given effect and implemented.

[231] This is essentially a statement concerning the honour of the Crown, which is acknowledged by the Governments and has informed my interpretation of Article 23. There is no need to repeat it in a declaration.

- ix. IEPs that comply with Article 23 must be sufficiently flexible to enable such adaptations as evidence demonstrates are needed, or as opportunities allow in order to maximize the likelihood of successful implementation.

[232] The evidence did not demonstrate a need for this declaration. As already pointed out, several features of the *Agreement* indicate the need for flexibility and adaptation. Evidence from the lay witnesses suggests that the Governments see IEPs as “live” documents that they intend to adjust as required over time.

Do the IEPs Comply with Article 23?

[233] The Governments take the position that their IEPs comply with the *Agreement*, but given my earlier conclusions this is not uniformly the case.

[234] NTI submitted that I need not undertake a detailed analysis of all IEPs to answer this question. Some materials in the arbitration identify a few IEPs that comply in particular ways. Examples include footnote 1 of NTI’s October 2018 letter; footnote 9 of NTI’s Pre-hearing brief; Dr. Prince’s report beginning at p 19; and his evidence at TR1, pp 58-59. I leave it to the parties to isolate those examples to the extent necessary. What follows is a high-level review of deficiencies in IEPs.

[235] Despite considerable effort by Governments in preparing the current generation of IEPs, with only a few exceptions they do not completely comply with the requirements of Article 23 as discussed in the two declarations granted above.

Long-term Goals to Explain How Representative Levels Will Be Achieved and Maintained

[236] There is no significant dispute that most IEPs do not accomplish this since it has been the Governments’ position throughout that only short- and medium-term goals are required.

GN's Failure to Employ NOC Codes Throughout Its IEPs

[237] Dr. Prince's report at p 7 describes GN's inadequate use of NOC codes and was elaborated on in his testimony: TR1, pp 49-50. This point is also clear from the evidence of Ms. Kolola and Ms. Merrin. As discussed above, the definition of representative level in the *Agreement* mandates the use of NOC codes in goals and action plans, not just in the analysis of under-representation.

GN's Failure to Address Part-time Positions in IEPs

[238] As discussed above, this is a requirement of Article 23.4.2(a) and, by implication, of 23.4.2(b). I am not persuaded that GN's IEPs deal with part-time positions.

Definition of Representative Level

[239] Although I cannot say that the IEPs completely fail to reflect the definition of "representative level" found in the *Agreement*, current IEPs often make it very difficult to tell whether and where there has been progress toward achieving a representative level. Future IEPs must be drafted so that this information is clearly apparent. Governments may report their Inuit hiring accomplishments in additional ways (such as whole of government or whole of departments) if they wish.

SUMMARY AND CONCLUSIONS

[240] The following declarations, as explained in the accompanying narrative, are granted.

[241] IEPs prepared by GoC and GN pursuant to the *Agreement* must comply with the requirements of Article 23 as described above and set out below:

1. IEPs must set forth how each department plans to increase and maintain Inuit employment at a representative level.
2. A representative level means a level of Inuit employment within Government reflecting the ratio of Inuit to the total population of the Nunavut Settlement Area.

[242] With limited exceptions, the current IEPs prepared by GoC and GN do not comply with the *Agreement* in the following ways:

1. The IEPs fail to set out how each department plans to increase and maintain Inuit employment at a representative level. In particular, they fail to employ long-term

goals and plans for achieving and maintaining a representative level of Inuit employment.

2. The GN's IEPs fail to report goals and action plans for achieving representative levels in terms of all levels and occupational groupings through the use of federal NOC codes.
3. The GN's IEPs fail to address regular part-time employment status.
4. Although current IEPs generally reflect the concept of "representative level" as defined in the *Agreement*, their structure often makes it difficult to ascertain the extent to which, and where, there has been progress toward achieving a representative level.

[243] I express my thanks to everyone who participated in and contributed to the arbitration. All counsel were capable and courteous throughout, and provided significant assistance throughout this challenging and important process.

Heard on June 23-25, 27-28 and September 16, 2022

Dated at Calgary, Alberta
this 25 day of March 2023



Constance D. Hunt, Arbitrator

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ARTICLE 23

INUIT EMPLOYMENT WITHIN GOVERNMENT

PART 1: DEFINITIONS

23.1.1 In this Article:

"government employment" includes

(a) positions in the federal Public Service for which Treasury Board is the employer,

(b) positions in the territorial Public Service for which the Commissioner is the employer, which shall include positions in the Northwest Territories Housing Corporation, and positions for which a Municipal Corporation is the employer;

"government organization" means a department or similar body within Government in the Nunavut Settlement Area;

"in-service training" means training provided to persons working in government employment;

"Inuit employment plan" means a plan designed to meet the objective of these provisions in accord with the process set out in Part 4;

"pre-employment training" means training provided to persons not employed by Government in anticipation of government employment;

"representative level" means a level of Inuit employment within Government reflecting the ratio of Inuit to the total population in the Nunavut Settlement Area; this definition will apply within all occupational groupings and grade levels;

"systemic discrimination" means policies or practices, which are not intended to discriminate, but which have a disproportionate and adverse effect on members of designated groups, and for which there is no justification;

"under-representation" means a level of Inuit employment within Government in the Nunavut Settlement Area that is lower than the ratio of Inuit to the total population in the Nunavut Settlement Area.

PART 2: OBJECTIVE

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.

PART 3: INUIT LABOUR FORCE ANALYSIS

- 23.3.1 Within six months of the date of ratification of the Agreement and as a basis for the development of initiatives contemplated in this Article, the Government shall, with the participation of the NITC, undertake a detailed analysis of the labour force of the Nunavut Settlement Area to determine the availability, interest and level of preparedness of Inuit for government employment. The data shall be maintained and updated on an on-going basis.
- 23.3.2 The purpose of the analysis in Section 23.3.1 is to assess the existing skill level and degree of formal qualification among the Inuit labour force and to assist in formulating Inuit employment plans and pre-employment training.
- 23.3.3 It is understood that the analysis in Section 23.3.1 will incorporate and build upon existing data wherever possible.

PART 4: INUIT EMPLOYMENT PLANS

- 23.4.1 Within three years of the date of ratification of the Agreement, each government organization shall prepare an Inuit employment plan to increase and maintain the employment of Inuit at a representative level.
- 23.4.2 An Inuit employment plan shall include the following:
- (a) an analysis to determine the level of representation of Inuit in the government organization and to identify areas of under-representation by occupational grouping and level and regular full-time and regular part-time employment status;
 - (b) phased approach, with reasonable short and medium term goals, 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; such goals to take into account the number of Inuit who are qualified or who would likely become qualified, projected operational requirements, and projected attrition rates;
 - (c) an analysis of personnel systems, policies, practices and procedures in the organization to identify those which potentially impede the recruitment, promotion, or other employment opportunities of Inuit;
 - (d) measures consistent with the merit principle designed to increase the recruitment and promotion of Inuit, such as
 - (i) measures designed to remove systemic discrimination including but not limited to

- removal of artificially inflated education requirements,
 - removal of experience requirements not based on essential consideration of proficiency and skill,
 - use of a variety of testing procedures to avoid cultural biases,
- (ii) intensive recruitment programs, including the distribution of competition posters throughout the Nunavut Settlement Area, with posters in Inuktitut as well as Canada's official languages as required,
- (iii) inclusion in appropriate search criteria and job descriptions of requirements for an understanding of the social and cultural milieu of the Nunavut Settlement Area, including but not limited to
- knowledge of Inuit culture, society and economy,
 - community awareness,
 - fluency in Inuktitut,
 - knowledge of environmental characteristics of the Nunavut Settlement Area,
 - northern experience,
- (iv) Inuit involvement in selection panels and boards or, where such involvement is impractical, advice to such panels and boards,
- (v) provision of counselling services with particular attention to solving problems associated with accessibility to such services,
- (vi) provision of in-service education assignment and upgrading programs adequate to meet employment goals,
- (vii) promotion of apprenticeship, internship and other relevant on-the-job training programs,
- (viii) special training opportunities,
- (ix) use of measures which are found to be successful in achieving similar objectives in other initiatives undertaken by Government, and
- (x) cross-cultural training;
- (e) identification of a senior official to monitor the plan; and
- (f) a monitoring and reporting mechanism on implementation of the plan.

- 23.4.3 All employment plans shall be posted in accessible locations for employee review.
- 23.4.4 Notwithstanding the overall objectives of this Article, it is understood that some organizations may employ so few persons in the Nunavut Settlement Area that strict application of the above measures may not be practicable.

PART 5: PRE-EMPLOYMENT TRAINING

- 23.5.1 The plans outlined in Part 4 will require special initiatives to provide some Inuit with skills to qualify for government employment. Government and the DIO shall develop and implement pre-employment training plans.
- 23.5.2 To the extent possible, the plans referred to in Section 23.5.1 shall be designed to meet the special needs of Inuit by various means, including:
- (a) instruction in Inuktitut;
 - (b) training within the Nunavut Settlement Area;
 - (c) distribution of training sites among communities, it being understood that circumstances may require that training take place in central locations within the Nunavut Settlement Area or in other locations outside the Area; and
 - (d) the taking into account of Inuit culture and lifestyle.

PART 6: SUPPORT

- 23.6.1 Recognizing that active participation of Inuit in the employment and training programs will be required in order to meet the objective set out in Part 2, the DIO shall, to the extent possible, undertake, with assistance from Government, to play a primary role in the establishment and maintenance of support measures to enhance the potential for success of the measures undertaken pursuant to this Article.

PART 7: REVIEW, MONITORING AND COMPLIANCE

- 23.7.1 On the fifth anniversary of the date of ratification of the Agreement and at five-year intervals thereafter, or at such other dates as may be agreed upon by the Implementation Panel, the Panel shall arrange for an independent review of the Inuit employment plans and other measures under this Article. The Implementation Panel shall identify and recommend measures to correct any deficiencies in the implementation of this Article. With respect to pre-employment training plans under Part 5, the Panel shall consult with the NITC prior to identifying or recommending measures to correct any deficiencies in the implementation of Part 5.
- 23.7.2 The findings of the independent review and recommendations of the Implementation Panel shall be consolidated in the relevant annual report prepared by the Implementation Panel pursuant to Sub-section 37.3.3(h).

PART 8: CANADIAN FORCES AND RCMP

- 23.8.1 Although uniformed members of the Canadian Forces and the R.C.M.P. are excluded from the broad application of the provisions of this Article, it is understood that with respect to these categories of government employment, current policies for increasing recruitment, training and retention of Inuit shall continue, but will not necessarily reflect representative levels of the population in the Nunavut Settlement Area.

PART 9: SAVING

- 23.9.1 Notwithstanding any other provisions in this Article, Inuit shall continue to be eligible to benefit, on as favourable a basis as any other persons, from any special employment program, employment equity program, equal opportunity program or similar program that may exist, from time to time, for the purpose of increasing or otherwise promoting the employment of aboriginal people or other designated groups within or by Government.