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First Arbitration Award under the Nunavut Agreement

By: Nigel Bankes

Matter commented on: Arbitration Award in *The Inuit of Nunavut as represented by Nunavut Tunngavik Incorporated v His Majesty the King in Right of Canada as represented by the Minister of Crown-Indigenous Relations and The Commissioner of Nunavut as represented by the Government of Nunavut, and the Government of Nunavut as represented by the Premier of Nunavut, and the Government of Nunavut*, Initial Decision, March 25, 2023.

This is the first Arbitration Award under the revised dispute resolution provisions of the Nunavut Agreement (1993). The Nunavut Agreement is the constitutionally protected land claims agreement between the Inuit of Nunavut and the Governments of Canada (GoC) and Nunavut (GN). In this Award, the Honourable Constance Hunt, acting as the sole arbitrator, has issued a series of declarations concluding that Inuit Employment Plans (IEPs) prepared by each of the GN and GoC fell short of the obligations of government under the terms of Article 23 of the Nunavut Agreement (NA). Article 23 of the NA is entitled "Inuit Employment within Government".

The Arbitration was conducted under the amended Article 38 of the Nunavut Agreement. (The collected amendments to the Nunavut Agreement are here; the new text of Article 38 is here and a version of the Agreement that includes both the original text and amendments is here.)
As originally adopted, Article 38 provided that, except for a small number of specific matters referenced in different Articles of the Agreement, a matter could only be referred to arbitration where both Inuit (as represented by a designated Inuit organization or DIO) and "Government" "agree to be bound by the decision" (at s 38.2.1). Absent such an agreement there could be no arbitration and there were in fact no arbitrations under the original version of Article 38 (see Nigel Bankes, "The Dispute Resolution Provisions of Three Northern Land Claims Agreement" in Catherine Bell and David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts*, (Vancouver: UBC Press, 2004) at 298).

As a result, other disputes between the parties to the Nunavut Agreement came before the courts. In some cases these issues were brought before the Federal Court e.g *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)*, 1998 CanLII 9080 (FCA), [1998] 4 FC 405, and in some cases before the Nunavut Court of Justice, most significantly, *NTI v Canada (Attorney General)*, 2012 NUCJ 11, varied 2014 NUCA 2 (CanLII). This last case, which I commented on here (summary judgment – trial) and here (summary judgment – appeal), provides some of the backdrop for this arbitration, partly because it led to a settlement agreement between the parties, one element of which included a commitment to completely re-write Article 38 of the Nunavut Agreement.

The Current Article 38

Renamed "Dispute Resolution Process" instead of arbitration, Article 38 envisages a staged approach to dispute resolution beginning with efforts to settle a dispute through cooperation and discussions "in order to arrive at a mutually satisfactory resolution." (NA at s 38.2.2) Failing settlement in this manner, Article 38 envisages that the parties will attempt to resolve the dispute through negotiations within the Agreement's implementation panel, following which any party may initiate mediation. While in some limited cases a party may resort to arbitration (NA at s 38.5.15) without going through these preliminary steps, the default rule is that a party must exhaust these procedures before triggering arbitration (see David Wright, "Dispute Resolution in Modern Treaties: Evolutions, Observations and Next Steps" (2020) 11 Arctic Review on Law and Politics at 280).

Once appointed by agreement of the parties, or by the process envisaged by Nunavut's *Arbitration Act*, RSNWT (Nu), 1985, c A-5, the sole arbitrator (and it must be a sole arbitrator: see NA at s 38.6.3) has jurisdiction to arbitrate with respect to "any matter concerning the interpretation, application or implementation of the Agreement." Article 38 requires a bifurcated arbitral process such that:

> Following the hearing of an arbitration, an arbitrator shall issue an initial decision. The initial decision shall not include any remedial order other than a declaration or declarations concerning the interpretation of the Agreement and the rights and obligations of the DIO or Government under the Agreement. (NA at s 38.5.9)

Following the Initial Decision, which is what we have in this case, a party to the dispute has the opportunity to present a proposed remedy. Failing that, or failing acceptance of the proposed remedy, any party to the dispute may require the arbitration to reconvene in order to determine an appropriate remedy, which shall be set out in a final award (NA at s 38.5.12). A final award may be appealed to the Nunavut Court of Justice (NA at s 38.5.15).

There are certain matters that an arbitrator may *not* do in the course of exercising their jurisdiction. In particular, s 38.8.3 provides that

> … an arbitrator shall not:
>
> a. prescribe funding levels required to fulfill obligations of Government for implementation of the Agreement;
> b. prescribe Inuit employment levels required to be achieved by Government pursuant to Article 23;
> c. render decisions declaring invalid individual procurement contracts entered into between Government and third parties, or render decisions on the provisions of such procurement contracts with respect to the obligations between the parties to the procurement contract; or
> d. make determinations on questions of law which are not strictly related to the issue that is the subject of the arbitration.

This, however, is subject to two caveats. The first is that paragraphs (a) and (b) do not prevent an arbitrator from making a monetary award of damages for breach of the Agreement. The second, and of particular interest here, is the qualification that "[n]otwithstanding Sub-section 38.5.3(c), an arbitrator may arbitrate an issue referred to it by a party to a dispute which relates to obligations of Government or the DIO [Designated Inuit Organization] under Article 24."

A further limitation on an arbitrator's authority is that an arbitrator is "prohibited from making a decision that alters, amends, deletes or substitutes any provision of the Agreement in any manner." (NA at s 38.5.6). A live issue in this arbitration was the question of "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." (Award at para 135.)

The Current Dispute

As noted in the introduction, the current dispute engages the proper interpretation of Article 23 of the Nunavut Agreement. The objective of that article was said to be "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." (NA at s 23.2.1) As the introduction to the Award notes, 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." (Award at para 2). The parties also seemed to be in agreement that Article 23 was considered to be such an important economic commitment on the part of government that it justified Canada taking the position that the per capita compensation included in the Nunavut Agreement should be less than that established in other land claims agreements. (Award at para 10). There was, "no clear evidence of the extent of the trade-offs" associated with the negotiation of Article 23, but clearly the parties "intended the *Agreement* to be enforceable and effective." (Award at para 126) That said both parties also agreed that Article 23 did not contain a *guarantee* of representativeness (Ibid.)

Part 4 of Article 23 requires both GN and GoC to prepare Inuit employments plans (IEPs) "to increase and maintain the employment of Inuit at a representative level." (NA at s 23.4.1). The balance of Part 4 details the content to be included in an IEPs, and herein lay the principal issue in this arbitration. While NTI contended that the very idea of an IEP required long term goals, both the GN and the GoC resisted that contention, largely, it seems, on the basis that s 23.4.2(b) referenced "short and medium term goals". Nowhere in the NA was there a reference to long term goals (see Award at paras 127 and 174).

Differences as to the interpretation and application of Article 23 have been evident "for more than half the life" of the Agreement (Award at para 4), and NTI included the alleged breach of Article 23 in the litigation referenced above (*NTI v Canada*), but the Article 23 issues were not included in the summary judgment for which that case is reported. However, the parties subsequently entered into a Settlement Agreement (2015) which, amongst other things, did address Article 23 issues, including a re-commitment to the preparation of a Nunavut Inuit Labour Force Analysis (NILFA) originally required by s 23.3.1 of the Agreement. The Settlement Agreement, as recited in the Award, provided that the Settlement was without prejudice to the legal positions of the

parties with respect to the performance of the Nunavut Agreement and did not form part of that Agreement. (Award at para 40).

NTI gave notice of a dispute in relation to Article 23 in October 2018 pursuant to the amended dispute resolution provisions and went through the required steps recited above (negotiations and mediation – the mediator was the former Supreme Court Justice, Thomas Cromwell) before referring the dispute to arbitration in April 2020.

The Award (Initial Decision)

Following a summary of the key provisions of Article 23 at issue in the Arbitration, Arbitrator Hunt canvased the appropriate approach to the interpretation of land claims agreements, pointing to their multi-faceted legal character (constitutional, statutory, and contractual). This multifaceted character leads, as Arbitrator Hunt noted, to some interesting conundrums, particularly with respect to issues such as the relevance of contractual approaches to the interpretation of a land claims agreement, including the admissibility of evidence as to surrounding circumstances or factual matrix. But having engaged in that canvass, Arbitrator's Hunt assessment was more laconic:

> 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. (Award at para 66).

Arbitrator Hunt also references some of the key Supreme Court of Canada decisions relating to the interpretation of modern treaties and in particular the Court's decision in *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 (CanLII), from which she drew the following observations:

> 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.
>
> 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. (Award at paras 57 – 58)

The Main Issue

As noted above, the principal issue dividing the parties related to the required content of IEPs as prescribed by s 23.4.2. Section 23.4.2 is a very lengthy provision (I have included the full text of Part 4 of Article 23 as Appendix I to this post), but it begins with the words: "An Inuit employment plan shall include the following". This is followed by six paragraphs, one of which has a further ten sub clauses. Both parties agreed that the topics referenced by each of the six paragraphs must be mandatory, but they disagreed as to whether or not other matters might also be mandatory. This was an important threshold question. Arbitrator Hunt put it in terms of whether Article 23.4.2 is "extending or limiting" (Award at para 136). The governments argued that to include other topics as part of the mandatory content of an IEP would be to amend the Agreement – exactly what s 38.5.6 of the Nunavut Agreement put beyond the power of an arbitrator. (Award at para 137)

In order to answer this threshold question, Arbitrator Hunt canvassed a number of sources. These sources included case law in relation to different statutes, the context, including the balance of Article 23, and the French version of the Article. All of this led her to the preliminary conclusion that s 23.4.1 defined what an IEP was (i.e. a plan "to increase and maintain the employment of Inuit at a representative level"), and that s 23.4.2 was included for the avoidance of doubt as to the contents of an IEP, but it did not foreclose the possibility that other elements might be required to achieve what was defined in s 23.4.1. Arbitrator Hunt put the point this way:

> 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. (Award at para 161)

Two other ideas reinforced this preliminary conclusion:

> 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.
>
> 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. (Award at paras 163-164)

While this conclusion resolved the threshold question it was still necessary for NTI to demonstrate that other matters needed to be included within the minimum content of an IEP, on the basis of "the objectives of the *Agreement*, the language of Article 23 and the evidence." (Award at para 167). However, rather than addressing that as the next issue, Arbitrator Hunt moved directly to consider NTI's proposed declarations.

NTI's Proposed Declarations

Ordinarily one might have thought that one or more of the parties might have resisted the competence or jurisdiction of an arbitrator to issue a declaration or declarations, but that could not be an objection in this case because of the language of s 38.5.9, which expressly contemplates, nay, requires, the arbitrator to issue a declaration or a series of declaration. (see Award at para 170). I quoted s 38.5.8 above, but here it is again for ease of reference:

> Following the hearing of an arbitration, an arbitrator shall issue an initial decision. The initial decision shall not include any remedial order other than a declaration or declarations concerning the interpretation of the Agreement and the rights and obligations of the DIO or Government under the Agreement. (s 38.5.8)

NTI sought nine declarations. Arbitrator Hunt granted two of those declarations. While that might look like an NTI loss on the basis of the numbers, in fact, as already suggested in the introductory paragraph, Arbitrator's Hunt's Initial Decision is a comprehensive win for NTI.

The two declarations granted were these. First, IEPs must set forth how each department plans to increase and maintain Inuit employment at a representative level. (Award at para 177); and second, 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. (Award at para 197.)

Arbitrator Hunt concluded that the first declaration was necessary because governments needed to articulate how they would achieve the target of employment at a representative level.

> The various provisions of Article 23 mentioned above would make little sense without an underlying requirement that Governments explain <u>how</u> their plans are "designed to meet" the objective of attaining representative employment; <u>how</u> they plan to increase employment to a representative level; and <u>how</u>, once achieved, they plan to maintain that level. (Award at para 180, underlining in original.)

Furthermore, the word "maintain" served to capture and legitimate NTI's contentions that IEPs must concern themselves with more than just the short and medium term:

> Article 23.4.1 obliges Governments <u>to prepare a plan to increase and maintain</u> 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 <u>before</u> 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. (Award at para 186, underlining in original).

It is true that Article 23 offers no guarantees of representativeness,

> 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. (at para 187.)

Arbitrator Hunt, however, declined to add to the declaration any requirement that an IEP show how the particular measures proposed would achieve the goal of representative Inuit employment. In her view, this level of detailed causality was not supported either by the expert evidence at to what constituted an employment plan, or the language of Article 23. (Award at paras 194 – 196)

Arbitrator Hunt concluded that it was also necessary to grant the second declaration dealing with the meaning of "representative level" (even though this now seemed to be a shared understanding of the parties) on the grounds that this had not always been a shared understanding. A declaration in the above terms "reflects the *Agreement's* legal obligation." (Award at para 199). However, Arbitrator Hunt went on to consider some nuances with respect to this obligation including such issues as:

1. the GN's use of its own categorization of different occupational groupings rather than the current National Occupational Classification (NOC),
2. GN's practice of reporting in some cases on increases in raw numbers of Inuit employees rather than representativeness, and
3. the GN's failure to report separately on part-time and full time employment as is required by s 23.4.2(a).

In each of these instances Arbitrator Hunt appears to find in favour of NTI and it is thus perhaps surprising that these "findings" are not recorded in the form of formal declaration to supplement the generality of declaration # 2 quoted above.

Instead, Arbitrator Hunt seems to have tried to capture these conclusions in two ways in the concluding paragraphs of the Award under the heading "Summary and Conclusions". First, the formal declarations are preceded by a chapeau to the effect that "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 …" (and then follow the two declarations) (Award at para 241). Second, although not framed as declarations, the following paragraphs highlight how the current IEPs prepared by GN and GoC failed to comply with the Agreement, namely:

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 a achieving a representative level. (Award at para 242.)

Arbitrator Hunt declined to grant any of the other declarations sought by NTI, principally on the grounds that they are unnecessary (e.g. Award at paras 211, 218, 220, 227) to "justify further direction in this arbitration." (Award at para 217)

Further Remedies

As noted in the review of the structure of the current Article 38 above, the arbitration process under the Nunavut Agreement is bifurcated, with the question of remedies deferred to a second phase and a Final Award. One of the issues that will have to be determined in that second phase is the relative responsibility of the GN and GoC. While by far the greatest number of public service positions in Nunavut are GN positions rather than GoC positions (92:8) (see Award, para 22), it is evident that NTI will take the position that Canada, as the only government party to the Agreement (noted in the Award at para 41), will be responsible for GN's (non-) compliance with the Agreement. One of the available remedies is an award of damages for breach of the Agreement (NA, s 38.5.4).

The Arbitrator

Finally, a word on the Arbitrator. The Arbitrator selected by the agreement of the parties, Hon Constance Hunt, is a retired member of the Court of Appeal of Alberta (and formerly with extensive trial experience on the Court of Queen's (now King's) Bench), the members of which may also serve as members of the Court of Appeal of Nunavut. Ms Hunt served in that capacity from time to time, and, perhaps most significantly for present purposes, was a member of the panel in the important *NTI v Canada* decision referenced above. In that case Justice Hunt dissented. While the majority was of the view that the case was not an appropriate one for the chambers judge to have granted summary judgment (in favour of NTI), Justice Hunt would have affirmed the conclusion that Canada was in breach of Article 12.7.6 of the Nunavut Agreement, as well as the award of substantial damages on a restitutionary or disgorgement basis. If nothing else, this prior experience afforded Arbitrator Hunt an unusual level of familiarity with the complexities of the text of the Nunavut Agreement, as well as some of the history of conflict associated with the Agreement.

Thanks to Dave Wright for comments on an earlier draft of this post.

Appendix I, Article 23, Part 4 of the Nunavut Agreement

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.

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