

Inuit Self-Government in the Canadian North: The Next Step in the Nunavut Project

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I.	Introduction	78
II.	History	79
III.	The Nunavut Political System	84
IV.	Social and Financial Realities	88
	1. Social Realities	88
	2. Financial Realities	91
V.	The Future of Nunavut	92
	1. Implementation of the NLCA	93
	2. Devolution Talks	96
VI.	Appraisal	100

Abstract

The Territory of Nunavut is Canada's newest political unit and the only one which is governed and administered by an aboriginal people, the Inuit, who form about 85 % of the total Nunavut population. Nunavut was created in 1999 to settle Inuit land claims, following years of negotiations between the federal government and Inuit representatives. The creation of Nunavut was met with high expectations by both the federal government and the Inuit. The opportunity for Inuit to regain control over their ancestral land and over their political destiny by running their own territory was regarded as a way to solve the terrible social problems that have plagued the Inuit for decades. So far, however, the creation of the Nunavut Territory has not led to major improvements as regards the Inuit living conditions. This is mainly due to the fact that the federal government has breached its fiduciary obligations towards the Inuit and not provided the Nunavut government and designated Inuit organizations with sufficient funds or the chance to generate such funds in order to effectively address the immense social and economic problems in the Canadian Arctic.

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I. Introduction

The territory of Nunavut is the newest political unit of Canada. It came into being on 1.4.1999 with the splitting of the Northwest Territories (NWT) into two separate units. It comprises more than 2.1 million km² and thus nearly one fourth of the total area of Canada with a majority of Nunavut's area consisting of islands, bays and channels and lying beyond the arctic circle. The average temperatures range from -20 to -40 °C in winter and 2 to 10 °C in summer.

With approximately 33,000 inhabitants, Nunavut is one of the most sparsely populated areas in the world with its population being spread out among 26 communities. The capital Iqaluit with just above 6,000 inhabitants is the largest community in Nunavut. About 85 % of all Nunavummiut are Inuit with most of the non-indigenous population living in Iqaluit and staying only for a short time to work there. Thus Nunavut has been labelled the "first full territory in a modern nation ever to be governed and administered by aboriginal people".¹ However, the success of the Nunavut project has repeatedly been questioned. In particular, the disproportionate representation of non-Inuit in government institutions and the heavy financial dependency of the territory on federal funding are often regarded as merely turning the previous open heteronomy over the Inuit lands into a hidden heteronomy instead of creating a "real" aboriginal self-government as envisaged by the Inuit representatives when Nunavut came into being. In addition, the enormous costs attached to the creation and sustenance of Nunavut have led many Canadians of the southern regions to doubt whether the benefits achieved are really commensurate to the financial burden.

The aim of this article is to analyze whether the Nunavut project can – despite all these objections – nevertheless be regarded as a success, in particular, whether it has successfully promoted indigenous self-government, or at least has the potential to lead to such an outcome in the near future. Since such an analysis is not possible without examining the historic and socio-economic background of the region, the article is structured as follows: First, a historical overview over the creation of Nunavut will be given (Part II.). Then the current political regime of Nunavut will be surveyed (Part III.). In a next step, the social and economic realities of the Nunavut Territory will be described (Part IV.). Based on these examinations, the fu-

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¹ C. Nickerson, Canada's Unique Inuit Land: Next April Half of Canada's Northwest Territories Will Become Nunavut, the First Full Territory in a Modern Nation Ever to Be Governed and Administered by Aboriginal People, *The Baltimore Sun* (9.5.1998).

ture of the territory will be analyzed by presenting the two main issues currently being discussed with regard to Nunavut: the legal proceedings initiated by the main Inuit organization against the federal government for breach of promises, and the prospect of devolution (Part V.). Ultimately, an appraisal of the Nunavut project will be given (Part VI.).

II. History

Sovereignty over the northern regions was transferred to Canada by the former colonial power Great Britain in 1870. Great Britain first claimed sovereignty over the northern regions in 1670 when *King Charles II* transferred Rupert's Land, an area that comprised the entire Hudson Bay drainage basin, to the British trading company Hudson's Bay Company (HBC), which was also granted an exclusive license to trade with the aboriginal inhabitants.² When Great Britain defeated the French, who had also claimed sovereignty over this region, in the struggle for supremacy in North America in 1713,³ Great Britain de facto became the only European colonial power with access to the North. In 1821, Great Britain also officially claimed territorial sovereignty over the areas north and northwest of Rupert's Land by expanding the HBC's trading license to "all such parts of North America to the northward and the westward of the lands and territories belonging to the United States of America as shall not form part of any of our provinces in North America, or of any lands or territories belonging to the said United States of America, or to any European government, state or power".⁴ In 1868, the British Parliament passed the Rupert's Land Act,⁵ which provided for the transfer of all lands under the control of the HBC to the newly created federal Dominion of Canada. After the HBC had relinquished all rights to this area,⁶ the Rupert's Land and North-Western Territory Order was signed on 23.6.1870, stipulating the accession of these regions to the Dominion of Canada on 15.7.1870. Yet, since it remained questionable whether the Order had also transferred the Arctic islands north of Hudson Bay to Canada, the Canadian Parliament asked the British gov-

² Royal Charter for Incorporating the Hudson's Bay Company (1670).

³ Treaty of Utrecht (1713).

⁴ Parliamentary Papers, House of Commons (U.K.) No. 547 (1842), at 22; printed in extracts in *K. McNeil*, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations*, 1982, at 3.

⁵ (U.K.) 31 & 32 Vict., c. 105 (reprinted in R.S.C. 1970, App. II, No. 6).

⁶ See Deed of Surrender in Schedule C annexed to the Rupert's Land and North-Western Territory Order (1870), R.S.C. 1985, App. II, No. 9.

ernment to also expressly transfer all regions in North America still being under British sovereignty and all adjacent regions not forming part of the United States' or any European State's territory to Canada. In addition, it asked for a delineation of Canada's northern borders. In response to this request, the British government issued an Order-in-Council on 31.7.1880 stating:

“From and after the first day of September, 1880, all British Territories and Possessions in North America, not already included within the Dominion of Canada, and all Islands adjacent to and of such Territories and Possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws for the time being in force in the said Dominion, in so far as such laws may be applicable thereto.”⁷

The wording of the Order-in-Council is remarkable since it not only transferred all British regions in North America to Canada but also the adjacent islands, thereby implying that these were not under British sovereignty when the land was ceded to Canada in 1870.⁸ On what legal basis these regions could be transferred to Canada by Great Britain remains unclear.

In any case, the Inuit, who had been living in the Arctic regions for over 4,000 years, were completely ignored in this context. They had never been defeated in battle and they had never signed any cession treaties. Thus their lands were treated as terra nullius by the British and unilaterally placed under British control without the consent or even the knowledge of the Inuit. After the Dominion of Canada had been granted sovereignty over all northern regions by Great Britain, the Canadian government continued the British policy of completely ignoring the existence of the Inuit since neither the government nor individual settlers were interested in opening up the land for settlement.

It was not until the beginning of the 20th century that Inuit and Europeans established permanent contact: fur traders established economic ties with the Inuit, and through the introduction of new goods like weapons, tobacco and alcohol made them dependent on supplies from the South and thus threatened their traditional nomadic and subsistent society. When fur prices dropped in the 1930s, the living conditions of the Inuit dramatically

⁷ Order of Her Majesty in Council Admitting All British Territories and Possessions in North America and Islands Adjacent Thereto into the Union (1880), R.S.C. 1970, App. II, No. 14.

⁸ *K. McNeil* (note 4), at 44 et seq.

declined, yet the Canadian government did not supply the Inuit with any medical or financial aid but continued to ignore their existence. It was not until World War II when US soldiers and with them reporters reached the Arctic and documented the devastating living conditions of the Inuit that the Canadian government under the pressure of public opinion started to take action in order to improve the situation of the Inuit. Canada started a modernization offensive which led to the relocation and aggregation of Inuit in permanent settlements in order to facilitate their supply with social and medical services.⁹ English-speaking boarding schools were established at which Inuit children now spent most of the year.¹⁰ But although the Inuit now had – for the first time ever – access to public health and social services and to education, the Canadian government's actions ultimately destroyed the Inuit society, which had been based on small family communities, nomadism and subsistence hunting. The new jobs created in the Arctic, especially in the areas health, education and administration, were mainly given to Canadians from the South, whereas Inuit could only get short-term and low-paid jobs if any. Thus a whole people became dependent on social services which led to low self-esteem and to alcoholism, domestic violence and high suicide rates.¹¹

Yet, the everyday discrimination and the breaking-up of the traditional family structure also led to the creation of an Inuit national consciousness.¹² Especially the young generation, who had spent their winters at southern-style residential schools and their summers out on the land with their families, and thus were on the one hand familiar with the southern political system but on the other hand still rooted in their Inuit culture, was no longer willing to accept to be discriminated against and patronized, and under their leadership a political Inuit movement emerged.¹³

In the course of this movement, the Inuit organization Inuit Tapirisat of Canada (ITC) was founded in 1971 to represent the political, social and cul-

⁹ See *J. Hicks/G. White*, *Nunavut: Inuit Self-Determination through a Land Claim and Public Government?*, 2000, available at <http://caepr.anu.edu.au> (31.10.2010), at 19 et seq.; *A. Kersey*, *The Nunavut Agreement: A Model for Preserving Indigenous Rights*, *Ariz. J. Int'l & Comp. L.* 11 (1994), 429 et seq., at 432 et seq.; *A. Légaré*, *Canada's Experiment with Aboriginal Self-Determination in Nunavut: From Vision to Illusion*, *International Journal on Minority and Group Rights* 15 (2008), 335 et seq., at 340 et seq.

¹⁰ *R. Q. Duffy*, *The Road to Nunavut*, 1988, at 98 et seq.; *J. Hicks/G. White* (note 9), at 22 et seq. with further references.

¹¹ *J. M. Billson*, *Inuit Dreams, Inuit Realities: Shattering the Bonds of Dependency*, *The American Review of Canadian Studies* 31 (2001), 283 et seq., at 283 et seq.; *R. Q. Duffy* (note 10), at 205 et seq.; *J. Hicks/G. White* (note 9), at 23 et seq.; *A. Légaré* (note 9), at 350 et seq.

¹² *J. Hicks/G. White* (note 9), at 26.

¹³ *J. Hicks/G. White* (note 9), at 27; *A. Légaré* (note 9), at 342.

tural interests of the Canadian Inuit. In 1976, ITC demanded for the first time the creation of a new territory in order to settle open Inuit land claims.¹⁴

This demand was fuelled by the Comprehensive Land Claims (CLC) Policy introduced by the Canadian government in 1973 in response to the Canadian Supreme Court decision in *Calder v. Attorney-General of British Columbia*, in which the Canadian Supreme Court – for the first time ever – had hinted that Canada’s indigenous peoples still had aboriginal title, i.e. customary interests, which were rooted in the use and occupation of the land before the establishment of sovereignty by a European colonial power, and which survived colonization as a burden on the land, to all traditional lands over which no historic purchase agreements existed.¹⁵ According to the CLC Policy, indigenous groups were to be granted collective fee simple title to parts of their traditional territory and financial compensation in return for the surrender of their aboriginal title over the entire area. In addition, since the conclusion of the Nisga’a Final Agreement in 2000, all CLC Agreements have also contained provisions granting indigenous peoples self-government in those areas they were given as fee simple title. In 1982, aboriginal rights were further strengthened by the introduction of Sec. 35 (1) Constitution Act, 1982, stating that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”.

However, neither the CLC Policy nor Sec. 35 (1) Constitution Act, 1982 created a legal obligation for the Canadian government to form new political sub-units for the purpose of realizing indigenous self-government, and the Canadian government initially turned down the Inuit’s request for their own territory.¹⁶ However, several incidents helped the Inuit in their claim for their own territorial sub-unit. First of all, a referendum held in the NWT in 1982 showed that 56.5 % of all inhabitants of the NWT supported the Inuit’s claim with 79.5 % support in the suggested Nunavut region.¹⁷ Second, the straightforward and understandable proposal of the Inuit and their non-threatening vocabulary and demeanour increasingly gained support within the Canadian public, who more and more saw the Inuit as “the

¹⁴ R. Q. Duffy (note 10), at 235 et seq.; A. Kersey (note 9), at 435 et seq. with further references.

¹⁵ Supreme Court of Canada, *Calder v. Attorney-General of British Columbia* (1973) S.C.R. 313, at 328, 375 and 390.

¹⁶ A. Kersey (note 9), at 435.

¹⁷ F. Abele/M. O. Dickerson, *The 1982 Plebiscite on Division of the Northwest Territories: Regional Government and Federal Policy*, Canadian Public Policy 11 (1985), 1 et seq., at 6 et seq.

good guys” in this conflict and supported their claim.¹⁸ Third, the creation of Nunavut provided the Canadian government with an opportunity to attract favourable media coverage and to improve Canada’s reputation worldwide. This was particularly necessary since the 1990 Oka Crisis in Quebec had severely damaged Canada’s image as a leader in the field of human rights and indigenous peoples’ rights protection. The Oka Crisis was caused by a court decision allowing the expansion of a private golf course over an ancient Mohawk burial ground. In response to this decision, some members of the Mohawk community erected a barricade blocking access to the area. When a police emergency response team attacked the barricade, a gun battle erupted and a police officer got killed. In the aftermath, more and more native persons from within Canada and the United States joined the Mohawks and erected more barricades to completely block main traffic routes in that area. Canada ultimately mobilized the army to help end the barricade. This incident, covered by media worldwide, was extremely detrimental for Canada’s international reputation and Nunavut was regarded as a chance to restore it.¹⁹

Hence, after lengthy discussions, the Canadian government ultimately agreed to create Nunavut, but only upon condition that Inuit representatives – by now the Tunngavik Federation of Nunavut (TFN), a coalition of Inuit organizations, which had taken over this role from ITC in 1982 – would be able to reach an agreement with the Dene and Métis, the indigenous peoples living in the Eastern part of the NWT, on the exact borderline.²⁰ However, since the Dene and Métis as well as the Inuit claimed the unpopulated Mackenzie Valley as their traditional hunting ground, negotiations were slowed down, and it was not until the Canadian government appointed a mediator that the deadlock could be overcome. In May 1992, a referendum was held regarding the borderline suggested by the appointed mediator, and a narrow majority voted in favour of the division of the NWT along this borderline.²¹

The same year, Inuit representatives and the federal government signed a political accord which was ratified by affirmation of 69 % of eligible voters in the Nunavut region in November 1992.²² On 25.5.1993, the TFN and the Canadian government signed the Nunavut Land Claims Agreement

¹⁸ *P. Jull*, *Nunavut: The Still Small Voice of Indigenous Governance*, *Indigenous Affairs* 3 (2001), 42 et seq., at 47.

¹⁹ *J. Hicks/G. White* (note 9), at 31; *A. Légaré* (note 9), at 347. See also *P. Jull*, *Nunavut Abroad*, *Northern Perspectives* 21 (1993), 15 et seq.

²⁰ See *A. Kersey* (note 9), at 437 et seq.

²¹ *J. Hicks/G. White* (note 9), at 31 et seq.; *A. Kersey* (note 9), at 440 et seq.

²² *J. Hicks/G. White* (note 9), at 31 et seq.; *A. Kersey* (note 9), at 441.

(NLCA), whose Article 4.1.1 provided for the creation of the Nunavut Territory with “Nunavut” meaning “our land”.

The NLCA was implemented by two Acts of the Federal Parliament of 10.6.1993: the Nunavut Land Claims Act ratifying the NLCA, and the Nunavut Act, stipulating the creation of the Nunavut Territory and the Nunavut territorial government consisting of an executive, a legislature and judicature on 1.4.1999.

III. The Nunavut Political System

Unlike the Canadian provinces and the Yukon Territory, Nunavut has – like the NWT as the only other political entity within Canada – no political parties at the territorial level. Rather, the Nunavut government is based on the consensus system, i.e. individuals who are Nunavut residents are entitled to run for office as independents. The individuals elected within the 19 single-member electoral districts by simple plurality vote form part of the Nunavut legislative assembly and select the Premier and the cabinet members among themselves by majority vote in secret ballot. The Premier then assigns ministers to portfolios.²³ The Nunavut government administration is highly decentralized, i.e. although the Deputy Ministers and their senior managers are based in the capital, the headquarter positions in divisions, boards and agencies are divided between Iqaluit and several other communities being spread all over Nunavut.²⁴

Since Nunavut is a territory and not a province, its legislative powers are more limited than the powers of the provincial legislatures enshrined in Sec. 92-95 Constitution Act, 1867. The Nunavut legislative assembly has competence inter alia in the fields of administration of justice, hospitals and charities in and for Nunavut (but not health and social services in general), direct taxation, licensing, property and civil rights, education, preservation, use and promotion of the Inuktitut language, the preservation of game, and the expenditure of money for territorial purposes. Unlike provinces, however, Nunavut cannot borrow money for territorial, municipal or local purposes pursuant to its territorial laws without the approval of the Governor in Council, which considerably restricts the Nunavut government’s capacity to act.²⁵ With regard to foreign affairs, Nunavut does not have any competences, even within the fields of its exclusive competences, since the federal

²³ See *J. Hicks/G. White* (note 9), at 44 et seq., 51.

²⁴ *J. Hicks/G. White* (note 9), at 42.

²⁵ See Sec. 27 (2) Nunavut Act and Sec. 92 (3) Constitution Act, 1867.

government is the only level of government within Canada that may sign and is responsible to the international community for compliance with international agreements.²⁶ In general, unlike provinces, territories do not have to be involved in the implementation of international treaties either.²⁷ However, with regard to Nunavut, the NLCA provides that “[a]ny legislation implementing an international [...] agreement shall be interpreted and administered to treat Inuit on at least as favourable a basis as any other aboriginal people in Canada”²⁸ and that Inuit representatives shall participate in discussions leading to the formulation of the federal government’s position in relation to international agreements relating to Inuit wildlife harvesting rights in Nunavut.²⁹

In addition, in contrast to other territories, the integrity of Nunavut as a political unit within its current borders is guaranteed. As a principle rule, whereas the existence of the Canadian provinces within their current borders is guaranteed, the Canadian federal government may unilaterally dissolve or change the borders of its northern territories.³⁰ Yet, since Sec. 35 (3) Constitution Act, 1982 clarifies that “in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired”, the NLCA has to be regarded as a “treaty” within the meaning of Sec. 35 (1) Constitution Act, 1982, and thus the existence of the Nunavut Territory within its current borders is constitutionally guaranteed. However, according to the NLCA the Nunavut government is a public government, i.e. all Nunavut inhabitants have the same political rights irrespective of their ethnicity.³¹ Hence, *de iure* the existence of indigenous self-government is not guaranteed in Nunavut. Nunavut provides its inhabitants merely with territorial autonomy enjoyed by all Nunavummiut alike. Yet, since Inuit form the vast majority of the Nunavut population, they currently enjoy *de facto* Inuit self-government in Nunavut. However, since Canadians are free to move wherever they like within Canada, Inuit might lose this *de facto* self-government one day if a large immigration flow from the South took place and the Inuit became a minority within Nunavut. In particular, large scale resource extraction might lead to such an outcome as

²⁶ Sec. 132 Constitution Act, 1867.

²⁷ See *L. Barnett*, *Canada’s Approach to the Treaty-Making Process*, 2008, available at <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0845-e.pdf> (31.10.2010).

²⁸ Art. 5.9.1 NLCA.

²⁹ Art. 5.9.2 NLCA.

³⁰ See *A. J. Jordan*, *The Constitution of the Northwest Territories*, 1978, at 93. Exceptions to this rule can be found in Sec. 42 (e) and (f) Constitution Act, 1982.

³¹ Art. 4.1.1 NLCA.

it was the case in the Yukon Territory and the NWT, where indigenous peoples nowadays form a minority.³²

Yet, in addition to the creation of the Nunavut Territory and the installation of a public government, the NLCA also provides for special rights only benefitting the Inuit of Nunavut “in exchange for surrender of any claims, rights, title and interests based on their assertion of an aboriginal title”.³³ As a result of the conclusion of the NLCA, the customary interests of the Inuit are no longer a burden on the Crown’s radical title to land but these aboriginal title rights, rooted in the use and occupation of the land by Inuit prior to the establishment of sovereignty by a European colonial power, were permanently extinguished. In return, the Inuit of Nunavut were given, inter alia, collective fee simple title to around 350,000 km² land, which amounts to approximately 17 % of the total Nunavut land area, and sub-surface resource rights to 10 % of this area, held by designated Inuit organizations on behalf of the Inuit of Nunavut.³⁴ This made the Inuit of Nunavut the largest landowners in North America. The Inuit were also guaranteed priority hunting and fishing rights in the entire territory,³⁵ as well as influence on the management of land, water and natural resources in the entire territory via Institutions of Public Government,³⁶ which shall work together with the Nunavut government without being part of it.³⁷ The members of these Institutions of Public Government are nominated by designated Inuit organizations and by the federal and territorial government. These institutions enable Inuit to exert influence in fields which are of special importance to their life and culture beyond the influence they can exert as the majority group within the Nunavut public government.³⁸ Yet, the Institutions of Public Government are only advisory bodies which have to be heard and reviewed and which can make recommendations to the federal

³² A. Kersey (note 9), at 455 et seq.

³³ Preamble to the NLCA.

³⁴ Arts 19.1.1-19.8.19 NLCA. See also Nunavut Tunngavik Inc., *Nunavut: Our Land, Our People* (1993), at 5 et seq.

³⁵ Arts 5.6.1-5.7.44 NLCA.

³⁶ Institutions of Public Government with influence on the management of land, water and natural resources are the Nunavut Wildlife Management Board, the Nunavut Planning Commission, the Nunavut Impact Review Board, the Nunavut Water Board and the Nunavut Surface Rights Tribunal. Further Institutions of Public Government are the Nunavut Arbitration Board, the Nunavut Social Development Council and the Nunavut Implementation Panel.

³⁷ See J. Hicks/G. White (note 9), at 33; L. Nowlan-Card, *Public Government and Regulatory Participation in Nunavut: Effective Self-Government for the Inuit*, *Dalhousie Journal of Legal Studies* 5 (1996), 31 et seq., at 65.

³⁸ L. Nowlan-Card (note 37), at 38.

and territorial government and thus influence political decisions. The ultimate decision-making power, however, rests with the federal or the territorial government respectively, which can review, reject, modify or accept recommendations by the Institutions of Public Government.³⁹ Another special right, only granted to the Inuit in exchange for the surrender of their aboriginal title, is the right to be consulted before exploitations of sub-surface resources on public land take place.⁴⁰ With regard to water power generation or water exploitation projects within Nunavut or the exploitation of resources under Inuit owned land, developers are obligated to conclude impact and benefit agreements with the designated Inuit organizations before the project may commence.⁴¹ Furthermore, the Inuit are guaranteed a share in resource royalties generated on federal land of annually 50 % of the first CAD 2 million and 5 % thereafter.⁴² In addition, CAD 1.148 billion were transferred over a period of 14 years (1993-2007) by the federal government to the Nunavut Trust established specifically for this purpose.⁴³ The income generated from these funds is meant to be used to finance the beneficiary organizations that look after the interests of the Inuit of Nunavut in the long term.⁴⁴ The federal government also contributed CAD 13 million to the Implementation Training Fund established to fund the functions of the Nunavut Implementation Training Committee, which promotes training to enhance Inuit participation in the workforce within land claims-related organizations.⁴⁵ The federal government is also obliged to increase Inuit employment within the Nunavut government to a representative level.⁴⁶

In order to ensure that the promises made under the NLCA are carried out and that the federal and territorial governments fulfil their obligations, the NLCA mandated the Inuit organization Nunavut Tunngavik Incorporated (NTI), which was formed in 1993 to replace TFN as the legal representative of the Inuit of Nunavut, to serve as a watchdog over the implementation of, and adherence to, the NLCA by both the federal government and the territorial government. As the major “Designated Inuit Organiza-

³⁹ *L. Nowlan-Card* (note 37), at 44.

⁴⁰ Art. 27 NLCA.

⁴¹ Art. 26 NLCA.

⁴² Art. 25 NLCA.

⁴³ Arts 29.1.1-29.1.4 and 31.1.1 NLCA.

⁴⁴ See Nunavut Trust, *The Trust Fund* (2009), available at <http://www.nunavuttrust.ca/trust.htm> (31.10.2010).

⁴⁵ Arts 37.8.1-37.8.3 NLCA. See also Nunavut Implementation Training Committee, *About Us* (2010), available at <http://www.nitc.ca/english/home.html> (31.10.2010).

⁴⁶ Art. 23 NLCA.

tion”,⁴⁷ NTI acts on behalf and for the benefit of all Inuit of Nunavut, and co-ordinates and manages Inuit responsibilities under the NLCA. It is also NTI which holds most of the collective fee simple title for the Inuit and manages the Nunavut Trust. NTI’s executive officers are elected by Inuit voters alone. Hence, there are two parallel political regimes in Nunavut: a public government and an Inuit land rights regime.

IV. Social and Financial Realities

The creation of Nunavut was met with high expectations, both by the federal government and the Inuit of the Nunavut region. The relocation and aggregation of Inuit in permanent settlements that have occurred during the modernization offensive initiated by the Canadian government after World War II have led to an alienation of Inuit from their land and their culture, and to a heteronomy of the Inuit’s lives leading to low self-esteem and a myriad of social problems among the Inuit community of Nunavut. The chance for Inuit to regain control over their land and their political destiny by separating from the NWT and forming their own government was regarded as a way to solve the terrible social problems that have plagued the Inuit of Nunavut for decades.⁴⁸ However, the current social and financial situation of the Inuit of Nunavut remains rather gloomy.

1. Social Realities

The unemployment rate among the Inuit of Nunavut is with 17 % on average more than twice as high as the Canadian national average.⁴⁹ Yet, if the people who quit looking for work were included in the statistics, the rate would be much higher, amounting to up to 70 % in smaller communities.⁵⁰ The median income of Inuit in Nunavut is less than two thirds of the national average,⁵¹ and more than half of the Inuit are dependent on welfare

⁴⁷ Art. 1.1.1 NLCA.

⁴⁸ A. Légaré (note 9), at 336.

⁴⁹ Statistics Canada, StatsUpdate: Labour Force, (2010), available at <http://www.gov.nu.ca> (31.10.2010).

⁵⁰ A. Légaré (note 9), at 360; P. Mayer, Mayer Report on Nunavut Devolution, 2007, available at <http://www.ainc-inac.gc.ca> (31.10.2010), at 9.

⁵¹ L. Gionet, Inuit in Canada: Selected Findings of the 2006 Census, 2008, available at <http://www.statcan.gc.ca> (31.10.2010).

support.⁵² However, living expenses are 64 % higher than the national average due to the fact that there is no road infrastructure linking Nunavut to the rest of Canada or the Nunavut communities to one another, and hence all goods and equipment have to be transported at high costs either by ship during the short summer season (July-September) to the coastal communities or flown in.⁵³

Since Nunavut has no developed wage economy, industry, agriculture or manufacturing base, the Nunavut government is the main employer accounting for about 40 % of all jobs,⁵⁴ yet only half of the government staff is of Inuit descent.⁵⁵ This fact is mainly due to the lack of qualification among the Inuit population. More than half of the Inuit population aged 25 to 64 has less than a high school diploma, and only one third has completed a post-secondary education program, which is required for most government positions.⁵⁶ Currently only 25 % of Inuit children graduate from high school and not all of them will commence post-secondary education.⁵⁷ The high drop-out rate is partly due to the fact that the school curricula developed in the South are often not suitable for Nunavut's Arctic environment and thus foreign to the Inuit culture. In addition, most teachers are non-Inuit, which often leads to cultural boundaries between teachers and students.⁵⁸ Another problem is the language. Although 75 % of all Inuit in Nunavut still regard Inuktitut as their first language,⁵⁹ English is currently the working language of the Nunavut government since most of the government employees are non-Inuit, and therefore fluency in English is essential for a government job.⁶⁰ Since there are no universities in Nunavut, fluency in English is also essential for post-secondary education in the South. Yet, during grade 1-3/4, Inuit children are taught solely in Inuktitut whereas from grade 4/5 onwards – due to a lack of qualified secondary Inuit teachers and Inuktitut material resources – Inuktitut is completely abandoned and English becomes the sole language of instruction. This abrupt and complete change of language of instruction often leads to the result that

⁵² P. Mayer (note 50), at 9.

⁵³ A. Légaré (note 9), at 339.

⁵⁴ A. Légaré (note 9), at 359.

⁵⁵ A. Légaré (note 9), at 357.

⁵⁶ L. Gionet (note 51).

⁵⁷ T. R. Berger, Nunavut Land Claims Agreement Implementation Contract Negotiations for the Second Planning Period 2003-2013: Conciliator's Final Report: "The Nunavut Project", 2006, available at <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nuna/lca/nlc-eng.pdf> (31.10.2010), at iii.

⁵⁸ L. Gionet (note 51); A. Légaré (note 9), at 364 et seq.

⁵⁹ T. R. Berger (note 57), at iii.

⁶⁰ A. Légaré (note 9), at 356.

Inuit children are neither fluent in English nor in Inuktitut. Problems with the language of instruction and the cultural inadequacy of the school curricula lead to frustration among Inuit children, which contributes to the high drop-out rates of currently 75 % and thus to the lack of qualified personnel in the future.⁶¹

The high unemployment rate and welfare dependency also lead to numerous other social problems and decisively contribute to the poor living and health conditions of the Inuit. About 50 % of the Inuit in Nunavut live in social housing units with 39 % of the Inuit living in overcrowded conditions (more than one person per room), and about one fourth of all homes are in need of major repairs.⁶² The inadequate housing conditions along with poor ventilation, the need to stay inside for most of the Arctic winter and the fact that in most Nunavut households there is at least one person smoking inside the house lead to numerous health problems such as respiratory diseases and hearing impairments among children, tuberculosis, lung cancer and hepatitis A, which are rampant within Nunavut.⁶³ In addition, overcrowding contributes to the students' poor homework and school performances, and leads to poor mental health of the Inuit population and often to domestic violence.⁶⁴ Alcohol and substance abuse is a serious problem within Nunavut, as is the rate of crime, incarceration and domestic violence which is the highest within Canada.⁶⁵ The suicide rates among young Inuit men are a staggering 40 times higher than for the average Canadian in the same age group.⁶⁶

In addition to these mental and physical illnesses mainly caused by overcrowding, many Inuit also suffer from diabetes and obesity since most Inuit do not go out on the land any more to hunt for food but cannot afford healthy and balanced food from the stores either, and therefore often rely on cheap fatty food from the stores.⁶⁷ Overall, Nunavut health indicators compare better with third world countries than with the rest of Canada,⁶⁸

⁶¹ A. Légaré (note 9), at 365; T. R. Berger (note 57), at iv-v.

⁶² L. Gionet (note 51); A. Légaré (note 9), at 353 et seq.

⁶³ T. R. Berger (note 57), at vi; L. Gionet (note 51); Government of Nunavut – Nunavut Department of Health and Social Service, Report on Comparable Health Indicators for Nunavut and Canada, (2002), available at http://www.gov.nu.ca/health/PIRC_English.pdf (31.10.2010), at 20, 33; A. Légaré (note 9), at 353 et seq.; P. Mayer (note 50), at 10.

⁶⁴ A. Légaré (note 9), at 354; P. Mayer (note 50), at 10.

⁶⁵ A. Légaré (note 9), at 352.

⁶⁶ P. Mayer (note 50), at 10.

⁶⁷ Government of Nunavut – Nunavut Department of Health and Social Service (note 63), at 41; A. Légaré (note 9), at 353.

⁶⁸ R. Wilkins et al., Life Expectancy in the Inuit-Inhabited Areas of Canada: 1989 to 2003, 2008, available at <http://www.statcan.gc.ca> (31.10.2010), at 7 et seq.

with the life expectancy of Inuit being on average twelve years below the national average,⁶⁹ the infant mortality rate being more than three times higher compared to the rest of Canada,⁷⁰ and 38 % more infants being born underweight than on national average.⁷¹

2. Financial Realities

In Canada, there are three different forms of federal transfer payments: Canada Social Transfer (CST) and Canada Health Transfer (CHT), which are purpose-related and thus can only be spent on social and health services respectively, and Equalization payments, i.e. federal transfers for addressing fiscal disparities among provinces in order to enable less prosperous provincial governments to provide their residents with public services that are reasonably comparable to those in other provinces, at reasonably comparable levels of taxation.⁷² With regard to the Canadian territories, which do not participate in the Equalization program, the federal government transfers payments to them via the Territorial Formula Financing (TFF) to the same ends, i.e. to enable them to provide their residents a range of public services comparable to those offered by provincial governments, at comparable levels of taxation.⁷³ Unlike CST and CHT, Equalization payments and TFF are unconditional transfers.

The territory of Nunavut is the most fiscally dependent unit within Canada. It relies on federal funding for about 93 % of its annual budget,⁷⁴ whereas on average federal transfers account for about 19 % of provincial and territorial revenues.⁷⁵ The Nunavut government's own-source revenues

⁶⁹ Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations: 2006 Census (2007)*, available at <http://www.statcan.gc.ca> (31.10.2010), at 19.

⁷⁰ Government of Nunavut – Nunavut Department of Health and Social Service (note 63), at 12.

⁷¹ *P. Mayer* (note 50), at 11. See also Government of Nunavut – Nunavut Department of Health and Social Service (note 63), at 13.

⁷² Government of Canada – Department of Finance, *Equalization Program (2010)*, available at <http://www.fin.gc.ca/fedprov/eqp-eng.asp> (31.10.2010).

⁷³ Government of Canada – Department of Finance, *Territorial Formula Financing (2010)*, available at <http://www.fin.gc.ca/fedprov/tff-eng.asp> (31.10.2010).

⁷⁴ Government of Nunavut – Department of Finance, *2010-11 Fiscal and Economic Outlook (2010)*, available at <http://www.finance.gov.nu.ca> (31.10.2010), at 3.

⁷⁵ Government of Canada – Department of Finance, *Federal Support to Provinces and Territories (2010)*, available at <http://www.fin.gc.ca/fedprov/mtp-eng.asp> (31.10.2010).

flow mainly from taxes, with payroll tax, personal income tax, and tobacco tax accounting for most of Nunavut's tax receipts.⁷⁶

The per capita allocation of federal transfers amounts to almost CAD 35,985, whereas the average per capita allocation within Canada is CAD 1,897.⁷⁷ Since its creation in 1999, the Nunavut government's annual expenditures have almost doubled from CAD 620 million in the fiscal year of 1999/2000 to CAD 1.2 billion for 2010/2011.⁷⁸ Parallel to this increase in expenditures, the federal transfers to Nunavut have risen from CAD 557 million in 1999/2000 to CAD 1.18 billion in 2010/2011.⁷⁹ The revenues generated within Nunavut, however, have only risen from CAD 63 million in 1999/2000 to CAD 89 million in 2010/2011.⁸⁰ Hence, the Nunavut government's dependency on federal transfers has grown over the years.

V. The Future of Nunavut

Nunavut's most pressing need is to increase its revenues. Revenues are needed to build and maintain houses, to improve the education system, to preserve the Inuktitut language, and for health and social programs such as suicide prevention initiatives. Without an increase in revenues, the Nunavut government will not be able to effectively target the immense social problems within the Nunavut Territory. However, since its creation in 1999, the Nunavut government has been heavily underfunded and thus not been able to fulfil its obligations towards the Nunavut population. In order to increase Nunavut's revenues, two different goals are currently targeted: first, to attain proper implementation of the NLCA by court order, and second, to achieve devolution.

⁷⁶ Government of Nunavut – Department of Finance (note 74), at 4 et seq.

⁷⁷ Government of Canada – Department of Finance (note 75).

⁷⁸ Government of Nunavut – Department of Finance (note 74), at 2; Nunatsiaq News, *Then and Now: How the GN's Budget Has Swollen Since April 1, 1999* (4.3.2005), available at <http://www.nunatsiaqonline.ca> (31.10.2010).

⁷⁹ Government of Canada – Department of Finance (note 75); Nunatsiaq News (note 78).

⁸⁰ Government of Nunavut – Department of Finance (note 74), at 2; Nunatsiaq News (note 78).

1. Implementation of the NLCA

On 7.12.2006, NTI filed a statement of claim to the Nunavut Court of Justice alleging breaches of the NLCA by the federal government.⁸¹

According to Art. 37 NLCA, implementation contracts are to be signed every ten years. These implementation contracts are meant to ensure that the provisions of the NLCA are properly implemented and thus that the Inuit enjoy the special rights they were promised under the NLCA in exchange for the surrender of their aboriginal title.

In May 1993, the TFN on behalf of the Inuit of Nunavut, the government of Canada and the territorial government of the NWT concluded the Contract Relating to the Implementation of the Nunavut Final Agreement (Implementation Contract) covering the first ten years after the ratification of the NLCA (1993-2003). The Nunavut government, however, which is – alongside the federal government – responsible to implement the NLCA, did not come into being until the creation of Nunavut in 1999 and thus did not participate in the negotiations. Although the Inuit were represented by TFN in the negotiations for the Implementation Contract, the federal government and the government of the NWT, which knew that it would have no responsibility to implement the NLCA after the establishment of Nunavut in 1999, also entered into bilateral agreements fixing the amount of funding to be transferred in the first implementation period from the federal to the territorial government in order to implement the NLCA. As a result of these negotiations, from which the Inuit of Nunavut were excluded, the federal government awarded approximately CAD 2 million per year for the implementation of the NLCA.⁸²

During the ensuing period, both NTI and the Nunavut government regarded the funding agreed upon by the NWT and the federal government as grossly inadequate to properly fund the implementation of the NLCA, and in 2002, in anticipation of the expiry of the Implementation Contract, the federal government, the Nunavut government and NTI entered into negotiations for the conclusion of a new implementation contract for the second implementation period, which was originally intended to last from 2003-2013. For NTI and the Nunavut government the revision of the funding

⁸¹ Nunavut Court of Justice, *Nunavut Tunngavik Incorporated v. Canada (Attorney General) – Statement of Claim* (2006), available at <http://www.tunngavik.com/category/publications/legal-services/> (31.10.2010).

⁸² *Nunavut Tunngavik Incorporated v. Canada (Attorney General) – Statement of Claim* (note 81), at paras 71-72; J. Bainbridge, *Negotiating in Good Faith: An Analysis of the Negotiations to Update the Nunavut Implementation Contract*, 2005, available at <http://www.cba.org> (31.10.2010), at 3 et seq.

arrangements was at the centre of the negotiations. Whereas the federal government wanted to base the funding on the 1993 Implementation Contract and thus on what the NWT government had agreed to spend on the Nunavut region in 1993, not on what would be and would have been adequate to spend, and hence on an arbitrary number, the Nunavut government demanded that the funding be completely revised and instead based on what was actually needed to guarantee the implementation of the special Inuit rights under the NLCA in the future. It presented detailed calculations stipulating that in fact around CAD 50 million per year were needed to properly implement the NLCA. The federal government, however, did not acknowledge any additional costs and was only willing to transfer the annual amount of CAD 2 million per year agreed upon with the NWT government subject to inflation and administrative cost adjustments. It refused to discuss the general revision of the funding arrangements, and in November 2004, the federal government disengaged itself from further negotiations.⁸³

In particular, the federal government is reluctant to provide appropriate funding needed by the Nunavut government for measures required under Art. 23 NLCA, i.e. to provide for vocational training and prepare Inuit employment plans in order to increase Inuit representation within government institutions to a representative level. Altogether, it is evident that so far only those provisions of the NLCA have been implemented, which do not require much funding.⁸⁴ Since the Nunavut government is wholly dependent on funding from the federal government to fulfil the promises made by the Crown towards the Inuit in exchange for the surrender of their aboriginal title, many governmental obligations under the NLCA could so far not be implemented due to lack of sufficient funding.⁸⁵

The NLCA provides for the possibility of arbitration which could help break the impasse reached in the negotiations. However, according to the arbitration clause contained in the NLCA, arbitration will only take place if both parties agree.⁸⁶ Yet, since the inception of the NLCA, the federal government has constantly refused its consent to have any matter related to the

⁸³ *Nunavut Tunngavik Incorporated v. Canada (Attorney General) – Statement of Claim* (note 81), at paras 74-80; *J. Bainbridge* (note 82), at 7 et seq.

⁸⁴ Regarding the lack of proper implementation of Art. 23 NLCA see Pricewaterhouse Coopers, *The Cost of Not Successfully Implementing Article 23: Representative Employment for Inuit within the Government* (2003) available at <http://www.tunngavik.com> (31.10.2010).

⁸⁵ *Nunavut Tunngavik Incorporated v. Canada (Attorney General) – Statement of Claim* (note 81), at paras 16, 74.

⁸⁶ Art. 38 NLCA.

NLCA resolved through arbitration.⁸⁷ The NTI regards this refusal of consent as a breach of the Crown's fiduciary obligations.⁸⁸

In June 2005, the federal government appointed a conciliator to recommend new approaches to the implementation of the NLCA. In March 2006, the appointed conciliator, *Thomas Berger*, published his Final Report proposing a considerable raise in funding in order to effectively run training programs to increase Inuit representation in public services and to provide for a bilingual education system from grade 1 to 12.⁸⁹

Thomas Berger refers to a report published by Pricewaterhouse Coopers in 2003, which estimates that the incremental lost income to the Inuit of Nunavut due to the fact that the government has not successfully implemented Art. 23 NLCA and continues to import a Southern workforce amounted to CAD 123.3 million in 2003 alone.⁹⁰ However, all these reports were ignored by the federal government, and no new implementation contract was signed. Instead, the federal government continues to transfer only the amount of money agreed upon in the first Implementation Contract of 1993 with the NWT government plus an inflation and administration cost adjustment.

Since the Nunavut government has proven to be reluctant to head for confrontation with the federal government and to take legal action, NTI has fulfilled its function as a watchdog over the implementation of the NLCA by going to court instead. The law suit initiated by NTI is based on breach of the Crown's fiduciary obligations towards the Inuit of Nunavut, i.e. the federal government's failure to respond to the recommendations made by *Thomas Berger* or other expert reports, to agree to arbitration, to negotiate in good faith, and to provide funding to the Nunavut government in an amount sufficient to allow it to meet its obligations under the NLCA.⁹¹

The relief sought by NTI is a declaration that the Crown has breached its obligation to properly implement several provisions of the NLCA, an order for specific performance requiring the Crown to fulfil its obligations, an

⁸⁷ *Nunavut Tunngavik Incorporated v. Canada (Attorney General) – Statement of Claim* (note 81), at paras 81-84.

⁸⁸ *Nunavut Tunngavik Incorporated v. Canada (Attorney General) – Statement of Claim* (note 81), at paras 19 (k), 85.

⁸⁹ *T. R. Berger* (note 57), at 13 et seq.

⁹⁰ Pricewaterhouse Coopers (note 84), at 10.

⁹¹ *Nunavut Tunngavik Incorporated v. Canada (Attorney General) – Statement of Claim* (note 81), at para. 19.

order requiring the Crown to consent to arbitration, and CAD 1 billion in damages for loss of wages and benefits for the Inuit plus punitive damages.⁹²

2. Devolution Talks

The second goal currently targeted to improve Nunavut's financial situation and thus to enable the Nunavut government to respond to the pressing social problems within the territory is devolution. Unlike the law suit initiated by NTI against the federal government, a positive outcome of the devolution process would not only benefit the Inuit of Nunavut but all Nunavut residents alike.

Devolution is the process of transferring authority from one government to another, in this case, the transfer of powers from the federal government to the Nunavut government to manage surface and sub-surface natural resources, including the power to levy and collect resource royalties and other revenues, and to control and administer Crown land with the right to use, sell or otherwise dispose of such land.⁹³

In this context, a major difference between provinces and territories within the Canadian legal and political system needs to be noted: whereas – as a general rule – public land and sub-surface resources within the Canadian provinces are owned and administered by the respective province, public land and resources within territories are generally under the proprietorship and control of the Crown in right of the federal government. However, this general rule has been undermined by recent developments. In October 2001, the government of the Yukon and the federal government concluded the Yukon Devolution Transfer Agreement providing for the transfer of province-like responsibilities for land, water and resource management from the federal to the territorial government on 1.4.2003. In the NWT, devolution talks are currently carried out, and in March 2004, a Devolution Framework Agreement providing for provincial-like responsibilities for land, water and resource management was signed. Originally, the target date for completion of the devolution talks was scheduled for March 2007 but due to the fact that the numerous aboriginal groups within the NWT wanted to participate in the talks and get a share in resource royalties, the process has been delayed. In May 2007, the NWT government and the abo-

⁹² *Nunavut Tunngavik Incorporated v. Canada (Attorney General) – Statement of Claim* (note 81), at para. 86.

⁹³ See Government of the Northwest Territories – Office of Devolution, Office of Devolution (2009), available at <http://www.executive.gov.nt.ca/offices/devolution> (31.10.2010).

iginal groups within the NWT finally reached a Resource Revenue Sharing Agreement-in-Principle and a Devolution Agreement-in-Principle, which was then forwarded to the federal government with a recommendation to adopt it as the basis for a mandate for a final agreement.⁹⁴ With regard to the Nunavut Territory, the federal government announced in December 2004 that it was committed to starting devolution negotiations with the Nunavut government before December 2005, and it set the objective of reaching an agreement by December 2008. Yet, despite this objective, devolution talks have not even started.

The objectives of devolving province-like responsibilities for land, water and resource management from the federal to territorial governments are to foster the political development of the North and to enable Northerners to enjoy opportunities and a quality of life similar to that of Canadians in the South, and thus to ensure that future generations will live up there, thereby affirming Canada's sovereignty over the Arctic. Furthermore, devolution is meant to give territorial governments greater control over the development of their land, to reduce their dependency on federal funding, and to make them accountable, thereby enabling the territorial governments and the Northerners to realize their full potential.⁹⁵

Right now the Nunavut government does not benefit from the exploitation of land and resources within Nunavut at all. Those benefits either go to NTI and other designated Inuit organizations, which own 17 % of the Nunavut landmass and 10 % of the sub-surface resources located on their fee simple land, and which are given a share in resource royalties generated on federal land, or to the federal government, which owns the remaining 83 % of the Nunavut area.⁹⁶

Just like the Yukon and the NWT governments, the Nunavut government wants provincial-type powers over management of land, water and natural resources, i.e. the same legislative jurisdiction over natural resources as provincial legislatures and 100 % resource revenues from the exploitation of resources on public land.⁹⁷ The Nunavut government insists that the devolution agreement will not only provide for the transfer of control and revenues regarding land and resources on land but also of the lands, islands and waters within the Canadian Arctic Archipelago and of those resources lying under the seabed of Nunavut's internal waters, i.e. the waters within

⁹⁴ Government of the Northwest Territories (note 93).

⁹⁵ *P. Mayer* (note 50), at 5 et seq.

⁹⁶ Besides the collective fee simple title held by NTI and other designated Inuit organization on behalf of the Inuit of Nunavut, there is no private ownership of land within the Nunavut Territory.

⁹⁷ *P. Mayer* (note 50), at 21.

the baseline of Canada's Arctic islands.⁹⁸ In addition, the Nunavut government wants to ensure that despite the devolution of resource revenues, it will retain a so-called net fiscal benefit, i.e. a guarantee that it will not be required to offset all resource revenues from the TFF payments to Nunavut. For an agreed period of time it wants Nunavut to receive 100 % of the resource revenues generated on public land without a TFF claw-back in order to enable Nunavut to generate the additional income needed to solve the social and fiscal problems of the territory. It is the Nunavut government's position that only after reaching a certain level of development, Nunavut would have to share the resource revenues with Canada.⁹⁹ Furthermore, since almost all of Nunavut's resources have to be explored and exploited under difficult geographic and climatic circumstances and due to the lack of infrastructure within the territory, the Nunavut government argues in favour of the establishment of a non-renewable resource development fund to help Nunavut with the exploration and exploitation of its "stranded resources".¹⁰⁰

It is estimated that there are vast amounts of gold, diamonds, uranium and base metals such as lead, nickel and zinc located on the Nunavut Territory, and that at least 10 % of Canada's total oil reserves and more than 20% of Canada's natural gas reserves lie beneath the Arctic Ocean. Yet, the severe climate conditions, in particular the permafrost and the permanently frozen Arctic Ocean, and the lack of basic infrastructure make explorations and exploitation extremely expensive and thus not economically feasible at the moment.¹⁰¹ Hence, right now, devolution is more of a symbolic value: it is not so much about revenues but about who has jurisdiction and control over the future development of the land within the territory. But although in the short term there will be no immediate financial benefit, devolution is in the long-term the only way to reduce Nunavut's dependency on federal transfers.¹⁰² Since devolution will give the Nunavut government a real chance to become more financially self-reliant in the future, it would amount to nothing less than the next step in Inuit self-determination in the Canadian Arctic.

Yet, the federal government has proven to be reluctant to transfer province-like land and resource management rights to the Nunavut government. Due to the fact that the Nunavut government has not been able to ade-

⁹⁸ P. Mayer (note 50), at 28, 31 et seq.

⁹⁹ P. Mayer (note 50), at 32 et seq.

¹⁰⁰ P. Mayer (note 50), at 34.

¹⁰¹ P. Mayer (note 50), at 17; J. Hicks/G. White (note 9), at 16; A. Légaré (note 9), at 360 et seq.

¹⁰² P. Mayer (note 50), at 19.

quately cope with many of the tasks it has been faced with since the establishment of the territory, the federal government does not seem to want the Nunavut government to assume even more responsibilities. Instead, the federal government seems to prefer to collect the financial benefits from resource extraction, e.g. corporate taxes and resource revenues, itself and then transfer these benefits partly or in full to the Nunavut government. This paternalistic approach implies that the Inuit of Nunavut are incapable of raising and collecting the money from resource extraction themselves.

It is true that Nunavut suffers from a lack of qualified personnel. However, it has to be borne in mind that it was the federal government which has manoeuvred the Nunavut government into this position. The federal government has neglected the people and the economic development of the Arctic for decades and is still not willing to provide the Nunavut government with adequate funding to effectively run the territory, to raise the supply of qualified Inuit, and thus to create a workforce which is able to assume more responsibilities. Hence, the lack of qualified human resources cannot be regarded as a valid excuse for the federal government for not transferring land and resource management rights to the Nunavut government. Instead, the federal government should transfer province-like responsibilities to the Nunavut government now, just as it has done or is willing to do with regards to the Yukon and the NWT, which also have to deal with numerous problems but where non-indigenous people form the majority of the population, and support the Nunavut government during the first years after devolution. The federal government could second federal employees to the Nunavut government for some years to build capacity in particular key areas. In addition, the federal government could encourage its employees, which are currently already working within Nunavut in federal programs, to join the territorial government upon devolution.¹⁰³ Although the Nunavut government would be dependent on retaining and recruiting qualified personnel from the South for several years in order to co-ordinate the exploration and exploitation within Nunavut, it would nevertheless be the Inuit-dominated Nunavut government which would have the last say with regard to the use and development of Inuit ancestral lands. Yet ultimately, the federal government needs to fulfil its obligations under the NLCA and fully implement Art. 23 NLCA in order to enable the Nunavut government to recruit qualified personnel from among its own residents in the future and thus to cope with the new responsibilities following devolution on its own.

¹⁰³ P. Mayer (note 50), at 25 et seq.

VI. Appraisal

Since the creation of the Nunavut Territory has – despite high expectations – not led to major improvements as regards the immense social problems in the Canadian Arctic, the questions need to be asked whether the creation of Nunavut in its current form was a failure, and what Nunavut's future could look like.

Media coverage and polls in Canada show that the public in the Southern provinces is very concerned about the high expenses attached to the Nunavut project. CAD 1.18 billion for a jurisdiction of only 33,000 people is regarded as excessive government spending by many Southerners.¹⁰⁴

However, Canadians need to be reminded that in the early days of their country, many regions enjoyed massive federal funding on infrastructure facilities necessary for economic development, whereas the money Nunavut receives covers only the costs for running the government.¹⁰⁵ In addition, Canadians living in the South need to be reminded that the Nunavut government is not wasting money but that life in the Arctic is simply more expensive. They also have to take into consideration the size of the Nunavut Territory. Creating an entire government structure over an area that would – by itself – be the 12th biggest country in the world naturally requires a substantial amount of money. Besides, in terms of the overall federal budget, the amount currently being transferred to Nunavut per year is negligible.¹⁰⁶

At the end of the day it has to be borne in mind that Nunavut is a political experiment – a constitutionally protected territory and territorial government as means of reconciliation. The costs attached to this project are a redress for historic injustices. Not only can Canada as a rich country afford the necessary transfer payments, it also has a moral historic responsibility to support the Inuit in Nunavut financially since it was colonialism which destroyed their economic basis and made them dependent.

It is true that there are still many social problems but the Nunavut government has only been in place for eleven years now, and since its coming into being it has been faced with very difficult social circumstances resulting from the federal government's neglect of the region for decades. In addition, the Nunavut government has always been heavily underfunded. Importantly, it also has to be noted that the Nunavummiut are very proud of Nunavut. They feel that the implementation of the NLCA has had a posi-

¹⁰⁴ J. Hicks/G. White (note 9), at 64.

¹⁰⁵ J. Hicks/G. White (note 9), at 65.

¹⁰⁶ J. Hicks/G. White (note 9), at 64.

tive impact on their life. The existence of the Nunavut Territory improves their self-esteem and makes them more optimistic of the future.¹⁰⁷ Hence, the answer to the first question, i.e. whether the creation of Nunavut has to be regarded as a failure, has to be answered in the negative. Ultimately, it cannot be emphasized enough that Nunavut can work but Nunavut needs more money to make it work. The transfer of an adequate amount of money is also in the interest of the federal government since federal investment in Nunavut today means healthier communities and reduced costs in the future.¹⁰⁸

Turning to the second question on what Nunavut's future could look like, it needs to be stressed first that independence does not seem to be an option. Not only would Canada never agree to Nunavut's secession and thus to a loss of almost one quarter of its territory but in addition the vast majority of the Nunavummiut does not want to form an own State. Instead, Nunavummiut think of themselves as Canadians first and no one seriously demands independence. What they ultimately want to achieve is Nunavut to become a province one day.

Yet, whereas prior to 17.4.1982 territories could gain provincial status by a simple Act of Parliament, the Constitution Act, 1982 now requires for the creation of a new province the consent of both federal houses and two thirds of the provinces having in the aggregate at least 50 % of the population of all of the provinces.¹⁰⁹ However, it is rather unlikely that the existing provinces will agree to a Province of Nunavut. This is mainly due to Canada's amending formula laid down in Sec. 38 (1) Constitution Act, 1982. Currently seven out of ten provinces have to agree to have the constitution amended. If the Northern territories gained provincial status, this formula would have to be adapted to the detriment of the existing provinces, hence they would lose influence. Especially since Nunavut has only around 33,000 inhabitants, the provinces do not agree that such a sparsely populated political unit should have an equal say in Canada's future as the densely populated Southern provinces. In addition, it is very unlikely that the Province of Quebec, which is home to almost one fourth of Canada's overall population and which constitutes the sole French-only province within Canada, would agree to Nunavut's transformation into a province since it regards Nunavut as a predominantly English-speaking region, and feels that consenting to the creation of another English-speaking province would further undermine the French influence in Canada.

¹⁰⁷ J. Hicks/G. White (note 9), at 38 with further references.

¹⁰⁸ J. Hicks/G. White (note 9), at 64 et seq.

¹⁰⁹ See Sec. 42(1) lit. f and 38(1) Constitution Act, 1982.

Hence, since becoming a province is unlikely in the foreseeable future, the Nunavut government instead focuses on devolution to get province-like competences. Devolution would lead to an intermediate stage between territory and province – a “quasi-province” – which would eventually be able to support itself one day. The federal government, however, seems to be unwilling to grant Nunavut a higher degree of self-government. There is and always has been reluctance on behalf of the federal government to trust the people “up there”. The Inuit are still regarded as incompetent to administer the land and resources within the territory on their own and to independently govern their own development. Hence paternalism towards indigenous peoples continues within Canada. In contrast, the government of Canada is far more willing to grant a higher degree of control and self-government to the territories of Yukon and the NWT where non-indigenous peoples form the majority of the population.

It has to be borne in mind that with the conclusion of the NLCA in 1993, the federal government got everything they wanted to achieve as regards Nunavut at once: the complete and final extinguishment of the Inuit’s aboriginal title in the Arctic. Now it is the federal government’s turn to fulfil its obligations under the NLCA and to give redress for historic injustices by providing the Inuit with the necessary funds and by transferring to them more control over their traditional land and resources and thus allowing them to take charge of their lives. Only by this, the Inuit’s vision of once again being able to look after their ancestral land, decide their course of future, and being regarded as an equal people within the Canadian Federation can become reality.