



MAYER REPORT ON
NUNAVUT DEVOLUTION

PAUL MAYER
FASKEN MARTINEAU DUMOULIN LLP
JUNE 2007

Mayer Report on Nunavut Devolution

by Paul Mayer

Fasken Martineau DuMoulin LLP

June 2007

The opinions and views outlined in this report are those of Mr. Paul Mayer, the Senior Ministerial Representative for Nunavut devolution. They are not necessarily the opinions or views of the Government of Canada.

Mr. Mayer prepared this report in English. It has been translated into French and Inuktitut. The French and English versions shall be the authoritative versions.

QS-Y288-000-EE-A1

Catalogue: R2-478/2007E

ISBN:978-0-662-46129-6

Table of Contents

1. The Mandate	5
2. Nunavut Today	7
2.1 Challenges	8
2.1.1 Geography	8
2.1.2 Society	9
2.1.3 Governance	12
2.2 Optimism	14
3. The Importance of Devolution for the GN and NTI	18
3.1 Importance of Devolution for the GN	18
3.2 Importance of Devolution for NTI	20
4. Substantive Issues	21
4.1 What is Being Transferred?	21
4.1.1 The GN's Position	21
4.1.2 NTI's Position	22
4.1.3 Federal Position	22
4.2 A-Base	23
4.3 Human Resources	24
4.3.1 Retention	25
4.3.2 Capacity Building	26
4.3.2.1 The GN's Position	26
4.3.2.2 NTI's Position.....	26
4.4 Article 23 of the NLCA	27
4.5 Seabed Resources	28
4.5.1 The GN's Position—Internal Waters	28
4.5.2 NTI's Position – Marine Areas	31
4.5.3 The Federal Position	32
4.6 Net Fiscal Benefit	32
4.6.1 The GN's Position	33
4.6.2 NTI's Position	33
4.6.3 No Clawback of Resource Revenues	33
4.6.4 Non-Renewable Resource Fund	34

4.7	Institutions of Public Government	35
4.7.1	How Are Federal Responsibilities for IPGs Going to be Devolved?	35
4.7.2	Is the Regulatory Framework of IPGs Working Adequately?	35
4.7.3	Funding IPGs	37
4.7.4	The Nunavut Resource Management Act Working Group	37
4.8	Oil and Gas	38
4.8.1	The GN’s Position	38
4.8.2	The Federal Position	39
4.9	Contaminated and Waste Sites	39
4.9.1	The GN’s Position	40
4.9.2	NTI’s Position	40
4.10	Participation of NTI at the Devolution Negotiation Table	41
4.10.1	Consultation Is Not a Veto	41
4.11	Negotiating a Protocol and Process	42
4.11.1	One Table	42
4.11.2	Negotiation Protocol	42
4.11.3	Timeline	43
4.11.4	Interest-Based Negotiations	43
5.	Need to Apply “Lessons Learned” from Yukon Devolution	44
5.1	Negotiating the Agreement	44
5.2	Transition and Implementation	45
6.	Conclusions and recommendations	46
6.1	Good Relations	46
6.2	Are the Right Conditions in Place?	46
6.3	Recommendations	47

1. The Mandate

At the end of November 2006, the Honourable Jim Prentice, Federal Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians (the “**Minister**”) appointed me as his Senior Ministerial Representative for Nunavut devolution.

The Minister, by virtue of the *Department of Indian Affairs and Northern Development Act*, is responsible for the administration, control and management of the lands, forests, water resources, mineral resources, oil and gas, as well as the management of environmental issues incidental to lands and resources in the Nunavut territory. These are responsibilities that are usually discharged by provincial governments.

Since the 1970s, the federal government has gradually transferred decision-making powers to the territorial governments. Over the years, Canada has transferred significant powers to the Government of Nunavut (“**GN**”), including those relating to taxation, healthcare services, education, social services, housing, airports, civil matters and language. In the case of the Yukon, land and resource management was devolved in 2003. In the Northwest Territories (“**NWT**”), devolution discussions over the transfer of land and resource management have been ongoing since 2002.

As the Auditor General of Canada (the “**Auditor General**”) indicated in her 2003 report, the transfer of responsibilities to Northern governments is a significant change in the governance of Northern Canada that shows just how much Canada has matured as a northern nation: “*By these actions, the federal government and Canadians are accepting that the North is more than a frontier; it is a homeland for the people who live there.*”¹

The policy objectives of devolution include:

- fostering the political development of Northern Canada;
 - ensuring that future generations will continue to live in the North and thereby affirm and reinforce Canadian sovereignty;
 - giving the territorial governments greater local control and making them accountable;
 - creating an opportunity for territorial governments to share in resource revenues and helping unleash the vast economic potential of the territories;
 - helping ensure that Northerners enjoy opportunities and a quality of life similar to other Canadians;
- and

¹ Report of the Auditor General of Canada, Chapter 8, “*Indian and Northern Affairs Canada – Transferring Federal responsibilities to the North*”, November 2003, p. 6.

- helping Northerners realise their full potential and reducing their dependency on federal funding transfers.

In December 2004, the federal government announced that it was committed to starting devolution negotiations with the GN within the near future: “[...] consistent with its commitment to the devolution of provincial-type responsibilities to northern governments, the Government of Canada will, within a year, begin devolution negotiations with Nunavut. The Government of Canada and the Government of Nunavut would like to reach an agreement on devolution as quickly as possible, and have set a goal of reaching a final agreement by December 2008.” Initial informal and exploratory devolution discussions took place between federal officials, the GN and Nunavut Tunngavik Incorporated (“NTI”) in 2005.

Given the change of government in January 2006 and time that has lapsed since those initial discussions, the Minister appointed me to take a fresh and unbiased look at this important issue for the political and economic self-determination of this young territory. I was asked to provide the Minister with objective advice outlining the issues and to ascertain the likelihood of productive, constructive and successful devolution negotiations between the federal government, the GN and NTI. As well, it was hoped that I would help build and foster good relations with the GN and NTI with respect to the devolution issue.

In order to accomplish those objectives, I have:

- met with territorial leaders and senior officials of the GN and NTI to discuss their issues, interests, priorities and expectations which would inform the Minister in respect of the Nunavut devolution;
- met with senior officials in various federal government departments affected by devolution to discuss federal approaches to addressing Nunavut’s specific issues and interests; and
- met and contacted senior executives and land administration employees of exploration and mining companies currently active in Nunavut to discuss the territory’s current regulatory framework.

As part of that process, I have tried to establish strong foundations for a good relationship that will be necessary for successful devolution negotiations. I am confident that the information received was comprehensive in light of the objective of this mandate.

2. Nunavut Today

Nunavut is a territory of almost two million square kilometres. This represents approximately 20% of Canada's landmass and 70% of Canada's coastlines. Its population of nearly 30,000 people (85% of whom are Inuit) lives dispersed among 25 communities that are isolated from one another. Its capital, Iqaluit, has a population of nearly 7,000. Only a few of the other communities have a population of more than 1,000 people.

Nunavut has a very young population. Its birth rate is the highest in Canada. It is estimated that 40% of the population is under the age of 16 and that 60% of the population is under 25. The non-Inuit population (15%) is concentrated in three regional centers — Iqaluit, Rankin Inlet and Cambridge Bay. Many of the smaller communities have a population that is more than 95% Inuit. Half of the population lives in the Baffin Region, 30% in the Kivalliq Region and 20% in the Kitikmeot Region. The population is increasing very rapidly and is expected to reach nearly 44,000 by 2020. The Inuit languages Inuktitut and Inuinnaqtun are spoken by 70% of Nunavummiut.

The GN is a public government. Nunavut has no political parties at the territorial level. Instead, individuals who are Nunavut residents are entitled to run for office as an individual rather than a party basis. Nunavut has a 19-member legislative assembly. Following a general election, MLAs meet to select the premier as well as the cabinet. The premier assigns ministerial portfolios. This is the second mandate of Premier Paul Okalik.

The Government of Canada provides financial support to Nunavut through health and social transfers, the Territorial Formula Financing ("TFF") and other programs. In 2006-2007, the federal government provided approximately \$877 million (\$29,000 per capita) of the \$976-million territorial budget. For fiscal year 2007-2008, the GN projects total expenditures of \$987.1 million. Federal expenditures in Nunavut in 2007-2008 are expected to reach \$1.135 billion. This includes the \$893 million in TFF, \$24 million in Canada Health Transfer, \$11 million in Canada Social Transfer, \$32 million in Infrastructure, \$2 million in Canada Eco-Trust funding, \$23 million for GN's Accounting Training Program to address deficiencies in the GN's financial management practices and approximately \$150 million in INAC and other government department spending.

In its May 2006 Report, the Expert Panel on Equalization and Territorial Formula Financing (the "**O'Brien Report**") made some suggestions to provide the territories with more TFF funding to meet pressing needs in key program areas and to achieve the goal of self-sufficiency and self-reliance. In addition, it suggested that work be done to assess expenditure needs in Nunavut and that additional funding be provided through targeted programs outside of the TFF. One example is the federal government's May 2006 commitment to a \$200 million housing trust in Nunavut, which will result in the construction of 725 housing units.

The Inuit are the only Aboriginal group in Nunavut and they have a settled land claim. The Nunavut Land Claims Agreement ("NLCA") was signed in 1993. It led to the creation of Nunavut in 1999 and made the Inuit

of Nunavut Canada's largest landowners, with 356,000 square kilometres held in fee simple, which represents approximately 18% of Nunavut. Thirty-eight thousand square kilometres of that area include both surface and subsurface rights. This settled land claim provides much clarity for the development of natural resources.

The NLCA implemented an integrated resource management regime in Nunavut by creating resource co-management boards called Institutes of Public Government ("IPGs"). The NLCA provided for a capital transfer of \$1.173 billion to Nunavut Trust over 14 years, with the last payment being scheduled for 2007. With the NLCA, the Inuit gained a share of resource royalties, hunting rights and a greater role in managing the land and protecting the environment. NTI was established in 1993 to ensure implementation of the NLCA for the Inuit of Nunavut.

Nunavut is at a crossroads today. On the one hand, it is a land of incredible opportunity. It has vast mineral and natural resources wealth. At the briefings given by senior GN and Inuit association leaders in Nunavut, I heard many predict a bright and optimistic future for Nunavut. They outlined a vision of a self-reliant territory that would become less dependent on federal government transfers in which Nunavummiut would enjoy a standard of living comparable to that of southern Canadians. On the other hand, despite this optimism, the territory continues to face extremely difficult challenges. But the reality would best be described as a blend of optimism and despair. As former Justice Berger remarked in his March 2006 report (the "**Berger Report**"), Nunavut today "*faces a moment of change, a moment of crisis.*"²

It is in the context of both this optimism and these challenges that the topic of devolution must be examined.

2.1 Challenges

Nunavut faces significant operational, financial and social challenges that raise serious concerns over the GN's ability to assume additional responsibilities. I will now examine these more closely.

2.1.1 Geography

Nunavut's geography and climate present immense challenges. Its 25 remote and isolated communities are not linked by roads. Nunavut has no railroads or ports. Its "*stranded*" resources have to be reached by water, winter roads, summer navigation or air travel. Most of Nunavut lies north of the Arctic circle, which presents technical challenges for the development of natural resource projects. Long winters also create operational challenges, while a short construction and transportation season causes logistical challenges. Transportation

² Thomas R. Berger, "*Conciliator's Final Report: The Nunavut Project*", March 1, 2006; p. 1.

is always weather dependant. Twenty-five isolated communities require 25 separate sets of infrastructure, namely schools, health care facilities, sewage and water systems, electric diesel power generator facilities and airports.

Diesel and other fossil fuels are used for all personal, public and private activities in Nunavut. Twenty percent of the GN's budget is spent on energy. Increases in the cost of oil have a direct impact on the territory's budget. By contrast, 21% of the GN's operational spending is allocated to education, and 26% to health care.

The geographic challenge means everything costs more in Nunavut, including the cost of delivering government services. Nunavut has the highest cost of living in Canada – 64% higher, in fact, than the national average. Housing costs are three times higher than in Ottawa. The cost to build in Iqaluit is \$330.00 per square foot compared to \$103.00 per square foot in Ottawa. The cost of milk (with the help of the Food Mail Program) is \$3.65 per litre in Iqaluit, compared to \$2.00 per litre in Ottawa. The two small tomatoes I purchased in Cambridge Bay to make a salad cost \$4.17.

2.1.2 Society

Nunavut faces enormous social challenges which, in the words of the GN, have “*reached crisis proportions.*” Alcohol and substance abuse problems are prevalent. Crime, family violence and suicide rates in Nunavut are all well above the national average. Arson is a serious problem.

According to the June 2003 *Nunavut Economic Development Strategy*, the average Inuit unemployment rate, if we include those who have stopped looking for work, was 27% in Nunavut. In some communities, that rate exceeds 50%.³

The subsequent 2005 *Nunavut Economic Outlook Update* identified the skills and human capital challenges facing Nunavut.⁴ It stated, among other things, that 26% of families were headed by a single parent in Nunavut in 2004, compared to 16% for Canada. The average family income in Nunavut is \$52,624.00 compared to \$66,160.00 in Canada.

More than 55% of Inuit receive income, fuel and utility support.

In 2003, there were 7,943 violent crimes per 100,000 inhabitants in Nunavut compared to 963 per 100,000 in Canada, up 50% since 1993. In that same period, the rest of Canada showed a 0.50% increase. There were 7,231 property crimes per 100,000 in Nunavut, compared to 4,121 per 100,000 in Canada. This represents a 65% increase from 1999 to 2003 in Nunavut compared to a decrease of 4% in the rest of Canada.

3 The Sivummut Economic Development Strategy Group, “*Nunavut Economic Development Strategy – Building a Foundation for the Future*,” June 2003, p. vii.

4 Nunavut Economic Forum, *2005 Nunavut Economic Outlook – Update on Five Years of Progress*, June 2005.

The suicide rate in Nunavut is shockingly high. Twenty-nine people in the territory took their lives in 2006, the second-worst year on record. Young men between 15 and 24 years of age in Nunavut are about 40 times more likely to commit suicide than the average Canadian in that same age group. According to Jack Hicks, researcher with the International Network for Circumpolar Health Research, the suicide problem in Nunavut is “*tragic and appalling*.” The phenomenon is a relatively new one that defies simple explanation, especially since it does not stand alone. The high suicide rate is a symptom of the current social malaise in Nunavut society caused by, among other things, rapid social change, high drop-out rates, poverty, unemployment and dysfunctional families. Hicks indicates that unless appropriate and concerted efforts are made, it is entirely possible that suicide rates in Nunavut will remain at current rates in the foreseeable future.⁵ The GN has yet to honour its 2004 commitment to implement a suicide prevention strategy.

There is an acute housing shortage in Nunavut. Nearly half the population — more than 14,000 Inuit — live in public housing. More than 1,000 families are on a waiting list. It is estimated that 54% of Nunavut residents live in crowded conditions. Such overcrowding contributes to health problems and learning disabilities. The Berger Report reveals that “*Inuit children live in the most overcrowded, overheated homes in Canada, where one-third to one-half of children, uniquely susceptible as a race to chronic otitis media, suffer from hearing impairment (the teachers in Nunavut have to use microphones in the classroom) and delayed speech development.*” Mr. Berger goes on to state:

Imagine the odds faced by a student attempting to do homework with 12 or 13 other people in the house (on average, half of them children), perhaps sleeping two, three or four to a room. Nunavut’s climate dictates that these tiny homes will be shut tight against the weather for possibly eight months of the year; virtually every home has at least one resident smoker; oil heating may produce carbon monoxide and other pollutants. The fact that even one-quarter of Inuit’s students graduate from high school is, under the circumstances, a testament to the tenacity of those students, their parents and their communities.⁶

There is also a major gap in the health status of Nunavummiut. Despite significantly higher spending per capita on health care in Nunavut compared to the rest of Canada,⁷ Nunavut has a lower life expectancy, higher infant mortality rate, and higher death rates from lung cancer. For example, in Nunavut:

- life expectancy is 10% lower;
- the rate of infant mortality is three times higher;

5 Jack Hicks, “*The Social Determinants of Elevated Rates of Suicide by Inuit Youth*,” Speech at the Public Policy Forum Seminar, Ottawa, December 13, 2006.

6 *Supra*, note 2, p. vi.

7 Total per capita health expenditures in Nunavut were \$10,796.00 in 2005, compared to the Canadian average of \$4,399.00 per capita.

- 38% of infants are born with a low birth weight;
- tuberculosis rates are 18 times higher; and
- smoking rates are three times higher for youth and twice as high for adults.

The low education levels and corresponding lack of employable skills in the Inuit population of Nunavut is one of the territory's most pressing issues. An appropriate education system is essential to the success of Nunavut. The one now in place is currently failing. This means that an entire generation of young Nunavummiut are being left behind and will be deprived of future opportunities. Only 24% of Inuit children graduate from high school. A Nunavut Department of Education briefing showed that there is a clear link between low literacy, education and training levels and the social challenges that Nunavut is currently experiencing. A 2005 International Adult Literacy and Skills survey showed that over 70% of Nunavut respondents scored in the lowest literacy range, namely levels 1 and 2. Experts suggest that level 3 literacy is the minimum needed for most occupations, while much higher levels are required for professional and technical occupations.⁸

A joint paper that the GN and NTI submitted before the National Aboriginal Roundtable in October 2004 identified the challenges and barriers that the GN faces in providing proper Inuit education.⁹ A report published by the Iqaluit Education Authority in November 2005 revealed that a significant education gap exists between Nunavut and the rest of Canada, a gap that may be widening.¹⁰ It showed that despite significant investments in education by the GN, the record of educational achievement for students attending Nunavut's public schools stood at one-third the national standard. These challenges were more recently outlined in the Berger Report. Mr. Berger pointed out that measures must be taken to give the Inuit opportunities to receive an education that will help them secure jobs in the modern economy.

These educational and skill challenges are also being felt in the Nunavut mining and exploration industry. An exploration company executive explained *"There are not sufficiently skilled people available. There is an expectation that industry must hire Inuit, but a skilled work force is difficult to find."*

An example of the lack of trained and skilled Inuit personnel can be seen in the employment challenges faced by the sole operating mine in Nunavut, the Jericho Diamond Project. Tahera Diamond Corporation signed an impact benefit agreement with the Kitikmeot Inuit Association, which sets employment targets of 60% Inuit staff to be achieved over a five-year period. Currently, Jericho employs 30% Inuit employees. Tahera recently posted a notice looking for qualified people for its apprenticeship program, which requires a grade 10 education. They received only one résumé from an Inuk who was applying for a cooking job.

8 Department of Education, Government of Nunavut, *"Investing in Canada's Future: Education and Training in Support of Devolution"*, December 2006.

9 Government of Nunavut & NTI, *"Lifelong Learning: Early Childhood Education and Kindergarten – Grade 12"*, October 2004.

10 Iqaluit Education Authority, *"Closing the Education Gap: A Status Report on the Issue"*, November 2005.

2.1.3 Governance

The GN is also facing a significant governance challenge. GN is experiencing difficulties with its current responsibilities. They have very high turnover and vacancy rates in staffing. I have been told that: *“the biggest challenge”* in Nunavut *“is the lack of qualified and competent human resources. They have such a high turnover, they should really be doing less but doing it better.”*

This problem is exacerbated by the difficulty of attracting and retaining professionals and specialists in Nunavut’s private sector, IPGs and all levels of government. Already monumental, the challenge will only get worse in the field of land and resource management.¹¹

Nunavut has a largely transitional work force of often young and inexperienced people looking for their first work experience. This means that key positions can be vacant at critical times as workers find better opportunities. This is a challenge not only for the federal and territorial Government, but for the Nunavut private sector as well. For example, the average length of employment in the Nunavut Regional Office (“NRO”) is 18 months, and its current vacancy rate is approximately 22%. The federal government is fortunate in that it can lean on the NWT regional office and/or Ottawa headquarters for help in times of crisis. The GN enjoys no such luxury.

The GN indicated in a paper that it prepared for these devolution discussions that the process of staffing up has not been without *“teething problems that continue to challenge the Government.”* The paper has revealed that various government branches, Inuit organisations and the private sector continuously *“poach”* employees from one another *“trying to meet their operational needs and keep their Inuit employment numbers up.”*¹²

These human capacity issues were highlighted in the Auditor General’s 2002 and 2005 reports on fiscal management of the GN. In particular, the 2005 report stated that the GN’s *“current financial management is weak and fragile. It has not adequately reduced the risk of error, bad decisions or fraud. In some cases, when one qualified person leaves, a part of the governance finance functions comes close to shutting down until a replacement is found, sometimes months later.”*¹³

The 2005 report found that, despite efforts to improve financial management, these *“efforts are not translating into sustainable, long-term improvements.”* In the December 2006 briefings in Iqaluit, the GN insisted that they were taking the report seriously. Concrete measures were being taken to *“aggressively”* address the issues raised by the Auditor General, such as the \$2.5 million that the GN earmarked for just that purpose.

11 One often-cited study calculated that the mining industry will need between 47,000 to 70,000 new employees in the next decade, depending on growth, given the spike in commodity prices and their resultant burst in mining activity in the past 24 months. According to a recent newspaper article, the mining labour shortage in Canada is forcing the industry *“into a craze of perks, options and salaries higher than they have been in decades. Six-figure salaries for geology grads and stock options for secretaries, drillers who bolt from camps that are not comfortable enough and vice presidents who refuse to take on the legal tedium that comes with being president; \$250,000. jobs that go unfilled - ... are all part of the rude reality for companies desperate to find workers now to mine their deposits at the peak of commodity prices.”* See Nathan VanderKlippe, *“Lofty Paycheques Pinch Mine Profits”*, National Post, March 7, 2007, p. WK1

12 Government of Nunavut, *“A Human Resource Needs Analysis for Devolution: Preparing the Public Sector for New Jurisdictions and New Accountabilities”*, January 30, 2007.

13 Report of the Auditor General to the Legislative Assembly of Nunavut, 2005.

In keeping with the recommendations of the Auditor General, the GN's 2007-2008 budget introduced an accrual-based method of accounting. The budget also integrated estimates for territorial corporations and statutory bodies, making the budget more transparent and open. As part of the 2007-2008 Federal Budget, the federal government is providing Nunavut \$23 million to strengthen financial management practices and systems.

The GN operates on a decentralized governance model, and it is easy to understand why. The wage economy in Nunavut is largely dependent on government employment. The GN decentralized its administration to ensure that job opportunities are spread throughout the territory. Various government departments are located in communities outside Iqaluit. As part of the GN's decentralization strategy, 459 jobs have been moved to smaller communities. Twenty-seven percent of those positions remain unfilled, and only 41% of those that are filled are held by Inuit. To date, the GN calculates that the human resource cost of its decentralization program is \$32.3 million.¹⁴

Unfortunately, the policy has only aggravated the human capacity problem. The February 2002 report entitled *"Building Nunavut Through Decentralization"* detected significant drawbacks to the decentralized model.¹⁵ The Auditor General's 2002 and 2005 reports identified problems caused by such a system. The 2005 Report indicated that the GN's *"accounting staff is spread throughout Nunavut in small, decentralized groups. Large organizations need professional accountants to provide financial leadership. At present [the] Government does not have enough professional accountants for such a decentralized environment, and certainly not enough to deal with all the problems needing attention."*¹⁶ In response to the Report, the GN has recently announced that it will be centralizing certain accounting positions of two departments, Executive and Intergovernmental Affairs and Health and Social Services into the Department of Finance in Iqaluit.

There are other examples of recent difficulties the GN has had in assuming its current responsibilities:

- In January 2006, the Baffin Regional Hospital in Iqaluit did not pass an accreditation review, having failed to meet certain minimum standards of service.
- In March 2006, a consultant's report was tabled in the Legislative Assembly stating that the GN had mismanaged the annual summer sealift since 2000, the year in which the federal government had devolved responsibility of this service to the GN.
- In February 2007, a newspaper article reported that, according to a consultant's report, the GN's under-staffed and under-supported regional motor vehicles office in Iqaluit was in a serious state of

14 Jim Bell, *"Decentralized GN Jobs Still Go Begging – Inuit Employment Rate in Decentralized for only 41%"*, Nunatsiaq News, March 16, 2007.

15 Millenium Partners, *"Building Nunavut Through Decentralization: Evaluation Report"*, February 2002.

16 *Supra*, note 13, p. 2.

administrative disarray. The article identified a lack of proper staff training and inadequate policies and procedures.¹⁷

During my visits to Nunavut, I witnessed or read about several other challenges the territory is facing. Nunavut newspapers can be rather depressing given the sheer scope of social issues with which this young Government must grapple. A few weeks before I arrived in Iqaluit, the November 10, 2006 issue of *Nunatsiaq News* published this cover story — “*Life on Iqaluit’s Mean Streets: The Consequences of Homelessness in Nunavut are Truly Dreadful.*” The article describes 13-year old girls trading sex for shelter and single mothers sleeping with their babies next to automated banking machines. It also mentions a report prepared by the Federal Department of Human Resources and Development entitled “*Homelessness in the Territorial North.*”

To bring the matter even closer to home, the week before I traveled to Cambridge Bay in early January 2007, three people were tragically shot and killed in the city, and two others were wounded and sent to hospital. All this took place the same week that two young mothers took their lives in Iqaluit. What a gloomy start to the year. I expressed my sympathies and condolences to my hosts in Cambridge Bay in the only way I thought possible, namely by pointing out the opportunities and hope for a better future that devolution might bring to this small, tightly-knit community of 1,300 in their time of grief.

These tragic events seem to confirm what I heard said about the deep social problems in Nunavut — “*it seems as though despair in Nunavut is contagious.*”

2.2 Optimism

Despite such grim social statistics and difficult challenges, Nunavut is also a territory that has incredible potential and opportunity. Everyone I had the good fortune to deal with in the territory believed that Nunavut had a better future in store.

The signing of the NLCA in 1993 and the creation of Nunavut in 1999 were significant achievements for the Inuit of Nunavut. The GN is a young government in its eighth year of existence — “*but a blink of an eye in the history of the Inuit.*”¹⁸ It has accomplished a great deal in that short time. Between June 1999 and June 2006, the GN more than doubled in size, going from 1,200 employees to about 2,900. To overcome its human resource problems, the GN continues to recruit from outside Nunavut, particularly in the professional and para-professional sectors.

While high school graduation levels are well below the national average, the number of graduates has increased slightly every year, evidence of a gradual improvement in the educational system. The GN estimates that at least

17 Jim Bell, “*Motor vehicle chaos at the Government of Nunavut*”, *Nunatsiaq News*, February 23, 2007.

900 individuals will obtain their high school diplomas between 2007 and 2012.¹⁹ There has also been an increase in the number of Inuit enrolling in Canadian universities and other post-secondary institutions over the last several years.

In order to make progress, it is important to have the ability to analyse challenges and identify solutions. A senior federal official with the NRO stated that the GN is to be congratulated for quantifying the scope of the problems it is facing and being very focussed in their search for solutions to these problems.

The GN and NTI released their first *Economic Development Strategy* in June 2003.²⁰ The report reflected a broad consensus on the directions needed for Nunavut's economic development and identified prospects for economic growth. The 2005 *Nunavut Economic Outlook — Final Report*²¹ also detected challenges specific to Nunavut and updated strategies for establishing a mixed economy.

The 2003 *Economic Development Strategy* identified the necessity for establishing, among other things, an economic and social development plan for Nunavut's "human capital." Under the strategy, the GN has committed itself to establishing a wide variety of training programs. In 2006, the GN and NTI published their *Nunavut Adult Learning Strategy*,²² a 20-year effort to deal with many of Nunavut's capacity issues. This program outlines key objectives and supporting actions, and provides a detailed implementation process to improve the delivery of adult learning activities in Nunavut.

As part of the *Economic Development Strategy*, the GN and NTI have adopted several sectorial policies to encourage and plan Nunavut's future economic development. These include an analysis of the territory's housing requirements (2005),²³ the *Nunavut Fisheries Strategy* (2005),²⁴ the *Nunavut Arts & Crafts Strategy* (2006)²⁵ and the *Nunavut Mineral Exploration and Mining Strategy* (2007).²⁶ Given the high cost of energy, the GN has recently announced that it will be developing an energy strategy that will propose energy-saving and conservation measures, as well as alternative energy sources.²⁷

Another source of optimism, not to mention an important Nunavut success story, is the way in which NTI's Lands and Resources Department and Regional Inuit Associations ("RIAs") have assumed their responsibilities in managing Inuit-Owned Lands ("IOLs") and the mineral rights to which they have subsurface titles. The NTI Lands Department's ten employees manage titles to 38,000 square kilometres of mineral subsurface rights in

18 The Honourable Ann Meekitjuk Hanson, "Commissioner's Address at the Opening of the Fourth Session of the Second Legislative Assembly of Nunavut", March 6, 2007.

19 *Supra*, note 12.

20 *Supra*, note 3.

21 *Supra*, note 4.

22 GN and NTI, "Nunavut Adult Learning Strategy", 2006.

23 Bayswater Counselling Group Inc., "Nunavut Housing Requirements, Needs and Demands to 2016", March 2005.

24 GN and NTI, Nunavut Fisheries Strategy, March 2005.

25 GN, "Sanaugart: A Strategy for Growth in Nunavut's Arts & Crafts Sector", June 2006.

26 GN, "Parnautit – A Foundation for the Future – Nunavut Mineral Exploration and Mining Strategy", January 2007.

27 *Supra*, note 18.

Nunavut. They promote their mineral rights at mining trade shows, including the Exploration Round-Up in Vancouver that I attended in January 2007. The RIAs that manage access tenure to surface IOLs have between 20 and 25 employees.

NTI currently has 64 active exploration agreements with prospectors and mining companies covering 6,000 square kilometres. In 2006, NTI collected approximately one million dollars in fees and rent under those agreements.²⁸ In 1997, NTI adopted a mining policy.²⁹ James Eetoolook, NTI's First Vice-President, whose portfolio includes NTI's Department of Lands & Resources, told me in Cambridge Bay that the "*Inuit were once on the outside of the mining industry looking in.*"

The signing of the NLCA changed all that. "*Now, for many reasons, we feel we can be considered part of the mining industry and that we are no longer on the outside.*"

During my stay in Cambridge Bay, I was heartened by how proud and eloquent the NTI land department employees were when describing their accomplishments in managing and promoting their properties.

But opinions on their performance vary once we leave the confines of the department. One mining executive told me that NTI's land department had hired good land administrators to set up its land administration system and that its employees were doing a good job. Another industry executive, though, recounted some of the problems encountered in its dealings with the NTI land department.

In January 2007, I had the pleasure of visiting Nunavut Sivuniksavut ("NS") in Ottawa. This eight-month training program offers the Inuit of Nunavut post-secondary credited courses in affiliation with Algonquin College. The Berger Report acclaims this program as one of the true success stories of Nunavut education. The objective is to bring Inuit high school graduates to Ottawa and instruct them on issues relating to their Inuit identity. The program acts as a bridge between their lives in Nunavut and the possibility of further education in Southern Canada. It also serves as a bridge between adolescent life in the communities and life in the workforce, both public and private. Mr. Berger claims that NS has a "*remarkable record*". A recent NS survey contacted 180 of its 230 graduates. Of these, 40% worked for governments, 15% for Inuit organizations, 19% were active in the private sector and 19% were continuing their post-secondary education. Only four were unemployed. Over the past ten years, between 80% and 85% of NS students graduated from the program, a remarkable rate given the geographical and cultural distance from Nunavut. This program's success is a true beacon in Nunavut education. NS recently began a pilot project for a second year of courses in affiliation with Carleton University, the University of Ottawa, the University of the Arctic and Algonquin College. According to Mr. Berger, this program requires additional support.³⁰

28 NTI 2006 Annual Report.

29 NTI, "*Mining Policy*", December 1997.

30 *Supra*, note 2, p. 55.

Many of today's Inuit leaders are veterans of the struggle for Nunavut's land claim agreement and the creation of the GN. These tremendous accomplishments took the Inuit of Nunavut more than 20 years to achieve. Behind this political vanguard, a younger generation of leaders are working their way up the ladders of government and Inuit associations, acquiring the requisite skills for effective governance. I was impressed by both of these groups. They are the face of Nunavut that I had the honour of meeting during my briefings and meetings in Nunavut. These are the people who make me optimistic about Nunavut's future.

This optimism is also fuelled by the rise in commodity prices and the tremendous opportunities open to Nunavut citizens who get the education and skills they need to take advantage of them. The greatest potential for economic growth in Nunavut lies in the yet untapped wealth of mineral and natural resources. Diamonds, gold, uranium and base metals are currently the main exploration targets. Premier Okalik is quoted as having said that Nunavut has no grass or trees, but it does have minerals, oil and gas.

Mineral exploration expenditures in Nunavut reached an all time high of almost \$200 million in 2006. It is estimated that approximately 20% of these expenditures flow directly to Nunavut in the form of salaries, contracts and purchases. It is expected that at least five new mines might open in the next ten years, creating an estimated 1,700 jobs. Construction of two new gold mines, the Meadowbank and Doris North projects, are hopefully going to begin this summer. In addition, the seabed around the Arctic islands of Nunavut contains huge oil and gas reserves. Although development is still years away, it is estimated that Nunavut has at least 10% of Canada's total oil reserves and more than 20% of Canada's natural gas reserves.

The GN released its *Mineral Exploration and Mining Strategy* earlier this year. Its goal is to create the conditions for a strong and sustainable mineral industry that contributes to a high and sustainable quality of life for all Nunavummiut.

3. The Importance of Devolution for the GN and NTI

During my briefings, I was impressed by how overwhelmingly important the issue of achieving devolution has become to the GN and NTI.

As one senior federal official explained it, “*devolution has been an objective of the Nunavummiut from the very beginning. In other territories, the desire to assume responsibility for management of the land and resources came on more gradually. In Nunavut, they started by wanting devolution.*”

While in Cambridge Bay, I had the honour of meeting John Amagoalik, considered the esteemed “*Father of Nunavut*” by many given the leadership he displayed in the NLCA negotiations that led to the creation of Nunavut. The “*Sir John A.*” of Nunavut is reported to have said, “*if the NLCA was Nunavut I, devolution will be Nunavut II.*”

This desire can be explained in part by the fact that Inuit culture is inherently connected to the land. In fact, the word Nunavut is a composite word in Innuktitut, which means “our land” in English.

According to Jose Kusugak, an Inuit leader who was also involved in the creation of Nunavut:

*The place of the term “Nunavut” in the everyday conversation of generations of Inuit has reflected ancient truths about Arctic demography and culture. The Inuit have been and the Inuit remain the Aboriginal people of Nunavut. We have lived in the Arctic for many thousands of years. The Arctic has sustained and defined us. We are a part of the Arctic landscape and seascape and the Arctic landscape and seascape are a part of us. A more subtle but no less authentic English interpretation of Nunavut is “our home,” not just “our land.”*³¹

3.1 Importance of Devolution for the GN

The Inuit’s desire to gain control over land and resources is reflected in the political discourse in Nunavut. Devolution has been a priority of the GN and Premier Okalik since the creation of the territory’s government. Premier Okalik has stated that his goal and desire is to hammer out a devolution transfer agreement during his current mandate. This was a key priority in the Government’s first five-year plan, the Bathurst Mandate. Initiating negotiations on devolution with the Government of Canada was also identified as one of the key objectives of the Second Legislative Assembly of Nunavut.³²

The March 6, 2007 Commissioner’s Address that was read at the opening of the Fourth Session of the Second Legislative Assembly of Nunavut devotes an entire chapter to the importance of devolution. The Commissioner pressed Ottawa to solve the GN’s need for money through, among other things, making changes to the TFF and

³¹ Jose Kusugak, “*The Tide Has Shifted: Nunavut Works for Us, and It Offers a Lesson to the Broader Global Community*”, Nunavut Inuit Regain Control of their Lands and their Lives (Copenhagen 2000), p. 20.

³² Government of Nunavut, PINASUAQTAVUT 2004-2009, “*Our Commitment to Building Nunavut’s Future*”, p. 14.

devolving control over natural resources. “[Devolution] will reduce Nunavut’s dependency on federal transfers and help Nunavummiut achieve a standard of living comparable to that of our fellow Canadians.”³³

Devolution is seen as the solution to Nunavut’s economic problems, the key to help it deal with its many social challenges. The 2003 *Nunavut Economic Development Strategy* identified devolution of control over resources as a means of obtaining resource revenues that “will enable Nunavummiut to take advantage of economic opportunities as they occur.”³⁴ In a speech to the Public Policy Forum Seminar on Economic Transformation North of 60° held in Ottawa in December 2006, Premier Okalik spoke about devolution and its importance to Nunavut. He identified that, for Nunavut, “gaining control of its resources is a critical step towards greater self-reliance.”³⁵ Premier Okalik made similar comments in speeches to the Mineral Round Up in Vancouver in January 2007 and at the Arctic Gas Symposium in Calgary in March 2007.³⁶

The GN argues that devolution would eliminate a layer of regulatory red tape. As Premier Okalik stated: “What we are looking for, is a simplified resource management system for Nunavut. We want companies to deal directly with us rather than through multiple layers of federal bureaucracy. That’s why my Government has been reducing red tape in Nunavut. We are working with the regulatory bodies set up under the land claim to clarify and rationalize the development approval process.”³⁷ The GN believes that devolution of federal control of Nunavut’s natural resources to the GN would simplify the development process.

In a Nunavut Ministry of Finance briefing last December 2006 in Iqaluit, the GN stated that the financial components of devolution must be approached with a broad understanding and appreciation of the GN’s overall financial circumstances. The briefing reported that, even if the needed TFF reforms were adopted, they would “narrow but not eliminate the GN’s fiscal gap.” The only conceivable long-term solution for dealing with the GN’s fiscal shortfall is for the Government to obtain its own source of revenues from mining, oil and gas royalties. In other words, the only way the GN can reduce its dependency on federal transfers is through devolution of land and resource management.

In December 2004, as part of a joint federal/territorial announcement launching consultations on a “Framework for a Northern Strategy”, the federal government agreed to begin devolution negotiations in Nunavut before December 2005, and set an objective to reaching a devolution agreement by December 2008. On the basis of that commitment, the GN created and staffed a devolution office reporting to the Department of Executive and

33 *Supra*, note 18.

34 Nunavut Economic Development Strategy, June 2003, p. x.

35 Honourable Paul Okalik, “*Devolution and Nation Building in Canada’s North*,” speech to the Public Policy Forum Seminar on Economic Transformation North of 60°, Ottawa, Ontario, December 13, 2006.

36 Honourable Paul Okalik, Speech to Arctic Gas Symposium, Calgary, Alberta, March 2, 2007.

37 *Supra* note 31. The premier made similar comments in his “*Speech to the 2007 Mining Round Up*” in Vancouver on January 29, 2007. At this conference, the premier told the audience that Nunavut was open for business and welcomed the mining industry. He said that back in the 1980’s, he spent a few years working at the Nanisivik mine as an apprentice welder and mechanic. “*I learned a few things while working at Nanisivik. The first thing I learned was that, in my case, I could make a greater contribution to mining by helping it politically than by my attempts at welding.*”

Inter-Governmental Affairs. Tony Penikett was appointed chief negotiator for the GN on devolution issues in January 2006.³⁸ Preparation for Nunavut's devolution negotiations has been ongoing for more than two years now. It is clear from the quality of the briefings that I received from the GN that they have high expectations, and that their issues and interests are well developed and articulated.

3.2 Importance of Devolution for NTI

NTI is also ready for devolution negotiations. The 2006 NTI Annual Report highlights that NTI has been actively preparing for devolution negotiations.³⁹ To date, they have been involved as a party to pre-negotiation discussions.

Charlie Evalik, the chief negotiator for NTI on devolution, indicated that, like many Inuit of his generation, he was born on the land *"and the land is an important part of my life."* An Inuit leader and past president of the Kitikmeot Inuit Association from 1993 to 2005, he was intricately involved in the development decisions respecting resource development in his region during those years. *"Inuit have a keen interest in development of lands and resources in Nunavut,"* he explained, *"because we are a people for whom the land forms our very identity and culture, and we know the land well."*

According to NTI, devolution represents an important opportunity to *"advance constitutional development in Nunavut towards the goal of territorial self-sufficiency."* NTI believes that development of the territory's resources offers tremendous prospects for employment and revenue in Nunavut. It seems to NTI *"only fair [...] that the Government which has the primary responsibility for managing the social and economic impacts of development should also share in the benefits of resource revenues."* NTI supports the transfer of land and resource management responsibilities to the GN because it believes it would be beneficial were these responsibilities to lie with those who are directly affected by development.

³⁸ Mr. Penikett is a well-known author and labour mediator. He was premier of the territorial government of Yukon from 1985 to 1992. After leaving the Yukon, he was, among other things, the Deputy Minister of Negotiations for the government of British Columbia.

³⁹ *Supra*, note 28.

4. Substantive Issues

I will now summarize and highlight the key issues, interests, priorities and expectations relating to Nunavut devolution which were raised by the GN and NTI over the past few months.

4.1 What is Being Transferred?

4.1.1 The GN's Position

According to the GN, the first and most fundamental substantive matter with respect to devolution concerns the GN's understanding of what devolution is. The GN views devolution as a transfer of "*provincial-type*" powers over land management and natural resources in the territory. This would vest the GN legislature with the same legislative jurisdiction over natural resources as other provincial legislatures. This approach is referred to as a "*jurisdictional*" transfer, in contrast to a simple transfer of existing INAC programs.

In 2006, the GN commissioned Hiram Beaubier, a highly respected, former long-term federal employee with 40 years of experience in the Northern Affairs Program, to examine the full range of activities and accountabilities that the GN will want to assume once authority over land and resource development is devolved to the GN. The goal for devolution identified in his report (the "**Beaubier Report**") is the "*creation of strong government fully capable of managing new jurisdictions.*"⁴⁰

In his report, Mr. Beaubier drew a distinction between "*jurisdictional*" and "*program*" transfers. A "*jurisdictional transfer*" entails full accountability for all activities in each resource sector, including the right to make legislative changes and form public policy. A "*program transfer*" transfers the program structure then in place. The Beaubier Report also identifies the budgets that would be required to implement such a jurisdictional transfer.

Mr. Beaubier clearly states that he did not assess INAC's existing programs in his determination of future needs. The report argues that natural resource management programs in the North have not been seen as a "*cornerstone of federal interest for years.*" Rather, he views them as a time-limited jurisdictional responsibility or trust held to advance the development of the North. The Beaubier Report argues that program reductions, split mandates (both federally and territorially), competing public policy agendas and the absence of a direct, territory-based political presence accountable for resource management have further frustrated efforts to develop and maintain a cohesive framework to guide resource management in Nunavut. In Mr. Beaubier's opinion, devolution will solve most of these problems, but it will also be an opportunity to close existing gaps.

⁴⁰ Hiram Beaubier, "*New Jurisdictions New Accountabilities – A Description of the Jurisdiction Scheduled to Transfer to the Government of Nunavut and the Budget Required for Successful Implementation*," May 2006.

According to the Beaubier Report:

- the Northern Affairs Program has been under significant strain for a number of years;
- the challenge of the devolution exercise is to avoid carrying forward INAC's internal funding problems;
- devolution negotiations should be based on the budget required to meet new obligations fully, not on how INAC is currently administrating the program.

The Beaubier Report posits that it will take in the area of 200 full time equivalent (“FTEs”) for the GN to meet its new responsibilities once authority over water, land, environment, mineral, oil and gas resources are under its jurisdiction.

4.1.2 NTI's Position

NTI supports the GN's position that devolution should transfer responsibilities that vest the GN's legislature with a legislative jurisdiction similar to the provincial legislatures' jurisdiction over natural resources under the Constitution.

It has cautioned, however, that this can only be done in a way that *“does not abrogate or derogate from any rights of Inuit and the NLCA.”* NTI has warned that it will need to be satisfied that steps have been taken to implement all NLCA responsibilities relevant to those matters under consideration for devolution. NTI will be looking for concrete measures and timetables that will satisfy them that the NLCA is being fully implemented.

4.1.3 Federal Position

Senior federal officials at the NRO and INAC headquarters have acknowledged that there are funding pressures to manage lands and resources in Nunavut, and has requested continued policy support from INAC headquarters and an additional annual allocation to coordinate federal responses to major project reviews.

The NRO was established in 1999 on a shared-service model with support from the NWT regional office. This support has not been sustained, given the increased development activity in the NWT. Federal officials have indicated that in 2005-2006, the NRO had a total of 105 approved positions and a budget of \$21.71 million to deliver both its province-like responsibilities (lands, waters, minerals, contaminated sites) and its other federal responsibilities (economic development and Inuit relations). It has been estimated that the current vacancy rate runs at about 22%. The NRO is also currently supported by approximately 13 FTEs in Ottawa headquarters.

Federal officials have conceded that it would be difficult and unproductive to argue against the Beaubier Report's underlying principle that the devolved responsibilities should be reasonably and sufficiently financed. That said, they have identified areas in which the Beaubier Report's proposed organization is much broader than the current Northern Affairs Program, and does not take into consideration the significant differences between the average provincial jurisdiction and Nunavut. They have also raised some questions about the organizational design proposed in the Beaubier Report, and have made some specific comments in respect to certain aspects of that model.

Clearly, it will take much time and effort during the devolution negotiations to examine these aspects carefully and reach an agreement that will be satisfactory to all parties.

4.2 A-Base

The GN has stated, as previously mentioned, that one of its objectives is to create a strong government fully capable of managing the devolved jurisdictions. Accordingly, it has suggested that the A-base transfer (or the initial budget for the GN to administer its new responsibilities) must be based on what a prudent government would require to manage Nunavut land and resources responsibly. In that vein, the GN has argued that the transfer cannot be based on what INAC currently has in place, and this for the reasons set out at length in the Beaubier Report.

The GN recognizes that agreeing on the final amount of employees and money necessary to effectively manage its responsibilities will “*require detailed discussions and study by the parties.*” The GN has also pointed out that the devolution agreement will have to provide for ongoing program funding along with a one-time transitional funding sufficient to enable the GN to effectively administer the responsibilities devolved to it.

According to the GN, an adequate A-base that would allow the GN to honour its devolved responsibilities must contain two main categories of costs: i) human resources; and ii) physical assets.

With respect to physical assets, the GN specified that it will need appropriate buildings to house the transferred programs, IT support and intellectual property. In its view, a number of A-base issues requiring transitional funding will be quite different from those encountered in the Yukon and NWT. In particular, the cost of office space and IT connectivity are more expensive and much less readily available in Nunavut.

4.3 Human Resources

If devolution negotiations are to be successful, the most significant challenge will be to ensure that the GN has the human resources it needs in order to be fully ready and capable to honour its devolved responsibilities on the devolution effective date. Bluntly said, if this issue cannot be satisfactorily dealt with, then the right conditions will not be in place to transfer federal responsibilities.

Currently, despite its many challenges, INAC runs a land and resource management program that has demanding service standards in an environment where industry expectations are high. Industry wants a system that is efficient, transparent, stable and reliable, complete with timelines and guidelines. Industry sources have confirmed that INAC is doing a good job of managing mineral and surface tenure of Crown lands. Well-established processes are important for the issuance and management of different types of mineral tenure. If devolution is to be successful, it is crucial that the investment climate in Nunavut not be unduly influenced or put at risk by a disruption in service levels or by an inefficient regulatory framework. It is estimated that a drop in exploration and mining investments would have a negative influence on Nunavut's gross domestic product.

In light of the challenges the GN has met in assuming its current responsibilities and fixing its mounting problems, some would argue that the GN is not ready to assume additional responsibilities. When I betrayed a degree of polite skepticism in that respect, both the GN and NTI took the time and made the effort to analyse, review and discuss this crucial but sensitive issue during the scoping exercise.

Concerns about the human resource capacity in Nunavut are genuine and well founded. The GN itself acknowledged during our discussions that devolution will bring about significant human resource challenges that will require close collaboration among the parties if they are to be overcome.⁴¹

There are two human resource capacity issues associated with devolution:

- ensuring the retention and transfer of as many current INAC devolvable employees as possible upon devolution; and
- building the human resource capacity to create the public services that are required to assume the responsibilities that will be transferred upon devolution.

⁴¹ *Supra*, note 12.

4.3.1 Retention

The GN has recognized the valuable experience, knowledge and skills of current INAC employees in Iqaluit. The GN believes it is important that as many of them as possible accept a position with the GN following devolution, and to that end has undertaken to work closely with INAC. In that regards, it has indicated that a collaborative approach, advance planning, and sensitivity to the needs of the individuals who stand to be affected will be necessary. The GN is taking a realistic approach to human resource issues. Among other things, it observed the following:

INAC's current Northern Affairs Program includes many employees who bring long experience and valuable knowledge and skills to their work. Many, both Inuit and Non-Inuit, are lifelong or long-term Northerners. The GN is hopeful that many of them will decide to join the territorial government upon devolution. They bring corporate knowledge and skills the GN will need in order to carry out its new responsibilities... Retention of NAP employees needs to be a foundation for the HR strategy for devolution.

According to the GN, efforts to encourage retention would need to begin as soon as an agreement is reached at the start of devolution negotiations. It proposes a combination of benefit packages, career development programs and a positive communications plan. The GN also views secondments as particularly important in addressing the human recruitment challenges of devolution. It suggests that federal employees could be seconded to the GN as a pre-devolution measure to build capacity in particular key areas. They believe that this approach could provide a positive option for INAC and possibly other federal employees who might be interested in continuing to work in Nunavut but who do not want to give up their federal public service status. As well, GN employees interested in taking up devolved positions could be seconded to INAC to learn and develop on-the-job experience during the transition period.

The Beaubier Report identified that one of the key challenges of devolution revolves around the people who are affected. Issues such as retention strategies, transition equity, career paths and benefits will have to be closely examined. The report identifies that retention issues are vital and that they should command early and constant attention in all stages of devolution discussions given that “*budgets mean nothing without capable motivated staff to deliver the programs.*”⁴²

A “*lessons learned*” report was prepared by the aforementioned Hiram Beaubier in 2004 for the Yukon devolution (the “**Yukon Report**”).⁴³ The objective of the Yukon Report was to facilitate institutional learning about the devolution experience in the Yukon. It revealed that one of the major challenges of the Yukon

⁴² *Supra*, note 2, p. 85.

⁴³ Hiram Beaubier, “*Yukon Devolution a Retrospective and a Lesson Learned*”, 2004.

devolution was managing the human resource issues, and this would likely be true for future transfers. The report recommended that, seeing as human resources is such an important and sensitive issue, an HR expert should sit on the negotiating team to help prepare information and communicate with affected staff.

In the case of Nunavut, due to several factors, the retention issue will likely be a much more difficult challenge than it was in the Yukon or might be in the upcoming NWT devolution.

4.3.2 Capacity Building

As discussed above, despite all best efforts, a retention strategy alone will not be enough to achieve devolution. To make devolution a successful reality, it will take a collaborative approach between the federal government, the GN and NTI to address the training and educational challenges of Nunavut.

4.3.2.1 The GN's Position

The GN maintains that “*realism is required*” when dealing with this issue, and insists that the devolution agreement will need to provide for effective training strategies and programs taking into account both labour market realities and the objectives of Article 23 of the NLCA. To do this, the GN wants to negotiate with Canada in order to establish targeted training initiatives as soon as devolution negotiations are underway, recognizing the lead time required to train employees in the professional categories that will be needed for devolution.

4.3.2.2 NTI's Position

NTI carefully considered the “*significant challenge*” of ensuring that a trained, representative workforce is in place to assume devolved responsibilities.⁴⁴

NTI wants to ensure that the provisions of Article 23 of the NLCA are “*fully*” implemented, and that the work force assuming authority and responsibility after devolution reflects a representative civil service that is 85% Inuit. NTI recognizes that, as the majority of the positions to be filled after devolution will generally be of a professional or para-professional nature, it will be “a big challenge” to train and recruit Inuit for these jobs. It also asserts that a carefully planned and executed strategy will be required. More specifically, broad co-operation and a partnership approach will be crucial. NTI offered three examples of successful and “*culturally sensitive*” strategies used in the past that can be used to help ensure that the Nunavut work force is ready and capable of

⁴⁴ NTI, “*Management of Lands and Resources Post Devolution – Building Human Resource Capacity in the Government of Nunavut – Recommendations from Nunavut Tunngavik Incorporated*”, February 27, 2007.

managing devolution responsibilities. Previous successful capacity building programs include: (i) the Nunavut Unified Human Resources Development Strategy (“NUHRDS”), which prepared Inuit to work in the new Nunavut Government (1996-1999); (ii) the Akitsiraq Law School program (2001-2005); and (iii) the Municipal Training Organization (“MTO”) (2004-2007).

NTI is of the view that “the design of a specific program to fit a planned timeline to successfully train Inuit for the specific positions required for Nunavut devolution is a clear priority.” Certain specific recommendations that it made in that respect will merit attention once the devolution negotiations begin.

4.4 Article 23 of the NLCA

One cannot deal with the issue of devolution without also addressing the contentious issue of Article 23 of the NLCA. Article 23’s stated objective is to “*increase Inuit participation in government employment*” in Nunavut to “*a representative level.*” This objective applies to “*all occupational groupings and grade levels*” within government. Canada and the GN have struggled to meet the required 85% representative levels of Inuit employment. At the time of writing of this report, Inuit representation stood at 27% in INAC’s Nunavut office, 45% in the GN and 78% in NTI.

The Berger Report recognizes that the GN has strived “*mightily*” to provide “*opportunities for virtually all qualified Inuit.*” The report goes on to state that:

*“The problem is that the supply of qualified Inuit is exhausted. Only 25% of Inuit children graduate from high school, and by no means all of these graduates go on to post-secondary education. The types of jobs where the need for increased Inuit participation is most acute — such as the executive, management and professional categories — have inescapable educational requirements.”*⁴⁵

Devolution will provide additional employment opportunities for the Inuit of Nunavut. However, these will be primarily technical and scientific in nature, positions that few Inuit are currently qualified to fill. It is evident that, if we had to wait for the goals and objectives of Inuit representation in the public services to be met, devolution would be some years off.

NTI maintains that any objective to reach a devolution agreement must address capacity issues in a way that is faithful to and maximizes the chances of reaching the NLCA goals. NTI has indicated that the Inuit greatly value the societal value of “*Piliriqatigiiniq – Ikajuatigiinniq*” — “*working together for a common cause.*” NTI believes that it should work together with the federal government and the GN to put into place capacity-building processes and programs to create a workforce able to assume authority and responsibility after devolution takes effect.

⁴⁵ *Supra*, note 2, p. iii.

4.5 Seabed Resources

The issue of whether or not seabed resources will be included in devolution negotiations has become the most politically sensitive issue to be dealt with by the Minister in a federal government mandate respecting devolution negotiations.

The Premier of Nunavut has made it a very public issue.⁴⁶ Devolution of the seabed resources is one of the GN's priority as stated in the March 2007 Commissioner's Address: "*The GN urges the federal government to establish a devolution mandate that includes our internal waters, so we can move ahead on this very important initiative.*"⁴⁷

4.5.1 The GN's Position – Internal Waters

The GN has stated that they want a devolution agreement that provides for the transfer for jurisdictional control over and revenues generated by non-renewable resources both on land and under the seabed beneath Nunavut's "*internal waters*," that is the waters within the baseline of Canada's Arctic islands.

The GN insisted in no uncertain terms on this issue. The Government even went so far as to indicate that it is "*essential*" to include internal waters in the federal mandate. In a letter dated February 20, 2007, the GN's Chief Negotiator, Tony Penikett, indicated that the internal waters issue "*must be on the table, I cannot stress this too strongly.*" He emphasized the "*high importance*" that the GN places on the matter, insisting on the fact that, from their perspective, "*it is imperative*" for the parties to agree that non-renewable resources located beneath internal waters be included as a subject matter for negotiation.

The GN's insistence on this issue rests on four main arguments:

- national interest;
- cultural significance to the Inuit;
- regulatory efficiency; and
- consistency with the land claim and Canadian law.

Here are their arguments, in full:

⁴⁶ Honourable Paul Okalik, "*The North is Nunavut's – Nunavut Cannot Accept an Agreement on Resources that Perpetuate Colonial Rule and Risk Arctic Canadian Sovereignty*," *The Ottawa Citizen*, December 13, 2006, p. A-17; see also supra, notes 35, 36 and 37.

⁴⁷ Supra note 18.

The National Interest

First and foremost, we believe that including the internal waters in devolution is in Canada's national interest. The Arctic, and particularly the Arctic Archipelago that chiefly lies within Nunavut, carries deep significance for Canadians and for Canada's national identity that needs to be acknowledged, valued and preserved intact. The Mulroney Government's conclusion of the NLCA did that. It was a major act of nation building of which Canadians were proud. The land claim that created Nunavut recognized the territory as a coherent whole, for reasons of geographic sense, cultural integrity and, not least, the assertion of sovereignty. It was also an important, historic step in Canada's political development, advancing the process of de-colonization. For today's federal government to parse devolution — the next step along that path of political development — into parts for anything less than momentous reasons of national interest would be a significant step backwards not only for Nunavut but for Canada as a whole.

The Government of Canada has not presented us with any such case of compelling national interest. It appears to us that the reticence being demonstrated around this issue relates to administrative convenience for Federal departments. The preference officials have repeatedly expressed for a pan-northern "offshore" resource regime would perhaps preserve cherished organizational structures within INAC. It also reflects, however, just how far Ottawa really is from truly understanding Northern realities, including the significant geographic differences and differing economic imperatives among the three territories.

Finally, we believe that Canada's international position in its effort to assert Arctic sovereignty would be tangibly improved through the devolution of authority over the seabed resources of the Archipelago. Certainly, the inclusion of Nunavut's internal waters under devolution would be entirely consistent with Canada's assertion of its right under international law to draw strait baselines around the Arctic Archipelago. Conversely, in political if not strict legal terms, Canada's international position could be harmed by issuing contradictory signals between our international claims and our domestic practice. The political risks here should not be dismissed as quickly as some federal officials appear ready to do.

Cultural Significance to Inuit

Second, but no less important, are the commitments undertaken by the Crown in the NLCA and the cultural attachment Inuit have to Nunavut's internal waters. This point was made very well by NTI at our Vancouver meetings. Inuit are a coastal people who have traditionally relied, and to this day

continue to rely, on a marine economy. This is reflected by the NLCA, which very clearly applies to the marine as well as terrestrial parts of Nunavut. In fact, a good portion of the NLCA is focused on Inuit rights in Nunavut's internal waters. This is specifically recognized by Article 15.1.1 of the NLCA. Further, 14 of the 42 articles of the NLCA relate to, and are applicable in, the internal waters. An example with special relevance to devolution is the fact that the IPGs have jurisdiction over development in Nunavut's internal waters.

Finally, in this regard, it bears saying that for the Government of Canada to introduce a distinction as regards Inuit rights between the marine and land portions of Nunavut would certainly be regarded by Inuit as a very significant political act, and quite possibly undermine public support in Nunavut for devolution itself. I would suggest that this political consideration needs to be placed against the administrative considerations apparently driving INAC's position on this matter.

Regulatory Efficiency

Third, the establishment of a split jurisdictional regime in Nunavut with the GN exercising jurisdiction over the Arctic islands while Canada exercised authority over the seabed between them would contribute significantly to what Minister Prentice called the "spider's web of regulatory confusion" in the North. Before entering a high-risk environment such as Nunavut's, development companies want to see a resource management regime that is effective, respectful of Northern desires and Aboriginal rights, and that applies to consistent and efficient regulatory standards and practices. The geographic, climatic and geological makeup of Nunavut's Archipelago reflects an absence of "controls" between land covered with water and dry land, which are often indistinguishable given the presence of land-fast ice and snow-covered terrain for much of the year. A jurisdiction with separate regulatory regimes for development activities on dry land and lands covered with water would very likely deter companies rather than attract them. Officials can argue all they want about "harmonizing" these dual regimes, but in the end, companies and regulatory institutions will be faced with far greater complexity than is necessary.

Conversely, establishing a seamless Nunavut land and internal waters administrative structure under the GN's active management would contribute to regulatory clarity and consistency, minimize jurisdictional overlap and complexity, and strengthen investor confidence.

INAC officials periodically present the technical complexity of managing oil and gas resources in a marine environment as a reason to withhold the internal waters. From the beginning, however, the GN has repeatedly indicated its readiness to consider options for dealing with this issue, including the

possibility of contracting back Canada Oil and Gas Operations Act (“COGOA”) responsibilities to the National Energy Board (“NEB”).

Consistency with the Land Claim and Canadian Law

Finally, as argued in the summary we provided to you, the inclusion of the internal waters area in devolution has a solid basis in Canadian law. Stated conversely, the legal arguments sometimes posed to support excluding the internal waters from devolution do not stand up to scrutiny. The starting point of our argument is that devolution has been approached in the other territories as a process intended to put the territorial governments as much as possible in the position of a provincial government by conferring on them “province-like” powers. The legal right of provinces to their internal waters and to the resources under their seabed has been clearly recognized by the Supreme Court of Canada. The waters between the islands of the Arctic Archipelago are internal to Canada and, given the clear statutory language and intent of the Nunavut Act and other relevant statutes, these waters are also clearly internal to Nunavut.

The fact that such waters are of greater geographic scope in the case of Nunavut than for any province is of no more legal consequence than the reality that British Columbia has internal marine waters while Alberta and Saskatchewan do not — or that, conversely, Saskatchewan will make more substantive use of its legislative rights with respect to agriculture under s. 95 of the Constitution Act, 1867 than would Nunavut if it had similar rights. The goal is legal equality, not geographic homogeneity. While we recognize that there is no legal obligation on Canada to include the internal waters in devolution, we think it warrants saying that the legal arguments raised by federal officials to support excluding them are legally unsound and should be discounted.⁴⁸

4.5.2 NTI’s Position – Marine Areas

NTI’s position is that the offshore regions form part of Nunavut’s “marine areas,” as described in the NCLA. The agreement adopts a “claims-based” perspective on marine areas, which is why they are an essential topic of devolution negotiations.

According to NTI, the NLCA recognizes the Inuit’s legal rights to marine areas and the management thereof based on traditional and current use. One of the preambles of the NLCA makes it clear that the Inuit assert Aboriginal title to the Nunavut settlement area “[...] based on their traditional and current use and occupation of the lands, waters and land-fast ice therein in accordance with their own customs and usages.”

⁴⁸ Tony Penikett, “Letter to Paul Mayer”, February 2007.

A good portion of the NLCA focuses on marine rights, responsibilities and jurisdiction. As well, 14 of the 42 Articles of the NLCA relate directly to marine matters. Of note, the responsibilities of the IPGs extend to the land and waters of Nunavut.

4.5.3 The Federal Position

The federal government does not agree with the GN's argument that devolving offshore resource rights will improve Canada's international legal position with respect to Canadian Arctic sovereignty. The federal government argues that, at the moment, no one, not even the United States, is challenging Canada's ownership of the lands, islands and waters of the Canadian Arctic Archipelago encompassing the territory of Nunavut, and this includes Canada's sovereign rights over the resources in the water, on the seabed, and in the subsoil.

The waters of the Canadian Arctic Archipelago, including the North-West Passage, are historic "internal" waters of Canada. This gives Canada the unfettered authority to legislate and regulate usage and entry into these waters. Baselines confirming the precise area where the waters are "internal" were published in 1985. The United States does not recognize these baselines. It would follow then that their contention is that the majority of the waters in the Canadian Arctic Archipelago are "territorial," that is waters out to 12 nautical miles from the low watermark along the coast of the land and islands, or from the baselines. Under customary international law, as codified in the UN Convention of Law of the Sea, all foreign vessels have right of "*innocent passage*" through territorial waters. The US further contends that the various waterways through the archipelago constitute an "*international strait*", and that Canada's right to regulate these waters would be subject to further limitations.

In the current NWT devolution mandate, Canada has restricted the devolution process to onshore land. It should be pointed out that, if Canada adopts a similar position in Nunavut, there is a risk that the GN and NTI may be unwilling to participate in devolution negotiations. It is worth noting, however, that in one of their earliest briefings, the GN did indicate that they were prepared to consider a phased approach in the devolution negotiations with respect to internal waters, but that the Federal mandate must ensure that Nunavut's offshore interests will be considered.

4.6 Net Fiscal Benefit

The federal government's approach to the Yukon and NWT devolution is to have the Minister of Finance negotiate resource revenue sharing arrangements with territorial governments to ensure that the territories retain what is called a "net fiscal benefit" ("NFB"). The NFB is a concept whereby territories are not required to offset all resource revenues from the TFF payment to Nunavut.

4.6.1 The GN's Position

The GN wants the devolution agreement to provide for an NFB containing the following elements:

- a resource revenue agreement that grants Nunavut 100% of resource revenues (with no TFF clawback) for an agreed period of time. The agreement may include “triggers” for sharing the resource revenues with Canada, once Nunavut has reached an agreed level of development;
- a non-renewable resource development fund that would help Nunavut deal with the “stranded” resources issue, including funds focused on geoscience.

In the March 2007 Commissioner's Address, the GN lamented that Nunavut loses “hundreds of millions of dollars each year” in royalties and tax benefits because the Federal Government still owns and controls “our” non-renewable resources.⁴⁹ This amount does not appear to be borne out by reality. A federal official estimates the royalty and income taxes that Canada will collect from resource development in 2007 at around \$33 million.

4.6.2 NTI's Position

NTI has stated that royalties collected by Canada for resources extracted on Crown lands in Nunavut have been relatively modest. It is, in their view, critical to the future of Nunavut's economy that the territory retain royalties derived from the removal of minerals, oil and gas. It has also suggested that corresponding TFF deductions not be made.

NTI has also indicated that the resource revenues it receives under Article 25 of the NLCA should not be “adversely affected” by devolution, including the “power to legislate new royalty schemes.”

4.6.3 No Clawback of Resource Revenues

Commitments were set out in the 2006 federal budget to renew and strengthen the TFF program. The 2007-2008 federal budget implements the O'Brien Report recommendations and returns the TFF to a formula-based approach that respects principles of fairness and predictability, and reflects the federal government's commitment to the continued development of the North.

The O'Brien Report specifically suggested that territorial governments should see direct benefits from the development of resources in their territories. It recommended excluding resource revenues from the calculation of revenues included in the TFF and that, in principle, the NFB of each of the territories should be similar.

⁴⁹ *Supra*, note 18.

During my meetings with senior federal officials, it was stressed that, whatever approach is used with respect to the NFB in Nunavut devolution, the Government of Canada will need to take a position that is “*broadly consistent*” and coherent with other Northern jurisdictions.

4.6.4 Non-Renewable Resource Fund

During briefings with the GN, a mining projection royalty study prepared by Watts, Griffis and McOuat was distributed. This projection shows that even if Nunavut were to secure a resource revenue agreement giving Nunavut 100% of royalties from its potential resource revenues without any clawback from TFF funding, that arrangement would leave the GN without an NFB for ten years or more.

For this reason, the GN has asked Canada to consider expanding its devolution mandate to include the ability to explore other options for achieving an NFB. It is with this in mind that they proposed that Canada consider creating a non-renewable resource fund to deal with the fact that Nunavut’s resources are “*stranded*” because of a lack of basic development infrastructure (i.e. roads, ports, power generation facilities).

The GN recognizes that the major developments associated with infrastructure projects are usually the responsibility of the private sector companies undertaking mining projects in Nunavut, though it does argue that Canada needs to recognize that there are other types of infrastructure that are “*broadly the responsibility of government.*” This, according to the GN, is an area that is ripe for “*creative, collaborative thinking.*”

One suggestion forwarded by the GN was that Canada make significant investments in Nunavut geoscience. The GN pointed out that 53% of Nunavut remains unmapped. The territory has estimated that, at current levels of geoscience investments, it would take another 80 years to complete the geological map base of Nunavut. The federal government created the Canada-Nunavut Geoscience Office, a partnership between the Geological Survey of Canada, Indian and Northern Affairs and the GN’s Department of Economic Development and Transportation. Canada invests roughly \$1 million annually in mapping activities related to this office. The mandate of this office is to provide accessible geoscience information and expertise in Nunavut in support of geoscience education, training opportunities and the responsible development of mineral and energy resources, as well as to assist with the geographic information system requirements of Nunavut-based partners.

I was told by federal officials that investments in geoscience programs have led to discoveries of new, non-renewable resources. In particular, officials maintain that the release of mapping results in Nunavut in 2002 led to an immediate, tenfold increase in claims staking and subsequent gold discoveries in 2003. It is estimated that a \$1 million investment in geoscience will lead to \$5 million in industry expenditures and \$125 million in mineral resource reserves.

4.7 Institutions of Public Government

The NLCA required the federal government to establish and fund five IPGs or co-management boards through federal legislation.

4.7.1 How Are Federal Responsibilities for IPGs Going to be Devolved?

Paragraph 2.10.2 of the NLCA allows the Government of Canada to devolve or transfer powers or jurisdiction over IPGs to the GN, provided that the devolution or transfer does not abrogate or derogate from any rights of Inuit under the NLCA.

The GN believes that ministerial responsibilities for the IPGs should be transferred to the GN under devolution. NTI does not object to that proposition, but it underscores that a much fuller discussion of the issue will be necessary as devolution negotiations progress. NTI has stated that legislative jurisdiction over the IPGs cannot be “*transferred holus bolus*.”⁵⁰

The GN recognizes that NTI has raised issues in this regard, particularly the need to ensure appropriate ongoing funding for the boards in a transparent and accountable manner.

During the January 2007 briefings with Nunavut Impact Review Board (“NIRB”) and Nunavut Planning Commission (“NPC”) in Cambridge Bay, both boards expressed concerns about the transfer of the IPG responsibilities to the GN.

4.7.2 Is the Regulatory Framework of IPGs Working Adequately?

The issue of devolving the regulatory framework governing IPGs cannot be addressed in isolation. One must be cognisant of the serious challenges of Nunavut’s current regulatory framework, especially the difficulties that industry is having with IPGs.

I have held several discussions with leading executives currently active in the Nunavut mining and exploration industry who have highlighted some of the regulatory challenges of Nunavut. I heard from them that Nunavut has enormous potential, but that it needs industry’s help to develop it and that everything should be done to get investment dollars up to Nunavut. However, I heard from industry that there are many things wrong in Nunavut. Some of the issues identified include:

50 Charlie Evalik, “*Letter to Paul Mayer*”, December 28, 2006.

- The regulatory process is “*almost impossible to get through*”
- Nunavut has a reputation on Bay Street of “*being a very difficult place to do business*”
- The regulatory process is “*time consuming and expensive*”
- The regulatory process involves too many groups
- There is a duplication of work “*which no one wants to acknowledge*”
- The process does not have the timelines, certainty and transparency that industry wants
- *The Canadian Environment Assessment Act* (“CEAA”) is still used to review all projects, requiring signoff from various federal departments — “*an unnecessary and complicated step*”
- Widespread redundancy of information that must be provided to INAC, RIAs and IPGs
- Lack of thresholds for water use and waste disposal
- Basic lack of consistency between the standards being applied by technical advisors
- No consistency demonstrated for the time that it takes for an application to be approved and a license issued.
- Issuance of licenses being delayed because of lack of board quorum

The common theme running through all of these industry comments is that the current regulatory system in Nunavut is not creating a positive climate that encourages investment. Industry representatives are “*scared*” of the impact of devolution as they are aware of the many challenges that the GN has not been able to conquer and match since the territory was established and cannot see how it is possible for them to assume more responsibilities. One industry executive I spoke to did acknowledge that the NTI lands department has a good program and people who “*have their act together*” and that this was likely because they reached out to experienced administrators to establish their land administration system.

Given the social and economic challenges faced by Nunavut, industry feels that the mineral development of the territory is crucial, which is “*why fixing the regulatory process is so important.*” One exploration company executive likened the Nunavut regulatory framework to an orchestra: “*There are many musicians, — INAC, NTI, NIRB, NWB [Nunavut Water Board], GN, RIAs, CBCs [Community Beneficiary Committee], but there is no conductor making sure that they are all working together towards a common goal.*”

I also heard that the boards are inadequately staffed and do not have the ability to manage the regulatory process, and that the boards have no clear mandate and do not seem to understand where their jurisdiction begins or ends.

One cannot help but notice the similarity between the issues faced by industry in Nunavut and those described by the Auditor General in her April 2005 report on the development of resources in the NWT.⁵¹ The Auditor General noted that the NWT's investment climate was at risk because the regulatory system was uncertain, unstable and inefficient in crucial areas. She also observed that the NWT boards established to regulate the use of land and water lacked "*direction and guidance*," and that they were not responding adequately to industry.

There is no short-term solution to this problem. Canada and the NLCA parties will need to make a long-term investment to resolve the fundamental capacity issues of the IPGs — the parties must work together to find a way to improve the IPGs.

4.7.3 Funding IPGs

A number of people consulted during this mandate agreed that Nunavut's IPGs are insufficiently funded; with the current interest in Nunavut resource development that has greatly increased their workload. The Nunavut Implementation Panel ("NIP") started negotiations in July 2002 to update funding levels for the second implementation-planning period (2003-2013). The parties reached an impasse in May 2004 over differences in interpretations on how the NLCA should continue to be implemented. In June 2005, the parties to the NLCA agreed to a conciliation process to help resolve the impasse. Mr. Berger was appointed. He examined the issue concerning the appropriate IPG funding levels.⁵²

Based on Mr. Berger's intervention, in January 2006 the NIP recommended a \$2.2 million increase in the annual core IPG funding. The federal government has not yet provided this additional funding.

4.7.4 The Nunavut Resource Management Act Working Group

The federal government, in collaboration with the NTI, GN and IPGs, has been working on completing the development of federal legislation for Nunavut's IPGs. Two expected outcomes will be a streamlined version of the existing regulatory process and the clarification of the CEEA's role in the Nunavut environmental assessment process. The GN claims that it wants to reduce red tape in Nunavut as well as clarify and rationalize the development approval process.⁵³

To ensure a positive investment climate in Nunavut, it is essential that this process be successfully concluded. More needs to be done, however. More specifically, the Auditor General's recommendations regarding the NWT regulatory process and boards need to be implemented, as they also apply to the Nunavut situation.

51 Office of the Auditor General of Canada, Chapter 6 "*Indian and Northern Affairs Canada – Development of Non-Renewable Resources in the NWT*", April 2005.

52 Thomas R. Berger, "*Conciliator's Interim Report – Nunavut Land Claims Agreement Implementation Contract Negotiations for the Second Planning Period 2002-2013*", August 31, 2005.

53 *Supra*, note 36.

4.8 Oil and Gas

The inclusion of oil and gas in devolution negotiations is closely tied to the issue of seabed resources discussed earlier in Section 4.5 hereof.

4.8.1 The GN's Position

At a briefing, the GN estimated that a large proportion of the royalties from future Nunavut mining projects scheduled to be developed over the next ten years will only benefit the NTI, as the next five potential mines to come on stream will all be located on IOLs.⁵⁴ For this reason, securing jurisdiction over oil and gas reserves underlying the seabed of Nunavut's internal waters is of crucial importance to the GN.

As mentioned in Section 4.5 above, the GN affirmed that the devolution agreement would need to transfer legislated jurisdiction over the regulation of both onshore and offshore oil and gas activities, including the issuance of oil and gas rights, a tenure system, and royalties. In order to address capacity issues, the GN is prepared to consider contracting technical support services back to the NEB for a fixed period of time.

The GN expressed its conviction during briefings that devolution of the seabed resources to the GN would immediately unlock the rich potential that exists there. During briefings on what was then Nunavut's draft Mineral Exploration and Mining Strategy, the GN's Director of Mineral and Petroleum Resources Division explained that the Drake Point gas field on the northern tip of Melville Island in the Sverdrup Basin has a complicated ownership structure. There are, according to the GN, 18 earned (working) interest holders with 343 spatially separated and 341 stratigraphic sections. As well, there are many large unknown "carried" interests. These are governed by Significant Discovery Licenses ("SDL") under existing federal regulations.

Under these regulations, such license holders are able to hold on to their licenses indefinitely at no cost, which in the GN's view prevents these areas from being developed. The Minister has the authority to issue drill orders to the holders of these licenses, something that the GN believes would prompt market consolidations. The *2003 Nunavut Economic Development Strategy* sets an objective for the GN to issue drill orders for all existing SDLs by 2013 in order to prompt a resumption in oil and gas exploration and development activities in Nunavut.⁵⁵

54 See Robert McPherson, *New Owners in Their Own Lands – Minerals and Inuit Land Claims*, (University of Calgary Press, 2003) which outlines the land selection process and subsurface rights used by the Inuit during negotiations of the NLCA. The Inuit hired mineral specialists to aid them in selecting appropriate parcels to satisfy their need for immediate returns which would yield wealth and benefits.

55 Nunavut Economic Strategy, June 2003, Page 23.

4.8.2 The Federal Position

INAC officials expressed concerns with GN's suggested approach of issuing drill orders and feared that such actions might very well lead to litigation. From their point of view, the vast oil and gas resources of Nunavut remain undeveloped because of a variety of challenges, including the geographic challenge of developing offshore resources in the Arctic environment and the enormous capital cost required to tap them. There are, apparently, other very capital-intensive projects in other parts of the world that offer more immediate returns. For example, there are significantly larger reserves off the coast of Norway closer to market than Canada's high Arctic islands. Federal officials have indicated that industry has not taken up any of its annual offers to explore the Sverdrup Basin in recent years; they are of the view that, despite high oil prices, the timeline for significant exploration and development in Nunavut is more than ten years away.

The federal government's position has been that jurisdiction over offshore resources should remain federal. Canada recognizes that territories have interests in offshore oil and gas resources similar to the interests of coastal provinces, and it has an outstanding commitment with the Yukon Government to discuss some form of shared management of these resources. According to federal officials, before formal discussions can begin, Canada must adopt a national policy approach and principles to guide these discussions. In previous devolution negotiations, Canada agreed to discuss a shared management arrangement for offshore oil and gas in separate negotiations once an onshore land and resource management agreement is concluded. In the existing East Coast offshore accords, the question of jurisdiction was set aside in favour of shared arrangements with offshore boards.

4.9 Contaminated and Waste Sites

The management of contaminated sites is another issue to be dealt with during devolution negotiations. An entire chapter of the Yukon Devolution Agreement is devoted to the issue. It is estimated that the federal government has somewhere between 300 and 400 contaminated and waste sites in Nunavut that have hosted mining, mineral exploration and military activities (such as the Distant Early Warning ("DEW") line). INAC has identified approximately 330 contaminated sites for which it is responsible.⁵⁶ The contamination ranges from sites littered with metal debris and empty barrels, sites containing waste oil, and highly contaminated sites such as the significant PCB contamination on Resolution Island.

⁵⁶ Indian and Northern Affairs Canada, *"The Big Picture – Contaminated Sites in Nunavut"*, 2006.

4.9.1 The GN's Position

The GN insists that the devolution agreement must provide for Canada's continued responsibility and liability for contaminated and waste sites, including undiscovered sites, until such time as they are properly rehabilitated. The GN proposes that the administration and control of contaminated sites should be transferred to the GN based on the understanding that Canada will have agreed to rehabilitate the sites for which it is responsible according to the agreed schedule and up to the agreed standard. Once the site has been completely rehabilitated and monitored for the agreed period, the GN would release Canada of its responsibility for that site.⁵⁷

4.9.2 NTI's Position

NTI agrees that cleaning up contaminated sites in Nunavut is an important aspect of the devolution process. Site rehabilitation is seen by NTI as an economic development opportunity. A discussion paper provided by NTI states that the cleanup of environmental sites offers significant opportunities to generate capacity within the Inuit labour force and within Inuit businesses. *"It is essential, therefore, that the impacts and benefits of ... major cleanups be maximized for Inuit and for the Nunavut economy as a whole."*⁵⁸

One example cited in this regard is the rehabilitation of Resolution Island that was completed in 2005 under the Contribution Agreements between INAC and Qikiqtaaluk Corporation. This particular cleanup provided employment opportunities for residents of the closest communities (Iqaluit, Kimmirut and Pangnirtung) and hired over 85% Inuit employees. Over 25% of the time spent on site was dedicated to training. Many of the skills learned from this remediation were transferable to other sectors. This cleanup generated over \$12 million of business opportunities in Nunavut. Nine million dollars went to salaries and over one million dollars to training. NTI observed that, despite the success at Resolution Island, INAC has not been following the same process for subsequent remediation projects. INAC is using the Public Works and Government Services Canada ("PWGS") as its contracting agent. The PWGS follows a request for proposals procedure to procure general contractors for site cleanups. These proposals are assessed in terms of a complex point system, which is presumed to provide the *"best overall value to the Crown."*

Another example cited are the projects funded by the Department of National Defence ("DND") to clean up abandoned DEW line sites that have generated employment and training opportunities for over 100 Inuit over the past three years. NTI has asked INAC to enter into an agreement similar to the one it had with DND to decontaminate the DEW line sites in Nunavut. This agreement is seen as *"the high watermark"* of what can be achieved when parties work collaboratively.

57 Government of Nunavut, *"GN Approach to Contaminated Sites Issue in the Context of Devolution"*, January 29, 2007.

58 NTI, *"Discussion Paper – Contaminated Sites in Nunavut – Remediation of Abandoned Military and Other Contaminated Sites"*, March 17, 2007.

4.10 Participation of NTI at the Devolution Negotiation Table

NTI wields a unique blend of political and economic power in Nunavut. It represents the overwhelming majority of the territory's population. As a large (and only) landowner in Nunavut, NTI has a significant interest in the topic at hand.

The federal government has made it a practice in the past to include territorial Aboriginal organisations in devolution negotiations and to give them the necessary funding to ensure their effective participation. NTI was involved in the 2005 Nunavut exploratory devolution discussions, as well as in this scoping exercise.

NTI expects to be a full party to the negotiations. NTI is the recognized body that represents Inuit interests, as these were negotiated under the NLCA, which is protected under section 35 of the Constitution. A preamble of the NLCA outlines one of the objectives of the agreement as being to provide “*rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resource, including the offshore.*” According to NTI, this language foresees a continuing common law duty to consult with the Inuit and to allow them to “*participate*” in decision-making concerning the use of land and resources. Furthermore, paragraph 2.10.2 of the NLCA stipulates that Canada has a right to devolve or transfer powers or jurisdiction to the GN, “*provided that the devolution or transfer shall not abrogate or derogate from any rights of Inuit in the agreement.*” Thus, NTI is of the view that, where any Inuit rights stand to be affected, Canada has an obligation to consult them.

According to NTI, Canada established a “*legal*” precedent with respect to the consultation of Aboriginal groups during previous devolution negotiations. NTI wishes to be a full and equal party to the devolution negotiations. In order to perform this role effectively, it would like to reach an early agreement on an appropriate level of funding required for its participation.

No estimate has been provided since I was appointed Senior Ministerial Representative. It is likely, however, that NTI will review their proposal once the scope of the negotiation mandate is clear. In both the Yukon and NWT devolution negotiations, the cost of Aboriginal participation was shared between the federal and territorial governments. The federal government has not approached the GN about sharing the cost of NTI's participation.

4.10.1 Consultation Is Not a Veto

NTI has indicated that, in order to have successful devolution negotiations, it will have to be “*satisfied that steps have been taken to implement “in full” all of the NLCA responsibilities relevant to those matters under consideration for devolution.*”⁵⁹

⁵⁹ *Supra*, note 38.

For this reason, it may be necessary for Canada to clarify that, although NTI will be a party to devolution negotiations, it will not have a veto power and the federal government and the GN have the ability to conclude a bilateral agreement among them.

4.11 Negotiating a Protocol and Process

4.11.1 One Table

The GN and NTI recognize that INAC and the federal Department of Finance have their respective interests and roles in the Nunavut devolution. The GN has requested that the devolution discussions proceed at a single table in order to ensure that the final devolution package is “*coherent and balanced*”. The GN has also indicated that, if a two-table approach is adopted, there must be an understanding that they will need to be “*coordinated effectively*” if an agreement is to be reached. The GN “*strongly encourages*” the idea that the mandate of Canada’s Chief Negotiator include both financial components (NFBs and resource royalty sharing provisions) along with all other matters.

NTI, for its part, believes that the federal negotiator’s mandate should include the authority to negotiate financial issues, including the relationship between royalties and other revenues that will accrue to the GN as a result of devolution and TFF.

Both the Yukon and NWT devolution mandates stipulated that Canada’s chief federal negotiator had the power to negotiate all provisions of the transfer, save the NFB and resource royalty sharing provisions.

4.11.2 Negotiation Protocol

During the Yukon and NWT devolution negotiations, a great deal of time was spent trying to agree on a negotiating process. A federal official commented that the NWT Devolution Framework Agreement seems to have worked quite well as a guide to the negotiations because its terms were so thoroughly discussed and negotiated that they reflected all of the parties’ views once the agreement was finalized.

The GN and NTI have agreed on a draft negotiation protocol designed to “*get ahead of the curve*” and serve as a guide for negotiations once they begin. Much of the wording from the proposed protocol was taken from the NWT Devolution Framework Agreement. Once an agreement is reached on when devolution negotiations should start, the GN and NTI will formally present this draft protocol to Canada’s chief negotiator.

4.11.3 Timeline

The GN previously indicated that they wanted to reach a devolution agreement by December 2008. The draft protocol points to December 31, 2007 as the target date for an Agreement in Principle (“AIP”). It also indicates that, once the AIP is approved, the parties will have to negotiate in good faith and make best efforts to conclude a Final Devolution Agreement by June 30, 2010. The target date for bringing this agreement into force is April 1, 2011.

These target dates are very optimistic given the lead-time required to train employees in the professional categories that will be needed following devolution. It should be noted, however, that the “*Human Resources Need Analysis for Devolution*”, a report prepared by the GN, anticipates that the effective date for devolution will be 2012.⁶⁰

4.11.4 Interest-Based Negotiations

The GN and NTI have suggested that an interest-based collaborative approach to negotiations must be undertaken with respect to those issues over which Canada, the GN and NTI have a common interest. With this in mind, the GN has suggested that the parties begin with interest-based explorations of the jurisdictional aspects of devolution before moving on to positional bargaining on human resources, dollars and cents.

NTI believes that there is no fundamental reason why interest-based negotiations cannot be the cornerstone for all the issues, including human resources and dollars. It is of the view that a good interest-based discussion on those very subjects just might thwart potential deadlocks should the parties bring intractable positions to the table.

⁶⁰ *Supra*, note 12.

5. Need to Apply “Lessons Learned” From Yukon Devolution

In a 2003 report of the Auditor General, it was recommended that INAC should take stock of its management of the Yukon devolution exercise and apply the *lessons learned* to its upcoming devolution of responsibilities.⁶¹ In particular, it recommended that the federal government adopt a management framework to identify projects, develop timelines and milestones, and generally identify and lessen risks when implementing devolution transfer agreements.

The Yukon Report, referred to earlier in this report, provides a valuable reference for the Nunavut devolution process. It identifies things that worked well and things that could be improved in respect of the negotiation of the devolution agreement, its transition and implementation. The Yukon Report highlights the importance of properly assessing issues before the devolution negotiation process begins, both in terms of creating a climate of trust between the parties, and in terms of developing a clear understanding of the perceptions and expectations of the different parties. This scoping exercise and report should assist in these two goals, and will hopefully help the Minister establish a clear vision and certain specific objectives for the federal negotiation team.

5.1 Negotiating the Agreement

Some of the issues identified in the Yukon Report worked well, and should be applied to the Nunavut devolution negotiations:

- Positioning negotiations in the Yukon allowed work, largely dependent on the contribution of regional staff, to be organized between negotiations
- Taking fiscal arrangements off of the main negotiating table and entrusting them to the Department of Finance was seen as the proper approach.

The following suggestions were made to improve the process for future devolution negotiations:

- Provide adequate resources
- Need for better on-the-ground intelligence
- Developing and implementing a retention strategy for current employees.

⁶¹ *Supra*, note 1.

5.2 Transition and Implementation

The Yukon Report also made some suggestions with respect to the transition and implementation process after the devolution agreement is signed. Furthermore, the Auditor General described the management framework surrounding the key tasks for implementing the Yukon devolution transfer agreement as “*inadequate*”.⁶² The Auditor General suggested that a comprehensive management framework would make the process run more smoothly with less stress on the people involved.

⁶² *Supra*, note 1.

6. Conclusions and Recommendations

To conclude, I was engaged to, among other things:

- establish effective relationships with the GN and NTI in advance of the proposed negotiations;
- assess whether the necessary conditions are in place for successful devolution negotiations; and
- inform the development of federal government positions and strategies.

6.1 Good Relations

With respect to the first objective of this mandate, I believe that the process of consultation involved in identifying devolution issues has created positive interpersonal relationships with the chief negotiators of NTI and the GN. These will be valuable in the future negotiations.

6.2 Are the Right Conditions in Place?

The main question I have been asked advice on, however, is whether the right conditions are in place in Nunavut for successful devolution negotiations.

In light of the significant challenges identified in this report that the GN faces in assuming its current responsibilities, the easy answer would be no.

A simple answer, however, is not acceptable in the current context. In fact, the devolution train left the station in December 2004. The Government of Canada has issued repeated statements that it supports devolution. It has been a long-standing policy objective to implement devolution in the Northern territories.

Based on the Government of Canada commitments, the GN and NTI have prepared for devolution negotiations. Political expectations are very high. As described in this report, devolution has become an important political objective for both the GN and NTI. Many conditions are in place to begin devolution negotiations:

- There is one land claim agreement, one Aboriginal people and one settlement area under discussion; and
- both the GN and NTI have shown that they have properly analyzed the issues to be tackled during devolution negotiations.

6.3 Recommendations

In light of the above, the following is a list of the recommendations with respect to devolution negotiations that flow from this report:

- There is much to be said for just putting one foot in front of the other every day. I suggest that the GN and the federal government take one step at a time in the devolution of responsibilities. Given the enormous challenges faced by the GN in assuming its current responsibilities, I would recommend a phased approach to devolution.
- The NFB, to be agreed upon, will have to be “*broadly consistent*” and coherent with other Northern jurisdictions.
- As stated herein, if the human resource capacity issue cannot be satisfactorily dealt with, then the right conditions will not be in place to transfer federal responsibilities. Canada will need to work cooperatively with the GN and NTI to target existing and new programs that will develop the capacity and skills needed to employ Inuit for the technical, scientific and professional positions being devolved. Pre-employment training funds that target the positions that will be necessary after devolution in the resource management sector will be essential. An agreement will need to be reached in terms of timelines and benchmarks.
- It is essential that the gruelling and expensive regulatory system be improved and that there be sufficient funding for IPGs in order to foster a positive investment climate in Nunavut.
- It is recommended that NTI be a full participant at the negotiation table and that it be adequately funded to fulfill that role. Negotiations should be structured as bilateral whenever possible and multi-party only when necessary.
- A retention strategy for current INAC employees will need to be closely examined.
- The federal government should give some consideration to including funding for an advanced geoscience project in the devolution negotiation mandate. Away from the devolution table, some consideration should be given, on a case-by-case basis, to providing the GN with targeted infrastructure funding to address the challenges of accessing “*stranded*” resources in Nunavut.
- It will be necessary to have an effective communication plan, including for i) affected INAC employees, to ensure that as many of them as possible will agree to transfer to the GN; and ii) with industry, to ensure that they will continue to do business in Nunavut. It will be very important to maintain investors’ confidence as devolution negotiations proceed to ensure that industry remains interested in the economic development of Nunavut.

- Several aspects of the “lessons learned” from the Yukon Report and the Auditor General’s 2003 report on the Yukon devolution process should be applied to the Nunavut devolution negotiations, transition and implementation. Canada should ensure that it has a proper management framework in place following the execution of a devolution agreement that will identify projects, develop timelines and milestones and generally identify and lessen the risks associated with implementing the devolution transfer agreement.

Note to Reader

To consult the appendices identifying the persons consulted and the list of meetings held, please contact Indian and Northern Affairs Canada at 867.975.4500 or nuinfo@ainc-inac.gc.ca.

