

CLOSING THE CITIZENSHIP GAP IN CANADA'S NORTH: INDIGENOUS RIGHTS, ARCTIC SOVEREIGNTY, AND DEVOLUTION IN NUNAVUT

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Abstract

When Canada signed the Nunavut Land Claims Agreement in 1993, it committed to create a new territory, Nunavut, as an Inuit homeland in the Canadian Eastern Arctic. Parliament fulfilled this promise with the passage of the Nunavut Act, and the new territory came into existence on April 1, 1999.

Still, the Government of Nunavut remains a

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creature of statute and has only such powers as Parliament has devolved to it. To date, these devolved powers do not include jurisdiction over lands and resources. Nunavut is the only place in Canada where Canadian citizens may not elect a sub-national legislature empowered to make fundamental decisions about the land beneath their feet.

This Article explores the impact of this citizenship gap on indigenous rights in Nunavut and on Canada's security posture in the Arctic. As the sea ice melts and as much as a trillion dollars of oil and gas becomes profitably extractable, decisions about natural resources will become a focus not only of Canada's domestic politics, but also of its international engagement. With a comparatively weak military presence in the Arctic, Canadian sovereignty has been borne out primarily in the form of permanent settlement, and the Inuit have played the part of "human flagpoles" in federal Northern policy. This Article argues that devolution, as a means to Inuit self-government, must occur in tandem with assertions of Canadian sovereignty in the Far North.

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INTRODUCTION: WHO OWNS CANADA?

Who owns and who controls Canada's resource riches—the federal government or the governments of Canada's provinces, resource companies or local citizens? The question has polarized Canada's politics for longer than the country has existed. For indigenous peoples—and for Nunavut, the federal territory that is the Inuit homeland in the Canadian Eastern Arctic—it is anything but settled.

The struggle for jurisdiction over natural resources within the Canadian federation has been a long one. In 1905, when Prime Minister Wilfred Laurier created the provinces of Saskatchewan and Alberta from the prairie lands of the North West Territories, Canada retained control of their natural resources. It was not until 1930 that Prime Minister Mackenzie King devolved to the four Western provinces—Manitoba,³ Saskatchewan,⁴ Alberta,⁵ and British Columbia⁶—the same law-making powers over resources enjoyed by their sister provinces to the east.⁷

“Since [Manitoba Métis leader] Louis Riel first pushed for resource control [in the late nineteenth century] as the key to his community's destiny,” journalist Mary Janigan has argued, “the notion has been deeply embedded in the West's identity and pride.”⁸ The same can be said for the Far North. The Inuit inhabitants of Nunavut are now seeking a deal like the one that the Western provinces secured in 1930: devolution of jurisdiction over lands and resources—and a substantial share of resource revenues—from the federal Parliament to their territorial legislature. Nunavut's central, basic demand is

³ See Manitoba Natural Resources Act, S.C. 1930, c. 29 (Can.).

⁴ See Saskatchewan Natural Resources Act, S.C. 1930, c. 41 (Can.).

⁵ See Alberta Natural Resources Act, S.C. 1930, c. 3 (Can.).

⁶ See Railway Belt and Peace River Block Act, S.C. 1930, c. 37 (Can.).

⁷ See Constitution Act, 1930, 20 & 21 George V, c. 26 (U.K.).

⁸ Mary Janigan, *On the Rocky Road to a National Energy Strategy*, GLOBE & MAIL, Dec. 1, 2012, <http://www.theglobeandmail.com/commentary/on-the-rocky-road-to-a-national-energy-strategy/article5864015/>.

essentially the same as the one that shaped the story of the Canadian West: local control.

This Article argues that, without devolution, Nunavummiut⁹ are caught in a “citizenship gap”—the unequal allocation of legislative powers among the constituent members of the Canadian federation. This citizenship gap is not only problematic under both domestic and international law, but it may also weaken Canada’s geostrategic position in the circumpolar world. This Article explains how.

Part I describes the process of devolution to date, by which Canada’s federal government has transferred jurisdiction over lands and resources to new provinces—by constitutional amendment—and to new territories—by statute. It documents Nunavut’s failure to secure even a meaningful negotiation with the federal government during the entirety of the territory’s existence. Part II examines Nunavut’s territorial government through the prism of indigenous rights under Canadian and international law. It argues that devolution can achieve what the Inuit have sought for decades: meaningful self-government within the framework of Canadian federalism. Part III re-examines devolution from the international perspective and with respect to Canada’s Arctic sovereignty. It concludes that vindicating the indigenous rights of Nunavut’s Inuit inhabitants through devolution—and closing the citizenship gap in Canada’s North—is in Canada’s broader and long-term, strategic interest.

I. THE EVOLUTION OF DEVOLUTION: THE CITIZENSHIP GAP

Canada’s constitution divides law-making powers between the federal and provincial orders of government. Section 91 of the *Constitution Act, 1867* enumerates the powers of the federal government,¹⁰ while Section 92 describes the areas of provincial jurisdiction, including—in Sections 92(5) and 92A—natural resources.¹¹ But, unlike the ten southern provinces, Canada’s

⁹ “Nunavummiut” is the Inuktitut word that describes the inhabitants of Nunavut. See *Definition of Nunavummiut in English*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/Nunavummiut>.

¹⁰ Constitution Act, 1867, 30 & 31 Vict., c. 3, s. 91 (U.K.).

¹¹ Constitution Act, 1867, 30 & 31 Vict., c. 3, ss. 92(5) & 92A (U.K.).

three Northern territories have no constitutionally guaranteed legislative powers; instead, Yukon, the Northwest Territories, and Nunavut are all creatures of statute.¹² Since the late 1980s—and despite the failure of the 1987 Meech Lake Accord,¹³ which would have amended Canada's Constitution to give the existing provinces a veto over the admission of any new provinces—it has become uncontroversial among Northern leaders to suggest that provincehood is not in the cards for any of Canada's territories.¹⁴ For the foreseeable future, devolution of province-like (or “province lite”) powers may be all there is for Canada's Arctic and sub-Arctic territories.¹⁵ The constitutional trajectory traced by British Columbia, Alberta, Saskatchewan, and Manitoba in the early twentieth century is unlikely ever to be repeated. Instead, devolution is all there is.

In Yukon and the Northwest Territories, devolution is well underway. Under the *Yukon Northern Affairs Program Devolution Transfer Agreement* reached between the Yukon Territory and Canada in October 2001,¹⁶ the territorial government manages federal lands, which means that it can authorize the transfer of ownership of these lands to private hands, lease them, and license resource extraction on them.¹⁷ It can use and dispose of federal lands as though it were the owner. The Yukon Territory does not own the lands but, under federal legislation, it acts for the owner through lands and resource

¹² Kirk Cameron & Alastair Campbell, *The Devolution of Natural Resources and Nunavut's Constitutional Status*, 43 J. CAN. STUD. 198, 200 (200); see Yukon Act, S.C. 2002, c.7 (Can.); Nunavut Act, S.C. 1993, c. 28 (Can.); Northwest Territories Act, R.S.C. 1985, c. N-27 (Can.).

¹³ *1987 Constitutional Accord*, PRIVY COUNCIL OFFICE, <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=constitution&doc=meech-eng.htm> (last updated Apr. 26, 2010); see generally ANDREW COHEN, *A DEAL UNDONE: THE MAKING AND BREAKING OF THE MEECH LAKE ACCORD* (1990) (surveying the history of the Meech Lake negotiations and the subsequent failure of the ratification process).

¹⁴ Tony Penikett, *Destiny or Dream? Sharing Resources, Revenues and Political Power in Nunavut Devolution*, in POLAR LAW TEXTBOOK II, at 199, 200 (Natalia Loukacheva, ed., 2013).

¹⁵ See *id.*

¹⁶ Minister of Pub. Works & Gov't Servs. Can., Yukon Northern Affairs Program Devolution Transfer Agreement (2001), <https://www.aadnc-aandc.gc.ca/eng/1297283624739/1297283711723> (accessed July 10, 2013).

¹⁷ *Id.* arts. 1.25-1.26.

legislation of its own.¹⁸ The NWT Devolution Agreement-in-Principle, signed with Canada in 2011,¹⁹ provides for a similar set of territorial powers.

Yukon and NWT were and are not provinces, not even provinces with less than full provincial powers like Alberta and Saskatchewan were in 1905. After reaching their respective devolution deals with Ottawa, both territories remained territories, but now hold province-like jurisdiction over their own lands and resources. Only Nunavut is still out in the cold.

Nunavut is Canada's youngest territory, created by an Act of Parliament in 1999.²⁰ It is the result of the largest²¹ Aboriginal land claims settlement²² in Canadian history, reached between

¹⁸ E-mail from Piers McDonald to Tony Penikett, August 18, 2012, on file with author.

¹⁹ Northwest Territories Land and Resources Devolution Agreement (May 31, 2013), available at <http://devolution.gov.nt.ca/wp-content/uploads/2011/12/Final-DevolutionAgreement-May-31.pdf> (accessed July 10, 2013).

²⁰ Nunavut Act, S.C. 1993, c. 28 (Can.).

²¹ See Michael Mifflin, *Canada's Arctic Sovereignty and Nunavut's Place in the Federation*, POLICY OPTIONS, July/August 2008, at 86, <http://archive.irpp.org/po/archive/jul08/mifflin.pdf>.

²² Twenty-three comprehensive land claim agreements are now in force across Canada. See *Government of Canada Progress Report (2006-2012), With Strong Resolve: Advancing Our Relationship with First Nations Peoples and Communities*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA (2012), available at <http://www.aadnc-aandc.gc.ca/eng/1327173357543/1327173403786> (last updated Jan. 22, 2012). The modern instruments, together with two self-government agreements, cover some forty percent of Canada's total landmass. *Id.* The treaties transfer title to huge tracts of land and re-establish aboriginal governance of those treaty lands. *Comprehensive Land Claim Agreements (CLCAs)*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, <http://www.aadnc-aandc.gc.ca/eng/1100100027668/1100100027669> (last modified Sept. 15, 2010). Unlike the nineteenth-century treaties that consigned First Nations to tiny reserves on marginal land, these northern treaties operate on a larger geographic scale and have broader political scope; the Yukon treaty, for example, provides 41,000 square kilometres to seven thousand Dene and Tlingit, more land than is covered by all the Indian reservations in all of southern Canada. See *Umbrella Final Agreement Between The Government Of Canada, The Council For Yukon Indians and The Government Of The Yukon* (2003), available at <http://www.aadnc-aandc.gc.ca/eng/1297278586814/1297278924701> (last updated Feb. 9, 2011).

Canada and the Inuit²³ of the Eastern Arctic in 1993.²⁴ The *Nunavut Land Claims Agreement (NLCA)*²⁵ made the Inuit there the largest private landowners in the world, with collective title to 350,000 square kilometres.²⁶

That treaty also created the Nunavut territory,²⁷ a new jurisdiction in which the Inuit constitute more than eighty percent of the population.²⁸ However, even after the 1993 NLCA and the creation of Nunavut in 1999, Ottawa still retains legislative jurisdiction over the territory's lands and resources. As energy developments and climate change both affect the Arctic environment, uncertainty about the future of Nunavut continues to grow.

As Arctic residents for thousands of years, the Inuit now see Nunavut devolution as the third and next step, after treaty agreement and territorial status, in their journey towards

²³ The Inuit, formerly known as Eskimos, live in four countries: Russia, the United States, Greenland, and Canada. See INUIT CIRCUMPOLAR COUNCIL (CANADA), <http://www.inuitcircumpolar.com/index.php?Lang=En&ID=1>. In Canada, the Inuit achieved land claims settlements in Northern Quebec in 1975, the Western Arctic in 1984, Labrador—also known as Nunatsiuvut—in 2004, and Nunavik—in Northern Quebec—in 2006. See James Bay and Northern Quebec Agreement (Nov. 11, 1975), available at <http://www.gcc.ca/pdf/LEG000000006.pdf> (accessed July 10, 2013); The Western Arctic Claim Inuvialuit Final Agreement, available at http://www.inuvialuitland.com/resources/Inuvialuit_Final_Agreement.pdf (accessed July 10, 2013); Labrador Inuit Land Claims Agreement, available at http://www.exec.gov.nl.ca/exec/igas/land_claims/January212005AgreementComplete.pdf (accessed July 10, 2013); Nunavik Inuit Land Claims Agreement, available at http://www.nonstatusindian.com/docs/selfgovern/Nunavik_Inuit_LandClaim.pdf (accessed July 10, 2013).

²⁴ See Mifflin, *supra* note 21, at 86.

²⁵ See Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (May 25, 1993), available at http://www.collectionscanada.gc.ca/webarchives/20071124140800/http://www.ainc-inac.gc.ca/pr/agr/pdf/nunav_e.pdf (accessed June 27, 2013) [hereinafter NLCA].

²⁶ See Penikett, *supra* note 14, at 201.

²⁷ Nunavut was carved out of the eastern Northwest Territories in 1999, pursuant to Article 4 of the NLCA. NLCA, *supra* note 25, art. 4.

²⁸ *Nunavut, Canada's Third Territory 'North of 60,'* ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, <http://www.aadnc-aandc.gc.ca/eng/1303138100962/1303138315347> (last updated Oct. 10, 2012).

autonomy within Canada.²⁹ Until devolution is achieved, Nunavut will remain the only Canadian jurisdiction without legislative control of its own resource base—the only place where Canadian citizens do not elect a local legislature that makes decisions about the land beneath their feet. Devolution would close this citizenship gap at last.

Prime Minister Paul Martin promised on December 14, 2004 to start devolution negotiations with Nunavut. Based on this promise, the Government of Nunavut's Cabinet approved a devolution negotiation mandate for a three-cornered negotiation between itself, Canada, and Nunavut Tunngavik Incorporated (NTI), the Inuit political body that is responsible for implementing the NLCA on behalf of its beneficiaries. In a 2007 letter, the special representative of the federal Minister of Indian Affairs and Northern Development recommended that talks begin by agreeing on a devolution negotiations protocol,³⁰ and the *Nunavut Lands and Resources Devolution Negotiation Protocol* was concluded the following year.³¹ The Protocol stipulates that the parties will negotiate an Agreement-in-Principle for the devolution of jurisdiction over lands and minerals, and also includes a firm commitment to start second-stage negotiations for an integrated onshore and seabed oil and gas management regime.³²

²⁹ See Eva Ariak, *The Next Step in Nunavut's Journey*, NUNATSIAQ NEWS, Nov. 8, 2010, http://www.nunatsiaqonline.ca/stories/article/98789_the_next_step_in_nunavut_s_journey/.

³⁰ PAUL MAYER, MAYER REPORT ON NUNAVUT DEVOLUTION (2007), available at http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-NTH/STAGING/texte-text/dev_mr_1357230369296_eng.pdf.

³¹ Lands and Resources Devolution Negotiation Protocol, available at <http://www.tunngavik.com/documents/publications/Devolution%20Protocol%20Eng%205%20Sept%202008.pdf> (last modified Sept. 8, 2008). Initially, Ottawa wanted simply to transfer the administration of its Northern Affairs Program and federal lands in Nunavut to the territorial government. See MAYER, *supra* note 30, at 40. The Government of Nunavut was more interested in jurisdiction over both land and seabed resources in the territory. See Penikett, *supra* note 14, at 202. The protocol eventually sought to combine the negotiation of these two objectives. *Id.*

³² The Protocol furthers both the territory's objectives and those of the federal government; the territory seeks the devolution of jurisdiction—that is, province-like powers—over its lands and waters, while the federal government

The Protocol's promise has, however, gone unfulfilled. In the five years since the Protocol was concluded, the federal government has engaged in no serious negotiations toward sharing jurisdiction or resource revenues; a federal negotiator appointed on May 18, 2012 is instructed merely "to engage key stakeholders on their views with respect to devolution to identify the next steps required to advance negotiations and to examine how land and resource management capacity can be improved in Nunavut."³³ Canada questions Nunavut's capacity to manage its current responsibilities, much less administer the territory's lands and resources. On January 27, 2011, the Minister of Indian and Northern Affairs went so far as to tell reporters that Nunavut and its population were "not at the stage of readiness" to assume responsibility for managing their lands.³⁴ After decades of federal control—during which Ottawa neither supported nor encouraged the training of any Inuit exploration geologists, mining engineers, or chartered accountants—federal officials now point to the dearth of Inuit exploration geologists, mining engineers, and chartered accountants as a reason not to trust

has been primarily concerned, instead, with building the territorial government's administrative capacity. *Id.* Nunavut's position is rooted in indigenous history. In summer and winter for thousands of years, the Inuit fished and hunted on the lands and waters around their Arctic homelands—and also lived on the sea ice. Rick Riewe, *Inuit Use of the Sea Ice*, 23 ARCTIC & ALPINE RESEARCH 3, 3 (1991). As a result, today, all but one of Nunavut's communities are coastal settlements—all of which have a vital interest in ice. *Id.* Nunavut's first premier, Paul Okalik, insisted repeatedly that devolution negotiations must include not only topics such as net economic and fiscal benefits and trained staff, but also jurisdiction over Nunavut's internal waters, on which the Inuit historically fished, hunted, and lived. See Jim Bell, *Okalik: Devolution Must Include Internal Waters*, NUNATSIAQ NEWS, Dec. 22, 2006, http://www.nunatsiaqonline.ca/archives/61222/news/nunavut/61222_05.html. However, Premier Okalik conceded that, if Ottawa were serious about negotiating jurisdiction, the more complicated question of seabed resources or "internal waters" could be deferred to a later phase of the negotiations. *Id.*

³³ Press Release, Aboriginal Affairs and Northern Development Canada, Minister Duncan Appoints Chief Federal Negotiator for Nunavut Devolution (May 18, 2012), available at <http://www.aadnc-aandc.gc.ca/eng/1337345570394/1337345596592>.

³⁴ *Nunavut Premier Wants Devolution Talks*, CBC NEWS (Jan. 27, 2011, 5:40PM), <http://www.cbc.ca/news/canada/north/story/2011/01/27/nunavut-devolution-nwt-eva-aariak.html>.

Nunavut's government with the jurisdiction that it seeks.³⁵ This is despite Yukon's experience; in that territory's devolution deal, the territorial government assumed jurisdiction over oil and gas developments, then contracted the administration of that jurisdiction back to the federal government's National Energy Board.³⁶ Jurisdiction formally changed hands, in other words, but in a manner that ensured a smooth transition to local control, and this policy innovation has given Yukon the time it needs to build administrative capacity while also exercising jurisdiction in strategically vital fields.³⁷ Nunavut's negotiators have suggested similar arrangements, as yet to no avail.³⁸

This Article argues that, in the context of Canadian and international law, the federal government's concerns about "capacity" should not ultimately be dispositive. The status quo—the citizenship gap—is undeniably unequal; Canadian citizens have the democratic power to choose provincial or territorial representatives who make decisions about the management of the lands and resources beneath their feet in every jurisdiction—with one exception. Nunavut's lesser status within the Canadian federal system raises basic questions of equality and rights that only devolution can resolve. Non-devolution also complicates Canada's claims to Arctic sovereignty, even as the region's geostrategic significance skyrockets. The rest of this Article lays out the argument for devolution from the point of view of Canadian and international law.

II. DEVOLUTION AND INDIGENOUS RIGHTS

A. *Inuit Self-Government Through the Government of Nunavut*

Nunavut's creation in 1999 came after decades of activism and negotiation by Inuit leaders. The Inuit Tapirisat of Canada (ITC) had been asserting Inuit claims in the Canadian Eastern

³⁵ See MAYER, *supra* note 30, at 30.

³⁶ Penikett, *supra* note 14, at 205.

³⁷ *Id.*

³⁸ MAYER, *supra* note 30, at 30-31.

Arctic since the early 1970s.³⁹ In the same period, Inuit and Dene leaders across Canada's North began to speak in the language of self-determination. As a group of territorial councilors—as the Northwest Territories' Members of the Legislative Assembly (MLAs) were then called—wrote in *Nunatsiaq News*⁴⁰ in 1975:

[T]he Inuit, the Dene, Indians and Metis, have the right to political self-determination. This is the crux of the matter. . . . This claim for equality in political self-determination is based firmly on the indisputable fact that the Inuit and the Dene are the aboriginals—the first citizens of the land they claim as their homeland. . . . We want to hear the Minister of Indian and Northern Affairs . . . say categorically: “We hold it as a matter of principle that the Inuit and Dene people of the Northwest Territories have the right, within Canada's constitution, to political self-determination within their homelands.”⁴¹

In 1977, ITC published *Speaking for the First Citizens of the Canadian Arctic*, which called explicitly for self-government.⁴² “We want the opportunity to run our own affairs,” the document states.⁴³ “We want to cooperate with Canada as partners in Confederation. We are not opposed to development. We are realistic enough to know that some development is inevitable. But we want to run our own affairs, and we seek guarantees that our land will not be destroyed.”⁴⁴ Decades before the NLCA was concluded and Nunavut was created, decision-making power over land was at the heart of Inuit claims. Here, indigenous leaders echoed Quebec's nationalists, who nationalized many of

³⁹ See Jessica Shadian, *Remaking Arctic Governance: The Construction of an Arctic Inuit Polity*, 42 POLAR RECORD 249, 252 (2006).

⁴⁰ *Nunatsiaq News* is a weekly newspaper published in Iqaluit, which became Nunavut's capital when the territory was created in 1999.

⁴¹ Ludy Pudluk et al., *Statement: “Political Development in the North,”* NUNATSIAQ NEWS, Oct. 22, 1975, available at http://www.nunatsiaqonline.ca/archives/april0199/nvt90401_03.html.

⁴² INUIT TAPIRISAT OF CANADA, *SPEAKING FOR THE FIRST CITIZENS OF THE CANADIAN ARCTIC* (1977).

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 7.

that province's hydroelectric resources during the "Quiet Revolution" of the 1960s.⁴⁵ Premier Jean Lesage made that pledge the centerpiece of his 1962 re-election campaign, during which his party's slogan was "*maitres chez nous*," masters of our own house.⁴⁶ As the five territorial councilors wrote in *Nunatsiaq News*, fifteen years later, theirs was "essentially the same claim French-speaking Canadians make for themselves in Quebec."⁴⁷ The Inuit intended to become *maitres chez nous*.⁴⁸

Yet, when the NLCA and the accompanying *Nunavut Political Accord*⁴⁹ were finally concluded, the self-government and self-determination rhetoric of 1970s Inuit political activism was excluded.⁵⁰ The *Accord*'s preamble does begin with a simple statement of purpose that anchors Nunavut in the indigenous claims of decades past: "[T]he creation of a new Nunavut Territory with its own government is a fundamental objective of the Inuit of Nunavut," it declares.⁵¹ Still, the federal government has left little room for interpretation. As Jane Stewart, then the Minister of Indian Affairs and Northern Development, told the House of Commons in 1998:

[W]e are not talking about self-government for the Inuit people. We are talking about building a public government that will represent all who live in the eastern Arctic, in the territory of Nunavut. With this public government, we will have a structure that better represents the Inuit people who make up 85% of the population but which, in addition, is

⁴⁵ See John Parisella, *Robert Bourassa: Vision and Resilience*, POL'Y OPTIONS, June/July 2012, at 1.

⁴⁶ See David Gagnon, *Un slogan, et tout devient possible*, 153 QUÉBEC FRANÇAIS 58, 58 (2009).

⁴⁷ Pudluk et al., *supra* note 41.

⁴⁸ Grammatically, this should be "*maitres chez eux*," but you take our point.

⁴⁹ Nunavut Political Accord, Oct. 30, 1992, *available at* <http://www.tunnngavik.com/wp-content/uploads/2011/01/nunavut-political-accord-1992.pdf> [hereinafter NPA].

⁵⁰ Alisa Henderson, *Self-Government in Nunavut*, in ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES 230 (Yale D. Belanger, ed., 2008).

⁵¹ NPA, *supra* note 49, pmb1.

representative of those other Canadians who live in the territory.⁵²

In negotiating the NLCA, the Inuit opted for a so-called public form of government,⁵³ rather than for the kind of Aboriginal self-government that the Nisga'a of northern British Columbia achieved in their treaty with Canada and British Columbia six years later, in 1999.⁵⁴ As a consequence, the Government of Nunavut is not constituted as an *Aboriginal* government, but rather as a *territorial* government, elected by all Canadian citizens who reside in Nunavut, be they Inuit or not.⁵⁵

This distinction is crucial, but it is also where form and substance begin to diverge. Nunavut's territorial government has widely been characterized—including by the federal government⁵⁶—as “de facto” self-government.⁵⁷ The overwhelming majority of Nunavummiut are Inuit,⁵⁸ and the *Nunavut Act*,⁵⁹ by which Parliament created the territory, explicitly contemplates its indigenous character.⁶⁰ And Nunavut

⁵² Hon. Jane Stewart, Minister of Indian Affairs and N. Dev., Remarks to the House of Commons, 36th Parl., 1st Sess., (Apr. 20, 1998).

⁵³ NATALIA LOUKACHEVA, *THE ARCTIC PROMISE: LEGAL AND POLITICAL AUTONOMY OF GREENLAND AND NUNAVUT* 49 (2007).

⁵⁴ Nisga'a Final Agreement, Apr. 27, 1999, available at <http://www.nkn.ca/files/u28/nis-eng.pdf> (last visited Sept. 13, 2013).

⁵⁵ KIM VAN DAM, *A PLACE CALLED NUNAVUT: MULTIPLE IDENTITIES FOR A NEW REGION* 69 (2008).

⁵⁶ See André Légaré, *An Assessment of Recent Political Development in Nunavut: The Challenges and Dilemmas of Inuit Self-Government*, 18 CAN. J. NATIVE STUD. 271, 289 (1996).

⁵⁷ LOUKACHEVA, *supra* note 53, at 49-50; see also Henderson, *supra* note 50, at 232.

⁵⁸ See *Nunavut Population Estimates by Inuit and Non-Inuit, Region and Community, 2006 to 2012*, Table in *Population Estimates*, NUNAVUT BUREAU OF STATISTICS (MAR. 18, 2013), <http://www.stats.gov.nu.ca/en/Population%20estimate.aspx>.

⁵⁹ Nunavut Act, S.C. 1998, c. 28 (Can.).

⁶⁰ See, e.g., Nunavut Act, S.C. 1998, c. 28, § 23(1)(n) (conferring on the Nunavut legislature the jurisdiction over “the preservation, use and promotion of the Inuktitut language.”). *Id.* at § 24. “The Legislature may not make laws under section 23 that restrict or prohibit Indians or Inuit from hunting, on unoccupied Crown lands, for food game other than game declared by order of the Governor in Council to be game in danger of becoming extinct.” *Id.* at § 25. “[T]he Legislature may make laws under any other provision of this Act for the

owes its very existence to the NLCA,⁶¹ which was the basis for—and enacted alongside⁶²—the *Nunavut Act*, and which is an agreement between Canada’s Inuit people and the Crown. In the words of Nunavut Premier Eva Aariak:

When pursuing greater control over our affairs, Inuit in what is now Nunavut opted for a public government. *All* citizens in the territory—regardless of ethnicity—participate in elections. This does not prevent us from seeking a government that embodies the knowledge and values of our Inuit majority. Indeed, the Government of Nunavut has adopted . . . Inuit principles that are meant to inform its operations and its relations with the public.⁶³

The Inuit character of—and imprint on—the territory’s organic documents is undeniable. To mention just a few examples: the NLCA guarantees full Inuit participation in public hearings of the Nunavut Wildlife Management Board.⁶⁴ It protects Inuit rights to harvest.⁶⁵ It provides for government

purpose of implementing the land claims agreement entered into by Her Majesty in right of Canada and the Inuit on May 25, 1993 . . .” *Id.* at § 51(1). “The Governor in Council may make regulations for the protection, care and preservation of sites, works, objects and specimens in Nunavut of palaeontological, archaeological, ethnological or historical importance.” *Id.* at § 5.

⁶¹ NLCA *supra* note 25.

⁶² Nunavut Land Claims Agreement Act, S.C. 1993, c. 29 (Can.), available at <http://laws-lois.justice.gc.ca/PDF/N-28.7.pdf>.

⁶³ Eva Aariak, Premier of Nunavut, Speech at the Seventh Annual Symons Lecture on the State of the Confederation (Nov. 3, 2009), available at <http://www.premier.gov.nu.ca/apps/News/dspNews.aspx?id=41> (emphasis in original).

⁶⁴ NLCA, *supra* note 25, art. 5.2.28. “Any representative or agent of the Government of Canada or Territorial Government, any Inuk . . . shall be accorded the status of full party at a public hearing . . .” *Id.*

⁶⁵ *Id.* art. 5.6.1. “Where a total allowable harvest for a stock or population of wildlife has not been established by the [Nunavut Wildlife Management Board] . . . , an Inuk shall have the right to harvest that stock or population in the Nunavut Settlement Area up to the full level of his or her economic, social, and cultural needs . . .” *Id.* “[T]he following persons . . . may harvest furbearers in the Nunavut Settlement Area, namely: (a) an Inuk . . .” *Id.* art. 5.6.13. “[A] General Hunting Licence held by a person who is not an

communications in Inuktitut,⁶⁶ and the official recognition of Inuit history.⁶⁷ It guarantees Inuit employment in government,⁶⁸ and it governs the process by which Inuit membership is defined and administered.⁶⁹ Most notably, the NLCA declares itself to be “a land claims agreement within the meaning of Section 35 of the *Constitution Act, 1982*.”⁷⁰ As Member of Parliament (MP) Jack Anawak, later one of Nunavut’s first territorial legislators, told the federal House of Commons in 1996: “[T]here are around 20,000 people in Nunavut. . . . [T]hose 20,000 people can record their history back thousands of years. They have occupied that land for at least 4,000 years.”⁷¹ Anawak also informed the House—in Inuktitut, no less—that, “[n]o piece of legislation can take away the Inuit way of life. . . . That way of life is protected in the Nunavut Land Claims Agreement and in the Constitution of Canada.”⁷² Non-Inuit MPs have been even more explicit: “We

Inuk is deemed to be a personal licence only, and is neither transferable nor heritable.” *Id.* art. 5.6.15. “Harvesting by a person *other than an Inuk* shall be subject to this Article and all laws of general application.” (emphasis added). *Id.* art. 5.6.37. “No by-law . . . shall unreasonably prevent the individual Inuk from harvesting for the purpose of meeting the consumption needs of himself or herself and his or her dependents.” *Id.* art. 5.7.11. “[A]n Inuk with proper identification may harvest up to his or her adjusted basic needs level without any form of licence or permit and without imposition of any form of tax or fee.” *Id.* art. 5.7.26. “An Inuk shall have the right to remove up to 50 cubic yards per year of carving stone from Crown lands without a permit” *Id.* art. 19.9.4.

⁶⁶ *Id.* arts. 8.4.16, 10.6.1(g), 11.4.15, 12.2.26, 13.3.11-12, 21.8.8, 23.4.2(d)(ii), 35.6.4, 36.2.12.

⁶⁷ *Id.* art 8.4.18.

⁶⁸ *Id.* art 23.4.1-4.

⁶⁹ *Id.* art. 35.

⁷⁰ *Id.* art 2.2.1. Section 35 of the *Constitution Act, 1982* declares that, “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; see generally THOMAS ISAAC, *ABORIGINAL LAW: COMMENTARY & ANALYSIS* 19-24 (2012) (describing Section 35 and its application).

⁷¹ Remarks by Jack Anawak, MP for Nunatsiak, to the House of Commons, 35th Parl., 2nd Sess., Oct. 29, 1996, 92 DEBATES 5868, available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=35&Ses=2&DocId=2332630#5868>.

⁷² Remarks by Jack Anawak, MP for Nunatsiak, to the House of Commons, 35th Parl., 1st Sess., June 13, 1995, 217 DEBATES 13700, available at

have just established Nunavut within Canada, an Inuit territory,” MP John Finlay declared in 2000.⁷³ In the spring of 2013, Western Arctic MP Denis Bevington described Nunavut Tunngavik Inc., the entity that represents the NLCA’s Inuit beneficiaries, as “the land claims group that worked so hard to establish its homeland in Nunavut.”⁷⁴ When Terry Audla, the new president of Inuit Tapiriit Kanatami, Canada’s national Inuit organization, told a House of Commons committee in October 2012 that Nunavut was “the Inuit homeland in Canada,”⁷⁵ surely no one batted an eye. As Inuit leader John Amagoalik announced after the NLCA’s conclusion: “No other land claim has involved creating a new territory with our own government. It is a victory. We’ve achieved what other aboriginal people can only dream about.”⁷⁶

The operation of Nunavut’s territorial government itself defies a crisp distinction between indigenous and non-indigenous. Though it is organized in the Westminster tradition,

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=35&Ses=1&DocId=2332474#13700>.

⁷³ Remarks by John Finlay, MP for Oxford, to the House of Commons, 36th Parl., 2nd Sess., Mar. 13, 2000, 63 DEBATES 1645, *available at* <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=36&Ses=2&DocId=2332187#LINK249>.

⁷⁴ Remarks by Dennis Bevington, MP for Western Arctic, to the House of Commons, 41st Parl., 1st Sess., Mar. 4, 2013, 218 DEBATES 1225, *available at* <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=6017925#Int-7913404>.

⁷⁵ Statement by Terry Audla, President, Inuit Tapiriit Kanatami, to the House of Commons Finance Committee, 41st Parl., 1st Sess., Oct. 29, 2012, 84 EVIDENCE 1720, *available at* <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5797712&Language=E&Mode=1&Parl=41&Ses=1#Int-7747698>.

⁷⁶ Alexandra Kersey, *The Nunavut Agreement: A Model for Preserving Indigenous Rights*, 11 ARIZ. J. INT’L & COMP. L. 429, 429 (1994) (quoting Trish Crawford, *The Year of the Indian*, TORONTO STAR, Apr. 18, 1993, at B1); *see also* Jack Hicks & Graham White, *Nunavut: Inuit Self-Determination Through a Land Claim and Public Government?*, in NUNAVUT: INUIT REGAIN CONTROL OF THEIR LANDS AND THEIR LIVES 30 (Jens Dahl et al., eds., 2000) (“Roughly 85 per cent of Nunavut’s population are Inuit, so that although it has a ‘public government’—in which all residents, Inuit and non-Inuit, can participate—Nunavut is primarily about Inuit needs and Inuit approaches to governance. . . . Nunavut differs fundamentally from other Canadian provinces and territories.”).

it also strives to be characteristically Inuit in its operation. There are no political parties.⁷⁷ The legislature operates by consensus.⁷⁸ Inuit legal procedures figure into the functioning of the territorial executive.⁷⁹ The legislative chamber itself, in Iqaluit, is festooned with Inuit signs and symbols.⁸⁰ Though, pursuant to the *Nunavut Act* and Section 32 of the *Canadian Charter of Rights and Freedoms*,⁸¹ the *Charter* applies to Nunavut, the territory's *Human Rights Act*,⁸² adopted in 2003, begins with an endorsement of Inuit culture and values.⁸³ Even the Nunavut Court of Justice—a conspicuously colonial institution, staffed entirely by non-Inuit judges⁸⁴—has adopted the practice of having its clerks (and some judges) wear sealskin vests and robes. The Government of Nunavut is engaged in a constant effort better to indigenize its own institutions, from preferential public service hiring policies, to legislation to protect Inuit language, to initiatives to integrate *Inuit Qaujimjatuqangit*—traditional knowledge, thinking, and practice—into the Government's relationship with Nunavummiut.⁸⁵ Membership in the polity is also harder to earn in Nunavut than anywhere else in Canada; unlike other Canadian jurisdictions, where six months' residency is sufficient to vest a citizen with full rights of political

⁷⁷ JOHN BORROWS, CANADA'S INDIGENOUS CONSTITUTION 103 (2010).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See LEGISLATIVE ASSEMBLY OF NUNAVUT, <http://www.assembly.nu.ca/> (last visited Aug. 24, 2013).

⁸¹ The *Charter*, which was enacted as Part I of the *Constitution Act, 1982*, is Canada's bill of rights. See *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 1-34.

⁸² Human Rights Act, S.Nu. 2003, c. 12.

⁸³ *Id.* at pmb1.; see also Bill Rafoss, *First Nations and the Charter of Rights*, in MOVING TOWARD JUSTICE: LEGAL TRADITIONS AND ABORIGINAL JUSTICE 198, 203 (John D. Whyte ed., 2008) (discussing the same).

⁸⁴ See *Meet the Judges*, NUNAVUT COURT OF JUSTICE (Feb. 21, 2013), <http://www.nucj.ca/judges.htm>.

⁸⁵ Henderson, *supra* note 50, at 237; see also BORROWS, *supra* note 77, at 103 ("Today, the Nunavut territorial government is one of the most important institutions implementing Inuit legal traditions in Canada. The government has taken great guidance from *Inuit Qaujimjatuqangit* to structure its legislative and administrative agenda and actions.").

membership, Nunavut requires a full year of residency before extending the franchise.⁸⁶

It is impossible, in other words, to understand Nunavut's government without reference to Inuit self-government. The logic of the NLCA—and of Nunavut's creation—can therefore be understood to lead inexorably towards devolution. Kirk Cameron and Alastair Campbell state the argument succinctly:

[T]he vision underlying the land claim . . . can only be fully realized following the transfer of jurisdiction for land and resource administration and control to the territory. Without devolution, self-sufficiency and the pride that comes with that cannot be pursued. Without devolution, the pace and direction of development remains significantly tied to a distant federal administration operating on the basis of national considerations.⁸⁷

Yet, perhaps the most convincing evidence to support this proposition is contained within the NLCA itself. In the event that the Inuit of Nunavut ever cease to comprise a majority of the territory's inhabitants, they retain the right to seek formal Aboriginal self-government under Section 35 of the *Constitution Act, 1982*.⁸⁸ Until they do so, Nunavut's government—though formally “public” and not “ethnic”—will continue to serve the purpose of Inuit self-government.

Nunavut's territorial government is the living embodiment of the Inuit right to self-government under Canadian and international law. This right survives the NLCA; though the NLCA states that the Inuit have “cede[d], release[d], and surrender[ed] all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada,”⁸⁹ this release does not apply to self-government rights, since those rights attach to the Inuit

⁸⁶ J.R. MILLER, *LETHAL LEGACY: CURRENT NATIVE CONTROVERSIES IN CANADA* 272 (2004).

⁸⁷ Cameron & Campbell, *supra* note 12, at 211.

⁸⁸ See LOUKACHEVA, *supra* note 53, at 49.

⁸⁹ NLCA, *supra* note 25, art. 2.7.1(a).

themselves, not to the lands covered by the NLCA.⁹⁰ They are not relinquished thereunder.⁹¹ Ottawa has implicitly, if indirectly, conceded as much; two years after the NLCA was finalized, the federal government adopted its 1995 “Inherent Right Policy”:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. . . . Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.⁹²

The Supreme Court of Canada has also recognized that, though the Crown is ultimately sovereign, Aboriginal peoples enjoy a limited right to self-government under Canada’s Constitution.⁹³ This right survives notwithstanding the “cede, release, and surrender” language in the NLCA, since that waiver applies only to “claims, rights, title and interests . . . *in and to lands and waters*.”⁹⁴ Under Canadian law, Aboriginal rights—including the right to self-government—are not coterminous with Aboriginal title.⁹⁵ The Supreme Court of Canada has held,

⁹⁰ See Légaré, *supra* note 56, at 289.

⁹¹ *Id.*

⁹² *The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, ABORIGINAL AFF. & N. DEV. CAN., <https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844> (last modified Sept. 15, 2010).

⁹³ See generally *R. v. Pamajewon*, [1996] 2 S.C.R. 821 (Can.).

⁹⁴ NLCA, *supra* note 25, art. 2.7.1(a) (emphasis added).

⁹⁵ As the Supreme Court of Canada held in *R. v. Van der Peet*, “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.” *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 509 (Can.). Aboriginal title, by contrast, was determined in *Delgamuukw v. British Columbia* to be “a species of aboriginal right recognized and affirmed by s. 35(1) [that] is distinct from other aboriginal rights because it arises where the connection of a group with a

for example, that though provinces may hold title in and to “[a]ll [l]ands, [m]ines, [m]inerals, and [r]oyalties,”⁹⁶ that *title* is nonetheless subject to Aboriginal *rights* thereon.⁹⁷

This is distinct from the approach taken in U.S. law, which does not distinguish Aboriginal rights and title as clearly as Canadian law does. In the United States, indigenous peoples may claim precious few indigenous rights where they do not hold title.⁹⁸ Though the U.S. Supreme Court, in its 1823 decision in *Johnson v. M’Intosh*,⁹⁹ held that title granted by colonial powers is nonetheless subject to an “Indian right of occupancy,”¹⁰⁰ which is “as sacred as the fee-simple of the whites,”¹⁰¹ the Court has applied this rule narrowly, while recognizing plenary federal power over Indians.¹⁰² Today, in the United States, tribal autonomy is limited to a “right of occupancy,” which “may be terminated . . . by the sovereign itself without any legally enforceable obligation to compensate the Indians.”¹⁰³ In the 1970s and 1980s, even as the political branches were endorsing legislation that embraced broader claims to Indian self-determination,¹⁰⁴ the U.S. Supreme Court held firm that tribal

piece of land was of a central significance to their distinctive culture.” *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 137 (Can.).

⁹⁶ Constitution Act, 1867, 30 & 31 Vict., c. 3, s. 109 (U.K.).

⁹⁷ *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 175.

⁹⁸ See Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 679, 713 (1991).

⁹⁹ 21 U.S. (8 Wheat.) 543 (1823).

¹⁰⁰ Johnson, 21 U.S. (8 Wheat.) at 574 (“While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.”).

¹⁰¹ *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

¹⁰² *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937).

¹⁰³ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

¹⁰⁴ See, e.g., 166 Cong. Rec. 23, 131 (1970) (statement of President Nixon) (endorsing Indian self-determination in order “to strengthen the Indian’s sense of autonomy”); The Indian Self-Determination and Educational Assistance Act of 1975, Pub L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450-450n, 455-458e) (declaring a congressional commitment to “the establishment of a meaningful Indian self-determination policy which will permit an orderly transition . . . to effective and meaningful participation by the

autonomy could only ever exist “at the sufferance of Congress and is subject to complete defeasance,”¹⁰⁵ since Congress maintained “paramount power over the property of the Indians,”¹⁰⁶ under the Commerce Clause¹⁰⁷ and the federal treaty-making power.¹⁰⁸

Early Canadian law initially viewed this Indian right of occupancy in even more circumscribed terms. In *St. Catherine's Milling and Lumber Company v. The Queen*,¹⁰⁹ the Judicial Committee of the Privy Council—then Canada's final court of appeal—determined that the Indian right of occupancy was merely “personal and usufructuary,” and “dependent upon the good will of the sovereign.”¹¹⁰ Any such right was, in any case, traceable to the (British) Royal Proclamation of 1763—all indigenous rights were held to have a colonial source.¹¹¹

St. Catherine's is no longer good law; in 1972, in *Calder v. British Columbia (Attorney General)*,¹¹² the Supreme Court of Canada explicitly rejected the Privy Council's reasoning. Six of seven justices found that Aboriginal title existed at common law and that it was not a “personal or usufructuary right,” though it was nonetheless “dependent on the goodwill of the

Indian people in the planning, conduct, and administration of those programs and services”); The Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-29(e)(1988)) (ratifying land claims agreements between the U.S. Congress and Alaska Native peoples); see generally Jean M. Silveri, Note, *Comparative Analysis of the History of United States and Canadian Federal Policies Regarding Native Self-Government*, 16 SUFFOLK TRANSNAT'L L. REV. 618, 636-37 (discussing President Nixon's message to Congress and the *Indian Self-Determination and Educational Assistance Act of 1975*, and corresponding developments in U.S. case law); Martha Hirschfield, Note, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331 (1992) (discussing the Alaska Native Claims Settlement Act).

¹⁰⁵ *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

¹⁰⁶ *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980).

¹⁰⁷ U.S. CONST. art. I § 8.

¹⁰⁸ U.S. CONST. art. II, § 2, cl. 2 (“The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .”).

¹⁰⁹ [1888], 14 A.C. 46, 46 (P.C.).

¹¹⁰ *Id.* at 54.

¹¹¹ *Id.* at 54-55.

¹¹² [1973] S.C.R. 313.

Sovereign.”¹¹³ A decade later, in *Guerin v. The Queen*,¹¹⁴ the Court removed the Royal Proclamation altogether as a source of Aboriginal rights: “Their interest in their lands is a pre-existing legal right not created by the Royal Proclamation . . . or by any other executive order or legislative provision,” the Court held.¹¹⁵ Canadian courts have since acknowledged that indigenous nations were sovereign for the purpose of entering into treaties with the British Crown,¹¹⁶ and that Aboriginal sovereignty continued after the Crown’s assertion of sovereignty.¹¹⁷

It is devilishly difficult, under Canadian law, for any indigenous group to prove Aboriginal title to a particular tract of land.¹¹⁸ Yet the inherent right to self-government, recognized by the federal government in 1995,¹¹⁹ is not territory-specific; unlike in the United States, Canadian indigenous peoples have a right to self-government that originates not in land but in

¹¹³ [1888] 14 A.C. at 54 (P.C.).

¹¹⁴ [1984] 2 S.C.R. 335 (Can.).

¹¹⁵ *Id.* at 379.

¹¹⁶ *R. v. Sioui*, [1990] 1 S.C.R. 1025 (Can.).

¹¹⁷ *Campbell v. British Columbia (Attorney General)*, 2000 CanLII 1123 (Can. B.C. S.C.). Today, though Aboriginal title and rights may be infringed or extinguished by the federal crown, such “infringements [must] satisfy the test of justification.” *Delgamuukw*, [1997] 3 S.C.R. 1010 at paras. 160, 173.

¹¹⁸ *See, e.g., Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 7 (Can.) (“The stakes are huge. . . . The Haida’s claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.”); *William v. British Columbia*, 2012 CarswellBC 1860, para. 161 (“[T]he stakes in Aboriginal title claims have been high—cases such as *Calder*, *Delgamuukw*, and *Marshall; Bernard* involved vast areas of land. The resolution of such claims can be critical to the future of both the First Nation involved and the broader Canadian population.”).

¹¹⁹ *See supra* note 92 and accompanying text. The Supreme Court of Canada has never explicitly recognized such an inherent right to self-government. *See Bradford W. Morse, Regaining Recognition of the Inherent Right of Aboriginal Governance, in ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES* 39, 62 (Yale D. Belanger, ed., 2008). Patrick Macklem has suggested, however, that the Supreme Court of Canada’s decisions in *Delgamuukw* and the earlier case of *R. v. Pamajewon*, [1996] 2 S.C.R. 821 (Can.), read together, “suggest an inherent Aboriginal right of self-government—specifically, a right to make laws . . . in relation to the use of reserve lands and lands subject to Aboriginal title.” PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* 174 (2001).

identity—it has its origins before contact, and it attaches to indigenous peoples themselves.¹²⁰ For the Inuit, the implication of this body of law should be that their right to self-government is not diminished by the fact that they do not hold title over the entirety of Nunavut's vast geography. Recall, after all, that the NLCA guarantees the Inuit the option of later invoking their right to self-government if ever they lose their majority in Nunavut.¹²¹ So, unless and until that happens, there are two ways to understand the present status of Inuit self-government rights in the territory: either they have not yet been vindicated, or else they can be exercised through the governance provisions of the NLCA, including through the territorial government. The former interpretation makes little sense; it makes a mockery of Inuit leaders' understanding of Nunavut as "the Inuit homeland in Canada."¹²² We are left, then, with a simple conclusion: the Government of Nunavut can reasonably be understood as a "de facto" form of Inuit self-government.¹²³ The demographic reality of the Eastern Arctic can be read expressly into the intentions of the Inuit drafters of the NLCA; their choice of a public government model can be interpreted as a direct consequence of the population's overwhelming indigeneity—a more explicit Nisga'a-like arrangement (which certainly would have been more difficult to negotiate) was not necessary to secure the Inuit's immediate objectives.¹²⁴ Instead, they achieved self-

¹²⁰ See DAN RUSSELL, A PEOPLE'S DREAM: ABORIGINAL SELF-GOVERNMENT IN CANADA 46 (2000) ("[A] land base is simply not pertinent to many matters over which Aboriginal jurisdiction is sought.").

¹²¹ See *supra* notes 88-91 and accompanying text.

¹²² See *supra* notes 71-76 and accompanying text.

¹²³ See *supra* notes 56-57 and accompanying text.

¹²⁴ As noted above, the Nisga'a treaty was concluded six years after the NLCA was finalized. See *supra* note 54 and accompanying text. It recognizes the right of the Nisga'a to self-government within the ambit of Section 35 of the *Constitution Act, 1982*, and, as part and parcel of the same, gives the Nisga'a government the authority to manage lands and resources within the its jurisdiction. See *Fact Sheet: The Nisga'a Treaty*, ABORIGINAL AFF. & N. DEV. CAN., <http://www.aadnc-aandc.gc.ca/eng/1100100016428/1100100016429> (last modified Sept. 15, 2010). When the Inuit negotiated the NLCA, this self-government precedent did not yet exist, but the public government model offered attractive advantages over a simple land claim; in particular, it allows the Inuit, through their majority in Nunavut, to exercise broad powers over

government in function, if not explicitly in form.¹²⁵ As J.R. Miller has observed:

Although Nunavut has a “public government,” that is a territorial government open to all long-term residents of the territory, the heavy numerical domination of Inuit effectively makes it an Inuit state. In the Western Arctic, where relatively significant numbers of Dene and Metis exist alongside the Inuit, the challenge is obviously greater, if only because a “public government” there will not secure self-government for any single Aboriginal group. The same is true of northern Quebec and northern Labrador.¹²⁶

In Nunavut, unlike in other parts of the country, the end was achieved without the means. The Inuit now seek to practice their right to self-government through their territorial government. Devolution is the vital next step that will enable them to do so.

B. Inuit Self-Government Through Devolution

The previous section established that the Inuit’s right to self-government exists in Canadian law, that its existence does not require recognition of exclusively Inuit title over any particular geographic area (as would be the case under U.S. law), and that it can effectively be exercised through the governance provisions of the NLCA, including through the public government of the territory. This section argues that, as a consequence, the devolution of jurisdiction over lands and resources from the

culture, education, health, and other areas of social and economic policy. Légaré, *supra* note 56, at 279.

¹²⁵ See generally Cameron & Campbell, *supra* note 12, at 209 (“The fact that it is a product of Article 4 of the NLCA is a powerful statement regarding the important role the public territorial government is intended to play in achieving the goals of Inuit.”); Laureen Nowlan-Card, *Public Government and Regulatory Participation in Nunavut: Effective Self-Government for the Inuit*, 5 DALHOUSIE J. LEGAL STUD. 31, 36 (1996) (explaining the Inuit’s understanding of Article 4 of the NLCA as the effective self-government provision of the land claim).

¹²⁶ MILLER, *supra* note 86, at 100.

federal Parliament to the territorial legislature is the most obvious means of vindicating the Inuit right to self-government, under Canadian and international law.

As long as jurisdiction over Nunavut's lands and resources is not devolved to the territorial government, it will remain with the federal Parliament, vested in the federal Cabinet. British Columbia—with thirty-six Members of Parliament (MPs)—will continue to have thirty-six times more jurisdictional clout over Nunavut's lands and resources than Nunavut—with one MP—does.¹²⁷ And, should Nunavut ever again lack a seat at the Cabinet table—as it has done every year other than the last five—it would be cut entirely out of the locus of federal decision-making; not one single Nunavummiut would be in the room when the Cabinet decisions about Nunavut's lands and resources were made.

Under the NLCA, resource management decisions are governed by the work of three co-management boards: the Nunavut Wildlife Management Board (NWMB),¹²⁸ the Nunavut Impact Review Board (NIRB),¹²⁹ and the Nunavut Water Board (NWB).¹³⁰ The co-management boards are a poor proxy for jurisdiction, however, since every salient decision—from the appointment of board members to the acceptance or rejection of the board's recommendations—ultimately falls to the federal Minister responsible, not to the Government of Nunavut.¹³¹ The Inuit of Nunavut, through their territorial legislature, participate in every part of the decision-making process—except the decision itself.

Devolution would consequently fill a crucial void in the exercise of Inuit self-government in Nunavut. A recent example illustrates this point. In the summer of 1962, a Canadian

¹²⁷ See *Guide to the Canadian House of Commons*, PARLIAMENT OF CANADA, <http://www.parl.gc.ca/About/Parliament/GuideToHoC/index-e.htm> (last updated Dec. 2011).

¹²⁸ See NLCA, *supra* note 25, art. 5.2.

¹²⁹ *Id.* art. 12.2.

¹³⁰ *Id.* art. 13.2.

¹³¹ See, e.g., Helle Høgh, *Bowhead Whale Hunting in Nunavut: A Symbol of Self-Government*, in NUNAVUT: INUIT REGAIN CONTROL OF THEIR LANDS AND THEIR LIVES 196, 196-97 (Jens Dahl et al. eds., 2000) (making this point about the NWMB).

prospector named Murray Watts found iron ore deposits south of Pond Inlet, a community on the northern tip of Baffin Island, in what is now Nunavut.¹³² The samples he took were impossibly pure, with iron content as high as seventy percent.¹³³ Five decades later, Watts's claim—now owned by a Toronto outfit called Baffinland Iron Mines Corporation—was set to be the subject of a \$4.1-billion mining development project, among the most ambitious ever attempted anywhere in the circumpolar world.¹³⁴ Baffinland submitted its Mary River proposal to the NIRB, NWB, and the Nunavut Planning Commission¹³⁵ in 2008, and its final NIRB hearings took place in the summer of 2012.¹³⁶ Representatives from the Nunavut communities that would be most affected by the project made submissions about its impact on everything from small mammals¹³⁷ to domestic violence.¹³⁸ The NIRB recommended the proposal in September 2012, subject to 184 terms and conditions, and sent its report to the federal Minister of Aboriginal Affairs and Northern

¹³² Paul Waldie, *A Railway to Arctic Riches: Economic Boom, Environmental Threat?*, *GLOBE & MAIL* (May 14, 2011), <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/a-railway-to-arctic-riches-economic-boom-environmental-threat/article4259449/>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See NLCA, *supra* note 25, art. 11; see also Nunavut Planning Commission, NUNAVUT PLANNING COMMISSION, <http://www.nunavut.ca> (“The Nunavut Planning Commission (NPC) is responsible for the development, implementation and monitoring of land use plans that guide and direct resource use and development in the Nunavut Settlement Area.”).

¹³⁶ See Samantha Dawson, *Mary River Project Good for Nunavut and Inuit, Baffinland Boss Says*, NUNATSIAQ NEWS (July 16, 2012), http://www.nunatsiaqonline.ca/stories/article/65674mary_river_project_good_f_or_nunavut_and_inuit_baffinland_boss_says/. In the interests of full disclosure, it should be noted that Adam Goldenberg served briefly as a member of the Nunavut Department of Justice delegation to these Baffinland NIRB hearings.

¹³⁷ See David Murphy, *Community Reps: Will Mary River Damage Small Mammals?*, NUNATSIAQ NEWS (July 20, 2012), http://www.nunatsiaqonline.ca/stories/article/65674community_reps_will_mary_river_damage_small_mammals/.

¹³⁸ See Samantha Dawson, *Mary River Project Would Inflict Big Strains on Iqaluit: Mayor*, NUNATSIAQ NEWS (July 23, 2012), http://www.nunatsiaqonline.ca/stories/article/65674mary_river_project_would_inflict_big_strains_on_iqaluit_mayor/.

Development for final approval.¹³⁹ The federal government approved the project in early December of the same year.¹⁴⁰

Throughout the process, the Government of Nunavut's role was, at most, peripheral. The statement issued by the territory's premier, after the NIRB approved the project, is telling: "The [Government of Nunavut] will be diligent in completing a review of the recommendations made by NIRB to the Government of Canada and will be able to comment in more detail once that is complete," said Premier Eva Ariak.¹⁴¹ "We look forward to a timely decision from the Federal Minister of Aboriginal Affairs and Northern Development Canada."¹⁴² After a four-year review process for a project whose cost will run to \$4 billion¹⁴³—the largest infrastructure ever proposed in Canada's North¹⁴⁴—with potentially huge revenue implications for governments and NLCA beneficiaries, the territorial

¹³⁹ *Nunavut Board Says Yes to Mary River, with Conditions*, NUNATSIAQ NEWS (Sept. 24, 2012), http://www.nunatsiaqonline.ca/stories/article/65674nunavut_board_says_yes_to_mary_river_with_conditions/.

¹⁴⁰ *Duncan Says Yes to Nunavut's Mary River Iron Mine*, NUNATSIAQ NEWS (Dec. 3, 2012), http://www.nunatsiaqonline.ca/stories/article/65674duncan_says_yes_to_nunavuts_mary_river_iron_mine/.

¹⁴¹ Office of the Premier, Government of Nunavut, GN Response to NIRB's Baffinland Recommendations (Sept. 14, 2012), *available at* <http://www.gov.nu.ca/news/2012/september/sep14.pdf>.

¹⁴² *Id.*

¹⁴³ *Multibillion-Dollar Iron Mine Approved for Baffin Island*, CBC NEWS (Sept. 15, 2012), <http://www.cbc.ca/news/canada/north/story/2012/09/15/north-baffinland-mine-decision.html>. The project has since been scaled back to an initial \$740-billion build phase, to reflect volatility in global commodities markets. See Pav Jordan, *Baffinland Sees Silver Lining in Scaling Back Mary River Project*, GLOBE & MAIL (Jan. 25, 2013), <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/baffinland-sees-silver-lining-in-scaling-back-mary-river-project/article7849338/>. This "early revenue" modification is now undergoing a fresh NIRB review, with an expedited public consultation process to be completed during 2013. See Jane George, *Baffinland Lets NIRB Look at Plan for Mary River Lite*, NUNATSIAQ NEWS (June 17, 2013), http://www.nunatsiaqonline.ca/stories/article/65674baffinland_lets_nirb_look_at_plan_for_mary_river_lite/.

¹⁴⁴ *Nunavut Braces for Massive Mary River Mine*, CBC NEWS (Sept. 13, 2012), <http://www.cbc.ca/news/canada/north/story/2012/09/13/north-baffinland-iron-mine-0913.html>.

government's official role in the project's final approval was essentially a polite wave as the decision drove by.

This is not to say that the Inuit lack a voice in the process. They participate in the NIRB process as deponents, NIRB panel members, and in the form of the Government of Nunavut's own submissions. They vote for a Member of Parliament who has one of the 308 seats in the House of Commons, to which the federal government is responsible. They are assured by Article 26 of the NLCA that companies seeking to develop the North will recognize and respect their interests, with consideration in the form of Inuit Impact and Benefit Agreements (IIBAs).¹⁴⁵ Most indispensably, they are landlords; NLCA beneficiaries hold title to nearly twenty percent (400,000 square kilometres) of Nunavut's landmass, and subsurface rights to two percent (48,000 square kilometres).¹⁴⁶ The Mary River project, for example, will operate under the terms of an IIBA and a lease negotiated by Baffinland with the Qikiqtani Inuit Association, the beneficiary corporation that represents the Inuit of Baffin Island.¹⁴⁷ But none of this input—nor even the veto conferred by property ownership under the land claim—amounts to the legal jurisdiction that devolution would transfer from Ottawa to Nunavut.

International law provides telling points of comparison. Article 26 of the *U.N. Declaration on the Rights of Indigenous Peoples* (UNDRIP)¹⁴⁸ provides in part that “[i]ndigenous people

¹⁴⁵ NLCA, *supra* note 25, art. 26; *see also* FAQ, BAFFINLAND, <http://www.baffinland.com/people-careers/faq/?lang=en> (last visited Sept. 19, 2013) (explaining the IIBA for the Mary River project).

¹⁴⁶ *See Fact Sheet*, *supra* note 124.

¹⁴⁷ *See FAQ*, *supra* note 145.

¹⁴⁸ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Sept. 13, 2007) [hereinafter UNDRIP]. Canada endorsed UNDRIP as a non-binding, “aspirational” document in 2010. *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, Aboriginal Aff. & N. Dev. Can., <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> (last modified Jul. 30, 2012). Though UNDRIP is “soft law,” it is also evidence of an emerging norm of customary international law. *See generally* S. James Anaya, *International Human Rights and Indigenous Peoples* 79-82 (2009) (discussing the role of U.N. declarations in the formation of customary international law); *see also* Lorie M. Graham & Siegfried Wiessner, *Indigenous*

have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use.”¹⁴⁹ It would be tough to argue that either the NCLA or the *Nunavut Act* gives the Inuit sufficient “control” over their “lands, territories and resources” to fulfill UNDRIP’s command. To begin with, “the lands, territories and resources that [the Inuit of Nunavut] possess by reason of traditional ownership or other traditional occupation or use” would extend, by almost any definition, well beyond the less than twenty percent of the territory over which the Inuit hold collective fee-simple title under the NLCA.¹⁵⁰ Even that twenty percent is nonetheless under the federal

Sovereignty, Culture, and International Human Rights Law, 110 S. Atlantic Q. 403, 406 (2011) (“[D]espite its status as a declaration, [UNDRIP] is poised to be a jurisprudentially and politically useful tool in the ongoing struggles of indigenous peoples. Yet considerable amounts of uncertainty remain.”). Several of UNDRIP’s provisions bear directly on indigenous rights in the Arctic, including Article 3 (“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”), Article 18 (“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”), Article 19 (“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”), and Article 26 (*see infra* note 149).

¹⁴⁹ UNDRIP, *supra* note 148, art. 26. In full, Article 26 reads:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

¹⁵⁰ See Cécile Pelaudeix, *Inuit Governance in a Changing Environment: A Scientific or a Political Project?*, in *WHAT HOLDS THE ARCTIC TOGETHER?* 67, 74 (Cécile Pelaudeix et al. eds. 2011).

government's ultimate jurisdiction when it comes to decisions pertaining to land and resources. It is true that Canadian courts use the term "territory" in a far more limited sense than the UNDRIP does,¹⁵¹ but this need not diminish our ability to apply the Inuit right self-government to Nunavut; recall that, under Canadian law, the right to self-government is tied to indigenous peoples, not to particular tracts of territory.¹⁵²

In its historic 2001 *Awas Tingni* decision,¹⁵³ the Inter-American Court of Human Rights held that:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.¹⁵⁴

The Court rested its decision on Article 21 of the American Convention of Human Rights,¹⁵⁵ rather than on non-codified principles of international law. (Article 21 of the Convention protects property rights.) Even so, as Siegfried Wiessner has

¹⁵¹ See, e.g., *William v. British Columbia*, [2012] BCCA 285, para. 220 (Can. B.C. C.A.) ("Aboriginal title cannot generally be proven on a territorial basis, even if there is some evidence showing that the claimant was the only group in a region or that it attempted to exclude outsiders from what it considered to be its traditional territory.").

¹⁵² See *supra* note 120 and accompanying text.

¹⁵³ *The Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79 (Aug. 31, 2001).

¹⁵⁴ *Id.* at ¶ 149.

¹⁵⁵ See American Convention on Human Rights Pact of San Jose, Costa Rica art. 21, Nov. 22, 1969, 1144 U.N.T.S. 17955 (referencing the Pact's adoption at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969). Article 21 of the Convention reads:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Id.

explained, the Court's interpretation of this treaty provision is best understood in terms of a broader normative shift among states in their understanding of indigenous rights under international law.¹⁵⁶ Professor Wiessner cites Chief Justice A.O. Conteh of the Supreme Court of Belize, who determined in 2007 that "both customary international law and general international law would require that Belize respect the rights of its indigenous people to their lands and resources."¹⁵⁷

Awas Tingni was the first decision by an international tribunal to recognize the land and resource rights of indigenous peoples in the face of adverse state action.¹⁵⁸ The decision should be understood as part of a broader move in customary international law towards recognition of Aboriginal land and resource rights. If we understand the NLCA and the establishment of Nunavut as steps towards the vindication of the Inuit right to self-government, then these Canadian developments belong on the same trajectory.¹⁵⁹ So does devolution; if the territorial government is an appropriate vessel for Inuit self-government in Canada's Eastern Arctic—and this Article has argued that it is—then devolving decision-making over lands and resources from Ottawa to Nunavut is consistent with the development of international law.

The International Covenant on Civil and Political Rights (ICCPR) provides further support for indigenous rights under international law. In *Ominayak v. Canada*,¹⁶⁰ the Human Rights Committee cited Article 27 of the Covenant¹⁶¹ to find in favour

¹⁵⁶ Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 137 (2011).

¹⁵⁷ *Id.*

¹⁵⁸ See S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 2 (2002).

¹⁵⁹ See Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1170 (2008); Wiessner, *supra* note 156, at 135.

¹⁶⁰ Human Rights Committee Comm'n No. 167/1984, U.N. GAOR, 45th Sess., Supp. No. 40, (Vol. II), at 1, U.N. Doc. A/45/40, Annex 9(A) (Mar. 26, 1990).

¹⁶¹ International Covenant on Civil and Political Rights art. 27, entered into force Mar. 23, 1976, 999 U.N.T.S. 171 (Mar. 23, 1976) ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to

of a First Nation that disputed the Canadian government's decision to permit the Government of Alberta to expropriate indigenous lands for private purposes. The Committee's decision in *Ominayak* has come to stand for its willingness not to be deferential in its review of state action affecting indigenous groups when dealing with cases brought through its individual complaints mechanism.¹⁶² It is also a notable example of how international law can support indigenous resistance to state action when a state's decisions affect indigenous territory. Indigenous decision-making through self-government—and, in Nunavut, achieving self-government through devolution—is an obvious means of avoiding such conflicts.¹⁶³

As Claire Charters has argued, “[b]y utilizing and referencing international law on the rights of Indigenous peoples—framing local, regional, national and international issues in terms of their conformity to international legal standards—that law will become embedded in international and domestic legal systems and legal psyches.”¹⁶⁴ The indigenous rights case for devolution in Nunavut is an opportunity for precisely this sort of norm integration.

As long as the Government of Nunavut—Canada's lone indigenous territory—remains formally on the sidelines of the decisions that affect its own lands and resources, its Inuit inhabitants will await the true fulfilment of their rights as

such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”)

¹⁶² See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 256 (2004).

¹⁶³ Arctic indigenous peoples seeking to enforce their rights under the ICCPR may also look to the non-discrimination provisions of Article 2, or even the right “[t]o take part in the conduct of public affairs, directly or through freely chosen representatives,” under Article 25. Though the Inuit of Nunavut elect an MP who sits in the federal Parliament, this is a lesser degree of democratic participation in decision-making than that enjoyed by Canadian citizens in any other jurisdiction. See *supra* note 127 and accompanying text. In addition to undermining Article 25, this imbalance could also constitute the sort of discrimination that Article 2 prohibits.

¹⁶⁴ Claire Charters, *Indigenous Peoples and International Law and Policy*, in *INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES* 191 (Benjamin J. Richardson et al. eds., 2009).

indigenous peoples. Vindicating the indigenous rights of Nunavummiut through devolution is a crucial step towards, in Premier Aariak's words, "completing the map of Canada":

Should the people who have lived on this land, as the stewards of the land for generations not have the same power to make decisions as other Canadians? This would be in keeping with the Inuit principle of $\Omega^L \Gamma \sigma^{5b} \perp \rho C \uparrow^a \Omega^5 \sigma^{5b}$, or self-reliance. And this is why Nunavut is actively seeking a devolution agreement—so that political and economic development can move forward in step with each other.¹⁶⁵

The case for an indigenous right to devolution in Nunavut thus ends where it began, with the Inuit's simple, familiar, fundamentally Canadian—and human—desire to be *maîtres chez nous*.¹⁶⁶

III. DEVOLUTION AND ARCTIC SOVEREIGNTY

This Article began by describing the basic inequality among members of the Canadian federation, in which only Nunavut lacks jurisdiction over its own lands and resources. Subsequent sections explained why the Inuit right to self-government—viewed through the bifocal lens of Canadian and international law—demands the devolution of land and resource jurisdiction from Canada's federal government to the Government of Nunavut. We conclude by canvassing a different dimension of international law; this Part argues that devolution will bolster Canada's Arctic sovereignty.

¹⁶⁵ Aariak, *supra* note 63.

¹⁶⁶ See *supra* notes 46-48 and accompanying text. Though this Article has focused on the rights dimension of devolution in Nunavut, it also has enormous resource implications, which doubtless figure prominently in the private deliberations of both the Government of Canada and the Government of Nunavut on their respective approaches to the devolution file. For a discussion of the fiscal implications of devolution, and a comparison to the parallel process in Greenland, see Anthony Specca, *Nunavut, Greenland and the Politics of Resource Revenues*, POL'Y OPTIONS, May 2012, at 62, available at <http://archive.irpp.org/po/archive/may12/specca.pdf>.

A. Indigenous Rights, International Law, and “Human Flagpoles”

Inuit occupation has, for decades, been a central feature of Canadian claims to sovereignty in the Arctic. The NLCA confirms that “Canada’s sovereignty over the waters of the arctic archipelago is supported by Inuit use and occupancy.”¹⁶⁷ The federal government’s 2009 Northern Strategy¹⁶⁸ concedes that “sovereignty over our Arctic lands and waters . . . is long-standing, well-established and based on historic title, international law and the presence of Inuit and other Aboriginal peoples for thousands of years.”¹⁶⁹ The basic claim is that Canada may assert sovereignty over the high Arctic because Canadians—Inuit Canadians—live there.

But what if the Canadian citizens who occupy the high Arctic are denied the same complement of rights that Canadian citizens who live elsewhere take for granted? The citizenship gap that persists in the absence of devolution¹⁷⁰ raises precisely this question. As it stands, the Inuit of the Eastern Arctic contribute directly to Canada’s assertion of sovereignty in the Arctic and receive only an incomplete bundle of rights in return.

Canada’s dispute with the United States over the legal status of the Northwest Passage offers a case in point. Canada’s position is that the waters of the Passage are internal waters in which Canada may enforce its laws and deny passage to foreign vessels.¹⁷¹ The United States claims that the Passage is an

¹⁶⁷ NLCA, *supra* note 25, art. 15.

¹⁶⁸ GOVERNMENT OF CANADA, CANADA’S NORTHERN STRATEGY: OUR NORTH, OUR HERITAGE, OUR FUTURE (2009), <http://www.northernstrategy.gc.ca/cns/cns.pdf> [hereinafter Northern Strategy].

¹⁶⁹ *Id.*

¹⁷⁰ See *supra* notes 164-184 and accompanying text.

¹⁷¹ See generally Robert Dufresne, *Canada and the United States: Arctic Sovereignty*, PARLIAMENT OF CANADA, Dec. 2008, http://www.parl.gc.ca/content/lop/researchpublications/prb0834_13-e.htm (summarizing the dispute and its implications). While Canada’s dispute with the United States over the status of the Northwest Passage is legally significant, it is not a source of real conflict; the two sides have simply agreed to disagree. Franklyn Griffiths, *The Shipping News: Canada’s Arctic Sovereignty Not on Thinning Ice*, INT’L J. 257, 257 (2003). The issue commands headlines because

international strait, through which (and, in the case of aircraft, above which) foreign states enjoy a right of transit.¹⁷² When, in 1970, a U.S.-registered oil tanker, the *S.S. Manhattan*, journeyed eastward from Alaska through the ice-bound Passage, a Canadian Inuit hunter drove his dog team into its path and stopped, forcing the massive Yankee vessel to do the same.¹⁷³ As Terry Fenge has noted:

The *Arctic Waters Pollution Prevention Act*—Canada's prime response to the *Manhattan* incident—invoked the need to protect the environment upon which Inuit depended out to 100 miles from the coast. In 1985 Inuvialuit as well as Canadian nationalists from the south were on board a small plane that buzzed the [U.S. Coast Guard vessel *U.S.C.G.S. Polar Sea* dropping politically charged notes from the sky politely but firmly reminding the crew of Canada's Arctic sovereignty. In the aftermath of the *Polar Sea* incident the late Mark R. Gordon, an Inuit leader from northern Quebec, said Inuit would hold up the Canadian flag in the Arctic. And still today Inuit leaders remain fully supportive of Canada's Arctic sovereignty. Mary Simon, President of Inuit Tapiriit Kanatami, the national Inuit organization, conducted a Canada-wide tour late in 2007 to engage and inform Canadians on Arctic sovereignty and to gain public support for Inuit involvement in this issue.¹⁷⁴

of a perception that large-scale intercontinental shipping through the passage is imminent. It is not.

¹⁷² See generally Dufresne, *supra* note 171 (summarizing the dispute and its implications). While Canada's dispute with the United States over the status of the Northwest Passage is legally significant, it is not a source of real conflict; the two sides have simply agreed to disagree. Franklyn Griffiths, *The Shipping News: Canada's Arctic Sovereignty Not on Thinning Ice*, INT'L J. 257, 257 (2003). The issue commands headlines because of a perception that large-scale intercontinental shipping through the passage is imminent. It is not.

¹⁷³ See Terry Fenge, *Inuit and the Nunavut Land Claims Agreement: Supporting Canada's Arctic Sovereignty*, POL'Y OPTIONS, Jan. 2008, 85, available at <http://jsis.washington.edu/canada/file/Fenge,%2007-08.pdf>

¹⁷⁴ *Id.*

But the strategic importance of Inuit occupancy also has a dark history. Between 1953 and 1956, Canada's federal government relocated some 19 Inuit families from Inukjuak, on the eastern shore of Hudson Bay, to the sites that are now the communities Grise Fjord, Nunavut and Resolute Bay, Nunavut—among the most remote permanent settlements in the circumpolar world.¹⁷⁵ These “human flagpoles” were unwarned, unprepared, and undersupplied, separated from their families and the way of life they knew and understood.¹⁷⁶ And then they were abandoned.

There is some dispute as to the reasons for the relocation,¹⁷⁷ but none is more obvious than the assertion of Canadian sovereignty in the North.¹⁷⁸ The descendants of those relocated families—along with tens of thousands of other Inuit—are still there, across the Arctic, Canadian citizens whose occupancy is the human foundation of Canada's claims to sovereignty across the Far North. Fully implementing the NLCA and completing a devolution agreement with Nunavut could bolster Canadian security and sovereignty in the region.¹⁷⁹ Yet, two decades after the NLCA was signed, its beneficiaries are pursuing a civil action against Canada, alleging failures of implementation,¹⁸⁰ all while the federal government has dragged its feet on devolution. The children and grandchildren of the “human flagpoles” continue to be denied both the jurisdiction over lands and

¹⁷⁵ Bruce Campion-Smith, *Ottawa Apologizes to Inuit for Using Them as 'Human Flagpoles,'* TORONTO STAR (Aug. 18, 2010), available at http://www.thestar.com/news/canada/2010/08/18/ottawa_apologizes_to_inuit_for_using_them_as_human_flagpoles.html.

¹⁷⁶ *Id.*

¹⁷⁷ See Fenge, *supra* note 173.

¹⁷⁸ See Samantha Arnold, *Nelvana of the North, Traditional Knowledge, and the Northern Dimension of Canadian Foreign Policy*, 14 CANADIAN FOREIGN POL'Y J. 95, 105 (2008).

¹⁷⁹ See Tony Penikett, *Arctic Security Means More than Arctic Sovereignty*, GLOBE & MAIL (Jan. 26, 2011), <http://www.theglobeandmail.com/commentary/arctic-security-means-more-than-arctic-sovereignty/article563433/>.

¹⁸⁰ See *Nunavut Tunngavik, Inc. v. Canada*, [2012] N.U.C.J. 11; *Why is NTI Suing the Government of Canada?*, NUNAVUT TUNNGAVIK INCORPORATED, <http://www.tunngavik.com/documents/publications/2007-Naniiliqpita-Spring.pdf>.

resources to which they are entitled as Canadian citizens and their right to self-government as indigenous peoples.

If the watered-down citizenship of Nunavut's inhabitants can be seen to weaken Canada's claim to sovereignty based on occupancy, then devolution can be seen to strengthen it—including over the very waters that are the subject of Canada's disagreement with the United States. Remember that the Government of Nunavut has pressed for devolution to cover Nunavut's internal waters, since the Inuit have long occupied not only the Arctic islands but also the sea ice in between.¹⁸¹ Devolution would recognize this historic Inuit occupancy of the Northwest Passage in concrete legal terms, and this can only assist Canada's sovereignty claim. As Cameron and Campbell argue:

Canada's jurisdiction over internal waters (as enclosed by the 1985 baselines), marine areas (as defined in the NLCA and the territorial sea) would be strengthened if Canada were to recognize the jurisdiction of the territorial government through the devolution of hydrocarbon and mineral resources in such areas. . . . Acceptance of the Government of Nunavut's jurisdiction over . . . the marine areas defined in the land claims agreement, would be logical, and would have the further benefit of strengthening Canada's sovereignty argument.¹⁸²

Even more simply, the devolution of broad resource-management responsibilities over both land and marine bed resources to the Government of Nunavut would be a clear act of effective governance on the part of the federal government.¹⁸³ It would mean, after all, that the federal government's relationship with Nunavut would be functionally identical to its relationship with every other province or territory—as well as with the citizens of those provinces and territories. And, by more

¹⁸¹ See *supra* note 32 and accompanying text.

¹⁸² Cameron & Campbell, *supra* note 12, at 214.

¹⁸³ Suzanne Lalonde, *An Analysis of the Impact Devolution of Jurisdiction over Land and Marine Bed Resources to the Government of Nunavut Would Have on Canada's Claim to Sovereignty over the Waters of the Arctic Archipelago* (Feb. 2008) (on file with authors).

completely expressing the indigenous right to self-government through Nunavut's territorial government, Canada can further ground its sovereignty claim in the full indigenous history of the people of the North. Recall UNDRIP's Article 26: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."¹⁸⁴ By vindicating this right, and by further integrating emerging international indigenous rights norms¹⁸⁵ into the fabric of Canadian federalism, Canada can better use the Inuit's traditional ownership and occupancy of the land and ice of the high Arctic to substantiate its sovereignty claim.

When representatives of the five Arctic coastal nations met in Greenland in May 2008 to draft the Ilulissat Declaration¹⁸⁶—which affirmed the principles of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹⁸⁷ as the basis for resolving all outstanding Arctic maritime issues—they made no reference to emerging international law on the rights of indigenous peoples. To protest their exclusion from the Ilulissat gathering, the Inuit of Canada, Alaska, Russia, and Greenland issued *A Circumpolar Inuit Declaration on Sovereignty in the Arctic*.¹⁸⁸ As indigenous parties to treaties and other agreements with Arctic states, they asserted their right to be consulted about matters affecting their interests. Article 4.2 of the *Declaration* reads: "The conduct of international relations in the Arctic and

¹⁸⁴ UNDRIP, *supra* note 148, art. 26.

¹⁸⁵ See *supra* notes 195-196 and accompanying text.

¹⁸⁶ The Ilulissat Declaration, May 29, 2008, *available at* http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.

¹⁸⁷ United Nations Convention on the Law of the Sea, *entered into force* Nov. 16, 1994, 1833 U.N.T.S. 3. UNCLOS invites coastal states to exercise jurisdiction over a continental shelf, and its seabed resources, on the shelf extending two hundred nautical miles from coastal baselines, or beyond if the shelf is a natural extension of its lands. All five Arctic states have been collaborating on the legal and scientific processes to define the limits of their continental shelves. See Fenge, *supra* note 173, at 84 ("Canada [relied] upon a Russian icebreaker as the platform from which to collect data to support its own Arctic Ocean continental shelf submission.").

¹⁸⁸ A Circumpolar Inuit Declaration on Sovereignty in the Arctic, Apr. 2009, *available at* https://www.itk.ca/system/files_force/Declaration_12x18_Vice-Chairs_Signed.pdf?download=1 [hereinafter Circumpolar Declaration].

the resolution of international disputes in the Arctic are not the sole preserve of the Arctic states or other states, they are also within the purview of the Arctic's indigenous peoples.”¹⁸⁹ The Inuit notion of sovereignty in the Arctic is one that includes indigenous peoples in their capacities as the owners of significant lands and resources, as regional governors, and as rights holders. If Canada embraces and expresses this view through devolution, it will only enhance its own claims to sovereignty over the Arctic archipelago and the straits and narrows of the Northwest Passage; if meaningful Inuit self-government is achieved through Canadian federalism, then Canada may successfully adopt the indigenous argument for sovereignty as its own. As Suzanne Lalonde has suggested, “Inuit participation in the management and exploitation of land and marine bed resources within the Territory of Nunavut would reinforce Canada’s claim that its title over . . . Arctic waters . . . has been consolidated, and more importantly, that these waters are historic Canadian internal waters.”¹⁹⁰ Nunavut’s Premier, meanwhile, has been even more blunt. For Canada to leave Nunavut, its only majority-indigenous jurisdiction, as “the only jurisdiction without control over its lands, internal waters and resources would be backsliding towards the paternalism and colonialism of the past,”¹⁹¹ she said in 2011. “As it stands,” she warned, “Nunavut is joined to the rest of Canada by only the thinnest of threads.”¹⁹² Paradoxically, the territory’s ties to the rest of the Canadian federation are weaker than those of any other jurisdiction because, in Nunavut alone, decision-making power is still centralized in Ottawa. Through devolution, the federal government may finally begin to end this inequality, and the citizenship gap that it creates. An empowered territorial government within the Canadian federation—whose constituents have called the Eastern Arctic home for millennia—offers a thicker basis for Canadian claims to sovereignty than does the

¹⁸⁹ *Id.* at art. 4.2.

¹⁹⁰ Lalonde, *supra* note 183.

¹⁹¹ Premier Eva Aariak, Remarks to Munk-Gordon Speaker Series (Nov. 3, 2011), <http://gordonfoundation.ca/sites/default/files/publications/2011-11-3-Premier-Aariak-Munk-Gordon-Speech.pdf> (accessed July 10, 2013).

¹⁹² *Id.*

colonial vestige of federal control from Ottawa. If Nunavut, an expression of Inuit self-government, becomes a more equal participant in Canada's federal system, then it will be better equipped to substantiate Canada's claims to sovereignty in the high Arctic. As the *Circumpolar Inuit Declaration* states, "[t]he inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination and other rights require states to accept the presence and role of Inuit as partners in the conduct of international relations in the Arctic."¹⁹³

B. Arctic Multilateralism and Inuit Self-Government

By vindicating the rights of Inuit Nunavummiut, Canada can strengthen the ties that bind its northernmost territory to the rest of its people and strengthen its claims to sovereignty across the Far North. It can also ensure that its multilateral engagement with other Arctic states emphasizes the Inuit's historic occupancy of the Eastern Arctic, to the same ends.

Canada's relationships with other Arctic states have rarely been adversarial, and what sovereignty concerns there are have largely been exaggerated. Canadian and American experts are commonly optimistic about the possibility of a win-win solution to Canada's dispute with the United States over the offshore boundary between Yukon and Alaska in the oil-rich Beaufort Sea.¹⁹⁴ Tensions between Canada and Denmark over Hans Island—a 1.3-square-kilometre piece of rock between Greenland and Ellesmere Island—remain unresolved, but the stakes are hardly high.¹⁹⁵ And Canada has never had any real need to arm

¹⁹³ Circumpolar Declaration, *supra* note 188, art. 3.3.

¹⁹⁴ See, e.g., James Baker & Michael Byers, *The Beaufort Sea Boundary Dispute: Identifying and Assessing Options*, MICHAEL BYERS ON POLITICS (Feb. 25, 2010), <http://byers.typepad.com/files/baker-byers-discussion-paper-25-feb-2010.pdf>; see generally Randy Boswell, *Canada Non-Committal over U.S. Position on Beaufort Sea Dispute*, CANWEST NEWS SERVICE (Mar. 9, 2010), <http://www.canada.com/technology/Canada+committal+over+position+Beaufort+dispute/2662672/story.html> (describing the dispute).

¹⁹⁵ See Kim Mackrael, *Canada, Denmark Closer to Settling Border Dispute*, GLOBE & MAIL (Nov. 29, 2012),

itself military against other Arctic states; as Russia's Arctic Ambassador, Anton Vasiliev, has stated, "[t]here are no issues between Arctic states that could call for a military solution."¹⁹⁶

Canada has relied on cooperation with other Arctic states as the region has become increasingly interdependent. Next to Russia, Canada has the longest Arctic coastline, and yet has no deep-water Arctic port. Absent the assistance of other Arctic states, Canada has little capacity to respond to an air crash or a cruise ship disaster on its northern coastline.¹⁹⁷ And, even during the Cold War, Canada never established a major military presence in the Arctic, in part "because it has always known it can rely on the U.S. to provide military might should it be required."¹⁹⁸ The question now is whether Canada is prepared to extend the scope of its circumpolar partnerships to include its own indigenous peoples.

In May 2013, Canada assumed the Chair of the Arctic Council, a multilateral forum comprised of the eight Arctic states.¹⁹⁹ The Government of Canada's stated theme for its chairmanship, which lasts until 2015, is "Development for the People of the North."²⁰⁰ In a forum that has included indigenous involvement since its inception,²⁰¹ an indigenous rights claim for

<http://www.theglobeandmail.com/news/national/canada-denmark-closer-to-settling-border-dispute/article5831571/>.

¹⁹⁶ M.D., *Canada and the Arctic: Frozen Promises*, THE ECONOMIST (May 14, 2013, 4:52 PM), <http://www.economist.com/blogs/americasview/2013/05/canada-and-arctic>.

¹⁹⁷ See, e.g., *Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic*, available at <http://www.ifrc.org/docs/idrl/N813EN.pdf>.

¹⁹⁸ Andrea Charron, *The Northwest Passage Shipping Channel: Sovereignty First and Foremost and Sovereignty to the Side*, 7 J. MIL. STRAT. STUD. 1, 17 (2005).

¹⁹⁹ See *Member States*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/about-us/member-states> (last updated June 29, 2011).

²⁰⁰ *Development for the People of the North: The Arctic Council Program During Canada's Chairmanship (2013-15)*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/document-archive/category/425-main-documents-from-kiruna-ministerial-meeting?download=1763:canadian-chairmanship-program-2013-2015-english> (last visited July 10, 2013).

²⁰¹ See Thomas S. Axworthy, *Changing the Arctic Paradigm from Cold War to Cooperation: How Canada's Indigenous Leaders Shaped the Arctic Council*, 5 Y.B. POLAR L. (forthcoming 2013), available at

devolution in Nunavut—against the backdrop of Canada’s broader efforts to secure its sovereignty in the Arctic—may well be difficult to ignore.

In the 1996 *Declaration on the Establishment of the Arctic Council*—known as “the Ottawa Declaration”—the Government of Canada and the other Arctic Council member states “affirm[ed their] commitment to the well-being of the inhabitants of the Arctic, including recognition of . . . indigenous people and their communities.”²⁰² The Declaration designates six indigenous organizations as “Permanent Participants” in the Council.²⁰³ As Greenland’s former prime minister, Kuupik Kleist, told the Brookings Institution in April 2013, “the creation of the Arctic Council was initiated by the Arctic peoples themselves, the indigenous Arctic peoples, because we need . . . international cooperation” in the management of Arctic natural resources and the protection of Arctic ecosystems.²⁰⁴

By elevating Nunavut’s status within Canada through devolution, and by presenting devolution as a means of achieving meaningful indigenous self-government in the Arctic, the federal government may well strengthen its position within the Arctic Council at a time when indigenous participation is becoming indispensable. True, there has been a persistent lack of consensus as to whether the Arctic Council’s indigenous Permanent Participants should sit at the same council table as the representatives of member states,²⁰⁵ and indigenous groups’ demands for enjoy equal voting rights in Council deliberations, alongside member states,²⁰⁶ have not been heeded. Yet, moves to

http://www.gordonfoundation.ca/sites/default/files/publications/Changing%20the%20Arctic%20Paradigm%20from%20Cold%20War%20to%20Cooperation%20-%20CopyEdited%2012-10-10_FINAL_FORMATTED_1.pdf.

²⁰² Declaration on the Establishment of the Arctic Council, pmbll., Sept. 19, 1996, 35 I.L.M. 1387 [hereinafter Ottawa Declaration].

²⁰³ *Id.* at art. 2.

²⁰⁴ Kuupik Kleist, Remarks to the Brookings Institution, (Apr. 17, 2013), *available at* http://www.brookings.edu/~media/events/2013/4/17%20energy%20arctic/20130417_arctic_energy_transcript.pdf.

²⁰⁵ *Id.*

²⁰⁶ *Indigenous Groups Want More Say at Arctic Council*, CBC NEWS (May 10, 2011), <http://www.cbc.ca/news/canada/north/story/2011/05/10/arctic-council-indigenous.html>.

convene Arctic coastal states without the presence of indigenous representatives have been met with vocal resistance from Arctic Council members, most notably the United States; when Canada hosted a meeting of the “Arctic Five”—Canada, the United States, Russia, Norway, and Denmark—in 2010 and did not invite indigenous groups to participate, then-U.S. Secretary of State of Hillary Clinton objected publicly.²⁰⁷ Devolution would be a striking move away from past indigenous exclusion; by localizing decisions about lands and resources in Nunavut, and by achieving effective Inuit self-government through the territory’s institutions of public government, Canada would give Inuit Nunavummiut a seat at the table as jurisdiction-holders and decision-makers. Devolution would thus help to establish Canada as a leader on indigenous rights in a region where multilateralism is increasingly important. As circumpolar economic activity intensifies, and as international indigenous rights norms become more deeply embedded, Canada can use devolution to demonstrate cutting-edge engagement with a core Arctic governance issue, and this can only make its sovereignty claims more resonant.

Nunavut is seeking devolution at a moment of enormous change in the Arctic. This Article has presented that process—as well as Nunavut’s very existence as a separate territory—as an effort to achieve meaningful Inuit self-government in Canada’s Eastern Arctic. Canadian law, international indigenous rights norms, and Canada’s geostrategic interests all point in the same direction, towards a fundamental act of decolonization: the closing of the citizenship gap in Canada’s North. By recognizing that the Inuit of Nunavut, through the territorial government for which they negotiated, ought to decide for themselves how their lands and resources are to be exploited or conserved, Canada may begin to extend to Nunavummiut the same jurisdictional power that is presently enjoyed by Canadian citizens in every other province and territory. This Article has argued that, until Canada takes this step, its federation will remain unfinished.

²⁰⁷ *Clinton’s Arctic Comments Cheer Inuit*, CBC NEWS (Mar. 31, 2010), <http://www.cbc.ca/news/canada/story/2010/03/31/clinton-arctic.html>.