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Court of Appeal Confirms the Availability of a Disgorgement Remedy as a Possible Means of Assessing Damages for Breach of a Modern Land Claim Agreement

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Case commented on: *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 02

The Nunavut Court of Appeal has confirmed the availability of a disgorgement remedy as a possible means of assessing damages for breach of a modern land claim agreement. However, the majority of the Court (Justices Slatter and O'Brien) ruled that summary judgment was not available to the Nunavut Tunngavik Inc (NTI) in this case and that consequently damages must still be assessed following the trial. Justice Hunt (dissenting on this point) concluded that summary judgment was available. All members of the Court were agreed that nominal damages would not be appropriate in this sort of case even if NTI were unable to prove actual damages. To allow an award of nominal damages for breach of a land claim agreement would not foster the overall goal of reconciliation.

I discussed the facts of this case and commented on the judgment at trial here. In brief, NTI is suing the federal Crown for its alleged failure to implement the terms of the Nunavut Final Agreement, a land claim agreement between Canada and the Inuit of Nunavut. One of the specific claims made by NTI is that Canada failed to fulfil its promise to establish an environmental monitoring program for the Nunavut Settlement Area. NTI sought summary judgment on this specific matter based on admissions made by the Crown on discovery and it claimed damages to be assessed on the basis of the savings that accrued to Canada as a result of its delayed implementation of this obligation. The case management judge found a breach and awarded damages on the basis sought by NTI. On appeal the Crown indicated that it would not appeal the finding of breach.

NTI supported its claim for damages on the basis of disgorgement by arguing that the federal Crown owed NTI a fiduciary duty with respect to the discharge of the monitoring obligation. The majority would have none of that and I think rightly so. It will always be hard to argue that a fiduciary obligation covers the same ground as that of an express contractual covenant and perhaps now even more so since the Court has made it clear that in general fiduciary law the test for establishing a "facts and circumstances" fiduciary obligation rests upon establishing a reasonable expectation of loyalty rather than vulnerability: (see *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24).

But of course it is not necessary to establish the existence of a fiduciary duty in order to claim restitutionary damages for a breach of contract - and there was certainly a breach of contract here as the majority emphasized:

> [67] If the Land Claims Agreement contains a covenant to do something, the appellant is obliged by that covenant to do it. It has never been a defence to breach of contract that: "Sorry, we ran out of money", or "Sorry, we never included that in our budget". If the covenant in the Land Claims Agreement requires a fixed amount of funding, that amount must be provided. If the covenant creates an obligation to fund, but without a fixed amount, the amount must be determined in accordance with the proper interpretation of the covenant (possibly, a "reasonable" amount). If the covenant in the Land Claims Agreement requires the appellant to do something, the appellant must find the necessary funds to perform.

As to the availability of restitutionary damages, the majority referred to the Supreme Court's decision in *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 noting that:

> [80] Restitutionary damages are available in exceptional cases, where the expectation damages are difficult or impossible to calculate, or where expectation damages would effectively allow the breaching party immunity notwithstanding the breach.

The majority provided the following principles to guide assessment of damages (at para 85):

> a) The presumptive rule is that the plaintiff is entitled to expectation damages: *Bank of America Canada* at paras. 25-6. The plaintiff is to be put in the position it would have been in if the contract had been performed.
> b) Exceptionally, where damage is shown but expectation damages are not readily quantifiable, or where the circumstances of the case call for a different measure of damages to provide an effective remedy:
> i) where the anticipated "bargain" was non-financial or intangible, then damages can be assessed and awarded at large to reflect the expectations of the parties, for example where the contract is not commercial in nature, or the damages are not liquidated: *Fidler v Sun Life Assurance Co. of Canada*, 2006 SCC 30 (CanLII), [2006] 2 SCR 3 at paras. 44-5, 2006 SCC 30; *Honda Canada Inc. v Keays*, 2008 SCC 39 (CanLII), 2008 SCC 39 at paras. 55, 59, 2008 SCC 39 (CanLII), [2008] 2 SCR 362; *Jarvis v Swan Tours Ltd*., [1973] QB 233 (CA).
> ii) in some cases a restitutionary remedy (disgorgement of some benefit achieved by the defendant from the breach) is a potential remedy. Some exceptional circumstances are required (as in *Blake*, and the facts in *Dolly Varden*) to justify this approach. The trial judge should give consideration to the concept of "efficient breach", and the effect that has on the calculation of damages: *Bank of America Canada* at paras. 31-3; *Dasham Carriers Inc. v Gerlach*, 2013 ONCA 707 (CanLII), 2013 ONCA 707 at paras. 29-30.
> For these purposes "not readily quantifiable" does not just mean that the plaintiff has not marshaled the evidence necessary to prove what would be provable.
> c) Where breach is shown, but no damage is evident, nominal damages should be awarded: *B.M.P. Global Distribution Inc. v Bank of Nova Scotia*, 2009 SCC 15 (CanLII), 2009 SCC 15 at para. 90, 2009 SCC 15 (CanLII), [2009] 1 SCR 504; *Métis National Council Secretariat Inc. v Dumont*, 2008 MBCA 142 (CanLII), 2008 MBCA 142 at paras. 40-6, 305 DLR (4th) 356; *Place Concorde East Limited Partnership v Shelter Corp. of Canada Ltd.* 2006 CanLII 16346 (ON CA), (2006), 270 DLR (4th) 181 at para. 78, 211 OAC 141 (CA).

Evidently it is principle (b) that is important here. In concluding that the case management judge had not erred the majority considered the following factors to be important (paras 86 – 88):

- The covenant to establish a system of statistical monitoring is not truly commercial in nature, and there is no obvious way of measuring its value in economic terms.
- The benefits that accrue from the statistical data would be indirect, and would benefit the general Inuit population in ways that could not easily be measured.
- Canada had already received valuable consideration (the surrender of aboriginal title) for the covenant to establish a system of statistical monitoring. If Canada could simply refuse to perform that covenant, and argue that it need not pay any damages because none could readily be established, it would potentially deprive the Inuit of many of the intended benefits of the Land Claims Agreement. In the context of a land claims treaty, insulating the contracting government from any consequences of a breach of a covenant like this is legally unacceptable.

The case management judge had relied heavily on *AG v Blake*, [2001] 1 AC 268 but both the majority and the dissent seemed more persuaded by the mining case of *Dolly Varden Mines Ltd v Sunshine Exploration Ltd*, [1970] SCR 2 - a case which the Court (and I am guessing that this was Justice Hunt) brought to the attention of counsel. In *Dolly Varden* the defendant had agreed to undertake a program of exploration but failed to do so. The Court held that damages should be assessed based on the cost of performing work program rather than any loss that the plaintiff could prove (or not) as a result of not having the work performed (at para 88): "The 'savings' achieved by [Canada] in not performing [the monitoring obligations] are different in character from the profits recovered in *Blake*, but roughly analogous to the saved expenses in *Dolly Varden*, and are a relevant consideration."

At the end of the day however the majority failed to endorse the case management judge's assessment of the appropriate damages in this case on the grounds that this should not have been determined on an application for summary judgment. Ordinarily one would not expect that a decision on the availability of summary judgment would be a matter on which the disappointed party would be able to obtain leave to appeal from the Supreme Court of Canada. However, the Court's recent ruling in *Hriniak v Mauldin*, 2014 SCC 7 suggests that the Court favours making summary judgment more readily available as part of an important agenda of facilitating access to justice. Both the majority and the dissent referred to this decision but the majority was evidently of the view that summary judgment on this issue would be unfair to Canada. Some of the reasons offered by the majority (e.g. Canada did not really know the case it had to meet until the case management judge had rendered his decision (at para 98) and that "both parties" anticipated that the entire dispute would proceed to trial (at para 91)) seem far from convincing – so perhaps this is a case that the Court could be persuaded to review.