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If A Land Claims Agreement Says That You Must Resolve The Dispute Through Arbitration, Then That's What You Must Do

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Case Commented On: *Newfoundland and Labrador v Nunatsiavut Government*, 2022 NLCA 19 (CanLII)

If a land claims agreement says that you must resolve the dispute through arbitration, then that's what you must do. That's the blunt (and perhaps obvious) conclusion of the Newfoundland and Labrador Court of Appeal in this decision involving the terms of the *Labrador Inuit Land Claims Agreement* (*Agreement*).

There could be little doubt that the *Agreement* did in fact stipulate that a dispute of this nature (a dispute relating to the determination and sharing of revenues from the Voisey's Bay project) must be referred to arbitration (see the combined effect of ss 7.6.9 and 21.9.1of the *Agreement*, as discussed at paras 34 -52). But in this case, the Nunatsiavut government had submitted the dispute to the provincial superior court, and the provincial government had failed to take any objection to that course of action; until it lost at trial (*Nunatsiavut Government v Newfoundland and Labrador*, 2020 NLSC 129 (CanLII))and the matter went on appeal to the Court of Appeal.

If this were an ordinary bilateral commercial contract, I think that the province's failure to object to the Nunatsiavut government's decision to submit the dispute to the ordinary courts of justice, and the province's willingness to participate in that forum, would have been fatal to the province's attempt to raise the issue on appeal (see the discussion here at paras 53 – 56, under the heading "attornment to jurisdiction"). But land claims agreements are no ordinary agreements. They are undoubtedly contracts that can support a cause of action seeking significant damages for breach of contract: *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 (CanLII). They are also statutory contracts in the sense that provincial and federal statutes accord them the force of law, thereby establishing rights and obligations, not just for the parties to the agreement, but also third parties. In that sense, land claims agreements have a property-like status: contracts generally only bind the parties to the contract, property rights bind the whole world, as do agreements that are accorded the force of law by statute. And finally, land claims agreements are recognized and affirmed by s 35 of the *Constitution Act, 1982*, and, as stated by Justice Ian Binnie in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII)) at para 33: "[t]he decision to entrench in s. 35 of the Constitution Act, 1982 the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal…" (as cited in this case under comment at para 24, and for the ABlawg post on *Beckman* see here)). That said, there are decisions suggesting that the rights protected by these agreements are not immune from justifiable infringement by another order of government: see *Sga'nism Sim'augit (Chief Mountain)*

v Canada (Attorney General), 2013 BCCA 49 (CanLII) and *Campbell v AG BC/AG Cda & Nisga'a Nation,* 2000 BCSC 1123 (CanLII).

The decision by the Court of Appeal to allow the appeal and dismiss the entire case on jurisdictional grounds is undoubtedly disappointing to the Nunatsiavut government since they had succeeded on the merits before Justice Vikas Khaladkar. Now they will have to start again before an arbitration panel established under Chapter 21 of the *Agreement*. That said, they will have in their pocket Justice Khaladker's decision. It won't be binding on the arbitral panel, but it cannot be discounted. Furthermore, the unanimous judgment does offer important statements as to the legal and constitutional significance of lands claims agreements. The next few paragraphs expand upon these statements.

First, the Court affirmed that all treaties and modern land claims agreements represent an exchange of solemn promises and must "always be interpreted in such a way that it upholds the honour of the Crown" (at paras 24 – 25).

Second, and in discussing the difference between commercial contracts and land claims agreements, the Court affirmed the special status of land claims agreements:

> Here, the exclusion of the [jurisdiction court is not by way of a simple contract, but an agreement that has constitutional dimensions with the force of law. This is not a matter of simply "waiving" one's rights to mandatory clauses in a commercial contract. (See also *J.N. v. Durham Regional Police Services*, 2012 ONCA 428, at paragraph 25; *Ontario Provincial Police Commissioner v. Mosher*, 2015 ONCA 722, at paragraph 67; *Whalen v. Whalen*, 2018 NSCA 37, at paragraph 36, the Court stated that jurisdiction is not optional and "cannot be conferred by consent"; *Gourlay v. Crystal Mountain Resorts Ltd.*, 2020 BCCA 191, at paragraph 64; and *Norex Petroleum Limited v. Chubb Insurance Company of Canada*, 2008 ABQB 442, at paragraph 60.) (at para 50)

Third, the Court applied the *Marshall* rules or principles of interpretation (see *R v Marshall*, 1999 CanLII 665 (SCC), [1999] 3 SCR 456, at para 78, per Justice Beverley McLachlan, dissenting) as modified for modern land claims agreement in *Beckman,* to reject a narrow interpretation of the dispute settlement provisions of the *Agreement*. This issue arose because of the Nunatsiavut government's contention that not all of the issues that were subject of the dispute fell within the compulsory arbitration provisions. The Court concluded that a narrow interpretation of these provisions would

> [61] … not [be] in keeping with the language used, and is not in keeping with the principles as stated by McLachlin C.J. respecting the interpretation of treaties. For example, such an interpretation would not be a "liberal" interpretation of the section, contrary to principle 2, but a "technical" interpretation, contrary to principle 7.
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> ….
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> [64] Finally, to interpret this section as proposed by Nunatsiavut would create bifurcated processes for disputes potentially arising out of the same facts: arbitration to resolve *how much* to pay ("calculation"), and the court to resolve *if* money should be

> paid. This is not a reasonable interpretation of the parties' intentions respecting disputes of this kind, in light of the detail to which the parties addressed dispute resolution throughout the treaty. If the parties intended a bifurcated process to resolve disputes over revenue sharing, one would reasonably expect the terms of sections 7.6.8 and 7.6.9 to have so stated.

Fourth, the Court took a broad view of the jurisdiction of an arbitral panel constituted under the *Agreement* to consider ancillary questions that might be raised, including issues related to the duty to consult:

> Given that the arbitration panel is empowered to deal with all questions of law, fact, or mixed fact and law, as well as providing "any remedy in law", I am satisfied that the arbitration panel is empowered to address all aspects of the dispute in these circumstances, including whether the Province failed to behave honourably towards Nunatsiavut by failing to consult with it regarding the impugned monies. (at para 69)

Finally, and related to the last point, while the *Agreement* had not unequivocally removed the jurisdiction of the superior courts to address independent questions of the duty to consult, or the honour of the Crown, in these circumstances the Court should decline to exercise that jurisdiction.

> [74] However, the objectives of the treaty support that even if the provincial Superior Court retains the jurisdiction to address complaints of the failure of the Crown to behave honourably, in these circumstances the Court should decline to exercise its jurisdiction.
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> [75] Firstly, the terms of the treaty, as discussed earlier, have fully equipped the arbitration panel to address this complaint.
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> [76] Secondly, whether the Province failed in its duty to consult is inextricably linked to the dispute over whether the Province was obliged to share the monies because the duty to consult only arises if the monies constitute revenue. The duty to consult does not engage every financial decision of the Province, only those actions that affect the established rights or interests of Nunatsiavut. Here, Nunatsiavut's interests include their legitimate claim to revenue generated from Voisey's Bay. But if the monies in question are not "revenue", then there may be no issue as to whether or not the Province was obliged to consult. As in *Best*, given the link between the dispute that is governed by chapter 7 and the duty to consult, the "essence" of the dispute is still whether or not the monies constituted revenue.
>
> [77] Finally, the Court should decline jurisdiction, because the parties should use the very tools they have created to govern their relationship. As stated earlier, the treaty is a document with constitutional dimensions that comprehensively provides for management of the relationship between the parties; including disputes over revenue sharing. It is a solemn promise between two nations, enshrined in legislation to facilitate reconciliation. If these "solemn promises" are to be a step towards reconciling the relationship and a step towards the future, it behooves the parties to adhere to the terms

> they have carefully considered and negotiated, including to avail of the dispute resolution mechanisms as provided for in the treaty. To condone ignoring the terms to which the parties have agreed is to render the treaty meaningless.

In sum, the specific outcome of this decision is no doubt disappointing to the Nunatsiavut government, but there is also much here that should give comfort to those with an interest in affirming the special legal and constitutional status of land claims agreements. It is even possible that the judgment might give some pause to those who think that the doctrine of justifiable infringement does, or should, apply to modern land claims agreements, even agreements that contain amendment provisions (suggesting that changes in circumstances, for example, should be accommodated by a consensual amendment rather unilateral infringement, even if "justifiable"). After all, if it is not possible for two parties to a land claims agreement (Canada is also a party to the *Agreement* but had no stake in the outcome of this dispute) to informally vary the application of a mandatory provision of the agreement, why should it be lawful for one party to *unilaterally* infringe the rights of another party to the agreement.

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