In the Court of Appeal of Nunavut

Citation: Nunavut Tunngavik Incorporated v Canada (Attorney General), 2014 NUCA 02

Date: 20140423
Docket: 08-12-007-CAP
Registry: Iqaluit

Between:

The Inuit of Nunavut as Represented by Nunavut Tunngavik Incorporated

Respondent (Plaintiff)

- and -

The Attorney General of Canada

Appellant (Defendant)

- and -

The Commissioner of Nunavut as Represented by Government of Nunavut and The Government of Nunavut

Third Parties

The Court:

The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Frans Slatter

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Mr. Justice O'Brien

Dissenting Reasons for Judgment Reserved of the Honourable Madam Justice Hunt

Appeal from the Order by
The Honourable Mr. Justice E.D. Johnson
Dated the 27th day of June, 2012
(2012 NUCJ 11, Docket: 08-06-713-CVC)

Reasons for Judgment Reserved of the
Honourable Mr. Justice Slatter

[1] The appellant, the Government of Canada, appeals the partial summary judgment granted against it by the case management judge: ***Nunavut Tunngavik Inc. v Canada (Attorney General)***, 2012 NUCJ 11, [2012] 3 CNLR 210. The underlying action alleges numerous breaches by Canada of the Nunavut Land Claims Agreement. The partial summary judgment relates to a breach of one clause of that agreement (Article 12.7.6) regarding the implementation of an informational monitoring plan. The live issues on this appeal are: a) whether Canada owes the respondent fiduciary duties under or parallel to Article 12.7.6 of the Land Claims Agreement, b) whether restitutionary (as opposed to only expectation) damages are available for the breach, and c) whether the record on the quantum of damages was sufficiently clear to permit summary judgment.

Background Facts

[2] The Inuit have resided in the eastern Arctic for many generations. They never entered into any treaty arrangements with the British Crown. Negotiations for a comprehensive treaty commenced in the 1970s, and culminated with the signing in 1993 of the Nunavut Land Claims Agreement. The Land Claims Agreement is over 200 pages long, and covers virtually every conceivable subject; it bears no resemblance whatsoever to the simple aboriginal treaties of the Victorian era: see the text at nlca.tunngavik.com. One of its central components is the surrender by the Inuit of their traditional aboriginal land claims in exchange for title to large tracts of land, and the many other benefits set out in the Land Claims Agreement. Parallel to the implementation of the Land Claims Agreement, an entirely new political jurisdiction was carved out of the Northwest Territories. This resulted in the creation in 1999 of the Territory of Nunavut, a new unit of government in Canada.

[3] The respondent, Nunavut Tunngavik Incorporated, is a corporation without share capital established to represent the interests of the beneficiaries of the Land Claims Agreement. It is, among other things, the "Designated Inuit Organization" that holds title to the lands granted to the Inuit under Article 19.3.1 of the Land Claims Agreement. It also has various other rights and responsibilities, including under Article 2.14.1 which authorizes it to enforce the covenants in the Land Claims Agreement.

[4] The Inuit ratified the Land Claims Agreement by vote, as contemplated by Article 36.2.1. Article 36.3.1 contemplated that Canada would sign the Land Claims Agreement, and ratify it by statute as detailed in that Article. That statute is the *Nunavut Land Claims Agreement Act*, SC 1993, c. 29. The *Act* recites the negotiation of the Land Claims Agreement, and in its preamble sets out the perceived purposes of that Agreement:

> WHEREAS Her Majesty the Queen in right of Canada and the Inuit of the Nunavut Settlement Area have negotiated an Agreement based on and reflecting the following objectives:

> to provide for certainty and clarity of rights to ownership and use of lands and resources and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore,
>
> to provide Inuit with wildlife harvesting rights and rights to participate in decision-making concerning wildlife harvesting,
>
> to provide Inuit with financial compensation and means of participating in economic opportunities,
>
> to encourage self-reliance and the cultural and social well-being of Inuit;

Section 4(1) of the *Act* declares that the Land Claims Agreement is "ratified, given effect and declared valid".

[5] The *Act* goes on to provide some principles by which it and the Land Claims Agreement should be interpreted. Section 4(3) provides:

> (3) For greater certainty, any person or body on which the Agreement confers a right, privilege, benefit or power or imposes a duty or liability may exercise the right, privilege, benefit or power, shall perform the duty or is subject to the liability, to the extent provided for by the Agreement.

Section 6(1) provides that the Land Claims Agreement prevails in the face of any inconsistency between it and "any law, including this Act".

The Land Claims Agreement

[6] The Land Claims Agreement is at the heart of this litigation. The entire Statement of Claim and the summary judgment application were premised on it. It is pled in para. 3 of the Amended Statement of Claim, and "admitted" in para. 4 of the Defence. Both the parties and the case management judge were well aware of its admitted existence and content. The fact that the parties did not photocopy the lengthy Agreement and include it in the Appeal Books is of no consequence. It is available for review on line. The Land Claims Agreement is a document with constitutional status, it was tabled in Parliament, it has been ratified by statute, and was admitted in the pleadings. It is artificial to suggest it is not a part of this record. It is axiomatic that an agreement must be interpreted as a whole, and all the provisions of the Agreement must be considered when deciding what duties flow from it.

[7] As noted, the Land Claims Agreement covers many topics. It contains some guides to its interpretation, including a "whole agreement" clause that complements the statutory provisions just discussed:

> 2.9.2 The Agreement shall be the entire agreement and there is no representation, warranty, collateral agreement or condition affecting the Agreement except as expressed in it.

Article 2.9.3 negates the *contra proferentum* presumption. Read as a whole, it is clear that the Land Claims Agreement was carefully and professionally drafted in accordance with modern contractual drafting conventions.

[8] The Land Claims Agreement also deals with the creation of the new governmental and quasi-governmental organizations that complement it, and the implementation of the many covenants in it. Implementation was to be accomplished through an Implementation Plan, under the supervision of an Implementation Panel, in part through the mechanism of an Implementation Contract. The concept was outlined in Article 37.1.1:

> 37.1.1 The following principles shall guide the implementation of the Agreement and shall be reflected in the Implementation Plan:
>
> (a) there shall be an ongoing process for Inuit and Government to plan for and monitor the implementation of the Agreement which shall mirror the spirit and intent of the Agreement and its various terms and conditions;
>
> (b) implementation shall reflect the objective of the Agreement of encouraging self-reliance and the cultural and social well-being of Inuit;
>
> (c) timely and effective implementation of the Agreement with active Inuit participation, including those provisions for training, is essential for Inuit to benefit from the Agreement;
>
> (d) to promote timely and effective implementation of the Agreement, Inuit and Government shall
>
> (i) identify, for multi-year planning periods, the implementation activities and the level of government implementation funding which will be provided during any planning period, and
>
> (ii) allow flexibility through an implementation panel to reschedule activities, and consistent with government budgetary processes, to re-allocate funds within the planning period; and . . .

This Article contemplates the joint participation by the Inuit and the Government of Canada in the implementation process. To some extent the provisions are possibly no more than an "agreement to agree".

[9] The specific covenant at issue in this appeal concerns the creation of a monitoring plan:

ARTICLE 12, PART 7, MONITORING

12.7.6 - General Monitoring

There is a requirement for general monitoring to collect and analyse information on the long term state and health of the ecosystemic and socio-economic environment in the Nunavut Settlement Area. Government, in co-operation with the NPC [Nunavut Planning Commission], shall be responsible for developing a general monitoring plan and for directing and co-ordinating general monitoring and data collection. The NPC shall:

(a) in accordance with the plan, collate information and data provided by industry, government departments and agencies, amongst others;

(b) in accordance with the plan, report periodically on the ecosystemic and socio-economic environment of the Nunavut Settlement Area; and

(c) use the information collected under Sub-sections (a) and (b) to fulfill its existing responsibilities under Article 11.

It is the now admitted breach of this covenant that formed the basis of the summary judgment.

[10] The Implementation Contract contains a number of Schedules, including Schedule 1, "Implementation Worksheets". The purpose of Schedule 1 was set out in section 2.3:

2.3 In Schedule 1:

a) the text in each worksheet under the heading "Obligation, Activity, Project: constitutes the primary provisions of the Agreement to which the activities in that worksheet relate but are not intended to represent the only relevant provisions in relation to those activities;

b) the inclusion of the text under the headings "Participant/Liaison" and "Referenced Clauses" is intended solely to facilitate the utilisation of Schedule 1 as a planning tool and is not to be used to affect or interpret the obligations of the parties under the Contract;

c) the Planning Assumptions shall be of interpretive value only; and

d) any qualification in the Nunavut Final Agreement relating to any obligation described in the Schedule shall apply to that obligation.

Section 3.1 provides that each party would "act in good faith to honour and carry out its obligations". Section 5.1 confirms Canada's obligation to provide implementational funding.

[11] Schedule 1 includes a Worksheet respecting Article 12.7.6 of the Land Claims Agreement:

Subject: GENERAL ENVIRONMENTAL MONITORING

Obligation, Activity, Project: **Processing of General Monitoring**

12.7.6 [Set out *verbatim*, see *supra*, para. 9]

Management Responsibility:

DIAND

Participation/Liaison:

NPC
Appropriate government departments

Referenced Clauses*:

12.7.7; Article 11

ACTIVITIES	RESPONSIBILITY	TIMING
Identify government agencies involved in monitoring and data collection	DIAND	ASAP
In cooperation with NPC, establish a process to coordinate monitoring and data collection by government agencies	DIAND	ASAP after NPC established
In cooperation with NPC, review existing ecosystem and socio-economic monitoring programs in the Nunavut Settlement Area	DIAND	ASAP after NPC established
In cooperation with NPC, develop a general monitoring plan	DIAND	ASAP after NPC established
Provide information and data collected by government to NPC for collating	DIAND	In accordance with general monitoring plan
In cooperation with NPC, direct and coordinate general monitoring and data collection	DIAND	In accordance with general monitoring plan

*Article 12.7.7 gives the Nunavut Planning Commission the power to delegate. Article 11 covers many aspects of Land Use Planning.

The Present Dispute

[12] The Land Claims Agreement and the Implementation Agreement came into effect in 1993. Nunavut was created as of 1999. Implementation commenced; there was obviously a lot to be done.

[13] Differences of opinion arose, and in 2006 the respondent issued the Statement of Claim which underlies this appeal. The Statement of Claim alleges numerous breaches of the Land Claims Agreement, including (in paras. 12(c), 43-5) a breach of Article 12.7.6. The Statement of Claim also alleges fiduciary duties. It states that the appellant has the power to "design, select and implement such initiatives" as are required to perform its obligations under the Land Claims Agreement, and the resulting power or control, in the face of the "vulnerable position" of the respondent "give[s] rise to *sui generis* fiduciary obligations". Particulars of the scope of the pleaded fiduciary duty are:

> 18. (a) It [Canada] is obliged to engage in good faith negotiations with the Inuit for the purpose of reaching agreement on the funding necessary to fulfill the promises made to Inuit in the Agreement;
>
> (b) It cannot unilaterally exercise its power over the appropriation of funds so as to erode, delay, or minimize the scope and substance of the benefits promised to Inuit in the Agreement;
>
> (c) In the event of an impasse over the funding necessary to fulfill the promises made by the Crown in the Agreement, it is obliged to have the matter determined by submission to the arbitration procedure provided under the Agreement or by another neutral dispute resolution process agreed on by the parties;
>
> (d) It is obliged to seek the agreement of the Inuit on Governmental initiatives it proposes to establish for the purpose of fulfilling its obligations under the Agreement;
>
> (e) It is obliged to design governmental initiatives required by the Agreement in a manner that is intended to achieve and is reasonably capable of achieving the objectives set out in the Agreement.

Paragraph 19 of the Statement of Claim then alleges numerous breaches of the fiduciary duty.

[14] Significant portions of the Statement of Claim relate to allegations of "inadequate funding". The respondent alleges (based on provisions such as Article 37.1.1(e)(ii)) that the appellant is obliged under the Land Claims Agreement and its fiduciary duties to fund various

initiatives, activities, and institutions in Nunavut. A significant portion of the dispute relates to whether the funding that has been provided complies with the pleaded obligations.

[15] The relief claimed includes numerous declarations that the appellant is in breach of the Land Claims Agreement, specific performance, continuing supervision by the Court, an order requiring the appellant to consent to arbitration, declarations that the appellant is in breach of its fiduciary duties, damages of $1 billion, and collateral relief.

[16] After the usual exchange of documents, and examinations for discovery, the respondent brought this application for summary judgment. The application is narrow, and relates only to the alleged breach of Article 12.7.6. It is anticipated that the balance of the action will proceed to trial. The application was decided based on various admissions, affidavits sworn by the parties' representatives, and answers given at examinations for discovery by T. Sewell, the appellant's designated officer.

Decision of the Case Management Judge

[17] The appellant's position at the summary judgment application was that there had been no breach of Article 12.7.6. The case management judge found otherwise, and on appeal the appellant does not challenge that finding. Since the Land Claims Agreement contains no deadline for the performance of the appellant's obligations under Article 12.7.6, the case management judge found that they had to be performed within a reasonable time (reasons para. 82). He concluded that, at the latest, those obligations should have been performed by 2003 (reasons paras. 83, 105(iii), (iv)), and that the appellant was in breach by not implementing monitoring until 2010 (reasons para. 196). Those findings are now uncontested.

[18] After finding a breach of the Land Claims Agreement, case management judge went on to conclude that there was also a breach of fiduciary duty:

> 265. I am satisfied that NTI [the respondent] has established that Canada owed a fiduciary duty to the Inuit to establish the NGMP [Nunavut General Monitoring Plan] as soon as possible after the establishment of the NPC [Nunavut Planning Commission] and no later than July 2003.

That finding was largely pursued because the respondent did not seek expectation damages for the breach of covenant, but rather sought a restitutionary remedy, namely the disgorgement of the savings realized by the appellant through its delayed performance. Since the appellant argued that only expectation or nominal damages were available for breach of covenant, the case management judge explored the existence of a fiduciary duty. The case management judge concluded that expectation damages were inappropriate for the breach (reasons para. 295, 331). The case management judge concluded that there was a breach of fiduciary duty (reasons para. 265), that restitutionary remedies were available and appropriate for breaches of fiduciary duty (reasons paras. 275-6, 309), but in any event he concluded that the same restitutionary remedies would be available for breach of covenant (reasons paras. 333-4).

[19] The case management judge then went on to consider the quantum of damages. The appellant argued that, even if a breach was found, the record was not sufficiently clear to justify summary judgment on quantum, and that the question of quantum should be sent to trial. The case management judge found, however, that the record was sufficiently clear to determine the cost savings that the appellant had achieved by delaying performance of its obligation to implement a monitoring plan (reasons paras. 105, 146, 196). He concluded that it was not possible to calculate expectation damages in this situation (reasons para. 201). He referred to a Business Case which had been developed for the monitoring plan, one of the options in that Business Case which had apparently been agreed to, and the budgeted cost savings that the appellant had realized by delaying performance for seven years. The case management judge determined that there was no genuine issue for trial with respect to the quantum, and awarded damages of $14.8 million (reasons paras. 39, 354).

Issues and Standard of Review

[20] As noted, this appeal raises three issues:

a) Whether Canada owes the respondent fiduciary duties under or parallel to Article 12.7.6 of the Land Claims Agreement;

b) Whether restitutionary (as opposed to only expectation) damages are available for the admitted breach; and

c) Whether the record on the quantum of damages was sufficiently clear to permit summary judgment.

To be clear, this was a summary judgment application. The only issue before the Court is therefore whether the respondent proved its case on this record in advance of a full trial, and demonstrated that there was no remaining genuine issue for trial. The only covenant on which summary judgment was applied for was Article 12.7.6 relating to general monitoring. Thus, the three issues just stated are engaged only with respect to a breach of that Article, and whether any breach can be established without a full trial.

[21] The conclusion that restitutionary damages are available for breach of contract does not render moot any discussion about parallel fiduciary duties. The existence of such parallel fiduciary duties would define the scope of any breach by the Crown, and could have an impact on the remedies available.

[22] There is clearly no unfairness in discussing the issue of fiduciary duty. The respondents wanted to establish a fiduciary duty parallel to the covenants in the Land Claims Agreement, undoubtedly because it would be a significant advantage in the trial still to come. The issue was pled by the respondents, was fully argued on the summary judgment application, and was fully engaged by the case management judge. The respondents' factum discussed the issue and supported the result; there was no suggestion that the issue was unsuitable for adjudication on a summary judgment application.

[23] Further, there is nothing that makes inappropriate the discussion of fiduciary duty, albeit in the narrow context of a summary judgment application about Article 12.7.6. The factual, historical and constitutional context in which the Land Claims Agreement was negotiated is not in dispute. Its terms are clear. There are numerous cases in aboriginal law discussing the Crown's obligations, including the recent decision in ***Manitoba Métis***. In ***Hryniak v Mauldin***, 2014 SCC 7 the Court called for "a culture shift . . . in order to create an environment promoting timely and affordable access to the civil justice system . . . moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case." Merely because some legal analysis is required to resolve the issue does not preclude a decision. As was said in ***Kripps v Touche Ross & Co.*** (1992), 94 DLR (4th) 284 at p. 309, 69 BCLR (2d) 62 (CA):

> A court might be tempted, at the present point in the development of the Canadian law of negligence, to permit every negligence claim to proceed to trial. But that would lead to a long and costly period of uncertainty, one particularly costly in the commercial world where certainty in the law is of considerable importance. It seems to me that the courts would fail in their duty to the community were they to decline to exercise jurisdiction under Rule 19(24) simply because of the current state of the jurisprudence in this area of the law. It is, I think, important in some cases that the court make a decision at this stage concerning the extent to which recovery in negligence can be enlarged, and I believe this to be such a case.

Likewise, on this summary judgment application this Court can discuss the law of fiduciary duties running parallel to Article 12.7.6.

[24] The factual findings of the case management judge underlying the finding of a fiduciary duty are entitled to deference. However, the legal test for the existence of a fiduciary duty is a question of law reviewed for correctness: ***Perez v Galambos***, 2009 SCC 48 at paras. 48-49, [2009] 3 SCR 247; ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24 at paras. 4, 22, [2011] 2 SCR 261; ***Housen v Nikolaisen***, 2002 SCC 33 at paras. 8, 10, 25, [2002] 2 SCR 235. Deciding if a particular set of facts meets a legal standard calls for the drawing of a legal inference from those facts, which in turn calls for a "higher standard" of review: ***Housen*** at paras. 26, 28.

[25] The interpretation of the terms of the Land Claims Agreement is a question of law reviewed for correctness: ***Sumner v PCL Constructors Inc.***, 2011 ABCA 326 at para. 25, 515 AR 231; ***Globex Foreign Exchange Corp v Kelcher***, 2011 ABCA 240 at para. 108, 513 AR 101; ***Diegel v Diegel***, 2008 ABCA 389 at para. 20, 100 Alta LR (4th) 1; ***358296 Alberta Ltd. v Phoenix Marble Ltd.***, 2008 ABCA 177 at para. 9, (*sub nom* ***Alberta Importers and Distributors (1993) Inc. v Phoenix Marble Ltd.***) 88 Alta LR (4th) 225, 432 AR 173.

[26] The availability of any particular type of damages for breach of contract is a question of law reviewed for correctness. The determination of the quantum of damages is largely a question of fact, and should only be interfered with where the trial judge applied a wrong principle of law, or the overall amount is a wholly erroneous estimate: ***Andrews v Grand & Toy Alberta Ltd.***,

[1978] 2 SCR 229 at p. 235, 19 NR 50; ***Herron v Hunting Chase Inc.***, 2003 ABCA 219 at para. 38, 330 AR 53.

[27] The test for summary judgment is a question of law reviewed for correctness. The application of that test to a particular record involves a mixed question of fact and law, and the granting of summary judgment is entitled to some deference: ***Hryniak v Mauldin*** at paras. 81-2; ***Diegel***; ***Stobbe v Paramount Investments Inc.***, 20013 ABCA 384 at para. 10.

Fiduciary Duty in Aboriginal Law

[28] A considerable portion of the reasons of the case management judge, and the argument before this Court, concerned whether the appellant owes fiduciary duties to the respondent that parallel or supplement the covenants in the Land Claims Agreement. The respondent argued that the relationship between Canada and the Inuit is inherently fiduciary in nature, and that the execution of the Land Claims Agreement does not change that. It points to cases where a fiduciary and a beneficiary will enter into a contract, which is built on the platform of fiduciary duties: ***Strother v 3464920 Canada Inc.***, 2007 SCC 24 at para. 34, [2007] 2 SCR 177.

[29] Some examples of the alleged fiduciary duties are helpful in providing some context to this argument. One example is the opportunity to arbitrate disputes. Article 38.2.1(a) of the Land Claims Agreement provides that certain disputes may be sent to arbitration, but only if both parties consent. The respondent pleads in paras. 19(k), 82-4 that the appellant has refused to consent to the resolution of some portions of the dispute by arbitration, and that the withholding of its consent is a breach of its fiduciary duties.

[30] A second example relates to the pleading that the appellant has a fiduciary duty to fund various activities or institutions, and has failed to do so. The Land Claims Agreement contains some express covenants to fund certain activities, sometimes in fixed amounts, and sometimes in amounts within certain general parameters. In addition to these contractual duties, the respondent pleads in para. 18 that the appellant has fiduciary duties that place limits on how it can exercise its powers over funding.

[31] Fiduciary duties have two sources. First, there are some relationships which by their very nature are fiduciary. Second, even outside the established fiduciary relationships the particular factual matrix of a given relationship may generate fiduciary duties. It has long been recognized that the relationship between the Crown and the aboriginal peoples is one that is fiduciary in nature, with certain features that are unique to that relationship: ***Guerin v The Queen***, [1984] 2 SCR 335 at pp. 383-5; ***Elder Advocates*** at paras. 48-9. The issue is therefore whether there is any source of fiduciary duty at play in this appeal.

[32] The law on the subject has evolved, and was most recently summarized in ***Manitoba Métis Federation Inc. v Canada (Attorney General)***, 2013 SCC 14, [2013] 1 SCR 623. ***Manitoba Métis*** was decided after the decision of the case management judge presently under appeal, and accordingly was not available to him. ***Manitoba Métis*** sets out several principles:

1. While overall the relationship between the Crown and aboriginal peoples can be described as fiduciary in nature, not all aspects of that relationship are governed by fiduciary obligations (at para. 48). As stated in ***Wewaykum Indian Band v Canada***, 2002 SCC 79 at para. 81, [2002] 4 SCR 245, the fiduciary duty "does not exist at large but in relation to specific Indian interests".

2. There are two ways that a fiduciary duty can arise in the aboriginal context:

(a) Where the Crown administers lands or property in which Aboriginal peoples have an interest, such a duty may arise if there is

(i) a specific or cognizable Aboriginal interest, and

(ii) a Crown undertaking of discretionary control over that interest (at para. 51).

The interest must be a communal Aboriginal interest in land that is integral to the nature of the community and their relationship to the land (at para. 53). It must be predicated on historic use and occupation, and cannot be established by treaty or by legislation (at para. 58).

(b) A more general fiduciary duty may arise (at para. 60), if there is:

(i) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary, coupled with a duty of loyalty that would involve subordinating the interests of all others in favour of the beneficiary (at para. 61),

(ii) a defined person or class of persons vulnerable to a fiduciary's control; and

(iii) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

3. Where a fiduciary duty exists, the scope and content of that duty will vary depending on the circumstances (at para. 49).

Does the application of these principles demonstrate a fiduciary duty in this case with respect to the obligation to provide statistical monitoring?

Administration of Aboriginal Lands

[33] It will immediately be apparent that no fiduciary duty can arise under the first branch of the test: where the Crown administers lands or property in which Aboriginal peoples have an interest. In ***Manitoba Métis*** the Supreme Court clearly stated (at para. 58) that the necessary

foundational rights cannot arise by treaty, because in that event the Crown's duties are defined by the treaty, not another cognizable Aboriginal interest. The only source of the duty to monitor is the Land Claims Agreement, which is clearly a treaty. In any event, as discussed below, the necessary fiduciary elements of discretionary control and subordination of interest are absent here.

[34] That makes moot any search for a "cognizable aboriginal interest", which is a part of the test for the first category of fiduciary duty. In any event, there is no sufficient land or property interest involved in Article 12.7.6 that would qualify; there is no evidence on this record of an aboriginal property or other interest in "ecosystemic and socio-economic monitoring". As discussed, *infra* paras. 42-48, the now surrendered aboriginal land claim cannot be the necessary interest. The contractual entitlement to monitoring, like the statutory property rights involved in ***Manitoba Métis***, is not sufficient to support a fiduciary duty under the first branch of the test.

Fiduciary Duty by Undertaking

[35] A second possible source of a fiduciary duty is through the other branch of the test, which requires an undertaking of loyalty, directed to a defined group, related to a "practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control".

Undertaking and Loyalty

[36] The first part of the test requires that the proposed fiduciary undertook to act in the interests of the beneficiary, to the extent that it would subordinate its own self interest, and that of any other group, to those of the beneficiary.

[37] The Land Claims Agreement was negotiated by two parties, each of which had access to sophisticated advice, in an arm's length context: ***Beckman v Little Salmon/Carmacks First Nation***, 2010 SCC 53 at para. 9, [2010] 3 SCR 103. The Government of Canada, in the public interest, and having regard to its obligations to aboriginal peoples, negotiated a surrender of the Inuit's claim to traditional land rights. In exchange for that, Canada vested in the Inuit fee simple title to tracts of land, and other benefits set out in the Land Claims Agreement. There is no indication in the *Act* or the Land Claims Agreement, or in the underlying arrangement, that Canada agreed to "relinquish its own self-interest and act solely on behalf of the Inuit". Neither the *Act* nor the Land Claims Agreement contain an element of "loyalty" and "subordination of interest" that is the key to finding fiduciary responsibilities.

[38] In this respect Canada's supposedly subordinated "self-interest" is the public interest. Canada has an obligation to discharge its obligations to various aboriginal communities, but Canada also has a broader obligation to the public at large. In ***Elder Advocates*** the Court pointed out that governments are only fiduciaries in "limited and special circumstances" (at para. 37), because of the wide-ranging duties they owe:

> 44 Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education),* 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada,* 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

The Court noted that if the fiduciary duty is said to arise from statute, the language of the legislation must clearly support it (at para. 45). There is no indication in the *Act* or the Land Claims Agreement that Canada agreed that the public interest would in all cases be subordinated to the interests of the Inuit, and that Canada would assume the role of a fiduciary in discharging its covenants under the Agreement.

[39] The obligation of governments to balance the interests of many competing groups in society has been recognized even in the context of aboriginal rights. As the Court noted in ***Wewaykum Indian Band*** at para. 96, the Crown is entitled to balance aboriginal rights with broader public rights:

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting. . . .

In ***R. v Nikal***, [1996] 1 SCR 1013 at para. 92 the Court adopted with approval the comment in ***R. v Agawa*** (1988), 65 OR (2d) 505 (CA) at p. 524:

> . . . Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. . . .

When entering into and performing its obligations under the Land Claims Agreement, Canada was entitled to have regard to the broader public interest, not just the interests of the Inuit.

[40] It follows that the first part of this test for fiduciary duty is not met. There is no obvious reason why Canada would agree in the Land Claims Agreement to subordinate the larger public interest, and act "solely on behalf of the Inuit", and there is nothing to be found in the Land Claims Agreement to suggest otherwise.

A "Practical Interest"

[41] While the first type of fiduciary duty identified in ***Manitoba Métis*** requires, in part, a "cognizable aboriginal interest", the second type requires a "practical interest of the beneficiary that stands to be adversely affected". The difference between the two is not clearly defined, although a "practical interest" is perhaps wider than a "cognizable aboriginal interest". The necessary interest was described in ***Elder Advocates*** at para. 51 as "a pre-existing distinct and complete legal entitlement". The particular interest involved in this appeal is an interest in having monitoring done. There is no evidence on this record of a pre-existing aboriginal interest in monitoring that would support summary judgment being granted on that issue. This is not a case where a fiduciary and beneficiary in a known fiduciary relationship entered into a contract to regulate an implied or background aspect of that relationship.

[42] The respondent sought to tie all of the obligations in the Land Claims Agreement back to the Inuit's traditional claim to the lands they had occupied for generations. Following on this argument, all the covenants in the Land Claims Agreement, including the agreement to set up a monitoring program, related to "aboriginal title", or "aboriginal lands". Since aboriginal land claims have been one of the most clearly protected aboriginal interests, this was said to be a suitable basis to ground any fiduciary claim, even one over so mundane a function as collecting statistics. Since the statistical data collected might be helpful to the Inuit in enjoying the land they now own, the collection of statistics could be categorized as a sufficient property based aboriginal interest to found fiduciary duties.

[43] The case management judge (not having the guidance from ***Manitoba Métis***) embraced this argument as follows:

> 262 Article 12.7.6 is not an interest in land and its rights and obligations did not exist before the NLCA came into force. However, it was a part of the aboriginal title that the Inuit surrendered in exchange for the promise from the Crown to set up the NGMP. It was a significant promise because of the large percentage of land retained by the Inuit that would be governed by the NGMP and the massive areas where wildlife harvesting and fishing would take place. The Inuit understandably wanted the best information available to make the highest quality decisions about their land and hunting areas.

There are several problems with this line of analysis.

[44] A word is appropriate first on the uncertain term "aboriginal title". That term is best reserved for the type of collective interest that aboriginal communities had in the lands they traditionally occupied before the arrival of the European settlers. The Inuit asserted such a claim during the negotiations, but in Article 2.7.1 of the Land Claims Agreement they surrendered those rights:

> 2.7.1 In consideration of the rights and benefits provided to Inuit by the Agreement, Inuit hereby:

> (a) cede, release and surrender to Her Majesty The Queen in Right of Canada, 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; and
>
> (b) agree, on their behalf, and on behalf of their heirs, descendants and successors not to assert any cause of action, action for a declaration, claim or demand of whatever kind or nature which they ever had, now have or may hereafter have against Her Majesty The Queen in Right of Canada or any province, the government of any territory or any person based on any aboriginal claims, rights, title or interests in and to lands and waters described in Sub-section (a).

In exchange, Article 19.3.1 vested in the respondent "fee simple title" over large areas of land. Other rights (such as the right to harvest) were given over other areas. As a result, the Inuit exchanged their unconfirmed and ill-defined "aboriginal title" for the legally recognized "fee simple title", and other contractual rights. Therefore, it is now somewhat out of context to refer to "aboriginal title" when discussing land rights in Nunavut.

[45] The first problem with the reasoning adopted by the case management judge is an inconsistency in the underlying assumptions. The case management judge correctly noted that the right to monitor was not "an interest in land", but then asserted that it was "part of the aboriginal title". These two observations cannot sit together.

[46] In any event, there is no evidence on this summary judgment record showing that statistical monitoring was ever "a part of the aboriginal title". The aboriginal peoples lived on and derived their sustenance from their land; judicial notice cannot be taken that collecting statistics was part of their culture. This attempt to tie every covenant in the Land Claims Agreement back to the now surrendered claim to aboriginal title is artificial.

[47] Further, having surrendered all of their "aboriginal title", the previous unacknowledged existence of those asserted rights cannot found the basis of new fiduciary duties. This runs counter to the clear covenant in Article 2.7.1(b) that the Inuit will not make any future claim "based on any aboriginal claims" that were surrendered under the Land Claims Agreement. The Inuit cannot surrender those rights, and then assert them as a basis for finding a fiduciary duty. It follows that the respondent cannot build any fiduciary duty based on a platform of the now surrendered aboriginal land claim.

[48] It is true that the traditional aboriginal land claim surrendered in the Land Claims Agreement was a part of the consideration given by the Inuit in exchange for Canada's covenants in the Agreement. In that respect the case management judge could describe it as "a part of the aboriginal title that the Inuit surrendered" in exchange for the promises in the agreement. But having surrendered that claim as part of the consideration it gave, the Inuit could not also continue to assert it as a basis for making new claims against Canada. The Inuit cannot both give something as consideration, and continue to enjoy it thereafter.

[49] This part of the test for fiduciary duty is therefore not met. There is no "practical interest" to monitor that could support a fiduciary duty.

Discretion

[50] Another important component of the second test for a fiduciary duty is a discretion in the fiduciary, which can affect the interests of the beneficiary.

[51] The case management judge's conclusion that the appellant had a discretion over a "sufficient interest" was summed up as follows:

> 263 Canada had broad discretion in deciding how its obligation to establish a general monitoring plan should be satisfied. Implementation of a monitoring plan required Canada's initiative. A general monitoring plan for Nunavut could not be implemented unless Canada chose to act. Most importantly, Canada had the sole discretion on whether to make funding available for the development and operation of a monitoring plan. Through the exercise of this discretion, Canada could unilaterally choose whether to carry out its obligation and when to carry it out. It is significant that almost immediately after this action was commenced Canada took the first steps that led to the preparation of the Business Case in December 2008.

There are a number of problems with this analysis:

> (a) One can accept that there were a number of different ways that Canada could perform some of the rather open-ended covenants in the Land Claims Agreement, but perform it must. It is potentially misleading to say Canada has a "broad discretion", as its choice of the method of performance must fall within the proper interpretation of the covenants.
>
> (b) It is inaccurate to say that Canada could "choose to act". Canada had covenanted to do certain things, and do them it must. If Canada could truly "choose to act", then the respondent would not be entitled to summary judgment, because there would be no breach.
>
> (c) It is inaccurate to say that Canada had the sole discretion on whether to make funding available. Canada had covenanted to put in place the monitoring program, and had to fund it whether it liked it or not. If funding was in Canada's "sole discretion", then how could the respondent be entitled to summary judgment for the amounts not spent?
>
> (d) It is inaccurate to say that Canada could "unilaterally choose whether to carry out its obligation" and it is equally inaccurate to say it could choose "when to carry it out". To repeat, Canada had no alternative but to perform as it had covenanted to perform, or be faced with an action for damages. And if it had a unilateral choice as to "when" to perform, then on what basis could the case management judge find that the monitoring plan had to be in place by 2003?

The only "choice" that Canada had was to perform its covenants, or be in breach. While there might have been some uncertainty about exactly what some of the covenants meant, Canada was obliged to perform them based on the proper interpretation of the Land Claims Agreement, as eventually determined by the courts if necessary. Whatever level of decision making was left to Canada, it had to act in a way consistent with the Land Claims Agreement. That is not a sufficient level of "discretion" to create a fiduciary duty.

[52] This reasoning is also inconsistent with ***Elder Advocates***, a case which involved the presence of fiduciary duties in the public sector, between a government and persons contracting for accommodation and care. It could equally have been said in ***Elder Advocates*** that the government had a "choice" whether to perform its duties, when to act, whether to provide services, or whether to provide funding. However, that supposed level of discretionary control was not sufficient to support fiduciary duties.

[53] In addition, it must be obvious that if this line of analysis is sufficient to create a fiduciary duty, then every contracting party would potentially be a fiduciary. But as noted in ***Ironside v Smith***, 1998 ABCA 366 at para. 79, 70 Alta LR (3d) 393:

> While [contracting parties] are contractually obligated to fulfill their responsibilities, participants neither relinquish their self interest, nor act solely on behalf of the other parties by agreeing to do so. Parties may depend upon each other to fulfill contractual obligations, without becoming peculiarly vulnerable or at each others' mercies. . . .

In every contract, each party is exposed to the risk that the other party will not perform. Sometimes the defaulting party may deliberately decide to default, and sometimes the default may be beyond the control of the defaulting party. But this element of risk (or "discretion") in contract is not sufficient to potentially turn every contractual obligation into a fiduciary duty.

Summary

[54] In summary, the record put forward by the respondent in support of summary judgment does not disclose a fiduciary duty under the second branch of the test set out in ***Manitoba Métis***. The Land Claims Agreement does not support any undertaking of loyalty, or undertaking by the government to subordinate its interests to those of the Inuit. Further, the covenant to monitor is not a sufficiently identifiable interest to support a fiduciary duty under this part of the test.

A Parallel Fiduciary Duty?

[55] The obligation to conduct ecosystemic and socio-economic monitoring is, *prima facie*, found in the Land Claims Agreement. The respondent argued (and the case management judge accepted) that the mere existence of the express covenant to monitor did not preclude the existence of parallel fiduciary duties. The respondent argues that the relationship between the Crown and the Inuit is fiduciary in nature, and the covenants in the Land Claims Agreement are merely a manifestation or extension of that fiduciary relationship. To the extent that this

argument is built on the second branch of the test for fiduciary duty found in ***Manitoba Métis***, it has already been dealt with. ***Manitoba Métis*** did not suggest there is a third possible source of fiduciary duties.

[56] ***Manitoba Métis*** made the point (at para. 48) that just because the relationship between the Crown and aboriginal peoples can be described as fiduciary in nature, it does not follow that all aspects of that relationship (such as the Land Claims Agreement) are governed by fiduciary obligations. Not every contract between a fiduciary and the beneficiary expands the scope of the underlying fiduciary duty.

[57] Assuming that there is a third source of fiduciary duties (to be found in contracts between fiduciaries and beneficiaries), there is (specifically with respect to the breach of Article 12.7.6) no basis for imposing such parallel fiduciary duties here. Firstly, on a proper interpretation of the Land Claims Agreement and the *Nunavut Land Claims Agreement Act* there is no room for such parallel duties. The Land Claims Agreement is not a springboard for fiduciary duties and corresponding benefits between the parties. Secondly, the proposed fiduciary duties do not meet the legal test underlying such duties.

The Construction of the Agreement and the Act

[58] As noted, the lengthy Land Claims Agreement was carefully drafted by professionals, it covers a great many topics, and it was clearly intended to be a comprehensive definition of the obligations between the appellant and the respondent as set out in the Land Claims Agreement. In the words of ***Little Salmon*** at para. 9 and ***Quebec (Attorney General) v Moses***, 2010 SCC 17 at para. 7, [2010] 1 SCR 557, the Land Claims Agreement is "the product of lengthy negotiations between well-resourced and sophisticated parties".

[59] The "whole agreement" clause in the Land Claims Agreement specifies that there are no collateral representations. The overall structure and content of the Land Claims Agreement do not leave any room for implied covenants covering the subjects specifically dealt with in it. Everything that the appellant agreed to do about implementing and funding monitoring is to be found in Article 12.7.6. That is not to say that the background fiduciary relationship between the parties might not have some impact on the interpretation of the Land Claims Agreement (see *infra*, paras. 71-72 and ***Little Salmon*** at para. 69), but it is not a basis for enlarging on the contractual covenants.

[60] An analogous situation arises in cases where there is concurrent liability in tort (which is imposed as a matter of law) and contract. The law recognizes such concurrent liability, but requires that the tort duty be independent of the covenants in the contract. As was said in ***Central Trust Co. v Rafuse***, [1986] 2 SCR 147 at p. 205:

> . . . the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of

> the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. . . . (Emphasis added)

It follows that while it is possible for there to be concurrent fiduciary and contractual duties, the extent of the fiduciary duty cannot arise solely from the covenants in the contract to do particular things.

[61] The comprehensive and overriding nature of the Land Claims Agreement is confirmed by the *Nunavut Land Claims Agreement Act.* It states that the covenants in it shall be performed "to the extent provided for by the Agreement". Again, there is no room in this wording for the suggestion that there are parallel fiduciary duties that somehow expand the obligations of the appellant with respect to the topics specifically covered in the agreement. The *Act* goes on to state that in case of conflict between the Land Claims Agreement and "any law, including this Act", the contract prevails. In this context "any law" must include the common law, and to the extent that the Land Claims Agreement modifies or defines the inherent fiduciary obligations of the appellant, the Land Claims Agreement must prevail. Again, there is no scope for any parallel duties covering the same topics as are covered by the express covenants in the Land Claims Agreement.

Parallel Fiduciary and Contractual Duties

[62] There are occasions when contractual obligations can either a) create fiduciary duties, or b) be related to the exercise of pre-existing fiduciary obligations. For example, a contract between a solicitor and client builds on, and will reflect, the underlying fiduciary nature of that relationship: ***Strother*** at para. 34. Not every contract will have those characteristics. The respondent argues that in this case the Land Claims Agreement is built upon the foundation of the fiduciary relationship between the Crown and aboriginal peoples, and so the Land Claims Agreement is infused with fiduciary obligations that extend beyond the covenants themselves.

[63] A leading case is ***Hodgkinson v Simms***, [1994] 3 SCR 377, in which an investor retained an accountant for advice on tax sheltered investments. The accountant provided that advice, but did not disclose that he was also acting for the developers of the investment, meaning he had a conflict of interest. The investor sued the accountant for breach of contract and breach of fiduciary duty. The Supreme Court confirmed at p. 407 that there could be parallel contractual and fiduciary obligations, but pointed to certain indicia that must be present:

(a) the fiduciary has agreed to act in the beneficiary's best interests (at p. 407),

(b) the fiduciary has relinquished its own self-interest and has a duty to act solely in the interests of the other party (at pp. 409-10, 428), and

(c) a "reasonable expectation" that the fiduciary will act in the best interests of the beneficiary (at pp. 409, 413).

This decision also explores the usual presence of a discretionary power that can affect the interest of the beneficiary, and a vulnerability to the exercise of that power. Those concepts are essentially the same as those set out in the second part of the test in ***Manitoba Métis***. As previously discussed, that test is not met here.

[64] ***Elder Advocates***, the case involving the presence of duties in the public sector between a government and persons contracting for accommodation and care, confirmed at paras. 29-32 the principles in ***Hodgkinson v Simms***. In ***Elder Advocates*** the Court held that fiduciary duties did not exist, notwithstanding that the persons in care were dependent on the government for many of their fundamental needs. ***Elder Advocates*** was cited as a source of the test developed in ***Manitoba Métis*** (at para. 50), and does not provide any further basis for imposing a fiduciary duty.

[65] Further, even though fiduciary duties and contractual obligations can coexist and complement each other, the terms of the contract will prevail in case of inconsistency. As was said in ***Hospital Products Ltd. v United States Surgical Corporation*** (1984), 156 CLR 41 at p. 97 (HCA):

> That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

The same point was made in ***Cadbury Schweppes Inc. v FBI Foods Ltd.***, [1999] 1 SCR 142 at para. 36:

> Just as a contractual term can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity . . .

Even where equitable duties run parallel to contractual duties, the equitable duties generally will not override those duties: ***Sharbern Holding Inc. v Vancouver Airport Centre Ltd.***, 2011 SCC 23 at para. 143, [2011] 2 SCR 175; ***Central Trust Co. v Rafuse*** at p. 206; ***Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.***, [1997] 3 SCR 1210 at para. 114; ***Boulting v***

Association of Cinematograph, Television and Allied Technicians, [1963] 2 QB 606 at pp. 636-7 (CA).

[66] The specific examples identified *supra*, paras. 29-30, will illustrate the point. As noted, Article 38.2.1(a) of the Land Claims Agreement provides that certain disputes may be sent to arbitration, but only if both parties consent. The respondent pleads in paras. 19(k), 82-4 that the appellant has refused to consent to arbitration, and that this is a breach of its fiduciary duties. The respondent effectively argues that even though the Land Claims Agreement gives the appellant a right to withhold consent, it cannot actually refuse to consent because of its fiduciary duties. That effectively amends the Land Claims Agreement. Since the Land Claims Agreement specifically provides that arbitration is only available with consent, even if there are parallel fiduciary duties, they cannot create an obligation to consent where consent is required by the contract but withheld.

[67] The same reasoning applies to the second example, noted *supra*, para. 30, relating to the pleading that the appellant has a fiduciary duty to fund various activities or institutions, and has failed to do so. 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. Thus, having agreed to put in place a monitoring program, the appellant must provide the necessary funding. Asserting a "fiduciary duty to fund" adds nothing to these covenants.

[68] The obligation to fund is based on the covenant to perform, not on any "reasonable expectation" of the other contracting party that suitable funding will be made available. Most specifically, no fiduciary duty can exist that obliges the appellant to provide more funding to perform the covenants in the Land Claims Agreement than the Land Claims Agreement itself obliges it to provide. Any failure by the appellant to provide funding it has contracted to provide is a breach of covenant, not a breach of fiduciary duty: ***Beattie v Canada***, 2004 FC 674 at paras. 78-9, [2004] 4 FCR 540 (Proth), affm'd 2005 FC 715, 274 FTR 12; ***Southeast Child and Family Services v Canada (Attorney General)***, [1997] 9 WWR 236 at para. 22, 120 Man R (2d) 114 (CA).

[69] In this context, it also adds nothing to say "it is always assumed that the Crown intends to fulfil its promises". If the "promise" is a binding covenant in a contract, no "assumption" is needed, because the law will enforce those covenants. This expression, as used in cases like ***Haida Nation v British Columbia (Minister of Forests)***, 2004 SCC 73 at para. 20, [2004] 3 SCR 511, refers to pre-treaty promises that are not enforceable as contracts. Further, in this context it does not assist to invoke the "honour of the Crown", because as ***Manitoba Métis*** shows that is not an independent source of fiduciary duty.

[70] It is of no consequence that the covenants in the Land Claims Agreement may differ from the fiduciary obligations that might be implied in equity. As long as the contract is not unenforceable (e.g., for unconscionability, or undue influence), the fiduciary and the beneficiary can alter the terms of their relationship by contract: ***Jirna Ltd. v Mister Donut of Canada Ltd.***, [1975] 1 SCR 2 at p. 3; ***Alberta Union of Provincial Employees v United Nurses of Alberta***, 2009 ABCA 33 at paras. 33-6, 1 Alta LR (5th) 217 leave refused [2009] 1 SCR v. (There may be some situations where the fundamental nature of the fiduciary relationship cannot be altered for public policy reasons, as in ***Strother*** at para. 34.) Having expressly been "declared valid" by federal statute, there cannot be any suggestion that the Land Claims Agreement is for any reason unenforceable. To the extent that it is inconsistent with any common law fiduciary duty, the Land Claims Agreement must prevail.

[71] Further, there is a fundamental difference between imposing, identifying or declaring a duty, and interpreting the scope of a duty. There are numerous cases that have made the point that a treaty is not an "ordinary contract", and that because of the special relationship between the Crown and the aboriginal communities, different approaches to interpretation will apply. This same point has been made using different phraseology:

(a) A treaty must be "interpreted and applied in a manner that upholds the honour of the Crown": ***Little Salmon*** at para 12.

(b) The Crown is obligated to act honourably in implementing treaties: ***Haida Nation*** at paras. 17, 19.

(c) The Crown must endeavor to ensure its promises are carried out "in a way that pursues the purpose behind the promise": ***Manitoba Métis*** at paras. 79-80.

It is, however, circular to use these techniques of interpreting an existing duty to impose a different duty.

[72] The interpretive principles outlined in these cases may have some role to play in interpreting the appellant's covenants in the Land Claims Agreement, but not in creating parallel fiduciary or other duties. Principles of interpretation cannot be taken so far that they compel the appellant to do more than what has been agreed to, nor to create new obligations that are not in the Land Claims Agreement. A treaty is not an empty vessel to be filled up using interpretive principles with whatever covenants one of the parties or the court thinks, with hindsight, would be a "good idea", "fair", or "consistent with the honour of the Crown": ***R. v Marshall***, [1999] 3 SCR 456 at para. 14; ***Mitchell v Peguis Indian Band***, [1990] 2 SCR 85 at p. 143; ***Reference re Public Service Employee Relations Act (Alta)***, [1987] 1 SCR 313 at p. 394. Since a breach of Article 12.7.6 is now admitted, in this context saying that a "treaty is not an ordinary contract" adds nothing.

Summary

[73] The interpretation of the Land Claims Agreement, the interpretation of the statute, and outlining the legal test for the existence of a fiduciary duty all attract the correctness standard of review. A proper interpretation of the Land Claims Agreement and the *Act* reveal that they were intended to be a comprehensive exposition of the specified rights and obligations of the appellant and the respondent. It is inconsistent with the entire legislative and contractual package to superimpose supplementary or parallel fiduciary duties to monitor over the express covenants in the Land Claims Agreement. Even if the background relationship between the Crown and aboriginal peoples is fiduciary in nature that does not mean that there are parallel fiduciary duties to every covenant entered into by the Crown. In any event, any fiduciary duty cannot be inconsistent with the express covenants in the agreement.

[74] On this record in support of summary judgment, the respondent has not demonstrated a common law, equitable, fiduciary, or aboriginal right to "ecosystemic and socio-economic monitoring", nor a corresponding duty on the Crown to monitor. The duty to monitor found in Article 12.7.6 is entirely a creation of the Land Claims Agreement. The scope of that obligation is to be found within the four corners of the Land Claims Agreement. On this summary judgment record, the respondent has not demonstrated a fiduciary obligation to "monitor" parallel to that arising out of the Land Claims Agreement. The case management judge's finding to the contrary at para. 265 cannot be sustained.

[75] As was noted in ***Little Salmon*** at paras. 10-2, modern aboriginal law is informed by the overriding objective of the reconciliation of pre-existing aboriginal societies with the assertion of Canadian sovereignty. In that regard the Crown (with or without the invocation of the "honour of the Crown") should be expected to fulfill its contractual promises found in the treaties it enters into. If the Crown breaches those treaties, appropriate remedies should be granted.

[76] However, it adds nothing to superimpose a fiduciary cloak over what is essentially a contractual relationship. In this case the asserted fiduciary duties are ill defined, open-ended, and in many respects inconsistent with the wording of the Land Claims Agreement. If such fiduciary duties exist, neither the appellant nor the respondent could know with certainty what they encompass. This is inconsistent with the purposes of modern treaties, which are summed up in ***Little Salmon*** at paras. 10-12:

> 10. The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. . . . The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. . . .

> 12. . . . Modern comprehensive Land Claim Agreements . . . while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. . . . (emphasis added)

The uncertainty and unpredictability created by the asserted fiduciary duties can only lead to more disagreements, and more litigation, which can only undermine the ultimate objective of reconciliation: ***Eastmain Band v Canada (Federal Administrator)***, [1993] 1 FC 501 at pp. 518-9, 99 DLR (4th) 16 (CA). Imposing such vague fiduciary duties on the contractual obligations will not aid in building positive future relationships. Any appropriate remedies can be fashioned from the law of contract.

[77] Canada should be encouraged to settle outstanding aboriginal claims through new treaties. As Lamer, CJC said in ***Delgamuukw v British Columbia***, [1997] 3 SCR 1010:

> 186 Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. . . . Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

It does not assist the treaty making process to send a signal that every new treaty carries with it ill-defined parallel fiduciary duties. Canada will be better positioned to enter into modern treaties if it knows that its obligations are to be found within the four corners of the treaty, based on recognized principles of interpretation of such covenants, and that surrendered aboriginal claims will not still exist in some ephemeral state to impose additional, possibly inconsistent, fiduciary obligations. There is no compelling policy reason to find a fiduciary duty in this case.

Restitutionary Damages in Contract

[78] The appellant now acknowledges a breach of the covenant in Article 12.7.6. The case management judge concluded that the calculation of expectation damages would not be feasible. He also concluded that nominal damages would not be an appropriate response to the breach, and therefore awarded a restitutionary remedy. That remedy was a damage award equivalent to the amount the appellant "saved" by delaying implementation of the monitoring plan until 2010. The second issue on this appeal is, therefore, whether restitutionary remedies of this type are available for breach of contract.

[79] The appellant correctly points out that "expectation damages" are the normal measure of damages for breach of contract. The general rule is that the plaintiff in a breach of contract case is entitled to be put into the position it would have been in if the contract had been performed: ***Bank of America Canada v Mutual Trust Co.***, 2002 SCC 43 at para. 26, [2002] 2 SCR 601. In most cases this amounts to giving the plaintiff the benefits of the bargain it made.

[80] Notwithstanding the presumption in favor of expectation damages, the law recognizes that expectation damages are not always the appropriate measure, and that justice in some cases requires a different approach. As was said in ***Bank of America Canada*** at para. 25:

> 25 Contract damages are determined in one of two ways. Expectation damages, the usual measure of contract damages, focus on the value which the plaintiff would have received if the contract had been performed. Restitution damages, which are infrequently employed, focus on the advantage gained by the defendant as a result of his or her breach of contract.

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.

[81] An unusual example is ***Attorney General v Blake***, [2001] 1 AC 268 (HL) where a former employee of the English Secret Intelligence Service had published a memoir in breach of his covenants of confidentiality. It was essentially impossible to measure any expectation loss suffered by the government, yet an award of nominal damages would have permitted the former employee to breach his covenant with impunity. As a result, damages were measured by the profits he made from publishing the memoir.

[82] Another interesting example is ***Dolly Varden Mines Ltd. (N.P.L.) v Sunshine Exploration Ltd.***, [1970] SCR 2. In this case the defendant had covenanted to do some development and exploration work with respect to a mining prospect. The work was never done, but the defendant argued that the plaintiff was only entitled to nominal damages because the mining project had effectively been abandoned, and the plaintiff had lost nothing by the breach. The Court held that by agreeing to do the work, and receiving the consideration for doing it, the defendant had effectively acknowledged that the value of the work was at least equal to its cost. As a result, it was appropriate to measure damages by the amount that the defendant had saved by not doing the work. ***Dolly Varden*** did not address the issue from a restitutionary perspective, but it demonstrates the flexibility of the common law in measuring the "expectation" of the parties when calculating damages. Sometimes the savings of the breaching party are the foundation of a fair remedy.

[83] The courts will generally award only expectation damages for breach of contract, in order to avoid discouraging what is known as "efficient breach". As explained in ***Bank of America Canada*** at para. 31:

> 31 Courts generally avoid this measure of damages so as not to discourage efficient breach (i.e., where the plaintiff is fully compensated and the defendant is better off than if he or she had performed the contract) (Waddams, supra, at p. 473). Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.

So, if the plaintiff effectively "got its bargain", it is generally not relevant that the defendant might also have profited from the contract or the breach.

[84] The flexibility of the common law approach was recently confirmed in ***IBM Canada Limited v Waterman***, 2013 SCC 70 at para. 36, [2013] 3 SCR 985:

> 36 Considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied and there are well-established exceptions to it. For example, the rule that contract damages compensate only the plaintiff's actual loss is not the only rule that applies to assessing contract damages. As a leading English case put it, "Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick": *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.), at p. 278. In some cases, for example, an award of damages in contract may be based on the advantage gained by the defendant as a result of the breach rather than the loss suffered by the plaintiff: see, e.g., *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 25. The rule that damages are measured by the plaintiff's actual loss, while the general rule, does not cover all cases. In addition, through the doctrines of remoteness and mitigation, the compensation principle gives way to considerations of reasonableness in relation to whether the plaintiff's expectations of the contract and his or her conduct in response to the breach of it were reasonable.

Thus, there is no absolute rule that restitutionary damages are not available for breach of contract.

[85] To summarize, the calculation of damages in a breach of contract case is governed by the following principles:

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] 2 SCR 3 at paras. 44-5, 2006 SCC 30; ***Honda Canada Inc. v Keays***, 2008 SCC 39 at paras. 55, 59, [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 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 at para. 90, [2009] 1 SCR 504; ***Métis National Council Secretariat Inc. v Dumont***, 2008 MBCA 142 at paras. 40-6, 305 DLR (4th) 356; ***Place Concorde East Limited Partnership v Shelter Corp. of Canada Ltd.*** (2006), 270 DLR (4th) 181 at para. 78, 211 OAC 141 (CA).

In this appeal the case management judge concluded that expectation damages could not realistically be calculated, and that nominal damages would not be an effective remedy. Those conclusions are entitled to deference on appeal.

[86] In this appeal, the particular nature of the breached covenant is important. 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. In the Land Claims Agreement the appellant covenants to provide a number of what might be described as "social" or "public" services, not because they have any commercial value, but because they are perceived to have inchoate social advantages. Exactly what benefit could be made of the statistical data that results from the monitoring program is difficult to predict or calculate. 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.

[87] There is very little authority in this area. Most public services are provided by statute, and generally no private cause of action arises because the statutory duty is owed to the public at large, and is not actionable in the hands of any individual even if they were one of the intended beneficiaries of the statute: ***X (Minors) v Bedfordshire County Council***, [1995] 1 AC 633 at pp. 731-2 (HL); ***Phelps v Hillingdon London Borough Council***, [2001] 2 AC 619 at p. 652 (HL). As a result, the issue of quantification of damages in this type of situation rarely arises. In this appeal the statistical monitoring services were similarly aimed at a disparate group. However, here they were provided for by covenant, and the respondent was specifically nominated in Article 2.14.1 of the Land Claims Agreement as the body with the ability to enforce those covenants. Thus, the issue of quantification must be tackled.

[88] The appellant received valuable consideration for the covenant to establish a system of statistical monitoring. If it 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. As a result, the case management judge was correct in concluding that the respondent is not limited to a claim for nominal damages. Some appropriate measure of damages must be found. The "savings" achieved by the appellant in not performing 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.

[89] As a result, the decision of the case management judge that restitutionary remedies were available for this breach of covenant discloses no reviewable error.

Summary Judgment on Damages

[90] The final issue is whether the record was sufficiently clear to enable the case management judge to award summary judgment for the admitted breach. The parties are in agreement that the test for summary judgment is whether there remains a "genuine issue for trial", or whether the record is sufficiently clear to enable a fair adjudication on the issue of damages. The appellant argues that gaps in the record require that the quantum of damages be remitted to trial.

[91] As previously noted, this summary judgment application had no prospect of resolving the entire dispute between these parties. It was brought on one very narrow aspect of the dispute, relating specifically to Article 12.7.6. It was brought at a time when both parties anticipated that the entire dispute would proceed to trial, at which time each party would have a full opportunity to present its evidence and arguments.

[92] The Statement of Claim pleaded only that the respondent claimed $1 billion in damages (in addition to many other items of relief) without providing any specifics on how damages should be calculated. The allegations in the Statement of Claim covered a lot of subjects, and it is not surprising that little attention appears to have been paid at examinations for discovery to "savings", or the prospect of savings forming the basis of the claim for damages.

[93] The Notice of Motion for summary judgment merely claimed "damages" without specifying an amount. It did allude to "savings" by the appellant, and the budgeted amount in the Business Case. The case management judge concluded at para. 348 that any prejudice to the appellant was cured by providing particulars of the claim in the pre-hearing brief. However, by this time record production had been completed, the examinations for discovery of the respondent's officer concluded, and affidavits in support of the motion filed. The general answers of the respondent's officer that were relied on as establishing the "savings" were not focussed on the quantum of the claim, but rather on the general progress of implementation of the Land Claims Agreement.

[94] The summary judgment application itself was focussed on: 1) whether summary judgment was even appropriate; 2) if so whether there was a breach of Article 12.7.6, and if so what that entailed; 3) whether there were parallel fiduciary duties; and 4) whether restitutionary damages were available. The complexity of the issues discussed can be seen by the length of the case management judge's decision. It is hardly surprising that issues relative to quantum were not canvassed to any degree, or that expert opinions were not obtained to address the issue at the application stage. The method of calculating the damages in this unusual situation evolved right up until the appeal was heard; the ***Dolly Varden*** case was not brought to the attention of the parties until shortly before oral argument.

[95] The first step in quantifying damages for breach of contract is to determine the scope of the obligations of the breaching party. Article 12.7.6 requires:

> Government, in co-operation with the NPC [Nunavut Planning Commission], shall be responsible for developing a general monitoring plan and for directing and co-ordinating general monitoring and data collection. The NPC shall:
>
> (a) in accordance with the plan, collate information and data provided by industry, government departments and agencies, amongst others;
>
> (b) in accordance with the plan, report periodically on the ecosystemic and socio-economic environment of the Nunavut Settlement Area; and
>
> (c) use the information collected under Sub-sections (a) and (b) to fulfill its existing responsibilities under Article 11.

No delineation was made of the appellant's exact obligations in performing 12.7.6. That obligation is to "develop" a plan and then "coordinate" general monitoring. There was no resolution of the difference between the cost of establishing the monitoring plan, and co-ordinating it in the future. On the other hand, the Nunavut Planning Commission has related responsibilities for collecting data and implementing the plan. There is a genuine issue for trial on what the appellant was required to do, and the division of responsibilities between the two organizations.

[96] There is also the principle that in calculating damages the breaching party is entitled to assume the least expensive method of performance: ***Hamilton v Open Window Bakery Ltd.***, 2004 SCC 9 at paras. 11-8, [2004] 1 SCR 303; ***Agribrands Purina Canada Inc. v Kasamekas***, 2011 ONCA 460 at paras. 47-50, 106 OR (3d) 427; ***Bhasin (c.o.b. Bhasin & Associates) v Hrynew***, 2013 ABCA 98 at para. 37, 84 Alta LR (5th) 68. The exact scope of this principle in the context of a treaty is likewise unexplored. Just because the parties apparently reached a consensus on the model of implementation found in the Business Case, does not mean that the appellant was contractually obliged to give that level of performance. The appellant has some scope with respect to the way it could approach its obligations. It opted to take the "partnership approach" with the result that a number of parties, including the respondent, had input into the model and design of the monitoring plan. The fact that the appellant did not act unilaterally, and did not set about to fulfill its obligation in the least expensive manner, should not deprive the appellant of arguing that it is entitled to have damages assessed in accordance with the general principle in contract law that damages are assessed in the way most beneficial to the contract breaker.

[97] The damages here are to compensate the respondent for the delay in the performance of the contractual obligation. That raises an issue as to what information was lost to the Inuit, and perhaps as to whether the lost information was material to their interests. Article 12.7.6 appears to involve, to some extent at least, the gathering and collating of information from monitoring that was already underway. As pointed out by the appellant's officer, the general monitoring plan provided for "the overall co-ordination and accessibility of the various types of data. But the absence of the plan doesn't stop the data from being gathered" (AB, p. EV96, l. 20-2). In short, the absence of the plan did not stop the gathering of information – with the result that inquiries of a factual nature need to be made to determine what information, of a material nature to the Inuit, was not provided because the plan was not put in place earlier. In other words, how much of the information was obtained by the Inuit through the monitoring already taking place, at what cost, and what information, in fact, was not available?

[98] Summary judgment is the appropriate remedy when it involves a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute, to apply the relevant legal principles to the facts as found, and to give "confidence in the conclusion": ***Hryniak v Mauldin*** at paras. 28, 50. It is acknowledged that calculating damages for breach of contract other than by the conventional method of measuring the value of the bargain is exceptional. The appellant's argument on the summary judgment application was that only nominal damages were available, and it was not until after the case management judge rendered his decision that the appellant could really understand the case it had to meet. In all of the circumstances, there remained genuine issues for trial on the quantum of damages, and this was not an appropriate case to try and quantify them on a summary judgment basis.

Conclusion

[99] In closing, it is worth noting again that the issues presented on this appeal were narrow. The underlying application was for partial summary judgment only, and was only brought with respect to the specific Article 12.7.6, on this limited record. While a broader discussion was sometimes necessary in order to illustrate the principles at play, this decision is limited to deciding if the respondent has met the test for summary judgment on whether Article 12.7.6 is capable of generating parallel fiduciary duties, and whether a breach of that Article would entitle the respondent to more than nominal damages. Summary judgment not being available on this record, the issues between the parties arising out of the alleged breaches of the Land Claims Agreement will be resolved at the eventual trial.

[100] In conclusion, the appeal is allowed, and the summary judgment below set aside. Based on the admission made, the respondent is entitled to a declaration that the appellant is in breach of Article 12.7.6, and that the respondent is not limited to a claim for nominal damages. The respondent has failed to demonstrate that there is no genuine issue for trial on the other points raised. The timing and format of the procedure for the calculation of the quantum of damages is remitted to the case management judge.

Reasons filed at Iqaluit, Nunavut
this 23rd day of April, 2014

"Original signed by Justice Frans Slatter"

Slatter J.A.

"Original signed by Justice Clifton O'Brien"

I concur: O'Brien J.A.

Dissenting Reasons for Judgment Reserved of the Honourable Madam Justice Hunt

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[101] The chambers judge granted summary judgment on one claim contained in a multi-faceted action launched by the respondent, the Inuit of Nunavut as represented by Nunavut Tunngavik Incorporated (NTI) against the appellant, Attorney General of Canada (Canada). At issue is whether, at this stage, the judge ought to have awarded damages against Canada for its breach of a land claims agreement and concluded that Canada breached its fiduciary obligation to the Inuit.

[102] I agree with the majority that the judge properly concluded nominal damages were inappropriate and restitution should be the basis for damages.

[103] I would, however, dismiss the appeal because the judge did not err in granting summary judgment on the issue of damages for Canada's for breach of Article 12.7.6 of the land claims agreement, or in his assessment of damages.

[104] If I had to decide the point, I would conclude that the fiduciary duty issue should not have been resolved in summary proceedings. In my view this important issue requires a more complete evidentiary foundation as well as the parties' submissions on other aspects of the land claims agreement, which did not occur before this Court or in the Court below. These matters should accordingly be left for another day.

A. Background

i. Nunavut Land Claims Agreement

[105] In 1993 the Inuit of Canada=s eastern Arctic entered into the Nunavut Land Claims Agreement (Agreement) with Canada. It described the widely-dispersed lands, water and marine areas they use as the Nunavut Settlement Area. NTI is the successor of the Inuit organization that signed the Agreement and represents Inuit beneficiaries under the Agreement.

[106] This modern land claims agreement is comprehensive and complex. It requires Canada to transfer lands and money to Inuit beneficiaries and mandates the establishment of new institutions and initiatives. In return, the Inuit surrender Aany claims, rights, title and interests based on their assertion of an aboriginal title@ (preamble). Among the Agreement=s objectives are to provide the Inuit with participatory rights "in decision-making concerning the use, management and conservation of land, water and resources"; provide them harvesting rights and participatory rights in wildlife harvesting decision-making; and encourage their self-reliance, and cultural and social well-being.

[107] Article 12 of the Agreement is titled Development Impact. It requires the establishment of a new institution of public government, the Nunavut Impact Review Board, and describes how it will interact with another new institution, the Nunavut Planning Commission (Planning Commission or NPC) as well as with a federal Environmental Assessment Panel. The Nunavut Impact Review Board is charged with reviewing the ecosystemic and socio-economic impacts of project proposals, while the Planning Commission (funded by Canada pursuant to Article 11.4.3) is mandated to develop land use plans to guide and direct resource use and development in the Nunavut Settlement Area. Article 12.7.1 permits the imposition of a monitoring program when a project is approved, which program will have the purpose of measuring the effects of the project Aon the ecosystemic and socio-economic environments@ of the Nunavut Settlement Area: Article 12.7.2.

[108] These Articles provide a context for understanding the purpose of Article 12.7.6, the provision at the heart of this appeal:

> There is a requirement for general monitoring to collect and analyse information on the long term state and health of the ecosystemic and socio-economic environment in the Nunavut Settlement Area. Government, in co-operation with the NPC, shall be responsible for developing a general monitoring plan and for directing and co-ordinating general monitoring and data collection. The NPC shall:
>
> (a) in accordance with the plan, collate information and data provided by industry, government departments and agencies, amongst others;
>
> (b) in accordance with the plan, report periodically on the ecosystemic and socio-economic environment of the Nunavut Settlement Area; and
>
> (c) use the information collected under Sub-sections (a) and (b) to fulfill its existing responsibilities under Article 11 [Land Use Planning]
>
> (emphasis added)

[109] It is manifest from these and other parts of the Agreement that when surrendering their aboriginal claims the Inuit were adamant about ensuring a healthy future for their traditional homeland, where their ownership, decision-making and harvesting rights would be recognized and protected. A general monitoring plan (Monitoring Plan) was part of the agreed strategy for accomplishing this. Without such a plan, the Planning Commission would be unable to fulfill its important mandate and it would be difficult to protect Inuit rights (including harvesting rights) recognized in the Agreement.

ii. Implementation Contract

[110] The Agreement was executed alongside a document describing the parties' responsibilities for implementing the Agreement (Implementation Contract). The Implementation Contract identifies an initial planning period of 10 years from the ratification date of the Agreement, July 23, 1993.

[111] Schedule 1 of the Implementation Contract refers to Article 12.7.6, indicating that the federal Department of Indian and Northern Development is responsible for each activity associated with Article 12.7.6 and will, in cooperation with the Planning Commission, develop a general monitoring plan "ASAP" (as soon as possible) after the establishment of the Planning Commission. The Planning Commission was set up in July 1996.

iii. NTI=s Lawsuit and Summary Judgment Application

[112] In December 2006, some 13 years after the Agreement was signed and 10 years after the Planning Commission came into being, NTI sued Canada, alleging breaches of the Agreement and claiming overall damages of $1 billion. Part of its claim is that Canada breached Article 12.7.6. NTI also claims that Canada has breached fiduciary duties and not provided adequate funding to institutions established under the Agreement (including the Planning Commission). The trial is expected to proceed in 2014.

[113] In October 2011, NTI applied for summary judgment in respect of the breach of Article 12.7.6, seeking a declaration and damages.

iv. Evidence on the Summary Judgment Application

[114] The evidence consisted of affidavits by Kunuk (NTI=s Director of Implementation) and Reinhart (Manager of the Nunavut General Monitoring Plan in the Nunavut Regional Office of Aboriginal Affairs and Northern Development Canada). Neither was examined on his affidavit. Extensive excerpts from the 2009 examination for discovery of Sewell (Director General of the Implementation Branch in Canada=s Claims and Indian Government Sector) were also put forward.

[115] The evidence establishes that after NTI filed its lawsuit in August 2007, Canada invited NTI and others (including the Planning Commission and the Government of Nunavut) to participate in a working group (Working Group) on the Monitoring Plan (also referred to as the NGMP). In March 2008, a workshop was held as part of this process. A consultant retained by Department of Indian and Northern Development prepared a business case (Business Case) for the Monitoring Plan for a five year cycle commencing 2009-10. The Business Case offered four options for implementing the Monitoring Plan, recommending Option C1 (AReasonable Dedicated Annual Funding @). The five year cost of this option was approximately $11.3 million.

[116] The rejected options cost less. The least expensive was Option A ($2.2 million) which was premised on having no new resources for the Monitoring Plan. Option B ($8.375 million) did not involve a long-term commitment of additional resources. Option C2 anticipated long-term new funding but cost approximately $3 million less than Option C1. See generally EX275.

[117] In December 2008, the Working Group accepted the consultant's recommendation for Option C1. Canada provided five year funding for the Monitoring Plan in March 2010 and implementation began in July 2010.

B. Reasons of the Chambers Judge - *NTI v Canada (Attorney General)*, 2012 NUCJ 11

[118] The judge noted that summary judgment is meant to prevent claims or defences that have no chance of success from proceeding to trial: para 18. It should be granted only if there is no genuine issue for trial: para 21.

[119] He set out Canada=s admissions: para 26. Among these were that Canada had refused to disclose whether the Department of Indian and Northern Development received an increase in its departmental funding to develop a general monitoring plan; the Business Case was to be used to request funding from Treasury Board; the total cost of implementing the Monitoring Plan over five years was $11,307,500, with the costs for year 5 being $2,340,000; and in March 2010 five year funding for the Monitoring Plan was provided in the amount of $11 million.

[120] He concluded that the Implementation Contract required Canada to create a monitoring plan by 2003: para 83. Canada breached this obligation: paras 105 and 169. Other fact findings included:

> - during the first 10 year planning period there were only minimal and sporadic efforts by Canada to develop a general monitoring plan in compliance with Article 12.7.6;
> - Canada=s sustained efforts toward developing a general monitoring plan did not really begin until after NTI initiated its lawsuit;
> - both Canada and NTI accepted the recommendation in the Business Case that the funding required to implement the Monitoring Plan over five years was more than $11 million; and
> - the Inuit had a reasonable expectation that Canada would spend what was necessary to perform its obligations under the Agreement.
>
> para 105

[121] He considered whether, in light of Canada=s breach, there were genuine questions of law as to the remedy for the breach: para 106. He rejected Canada's arguments on this matter, emphasizing that parties to a summary judgment motion are required to Aput their best foot

forward@ rather than leaving dangling "the promise that better evidence will be available at trial": para 144. He held that all the material evidence was before him, putting him in as good a position as a trial judge to analyze the legal issues: para 143.

[122] Starting at paragraph 194 he examined the damages for Canada=s breach of Article 12.7.6, setting out some of Sewell=s admissions. He suggested Canada's argument that it had no "savings" as a result of delayed implementation of Article 12.7.6 assumed it was not obliged to implement the Monitoring Plan on a timely basis, a view he rejected. Since this obligation exists in perpetuity, delay clearly benefitted Canada: para 197. He noted that the "implementation of the NGMP in July 2010, ended Canada's breach and crystalized the damages ... [and] there is no claim advanced for future loss": para 196. Damages were crystalized at the date of argument: para 146.

[123] Acknowledging that calculating damages can be difficult, he concluded that employing the cost of implementation of similar initiatives in other jurisdictions would be "arbitrary and speculative": para 200. The most reliable evidence was the cost of the five year implementation: para 201. The failure to implement sooner meant the Inuit suffered a real loss in not having information to make better decisions about their interests, a loss impossible to quantify using expectation damages (which have as their purpose to put the injured party in the same position it would have been absent the breach). As a result of Canada=s breach, the Inuit were worse off; Canada was better off.

[124] He emphasized that the Articles at issue were intended to provide better management of Nunavut=s resources; to have life they required information, which the Monitoring Plan was meant to provide. He observed that the classic response in such a situation would be nominal damages but that remedy would be hollow and unjust. Instead, he explored the remedy of disgorgement, pointing out that whatever the remedy, it should enforce Canada=s obligation to act honourably in its dealings with aboriginal peoples: paras 203-04.

[125] The judge also held that Canada owed a fiduciary duty to the Inuit which it had breached: paras 254-77. This entitled the Inuit to disgorgement of Canada's savings for not implementing the Monitoring Plan in a timely way.

[126] In the alternative, he was prepared to award restitutionary damages for breach of contract based on *Attorney General v Blake*, [2000] UKHL 45, [2000] 4 All ER 385. To remedy its breach, Canada should disgorge the benefit of its breach of contract (the funds it saved by not living up to its perpetual contractual obligations for six and a half years).

[127] Although providing two different rationales, he accepted that NTI=s damages were the saved amounts. He granted NTI's summary judgment motion and awarded damages of $14,817,500 and costs.

C. Standard of Review

[128] Summary judgment motions must be granted when there is no genuine issue requiring a trial. This will be so when the judge is able to make the necessary fact findings, apply the law to the facts, and the result is a proportionate, more expeditious and less expensive means of achieving a just result: *Hryniak v Mauldin*, 2014 SCC 7 at paras 47-50, 366 DLR (4th).

[129] The standard of review of a summary judgment is reasonableness. An appeal court will be reluctant to interfere when "the chambers judge has stated and applied the proper principles and where there was evidence to support the findings made and the inferences drawn": *Desoto Resources Ltd v Encana Corp*, 2011 ABCA 100 at para 19, 513 AR 72. "[A]bsent an error of law, the exercise of powers under the new summary judgment rule attracts deference ... unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.": *Hryniak* at paras 81, 83.

[130] The standard of review for a summary judgment remedy is similar: *Trico Developments Ltd v 5117089 Manitoba Ltd.*, 2009 MBCA 3, 236 Man R (2d) 91.

[131] The party seeking summary determination must prove there is no genuine issue of material fact requiring a trial; it cannot merely rely on the pleadings. If this is established, the other side must refute or counter the evidence, or risk summary dismissal. "Each side must put its 'best foot forward' with respect to the existence or non-existence of material issues to be tried": *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 11, [2008] 1 SCR 372. The chambers judge may draw inferences of fact based on undisputed evidence, as long as the inferences are strongly supported by the facts: *ibid.* Summary judgment motions must be assessed on the basis of material before the judge, not on suppositions about what might be pleaded or proved in the future: *ibid* at para 19.

[132] Material filed to support a claim of damages in a summary trial motion must provide a reliable basis on which to assess damages: *DaimlerChrysler Canada Inc v Associated Bailiffs & Co* 2005 CarswellOnt 3007 at para 21, [2005] OJ No 2855 (Ont SCJ). An appellate court may not alter a damages award simply because it would have awarded a different amount if it had tried the case. "It must be satisfied that a wrong principle of law was applied, or that the overall amount is a wholly erroneous estimate of the damage": *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 235, [1978] 1 WWR 577.

D. The Approach to Interpreting Modern Land Claims Agreements

[133] The Supreme Court has provided direction on how to interpret modern land claims agreements.

[134] Modern treaties are "the product of lengthy negotiations between well-resourced and sophisticated parties": *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 9, [2010] 3 SCR 103 [*Little Salmon*]. Such agreements attempt to further the objective of reconciliation between aboriginal and non-aboriginal Canadians by, among other things, "creating the legal basis to foster a positive long-term relationship" between the two groups: para 10. Moreover, "[t]houghtful administration of the treaty will help manage ... some of the

misunderstandings and grievances that have characterized the past": *ibid.* The treaty will not accomplish this if government officials interpret it "in an ungenerous manner or as if it were an everyday commercial contract": *ibid.* The parties are "to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way": para 12.

[135] In *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557, Binnie J underscored the need to pay attention to the terms of the treaty to determine what the parties agreed and whether the federal government has gone back on its word: para 4. "The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties": para 7.

E. Issues on Appeal

[136] In a reversal of its position on the summary judgment application, Canada no longer contests the judge=s finding that it "did not fulfill its treaty obligation under Article 12.7.6 of the Agreement in a timely manner" and agrees NTI is entitled to damages if it can prove them: Factum at para 4. It argues the judge wrongly concluded Canada owed the Inuit a fiduciary duty as regards Article 12.7.6. Its prayer for relief asks this Court to allow NTI's summary judgment motion as to Canada's breach of Article 12.7.6 and to dismiss the balance of the summary judgment motion.

[137] As for damages, it asserts the judge erroneously concluded NTI had met its burden of proof; restitutionary damages were available for breach of fiduciary duty and breach of contract; restitutionary damages were the only available remedy; and calculated damages absent any evidence, having misread the examination for discovery admissions and made holdings contrary to the affidavit evidence: Factum at para 46.

[138] After the main factums were filed, the Supreme Court released *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623. The parties filed supplementary factums about *Manitoba Métis Federation* and were asked to comment on a case about damages for breach of contract not argued before the judge, *Sunshine Exploration Ltd v Dolly Varden Mines Ltd. (NPL)*, [1970] SCR 2, 8 DLR (3d) 441.

[139] It bears underscoring that the Agreement did not form part of the Appeal Book, which contained the affidavits, documents and excerpts from Sewell's examination.

F. Analysis

[140] Given the Crown's concession that it breached the Agreement, this appeal may be resolved on a narrow ground: did the judge err in concluding there was no genuine issue for trial about damages? Given the deferential standard of review and the arguments made before him, he did not.

[141] I need not decide whether he erred in finding that Canada breached its fiduciary duty. I will nevertheless explain why that issue should not have been decided on a summary basis.

(i) Legal basis for assessing damages for this breach of contract

[142] The majority concludes the judge properly determined that nominal damages would be inadequate and restitutionary damages would be appropriate. I agree.

[143] The judge properly relied on *Blake* to order Canada to disgorge the savings accrued from its delayed performance of Article 12.7.6. Had it been drawn to his attention, he could equally have employed *Dolly Varden*, where a contractor promised the owner of a mining property it would conduct information-gathering work in relation to the property. The contractor failed to meet its obligations and the Supreme Court upheld damages based on the cost of performing the work.

[144] *Dolly Varden* provides a useful vista for this appeal. It emphasizes the factual nature of damages and the generality of damage principles, which purpose is to do justice between the parties. It upholds the principle that if a breach of contract makes it impossible for the injured party to demonstrate the more conventional measure of damages, the cost of performing the contract can be used in its stead.

[145] I am not persuaded by Canada's position that *Dolly Varden* is inapplicable.

[146] First, Canada points out that *Dolly Varden* was a commercial case involving private parties. When Canada is a party, it does not "save" money or benefit financially in the same way as a private individual or undertaking. Rather, it spends the money on other priorities. Principles employed in a commercial setting should not be used.

[147] While there are differences between private and public actors, that factor is not significant in this case. A principled approach to assessing NTI=s damages must be found since conventional approaches are unworkable. The interpretational principles previously discussed about modern land claims agreements make it arguable Canada should be held to an even higher standard than a commercial party.

[148] Canada wrongly relies on cases advocating restraint in awarding damages against the Crown: *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28; *Taunoa v The Attorney-General*, [2007] NZSC 70. *Ward* concerned an action in damages under section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 which permits courts to award a remedy that is "appropriate and just". *Taunoa* concerned damages for a breach of the New Zealand *Bill of Rights*. Here, Canada acknowledges it breached a contractual obligation; the issue is how to measure the resulting damages. Principles from commercial cases are more relevant in this context than *Charter* or *Bill of Rights* cases.

[149] Second, Canada submits that in *Dolly Varden* there was a total failure of consideration, whereas here the breach was partial because implementation was merely delayed. But a partially-fulfilled contract does not make an injured party less deserving of damages.

[150] Third, Canada argues *Dolly Varden* has received little recognition in other cases, apparently suggesting that its principles have little value. But the decision has never been varied or disclaimed and draws on principles more than 150 years old. The little existing commentary

suggests that if the Supreme Court's findings of fact are accepted, it was "rightly decided": S M Waddams, *The Law of Contracts in Canada* (Toronto: Canada Law Book) (looseleaf, Release 21, November 2012) at 1.2390, see also GHL Fridman, *The Law of Contract*, 4th ed (Scarborough: Carswell, 1999) at 789.

[151] Accordingly, *Dolly Varden* also supports the judge's decision on damages.

[152] I next explore Canada=s argument that NTI failed to discharge its burden of proof for demonstrating damages and the issue should be returned to the trial court for assessment.

(ii) Did NTI's evidence about the cost of timely implementation of the Monitoring Plan permit summary judgment?

[153] To recapitulate, the judge's conclusion that there was no genuine issue for trial about damages is entitled to deference, unless premised on palpable and overriding error or an error of principle. The assessment of damages is a question of fact. I disagree with the majority's conclusion that the evidence on damages was inadequate.

[154] I begin with Canada's acknowledgment during oral submissions that its arguments before the judge focused on its now-abandoned position that it had not breached the contract beginning in July 2003. It is manifest from the judge's meticulous outline of each party's arguments at paragraphs 175 to 193 that many of Canada's arguments on appeal are new.

[155] Before the judge, Canada argued that Sewell's admissions about Canada's savings neither supported NTI's damages claim nor evidenced NTI's loss. Canada contended it had no savings because it is now spending the implementation money and there was no evidence of ongoing costs. Canada also asserted NTI failed to explain what valuation methods were attempted and did not show what loss the Inuit suffered as a result of delayed performance.

a. Canada's arguments on appeal

[156] Somewhat restated, the following are Canada's main arguments about damages on appeal.

[157] First, Canada contends NTI did not discharge its burden on a summary judgment application to establish damages on a balance of probabilities. There was no evidence that expectation damages were impossible to calculate, merely assertions by counsel to that effect. Appropriate evidence might have included requests by other parties for data; Planning Commission minutes showing how the lack of data affected decision-making; and what efforts NTI made to quantify its damages: Factum at paras 49-57. Absent such evidence, damages should have been put over to trial.

[158] The answer to Canada's position emerges from *Dolly Varden* and inferences drawn by the judge.

[159] *Dolly Varden* makes it plain that a conventional approach to assessing damages may be unsuitable when the breaching party neglected to provide valuable information. As a result of Canada's breach important information was lacking for more than six years.

[160] Although the Business Case described the benefits of the Monitoring Plan (see EX82ff), it stated they were "not quantifiable (or difficult to attach a specific dollar value to)": EX118. The judge inferred that the absence of the information made it impossible to assess the resulting loss. This reasonable inference should not be overturned on appeal.

[161] Second, Canada asserts the judge treated damages as punitive and ignored other bases for damages apart from nominal damages. He could have put the matter over to trial or crafted a more equitable remedy instead of awarding damages that exceeded proven loss. Nominal damages were sufficient: Factum at paras 74-79.

[162] Nothing demonstrates that the judge treated damages for breach of contract as punitive. When he used the word "vindicate", it was in relation to the honour of the Crown: para 210. In the context of fiduciary duty, he mentioned the function of deterrence: para 278. He also concluded that this case had the "something more" required by *Blake* to justify restitutionary damages: para 333. None of this supports the suggestion that he treated damages for breach of contract as punitive.

[163] Nor did he ignore bases for damages beyond nominal damages. He considered the cost of similar monitoring programs in other jurisdictions, about which the Business Case contained evidence. His summary of Canada's arguments on damages does not show Canada proposed other measures of damages: paras 182-93. He appropriately rejected costs of other programs as speculative: para 200.

[164] As for putting the matter over to trial, Canada made this proposal primarily because disgorgement is novel and should not be decided summarily: paras 128-32. The judge's description of Canada's damages arguments does not include suggestions that the evidence about savings was inadequate. The judge rejected Canada's argument about the novelty of disgorgement and was unpersuaded that damages raised a genuine issue for trial, relying largely on the absence of factual disputes and the presence of all the material evidence: paras 142-43. His conclusion that the most reliable evidence was the cost of implementing the Monitoring Plan was not in error: para 200.

[165] Third, Canada claims the judge erred in concluding it had "savings" equivalent to the cost of implementing Article 12.7.6. This argument restates one the judge rejected because it assumed Canada was not obliged to implement the Monitoring Plan long before it did. But Canada no longer contests the judge's finding that implementation ought to have occurred by July 2003.

[166] A related point is Canada's contention that the judge should not have ignored its pre-2010 efforts toward implementation, e.g., workshops. This argument also assumes Canada's obligation did not commence in 2003.

[167] Fourth, Canada says it should be treated differently than private entities in the context of damages awards. I have earlier rejected this argument.

[168] Fifth, it asserts damages should be limited to interest on money Canada ought to have expended. This ignores the ongoing and perpetual nature of Canada's obligation. The savings accumulated by late performance were monies it was contractually obligated to start spending in 2003 and continue spending thereafter. An award based on interest would inaccurately assess how much it saved.

[169] Sixth, Canada argues the judge was wrong to use the projected costs of year 5 to calculate the costs for another year and a half, as it would be better to determine the actual cost of the Monitoring Plan for that period.

[170] Damages for breach of contract crystalize on the date of the breach: *Treaty Group Inc v Drake International Inc.*, 2007 ONCA 450 at paras 22-23, 86 OR (3d) 366. Damages for breach of contract are necessarily forward-looking because their goal is to place the claimant "in the same position as he would have been in if the contract had been performed": *Wertheim v Chicoutimi Pulp Co.*, [1911] AC 301 at 307 (PC). The judge found the damages were crystalized by the date of argument. Had Canada met its contractual obligation, all the necessary amounts would have been spent before the application was heard. If damages are assessed for the last year and a half based on amounts actually spent, NTI will have to wait until at least 2017. Under these circumstances, extrapolation of the fifth year costs was neither an error of principle nor unreasonable.

[171] I next consider other arguments only some of which were explored at the appeal hearing.

b. Ongoing funding versus one-time start-up funding

[172] Does the budget in the Business Case reflect ongoing operating costs or include one-time costs required to get the Monitoring Plan up and running? If the latter, the budget would provide an inappropriate measure of damages since one-time costs would have been incurred regardless of when Canada fulfilled its obligation.

[173] Part of this concern arose from Sewell=s testimony in 2009 when asked about forthcoming funding proposals to Cabinet or Treasury Board (identified as $11 million):

> Q: And how much of that [$11 million] is a one time cost and how much is ongoing year to year operational cost?
>
> A: … I think it may be roughly half of each. But that's a – I would have to refresh on that.

EV 214/23-215/2

[174] This passage might suggest that only about half of the projected amount should be used as damages, since development (or start-up) costs would have been spent regardless of the delay in implementation. But his testimony on this point was very tentative.

[175] Nowhere in its factum or before the judge did Canada suggest the Business Case budget included one-time start-up costs. That argument should not be given life on appeal. Nor is such a view supported by the evidence.

[176] For example, the judge relied on Sewell's evidence that the "development" costs included workshops and report preparation: para 194(b). These were incurred long before July 2010.

[177] Canada's factum even describes the budget accepted by the Working Group as involving implementation: para 52, see also paras 80, 83. "At the time the admission was made in November 2009, NGMP had not yet been funded but its development was ongoing .... Some four months later in the March 2010 federal budget monies were allocated for the cost of implementation of NGMP" (emphasis added).

[178] The Business Case shows that the proposed budgets were for implementation, not development. First, the option selected had the self-explanatory title "Implementation of NGMP with 'Reasonable' Dedicated Annual Funding (with Long-term Funding Commitment)": EX 276. Second, the "funding organization will need to obtain additional resources for the implementation, and/or allocate resources from within existing resources: EX 276 with emphasis. Third, "the Government's obligations regarding the NGMP extend in perpetuity, and ongoing long-term funding is desirable to implement the NGMP": EX 277 with emphasis. Fourth, incremental funding was contemplated for "capacity building projects ... on an annual application basis": EX 277.

[179] The detailed budgeting spreadsheet in the Business Case and related documentation suggest the $11.3 million funds ongoing activities. No ($0) capital funding was allocated: EX 271, 276. The advertised job postings appear to be permanent, fulltime positions, not temporary: see EX 365-436. The funding for those positions accounts for about half of the $11.3 million. The balance is allocated to "Gap Filling/Data Development/Capacity Building". There is an associated "annual request for proposals for projects that will address identified priority needs": EX 277. The templates that will be used to apply for such funding (and evaluate those funding requests) indicate an annual "call for proposals" (EX 669) because "[m]any data collection, analysis and reporting systems are relatively new, or in some cases non-existent": EX 673. This "will be a continuing process" (EX 675 with emphasis) with initial funding for "priority information and capacity deficits": EX 679. Finally, the initial gap analysis needs assessment will be "supplemented over the five-year cycle ... once in each five-year cycle": *ibid.* This leads to the reasonable conclusion that both staffing and 'gap filling' are ongoing efforts rather than one-time start-up activities.

[180] To summarize, Canada has never argued that the Business Case contained one-time start-up costs, and the evidence does not support that interpretation.

c. Role of the Planning Commission

[181] Another issue raised by this Court in oral argument was whether other parties, especially the Planning Commission, had responsibility for funding the Monitoring Plan. Again, this argument was not made to the judge or in Canada=s factum. The only evidence supporting it is a

passage in the Business Case noting that, under Option C.1, the Monitoring Plan would be implemented with new resources from Canada, the Government of Nunavut "and possibly the Planning Commission": EX 54. This was "to be determined" and would be the subject of negotiations. Since funding was allocated in March 2010 and the Monitoring Plan implemented in July 2010, one might have expected Canada to know by February 2012 (when the application was argued) whether negotiations had resulted in financial contributions from others. This was not information NTI would have been able to access, especially given Canada=s refusal to disclose other financial information.

[182] The Agreement anticipates the Planning Commission's collaboration in setting up the Monitoring Plan but nowhere suggests it has financial responsibility. The Planning Commission is funded by Canada (Agreement, Art 11.4.3) and in the lawsuit NTI asserts its funding is inadequate: Appeal Book P23 clause 12(a). Sewell frequently said that the Department of Indian and Northern Development was responsible for the Monitoring Plan: EV 20, 48, 58, 102, 129 and 134. He explained that any Planning Commission contributions would have to come from its budget and it had no such line item: EV 86.

d. Does the Business Case reliably show savings?

[183] This Court also asked during oral argument whether the Business Case's budget shows what was actually spent (or saved) by Canada. The answer is that the parties agreed that the implementation option they collectively selected met Canada=s obligations under Article 12.7.6. Submissions to Treasury Board were based on the Business Case (Reasons at para 26 (j)), which resulted in continued funding into the Department of Indian and Northern Development budget: Reasons at para 215. Thus, these figures accurately reflect Canada=s savings. Since Canada apparently did not argue before the judge that the budget was an unreliable basis for determining its savings, he reasonably inferred that money budgeted and provided to implement the Monitoring Plan would be spent for those purposes.

e. Was there a lower cost option?

[184] This Court questioned whether Canada could have fulfilled its obligation by selecting a lower-cost option. This position was never put forward by Canada. Returning the issue of damages to the trial court on this basis undermines the responsibility of respondents on a summary judgment application to put their best foot forward. It is also contrary to the Supreme Court's view of summary judgment as an opportunity for effective and accessible adjudication: *Hryniak* at paras 1-2.

[185] In any event, along with the other members of the Working Group, Canada chose Option C1 as a means of fulfilling Article 12.7.6. At least two other options were unrealistic. Option A was based on no new funding. But without new funding, the Department of Indian and Northern Development had been unable to meet Canada=s obligation over the long term. Option B did not involve long-term funding and since Article 12.7.6 contains a perpetual responsibility, Option B

could not fulfill Canada=s obligations. The judge's conclusion that the savings were the cost of Option C1 was reasonable.

f. Other arguments

[186] I complete this section by addressing other points made by the majority about damages.

[187] I disagree that Canada was not positioned to understand the case it had to meet until after the decision under appeal was rendered. As the majority acknowledges, the grounds for the application set out in NTI's Notice of Motion contained the allegation that Canada's savings were the costs estimated in the Business Case. It is apparent from paragraphs 38-39 of the Reasons that NTI's pre-hearing brief referenced the savings argument in detail. Canada had every opportunity to argue that savings were an inappropriate measure of damages, and why. Its focus on showing there was no breach of contract should not give it licence on appeal to succeed on arguments never made on the summary judgment application.

[188] As for any suggestion that NTI needed to show what information it lacked as a result of Canada's breach, the whole point of Article 12.7.6 was to have a plan to collect and co-ordinate data. Even if some information was available from other sources, its reliability may have been questionable since uncollected data might have altered the significance of available data. NTI did not have to furnish evidence on this matter and if Canada had evidence, it had every opportunity to provide it.

g. Conclusion on damages

[189] The Supreme Court said in *Hryniak* that there "will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result": para 49.

[190] There is no basis for returning the issue of damages to the trial court. Canada was not caught unaware by NTI's assertion that Canada's savings were the appropriate measure of damages. Canada's arguments on the motion may have underemphasized damages and overemphasized its position that it had not breached the Agreement. But permitting Canada to succeed now on new arguments would undermine the very purpose of summary judgment. The judge committed no errors of principle and his conclusion on damages was reasonable.

iii. Did the judge err in concluding that Canada breached its fiduciary duty?

[191] My view that the judge's decision on damages should be upheld suffices to dismiss the appeal. I will nevertheless explain why, as Canada argued before the judge, the issue of fiduciary duty should not have been resolved by a summary procedure.

[192] I will also outline my disagreement with one point made by the majority about the Crown's fiduciary duty to aboriginal peoples.

a. On this record, was it erroneous to resolve summarily the fiduciary duty issue?

[193] By way of background, the Supreme Court said there are two paths to establishing a fiduciary duty in the aboriginal context. Only one was argued on this appeal: when the Crown administers lands or property in which aboriginal peoples have an interest, a fiduciary duty may arise if there is a specific or cognizable Aboriginal interest and a Crown undertaking of discretionary control over the interest: *Manitoba Métis Federation* at para 51. Of necessity I limit my comments to that path.

[194] The judge concluded that the complexity of the legal issues about fiduciary duty did not make it inappropriate to decide them summarily, since there is a large body of Supreme Court law on the topic: para 139. He also said all the relevant material was before him: para 143. In my view he erred in principle for two main reasons: the relevant law is very undeveloped and the evidence was inadequate.

The law is too undeveloped to decide the fiduciary duty issue summarily

[195] In my view there are three preliminary reasons why the issue of the Crown's fiduciary duty ought not to have been decided summarily.

[196] First, the judge's conclusion that the relevant law is "not unsettled or novel" is difficult to accept: para 139. The vast majority of cases about fiduciary duties in an aboriginal context date from the 1980s. Compared to Canadian law in general, this jurisprudence is recent and not extensive.

[197] Second, there seem to be few cases where the Crown's fiduciary duties to aboriginal peoples have been determined on a summary basis. In *Lameman* the Supreme Court upheld the summary dismissal of the part of an aboriginal claim that asserted a fiduciary duty, but there the claim was barred by a limitations statute, rendering superfluous the need for evidence.

[198] Some appellate courts have summarily adjudged whether the Crown stood as fiduciary to specific aboriginal peoples, see e.g., *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2001), 51 OR (3d) 641; 195 DLR (4th) 135 (CA). In the first, it does not appear that the parties disagreed about the appropriateness of summary procedures. In the second, the Court declined to entertain arguments (made for the first time on appeal) that a summary procedure was inappropriate.

[199] It seems, therefore, that only in rare cases will fiduciary duties to aboriginal peoples be determined on a summary basis, with little or no evidence.

[200] Third, and most importantly, few cases have examined fiduciary duty in the context of modern land claims agreements. The minority judgment of Deschamps J. in *Little Salmon* adverts to the issue. Without analysis, the Federal Court held that the extinguishment of aboriginal rights under the James Bay and Northern Quebec Agreement gave rise to a fiduciary duty: *Cree Regional Authority v Canada (Federal Administrator)*, [1991] 1 FC 440 at 464, [1991] 4 CNLR 84 (TD).

Although an appeal court upheld a finding that the government process under the same agreement (by which funding was provided to a school board) was capable of supporting a fiduciary duty, the fiduciary duty point was discussed in passing in only one of the three Court of Appeal judgments: *Cree School Board v Canada (Attorney General)*, [1998] 3 CNLR 24 at paras 118-19, aff'd [2002] CNRL 112 (Que CA), leave to appeal to SCC refused [2001] CSCR no 563. In short, the law on these issues is virtually non-existent.

[201] Similarly, there is a paucity of jurisprudence concerning the effect on fiduciary duties of surrender clauses in modern land claims agreements. The fact that the duty to consult survives a surrender clause and an entire agreement clause in a modern land claims agreement, however, suggests it is at least arguable that fiduciary duties survive such clauses: *Little Salmon* at paras 142-44.

[202] Canada does not appear to have ever argued that a fiduciary duty was precluded because of some of the Agreement's general provisions. Nor was the matter raised orally by this Court. Since this has likely significance for portions of the action awaiting trial, argument should not be foreclosed without the parties' submissions.

[203] The Court could have requested additional written argument about the significance of Articles such as 2.7.1 and 2.15 on the claimed fiduciary duties. However, since parts of the action awaiting trial may depend on the same points, it is preferable not to determine them pre-emptively now.

The evidence was inadequate to decide the fiduciary duty summarily

[204] Even if the law is as settled as the judge concluded it was, there were (and continue to be) evidentiary lacunae which made it inappropriate to decide the matter summarily.

[205] Concerning the adequacy of evidence on fiduciary duty, at paragraph 143 the judge relied on his earlier analysis (at paras 103-105) which focussed on "whether Canada carried out its obligations within the first 10-year planning period" (para 104), in other words, whether Canada breached the Agreement. The facts he found concerned that issue alone: para 105. Since none of those facts related to fiduciary duty, they could not provide an evidentiary foundation for such duty.

[206] Even more critically, none of the evidence was expressly directed at the fiduciary duty issue. For example, NTI partly bases its fiduciary claim on the assertion that communal decision-making about the land is part of aboriginal title: Reasons at para 219 and 261, citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 at para 115. *Delgamuukw* involved a lengthy trial and issues other than fiduciary duty.

[207] Here, there was no evidence that communal decision-making concerning the land was part of Inuit aboriginal title. Yet *Manitoba Métis Federation* establishes that fiduciary duty in an aboriginal context requires a communal aboriginal interest integral to the nature of the distinct aboriginal community and its relationship to the land: para 53. Similarly, there was no evidence

that the Inuit traditionally "monitored" the land. Nevertheless, the judge held that such monitoring was a cognizable aboriginal interest: para 265.

[208] To establish fiduciary duty under the first path a claimant must also show that the Crown administers land or property that is subject to a cognizable aboriginal interest. When the Inuit surrendered their aboriginal claims, Canada recognized their ownership to some areas as well as harvesting rights over most of Nunavut's lands and waters (Art 5.7.16) and beyond, into parts of the Northwest Territories: Art 40.3. The Inuit lands are administered by Inuit organizations: see generally Art 19. It is difficult to see how an Inuit claim of fiduciary duty can arise under the first path in relation to lands they own and are not administered by Canada. Perhaps the Inuit can demonstrate a specific or cognizable aboriginal interest in other parts of Nunavut impacted by Canada's untimely implementation of Article 12.7.6 (for example, lands where they exercise broad harvesting rights). The Monitoring Plan's scope is Nunavut-wide (Business Case at EX 70), but there is no evidence about Crown administration of parts of Nunavut that are not Inuit-owned.

[209] I conclude that the issue of Canada's fiduciary duty should not have been decided summarily because the legal underpinnings are undeveloped in the context of this case and, in any event, there was a lack of evidence on this point.

b. Disagreement with majority on a point of law

[210] The majority makes potentially far-reaching and, in my view, unnecessary statements about fiduciary duties. Since many of these points were not the subject of argument (either before the judge or before this Court) I decline to comment on all but one.

[211] The majority concludes no fiduciary duty can arise in this case because *Manitoba Métis Federation* states an "Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, legislation. Rather, it is predicated on historic use and occupation": para 58 with emphasis added.

[212] In my opinion paragraph 58 of *Manitoba Métis Federation* simply means that a treaty or statute alone cannot establish aboriginal title in land; only historic land use and occupancy can do so. Consequently, I disagree with the majority that this paragraph completely bars a finding of fiduciary duty because Inuit rights under Article 12.7.6 arise by "treaty" (i.e., the Agreement).

[213] To understand paragraph 58, it must be read in the legal context in which it is written and in the factual context of *Manitoba Métis Federation* itself.

Legal Context

[214] Paragraph 58 draws on a passage from *Guerin v The Queen,* [1984] 2 SCR 335, 13 DLR (4th) 321 where Dickson CJ distinguished *Guerin* from a series of "political trust" cases that did not involve Canadian aboriginal peoples. He emphasized that aboriginal rights in land arise originally from historic use and occupation, not from treaty or statute. In contrast, he pointed out that in each of the "political trust" cases the party claiming to be a beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for claiming an interest in funds. As

he added, Canadian aboriginal peoples' circumstances are "entirely different. Their interest in the lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive or legislative provision.": at 379.

[215] To make matters even clearer, in the paragraph that followed Dickson CJ said it did not matter whether *Guerin* concerned an Indian Band's interest in a reserve or unrecognized aboriginal title in traditional tribal lands, since "the Indian interest in the land is the same in both cases". Dickson CJ could not have intended to suggest that no fiduciary duty of any kind could ever be based on statute or treaty, since a provision in the *Indian Act* provided part of the foundation of the duty he found in *Guerin*.

Manitoba Métis Federation's Factual Context

[216] The claim in *Manitoba Métis Federation* that Canada had a fiduciary duty in administering land intended for Métis children was rejected because of trial findings that the Métis "used and held land individually, rather than communally, and permitted alienation": para 56. There was no evidence that the Métis asserted they held Indian title when the British purported to extinguish it. Their interests in land were individual rather than based on their shared Métis identity. Neither the words of the statute at issue nor the evidence showed they had a pre-existing communal aboriginal title.

Conclusion on Paragraph 58

[217] To summarize, in my opinion paragraph 58 of *Manitoba Métis Federation* simply means an agreement or statute alone cannot establish aboriginal title in land; only historic land use and occupancy can do so. As I have already suggested, the determination of what evidence would be required in this case to show historic land use and occupancy, or the basis of any other rights from which a fiduciary duty may arise, is best left for another day.

G. Conclusion

[218] I would dismiss the appeal.

Reasons filed at Iqaluit, Nunavut
this 23rd day of April, 2014

"Original signed by Justice Constance Hunt"

Hunt J.A.

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