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# Disgorgement Damages Awarded against Canada for Breach of a Modern Land Claim Agreement

**By Nigel Bankes**

**Case commented on:**
*NTI v Canada (Attorney General)*, 2012 NUCJ 11

In this important case Justice Earl Johnson in the Nunavut Court of Justice has granted summary judgement against Canada in the amount of $14,817,500 for breach of Article 12.7.6 of the Nunavut Land Claims Agreement (NLCA) which provided for the establishment of a monitoring program to cover "the long term state and health of the ecosystemic and socio-economic environment in the Nunavut Settlement Area." Justice Johnson assessed damages on a disgorgement basis calculated by reference to the expenditures that Canada avoided making by failing to implement this provision of the NLCA in a timely way. In doing so the judgement draws upon the decision of the House of Lords in *Attorney General v Blake*, [2001] 1 AC 268 (HL).

Section 12.7.6 of the NLCA provides as follows:

> 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.

NTI commenced this action against Canada in December 2006 seeking damages of $1 billion for a series of breaches of the NLCA, but brought this application under Rules 174 and 181 of the Nunavut for summary judgement "on all or part of the claim" relying on admissions made in Canada's statement of defence, an affidavit of one of its witnesses and portions of the transcript of the examination for discovery of one of Canada's.

Given the general nature of the obligation and the broad class of people who might benefit from its performance perhaps the key obstacle the plaintiffs faced was that under the normal rule for assessing damages for breach of contract (expectation damages, the plaintiff is entitled to be put

in the same position as it would have been in had the contract been performed: *Bank of America v Mutual Trust Co*, 2002 SCC 543) the onus would be on NTI to demonstrate those damages, and, in the absence of being able to do so, damages would be purely nominal. As the Court put it (at paras 201 – 202):

> Canada breached Article 12.7.6 and that information is finally in the process of being accumulated, at least 6.5 years late. If the NGMP had been put in place during the first ten-year planning period, the Inuit would have had more information to make better decisions than they now possess. That is a real loss to the Inuit but it is impossible to quantify on the principles applicable to expectation damages. In the case at bar the breach is not efficient but is a zero sum outcome. The Inuit are clearly worse off while the Crown is better off.
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> The NLCA is not an ordinary commercial contract although it has some features that resemble one such as the payment of money over a period of time and the transfer of title to land. It has numerous other clauses besides Article 12 that concern unquantified monetary obligations such as Article 5 dealing with Wildlife Management, Article 8 dealing with Parks, Article 10 dealing with Land Resource Management Institutions, Article 11 dealing with Land Use Planning, and Article 13 that deals with Water Management. These clauses are directed at providing better management of Nunavut's natural resources. They require information to have life and the NGMP was intended to provide that information. [Emphasis supplied.]

Recognizing this challenge, NTI argued that the correct measure of damages was disgorgement of monies that Canada did not spend or need to spend by failing to implement the monitoring program.

NTI also recognized that a court will only award disgorgement damages in exceptional circumstances. In order to meet this challenge NTI argued that the case was special because of the Crown's fiduciary obligation to NTI in the implementation of this clause of the land claim agreement; NTI also argued in the alternative that the honour of the Crown and associated policy reasons should dictate the same result even of the action sounded only in contract. NTI succeeded on both grounds.

I think that the contractual analysis is particularly persuasive as were the grounds adduced by counsel for NTI as to the "special" nature of the claim (at para 297) or the need for "something more":

> (a) the sui generis nature of land claims agreements, in particular the NLCA, which, while contracts, are contracts of a special nature;
> (b) the impossibility of quantifying damages on an expectation basis;
> (c) the deliberate and repeated failure by the Crown to take initiatives or provide sufficient funding to establish a general monitoring plan even when …. under a contractual and constitutional obligation to do so;
> (d) the non-commercial nature of the NLCA in general and Article 12.7.6 in particular;
> (e) the significant benefit to the Inuit of having a general monitoring plan that would contribute to decision-making regarding lands and resources in Nunavut, a benefit impossible to quantify, but one which is nevertheless substantial;

(f) the legitimate interest that the Inuit had in restraining the Crown from its "profit making activity", *i.e.* retaining money that it would have had to spend to fulfill its obligations; and
(g) The manifest injustice of allowing the Crown to benefit from its failure to fulfill its obligations under Article 12.7.6 and the associated need to ensure that the Crown properly respects and fulfills its obligations under land claims agreements, including obligations to provide benefits that are not capable of being quantified in financial terms.

Justice Johnson accepted all of this and added some reasons of his own referring to the relationship as quasi-fiduciary if not fiduciary, the importance of reconciliation and the importance of ensuring that Canada fulfils its obligations under land claims agreements (at para 333):

I am satisfied that Canada's failure to implement an important article of the land claims for over 15 years undermined the confidence of aboriginal people, and the Inuit in particular, in the important public value behind Canadian land claims agreements. That value is to reconcile aboriginal people and the Crown. It would be manifestly unjust to allow the Crown to benefit from its failure to fulfill its obligations under Article 12.7.6. It is also important that to ensure that the Crown properly respects and fulfills its obligations under land claims agreements, including obligations to provide benefits that are not capable of being quantified in financial terms.

If this decision holds up on appeal it will have important ramifications for the negotiation and implementation of modern land claim agreements and the conduct of litigation between the Crown and aboriginal peoples. It will also be interesting to see if the decision proves to have much application outside the specialized area of aboriginal rights litigation. The decision is one of the few cases in which *Blake* has been applied in Canada. I have suggested elsewhere that disgorgement damages might be used in cases of unlawful production of natural resources from dead leases (see "Termination of an Oil and Gas Lease, Covenants as to Title, and Assessment of Damages for Wrongful Severance of Natural Resources: A Comment on *Williston Wildcatters*" (2005), 68 Sask. L. Rev. 23 – 77 and a related post "Damages for production on a dead oil and gas lease" (see here) but to this point Canadian courts have generally preferred to award tort damages in such cases on a compensatory basis. The special nature of a land claim agreement will make it difficult to apply this case directly in typical commercial settings but in any event the case may serve to draw new attention to the *Blake* decision more than ten years after it was originally handed down.