IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Nunatsiavut Government v. Newfoundland and Labrador*, 2020 NLSC 129
Date: September 24, 2020
Docket: 201601G3137

BETWEEN:

NUNATSIAVUT GOVERNMENT

PLAINTIFF

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR

DEFENDANT

Before: Justice Vikas Khaladkar

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: May 6-8, 2019 and October 1-2, 2019

Summary:

The Nunatsiavut Government claims that the Province is in breach of a modern-day Land Claims Agreement that conveys certain benefits to the Inuit and the people of Newfoundland and Labrador.

The Nunatsiavut Government alleges that its entitlement to share in the wealth created from the extraction of nickel, copper and cobalt in Voisey's Bay, Labrador, has been calculated by improperly taking into account the cost of

refining the nickel ore on the island of Newfoundland. Furthermore, the Nunatsiavut Government claims that certain payments made to the Province on account of the developer's need to ship additional ore out of the province for refinement should have resulted in a payment of 5% of those additional amounts to the Nunatsiavut Government in accordance with the terms of the Land Claims Agreement.

Finally, the Nunatsiavut Government claims that the Province has breached its fiduciary duty by failing to consult with the Nunatsiavut Government concerning the calculation of the tax and the payment of the said additional amounts.

The Nunatsiavut Government is seeking declarations with respect to its claims concerning the calculation of the mineral tax and the Nunatsiavut Government's share of that tax, a declaration that the Province is in breach of its fiduciary duty and its duty to consult with respect to the calculation of taxes and the negotiated additional payments, and a judgment with respect to the amount that the Nunatsiavut Government says it should have received from those additional payments.

The Province argues that the parties entered into a modern-day treaty, that the Labrador Inuit Association, the negotiating body representing the Inuit before the Nunatsiavut Government was established, was ably represented by counsel and consultants with knowledge of mining and taxation, and that the Province has abided by the spirit and intent of the agreement and paid all amounts due and owing to the Nunatsiavut Government.

The Province entered into negotiations with the developers and later, their successors, by virtue of which it was agreed that the developers would build a refining facility on the island of Newfoundland. Strict timelines were negotiated within which the developer would complete the refining facility but, for many reasons, the refining facility was significantly delayed in completion and there were substantial cost overruns encountered. As a result, the developer negotiated an agreement with the Province to allow it to ship nickel concentrate out of the province in excess of what had been earlier negotiated while the refining facility was being constructed. The concentrate was shipped out of province from Labrador. By virtue of that agreement, the developer paid the Province additional amounts as compensation for the delay in completion of the refining facility. In addition, the developer set up a fund by virtue of which several projects were completed for the benefit of the

citizens of Newfoundland and Labrador generally. No share of these additional monies was paid to the Nunatsiavut Government because the Province took the position that these were extraordinary amounts not included or covered by the Land Claims Agreement.

The developer is allowed to deduct from the calculation of the mineral taxes payable to the Province all expenses incurred in the mining and processing of the nickel concentrate in its facilities in Labrador and on the island of Newfoundland, including depreciation of its capital costs of construction of the refining facility. The net result is that since the successful commissioning of the refining facility, the Nunatsiavut Government has received no share of mineral taxation revenue derived from the extraction of nickel at Voisey's Bay because the mineral taxation has been zeroed out by the developer's entitlement to tax deductions. This will continue until 2035, at which time it is expected that the mine at Voisey's Bay will be decommissioned.

The negotiation of modern-day treaty agreements with the Aboriginal People of Canada invokes the principle that the honour of the Crown is at stake as much now as was the case historically. When the historic treaties were entered into between the Crown and the Aboriginal Peoples in the 18th and 19th centuries, there was a vast inequity in the bargaining positions of the parties owing to differences in culture, language, principles of law and world view. The Crown was duty bound to act not only as a party to a contractual arrangement, but also as a fiduciary insofar as ensuring that the Aboriginal People were dealt with fairly and honourably. The treaties that resulted have been accorded constitutional status and are Canada's obligations of the highest order because they are nation to nation agreements and convey significant rights and benefits to both parties.

Modern-day comprehensive land claims agreements are no less treaties that are constitutionally protected. They are no less nation to nation agreements. In their negotiation the Province is bound by the principle that the honour of the Crown should not be tarnished - the Province must make every effort to conclude negotiations with the Aboriginal People fairly and by making full disclosure of any information that the Aboriginal People need to know and understand before entering into a comprehensive land claims arrangement. Certainly the Province knew that the requirement to refine nickel ore in the province would significantly impact the developer's liability to pay mineral taxes to it. The knowledge that the share of mineral taxation revenues to be

received by the Nunatsiavut Government would be reduced to zero should have been disclosed as soon as it became apparent that this would be the case.

The Province gains substantial benefits by requiring the developer to locate its refining facility within the province. The Province gains additional revenue from the harmonized sales tax paid on account of construction and operations, income tax revenue from the persons that are hired to build and work in the refining plant, income taxes from the developer's corporate income and from all of the other economic benefits that flow as a result of creating tens of thousands of person years of employment on the island part of the Province. The Nunatsiavut Government will receive no share of that revenue despite the fact that the nickel ore is being extracted from their traditional territory. Such an outcome is inequitable and besmirches the honour of the Crown.

Declarations are granted as follows:

1. The Nunatsiavut Government's share of mineral taxation revenues is to be calculated without reference to any costs incurred by the developer outside of the Labrador Inuit Settlement Area. In particular, the costs of construction, depreciation and operation of the refining facility in Long Harbour, on the island of Newfoundland, shall not be used in calculating the 5% share payable to the Inuit on account of processed ore shipped from Voisey's Bay.

2. The Nunatsiavut Government is entitled to receive a 5% share of the amounts received by the province of Newfoundland and Labrador as a result of the fifth and sixth amending agreements entered into with the developers in 2013 and 2014, and the Nunatsiavut Government is entitled to receive a 5% share of the Community Investment Fund that was negotiated in the sixth amending agreement.

3. The Province breached its fiduciary duty to the Inuit by failing to advise them of a decline in mineral taxation revenues as a result of the Province's insistence that the refining plant be located on the island of Newfoundland and, furthermore, the Province breached its fiduciary and contractual duty by failing to consult with the Nunatsiavut Government in advance of negotiating the Fifth and Sixth amending agreements. The duty to consult is a proactive duty that requires

meaningful exchanges of information with the result that the parties can enter into a dialogue that will result in meaningful negotiations. An *ex post facto* delivery of information that the Province has concluded an agreement with the developer without any Aboriginal participation is a breach of the treaty, a breach of the Province's ongoing fiduciary duty and impairs the honour of the Crown.

Authorities Cited:

CASES CONSIDERED: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53; *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; *Nunatsiavut Government v. Newfoundland and Labrador (Minister of the Department of Municipal Affairs)*, 2013 NLTD(G) 142; *Ross v. Minister of National Revenue*, [1950] Ex. C.R. 411; *Prenn v. Simmonds*, [1971] 3 All E.R. 237, 1 W.L.R. 1381 (U.K. H.L.); *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21

STATUTES CONSIDERED: *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Mineral Act*, R.S.N.L. 1990, c. M-12; *Mining and Mineral Rights Tax Act*, S.N.L. 2002, c. M-16.1

TREATIES AND AGREEMENTS: Labrador Inuit Land Claims Agreement, 2005

Appearances:

Brian A. Crane, Q.C., Graham S. Ragan and John J. Wilson	Appearing on behalf of the Nunatsiavut Government

Justin S.C. Mellor and Mark P. Sheppard	Appearing on behalf of Her Majesty the Queen in Right of Newfoundland and Labrador

REASONS FOR JUDGMENT

KHALADKAR, J.:

INTRODUCTION

[1] The Inuit have been resident in Labrador since time immemorial. Traditionally they pursued hunting, fishing, whaling, sealing and gathering activities. Eventually, after contact with Europeans, they settled in the towns of Nain, Hopedale, Postville, Makkovik, Rigolet (which are within the Labrador Inuit Settlement Area) and Happy Valley-Goose Bay, Northwest River and Mud Lake (which are outside the Labrador Inuit Settlement Area). There were other communities such as Hebron, further north than Nain, and Zoar south of Nain, but they were either resettled during the 1960s or abandoned.

[2] The Inuit still have a heavy reliance on their traditional pursuits of hunting, fishing, sealing and gathering. In days gone by lithic materials were quarried to make stone implements such as harpoon heads and projectile points for arrows and spears. Soapstone was used for carving domestic items such as lamps and cooking vessels. Today many Inuit artists and craftspeople rely upon the quarrying of lithic materials to create sculptures and carvings.

[3] The Labrador Inuit Association was formed for the purpose of negotiating the Labrador Inuit Land Claims Agreement, 2005 (the "Land Claims Agreement"), which was initialed for ratification in 2003 after at least 13 years of negotiations. It was ratified by all three levels of government - Canada, the Province of Newfoundland and Labrador and Nunatsiavut in 2005. Ratification involved the passage of legislation by the Her Majesty the Queen in Right of Newfoundland and Labrador (the "Province") and Canada, and a referendum by the Inuit.

[4] The Land Claims Agreement is recognized as a modern-day treaty and came into force in December, 2005. In 2005 the Labrador Inuit Association ceased to function and was replaced by the Nunatsiavut Government - which had the responsibility, on behalf of the Inuit, to implement the Land Claims Agreement.

[5] Voisey's Bay is located just south of the community of Nain, a largely Inuit settlement, in northern Labrador. The area was traditionally used by the Inuit in hunting, fishing and gathering activities. Many persons had constructed dwellings in the area and used the land and marine resources for their needs. In addition to subsistence hunting, fishing and gathering, the Inuit who lived in Voisey's Bay also engaged in commercial fishing operations and traplines for fur-bearing animals. There was a community named Zoar located in Voisey's Bay, and the Moravians established a church in Zoar - which was at the East end of Voisey's Bay.

THE HISTORICAL MATRIX

[6] In October, 1993 in an attempt to negotiate a comprehensive land claims settlement, the then premier of the Province, Clyde Wells, offered the Inuit the land in and around Nain and Voisey's Bay, amongst other lands further to the South, as Inuit Settlement Lands with a view to entering into an agreement. Under the proposal the Inuit would have owned Voisey's Bay in its entirety - including the minerals rights therein. The Inuit were not happy with the quantum of land that was being offered and rejected the overture. No one knew, at the time, that under the surface lay one of the richest nickel deposits in the world.

[7] In 1994, a claim was staked by prospectors for a nickel and copper deposit in Voisey's Bay. On December 7, 1994 the president of the Labrador Inuit Association, William Barbour, sent a letter to Premier Wells to clarify the Province's position on revenue sharing and royalties regarding the mineral discovery at Voisey's Bay. Premier Wells responded on February 8, 1995 that he was pleased that the Labrador Inuit Association was considering his suggestion on resource royalty revenues, but that it was premature to address the issue during the exploration phase of the mineral discovery.

[8] In the February 8 letter, Premier Wells proposed that all resource revenues from Voisey's Bay be placed in trust to be paid to the party or parties entitled to them under the Land Claims Agreement. However, no protocol regarding the management of the exploration that was going on at Voisey's Bay was established and the Premier's offer of setting up a trust fund was neither accepted by the Labrador Inuit Association nor implemented by the Province.

[9] Negotiations between the parties continued. On November 4, 1996 the Inuit put forward a discussion paper. In response, the Provincial Chief Negotiator informed the Labrador Inuit Association that the Province will not consider Inuit ownership of the surface or subsurface at Voisey's Bay. The Labrador Inuit Association negotiators responded that in order for that position to be acceptable, the Province must recognize Inuit land rights to Voisey's Bay and the Province must offer to compensate, through resource royalty sharing, the Inuit in consideration of the extinguishment of their land rights.

[10] On January 10, 1997 the Provincial Chief Negotiator advised the President of the Labrador Inuit Association, William Barbour, and the Labrador Inuit Association's Chief Negotiator, Toby Anderson, that the sharing of revenue from Voisey's Bay was withdrawn from the negotiation as far as the Province was concerned.

[11] The parties had also reached impasses on other aspects of the land claims negotiation and, ultimately, it was decided that a meeting of senior officials be convened with a view to giving direction to the negotiating teams on these outstanding issues. The senior officials from each of the three delegations, Canada, Newfoundland and Labrador and the Labrador Inuit Association, met from October 20-28, 1997 and arrived at agreements in principle on a number of the outstanding issues. These included, but were not limited to, the quantum of land, namely 6,100 square miles of fee simple land, that would comprise the Labrador Inuit Settlement Lands, the establishment of a national park in the Torngat Mountains, the quantum of a marine area of 17,000 square miles subject to Inuit jurisdiction, harvesting rights outside of the Labrador Inuit Settlement Area, Inuit subsurface rights on Labrador Inuit Settlement Lands and resource revenue sharing within the Labrador Inuit Settlement Area.

[12] The parties agreed to a revenue sharing arrangement in respect of Voisey's Bay comprising 3% of annual revenues if it was authorized to proceed. The Inuit were also authorized to conclude an impact and benefits agreement with the developer provided that the amount payable to the Inuit would be capped at a maximum level. The Province insisted on the capping formula at the senior officials' meeting. The parties agreed upon certain financial considerations relating to the transfer of capital funds from the Government of Canada for the Inuit Government and an implementation fund for the Labrador Inuit.

[13] The federal funds were contingent upon a resource revenue sharing arrangement being concluded between the Province and the Inuit. Immediately upon the 3% being negotiated, Canada committed to the transfer of the capital and implementation monies. Self-government arrangements were also concluded upon the parties agreeing upon issues relating to non-beneficiaries who were resident in Inuit communities on what would become Labrador Inuit Settlement Lands. The federal and provincial officials exchanged side letters concerning the impact that revenue sharing would have upon the equalization formula between the two levels of government.

[14] The issues that were resolved as a result of the Officials' agreement were as follows:

a. $140 million plus $115 million for implementation funding from Canada;

b. Labrador Inuit Lands in the amount of 6,100 square miles to be selected within the Labrador Inuit Settlement Area - which would comprise 28,000 square miles (including Torngat Mountains National Park);

c. Revenue sharing on an annual basis as follows:

    i. 25% of provincial subsurface resource revenues on Labrador Inuit Lands;

    ii. 50% of the first $2 million of provincial resource revenues from the Labrador Inuit Settlement Area and 5% of the remaining revenues thereafter;

iii. 3% of provincial resource revenues from the Voisey's Bay Project (mine production).

d. It was agreed that Voisey's Bay was a special case to be dealt with in a separate chapter of the Land Claims Agreement.

[15] As a follow up to the senior officials' meeting, the negotiating teams took their direction and wrote chapters that would be included in an agreement in principle. By May 10, 1999 the negotiators had concluded writing a Chapter 7 that was initialed by the parties on that date in an agreement in principle. Chapter 7 was intended to contain revenue sharing provisions that were negotiated by the senior officials and incorporated by the negotiating committee drafters into the agreement in principle. Chapter 8 was reserved in relation to the Voisey's Bay development but, in May, 1999 it could not be completed because the environmental assessment for the proposed project was not finished, government approvals for the project were still outstanding and the size and scope of the project had not been finalized by the developers.

[16] The Labrador Inuit Agreement-in-Principle was initialed by its negotiators on May 10, 1999. The definition of the Voisey's Bay Project remained incomplete at the time. However, the Inuit agreed that they would not select lands within the Voisey's Bay Area:

> 4.2.15 For purposes of this Agreement-in-Principle the Inuit will not identify and select lands within the boundaries set out in Schedule 4-B, as Labrador Inuit Lands.
>
> 7.5.1 The Inuit Central Government is entitled to receive, and Newfoundland shall pay to the Inuit Central Government, an amount equal to 3% of Revenue from the Voisey's Bay project.
>
> 7.5.5 Prior to the Agreement the Parties will define the Voisey's Bay project.

[17] In September, 1999 the Labrador Inuit Association advised the Province and Canada that any bilateral agreements between the Province and the developer with

respect to Voisey's Bay could prejudice Inuit land rights. The Labrador Inuit Association requested that they be involved in any agreements with the developer. In response the Province indicated that it would "continue its longstanding policy of consulting with affected Aboriginal groups on matters which impact areas subject to comprehensive land claims. Notwithstanding this commitment, the Labrador Inuit Association was not consulted on the negotiations between the Province and the developer on the development of the Voisey's Bay mine.

[18] The Province's position that the Inuit would not be allowed to select Voisey's Bay as part of their land claims entitlement created concern in the Inuit communities because many Inuit felt that 3% of revenues was not a very good bargain given what they were being asked to give up in the area of Voisey's Bay.

[19] The Inuit conducted a series of community consultation and information sessions preliminary to an eventual ratification vote. These were conducted in all of the Inuit communities in Labrador. A vote was successfully held and the Agreement in Principle was ratified. The Inuit started their process of land selection later in 1999. The federal and provincial governments and the Labrador Inuit Association signed the Agreement in Principle on June 25, 2001. Chapter 8 - the Voisey's Bay chapter - was not concluded at that time.

[20] A number of issues were still outstanding and unresolved in 2001. This led to a meeting between Premier Grimes of Newfoundland and Labrador and President Barbour representing the Inuit in 2002. At that meeting a letter of understanding was entered into. One of the issues addressed was the increase of the revenue sharing arrangement for the Inuit from 3% to 5%.

[21] Contemporaneously, the Province was negotiating a statement of principles with the developer for the Voisey's Bay mine. The Inuit were neither consulted in relation to these negotiations, nor were they consulted with respect to the development agreement that was eventually entered into between the developer and the Province. In June, 2002 the Province announced that it had reached an agreement with the developer and, on September 30, 2002 a development agreement was executed by the developer and the Province.

[22] The development agreement contained an agreement by the developer to concentrate 6,000 tonnes of nickel and copper ore per day at Voisey's Bay. It contemplated that a hydrometallurgical refining facility would be built on the island of Newfoundland for the purpose of producing high grade finished nickel product from the nickel concentrate provided from Voisey's Bay. It was agreed that the processing plant would operate well beyond the life of the mine.

[23] The development agreement described the projected benefits to the Province from the mine at Voisey's Bay and the processing plant. The estimate of total employment benefits to the Province over 30 years was 76,000 direct and indirect person years. The total gross domestic product impact to the Province was estimated to be $11 billion. These amounts were based on the assumption that the developer would make a capital investment of $2.9 billion. The capital investment would eventually amount to almost 2.5 times that initial estimate.

[24] The Province and the developer entered into a separate tax agreement which contained clauses that would oblige the developer to maximize, to the extent permissible by Part IV of the Federal Income Tax Regulations, the allocation to the Province of the developer's gross revenues from the sale or disposition of nickel, copper and cobalt products from the project.

[25] The Inuit were not consulted in the negotiation of the development agreement or the tax agreement between the Province and the developer.

[26] On October 7, 2002 the Province issued an Order allowing up to 355,000 tonnes of nickel concentrate to be exported for processing.

[27] The Land Claims Agreement was initialed on August 29, 2003. The agreement came into force, after ratification by the Inuit and the enactment of approval legislation, on December 1, 2005. The Land Claims Agreement is a modern treaty protected by section 35 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[28] By 2005 the construction of the mine and related facilities at Voisey's Bay had been completed. Thereafter nickel concentrate was exported from the Province and the following payments were made, mostly in respect of the 5% share, to the Inuit:

31 March 2006	$4,112
31 March 2007	$2,634,506
31 March 2008	$14,999,229
31 March 2009	$4,464,787
31 March 2010	$2,863,274
31 March 2011	$6,262,364
31 March 2012	$11,033,200
31 March 2013	$7,357,602
31 March 2014	$3,678,086
Total	**$53,297,160**

[29] In January, 2009 the Province announced that the developer would proceed with the construction of a processing plant at Long Harbour on the island of Newfoundland. The development agreement was amended to extend the completion date for the processing plant to February, 2013.

[30] It was not until November 29, 2012 that the Province advised the Inuit that a drastic reduction in mining tax was anticipated. The developer was allowed, under the legislation, to claim its costs of operations and depreciation of its capital assets, including the costs of operating the refining plant at Long Harbour and the depreciation of its island based capital assets against the mineral taxes otherwise owing to the Province. The processing plant was expected to cost $3.5 to $4.0 billion to construct. The Province advised the Inuit that there would be next to nothing in revenue sharing for at least the next two fiscal years.

[31] In fact the capital costs of construction were over double the initial estimates. In calculating its deductions for mineral tax, the developer deducted annual operating costs of the processing plant, depreciation and processing allowances. Between 2015 and 2018 the Inuit received about $534,211 as its total share of revenue.

[32] On March 28, 2013 the Province announced that a commitment had been obtained for the development of an underground mine at Voisey's Bay. The Inuit were advised approximately one hour before the announcement was made public. As a result of the underground mine expansion at Voisey's Bay, the mine is expected to continue operating and producing nickel concentrate past 2035.

[33] The construction of the refining plant met further delays. The developer was unable to meet its target for the completion of the refining plant. In 2013 and 2014 the Province and the developer entered into two amending agreements to further extend the completion date for the refining plant. This entailed an ability, on the part of the developer, to export additional nickel concentrate beyond the initial 355,000 tonnes – totaling 633,000 tonnes in all. In consideration of each of these amending agreements the Province received substantial payments from the developer.

[34] The amending agreements were negotiated in private between the Province and the developer. The Nunatsiavut Government was neither consulted nor informed that such negotiations were taking place. After the fact, the Province informed the Inuit that the additional payments received by the Province would not be shared. The Province received in cash and kind approximately $230 million under the two amending agreements. None of those revenues have been shared with the Nunatsiavut Government.

[35] In a February, 2015 briefing note the Assistant Deputy Minister of Natural Resources described the taxation benefits to the Province from the whole project (including underground mining) as follows:

> In addition the province has realized significant benefits through direct, indirect and induced taxation. These include:-
>
> - Mining tax at standard rates (calculated at 16% of profit with appropriate deductions applied).
> - Corporation tax, with taxation paid in province maximized through a tax agreement signed in 2002
> - Indirect taxation paid through income tax, sales tax, and corporate tax by workers and suppliers to the project

...

- Provincial revenues for the whole project (including underground mining) are estimated to be four times greater than estimated in 2002 (estimate provided by Vale on confidential basis - $4 billion)

- Total capital investment in the province to date is over $5 billion, with commitments to more through the underground mine and completion of Long Harbour, well above the original commitment in 202 [sic] of $2.9 billion (confidential analysis suggests actual figure may be greater than $8 billion including the underground mine).

- Contribution to GDP has doubled since 2002 to over $22 billion.

[36] After 2014, and until Voisey's Bay ceases to produce ore in 2035, the Nunatsiavut Government will receive no revenue sharing from the Voisey's Bay Project if Long Harbour expenditures are allowed to be deducted from the mineral tax payable.

ISSUES

1) How should the Inuit share of Revenue from the Voisey's Bay Project be calculated?

2) Is the Province obligated to share the amounts that it received under the Fifth and Sixth amending agreements with the developer?

   (DUNC, CUNC and the COMMUNITY INVESTMENT FUND)

3) Did the Province owe a fiduciary duty to the Nunatsiavut Government with respect to the administration of the Inuit Revenue share from the Voisey's Bay Project and, if so, was there a breach of that duty?

4) Was there a breach of the Province's duty to consult with the Nunatsiavut Government under the Land Claims Agreement or at Common Law with respect to the calculation and administration of the Inuit Revenue share for the Voisey's Bay Project?

5) Did the Province breach its duty to consult the Nunatsiavut Government under the Land Claims Agreement or at Common Law with respect to the payments that it received under the Fifth and Sixth amending agreements with the developer?

ANALYSIS

[37] The Land Claims Agreement is a constitutionally protected modern treaty under s. 35 of the *Constitution Act, 1982*. In case of conflict the provisions of the Land Claims Agreement prevail over federal and provincial legislation.

[38] The objective of modern land claims agreements is to bring about a reconciliation between the competing interests of the affected Aboriginal Peoples and the Crown. The establishment of a positive, long-term relationship is in everyone's best interests. The Supreme Court of Canada, in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, at paragraph 10, put it thus:

> 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. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. A canoeist who hopes to make progress faces forwards, not backwards.

[39] In *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 at paragraphs 37 and 38, the Supreme Court of Canada discussed the judicial approach to the interpretation of modern land claims agreements. The Court reiterated that a modern treaty should not be interpreted in an ungenerous manner as if the treaty were a commercial contract. The Court re-emphasized that the interpretive principles to be utilized must assist in advancing reconciliation – which is found in the respectful fulfillment of a modern treaty's terms.

[40] To that extent, the terms of the modern treaty must be interpreted in a fashion that is *sui generis*. I am bound to take into account the treaty text as a whole and pay particular attention to the treaty's objectives. And, as instructed by the Court's decisions in *Little Salmon* and *Nacho Nyak Dun*, while I must strive to respect the handiwork of the parties to a modern treaty, this is subject to such constitutional limitations as the honour of the Crown.

[41] The Supreme Court of Canada explained, in paragraph 38 of *Nacho Nyak Dun,* that reconciliation will be found in the respectful fulfillment of a modern treaty's terms.

[42] The honour of the Crown gives rise to a fiduciary obligation when the Crown assumes discretionary control over a specific or cognizable Aboriginal interest. Chief Justice Wagner explained, in *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 that the Crown's fiduciary obligations include the fiduciary duties of loyalty, good faith and full disclosure. He wrote, at paragraph 46:

> 46. A fiduciary obligation requires that the Crown's discretionary control be exercised in accordance with a standard of conduct to which equity holds a fiduciary (*Guerin*, at p. 364, *Wewaykum*, at para. 80). This is embodied, for example, in the fiduciary duties of loyalty, good faith and full disclosure. The standard of care to which a fiduciary is held in its pursuit of the beneficiary's interests is "that of a man of ordinary prudence in managing his own affairs". ...

[43] The Inuit had an Aboriginal interest in Voisey's Bay because they hunted, trapped, fished, sealed, gathered and resided there. That interest was substantially affected by the Province declaring that the area was not available for selection by the Inuit once it learned that a world class nickel deposit lay beneath the surface. The Province's *de facto* assumption of control over the area, and the successful negotiation of the Land Claims Agreement - including a chapter relating to Voisey's Bay, gave the Province responsibility for the management, calculation and disbursement of the Inuit Revenue share. In doing so, the Province owes the Inuit a duty of loyalty, good faith and full disclosure in the discharge of its obligations.

[44] The Inuit negotiated under the Land Claims Agreement, and were granted, the right to be consulted by Canada and the Province in a number of areas including Chapter 8 - the Voisey's Bay chapter. Under section 8.6.2 of the Land Claims Agreement the Province has a specific duty to consult with the Nunatsiavut Government prior to deciding an application for a permit or issuing an order pertaining to the Voisey's Bay Project or to any other work or activity in the Voisey's Bay Area.

> 8.1.1 "Permit" means a lease, license, permit, approval, plan, or other authorization required by Law and includes an amendment to a lease, license, permit, approval, plan, or other authorization required by Law;
>
> 8.6.2 Canada and the Province shall Consult the Nunatsiavut Government prior to:
>
> (a) deciding an application for a Permit or issuing an order pertaining to the Voisey's Bay Project or to any other work or activity in the Voisey's Bay Area; or
>
> (b) attaching a condition or making an amendment to a Permit or order pertaining to the Voisey's Bay Project or to any other work or activity in the Voisey's Bay Area.

[45] In Part 1.1.1 of the Agreement-in-Principle negotiated by the parties in May, 1999, they defined the term "Consult" as follows:

"Consult" means to provide:

(a) to the Person being consulted, notice of a matter to be decided in sufficient form and detail to allow that Person to prepare its views on the matter;

(b) a reasonable period of time in which the Person being consulted may prepare its views on the matter, and an opportunity to present its views to the Person obliged to consult; and

(c) full and fair consideration by the Person obliged to consult of any views presented.

[46] While this definition of "Consult" was not incorporated into the final Land Claims Agreement, it fairly sets out what the duty entails. Part 8.6 of the Land Claims Agreement sets out in specific detail those items which require consultation with the Nunatsiavut Government.

[47] The duty to consult exists outside the terms of the Land Claims Agreement. As explained by the Supreme Court of Canada in *Little Salmon* at paragraph 69, the duty to consult is imposed as a matter of law, irrespective of the parties' "agreement". It does not "affect" the agreement itself. It is simply part of the essential legal framework within which the treaty is to be interpreted and performed.

[48] As early as October 4, 1999 in a letter to the President of the Labrador Inuit Association, the Province acknowledged that it had a longstanding policy to consult "on matters which impact areas subject to comprehensive land claims". [Agreed Book of Documents, Volume 5, Tab 143]. As will be seen, however, the policy was honoured more in its breach than its observance.

[49] This Court earlier interpreted the consultation provisions in the same Land Claims Agreement that forms the subject matter of the instant action. Butler, J. (as she then was) had occasion to rule upon the issue of consultation in *Nunatsiavut Government v. Newfoundland and Labrador (Minister of the Department of Municipal Affairs)*, 2013 NLTD(G) 142, at paragraphs 57 and 60. She wrote:

57. Applying these principles to the facts I have already reviewed, I conclude that in the circumstances of this case:

- the Agreement is a solemn constitutional obligation to the Nunatsiavut Government aimed at reconciling their people's Aboriginal interests with sovereignty and it engages the honour of the Crown; and

- the honour of the Crown requires the Province to act with diligence in pursuit of the fulfillment of the promises made.

60. Viewed as a whole, I conclude that the Province's actions did not meet the standard expected of the duty of the honour of the Crown and that the Respondent is in breach of the spirit and intent of Part 10.6 of the Agreement.

[50] Part 2.15.2 of the Land Claims Agreement states:

2.15.2 If there is an inconsistency or a conflict between federal or Provincial Law and the Agreement, the Agreement prevails to the extent of the inconsistency or conflict.

[51] The Province's *Mineral Act*, R.S.N.L. 1990, c. M-12 requires holders of licenses to extract minerals to complete primary production within the Province. This requirement may be waived, in whole or in part, upon such terms and conditions as may be prescribed by the Province. It is the payments made by the developer to the Province in consideration of two such exemptions that are, in part, in issue in this case. Also in issue is the manner in which revenues from resources extracted at Voisey's Bay were to be shared.

1) How should the Inuit share of Revenue from the Voisey's Bay Project be calculated?

[52] The Nunatsiavut Government's right to receive a share of subsurface resource revenue can be found at Part 7.5.1 of the Land Claims Agreement. It states:

7.5.1 The Nunatsiavut Government is entitled to receive, and the Province shall pay to the Nunatsiavut Government, an amount equal to five percent of the Revenue from the Voisey's Bay Project.

[53] The definitions of Revenue and Royalty Tax are found in Part 1.1.1 of the Land Claims Agreement, which states:

"Revenue" means:

(a) any Royalty Tax that is received by the Province under the *Mining and Mineral Rights Tax Act,* the *Petroleum and Natural Gas Act,* the *Quarry Materials Act* or the *Mineral Act;*

(b) any Royalty Tax that is received by the Province under any Provincial Legislation to replace or amend the *Mining and Mineral Rights Tax Act*, the *Petroleum and Natural Gas Act*, the *Quarry Materials Act* or the *Mineral Act* or to levy a new or additional Royalty Tax in respect of Subsurface Resources in Newfoundland and Labrador;

(c) any amount that is received by the Province under a tax collection, tax rental, revenue sharing or similar arrangement with Canada or any other jurisdiction in respect of a Royalty Tax referred to in clause (a) or (b) in respect of Subsurface Resources in Newfoundland and Labrador;

(d) any interest or penalty that is received by the Province in respect of a Royalty Tax or an amount referred to in clause (a), (b) or (c); and

(e) where the Province has taken an equity share in a Subsurface Resource Development *in lieu* of Royalty Taxes, the net revenue received by the Province in respect of such share but, for greater certainty, excludes revenue where the Province acquires an interest through a purchase of shares or where it receives a return on the Subsurface Resource Development from the investment of capital or resources other than the Subsurface Resource in respect of which the equity share is taken *in lieu* of Royalty Taxes;

"Royalty Tax" means:

(a) an amount in respect of a Subsurface Resource that is a tax, royalty, rent, fee, excluding a fee levied for administrative purposes, or other payment in the nature of a royalty; and

(b) any other amount that is payable for a right to explore for or exploit a Subsurface Resource or a right of entry or use relating to a right to explore for or exploit a Subsurface Resource.

[54] The Province argued that it ought not to be forced to share revenue it has not received. The Province takes the position that the Land Claims Agreement defines "revenue" as money that is received, not money that is deemed to be received or that is payable.

[55] The Land Claims Agreement contains the definition of the term "Revenue". It is, when considered with the term "royalty tax", a broad definition that encompasses much more than royalty tax in the narrow sense of those words. The definition includes "an amount in respect of a Subsurface Resource that is a tax, royalty, rent, fee, or other payment in the nature of a royalty". [Emphasis added].

[56] The Province is the beneficiary of billions in Revenue as a result of requiring that processing take place on the island of Newfoundland.

[57] The Province argued that the Nunatsiavut Government was aware, prior to the signing of the Land Claims Agreement, that processing would occur outside the Voisey's Bay Area. It also argued that the Nunatsiavut Government knew that processing expenses were deductible under the *Mining and Mineral Rights Tax Act*, S.N.L. 2002, c. M-16.1. That is probably so. However, they were not aware that the Province would use those deductions to completely negate the Nunatsiavut Government's share of the Revenue.

[58] The Province pointed out that the Nunatsiavut Government successfully negotiated measures in the Land Claims Agreement to protect itself from tax deductions for explorations outside the Voisey's Bay Area but not processing. There are two cogent, and more persuasive, arguments in response.

[59] Firstly, the Province should have alerted the Nunatsiavut Government, while negotiating deductions for explorations outside the Voisey's Bay Area that there was a potential that processing costs from the island of Newfoundland might impair the Nunatsiavut Government's share of the Revenue. The Province did not make this information known to the Inuit and, in not doing so, breached its fiduciary duty of full disclosure. A breach of a fiduciary duty tarnishes the honour of the Crown. *Williams Lake Indian Band v. Canada* at paragraph 46.

[60] Secondly, the definitions of revenue and royalty tax are qualified by the terms of Part 7.5.1 of the Land Claims Agreement - in that the Province is obligated to pay 5% of the revenue from the Voisey's Bay Project. "Voisey's Bay Project" means the activities that take place in the Voisey's Bay Area - not the activities that take place on the island of Newfoundland.

[61] The Province argued that excluding deductions for the hydrometallurgical refining plant is tantamount to making the Province pay the Nunatsiavut Government a tax stream regardless of whether the Province receives any taxes from the developer.

[62] Under Part 7.5.1 of the Land Claims Agreement, the Province must pay the Nunatsiavut Government an amount equal to 5% of the Revenue from the Voisey's Bay Project. In order to determine the meaning of the term "Revenue" as it is used in the Land Claims Agreement, one must resort to the definitions of the "Voisey's Bay Area" and the "Voisey's Bay Project" found in C-8.1.1:

> "Voisey's Bay Area" means the area, including land, resources and land covered by water, within the boundaries set out in the Map Atlas (shown for illustrative purposes only in Schedule 8-A) and described in appendix C-2;
>
> "Voisey's Bay Project" means all activities carried out in the Voisey's Bay Area by the Developer or a Subsequent Developer for purposes of, and the physical infrastructure associated with, mining, extracting, concentrating and producing Subsurface Resources located within the Voisey's Bay Area including all shipping in the Zone that is directly associated with these activities and physical infrastructure. Without limiting the generality of the foregoing, these activities and physical infrastructure include construction and operation of the port at Edward's Cove, the airstrip, the roads, the accommodations complex, and all other infrastructure and related facilities and activities, facilities and physical infrastructure related to reclamation, Rehabilitation, and all aspects of Closure. [Emphasis added].

[63] The Voisey's Bay Area is an area contiguous to the mine site at Voisey's Bay in Labrador. It does not include the hydrometallurgical refining facility built by the developer in Long Harbour on the island of Newfoundland. Insofar as the relationship between the Nunatsiavut Government and the Province of Newfoundland and Labrador is concerned, the Land Claims Agreement requires the

Province to pay the Nunatsiavut Government an amount equivalent to 5% of the Revenue from the Voisey's Bay Project. It is worth repeating the wording in the Land Claims Agreement:

> 7.5.1 The Nunatsiavut Government is entitled to receive, and the Province shall pay to the Nunatsiavut Government, an amount equal to five percent of the Revenue from the Voisey's Bay Project.

[64] The construction and operation of a refining plant on the island of Newfoundland is not an activity carried out in the Voisey's Bay Area. It is not part of the Voisey's Bay Project.

[65] It is clear from the terms of the Land Claims Agreement that the parties agreed that the developer could, in arriving at net revenue, deduct the cost of mining, extracting, concentrating and producing nickel ore. The parties also contemplated that the capital cost of infrastructure such as roads, port, airstrip and accommodations complex at, or near, the mine site would also be depreciable, deductible costs. It is clear from the terms of the agreement that the parties did not contemplate, or agree, that the cost of constructing and operating a hydrometallurgical refining plant on the island of Newfoundland would be an eligible cost for the purpose of determining the Revenue to be shared with the Nunatsiavut Government.

[66] Part 7.6.2 of the Land Claims Agreement states:

> 7.6.2 The amount of the Revenue to be shared under each of parts 7.3, 7.4 and 7.5 shall be determined without reference to any credit or any other adjustment in computing the Revenue that is:
>
> (a) determined with reference to other taxes or amounts that are not Revenue eligible for sharing under that part; or
>
> (b) in respect of exploration activity that does not relate to Subsurface Resources that give rise to the Revenue to be shared.

[67] Part 7.5 deals with Revenue from the Voisey's Bay Project. Part 7.6.2 says that the amount of revenue to be shared is to be determined by ignoring any taxes or amounts that are not eligible for sharing with the Nunatsiavut Government. This would include the deductions from the hydrometallurgical refining plant that are at issue in this legislation.

[68] In determining the Nunatsiavut Government's share of Revenue from Voisey's Bay, any credits or other adjustments to mining tax that do not relate to the Voisey's Bay Project - as that term is defined in the Land Claims Agreement - should be removed from the calculation of Revenue from the Voisey's Bay Project.

[69] It would be a disturbing finding indeed if it transpired that the Inuit would cease to receive a share of Revenue from nickel, copper and cobalt mined in their back yard while the Province obtains the benefits derived from the construction of a refining plant on the island of Newfoundland and the creation and maintenance of tens of thousands of person years of employment. Such a result, in my view, would be inequitable.

[70] The Inuit Government's share of Revenue should be calculated on the basis of the definition set out in the Land Claims Agreement. Nothing more, nothing less.

2) Is the Province obligated to share the amounts that it received under the Fifth and Sixth amending agreements with the developer?

(DUNC, CUNC and the COMMUNITY INVESTMENT FUND)

[71] The Province took the position that the DUNC (Defined Unprocessed Nickel Charge), CUNC (Contingent Unprocessed Nickel Charge) and Community Investment Fund are not taxes and that the Land Claims Agreement specifies that revenue is shared only if it arises from taxes imposed under four specifically named statutes. I disagree.

[72] The definition of "royalty tax" includes a tax, royalty, rent, fee, but not administrative fees, or other payment in the nature of a royalty and any other amount that is payable for a right to exploit a subsurface resource. In consideration of the developer being granted two extensions of time for the completion of the hydrometallurgical refining plant in Long Harbour, and the ability to ship additional ore out of the Province for refining elsewhere, the developer paid substantial additional sums of money to the Province.

[73] The Province argued that these payments arose under a contract to which the Nunatsiavut Government is not a party.

[74] All developers under the mineral legislation in force in the Province are obliged to carry out processing within the Province unless exemption orders are obtained from the Province. Exemption orders allow the developer to ship the resource out of the Province for processing and refining. They exempt the developer from processing within the Province as mandated by the mineral legislation.

[75] The payments made under the two exemption order extensions were known as the DUNC and CUNC and Community Investment Fund payments. These payments were clearly made in furtherance of a right to continue to exploit a subsurface resource and, I find, were royalty taxes within the meaning attributed to that term in Part 1.1.1 of the Land Claims Agreement. Furthermore, I find that these payments are captured by the term "revenue" as defined in Part 1.1.1. of the Land Claims Agreement. It matters not whether the payments arose as a result of contract or in some other fashion. The fact remains that the payments are in the nature of a royalty.

[76] The developer agreed to set up a Community Investment Fund worth $30 million for various charitable projects in the Province. The Province approved all of the expenditures from this fund and was involved in selecting many of the projects that received funding.

[77] The term "royalty" is not defined in the Land Claims Agreement. In *Ross v. Minister of National Revenue*, [1950] Ex. C.R. 411, Cameron, J. defined the term in relation to resource development as follows:

> 20. ... Royalties, in reference to mines or wells in all the definitions, are periodical payments either in kind or money which depend upon and vary in amount according to the production or use of the mine or well, and are payable for the right to explore for, or bring into production and dispose of, the oils or minerals yielded up. ...

[78] The Province argued that the DUNC, CUNC and Community Investment Fund are not amounts payable for a right to exploit a subsurface resource.

[79] Under the definition of the term "royalties" in *Ross*, the payments made to the Province as a result of the Fifth and Sixth amending agreements, including the Community Investment Fund, are clearly royalties. They were negotiated with a view to allowing the developer to ship additional ore out of the Province for processing - something that the developer would not have been able to do had the hydrometallurgical refining plant been completed on schedule as planned.

[80] Finally the Province argued the DUNC and CUNC are compensation for economic damage caused by delays in secondary processing. This position is not tenable. The text of the Fifth and Sixth amending agreement states that these payments are made in consideration of the exemption orders granted by the Province.

[81] The Nunatsiavut Government ought to have been paid 5% of each of those amounts (DUNC and CUNC) in accordance with the terms of the Land Claims Agreement. In addition, the Nunatsiavut Government ought to have been the recipient of 5% of the Community Investment Fund for charitable projects in its territory.

3) Did the Province owe a fiduciary duty to the Nunatsiavut Government with respect to the administration of the Inuit Revenue share from the Voisey's Bay Project and, if so, was there a breach of that duty?

[82] As I have mentioned earlier in this decision, the honour of the Crown gives rise to a fiduciary obligation when the Crown assumes discretionary control over a specific or cognizable Aboriginal interest.

[83] Premier Clyde Wells initially offered the Voisey's Bay Area to the Inuit recognizing that this was territory that the Inuit had traditionally used and occupied.

[84] The Province unilaterally removed Voisey's Bay as an area that the Inuit could claim as settlement lands once it was discovered that there was a world class nickel deposit located underground at Voisey's Bay.

[85] A long process of modern treaty negotiation ensued, but the Province assumed and maintained control over the Voisey's Bay development – including the administration of the share of the Revenue that would be received by the Inuit. In assuming that burden the Province placed itself in the role of a fiduciary. It owed, and owes, a duty to the Nunatsiavut Government with respect to the administration of the Inuit share of Voisey's Bay Revenue.

[86] When considering the impact of the Long Harbour deductions on the mineral tax payable, the Province was under a duty to disclose the potential impact to the Nunatsiavut Government. In addition, the Province was under a duty to determine, in accordance with the terms of the agreement, whether the deductions ought to apply to the Inuit share of the resource revenue.

[87] By failing to consult and properly account to the Nunatsiavut Government for its share of the Voisey's Bay Revenue, the Province breached its fiduciary duty.

4) Was there a breach of the Province's duty to consult with the Nunatsiavut Government under the Land Claims Agreement or at Common Law with respect to the calculation and administration of the Inuit Revenue share for the Voisey's Bay Project?

[88] The duty to "Consult" is contained in Part 8.6 of the Land Claims Agreement.

[89] Consultation with respect to the Voisey's Bay Project is also dealt with in Part 8.6 of the Land Claims Agreement. The salient sections of that Part are as follows:

> 8.6.1 Canada and the Province shall provide to the Nunatsiavut Government on a timely basis, a copy of every application made by the Developer or a Subsequent Developer for a Permit with respect to the Voisey's Bay Project or any other work or activity in the Voisey's Bay Area and any plan, report, or other document submitted by the Developer or Subsequent Developer with respect to the application that is required by Law, and any information respecting the process, including timing, applicable to the disposition of such application.
>
> 8.6.2 Canada and the Province shall Consult the Nunatsiavut Government prior to:
>
> (a) deciding an application for a Permit or issuing an order pertaining to the Voisey's Bay Project or to any other work or activity in the Voisey's Bay Area; or
>
> (b) attaching a condition or making an amendment to a Permit or order pertaining to the Voisey's Bay Project or to any other work or activity in the Voisey's Bay Area.
>
> 8.6.4 Canada and the Province shall provide to the Nunatsiavut Government, on a timely basis, a copy of every Permit pertaining to the Voisey's Bay Project and the Voisey's Bay Area in effect from time to time.

[90] It is clear from the evidence that was adduced in this matter that no consultations took place with the Nunatsiavut Government with respect to the development agreement that the Province entered into with the developer regarding the construction of a hydrometallurgical refining plant on the island of Newfoundland.

[91] It is clear from the evidence that the Nunatsiavut Government was not consulted with respect to the Province's intention to allow the developer's construction, operation and depreciation costs relating to the hydrometallurgical refining plant to be deducted in calculating the Nunatsiavut Government's share of resource revenue from the Voisey's Bay Project.

[92] The development agreement was entered into by the Province and the developer on September 30, 2002 - about four months earlier the parties had entered into a Statement of Principles regarding the development agreement that was approved by the House of Assembly on June 20, 2002.

[93] The Nunatsiavut Government was advised at a meeting called by the Province on November 29, 2012 that when the hydrometallurgical refining plant was commissioned there would be a significant decline in revenue sharing payments due to the fact that the developer was able to take deductions for depreciation and processing allowances based on the capital cost of the plant in Long Harbour. The liability of the developer to pay mining tax would become zero.

[94] The Province knew, or ought to have known, long before 2012 that there was going to be an impact on the mineral taxes paid by the developer. Even with the original estimate of the cost of construction there would have been a significant impact. As construction proceeded, delays were encountered and costs spiraled, the Province would have been well aware that mineral taxes were going to be zeroed out by the developer's deductions. It was incumbent on the Province to discuss the issue with the Nunatsiavut Government. By failing to so do, the Province breached its duty to consult with the Nunatsiavut Government under the Land Claims Agreement.

[95] For the purposes of this decision it is irrelevant whether there was a breach at common law. The Land Claims Agreement is a constitutionally protected document. The breach of the Land Claims Agreement is a more serious matter than a common law breach. Having found a breach under the Agreement, I need not determine if there was a common law breach as well.

5) Did the Province breach its duty to consult the Nunatsiavut Government under the Land Claims Agreement or at Common Law with respect to the payments that it received under the Fifth and Sixth amending agreements with the developer?

[96] The Inuit were advised of the amendment agreements with the developer only after the agreements had been executed. In the case of the Fifth amending agreement, the Inuit received notice of it one hour before the formal public announcement was made in March, 2013. The Inuit were advised that the amount negotiated (DUNC) would not be shared on September 5, 2014. That advice was tendered because the Province's Auditor General chastised the Province for not having consulted the Inuit, in accordance with the terms of the Land Claims Agreement, prior to entering into the Fifth amending agreement.

[97] The Auditor General wrote to the Deputy Minister of Finance on October 17, 2014 referencing Part 8.6.2 of the Land Claims Agreement - which directed the Province to consult with the Inuit prior to attaching a condition or making an amendment to a permit or order pertaining to the Voisey's Bay Project.

[98] The Deputy Minister agreed to follow the Auditor General's advice. However, the Province was then in negotiations with the developer relating to the Sixth amending agreement and, as before, no consultations were undertaken in relation to the Sixth amending agreement. The Inuit were advised that an agreement was entered into a day before it was made public in February, 2015.

[99] The lack of consultation on such important matters is clearly in breach of the terms of the Treaty. Again, whether or not a breach exists at common law is a moot point and there is no need to consider that question.

THE CONDUCT OF THE TRIAL

[100] The parties tendered an Agreed Book of Documents consisting of 12 volumes and comprising the entire, relevant record of negotiations between the parties. It consisted of thousands of pages. In addition, evidence was tendered *viva voce* by a number of witnesses. I have had the benefit of a transcript of their evidence. And the parties filed transcripts of examinations for discovery that were conducted.

[101] I applaud counsel's ability to agree with respect to most matters. The number of sitting days at trial was thereby substantially reduced. I am also grateful to all counsel for the excellent briefs that they submitted and for the quality of their oral submissions.

[102] In order to get an understanding of the historical background for this action, I have reviewed the factual matrix that was presented to me – but only for the purpose of comprehending the issues that confronted the parties and the manner in which the negotiations progressed. In arriving at my decision, however, I have relied solely upon the written text of the Treaty and the jurisprudence relating to treaties generally. As Lord Wilberforce noted in *Prenn v. Simmonds*, [1971] 3 All E.R. 237, 1 W.L.R. 1381 (U.K. H.L.), "it is only the final document that records a consensus" (at page 1384).

[103] Lord Wilberforce's pronouncement was judicially considered, and accepted, by Cameron, J.A. in *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21.

CONCLUSION

[104] The historic treaty between the Inuit and Newfoundland and Labrador is not a commercial contract, and should not be interpreted as one. It is a nation to nation agreement that deserves to be interpreted in a generous manner. It is an agreement

that must be considered having regard to the treaty text as a whole and with a view to the treaty's objectives.

[105] On March 8, 2018 I approved the bifurcation of the trial in this matter. I ordered, at that time, that the trial first proceed in relation to the issue of liability and, secondly, with respect to the quantum of damages. Accordingly, I make the following declarations:

1. Revenue sharing payments under the Land Claims Agreement should be determined by the Province without reference to credits or amounts relating to the developer's costs incurred off-site – that is outside of the Voisey's Bay Area as that term is defined in the Land Claims Agreement. For greater certainty, the Province is to refrain from using the developer's capital costs and operating expenses of the processing plant in Long Harbour, or any other costs not directly related to mining, as deductions;

2. The DUNC, CUNC and Community Investment Fund payments to the Province are revenues subject to resource revenue sharing under the Land Claims Agreement;

3. The Province is in breach of its fiduciary obligations to the Nunatsiavut Government in its administration and determination of revenue sharing payments under the Land Claims Agreement;

4. The Province is in breach of its duty to consult the Nunatsiavut Government by:

    a. Failing to consult with the Nunatsiavut Government prior to entering into the Fifth and Sixth Amending Agreements and issuing Exemption Orders under the *Mineral Act*; and

    b. Failing to consult with the Nunatsiavut Government with respect to the anticipated decline or elimination of Voisey's Bay mining tax and, as well, in relation to the determination of the

Nunatsiavut Government's share of revenue under the Land Claims Agreement.

I order and direct:

1. The Nunatsiavut Government is entitled to damages to be assessed with respect to the declarations in paragraphs 1, 3 and 4 above;

2. The Province of Newfoundland and Labrador pay to the Nunatsiavut Government its 5% revenue share of payments made to the Province pursuant to DUNC, CUNC and Community Investment Fund payments together with interest thereon calculated from the date of receipt thereof by the Province together with interest in accordance with Part 7.6.6 of the Land Claims Agreement;

3. The Nunatsiavut Government shall have its costs of the action. I am mindful of the effort that was required, by all counsel, to get this matter ready for trial. That effort should be reflected in the award for costs. In the event that the parties are unable to agree they have leave to refer the matter to me for a decision;

4. Counsel may contact the Supreme Court Trial Coordinator with a view to obtaining dates for the resumption of the trial at their convenience.

VIKAS KHALADKAR
Justice