IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Newfoundland and Labrador v. Nunatsiavut Government*, 2022 NLCA 19
Date: March 16, 2022
Docket Number: 202001H0072

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR	APPELLANT

AND:

NUNATSIAVUT GOVERNMENT	RESPONDENT

AND:

INNU NATION INC.	INTERVENOR

Coram: Welsh, Goodridge and Knickle JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201601G3137 (2020 NLSC 129)

Appeal Heard: November 15, 2021
Judgment Rendered: March 16, 2022

Reasons for Judgment by: Knickle J.A.
Concurred in by: Welsh and Goodridge JJ.A.

Counsel for the Appellant: Justin S.C. Mellor and Mark P. Sheppard
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Authorities Cited:

CASES CITED: *Drew v. Newfoundland and Labrador (Minister of Government Services and Lands)*, 2006 NLCA 53, 260 Nfld. & P.E.I.R. 1; *R. v. Marshall*, [1999] 3 S.C.R 456; *R. v. Badger*, [1996] 1 S.C.R. 771; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Best v. Nunatsiavut Government*, 2011 NLCA 36, 308 Nfld. & P.E.I.R. 72; *Township of Cornwall v. Ottawa and New York Rway. Co.* (1916), 52 S.C.R. 466; *Ex parte Pratt* (1884), 12 Q.B.D. 334; *J.N. v. Durham Regional Police Services*, 2012 ONCA 428; *Ontario Provincial Police Commissioner v. Mosher*, 2015 ONCA 722; *Whalen v. Whalen*, 2018 NSCA 37; *Gourlay v. Crystal Mountain Resorts Ltd.*, 2020 BCCA 191; *Norex Petroleum Limited v. Chubb Insurance Company of Canada*, 2008 ABQB 442; *Best v. Nunatsiavut* Government, 2015 NLTD(G) 83, 368 Nfld. & P.E.I.R. 313; *Corporation Makivik c. Quebec (Procurer général)*, 2011 QCCS 5955; *Engels v. Merit*, [2008] O.J. No. 672, 164 A.C.W.S. (3d) 434 (Ont. S.C.J.).

STATUTES CONSIDERED: *Labrador Inuit Land Claims Agreement Act*, S.N.L. 2004, c. L-3.1, section 3(2); *Federal Courts Act*, R.S.C. 1985, c. F-7; *Interpretation Act*, RSNL 1990, c. I-19, section 11(2); *Arbitration Act*, R.S.N.L. 1990, c. A-14.

OTHER: *Labrador Inuit Land Claims Agreement*, chapters 1, 2, 3, 6, 7, 14, 15, 21.

KNICKLE J.A.:

INRODUCTION

[1] The issue in this appeal is whether the Superior Court retains jurisdiction over a dispute between the parties. The dispute arose within the context of a treaty. The trial judge adjudicated the matter and found the appellant (the Province) liable in damages to the respondent (Nunatsiavut) by failing to share

monies related to the exploitation of land subject to the treaty. The trial judge also awarded costs to the respondent with leave to bring the issue before him should the parties not agree on the appropriate costs. The parties have yet to set a date for a further hearing with respect to the quantum of damages.

[2] On appeal to this Court on the issue of liability, the Province raised, for the first time, the jurisdiction of the Superior Court to have presided over the dispute. After hearing from the parties, and upon considering both the oral and written submissions on this question, this Court was in agreement that the appeal should be allowed and the decision of the trial judge be set aside, with written reasons to follow. These are the written reasons.

BACKGROUND

[3] In 2004, Nunatsiavut, the Province and the Government of Canada (Canada), entered into the *Labrador Inuit Land Claims Agreement* (the treaty). The treaty was ratified by the parties, including by the Province, under the *Labrador Inuit Land Claims Agreement Act*, S.N.L. 2004, c. L-3.1. Although a signatory to the treaty, Canada is not involved in the dispute that is before the Court.

[4] The treaty is comprehensive: twenty-two chapters and over three hundred pages. The treaty governs a large sphere of activity among the signatories, including but not limited to, economic development, environmental protection, establishment of Inuit government and law, the protocols for establishing oneself as a beneficiary under the treaty, treatment of archaeological sites, indigenous human remains, and – the issue in these circumstances – sharing of revenues earned from the exploitation of lands governed by the treaty.

[5] The treaty also addresses how disputes are to be resolved; both generally, under chapter 21, and also specifically in particular chapters.

[6] The terms established respecting sharing revenue from the exploitation of minerals located in Labrador, and in particular, in the Voisey's Bay area of Labrador, was the result of many years of detailed negotiations. For several years, revenue was shared between the Province and Nunatsiavut as per the terms of the treaty.

[7] A dispute arose between the parties respecting certain monies received by the Province from the developer responsible for exploiting the minerals in Voisey's Bay. Nunatsiavut asserted the monies constituted "revenue" as defined under the treaty and ought to have been shared. Nunatsiavut asserted that the

Province had failed to consult with it regarding the Province's agreement with the developer and that such consultation was required both under the terms of the treaty, and at common law.

[8] The Province responded that it was under no obligation to consult about, or share with, Nunatsiavut these particular monies, as these monies did not constitute revenue as defined under the treaty. The monies were related to arrangements made with the developer respecting processing facilities on the island portion of the Province and did not relate to the Voisey's Bay area.

[9] The parties attempted to resolve the dispute by referral to the Subsurface Resource Revenue sharing committee, established under the treaty. When the parties could not resolve the dispute through that committee, Nunatsiavut filed a statement of claim with the Court notwithstanding that under the terms of the treaty, the parties were obliged to pursue arbitration.

[10] Upon being served with the statement of claim, the Province filed its defence, but made no reference to the requirement to seek arbitration. In fact, at no point during the trial did either party raise with the trial judge whether or not the Superior Court was the proper forum for resolution of the dispute.

[11] Although Nunatsiavut claimed several forms of relief, the central issue was whether the monies in question received by the Province constituted "revenue" as defined under the treaty and thereby were to be shared with Nunatsiavut. The trial judge found that the monies did constitute revenue, and as such, the Province was liable to Nunatsiavut for a share of this money. The trial judge also found that the Province had failed to consult with Nunatsiavut as was required under the treaty, and in so doing, abrogated its obligation to behave honourably towards Nunatsiavut.

[12] The Province appealed the trial judge's decision. Apart from alleging the trial judge erred in finding the Province liable to Nunatsiavut to share the monies, the Province raised for the first time whether or not the Court ought to have heard the matter in light of the requirement under the treaty for mandatory arbitration. Given this Court's view that the jurisdictional issue might resolve the appeal, the Court requested that the parties address the jurisdictional question prior to addressing the other grounds of appeal.

The position of the parties on the jurisdictional question

The Province's position

[13] The Province submitted that the dispute was over the determination of revenue. According to the treaty, this kind of dispute was required to be resolved by way of arbitration. The requirement for arbitration meant that the Court did not have jurisdiction to resolve the dispute. Nor could the parties consent to the Court taking jurisdiction, notwithstanding that the parties had proceeded to trial. The Province submitted that the decision of the trial judge must be set aside, and the parties were obliged to take the next steps to pursue arbitration as per the terms of the treaty.

Nunatsiavut's position

[14] Nunatsiavut submitted that notwithstanding the treaty terms, the Court possessed the necessary jurisdiction to resolve the dispute. In Nunatsiavut's view, any derogation from the Court's inherent jurisdiction must be clear and unequivocal. The terms of the treaty relied on by the Province could not be said to be so clear to have ousted the jurisdiction of the Court. Nunatsiavut submitted the question was whether the Court should decline to exercise its jurisdiction. In these circumstances, where the parties voluntarily attorned to the jurisdiction, the Court should not decline to hear the matter.

[15] Nunatsiavut also argued that even if the sections of the treaty relied on by the Province ousted the jurisdiction of the Superior Court, the sections did not encompass the entirety of the alleged wrongdoing in these circumstances. Nunatsiavut argued its complaint was not simply a matter of "calculation" of revenue, as referenced in the sections of the treaty relied on by the Province, but whether or not the Province was obliged to make the payments in the first place. These particular sections of the treaty also did not address the failure by the Province to consult with Nunatsiavut. Nunatsiavut argued the arbitration panel would not have the authority to address these particular claims and as such it was entitled to bring the entire dispute to the Court for resolution.

[16] Nunatsiavut further argued that even if the sections of the treaty relied on by the Province support mandatory arbitration, the treaty also applied the Province's arbitration legislation which preserved the authority of the Court.

The Innu Nation's position

[17] The intervenor, the Innu Nation, made no submissions on the question of mandatory arbitration, but provided submissions on the proper approach to the interpretation of treaties between the federal and provincial governments and indigenous peoples.

ISSUES

[18] Were the parties obliged to pursue mandatory arbitration under the treaty to resolve the dispute?

THE LAW

[19] In order to address this issue, it is necessary to consider the principles governing the interpretation of treaties, as well as the principles governing the jurisdiction of the provincial Superior Court.

The principles applicable to the interpretation of treaties between the federal and provincial governments and Aboriginal peoples.

[20] The goal of treaty interpretation is to ascertain the common intention of the parties at the time the treaty was signed. This Court in *Drew v. Newfoundland and Labrador (Minister of Government Services and Lands)*, 2006 NLCA 53, 260 Nfld. & P.E.I.R. 1, at paragraph 97, cited the principles of treaty interpretation as stated by McLachlin J. (as she was then) in *R. v. Marshall*, [1999] 3 S.C.R 456, at paragraph 78:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997), 36 *Alta. L. Rev*. 149.

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; *Badger*, *supra*, at para. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui*, *supra*, at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger*, *supra*, at para. 41.

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, *supra*, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, *supra*, at paras. 53 *et seq.*; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, *supra*; *Horseman*, *supra*; *Nowegijick*, *supra.*

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger*, *supra*, at para. 76; *Sioui*, *supra*, at p. 1069; *Horseman*, *supra*, at p. 908.

9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown*, *supra*, at para. 32; *Simon*, *supra*, at p. 402.

[21] These principles apply to the interpretation of all treaties between federal or provincial governments and indigenous peoples, whether historical (*Marshall* and *R. v. Badger*, [1996] 1 S.C.R. 771) or modern (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103). However, a modern treaty does not present with the same potential for ambiguity as to the common intentions of the parties that a treaty created hundreds of years might so do. As stated by Binnie J. in *Beckman*:

> [12] The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties such as the 1760-61 Treaty at issue in *R. v. Marshall*, [1999] 3 S.C.R. 456, and post-Confederation treaties such as Treaty No. 8 (1899) at issue in *R. v. Badger*, [1996] 1 S.C.R. 771, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975), 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…

[22] And at paragraph 9:

> [9] Unlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties...

[23] The treaty at issue in this appeal is a modern treaty and as stated in *Beckman*, it is a document in which the parties intended to "create some precision around property and governance rights and obligations". In providing the framework to place the relations between the parties "in the mainstream legal system", it is more than a simple "commercial contract" and cannot be treated as such.

[24] A treaty, whether modern or historical, must also always be interpreted in such a way that it upholds the honour of the Crown. The Crown has a constitutional obligation to work towards a reconciliation with Aboriginal peoples. The constitutional dimension to treaties was described in *Beckman*:

> [33] The decision to entrench in s. 35 of the *Constitution Act, 1982* the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal…

[25] A treaty represents "an exchange of solemn promises" between the parties (*Badger*, at paragraph 41).

[26] It is through this lens and with these parameters that the terms of the treaty in the present circumstances must be interpreted.

The principles governing the jurisdiction of the Superior Court

[27] There is no disagreement that before the inherent jurisdiction of a superior court can be said to have been excluded by legislation or by agreement between the parties, there must be clear and explicit language to that effect: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585. In *TeleZone*, the issue was whether the *Federal Courts Act*, R.S.C. 1985, c. F-7, precluded the plaintiffs, TeleZone, from bringing private law actions against the federal government for alleged damages. The allegation was that the damages arose as the result of a ministerial decision. The government argued

that the Superior Court had no jurisdiction to hear the private actions given the provisions of the *Federal Courts Act*.

[28] In analyzing the extent to which, if any, the provincial superior courts were precluded from hearing the claims, Binnie J., speaking for a unanimous Court, stated:

> [42] What is required, at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial Superior Courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: "[The] ouster of jurisdiction from the provincial Superior Courts in favour of vesting exclusive jurisdiction in a statutory court ... requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 38. The Attorney General's argument rests too heavily on what he sees as the negative implications to be read into s. 18.
>
> 43 The oft-repeated incantation of the common law is that "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged": *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88…

[29] Although the circumstances in *TeleZone* were different, these principles are applicable to whether the terms of the treaty in these circumstances have excluded the jurisdiction of the provincial Superior Court.

[30] In *Best v. Nunatsiavut Government*, 2011 NLCA 36, 308 Nfld. & P.E.I.R. 72, this Court considered the extent to which the same treaty excluded the jurisdiction of the provincial Superior Court in the context of the procedures for establishing eligibility as beneficiaries under chapter 3 of the treaty. Three plaintiffs brought separate actions against Nunatsiavut in the Superior Court. Although the complaints of the three plaintiffs were slightly different all three claimed to be eligible beneficiaries under the treaty. All three sought damages for the failure to be so declared. Chapter 3 of the treaty provides for detailed procedures for establishing eligibility, and so the Nunatsiavut government brought an application to have the statements of claim dismissed. The applications judge found that the plaintiffs' claims under the agreement were governed by the terms of chapter 3 and according to these terms, there was no recourse to the Superior Court. The only recourse to the Court was by way of judicial review, and then, only to the federal court. The applications judge set aside the statements of claim.

[31] On appeal to this Court, there was no issue that the terms of the treaty excluded the jurisdiction of the Court. According to chapter 3, the Federal Court possessed exclusive jurisdiction over a decision relating to eligibility under the treaty. The Court stated:

> [26] … The Agreement is explicitly clear that the processes to determine eligibility for membership and benefits before the committees, Commission and Appeal Board are the exclusive routes agreed upon by the LIA and two levels of government. Any final recourse on the issue of eligibility is by way of judicial review which exclusively resides in the Federal Court of Canada…
>
> …
>
> [30] … The provision respecting the absence of any right of appeal beyond the Inuit-based enrolment committees, the Enrolment Commission and the Inuit Membership Appeal Board with recourse by way of judicial review only to the Federal Court adopts a careful and detailed set of procedures created to deal exclusively with claims of any particular individual to Inuit status and beneficiary status under the Agreement…

[32] The Court also observed, at paragraph 30, that the comprehensive nature of the agreement, being enshrined in legislation by both Parliament and the Province, and ratified by vote by Inuit peoples, supported that the specificity of the language was "adequate" to establish the necessary derogation of jurisdiction from the Superior Court.

ANALYSIS

Do the terms of the treaty exclude the jurisdiction of the Superior Court in these circumstances?

[33] As observed in *Best*, the treaty is an "agreement" but it is not a simple private contract. The treaty has been enacted though the *Labrador Inuit Land Claims Agreement Act*, and by virtue of section 3(2), has the "force of law". Applying the principles in *Best*, as an agreement that has the "force of law", the treaty is capable of limiting the jurisdiction of the provincial Superior Court where the necessary clear language has been employed. Here, the relevant sections to be considered are chapters 7 and 21.

The terms of chapter 21

[34] The starting point for the resolution of disputes under the treaty is section 21.2 of chapter 21. Section 21.2.1 states:

> Disputants shall make good faith efforts to resolve Disputes promptly through discussion or negotiation before seeking recourse to the processes set out in this chapter.

[35] Chapter 21 establishes a general progression of mechanisms to be employed, beginning with negotiation, leading to mediation where negotiation is unsuccessful, and progressing to arbitration. In those cases where arbitration has occurred and concluded, it is open to the parties to pursue judicial review of an arbitrator's decision (section 21.7.5).

[36] Section 21.9.1 explicitly prohibits litigation of a dispute that must be referred to one of the dispute resolution mechanisms as provided for in provisions of the treaty. Section 21.9.1 states:

> A Person **shall not** litigate a Dispute if the Dispute is one that must be referred to dispute resolution under a provision of the Agreement.
>
> (Emphasis added.)

[37] Further, once the procedures under chapter 21 have been employed, under section 21.9.2, a party is prohibited (subject to exceptions of no application here) from applying to a court to "enjoin, prohibit, attempt to delay or otherwise interfere" with arbitration.

The terms of chapter 7

[38] Chapter 7 is the chapter that establishes the regime for revenue sharing between the Province and Nunatsiavut respecting "subsurface" economic development.

[39] Chapter 7 governs revenue arising from the exploitation of Voisey's Bay, by virtue of section 7.5.

[40] Section 7.5 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.
>
> 7.5.2 Payments by the Province to the Nunatsiavut Government in respect of the amounts to be paid under section 7.5.1 shall be calculated on the basis of the amount of Revenue received by the Province in each month and shall be paid by the Province to the Nunatsiavut Government on the first business day following the twentieth day of the month after the month in which the Revenue is received by the Province.

> 7.5.3 For purposes of determining the amounts to be paid under section 7.5.2:
>
> (a) an instalment paid on account of the Revenue receivable by the Province is deemed to be Revenue received by the Province at the time it is paid; and
>
> (b) any Revenue receivable by the Province from an agent of or corporation controlled by the Province is deemed to be Revenue received by the Province at the time the Revenue becomes receivable.
>
> 7.5.4 The payments under section 7.5.1 are in addition to any payments under sections 7.3.1 and 7.4.1.

[41] Chapter 7 also establishes procedures to be employed where disputes arise over how, or the extent to which, revenue is to be shared. The "initial forum" for the resolution of disputes over the revenue sharing in chapter 7, including revenue arising from the development at Voisey's Bay, is the Subsurface Resource Revenue sharing committee under section 7.6.8. Section 7.6.8 states:

> 7.6.8 The Province and the Nunatsiavut Government **shall** establish a Subsurface Resource Revenue sharing committee to:
>
> (a) review issues related to Provincial Laws respecting Royalty Tax when and to the extent that they affect Subsurface Resource Revenue sharing arrangements under parts 7.3, 7.4 and 7.5; and
>
> (b) **be the initial forum** for the Province and the Nunatsiavut Government to resolve **disagreements respecting payments made to the Nunatsiavut Government under parts 7.3, 7.4 and 7.5** and for sharing information for that purpose.
>
> (Emphasis added.)

[42] If a dispute under section 7.3, 7.4, or 7.5 (Voisey's Bay) cannot be resolved "after referral" to the Subsurface Resource Revenue sharing committee, pursuant to section 7.6.9, the dispute "shall be referred to arbitration under chapter 21". Section 7.6.9 states:

> 7.6.9 If the Nunatsiavut Government disagrees with a calculation or a payment made to it under part 7.3, 7.4 or 7.5 and the disagreement cannot be resolved after referral to the Committee, the disagreement **shall be referred to arbitration under chapter 21**.
>
> (Emphasis added.)

[43] The language in these sections is explicit. Per section 7.6.8, the Subsurface Resources Revenues sharing committee "shall" be established to be the "initial forum" to "resolve disagreements", and if the disagreement cannot be resolved there, per section 7.6.9, the parties "shall" proceed to arbitration. The use of the term "shall" supports that there is no discretion as to the mechanism to be employed to resolve the dispute (aside from the parties coming to a resolution or agreement). As stated under section 11(2) of the *Interpretation Act*, RSNL 1990, c. I-19:

> 11(2) The word "shall" shall be construed as imperative and the word "may" as permissive and empowering.

[44] This unequivocal language supports that the parties were obliged to pursue arbitration to resolve the dispute; not the Superior Court. This is further supported by the fact the treaty is replete with examples where arbitration is optional, not mandatory. In some chapters, the manner of access to the courts is explicitly described. A few examples will illustrate.

[45] Under chapter 2, section 2.10.3, the parties "may" proceed to arbitration for particular kinds of disputes.

[46] In chapter 6, the chapter respecting "ocean management", several sections permit arbitration as a mechanism that "may" be used to resolve particular disputes (see sections 6.7.8, 6.7.9, 6.7.10, 6.7.13). However, under section 6.7.16, Nunatsiavut also has the option to utilize the court process in a specific situation. Under section 6.7.16, where Nunatsiavut is of the view that a developer may have improperly "split" a development (to avoid application of the requirement for an impacts and benefits agreement under this chapter), Nunatsiavut "may" apply to a "court of competent jurisdiction" to "enjoin" development until the question of whether such an agreement is required can be resolved. Further, section 6.7.16 states that "[n]othing in this section prevents a court from making any other order or award in respect of an application by the Nunatsiavut Government".

[47] Under chapter 14, where an individual has suffered damages as a result of development, they "may" pursue compensation for such losses by way of arbitration (section 14.7.3, 14.7.7). That arbitration under this chapter is not mandatory is reinforced by section 14.7.10 which states:

> 14.7.10 This chapter is without prejudice to any other rights or remedies that the Claimant may have under Laws of General Application with respect to loss or damage arising out of a Development. However, a Claimant who makes a Claim may not

> pursue any rights or remedies under Laws of General Application with respect to any loss or damage for which the Claim is made.

[48] Under chapter 15 of the treaty, the chapter involving archeological sites, significant cultural artifacts and human remains, while certain disputes "shall" be resolved by arbitration (see section 15.14.2), other matters (such as the sensitive issue of dealing with human remains) establish an entirely different process (see section 15.7). Where these procedures are employed, a decision is final and not subject to judicial review or appeal (see section 15.7.8 or 15.8.7).

[49] Chapter 21 itself distinguishes between disputes that will be referred to an arbitration panel on a mandatory basis from referrals that may come as a matter of right or agreement (see section 21.6.4).

[50] Even within chapter 7, the chapter at issue in these proceedings, not all disputes must be resolved by arbitration. For example, where there are "unresolved issues" regarding the "content, terms, or conditions" of impacts and benefits agreements, the parties "may" seek arbitration (see section 7.7). And like the procedures in chapter 6, under section 7.7.18, if Nunatsiavut is concerned that a developer may be attempting to "split" a development to avoid the application of the relevant sections of chapter 7, Nunatsiavut may apply to a court of competent jurisdiction to "enjoin" the developer "from commencing or from continuing to operate". Section 7.7.18 further states that "[n]othing in this section prevents a court from making any other order or award in respect of an application by the Nunatsiavut Government". There is no similar language with respect to the resolution of disputes about revenue sharing between the parties under sections 7.6.8 and 7.6.9.

[51] The above varying dispute resolution options established in the treaty, as well as an entire chapter devoted to dispute resolution, illustrate that the parties turned their minds in considerable detail as to how they wished to handle disputes; including limiting or specifying access to the courts, depending on the circumstances or type of dispute.

[52] That the parties carefully considered their options and chose accordingly, informs the significance of the use of the word "shall" in sections 7.6.8 and 7.6.9. Given the above explicit and clear language in the use of the word "shall", arbitration was mandatory. When this language is coupled with section 21.9.1 that a person "shall not litigate a dispute" that "must" be referred to arbitration in chapter 21, as is the case here, this language is clear and explicit

that there was no recourse to the Superior Court, except by way of judicial review, and not before proceeding to arbitration.

Could the parties attorn to the jurisdiction?

[53] Nunatsiavut argued that notwithstanding the terms of the treaty, as the Province did not raise the issue of jurisdiction before the trial judge, it can be taken to have "attorned" to the jurisdiction. Given this, the Province should not now be allowed to argue for a different forum simply because they did not receive the result they wanted in the trial court. As stated in *Township of Cornwall v. Ottawa and New York Rway. Co.* (1916), 52 S.C.R. 466, at 499, referring to *Ex parte Pratt* (1884), 12 Q.B.D. 334:

> In *Ex parte Pratt*, at p. 341, the same principle, the primary court being a Superior Court, is expressed by Lord Justice Bowen in these words: —
>
> > There is a good old-fashioned rule that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, "You have no jurisdiction." You ought not to lead a tribunal to exercise jurisdiction wrongfully.

[54] However, parties cannot "attorn" to jurisdiction where jurisdiction does not exist. As stated in *Township of Cornwall v. Ottawa and New York Rway. Co.*, at 496-497:

> … First, it is said to be a case for the application of the maxim consent cannot give jurisdiction. This, of course, simply begs the question. Consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived, otherwise it cannot. Where want of jurisdiction touches the subject matter of the controversy or where the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative…

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

[56] Given the clear language of the treaty that the parties must proceed to arbitration to resolve the disputes over revenue sharing, the parties cannot "attorn" to the jurisdiction of the Court because the jurisdiction of the provincial Superior Court has been removed by these terms. It is also for this reason the *Arbitration Act*, R.S.N.L. 1990, c. A-14, is of no assistance to Nunatsiavut's position.

Are there aspects to the statement of claim that are not covered by the limiting terms under chapters 7 and 21?

[57] Nunatsiavut argued that even if the terms of chapters 7 and 21 excluded the parties from utilizing the provincial Superior Court to resolve the disputes over revenue sharing, sections 7.6.8 and 7.6.9 did not apply to all of their complaints against the Province. For those complaints, Nunatsiavut was still entitled to proceed to the Superior Court for redress.

[58] In *Best*, for example, while this Court found that the issue of eligibility under chapter 3 of the treaty was beyond the purview of the Superior Court, the application judges failed to consider whether or not there were aspects to the allegations that fell outside the purview of chapter 3 eligibility procedures. (*Best*, at paragraphs 23 and 26). Upon the matter being returned to the Superior Court for determination on this issue, while the claims of two of the three plaintiffs were dismissed, Orsborn J. was satisfied that there were aspects to the claim of the third plaintiff that fell within the jurisdiction of the Court. The "essential nature" of those claims was not about membership or eligibility, but about damages arising as a result of the conduct of the defendants (see *Best v. Nunatsiavut* Government, 2015 NLTD(G) 83, 368 Nfld. & P.E.I.R. 313, at paragraphs 48-49).

[59] In these circumstances, Nunatsiavut argued that two aspects of their claims fell outside the purview of the limiting sections of the treaty. Firstly, sections 7.6.8 and 7.6.9 only addressed the "calculation" of the amounts, it did not extend to whether or not the monies were owed in the first place. Secondly, Nunatsiavut argued that the claim that the Province failed in its duty to consult Nunatsiavut were complaints independent of the revenue sharing dispute under chapter 7. As such, Nunatsiavut argued it was not precluded by chapters 7 or 21 to bring these complaints to the Superior Court by way of statement of claim.

(1) The scope of dispute resolution under sections 7.6.8 and 7.6.9

[60] Nunatsiavut argued that the wording of sections 7.6.8 and 7.6.9 suggested that their scope was limited to disputes solely relating to "a calculation or a payment made to" or a "failure" to disclose information as required under chapter 7. Nunatsiavut submitted this wording would not extend to the question of whether the Province had failed to share revenue or whether the monies in question constitute revenues. Given this, the dispute over whether or not the Province was obliged to share the monies in the first place falls outside the scope of sections 7.6.8 and 7.6.9. I disagree. This is too narrow an interpretation of these sections.

[61] As stated by the Province in its reply factum, to interpret the sections as suggested by Nunatsiavut, would "reduce the matters subject to [dispute resolution] to ones of pure mathematics". I agree that such a narrow interpretation of these sections is not in keeping with the language used, and is not in keeping with the principles as stated by McLachlin C.J. respecting the interpretation of treaties. For example, such an interpretation would not be a "liberal" interpretation of the section, contrary to principle 2, but a "technical" interpretation, contrary to principle 7.

[62] The reference to "disagreement" in sections 7.6.8 and 7.6.9 must be read in its context. Chapter 7 establishes the right of Nunatsiavut to share in certain revenues earned by the Province, and disagreements arising in section 7.5 are governed by sections 7.6.8 and 7.6.9. The obligation to share monies only arises if the monies constitute "revenue" (as defined in chapter 1). A dispute about whether or not monies constitute revenue and ought to be shared is not only logically, but necessarily encompassed by the reference to "disagreement" or "disagreements" in sections 7.6.8 and 7.6.9.

[63] Further, the broad definition of "disputes" under chapter 1.1, includes "a disagreement", "… respecting the interpretation, implementation or application of the Agreement." This definition easily encompasses whether or not the Province was obliged to share the monies. This dispute is a "disagreement" respecting "the application of the Agreement", in this case, the terms of chapter 7, to Nunatsiavut's alleged right to share these monies.

[64] Finally, to interpret this section as proposed by Nunatsiavut would create bifurcated processes for disputes potentially arising out of the same facts: arbitration to resolve *how much* to pay ("calculation"), and the court to resolve *if* money should be paid. This is not a reasonable interpretation of the parties'

intentions respecting disputes of this kind, in light of the detail to which the parties addressed dispute resolution throughout the treaty. If the parties intended a bifurcated process to resolve disputes over revenue sharing, one would reasonably expect the terms of sections 7.6.8 and 7.6.9 to have so stated.

[65] For these reasons, I am satisfied that sections 7.6.8 and 7.6.9 encompass both the question of whether the Province was obligated to share revenue, as well as the amount that is to be shared.

(2) Does the failure in the duty to consult with Nunatsiavut regarding these monies fall outside the purview of chapters 7 and 21?

[66] Nunatsiavut also submitted that its complaints against the Province went beyond whether or not it was entitled to share in revenue, but also to whether the Province failed in its duty to consult with Nunatsiavut. Nunatsiavut states that this is a standalone complaint independent of sections 7.6.8 and 7.6.9, and beyond the purview of the arbitration panel under chapter 21.

[67] I do not agree that the nature of this complaint is beyond the purview of an arbitration panel established under chapter 21. The powers of the arbitration panel are expansive and enable it to address all questions of fact, law, or mixed fact and law. The panel possesses the jurisdiction to "arbitrate" all matters related to a dispute (section 21.6). As stated, "Dispute" is broadly defined under section 1.1.:

> "Dispute" means a controversy, question, disagreement or claim:
>
> (a) respecting the interpretation, implementation or application of the Agreement;
>
> (b) that the Agreement stipulates may be resolved under chapter 21; or
>
> (c) arising under or with respect to an agreement between two of the Parties or among all Parties that provides that the controversy, question, disagreement or claim may be resolved under chapter 21.

[68] The broad powers accorded the arbitration panel under section 21.6.7 also include the ability to award "any remedy in law" under subsection (k).

[69] Given that the arbitration panel is empowered to deal with all questions of law, fact, or mixed fact and law, as well as providing "any remedy in law", I am satisfied that the arbitration panel is empowered to address all aspects of the dispute in these circumstances, including whether the Province failed to behave

honourably towards Nunatsiavut by failing to consult with it regarding the impugned monies.

Does the Superior Court retain jurisdiction to address the issue of the duty to behave honourably in its dealings with Nunatsiavut?

[70] Nunatsiavut further argued that even if the arbitration panel is empowered to adjudicate allegations respecting whether the Crown has behaved honourably, there is nothing in the terms of the treaty that has "clearly" and "unequivocally" excluded the jurisdiction of the provincial Superior Court on these matters. Given this, the Superior Court retains jurisdiction over this aspect of the claim.

[71] There is no dispute that the duty of the Crown to consult with Aboriginal people's on matters that may affect their established rights is not only an adjunct of the doctrine that the Crown must behave honourably towards Aboriginal peoples, it is a doctrine that exists independently of a treaty. As stated in *Beckman*:

> [61] … The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.

[72] While independent of the treaty, the extent of the duty to consult may be informed by the treaty terms, particularly where the treaty is a modern treaty as is the case here. In *Beckman*, Binnie J. stated:

> [54] The difference between the LSCFN Treaty and Treaty No. 8 is not simply that the former is a "modern comprehensive treaty" and the latter is more than a century old. Today's modern treaty will become tomorrow's historic treaty. The distinction lies in the relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork: *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557.

[73] In these circumstances, while the treaty contains terms that reinforce the Province's obligation to consult with Nunatsiavut, I accept that there is no language that limits the jurisdiction of the Superior Court to address claims that

the Crown failed to behave honourably towards Nunatsiavut by failing in its duty to consult with respect to revenue sharing.

[74] However, the objectives of the treaty support that even if the provincial Superior Court retains the jurisdiction to address complaints of the failure of the Crown to behave honourably, in these circumstances the Court should decline to exercise its jurisdiction.

[75] Firstly, the terms of the treaty, as discussed earlier, have fully equipped the arbitration panel to address this complaint.

[76] Secondly, whether the Province failed in its duty to consult is inextricably linked to the dispute over whether the Province was obliged to share the monies because the duty to consult only arises if the monies constitute revenue. The duty to consult does not engage every financial decision of the Province, only those actions that affect the established rights or interests of Nunatsiavut. Here, Nunatsiavut's interests include their legitimate claim to revenue generated from Voisey's Bay. But if the monies in question are not "revenue", then there may be no issue as to whether or not the Province was obliged to consult. As in *Best*, given the link between the dispute that is governed by chapter 7 and the duty to consult, the "essence" of the dispute is still whether or not the monies constituted revenue.

[77] Finally, the Court should decline jurisdiction, because the parties should use the very tools they have created to govern their relationship. As stated earlier, the treaty is a document with constitutional dimensions that comprehensively provides for management of the relationship between the parties; including disputes over revenue sharing. It is a solemn promise between two nations, enshrined in legislation to facilitate reconciliation. If these "solemn promises" are to be a step towards reconciling the relationship and a step towards the future, it behooves the parties to adhere to the terms they have carefully considered and negotiated, including to avail of the dispute resolution mechanisms as provided for in the treaty. To condone ignoring the terms to which the parties have agreed is to render the treaty meaningless. As Binnie J. stated in *Beckman*:

> [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. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

[78] Given the above, the Superior Court's jurisdiction with respect to these particular circumstances, should be declined.

Conclusion on the jurisdictional question

[79] For the above reasons, the statement of claim was not properly before the trial judge. The jurisdiction for the resolution of disputes as raised by Nunatsiavut, that is, whether they were entitled to a share of the monies received by the Province as "revenues", was a dispute that fell squarely within the purview of chapters 7 and 21 of the treaty. As such, the dispute was required to be referred to arbitration if the parties could not otherwise come to an agreement. While the allegation of the Province's failure to behave honourably was a matter that could be heard by the Superior Court, given that this issue was inextricably intertwined with the sharing of revenue question, and that the arbitration panel was fully equipped to deal with this issue, this dispute should also be resolved by the arbitration panel.

[80] At the hearing, the appeal was allowed and the decision of the trial judge was set aside, so that the parties could pursue arbitration as required.

COSTS

[81] The trial judge awarded costs to Nunatsiavut, as the successful claimant. On appeal, the Province took no position on costs. While the Province has been successful in this Court in having the decision set aside, the trial judge's decision on costs should not be disturbed. The Province could, and should have, as part of its duty to behave honourably, raised the jurisdictional issue as soon as it was served with the statement of claim. As stated in *Corporation Makivik c. Quebec (Procurer général),* 2011 QCCS 5955:

> [97] The honour of the Crown means, in particular, that when it concludes and applies a treaty, the government must behave with honour and integrity; it must avoid any appearance of "sharp dealing." [*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41]

[82] Whether by acquiescence or neglect, the Province's failure to address the jurisdictional issue if not sharp dealing, brings to mind the comments of Strathy J. in *Engels v. Merit*, [2008] O.J. No. 672, 164 A.C.W.S. (3d) 434, at paragraph 11 (Ont. S.C.J.), that "[i]t is not appropriate to ride the litigation horse down the road until it becomes inconvenient to do so and then try to mount the arbitration horse."

[83] As discussed earlier, if the treaty is to be a viable framework under which the relationship between the parties operates, the broad principle of the duty of the Crown to behave honourably in its dealings with Aboriginal peoples, and the goal of reconciliation, supports that the Province shouldered the greater responsibility to have raised the issue of jurisdiction.

[84] The trial judge's award of costs is affirmed.

[85] Nunatsiavut nonetheless must bear some responsibility for the decision to pursue litigation in the face of the mandatory arbitration clauses of chapter 7. As a signatory to the treaty, represented by counsel during exhaustive and comprehensive negotiations, Nunatsiavut cannot be said to have misunderstood the clause or to have been misled because of the ambiguity of an ancient term in a historical treaty. There was clear evidence in the record that Nunatsiavut was aware that the next step was arbitration but chose not to pursue it.

[86] Given this, both parties shall bear their own costs on this appeal.

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F.J. Knickle J.A.

I Concur:_____

B.G. Welsh J.A.

I Concur:_____

W.H. Goodridge J.A.