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NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation:	***NTI v. Canada (Attorney General)*, 2012 NUCJ 11**
Date of Judgment:	20120627
Docket:	08-06-713-CVC
Registry:	Iqaluit
Applicant:	**Inuit of Nunavut as Represented By Nunavut Tunngavik Incorporated**
	-and-
Respondent:	**The Attorney General of Canada**
	-and-
Third Party	**The Commissioner of Nunavut As Represented by the Government of Nunavut and the Government of Nunavut**

Before:	The Honourable Mr. Justice E. Johnson
Counsel (Applicant):	Dugald Brown, J. Aldridge
Counsel (Respondent):	Michele Annish, Paul Henderson
Location Heard:	Iqaluit, Nunavut
Date Heard:	February 12, 13, 2012
Matters:	*Nunavut Rules of Court*, R.N.W.T. R-010-96, as duplicated for Nunavut by s.29 of the Nunavut Act, S.C. 1993, c. 28, Rules 174, 181, 238, 258 and 266.

REASONS FOR JUDGEMENT

(NOTE: This document may have been edited for publication)

I. INTRODUCTION

[1] On May 25, 1993, the Inuit then residing to the east of the tree line of the Northwest Territories (NWT) entered into the *Nunavut Land Claims Agreement* with Canada (NLCA). The NLCA identified the geographical area of the NWT inhabited by these Inuit as the Nunavut Settlement Area (NSA). On April 1, 1999, this area became the Territory of Nunavut, pursuant to s. 3 of the *Nunavut Act*, S.C. 1993, c. 28.

[2] The Tungavik Federation of Nunavut (TFN) was the signatory of the NLCA on behalf of the Inuit of the NSA. The applicant in the current action (NTI) is an incorporated organization that succeeded the TFN, and currently represents the Inuit under the NLCA.

[3] On the same day as the execution of the NLCA, the respondent (Canada), the Government of the Northwest Territories and the TFN entered into *A Contract Relating To The Implementation of the Nunavut Final Agreement* (*Implementation Contract*), identifying their respective roles and responsibilities in the implementation of the NLCA.

[4] On December 7, 2006, NTI commenced this action against the Defendant (Canada) alleging breaches of the NLCA and claiming damages of $1,000,000,000.

[5] The action has slowly and steadily moved forward. This Court and the Nunavut Court of Appeal issued judgments on some initial procedural issues. They are reported at 2007 NUCJ 27, [2007] NJ No 32; 2008 NUCJ 13, 2008 CarlswellNun 13; 2008 NUCJ 15; and 2009 NUCA 2, 2009 CarswellNun 14.

[6] The parties have been conducting examinations for discovery for the past two and half years and a realistic trial date is sometime in the first half of 2014.

[7] In this application NTI seeks summary judgment in the amount of $14,817,500, pursuant to Rules 174 and 181 of the *Rules of Court,* as duplicated for Nunavut by s. 76.05 of the *Nunavut Act*, S.C. 1993, c. 28 [*Rules of Court*], for that part of the Amended Statement of Claim alleging breach of Article 12.7.6 of the NLCA as pleaded in paras 12(c), 13-18, 19, 43, 44, 45, 86(a)(iii), and 86(e). The corresponding paras of the Statement of Defence are 8, 40, 41, and 68.

[8] These paras of the Statement of Claim allege that Canada breached Article 12.7.6 of the NLCA by failing to set up a general monitoring plan in accordance with timelines established under the Implementation Agreement.

[9] The application was opposed by Canada and judgment was reserved.

II. LAW

A. Rules of Court

[10] Rule 174 (1) permits a plaintiff to apply for summary judgment on part of the relief requested in the statement of claim.

> 174**.** (1) A plaintiff may, after a defendant has delivered a statement of defence, apply with supporting affidavits or other evidence for summary judgment against the defendant on all or part of the claim in the statement of claim.

[11] Rule 176 (1) requires the defendant to respond to the application by setting out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

> 176. (1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondant may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

[12] Rule 181 permits this Court to give judgment where admissions of fact constitute the “other evidence” specified in Rule 174.

> 181. At any stage of a proceeding or action, the Court may, on application, give any judgment or order to which NTI may be entitled where
> (a) admissions of fact have been made on the pleadings or otherwise; or
> (b) the only evidence consists of documents and such affidavits as are sufficient to prove their execution or identity.

B. Rule 181 - use of admissions

[13] The combined operation of Rules 174 and 181 makes summary judgment available where there are admissions and undisputed facts that provide an evidentiary basis for this Court to conclude that there is no genuine issue for trial and where the admissions are in respect of matters that would entitle a party to judgment. As Osborne J. noted in *Ford Motor Co. of Canada v Ontario Municipal Employees Retirement Board* (1997) 36 OR (3d) 384 at (CanLII) para 48, 153 DLR (4th) 33:

> Such an order will typically take the form of a summary judgment for part of the plaintiff's claim.

[14] As held in *Ellis v Allen*, [1914] 1 Ch 904 at 908, [1911-13] All ER 906 quoted in *Shinkaruk v Ecclesiastical Ins. Office Public Ltd*. (1986), 52 Sask R 8, [1986] SJ No 588, Rule 181 is intended to permit the plaintiff to obtain speedy judgment on a plain admission.

[15] At para 9 of *Admiral Canada Inc. v Freekick Ltd*., 2006 ABQB 451, [2006] AJ No 1651 (CanLII), Moen J. listed a number of cases where the Alberta Court of Appeal stated that summary judgment may be granted where admissions are clear and unequivocal. In this context, Moen J. noted admissions are concessions or voluntary statements made by a party concerning the existence of facts that are relevant to the adverse party.

> 'Admissions' are concessions or voluntary acknowledgements made by a party of the existence of certain facts. More accurately regarded, they are statements by a party, or someone identified with him in his legal interest, of the existence of a fact which is relevant to the cause of his adversary [...]: *Vector Energy Inc.* v. *Canadian Pioneer Energy Inc.* (1996), 185 A.R. 214 (Q.B. Master) at 217.

[16] There are similar statements by Cromwell J. (as he was then) at para 3 of *Armoyan Group Ltd. v Dartmouth (City)*, [1998] NSJ No 26, 167 NSR (2d) 398, and by Veit J. at para 18 of *1103785 Alberta Ltd. v ExxonMobil Canada Ltd.*, 2008 ABQB 581, [2008] AJ No 1043. In *Vector Energy Inc. v Canadian Pioneer Energy Inc.*, [1996] AJ No 440, 185 AR 214, Master Waller also noted that admissions must be read in context.

C. Rule 174 - general principles of summary judgment

[17] Rule 174 is intended to advance procedural justice by preventing defences and claims that have no chance from proceeding to trial. In *Papaschase Indian Band No 136 v Canada*, [2008] 2 CNLR 295 at (QL) para 10 [*Papaschase*], the court stated:

> This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[18] The court also noted at para 11 that the reciprocal obligation placed on an applicant is high:

> For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America* v. *Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd.* v. *Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd.* v. *Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co.* v. *Predator Corp.*, (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada* v. *Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie* v. *Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.

[19] These principles of law for interpreting the summary judgment rules in other jurisdictions have been applied in the Northwest Territories. That jurisdiction has the same *Rules of Court* as Nunavut. In *Base v Hadley*, 2006 NWTSC 4, [2006] NWT J No 3 [*Base*], Schuler J. held a party moving for summary judgment has the ultimate burden of establishing that there is not a genuine issue for trial and that judgment should be granted. However, Canada has an evidentiary burden to "put its best foot forward". Canada cannot rest on unsupported allegations or denials but must adduce evidence of specific facts showing that there is a genuine issue that requires a trial. The Court is entitled to assume that the evidence Canada presents is all the evidence that is available to it and to decide the motion on the basis of the evidence before the Court.

[20] In *Base,* Schuler J. held that either party could rely on transcripts of examinations for discovery to support their argument.

[21] These principles were applied in Nunavut in *Nunavut Tunngavik Inc. v Canada (Attorney General)*, 2003 NUCJ 01, [2003] Nu J No 2 [*NTI Firearms*]. In that case, NTI applied for an interim order staying the application of firearms registration to Inuit Beneficiaries. Canada filed a cross-application for summary judgment dismissing the application. In granting the order requested by NTI and dismissing the cross-application, Kilpatrick J. adopted the words of Vertes J. in *Norn v Stanton Regional Hospital*, [1998] NWT J No 88 at (QL) para 17, 26 CPC (4th) 276, as follows:

> The test on a summary judgment motion is well-known. The motions judge must take a hard look at the evidence to determine whether there is a genuine issue for trial: see 923087 N.W.T. Ltd. v Anderson Mills Ltd., [1997] N.W.T.R. 212 (S.C.), at pages 221 - 223. If there is no genuine issue for trial, the court must grant summary judgment: Rule 176(2). And, if the only genuine issue is a question of law, the court may, not must, determine that question and grant summary judgment: Rule 176(4). The "genuine" issue is usually one of fact or one of mixed fact and law, but it may also be one of pure law where, as here, the state of the law is in flux. The case law, even while recognizing that a summary judgment motion is an effective way of avoiding expensive and lengthy litigation, demands that it must be clear that a trial is unnecessary to resolve the issues.

[22] There are some authorities that have held that serious or novel areas of law should not be decided on a summary judgment. See *Shell Canada Resources Ltd. v Ralph M. Parsons Co. of Canada*, [1981] AJ No 977, [1981] 4 WWR 647; *Prudential Trust Co. v National Trust Co.*, [1965] AJ No 7, 55 DLR (2d) 272; *Edmonton Region Community Board for Persons with Developmental Disabilities v Pearl Villas Homes Ltd*., 2010 ABQB 786, [2010] AJ No 1420; *Saint-François de Madawaska (Village) v Nadeau Poultry Farm Ltd*., 2011 NBCA 55, [2011] NB J No 197; *Royal Bank v Société Général (Canada)* (2006), 219 OAC 83, 31 BLR (4th) 63; *Shell v Barnsley*, 2006 MBCA 133, [2007] 2 WWR 66.

III. UNDISPUTED FACTS

[23] NTI relies on the pleadings, the affidavit of David Kunuk (Kunuk) sworn October 14, 2011, and portions of the transcript of the examination for discovery of Terry Sewell (Sewell) that took place on November 24 and 25, 2009.

[24] Canada relies on the affidavit of Seth Reinhart (Reinhart) sworn November 19, 2011.

[25] Canada made a number of admissions in the *Statement of Defence,* as follows:

(a) That NTI and Canada entered into the NLCA in 1993.

(b) That the rights and benefits of the Inuit in the NLCA have not merged in any statute or other law.

(c) That the NLCA is binding on Canada.

(d) That the NLCA is an enforceable contract between NTI and Canada.

(e) That the NLCA is a land claim agreement within the meaning of section 35 of the *Constitution Act, 1992*. In the NLCA the Inuit receive defined rights and benefits in exchange for the surrender of their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada.

(f) That Section 12.7.6 of the NLCA states:

> There is a requirement for general monitoring to collect and analyse information on the long term state and health of the ecosystemic and socio-economic environment in the Nunavut Settlement Area. Government, in co-operation with the NPC, shall be responsible for developing a general monitoring plan and for directing and co-ordinating general monitoring and data collection. The NPC shall:
>
> (a) in accordance with the plan, collate information and data provided by industry, government departments and agencies, amongst others;

> (b) in accordance with the plan, report periodically on the ecosystemic and socio-economic environment of the Nunavut Settlement Area; and
>
> (c) use the information collected under Sub-sections (a) and (b) to fulfill its existing responsibilities under Article 11.

[26] Canada admitted the following facts from paras 3-12, 17-18 and 23-31 of NTI's pre-hearing brief. They concern the terms of the NLCA and the *Implementation Agreement* as fleshed out in Sewell's examination for discovery.

(a) Canada admits that the NLCA created an ongoing obligation to establish a general monitoring plan.

(b) The Department of Indian Affairs and Northern Development (DIAND) was responsible for getting the general monitoring plan into operation.

(c) In addition to the obligation to establish a general monitoring plan, there was an ongoing obligation to direct and co-ordinate monitoring and data collection. The responsibility for carrying out this obligation was also assigned to DIAND.

(d) Part 2 of Article 37 of the NLCA required the development of an implementation plan. The *Implementation Plan* was required, among other things, to establish timeframes for the completion of activities required to implement the obligations under the NLCA.

(e) The *Implementation Plan* was consolidated into the *Implementation Contract* that is attached as Exhibit "A" to the Kunuk affidavit.

(f) The activities required to implement section 12.7.6 of the NLCA, and the time within which those activities were to be carried out, are set out in the *Implementation Contract*.

(g) The *Implementation Contract* established a 10-year "initial planning period" that started on the date of ratification of the NLCA, July 23, 1993, and ended on July 23, 2003.

> *"initial planning period" means the period commencing on the date of ratification and expiring on the tenth anniversary of the date of ratification*
>
> *Implementation Contract, section 1.1*
>
> *"date of ratification" has the same meaning as in the Nunavut Final Agreement*
>
> *Implementation Contract, section 1.1*
>
> *"date of ratification of the Agreement" means the date on which the ratification legislation comes into force*
>
> *NLCA, section 1.1.1*

(h) Canada has refused to disclose whether DIAND received an increase in its departmental funding to develop a general monitoring plan and to co-ordinate monitoring and data collection.

(i) Canada acknowledges that the Inuit had a reasonable expectation that the Government would spend what was necessary to carry out the obligations in the NLCA.

> 4635. Q. Okay. Now under the Implementation Contract, as your Counsel has already indicated, the amounts of funding dedicated or allocated by the Federal Government to performance of its obligation under the Implementation Contract, those aren't disclosed in the contract, right?
>
> A. That's correct.
>
> 4636. Q. So you'd agree with me, then, that the Inuit, they were not agreeing to any specific amount of money or ceiling amounts that the Government had to spend?
>
> A. The Federal Government.
>
> 4637. Q. Right?
>
> A. I agree.

4638. Q. So from the Inuit perspective, you'd agree, when they signed the Implementation Contract, the contract required the Government to actually carry out the responsibilities assigned to it, not to spend up to a certain cap or ceiling amount of money?

A. That's correct.

4639. Q. So that if, from the Inuit perspective, if it took more money to carry out some of the activities than the Government originally estimated, or allocated, it was a reasonable expectation on the part of the Inuit that the Government would spend what was necessary to actually perform the obligation?

A. I would agree with that.

(j) Canada admits that the Business Case attached as exhibit “D” to the Kunuk affidavit was to be used to request funding from the Treasury Board of Canada.

5350. Q. Okay. A business case with no commitment to funding?

A. That's correct. But a business case that will outline what the plan looks like and provide cost estimates so that it's able to be used as a budget request or a pitch for funding.

5351. Q. And just to follow up on that, Canada's document 67543. This is an e-mail from Mr. Beauchesne to a I. Gladstone in the Nunavut Government. And he says that

"This proposed business case, once it's developed, would then be used to request funding from Treasury Board, or to leverage funding from other sources".

So is that what you were referring to?

A. Let me find that. Yes, I see, the business case would be used to request funding from the Treasury Board, yes, that's what I was referring to.

(k) In August 2007, the Nunavut Regional Office of DIAND (NRO) informed NTI that it wished to undertake the collaborative development of a Business Case for Nunavut general monitoring.

(l) The Nunavut Planning Commission (NPC), the Government of Nunavut (GN), and NTI all agreed to participate on a Working Group on the Nunavut General Monitoring Plan (NGMP) set up by the NRO.

(m)
The Business Case was completed in December 2008. It set out the components of a NGMP and described in detail how the monitoring plan would be established and how it would function over a five-year period from 2009/10 to 2013/14. It set out four options for structuring the financial resources necessary to implement the monitoring plan. The recommended option was Option C1 Implementation of NGMP with 'Reasonable' Dedicated Annual Funding. A detailed “NGMP Five-Year Workplan" was developed for Option C1.

(n) The cost of implementing the NGMP under the recommended option C1 is $11,307,500 over five years. The cost per year is:

Year 1	Year 2	Year 3	Year 4	Year 5
$1,447,500	$2,440,400	$2,465,000	$2,615,000	$2,340,000

(o) Following receipt of the Business Case in December 2008, all members of the Working Group on the NGMP accepted the recommendation that the NGMP should be funded in accordance with the recommended option C1.

(p) As of November 25, 2009, when Canada's representative was examined for discovery, there was still no funding for implementation of the NGMP.

5369. Q. And would I be correct that as of yet there is no funding to proceed with that?

A. That's correct. They're pursuing approval of funding to implement the business case

5370. Q. Has a request for funding gone in?

A. No

5371. Q. And why not?

A. There had been attempts to attach it to various Cabinet submissions, because we had Cabinet submissions on related topics going forward. I think we looked at a draft of a Nunavut devolution paper that had an NGMP proposal in it. That was not successful. I don't believe that MC went forward. Another MC was done and Minister Prentice was quite interested in northern regulatory improvement, and we saw a logical link for including NGMP in that. That Cabinet submission has not, to my knowledge, gone forward yet. The idea of putting it in a Cabinet submission is to, if we had a Cabinet submission going in a timely fashion to get Cabinet endorsement, which gives us added weight in going to Treasury Board seeking the funding. We also had the alternative which we're looking at right now of going directly to Treasury Board without going to Cabinet, so all of that is in play at this moment.

5372. Q. And what is the funding required?

A. The amount?

5373. Q. Yes?

A. This is going to be an approximation, but something in the order of $11 million over a five year period.

(q) The Federal Budget released in March 2010, announced funding for the NGMP. Subsequently, the Director-General of the Implementation Branch of DIAND informed the members of the Nunavut Implementation Panel that a total of $11 million had been made available to the NRO to implement the general monitoring plan in accordance with the recommended funding option in the Business Case.

IV. DISPUTED FACTS

A. Timing of the development of the NGMP

[27] Canada did not admit facts that flow from the interpretation of some questions and answers in Sewell's examination for discovery about the timing of the implementation of the general monitoring plan that appear in para 13 of the applicant's pre-hearing brief.

[28] The respondent does not dispute that the following questions and answers took place at the examination concerning when the plan was to be prepared.

> 4583. Q. Now looking at the Implementation Contract, would you agree with me that there's nothing in the contract to indicate that the establishment of the general monitoring plan was to be postponed beyond the initial 10 year planning period?
>
> A. I would agree.
>
> 4588. Q. And you've agreed with me already that the Contract certainly did not contemplate that these were activities that would happen after the initial 10 year period?
>
> A. I think if that was contemplated we would see that in the timing column.
>
> 4589. Q. Right. In fact, the timing column indicates that these activities would be carried out, for the most part, as soon as possible?
>
> A. Sorry, that's the words we see on the first four, yes, in the letters we see.

4590. Q. Well, in fairness, the numbers two, three, the second, third and fourth activities indicate that it's as soon as possible after the Nunavut Planning Commission has been established?

A. That's correct, yes

4591. Q. The Nunavut Planning Commission was established in July of 1996?

A. I don't know that.

4592. Q. Are you aware that it was established during the initial planning period?

A. Yes, I am.

4593. Q. So the timing, as contemplated under the Implementation Contract agreed to by the Government was that the general monitoring plan was to be developed as soon as possible after the Nunavut Planning Commission was established?

A. I would agree with that, yes.

4594. Q. And I'm telling you that it was established, it's a historical fact that it was established in July of 1996. You can confirm that, but the contract then seems to contemplate that the plan itself will be developed shortly after the establishment of the NPC?

A. That's what the contract calls for, yes.

4595. Q, Right, And then the last two activities, numbers five and six, under the contract, dealing with data collection and co-ordination of the general monitoring, it was contemplated in the contract that that would happen as soon as the general monitoring plan was developed, right?

A. That's correct.

4596. Q. And so you would agree with me that all of this was supposed to happen within the first 10 year period?

A. I would agree with that, yes.

B. Other disputed facts from applicant's pre-hearing brief

[29] Para 14 of NTI's Brief relied on the following questions and answers from the examination for discovery to support its allegation of fact that the NGMP had not been established by the time of Sewell's examination in November 2009.

> 4641. Q. The plan is not in place?
>
> A. That's correct.
>
> 4642. Q. It's not been established?
>
> A. There is no plan in place today, no.
>
> 4643. Q. And so there's no actual monitoring taking place?
>
> A. Well, the ---
>
> 4644. Q. Under the aegis of the plan?
>
> A. The plan, from my reading of the documents, is about co-ordinating of data and access to data. Departments all have the responsibility to gather data in carrying out their affairs.
>
> 4645. Q. All right. The departments may be collecting data, but it's not being done as part of a general monitoring plan that is in place?
>
> A. That's correct.
>
> 4646. Q. Okay. So to come back to my question, the obligations in the Agreement with respect to general monitoring and development of a plan, and the actual monitoring and data collection, to this point in time, that's not been accomplished?
>
> A. As called for in the Agreement, no, it's not in place.

[30] Para 15 of NTI's Brief relied on the following questions and answers from the examination for discovery to support its allegation of fact that the NPC was not responsible for the failure to establish the NGMP.

> 4994. Q. Mr. Sewell, we've been discussing the requirement under Article 12.7.6 to develop a general monitoring plan. Are you aware of any instances or occasions where the Nunavut Planning Commission has failed or refused to co-operate with the Government in working on the plan and working on the development of the plan?
>
> A. No, I'm not aware of that.
>
> 5027. Q. All right. So if anything was going to get done in terms of getting the general monitoring plan developed and established and up and running, the ball was really in the Government's court?
>
> A. That's correct.
>
> 5028. Q. Not NPC's court?
>
> A. That's correct.

[31] Para 16 of NTI's Brief relied on the following questions and answers from the examination for discovery to support its allegation of fact that Canada admitted it was foreseeable that funding would be required to carry out its obligations in section 12.7.6 of the NLCA.

> 4620. Q. All right. Well, whether or not the activities required to implement the monitoring plan and get the data collection and monitoring activities up and running, whether or not those were actually costed out by the Federal implementation managers, you would agree with me that when the Implementation Contract itself was negotiated, it was certainly foreseeable that funding would be required to actually carry out the obligations in 12.7.6?
>
> A. I would agree with that, that's correct.

4621. Q. Now we've discussed before in this examinations [sic] the difference between what the Government views as an incremental cost and an activity that's already within the scope of a department's existing programme activities?

A. Yes.

4622. Q. Would you agree with me that, and certainly my understanding, based on what you've told me so far is that the activities required to carry out the obligations in 12.7.6, those would be incremental costs?

A. The development and maintenance of a plan, and the co-ordination of data would be incremental costs, yes.

4623. Q. So because those were not activities that were previously carried out by DIAND?

A. Or any of the other departments, yes.

[32] Para 19 of NTI's Brief relied on the following questions and answers from the examination for discovery to support its allegation of fact that, notwithstanding the expectation that Canada would pay the cost of carrying out its obligations, DIAND in 2007 proposed to NTI and the Government of Nunavut (GN) in 2007 that they invest in a pilot project for the NGMP where DIAND would match the investments from the other parties up to $100,000.

5347. Q. And then point number two, Mr. Nadler says that

> "In order to keep the thing going ,the NRO wants to develop a pilot or prototype".

And then he says that:

> The NRO is willing to give to NTI and the GN the opportunity to participate and that DIAND would match investments from the other parties up to $100,000.

Now you would agree with me that the obligation under the Land Claim Agreement is an obligation that is solely on the Federal Government to establish the Nunavut general monitoring plan?

A. In collaboration with the NPC, yes.

5348. Q. Right. So there's nothing in the Land claim Agreement that would require NTI to invest money in this to get it up and running?

[33] Para 20 of NTI's Brief relied on the following questions and answers from the examination for discovery to support its allegation of fact that, as of the date of the examination in November 2009, there were still no funds dedicated for the establishment of the NGMP or for the ongoing co-ordination of monitoring and data collection.

4647. Q. And am I correct that there is no funding available at this point in time to actually establish and put into place the general monitoring plan and to get started on the co-ordination of monitoring and data collection?

A. I believe that the plan has been developed in conjunction with the other parties and a pilot project is being undertaken based on available funding today, but there is not funding in place for full implementation of the plan.

4648. Q. Right. You spoke of the pilot, but, in fairness, Article 12.7.6 doesn't call for a pilot plan, it calls for a general monitoring plan?

A. That's correct.

4649. Q, Okay. And so then I think the answer to my question is in terms of the funding, there is not the funding today, as we sit here, to actually carry out the obligations in 12.7.6, correct?

A. That's correct.

[34] Para 21 of NTI's Brief relied on the following questions and answers from the examination for discovery to support its allegation of fact that Canada admitted that an effective monitoring system would be of benefit to the Inuit and that the Inuit have not received the benefit that was contemplated under the NLCA.

> 4597. Q. Now the type of general monitoring that is provided for in Article 12.7.6 of the Agreement, would you agree with me that that sort of monitoring and these data collection activities, there's a purpose to that?
>
> A. I would agree with that.
>
> 4598. Q. Okay. And from your discussions with the champions up in the Nunavut Regional Office on the monitoring activities, is it your understanding that an effective monitoring programme would contribute to good decision making about land use activities and environmental protection?
>
> A. I would.
>
> 4599. Q. Would you also agree with me that the residents of Nunavut have a legitimate interest in the decisions that affect the environment in Nunavut and land use in Nunavut?
>
> A. Yes.
>
> 4600. Q. Would you agree with me, therefore, that an effective monitoring system would be of benefit to Inuit in Nunavut because it would contribute to better decisions?
>
> A. Yes.
>
> 4601. Q. And I take it you would agree with me that up to the present time, because there is no general monitoring system in place, the Inuit have not had the benefit that was contemplated?
>
> A. Not the benefit of a general monitoring plan, no.

[35] Para 22 of NTI's Brief relied on the following questions and answers from the examination for discovery to support its allegation of fact that in 2007, after the commencement of this action, the NRO of DIAND decided to develop a "Business Case" to describe the components and structure of a general monitoring plan and to estimate the cost of implementing the plan.

> 5344. Q. If we could look next at Canada's document 068038 [00-01]? This is another email from Mr. Nadler to Mavis Dellert, it's August 9th, 2007.
>
> A. Yes, I have that.
>
> 5345 Q. And Mr. Nadler indicates that " The GN is pushing to develop a Memorandum of Understanding that will involve a commitment and negotiation for funding"?
>
> A. Yes.
>
> 5346. Q. And that was, as he put it, hitting the wall because there was no funding available?
>
> A. That's correct
>
> 5347. Q. And then point number two, Mr. Nadler says that
>
> > "In order to keep the thing going, the NRO wants to develop a pilot or prototype".
>
> And then he says that:
>
> > "The NRO is willing to give to NTI and the GN the opportunity to participate and that DIAND would match investments from the other parties up to $100,000."
>
> Now you would agree with me that the obligation under the Land Claim Agreement is an obligation that is solely on the Federal Government to establish the Nunavut general monitoring plan?
>
> A. In collaboration with the NPC, yes.

5348. Q. Right. So there's nothing in the Land claim Agreement that would require NTI to invest money in this to get it up and running?

A. That's correct.

5349. Q. And in para three he says that "The NRO is proposing the development of a business case with no commitment to funding and could be used by all parties to scare up resources in the future.

[36] Para 32 of NTI's Brief relied on paras 9 (a) to (d) of Reinhart's affidavit to support its allegation of fact that until the 2010 Federal Budget announcement of funding for the NGMP, the activities of the NRO in relation to the general monitoring plan were limited to making presentations to groups inside and outside the government about the potential benefits of the NGMP.

[37] Para 33 of NTI's brief relied on para 20 of Kunuk's affidavit and paras 2 and 9(e) of Reinhart's affidavit to support its allegation of fact that the NRO of DIAND started using the funding announced in the 2010 Federal Budget to begin work on the implementation of the NGMP on or about April 2010. The job of NGMP manager was filled in May 2010, when Reinhart was assigned to the position. An NGMP Secretariat was set up within NRO. The inaugural meeting took place in July 2010.

[38] Para 34 of NTI's Brief relied on the following questions and answers from the examination for discovery to support its allegation of fact that, as a result of its failure to develop a general monitoring plan by the end of the 10-year planning period in July 2003, Canada has realized significant savings.

4651. Q. And the costs to actually establish the plan and to operate on an ongoing basis, those are costs that have not been incurred to date?

A. The costs that have been incurred to date would be developmental reports, the cost of workshops. Those sorts of costs.

4652. Q. Right. But in terms of the actual costs entailed in establishing the plan and then actually co-ordinating and directing the monitoring and the data collection, those are costs that have not been incurred, or certainly fully incurred to date?

A. That's correct.

4653. Q. So would you agree with me that the failure to develop and establish a general monitoring plan to date and to co-ordinate the actual monitoring and data collection activities, that's resulted in a savings to the Government because it hasn't had to spend the money?

A. That would be correct.

4654. Q. And the longer the delay in actually establishing the plan and getting the monitoring going and the data collection, the greater the savings?

A. That would be logical.

[39] Para 35 of NTI's Brief alleged that by not fulfilling its obligation to implement the general monitoring plan by the end of the initial planning period, Canada realized savings from July 2003 until July 2008 of $11,307,500, which is the undisputed cost of establishing the general monitoring plan in the first five years of its life. In addition, Canada also realized savings from July 23, 2008 to April 2010, when it belatedly commenced implementation of the plan in accordance with the agreed budget contained in the Business Case. The amount saved during this period is, at a minimum, $3,510,000—an additional year at the undisputed fifth year cost of $2,340,000 plus savings for a minimum of an additional half year of $1,170,000 (also based on the fifth year cost). The total amount saved by the Crown over a 6.5 year period is therefore at least $14,817,500.

[40] Para 36 of NTI's Brief relied on paras 9 (e) to (r) of Reinhart's affidavit to support its allegation of fact that at the present time the NGMP Secretariat within the NRO is continuing to carry out the tasks identified to be carried out in the first year of the NGMP Workplan. Many, but not all, of the tasks for the first year have been completed. The NGMP remains a work in progress.

V. ISSUES

[41] I have divided my analysis of the arguments into five issues:

(a) What is the legal effect of the admissions made by Sewell in para 28 above?

(b) What are the other findings of fact from paras 29 to 40?

(c) Does Reinhart's affidavit conflict with Kunuk's affidavit on relevant facts?

(d) Do the admissions and other facts established by NTI leave any genuine issue for trial on the facts?

(e) If Canada breached Article 12.7.6, are there genuine issues on questions of law on the remedy for the breach that should be decided on a summary judgment application?

(f) If there are no genuine issues for trial, did Canada breach Article 12.7.6 of the NLCA?

(g) If Canada breached Article 12.7.6, what is the measure of damages?

(h) Pleading issues and Declaratory Remedy.

A. What is the legal effect of the admissions made by Sewell in para 28 above?

(i). Applicant's argument

[42] NTI argues that the questions and answers given in the transcript of the examination for discovery constitute clear and unequivocal admissions that the general monitoring plan was to be established within the 10-year initial planning period that ended on July 23, 2003. The respondent also admits that data collection and co-ordination of monitoring were to start within the 10-year initial planning period.

[43] On the timing admission in para 41 (a), NTI emphasized Sewell's acknowledgement in questions 4563-4568 that he had spoken to the Nunavut Regional Director of DIAND - Michael Nadler, Bernie MacIssac - a champion in the Nunavut Regional Office, as well as Seth Reinhart, Manager of the Nunavut Regional Monitoring Plan to inform himself about the general monitoring issues. He acknowledged he was sufficiently informed to answer questions on behalf of Canada. NTI submits that Canada's understanding of when it was to carry its obligations under the *Implementation Contract,* to which it was a party, is not a matter of opinion. It is a fact.

[44] NTI conceded that while Canada is bound by Sewell's answers, they are not binding on the Court in adjudicating the issues. The reading in at a trial of an answer on an examination for discovery is an informal admission. It is not like a party standing up and admitting liability. An answer read in at trial is just part of the evidence that is subject to weighing and interpretation by the trial judge.

(ii). Respondent's argument

[45] Canada focused its argument on the alleged admission concerning Canada's obligation to establish the general monitoring plan within the initial 10-year planning period.

[46] Canada strongly disagrees with NTI's interpretation of Sewell's answers in the excerpt from the transcript reproduced in para 28 above. It argues that Sewell's answers did not constitute the admission that appears to come from the transcript. A close examination of the transcript indicates that Sewell is simply agreeing with an interpretation placed on phrases in the *Implementation Contract* by NTI's legal counsel. If it did amount to an admission, it was about an interpretation of the *Implementation Contract* regarding timing for the development of the general monitoring plan and direction and coordination of general monitoring and data collection. Sewell's agreement with an interpretation proposed by NTI's counsel is not an "admission of fact".

[47] Canada argues that this "admission" is not a clear and unequivocal admission of fact as contemplated under Rule 181. Rather, it is a statement of law or mixed fact and law because Sewell was asked about an interpretation of the provisions of the *Implementation Contract*. It is an opinion as opposed to a fact. That opinion cannot replace the legal interpretation, analysis, and ultimate opinion of this Court.

[48] Canada relies on *Chitty on Contracts*[1] [*Chitty*], for the proposition that interpreting a contract in order to ascertain the nature of a party's obligations is a question of law. Whether the actual performance measures up to that obligation is a question of mixed fact and law. In this case, it is a question of law to interpret the terms of the NLCA and the *Implementation Contract* to determine the nature of Canada's obligation. It is a question of mixed fact and law whether the actions of Canada in developing and implementing the general monitoring plan complied with that obligation.

(iii). Applicant's reply

[49] One of the purposes of examinations for discovery is to obtain confirmation on the record of the opposing party's case. The second purpose is to obtain admissions that either advance the examining party's case or undermine the opposing party's case. NTI argues that Canada's argument on the application was fundamentally inconsistent with those purposes and fundamentally undermines the purpose of having examinations for discovery. The answers given by a witness at an examination for discovery that are not helpful to the other party's case have high probative value. It is for that reason the answers can be read in at trial and why they are accorded high probative value. Canada's arguments amount to an attempt to impeach its own witness and it should not be permitted to retreat from its agreement that Sewell's evidence bound Canada.

[1] HG Beale, ed, *Chitty on Contracts*, 27th (London: Sweet & Maxwell, 1994) at 1023.

(iv). Analysis

A.iv.1 Para 28 admission

[50] As noted in *The Art of Discovery*[2], the rules of evidence are not applied as strictly to the conduct of an oral examination as they are to the evidence given at trial. This is because the purpose of discovery is not simply to obtain admissions that could constitute admissible trial evidence. Another significant purpose is to find out as much as possible about the other side's case. That is why the examiner may ask questions on discovery that may not be read into the trial record. White states at page 39:

> If the only purpose of discovery was to obtain admissions for use at trial, the same rules of evidence should be applied to discovery as are applied at trial. However, the law permits the examiner to find out more about the other side's case than application of the strict rules of trial evidence would afford and accordingly certain aspects of the law of evidence. The specific modifications are with respect to hearsay, belief, and relevance and materiality.

[51] As White notes at page 29, the relaxation of the rules means that a corporate officer will often not have personal knowledge of all the matters that are within the knowledge of the company. In order to properly answer the questions the officer is obliged to inform himself of those facts through whatever means are available from within the company and that are the proper subject of discovery. In giving answers based on such information, the officer is relating hearsay. The degree to which the officer's answers that are based on hearsay information and belief can be read into the record against the corporate party are a matter of complexity and confusion.

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[2] Robert B. White, *The Art of Discovery* (Aurora: Canada Law Book, 1990) at 29.

[52] One example of this type of problem can be seen in *Fullowka v Royal Oak Mines Inc.*, [1997] NWTJ No 42, [1998] NWTR 32, where Vertes J. discussed the hearsay problem that arises when the corporate officer acknowledges information in its possession from former employees. If the corporate representative accepts the information, it then becomes part of the evidence of that party. The officer, however, may acknowledge that it is part of the corporate information but reject it.

[53] The type of questions posed by counsel for NTI fall into the general category of what is known as a reliance question. These questions seek answers about the other party's factual position to enable it to know the case that has to be met and to avoid a surprise at trial. Sometimes the questions request the facts relied on by a party to support a pleading. A more difficult issue is whether it is proper for a party to seek answers about the other party's legal position.

[54] The case law is divided on whether the examiner can ask questions about the party's legal position. In *Can-Air Services Ltd. v British Aviation Ins. Co*. (1988), 91 AR 258, [1989] 1 WWR 750 [*Can-Air*], the Alberta Court of Appeal indicated such questions are not proper. However, in *Six Nations v Canada* (2000), 48 OR (3d) 377 (QL), [2000] OJ No 1431 [*Six Nations*], the Ontario Court of Appeal declined to follow *Can-Air*, noting that the Alberta *Rules of Procedure* were different from those in Ontario. Campbell J. for the Court stated at para 11:

> Canada has pleaded many issues of law or issues of mixed fact and law. This is perfectly appropriate in a case of this nature. Some of these issues are stated vaguely. Canada takes the position that there is no mechanism under the Rules by which the plaintiff can compel Canada to confirm or clarify its legal position in respect of any issue of law prior to trial, that position is not consistent with the policy underlying the Rules which is to encourage full and frank disclosure prior to trial so as to minimize costs and expedite the just resolution of claims. Further, it is not an interpretation of the Rules which is in accordance with their plain and ordinary meaning.

[55] In *Fullowka v Royal Oak Mines Ltd*., [2001] NWTJ No 83, Vertes J. declined to follow *Can-Air* because it interpreted the more restrictive Alberta *Rules of Court*. He adopted the approach taken in *Six Nations* because Northwest Territories Rule 251 was modeled on the Ontario *Rules* that were much broader and permitted this type of question. Other cases adopting the broader approach are *Saskatchewan Trust Company (Liquidator of) v Coopers & Lybrand*, 2001 SKQB 8, 204 Sask R 1; and *Montana Band v. Canada*, [2000] 1 FC 267, [1999] FCJ No 1088 [*Montana*].

[56] I adopted the analysis of Vertes J. in *Nunavut (Department of Community and Government Services) v Northern Transportation Company Ltd.*, [2010] NUCJ 5, [2010] Nu J No 1, because Nunavut has the same *Rules of Court* as the Northwest Territories. I am satisfied that it is proper in this jurisdiction to ask questions about a party's legal position on matters in issue or on questions of mixed fact and law.

[57] Sewell was produced as an officer of Canada under Rule 238(1) and, as noted in the transcript, counsel for the respondent acknowledged that his answers would bind Canada. Rule 251(2) required Sewell to inform himself before being examined. When he answered the question he exercised some judgment that could be described as an opinion but he was in fact expressing the corporate position. As noted by Hugessen J. in *Montana* at para 20:

> It is nothing new to say that the border between fact and opinion, like that between fact and law, is easy to assert but hard to draw on the ground. It is better to have the deponent answer any marginal questions and if the answer turn out to be simply the expression of a personal point of view the Trial Judge can deal with the matter appropriately if necessary.

[58] The questions put to Sewell sought answers to Canada's understanding of the timing of its obligations under the *Implementation Contract*. The witness was asked if he agreed with a possible interpretation of the contract and he answered that he agreed with the interpretation suggested by the questioner. His answer expressed the corporate view at the time of the discovery. If it was incorrect or incomplete, Canada had the opportunity to correct it by using Rule 260 but chose not to do so. That Rule states:

> 260. (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf of, in place of or in addition to the party and the party subsequently discovers that the answer to a question on the examination was incorrect or incomplete when made or is no longer correct and complete, the party shall forthwith provide the information in writing to every other party.

[59] Furthermore, counsel for Canada did not object to the questions nor attempt to re-examine Sewell as permitted under Rule 259. Another option open to Canada was to attempt to have counsel answer the question for the witness as permitted under Rule 258.

[60] Accordingly, I am satisfied that the questions were proper questions for an examination for discovery and Canada is bound by the answers.

[61] Counsel for Canada argues that the "admission" is not an admission of fact as required by Rule 181 but rather it is a statement of law or mixed fact and law that cannot replace the legal interpretation, analysis and ultimate opinion of this Court. Since the admission was not an admission of fact it cannot found a judgment under Rule 181. Canada then provided an alternative interpretation that supported its argument that it was not required to establish the general monitoring plan with the first ten-year initial planning period.

[62] Canada's argument raises an issue concerning the admissibility of discovery evidence at trial. As White notes at p. 40, every jurisdiction with a rule similar to Ontario Rule 31.11 (1) does not permit discovery evidence to be used unless the evidence is "otherwise admissible". The Nunavut equivalent is Rule 261 that states:

> 266. (1) At the trial of an action, a party may read into evidence, as part of the party's case against a party adverse in interest, any part of the evidence given on an examination for discovery of the party adverse in interest or, unless the trial judge orders otherwise, a person examined for discovery on behalf of, in place of or in addition to the party adverse in interest, if the evidence is otherwise admissible, whether the party or person has already given evidence or not.

[63] As noted earlier, some of the discovery evidence of an officer is hearsay because he does not have personal knowledge of all of the information provided. As held in *Claiborne Industries Ltd. v National Bank of Canada* (1989), 69 OR (2d) 65, 59 DLR (4th) 533, a corporation is bound by its representative's hearsay answers on examination for discovery and these are admissible at trial, unless it expressly protects itself by disclaimer. I am satisfied that Sewell's admission is similarly admissible and that I can consider it as part of the body of evidence relied on by NTI. While the admission certainly represents Canada's corporate thinking at the time of discovery, it does not prevent Canada from advancing an alternative argument in response to the application. As acknowledged by NTI, the proper legal interpretation is a matter for this Court to determine after considering all of the evidence.

A.iv.2 Analysis of Respondent's argument on interpretation of article 12.7.6 and the *Implementation Contract*

Canada's argument

[64] Although Sewell agreed at discovery that DIAND was required to establish the NGMP within the first 10-year planning period, Canada now argues that Article 12.7.6 of the NLCA and the *Implementation Contract* do not specifically discuss the timing of Canada's obligations with respect to the development and implementation of the NGMP. Canada pointed out that Article 12.7.6 of the NLCA was reproduced at page 12-7 in Schedule 1 of the *Implementation Contract* and states in part:

> Government, in co-operation with the NPC, shall be responsible for developing a general monitoring plan and for directing and coordinating general monitoring and data collection.

[65] The use of these words indicates that the responsibility for the NGMP was not entirely Canada's. Below these words there is the statement DIAND is assigned "Management Responsibility". However, below that on the page there is a requirement for "Participation/Liaison with NPC and appropriate government departments that would include NTI and the GN.

[66] Canada then referred to bottom of the page where there are three columns with the headings "Activities", "Responsibility" and "Timing". On the fourth line the activity identified is "In co-operation with NPC, develop a general monitoring plan", the responsibility is assigned to "DIAND" and the timing is described as "ASAP after NPC established". Canada argues that since NPC was established in 1996 it was obligated to establish the general monitoring plan ASAP after 1996. Canada's interpretation of ASAP after 1996 is that these words do not mean that it had to establish the monitoring plan within the first 10-year planning period. It builds on this interpretation by arguing that it met its contractual obligations when it provided the funding in 2010 that resulted in the creation of the NGMP.

[67] On the fifth and sixth lines on the same page, the activities identified were “Provide information and data collected by government to NPC for collating” and “In co-operation with NPC, direct and coordinate general monitoring and data collection”. DIAND was assigned responsibility and the work was to be done “in accordance with the general monitoring plan”. Canada argues that these words do not necessarily mean that the work was to be started during the initial 10-year planning period and suggests it fulfilled its obligation when the NGMP began its first year of operation in 2010.

[68] Canada argues that the trial judge should decide this question of law. In oral argument, Canada submitted that the “interplay between the *Implementation Contract* and the modern treaty itself is a novel legal issue that has not been decided by a Canadian court in the context for certain of the NLCA”. Noting the comments of Kilpatrick J. in *NTI Firearms* on the importance of the NLCA to the rights and freedoms of Inuit, Canada argues that this Court needs a full trial record to determine the meaning of provisions of the NLCA.

[69] While noting that this application does not involve “warring affidavit evidence” as was the case in *NTI Firearms*, Canada indicated that a judge would need to understand the interplay between the *Implementation Contract* and the NLCA. A partial summary judgment could run into a problem later when the trial judge rules on similar issues on the interpretation of other articles of the NLCA because there could be inconsistent decisions.

[70] Finally, Canada argued that it anticipated calling “more fulsome evidence” at trial to talk about the “NGMP chronology that is discussed in the Business Case”.

NTI argument

[71] NTI argues that this Court has all the relevant evidence and is in as good a position as the trial judge to decide the question of law.

[72] NTI argues that if Canada wants to argue that it took significant steps between 1993 and 2008 in carrying out its obligations, the simple straightforward way to do so is to file an affidavit from a knowledgeable person setting out what they say was done and what funding was available. The reason Canada did not file an affidavit to support their argument is because Sewell gave truthful and accurate answers under oath at his examination for discovery.

[73] NTI argues that section 37.1.1 of the *Implementation Contract* provides the context to understand the intentions of the parties about the interpretation of these clauses. It starts off with the words “the following principles shall guide the implementation of the agreement and shall be reflected in the Implementation Plan”. Subparagraph (d) specifies that the parties would identify multi-year planning periods and the implementation activities and the level of government implementation funding that would be provided during any planning period. Subsection (c) states that timely and effective implementation of the Agreement is essential for the Inuit to benefit from the Agreement.

[74] The content of the *Implementation Plan* was specified in Article 37.2.1 of the NLCA. Article 37.2.3 specified that the *Implementation Plan* would be consolidated into the *Implementation Contract*. The definition of the initial planning period in Section 1.1 of the *Implementation Contract* is “means the period commencing on the date of ratification and expiring on the tenth anniversary of the date of ratification”. The interpretation put forward by NTI is that “ASAP means at a minimum within the initial ten-year planning period as accepted by Sewell at the examination for discovery.”

A.iv.3 Analysis

[75] Both parties acknowledge that the determination of the timing of Canada’s obligation is a question of law involving the interpretation of Article 12.7.6 and Schedule 1 of the *Implementation Contract*. They disagree on the legal effect of Sewell’s admissions in determining the question of law.

[76] I have ruled above that the admissions are admissible evidence that I may consider in determining the question of law.

[77] I am satisfied that I am in as good a position as the trial judge to decide this point of law. Canada's vague reference to the need for contextual evidence at trial to interpret a modern land claim does not satisfy its obligation to put its best foot forward and to provide specific facts to show there is a genuine issue for trial under Rule 276. In response to questioning from the court about what additional evidence Canada might call at trial on this issue, Canada responded that it intended to call other witnesses who would expand on the development of the business case. There were no specifics given about any additional contextual evidence that would be called to help the Court interpret Article 12.7.6 and the *Implementation Contract*.

[78] In *NTI Firearms,* Kilpatrick J. held that contextual evidence was essential in interpreting a treaty particularly where there were conflicting affidavits. In that case, Canada relied on *Eastmain Band v Canada (Federal Administrator)*, [1993] 3 CNLR 55, 99 DLR (4th) 16, to argue that context is less important when interpreting a modern land claim agreement. In this case, there are no real conflicts in the affidavits as discussed in the next issue.

[79] The interpretative exercise in determining Canada's obligations under the *Implementation Contract* is to decide the meaning of "ASAP after NPC established". Both parties agree and it is a historical fact that the NPC was established and in operation in 1996.

[80] In *King's Old Country Ltd. v Liquid Carbolic Can. Corp. Ltd.*, [1942] 2 WWR 603, Dysant J. held that "to do a thing 'as soon as possible'" means to do it within a reasonable time, with an understanding to do it within the shortest possible time.

[81] The concept of reasonableness is also required when assessing the conduct of the promisor. As stated by Waddams[3]:

> The principal function of the law of contracts is to protect reasonable expectations engendered by promises. It follows that the law is not so much concerned to carry out the will of the promisor as to protect the expectation of the promisee. This in not, however, to say that the will of the promisor is irrelevant. Every definition of contract, whether based on agreement or on promise, includes a consensual element. But the test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an enquiry into the actual state of mind of the promisor, but on how the promisor's conduct would strike a reasonable person in the position of the promisee.

[82] Fridman[4] notes that where no particular time is specified for the performance of obligations, they must be performed within a reasonable time. What is a reasonable time is a question of fact for the judge to decide.

[83] I am satisfied that by any objective standard "as soon as possible" in the context of the above terms from the *Implementation Contract* meant within the end of the first ten-year planning period. Since the NPC was not established until 1996, Canada had seven years to create the monitoring plan and, as Sewell admitted, the parties expected it to be in place at the end of the first planning period.

B. What are the other findings of fact from paras 29 to 40 of the judgment, as described above?

[84] Although Canada did not admit the facts alleged in these paras it only took issue in argument with paras 34 and 38-39 in argument on the calculation of damages. I will leave discussion of whether these admissions were clear and unequivocal to the damages issue.

[85] Accordingly I find the factual allegations made by NTI in paras 29, 30, 31, 32, 33, 35, 36, 37 and 40 have been established by the admissions or the evidence in the affidavits.

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[3] S.M. Waddams, *The Law of Contracts* (Aurora: Canada Law Book, 2010) at 105.

[4] G.H.L. Fridman, *The Law of Contract in Canada*, (Scarborough: Carswell, 1999) at 556-557.

C. Does Reinhart's affidavit conflict with Kunuk's affidavit on material facts?

(i). NTI's argument

[86] NTI argues that the Kunuk and Reinhart affidavits do not conflict on the material facts and, as a result, there is no genuine issue of fact that has to be determined at a trial.

[87] The Reinhart affidavit was primarily focused on the respondent's actions from 2007 to the present that were also described in the Kunuk affidavit. The alleged conflict in the affidavits concerns the actions of the respondent during the first ten-year planning period. However, Reinhart's discovery evidence demonstrates that there is no material conflict in the affidavits about the respondent's failure to establish and implement the NGMP during the first ten-year planning period.

(ii). Canada's argument

[88] The respondent argues that it took significant initiatives during the first ten-year planning period as indicated in the NGMP chronology attached as Appendix "A" to the NGMP Business Case that was attached as exhibit "D" of Kunuk's affidavit pages 3 and 4 of 116.

[89] In oral argument, Canada's counsel directed the Court to a number of initiatives where Canada sponsored and spent considerable sums of money during the first ten-year planning period. These included the West Kitikmeot pilot project and the technical workshop that took place in Yellowknife on April 21-22, 1998. Canada argues these facts conflict with the allegations in the Kunuk affidavit that Canada took no steps to establish and implement the NGMP and create a genuine issue of fact that should be determined at trial.

[90] Canada also argues that there were numerous meetings and discussions with NTI and the NPC during the first ten-year planning period concerning the conceptual framework for the NGMP. Until these issues were fleshed out, Canada was unable to proceed because it required the co-operation of these other parties.

(iii). Analysis

[91] Canada argues that, unlike the respondents in *Papaschase* or *Ootoova Estate,* it has adduced some evidence to show there is a genuine issue of material fact on the matter of the development and implementation of the NGMP during the first ten-year planning period. However, Sewell's discovery evidence removed the apparent conflicts and established that there is no genuine issue of material fact on these very material facts.

[92] Reinhart's affidavit was primarily directed at establishing what Canada accomplished in developing the Business Case and the establishment of the monitoring program in 2010. However, para 4 included some information about events that occurred during the first ten-year planning period. He stated:

> A selected chronology of the substantive initiatives respecting Article 12.7.6 of the Nunavut Land Claims Agreement (NLCA) is attached as Appendix "A" to the NGMP Business Case NGMP Business Case (NGMP Chronology) which is located in Exhibit "D" to the Affidavit of David Kunuk, Can-078860, pages 3 and 4 of 116. The NGMP chronology includes a description of presentations, discussion papers, AANDC correspondence and AANDC sponsored workshops on NGMP over the period from 1993 to December 2008. I am informed through my discussions with Bernie MacIsaac, Director of Operations in the NRO, and by my review of the HGMP Chronology and do verily believe that key research and exploration of monitoring plans in other jurisdictions, receipt and review of discussion papers regarding NGMP, and presentations by the NRO's internal working group on NGMP to the GN, NTI and the NPC in October 2006.

[93] Canada argues that these actions demonstrate that it began work on the plan in the first ten-year planning period but did not complete it until 2010 when the NGMP was in place. Canada's counsel spent a considerable amount of time in oral argument taking the Court through exhibits to Reinhart's affidavit to demonstrate Canada's level of activity.

[94] She described these activities as “periods of engagement and discussion about what the model of NGMP might look like”. She referred to the conceptual design workshop in April 1997, noting the consultant was hired by NTI and that NTI supervised the administration of the contract. While Canada did not pursue this activity it provided the funding and therefore takes credit for participating. Canada’s counsel went on to state that Canada participated in many of these projects by either funding them or conducting pilot projects.

[95] For example, Canada funded a technical workshop held in Yellowknife on April 21-22, 1998, and a five-year West Kitikmeot pilot project that ran between 1996 and 2001. Canada relies on these facts to argue that it may have been guilty of delayed performance but was not guilty of completely failing to perform within the first ten-year planning period.

[96] At first glance, para 4 of Reinhart’s affidavit appears to conflict with Sewell’s admissions at discovery as set out in para 29 above and reproduced below:

> 4641. Q. The plan is not in place?
>
> A. That's correct.
>
> 4642. Q. It's not been established?
>
> A. There is no plan in place today, no.
>
> 4643. Q. And so there's no actual monitoring taking place?
>
> A. Well, the ---
>
> 4644. Q. Under the aegis of the plan?
>
> A. The plan, from my reading of the documents, is about co-ordinating of data and access to data. Departments all have the responsibility to gather data in carrying out their affairs.
>
> 4645. Q. All right. The departments may be collecting data, but it's not being done as part of a general monitoring plan that is in place?

A. That's correct.

4646. Q. Okay. So to come back to my question, the obligations in the Agreement with respect to general monitoring and development of a plan, and the actual monitoring and data collection, to this point in time, that's not been accomplished?

A. As called for in the Agreement, no, it's not in place.

[97] However, in response to Canada's argument, NTI's counsel referred to other parts of the discovery where Sewell clearly and unequivocally admitted that these "periods of engagement" did not satisfy Canada's obligation to create and implement the NGMP within the first 10-year planning period.

[98] NTI relied on the following question and answer from Sewell's examination for discovery to prove that the West Kitikmeot monitoring program did not satisfy Canada's obligation.

4867 Q. And you're not suggesting that this West Kitmeot monitoring program represented satisfaction of the obligation to develop and implement a general monitoring plan?

A. No.

[99] Similarly, Canada acknowledged that the technical workshop in Yellowknife on April 21-22, 1998, was not part of the development of the NGMP from the following questions and answers from Sewell's examination for discovery.

4869 Q. Now we just looked at the discussion paper for the technical workshop, and this document we've just called up is, in fact, the final report of that technical workshop held on April 21-22 1998 in Yellowknife. Do you see that?

A. I see that, yes.

4870 Q. Okay. It looks like Geo-North had a contract to prepare the discussion paper and be the rapporteur on the workshop?

A. That would be a common practice, yes.

4871 Q. Is Geo-North, is that Mr. O'Connell's consulting company?

A. I'm not sure, I've seen his name in some of the documents, but I'm not certain.

4872 Q. Now if you could look, please, at page 10 of the electronic document?

A. Is this page two?

4873 Q. Yes it should be Appendix "A"?

A. Yes I have Appendix "A"," Presentation on the Process to this Point?

4874 Q. Yes, and you'll see the name there Jon Pierce. I believe Mr. Pierce was the executive director of the Nunavut Planning Commission at this point in time?

A. I believe so yes.

4875 Q. And in the third para the conference report states, and I quote "Jon explained that neither DIAND nor NPC were sufficiently funded to carry out an ongoing and comprehensive NGMP.

Do you agree that's an accurate statement of the funding situation as at that time in April '98.

A. I think so, yes.

5071 Q. Because up to this point of time, by the time you come in as Regional Director, it's fair to say, isn't it that there hasn't even really been enough funding over the years to develop the vision or the plan of what this is really supposed to be all about, it's really what we see as just sporadic workshops and consultant's reports?

A. And I think that from the way I reviewed the documents that it seemed to me that part of the problem was there was such a divergence of viewpoints as to what NGMP meant, that I think there was a great deal of struggle to come to terms with what it was all about. And so I think it's both finding resources, but also seeking of clarity and an agreement among the parties as to what NGMP means.

5072 Q.Okay. But you'd agree with me that up to this point in time, there had not been enough time attention and money devoted to obtain that clarity?

A. I think it would be clear that the efforts seemed to be sporadic on that matter.

[100] Sewell was asked about NPC's cooperation with Canada in the development of the NGMP. As indicated in the questions and answers set out below, he accepted on behalf of Canada that he knew of no instances where the NPC failed to co-operate with Canada and that Canada was responsible for the creation and implementation of the NGMP.

4994. Q. Mr. Sewell, we've been discussing the requirement under Article 12.7.6 to develop a general monitoring plan. Are you aware of any instances or occasions where the Nunavut Planning Commission has failed or refused to co-operate with the Government in working on the plan and working on the development of the plan?

A. No, I'm not aware of that.

5027. Q. All right. So if anything was going to get done in terms of getting the general monitoring plan developed and established and up and running, the ball was really in the Government's court?

A. That's correct.

5028. Q. Not NPC's court?

A. That's correct.

[101] Sewell was also asked about whether there was any lack of collaboration by NTI in helping to develop the NGMP. As set out below, he clearly removed any doubts that NTI was responsible for the failure to create and implement the NGMP in the first ten-year planning period.

4916. Q. But you'd agree with me that the money that was available in the first 10 years of the Implementation Contract had not, apparently been sufficient to get the plan designed?

A. I don't know that.

4917. Q. So is it your position that the failure to develop the general monitoring plan within the first 10 year period, that wasn't attributable to lack of funding, it was just attributable to inaction?

> A. I don’t believe it was an absence of money. I believe what we see is various attempts to try to understand what that clause means. For, instance, the title of this paper is “Nunavut General Monitoring Programme”, and the Land Claim Agreement calls for a Nunavut general monitoring plan.
>
> 4918. Q. But all those attempts and all those efforts were ultimately unsuccessful, right?
>
> A. To this point, yes.
>
> 4919. Q. And you’re not laying any of the blame for this at the feet of NTI?
>
> A. No.
>
> 4920. Q. Or the NPC?
>
> A. No.

[102] I am satisfied that the Kunuk and Reinhart affidavits do not conflict on material facts.

D. Do the admissions and other facts established by NTI leave any genuine issue for trial on the facts?

[103] In response to my questions during oral argument, counsel for Canada indicated she intended to call “more fulsome evidence” at trial in relation to these “periods of engagement”. However, she was unable to provide any particulars other than those discussed above about the pilot projects.

[104] I am satisfied that all the material evidence is before me. Canada put its best foot forward in the fourth para of Reinhart’s affidavit and it does not disclose any genuine issue of fact that has to be determined at a trial. In particular, there is no genuine issue for trial as to whether Canada carried out its obligations within the first 10-year planning period.

[105] As a result of the admissions by the Crown in its pleadings, pre-trial brief and the other admissions established in Sewell's examination for discovery as analyzed above, I am satisfied that NTI has proved the following facts:

i. The NLCA is an enforceable contract between the Inuit and Canada;

ii. Canada had an obligation under Article 12.7.6 of the NLCA to develop a general monitoring plan and to carry out monitoring and data collection under the plan;

iii. The plan was to be developed and monitoring was to be underway within the 10-year planning period that ended on July 23, 2003;

iv. The plan was not developed within the initial 10-year planning period;

v. During the first 10-year planning period there were only minimal and sporadic efforts by Canada to develop a general monitoring plan in compliance with Article 12.7.6 of the NLCA;

vi. It was only after NTI commenced this action that Canada initiated a sustained effort toward developing a general monitoring plan. In December 2008, Canada completed a Business Case that set out a detailed plan for developing and implementing a general monitoring plan but Canada did not proceed with its implementation on the ground that funding was unavailable.

vii. Both Canada and NTI accepted the recommendation in the Business Case that the funding required to implement the general monitoring plan over five years was $11,307,000;

viii. Notwithstanding the acceptance of the work plan and the cost estimates in the Business Case, Canada did not make any funding available to proceed with implementation of the general monitoring plan;

ix. DIAND used the Business Case to make a “pitch for funding” to the Treasury Board;

x. Funding for the implementation of the general monitoring plan was announced in the Federal Budget in March 2010, and after that date $11,307,000 was made available to the NRO of DIAND for the implementation and operation of the general monitoring plan;

xi. The plan approved spending of $1,447,500 in the first year, $2,440,400 in the second year, $2,465,000 in the third year, $2,615,000 in the fourth year and $2,340,000 in the fifth year;

xii. The Inuit had a reasonable expectation that Canada would spend what was necessary to perform its obligations under the NLCA;

E. If Canada breached Article 12.7.6 are there genuine issues on questions of law on the remedy for the breach that should be decided on a summary judgment application?

(i). NTI's argument

[106] NTI argues that Canada's breach of contract was also a breach of a fidicuary duty as discussed in *Alberta v Elder Advocates Society of Alberta*, 2011 SCC 24, [2011] 2 SCR 261 [*Elder*]. In either case, the remedy should be consistent with the over-arching principle that the Crown must act honourably in dealing with aboriginal peoples as enunciated in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon*]; and *Haida Nation v B.C. (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*]. This principle is firmly established in Canadian law and includes implementing land claims agreements in a manner that upholds the honour of the Crown.

[107] As pronounced by the Supreme Court of Canada in *Little Salmon,* the honour of the Crown is not empty rhetoric. The court observed that the honour of the Crown has become an "important anchor in this area of the law" and has "been confirmed in its status as a constitutional principle". The court also clarified that the principle applies to modern land claim agreements.

[108] As stated at para 41 in *Haida*, quoting *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th), "[i]t is always assumed that the crown intends to fulfill its promises".

[109] Relying on *Elder,* NTI argues the relationship between Canada and aboriginals is trust-like rather than adversarial. In *Haida* the Court recognized that the honour of the Crown gives rise to different duties in different circumstances. As stated by McLaughlin J., where the Crown has assumed discretionary control over specific aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. The content of the fiduciary duty may vary but the duty's fulfillment requires that the Crown act with reference to the aboriginal group's best interests in exercising discretionary control over the specific aboriginal interest at stake.

[110] In most contexts, governments do not have a fiduciary relationship with individuals or groups in society because the nature of government is such that governments do not undertake to act in the best interests of a beneficiary. Such an undertaking is a necessary requirement for the existence of a fiduciary relationship. However, with respect to aboriginal peoples, the necessary undertaking is met "…by clear governmental commitments from the *Royal Proclamation of 1763* to the *Constitution Act, 1982* and considerations akin to those found in the private sphere".

[111] As held in *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*], in order to determine whether a specific obligation of the Crown to an aboriginal group also gives rise to fiduciary duties, a court must assess whether the Crown has unilateral control in relation to a "cognizable aboriginal interest" that can be exercised in a way that affects the legal or practical interests of the aboriginal group. Cognizable aboriginal interests sufficient to ground the Crown's fiduciary obligation to an aboriginal group are not limited to aboriginal interests in land.

[112] In the case at bar, the Inuit of Nunavut surrendered their aboriginal title, rights and interests to the settlement area. Their aboriginal title included the ability to make decisions about the uses to which the land could be put. As noted by Lamer J. at para 115 in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*], aboriginal title is held communally. It is a collective right to land held by all members of an aboriginal nation. “Decisions with respect to that land are also made by that community.”

[113] In return for the surrender by the Inuit of this aboriginal interest as part of their surrender of aboriginal title, the Crown agreed to establish structures and measures for the proper management of the lands and resources of the territory. The general monitoring plan required by 12.7.6 was a key part of the arrangements that were to be put in place to facilitate proper management of lands and resources in Nunavut.

[114] Canada had broad discretion in deciding how its obligation to establish a general monitoring plan should be satisfied. Implementation of a monitoring plan required Canada’s initiative. A general monitoring plan for Nunavut could not be implemented unless Canada chose to act. Most important, Canada had the sole discretion whether to make funding available for the development and operation of a monitoring plan. Through the exercise of this discretion, Canada could unilaterally choose whether to carry out its obligation and when to carry it out. As a consequence of Canada’s control over funding, the Inuit were left in the position where obtaining a benefit they were promised in return for surrender of aboriginal title depended entirely on the exercise of discretionary power by Canada.

[115] The requirements for the existence of a fiduciary duty are satisfied in this case. The obligation to establish the general monitoring plan as soon as possible after the establishment of the NPC and, in any event, no later than July 2003, was clear and undisputed. The obligation arose in exchange for the surrender of aboriginal title. The obligation involved a cognizable aboriginal interest for Inuit: monitoring the ongoing condition of the lands, resources and people in the Inuit homeland. At the same time, Canada's complete discretionary control over funding effectively allowed it to decide whether and when a monitoring plan would be implemented. In this case, Canada chose to exercise its discretion so as to confer a benefit on itself rather than carry out its promises under the NLCA.

[116] The normal rule for calculating damages for breach of contract is that the innocent party should be placed, so far as money can do it, in the same situation as if the contract had been performed. As held in *Bank of America v Mutual Trust Co*., 2002 SCC 43 at (WL) paras 25-26, [2002] 2 SCR 601 [*Bank of America*], quoting *Robinson v Harman* (1848) 1 Ex. 850 at 855, damages calculated on this basis are referred to as "expectation damages".

[117] In the case at bar, it is not possible to calculate expectation damages. Although Canada admits that the Inuit have not received the benefit that was contemplated from having a general monitoring system in place, it is impossible to calculate monetarily, in a manner that would be fair to both parties, how to put Inuit in the same situation as if the contract had been performed. At the same time, Canada admits that its failure to establish the general monitoring plan has resulted in savings to the government.

[118] NTI argues that the damages for Canada's breach should be equivalent to the amount saved by Canada by virtue of its failure to fulfill its obligations. Canada should not be entitled to reap a benefit from its own breach and should be required to disgorge its savings.

[119] Disgorgement is a remedy available for breach of fiduciary duty. It is also a remedy for breach of contract when expectation damages cannot be calculated and where the parties have a fiduciary relationship or a relationship akin to a fiduciary relationship. The best illustration of the application of the principle comes from the House of Lords judgment in *Attorney General v Blake (Jonathan Cape Ltd., third party)*, [2000] 4 All ER 385, [2001] 1 AC 268 HL (Eng) [*Blake*]. In that case, the House of Lords awarded restitutionary damages in the form of an accounting for profits for breach of contract to prevent the convicted spy George Blake from profiting from his crime in writing a book about his exploits.

[120] *Blake* was considered in *Experience Hendrix LLC v PPX Enterprises Inc.*, [2003] FCR 46. The English Court of Appeal reviewed the reasons in *Blake* and emphasized that an order for a full accounting of profits would only be made in exceptional circumstances. The Court of Appeal concluded, after noting certain similarities between that case and *Blake*, that there were insufficient exceptional circumstances to require disgorgement, particularly as the breaches in question took place in a commercial context unlike *Blake.*

[121] While the Supreme Court of Canada has not yet pronounced on the applicability of *Blake* in Canada, in *Bank of America* the Court did indicate that there are circumstances in which damages will be considered differently than on the basis of expectation damages.

[122] Lower courts in Canada have generally assumed the applicability of *Blake* in Canada and have emphasized the exceptional nature of the circumstances that may give rise to disgorgement of benefits. The principles were applied with little discussion in *Amertek Inc. v Canadian Commercial Corp.* (2003), 229 DLR (4th) 419, 39 BLR (3d) 290 (Ont SCJ), rev'd on other grounds [2005] OJ No 2789, 256 DLR (4th) 287). The most detailed discussion of *Blake* by a Canadian court is in *Indutech Canada Limited v Gibbs Pipe Distributors Ltd*., 2011 ABQB 38, [2011] AJ No 2789. The British Columbia Court of Appeal in *Smith v Landstar Properties*, 2011 BCCA 44, [2011] BC J No154, did not question whether *Blake* was applicable in Canada but found it was not applicable to the facts in that case.

[123] The availability of disgorgement as a remedy for breach of contract is discussed at length by Prof. John McCamus[5] [*McCamus Article*].

[124] Although these arguments raise complex questions of law, they are not unsettled or novel. NTI argues this Court should deal with them in this summary judgment application because the Court is in as good a position as the trial judge. It argues that a judge has the discretion under Rule 176 (4) to decide if he or she should entertain and decide the questions of law. NTI argues I should follow Ontario case law on how to exercise that discretion because the summary judgment *Rules* in the Northwest Territories and Nunavut are identical to the old *Ontario Rules*. In particular, I should apply the reasoning of the Ontario Court of Appeal in *Aronowicz v EMTWO Properties Inc.*, 2010 ONCA 96, 319 DLR (4th) 621 [*Aronowicz*].

[5] Prof. John McCamus,"Disgorgment for Breach of Contract: A comparative Perspective" (2005) 36 Loy LA L Rev 943.

[125] In *Aronowicz,* the trial judge granted summary judgment. The appellant argued that the trial judge should not have granted summary judgment because the case dealt with alleged novel questions of law. At para 71, the court rejected this argument and summarized the general principles applicable. It noted that the reason for the reluctance of courts to grant summary judgment where there are unsettled questions of law is because there is frequently an incomplete factual record. However, a court may determine a question of law on a motion for summary judgment if it has the necessary undisputed factual record, is in as good a position as the trial judge would be to do so, and is satisfied the only genuine issue is a question of law.

[126] NTI argues that there are no unsettled questions of law regarding disgorgement. It is a settled principle of contract law, although it is only available in exceptional circumstances.

[127] Finally, NTI argues that even if I find there is a genuine issue of law raised by Canada it is not a bar to a summary judgment. If I consider there to be a genuine question of law, I have the discretion to determine the issue if the factors specified in *Aronowicz* are present. The case at bar is not one where the factual record is in dispute and I am in as good a position as the trial judge to determine the questions of law.

(ii.) Canada's argument

[128] Relying on *Edmonton Region Community Board for Persons with Developmental Disabilities v Pearl Villa Homes Ltd*., 2010 ABQB 786, [2010] AJ No. 1420 [*Pearl Villa*], Canada argues that developing or novel areas of law should not be decided in summary judgment applications. In that case, J.M. Ross J. adopted the reasoning in *Shell v Barnsley*, 2006 MBCA 133, 208 Man R (2d) 264 [*Shell*]; and *Romano v D'Onofrio*, [2005] OJ No 4969 (2005), 262 DLR (4th) 181 [*Romano*], in holding that developing or novel areas of law should not be decided in summary judgment applications without the benefit of a full exploration of the facts.

[129] Canada noted similar comments by the New Brunswick Court of Appeal in *Saint-François de Madawaska (Village) v Nadeau Poultry Farm Ltd*., 2011 NBCA 55, 83 MPLR (4th) 169 [*Nadeau*].

[130] At (QL) paras 51, 53 of *Royal Bank v Société Générale (Canada)*, [2006] OJ No 5081, 219 OAC 83 [*Royal Bank*], the Ontario Court of Appeal cautioned motion judges that "matters of law which are not settled, or have not had the benefit of contemporary judicial consideration, should not be determined at the interlocutory stage but should be sent to trial to be determined on a full factual record". Such matters should be "permitted to go to trial with the other claims" in the action.

[131] Canada also relies on the *McCamus Article*. At pages 948, 951, 960, 967, and 973 Professor McCamus noted the following:

- there is little support for universal availability of the disgorgement measure;
- the theory remains controversial;
- opinion is divided on the manner and the extent to which such a development would be desirable;
- the reach of the disgorgement remedy for breach of contract in English law thus remains, to some extent, a matter of speculation;
- it will operate at the margins of the existing wrongdoer principle, rather than providing a springboard for a substantial restructuring of contract remedies.

[132] Canada argues that NTI's arguments raise genuine issues of law that should be decided at trial on the questions of the existence of a fiduciary duty and the granting of the remedy of disgorgement. The courts have not yet dealt with the issue of determining the relief that is available where breach of implementation obligations under a section 35 land claim agreement arises. Whether breach of implementation obligations pursuant to a section 35 land claim agreement is pled as a breach of contract, breach of fiduciary duty or breach of a duty "akin to a fiduciary duty", the availability of remedies for breach of a section 35 land claim agreement is a novel question of law. Such a novel question of law should be decided on a full evidentiary record available at trial and not the limited record available on a summary judgment motion.

[133] Relying on *Clow v Palmer*, 2009 PEICA 15, [2009] PEIJ No 32 [*Clow*]; and *Corchis v KPMG Peat Marwick Thorne*, [2002] OJ No 1437, 112 ACWS (3d) 1045 [*Corchis*], Canada argues that partial summary judgment should only be granted in matters where the claims are separate and distinct and where part of the claim is severable from the rest and the balance of the claim is not affected.

[134] Relying on *Wenzel Downhole Tools Ltd. v National-Oilwell Canada Ltd*., 2010 FC 966, 87 CPR (4th) 412 [*Wenzel*], Canada submits that disposing of part of Article 12.7.6 on summary judgment would not conclusively dispose of the issue at trial. If this Court made a determination against Canada on summary judgment that Article 12.7.6 was breached because the NGMP was not developed in a timely fashion (past performance), the trial judge would still be left to consider whether there has been a breach of Article 12.7.6 in light of Canada's ongoing implementation of that Article. Ultimately, the development of the NGMP is interrelated to its implementation and cannot be easily segregated from the whole of Article 12.7.6. It would not be an efficient or effective use of the Court's time to grant relief in relation to past performance of Article 12.7.6 and only to have to address both past and ongoing performance at trial in order to deal with any remaining issues surrounding Article 12.7.6.

[135] Canada argues that there is an interplay between the obligations stated in Article 12.7.6 of the NLCA and the six activities listed in the *Implementation Contract*. It submits that these six activities are listed in some kind of relational order, as though one activity flows to another. The relationship between each activity, and the ability of Canada to complete one activity and move on to another activity, is an issue that impacts upon the assessment of Canada's alleged breach of Article 12.7.6. Ultimately, it ought to be the trial judge who determines the interpretation and interrelationship of the NLCA and the *Implementation Contract*, and how these two documents connect with one another. That complex issue then needs to be considered, in light of all the evidence, including Canada's alleged breach of Article 12.7.6.

[136] Relying on *Society of Composers, Authors & Music Publishers of Canada v Maple Leaf Sports & Entertainment Ltd.*, 2010 FC 731, [2010] FCJ No 885 [*Maple Leaf*], Canada argues that Article 12.7.6 is interrelated with the claim as a whole and cannot be easily segregated, particularly since interpretations regarding timing for various obligations and activities at issue in the remainder of the claim, will require an overall perspective on the interconnection and interrelationship between the NLCA and the *Implementation Contract*. It would not be an efficient and effective use of the Court's resources to determine the intersection and interrelationship between the NLCA and the *Implementation Contract* in this motion only to have the very real possibility that the trial result will be inconsistent. Rather as stated by Phelan J. "It is more efficient and effective to have all the issues addressed at once against the backdrop of all the evidence".

[137] Finally, Canada notes the comments of Kilpatrick J. in *NTI Firearms* on the complexity of the NLCA and the importance of interpreting the obligations under the NLCA in the context of the treaty in its entirety.

(iii). Analysis

[138] It is readily apparent from this detailed summary of the arguments that counsel fully addressed the legal issues on the merits as would have occurred at a trial.

[139] I accept NTI's argument that the issues of fiduciary duty to aboriginal people and honour of the Crown, while complex, are not unsettled or novel. Aboriginal law is a growth industry in Canada and the Supreme Court of Canada has created a large body of jurisprudence including the authorities relied on by NTI on the honour of the Crown and the fiduciary duty to aboriginal people.

[140] NTI's arguments on fiduciary duty and the honour of the Crown were advanced as the foundation for an unusual argument that this Court should apply the remedy of disgorgement for Canada's breach of Article 12.7.6 of the NLCA. While the law of disgorgement is not unsettled law, it is only available in exceptional circumstances. The principle has had only limited consideration in Canada and has never been applied for pure breach of contract. As noted by Canada, it has never been applied as a remedy for the breach of a modern land claim agreement. Accordingly, I accept Canada's argument that the argument is novel.

[141] At para 71 of *Aronowicz,* Blair J.A. recognized the principles discussed in *Pearl Villa*, *Barnsley*, *Romano*, *Royal Bank* and *Nadeau,* about the reluctance of courts to decide unsettled matters of law at a pre-trial stage. His understanding of the theoretical basis for this reluctance was because at a pre-trial stage the factual record is incomplete. However, he then noted that a court may determine a question of law on a summary judgment if it has the necessary undisputed factual record stating:

> However, a court may determine a question of law on a motion for summary judgment if it has the necessary undisputed factual record before it, is in just as good a position as the trial judge would be to do so, and is satisfied the only genuine issue is a question of law: see, for example, *Bader v. Rennie* (2007), 229 O.A.C. 320 (Div. Ct.), at para. 22; *Robinson v. Ottawa (City)* (2009), 55 M.P.L.R. (4th) 283 (Ont. S.C.), at paras. 63-64; *Alexis v. Toronto Police Services Board*, 2009 ONCA 847, at para. 19.

[142] The most important condition is an undisputed factual record. The case at bar is unusually free of factual conflict. Neither party chose to cross-examine on the lengthy Kunuk and Reinhart affidavits. There are no credibility issues and, as I have noted above, there are no conflicts on material facts. Many facts were admitted in the pleadings or the pre-trial briefs. The remainder of the evidence comes from Sewell's examination for discovery. The Crown offered no evidence to contradict his answers and the major issue concerned the legal effect of his answers as analyzed above.

[143] The second issue is whether there is a sufficient factual record to permit the determination of the issue. As noted in my analysis of the fourth issue above, all the material evidence is before me. I am in as good a position as the trial judge to analyze the legal issues.

[144] Canada's final argument is a variant of the one I rejected earlier in paras 78 and 79 about the need for contextual evidence at trial on the interconnection and interrelationship between the NLCA and the *Implementation Contract*. It argues Article 12.7.6 is interrelated with the claim as a whole and cannot be easily segregated, particularly since interpretations regarding timing for various obligations and activities at issue in the remainder of the claim, will require an overall perspective on the interconnection and interrelationship between the NLCA and the *Implementation Contract*. However, Canada could give no particulars about what that contextual evidence would be. As Phelan J. stated at (QL) para 7 in *Maple Leaf*:

> The parties are to put their "best foot forward" in a summary judgment motion. This does not entail turning a summary judgment motion into the trial itself by requiring all the trial evidence. It does require putting forward the best evidence to satisfy the test on a summary judgment and not leave dangling the promise that better evidence will be available at trial to show that there is a genuine issue for trial.

[145] The claims for breach of Section 12.7.6 are specifically pleaded in paras 43-45 of the amended Statement of Claim and specific relief is pleaded in para 86 (a) (iii). In my view they can be severed without impacting the other parts of the Statement of Claim.

[146] Any judgment will cover past performance and NTI has crystalized the damages to the date of the argument. The NGMP is now up and operating and both parties seem to be satisfied with the ongoing implementation. There was no suggestion in argument that NTI was pursuing a claim for the plan that is now being implemented. Future issues on ongoing implementation would presumably be resolved through arbitration under Article 38 of the NLCA. The likelihood of inconsistent judgments is remote.

[147] The facts in the case at bar are easily distinguishable from those in *Clow, Corchis, Wenzel* and *Maple Leaf*.

[148] *Clow* was a matrimonial case that reviewed all the law applicable to severing a divorce from other matrimonial claims. The Court noted severance may be denied where there is prejudice to one of the parties.

[149] In *Corchis*, Gilese J. on behalf of the panel held that the trial judge erred in granting partial summary judgment because all the payments were part of one overall transaction.

[150] In *Wenzel* ,the plaintiffs, William Wenzel and Wenzel Downhole Tools Ltd. (Wenzel Tools) started a patent infringement action against the defendants. Mr. Wenzel claimed that he was the inventor of a Canadian patent and Wenzel Tools claimed to be the owner of the patent by way of assignment. The defendants denied that Mr. Wenzel was the true inventor of the subject matter of the claims in the Patent and that the Patent was invalid on the grounds of obviousness, anticipation, and lack of inventiveness and utility. The defendants filed a motion for summary dismissal of the plaintiff's action. Snider J. dismissed the application because expert evidence would be required, the issues were complex and interwoven, and there were credibility issues.

[151] In *Maple Leaf*, the plaintiff applied for summary judgment in a copyright infringement action concerning the use of musical works at a number of concerts held at the Air Canada Centre in Toronto. Phelan J. dismissed the application for reasons similar to those in *Wenzel*. He found there were complex legal issues and difficult evidentiary determinations including admissibility and credibility that should be decided at trial.

[152] I am satisfied that all the requirements noted in *Aronowicz* are satisfied and that I am in as good a position as the trial judge to analyze and rule on the questions of law.

F. If there are no genuine issues for trial, did Canada breach Article 12.7.6 of the NLCA?

(i). NTI's argument

[153] NTI acknowledges that Canada did ultimately develop the NGMP and started to implement it in mid-2010. Both parties are working to implement the plan and it is a work in progress.

[154] As noted earlier, NTI argues that Canada breached Article 12.7.6 when it failed to develop the general monitoring plan and commence data collection within the initial 10-year planning period.

[155] NTI relies on the discovery answers given by Sewell to prove the breach of contract. He admitted that an effective monitoring plan would be of benefit to the Inuit and that the Inuit have not had the benefit that was contemplated under the NLCA. He also admitted that the Inuit had a reasonable expectation that Canada would spend what was required to perform its obligations under the NLCA.

[156] Despite Canada's late performance of its obligations, NTI argues that the late performance was still a breach of Article 12.7.6. As held in *Tenak Steamship Co. v Brimnes (The) (Owens)*, [1975] QB 929 (CA), a party that fails to perform its contractual obligations on time commits a breach of contract. Although a land claims agreement is not an ordinary commercial contract, there is no principled reason why this well-established rule should not apply to Canada, given that it is under a constitutional duty to act honourably in carrying out its obligations under a land claims agreement.

[157] As held in *Sail Labrador Ltd. v Challenge One (The)*, [1999] 1 SCR 265, [1998] SCJ No 69, in cases of untimely performance, the question often arises as to whether, in addition to damages, the innocent party is entitled to recission of the contract and to be relieved of its obligations. An innocent party has the right to rescind a contract for untimely performance only if there is a contractual term that "time is of the essence" or if a party has made time "of the essence" by delivering a notice stipulating a time for performance. NTI is not seeking rescission in the case at bar.

[158] The right of the Inuit to obtain damages for Canada's failure to carry out its obligations under Article 12.7.6 in a timely fashion does not depend on whether there is a contractual term or a subsequent notice making time of the essence. As noted in *Chitty on Contracts* [6] [*Chitty*], in circumstances where time is not of the essence, a party that fails to carry out its obligation on time is not relieved of liability and remains liable for damages.

(ii). Canada's Argument

[159] As noted earlier, Canada argues that between 1993 and 2003 substantial initiatives and accomplishments were achieved. They included the concept design workshop in 1997, the technical workshop in 1998, and the West Kitikmeot pilot project.

[160] By August 2007, an internal NGMP working group was established in the NRO of DIAND.

[161] In March 2008, a workshop was held in Iqaluit to discuss the monitoring needs and activities of various organizations for the purpose of contributing to the design of the general monitoring plan.

[162] In December 2008, a Business Case that set out a detailed plan for developing and implementing a general monitoring plan was completed.

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[6] H.G. Beale, ed, *Chitty on Contracts*, 29th ed vol 1 (London, UK: Sweet & Maxwell, 2004) at paras 21-018.

[163] Both NTI and Canada accepted the recommendation in the plan that the funding required to implement the plan over five years was $11,307,000.

[164] In July 2010, funding to implement the plan started to flow and continues to be implemented as the litigation continues.

[165] Canada argues that it was not required to produce the NGMP in the first 10 years. While there was no plan designed and no implementation during that time, there was a lot of research and development that took place. After the research was finalized, the plan was developed in 2008 and implemented in 2010.

(iii). Analysis

[166] As I held earlier, I am satisfied that there is no genuine issue for trial on Canada's obligation to produce the NGMP within the first 10-year planning period.

[167] Despite the full co-operation of NTI and NPC, Canada failed to produce the plan during the planning period.

[168] The evidence also establishes that Canada produced the plan and commenced implementation in the second planning period after the litigation commenced in December 2006.

[169] I accept NTI's argument that Canada's late performance was a breach of Article 12.7.6 of the NLCA as more fully analyzed later in issue H.

G. If Canada breached Article 12.7.6, what is the measure of damages?

(i) Damages for breach of collective right

[170] As held by the Supreme Court of Canada in *Delgamuukw,* rights acquired under a land claims agreement are collective rights received in consideration of the surrender of aboriginal title and cannot be held by individuals.

[171] As held in *Pasco v Canadian National Railway Company*, [1990] 2 CNLR 85, 56 DLR (4th) 404 (BCCA), aff'd [1989] 1 SCR 117, 68 DLR (4th) 478 [*Pasco*], compensation resulting from breach of treaty rights is to be paid to the collectivity that holds the rights.

[172] NTI argues Canada's breach of Article 12.7.6 affects all Inuit equally and does not give rise to questions, that may arise in some other parts of the claim, of whether some individuals have been affected more seriously than others by the breach.

[173] Since damages are to compensate for a collective right, decisions concerning the use and distribution of compensation are properly made by the aboriginal collectivity acting through its duly authorized representative.

[174] Canada did not take issue with this argument, except to note on the issue of a "cognizable aboriginal interest" that the NGMP will be of use not only to the Inuit but also to a variety of stakeholders in Nunavut.

(ii). Calculation of Damages

G.ii.1 NTI's argument

[175] The normal rule for calculating damages for breach of contract is that the innocent party should be placed, so far as money can do it, in the same situation as if the contract had been performed. As held in *Bank of America v Mutual Trust Co*., 2002 SCC 43 at (WL) paras 25-26, [2002] 2 SCR 601 [*Bank of America*], quoting *Robinson v Harman* (1848), 1 Ex 850 at 855, damages calculated on this basis are referred to as "expectation damages".

[176] In the case at bar, it is not possible to calculate expectation damages. Although Canada admits that the Inuit have not received the benefit that was contemplated from having a general monitoring system in place, it is impossible to calculate monetarily, in a manner that would be fair to both parties, how to put the Inuit in the same situation as if the contract had been performed. At the same time, Canada admits that its failure to establish the general monitoring plan has resulted in savings to the government.

[177] NTI argues that the loss experienced by the Inuit from the failure to establish the NGMP in a timely way was the ability to make better decisions about the socioeconomic and environmental issues facing the Inuit. It is difficult to assign a monetary value to the increased quality of decision-making over the course of years and it is self-evident that any attempt to do so would be speculative and attacked by Canada as being speculative and remote. Any attempt to generate a monetary value representing the difference between the decisions that were made and the decisions that would have been made would result in either no expectation damages or nominal damages being awarded.

[178] NTI acknowledges that Canada's argument would be a good one in a commercial case. However, the case at bar is not a commercial case. The claim concerns a breach of a land claim agreement. The Supreme Court of Canada has held that a land claim should be honourably implemented so as to reconcile aboriginal and non-aboriginal purposes. That reconciliation will never occur if the only benefits Canada will take seriously are benefits that can be readily reduced to a monetary value. Taking this approach to the assessment of damages gives Canada a free pass and allows it to ignore the other benefits such as the NGMP because it does not want to spend the money.

[179] As set out in para 35 of its pre-trial brief, by not fulfilling its obligation to implement the general monitoring plan by the end of the initial planning period, Canada realized savings from July 2003 until July 2008 of $11,307,500. This is the undisputed cost of establishing the general monitoring plan in the first five years of its life. In addition, Canada also realized savings from July 23, 2008 to April 2010, when Canada belatedly commenced implementation of the plan in accordance with the agreed budget in the Business Case. The amount saved during this period is, at a minimum, $3,510,000. This figure is compiled from using an additional year at the undisputed fifth year cost of $2,340,000 plus savings for an additional half year of $1,170,000. The total Canada saved over a 6.5 year period is at least $14,817,500 ($11,307,500 plus 2,340,000 plus $1,170,000).

[180] Canada was contractually obligated to start delivering on its ongoing obligation to set up the NGMP by July 2003, at the latest. Instead Canada waited 6.5 years, until the spring of 2010, to start spending the money necessary to establish a monitoring plan. NTI argues that the money Canada started to spend in 2010 should have been initially expended in July 2003. Canada did not have the discretion to start the NGMP when it was convenient. That obligation continues uninterrupted from 2003 forward indefinitely.

[181] NTI submits that this Court should award as damages the $14,817,500 Canada saved in not fulfilling its contractual obligations. Canada should not be entitled to reap this quantified benefit from its own breach and should be required to disgorge the $14,817,500. Disgorgement is a remedy available for breach of fiduciary duty. It is also a remedy for breach of contract when expectation damages cannot be calculated and where the parties have a fiduciary relationship or a relationship akin to a fiduciary relationship.

G.ii.2 Canada's argument

[182] NTI relies heavily on two of Sewell's admissions that were set out in paras 21 and 34 of NTI's pre-trial brief.

[183] In response to the para 21 admission, Canada argues it does not establish that the Inuit do not have the benefit of Article 12.7.6 for all time. It is qualified and admits that to the date of Sewell's discovery on November 24, 2009, there was no general monitoring system in place. Canada argues that the admission could be interpreted as meaning that the NGMP had not been fully implemented. Canada notes that NTI admits that the NGMP is now operating and benefitting the Inuit and other user groups in Nunavut.

[184] In response to para 34, Canada argues the admission is not unequivocal and is contingent on certain factors. Sewell's admission of "a savings" is qualified by the fact that costs on development and implementation of NGMP had not been fully incurred at the time that the officer was examined. The admission of "a savings" is further qualified by the fact that Canada had not "had to spend the money" at the time the officer was examined.

[185] In light of these qualifications on the answers, the admission cannot support the allegation that "the federal government has realized significant savings" because Canada has now started to spend the money set out in the five year monitoring plan.

[186] Further, the admission on "a savings" is not evidence of any loss caused to NTI by alleged delay in developing or implementing the NGMP. The admission cannot be used to infer and extrapolate that a "substantial savings", an actual sum of money or the "undisputed cost of establishing the general monitoring plan in the first five years of its life" ($11,307,500) have been incurred. Finally, the admission cannot be used to infer or speculate that a "realized savings" between a particular time period (July 23, 2008 to April 2010) is established.

[187] These inferences and extrapolations are inconsistent with the requirements set out in *Vector* and other cases that the admission must be clear and unequivocal. They also conflict with other evidence before the Court. A “savings” referred to the pool of money that Canada proposed it would spend for implementation of the NGMP in accordance with the NGMP Business Case. This evidence establishes that this very pool of money is now being spent and continues to be spent to implement the NGMP. It is therefore impossible to conclude that “a savings” of that sum of money has arisen when the same pool of money for implementation is now occurring.

[188] Canada argues that the $11,300,000 cost of the first five-year NGMP is a projected amount based on the NGMP Business Case. This does not equate to the value of the NGMP itself. These projections also relate to the costs of the implementation of the NGMP, not to development of the NGMP that is actually performed. NTI’s use of projected implementation costs to speculate on or predict potential savings into the future being incurred by Canada over the period from July 23, 2008 to April 2010 is without merit. It is based on the assumption that the initial five-year costs for implementation set forth in the NGMP Business Case would continue to be spent on an annual basis when there is no evidence of ongoing cost before the Court.

[189] Canada argues that NTI provided no evidence to support its argument that it is impossible to calculate or quantify expectation damages and that they would be inadequate. NTI also failed to explain what valuation methods were attempted and how they failed so that it was impossible to calculate the expectation damages.

[190] Canada argues that NTI failed to explain why the valuation methods for expectation damages would be unfair to the parties despite possessing information about other models in other jurisdictions, as set out in Exhibit “D” of Kunuk’s affidavit (Appendix “C”, CAN-078860 at p. 27 of 116). This information would have permitted NTI to explore the value of these monitoring systems to an economy or group and permit it to value the lost opportunities caused by delayed access to the NGMP. NTI also administered the contract between Canada and DPRA Canada to prepare the Business Case. As a result, it was aware of the costs for the development of the NGMP Business Case. Despite possessing this knowledge, NTI did not adduce any evidence on its expectation damages.

[191] As noted in *The Law of Damages* [7] [*Waddams Text*], while difficulty in determining the amount of a loss can never excuse the wrongdoer from paying damages, there must be a reliable basis to assess damages.

[192] In the case at bar, damages for delayed performance can surely not be quantified to include the costs of actual performance for the first five years and an assumed speculative cost of performance for an additional 1.5 years. Such a calculation and outcome amounting to over twice the projected cost of NGMP is flawed. As held in *DaimlerChrysler Canada Inc. v Associated Bailiffs & Co*., [2005] OJ No 2855, summary judgment for damages cannot be based upon evidence that is indirect or speculative.

[193] NTI has not adduced any evidence that a court would have expected to support such a damages claim. There is no evidence of the ongoing cost of implementation, nor evidence of loss or damages suffered by the Inuit as a result of the alleged delay in performance. In addition, there is no expert valuation of the NGMP itself and there is no benefit established by the evidence before the Court.

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[7] S.M. Waddams, *The Law of Damages* (Aurora: Canada Law Book, 2009).

G.ii.3 Analysis

[194] For the sake of convenience I have reproduced the admissions below:

(a) Para 21 - Questions 4597 to 4601

4597. Q. Now the type of general monitoring that is provided for in Article 12.7.6 of the Agreement, would you agree with me that that sort of monitoring and these data collection activities, there's a purpose to that?

A. I would agree with that.

4598. Q. Okay. And from your discussions with the champions up in the Nunavut Regional Office on the monitoring activities, is it your understanding that an effective monitoring programme would contribute to good decision making about land use activities and environmental protection?

A. I would.

4599. Q. Would you also agree with me that the residents of Nunavut have a legitimate interest in the decisions that affect the environment in Nunavut and land use in Nunavut?

A. Yes.

4600. Q. Would you agree with me, therefore, that an effective monitoring system would be of benefit to Inuit in Nunavut because it would contribute to better decisions?

A. Yes.

4601. Q. And I take it you would agree with me that up to the present time, because there is no general monitoring system in place, the Inuit have not had the benefit that was contemplated?

A. Not the benefit of a general monitoring plan, no.

(b) Para 34 - Questions 4651 to 4654

4651. Q. And the costs to actually establish the plan and to operate on an ongoing basis, those are costs that have not been incurred to date?

A. The costs that have been incurred to date would be developmental reports, the cost of workshops. Those sorts of costs.

4652. Q. Right. But in terms of the actual costs entailed in establishing the plan and then actually co-ordinating and directing the monitoring and the data collection, those are costs that have not been incurred, or certainly fully incurred to date?

A. That's correct.

4653. Q. So would you agree with me that the failure to develop and establish a general monitoring plan to date and to co-ordinate the actual monitoring and data collection activities, that's resulted in a savings to the Government because it hasn't had to spend the money?

A. That would be correct.

4654. Q. And the longer the delay in actually establishing the plan and getting the monitoring going and the data collection, the greater the savings?

A. That would be logical.

[195] In addition to these questions and answers, NTI also relied on questions 5379 to 5381 in order to respond to Canada's argument that NTI had not filed any evidence of the monitoring costs beyond the first five years nor had cross-examined Reinhart about it.

5379. Q. and then you would agree the operation of the general monitoring plan is an ongoing activity. Does the department see that being dealt with in the further renewals of the Implementation Contract?

A. Well, as you'll recall from our previous discussions, that once we get Treasury Board approval for ongoing funding from the claims envelope, then that funding will exist in perpetuity.

5380. Q. As part of the department's A-base funding?

A. It would be in addition to the department's A-base.

Q. And just so I have it clear, let's suppose you get the 11 million approval from Treasury Board for the five years, does that money come into the department's A-base, or is it dedicated specifically for use for this purpose?

A. No, it comes into the department's A-base.

[196] I am satisfied that Sewell's answers to questions 4597 to 4601 are clear and unequivocal. At the time the action was commenced there was no NGMP in place and it was still not in place at the date of the examination for discovery in November 2009. The implementation of the NGMP in July 2010, ended Canada's breach and crystalized the damages. There is no claim advanced for future loss.

[197] Canada's argument is based on the assumption that it had no obligation to create and implement the NGMP on a timely basis. If Canada could implement the NGMP whenever it was convenient to Canada, there is some basis for the argument that there were no "savings". However, I have held that Canada was obligated to have the plan in place by July 2003, at the latest. As Sewell admitted in questions 5379 to 5381, the obligation is not subject to renewal at the end of each five-year period. It continues in perpetuity. Before the expiration of the current five-year plan Canada and NTI will negotiate the amount of funding required for the second term and so on. If the parties cannot agree on the amount then the issue will likely move into arbitration. Factoring these considerations into the equation the only logical conclusion, as Sewell admitted, is that the delay benefitted Canada.

[198] As noted by Waddams, the calculation of damages may be difficult and imprecise. Canada has validly identified many of the problems with attempting to calculate expectation damages. NTI has validly argued that any attempt to generate a monetary value representing the difference between the decisions that were made and the decisions that would have been made would be speculative resulting in either no expectation damages or only nominal damages being awarded.

[199] Table C-3 in Appendix “C” of the Kunuk affidavit contains a summary of the Structure/Governance and the budgeting for the operation of the various monitoring systems. Many have no budgeting information. The budgeting information that is available is as follows:

- $72,000/$177,000 in British Columbia
- $400,000 in Newfoundland
- $845,000 for the Hudson Bay region
- $3.14 million multi-year in the Northwest Territories
- $2.25 million over five years - West Kitikmeot Study
- $2 million over two years - Oregon

[200] Analysis of this information could have produced a cost projection for Nunavut. However, I am satisfied that the results of any analysis of this information would have been arbitrary and speculative. Each jurisdiction has unique factors that may or may not be appropriate to use in Nunavut. The most reliable evidence of the cost in Nunavut is the initial five-year NGMP costs.

[201] Canada breached Article 12.7.6 and that information is finally in the process of being accumulated, at least 6.5 years late. If the NGMP had been put in place during the first ten-year planning period, the Inuit would have had more information to make better decisions than they now possess. That is a real loss to the Inuit but it is impossible to quantify on the principles applicable to expectation damages. In the case at bar the breach is not efficient but is a zero sum outcome. The Inuit are clearly worse off while the Crown is better off.

[202] The NLCA is not an ordinary commercial contract although it has some features that resemble one such as the payment of money over a period of time and the transfer of title to land. It has numerous other clauses besides Article 12 that concern unquantified monetary obligations such as Article 5 dealing with Wildlife Management, Article 8 dealing with Parks, Article 10 dealing with Land Resource Management Institutions, Article 11 dealing with Land Use Planning, and Article 13 that deals with Water Management. These clauses are directed at providing better management of Nunavut's natural resources. They require information to have life and the NGMP was intended to provide that information.

[203] The classic legal response to this type of problem is to award nominal damages. In *Mètis National Council v Dumont*, 2008 MBCA 142 at (QL) para 41, [2008] MJ No 421, the Manitoba Court of Appeal adopted the explanation provided by S.M Waddams in the *Waddams Text* as follows:

> As explained in the text S.M. Waddams, *The Law of Damages*, looseleaf (Aurora: The Cartwright Group Ltd., 2008), "[n]ominal damages is a sum awarded where the plaintiff's legal right has been invaded, but no damage has been proved" (at para. 10.10). Waddams cites Lord Halsbury's seminal decision in *Owners of Steamship "Mediana" v. Owners, Master and Crew of Lightship "Comet." The "Mediana*," [1900] A.C. 113 (H.L.), where he wrote (at p. 116):
>
> > [...]"Nominal damages" is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. [...]

[204] The Manitoba Court of Appeal went on to explain that an award of nominal damages accomplishes two tasks: it establishes the plaintiff's legal right and acknowledges that a breach did occur. This acknowledgement may deter future infringements or may enable the plaintiff to obtain an injunction to restrain a repetition of the wrong. However, specific performance and injunctions are not available against the Crown by virtue of section 22 (1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [*Crown Liability Act*]. A successful party is restricted to the remedy of a declaratory order. As a result, an award of nominal damages in this case would be a very hollow and unjust remedy.

[205] The alternative is to analyze the possible application of the principle of disgorgement as argued by NTI and strongly opposed by Canada as set out in the remainder of this judgment.

(iii). Remedy should enforce Crown's duty to act honourably

G.iii.1 NTI and Canada arguments

[206] As set out above in paras 107-110, NTI argues that whether the remedy is for breach of contract or breach of fiduciary duty, Canada must act honourably in its dealings with aboriginal peoples. In *Little Salmon,* the Supreme Court of Canada held that the duty to act honourably applies to modern land claims agreements. As the court also held in *Haida* ,"[i]t is always assumed that the Crown intends to fulfill its promises".

[207] To uphold the "honour of the Crown", this Court should grant a remedy that deprives Canada of the benefit it received in failing to set up and implement the NGMP in a timely manner.

[208] Canada accepts that it is bound by the "honour of the Crown" principle and argues it has acted honourably in all of its dealings with the Inuit.

G.iii.2 Analysis

[209] The “honour of the Crown” legal concept provides some general principles that courts must keep in mind when analyzing legal arguments on the interpretation of treaties between Canada and its aboriginal people.

[210] These principles provide the foundation for the arguments on the nature of the fiduciary relationship between the Crown and aboriginal people that are analyzed below. In the context of the case at bar, NTI argues that the “honour of the Crown” principle applies to the interpretation of Article 12.7.6 and the determination of the remedy for the breach. At a minimum, the “honour of the Crown” requires that the Crown should not be able to derive a benefit from its own failure to carry out its obligations and the remedy should vindicate this requirement. Canada should not stand to benefit from its own breach just because the monetary value of the breach cannot be calculated.

[211] As noted at paras 17 to 20 of *Haida*:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw, supra,* at para. 186, quoting *Van der Peet, supra,* at para. 31.
>
> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum,* at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

[...] "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall, supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship [...]".

Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate. (Emphasis added)

[212] These principles were applied in *Little Salmon* where the Supreme Court of Canada adjudicated on the nature of the duty to consult the aboriginal party to a modern treaty on land use. Binnie J. stated:

> The argument that the LSCFN Treaty is a "complete code" is untenable. For one thing, as the territorial government acknowledges, nothing in the text of the LSCFN Treaty authorizes the making of land grants on Crown lands to which the First Nation continues to have treaty access for subsistence hunting and fishing. The territorial government points out that authority to alienate Crown land exists in the general law. This is true, but the general law exists outside the treaty. The territorial government cannot select from the general law only those elements that suit its purpose. The treaty sets out rights and obligations of the parties, but the treaty is part of a special relationship: "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably" (*Haida Nation*, at para. 17 (emphasis added)). As the text of s. 35(3) makes clear, a modern comprehensive land claims agreement is as much a treaty in the eyes of the Constitution as are the earlier pre- and post-Confederation treaties.

[213] Relying on *Elder,* NTI argues the relationship between Canada and aboriginal people is trust-like rather than adversarial. As held in the words underlined above from *Haida*, the Supreme Court recognized that the honour of the Crown gives rise to different duties in different circumstances. McLaughlin J. stated that where the Crown has assumed discretionary control over specific aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. The content of the fiduciary duty may vary but the duty's fulfillment requires that the Crown act with reference to the aboriginal group's best interests in exercising discretionary control over the specific aboriginal interest at stake.

[214] In most contexts, governments do not have a fiduciary relationship with individuals or groups in society because the nature of government is such that governments do not undertake to act in the best interests of a beneficiary. Such an undertaking is a necessary requirement for the existence of a fiduciary relationship. However, with respect to aboriginal peoples, the necessary undertaking is met "[…] by clear governmental commitments from the *Royal Proclamation of 1763* to the *Constitution Act, 1982* and considerations akin to those found in the private sphere".

[215] As held in *Wewaykum,* in order to determine whether a specific obligation of the Crown to an aboriginal group also gives rise to fiduciary duties, a court must assess whether the Crown has unilateral control in relation to a "cognizable aboriginal interest" that can be exercised in a way that affects the legal or practical interests of the aboriginal group. Cognizable aboriginal interests sufficient to ground the Crown's fiduciary obligation to an aboriginal group are not limited to aboriginal interests in land.

[216] In the next issue I analyze whether a fiduciary duty is applicable to the obligations accepted by Canada to establish and implement the NGMP. To be applicable I have to be satisfied that the duty to implement to the NGMP was a fiduciary duty in relation to a "cognizable aboriginal interest".

(iv) Fiduciary Duty, cognizable aboriginal interest, and Crown undertaking of discretionary control

G.iv.1 NTI's argument

[217] As held in *Weywakum,* to determine whether a specific obligation of the Crown to an aboriginal group also gives rise to fiduciary duties, a court must assess whether the Crown has unilateral discretionary control in relation to a "cognizable aboriginal interest" that can be exercised in a way that affects the legal or practical interests of the aboriginal group.

[218] Cognizable aboriginal interests sufficient to ground the Crown's fiduciary obligation to an aboriginal group are not limited to aboriginal interests in land, although Crown obligations that give rise to a fiduciary duty will often involve aboriginal interests related to land.

[219] In the case at bar, the Inuit of Nunavut surrendered their aboriginal title, rights and interests to the settlement area. Their aboriginal title included the ability to make decisions about the uses to which the land could be put. As noted by Lamer J. at para 115 of *Delgamuukw*, aboriginal title is held communally. It is a collective right to land held by all members of an aboriginal nation. "Decisions with respect to that land are also made by that community."

[220] In return for the surrender by the Inuit of this aboriginal interest as part of their surrender of aboriginal title, the Crown agreed to establish structures and measures for the proper management of the lands and resources of the territory. The general monitoring plan required by Article 12.7.6 was a key part of the arrangements that were to be put in place to facilitate proper management of lands and resources in Nunavut.

[221] Canada had broad discretion in deciding how its obligation to establish a general monitoring plan should be satisfied. Implementation of a monitoring plan required Canada's initiative. A general monitoring plan for Nunavut could not be implemented unless Canada chose to act. Most important, Canada had the sole discretion whether to make funding available for the development and operation of a monitoring plan. Through the exercise of this discretion, Canada could unilaterally choose whether to carry out its obligation and when to carry it out. As a consequence of Canada's control over funding, the Inuit were left in the position where obtaining a benefit they were promised in return for surrender of aboriginal title, depended entirely on the exercise of discretionary power by Canada.

[222] The requirements for the existence of a fiduciary duty are satisfied in this case. The obligation to establish the general monitoring plan as soon as possible after the establishment of the NPC and, in any event, no later than July 2003, was clear and undisputed. The obligation arose in exchange for the surrender of aboriginal title. The obligation involved a cognizable aboriginal interest for Inuit: monitoring the ongoing condition of the lands, resources and people in the Inuit homeland. At the same time, Canada's complete discretionary control over funding effectively allowed it to decide whether and when a monitoring plan would be implemented. In this case, Canada chose to exercise its discretion so as to confer a benefit on itself rather than carry out its promises under the NLCA.

[223] As noted by McLaughlin J. at para 38 in *Elder*, while the Crown does not stand in the same position as a conventional fiduciary, when the Crown has fiduciary duties to aboriginal peoples, those duties are in the nature of private law duties. They are not public law duties.

[224] As held by Binnie J. at paras 94-97 of *Weywakum*, fiduciary duties require adherence to standards of conduct: loyalty, good faith, even-handedness, and ordinary diligence in what would be reasonably be regarded as the best interest of the beneficiary.

[225] As held at para 104 of *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344, 130 DLR (4th) 193 [*Blueberry*], the duty on the Crown as a fiduciary was that of "a man of ordinary prudence in managing his own affairs". In the case at bar, Canada's conduct fell below even the most minimal standard expected of a fiduciary. No person of ordinary prudence with a reasonable regard for Inuit interests would delay implementing the NGMP for more than 15 years. It also offends the most basic standards expected of a fiduciary to permit Canada to retain the benefit created for itself by choosing not to provide the funds required to carry out its promises under a land claims agreement.

[226] As held at para 94 of *Weywakum,* the existence of a fiduciary obligation opens access to private law remedies.

[227] As held in *Hodgkinson v Simms*, [1994] 3 SCR 377, [1994] SCJ No 84 [*Simms*], it is well-established that, as a remedy for breach of fiduciary duty, a fiduciary may be required to disgorge any benefit obtained through the breach of his duties as a fiduciary.

G.iv.2 Canada's argument

[228] Emphasizing para 81 of *Weywakum,* Canada argues that not all existing obligations between the Crown and aboriginal parties are fiduciary in nature. As held in *Lac La Ronge Indian Band v Canada,* 2001 SKCA 109, [2002] 1 WWR 673, and *Beattie v Canada*, 2004 FC 674, [2004] 4 FCR 540, treaty obligations are not necessarily fiduciary obligations.

[229] Creation of a fiduciary duty requires a cognizable aboriginal interest and the Crown's undertaking of discretionary control in a way that involves responsibility in the nature of a private law duty.

[230] *Weywakum* does not impose a fiduciary duty on the Crown at large but in relation to specific Indian interests.

[231] At para 51 of *Elder,* the Supreme Court of Canada explained that the nature of the interest must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement.

[232] As noted at para 53 of *Elder,* Canada's undertaking requires more than a promise to fulfill an obligation. Rather it requires an undertaking to take on direct administration of the subject of the other party's interest such as property and finances.

[233] One example noted at para 45 of Elder is where the undertaking flows from a statute. In *Guerin v Canada*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*], the Supreme Court examined section 18(1) of the *Indian Act*, RSC 1952, c 149, and held that it confirms the Crown's duty to manage Indian lands for Indian use and benefit. Similarly in *Authorson (Litigation Guardian of) v Canada (Attorney General)*, [2000] OJ No 3768, 53 OR (3d) 221 [*Authorson*], the Ontario Supreme Court examined the *Pension Act*, RSC 1970, c P-7 and the *War Veterans Allowance Act*, RSC 1985, c W-3 that set out Canada's obligation to hold and administer funds on behalf of and for the benefit of incapable veterans and their dependents.

[234] In *Blueberry,* the Supreme Court of Canada found a fiduciary duty in the words of the 1945 agreement that surrendered reserve lands "upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people."

[235] To satisfy the Crown undertaking of discretionary control sufficient to establish a fiduciary duty. NTI must demonstrate a clear undertaking by the Crown to administer the subject of the beneficiary's proprietary interest. It is not enough that the Crown has assumed an obligation.

[236] Canada premises its argument on the assumption that NTI must prove that its aboriginal interest was a pre-existing interest in land. Aboriginal interests in land have been found to pre-exist the Crown's involvement in their administration. In the case at bar, the interest of the Inuit as holders of aboriginal title has been surrendered and exchanged and replaced with land claim agreement obligations under the NLCA. Canada thus does not hold such lands in trust for the Inuit and NTI has provided no evidence that Inuit had a pre-existing interest in "monitoring the ongoing condition of the lands, resources and people of the Inuit homeland".

[237] NTI acknowledges that the development of a general monitoring plan and the coordination of general monitoring and data collection "were activities that had not been carried out prior to the NLCA". The fact that the plan was to be developed is inconsistent with any suggestion that NTI's interest in the plan pre-existed.

[238] NTI's interest is not a specific aboriginal interest. There is nothing inherently aboriginal about the NGMP and it is intended to benefit a variety of stakeholders.

[239] NTI has failed to provide evidence that Canada undertook discretionary control over Inuit interests in the NGMP in the manner required to establish a fiduciary duty.

[240] NTI submits that Canada's "decision" to fulfill its obligation in Article 12.7.6 in accordance with its terms equates to the type of discretion required by the case law to establish the existence of a fiduciary duty. If this approach is accepted it means that any of Canada's contractual obligations could be sufficiently discretionary to found a fiduciary obligation. There is no legal basis for such a proposition.

[241] There is no evidence that Canada undertook to "administer" any Inuit interest in relation to the NGMP in the nature of the administration of surrendered reserve lands in *Guerin* or administration of veteran's pensions in *Authorson*. There is no evidence that the Crown undertook "carte blanche" discretion over an interest for the benefit of the Inuit in relation to the NGMP.

[242] Canada could not fulfill the obligations to develop the monitoring plan and to direct and coordinate it on its own initiative. The development and the implementation of the NGMP is a collaborative effort that requires the cooperation of a number of parties.

[243] Finally, NTI has not identified any court decision where such a section 35 lands claim agreement obligation was held to constitute a fiduciary duty.

G.iv.3 Analysis

[244] Canada refined its written submission in oral argument and argued that because the NLCA does not create a fiduciary duty in relation to a pre-existing aboriginal interest, as was the case in *Weywakum,* it did not have a fiduciary duty in relation to the obligation imposed by Article 12.7.6 of the NLCA.

[245] Binnie J. clearly rejected the alleged requirement for a pre-existing aboriginal right when he stated at para 78 of *Weywakum*:

> The *Guerin* concept of a *sui generis* fiduciary duty was expanded in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, to include protection of the aboriginal people's pre-existing and still existing aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982*. In that regard, it was said at p. 1108:
>
> The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Emphasis added.]
>
> See also: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 185.

[246] The general requirements for a fiduciary duty in the private sector were reviewed in *Elder.* At paras 34-35, McLaughlin C.J.C stated:

> Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, *per* Wilson J., at p. 142.
>
> In the traditional categories of fiduciary relationship, the nature of the relationship itself defines the interest at stake. However, a party seeking to establish an *ad hoc* duty must be able to point to an identifiable legal or vital practical interest that is at stake. The most obvious example is an interest in property, although other interests recognized by law may also be protected.

[247] These passages also clearly indicate that the interest does not have to pre-exist and it does not have to be an interest in land. It has to be a legal or substantial practical interest.

[248] At para 37, the Chief Justice notes that these general principles will only apply to governmental responsibilities in limited and special circumstances.

> The general principles discussed above apply not only to relationships between private actors, but also to cases where it is alleged that the government owes a fiduciary duty to an individual or class of individuals. However, the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances.

[249] At para 38, the Chief Justice referred to the unique circumstances of the Crown's fiduciary duty to aboriginal peoples that were discussed by Binnie J. in *Weywakum*:

> Binnie J., for the Court, made the same point in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96: "The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting". *Guerin* exceptionally recognized that the Crown was under a fiduciary duty in the management of Indian lands for their benefit. But the Court there noted, at p. 385, that the fiduciary duty owed to the Aboriginal peoples of Canada is unique and grounded in analogy to private law:
>
> > The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary. [Emphasis added.]
>
> Noting the unique nature of the fiduciary duty owed by the Crown in the Aboriginal context, courts have suggested that this duty must be distinguished from other relationships: *Hogan v. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225 (Nfld. C.A.), at paras. 66-67.

[250] The Chief Justice notes the comments of Binnie J. in *Weywakum* that the fiduciary duty owed by the Crown to aboriginal people with respect to their lands is sui generis:

> In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Court confirmed that the fiduciary duty owed by the Crown to Aboriginal peoples with respect to their lands is *sui generis*, at p. 1108:
>
> > The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Emphasis added.]
>
> Similarly, in *Wewaykum*, Binnie J. suggested that the fiduciary duty owed by the Crown to Aboriginal peoples is not restricted to instances where the facts raise "considerations 'in the nature of a private law duty'" (para. 74).

[251] At para 40, the Chief Justice recognized the unique and historic nature of Crown-aboriginal relations when she rejected the argument that they serve as a template for the duty of the government to citizens in other contexts.

[252] The Chief Justice noted in paras 46 and 47 that where the undertaking did not flow from a statute it could arise by implication from the relationship between the parties by focusing on analogous cases. As a general rule a strong correspondence with the traditional categories is a pre-condition. In para 48, she noted that meeting the requirement of an undertaking by a government actor will be rare, stating:

> In sum, while it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare. The necessary undertaking is met with respect to Aboriginal peoples by clear government commitments from the *Royal Proclamation* of 1763 to the *Constitution Act, 1982* and considerations akin to those found in the private sphere. It may also be met where the relationship is akin to one where a fiduciary duty has been recognized on private actors. But a general obligation to the public or sectors of the public cannot meet the requirement of an undertaking.

[253] In other words, where the government has undertaken responsibilities to a sector of the public it will not typically give rise to a fiduciary duty. However, where the undertaking is made in the context of the unique Crown-aboriginal relationship, other considerations are applicable as set out in well-defined aboriginal law.

[254] *Weywakum* is important because it recognizes that the fiduciary duty does not arise in each and every transaction between the Crown and aboriginal people. However, where the Crown has discretionary control over an interest and there is an aboriginal vulnerability, a fiduciary duty may arise. The content of the duty will depend on the circumstances.

[255] At para 79, Binnie J. elaborated on the nature of the vulnerability in the relationship between the Crown and aboriginal people, stating:

> (79) The "historic powers and responsibility assumed by the Crown" in relation to Indian rights, although spoken of in *Sparrow*, at p. 1108, as a "general guiding principle for s. 35(1)", is of broader importance. All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples. As Professor Slattery commented:
>
> > The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
>
> (B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)
>
> See also *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 17; W. R. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective", [1986] 3 C.N.L.R. 19, at p. 31.

[256] However, Binnie J. at para 81 (quoted earlier at para 212) noted that the fiduciary duty imposed on the Crown does not exist at large but in relation to specific aboriginal interests. In the case at bar, the subject matter is land but it does not always have to be with land.

[257] At para 83, Binnie J. noted that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature. As a result, it is necessary to focus on the particular obligation or interest that is the subject matter of the dispute and whether the Crown assumed discretionary control.

> I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[258] Finally at para 85, Binnie J. articulated the cognizable aboriginal interest test stating:

> I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty", as discussed below.

[259] To summarize, the hallmarks of the fiduciary duty in a Crown-aboriginal relationship arise from the honour of the Crown and attach rights to a relationship that will in turn give rise to a fiduciary duty with regard to a particular interest. The interest could be legal or a significant practical interest over which the Crown assumes discretionary control leading to a corresponding vulnerability on the part of the aboriginal party.

[260] The NLCA is a contract where there was an exchange of consideration. The consideration from the Inuit was, among other things, the surrender of aboriginal title to the lands, resources and waters of the settlement area. In return, the Crown promised to carry out the obligations set out in the NLCA including Article 12.7.6.

[261] As noted earlier in paras 170-174, aboriginal title included as a component within it a collective ability to make decisions in respect of the land. This collective ability to make decisions was surrendered in exchange for a regime where the Crown would make decisions in respect of the land within the parameters set out in the agreement. One of the parameters that conditioned the Crown's authority over the land was the obligation of the Crown to avail itself of a general monitoring plan to collect and organize data in order to enhance the quality of the decisions that would be made by the Crown in the future.

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

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

[264] As a consequence of Canada's control over funding, the Inuit were left in the position where obtaining the benefit they were promised in return for surrender of aboriginal title depended entirely on the exercise of discretionary power by Canada.

[265] I am satisfied that NTI has established that Canada owed a fiduciary duty to the Inuit to establish the NGMP as soon as possible after the establishment of the NPC and no later than July 2003. The obligation involved a cognizable aboriginal interest for Inuit: monitoring the ongoing condition of the lands, resources and people in the Inuit homeland. In other words, the interests the Inuit had in the structure for well-informed rational decision-making about the land would be enabled by the NGMP. It was not a monitoring plan that was to be set up for its own sake. The NGMP was not an end in itself but for the purpose of better decision-making by the Crown.

[266] As noted at paras 94 to 97 of *Weywakum,* fiduciary duties require adherence to standards of conduct that require loyalty, good faith, even-handedness and ordinary diligence to act in what would be reasonably regarded as the best interest of the beneficiary.

[267] I am satisfied that, in the case at bar, Canada's conduct fell below even the most minimal standard expected of a beneficiary. No person of ordinary prudence with a reasonable regard for Inuit interests would delay implementing the NGMP for more than 15 years. It also offends the most basic standards expected of a fiduciary to permit Canada to retain the benefit created for itself by choosing not to provide the funds required to carry out its promises under a land claims agreement.

[268] As held at para 94 of *Weywakum,* the existence of a fiduciary obligation opens access to private law equitable remedies. As held in *Simms,* one remedy for breach of fiduciary duty is to order the fiduciary to disgorge any benefit obtained in breach of his duties as a fiduciary.

[269] In *Simms,* an investor retained professional investment advice and the advisor recommended that the investor put money into multiple unit residential buildings (MURB). The investor lost all his money and sued for breach of contract and fiduciary duty. He recovered under both heads and the Supreme Court held that the measure of damages for the two was identical. At para 3, LaForest J. discussed the conceptual underpinnings to the award of damages by focusing on the nature of the breach rather than the nature of the loss. He stated:

> I should say at the outset that I would restore the trial judge's decision in its entirety. In my view, her statement of fiduciary law was correct, and I cannot find fault with her assiduous findings of fact or her application of the facts to the law. I am also in substantial agreement with her on the issue of damages. In assessing damages, the trial judge rightly focused on the nature of the breach rather than the nature of the loss and, as a result, her calculation of the losses flowing from the breach vindicated the core duties immanent in the relationship between the appellant and the respondent.

[270] At para 28, LaForest J. noted that the existence of a contract did not necessarily preclude the existence of fiduciary obligations stating:

> Finally, I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty.

[271] In the case at bar, the contract is a land claims agreement and it can provide the same springboard for a fiduciary duty as an ordinary contract.

[272] At para 36, LaForest J. describes how the fiduciary duty arises in a power dependency relationship stating:

> In seeking to identify the various civil duties that flow from a particular power-dependency relationship, it is simply wrong to focus only on the degree to which a power or discretion to harm another is somehow "unilateral". In my view, this concept has neither descriptive nor analytical relevance to many fact-based fiduciary relationships. Ipso facto, persons in a "power-dependency relationship" are vulnerable to harm. Further, the relative "degree of vulnerability", if it can be put that way, does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations. Obviously, a party who expects the other party to a relationship to act in the former's best interests is more vulnerable to an abuse of power than a party who should be expected to know that he or she should take protective measures.

[273] In the case at bar, Canada acknowledges that the Inuit had a reasonable expectation that the Crown would spend what was necessary to carry out the obligations in the NLCA. This admission fits exactly into the conceptual framework described by LaForest J. where vulnerability arises from reasonable expectation.

[274] At para 48, Laforest J. indicated the policy behind the rule was to protect and reinforce the integrity of social institutions:

> The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules. By instilling this kind of flexibility into our regulation of social institutions and enterprises, the law therefore helps to strengthen them.

[275] I am satisfied that the same policy considerations are applicable in this case to protect and reinforce the integrity of the Crown-aboriginal relationship and the goal of reconciliation that underlies that relationship.

[276] Ordering disgorgement for this breach of fiduciary duty will advance this policy objective far more effectively and fairly than awarding nominal damages.

[277] Laforest J. also recognized that the law of fiduciary duties always contains within it an element of deterrence. In accepting the comments of Mark Ellis in *Fiduciary Law in Canada,* he stated at para 93:

> There is a broader justification for upholding the trial judge's award of damages in cases such as the present, namely the need to put special pressure on those in positions of trust and power over others in situations of vulnerability.

[278] This type of case also calls out for a similar type of deterrence particularly since other remedies such as injunctions and specific performance are not available against the Crown.

[279] However, if I am wrong in finding there was a breach of fiduciary duty, disgorgement may still be available to NTI on the basis of breach of contract.

(v) Breach of Contract

G.v.1 NTI's argument

[280] As noted by the Nunavut Court of Appeal in *Canada (Attorney General) v Nunavut Tunngavik Inc.*, 2009 NUCA, 70 CPC (6th) 93 [*NTI Land Claim*], the NLCA is not an ordinary contract.

[281] Land claims agreements are unique in several respects. As seen in the preamble of the NLCA, they are on their face agreements under which there is an exchange of consideration of a sweeping and unique sort.

[282] Land claims agreements are made binding and given the force of law by legislation. In this case it is the *Nunavut Land Claims Agreement Act*, SC 1993, c 29 [*NLCA Act*].

[283] Finally land claims agreements, including the NLCA, have constitutional protection under s. 35 of the *Constitution Act*, *1982*.

[284] In *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] SCR 557, Binnie J. for the majority distinguished a modern land claim from historic treaties because of the importance and complexity of the actual text. The majority also agreed with the dissenting justices' reference to the James Bay Agreement as a contract.

[285] In *Little Salmon,* Binnie J. observed that the reconciliation of aboriginal and non-aboriginal in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act*, 1982. Thoughtful administration of the treaty will help manage some of the misunderstandings and grievances of the past. 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".

[286] As argued earlier, it is a well-settled rule that a fiduciary can be compelled to disgorge a benefit obtained as a result of the breach of his or her obligations. This remedy should also be available for a breach by the Crown of a land claims agreement.

[287] It has now been recognized in common law that in some circumstances an appropriate remedy for breach of contract is to require the defendant to disgorge the benefit obtained through the breach. One such circumstance is when the defendant is under a fiduciary obligation or an obligation "akin to a fiduciary". As argued earlier, NTI submits that the Crown had fiduciary obligations in relation to the implementation of Article 12.7.6 of the NLCA. However, even if the Crown was not under a fiduciary obligation, the Crown's duty to act honourably in the implementation of land claims agreements is "akin to a fiduciary obligation".

[288] Reflecting the defendant's gain in an award of damages was discussed and analyzed in the leading case of *Attorney General v Blake*, [2001] 1 AC 268 (HL), [2000] 4 All ER 385 [*Blake*]. In that case a convicted spy, George Blake, who had escaped from prison in England, had written memoirs in which he included matters that the court ruled he was contractually prohibited from revealing. The Crown sought payment of the proceeds of the contract between Blake and his publisher. Lord Nichols concluded that in exceptional cases a court could award the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he received from his breach of contract. A useful general guide to when the remedy will be granted is to examine whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

[289] The English Court of Appeal considered *Blake* in *Experience Hendrix LLC v PPX Enterprises Inc*. [2003] FSR 46 [*Hendrix*]. The court concluded that there were insufficiently exceptional circumstances to require disgorgement.

[290] As noted in para 121 the Supreme Court of Canada has not yet pronounced on the applicability of *Blake* in Canada. However, in *Bank of America,* the Court did indicate that there are circumstances where damages will be considered differently than on the basis of expectation damages.

[291] Because the court in *Bank of America* was able to make an appropriate award on another basis it did not consider the application of disgorgement. Although the Court did not refer to *Blake,* it did endorse the idea that courts should avoid discouraging "efficient breach" that was defined as "where one party may be better off but no one is worse off" or that "nobody loses". This outcome is to be distinguished from a "zero sum outcome" where "the defendant's gain is the plaintiff's loss, the value of which, but for the defendant's breach, would have belonged to the plaintiff".

[292] In the case at bar, the breach is not efficient but is a zero sum outcome. The Inuit are clearly worse off while the Crown is better off. NTI submits that the concept of “efficient breach” is fundamentally inconsistent with the nature and reconciliatory purpose of land claims agreements.

[293] As noted in para 122, lower courts in Canada have generally assumed the applicability of *Blake* in Canada and have emphasized the exceptional nature of the circumstances that may give rise to disgorgement.

[294] The availability of disgorgement as a remedy for breach of contract was discussed in the *McCamus Article.*

[295] In the case at bar, expectation damages would not only be inadequate but also incapable of calculation. If disgorgement is not granted, the Crown will have effectively expropriated the right of the Inuit to timely compliance with Article 12.7.6.

[296] In the *McCamus Article,* Professor McCamus wrote that Blake’s disclosures could undermine the complete confidence that members of the secret service needed to have in each other and the willingness of informers to cooperate with the service thus threatening to jeopardize the effectiveness of the service. This particular breach constituted a threat to the effectiveness of a very important public institution. NTI submits that similar reasoning applies to this case. Breaches similar to the Crown’s breach of Article 12.7.6 will inevitably undermine the confidence that aboriginal people in general, and the Inuit in particular, have in land claims agreements and thereby threaten the effectiveness of an important public institution - namely modern treaties as a means of reconciliation between aboriginal peoples and the Crown.

[297] NTI submits that the Crown's breach of article 12.7.6 involves exceptional circumstances that justify an award of damages in the amount the Crown has saved by failing to comply with its contractual obligations. In summary, these circumstances include:

(a) the sui generis nature of land claims agreements, in particular the NLCA, which, while contracts, are contracts of a special nature;

(b) the impossibility of quantifying damages on an expectation basis;

(c) the deliberate and repeated failure by the Crown to take initiatives or provide sufficient funding to establish a general monitoring plan even when it knew it was under a contractual and constitutional obligation to do so;

(d) the non-commercial nature of the NLCA in general and Article 12.7.6 in particular;

(e) the significant benefit to the Inuit of having a general monitoring plan that would contribute to decision-making regarding lands and resources in Nunavut, a benefit impossible to quantify, but one which is nevertheless substantial;

(f) the legitimate interest that the Inuit had in restraining the Crown from its "profit making activity", *i.e.* retaining money that it would have had to spend to fulfill its obligations; and

(g) The manifest injustice of allowing the Crown to benefit from its failure to fulfill its obligations under Article 12.7.6 and the associated need to ensure that the Crown properly respects and fulfills its obligations under land claims agreements, including obligations to provide benefits that are not capable of being quantified in financial terms.

[298] The indifference of the Crown towards implementing Article 12.7.6 before the commencement of this action (and indeed for several years thereafter) and its blatant disregard of its obligations constitutes a breach of contract. If the Crown's conduct falls short of a breach of fiduciary duty, it had a duty that is "akin to a fiduciary duty".

[299] The correct approach to damages in this case is to award damages in an amount that will require the Crown to disgorge the amount it saved by failing to fulfill its obligations under Article 12.7.6. The Crown realized savings from July 2003 until the spring of 2010, of at least $14,817,500 and it should be ordered to disgorge this amount.

G.v.2 Canada's argument

[300] Canada argues that the exceptional circumstances present in *Blake* are not present in this case. Canada was not engaged in a profit-making activity like Blake and the necessary egregious conduct is lacking.

[301] In any event, Canada argues that *Blake* has not been accepted in Canadian law. The only cases that engage the issue are *Indutech* and *Amertek*.

[302] In *Indutech,* Romaine J. awarded damages for breach of fiduciary duty and only discussed disgorgement as an alternative remedy that was available.

[303] In *Amertek,* O'Driscoll J. provided no analysis and simply quoted from *Blake.* The defendant was found liable for the tort of deceit, breach of fiduciary duty, breach of a collateral contract and unjust enrichment. Although the findings were overturned on appeal, it is clear that the defendant's conduct was far more egregious than that alleged against Canada in the case at bar. The Court of Appeal did not deal with the issue of disgorgement because it allowed the appeal on other grounds.

[304] In both of these cases the judges were dealing with profit-making that is very different from not performing a treaty obligation. In any event Canada eventually performed their obligation, and at worst the Court is dealing with delayed performance.

[305] Canada also noted that the *McCamus Article* indicated that for the most part, the remedy of disgorgement remains a matter of speculation.

G.v.3 Analysis

[306] The legal issue raised by NTI's argument is whether the remedy of disgorgement is available for Canada's breach of Article 12.7.6 of the NLCA.

[307] In *Bank of America,* Major J. used the term "restitution damages" to describe the "other side of the coin" for compensation based on the defendant's breach rather than the plaintiff's expectations. In *Blake,* Lord Nicholls observed at p. 397:

> My conclusion is that there seems to be no reason, *in principle*, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression 'restitutionary damages'.

[308] NTI noted in argument that Lord Nicholls probably preferred to avoid the term restitutionary damages to prevent the confusion that the phrase may cause with restitution as a cause of action quite distinct from breach of contract. The remedy is better referred to as "disgorgement" and I will use that term in my analysis.

[309] As held in *Simms,* disgorgement is available as a remedy for breach of fiduciary duty.

[310] In *Blake,* the appellant George Blake was a notorious, self-confessed traitor. He was employed as a member of the British security and intelligence services for 17 years, from 1944 to 1961. In 1951 he became an agent for the Soviet Union. From then until 1960 he disclosed valuable secret information and documents gained through his employment. On May 3, 1961, Blake pleaded guilty to five charges of unlawfully communicating information contrary to section 1(1)(*c*) of the *Official Secrets Act 1911*. He was sentenced to 42 years imprisonment.

[311] In 1966, Blake escaped from Wormwood Scrubs prison and fled to Berlin and then to Moscow. At the time of the appeal judgment he was still a fugitive from justice and resided in Moscow. In 1989 he wrote his autobiography. Certain parts of the book related to his activities as a secret intelligence officer. By 1989, the information in the book was no longer confidential, nor was its disclosure damaging to the public interest. On May 4, 1989, Blake entered into a publishing contract with Jonathan Cape Ltd. He granted Jonathan Cape an exclusive right to publish the book in England in return for royalties. Jonathan Cape agreed to pay him advances against royalties: £50,000 on signing the contract, a further £50,000 on delivery of the manuscript and another £50,000 on publication.

[312] Blake's book, entitled *No Other Choice*, was published on September 17, 1990. Neither the security and intelligence services nor any other branch of the Government were aware of the book until its publication was announced. Blake had not sought any prior authorization from the Crown to disclose any of the information in the book relating to the Secret Intelligence Service. Jonathan Cape had already paid Blake about £60,000 under the publishing agreement and that money could not be recovered. However, another £90,000 was still owed to Blake and the Attorney General sought to recover that money.

[313] As a term of his employment. Blake had given an undertaking not to disclose any information he gained from his employment while employed or after employment ceased. By submitting his manuscript for publication without first obtaining clearance Blake committed a breach of his undertaking. The Attorney General advanced an argument that restitutionary principles ought to operate to enable the Crown to recover the profits Blake received from his breach of contract.

[314] At p 394, Lord Nicholls referred to the basic principle of contract law from *Robinson v Harmon* (1848), 1 Exch. 850 at 855, [1843-60] All ER Rep 383 at 385, also discussed by the Supreme Court of Canada in *Bank of America*: Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position as if the contract had been performed. He then noted another rule that an award of damages, assessed by reference to financial loss, is not always “adequate” as a remedy for breach of contract.

[315] Lord Nicholls concluded his earlier remarks quoted above about the “unhappy expression restitutionary damages” with the following statement:

> When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.

[316] In accepting the argument of the Attorney General, Lord Nicholls defined the exceptional circumstances as being those situations where the undertaking is either a fiduciary obligation or “was closely akin to a fiduciary obligation”. He then stated:

> The state of the authorities encourages me to reach this conclusion, rather than the reverse. The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer.

[317] Lord Nicholls derived the authority to grant the remedy of disgorgement for breach of contract from the same equitable jurisdiction of the court to grant specific performance and damages. He went on to further define the circumstances where the remedy would be granted and added the requirement that the plaintiff have a legitimate interest in preventing the defendant’s profit-making activity stating:

> The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, in practice, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

[318] The English Court of Appeal in *Hendrix* considered *Blake* and held the circumstances of that case did not fit the exceptional circumstances required because it was a commercial transaction with no overriding policy concerns such as the protection of important public institutions.

[319] Although the Supreme Court in *Bank of America* did not mention *Blake,* it left the door open when it stated at paras 30-31:

> The other side of the coin is to examine the effect of the breach on the defendant. In contract, restitution damages can be invoked when a defendant has, as a result of his or her own breach, profited in excess of his or her expected profit had the contract been performed but the plaintiff's loss is less than the defendant's gain. So the plaintiff can be fully paid his damages with a surplus left in the hands of the defendant. This occurs with what has been described as an efficient breach of contract. In some but not all cases, the defendant may be required to pay such profits to the plaintiff as restitution damages (Waddams, supra, at p. 474).
>
> Courts generally avoid this measure of damages so as not to discourage efficient breach (i.e., where the plaintiff is fully compensated and the defendant is better off than if he or she had performed the contract) (Waddams, supra, at p. 473). Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.

[320] In *Ameritek,* O'Driscoll J. reproduced passages from *Blake* and, without much analysis, determined that the principle should be applied to the facts of that case because of the behavior of the federal civil servants employed by the defendant, Attorney General of Canada. He felt their actions would cause a reasonably informed person to lose confidence in a crown corporation and a department of the federal government. On appeal, the judgment was reversed on many other grounds and the court did not find it necessary to consider the disgorgement issue.

[321] In *Indutech,* Romaine J. assessed damages for breach of contract under three heads of damages. First, he awarded damages of $530,289 for loss of business opportunity. Second, he declined a claim for restitution of $864,699 for commissions lost. Third, he discussed the request for the disgorgement of profits and commissions. He held that, because he found the relationship to be fiduciary in nature, it was not necessary to decide whether the *Blake* type of disgorgement for breach of contract was applicable. However, he then noted that if he were wrong about his finding on the existence of a fiduciary relationship he would award damages for breach of contract on the *Blake* principles.

[322] In his discussion of disgorgement, Romaine J. considered the "something more" requirement necessary to satisfy the exceptional circumstances described by Lord Nichols. He found assistance from Professor McCamus stating at para 518:

> That "something more" may be as identified by Professor McCamus in the *Law of Contracts*, at page 974:
>
> > The principal argument in favour of granting this form of relief in a contractual context is that some breaches of contract are as offensive or wrongful as many breaches of fiduciary obligation or breaches of confidence. Accordingly, just as the accounting of profits remedy is available in these other contexts, so too it should be available in the context of a heinous or unusually wrongful breach of contract. A further and perhaps more persuasive argument in support is that courts will, in any event, order disgorgement of profits in a case of contract breach where any other result would be unjust, even in the absence of an explicit doctrine permitting the granting of such relief.

[323] Romaine J. summarized the circumstances when disgorgement will be granted as a remedy for a breach of contract as including situations where the relationship was akin to a fiduciary relationship as well as where damages are inadequate and the plaintiff has a legitimate interest in preventing the defendant's profit-making activity. He described the breaches as being particularly egregious, stating:

> This was not merely a cynical breach of a purely commercial contract, as even if the relationship between Indutech and the Gibbs Group did not give rise to fiduciary obligations, it was so close and the breaches so broad, deliberate and immediate to the execution of the Agreements that they were, as Professor McCamus has put it, as offensive and wrongful as many breaches of fiduciary obligations.

[324] In *Landstar*, the British Columbia Court of Appeal considered the disgorgement argument from *Blake* and *Hendrix*. The court did not question the applicability of the principles in Canada but felt the case was similar to *Hendrix* and declined to grant the remedy.

[325] At p. 952 of the *McCamus Article,* Professor McCamus opined that if disgorgement remedies are available for breach of fiduciary duty and tortious wrongdoing, it is unclear why they should not be available in the context of breach of contract. His rationale was stated as follows:

> A refusal to grant disgorgement relief simply permits the perpetrator to 'expropriate' the contractual rights of the promissee. This argument may be particularly compelling in cases as *Blake*, where the expectancy measure of relief yields no compensation whatsoever.

[326] At p. 966, McCamus observed:

> Disclosures such as Blake's could undermine the complete confidence that members of the service need to have in each other and the willingness of informers to cooperate with the service, thus threatening to jeopardize the very effectiveness of the service. This particular breach of contract, then, constituted a threat to the effectiveness of an important public institution.

[327] At p. 968, Professor McCamus suggests that disgorgement relief is likely to be tied to the protection of important social values. He states:

> The reach of the disgorgement remedy for breach of contract in English law thus remains, to some extent, a matter of speculation. However, a careful examination of the pre-Blake instances of disgorgement relief, together with the reasoning in *Blake* itself, may be thought to suggest that the remedy is not likely to be available beyond the range of fact situations in which, as in *Blake*, the breach of contract at issue is in conflict with important social values. Blake's breach of contract threatened the viability of the nation's security service, and may have been a crime. It was close to breach of fiduciary obligation and breach of confidence and might be thought to undermine the viability or value of confidential relationships. Thus, it might be said that his breach was of such a character that it engaged the principle that the wrongdoer should not be permitted to profit from his wrongdoing. The conduct was not a mere breach of contract and was wrongful in the requisite sense.

[328] As noted by the Nunavut Court of Appeal in *NTI Land Claim,* the NLCA agreement is a special kind of contract that is constitutionally protected under section 35 of the *Constitution Act, 1982.* It is non-commercial in nature unlike *Hendrix* and *Landstar*.

[329] If there was no fiduciary duty on Canada to implement Article 12.7.6 then the facts are "akin to a fiduciary relationship".

[330] The breach in this case was not as egregious as in *Indutech* and there was no profit-making activity. However, the Crown was indifferent to its obligations over many years and was only prodded into action by this lawsuit. Even then it took almost four years before the money started to flow. Canada's breach was not an efficient breach because the Inuit are worse off while the Crown is better off.

[331] It is impossible to calculate expectation damages other than to award nominal damages. Nominal damages can be useful in anchoring an application for specific performance or injunction in the future. That jurisdiction is granted to this Court pursuant to section 27 of the *Judicature Act*, SNWT 1998, c 34, s 1 as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28. However, as noted earlier, this Court has no jurisdiction to order specific performance or issue injunctions against the Crown because of section 22 (1) of the *Crown Liability Act*.

[332] The Inuit clearly had an interest in the money Canada saved by not implementing the NGMP in a timely manner.

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

[334] This case has the "something more" necessary to satisfy the exceptional circumstances required by *Blake* and I would apply the remedy of disgorgement for breach of contract if Canada did not have a fiduciary duty to NTI and the Inuit of Nunavut.

H. Pleading issues

(i). Canada's argument

[335] Canada argues that NTI failed to plead that Canada failed to develop the NGMP in a timely manner as requested in the Notice of Motion for Summary Judgment, or by July 2003, as argued in its pre-hearing brief. As a result, NTI's allegations about breach of Article 12.7.6 are a moving target and it should not be granted summary judgment for declaratory relief that has not been pleaded.

[336] As held in Lax *Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, [2011] SCJ No 56, the Crown is entitled to proper notice of "what declaration it was supposed to argue about and to test the evidence directed to that issue".

[337] Canada argues that NTI seeks summary judgment for damages in relation to Article 12.7.6 that have not been pled. As noted at p. 26-002 in *Chitty,* this particular type of damages alleged for breach of contract is considered to be special damages because they are based on precise calculations. As held in *Rotary Drum Corp v Louisana-Pacific Canada Ltd*., 2001 ABQB 297, [2001] AJ No 469 [*Rotary Drum*]; *Best Brands Meats Ltd. v United Canadian Shares Ltd*., [1994] MJ No 690, 100 Man R (2d) 300; and *Proud v National Bank of Can.*, [1985] PEI J No 8, 57 Nfld & PEIR 14, special damages must be particularized.

[338] Canada noted my comments in *NTI v Canada*, 2007 NUCJ 27, [2007] Nu J No 32 on *Rotary Drum,* where I noted that it is difficult in the early stages of litigation to provide precise calculations. On the other hand, after discoveries the parties should be in a position to provide particulars so as to prevent surprise at trial. Although discoveries are ongoing, NTI has not provided any particulars of its special damages.

[339] NTI's Motion for Summary Judgment sought an unspecified amount for breaches of Article 12.7.6 but there was no affidavit evidence to quantify a discrete amount. That information only appeared in the NTI pre-hearing brief when it requested damages of $14,817,500. This is not evidence upon which to base a claim for summary judgment for special damages. As a result of the failure to plead special damages and the ongoing discoveries, the summary judgment application should be dismissed.

[340] Canada argues that NTI failed to plead various particulars that appeared in its pre-hearing brief about fiduciary duties. There was no pleading to support the statements in the brief that the existence of the fiduciary obligation in relation to Article 12.7.6 “arose in exchange for the surrender of aboriginal title”, “involved a cognizable aboriginal interest for the Inuit: monitoring the ongoing condition of the lands, resources and people in the Inuit homeland,” and that the “Crown’s complete discretionary control over funding effectively allowing it to decide whether and when a monitoring plan would be implemented.” As a result, the summary judgment application should not be allowed for this cause of action.

[341] Finally, Canada objects because NTI did not plead disgorgement and did not mention it in the Notice of Motion.

(ii). NTI’s argument

[342] On timeliness, NTI noted that the action was commenced in 2006. In the 2009 discoveries, Sewell admitted that there was no general monitoring plan in place at that time. It was implicit from the pleading that there was no general monitoring in place and that it was also late.

[343] NTI argues that para 45 of the Amended Statement of Claim is a clear pleading that the Inuit were prejudiced as a result of the Crown’s failure to implement the general monitoring system.

[344] NTI understood that the Crown’s complaint about the lack of particulars of special damages pertained to the period after the first five years. In response, NTI pointed to the admissions given by Sewell in para 196 of this judgment. He confirmed that the Crown had an ongoing obligation to provide monitoring funding in perpetuity. That is all the evidence that is needed for the Crown to understand the damages.

[345] NTI argues that Canada failed to mention that paras 13 to 17 of the Amended Statement of Claim plead extensively about fiduciary duty so as to support NTI’s arguments.

[346] In response to the alleged surprise about the disgorgement argument, NTI pointed to para (b) (xi) and (xii) of the Notice of Motion. It argues that this wording is sufficient to allow experienced counsel to understand that the disgorgement argument was the basis of NTI argument about damages.

(iii). Analysis

[347] Para 44 of the Amended Statement of Claim pleads as follows:

> The Crown has failed to develop or to fund the development of a general monitoring plan and to direct and co-ordinate general monitoring data collection, including matters of vital importance to Inuit such as the rate and impact of climate change, airborne and waterborne contamination and demographic changes. Although it has developed a general workplan as to how it would satisfy its obligations under section 12.7.6 of the Agreement, the workplan does not meet its obligations under the Agreement, and, in any event, the Crown has not proceeded to complete the various tasks so itemized, nor has it taken other substantive steps to collect or analyze information on the long-term state and health of the ecosystem and socio-economic environment in the Nunavut Settlement Area.

[348] As held earlier in para 86 of this judgment, NTI established from Sewell's discovery evidence that there was no general monitoring plan operating in November 2009, because there was no funding available at that time. Subsequent to the discovery, Canada finally made funding available in the 2010 budget and the first steps to establish the NGMP took place in July 2010. That change permitted Canada to develop its late performance argument. Although NTI did not plead that the NGMP was to be established in 2003 and was therefore late in 2009, it is implicit that having no plan in place in 2009 also means it was late in 2003. Para 44 is broad enough to support the evidence that came out of the examination for discovery and as refined in the Notice of Motion and pre-hearing brief. Ideally, NTI should have amended its pleading to cover the refinements in the motion and pre-hearing brief. However, as I held in paras 58-60 of *Polar Supplies v Cape Dorset*, 2011 NUCJ 05, [2011] Nu J No 6, amendments at very late stages of proceedings may be allowed where the opposing party is not prejudiced or taken by surprise.

[349] In para 86 (e), NTI claims damages in the amount of one billion dollars for the alleged breaches of the NLCA including Article 12.7.6. In para 86 (f), it also claims special damages for out of pocket expenses expended in negotiations on implementation from 2001 to 2006.

[350] As *Chitty* states:

> General Damages are given in respect of such damage as the law presumes to result from the infringement of a legal right or duty: damage must be proved but the claimant cannot quantify exactly any particular items in it.

[351] The claim for breach of Article 12.7.6 falls within the overall claim for general damages because at the time the pleadings were filed in 2006, NTI could not quantify exactly what amount of money was required to satisfy Canada's obligation. That amount was still unknown at the date of argument and NTI argued that it was impossible to calculate it. Instead it advanced the argument that the amount of the damages should be determined by the value of the benefit to Canada. That amount was precise because it was based on the actual amounts negotiated by the parties. Para (b) (xi) and (xii) of the Notice of Motion clearly raises the issue of disgorgement as the remedy NTI was seeking. Canada knew about that argument in October 2011 and was not taken by surprise.

[352] Any future amounts to be expended after the expiration of the current five-year plan are speculation and cannot be quantified except to project the current figures. As Sewell testified, the obligation continues in perpetuity and has been added to the DIAND's A-base funding. The amount will vary from time to time as the amounts are negotiated at the expiration of the five-year agreements.

[353] Paras 13 to 17 of the Amended Statement of Claim are satisfactory to cover the evidence and arguments advanced to support the claim of a fiduciary duty.

VI. CONCLUSION

[354] NTI's Motion for summary judgment is granted. I award NTI damages in the amount of $14,817,500.

[355] Canada objected to the granting of a declaratory order in its written submissions and neither party commented on the issue in oral argument. The basis for the objection was a comment by Lazar Sarna in *The Law of Declaratory Judgments*, 3d ed (Toronto: Carswell, 2007) at 1, where he noted that a declaration should not be granted where it is ancillary to consequential relief. I see no reason why a declaration should not be made in this case if it is necessary for some other purpose in the future such as to prevent further breaches. However, I will not make the order at this time and give leave to NTI to apply to renew the application if necessary.

[356] NTI is also awarded costs that may be spoken to at a later date.

Dated at the City of Iqaluit this 27th day of June, 2012

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Mr. Justice Earl D. Johnson
Nunavut Court of Justice