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NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation: ***NTI v. Canada (A.G.), 2008 NUCJ 11***

Date of Judgment (YMD): 2008-04-11
Docket Number: 08-06-713-CVC
Registry: Iqaluit

Applicant: **Attorney General of Canada**

-and-

Respondent: **The Inuit of Nunavut as Represented By
Nunavut Tunngavik Incorporated**

Before: The Honourable Mr. Justice E. Johnson

Counsel (Applicant): Michele E. Annich

Counsel (Respondent)

Nunavut Tunngavik : Dougald E. Brown

Counsel (Respondent)

Government of Nunavut: Lorraine Y. Land

Location Heard: Iqaluit, Nunavut

Date Heard: January 25, 2008

Matters: *Nunavut Rules of Court*, R.N.W.T. R-010-96, n. 56,
58(3), 142(1), as duplicated for Nunavut by s. 29 of the
Nunavut Act, S.C. 1993, c. 28

REASONS FOR JUDGEMENT

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

I. INTRODUCTION

- [1] On December 7, 2006 the respondent Nunavut Tunngavik Incorporated (NTI) filed a Statement of Claim alleging breaches of the Nunavut Land Claim Agreement (NLCA) by the applicant Attorney General of Canada (Canada).
- [2] In this application, Canada requests an order adding the Commissioner of Nunavut, as represented by the Government of Nunavut, and the Government of Nunavut (collectively known as GN) as defendants in this action.
- [3] The respondents NTI and GN oppose the application.

II. FACTS

- [4] One of the issues raised in this application is the constitutional status of the territories. In order to address this matter, some background is necessary on the evolution of government in the Northwest Territories (NWT) to 1999, when Nunavut came into existence.
- [5] Several sources were consulted to compile the historical overview that follows:

Canada, Natural Resources Canada, "Territorial Evolution, 1870", online: The Atlas of Canada, <http://atlas.nrcan.gc.ca/site/english/maps/historical/territorialevolution/1870/1>.

Creery, Ian, "The Inuit (Eskimo) of Canada" in Minority Rights Group, *ed. Polar Peoples: Self-determination and development* (London: Minority Rights Publication, 1994) 105 at 121-123.

Dickerson, Mark O., *Whose North? Political Change, Political Development, and Self-Government in the Northwest Territories* (Vancouver: UBC Press, 1992) at 85-90.

Kusugak, Jose, "The Tide Has Shifted: Nunavut Works for Us, and It Offers a Lesson to the Broader Global Community" in *Nunavut: Inuit Regain Control of Their Land and Their Lives*, IWGIA Document No. 102 (Copenhagen: IWGIA, 2000) at 53.

Michael, Patrick L, "Yukon: Parliamentary tradition in a small legislature" in Gary Levy & Graham White, eds., *Provincial and Territorial Legislatures in Canada* (Toronto: University of Toronto Press, 1989) 189 at 192-193.

O'Keefe, Kevin, "Northwest Territories: Accommodating the Future" in Gary Levy & Graham White, eds., *Provincial and Territorial Legislatures in Canada* (Toronto: University of Toronto Press, 1989) at 207-216.

- [6] In 1670, the British Crown gave a monopoly of the fur trade to the Hudson's Bay Company, headed by Prince Rupert. Along with the trade monopoly was the right to govern the land with rivers draining into the Hudson Bay. This land became known as Rupert's Land. Further exploration and trade led to the region being divided into two parts: Rupert's Land, which included the lands draining into the Hudson's Bay, and the North-Western Territory, which included the lands draining into the Arctic and Pacific oceans.
- [7] The area then known as Rupert's Land and the North-Western Territory covered over two million square miles and included what is now the Yukon, the NWT, parts of Nunavut (including the southwest portion of Baffin Island), Alberta, Saskatchewan, most of Manitoba, and the northern parts of Quebec and Ontario.
- [8] The *British North America Act, 1867*, now referred to as the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, anticipated and made provisions, in s. 146, for the admission of Rupert's Land and the North-Western Territory into the Union. A year later, on July 31, 1868, the *Rupert's Land Act, 1868* (U.K.), 31-32 Vict., c. 105, authorized the Crown to accept the surrender of Rupert's Land and to approve its admission into the Dominion of Canada. On June 23, 1870, an Order in Council of the British Parliament officially admitted Rupert's Land and the North-Western Territory to the Dominion of Canada. Ten years later, on July 3, 1880, Britain transferred its rights to the Arctic islands to Canada.
- [9] The first form of government was established in 1869 with passage of the *Temporary Government of Rupert's Land Act*, S.C. 1869, c. 3. It was replaced with the *North-West Territories Act*, S.C. 1875, c. 49, which authorized a lieutenant-governor

and appointed council, and included provisions for the gradual replacement of appointed councilors with elected representatives.

- [10] In 1888, the Assembly contemplated by the *North-West Territories Act* became a reality as the first fully elected Legislative Assembly came to power.
- [11] In 1897, an Executive Council was formed that gave the NWT close to the full responsible government that evolved in the colonies of Nova Scotia, New Brunswick and Upper and Lower Canada before Confederation in 1867. The Legislative Assembly was given all of the powers of the provinces under s. 92 of the *Constitution Act*, 1867. However, unlike the provinces whose powers were entrenched, its powers under the *North-West Territories Act* were subject to amendment by Parliament. Canada could, within one year, disallow any legislation passed by the Assembly. There were also limitations on the power to borrow money and, most importantly, Canada retained control over revenues from natural resources.
- [12] From 1898 to 1905, the boundaries of the NWT began to change. In 1898, as a response to the population increase that resulted from the Klondike Gold Rush, the Yukon Territory was created. In 1905, Alberta and Saskatchewan were carved out of the NWT. By 1908, the Yukon government had evolved to a commissioner with six elected councilors, but was short lived because of the decline of the gold economy. After the first world war, the council was reduced from six to three because of declining population and in 1932, the Office of Commissioner was abolished. The residual NWT reverted back to the status of a colony run from Ottawa, as it had been in the early 1870s and did not see elected representatives again until the 1950s.
- [13] During the early 1960s the issue of dividing the NWT was first raised by non-aboriginal residents in the west of the territory who believed that the territory stood a better chance of becoming a province if the eastern portion was removed. A bill was introduced in Parliament in 1962 to divide the NWT in two, but

because of a federal election in 1963, the bill never passed. A similar bill was introduced in 1964, but did not pass either.

- [14] In 1965, inspired by Denmark's Royal Commission on Greenland, Canada established the Advisory Commission on the Development of the Government of the NWT, also known as the Carrothers Commission after its chairman, A.W.R. Carrothers. This Commission was tasked with recommending a new structure for government in the NWT. The *Carrothers Report* was released in 1966 and recommended: keeping the territory unified, moving the seat of government from Ottawa to Yellowknife, devolving executive authority to the Commissioner, transferring administrative function from the central government to the territorial government, and creating a territorial civil service.
- [15] In 1967, Yellowknife was named the new capital of the NWT, and later that year Ottawa began its plans to transfer some of the territorial administration of the Department of Indian Affairs and Northern Development (DIAND) to the new capital. From 1967 to 1970, responsibility for major services such as education, welfare, municipal services and the development of local government was transferred from Ottawa to Yellowknife. At the same time, Canada expanded its involvement in developing non-renewable resources in the North.
- [16] The Council of the Northwest Territories was fully elected for the first time in 1975. The Council had 15 members and was soon called the "Legislative Assembly". Three members of the Assembly were chosen to sit on the Executive Council, which until that time had consisted solely of appointees.
- [17] In 1979, an amendment to the *Northwest Territories Act* provided for between 15 and 25 elected members. In October 1979, the Northwest Territories held its first election under the *Territorial Elections Ordinance*, instead of the *Canada Elections Act*. The majority of the 22 members elected were aboriginal.

- [18] On October 9, 1979, Jake Epp, the new Minister of DIAND, responded to continuing pressure from Yukon government leader Chris Pearson by further revising the instructions to Commissioner Ione Christensen to take the final step to responsible government. He instructed her to accept the advice of the Council in all matters in the Act which are delegated to the Commissioner in Council. By giving these instructions, the Minister transformed the Commissioner into the role of a *de facto* lieutenant-governor for the Yukon. The letter authorized the government leader to refer to himself as “Premier” and his cabinet members as “Ministers”. Cabinet documents were changed from Commissioner’s Orders and Records of Recommendation to Orders-in-Council and Records of Decision, to reflect the fact that cabinet had replaced the Commissioner as the ultimate decision-maker in the territory.
- [19] Similar letters were sent to the Commissioner of the Northwest Territories and, in 1979 the Commissioner ceased sitting in the Assembly during formal session. In 1984, the evolution to a full territorial responsible government known as the Government of the Northwest Territories (GNWT) was completed when the Commissioner removed himself from the Committee of the Whole and gave up responsibility for the civil service to an elected minister chosen by the Legislative Assembly.
- [20] As mentioned previously, the proposal for dividing the NWT first arose in 1962, when leaders in the western NWT were pushing for provincehood, and felt that the eastern Arctic was holding them back. Nearly 15 years later, the idea for dividing the NWT was brought up again, this time by Inuit leaders in the eastern Arctic. The Inuit proposed a division of the territory along the treeline with a new government in the eastern territory that would be called *Nunavut*, or “our land,” in Inuktitut. Specifically, the Inuit sought a settlement of a comprehensive land claim¹ that would set out and enshrine Inuit use of their lands. It would also compensate them for past and future use of Inuit lands by non-Inuit and would create a new government in the eastern and

¹ Comprehensive claims involve aboriginal organizations that had never entered a treaty with Canada, while specific claims involve groups that had a treaty but disputed the obligations.

central Arctic, with the capacity to protect and foster Inuit language, culture and social well-being. The Inuit Tapirisat of Canada (ITC) embarked on a campaign to publicize this proposal for a comprehensive land claim.

- [21] Canada responded to the proposed creation of Nunavut by reiterating that political development was not a subject that could be included in land claims negotiations.
- [22] In 1977, Canada appointed C.M. Drury as Special Representative for Constitutional Development in the Northwest Territories. Drury's primary objective was to assess the constitutional process since the *Carrothers Report* and suggest change as needed.
- [23] Drury released his controversial report, *Constitutional Development in the Northwest Territories*, in 1980. In it, he came out against the creation of Nunavut, and instead focused on the need to strengthen local governments. In his view, strengthening local councils and committees would address the sense of powerlessness that was pervading the territory and the sense that the government was being administered from afar.
- [24] The ITC insisted that they wanted a land claim and were not willing to compromise on that goal. In 1979, the NWT established a Unity Committee to evaluate the depth of feeling for division of the NWT into two territories. The Unity Committee found that the evidence was in favour of the split. A plebiscite was held and 60% of those in the NWT voted in favour. In 1982, Canada announced that, subject to certain conditions, the NWT would be split.
- [25] The Tungavik Federation of Nunavut (TFN) was established to negotiate the Inuit land claim. The Inuit made it clear that they wanted a new territory called Nunavut to be created. They were also pressing for greater responsibility in land and offshore management, and a share of Canada's royalties on oil, gas and mineral production. The Inuit proposed provincial-type responsibilities in areas of social policy, health, housing and labour. A critical element in the Inuit position was their

willingness to accept a “public government” rather than “aboriginal self-government.”

- [26] In 1989, after many years of negotiation, TFN leaders signed *An Agreement-In-Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada* for a land claim in the eastern Arctic. The Inuit surrendered on the issue of extinguishment, but insisted on signing a political accord committing Canada and the GNWT to the creation of Nunavut.
- [27] On July 9, 1992, Canada and the GNWT entered into a *Memorandum of Understanding* establishing a framework for the implementation and funding of anticipated land claims agreements with the Gwich'in, Sahtu Dene and Metis, and the TFN.
- [28] On May 25, 1993, the Inuit then residing to the east of the tree line of the NWT entered into the *Nunavut Land Claims Agreement* with Canada. 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 the *Nunavut Act*, S.C. 1993, c. 28.
- [29] TFN was the signatory on behalf of the Inuit of the NSA. NTI in the current action is an incorporated organization that succeeded the TFN, and currently represents Inuit under the *NLCA*.
- [30] The signatories on behalf of Canada were the Prime Minister and the Minister of DIAND.
- [31] The *NLCA* was also signed by the Government Leader and the Minister of Renewable Resources of the GNWT.
- [32] The Inuit ratified the *NLCA*. The Government of Canada also ratified the *NLCA* with the enactment of the *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29.

- [33] On the same day as the execution of the *NLCA*, Canada, the GNWT and TFN entered into *A Contract Relating To The Implementation of the Nunavut Final Agreement (Implementation Agreement)*, identifying their respective roles and responsibilities in the implementation of the *NLCA*.
- [34] On October 19, 1993, Canada entered into an agreement with the GNWT setting out the funding that would be provided by Canada to the GNWT to enable it to fulfill its obligations under the *Implementation Agreement* for the period 1993 to 2002.
- [35] Upon the expiry of the funding agreement with the GNWT on March 31, 2002, Canada entered into new funding agreements with the GN that continue to the present date.
- [36] The Amended Statement of Claim (ASOC) alleges 16 breaches of the *NLCA* by Canada, including inadequate funding and the failure to implement a number of activities, such as Inuit employment and training programs.
- [37] The ASOC also alleges 13 breaches of the fiduciary obligations of the Crown.
- [38] Canada filed a Statement of Defence on March 30, 2007, and the Notice for Particulars on April 25, 2007.
- [39] NTI filed a Reply and Joinder of Issue on April 27, 2007, and Particulars on June 21, 2007.

III. LAW

A. General principles on joinder of defendants

- [40] The *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 (*Nunavut Rules*), with respect to the joinder of parties reflect the same broad principles that exist in other Canadian common law jurisdictions. The general principle set out in rule 56 is one of “permissive joinder” that entitles the plaintiff to choose whom to sue and what claims to assert in an action.

[41] Rule 58(6)(a) authorizes a person to be voluntarily added where that person shows “an interest in the subject-matter or result of the action”.

[42] Where an existing party to the action seeks to force the plaintiff to add a person as a party, rule 58(3)(b) provides for what is known as compulsory joinder:

“58. (3)(b) ... a person be added who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court to adjudicate on and settle all the questions involved in the cause or matter or to protect the rights or interests of any person or class of persons interested under the plaintiff or defendant.”

[43] As noted in *Holmested and Watson: Ontario Civil Procedure (Holmested and Watson)*, compulsory joinder of “necessary parties” under this rule is a narrow exception to the general rule of permissive joinder where a plaintiff is permitted to decide whom to sue and what claims to assert in an action.

[44] The analysis to determine the necessary parties was described by Devlin J. in *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 All E.R. 273, [1956] 1 Q.B. 357 (Q.B.D.) (*Amon*) at 286-287:

“The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ... The only reason which makes it *necessary* to make a person a *party* to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.” [Emphasis in original]

[45] The Alberta equivalent of rule 58(3)(b) was considered in *Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.*, 1993 CarswellAlta 32, [1993] A.J. No. 317 (Q.B.) (*Amoco*). Virtue J. describes the test as follows:

“[13] ... My understanding of the test enunciated by Devlin, J., which, for the reasons set out below, I respectfully adopt, is this: Would the order for which the Plaintiff was asking directly affect the intervenor, not in his commercial interests, but in the enjoyment of his legal rights. And secondly, the only reason which makes it necessary that a party be added is that the question to be settled cannot be effectually and completely settled unless he is a party. Unless these tests are met the Court has no jurisdiction to add a party within the rule.”

[46] The *Amoco* test was approved by the Alberta Court of Appeal in *CPCS Ltd. v. Western Industrial Clay Products Ltd.* (1995), 31 Alta L.R. (3d) 257, [1995] A.J. No. 620, 1995 CarswellAlta 247 (*CPCS Ltd.*). However, that case is of limited assistance because it involved a voluntary request by a non-party insurer to be added as a defendant to defend an interlocutory motion that exposed it to potential liability. The Court noted that the insurer also satisfied the tests for compulsory joinder.

[47] Similarly, in *Kispiox Band of Indians v. British Columbia*, [1994] C.N.L.R. 47, 25 C.P.C. (3d) 121 (B.C.S.C.) (*Kispiox*) and *Boothroyd Indian Band v. British Columbia (A.G.)*, [1994] B.C.J. No. 2247, 1994 CarswellBC 2007 (S.C.) (*Boothroyd*), the Government of Canada did not object to being added as a defendant because the issues were based on the history of Crown land ownership. Therefore the issue was not “compulsory joinder” as is the case in *Peigan Indian Band v. Alberta*, 1998 ABQB 850, 231 A.R. 201, [1998] A.J. No. 1108 (*Peigan*).

[48] In *Peigan*, the plaintiff Band sued the Government of Alberta, who then applied to add the Government of Canada as a defendant. The Band opposed the application and relied on *Amon* to argue that it had no cause of action against Canada and that Canada was therefore not a necessary party. Moore J. denied Alberta's application, distinguishing *Kispiox* and *Boothroyd*, to conclude there was no issue between the Peigan Indian Band and Canada:

“[28] In my view, these two cases are distinguishable because there was an issue in both over Canada's interest in the precise matter being disputed. Here, there is no such issue. Either Alberta received all of the relevant interests, including the disputed interests, in the transfer from Canada (which leaves Canada out of the equation), or Alberta received all of the relevant interests, except any of the disputed interests which belong to the Band (again, leaving Canada out of the equation).”

[49] The commentary in *Holmested and Watson* was considered in *Brett Young Seeds Ltd. v. Assié Industries Ltd.*, 2002 MBQB 57, [2002] M.J. No. 58. In that case, the plaintiff sought to add a non-party as a defendant and filed an affidavit that provided evidence of the nature of the claim asserted rather than the proposed amended statement of claim. Beard J. stated that although it was not a prerequisite for the plaintiff to have a claim against the proposed defendant, he should still examine the affidavit evidence. After the examination of the affidavit he concluded that there was no cause of action against the proposed defendant and denied the application.

[50] In *Robson Bulldozing Ltd. v. Royal Bank of Canada* (1985), 62 B.C.L.R. 267, [1985] B.C.J. No. 2775 (S.C.) (*Robson*), McLaughlin J. also concluded that some evidence of a cause of action was essential to satisfying the British Columbia equivalent to *Nunavut Rules* rule 58(3)(b). She stated:

“[7] The power conferred upon the court to join a party is discretionary, to be exercised upon the proper evidence being produced ... The discretion should be generously exercised so as to enable effective adjudication upon all matters in dispute without delay, inconvenience and expense of separate actions and trials ... However, the applicant must depose to facts sufficient to persuade the court of

the applicability of the portion of R. 15(5) relied upon ... In particular, there must be some evidence indicating a cause of action ...”
[Citations omitted]

[51] Rule 15(5)(a)(ii) of the *B.C. Supreme Court Rules*, B.C. Reg. 221-90, states:

“... (5)(a) At any stage of a proceeding, the court on application by any person may

...

(ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party...”

[52] It is very close to *Nunavut Rules* rule 58(3)(b), which states:

“...(3) The Court may, on the application of a party of its own motion, order, with or without terms, that

...

(b) a person be added who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court to adjudicate on and settle all the questions involved in the cause or matter or to protect the rights or interests of any person or class of persons interested under the plaintiff or defendant.”

[53] However, rule 15(5) of the *B.C. Supreme Court Rules* has an additional subrule that states:

“(iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected

(A) with any relief claimed in the proceeding, or
(B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party.”

[54] McLaughlin J. concluded in *Robson* that the discretion conferred by both parts of B.C. rule 15(5) were subject to the condition that a cause of action must be made out:

“[8] In the case at bar, the first question is whether there is a possible cause of action between the proposed plaintiffs and the defendants. Unless a cause of action is suggested, it cannot be said that they ought to have been joined as parties, that their participation is necessary to ensure effectual adjudication, or that there is an issue between them which it is just and convenient be tried with the others: R. 15(5). Only if a cause of action is made out, do the conditions set out under R. 15(5) become relevant.”

[55] In *Delgamuukw v. British Columbia*, 1986 CarswellBC 1019 (S.C.), [1986] B.C.W.L.D. 1185, aff'd 1986 CarswellBC 1166, [1986] B.C.W.L.D. 3369, the plaintiff sued the Province of British Columbia who then sought to add Canada as a defendant. In granting the application, Trainor J. stated that the discretion to add a defendant should be generously exercised upon a full consideration of all proper evidence in an attempt to achieve full and effective disposition or adjudication of matters in dispute without delay, inconvenience and the expense of separate trials. However, Canada sought to be added as an intervenor and the plaintiff had prepared and was in the process of serving a notice on Canada under the *Constitutional Question Act*. Accordingly, Canada was going to be involved in the action and the only question was whether it should be made a full party defendant. Since the legal issues involved the broad issues of ownership of Crown lands arising from the *Royal Proclamation of 1763*, the *Terms of Union of British Columbia 1871*, and the *Constitution Act, 1867 and 1982*, Trainor J. had no difficulty in finding that Canada ought to be added as a defendant and that it was also just and convenient to do so.

B. General principles of third party notice

[56] Rule 142 of the *Nunavut Rules* permits a defendant to serve a third party notice on both parties and non-parties to the action:

"142. (1) A defendant may serve a third party notice on any person, whether or not the person is already a party to the action, where the defendant claims against that person that

- (a) he or she is entitled to contribution or indemnity;*
- (b) he or she is entitled to any relief or remedy that is related to or connected with the original subject matter of the action and that is substantially the same as some relief or remedy claimed by the plaintiff; or*
- (c) any question or issue relating to or connected with the original subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined, not only as between the plaintiff and the defendant, but also as between the plaintiff and the defendant and the third party, or between any of them."*

[57] *Nunavut Rules* rule 142 is much broader than the equivalent in Alberta. Rule 66 of the *Alberta Rules of Court*, Reg. 390/1968, states:

"66(1) When a defendant claims against any person (whether or not that person is already a party to the action) that the person is or may be liable to him for all or part of the plaintiff's claim against him he may serve a third party notice."

[58] *Nunavut Rules* rule 142 is closer to rule 29.01 in Manitoba and Ontario.

[59] *Court of Queen's Bench Rules*, Man. Reg. 553/88, states:

"29.01 A defendant may commence a third party claim against any person who is not a party to the action and who

- (a) is or may be liable to the defendant for all or part of the plaintiff's claim;*
- (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of a transaction or occurrence or series of transactions or occurrences involved in or related to the main action; or*

(c) should be bound by the determination of an issue arising between the plaintiff and the defendant."

[60] In Ontario, the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, states:

"29.01 A defendant may commence a third party claim against any person who is not a party to the action and who,

(a) is or may be liable to the defendant for all or part of the plaintiff's claim;

(b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,

(i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or

(ii) a related transaction or occurrence or series of transactions or occurrences; or

(c) should be bound by the determination of an issue arising between the plaintiff and the defendant."

[61] As noted by Blair J.A. in *Freudmann-Cohen v. Tran*, 2004 CanLII 34765 (ON C.A.), [2004] O.J. No. 1699, the old Ontario rule that was similar to Alberta rule 66 changed significantly in 1985 to broaden the use of a third party notice:

"[22] As several authorities have noted, the amendments effected by rule 29.01 were intended to make substantial changes in the law; claims which could not previously have been asserted under the former Rule 167 may well be allowed under rule 29 ... In a notation to rule 29.01, the authors of Holmsted and Watson, *Ontario Civil Procedure*, 2003, -- Volume 1, state, at 604:

"The significance of this change should not be underestimated. It changes the very nature of a third party claim. No longer is it limited to situations designed to obtain "a flow through of recovery" to D from the third party because of the judgment that the plaintiff may obtain against the defendant. Instead, it is now a general joinder device by which a defendant may engraft on to the main action any "related claim" he or she may have against non-parties, subject to the severance power given to the court by rule 29.09."

[23] The purpose of the new rule was to simplify third party procedure and to avoid multiplicity of proceedings ... This promotes efficiency and expedition in litigation, lowers costs, and enhances accessibility to the system. As E. Macdonald J. noted, in *Morey* [*Morey v. Knipple*, [1994] O.J. No. 2181, 50 A.C.W.S. (3d) 570 (Gen. Div.)] at para. 26, one of "the policies underlying the amendment to the rules, as reflected in Rule 29 is the objective of having the rights of all parties involved in the same factual situation determined without a multiplicity of proceedings" [Citations omitted]

[62] Similar comments were made by the Manitoba Court of Appeal in *Manitoba Development Corp. v. Arthur D. Little Inc.*, [1991] M.J. No. 410, 80 D.L.R. (4th) 459, where the same comment from *Holmsted and Watson* was approved:

"Third party procedure, first introduced in England in 1873, was at the outset "very wide in its terms", but in 1883 was confined in its application to claims for contribution and indemnity ... Manitoba Queen's Bench Rules similarly limited its availability. The 1939 Rule provided:

"135. Where a defendant is or claims to be entitled to receive contribution from any other person, whether already a party to the same action or not, who is, or would if sued have been, liable in respect to the same damages, whether as a joint tortfeasor or otherwise, or where a defendant is, or claims to be, entitled to contribution from, or to be indemnified by, any other person, whether already a party to the same action or not, he may serve a third party notice."

The amended rule, as it was before its repeal in 1989, still limited the availability of the proceedings. It read:

"135 Where a defendant claims to be entitled to contribution or indemnity or to any relief relating to the original subject of the action from any other person (hereinafter called "the third party") he may deliver, or be directed by the court to deliver, a third party notice stating the nature and grounds of his claim."

„

[Citations omitted]

[63] In *Metz v. Breland*, 1990 CarswellAlta 178, [1991] 1 W.W.R. 269 (C.A.), Coté J.A. held that a third party notice could not be used where the party issuing the third party notice seeks to enforce a duty which the third party owes to the plaintiff. However, these

comments are of limited value in interpreting rule 142 of the *Nunavut Rules* because the Alberta rule is much more restrictive than the corresponding rule in Nunavut, Ontario and Manitoba.

C. Compulsory joinder as last resort

[64] In considering the use of compulsory joinder, a court should weigh the negative and positive consequences. The availability of other options such as third party proceedings that will accomplish the same objective for lower costs could result in a dismissal of the application. In *Swearengen v. Bowater Canadian Forest Products Inc.*, 2007 CanLII 46252 (ON S.C.), [2007] O.J. No. 4251, the compulsory addition of a new defendant would have resulted in an extra trial with significant cost consequences. Kershman J. refused to add a defendant because third party proceedings might have been available.

[65] As held in *Slate Falls Nation v. Canada*, 2007 CanLII 1928 (ON S.C.), [2007] O.J. No. 348 (*Slate Falls*), where a third party claim is available, a defendant who seeks compulsory joinder should do so by adding the non-party as a third party.

IV. ARGUMENTS AND ANALYSIS

[66] Canada organizes its arguments to correspond with a reframed Amoco test. The first argument elaborates on whether the questions to be settled between NTI and Canada may be effectually and completely settled without the GN being added as a defendant. The second argument discusses whether the relief sought by NTI directly affects the GN in the enjoyment of its legal rights rather than its commercial interests.

[67] Prior to addressing these issues, some review of the constitutional status of the GNWT and GN is necessary to assess whether they were parties to the *NLCA*.

A. Constitutional status of GNWT and GN

- [68] In advancing the first argument, Canada discusses the constitutional status of the GNWT and the GN compared to the provinces, referring the Court to *Morin v. Northwest Territories (Commissioner)*, 1999 CanLII 6802 (NWT S.C.), [1999] N.W.T.J. No.5, 29 C.P.C. (4th) 362 (*Morin*), *Northwest Territories v. Public Service Alliance of Canada*, 2001 FCA 162, [2001] 3 F.C. 566, 40 C.H.R.R. 21 (*P.S.A.C. appeal*), and *Fédération Franco-ténoise v. Canada*, 2001 FCA 220, [2001] F.C. 341 (*Franco-ténoise*).
- [69] Canada argues that these cases establish that the GNWT and its successor the GN are separate and independent from Canada, with the full capacity to enter contracts and be sued separate and apart from Canada. This separate and independent status was recognized in the three-party *NLCA* with GNWT as a signatory. The rights and obligations of the GNWT passed to its successor the GN, pursuant to ss. 4(2) and 4(3) of the *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29.
- [70] While not disputing the separate status of the GNWT, NTI argues that the GNWT executed the agreement to “manifest the assent of Her Majesty the Queen in Right of Canada” and not as a separate party to the *NLCA*.
- [71] The GN takes a similar position indicating that the “signatures” page reflects the constitutional reality that Canada is the only Crown with constitutional authority to negotiate and settle land claims in the territories. There is no Crown in right of Northwest Territories or Nunavut, and therefore neither government had the legal capacity to be a party to the land claim agreement.
- [72] As noted in the historical evolution of territorial government discussed previously, the executive branch of the Government of Canada extended the principle of gradual responsible government to the territory obtained from Great Britain between 1868 and 1880. The initial form of government was patterned on the colonial governor and council appointed by Great Britain. This form of government gradually evolved in the pre-

confederation colonies into a responsible government model through pressure applied by the residents of the colonies, including rebellions in Upper and Lower Canada. Great Britain, fearing another American Revolution, slowly transferred executive authority from the appointed governor and council to an elected Assembly.

[73] When Alberta and Saskatchewan were created in 1905, the form of government in the residual NWT reverted to an appointed Commissioner and council that exercised executive and legislative power subject to instruction from the federal minister responsible for the territories. This continued until 1975, when all members of the council were elected. Between 1975 and 1984, the Commissioner reverted to the role of a lieutenant-governor and executive power transferred to an elected executive council.

[74] As noted by Vertes J. in *Morin* at 16:

“Since 1975 the structure of territorial government has come more and more to resemble that of a provincial government. In 1979 the federal Minister of Indian Affairs and Northern Development issued instructions to the Commissioner of the Yukon Territory which had the effect of achieving responsible government. The Commissioner withdrew from the cabinet and the Assembly; all cabinet positions were to be filled by the Assembly from among elected members; and the Commissioner was to accept the advice of cabinet in all matters. Thus the Commissioner became once again a "lieutenant-governor" type of figure while the government leader selected from the Assembly became a "premier". These terms were soon applied as well in the Northwest Territories.”

[75] The method chosen by Parliament to gradually devolve executive authority was the use of letters of instruction from the minister responsible for the Northwest Territories and occasional amendments to the *Northwest Territories Act*. In tandem with the instructions to the Commissioner, the Legislative Assembly of the Northwest Territories passed the *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, that created a territorial cabinet and more detailed provisions for the operation of the Assembly.

[76] The last letter of instruction was issued to the Commissioner of the Northwest Territories on March 29, 2000. It stated, in part, as set out in *Franco-ténoise*:

“[22]... The Executive Council, established by Section 9 of the Act, is the paramount institution for the exercise of executive authority in the Government of the Northwest Territories. Consistent with Canadian constitutional conventions, you shall act by and with the advice of your Premier and the Executive Council in all those manners [sic] relating to territorial policy and administrative decisions which fall within the competence of your office. There are only a few instances where your Premier alone has the capacity to provide direction or where the prerogatives you possess, similar to those held by a provincial Lieutenant Governor, may be of relevance.”

[77] The *Morin* judgement clearly establishes that the Legislative Assembly was an entity that is separate and distinct from the Parliament of Canada that had created it and sovereign within its sphere of powers. However, what is still unclear is the status of the Executive Council of the GNWT. Was it still part of the federal cabinet or had it evolved to some other independent status similar to the Legislative Assembly? The answer to this question emerged in the judgements of the Federal Court of Canada in *Franco-ténoise* and *Northwest Territories v. Public Service Alliance of Canada*, [1999] F.C.J. No. 1970, 183 D.L.R. (4th) 175 (*P.S.A.C. trial*).

[78] In *P.S.A.C. trial*, the Canadian Human Rights Commission challenged the status of the GNWT to apply for judicial review after the GNWT had been a party in the pay equity litigation for ten years. The GNWT had vigorously defended the pay equity claim and was the applicant in eight prior judgements of the Federal Court where there had been no objection to its status. Nevertheless, the Commission claimed that the GNWT was part of the Crown in right of Canada and therefore lacked the requisite standing to challenge a federal act. The motions judge, Dubé J., held that the GNWT was part of the federal Crown and did not have the status to apply for judicial review without the consent of the federal cabinet.

[79] In allowing the appeal, the Federal Court of Appeal in *P.S.A.C. appeal*, held that the Executive Council of the GNWT was distinct from the federal cabinet and had the right to defend itself in litigation stating:

“[15]...There is no doubt that the appellant has, with respect to the exercise of its statutory powers, standing before the courts to seek recognizance and enforcement of these powers. There is, in my view, also no doubt that the appellant has standing before the courts to defend itself when sued for an alleged abuse or misuse of these powers.”

[80] In *Franco-ténoise*, the Commissioner of the Northwest Territories, the Speaker of the Legislative Assembly and the Languages Commissioner of the Northwest Territories were sued in Federal Court by the plaintiff. The defendants raised a jurisdictional issue, arguing that they were not part of the Crown under s. 17(1), nor a federal board, commission or other tribunal under s. 18 of the *Federal Court Act*, R.S. 1985, c. F-7. The trial Judge dismissed the argument. However, in allowing the appeal, Décaré J.A summarizes the status of the territories as follows:

“[38] From this constitutional, legislative and jurisprudential overview, the following conclusions can be drawn:

(a) Constitutionally

[39] Constitutionally, the Territories do not have the same status as provinces. They remain a creature of the federal government, subject in principle to the good will of the Government of Canada. Her Majesty the Queen, in the Territories, is Her Majesty the Queen in right of Canada. Although some legislative and political arrangements may have the appearance of agreements between the Government of Canada and the Government of the Territories, these arrangements cannot convert the Territories into a province: indeed, the Territories cannot gain provincial status without an amendment to that effect to the Canadian Constitution, in accordance with the method provided by the Constitution.

(b) Legislatively

[40] Legislatively, the Parliament of Canada has invested the Territories with the attributes of a genuine responsible government and given this government the plenary executive, legislative and judicial

powers that the country's Constitution allowed Parliament to delegate, stopping just short of the plenary powers associated with a sovereign responsible government, those powers being limited by the Constitution to the Government of Canada and the provincial governments.

[41] However, Parliament has reserved to the Governor in Council the ultimate control over the exercise by the Government of the Territories of its legislative power. And Parliament went to some pains to note in its legislation that federal laws applied to the institutions of the Territories failing provision to the contrary.

[42] Although any comparison between territories and municipalities is unfair to the Territories since their status is closer to that of a province than it is to a municipality, it can be said that the Territories are no more the agents of their respective creators than are the municipalities when they administer the territory they have been empowered to manage.

(c) Politically

[43] Politically, the Government of Canada deals with the Territories as if it were dealing with provinces, inasmuch, it seems to me, as this is allowed by the Constitution. The political reality can clarify the juridical issue; however, it cannot falsify it: whatever the political appearances may be, there is not, in law, a "territorial" Crown, or a "territorial" province, or Her Majesty the Queen "in right of the Territories".

[81] The evolution of responsible government continued with passage of a new *Yukon Act* in 2002 that gave the territory some control over its natural resources and made a major change in its legislative powers. The previous legislation, *Yukon Act*, R.S.C. 1985, C. Y-2, contained the limitation also found in the *Northwest Territories Act* and the *Nunavut Act*:

“17. *The Commissioner in Council may, subject to this Act and any other Act of Parliament, make ordinances for the government of the Territory in relation to the following classes of subjects ...*”

[82] Instead, s. 18 of the new legislation, *Yukon Act*, S.C. 2002, c. 7 states:

“18. (1) *The Legislature may make laws in relation to the following classes of subjects in respect of Yukon ...*”

[83] This wording is almost identical to the wording used in s. 92 of the *Constitution Act*, 1867 on the legislative authority of the provinces and removes the automatic supremacy of federal legislation in the territory in cases of conflict. The federal cabinet continues to retain the power to disallow territorial legislation under s. 24(1) of the *Yukon Act*, 2002 by instructing the Commissioner to withhold consent to territorial legislation. However, as noted in paragraph 52 of *Morin*, this power is likely redundant by convention.

[84] I conclude from this review of the evolution of government in the Northwest Territories that, at the date of execution of the *NLCA*, the Executive Council of the GNWT had the same capacity to enter contracts as the cabinet of a province subject to any inherent constitutional limitations flowing from the status of being a territory.

[85] In Nunavut there was instant responsible government shortly after the territory came into existence on April 1, 1999 when the first Executive Council took office after the first election. The GN acquired the same constitutional status as the GNWT, except that in the case of an inconsistency between the *NLCA* and federal or territorial laws, the *NLCA* will prevail:

“2.12.2 Where there is any inconsistency or conflict between any federal, territorial and local government laws, and the Agreement, the Agreement shall prevail to the extent of the inconsistency or conflict.”

B. Was the GNWT a party to the *NLCA*?

(a) Arguments

- [86] Canada relies on the numerous references in the *NLCA* to “Territorial Government” obligations or shared obligations with Canada, to argue that the GNWT was a party to the *NLCA*. As foundation for the argument, Canada relies on the GNWT being a signatory to the *NLCA*, and to the separate implementation and funding contracts. Assuming the correctness of this argument, Canada also argues that the GN as the successor government and a separate signatory to a number of funding agreements also acquired the party status of the GNWT.
- [87] Both respondents dispute that the GNWT was a party to the *NLCA*. They maintain that the GNWT was a signatory as part of the Crown in right of Canada because, as held in *Franco-ténoise*, Canada is the only Crown in the NWT.
- [88] The respondents argue that the GNWT did not have the constitutional authority to enter into the *NLCA* with the Inuit because it has similar legislative capacity to a province. Even the provinces have no legislative capacity in this area because the Applicant has the exclusive power to legislate under s. 91(24) of the *Constitution Act, 1867* in relation to “Indians, and Lands reserved for the Indians”. The interpretation of “Indians, and Lands reserved for the Indians” was expanded to include Inuit and Inuit lands in *Re Eskimos*, [1939] S.C.R. 104, [1939] S.C.J. No. 5. As noted in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14, this legislative jurisdiction encompasses the exclusive power to extinguish aboriginal rights, including aboriginal title through the negotiation and settlement of aboriginal treaties and land claims. Finally, article 2.2.1 of the *NLCA* provides that it is constitutionally protected under s. 35 of the *Constitution Act, 1982*:

“2.2.1 The Agreement shall be a land claims agreement within the meaning of Section 35 of the *Constitution Act, 1982*.”

- [89] The respondents also rely on the introductory words of article 1.1.6 of the *NLCA* as negating any sense of shared responsibility with the “Territorial Government”.

"1.1.6 Without diminishing or otherwise altering the responsibilities of Her Majesty The Queen in Right of Canada under the Agreement, where, in the Agreement, it is unclear from the context which Government is to perform a function or where the context indicates that both Governments are to perform a function, without abrogating or derogating from their obligations under the Agreement or altering their respective jurisdictions, the two Governments may designate one of them to perform that function on behalf of the other or both. The DIO shall be given notice of such designation.” [Emphasis added]

(b) Analysis

- [90] The *NLCA* is a unique agreement because it combines in a comprehensive land claim agreement a fundamental term committing Canada to create another territorial public government. The land claim process has evolved since Canada reversed its position on the *White Paper, 1969* and began the process of negotiating land claims. In 1974 Canada created the Office of Native Claims and began negotiations to settle land claims that continue to this day.
- [91] In 1980, Canada appointed the first chief negotiator from outside the public service to assure greater neutrality and access to ministers. In 1986, the Office of Native Claims was abolished and replaced by several specialized units within DIAND. New federal policy papers were published in 1987, 1991 and 1996, and both provincial and territorial governments created their own administrative structures for claims .
- [92] The negotiation of aboriginal land claims is without question a federal power. Section 91(24) of the *Constitution Act, 1867* grants it authority in relation to “Indians, and Lands reserved for the Indians”. The federal authority over “Indians, and Lands reserved for the Indians” extends to Nunavut as a result of the case *Re Eskimos*. While there may be jurisdictional issues between Canada and the provinces over the extent of this

federal power, see *R. v. Blais*, 2003 SCC 44, [2003] S.C.R. 236, they are not present in the territories. As held in *Franco-ténoise*, there is only one Crown in the territories and that is the Crown in right of Canada. There is no Crown in right of Nunavut, Northwest Territories or the Yukon.

- [93] The land claims that were settled in the Northwest Territories with the Inuvialuit in 1984, the Gwich'in in 1992 and the Sahtu Dene and Metis in 1994, were strictly two party agreements between Canada and the organizations representing the aboriginal people residing in the land claim area. However, the *Umbrella Final Agreement (UFA)* signed on May 29, 1993 between Canada, the Government of the Yukon and the Council of Yukon Indians, was a three party framework agreement that set out the terms for final land claim settlements and self-government agreements with each of the Yukon's 14 First Nations. Final agreements with four First Nations were signed later in 1993.
- [94] Similarly, the 2003 *Tlicho Comprehensive Land Claims and Self-Government Agreement* in the NWT added a self-government component to the land claim.
- [95] The addition of self-government to these land claim agreements necessitated the inclusion of the respective territorial government as a formal party because the agreements required some delegation of the constitutional powers of the territory to the aboriginal organization.
- [96] In contrast, TFN and Canada did not require any delegation of powers by the GNWT because Canada and TFN intended to create a new territory and public government. Canada could exercise its constitutional authority over territorial lands in s. 4 of the *Constitution Act, 1871* (U.K.), 34-35 Vict., c. 28, reprinted in R.S.C. 1985, App. II, by amending the *Northwest Territories Act* and passing the *Nunavut Act* to create the new territory without any legal or constitutional participation by the GNWT.

[97] However, the cooperation of the GNWT was essential to the creation of Nunavut because of the time lag between the execution of the *NLCA* and the passage of the legislation that created Nunavut. During this period, the NSA was still part of the Northwest Territories and subject to the legislative and executive authority of the GNWT. Canada and the TFN had to develop rules for the transition period that required the involvement of the GNWT to ensure a smooth transition process was in place when the reins of government were transferred to the GN.

[98] Although most of these rules are found in the implementation and funding agreements, the GNWT is also mentioned in the *NLCA*. Canada and TFN could have included the GNWT as a formal party, as occurred in the Tlicho land claim agreement, because of the significant transition role to be played by the GNWT. However, in my view TFN and Canada made a deliberate choice not to include the GNWT as a formal party, by entitling the *NLCA* as an “Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada”. It is significant that four days after the execution of the *NLCA*, the Government of the Yukon was included as a formal party to the *UFA*.

[99] At the same time, the significant non-party role of the GNWT could not be ignored in the *NLCA*. The compromise was to exclude the GNWT as formal party but have it sign the agreement in the signature section entitled “Her Majesty the Queen in right of Canada”.

[100] In furtherance of this intention, the *NLCA* was structured to recognize the role of the GNWT as a non-party by including articles 4 and 37. The former is a term best described as an agreement to agree to a political accord. It states:

“4.1.2 Therefore, Canada and the Territorial Government and Tungavik Federation of Nunavut shall negotiate a political accord to deal with the establishment of Nunavut. The political accord shall establish a precise date for recommending to Parliament legislation necessary to establish the Nunavut Territory and the Nunavut Government, and a transitional process. It is the intention of the Parties that the date shall coincide with recommending ratification

legislation to Parliament unless Tungavik Federation of Nunavut agrees otherwise. The political accord shall also provide for the types of powers of the Nunavut Government, certain principles relating to the financing of the Nunavut Government, and the time limits for the coming into existence and operation of the Nunavut Territorial Government. The political accord shall be finalized before the Inuit ratification vote. It is the intention of the Parties to complete the Political Accord by no later than April 1, 1992.”

[101] Article 37: “Implementation”, provides the broad outline of the transition envisaged by Canada and TFN that required the participation of the GNWT. The details were provided in the *Implementation Agreement* signed on the same day as the *NLCA* and the successive funding agreements.

[102] Although the GNWT is included in the article 1.1.1 definition of “Territorial Government”, only article 24 contains any detail on the responsibilities of the GNWT. That article commits the Territorial Government to maintain preferential procurement policies in the NSA. Except for some mention of the GNWT in schedules 9-1 and 33-1, all of the other responsibilities of the GNWT come from the *Implementation Agreement*. The article 1.1.1 definition of “Territorial Government” includes “any successor government or governments, having jurisdiction over all or part of the Nunavut Settlement Area”, to bring in the GN when it came into existence.

[103] Canada and the TFN were careful to exclude the *Implementation Agreement* as a land claim agreement under s. 35 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. The *NLCA* states:

“37.2.6 The provisions of this Article or of the Implementation Plan identifying the obligations and responsibilities of any Minister, official or agent of the Crown acting on behalf of the Government of Canada or the Territorial Government shall not be interpreted so as to derogate from the obligations of Her Majesty under the Agreement or so as to alter, directly or indirectly, the respective jurisdictions of the Government of Canada and the Territorial Government.”

...

37.3.1 Within sixty days of the date of ratification of the Agreement, an Implementation Panel shall be established.”

[104] These words clearly indicate an intention by the TFN and Canada to treat the *Implementation Agreement* as separate but complementary to the *NLCA*. Accordingly, the inclusion of the GNWT as a party to the *Implementation Agreement* has little bearing on whether it is a party to the *NLCA*.

[105] The execution of separate funding agreements with both the GNWT and the GN simply provided the means to achieve the goals of the *Implementation Agreement*. They similarly have no bearing on whether the GNWT was a party to the *NLCA*.

[106] To link the *NLCA* and the *Implementation Agreement*, the GNWT signed the *NLCA* under the party described as “Her Majesty the Queen in right of Canada” rather than as separate formal party. It did so as a government separate and apart from Canada to indicate its consent to those parts of the *NLCA* that required its participation, and not as a party to the *NLCA*.

[107] Further indication of the intention of the parties is evident in the exclusion of the GNWT from any amendment to the *NLCA*:

“2.13.1 An amendment to the Agreement shall require the consent of the Parties as evidenced by,

(a) in respect of Her Majesty, an order of the Governor in Council, and

(b) in respect of Inuit, a resolution of the Tungavik, except as provided otherwise by its bylaws or Section 35.9.1,

but the jurisdiction of the Legislative Assembly shall not be altered, and the Territorial Government shall not incur any financial obligations, through any amendment without its written consent.”

[108] I conclude therefore that GNWT is not a party to the *NLCA*. It follows therefore that the GN, which was not in existence at the time of the execution of the *NLCA*, is not a party either.

C. Can the question between NTI and Canada be effectively and completely settled without GN being added as a defendant?

(a) Arguments

(i) Canada

[109] Canada argues that paragraphs 12 (d) through (i), 46 through 58, 12 (k), 60 through 64, 12 (m), 12 (n), 65, 86 (xiii) and (xiv) of the ASOC allege breaches of the *NLCA* that carry obligations or objectives that are shared between Canada and the GN. These include Inuit employment obligations in article 23, procurement policies in article 24 and Inuit impact benefit agreements in articles 8 and 9.

[110] As a result of these shared responsibilities, this Court will be required to determine the scope of the responsibility of Canada and the GN under these articles. Canada argues that the Court would be unable to effectively and completely determine the liability of each government for the public services they control unless the GN is added as a defendant.

[111] Canada argues that the issues raised in the ASOC directly relate to the jurisdiction of the GN to legislate with respect to the employment of territorial officers and expenditure of money for territorial purposes. Since any order of this Court may directly impact the jurisdiction of the GN over these legislative areas, the GN must necessarily be added as a party.

[112] Finally, Canada notes that NTI in paragraphs 12 (n)-(o), 66, 71-80 and 86 (a)(xiv)-(xv) of the ASOC took issue with the provision of the implementation funding by Canada to Nunavut. Since NTI was not a party to the funding agreements, the GN must be added as a defendant so that this issue may be properly addressed.

(ii) Respondents

[113] The respondents acknowledge that the GN and other non-signatory parties such as municipalities are bound by the *NLCA* and have distinct rights and obligations by virtue of s. 4(2) of the

Nunavut Land Claims Agreement Act. However, the existence of these public law rights and obligations does not make the GN a proper party to the action unless there is an allegation that those distinct obligations have been breached. Since there are no allegations by NTI against the GN in the ASOC, it follows that the GN is not a proper party in the litigation even though the GN may be financially affected by the litigation.

[114] NTI denies that there are any shared responsibilities between Canada and the GN under the *NLCA*, relying on the words of the first two sentences of article 1.1.6:

“Without diminishing or otherwise altering the responsibilities of Her Majesty The Queen in Right of Canada under the Agreement ...”

[115] NTI argues that these words make it clear that there was no intention to share responsibility. Furthermore, it is not pleaded in the Applicant’s Statement of Defence nor included in the evidence on this motion, that Canada has purported to designate that the GNWT or GN perform its functions under the *NLCA*.

[116] NTI, relying on *Robson*, argues that there is no cause of action between itself and the GN, because the GN is not a party to the *NLCA*. To add the GN as a party in this situation would lead to the absurd situation where the new defendant could immediately move to have the action dismissed. As held in *Lecomte v. Bell Telephone Co. of Canada*, [1931] O.J. No. 27, 2 D.L.R. 241 (C.A.), there is no jurisdiction to compel a plaintiff to assert new claims against an added defendant.

[117] Both respondents argue that any potential liability of the GN for the alleged breaches of the *NLCA* is better addressed through the use of the third party rules in the *Nunavut Rules*.

(b) Analysis

[118] As noted above, neither the GNWT nor the GN were parties to the *NLCA*. The parties to the agreement were TFN and Canada. The fundamental terms of the *NLCA* are that the Inuit of the NSA surrendered their aboriginal title to the NSA in consideration of

three distinct obligations on the part of Canada. First, the Inuit were to receive monetary compensation for the NSA. Second, the Inuit were to receive title to some land with surface rights only, some land with rights to the minerals below the surface, and some land where they had rights to harvest wildlife and have input into the land use. Third, Canada agreed to take the necessary steps to create the new Territory of Nunavut with a full public government.

[119] In order to satisfy the third obligation, Canada and TFN included article 4.1.2, committing Canada to take the necessary steps to ensure that the Territory of Nunavut was created with full public government. The passage of the *Nunavut Act* and the *Nunavut Land Claims Agreement Act* accomplished this objective. The participation of the GNWT was necessary to ensure the orderly transfer of the administration of public government in the NSA before April 1, 1999. It also required the participation of an interim commissioner who was authorized to enter into agreements but was required to act on written instructions issued by the Minister of DIAND. Finally, after the Executive Council of the GN assumed executive power, the GN had a role to play as the GNWT slowly ended its involvement by 2002.

[120] The exact role that each participant was to play in the transitional period was unclear at the time of the execution of the *NLCA*. As a result, article 1.1.6 provided the flexibility for the different functions and responsibilities described to be delegated back and forth among the different participants as would best accomplish the objectives. One purpose for the definition of “Government” in article 1.1.1 was to facilitate the flexibility required by article 1.1.6. However, it appears this article was never used because it was not pleaded in the Statement of Defence.

[121] The Applicant argues that the definition of “Government” was also necessary because the wording of articles 8, 9, 23 and 24 envisage a joint obligation between Canada and the GN. In describing these obligations, the drafters of the *NLCA* used the

word “Government” instead of “Canada” or “Territorial Government”.

[122] Article 8 requires the negotiation of Inuit impact benefit agreements (IIBAs) for the existing federal parks known as Auyuittuq and Ellesmere and any new parks that Canada or the GN might establish in the NSA. Canada was required to negotiate IIBAs for Auyuittuq and Ellesmere within two years of the execution of the agreement. The government that established a new park was obligated to negotiate an IIBA. Article 8.4.8 obligates “Government” to give preference to Inuit in the awarding of contracts for the establishment and operation of any parks in the NSA.

[123] Article 9 requires “Government” to conduct studies in consultation with Inuit to determine the need for new legislation or amendments to existing legislation to designate and manage conservation areas in terrestrial and marine environments in the NSA.

[124] The objective of article 23 was to increase Inuit participation in government employment in the NSA to a representative level. The article recognizes that the achievement of this objective would require initiatives by Inuit and by “Government”. “Government Employment” is defined to include both the federal and territorial public service and “representative level” is defined as a level of Inuit employment within “Government” reflecting the ratio of Inuit to the total population in the NSA.

[125] I am satisfied that these articles and the definition of “Government” in article 1.1.1 could support the argument of Canada that there are joint responsibilities for both Canada and the GN.

[126] Canada argues that because of this potential joint liability, the Court will be unable to effectually and completely determine the liability of each government for the public services they control unless the GN is added as a defendant.

[127] Canada proposes that the Court add the GN as a defendant and direct that the respondent NTI amend its pleadings by substituting the word “Defendants” in place of the word “Crown” in all of the relevant paragraphs of the ASOC.

[128] The jurisprudence discussed above is clear that this type of order should only be used where no other options are available and only where there is a cause of action between the plaintiff and proposed defendant. In the case at bar there is no cause of action between NTI and the GN, and there are other options.

[129] A cause of action has been defined as "a set of facts, which, if proven, would entitle the plaintiff to some form of relief" (*Sarnelli Estate v. Fraietta*, [1981] A.J. No. 722, 28 A.R. 482 (Q.B.) at para. 19).

[130] As stated in *Robson*:

“[7] ... However, the applicant must depose to facts sufficient to persuade the court of the applicability of the portion of R. 15(5) relied upon ... In particular, there must be some evidence indicating a cause of action ...” [Citations omitted]

[131] There are no facts pleaded by NTI which, if established, would entitle it to relief against the GN, and therefore there is no cause of action. As a result, NTI makes no claim against the GN and seeks its remedies against Canada because only Canada was a party to the *NLCA*.

[132] The rationale for the requirement of a cause of action is clear when considered with *Nunavut Rules* rule 129 on striking out pleadings. As argued by NTI, the lack of a cause of action could set up the absurd situation where a defendant who is added could immediately move to have action dismissed.

[133] Canada argues that the lack of a cause of action is not fatal because the GN may be impacted financially in its ability to exercise its jurisdiction under the *Nunavut Act*. As a result, there is sufficient connection to the action to add the GN as a defendant as occurred in *Kispiox*. The flaw in this argument is

that in *Kispiox*, Canada did not oppose being added as a defendant although the plaintiff Band objected. Meiklem J. then noted that the protest of the Band about delay rang hollow in the light of the protracted prosecution of the action.

[134] As noted above in *CPCS Ltd.*, *Delgamuukw*, *Kispiox* and *Boothroyd*, the proposed defendant was added because there was no real objection from the proposed defendant. Where the proposed defendant and the plaintiff oppose and there is no cause of action, as in *Peigan*, the request to add a defendant should be refused. This result is consistent with the principle, expressed in *Lecomte*, that the plaintiff should be free to choose the parties he, she or it wishes to sue. I agree with the following statement from *Lecomte*:

“[15] As to the appeal to compel the plaintiffs to claim against the city corporation, I can find no authority, statutory or otherwise, which would justify the Court in compelling any plaintiff to claim anything but what he chooses to claim – he is dominus litis, master of his own litigation, and we should not interfere with his discretion as to the person or persons he will sue. What may be the result at the trial, if any, of his refusal to sue the city, as to costs or otherwise, we need not consider.”

[135] The *NLCA* contains provisions that apply to a number of non-parties such as developers, municipalities and territorial governments. The GN is not contractually bound by the agreement because it was not a party to it. However, the *NLCA* is binding on the GN because of ss. 4(2) and 4(3) of the *Nunavut Land Claims Agreement Act*. These public law obligations may be enforced by any person who meets the tests for legal standing, including NTI and Canada. Since it is Canada that is raising these public law obligations, it makes more sense that Canada should take the necessary steps to enforce them rather than having this Court order the respondent NTI to do so unwillingly.

[136] If there is no cause of action but a non-party is affected, they may apply to be added as a defendant as occurred in *CPCS Ltd.*, *Delgamuukw*, *Kispiox* and *Boothroyd*. If this fails, they can seek to be added as an intervenor. The intervention rules have

substantially broadened to allow the participation of non-parties not directly affected by the litigation. See *Yellowknife Public Denominational District Education Authority v. Euchner*, 2008 NWTCA 01, [2008] N.W.T.J. No. 2. As noted in *Holmested and Watson*, compulsory joinder is a narrow exception to the general rule that a plaintiff is free to decide who to sue. The authority quoted in *Holmested and Watson* is a 1957 article in the *Michigan Law Review*. I suspect that the broadening of the intervention rules will make it even rarer.

[137] The soundness of having Canada pursue the public law remedies against the GN is further fortified, because Canada has available to it broad third party rules in the *Nunavut Rules*. Using these rules will also avoid the cost and delay ramifications noted by the GN. It submitted with some justification that its forced addition as a defendant will have significant cost and delay ramifications on both respondents. The current parties are already in the process of finalizing the production of documents and the commencement of discoveries. Adding a defendant will delay the respondent NTI and increase its costs. It will also force the GN to expend significant time and resources in a matter where the NTI is not pursuing a claim against the GN.

[138] Canada relies on *Metz* to argue that a third party notice could not be issued. *Metz* held that a third party notice could be used to enforce duties that the third party owes to the defendant but could not be used where the party issuing the third party notice seeks to enforce a duty which the third party owes to the plaintiff.

[139] However, as noted previously, the Alberta third party rules are much more restrictive than those of Ontario or Nunavut. As in Alberta, the *Nunavut Rules* permit a third party notice where contribution or indemnity is claimed. However, the *Nunavut Rules* also allow it to be used where the relief is connected with the original subject matter and is substantially the same:

“142. (1) (b) he or she is entitled to any relief or remedy that is related to or connected with the original subject matter of the action and that is substantially the same as some relief or remedy claimed by the plaintiff; or

(c) any question or issue relating to or connected with the original subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined, not only as between the plaintiff and the defendant, but also as between the plaintiff and the defendant and the third party, or between any of them.”

[140] The claims of Canada about the joint responsibility with the GN fit into either (b) or (c).

[141] Canada also points to the allegations in the ASOC about Canada’s failure to provide adequate implementation funding to the GN. Canada argues that because NTI was not a party to the implementation funding agreements, the only manner of dealing with the issue is to add the GN as a defendant. In support of the argument, Canada relies on *Alberta Treasury Branches v. Ghermezian*, 2000 ABCA 228, [2000] A.J. No. 963. In that case the Alberta Court of Appeal held that all parties to a contract must be before the Court to enable it to fully adjudicate on the issues.

[142] While NTI was not party to the bilateral implementation funding agreements, it was a party to the *NLCA* and the *Implementation Agreement*. The pleadings reveal that the issue is the interpretation of the *NLCA*, not the funding agreements. NTI pleads in paragraph 73 of the ASOC that:

“The funding provided to the GN pursuant to the bilateral agreement was grossly inadequate to fund the ongoing responsibilities under the Agreement that the Government of Canada had purported to assign to the territorial government by way of the bilateral agreement.”

[143] Canada denies the allegation in the Statement of Defence:

“... the funding provided to the Territorial government was and continues to be adequate to fund the ongoing responsibilities of the Territorial government under the Agreement. The GN succeeded the GNWT as the Territorial government under the bilateral agreement in 1999 with the coming into force of the *Nunavut Act*, S.C. 1993, c. 28. The funding in the bilateral funding agreement is in addition to the funding provided by the Crown to the GN under the Territorial Formula Financing arrangement, which provides for the financing of

many governmental functions that fulfill, in whole or in part some of the obligations of the GN under the Agreement.”

[144] NTI anchors these allegations in article 37.2.2 of the *NLCA* and the *Implementation Plan* that impose funding obligations on Canada to the GNWT and its successor the GN. It alleges breaches of these agreements in the provision of inadequate funding to the GN under the bilateral funding agreements. The absence of NTI as a party to the funding agreements does not disentitle it from raising it as an issue in the ASOC without the addition of the GN as a defendant. Any requirement for the participation of the GN in this issue may also be addressed through the third party procedure.

[145] When a third party claim is available, a defendant who seeks compulsory joinder should do so by adding the non-party as a third party. As stated in *Slate Falls*:

“[123] Further, even if joinder were appropriate in light of Ontario's reversal of position as to the necessity of a royal fiat, it is not the court's policy to require a plaintiff to sue someone he or she does not wish to sue ... The preferable course in circumstances in which a non-party may also be liable is for a party defendant to add the non-party as a third party, rather than compel the plaintiff to sue a party he or she does not wish to sue ...” [Citations omitted]

D. Will the order which NTI seeks directly affect Nunavut, not in its commercial interests but in the enjoyment of its legal rights?

[146] The relief sought by NTI is against Canada, not the GN. If there is an ultimate finding at trial that the GN is liable for some part of the Governmental responsibility, it will impact the GN financially and it could also affect its legal rights. However, the rights of the GN can be addressed through third party proceedings. If the GN were concerned about the impact on its rights, it would have supported the application.

V. CONCLUSION

[147] The application is dismissed. Costs are awarded to the respondents and shall be costs in the cause. Any third party notices contemplated by Canada shall be filed within 20 days of the date of the filing of this judgement.

Dated at the City of Iqaluit this 11th day of April, 2008

Mr. Justice Earl D. Johnson
Nunavut Court of Justice