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Nunavut Court of Justice

Fax

\# 2nd

To:	Michele Annich Erin George dougald Brown	**From:**	Janine Budgell IV
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Phone:		**Date:**	June 2nd, 2009
Re:	NTI Appeal Judgment	**CC:**	

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Good day,

Please find the following memorandum of Judgement in relation to file 08-08-05CAP.

Please notify me personally by emailing jbudgell@gov.nu.ca confirming receipt.

Sincerely,

Janine Budgell

Janine I. Budgell

Nunavut Court of Justice

In the Court of Appeal of Nunavut

Citation: Nunavut Tunngavik Incorporated v. Canada (Attorney General), 2009 NUCA

Date: 200905xx
Docket: 08-08-05 CAP

FILED
JUN 0 2 2009
CLERK COURT OF APPEAL OF NUNAVUT

Between:

The Inuit of Nunavut as represented by Nunavut Tunngavik Incorporated

Respondent
(Plaintiff)

\- and -

The Attorney General of Canada

Appellant
(Defendant)

\- and -

The Commissioner of Nunavut as represented by the Government of Nunavut and the Government of Nunavut

Third Party

The Court:

The Honourable Madam Justice Louise Charbonneau
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice E. Johnson
Dated the 11th day of April, 2008
Filed on the 29th day of April, 2008
(2008 NUCJ 11, Docket: 08-06-713-CVC)

Memorandum of Judgment

The Court:

[1] The issue on this appeal is whether the Government of Nunavut should be a defendant in this litigation, or whether it is sufficient that the Government of Nunavut be a third party.

[2] The action was started by Nunavut Tunngavik Incorporated, a body that was created to assist in the implementation of a comprehensive Land Claims Agreement negotiated by the Inuit and the Government of Canada. Nunavut Tunngavik claims that Canada is in breach of the Agreement. Canada alleges that the Government of Nunavut is responsible for performing some of the obligations that are said to be breached, or received some of the funding designated for performance of the Agreement, and that the Government of Nunavut should therefore also be a party defendant. The Government of Nunavut and Nunavut Tunngavik disagree, arguing that the Government of Nunavut should only be added as a third party.

[3] The chambers judge concluded that the Government of Nunavut should only be a third party, a decision which Canada now appeals: ***Nunavut Tunngavik Incorporated v. Canada (Attorney General)***, 2008 NUCJ 11, 58 C.P.C. (6th) 46.

Facts

[4] In 1993 the Tungavik Federation of Nunavut negotiated a comprehensive Land Claims Agreement covering the central and eastern Arctic. The Agreement was approved by a majority vote of the Inuit, and was subsequently ratified by the *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29. The Land Claims Agreement was confirmed to be a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982*.

[5] In addition to resolving the land claims of the Inuit, the Land Claims Agreement contemplated the creation of a new territory called Nunavut. Nunavut was to be carved out of the Northwest Territories, and it would have its own representative government.

[6] The *Nunavut Land Claims Agreement Act* provides in part:

> 4. (1) The Agreement is hereby ratified, given effect and declared valid.
>
> (2) For greater certainty, the Agreement is binding on all persons and bodies that are not parties to the Agreement.
>
> (3) For greater certainty, any person or body on which the Agreement confers a right, privilege, benefit or power or imposes a duty or liability may exercise the right, privilege, benefit or power, shall perform the duty or is subject to the liability, to the extent provided for by the Agreement.

It is clear that the Land Claims Agreement is not an ordinary common law contract, and it is of limited utility to analyze it that way. It has an obvious constitutional dimension, it is legislative in its effect and binding on non-parties to the contract, and it has many other features not present in ordinary contracts.

[7] The cover page of the Land Claims Agreement states that it is an agreement between "The Inuit of the Nunavut Settlement Area" and "Her Majesty the Queen in Right of Canada". The signature page provides a place for signatures "For Her Majesty the Queen in Right of Canada". Beneath that main heading are places for signatures "On behalf of the Government of Canada" and "On behalf of the Government of the Northwest Territories". There is also a main heading "For the Inuit of the Nunavut Settlement Area", with the signature lines headed "On behalf of the Tungavik Federation of Nunavut".

[8] In addition to the formal signatories to the Agreement, the Agreement mentions or imposes obligations on a number of other public institutions. They include the Commissioner of the Northwest Territories, the Legislative Assembly of the Northwest Territories and any successor councils having jurisdiction over all or part of the Nunavut Settlement Area, and various boards, organizations and commissions. The agreement also provided for the transfer of the specified "Inuit Owned Lands" to the plaintiff Nunavut Tunngavik Incorporated.

[9] The term "Parties" is defined to mean the "Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada". The term "Government" is defined to mean:

> . . . the Government of Canada or the Territorial Government or both, as the context requires, depending on their jurisdiction and the subject matter referred to, or as determined pursuant to Section 1.1.6.

The term "Territorial Government" is defined to mean:

> . . . the Government of the Northwest Territories, or any successor government or governments, having jurisdiction over all or part of the Nunavut Settlement Area.

The Government of Nunavut did not exist at the time, but as indicated s. 4.1.1 of the Agreement contemplated the creation of ". . . a new Nunavut Territory, with its own Legislative Assembly and public government, separate from the Government of the remainder of the Northwest Territories."

[10] Section 1.1.6 of the Land Claims Agreement provides:

> <u>Without diminishing or otherwise altering the responsibilities of Her Majesty the Queen in Right of Canada under the Agreement</u>, 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 [Designated Inuit Organization] shall be given notice of such designation.

The interpretation of the underlined portion of this section is said to be pivotal to the outcome of this litigation.

[11] A number of collateral agreements were entered into at the same time as the Land Claims Agreement. They included "A Contract Relating to the Implementation of the Nunavut Final Agreement", which provided implementation funding to the Government of the Northwest Territories from 1993 to 2002. Nunavut was created during this initial funding period, on April 1, 1999, pursuant to the *Nunavut Act*, S.C. 1993, c. 28.

The Action

[12] Nunavut Tunngavik Incorporated commenced this action in 2006, naming only the Government of Canada as a defendant. Numerous breaches are alleged, including inadequate provision of funding for the various boards, organizations and commissions recognized or created under the Agreement, and the failure to implement various monitoring plans, initiatives, analyses, and policies as contemplated by the Agreement. It is also pleaded that the Agreement has created fiduciary obligations in Canada, apart from its contractual obligations, and that Canada is in breach of those obligations. The pleaded fiduciary obligations include an obligation to provide adequate funding to implement the Agreement, and a corresponding duty to negotiate for the necessary funding in good faith.

[13] The Statement of Claim pleads that after its creation the Government of Nunavut was given approximately $2 million per year by Canada for the purposes of implementing the Agreement, but that this sum was "grossly inadequate". It is pleaded that attempts to negotiate a new funding arrangement after the expiry of the Implementation Agreement were unsuccessful, and that Canada has unilaterally determined the level of funding since then. The Statement of Claim seeks numerous declarations that Canada is in breach of the Agreement, an order for specific performance, continuing supervision by the Court of Canada's performance of the Agreement, and $1 billion in damages.

[14] The Statement of Defence includes a general denial of the claims. It is specifically pleaded that proper and adequate funding was provided during the initial implementation period, and that funding has since been increased. It is pleaded that the plaintiff is in breach of the Agreement by refusing to participate in certain decision-making mechanisms provided for in the Agreement. In some specific instances it is pleaded that funding was provided to the Government of Nunavut for use in implementing the provisions of the Agreement, and that this funding was "in addition to the funding provided by the Crown to the GN [Government of Nunavut] under the Territorial Formula Financing arrangement, which provides for financing of many governmental functions that fulfill, in whole or in part, some obligations of the GN under the Agreement".

[15] Canada took the position that the Government of Nunavut is a necessary party to the litigation, and brought an application to have it added as a defendant. Canada alleges that the Government of Nunavut is bound by the Land Claims Agreement both pursuant to the *Nunavut Land Claims Agreement Act* and as the successor to the Government of the Northwest Territories. Canada also alleges that the Government of Nunavut is a party to various funding arrangements that are in place to enable the implementation of the Agreement.

[16] The plaintiff and the Government of Nunavut opposed the application, arguing that if Canada wanted the Government of Nunavut involved in the action, then Canada should issue a third party notice against the Government of Nunavut.

The Chambers Decision

[17] The chambers judge dismissed the application, and concluded that the appropriate procedure was for the Government of Nunavut to be added as a third party. A number of issues were analyzed.

[18] It was argued that neither the Government of the Northwest Territories, nor the Government of Nunavut has any separate constitutional or legal existence separate from that of the Government of Canada. In other words, there is no separate manifestation of the Crown in right of the two Territories. The chambers judge reviewed the evolution of representative government in the Territories, and concluded at paras. 84-5 that the two Territories do have a separate existence, and an independent capacity to enter into contracts, and to be sued.

[19] Next the chambers judge analyzed whether the Government of the Northwest Territories was a party to the Land Claims Agreement. Since the Agreement operates *in rem* by virtue of ss. 4 (2) and (3) of the *Nunavut Land Claims Agreement Act*, and privity of contract is not an operative factor, this issue is perhaps of theoretical interest only. Nevertheless, it was argued that the Government of the Northwest Territories was not a separate signatory of the Agreement, but only signed as a manifestation of Her Majesty the Queen in Right of Canada as discussed, *supra*, para. 7. Thus it was argued that the Government of the Northwest Territories was not a party to the agreement, and therefore the Government of Nunavut could not be a party as a successor to the Government of the Northwest Territories. The chambers judge concluded at paras. 98-9 that a deliberate decision was made not to make the Government of the Northwest Territories a formal party, but that at the same time it had a "significant non-party role [that] . . . could not be ignored". As a result, the Government of Nunavut is not a party either.

[20] It was not necessary to conclusively resolve these collateral issues in order to dispose of the application. While the parties argued a number of these sub-issues, this was not a summary judgment application, and the formal judgment that resulted did not incorporate any final adjudication on these collateral issues. The discussion of these issues was a part of the analysis, but that was only to identify the live issues in the litigation, which in turn would identify the necessary parties. To illustrate, the issue was not "Is the Government of Nunavut a party to the Land Claims

Agreement?", but rather "Assuming that the identity of the parties to the Land Claims Agreement will be decided in this litigation, who are the necessary parties to the litigation?". None of these ancillary issues should be taken to have been conclusively decided in this application to decide the proper form of the pleadings.

[21] The chambers judge went on to analyze the Rules of Court, and concluded that Canada had not met the test for adding a defendant to the proceedings. The chambers judge concluded that there was a supportable argument that Canada and the Government of Nunavut had joint responsibilities under the Agreement. However, there were no facts pled in the statement of claim that would entitle the plaintiff to relief against the Government of Nunavut. In addition to adding the Government of Nunavut as a defendant, it would be necessary to order the plaintiff to make a number of amendments to trigger a claim against that new defendant. The chambers judge questioned the jurisdiction to force a plaintiff to add substantive claims. There was also the viable alternative of issuing a third party notice. He concluded that Canada should add the Government of Nunavut as a third party, if it wished.

[22] Canada launched the present appeal, but also filed a third party notice within the time specified by the chambers judge. The third party notice alleges, in part, that the Government of Nunavut is a "Government" within the meaning of the Land Claims Agreement, and that some of the liabilities the plaintiff seeks to impose on Canada are jointly the responsibility of the Government of Nunavut.

Standard of Review

[23] The interpretation of the Rules of Court is a question of law, and the standard of review is correctness: ***Housen v. Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8. The application of the Rules to a particular set of facts is a mixed question of fact and law, and the standard of review is palpable and overriding error: ***Housen*** at para. 36. To the extent that there is a discretion involved in amending pleadings or adding parties, the decision will only be interfered with on appeal if it is based on an error in principle, or is wholly unreasonable: ***Indian Residential Schools (Re),*** 2001 ABCA 216, 96 Alta. L.R. (3d) 16, 286 A.R. 307 at para. 23; ***Burtch v. Barnes Estate*** (2006), 80 O.R. (3d) 365, 27 C.P.C. (6th) 199 at para. 22; ***Bodnar v. The Cash Store Inc.***, 2008 BCCA 192 at para. 10.

Adding Parties to an Action

[24] The Rules of Court, R.N.W.T 010-96, that relate to the addition of parties and the issuing of third party notices are as follows:

> 58(3) The Court may, on the application of a party or 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.

> 59(1) Where a defendant is added or substituted, the plaintiff shall, unless otherwise ordered, amend the statement of claim in such manner as the joining of the defendant requires and serve the amended statement of claim on that defendant.

> 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.

The third party rule is no longer limited to claims of contribution and indemnity, and can support the addition of a wide range of related claims between the defendant and the third party.

[25] The general rule of civil procedure is that the plaintiff is entitled to decide what causes of action it wishes to pursue, what remedies it will claim, and against whom that relief will be claimed. There are, however, instances where it is inappropriate to adjudicate in the absence of necessary parties. In those situations Rule 58 allows the addition of parties against the wishes of the plaintiff.

[26] The objectives of the Rule allowing the addition of defendants against the wishes of the plaintiff are set out in Louisell and Hazard, *Cases and Materials on Pleading and Procedure* (4th ed. 1979), at p. 571:

> [T]he objectives of the rule were, and still are, simple enough: from the viewpoint of the court, to do a complete job on the controversy in one sitting; from the viewpoint of those already parties, to protect them against the consequences of subsequent litigation reaching inconsistent results; from the viewpoint of those not

> made parties but by the rule required to be brought in, to assure that their practical out-of-court situation would not be adversely affected by changes in the *status quo* wrought in consequence of the judgment.

The rule is, however, said to create only a narrow exception to the general rule that the plaintiff can structure the litigation as it chooses.

[27] A frequently quoted authority on the Rule is ***Amon v. Raphael Tuck & Sons Ltd.***, [1956] 1 Q.B. 357 where Devlin J. stated at pp. 379-80:

> . . . 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. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found a complete answer, but no one would suggest that it is *necessary* to hear them for that purpose. 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.
>
> On the wider construction of the rule, I do not understand where the line is to be drawn - it is conceded that it must be drawn somewhere - between a commercial interest in the question involved in the case and a legal one. It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally - that is by curtailing his legal rights. That will not be the case unless an order may be made any action which will operate on something in which he is legally interested.

The respondents argued that Canada has not met the test set out in ***Amon***.

[28] A number of factors are relevant in determining whether a party should be added as a defendant. The addition of a party will be inappropriate if the legal duties alleged do not exist as a matter of law. If there is "no cause of action" in that sense of the phrase, then addition is inappropriate. But if the very existence of the legal duties is unclear, and determining the existence

of those duties is one of the objectives of the suit, then the action should not in effect be summarily dismissed if there is some doubt over the existence of that legal duty. As stated in ***Amon*** at p. 382 "It is sufficient that a *prima facie* cause of action should be shown."

[29] The chambers judge held at paras. 128, 131 that joinder was inappropriate because no cause of action was pleaded against the Government of Nunavut. It is not surprising that the statement of claim pleads no cause of action against parties not named as defendants, but that is too narrow a formulation of the issue. As ***Amon*** notes at p. 382, the existence of a cause of action is sufficient even if it is not pled. The plaintiff argues that Canada owes it certain duties. Canada defends on the basis that some of those duties are actually owed by the Government of Nunavut. The pleadings, read as a whole, do therefore raise a "cause of action", or justiciable issue, *vis a vis* the Government of Nunavut: does the Government of Nunavut owe any of the duties alleged in the statement of claim? There is such a *prima facie* cause of action by the plaintiff against the Government of Nunavut, even if it is not pled.

[30] As previously noted, the motion to add a defendant should not be turned into an application for summary dismissal, unless the matter is sufficiently clear: ***Decock v. Alberta***, 2000 ABCA 122, 79 Alta. L.R. (3d) 11, 255 A.R. 234 at para. 20. In this case there is a live dispute as to whether the Government of Nunavut owes any duties jointly with Canada under the Land Claims Agreement. The pleadings (i.e. Canada's defence) introduce that "cause of action" or justiciable issue. The issue is not clear enough to warrant summary determination. It is obviously inappropriate to decide that issue in the absence of the Government of Nunavut itself, leading to the conclusion that the Government of Nunavut should be a party to this litigation.

[31] The respondents argue that no relief is claimed in the statement of claim against the Government of Nunavut, making joinder inappropriate. But that must always be the case in applications of this sort; relief would never be claimed against non-parties. Consequential amendments to the statement of claim would almost invariably be required if a defendant is added, as recognized by Rule 59. In some situations it is even appropriate to join a defendant, even though no relief is claimed against that defendant, in order to have that defendant bound by the result: ***Edmonton Friends of the North Environmental Society v. Canada (Minister of Western Economic Diversification)***, [1991] 1 F.C. 416, 73 D.L.R. (4th) 653 (C.A.) at p. 426; ***Delgamuukw v. British Columbia***, 1986 CarswellBC 1166 (C.A.).

[32] In any event, the relief claimed in the statement of claim implicitly engages the liability of the Government of Nunavut. The relief claimed is a long list of declarations that Canada is in breach of various obligations. The trial judge might grant or deny those declarations. But if the declarations are denied, that could be either because Canada has discharged its duties, or because Canada never owed all of the duties in the first place. In other words, the declarations may be denied because the duty is owed by the Government of Nunavut, or because Canada under its agreements with the Government Nunavut provided Nunavut with the means to fulfil Canada's duties, or Nunavut's duties, or both. Further, the trial judge is not bound to give a "true" or "false" answer to the requested declarations. The trial judge might give a qualified answer, to the effect that Canada and

the Government of Nunavut share or are both in breach of the obligation. So the request for these broadly worded declarations does implicitly engage relief against the Government of Nunavut.

[33] Ensuring that the potential new defendant is bound by the result can be important for several related reasons. First, the courts wish to avoid inconsistent verdicts. If it will be argued that the missing defendant owes certain duties, it is important that the conclusion be binding on that defendant. Otherwise, subsequent litigation which does involve that defendant might come to a different conclusion. Second, it is inappropriate to comment on the obligations of the missing defendant in its absence. While this factor will normally motivate the missing defendant to have itself added as a defendant, the existing parties may seek that relief as well. Third, it is an inefficient use of court resources to have multiple proceedings to resolve common factual and legal issues between the same parties. The pleadings in this case strongly suggest that some issues could well be subjected to duplicated analysis if both governments are not involved in this action. Fourth, ensuring that all proper parties are involved allows for a more complete discovery process. In this case Canada argues, in part, that it has adequately funded the Government of Nunavut, or that the Government of Nunavut itself has the obligation under the Agreement to provide some of the funding that the plaintiff alleges is inadequate. Whatever conclusion the court may reach on these issues, it is important that the Government of Nunavut be bound by that result. There should not be the possibility that subsequent litigation between Canada and the Government of Nunavut could lead to an inconsistent result. The Court should also not pronounce on this subject in the absence of submissions from the Government of Nunavut.

[34] The respondents argue that the Government of Nunavut is not affected in its "legal" interests as required by the test as set out in ***Amon***. As Devlin J. explained in ***Amon***, some potential defendants would merely have parallel or a similar interests to those being litigated. The example of the standard form contract is given. An adjudication about the rights arising under one such contract would not affect the *legal* interests of persons who are parties to separate but similar standard form contracts. Only the *commercial* interests of the latter group would be affected. But here there is only one Land Claims Agreement, and the issue is the responsibility of the Government of Nunavut under that very agreement. Any pronouncements by the trial court about the duties of the Government of Nunavut under the Agreement will affect the Government of Nunavut in its legal rights, not just in its commercial interests.

[35] Given the public nature of the Land Claims Agreement, the universality of the rights and obligations it creates, and the obvious interrelationship between Canada, the Government of Nunavut, and Nunavut Tunngavik, it is evident that the Government of Nunavut should be a party to this litigation. It would be inappropriate to determine the broader obligations of Canada to fund public activities in Nunavut without the presence of the Government of Nunavut. Any ruling on the adequacy of Canada's funding of the Government of Nunavut or public activities in Nunavut should be binding not only on Canada and Nunavut Tunngavik, but also on the Government of Nunavut. Any ruling on whether the Government of Nunavut has a separate legal existence, is a "Government" under the Land Claims Agreement, or has other obligations under the Agreement should not be decided in its absence. It would have been convenient if the Government of Nunavut

had been named as a defendant, even if no relief was claimed against it. The plaintiff, however, chose not to do so, and the issue is how the litigation should proceed from this point forward.

[36] Whether there are viable alternatives to adding a defendant to the litigation is a relevant consideration. There are very few substantive differences between adding the Government of Nunavut as a defendant, or as a third party. First, the third party rule is not limited to claims of contribution and indemnity, and the issues that Canada wishes to engage against the Government of Nunavut are clearly "connected with the original subject matter". There is no reason to interpret Rule 142 as being limited to issues solely arising between the defendant and the third party as urged by Canada: ***Freudmann-Cohen v. Tran*** (2004), 70 O.R. (3d) 667, 238 D.L.R. (4th) 428 (C.A.) at para. 22.

[37] Second, the issues raised in the third party notice should ensure that the document production and discovery obligations of the Government of Nunavut are identical no matter what type of party it may be. Third, any relief that Canada is entitled to against the Government of Nunavut can be granted.

[38] Fourth, any issue estoppel or *res judicata* that arises in the litigation will be binding on all the parties to the litigation, regardless of status. Rule 153 provides that a third party "shall be considered for all purposes to be a party to the action". Since an important purpose of third party proceedings is to avoid multiplicity of actions, and to ensure that all necessary parties are present, an issue estoppel should arise against all the parties respecting every issue in the litigation: ***Leblanc v. Canada***, 2005 FCA 234, 339 N.R. 244 at para. 6; ***Toronto (City) v. Canadian Union of Public Employees, Local 79***, [2003] 3 S.C.R. 77, 2003 SCC 63 at para. 37; ***Alberta Treasury Branches v. Toth***, 2006 ABQB 83, 393 A.R. 269 at paras. 23-33. This is especially so under the modern wider form of third-party procedure in effect in Nunavut. Under Rule 142(1)(c) third party proceedings can raise any question or issue "relating to or connected with the original subject matter . . . 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". It can be assumed that the Government of Nunavut will respond under Rule 147(3) to the third party notice since issued by Canada, engaging all issues relating to the "liability" claimed by Canada and by Nunavut Tunngavik Incorporated. The pleadings in the third party notice are therefore likely to duplicate the issues in the statement of claim and the statement of defence, ensuring that all three parties will be bound by the result.

[39] There appear to be only two substantive implications of adding the Government of Nunavut as a third party as ordered by the chambers judge. First, a plaintiff is not entitled to direct relief against a third party: ***Double N Earthmovers Ltd. v. Edmonton (City)***, 2005 ABCA 104, 41 Alta. L.R. (4th) 205 at paras. 59-62 affirmed [2007] 1 S.C.R. 116, 2007 SCC 3; ***Burry v. Centennial Properties Ltd.*** (1980), 38 N.S.R. (2d) 450 at p. 458, 106 D.L.R. (3d) 619 (C.A.); ***Corda v. Koszowski*** (1956), 64 Man. R. 232, 22 W.W.R. 75 (C.A.) at p. 78. Thus, Nunavut Tunngavik would not be entitled to any relief against the Government of Nunavut. But Nunavut Tunngavik has disclaimed any interest in obtaining any such relief, a position that it is entitled to take. That would not disentitle Canada to any relief against the Government of Nunavut.

[40] The second implication is that a plaintiff can settle (or possibly discontinue) the claim against a defendant. Even though Rule 59 appears to permit the Court to order Nunavut Tunngavik to add allegations against the Government of Nunavut, there is no effective way to force a plaintiff to diligently pursue such a claim. The plaintiff could attempt to settle that claim for a nominal amount, or enter into an agreement with the new defendant to pursue a common strategy. The plaintiff could simply decline to marshal the necessary evidence to pursue that claim. Adding a defendant over the objections of the plaintiff does not ensure that the necessary adversarial context will be present in the litigation. On the other hand, if the missing party is added as a third party, the defendant can ensure that an adversarial context remains through to the trial. Further, while the court retains a jurisdiction to regulate the pleading process, it is generally desirable in both legal and practical terms that parties have an autonomous ability to set out and present their own positions. As noted above, the defendant's wide ability to plead under Rule 142(1) enables it to ensure the issues are covered, and allows the third party to fully respond, while preserving the ability of the plaintiff to plead its own claim as it chooses.

[41] In this case there are advantages to having the Government of Nunavut added as a defendant, and other advantages to having it added as a third party. The decision of the chambers judge to select the latter solution discloses no error of principle, and is not unreasonable. No injustice will accrue to Canada, and the Government of Nunavut and Nunavut Tunngavik will be bound by the decision of the trial court. The appeal should accordingly be dismissed.

Appeal heard on May 12, 2009

Memorandum filed at Iqaluit, Nunavut
this 2nd day of ~~May~~ June, 2009

Charbonneau J.A.

Watson J.A.

Slatter J.A.

Appearances:

K. Epton and M.E. Annich
for the Appellant

D.E. Brown
for the Respondent

L.Y. Land
for the Third Party