

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

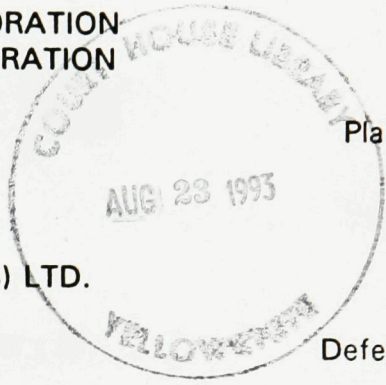
INUVIALUIT REGIONAL CORPORATION
and INUVIALUIT LAND CORPORATION

Plaintiffs

- and -

CANADIAN REINDEER (1978) LTD.

Defendant



Motion to amend the statement of defence and add a counterclaim joining the Crown in right of Canada granted.

Heard at Yellowknife on 15th March 1993

Judgment filed: 14th May 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Plaintiffs
(Respondents):

Gordon S. Griffiths, Esq.

Counsel for the Attorney General
of Canada (Respondent):

Brett Webber, Esq.

Counsel for the Defendant (Applicant):

Everett L. Bunnell, Q.C.

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

INDIVIDUALS AND CORPORATIONS

AND

THE

PLAINTIFFS



Defendants

IN REPLY TO THE AFFIDAVIT OF DEFENCE

Filed in support of the statement of defence and add a counterclaim joining the Crown in right of Canada named.

Filed at Yellowknife on 15th March 1993

Signature of Plaintiff

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.A. WERDT

Counsel for the Plaintiff

Counsel for the Defendant

Counsel for the Defendant



IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

INUVIALUIT REGIONAL CORPORATION
and INUVIALUIT LAND CORPORATION

Plaintiffs

- and -

CANADIAN REINDEER (1978) LTD.

Defendant

REASONS FOR JUDGMENT

This is a crucial motion, not only because the defendant seeks leave to amend its statement of defence and add a counterclaim but also because it proposes to join a new party, the Crown in right of Canada ("the Crown"), as a co-defendant to the intended counterclaim in addition to the plaintiffs (defendants-to-be to that counterclaim).

The motion is opposed by the plaintiffs and by the Crown, to whom notice of the motion was duly given. They say that the claims proposed to be made in the intended counterclaim are statute barred and that the Court is without jurisdiction to relieve against the statutory bar in the circumstances of the case. Even if, on the contrary, the Court has jurisdiction to grant relief from the statutory bar, the plaintiffs and the Crown submit that the Court should decline to grant that relief given the circumstances.

I. The Issues

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Three issues have been argued, which I shall state as follows:

1. May a counterclaim now issue, whether by amendment of the statement of defence or otherwise?
2. If so, is the claim to be advanced in the intended counterclaim statute barred?
3. If so, may the order sought by the defendant nevertheless be granted in the Court's judicial discretion?

II. Background

4

In the 1920s, when the Crown entered into discussions with representatives of the Inuvialuit people then living on the Arctic Coast in the Mackenzie Delta region of the Northwest Territories, it became apparent that they were not interested in entering into any treaty along the lines of those between the Crown and various bands of Indians to the south, whether pursuant to or merely in the spirit of the **Royal Proclamation of 1763**, R.S.C. 1985 (Appendix II, No. 1). However, since caribou were apparently scarce there at that time, the Crown arranged, at the request of the Inuvialuit, to bring a herd of reindeer into the region by land from Alaska through the Yukon Territory. That was done, with the reindeer arriving in the early 1930s after a historic trek.

5

Since the reindeer were Crown property and the Crown's policy seems to have been to only promote agriculture (by herding and raising the animals for sale of their hides and meat), hunting them was prohibited subject to penalties. As may be imagined, local hunters being then altogether unfamiliar with the domestication of animals other than sled

dogs, and culturally unatuned to agricultural practices, the presence of the reindeer in the region for ranching purposes has taken some getting used to by the Inuvialuit, even after all these years (during which a number of the Inuvialuit were employed as reindeer herders for the Crown and, more recently, have been so employed by the defendant).

It is not disputed for purposes of this motion that the reindeer herd has occupied a tract of land on the Tuktoyaktuk peninsula east of the Mackenzie Delta, extending over an area of some 18,000 square miles, since its arrival in the Northwest Territories in the 1930s. Until 1974, the herd (by then, many generations later in descent from the original herd) was owned and managed by the Crown. In that year, the Crown sold the herd to a private company known as Canadian Reindeer Limited.

In the meantime, the land had been withdrawn from disposal by the Crown under the **Territorial Lands Act**, R.S.C. 1952, c. 263 (now R.S.C. 1985 (3rd Supp.) c.7) pursuant to orders in council enacted in 1952 and 1955, whereby the land was designated a reindeer grazing reserve.

The agreement between the Crown and Canadian Reindeer Limited, as evidenced in the affidavit material on file, by which the herd was sold to that company in 1974, refers to the 1955 order in council and the reserve set aside thereby, stating that "it is Her Majesty's intent to continue to make such provision for the grazing of a reindeer herd".

In 1978 Canadian Reindeer Limited sold the herd and assigned its rights and

interests under the 1974 agreement with the Crown to the defendant, the herd's present owner.

10 Years of negotiation (between the Inuvialuit, through the Committee for Original Peoples' Entitlement, a corporation acting on their behalf, and the Crown) culminated in 1985 in the settlement of the Inuvialuit land claim pursuant to the **Western Arctic (Inuvialuit) Claims Settlement Act, 1984, c. 24**. By the settlement, as approved and given effect by that Act, tracts of land in fee simple were granted by the Crown to the Inuvialuit, including the land within the reindeer grazing reserve above mentioned. No mention of reindeer or that reserve is made in the settlement agreement or the Act.

11 The plaintiffs are Inuvialuit corporations as defined in the settlement agreement. It is not necessary for present purposes to say more about their roles than that the plaintiff Inuvialuit Regional Corporation has management responsibilities in respect of the lands subject to that agreement and the **Western Arctic (Inuvialuit) Claims Settlement Act**; the plaintiff Inuvialuit Land Corporation, a wholly-owned subsidiary of its co-plaintiff, is vested with title to and ownership of the Inuvialuit interests in those lands.

III. The Grazing Rights Dispute

12 The plaintiffs in this action are seeking both declaratory and injunctive relief against the defendant together with damages for trespass upon the land comprising the reindeer grazing reserve, including grazing fees and other charges claimed by the plaintiffs against the defendant. As the plaintiffs' action is framed, they say that the defendant has

no right to graze its reindeer on their land without permission from them. In consequence, they ask for a declaration that the defendant has been and is trespassing on their land together with an injunction requiring the defendant to remove its reindeer from that land.

The defendant denies that it has been or is trespassing on the land in question. It claims to be entitled to continue grazing its reindeer herd on that land by virtue of the 1974 agreement by which the Crown sold the herd to the defendant's assignor, Canadian Reindeer Limited, and the terms of that company's agreement with the defendant in 1978. The defendant claims that it is exercising its lawful rights under those agreements which, it says, were not in any way affected or diminished by the settlement agreement or, I presume, the **Western Arctic (Inuvialuit) Claims Settlement Act**.

It is not necessary, for present purposes, to discuss the specifics of this dispute.

IV. History of Proceedings

The plaintiffs issued their statement of claim in May 1987. The defendant filed its statement of defence together with a third party notice to the Crown in September 1987. At the same time, the defendant commenced an action against the Crown in the Federal Court of Canada, claiming contribution, indemnity, compensation and damages for inclusion by the Crown of the reindeer grazing reserve in the lands granted by the Crown to the Inuvialuit.

The plaintiffs' claim for interim injunctive relief in the present action was heard

on motion but was adjourned, without any further hearing date being fixed, in September 1987.

17 The defendant discontinued its third party proceedings in this action, against the Crown, in September 1990. And, in August 1992, the defendant obtained leave from the Federal Court to discontinue its action against the Crown in that Court without prejudice to its rights to bring a further proceeding in that Court if leave is not granted by this Court to permit the defendant to bring its claim against the Crown in this Court.

18 Following discontinuance of the third party proceedings against the Crown in this action, the plaintiffs have filed their statement as to documents and the parties have conducted mutual examinations for discovery. Further examinations of the plaintiffs are scheduled to be held in June 1993. Answers by the defendant on the undertakings it gave on examination for discovery had yet to be delivered when this motion was heard earlier this year.

V. The Proposed Amendment

19 As I understand the plaintiffs' position, the principal objection which they take is to the proposed counterclaim. They do not oppose any mere detailing of the statement of defence by the addition of various particulars. The Crown is concerned only to oppose its joinder in the counterclaim.

20 The proposed counterclaim includes still further allegations of fact as against the Crown only. And it makes claims for declaratory relief against both the plaintiffs and

the Crown as well as further claims against the Crown alone for contribution, indemnity and compensation for its alleged expropriation of the defendant's grazing rights together with damages for breach of contract among other things (in the event that the plaintiffs should succeed in their present action against the defendant).

As yet there is nothing in the pleadings filed to date or in the proposed counterclaim referring to any statutory bar, under the **Limitations of Action Act**, R.S.N.W.T. 1988, c. L-8 or otherwise.

VI. Discussion

1. May a counterclaim now issue?

Rule 5 of the **Rules of Court** states:

5. The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

Rules 126 and 127 of the **Rules of Court** read as follows:

126. The court may at any stage of the proceedings allow any party to alter or amend his pleadings or other proceedings in such manner and on such terms as may be necessary for the purpose of determining the real question in issue between the parties.

127. The court may at any time, on terms as to costs or otherwise, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

In addition, note may be made of Rule 518:

518. No pleading or other proceedings shall be defeated on the ground of an alleged defect of form.

24 I refer to Rule 518 since it strengthens my view that Rule 127 is not concerned solely with defects or errors in form only. Had that been the intention, Rule 127 would surely have so stated, bearing in mind the reference to such defects in Rule 518. Indeed, Rule 518 enables the Court to ignore mere defects in form only.

25 An examination of the record of the Federal Court proceedings above mentioned supports the defendant's submission that, in substance, its claims in that action were entirely dependent on the ultimate outcome of the plaintiffs' claims against the defendant in this Court. That action having been discontinued, as already described, it is plain that the proposed counterclaim (incorporating the claims made previously in the Federal Court action) is now sought to be brought before this Court to avoid a multiplicity of courts and of actions.

26 Prior to February 1st 1992 the defendant could not proceed with the proposed counterclaim in this Court, by reason of the exclusive jurisdiction, in proceedings against the Crown, then vested in the Federal Court. That exclusivity of jurisdiction was only removed, so as to confer concurrent jurisdiction on this Court, on February 1st 1992 pursuant to **An Act to Amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof, 1990, c.8.**

27 What is in contention here is not the proposed amendments to the statement of defence, but the addition of a further distinct pleading. Yet it would, I think, be mere mindless formalism to insist on that distinction of pleading where the Rules require, as they do, that a counterclaim be conjoined, as a matter of form, to the statement of

defence. That conjunction can surely always be effected by leave to amend, in keeping with the spirit and intent expressed in Rule 5 and by analogy to Rules 126 and 127. Subrule 4(2) so provides:

4. (2) As to all matters not provided for in these Rules the practice as far as may be shall be regulated by analogy thereto.

The circumstances of the case plainly call for a grant of leave to amend the statement of defence as sought by the defendant and to allow the addition of a counterclaim, having regard to the above mentioned amendment last year of the **Federal Court Act** and the discontinuance by the defendant then of its Federal Court action. See **Basarsky v. Quinlan**, [1972] S.C.R. 380, [1972] 1 W.W.R. 303, 24 D.L.R. (3d) 720; **Porbak v. Gibb et al.**, [1983] 2 W.W.R. 339, 32 C.P.C. 121, 44 A.R. 18, 23 Alta. L.R. (2d) 363 (C.A.); and **Stevenson & Coté**, **Civil Procedure Guide** (1989), at page 360.

The questions which follow will first have to be considered, of course, before a decision is made on whether that addition is to be permitted in this instance.

2. Is the proposed counterclaim statute barred?

Only the proposed joinder of the Crown and the allegations and claims against the Crown in the intended counterclaim are in contention. The amended statement of defence is itself not in dispute. Nor is the proposed addition of the counterclaim in issue, to the extent that it impleads the plaintiffs. It is only in so far as the defendant claims relief against the Crown that issuance of the intended counterclaim is opposed by the plaintiffs and, of course, the Crown.

31 It is submitted on behalf of the plaintiffs that since the matters giving rise to the proposed counterclaim are the execution of the settlement agreement between the Committee for Original Peoples' Entitlement (on behalf of the Inuvialuit) and the Crown, on June 5th 1984, and the proclamation in force of the **Western Arctic (Inuvialuit) Claims Settlement Act** on July 25th 1984, the limitation periods set out in Part I of the **Limitations of Action Act** have all expired; and those periods apply by virtue of section 10 of the latter Act:

10. This Part applies to any claim of the nature mentioned in this Part alleged by way of counterclaim or set-off on the part of any defendant.

32 Counsel for the plaintiffs points out that there is a special provision in s.60 of the Alberta equivalent of our **Limitations of Action Act** which expressly relieves against the application of its limitations to "proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim". There is no such provision in our Act.

33 It is also submitted on behalf of the plaintiffs that the present case is distinguishable from that of **Basarsky v. Quinlan** since there the court merely modified an existing statement of claim as a matter of practice, no prejudice arising to the defendants; whereas, in the present case, the court is asked to allow a new action, in effect, to be brought by the addition of the proposed counterclaim and that, it is said, is expressly prohibited by Part I of the **Limitations of Action Act**, as mentioned in section 10 of that Act.

34 Crown counsel reminds the Court that the Crown ceased to be a party to the

present action in 1990, when the defendant discontinued its third party proceedings. At that time, however, the Federal Court had exclusive jurisdiction over the subject matter of those proceedings. That is no longer so. Parliament has amended that Act to give this Court concurrent jurisdiction over that subject matter, with effect as of February 1st 1992. In doing so, Parliament removed the need for the defendants to proceed against the Crown in the Federal Court in reference to that subject matter. And it is apparent that Parliament did so for reasons which include the heavy burden placed upon litigants before February 1st 1992 when they were required to proceed before two different courts at both trial and appeal levels where, in cases not involving the Crown, that was not necessary.

On behalf of the Crown it was also argued, or so I understand, that there is a potential advantage to the defendant in proceeding before the Federal Court in relation to the subject matter of the defendant's proposed counterclaim, rather than in this Court, because the defendant need not be concerned with any statutory bar under the **Limitations of Action Act** except when proceeding before this Court. But this submission (assuming I have correctly understood it) overlooks the recent amendment to section 24 of the **Crown Liability Act**, R.S.C. 1985, c. C-50, by the Act of 1990 already referred to. The 1990 Act amends the **Federal Court Act** and other federal Acts so as to give concurrent jurisdiction to this Court, among others of the provinces and territories, in matters such as the defendant proposes to pursue against the Crown in the proposed counterclaim.

Section 24 of the **Crown Liability Act**, as thus amended, now states:

- 37 24. In any proceedings against the Crown, the Crown may raise
- (a) any defence that would be available if the proceedings were a suit or an action in a competent court between subject and subject; and
 - (b) any defence that would be available if the proceedings were by way of statement of claim in the Federal Court.

38 Before the amendment came into effect, this section applied only to proceedings before the provincial and territorial courts and not the Federal Court. That has now been changed to include proceedings in that Court.

39 The defendant submits that Part I of the **Limitations of Action Act** is inapplicable to its claims against the Crown. If that is so, section 10 of the Act has no application with respect to the intended counterclaim. In advancing this submission, the defendant says that, in particular, neither paragraph 2(1)(f) nor 2(1)(j) of the Act, both of which are within Part I, is applicable. Paragraph 2(1)(f) reads as follows:

2. (1) The following actions must be commenced within and not after the following times: ...

- (f) actions for the recovery of money, except in respect of a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, and actions for an account or for not accounting, within six years after the cause of actions arose; ...

40 I am in agreement with that last submission, since it is not every claim for damages to which that paragraph applies and the defendant's claims against the Crown do not fall within the parameters of the paragraph. As for paragraph 2(1)(j), it is only

applicable where no other specific provision is made in the Act. Paragraph 2(1)(j) states:

2. (1) The following actions must be commenced within and not after the following times: ...

- (j) any other action not specifically provided for in this Act or any other Act, within six years after the cause of action arose.

The defendant's position is that sections 18 and 19, in Part III of the Act, do specifically provide a longer limitation period than that provided for generally in paragraph 2(1)(f), so that the longer limitation period must apply. Those sections are as follows:

18. No person shall take proceedings to recover any land except

- (a) within 10 years after the time at which the right to do so first accrued to the person through whom he or she claims; or
- (b) if the right did not accrue to such a predecessor, then within 10 years after the time at which the right first accrued to the person taking the proceedings.

19. Where

- (a) a claimant or a predecessor has in respect of the estate or interest claimed been in possession of the land or in receipt of the profits of the land, and
- (b) while entitled to the possession or receipts has been dispossessed or has discontinued the possession or receipt,

the right to take proceedings to recover the land shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits were so received.

If, for purposes of the present motion, the plaintiffs and the Crown are assumed to be correct in their reliance on either June 5th 1984 or July 25th 1984 as the dates triggering the defendant's cause of action against the Crown (or against the plaintiffs and the Crown together) in respect of a dispossession of the defendant of its alleged interest in the reindeer grazing reserve land, then the defendant is not barred from

commencing action, by counterclaim or otherwise, under section 18. And if the defendant in fact remains in possession and proves in the end to be liable to be removed from the land, the time to commence action will only begin to run when it is thus dispossessed, under section 19, if I correctly comprehend the argument of the defendant.

43 It is the defendant's submission, furthermore, that its claim against the Crown for damages is entirely contingent upon the plaintiffs being successful against the defendant in this action, by which I understand the defendant is saying that any limitation of action in respect of that claim will only begin to run from the date of judgment being rendered against it in favour of the plaintiffs in the present action. I fail to follow that argument since the defendant's cause of action against the Crown, for damages, arises from the events of 1985 if it arises at all, and will not arise from the rendering of a judgment in this action in favour of the plaintiffs. It is only the defendant's claim against the Crown for contribution and indemnity which arises on the rendering of such a judgment: **Peterson Steels Inc. v. Arctic Steamship Line et al.**, [1981] 2 F.C. 192 (T.D.).

44 With reference to sections 18 and 19 of the **Limitation of Actions Act**, I think it is only necessary to take note of the restrictive scope of those sections to conclude that they are of no assistance to the defendant in surmounting the general limitation contained in paragraph 2(1)(j) of the Act with regard to the defendant's intended counterclaim against the Crown for damages. Nor are those sections available respecting the defendant's claims for declaratory and compensatory relief against the Crown, since the declaration sought is one of entitlement to compensation, and compensation falls outside the scope of sections 18 and 19.

No argument has been advanced, on either side, in reference to the **Expropriation Act, R.S.C. 1985, c. E-21**. Nor have any submissions been made as to the applicability or otherwise of provincial or territorial statutory bars to federal causes of action having regard to the **Constitution Act, 1867** and section 17 of the **Northwest Territories Act, R.S.C. 1985, c. N-27**.

Sections 3, 4 and 5 of the **Western Arctic (Inuvialuit) Claims Settlement Act** deserve to be borne in mind. Those sections read as follows:

AGREEMENT

3. (1) The Agreement is hereby approved, given effect and declared valid.

(2) On the extinguishment of the native claims, rights, title and interests referred to in subsection (3), the beneficiaries under the Agreement shall have the rights, privileges and benefits set out in the Agreement, including the land title provided by subsections 7(1) and (2) of the Agreement.

(3) All native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Inuvialuit, wherever they may be, are hereby extinguished, but nothing in this Act prejudices the rights of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as to those resulting from their status as aboriginal people of Canada and from other legislation applicable to them from time to time.

(4) The financial compensation provided by the Government of Canada pursuant to section 15 of the Agreement and the funds provided by the Government of Canada pursuant to subsections 16(8) and 17(3) of the Agreement are exempt from taxation in the manner and to the extent set out in that section and those subsections, respectively.

(5) The Governor in Council may make such regulations as are necessary for the purpose of carrying out the Agreement or for giving effect to any of the provisions thereof.

CONSTRUCTION

4. Where there is any inconsistency or conflict between this Act or the Agreement and the provisions of any other law applying to the Territory, this Act or the Agreement prevails to the extent of the inconsistency or conflict.

5. Nothing in this Act or the Agreement shall be interpreted as granting any rights, privileges or benefits in respect of any area beyond the limits of the sovereignty or jurisdiction of Canada.

47 The Act makes no mention of the extinguishment of claims, rights, titles or interests other than "native claims, rights, title and interests, whatever they may be, in and to the Territory" (which for our purposes includes the reindeer grazing reserve earlier mentioned) "of all Inuvialuit, wherever they may be". See subsection 3(3). The obvious meaning of that subsection (no other meaning is suggested) excludes any claims, rights or interests of a private company such as the defendant, whose shares are owned by individual Inuvialuit, not by the Inuvialuit collectively (as contemplated by the Act).

48 Even if, for purposes of this motion, it is assumed that there is at common law (whether as recognized in paragraph 1(a) of the **Canadian Bill of Rights**, R.S.C. 1985 Appendix III, or otherwise) a right to compensation forming the basis for a claim by the defendant to declaratory or compensatory relief against the Crown in the circumstances described in the intended counterclaim, the defendant appears to be faced by the statutory bar in paragraph 2(1)(j) and section 10 of the **Limitation of Actions Act**.

49 It is therefore necessary to consider the third and last of the three issues mentioned at the outset. Unless there is a favourable resolution of that issue from the defendant's standpoint, the defendant's proposed joinder of the Crown in the intended counterclaim would appear to be a fruitless exercise except only for the defendant's claims for contribution and indemnity respecting any judgment in favour of the plaintiffs in this action, which ordinarily would be the subject matter of third party proceedings and not a counterclaim.

3. May the order be granted nevertheless?

Counsel have argued this question as a matter of judicial discretion and not on the basis of waiver by the Crown of its right to rely upon the limitation of action created by paragraph 2(1)(j) and section 10 of the **Limitation of Actions Act**.

On behalf of the defendant, reliance is placed on subsection 25(1) of the **Judicature Act, R.S.C. 1988, c. J-1**:

25. (1) A court may grant to a defendant, in respect of any equitable estate or right or other matter of equity and in respect of any legal estate, right or title claimed or asserted by a defendant,

- (a) all relief against any plaintiff or petitioner that the defendant has properly claimed by his or her pleading and as a court might have granted in a suit commenced for that purpose by the same defendant against the same plaintiff; and
- (b) all relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether or not already a party to the same cause or matter, who has been duly served with notice in writing of the claim under this Act or any order of the court as might properly have been granted against that person if that person had been made a defendant to a cause duly commenced by the same defendant for the like purpose.

It is the defendant's submission that since the same facts are in issue in the present action as will arise for purposes of the intended counterclaim, and the relief to be claimed against the Crown being related to and connected with the original subject matter of this action, the spirit and intent of this provision of the **Judicature Act** empower, and indeed ought to persuade, this Court to grant the leave now sought.

Were it not for section 10 of the **Limitation of Actions Act**, I should find myself

immediately persuaded by that submission. That section is, however, quite specific; whereas subsection 25(1) of the **Judicature Act** is a more general provision which must, it seems to me, be qualified by the specific requirements of section 10 of the **Limitation of Actions Act**. A contrary interpretation would surely deprive section 10 of its intended scope and application.

54 I find myself in agreement with the position of the plaintiffs and the Crown to the effect that there is no discretion left to the Court where the words of a statute have removed the basis for such discretion, as appears to be the situation under the **Limitations of Action Act** provisions already mentioned. Nor do I see that any such discretion has been preserved, in the present situation, by the **Judicature Act** provisions quoted above.

55 An examination of the order of the Federal Court, Trial Division, made on August 25th 1992 in the present defendant's action (as plaintiff in that action) against the Crown before that Court, reveals that leave was thereby granted to the present defendant to discontinue that action "without prejudice to its rights to bring a further proceeding in this Court" (i.e. the Federal Court) "if the Supreme Court of the Northwest Territories does not grant it leave to bring its claim against Her Majesty the Queen within the action pending in the Supreme Court of the Northwest Territories".

56 A notice of discontinuance was thereupon filed on behalf of the present defendant in respect of that action. But it deserves to be noticed that both the recital to the order and the terms of the notice of discontinuance mention that the discontinuance is to be "without prejudice to the plaintiff's" (i.e. the present defendant's) "rights to bring any subsequent proceedings" (emphasis added here). It was clearly contemplated, as it

seems to me, that the Crown would be joined in the present action before this Court either as a third party or as a defendant by counterclaim. As I understand matters, the Crown agreed to the discontinuance on that basis, although the Federal Court's order does not expressly reflect the Crown's consent.

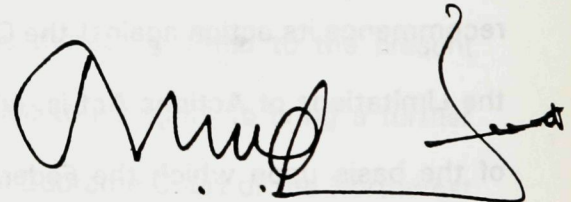
Bearing in mind the statutory amendment extending concurrent jurisdiction to this Court, among others of the provinces and territories, which came into force in February 1992, it is plain that the Federal Court order, and the discontinuance which flowed from it, were intended to give life to the amendment so as to remove what had been a greatly complicating element in the conduct of litigation in Canada where the Crown was, or might become, a party. That order was not appealed, as I understand; and it remains in force accordingly.

Crown counsel's submission to the effect that the defendant is at liberty to recommence its action against the Crown in the Federal Court without being affected by the **Limitations of Actions Act** is, or so it appears to me, a sufficient acknowledgement of the basis upon which the Federal Court order was made, to allow me to infer for purposes of the present motion not only that the Crown does not intend to rely on the limitation defence under that Act if the Federal Court proceedings should be recommenced, but also that the Crown does not now take a position before this Court which is inconsistent with that stance; and that the Federal Court order is to be so understood in consequence, for purposes of this motion.

VII. Conclusion

59 Given the Crown's position both in the present matter and before the Federal Court in the defendant's action against it in that Court, and the absence of any essentially new or additional issues so far as the plaintiffs are concerned in the present action, this is not a case in which the provisions of the **Limitations of Action Act** can be said to have been shown to unequivocally bar the defendant from proceeding as it proposes if granted leave to amend its statement of defence and add a counterclaim to it, joining the Crown as a co-defendant to the counterclaim. Leave for those purposes is therefore granted.

60 Costs were not argued. These normally follow the event. If counsel wish to make submissions as to costs, they may seek an appointment for that purpose.



M.M. de Weerd
J.S.C.

Yellowknife, Northwest Territories
May 14th 1993

Counsel for the Plaintiffs
(Respondents):

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Counsel for the Defendant (Applicant):

Everett L. Bunnell, Q.C.

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

STATE

vs

THE ATTORNEY GENERAL
NORTHWEST TERRITORIES

Plaintiff

- and -

DEFENDANT

Case No.

REASONS FOR JUDGMENT IN THE
COURT OF APPEALS



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NORTHWEST TERRITORIES

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HONOURABLE MR. JUSTICE M.M. de WEERDT



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