

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

PTARMIGAN CONSTRUCTION LTD.

Plaintiff

- and -

ALTA SURETY COMPANY and THE  
GOVERNMENT OF THE NORTHWEST  
TERRITORIES

Defendants

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Application by a defendant for leave to file a third party notice. Application granted, with costs.

Heard at Yellowknife on November 29, 1994.

Judgment filed: December 19, 1994.

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REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Counsel for the Plaintiff: J.V. Miller

Counsel for the Defendant  
Alta Surety Company: S.M. Maclellan

Counsel for the proposed  
third parties: P. Belzil

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REASONS FOR JUDGMENT

1           This application pursuant to Rule 137 concerns the court's discretion to grant leave to a defendant to file and serve a third party notice, after the defendant has already filed its defence.

2           In the within action the plaintiff, a construction company, sues the defendant Alta Surety Company, a bonding company, for the value of construction work performed pursuant to a contract between the plaintiff and the defendant Alta in the summer of 1991. The statement of claim was issued on October 10, 1991. Alta's statement of defence was filed on November 19, 1991, following a court order setting aside the plaintiff's noting in default of Alta on November 7, 1991, and under the court's direction that the statement of defence be filed expeditiously. The defendant Alta now applies for leave, pursuant to the Rules of Court, to file and serve a third party notice against alleged indemnitors. The plaintiff, and the proposed third parties, oppose the application.

3 Leave of the court is not required when the defendant files and serves the third party notice before, or at the time of, filing its defence:

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

...

(4) A third party notice shall be sealed with the court seal and shall, unless the court otherwise orders, be filed with the clerk of the court before the defendant has filed his defence or demand of notice, been noted in default, or has had judgment entered against him, and shall be served within 30 days from filing.

4 A review of the facts and circumstances leading to this litigation is necessary. For purposes of this application, the following facts appear to be without dispute.

5 In 1990 one of the proposed third parties, 851820 N.W.T. Ltd. carried on a construction business under the name of Curry Construction. In that year it entered into a contract with the Government of the Northwest Territories (GNWT) for the reconstruction of a portion of the Mackenzie Highway. Pursuant to the terms of that contract, Curry Construction obtained from its bonding company, Alta Surety Company, a labour and material payment bond and a performance bond. On each bond Curry Construction was named as principal, GNWT as obligee and Alta Surety as surety.

6 The shareholders of Curry Construction are Richard Bird and George Whissell, and these men are the only directors and officers of the company.

7 In 1988 George Whissell, Curry Construction and a related company

Canadian Concrete Products Ltd. executed in favour of Alta Surety an indemnity agreement in respect of any bonds Alta Surety might issue for the benefit of Curry Construction. This indemnity agreement is the subject matter of the proposed third party proceedings.

8 Work on the Mackenzie Highway contract occurred in 1990 and 1991. On July 15, 1991 GNWT considered Curry Construction to be in default under the contract and took the work out of the hands of Curry Construction. GNWT then called on the bonding company Alta Surety to complete the highway contract pursuant to the performance bond.

9 Alta Surety entered into an agreement with Ptarmigan Construction Ltd., the plaintiff herein, to complete the work under the highway contract. Ptarmigan Construction Ltd. was incorporated in May 1991. Its shareholders are Richard Bird and Brian Whissell (son of George Whissell). These two men are the only officers and directors of the plaintiff company.

10 The plaintiff's claim in the within action is for sums allegedly owing to it by the defendant Alta Surety for construction work performed pursuant to this post-July 15, 1991 agreement.

11 In the proposed third party notice the defendant Alta Surety claims that pursuant to the terms of the 1988 indemnity agreement the three indemnitors are liable to deposit with Alta sufficient funds to discharge any liability Alta has to the plaintiff Ptarmigan and to pay Alta's costs of defending this lawsuit and also to indemnify Alta generally with respect to these items.

12                   There is a companion lawsuit (CV 04149) in which Ptarmigan Construction Ltd. is plaintiff, Alta Surety and Curry Construction are defendants and the three indemnitors are third parties. In the companion action, commenced on September 3, 1992, Ptarmigan, *qua* sub-contractor of Curry Construction, claims sums due and owing to it, Ptarmigan, for construction work performed on the highway contract as Curry is sub-contractor prior to July 15, 1991. Ptarmigan seeks recovery of these sums from the general contractor Curry and as an "unpaid claimant" under the labour and material payment bond from Alta Surety. In its third party notice in the companion action (filed at the same time as its defence therein pursuant to R.137(4)) Alta Surety claims indemnity pursuant to the 1988 indemnity agreement.

13                   In the within action (CV 03368) examinations for discovery of officers and employees of the plaintiff Ptarmigan and the defendant Alta Surety took place in February 1992, April 1993, July 1993 and November 1993. Although counsel seem to be in agreement that those discoveries are essentially complete, there are certain undertakings arising therefrom which have yet to be discharged. It cannot be said that the main action is ready for trial.

14                   The present application by the defendant to issue third party proceedings in this lawsuit against the three indemnitors was filed on December 14, 1993. Subsequently, cross-examination on the affidavit filed in support of the application took place. The application was argued on November 29, 1994.

15                   Counsel, citing Alberta case authorities, are in agreement that on applications such as these there is an onus on the party opposing the issuance of a third

party notice (be that the plaintiff or the proposed third party) to establish:

- a) an inordinate delay by the defendant
- b) absence of a credible excuse for the delay
- c) serious prejudice to the party opposing (the plaintiff or the third party).

*Kreway v. Renfrew Chrysler Plymouth Ltd. et al.* [1973] 1 W.W.R. 447 (Alta. S.C.);  
*E.S.M. Transport Ltd. v. Western Mack Truck (Edm.) Ltd.* [1988] A.J. 431 (Alta. C.A.);  
*Sheahan v. Fisher* (1988) 90 A.R. 227 (Alta. Q.B.); *Bechtel Canada Inc. v. Esso Resources  
Canada Ltd. et al.* Alta. C.A., May 24, 1990, unreported; *Meier v. A.G.T. et al.* (1991)  
113 A.R. 241 (Alta. Q.B.).

16 I note, however, that with the exception of *Kreway*, these decisions were  
made at a time after the equivalent Alberta rule was amended to its present form:

17 Alberta Rule 66(4):

A third party notice shall be sealed with the Court seal, filed  
with the Clerk of the Court within six months from the time  
the defendant has filed his defence or demand of notice, but  
before he has been noted in default or has had judgment  
entered against him, and served within 30 days of filing.

**(emphasis added)**

and in the context of an application under Alberta Rule 548(1) for an extension of time  
within which to file the third party notice:

Alberta Rule 548(1):

Unless there is an express provision that this Rule does not apply, the Court may enlarge or abridge the time appointed by these Rules or any rules relating to time or fixed by any order for doing any act or taking any proceeding upon such terms as may be just.

18           The N.W.T. Rules address the question as one of the Court granting leave to have the third party notice issued rather than whether a prescribed time period should be enlarged to accommodate a defendant. In my view therefore, the matter of "prejudice" to other parties, or lack thereof, is more important on applications for leave under N.W.T. R.137(4) than the actual extent of the delay or the reason for the delay. In any event, inordinate delay and inexcusable delay can be, or are, subsumed within considerations of prejudice.

19           In the present case the defendant Alta Surety waited two years, i.e. from the filing of its defence in November 1991 to December 1993 when it applied for leave under R.137(4), before attempting to formally draw the indemnitors into the litigation. Alta explains this delay by firstly pointing to its filed statement of defence wherein it referred to the existence of the 1988 indemnity agreement and the relationship between the plaintiff and the indemnitors. Alta says that it was of the view that it was for the indemnitors (the proposed third parties) to resolve the plaintiff's claim. Alta refers to discussions with the plaintiff and the indemnitors subsequent to November 1991 and an agreement whereby Alta paid out the balance of the GNWT contract funds, and says it fairly assumed thereafter that the plaintiff was not pursuing its claim in the within litigation.

20           It is also pointed out on behalf of Alta that in early 1992 there was a period of time when Curry Construction was seeking relief under the *Companies Creditors*

*Arrangements Act*; and that this of necessity put matters in abeyance for a time.

21           The plaintiff Ptarmigan took no steps to advance this lawsuit after its examination for discovery of Alta Surety's officer in February 1992 until it retained new solicitors in February 1993.

22           Neither the plaintiff herein nor the proposed third parties has demonstrated how either of them could be prejudiced by the issuance of the third party proceedings, or by those proceedings being tried at the same time as the *lis* between the plaintiff and the defendant. Although the plaintiff's main action may be ready for trial within a reasonable period of time, there is nothing to prevent the third party proceedings being ready within that same time frame. The proposed third parties have already indicated that they have no further documents to disclose beyond those already disclosed by the plaintiff. George Whissell has already been examined as an indemnitor in the companion action CV 04149 on behalf of himself and as an officer of the other two indemnitors.

23           In the companion action, the indemnitors filed a defence to the third party notice consisting simply of a general denial. Recently amended, that defence now alleges "bad faith" by the defendant Alta Surety in its dealings with the plaintiff and the indemnitors, thereby voiding the 1988 indemnity agreement. Counsel for the indemnitors indicates he anticipates a similar defence being advanced by the indemnitors in resisting the claim of the defendant Alta Surety in the proposed third party notice in the within action. If so, it is clear that the evidence to be adduced by the parties (plaintiff and defendant) at the trial of the main action is inextricably interwoven with any evidence to be adduced by the parties (defendant and indemnitors) in the third party action. It would be quite inappropriate, in my view, for the two *lis* to be decided by two separate triers of



fact.

24                   The *raison d'être* of third party proceedings is to avoid duplicate litigation.

25                   To refuse leave to Alta Surety on this application is to require that litigant  
to commence a separate lawsuit against these indemnitors who are, in a very real sense,  
already involved with the within lawsuit. There is no practical reason to compel the  
defendant to start another lawsuit. The usual advantages of third party proceedings are  
present here - more practical, less time-consuming, less expensive and avoidance of  
inconsistent findings of fact. And, as already stated, no resulting prejudice to either the  
plaintiff or the proposed third parties has been demonstrated.

26                   For these reasons, the defendant's application is granted, with costs in triple  
column IV.

J.E. Richard

J.S.C.

Yellowknife, Northwest Territories  
December 19, 1994

Counsel for the Plaintiff:       J.V. Miller

Counsel for the Defendant  
Alta Surety Company:       S.M. MacLellan

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