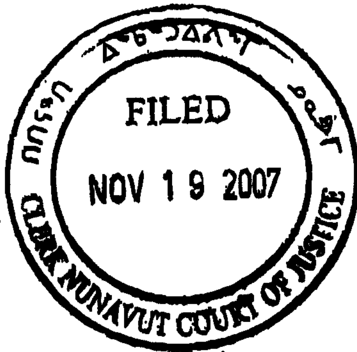

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NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation:	***N.T.I. v. Canada (A.G.),* 2007 NUCJ 27**
Date of Judgment (YMD):	2007-11-19
File Number:	08-06-713-CVC
Registry:	Iqaluit
Applicant (Defendant):	**Attorney General of Canada**
	-and-
Respondent (Plaintiff):	**The Inuit of Nunavut as Represented By Nunavut Tunngavik Incorporated**

Before:	The Honourable Mr. Justice E. Johnson
Counsel (Applicant):	Michele E. Annich
Counsel (Respondent):	Dougald Brown
Location Heard:	Iqaluit, Nunavut
Date Heard:	October 5, 2007
Matters:	*Nunavut Rules of Court*, N.W.T. R-010-96, Rules 106, 119 and 373(3), 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) filed a Statement of Claim that commenced a $1 billion legal action against the Applicant (the Attorney General of Canada), alleging breaches of the 1993 *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, commonly known as the *Nunavut Land Claims Agreement* (*NLCA*).

[2] After the close of pleadings, the Applicant filed a Notice for Particulars. The Respondent provided some of the particulars requested and objected to producing many others.

[3] The Applicant filed this motion requesting an order from the Court, requiring the Respondent to provide further and better particulars.

II. FACTUAL BACKGROUND

[4] On May 25, 1993, the Inuit then residing in the Northwest Territories entered into the *NLCA* with the Government of Canada and the Government of the Northwest Territories. The *NLCA* identified the geographical area of the Northwest Territories inhabited by the Inuit as the Nunavut Settlement Area. On April 1, 1999 this area became the territory of Nunavut, pursuant to the *Nunavut Act*, S.C. 1993, c.28.

[5] Tungavik Federation of Nunavut was the signatory on behalf of the Inuit of the Nunavut Settlement Area. The Plaintiff in the current action is an incorporated organization that succeeded the Tungavik Federation of Nunavut, and currently represents Inuit under the *NLCA*.

[6] The signatories on behalf of the Government of Canada were the Prime Minister and the Minister of Indian Affairs and Northern Development. The signatories for the Government of the Northwest Territories were the Government Leader and the Minister of Renewable Resources.

[7] The *NLCA* was ratified by the Inuit. The government ratified the *NLCA* with the enactment of the *Nunavut Land Claims Agreement Act*, S.C. 1993, c.29, and in particular by sub-section 4(1) of that *Act*.

[8] The Statement of Claim alleged 16 breaches of the *NLCA* by the Defendant, including inadequate funding and the failure to implement a number of activities, such as Inuit employment and training programs.

[9] The Statement of Claim also alleged 13 breaches of the fiduciary obligations of the Crown.

[10] The Defendant filed a Statement of Defence on March 30, 2007, and the Notice for Particulars on April 25, 2007.

[11] The Plaintiff filed a Reply and Joinder of Issue on April 27, 2007, and Particulars on June 21, 2007.

III. ISSUES

[12] The Applicant argued that the Respondent failed to provide the particulars, as requested in the Notice for Particulars. To assist the Court in reviewing the issues, the Applicant filed Appendix "A": a chart containing three columns. The first column listed the allegations in the Statement of Claim, the second column listed the particulars demanded, and the third column listed the Response of the Respondent. Prior to the hearing, counsel for the Respondent added a fourth column of responses to the alleged deficiencies in the particulars. These additions to Appendix "A" by the Respondent were not provided in advance to counsel for the Applicant. Because of the surprise additions, I permitted counsel for the Applicant to file a supplemental written response to her oral submissions.

[13] The issue to be determined in this judgment is whether the Respondent has complied with the Notice for Particulars, and if not, to make the appropriate Order to provide the particulars or better particulars requested.

IV. LAW

[14] Rule 106 of the *Nunavut Rules of Court*, N.W.T. R-010-96, as duplicated for Nunavut by s.29 of the *Nunavut Act*, S.C. 1993, c.28 (*Nunavut Rules*), provides the basic rule of pleading that the pleading must contain the material facts relied upon, but not the evidence by which those facts will be proved. It states:

> *"106. A pleading must contain only a statement in a summary form of the material facts on which the party pleading relies for his or her claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits."*

[15] Rule 119 permits a party to demand particulars at any time before a proceeding is set down for trial. It states:

> *"119. (1) A party to an action or proceeding may, at any time before the action or proceeding is set down for trial, deliver to any other party a notice requiring that the other party provide a further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in a pleading.*
>
> ...
>
> *(5) Where a party defaults in delivering particulars in accordance with this rule or the particulars delivered are not satisfactory to the party requiring them, the party requiring the particulars may apply to the Court for an order requiring the other party to give particulars as desired or for further or better particulars and, on the application, the Court may order delivery of particulars on such terms as to costs or otherwise as it considers just."*

[16] An Order for further Particulars is discretionary, and the degree of particularity required will vary in each case. (See: *Re: Indian Residential Schools,* 1999 ABQB 823, [1999] A.J. No.1266).

[17] The primary purpose of particulars is to enable the other side to frame a defence. (See *Canadian Commercial Bank (Liquidator of) v. McLaughlan*, [1988] A.J. No.923, 1988 CarswellAlta 190 (AB. Q.B.) (*McLaughlan*).) It is a well-settled practice that particulars after pleading will not be ordered until after discovery. (See *Oceatain Investments Ltd. v. Canadian Commercial Bank*, [1983] A.J. No.1010, 1983 CarswellAlta 431 (AB. Q.B.) (*Oceatain*).)

[18] However, particulars also have other functions as described in *Gulf Canada Limited v. The "Mary Mackin"*, [1984] 1 F.C. 884, [1984] F.C.J. No. 70 (F.C.C. C.A.) (*Gulf Canada*), where Heald J. adopted the details set out in the White Book dealing with the English Practice:

> "[p.889] ...
>
> "(1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved ....
> (2) to prevent the other side from being taken by surprise at the trial
> (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial ....
> (4) to limit the generality of the pleadings ....
> (5) to limit and decide the issues to be tried, and as to which discovery is required ....
> (6) to tie the hands of the party so that he cannot without leave go into any matters not included ...."
>
> ."

[19] One or more of these functions will predominate depending on the stage of the litigation. The requirement for particulars is more pronounced at the later stages of the litigation following discovery. (See *Neptune Bulk Terminals (Canada) Ltd. v. Kilborn Engineering Pacific Ltd.*, [1994] B.C.J. No.75, 1994 CarswellBC 700 (B.C. S.C. Master), and *Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd.*, [1990] F.C.J. No.163, 1990 CarswellNat 1098 (F.C.C. T.D.).

[20] Where particulars are requested following the filing of the Statement of Defence, the Defendant must establish on affidavit evidence that the particulars are necessary unless the allegations are so general and so vague that the need for particulars is evident. (See *Oceatain.*)

V. ARGUMENT AND ANALYSIS

A. Affidavit Evidence

[21] Relying on *Cominco Ltd. v. Westinghouse Canada Ltd.,* 1978 CarswellBC 31, 6 B.C.L.R. 25 (B.C. S.C.) (*Cominco*), the Respondent argued that the affidavit of Kevin Wasson was improper because it was based on information and belief. The affidavit was also attacked because it was couched in vague generalities and simply recycled the opinion of the Applicant's counsel and unnamed researchers. The particulars requested in the affidavit only referred to one sub-paragraph of the Statement of Claim.

[22] Bouck J., in *Cominco*, held that it was improper to use any affidavit on information and belief, stating:

> "[22] ... Affidavit material may be considered on an application of this nature. As a general rule a court may act on an affidavit sworn only as to information and belief except when the applicant is seeking a final order. The success or failure of an application requesting an order for further and better particulars does not by itself result in the dismissal or success of an action. But if a plaintiff is ordered to give particulars and cannot do so his claim may be struck out on a subsequent motion because the statement of claim fails to allege facts specifying the essential ingredients the plaintiff must prove. If the plaintiff cannot win at trial on the facts as pleaded, better to dismiss the action now than later. That is one of the purposes of pleading.
>
> [23] For these reasons, I intend to ignore the affidavits as filed where they are based on information and belief. Otherwise, the ultimate result might be a final order against the plaintiff which had its foundation on hearsay evidence."

[23] The British Columbia Rule considered in *Cominco* is similar to the Alberta Rule and the old rule in the Northwest Territories that permitted the use of affidavits based on information and belief on an interlocutory motion. The new Rule 373(3) in the Northwest Territories and Nunavut is similar to Ontario Rule 39.01(5) that limits the use of affidavits on information and belief to non-contentious matters.

[24] The meaning of contentious was considered in *Metropolitan Toronto Condominium Corp. No 781 v. Reyhanian*, [2000] O.J. No. 2640, 2000 CarswellOnt 2431(ON. S.C.J.). Lamek J. defined it as meaning that there was no information filed that contradicted or challenged the hearsay.

[25] The Applicant did not specifically address these arguments in its brief or reply, but appeared to rely on the exception specified in *Oceatain* that the affidavit, though filed, was not necessary where the allegations were so general or vague that the need for particulars was evident (*Oceatain* exception).

[26] I agree with the Respondent that paragraphs 4, 6, 7 and 10 of the affidavit fall into the category of information and belief. However, since there was no affidavit filled in reply, I am satisfied that the subject matter of the affidavit was not contentious, thereby permitting the reliance on information and belief.

[27] The remainder of the affidavit makes only one reference to the Notice for Particulars and the Response of the Respondent. As a result, the affidavit provides little assistance in analyzing the need for the particulars at this stage of the litigation. The affidavit deposes that better particulars will save the Applicant time and money but does not explain how.

[28] The rationale behind the *Oceatain* rule, limiting the requirement for particulars after filing a defence, recognizes that the document production process is an ongoing one that usually results in the production of additional documents during discovery through undertakings to produce additional documents. The time and money that concerns the Respondent would be better spent by focusing on the discovery process instead of attempting to identify every possible relevant document through particulars at this stage. While not ignoring the affidavit, I accord it very little weight. In any event, the Applicant is relying on the *Oceatain* exception discussed by Wachowich J. in *McLaughlan* that the allegations are so general and vague that the need for particulars is evident.

B. The Timing of the Application

[29] The Applicant chose to bring the application after the filing of the Statement of Defence and before the commencement of examinations for discovery. The Defence was not a barebones general denial of the allegations in the Statement of Claim. It is 17 pages long and demonstrates an intimate knowledge of the *NLCA*. This is not surprising since the parties spent a long time negotiating the *NLCA*. Rather than seeking the particulars for the purpose of pleading, the Applicant seeks them for the purpose of saving expense and potentially preventing surprise in the preparation and conduct of the trial.

[30] Wachowich J., in *McLaughlan,* accepted the authoritative statement of the law on particulars in *Oceatain* and I do likewise. From *Oceatain*, McFadyen J. stated:

> "[9] ... In my view, the law on this point is correctly summarized ... as follows:
>
> > "It is now well-settled practice that particulars after pleading will not be ordered until after discovery; following this principle further, if discovery results in full disclosure, particulars are not necessary; if discovery does not result in full disclosure particulars will be ordered. It follows that discovery takes the place of particulars if it results in full disclosure. To justify an order for particulars after the close of the pleadings, it must be shown by affidavit, or otherwise, that they are necessary for the purpose of saving expense or preventing surprise at the trial. Such an order should not be made as of course."
>
> [10] Examinations for discovery have not yet been held. No special reasons have been established by affidavit. This application is, in my view, premature and is dismissed. The defendants have leave to re-apply after examinations for discovery should the examinations for discovery not sufficiently limit or define the issues in this matter."

[31] In *McLaughlan*, Wachowich J. recognized that ordering particulars after the close of pleading was an exceptional situation. He denied the applications to produce the particulars before discovery and was satisfied that the defendants had sufficient particulars to frame their defences. However, he recognized that some particulars were required before the trial that was on the horizon. As a result, he indicated that he was prepared to revisit the issue if the defendants were dissatisfied with the additional particulars the plaintiffs undertook to produce. The productions were to take place within a fixed date while the discoveries were in progress.

[32] The application in *Gulf Canada* took place after pleadings had closed and examination for discovery had commenced. Counsel for the defendant objected to questions raised during examination for discovery by counsel for the plaintiff regarding the tug crew and equipment (issues that had no known or pleaded connection with the accident). The discovery adjourned and the defendant filed a demand for particulars. The trial judge ordered that the particulars be produced. The plaintiff appealed and Heald J., for the majority, refused to interfere with the discretion exercised by the trial judge, noting that few of the 653 questions posed by counsel for the plaintiff were relevant to the real issues raised in the action.

[33] The Applicants also relied on *Dumont v. Canada (A.G.),* 1991 CarswellMan 347, [1992] 2 C.N.L.R. 34 (MB. C.A.); *Pavey Candies Ltd. v. Choice Foods Corp.,* [1991] A.J. No. 91, 1991 CarswellAlta 453 (AB. Q.B. Master); *House of Sga'Nisim, Nisibilada v. Canada (A.G.),* 2005 BCSC 1489, [2005] B.C.J. No 2332; *Stoney Tribal Council v. PanCanadian Petroleum Ltd.*, 2005 ABCA 204, [2005] 4 C.N.L.R. 320.

[34] In *Dumont,* the particulars were ordered to permit the defendant to file a defence in a very unusual and historic action. Similarly, in *Stoney Tribal Council*, the plaintiff sued, claiming the Crown had wrongfully taken its land and transferred it to the Canadian Pacific Railway, and the respondent required particulars to file a defence. The Alberta Court of Appeal ordered that some particulars be produced, noting that the amended statement of claim on its face seemed to cry out for them. Limited particulars were also ordered in *House of Sga'Nisim* before the filing of a statement of defence.

[35] *Pavey* was an exception to the general rule that particulars should not be ordered after the filing of the Statement of Defence and before discovery. One particular was ordered despite the lack of an affidavit because the paragraph in the Statement of Claim to which the request for particulars related was written in bald general terms.

[36] Some particulars were also ordered in *Cominco* after the filing of the statement of defence and before discovery of one of the defendants. However, the action was well-advanced with the trial tentatively set to start eleven months later. The reason for the order was because the plaintiff admitted that it did not have many of the facts sought by the one of the defendants. As a result, Bouck J. concluded that the plaintiff was attempting to engage in a "fishing expedition".

[37] I conclude from these authorities that a defendant has an uphill battle in obtaining particulars after the filing of a statement of defence and before the start of discoveries. The pleadings must be so bald, general or vague so as to essentially cry out for particulars. A legal action is a dynamic process with both parties gradually seeking and receiving more and more information until they are ready for trial. The pleadings give the parties, or a judge, the filter to sort out irrelevant requests for information through interrogatories, discoveries, or undertakings. If pleadings are vague and general, then particulars can occasionally be ordered before the discovery process to refine the filter and save time and costs during discovery or trial.

[38] With this in mind, I now turn to consider whether any of the pleadings are so vague and general that ordering particulars is self-evident.

C. Vague and General Pleadings

[39] The Respondent filed a lengthy response to the Notice for Particulars in which it provided some of the information sought by the Applicant. As a result, the Applicant reduced the original request for particulars to those that it felt were absolutely necessary in order to know the case to meet. I am satisfied that the requests to which the Respondent has already provided a response require no further particulars.

[40] The remaining requests are those that the Respondent has refused to answer because the demand was deemed to be improper. With three exceptions, I am satisfied that the

Respondent was correct in law in refusing to answer the request for particulars and agree with the reasons provided in the fourth column of Appendix "A". The three exceptions for which this Court is ordering particulars follow.

[41] Paragraph 5(c) of the Notice for Particulars, as explained in the Supplemental Brief of the Applicant, seeks clarification on the meaning of the words "governmental obligations" in paragraph 16 of the amended Statement of Claim. The Applicant wishes to know whether the words include the Government of Nunavut. The Respondent is ordered to indicate whether the Government of Nunavut is included in the words "governmental obligations".

[42] Paragraph 17(a) of the Notice for Particulars, as explained in the Supplemental Brief of the Applicant, seeks clarification of paragraph 19(l) of the Amended Statement of Claim concerning which of the conciliator's recommendations the Applicant has refused to implement. The Respondent is ordered to provide these particulars.

[43] Paragraph 38 of the Notice for Particulars, as explained in paragraph 30 of the Supplemental Brief of the Applicant, seeks two particulars regarding paragraph 73 of the Amended Statement of Claim. Paragraph 73 states:

> "[73] 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."

First, the Applicant seeks clarification about the words "grossly inadequate". Second, the Applicant seeks the factual basis for the standing of the Respondent to represent the Government of Nunavut

[44] The Respondent is not ordered to address the Applicant's first request regarding the words "grossly inadequate". The Respondent is ordered to address the Applicant's second request by providing the factual basis for the Respondent's standing to represent the Government of Nunavut.

D. Damage Claims

[45] The Applicant conceded that no particulars of general damages are required. However, relying on *Rotary Drum Corp. v. Louisana-Pacific Canada Ltd.*, 2001 ABQB 297, [2001] A.J. No.469 (AB. Q.B. Master), it argued that the entire claim of the Respondent constituted special damages because they are alleged to result from breaches of a contract. As a result, the Respondent should be required to particularize the damages claimed in paragraphs 42, 55, 64 and 86 of the Amended Statement of Claim.

[46] The Respondent argued that particulars of special damages are not required at this stage of the litigation.

[47] I note that in *Campeau v. Imperial Life Assurance Co. of Canada*, 2005 MBCA 148, [2005] M.J. No.448, the Manitoba Court of Appeal made the same point as Master Funduk in *Rotary Drum*:

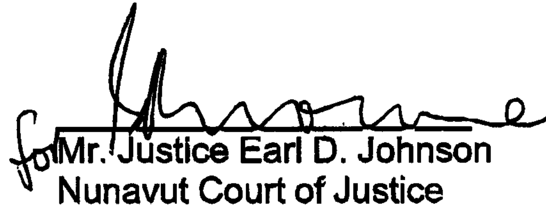
> "[26] An award of general damages may be made for a breach of contract, but damages must be proved, even if the plaintiff is not able to quantify precisely all aspects of the claim. "

[48] Wachowich J. recognized, in *McLaughlan*, that in litigation of this magnitude, it is difficult, at the early stages of litigation, to break down general and special damages or provide precise calculations. I am of the same view. At the conclusion of discoveries, the Respondent should be in a position to provide this information with some particularity so as to prevent any surprise at trial.

E. Costs

[49] Because the Respondent was substantially successful, it is awarded costs of this application to be costs in the cause.

Dated at the City of Iqaluit this 19th day of November, 2007



for Mr. Justice Earl D. Johnson
Nunavut Court of Justice

Counsel for the Applicant : Michele E. Annich
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