

Date: 2006 03 22

Docket: Appeal Nos: A-0001-AP2005000021; A-0001-AP2005000022,
A-0001-AP2005000023; A-0001-AP2005000024; A-0001-AP2005000025;
A-0001-AP2005000026; A-0001-AP2005000027; A-0001-AP2005000028;
A-0001-AP2005000030; A-0001-AP2005000031; A-0001-AP2005000032

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

BETWEEN:

PINKERTON'S OF CANADA LIMITED, THE GOVERNMENT OF THE
NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF
THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE, AEROSPACE,
TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA,
HARRY SEETON and TIMOTHY ALEXANDER BETTGER

Appellants/Respondents by Cross-Appeal

- and -

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT
PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE
DAWN ROWSELL, KAREN RUSSELL, BONNIE LOU SAWLER and JAMES
O'NEILL

Respondents/Appellants by Cross-Appeal

- and -

ALLAN RAYMOND SHEARING and ROGER WALLACE WARREN

Respondents/Respondents by Cross-Appeal

- and -

ROYAL OAK VENTURES INC. (formerly Royal Oak Mines Inc.)

Respondents

MEMORANDUM OF JUDGMENT

[1] One of the Appellants in this appeal, Government of the Northwest Territories (GNWT), seeks a stay of execution of the trial judgment.

[2] Following a lengthy trial of two related court actions, a number of defendants, including GNWT, were held jointly and severally liable to the plaintiffs for judgement amounts and costs amounts in excess of seventeen million dollars. The Workers Compensation Board (WCB) was subrogated to the litigation rights of both sets of plaintiffs and was the *dominus litis* of the lawsuit at trial.

[3] Several of the defendants, including GNWT, have filed appeals in this Court with respect to the trial judgment of December 2004. The appeals are not likely to be heard for several months.

[4] A stay of execution of a trial judgment pending appeal of that trial judgment is discretionary relief. Its purpose was described by Cote J.A. in *Katz v. Katz* [1993] A.J. No. 554:

In general, a stay exists in order to prevent a situation where the appellant wins the appeal but gets a hollow victory because in the meantime the subject matter of the lawsuit has disappeared or in some other way the appeal has been rendered nugatory.

[5] On an application for this discretionary relief, the applicant is normally expected to satisfy the Court:

- a) that there is a serious issue to be tried on appeal;
- b) that the applicant will suffer irreparable harm if the stay is refused; and,
- c) that the balance of convenience favors a stay because the applicant would suffer greater harm if the stay is denied than the respondents will suffer if a stay is granted. *Manitoba v. Metropolitan Stores* [1987] 1 S.C.R. 110.

[6] With respect to the first factor, the applicant's counsel summarized the GNWT's grounds of appeal as follows:

- (i) the Trial Court erred in law with respect to both its determination and its application of the law with respect to foreseeability;
- (ii) the Trial Court erred in law in finding that the Mining Safety Act gave rise to a duty of care to prevent the murders at issue;
- (iii) the Trial Court erred in law with respect to both its determination and its application of the law with respect to adverse inferences; and,

- (iv) the Trial Court erred in law with respect to both its determination and its application of the law with respect to causation.

[7] Upon a consideration of oral and written submissions made on behalf of both the applicant and the respondents regarding these proposed grounds of appeal, I am satisfied that there are serious issues for adjudication on this appeal.

[8] With respect to the second factor of “irreparable harm”, the concern expressed on behalf of the applicant is that the named plaintiffs (now named respondents) may not have the financial ability to re-pay the judgment amount if the appeal is decided in the applicant’s favor, given that the size of the judgment is beyond the means of ordinary citizens. And further, that the WCB as a non-party may not be compellable to repay the judgment amount to the successful appellant.

[9] Evidence was provided on this application to establish that both the applicant GNWT and the WCB have sufficient assets to pay or repay the judgment amount of approximately seventeen million dollars. The applicant GNWT acknowledges that it has liability insurance coverage of twenty five million dollars, in addition to its own assets. The Corporate Secretary of the WCB advises the Court on this application that the WCB has approximately two hundred and eighty million dollars in its Accident Fund, and further, that a) it intends to deposit the seventeen million dollars judgment amount into the Accident Fund and b) it will not pay any of the judgment amounts out to any of the named plaintiffs (respondents) until all appeals are finally concluded. In addition, the WCB has provided to this Court its written Undertaking to pay all amounts which this Court directs be paid to any party who has paid the judgment amount pending the within appeal, in the event the appeal is successful.

[10] Counsel for the applicant GNWT submits that the WCB assurances are insufficient to allay the applicant’s concern about re-payment of the judgment amount following a successful appeal. He points to the fact that the WCB is a statutory body and by its statute it is allowed to change its position on any previous decision or action:

s.7 (1) Subject to section 7.3, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court and, except where there has been a denial of natural justice or an excess of jurisdiction exercised by the Board, no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceedings in any court or be removable by *certiorari* or otherwise into any court, nor shall any action be maintained or brought against the Board in respect of any act or decision done or made by the Board in the honest belief that it was within the Board’s jurisdiction.

...

(3) Nothing in subsection (1) prevents the Board from reconsidering any matter that has been dealt with by it, or from rescinding, altering or amending any decision or order previously made, all of which the Board has authority to do.

(4) The Board is not bound to follow any previous decision of the Board as a precedent in reaching its decisions or making its rulings.

[11] Applicant's counsel also expresses doubt that this Court can make a binding Order against the WCB as it is not a party to the appeal before this Court.

[12] With respect, I do not share the applicant's concern in this regard. Counsel appearing for the respondents to this application also appeared on the instructions of the WCB and presented the Undertaking referred to above (Exhibit 1 on the hearing of this application). Given that clear and unequivocal Undertaking I am satisfied that this Court can order the WCB to repay the judgment amount (should this Court so decide) and that the WCB is bound to obey any such Order.

[13] I find that the applicant has failed to establish that irreparable harm will come to the GNWT if a stay is not granted and the GNWT is eventually successful on the appeal.

[14] In addition, I find that the balance of convenience, if anything, favors the respondents who were successful in obtaining a trial judgment twelve years after the events which gave rise to the lawsuits.

[15] There is case authority supporting a presumption that successful litigants are entitled *prima facie* to the fruits of their successful litigation. *Edmonton v. Westinghouse Canada Inc.* [1996] A.J. No. 721 (C.A.).

[16] Both sides of this litigation are adequately secured and can clearly pay or repay the judgment amount. In such a case, there should be no stay of a money judgment barring some unusual circumstances. *Jager Industries Inc. v. Leduc County* [1997] A.J. No. 870 (C.A.). No unusual circumstances exist here.

[17] For these reasons the application for a stay is denied. Each of the two sets of plaintiffs (now respondents in this Court) shall have their costs of this application payable forthwith and in any event of the cause.

Richard J.A.

Dated at Yellowknife, NT
this 22nd day of March 2006

Counsel for the Applicant GNWT: Peter Gibson

Counsel for the Respondents
Fullowka et al and for the
respondent James O'Neil and
for the WCB:

J. Philip Warner, Q.C. and Jeff Champion

Counsel for Pinkerton's:

John Hope, Q.C. and Norma Mitchell

Counsel for T.A. Bettger:

S. Leonard Polsky

Counsel for National Automobile:

Lyle S.R. Kanee

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MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE J.E. RICHARD
