CR 02080

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JAMES FOURNIER

REASONS FOR JUDGMENT

1 James Fournier is before the Court this afternoon for disposition of three counts in an indictment to which he entered guilty pleas last Tuesday, September 7th 1993. Evidence with reference to those counts was heard on Saturday, September 11th 1993 with certain agreed facts and the submissions of counsel for both the Crown and Mr. Fournier. In addition, Mr. Fournier made a personal statement to the Court.

2 Two other counts in the indictment were stayed at the direction of counsel for the Crown, as authorised by the Attorney General of Canada pursuant to s.596 of the **Criminal Code.** The Court is consequently neither required nor empowered to deal further with those counts in the present proceedings.

3 Two of the three counts remaining charge offences of mischief by wilfully damaging property without legal justification or excuse. In one instance, the property was a freezer trailer and the damage consisted of the disconnection of a power line to the trailer, cutting off the refrigeration in the trailer. In the other instance, the property was a kitchen trailer and the damage consisted of the throwing of a rock through a window which had already been broken by a rock thrown by someone else. There may also have been incidental damage inside that kitchen trailer from the rock thrown by Mr. Fournier, but no attempt has been made to describe the extent of such incidental damage, if any. I am given to understand that no incidental damage resulted to the freezer trailer or its contents.

4 The third count which is now before the Court is of a more serious nature. It consists of a charge of assault with a weapon, namely a rock, contrary to paragraph 267(1)(a) of the **Criminal Code**. That count derives from a count charging attempted murder, to which Mr. Fournier entered a plea of "not guilty". The Crown then consented to his guilty plea on the included offence of assault with a weapon. The substance of the charge is that Mr. Fournier threw a large rock, intending at least to splash and frighten the victim of the offence, one Eric Melanson, so that the rock instead struck Mr. Melanson, breaking one of his ribs.

5 Viewed in isolation, these offences are not of themselves very remarkable or, indeed, fully comprehensible. Mr. Fournier does not appear to have been under the influence of alcohol or any other psychoactive substance at the time.

6 The offences occurred during a disturbance on the property at Giant Mine at Yellowknife on June 14th 1992. Employees of the mine belonging to the Canadian Association of Smelter and Allied Workers were on strike. The owner and operator of the mine, namely Royal Oak Mines Inc., had obtained an injunction from this Court on May 23rd 1992, prohibiting any watching, besetting, picketing or attempts to do these things at or adjacent to the mine property, except only for picketing merely to obtain or communicate information by not more than five picketers at the main entrance to the mine, among others. The limit of five picketers had been extended to ten on May 29th 1992, in recognition of the peaceful conduct of the picket lines after the injunction had issued and up to that time.

7 According to the evidence, it appears that organisers of the striking union had nevertheless decided to hold a rally, far exceeding the maximum number of picketers allowed, at the main entrance to the mine, scheduled to begin at or shortly after 7.00 p.m. on June 14th 1992. A crowd, estimated at over a hundred persons, assembled there at that time. The crowd included women and children. Mr. Fournier was driven there from the union hall along with two or three other strikers. He went there to support the union, feeling it to be his duty as a loyal union member.

8 Mr. Fournier testified last Saturday that he is 41 years of age, has an extensive work history and a grade 12 level of schooling. He has a family consisting of a spouse and two children both aged under 10 years. He has lived in the Northwest Territories for about 12 years and was an employee of Giant Mine during that period up until July 23rd 1992, when he received

a written notice from Royal Oak Mines Inc. terminating his employment in consequence of his actions at the mine on June 14th 1992.

9 A videotaped depiction of the so-called rally, and some of the events which flowed from it, was entered in evidence last Saturday. It shows, among other things, a concerted effort by men from the rally tearing down a wire fence and storming on to the mine property, throwing rocks both before and after the fence went down. A group of perhaps 50 seems to have joined in this attack on the property, many of whom carried sticks or rocks as they went. Mr. Fournier was among them.

10 It was Mr. Fournier's evidence that, while he knew of the injunction at the time, he was uncertain as to whether the maximum number of lawful picketers was 5 or 10. In any event, the Royal Canadian Mounted Police on duty had made no effort to enforce the limit on the number of lawful picketers, whatever the limit may have been. He therefore felt, and I infer that he was not alone in this, that the injunction did not give rise to any legally enforceable limit on the number of people who could congregate lawfully at the main entrance to the mine. Had the police taken steps, before the injunction was later amended so as to specifically authorise them to arrest anyone in flagrant breach of its terms, the rally might not have been held, or those joining it might at least have been safely dispersed before things got out of hand. However, no such steps were taken.

11 It was not as if the feelings of the strikers were not widely known. Royal Oak Mines Inc.

had hired replacement workers so as to continue operating during the strike. That was well known to be deeply and hotly resented by the strikers and had been denounced publicly by the union. There is no general labour legislation in the Northwest Territories, and there was none at the time, to prevent the company from doing as it did. The company employed a force of security guards to protect its property as well as the replacement workers. The guards were supplied under a contract between the company and Pinkerton Security of Canada. A previous force of guards from another security agency had withdrawn from the mine as a result of violence and obvious fears of further more serious violence.

12 The situation had become so tense and dangerous that the potential for explosive violence was well recognized. Two special teams of police had been brought to Yellowknife to deal with the eventuality of a riot. As events proved on June 14th 1992, their services were in fact necessary to prevent violence even greater than did in fact occur that day.

13 It was Mr. Fournier's belief, and no doubt that of others in the union, that the purpose of Royal Oak Mines Inc. (and its agent Pinkerton Security of Canada) was to "break" the union and the strike. Feelings between the strikers and the Pinkerton guards were extremely high. It is apparent from the evidence, more particularly the videotape, that the strikers were not merely venting their feelings against Royal Oak Mines Inc. by damaging its property, and by creating a violent disturbance likely to put fear into its replacement workers and cause them to quit work; but it was also a prime objective of the strikers who came on to the minesite to put such fear into the Pinkerton Security guards that they also would withdraw and thus cause the mine to shut

down. As Mr. Fournier acknowledged in his testimony, the strikers were "hoping they would run".

14 It is in this context that the facts of the three offences which Mr. Fournier admits having committed must be reviewed.

15 Against this background, and taking notice of Mr. Fournier's belief that the rock-throwing was begun by Pinkerton Security guards, one can perhaps better comprehend the fury of the strikers' assault against the mine property, the cook shack where replacement workers were consuming a meal, and the guards. Mr. Fournier acknowledged, in the course of his testimony, that the rocks which he believed were thrown by the guards may have been deliberately designed to provoke reciprocal rock throwing by the strikers. If, as he believed, the Pinkerton Security force had as its aim the "breaking" of the union, and thus terminating the strike, such a provocation could well have been foreseen as likely to induce the massed strikers to react likewise and, in the end, to grossly over-react and commit acts which would expose them to the sanctions of the criminal law.

16 The victim of Mr. Fournier's assault had already suffered a severe injury to his leg and had suffered a severe beating with clubs from other strikers, as a result of which he had crawled up a mound of rubble, or "berm", surrounding a catchment pond which was partly filled with water. In an attempt to escape his attackers, the victim (Eric Melanson) had descended into the pond. He was standing there when Mr. Fournier found him and taunted him for his apparent lack of willingness to go to the protection of other guards then under attack by strikers. Mr. Fournier, it

seems, did not appreciate that Mr. Melanson was in the category of "walking wounded" and in no condition to re-enter the fray.

17 I believe Mr. Fournier's testimony that he in fact had no intention to do more than splash Mr. Melanson; and that he threw the rock, which weighed about 20 lbs, aiming at a point about two feet in front of Mr. Melanson. In doing that, he however not only threatened Mr. Melanson, as he intended, so as to inspire fear in him for his very life; but, unfortunately, he caused the rock to severely strike Mr. Melanson, that blow resulting in a broken rib and considerable pain for Mr. Melanson. While the confrontation was viewed by Mr. Fournier as merely a laughable one, at the time, it was quite clearly no laughing matter for Mr. Melanson, even if he was wearing a helmet when attacked. Mr. Melanson later received medical attention, spent the night under observation in hospital and was discharged on crutches for his injured leg the next day. Mercifully, he appears to have since made a full recovery.

18 The **Criminal Code** provides a maximum penalty of imprisonment for ten years, with or without a fine and victims fine surcharge, on conviction of an assault with a weapon. In addition to that, since the offence is one in which violence against a person was used, I am obliged to consider the provisions of s.100 of the **Criminal Code**.

19 On behalf of the Crown, it is submitted that a sentence of imprisonment for a period in excess of two years is called for in this case. If the Court imposes such a sentence, the Crown seeks only a short term of imprisonment in respect of the mischief offences, to run concurrently

with the sentence for the assault.

20 In making that submission, Crown counsel relies very much on the context of events leading up to and surrounding the assault. He submits that the circumstances call for condemnation of the offence and a generally deterrent penalty which will carry a clear message that violence of this kind is not in any way condoned or tolerated by the Court or by Canadian society. The Crown relies also on the fact that Mr. Fournier was on probation at the time; and that he has a previous conviction for assault, so that this is a repetition by him of assaultive behaviour. He was on probation as part of his sentence for the earlier assault.

21 Nevertheless, even without considering the facts in mitigation of the assault offence, I must respectfully disagree with Crown counsel's submission that the offence, in all the circumstances, calls for a penitentiary sentence of two years or more. I agree that the offence must be condemned. I agree that the law must be shown to carry a significant penalty, and that such a penalty must be imposed. I agree also that the penalty should be one which will clearly carry the message that the type of conduct which gave rise to the offence is neither condoned nor tolerated by the Court or by the Canadian public at large. In my respectful view, all these things can be served by the sentence which the Court is about to pronounce.

22 On behalf of Mr. Fournier, it is submitted that no more is required than a symbolic "one day" in gaol for the assault; and that fines ranging from $250 to $500 for each of the two mischief offences should suffice in all the circumstances.

23 By way of mitigation, Mr. Fournier has not only entered guilty pleas to the charges now to be dealt with; but he has very clearly expressed his sincere remorse for the assault, apologising publicly in Court and expressing sympathy to Mr. Melanson, for the regrettable assault and its results. It is also apparent that Mr. Fournier complied with the conditions of his probation almost until the end of its 9-month term. He breached only the general condition that he keep the peace and be of good behaviour when he mistakenly allowed his loyalty to the union to draw him into an open and flagrant breach of this Court's injunction; and then went on to commit the three offences for which he must now pay the penalties provided by law. However, he did not breach the other conditions of that probation; and that is to his credit.

24 Although it was not emphasized in the submissions of counsel, I take the fact that Mr. Fournier did not carry the weapon in question on to the mine site, when he joined in the general invasion, as a mitigating factor. Had he used a weapon, or something designed for use as a weapon, which he had carried with him on to the minesite, one could well say that the assault was premeditated in the sense that he was looking for someone to attack. His use of the rock, which he evidently found on the spot, it being too heavy to carry around for any length of time, indicates that he attacked Mr. Melanson spontaneously on the spur of the moment and without stopping to think of the potentially very serious consequences of his action. He got carried away, as I see it, by the general mob spirit which undoubtedly prevailed at the time.

25 Mr. Fournier is no doubt now aware that if he had been convicted of the offence of attempted murder he could today have been facing the possibility of a sentence of life

imprisonment. Scaring security guards into thinking one might kill them could thus result in a court imposing a sentence of several years, at least, in a penitentiary, where that sort of unjustifiable conduct has been brought before the court and has been adjudged as an attempt to commit murder. Mr. Fournier can reflect on his good fortune in being represented by able counsel; and in the Crown being likewise represented, so that the nature of his actions has been revealed as something less serious than that.

26 As a further consideration, I have given careful thought to the remarks made by Mr. Fournier in his testimony regarding what he now perceives as having been a provocation on the part of the security guards. Certainly, if rocks were initially thrown by the guards at the strikers, as Mr. Fournier evidently believes, that could have constituted a deliberate provocation which, in all the circumstances, could be taken into consideration in mitigation of Mr. Fournier's sentence on counts 4 and 5. It is, of course, not a defence to any of the charges before the Court. The majority of the Court of Appeal in **R v. Oakley** (1991) N.W.T.R. 27 merely held that the element of provocation had been over emphasized in sentencing in that case, albeit without the Court of Appeal having any transcript of the evidence at trial (or any live witnesses) before it. The majority along with the dissenting judge in the Court of Appeal did not by any means rule out a deliberate and critical provocation as a mitigating factor with respect to sentence. Experience in the courts, over the years, has led to that remaining a relevant factor in determining a fit sentence. In all the circumstances, I do not place much emphasis on this feature of the situation, in relation to the assault in the present case, however, since by then the provocation should have ceased to operate.

27 I have also given some thought to the danger of placing a disproportionate share of the blame for what occurred on the shoulders of Mr. Fournier when, as I see it, others behind the scenes who have not yet been called to account before the courts would appear to have a very large measure of responsibility for what eventually took place, including the three offences for which Mr. Fournier has had now to answer. Mr. Fournier should not be made a scapegoat for these others.

28 In saying this, I want to make it clear that I do not include Mr. Melanson with those others. There is nothing before the court to suggest that he in any way, by act or omission, either provoked or brought about the assault which resulted in his injury. On the contrary, it is somewhat of an aggravating feature that Mr. Fournier's attack on him, though not intended as more than an expression of scorn for his seeming unwillingness to help the other guards, was in fact an attack on a helplessly wounded victim.

29 What occurred on June 14th 1992 appears to have been, as Mr. Fournier now recognizes, a seriously mistaken endeavour on the part of the strikers, and even more so, the organisers of their so-called rally. It is plain from the videotape that Mr. Fournier was only one of many who took part, no doubt in the belief that they were advancing the union's proper interests (and their own, as striking employees). Mr. Fournier has, as a result, had his employment at the mine terminated. While that may not seem so serious since he is still on strike, it is nevertheless a very significant mark against him in his otherwise apparently good employment record.

30 No attempt has been made to show the extent of the damage caused by Mr. Fournier to the two trailers, beyond the brief description I have given. No order by way of compensation has been requested. I therefore make none.

31 An order under s.100 of the **Criminal Code** is made, no reason to the contrary having been shown. That means, Mr. Fournier, that you are prohibited by that order from having in your possession any firearm, ammunition or explosive for a period of ten years from today. I direct Crown counsel to prepare a formal order in the manner called for by the practice of this Court and to have that served personally on Mr. Fournier, with a copy to Mr. Marshall as his counsel, following entry of the order in the Registry.

32 Please stand Mr. Fournier. Have you anything further that you wish to say before the Court passes sentence upon you?

MR. FOURNIER: No, your Honour.

33 On count 2, the count of assault with a weapon, the sentence of the court is that you shall serve a sentence of imprisonment of three months.

34 On each of counts 4 and 5 in the indictment, being the counts charging you with mischief

to property, the sentence of the court is that you shall pay a fine of $250.00, making a total of $500.

35 In addition, on count 2, you shall pay a victims fine surcharge of $500.00.

36 And, as I have mentioned, you will be subject to an order under s.100 of the **Criminal Code**.

37 Do you need time to pay your fines?

MR. FOURNIER: Yes, I do.

38 You shall have a total of 14 months from today's date within which to pay your fines by instalments of not less than $100 a month beginning not later than on January 14th 1994 for the first instalment and then monthly on or before the 14th day of the month until the full amount of $1000.00 is paid, any default rendering the balance then unpaid immediately due and payable.

39 In default of payment of your fines, or any portion thereof, you shall serve one day in gaol for each amount of $25.00 or less then remaining unpaid.

Before we rise, let me advise you Mr. Fournier to seek the advice of your counsel as to how you may in due course obtain a pardon for all the offences on your now lengthening criminal record. That will take some time but you can in that way recover a measure of self respect which will allow you to act sincerely as a good role model for your children and in your community generally. You are an intelligent man who has much to offer, and you can, I hope, learn from the mistakes of the past how to build a better future for yourself and those who depend upon you.

M. M. de Weerdt
J.S.C.