SC CV 95 022

CV 05408

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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

Plaintiffs

- and -

ROYAL OAK MINES INC., MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVE TURNER, HER MAJESTY THE QUEEN AS REPRESENTED BY THE GOVERNMENT OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA, Successor by Amalgamation to CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS and the Said CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, HARRY SEETON, JOHN DOE NUMBER ONE, JOHN DOE NUMBER TWO, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, RICHARD ROE NUMBER ONE, RICHARD ROE NUMBER TWO and RICHARD ROE NUMBER THREE

Defendants

MEMORANDUM OF JUDGMENT

1 The plaintiffs apply *ex parte* for a *fiat* to file an amended statement of claim. They say that the amendment should be allowed under Rule 124B (the "free amendment" rule) without the necessity of obtaining an order or without notice to anyone else. None of the defendants have yet been served with the statement of claim.

The amendments sought are to:

(a) correct some typographical errors;

(b) replace the designation given for the Government of the Northwest Territories in the style of cause to a designation more suitable to the practice in this jurisdiction;

(c) replace the designations of "John Doe" and "Richard Roe" in the style of cause with the names of specific identifiable individuals; and,

(d) identify additional persons on whose behalf the action is brought.

3 The action is brought pursuant to the *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3. That statute provides for a two-year limitation period. The original claim was filed prior to the expiry of the limitation period. This amendment, however, comes after its expiry.

4 The only question before me on this *ex parte* application is not whether the amendments should be made but whether they can be made *ex parte* or must the other parties, including the intended and newly identified defendants be given notice.

5 First, Rule 124B is not the appropriate process by which to add, delete, or substitute parties in the style of cause. There is an annotation to that effect in Côte & Stevenson, Civil Procedure Guide (1992), at pages 396 - 397. The unilateral change of a party may be at worst a nullity or at best a curable irregularity depending on the change being made. But it cannot be made without leave first being obtained.

6 If one were seeking to add or delete a party then the appropriate procedure is an application under Rule 48(3). If one were merely substituting one name for a party as opposed to another name, i.e., the correction of a misnomer, then the required procedure is an application for leave to amend a defect or error under Rule 127.

7 The correction of typographical errors or mistatements in the body of the statement of claim would ordinarily be covered under Rule 124B and not require leave.

8 The change in the designation of the defendant Government of the Northwest Territories would clearly come under the category of misnomer — a "misnaming" in the purest sense — and therefore amenable to correction in the style of cause with leave under Rule 127. If none of the other parties have been served then there is no reason why leave could not be obtained on an *ex parte* basis.

9 The replacement of the designations "John Doe" and "Richard Roe" with specific named individuals, however, cannot in all cases be called a misnomer. It is a question of fact to be decided in each case as to whether such a change in the style of cause is the correction of a mere misnomer or the addition of a defendant. Is the "John Doe" a clearly identifiable person who would know that he or she were the person referred to in the claim? That was the situation in Jackson v. Bubela (1972), 28 D.L.R. (3d) 500 (B.C.C.A.). Or, could the reference be taken so as to apply to a group of people with no particular individual being identifiable out of the group? That was the situation in Dukoff v. Toronto General Hospital (1986), 54 O.R. (2d) 58 (Ont. H.C.J.). The question therefore is not without controversy.

In the cases where one seeks to add a defendant, a most helpful guide on whether or not notice should be given to the intended defendant was that set out by Senior Master Marriott in Lett v. Draper Dobie & Company, [1957] O.W.N. 265. He was writing in reference to old rules in Ontario which, however, were similar to the rules in this jurisdiction. That judgment states (at page 267):

> From the above authorities and keeping in mind the provisions of Rule 213, I conclude, first; that except in special cases notice of the application to add a defendant is to be given to all parties to the action. It is not necessary to give notice to any party not affected by the order, and of course, where the plaintiff makes the application prior to service of the writ of summons or the defendant has not defended the action notice of the application need not be given.
>
> Second; in a straightforward case where the plaintiff might have made the person sought to be added a defendant in the first place or his addition is clearly necessary in order that the issues in the action may be effectually and completely dealt with, the practice has been to make the order sought without notice to the proposed defendant, subject of course to any objection raised by any party, and to leave it to the person added to move under Rule 217 to set aside the order made *ex parte* as against him, at which time the question of the propriety of the joinder may be determined. Where, however, the addition of the defendant appears to be a contentious matter, notice should be given to the proposed defendant as well as to the other parties to the action.

11 In this case the substitution of the specific named defendants is a contentious matter. There is not only the question of whether the use of "John Doe" and "Richard Roe" and the now sought for substitution is a misnomer or not but there is now also the interpolation of the limitation period. A misnomer can generally be corrected even after expiry of a limitation period; a defendant cannot be added after expiry.

...ly, counsel wish to add additional named individuals in the body of the ...nt of claim as persons on whose behalf the action is brought. These would not ...new plaintiffs added to the style of cause. The *Fatal Accidents Act* provides a class of people who are statutory beneficiaries of any claim under the Act. It also provides that full particulars shall be set out in the statement of claim of the persons on whose behalf the action is brought. Here the amendment sought is to add claims on behalf of a daughter and granddaughter of one of the deceased. They were not mentioned in the original statement of claim at all and now the limitation period has expired.

13 There are numerous cases from jurisdictions that have enacted family law reform legislation in the past decade regarding the addition of such claimants, either as parties or merely as beneficiaries of the action, after the expiry of a limitation period. Factors to consider are the ages of the claimants (and whether a statutory extension to the limitation period would apply if the claimant were a plaintiff), any earlier notice to the defendants of the claim, potential prejudice, and any special circumstances. I am not convinced that, even if these claimants are not named plaintiffs, this amendment does not in effect add new claims after expiry of the limitation period. It is at least an issue that needs to be addressed further. This is not an issue that should be decided on the basis of an *ex parte* application.

14 The only other consideration is whether the interests of the proposed defendants can be just as easily protected by allowing the amendment and then giving an opportunity for any defendant to move to strike out the statement of claim. Ordinarily this would be

the most practical option. But, considering the fact that the limitation period has expired, and the state of the law regarding misnomer and the addition of claims after such expiry, it seems to me that the onus should be on the plaintiffs to establish the grounds for these amendments. I suspect it will be a highly contentious matter.

15 Therefore, the plaintiffs' application for a *fiat* directing the clerk to accept the amended statement of claim pursuant to Rule 124B is denied. While I recognize that some of the proposed amendments could come under that rule, I do not think it would be efficient to have piecemeal amendments. For that reason I direct that the plaintiffs serve on the defendants presently named and all prospective defendants (those for whom their identities have been established) the statement of claim as filed together with a notice of motion (with the amended statement of claim appended to it) seeking leave to amend and any supporting affidavits.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 15th day of June, 1995

Counsel for Plaintiffs: J. Philip Warner, Q.C.

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Defendants

Memorandum of Judgment of the Honourable Mr. Justice J. Z. Vertes

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