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, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER 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, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER, TERRY LEGGE, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, JAMES EVOY, DALE JOHNSON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE, and RICHARD ROE NUMBER THREE

Defendants

Ruling on plaintiffs' application to summarily dismiss defendants' motions to disallow amendments to the Statement of Claim and to strike out parties. Application dismissed.

<u>REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES</u>

Heard at Yellowknife, Northwest Territories
on March 19, 1996

Reasons filed: April 22, 1996

Counsel for the Plaintiffs: J. Philip Warner, Q.C.
& Sandra R. Hermiston

Counsel for the Defendant Evoy: G. Bruce Butler

Counsel for the Defendant Johnson: Raymond C. Purdy

Counsel for the Defendants Kosta, David,
Danis, B.R. Lisoway, Schram, Mager,
C. Lisoway, Campbell & Amyotte: Austin F. Marshall
& Sarah A.E. Kay

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Defendants

REASONS FOR JUDGMENT

1 The defendants Evoy, Johnson, Kosta, David, Danis, B.R. Lisoway, Schram, Mager, C. Lisoway, Campbell, and Amyotte, have brought motions to disallow amendments made to the Statement of Claim naming them as parties to this action. In response, the plaintiffs have applied to dismiss these motions summarily on the ground that these motions involve the relitigation of issues already dealt with by the Court of Appeal. These reasons address solely the plaintiffs' application.

History of the Litigation:

2 This action seeks damages for the wrongful deaths of nine men killed in an underground explosion on September 18, 1992. The Statement of Claim was filed shortly before the expiry of the two-year limitation for the commencement of such actions. In the original Statement of Claim, none of the defendants who bring these motions were individually identified. All of them were designated simply as "Richard Roe Number One" and "Richard Roe Number Two". In June of 1995, after the expiry of the limitation period, the plaintiffs sought to file an amended Statement of Claim under the so-called "free amendment" rule of the Rules of Court. That rule, Rule 124B, provides that a party may amend his or her pleading once, without the necessity of obtaining leave of the court, prior to the close of pleadings. The clerk rejected the amended claim and, on a subsequent ex parte application to me, I refused to authorize its issuance.

3 The amendments sought by the plaintiffs were described by their counsel as (a) the correction of typographical errors; (b) the correction of misnomers; and, (c) the identification of additional persons on whose behalf the action is brought. I rejected the ex parte application principally because I thought some of the amendments were not properly ones that can or should be made without leave and without notice. Those amendments are the ones that specifically substituted for the "Richard Roe" designations the names of the individual defendants who now bring these motions. The issue was whether those amendments were merely the correction of misnomers or were they the addition of new defendants (something that cannot be done after the expiry of the limitation period); and, since the matter was likely to be contentious, should those amendments have been sought on notice to the intended defendants.

4 The plaintiffs appealed my rejection of their ex parte application to the Court of Appeal under Appeal Court Rule 5(4):

> (4) An appeal in the case of a refusal of an ex parte application, when the refusal is for any other reason than the want of notice, shall be by way of renewal of the application to the Court.

5 On the appeal the plaintiffs made the same points as they did before me. The appeal also proceeded on an ex parte basis. At the end of the hearing on June 22, 1995, the panel hearing the appeal made the following ruling, as delivered by Tallis J. A. and recorded verbatim by the clerk:

> We're all in agreement Mr. Warner that there should be an order, or that we should vacate the order refusing leave to issue the amended statement of claim with perhaps an unnecessary rider but we put it in there anyway reserving to the defendants or prospective defendants the right to raise any limitations period by way of defence and you're not asking for costs.

6 As a result the amended Statement of Claim was issued on June 23, 1995. In January, 1996, the defendant Evoy, having been served with the amended claim which, for the first time, specifically identified him as a defendant, applied to the Court of Appeal to set aside the ex parte order made on June 22, 1995, and to strike him as a defendant in the action. The grounds advanced by that defendant were that (i) neither the application to issue the amended Statement of Claim nor the appeal should have been brought ex parte; (ii) the identification of that defendant as "Richard Roe" was not a misnomer; and, (iii) prejudice to the defendant by the amendment. In response, the plaintiffs submitted in their written brief that the naming of Evoy as a defendant was the correction of a misnomer and, if he disputes that, the Court of Appeal left it open to him to raise it in his pleading as a limitations defence.

7 On January 16, 1996, the Court of Appeal panel hearing Evoy's application made the following ruling, as delivered by Hetherington J.A. from the bench:

> Assuming without deciding that we have jurisdiction to hear the application before the Court at this time, we are not persuaded that we should interfere in any way with the Order made by the Court in June and we therefore dismiss the application. Costs would ordinarily follow the event.

8 These defendants now bring their motions relying on Rules 48(3), 48(7), and 125:

> 48. (3) The court may, either upon or without the application of any party and with or without terms order that the name of any party improperly joined be struck out and that any person be added who ought to have been joined or whose presence before the court may be necessary in order to enable the court to adjudicate upon and settle all the questions involved in the cause or matter, or protect the rights or interests of any person or class of persons interested under the plaintiff or defendant.
>
> . . .
>
> (7) An application to add, strike out or substitute a plaintiff or defendant may be made at any stage of the proceedings.
>
> . . .
>
> 125. Where any party has amended his pleading under Rule 124 the opposite party may, within 15 days after the delivery to him of the amended pleading, apply to the court to disallow the amendment or any part thereof and the court may disallow it or allow it subject to terms as to costs or otherwise.

9 The issue these defendants want to argue, of course, is whether their addition to this action was merely the correction of misnomers or were they added as new defendants after the expiry of the limitation period. The question raised by the plaintiffs' application to summarily dismiss these motions is: What did the Court of Appeal decide?

Plaintiffs' Submissions:

10 In his written brief, counsel for the plaintiffs submitted as follows:

> 19. On June 22, 1995 and January 16, 1996, in directing that the Amended Statement of Claim should be issued under Rule 124B, the Court of Appeal necessarily determined:
>
> (a) That want of notice to the Defendants was immaterial;
>
> (b) That the substitution of names of real persons in place of "Richard Roes" (each of the Defendants who have filed Offending Motions) was permissible as the correction of a misnomer and did not constitute the addition of a new defendant to the lawsuit;
>
> (c) Whether or not the allegations relating to Evoy, Johnson and the 8 Defendants in the original Statement of Claim were adequate to identify them is a matter of defence for which leave was specifically reserved;
>
> (d) The onus of proof of any such alleged impropriety or defence (if raised) rests with that Defendant.

11 It seems to me that the issue in (b) above is one that was expressly not determined by the Court of Appeal. Counsel acknowledged this at the hearing before me when he submitted that, in June, the Court of Appeal merely validated the issuance of the amended claim without the need for leave or notice and, in doing so, implicitly held that the addition of the named defendants was *arguably* the correction of misnomers.

12 Similarly, there is nothing to support the contention put forward in (d) above. That seems to me to be a question of what appropriate evidentiary rules apply in the circumstances.

13 The substance of counsel's submissions was that the court validated the procedure used to amend while preserving the right of the defendants to plead any limitations defence (essentially the misnomer issue). It is suggested that the court, by refusing to interfere with that order when it heard Evoy's application in January, confirmed that the issue should be raised in the pleadings and determined at trial. Counsel argued that the effect of this ruling procedurally is that Evoy had his opportunity to have a summary determination of the misnomer issue by applying to the Court of Appeal and now he should not have a second chance to argue the same

points on a summary application to this court under Rules 48(3) or 125. He submitted that such a step would be a relitigation of the same issues thereby violating the principle of *res judicata* and constituting abuse of process.

14 Counsel further bolstered his argument that the Court of Appeal necessarily directed the parties to decide this issue at trial by referring to the "objective" test for determination of whether mis-identification of a party is a true misnomer. This is explained in Davies v. Elsby Brothers Ltd., [1960] 3 All E.R. 672 (C.A.), at page 676:

> ...how would a reasonable man take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong' then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer.

15 Plaintiffs' counsel submitted that this test, which is the same whether the amendment comes before or after the expiry of a limitation period, is one that can only be assessed in the context of all of the evidence, hence after a trial.

16 These arguments were not just directed at the defendant Evoy; they were applied as well to the other defendants who have brought these motions. It was submitted that these other defendants could have participated in Evoy's application before the Court of Appeal and they would have benefitted from any success achieved by Evoy there. Reference was made toTung Wise Co. v. Park Georgia Realty Ltd. (1994), 23 C.P.C. (3d) 127 (B.C.S.C.), at page 132:

> While the present applicants were not formal participants in the Intrawest application, they are parties in the same action and the benefit sought by Intrawest would have accrued to them if Intrawest had been successful. They had the right as parties to make submissions and to participate fully in the Intrawest application and they are not entitled, in my view, to relitigate the issue after it has been decided against them:

> Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd. (1988), 22 B.C.L.R. (2d) 89 (S.C.).

17 The defendant Johnson did not appear before the Court of Appeal in January. The other nine named defendants did appear by counsel but took no part in the proceedings.

18 I have outlined these submissions in such detail because of the procedural history of the action to date and the issues raised by the plaintiffs' application to summarily dismiss these motions. After all, the defendants want to take a procedural step that they would ordinarily, with one qualification, be entitled to take pursuant to these rules. The only qualification is that an application to disallow an amendment under Rule 125 must be made within 15 days of receipt of the amendment (although another rule allows the court to extend time). An application to strike out a party under Rule 48, however, can be made at any stage of the proceedings.

The Court of Appeal Decision:

19 So what did the Court of Appeal decide? All we have are the utterances from the bench; there were no reasons given. This interpretive role is thrust upon me because of the position taken by the plaintiffs. They are of course entitled to take this position and, if they are right, then they are in fact assisting the court to regulate its process. As noted by Kerans J.A. in Logan v. Royal Bank of Canada (1992), 3 C.P.C. (3d) 121 (Alta. C.A.), at page 123: "...the court takes a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings."

20 In this case, the misnomer issue was raised by the defendant Evoy in his January application to the Court of Appeal. There is no question that the court did not determine the *substantive* merits of that issue. The question is whether that court determined the *procedural* merits of that issue. The plaintiffs say that the fact that the court did not deal with the substantive issue does not mean that it did not necessarily determine the procedure that must be followed: raising the issue in the defence pleadings and resolving it at trial. They apply the principles of *res judicata* and abuse of process to this question of procedure.

21 Authorities of long standing point out that *res judicata* is a form of estoppel which, as a necessary aspect of public policy, prevents relitigation and brings finality to disputes. The requirements for an estoppel by *res judicata*, either issue estoppel or cause of action estoppel, are well-established and were recently reviewed by the Alberta Court of Appeal in 420093 B.C. Ltd. v. Bank of Montreal, [1996] 1 W.W.R. 561. Issue estoppel applies here according to the submissions of plaintiffs' counsel. But, as noted in the Bank of Montreal case, even if for some reason estoppel is not available, an attempt at relitigation may still be declared an abuse of process.

22 The principle of issue estoppel goes beyond the particular decision in question. It covers as well every underlying decision that was necessary to the ultimate decision even though not expressly stated as a decision. The rule is expressed as follows in Spencer-Bower & Turner, The Doctrine of *Res Judicata* (1969, 2nd ed.), at page 152:

> Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, even though not declared on the face of the

> recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms: but, beyond these limits, there can be no such thing as a *res judicata* by implication.

23 In June, the Court of Appeal decided that the amended Statement of Claim could be issued without leave or notice. It reserved the right to "raise any limitations period by way of defence". Does this necessarily mean that what I have described as the misnomer issue could not be raised in any other manner permitted by the rules? I think not.

24 As noted in the quotation above, an underlying decision must have been an integral part of the explicit one for an estoppel to arise. This was explained further by Spencer-Bower & Turner at page 179:

> Even when in one way or another it can be demonstrated that the court has *expressly* determined, in the earlier proceeding, the same issue as is now in dispute, an issue estoppel will not by any means always be the result. Only determinations which are necessary to the decision—which are fundamental to it and without which it cannot stand—will found an issue estoppel. Other determinations, without which it would still be possible for the decision to stand, however definite be the language in which they are expressed, cannot support an issue estoppel between the parties between whom they were pronounced.

25 In my opinion, the only fundamental determination made by the Court of Appeal in June was that the amended claim can be issued. Any other determination, explicit or implicit, is not necessary to that decision. In January, the Court of Appeal merely refused to interfere in any way with the order made in June. I fail to see how an estoppel can arise with respect to the procedural question of how the misnomer issue will be addressed and resolved.

26 An example of an estoppel arising only with respect to "fundamental" aspects of a decision is provided by a case referred to by Spencer-Bower & Turner (at page 155): Penn-

Texas Corp. v. Murat Anstalt et al (No. 2), [1964] 2 Q.B. 647 (C.A.). On the plaintiff's application for production of documents by a company, the court, in the first proceedings, held that the order, though obtainable upon a proper application, should be refused due to defects in the particular application. On a second application, being the subject of the reported case, the company sought to re-argue the question as to whether the order could be made at all and the plaintiff raised a *res judicata* argument to prevent the question being entertained. The Court of Appeal held that its earlier decision, that a company could be ordered to produce documents, did not preclude the company from relitigating the point since its resolution was not necessary to its earlier ruling, which was in the company's favour, refusing the order due to deficiencies in the application. Lord Denning M.R. said (at pages 660 - 661):

> In my opinion a previous judgment between the same parties is only conclusive on matters which were essential and necessary to the decision. It is not conclusive on other matters which came incidentally into consideration in the course of the reasoning...
>
> The ruling by this court in *Penn-Texas* (No. 1) (that there was power in the court to order a limited company to produce documents) was only an incidental matter. It was not essential to the decision. No appeal lay from it. It is not therefore *res judicata* between the parties.

27 Similarly, the reservation of the right, expressed by the June decision, to raise any limitations period by way of defence cannot raise an estoppel since it was not essential or necessary to the decision to allow the amended claim to be issued. It was only an incidental matter. Indeed this may have been acknowledged by the court when Tallis J.A. made the comment that such a reservation is "perhaps an unnecessary rider".

28 The authorities say that a defence based on a limitation period must be pleaded. The facts giving rise to the defence must be proved in evidence. But the issue raised by these defendants' motions is not simply that the claim is statute-barred; that is the consequence of the

issue raised by these defendants, that being, that the substitution of them as named defendants for the original "Richard Roe" designations was not the correction of mere misnomers but their addition as new defendants. They could ordinarily bring that issue before the court on a motion, as here, under Rule 125 or Rule 48. If that had been done in the usual course, that is to say, if the amended claim had simply been issued and served (without going back and forth to the Court of Appeal), the plaintiffs would have no grounds to prevent these motions from at least being entertained. It seems to me that the same thing would have been accomplished if the plaintiffs had followed my original direction and sought leave for the amendments on notice to the intended defendants.

29 I am not aware of any authority that would preclude a litigant from exercising a procedural right under the Rules of Court in the absence of a specific direction by the court. In such a case any attempt to contradict that direction could be subject to a finding of abuse of process. Perhaps part of the reason why such authorities are rare is because in most cases these applications involve interlocutory matters that do not decide substantive issues relating to the cause of action. There is strong authority for the proposition that the principles of issue estoppel do not apply to interlocutory procedural matters: Talbot v. Pan Ocean Oil Corp. (1977), 3 Alta. L.R. (2d) 354 (C.A.).

30 The Penn-Texas and Talbot cases reveal another aspect of interlocutory proceedings and why issue estoppel does not arise. Both cases dealt with procedural steps, one involving production of documents and the other involving service *ex juris*. Initially both cases rejected the applications due to deficiencies in the material submitted in support of the motions. In both cases, however, the interested parties were not precluded from bringing a new applicaiton with

appropriate material. The result is that, in the absence of a specific order prohibiting it, an interlocutory motion may be renewed so long as it is not on the same material. If there is no new material, the previous order should be appealed, not relitigated.

31 Similarly, should these defendants be precluded from raising the misnomer issue prior to trial simply because one of them tried to raise it before the Court of Appeal? The substance of it was not dealt with by that court. It is not that the material was deficient; the court on both occasions did not address the issue. There was nothing to appeal from their decisions. Even if one assumes that the Court of Appeal in June intended this issue to be only raised in the pleadings (an assumption which in my view is not justified), presumably the defendants would still be able to apply prior to trial since, at least pursuant to Rule 48(7), an application to strike out a defendant can be made at *any* stage of the proceedings. The result of such an application may be "substantive" in the sense that if these defendants are successful presumably the limitation period provides them with a complete defence; but the ability of the defendants to apply is "procedural" and thus issue estoppel does not apply. Just because the Court of Appeal allowed the amended claim to be issued does not by implication foreclose the option of using the rules, where applicable, to have the misnomer issue decided by the court.

32 The plaintiffs submit that at least insofar as the defendant Evoy is concerned, he had his chance at a summary disposition of the misnomer issue before the Court of Appeal in January and lost. The problem with that argument, again, is that the court did not deal with that issue (a point conceded by the plaintiffs). All the court did in January was decide not to do anything. It did not interfere with the June order. The June order was made ex parte. This cannot raise an

estoppel barrier to prevent Evoy, who was only named as a defendant after the June order, from using the rules that are available to every litigant.

33 Would it be an abuse of process to allow these defendants to bring these motions forward as opposed to leaving the misnomer issue to be raised in the pleadings and then proceeding to trial? The plaintiffs argue that the question of whether these defendants were properly added can only be decided in the context of all of the evidence. It seems to me, however, that the evidence that would be most relevant on the misnomer issue would be that of the plaintiffs supporting their position as to why the substitution of names is merely the correction of misnomers. The evidence of the defendants is irrelevant since the sole test from their perspective — the "objective" test referred to by plaintiffs' counsel — requires simply an examination of the unamended pleadings to determine if a person in the position of these defendants would have known that they were the ones being referred to. Their subjective opinion is worthless.

34 This point was made in a judgment referred to by Evoy's counsel. In Pile Base Contractors v. Pasichnyk (1994), 15 Alta. L.R. (3d) 319 (C.A.), the court addressed the question of the substitution of a corporate defendant's name for a "John Doe" designation. The claim alleged negligence in the manufacture of a certain piece of equipment. The defendant moved to strike out the pleading. The court said (at page 322):

> Of course the claim against John Doe is worthless unless some real person or corporation can be substituted for John Doe. The one whom the plaintiffs named later was Simon RO Corporation. ... Is this a mere misnomer? Does the original statement of claim describe an actual person, and merely give him or it a mythical name? Had the claim done more to describe or identify the machinery said to be defective, it might well have. But all it said was that the machinery was a "cherry picker". The claim did not give its make, or the manufacturer's trade name, or the model, or the serial number, or even anything else distinctive such as a paint scheme or design. In the absence of evidence,

> it seems safe to assume that cherry pickers are made by more than one manufacturer. And we may assume that they are not rare items like nuclear power plants or battleships, so people in the industry would not know each individual machine. If one uses the English test, had Simon RO Corporation's officials read the original statement of claim, they could not possibly have said "That refers to us, but they have got our name wrong." Those factual assumptions in the absence of evidence are fair, for *the onus lies on the party moving to substitute a party or correct a misnomer, to adduce evidence to support his motion.* (emphasis added)

35 I do not interpret the June Court of Appeal decision as meaning that the only way the misnomer issue can be raised is by way of pleadings. I have already said that the limitations defence arises only as a consequence of the misnomer issue. If the plaintiffs are right in their assertion that the use of the "Richard Roe" designation was a true misnomer, then logically there is no limitation defence. If they are wrong, and these defendants are "new" defendants, then logically there is a limitation defence. Indeed they could not be added to the action at all. I do not see why, for these reasons, the misnomer issue could not be determined as a preliminary matter. If the defendants are right, then there is no point in having them participate in what could be lengthy and costly proceedings.

36 For these reasons, I conclude that these defendants are not precluded, on the basis of either *res judicata* or abuse of process principles, from bringing forward these motions.

Conclusions:

37 The plaintiffs' application to dismiss these motions is itself dismissed. These defendants may bring forward their motions subject to the following comments.

38 A motion under Rule 125 would be considered as being now out of time. The defendants have sought an enlargement of the time period. If that request is contested, plaintiffs' counsel should let the other parties know. I will therefore make the following directions:

1. Within 14 days of the date of these reasons, counsel for those defendants who intend to press ahead with their motions under either or both of Rules 48 and 125 shall notify plaintiffs' counsel of that fact and particularize which rule they will proceed under.

2. Within 14 days after that, plaintiffs' counsel will advise opposing counsel as to whether the request for enlargement of time for Rule 125, if applicable, will be contested.

3. Counsel are then to contact me with suggested dates for the argument of both the enlargement of time application (if necessary) and the substantive motions. I see no reason why both could not be argued at the same time. The scheduling of a hearing date will have to take account of the time required by plaintiffs' counsel to conduct any cross-examinations on affidavits filed in support of the motions. Likewise, if the plaintiffs intend to file affidavits, opposing counsel will need time to conduct their cross-examinations. Due to my previous involvement with these procedural questions, I will arrange for another judge to hear these motions.

39 Counsel should note that in these reasons I have referred to the rules as found in the 1979 Rules of Court. Henceforth counsel should have reference to the revised Rules of Court that came into effect on April 1, 1996. The specific rules discussed in these reasons are unaffected by those revisions.

40 Costs of this application will be left to the discretion of the judge who will, if necessary, hear these motions.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 22nd day of April, 1996

Counsel for the Plaintiffs: J. Philip Warner, Q.C. & Sandra R. Hermiston

Counsel for the Defendant Evoy: G. Bruce Butler

Counsel for the Defendant Johnson: Raymond C. Purdy

Counsel for the Defendants Kosta, David, Danis, B.R. Lisoway, Schram, Mager, C. Lisoway, Campbell & Amyotte: Austin F. Marshall & Sarah A.E. Kay

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Defendants

Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes