Date: July 16, 1997
Docket: 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

Motion respecting transitional effect of new Rules of Court on pending action.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on July 7, 1997.

Reasons filed: July 16, 1997

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

Counsel for the Defendants,
Royal Oak Mines Inc. & Witte: K. F. Bailey, Q.C.

Counsel for the Defendant,
Procon Miners Inc.: Charles McGee

Counsel for the Defendant,
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Counsel for the Defendants,
Whitford, Turner & the Government
of the Northwest Territories: Pierre J. Mousseau

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Defendants

REASONS FOR JUDGMENT

[1] In this application the plaintiffs raise the question of the impact on an existing action of the enactment by this court of new rules of procedure. As such it is a question of first impression in this jurisdiction.

[2] New Rules of Court came into force on April 1, 1996. This action was commenced prior to that date. The new rules contemplated the effect on pending actions by enacting Rule 736:

> 736. (1) Subject to subrule (2), these rules apply to all proceedings, whether commenced before or after these rules come into force.
>
> (2) Where a proceeding has been commenced before these rules come into force, the Court may order, subject to such terms as the Court considers just, that the proceeding or a step in the proceeding be conducted under the rules of court that governed the matter immediately before these rules came into force.

[3] Since the Rules of Court have the force of a statutory enactment, Rule 736 simply expresses the general rule applicable to the repeal and replacement of enactments found in s.36(2)(b) of the *Interpretation Act*, R.S.N.W.T. 1988, c.I-8:

> (2) Where an enactment is repealed in whole or in part and another enactment is substituted for the former enactment . . .
>
> (b) every proceeding commenced under the former enactment shall be continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment . . .

[4] The refinement on this general rule is that, by subrule 736(2), the court may order that the on-going proceeding or a step in that proceeding be conducted under the old Rules. The presumption is that the new Rules apply. It is therefore the responsibility of the party seeking to deviate from that presumption to satisfy the court of the justice in doing so.

[5] On this motion the plaintiffs seek leave to have the old Rules apply with respect to the examinations for discovery of corporate parties. Specifically, the plaintiffs wish to use the power provided by the old Rules to examine under oath employees or former employees of any adverse corporate party. Several of the party defendants, primarily the corporate parties, appeared by counsel to oppose this motion. Counsel for some of the other parties also appeared but only to maintain a watching brief.

[6] Pursuant to the old Rules, originally enacted in 1979 and taken almost word for word from the Alberta Rules of Court, three categories of people were subject to examination for discovery by any party adverse in interest without the necessity of a court order: (a) a personal party; (b) an "officer" of a corporate party as selected by that corporation; and, (c) any current or past employee of a party, either personal or corporate, who appears to have some relevant information acquired by virtue of that employment. The relevant provisions were found in old Rule 204:

> 204. (1) Any party to an action, any officer of a corporate party and any person who is or has been employed by any party to an action, and who appears to have some knowledge touching the question at issue acquired by virtue of that employment, whether the party or person is within or without the jurisdiction, may be orally examined under oath or affirmation before the trial of the action touching the matters in question by any person adverse in interest, without order.
>
> (2) The court may on application limit the number of employees, or former employees, of any party who may be examined and may set aside any appointment for the examination of any employee which it regards as unnecessary, improper or vexatious.

[7] Under the new Rules, with respect to corporate parties, one representative of the corporation, as selected initially by the corporation, is liable to be examined and no other representative may be examined without leave of the court or by agreement. The pertinent new provision is found in Rule 238:

> 238. (1) Where a corporation is to be examined for discovery, the examining party may examine an officer, director or employee on behalf of the corporation who is chosen by the corporation, but the Court, on application of the examining party before the examination, may order that another officer, director or employee may be examined on behalf of the corporation.
>
> (2) Where an officer, director or employee of a corporation has been examined, no other officer, director or employee of the corporation may be examined without leave of the Court or the agreement of the parties.

[8] It is no secret that the new rules with respect to examinations for discovery, not just with respect to corporate parties but generally, were modelled to a great extent on the Ontario Rules of Civil Procedure enacted in 1985. Similar rules governing examinations of corporate parties, however, can be found in the procedural rules of at least four other provinces.

[9] Counsel are in agreement that there is no vested right in procedure. There is, both at common law and in legislation such as s.36 of the *Interpretation Act*, a presumption that procedural legislation applies immediately and generally not just to future acts but also to pending ones: *Wildman v The Queen*, [1984] 2 S.C.R. 311, at page 331; *Petersen v Kupnicki* (1996), 44 Alta. L.R. (3d) 68 (C.A.), at page 77.

[10] Counsel are also in agreement that this motion should not be considered a contest between the old and new rules to determine which are "better". I have no doubt that such an exercise would be fruitless. Respectable arguments can be made for and against the merits of both, especially by litigators who are familiar and comfortable with one way of proceeding. In addition, one cannot consider the relative merits of some rules in isolation without regard to the whole system as reflected by the inter-operation of other rules.

[11] Plaintiffs' counsel suggested that this motion should be decided solely on the basis of the discretionary power given to the court by subrule 736(2). In his submission there are good and valid reasons for applying the old rules, reasons which would advance the cause of justice, or at least would cause no injustice to other parties.

[12] Plaintiffs' counsel argued that there is intrinsic value in sworn evidence, taken first hand, from people who are in a personal position to have information, as opposed to evidence based on second-hand information being filtered through the intermediary of a designated corporate officer. He also does not wish to receive such information subject to qualifications or editorial comments as may happen if it came second-hand. Counsel has identified through the documentary production to date a number of current and former employees of the defendant Royal Oak Mines, for example, who are likely to have personal information that is relevant, helpful in the search for truth, and possibly contradictory to the "official" corporate position of that party. Counsel also argued that proceeding under the old Rules may be more convenient and efficient.

[13] To appreciate these submissions I think it would be helpful if I set out my understanding of the procedure for examining corporate parties.

[14] Whether under the old Rules or the new ones the official representative of the corporate party to be examined has an obligation to inform himself or herself from the party's records and from present or past employees and agents and to disclose such information. The person being examined can be asked about all the knowledge deemed to be within the domain of the corporate party. If the examiner has information from current or past employees, the corporate representative may be asked and must answer whether that information is part of the party's information. If it is then the corporate party may accept it and, if it does, it becomes the evidence of that party. This is important because only discovery answers by parties may be read in at trial, not answers given by employees or others who are not the designated representative of the party. The corporate representative, however, may acknowledge that it is part of the party's information but may still reject it. Then the party has an obligation to disclose any contradictory information. The party may qualify it by other information. Or, the party may simply not accept or reject the information put to it by the examiner. To this extent, the procedure and result are the same whether under the old N.W.T. Rules of Court (or currently in Alberta) or the new N.W.T. Rules of Court (or in Ontario). Reference may be made, for the Alberta situation, to *Nova v Guelph Engineering Co.*, [1988] 2 W.W.R. 665 (Alta. Q.B.), and *Esso Resources Canada Ltd. v Stearns Catalytic Ltd.* (1993), 20 Alta. L.R. (3d) 320 (Q.B.), and, for Ontario, to *Claiborne Industries Ltd. v National Bank of Canada* (1989), 69 O.R. (2d) 65 (C.A.).

[15] I was advised that the practice in Alberta (several counsel appearing on this motion are senior members of the Alberta bar) is to conduct examinations of employees or former employees first and then to examine the designated corporate representative. That way it is a simple matter of obtaining the party's acknowledgment as to acceptance, rejection or qualification of the employee information. This procedure, it was said, avoids the prospect of re-examining the representative on the employee information. It is only if employee examinations are deemed unnecessary or vexatious that the court may limit the number.

[16] Under the new regime, as in Ontario, employees past or present are not "parties". There is no automatic right to examine them for discovery. To do so one is obliged to obtain an order for the examination for discovery of non-parties pursuant to new Rule 270. The criteria for such an order were canvassed in the Ontario Divisional Court judgment in *Famous Players Development Corp. v Central Capital Corp.* (1991), 3 C.P.C. (3d) 286. There was no facility in the old Rules, as there is none presently in Alberta, to examine non-parties (other than employees past and present).

[17] Both the old and the new Rules contemplate that there would be only one designated representative of a corporate party for examinations for discovery. That person may be an officer, director or employee of the party. But, unlike the old Rules, the new Rules, in subrule 238(2), also provide for leave to examine a second "official" corporate representative. The

criteria for this procedure were outlined, with respect to the equivalent rules in Ontario and British Columbia, for example, in *Abitibi-Price Inc. v Sereda* (1984), 43 C.P.C. 217 (Ont. H.C.J.), and *W. R. Grace & Co. v Privest Properties Ltd.* (1992), 67 B.C.L.R. (2d) 345 (C.A.).

[18] These last two points lead to a concern expressed by defendants' counsel, particularly counsel for Royal Oak Mines. It is submitted that this application is premature. The argument is that the proper time to bring this motion would be after the examination for discovery of the authorized corporate representative if it becomes apparent that a second representative or other employees must be examined to ensure that the plaintiffs get a meaningful discovery. This is essentially the basic requirement for relief under the new Rules 238(2) and 270 noted above.

[19] I appreciate the comments made by plaintiffs'counsel as to the value of direct sworn evidence. But, to take his argument to its logical conclusion, there would undoubtedly be even greater value in examining for discovery every and any potential witness in a trial. For various reasons, not the least of which is to keep pre-trial procedures under some modicum of control, Canadian jurisdictions have not adopted such wide open discovery procedures.

[20] There are also ways in which to obtain the type of information sought by the plaintiffs other than through the mouth of an official corporate spokesperson or formal examinations for discovery. Witnesses can be interviewed. Documentation from other proceedings may be used. I note only that some of the documentation used by the plaintiffs in this case to identify potential employee (past and present) witnesses are affidavits sworn by these people in other proceedings related to matters in issue in this case. In his written submissions, plaintiffs' counsel also noted that information has already been obtained from documents produced by the defendants.

[21] Plaintiffs' counsel also expressed his concern that evidence may be "shaped" in certain ways if they were forced to disclose, in an examination of the corporate representative, information to a defendant as to the questions they wish to ask of employees. Whether this is a real concern or not (and several of the counsel for the defendants made the point that there is no evidence to support this contention), I only say that it is a potential concern in all litigation. We rely to a great extent on the integrity of the participants in the process.

[22] I agree with plaintiffs' counsel in his submission that the transitional provision in subrule 736(2) gives the court a broad discretion to order that the old Rules apply to steps in an action, a discretion that has to be exercised on the basis of fundamental fairness to all parties. Counsel referred me to the previously noted *Petersen* case from the Alberta Court of Appeal. There, Fraser C.J.A. wrote (at page 79) that the application of new procedural rules should be deferred if applying them would "cause an injustice or disadvantage a litigant in what the Court considers to be an unfair or arbitrary way." But that case was dealing with what Fraser C.J.A. described (also at page 79) as "a procedural and logistical quandary akin to a Catch 22 situation" with an extremely draconian result for the applicant. That is not the situation here where the most that can be said is that the plaintiffs would arguably have more extensive discoveries under the old Rules.

[23] I am not convinced, however, that the old Rules would provide more extensive discoveries. They would certainly provide the facility to examine more people without leave of the court but that does not necessarily imply that there will be, overall, more meaningful discoveries. As I stated previously, these rules, old or new, cannot be viewed in isolation. The new Rules contain many features lacking in the old ones. I have already noted the power to examine additional corporate representatives in subrule 238(2) and the ability to examine non-parties, employees or not, in Rule 270. In addition there are provisions providing for (i) expanded disclosure obligations with respect to expert reports (Rule 252), insurance policies (Rule 253), and surveillance reports (Rule 254); (ii) a prohibition against refusing to answer on the basis that the information sought is evidence (Rule 251); (iii) the obligation to disclose names of persons who may have relevant information (Rule 251); (iv) an ongoing duty to provide new or follow-up information (Rule 260); and (v) the requirement for evidence summaries for each witness prior to trial (Rule 326). These factors are all relevant to a consideration of any alleged "disadvantage" to the plaintiffs in having to follow the new Rules.

[24] In considering how to exercise my discretion on this particular application, I am impressed by the decision of Master Sandler of the Ontario Supreme Court in *Primavera v Aetna Casualty Co.* (1985), 52 O.R. (2d) 181, affirmed on appeal at 53 O.R. (2d) 495 (H.C.J.). The following was how Master Sandler described the relevant factors (at page 187):

> In my view, it is impossible to lay down any broadly-based rule as to when the new Act and rules will not be applied. Rather, one must look at the specific new statutory provision or rule sought to be applied or avoided, the policy underlining that provision or rule, the specific facts of any particular action, any decisions or agreements that were made by counsel or rulings that were made by a court, based on the law as it existed before January 1, 1985, and the impact that the application or non-application of the particular new provision or rule in question will have on the rights of each party in any specific case.
>
> About all that can be said is that this transitional discretion should be exercised in such a way so as to afford litigants the advantages of the new Act and rules where this can be done without serious prejudice to either party, and so as to protect the rights that parties had prior to January 1, 1985, where not to do so would create procedural unfairness. And the discretion should be exercised in the same way, in all cases where the facts are the same.

I note that this extract was also quoted with approval in *Conklin Lumber Co. v Canadian Imperial Bank of Commerce* (1988), 65 O.R. (2d) 373 (H.C.J.).

[25] The two main purposes of examinations for discovery are to obtain information as to the facts and to obtain admissions which may be used in evidence against the opposite party. The various provisions I noted above reflect, in my opinion, a philosophical approach in the new Rules to widen the scope of discovery by eliminating many of the previous impediments to full disclosure. By the combined action of all the new Rules one can reasonably expect that litigation

by surprise will be minimized if not altogether eliminated, that relevant evidence will be uncovered, issues will be focussed, parties will be pinned down in their positions, and settlement will be encouraged because counsel will be able to adequately size up their case before trial. But the discovery rules, whether under the old or new Rules, were never meant, to paraphrase from the B.C. Court of Appeal decision in the *W. R Grace & Co.* case noted previously, to give an opportunity to examine all the witnesses who may have knowledge touching on an issue or who may be adverse in interest. Such a facility may be helpful in every case but there is always a concern about protracted discoveries, not in the breadth of discovery but the frequency.

[26] In my opinion the concerns underlying this application are likely present in every case where there are corporate parties. I am not convinced that there is anything unique in this situation so as to deviate from the general principle that the current Rules apply. All parties are then similarly situated. The substantive rules as to use of discovery evidence at trial have not changed. I note as well that the new Rules have already been employed by the plaintiffs to obtain production of insurance policies, something that was not open to them to do under the old Rules. I do not think it is conducive to a fair and orderly proceeding to have parties pick and choose which rules they will rely on for any specific step.

[27] I think it is speculative at this stage to think that the plaintiffs will be disadvantaged by the new discovery rules. If, however, it turns out that there is evidence of a significant disadvantage then it will be open to the plaintiffs to apply once more for this relief. It will also be open to the plaintiffs to invoke other rules, such as Rules 238(2) and 270, if there are grounds for them to do so.

[28] The application to conduct examinations for discovery pursuant to the previous Rules is dismissed. This is subject to my comments about the plaintiffs' right to re-apply or to apply for other relief should circumstances warrant.

[29] The plaintiffs sought further relief respecting exclusion of one of the defendants from the examinations to be conducted of employees. This aspect of the plaintiffs' motion is premature. I decline to deal with it at this time. Counsel may renew it if thought necessary in the future.

[30] There were no submissions as to costs of this motion. My inclination is to direct costs in the cause but counsel may make submissions to me if they cannot agree.

J. Z. Vertes
J.S.C.

Dated at Yellowknife , Northwest Territories
this 16th day of July, 1997.

Counsel for the Plaintiffs: J. Philip Warner, Q.C.
Counsel for the Defendants,
Royal Oak Mines Inc. & Witte: K. F. Bailey, Q.C.

Counsel for the Defendant,
Procon Miners Inc.: Charles McGee

Counsel for the Defendant,
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