Date: 1998 02 05
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 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) SHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE, and RICHARD ROE NUMBER THREE

Defendants

Application by plaintiffs to compel production of documents, received by way of Crown disclosure, from the defendants Shearing and Bettger.

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

Heard at Yellowknife, NT on January 22, 1998
Reasons filed: February 5, 1998

Counsel for the Plaintiffs: J.B. Champion

Counsel for the Defendants,

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Defendants

REASONS FOR JUDGMENT

[1] The plaintiffs seek production of documents from the defendants Shearing and Bettger. The particular documents sought are those received by way of Crown disclosure in certain criminal prosecutions of Shearing and Bettger. At the conclusion of the

hearing, I ordered production and issued specific directions. I said reasons would follow and these are those reasons.

[2] This action seeks damages arising from the wrongful death of nine men, killed in a bomb blast on September 18, 1992. One of the defendants named in this action, but not a party to this application, that being the defendant Warren, was subsequently convicted of the murder of these men. The blast occurred during a long and often violent labour dispute at the mine where these men were working. The defendants Shearing and Bettger were, like Warren, striking employees of the mine at the time. In May of 1995, they were convicted of various criminal acts in relation to the labour dispute, those acts occurring prior to the fatal blast in September of 1992. They were both sentenced to terms of imprisonment which have now been served.

[3] In preparation for the examinations for discovery in this action, the parties filed Statements as to Documents as required by Part 15 of the Rules of Court. The Statement filed on behalf of Bettger says that he has no documents in his possession, control or power relating to the matters in question in this suit and that he has not had any such documents in his possession, control or power. The Statement gives no further explanation.

[4] The Statement filed on behalf of Shearing itemizes those documents which he is prepared to produce and those he is not. Among the latter are what are referred to as "disclosure materials forwarded to his then defence counsel". The basis on which he refuses production is set out in his Statement as follows:

> Material supplied to the said defence counsel by the Crown as part of the Crown's duty to disclose. This material was supplied to Allan Shearing's defence counsel with the following proviso:
>
> > Any documents, including statements provided by way of disclosure are, and remain, the property of the Attorney General of Canada and are protected by the *Privacy Act*, R.S.C.p.21, sec.8(2)(d).
> >
> > They are provided to Counsel for the defence in order to make appropriate disclosure and should not be given or disseminated to any other individuals unless it is necessary for making full answer and defence. Any communication or use of these documents, outside the scope of necessary disclosure, is a violation of the *Privacy Act*, and as such subject to complaint under sec.29 of the said Act or to

> criminal prosecution under section 126 of the *Criminal Code* and liable to imprisonment for a term not exceeding two years.

[5] I was informed by these defendants' current counsel that there are large volumes of documents which were provided by the Crown by way of disclosure in the criminal prosecutions. At the time of this hearing the documents were still in the possession of the lawyers who represented these defendants in those prosecutions. Their current lawyers have not seen these documents. Messrs. Shearing and Bettger have given authorization to their former counsel to release these documents to their current counsel but apparently their former counsel are reluctant to do so in part because of the condition imposed on them by the Crown (as reproduced above). Crown counsel was given notice of this application but decided not to appear on it.

[6] Counsel appearing before me correctly identified the pertinent issues: Are these documents relevant? Is there a privilege or some other impediment to production?

Relevance:

[7] Rule 219 of the Rules of Court states:

> 219. Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this Part, whether or not privilege is claimed in respect of the document.

[8] The question of what can "relate to any matter in issue" was explained by Steer J. in *Unger v Sun Alliance & London Assurance Co.* (1978), 11 A.R. 404 (T.D.), at page 409:

> It has long been established that production is not limited to those documents which would be admissible in evidence or to those which would prove or disprove any point in the action. Any document which it is reasonable to suppose contains information which may enable a party to either advance his own case or damage that of his adversary, which may fairly lead him to a train of inquiry which may have either of these consequences is a document "...relating to matters or questions in the cause or matter..." and must be produced unless some privilege exists.

As noted in Stevenson and Côté, *Civil Procedure Guide (1996)*, at page 766: "The scope of relevance is wider here than it is at trial; the court allows a certain exploratory latitude."

[9] The Amended Statement of Claim sets out the basis of the claim as against the defendants Shearing and Bettger (and others) as follows:

> 21. In exercising or attempting to exercise significant influence and control over Roger Wallace Warren or the state of security in the Giant Mine in permitting significant influence and control to be exercised or attempted to be exercised or in assisting Roger Wallace Warren to do any of the things attributed hereinafter to Roger Wallace Warren, the Union, Harry Seeton, Allan Raymond Shearing, Timothy Alexander Bettger, Terry Legge, John Doe Number Three, James Evoy, Dale Johnson, Robert Kosta, Harold David, J. Marc Danis, Blaine Roger Lisoway, William (Bill) Schram, James Mager, Conrad Lisoway, Wayne Campbell, Sylvaine Amyotte, and Richard Roe Number Three owed a duty of care to all persons (including the Nine Miners) who were lawfully upon the Giant Mine to avoid conduct which they or any of them knew or ought to have known could create an unreasonable and foreseeable risk of harm to all such persons including causing others to consider it acceptable, reasonable, justifiable or necessary to conduct themselves in a manner that could create an unreasonable and foreseeable risk of harm to some or all of such persons. As well, the said Defendants owed a positive duty to intervene and/or to prevent others including any members of the Union with or over whom they or any of them stood in a position of influence and control from creating an unreasonable and foreseeable risk of harm to some or all persons and/or a positive duty to warn all persons including the Nine Miners who were lawfully upon the Giant Mine of such risk of harm.

[10] The essence of the complaint is that these defendants conducted themselves in such a way as to create an atmosphere which led Warren to believe that he could and should resort to violence. It is argued, therefore, that the criminal acts of Shearing and Bettger, even though factually unrelated to the criminal act of Warren, have some casual connection to what Warren did. As such, it is submitted, the documents sought have some possible relevance to the claim against these defendants.

[11] In my opinion, in terms of the scope of the action, there is likely relevance to these documents. While the basis for liability is somewhat novel, it is not so farfetched as to be impossible to establish either in law or in fact. The plaintiffs are entitled to pursue whatever information may be material and, in connection to these defendants, that includes the information relating to their criminal acts. There is a connection in time, place, and surrounding circumstances, between the criminal acts of these defendants and the criminal act of Warren notwithstanding that Warren's was a distinct and separate act in which these defendants were not implicated.

Privilege:

[12] The term "privilege" is not quite accurate in this context. There can be no solicitor-client privilege in these documents since they were received from a third party, the Crown. Similarly there can be no litigation privilege since these documents were not prepared by these defendants' legal advisors for use in this litigation; they were in fact prepared, if at all, by these defendants' adversaries for use in other litigation against them. If there is any "privilege" it would have to be somehow based on the condition imposed by the Crown on defence counsel or on some point of policy.

[13] I was told that the condition imposed by the Crown when making disclosure is a standard one employed in every case. With all due respect, I think it is meaningless.

[14] The condition (reproduced above) first sets out that the documents provided by way of disclosure "are, and remain, the property of the Attorney General of Canada". I have never heard of such a proprietary interest in matters relating to criminal prosecutions. The document entitled "Prosecution Policy of the Attorney General of Canada: Guidelines for the Making of Decisions in the Prosecution Process", published in 1993 as a public document, makes no reference to such a proprietary interest. In fact such a claim may go against the intent of the constitutional obligation on the Crown to make disclosure.

[15] The Supreme Court of Canada, in *R v Stinchcombe*, [1991] 3 S.C.R. 326, set out the Crown's duty to disclose to the defence all material evidence. But the Court noted (at page 331) that the "fruits of the investigation" in the possession of the Crown "are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done." This approach changes the nature of the Crown's interest in disclosure materials from one of a simple proprietary right, with the corollary right to control how the document is used, to that of a more complex nature with the predominant purpose being the furtherance of the public interest in the pursuit of justice.

[16] According to *Stinchcombe*, the duty of the Crown to provide full disclosure is an absolute duty subject only to the reviewable discretion regarding the withholding of certain types of information and the timing of disclosure. If the Crown could impose conditions on the recipient of the disclosure materials then can it be the case that the Crown could withhold disclosure should the recipient refuse to acknowledge those conditions? I think not. A refusal to make disclosure would violate the accused's

constitutional right to a fair trial. The logical extension of the Crown's position is untenable.

[17] The condition imposed by the Crown also makes reference to a possible complaint under s.29 of the *Privacy Act*, R.S.C. 1985, c.P-21, or prosecution under s.126 of the *Criminal Code* (wilfully disobeying a statute). I fail to see the relevance of either. As noted by the plaintiffs' counsel, the *Privacy Act* is meant to bind government officials not private individuals. The only application it may have is with respect to personal information already under the control of a government body that is released to the Attorney General for use in legal proceedings. That is what s.8(2)(d) of the Act refers to (the section referenced by the Crown). The threat of complaint under s.29 of the Act is difficult to understand since that relates to investigations by the Privacy Commissioner into complaints <u>from</u> individuals who allege that personal information about themselves held by a government office has been used or disclosed improperly by that government office. I fail to see how this can relate to the use of personal information, already in the hands of the individual concerned, by that same individual.

[18] It is still open to say, however, that as a matter of public policy there should be no dissemination or use of Crown disclosure documents for ulterior or collateral purposes. But for this, parties to litigation are already subject to an implied undertaking that documents or information obtained by a party in one legal proceeding will not be used by that party to launch or pursue other proceedings. I discussed the implied undertaking rule at some length in *M.K. v C.R.B.* (1996), 130 D.L.R.(4th) 487 (N.W.T.S.C.).

[19] The rule could apply to Crown disclosure documents where the party obtaining the disclosure, i.e., the defendant in the criminal proceeding, attempts to use information in the disclosure to launch new civil proceedings. Such was the situation in *Hedley v Air Canada* (1994), 23 C.P.C.(3d) 352 (Ont.Gen.Div.), where the defendant sought to use information, received by way of disclosure, that was originally provided to the Crown by the intended defendant in the civil action. But that is not the situation here. The defendants Shearing and Bettger do not intend to use the Crown disclosure documents to launch new and different proceedings. They are responding to the obligation in these proceedings to produce all relevant documents in their possession or control. Any attempt as well by the plaintiffs to use the documents so produced for purposes apart from this action would likewise be met by the implied undertaking rule.

[20] The question before me was addressed directly in the case of *Consolidated NBS Inc. v Price Waterhouse et al* (1994), 111 D.L.R.(4th) 656, a decision of a three-judge panel of the Ontario Divisional Court. The action was a claim against auditors for

negligence and breach of contract. One of the parties (named Howe) had been subject to criminal prosecution arising from the same underlying facts as in the civil action. The question was whether that party was under an obligation to produce for discovery the Crown disclosure documents from the earlier prosecution. The Court held that the documents must be produced for purposes of the civil action. It said (at page 659):

> While there is an implied undertaking that a party to whom documents are produced will not use them for a collateral or ulterior purpose, that principle has no application here. Howe is not seeking to use the Crown productions against the Crown; a third party is seeking production of the documents from him. It is argued that to produce these documents amounts to self-incrimination. The same may be said of any production from corporate records or the like which a litigant might be compelled to produce.
>
> There is no principle against self-incrimination in a civil proceeding. The pendulum swings in the opposite direction. A litigant is under a compulsion to submit to oral discovery and obliged to seek out relevant documents for an affidavit on production. As Cory J.A. (as he then was) said in *Cook v Ip* (1985) 22 D.L.R. (4th) 1 at p.4, 5 C.P.C. (2d) 81, 52 O.R.(2d) 289: "There can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the court. This is essential if justice is to be done between the parties."

[21] In my opinion, absent some issue regarding relevance or perhaps some other specific point of privilege which may apply to specific documents, in general documents obtained by way of Crown disclosure are subject to production in civil proceedings.

[22] For these reasons, I granted the order sought. I did so, however, on a general basis since these defendants' current counsel have not seen the documents. I therefore gave directions requiring the transmittal of these documents forthwith to counsel and the preparation of supplementary Statements as to Documents containing an itemized list of the documents. The defendants may still claim with respect to any individual item that it is not subject to production but it must still be identified and the basis of the objection noted. Any dispute concerning the obligation to produce any specific document is to be addressed no less than 14 days prior to the examinations for discovery of these defendants.

[23] Costs of this application will be in the cause.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT
this 5th day of February 1998

Counsel for the Plaintiffs: J.B. Champion

Counsel for the Defendants,
Shearing and Bettger: T.H. Boyd

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