Date: 19980505
Docket: CV05408

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

Applications for production of documents and to compel answers at examinations for discovery.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z VERTES

Heard at Yellowknife, Northwest Territories
on April 27, 1998

Reasons filed: May 5, 1998

Counsel for the Plaintiffs: J.P. Warner, Q.C. & J.E. Topolniski

Counsel for the Defendants,
Witte & Sheridan: K.F. Bailey, Q.C. & R.G. McBean

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

REASONS FOR JUDGMENT

[1] There are two applications respecting discovery issues in this action. One is an application by the defendants Witte and Sheridan for production of certain documents in the possession of the Workers' Compensation Board of the Northwest Territories. The other is an application by the plaintiffs to compel the defendant Witte to answer certain questions posed and objected to at her examinations for discovery.

[2] The background facts to this litigation are notorious. The plaintiffs claim damages arising from the deaths of nine miners at the Giant Mine in Yellowknife in 1992. The action is brought on behalf of all those who are said to be dependents of the deceased. The Workers' Compensation Board is subrogated to the rights of the plaintiffs. The defendant Warren was convicted of murder in these deaths. Notwithstanding that, the plaintiffs also allege breaches of a duty of care on the part

of all the defendants (although the allegations differ to a great degree as between the defendants).

[3] The defendant Royal Oak Mines Inc. is the owner of Giant Mine. Margaret Witte is the chief executive officer and a director of Royal Oak. William Sheridan is also a director of Royal Oak. Witte and Sheridan, however, are also sued in their personal capacities.

Application for Production of W.C.B. Documents:

[4] The defendants Witte and Sheridan apply for an order compelling the plaintiffs to produce documents relating to the amounts paid by the Workers' Compensation Board to the plaintiffs and relating to the amount of the plaintiffs' claim being advanced as the W.C.B. subrogated claim. The applicants submit that such documents are relevant to the determination of the quantum of the claim and, in particular, to the tax gross-up applicable to any portion of it.

[5] Rule 219 requires that every document relating to any matter in issue in the possession or control of a party be disclosed on a Statement as to Documents. Rule 226(1) empowers the court to order the production of a document where a party has neglected or refused to make production in accordance with the rules. Rule 220 provides that "a person for whose benefit an action is prosecuted" shall be regarded as a "party" for the purposes of discovery of documents. There is no dispute in this case that the Workers' Compensation Board is a "party" within the meaning of Rule 220: see also *Jahnke v Wylie* (1994), 26 Alta. L.R. (3d) 45 (C.A.), at pages 49-50.

[6] Counsel agree that the issue is relevance. The applicable law is well-known. There is a broad scope to the test of relevance at this stage of the proceedings. Any document which may tend to advance the case of the party seeking discovery can be regarded as relating to a matter in issue in the action. Many cases have said this stretching all the way back to *Cie Financiere du Pacifique v Peruvian Guano Co.*, (1882) 11 Q.B.D. 55 (C.A.). *Peruvian Guano* may be old but it is still applied: see, for example, *Esso Resources Canada Ltd. v Stearns Catalytic Ltd.* (1991), 82 Alta. L.R. (2d) 168 (C.A.).

[7] There are also policy considerations to the production of documents. These were identified in *Cook v Ip* (1986), 52 O.R. (2d) 289 (C.A.), leave to appeal to S.C.C. refused. The court there observed that it is in the public interest to ensure that all

relevant evidence is available to the court for a just determination of the dispute. Thus the court has an inherent jurisdiction to ensure that all pertinent material is produced. Further, it is also in the public interest to have early and fair settlements of disputes. The production of relevant documents aids this process. Opposing counsel, and eventually the court if need be, will then be able to make an informed assessment of the claim including the appropriate measure of damages. That case dealt with the production of medical records but the principles apply nevertheless.

[8] Much of the argument before me covered the statutory provisions relating to these types of proceedings. It is no secret that the plaintiffs have received benefits from the Board. By s.12(4) of the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6 (as amended), the Board is thereby subrogated to the plaintiffs' cause of action. In such a case the Board has some options and some rights. No settlement may be effected without the Board's consent: s.13(1)(a). An action for damages may be taken by the claimants, but only with the Board's consent, or the action may be taken directly by the Board in the name of the claimants (even without the consent of those claimants): s.13(1)(b). The Board may effect a settlement for such amount as it considers advisable: s.13(1)(d). The Board may accept money in full settlement and release the payor from liability in respect of the claim: s. 13(4)(a). Finally, the Board shall pay over to the claimants any excess amount received over and above the legal costs of recovery and the costs incurred by the Board with respect to its compensation payments: s.13(4)(d).

[9] The main thrust of the plaintiffs' argument in response to this application was that damages will be assessed in this case once and for all as in any other fatal accident claim. Those damages are what the defendants, some or all, will have to pay. How those damages will be divided as between the Board and the plaintiffs is irrelevant to that assessment. It is a purely private matter as between the Board and the plaintiffs. For example, the division of proceeds may differ as between those plaintiffs receiving periodic on-going payments, or those who have had their benefit entitlements commuted to a lump sum.

[10] Plaintiffs' counsel referred me to the decision of my colleague Richard J. in *Desrochers Estate v Simpson Air (1981) Ltd.*, [1995] N.W.T.J. No. 121 (S.C.). In that case the defendants sought details of the compensation payments being made by the Board to the plaintiffs. The defendants submitted that the information was relevant to the losses or damages suffered by the plaintiffs and would assist the defendants in preparing or responding to a settlement proposal, instructing actuarial experts,

considering a payment into court, and preparing for trial. My colleague refused the application on the basis that the information sought was not relevant because it did not relate to an issue in the lawsuit:

> The issues in the lawsuit, liability aside, are the actual losses and damages suffered by the plaintiffs. The compensation payments do not equate with those losses and damages. The trial judge, in determining those losses and damages, will not be bound by the compensation payments nor will he/she take the compensation payments into consideration in making that determination.
>
> The information sought may well be of assistance to the defendants with its preparation of a settlement proposal or payment into court, or with other pre-trial strategies; however that does not constitute the information germane to the subject-matter of the pleadings and the litigation.

[11] Richard J. went on to make a further comment:

> In Ontario, the Rules of Civil Procedure were amended a few years ago to compel disclosure of an insurance policy at the examination for discovery stage, even thought the policy is not relevant to any issue between the parties to the litigation. ...
>
> The new Ontario experience may be seen to be an enlightened one, assisting modern litigants with their pre-trial strategies and decisions; however, that regime is not (as yet) the law in the Northwest Territories.

[12] The application in *Desrochers* was decided in the context of the "old" (1979) Rules of Court. In 1996, the rules were substantially revised, particularly in those parts relating to discovery, and now there is a rule (Rule 222), similar to the Ontario rule noted by Richard J., which requires disclosure of any insurance policy available to satisfy a judgment or to indemnify a party.

[13] Plaintiffs' counsel submitted that the issue has been decided by the judgment in *Desrochers*. I do not agree. While principles of judicial comity ordinarily would incline me to adopt the approach of my colleague, I think the *Desrochers* case is distinguishable. First, there are new rules in place. The principle of wider disclosure is embodied in those rules. Second, in the present case and unlike the earlier one, the application is put squarely on the necessity to determine the applicable tax gross-up of the plaintiffs' damages. It is argued that this is something the trial judge will have to eventually take into consideration in setting the damages.

[14] Counsel referred me to the judgment in *Daigle et al v Cape Breton Crane Rentals Ltd. et al* (1987), 91 N.B.R. (2d) 189 (C.A.). The pertinent part of that case involved an appeal from the assessment of damages awarded to a widow and the New Brunswick Workers' Compensation Board. The trial judge had awarded a collective lump sum to the two parties and had included within that amount a sum as an adjustment for the impact of tax. The total award was $254,200 of which the sum of $145,000 was to be paid to the Board, $72,800 was to be paid to the widow, and $36,400 was the tax gross-up. The problem, being the calculation of the gross-up only on the widow's share, was described by Rice J.A. (at page 203):

> It was established that of the amount awarded the sum of $145,000.00 is to be paid to the Workers' Compensation Board. Pursuant to the provisions of the *Income Tax Act*, S.C. 1970-71-72, c.63, and the *Workers' Compensation Act*, R.S.N.B. 1973, c. W-13, the Workers' Compensation Board does not pay taxes on its earnings from such funds. In addition, benefits paid by the Workers' Compensation Board to Mrs. Daigle do not incur tax in her hands. In these circumstances, it is my opinion that neither the Workers' Compensation Board nor Mrs. Daigle should receive any allowance for income tax on this portion of the award.
>
> That being said, calculation of the gross-up on the portion of the award to be paid to Mrs. Daigle is necessary. However, the evidence before the court does not allow an extrapolation from the known figures of $36,400.00 as gross-up on an investment of $217,800.00 to a proportionate sum representing a gross-up amount on a $72,800.00 investment.

As a result, instead of sending the matter back for a new hearing on the calculation of the gross-up, the court did its own assessment of the gross-up on the widow's share.

[15] Plaintiffs' counsel argued that somehow the New Brunswick legislation was different than the Northwest Territories statute. I examined the extracts provided by counsel and I fail to discern a significant difference. Under the relevant New Brunswick statute the Board is subrogated to the rights of the claimant, the Board may maintain an action in the name of the claimant, and the excess amount recovered over and above the Board's entitlement is paid over to the claimant. In substance the scheme is the same.

[16] I was not told whether the tax treatment of such funds in the Northwest Territories is the same. But, it is common in fatal accident actions that a plaintiff's future dependency loss will attract a gross-up calculation since account must be taken of the fact that income tax will be payable on the interest earned on any award by the

court. It seems to me, therefore, that the information sought by these defendants may be relevant and helpful to an assessment of the overall potential liability since, with this information, an educated calculation can be made of the likely tax gross-up on that part of the award that will attract the gross-up. This does not predetermine what portion of the award that will be nor does it create some tax-free benefit to the defendants that does not exist in law. It will merely aid the defendants, and eventually the trial judge, in making a complete and accurate assessment of damages.

[17] To say simply that the division of the award is a private matter between the plaintiffs and the Board is no answer. The logical extension of that is that the entire award should be grossed-up even if (as a result of that "private" decision) only a part of it should have been. The result, simply put, is that the defendants would end up paying more than they should be required to pay.

[18] It is also no answer to say, as plaintiffs' counsel said to me, that the compensation payable by the Board is easily determined from the formula established by the statute. That presumes that the statute contains all of the factors that go into the calculation of payments. I am not satisfied that it does nor do I think that these defendants should have to assume that and guess at the figures.

[19] Finally, there is a further factor. Plaintiffs' counsel submitted that what the applicants seek is not the insurance policy but the insurer's file (to use their analogy to our Rule 222). I think the analogy misses the point. Here the Board is not simply in the position of an insurer who stands by waiting to see (as Kerans J.A. put it in the *Jahnke* case) if any fruit drops from the litigation tree. Here, the Board is shaking the tree. There is material on file, from other applications, that shows that plaintiffs' counsel are also retained by the Board from whom they receive instructions. The statutory provisions noted above give to the Board a far greater power than one would ordinarily expect a merely subrogated party to enjoy. The Board therefore may have a larger role to play in fulfilling the plaintiffs' discovery obligations. Here the applicants do not seek the Board's files. They seek production of specific information relating to the amounts paid by the Board to the plaintiffs and what portion of the claim is being advanced as the subrogated claim of the Board.

[20] The application for production of the information sought in the applicants' notice of motion is granted. In my opinion, the documents are relevant to the assessment of damages in this case.

Objections to Answers at Examinations for Discovery:

[21] The plaintiffs seek an order compelling the defendant Witte to answer certain questions put to her at her examination for discovery. There was a considerable list of questions to which objections were taken for one reason or another. Most of them were resolved at the hearing by way of oral directions. The ones under review here were ones that I reserved on since they raise issues of solicitor-client privilege.

[22] Ms. Witte was examined at these sessions in her personal capacity and not as the designated officer of the defendant Royal Oak Mines Inc. Counsel agree as to the general principles relating to examinations for discovery. But, as Côté J.A. observed in *Dorchak v Krupka* (Alta. C.A. No. 9503-0032-AC; March 27, 1997), questions of privilege touch on an important substantive rule of law. Therefore, on this application, it is beside the point to speak of the modern trend to wide discovery. The substantive law of privilege drives procedure, not vice versa.

[23] It is necessary to review the pleadings in some detail.

[24] As noted above, at all relevant times the defendant Witte was the chief executive officer and a director of Royal Oak Mines Inc. Witte, however, is being sued in this action in her personal capacity. As I understand the law, generally speaking, an officer and director of a corporation can be held civilly liable for the acts of the corporation if there is some conduct on his or her part that is either tortious in itself or exhibits a separate identity or interest from that of the corporation. The Amended Statement of Claim in this action alleges that Witte played a leading role in the decision to keep the mine open during the strike and to use replacement workers. It alleges she had a duty to take all necessary steps to prevent injury or death. It includes specific allegations of negligence: encouraging the company to keep the mine operating with the use of replacement workers and the services of a private security force supplied by the defendant Pinkerton's; permitting the security guards to conduct themselves in such a fashion so as to "inflame" an already dangerous environment; failing to take meaningful steps to enhance the level of security at the mine in the face of threats of violence and actual acts of sabotage; and, being in a position of influence and control over the safety conditions at the mine, failing in her duty to prevent foreseeable risks of harm.

[25] There was one Statement of Defence filed on behalf of Royal Oak, Witte and Sheridan. This pleading contains general denials of negligence and disputes the

existence of and the scope of a duty of care. It also relies on the criminal act of Warren as an intervening, unforeseeable event that constituted the sole cause of the deaths. These defendants plead that the mine was operated in accordance with all applicable statutes and regulations. In relation to Witte's position personally, it is pleaded that she acted honestly and in good faith within the scope of her authority as a director and officer of Royal Oak and in that company's best interests. The defence pleads that she did not knowingly, either deliberately or recklessly, direct or procure the commission of any wrongful act on the company's part; she discharged all duties imposed by law as a consequence of being an officer or director; and, she took all reasonable care in the circumstances to ensure that persons at the mine were safe.

[26] The plaintiffs filed a Reply and Joinder of Issue to the defence. In it they plead, among other things, that Witte was in complete control of the company in the context of all that transpired leading up to the deaths and that she conducted herself so as to "inflame" the already dangerous environment created by the strike and the use of replacement workers.

[27] Prior to Witte's examination, counsel for the plaintiffs served a Notice to Admit facts. Two of the facts sought to be admitted, and the responses contained in the Reply filed on behalf of Witte, are pertinent to this application:

Notice item number 73:

> 73. During the Relevant Time you caused Royal Oak to research the use and impact of the use of replacement workers in a strike situation and were aware of the results of that research.

Reply:

> 73. This paragraph is denied. It is admitted that in approximately May and June, 1992 a member or members of Royal Oak management, other than Witte, requested outside counsel to provide advice with respect to the use of replacement workers. Witte became aware of the results of that research.

Notice item number 173:

> 173. During the Relevant Time you directed Royal Oak's lawyers to apply to the Supreme Court of the Northwest Territories for Injunctions and the enforcement of Injunctions in relation to Strikers' activities.

Reply:

173. This paragraph is admitted.

[28] Plaintiffs' counsel submitted that there are three relevant issues raised by the pleadings, and touched on in these admissions, that are particularly applicable on this application: (i) Did Witte recognize a risk or duty to persons of a class including the deceased? (ii) Did Witte properly discharge those duties? (ii) Was personal injury to or the death of the deceased men foreseeable by Witte? Therefore, counsel argued, questions seeking information about what Witte identified as issues when considering whether or not to keep the mine operating during the strike and what steps she took on those issues are relevant and permissible.

[29] During her examination, and leading up to the disputed questions, Witte was asked if she had conducted research into labour-management issues. She said that she had been briefed by John Smrke, another Royal Oak officer, and by Michael Coady, a lawyer at the Ladner Downs firm in Vancouver. There then followed certain exchanges relating to these briefings:

> Q Had you, at any time prior to September 18th, 1992, researched or studied, formally or informally the use of temporary mining personnel as replacements for striking unionized full-time employees?
>
> A Certainly that was part of the briefing that was made to me and part of the advice that was discussed between our management team and Michael Coady at Ladner Downs.
>
> . . .
>
> Q As best you can recall, about what were you briefed as it related to the operation of a struck business?
>
> A I was briefed on the law with respect to replacement workers and the difference in the laws between provinces and the territories. I was briefed on mediation and arbitration rules and how -- timing issues and what the union could do when and what the company could do when and could the company lock the union out. I was briefed on, certainly, the past situation with Placer Dome in Timmins. I was briefed on the Caterpillar strike in the States, although because it was a U.S. situation, it was deemed not to be totally relevant.

Q When was that strike?

A I don't recall.

Q Early '80s?

A I don't recall. But the large portion of it centred around the legal aspects of what could be done and what couldn't be done in a strike situation.

Q Do you recall any particulars of those areas from a legal perspective?

MR. MCBEAN: Mr. Warner, my understanding is that that advice was coming from her legal counsel -- Royal Oak's legal counsel at the time, and I would think that anything that they told her would be privileged.

MR. WARNER: I'm going to leave that aside for a moment and consider it further.

Q MR. WARNER: Was any part of the briefing that you received with respect to some of the legal implications part of what was passed on to you by or commented upon by John Smrke?

A No. They were discussions between the legal counsel with myself and Mr. Smrke on the phone together or in person.

Later on Witte was asked about her understanding of the law with respect to the use of replacement workers in the Northwest Territories and how it differed from that in other jurisdictions. She testified as to her understanding. She was then asked whether the briefings covered what the company could do in response to acts of intimidation. Her counsel sought clarification of the question and she then replied:

MR. MCBEAN: Just so I'm clear on the question, you're now asking whether the briefing that she received included a discussion about acts of intimidation by CASAW members in Yellowknife?

MR. WARNER: And what could be done or could not be done.

MR. MCBEAN: With respect to acts of intimidation?

MR. WARNER: Yes.

> A Certainly Mike Coady at Ladner Downs talked about what would be possible with respect to proving the union was intimidating the company and members of the company and the legal action that could be taken in the form of injunctions and in the form of pressure on the Attorney-General's office to make sure the RCMP were keeping the peace.

[30] Apart from counsel's interjection (as noted above) concerning privilege in respect of advice received from legal counsel, there were no objections to these questions. Plaintiffs' counsel submitted to me that, notwithstanding this interjection, the witness voluntarily disclosed the advice that she received from legal counsel. Therefore, the witness has waived any claim to privilege over these communications. Witte's counsel submitted that they did not object to this line of questioning at the time due to inadvertence.

[31] The transcript reveals that, when the examination resumed, plaintiffs' counsel wished to pursue the subject of what legal advice she obtained, at least on what subjects, and from whom. This leads to the first four questions that were objected to by defendant's counsel. I will refer to them by the numbering sequence given to them in the material before me:

Question 10:

> Q When we adjourned yesterday, we were reviewing the considerations that had been given to the options whether to keep Giant operating or something else when it became obvious that there was likely to be a strike. In terms of the various options that you considered, as I recall what you've told me, just to quickly review, who the people were that you discussed the pros and cons of the options with were Mr. Smrke, Mr. Gross, and perhaps Mr. Werner or someone else with management at Giant. Did you have any discussions about these options with any experts in relation to labour relations, collective bargaining?
>
> A Mr. Coady at Ladner Downs.
>
> Q That review, without getting into the details of the particular legal advice that I gather your counsel objects to you telling me about, had to do, generally speaking, with the legislative regime that applied in the Northwest Territories as far as the use of temporary miners to replace the regular full-time unionized workers and the differences between that regime, in particular, the mediation

process that was entrenched in the Canada Labour Relations Code as compared to the U.S.?

MR. MCBEAN: Well, Mr. Warner, you're correct that her counsel objects to her discussing what legal advice she might have received from her lawyers or Royal Oak's lawyers at that time.

Question 11:

Q MR. WARNER: Was the input that you sought from Mr. Coady in relation to the options that you were considering in any way related to concerns with intimidation, harassment, sabotage, terrorism, things of that nature?

MR. MCBEAN: Don't answer that, on the same basis. I don't think it's proper to ask what legal advice is sought.

MR. WARNER: I see. Just on that point, and without --

MR. MCBEAN: Or what was discussed with the lawyers.

MR. WARNER: Without conceding your position is correct, it seems to me what this question was was if some topic was not discussed, and it seems to me that that's not getting into matters of solicitor-client privilege in any way, shape, or form.

MR. MCBEAN: Well, it's the flip side of the coin. If she testifies about the 64 billion things that were not discussed, that will leave you with the three things that were discussed, or four or five.

MR. BAILEY: I think that the short answer is that you shouldn't ask about what was discussed at all. You found that there was legal advice obtained concerning labour relations, and I think that's an appropriate response.

Question 15:

Q Was the advice that was received from the member of the Ottawa office of Mr. Sheridan's firm received prior to The Strike commencing?

A I don't recall.

Q Was that advice utilized in relation to the litigation that was initiated by Royal Oak against CASAW and the members of the executive in which proceedings, Injunctions or variations of Injunctions or proceedings relating to those Injunctions took place?

MR. MCBEAN: Don't answer that.

Question 16:

Q MR. WARNER: Are you able to tell me what the nature of the advice was that was communicated to you in relation to the impact of the use of replacement workers in a strike situation?

MR. MCBEAN: You're asking her what the advice was that she got from her lawyers?

MR. WARNER: Yes.

MR. MCBEAN: I'm instructing her not to answer.

(It appears evident from the transcript that these last two exchanges were part of a series of questions referring to the Reply to item number 73 from the Notice to Admit).

[32] In addition to these questions there was a question seeking information as to the names of the lawyers consulted:

Question 13:

Q MR. WARNER: Yes. Now, Mr. McBean has just made a comment which makes me wonder whether there's someone else besides Mr. Coady or Mr. Sheridan that you --

A Are you referring to legal counsel?

Q Yes.

MR. MCBEAN: I guess I don't -- I don't think she has an obligation to disclose the identities of the legal counsel that she spoke with, so I would instruct her, at this stage at least, to not answer the question.

[33] These exchanges reveal four distinct issues. In the circumstances of this case: (1) Is the subject-matter of the legal advice, i.e., the topics covered, privileged? (2) Are the names of the lawyers consulted privileged? (3) Has there been a waiver of the privilege? (4) Has the fact of obtaining legal advice been put in issue so as to amount to an implied waiver of privilege? The answers to (3) and (4) would ordinarily determine the answers to the first two. Some general points may be helpful to keep the questions in perspective.

[34] The modern rule as to solicitor-client privilege was stated in two Supreme Court of Canada judgments: *Solosky v The Queen* (1979), 105 D.L.R. (3d) 745, and *Descôteaux v Mierzwinski* (1982), 141 D.L.R. (3d) 590. The privilege attaches to any communication made in confidence for the purpose of the lawyer giving and the client receiving legal advice and services within the ordinary scope of the professional lawyer-client relationship. It has been described as a fundamental civil and legal right that should be interfered with only to the extent absolutely necessary to do so. The basic principle justifying the privilege arises from the public interest requiring full and frank exchange of confidences between solicitor and client.

[35] The law also recognizes that the privilege may be waived by the client. It may be waived by an intentional and voluntary decision by the client. Or it may be waived impliedly where the client relies in part upon privileged communications to either assert a claim or base a defence. The underlying rationale for finding implied waiver in such circumstances is fairness. It would be unfair to permit a party who has set up a claim or defence based on privileged communications, or makes his or her intent and knowledge of the law relevant, to preclude the opposing litigant from discovering information relating to that claim or defence by relying on the privilege. If privilege were successfully raised, the opponent would have no effective method of exploring the validity of the claim or defence: *Rogers v Bank of Montreal*, [1985] 4 W.W.R. 508 (B.C.C.A); *Alberta Wheat Pool v Estrin*, [1987] 2 W.W.R. 532 (Alta. Q.B.).

[36] I do not think the facts in this case reveal a voluntary waiver of privilege by the defendant Witte. Cases have held that there must be an intention to waive privilege: *Nova Scotia Power Corp. v Surveyer et al* (1987), 78 N.S.R. (2d) 217 (C.A.); *Royal Bank of Canada v Lee* (1992), 3 Alta. L.R. (3d) 187 (C.A.). These cases deal specifically with the inadvertent or accidental disclosure of privileged documents but the principle applies here as well. The failure of counsel to object at the first opportunity is immaterial. There was an assertion early on that any information as to the actual advice received was privileged and the witness never varied from that

position. In addition, as noted in Stevenson & Côté, Civil Procedure Guide (1996), at page 89, since a discovery answer is not "volunteered", then any waiver can be confined to the very contents of the answer: "surely giving one answer on discovery which might be privileged does not destroy all privilege for related matters, especially as one is obliged to answer questions on discovery". See also *Bolivar v Craft* (1991), 108 N.S.R. (2d) 94 (C.A.).

[37] The question of what was the defendant's state of mind, however, has been put in issue. The claim alleges that this defendant took various decisions that directly and indirectly contributed to the volatile situation and atmosphere that led to Warren's criminal act. In her defence Witte pleads that she acted in good faith, with due regard for all applicable rules and regulations, and that she took all reasonable care in the circumstances. Her Reply to the Notice to Admit acknowledges as fact that she obtained advice from and gave instructions to legal counsel on matters pertinent to the strike. It seems to me that the question of whether or not Witte sought and received legal advice on these points is relevant to her defence of acting in good faith, in due compliance of the law, and with all reasonable care. Therefore the fact of seeking and obtaining legal advice is relevant. That, however, does not necessarily make the content of the legal advice relevant or admissible. At this point, plaintiffs' counsel does not seek to ascertain the content of the advice (with one exception discussed below). Therefore, I conclude that to a limited extent there has been an implied waiver by this defendant putting in issue her state of mind and actions.

[38] Does this mean that counsel is entitled to know on what topics the defendant sought and received advice? To some extent this information was supplied in the answers leading up to the objectionable questions. I have no difficulty in concluding that, in general, the nature of the confidential communications is also protected by the privilege (even if the contents are not sought). This would cover instructions or inquiries from the client. The Supreme Court, in *Descôteaux*, held that the right to confidentiality arises as soon as the client has his or her first dealings with the lawyer in order to obtain legal advice. In *Balabel v Air India*, [1988] 2 All E.R. 246 (C.A.), Taylor L.J., on behalf of the court, said (at page 254):

> Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying

> legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as 'please advise me what I should do'. But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context. (emphasis added)

[39] In my opinion, the fact that this defendant obtained legal advice is relevant. On what topics she obtained advice is also relevant. These go to the nature of her decision-making. The topics could go to the question of whether this witness identified the appropriate risks (and thus acted with reasonable care). The real concern here, however, as argued by Witte's counsel, is whether by even identifying the subject-matter of the advice the content of the advice would also be given away. There is considerable danger in giving away privileged information by the manner in which one merely identifies or characterizes that information. This was the concern in *Int. Minerals & Chemicals Corp. v Commonwealth Insurance Co.* (1992), 104 Sask. R. 246 (Q.B.), where questions as to topics discussed at meetings attended by counsel were ruled improper. It was held there that to reveal what subjects were discussed was to reveal part of the privileged communications. It was described as an oblique way of encroaching on the privilege. This was also a concern identified in the *Dorchak* case noted above (although that case dealt with the identification of privileged documents for production purposes and, having regard to our specific rules on this point, I am not convinced that that issue would be addressed in exactly the same way in this jurisdiction).

[40] I have concluded that the general nature of the legal advice sought and obtained by this defendant is a proper line of inquiry. The questions and answers can be framed in a sufficiently non-specific manner so that the contents of the actual advice need not be disclosed. The exchanges leading up to the objected parts, by and large, reveal such a general approach. Counsel will have to be alert to avoid encroaching on the privileged area of the advice itself. Therefore, I direct that the witness answer

Questions 10, 11, and 15. Question 16 is asking directly what advice the witness received. That is privileged and I uphold the objection to that question.

[41] Question 13 asks for the names of legal counsel consulted by Witte. There is no case law I could find directly on the question of whether a witness must disclose the identity of counsel. In *Cross and Tapper on Evidence* (8th ed., 1995), there is a footnote on page 471 that "the privilege does not protect the identity of the client (or presumably of the lawyer)" and reference is made to an old case, *Bursill v Tanner*, (1885) 16 Q.B.D. 1. Generally, there is no privilege attaching to the client's name (although there may be exceptions): see Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (1992), at page 639. If there is no privilege over the name of the client, generally, it seems to me that there is less cause for a privilege over the name of the lawyer (although I recognize that Côté J.A. used an illustration in *Dorchak* as to how such identification may encroach on the privilege). Here, it has been admitted by the defendant that lawyers were consulted with respect to labour relations matters. Divulging those lawyers' names will not damage the privilege pertaining to their advice. I therefore direct the witness to answer this question.

[42] There was one other question to which objection was taken. This question related to discussions Witte had with the defendant Sheridan. Sheridan is a lawyer. Witte's counsel suggested that Sheridan may have had a concurrent role as a director of Royal Oak and as a lawyer for Royal Oak. Therefore these discussions would be privileged. The lead up to the disputed question was an exchange between counsel:

> Q MR. WARNER: Did you seek input from any other person that you regarded as having some experience or expertise in labour relations, collective bargaining issues on these various options that you were considering, other than Mr. Coady?
>
> MR. MCBEAN: And other than any other lawyer?
>
> MR. WARNER: Well, I'll leave it at the question as I've asked it.
>
> MR. BAILEY: Let me just interject. I'm sorry to interrupt you, but I should tell you we've now got Bill Sheridan's diary, and I'll be giving it to you to give you a chance to look through it. One of the things that has now become apparent to me was that his involvement in this would clearly -- at least just from reviewing the diary, appears to be of a legal nature rather than as a director, and so we're going to have to take a different view, perhaps, of that as well. But I'll give you that, and that will become apparent to you.

MR. WARNER: You'll let me know about that.

MR. BAILEY: Yes.

This then led to the disputed question (labelled as Question 12):

> Q Should I understand from the comments, particularly that Mr. Bailey has made, that the other person that you discussed this with whose input we discussed to some extent yesterday was Mr. Sheridan?
>
> MR. MCBEAN: Don't answer that.

[43] To some extent this question is in the same category as Question 13 respecting the names of counsel consulted. But I note that right after the objection the answer may have been given (in part at least) by Witte's counsel:

> MR. BAILEY: I think we'd be prepared to say -- I think she indicated yesterday she'd spoken to Bill Sheridan. What I had not appreciated yesterday was it looks like he had a role as a lawyer rather than as a director. I perhaps leapt in.

[44] I also note, from the material provided to me, that later on the witness essentially answered this question. This was done in relation to questioning with respect to item 73 from the Notice to Admit:

> Q If I could refer you to another item or two in the Notice to Admit Facts at page 13, item 73. This was a request that during the Relevant Time, you admit that you caused Royal Oak to research the use and impact of the use of replacement workers in a strike situation and were aware f the results of that research. Your reply with respect to this item 73 is at the bottom of page 11 and the top of page 12. Perhaps I'll just read the reply. "This paragraph is denied. It is admitted that in approximately May and June of 1992, a member or members of Royal Oak management other than Witte requested outside counsel to provide advice with respect to the use of Replacement Workers. Witte became aware of the results of that research." Is this research that's referred to in this response something other than what you discussed with Mr. Sheridan or with Mr. Coady?
>
> A No.

Q It is the same?

A It is the same.

The witness went on to say that she contacted Sheridan and he brought in someone from his office (presumably his law office). This then led to the question noted above as Question 15.

[45] Witte's counsel noted that when lawyers occupy a dual function vis-à-vis a corporation, such as counsel and director, then those communications made in the capacity of counsel are protected. Counsel said that they have disclosed Sheridan's information as to his role of director. Any other information is privileged.

[46] There is no dispute over the law on this point. Legal advisors, even if they are officers or employees of the corporation, are regarded as any other legal advisors. However, there may be occasions when the legal privileges inherent in the solicitor-client relationship may not be claimed. This was explained by Lord Denning M.R. in *Alfred Crompton Amusement Machines Ltd. v Commissioner of Customs & Excise*, [1972] 2 All E.R. 353 (at page 376):

> I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned. There are many cases in the books of actions against railway companies where privilege has been claimed in this way. The validity of it has never been doubted. I speak, of course, of their communications in the capacity of legal advisors. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.

[47] It seems to me that Lord Denning's admonition that the legal advisor "must be scrupulous to make the distinction" places the onus on the lawyer, or the client, to identify what communications are within the sphere of the privilege and what are without. As noted by plaintiffs' counsel, the onus is on the party seeking to prevent disclosure to establish the applicability of the privilege. That is something that, in this case, may have to await further questioning of this witness and perhaps the

examination of Sheridan. For now, it is enough to direct the witness to answer Question 12.

Conclusion:

[48] My directions are found in these reasons. With respect to costs I am inclined to order costs in the cause. Counsel may, however, make further submissions if they cannot agree.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 05th day of May, 1998

Counsel for the Plaintiffs: J.P. Warner, Q.C. & J.E. Topolniski

Counsel for the Defendants,
Witte & Sheridan: K.F. Bailey, Q.C. & R.G. McBean

CV05408

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

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