Fullowka et al v. Slezak et al, 2002 NWTSC 23

Date: 20020313
Docket: CV 06964

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 -

ROSS SLEZAK, BASIL E. HARGROVE, THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS OF CANADA LOCAL 2304, DALE JOHNSTON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE, GORDON ALBERT KENDALL, EDMUND SAVAGE, JOE RANGER, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER AND TERRY LEGGE

Defendants

- and -

ROYAL OAK MINES INC., MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED and WILLIAM J.V. SHERIDAN

Third Parties

MEMORANDUM OF JUDGMENT

[1] The defendants, Basil E. Hargrove and the National Automobile, Aerospace, Transportation and General Workers Union of Canada Local 2304, brought an application for summary judgment on the ground that this action is statute-barred. Prior to the hearing of the application, the plaintiffs discontinued the action against the defendant Hargrove. This memorandum therefore addresses the application in reference to the defendant union local.

[2] This particular action (CV 06964) was commenced on March 26, 1997. The Statement of Claim expressly refers to an earlier action (CV 05408) commenced on September 12, 1994. Both actions arise from the deaths of nine miners, killed in an explosion at the Giant Mine in Yellowknife on September 18, 1992. A large number of individuals and entities have been named as defendants. The actions are brought on behalf of the surviving dependants of each of the deceased miners claiming damages pursuant to the *Fatal Accidents Act*, R.S.N.W.T. 1988, c.F-3. That Act provides in s.6(2), that an action "may not be brought after two years from the death of the deceased". Hence, Local 2304, which is not named in action CV 05408, asserts that this action was commenced beyond the expiry of the limitations period.

[3] Generally speaking, courts are very cautious when asked to decide limitations issues on a summary judgment application. That is because these issues are usually fact-driven, particularly with respect to the application of the discoverability principle. The court's function on a summary judgment application is not to resolve issues of fact but rather to determine whether there is a genuine issue for trial. But, even though there is this cautious approach, if the plaintiff fails to show that there are material facts requiring a trial, then the limitations defence will have been made out and summary judgment will issue in favour of the defendant.

[4] It is helpful to review portions of the pleadings in both actions in order to place this application in context.

[5] In action CV 05408, there are two defendants identified in the style of cause as (I) "National Automobile, Aerospace, Transportation and General Workers Union of Canada, successor by amalgamation to Canadian Association of Smelter and Allied Workers", and (ii) "the said Canadian Association of Smelter and Allied Workers". It is not necessary for purpose of this application to go into detail as to the allegations of negligence and breach of duty of care as against these defendants. A paragraph in the Statement of Claim identifies "Canadian Association of Smelter and Allied Workers, Local 4" as the then certified bargaining agent for the unionized employees at the Giant Mine. It also contains the pleading that the Canadian Association of Smelter and Allied Workers amalgamated with the National Automobile, Aerospace, Transportation and General Workers Union of Canada "which thereby succeeded to and became responsible for all assets and liabilities of CASAW".

[6] For ease of reference, I will hereafter refer to Canadian Association of Smelter and Allied Workers as "CASAW"; Local 4 of CASAW as "Local 4"; National Automobile, Aerospace, Transportation and General Workers Union as "CAW"; and CAW Local 2304 (the specific applicant in this case) as "Local 2304" or "applicant".

[7] In its Statement of Defence in action CV 05408, the defendant CAW noted that "Local 4" was the certified bargaining agent at the Giant Mine at the time of the explosion. In June, 1994, CAW entered into a merger agreement with CASAW. By this agreement CASAW merged with CAW. However, it is pleaded that CAW, CASAW and Local 4 are all separate, distinct and autonomous entities and that the merger agreement retained the autonomy of established CASAW locals, including Local 4. The defence denies the allegation that CAW succeeded to or became responsible for all assets and liabilities of CASAW.

[8] In the present action (number CV 06964), the named defendant is, as noted above, CAW Local 2304. The Statement of Claim also refers to the "merger or amalgamation" of CAW with CASAW and alleges that, as a result, CAW became responsible for all assets and liabilities of CASAW and/or CASAW Local 4. Alternatively, it alleged that CAW Local 2304 became responsible for the assets and liabilities of CASAW Local 4. There is also an allegation that CAW and CAW Local 2304 concealed the cause of action by fraud. This was undoubtedly included to get around the obvious problem that this action was commenced beyond the two-year limitation period provided by the *Fatal Accidents Act* .

[9] The defence filed on behalf of Local 2304 denied concealing the cause of action, alleged that it is a local of CAW but a separate legal entity, and that it first came into existence in 1994 as a result of the Canada Labour Relations Board acknowledgement of the new CAW locals as the bargaining agents for employees formerly represented by CASAW locals. Local 2304 further pleads, in addition to denying the specific allegations of negligence, that it had no involvement in the labour dispute and thus there is no cause of action against it. Finally it pleads that the claims are statute-barred and there is a reference to the *Limitations of Actions Act*, R.S.N.W.T. 1988, c.L-8.

[10] The plaintiffs filed a Reply and Joinder of Issue in this action. In it they repeat that there is no distinction between the locals and the national unions and that since Local 2304 admitted that it is the successor of one or more of CASAW, CASAW Local 4 and CAW, then it is liable for any liability of those entities. Also, the plaintiffs assert that the *Limitations of Actions Act* does not apply to this action or cause of action.

[11] The evidence presented on this application reveals that in June, 1994, a merger agreement was executed between CAW and CASAW (the national bodies). By that agreement, CAW issued local union charters to the locals of CASAW then existing and those "merged locals" became CAW locals. Each of those new CAW locals acquired "all of the rights, privileges and duties (including bargaining rights) of the CASAW local to which it has succeeded" (as per Article 2 of the agreement). In August, 1994, CAW applied to the Canada Labour Relations Board for a declaration, pursuant to s.43 of the

Canada Labour Code, that CAW is the successor to CASAW pursuant to the merger agreement. The application specifically referred to the fact that Article 2 of the agreement provides for the former CASAW locals to become CAW locals and that "the former CASAW Local 4 becomes CAW Local 2304".

[12] On October 3, 1994, the Canada Labour Relations Board declared that CAW Local 2304 was the successor bargaining agent of CASAW Local 4 with respect to the certified bargaining unit at Giant Mine. The pertinent subsections of the *Canada Labour Code* relating to the declaration are as follows:

> 43.(1) Where, by reason of a merger or amalgamation of trade unions or a transfer of jurisdiction among trade unions, a trade union succeeds another trade union that, at the time of the merger, amalgamation or transfer of jurisdiction, is a bargaining agent, the successor shall be deemed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise.
>
> (2) Where, on a merger or amalgamation of trade unions or a transfer of jurisdiction among trade unions, any question arises concerning the rights, privileges and duties of a trade union under this Part or under a collective agreement in respect of a bargaining unit or an employee therein, the Board, on application to it by a trade union affected by the merger, amalgamation or transfer of jurisdiction, shall determine what rights, privileges and duties have been acquired or are retained.

[13] On the hearing of this application counsel for the plaintiffs conceded that this action is beyond the limitation period of the *Fatal Accidents Act*. He expressly withdrew any reliance on the allegation of fraudulent concealment of the cause of action. The argument advanced on behalf of the plaintiffs was that the declaration under s.43 of the *Canada Labour Code* created an entirely new cause of action, one governed not by the *Fatal Accidents Act* but by sections 2(1)(f) or 2(1)(j) of the *Limitations of Actions Act*:

> 2.(1) The following actions must be commenced within and not after the following times . . .
>
> (f) actions for the recovery of money . . . Whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty . . . , within six years after the cause of action arose . . .
>
> (j) any other action not specifically provided for in this Act or any other Act, within six years after the cause of action arose.

This argument is being advanced notwithstanding the explicit position adopted in the plaintiffs' Reply and Joinder of Issue that the *Limitations of Actions Act* does not apply.

[14] The plaintiffs submitted that the first action (the one commenced in time) includes not just CAW but all of its "parts, branches, sub-organizations, predecessors and locals (including the parts formerly called CASAW and CASAW Local 4)". If that is the case, and counsel is correct, then there is no need for the second action. Local 2304 is caught by the first action. Counsel for this defendant, however, submitted extensive authority from the labour relations field demonstrating that there is a distinction drawn between a "local union" and its "parent union". They are considered to be distinct and separate organizations for legal and labour relations purposes.

[15] There are significant legal issues that will have to be ultimately resolved in the context of the trial in action number CV 05408: (a) whether Local 2304 is nothing more than a part of the national CAW, and (b) whether CAW and Local 2304 stand in the place of CASAW and Local 4 in respect of potential tort liabilities. But these questions do not resolve the limitations issue in this action. And, for purposes of this application, I do not need to resolve them.

[16] The defendant submitted that a s.43 declaration does not affect either the liabilities of the new local or the position of the parties other than in respect of collective bargaining rights. The section is designed to maintain industrial stability by providing for the orderly transfer of collective agreement rights and obligations should there be a change in the union through a merger or amalgamation. There is nothing in the *Canada Labour Code*, however, that supports the novel proposition that s.43 creates some new and separate cause of action. Plaintiffs' counsel candidly acknowledged that he can find no case authority to support that argument.

[17] In my opinion the purpose of s.43 of the *Canada Labour Code* is, as counsel submitted, the orderly governance of collective bargaining relations. I adopt the conclusions of the Canada Labour Relations Board as expressed in *National Bank of Canada and Retail Clerks Union* (1989), 2 C.L.R.B.R (NS) 202, at 210-211:

> Section 143 [now s.43], which deals with a merger or amalgamation of trade unions or a transfer of jurisdiction among trade unions, is designed to maintain the industrial stability which results from the signing of a collective agreement, while providing sufficient flexibility to allow for recognition of the changes that are likely to occur in the bargaining agent. Section 144 of the Code stipulates that a sale of business does not invalidate the collective agreement and makes the purchaser a party to a collective agreement entered into by its predecessor. This section was enacted to ensure the protection and permanence of bargaining rights. These provisions are intended to maintain industrial peace by confirming the validity of a collective agreement and the existence of the bargaining agent. . .

> The provisions of s.143 have the same objective. Their purpose is to recognize that a union, which is the bargaining agent, can undergo change, such as a merger or amalgamation or a transfer of jurisdiction, just like the business that may be sold during the life of a collective agreement. In this situation, the industrial stability resulting from the binding nature of the collective agreement is not threatened.

[18] The cause of action in this case is the wrongful death of nine miners. That is governed by the *Fatal Accidents Act*. Just because a potential tortfeasor goes through some "corporate" change does not create a new cause of action. The *Canada Labour Code* provision is not directed to the rights of some third party not a part of the collective bargaining relationship.

[19] A useful analogy can be drawn to the case of *Commonwealth Insurance Co. v. Hammer*, [1983] 1 W.W.R. 571 (Alta.Q.B.). There a school board sought damages against a child and his parents for property damage caused by the child. The limitations period for a tort action was 2 years. The plaintiff claimed, however, that the limitation period was 6 years since the action arose under s.176(1) of the Alberta *School Act*. That section stated that a pupil and his or her parents were jointly and severally liable for the acts of the pupil resulting in damage. The plaintiff argued that the cause of action was based on this statute (an argument similar to the one advanced by plaintiffs' counsel before me). The court in *Commonwealth* held that the *School Act* provision merely codified the vicarious liability of parents and did not create a new cause of action so as to extend the limitation period. The cause of action was, and continued to be, in tort. Similarly here there is only one cause of action and that is the one under the *Fatal Accidents Act*.

[20] The other argument advanced by the plaintiffs was that somehow a declaration under s.43 of the *Canada Labour Code* invested causes of action with the quality of survival for the purposes of suit against a successor. Again counsel could point to no authority in support of this proposition.

[21] Generally speaking, once a limitation period starts running then the subsequent disability of a party does not stop it from running, nor is the period interrupted just because an alleged tortfeasor changed its identity. After it starts to run, in the absence of some legislation, a limitation period will continue to run until properly terminated: see *Canadian Encyclopedic Digest* (Western), 3rd ed., Vol. 21, at para. 28. In this case, in the absence of evidence that some element of the cause of action was unknown to the plaintiffs, the limitation period for this cause of action started to run with the deaths of the nine miners and ended two years later. The plaintiffs were never under some disability so as to delay or interrupt the period. Also, the applicant was never under a disability. Local 2304 came into existence as a result of the merger of CASAW and

CAW. Before the merger the bargaining unit at the Giant Mine was Local 4; after the merger it was Local 2304. But there never was a period when there was no bargaining unit (that is the purpose of a s.43 declaration). Hence there never was a period when the tortfeasor was not available to be sued. The limitation period was never interrupted. And, in any event, the s.43 declaration did not issue until the limitation period had expired.

[22] One of the elements of a cause of action is, as stated by Vaughan Williams L.J. in *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718 (at 729), the existence of a party capable of suing and a party liable to be sued. Here the plaintiffs were aware of the cause of action and the party liable to be sued prior to the expiry of the limitation period stipulated by the *Fatal Accidents Act*. That is the only applicable limitation period. And, even if one accepts for sake of argument that the discoverability principle applies, it is clear from the Statement of Claim in action CV 05408 that the plaintiffs were aware of the existence of CASAW Local 4. Yet Local 4 is not named as a distinct party in that action. Local 2304 (the applicant) is named only in the second action. That was filed beyond the limitation period and no argument has been advanced to justify an extension of the two-year limit. The only arguments have been based on some notion that s.43 of the *Canada Labour Code* creates a new cause of action or somehow revives an action. I reject those arguments.

[23] In the absence of fraudulent concealment of its identity by the tortfeasor, a limitation period begins to run from when the plaintiff discovers the damage, or ought reasonably to have done so, and has determined, or could reasonably have determined, the identity of the tortfeasor. This is a general statement of the discoverability rule. But where a plaintiff is met with the argument that a limitations period has expired, the plaintiff must show not only actual ignorance of the potential defendant's identity but also that reasonable diligence would not have revealed that identity. On this application the plaintiffs chose not to file any evidence. And they abandoned reliance on the plea of fraudulent concealment of the cause of action. In my opinion, there is no triable issue with respect to the limitations defence in this action.

[24] For these reasons, this defendant's summary judgment application is granted. Action number CV 06964 is statute-barred and therefore dismissed. The defendant will have its costs on the basis of double column 4 of the tariff.

J.Z. Vertes
J.S.C.

Dated this 13th day of March, 2002.

Counsel for the Plaintiffs/Respondents: Bryan W. Sarabin

Counsel for the Defendant/Applicant: Lyle S.R. Kanee

CV 06964

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