Fullowka v. Royal Oak Mines Inc., 2001 NWTSC 81

Date: 20011114
Action No. 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, 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

- and -

ROYAL OAK MINES INC., HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, CANADA, AND THE MINISTER OF LABOUR, CANADA and THE ROYAL CANADIAN MOUNTED POLICE AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Third Parties

Heard at: Yellowknife, NT, on October 15-18, 2001.

Reasons filed: November 16, 2001

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE E.P.MACCALLUM

Counsel for the Plaintiffs:	Bryan W. Sarabin
Counsel for the Defendant - Dale Johnson	Raymond C. Purdy
Counsel for the Defendants - Robert Kosta, Harold David, J. Marc Danis, William (Bill) Schram, James Mager, Conrad Lisoway, Wayne Campbell & Sylvain Amyotte	Austin Marshall
Counsel for the Defendants - Timothy Alexander Bettger & Blaine Roger Lisoway	Michael Kelly

Introduction

[1] Nine miners died on September the 18th, 1992 in an explosion at the Giant Mine in Yellowknife.

[2] Roger Wallace Warren was convicted in January of 1995 of murdering them by setting the explosives.

[3] In the meantime, the Plaintiffs, spouses and in one case mother of the deceased, sued Warren and others for damages in their own right, for dependent children and on behalf of the deceased under the *Fatal Accidents Act*. The Statement of Claim was issued on September 12th, 1994, but sealed until conclusion of the criminal trial in January of 1995.

[4] The Statement of Claim named eleven Defendants but the Plaintiffs thought that others were either implicated or had influenced Warren. Being unable, for lack of information then available, to identify these persons, the Plaintiffs used pseudonyms, John Doe Numbers One, Two and Three and Richard Roe Numbers One, Two and Three.

[5] The Plaintiffs acquired further information and filed an Amended Statement of Claim on January 23rd, 1995 in which they substituted the Defendants Shearing, Bettger and Legge for John Doe Numbers One and Two, and Defendants Evoy, Johnson, Kosta, David, Danis, B.

Lisoway, Schram, Mager, C. Lisoway, Campbell, and Amyotte for Richard Roe Numbers One and Two. This amendment was done without leave pursuant to Rule 124(b).

[6] Mr. Marshall applied on behalf of Kosta, David, Danis, Schram, Mager, C. Lisoway, Campbell and Amyotte (the eight Defendants) to strike the Plaintiffs' action against them under Rule 124(a)(1)(a). Alternatively he asked that the amendment which named them be disallowed - a misnomer application.

[7] Mr. Kelly also brought a misnomer application for Bettger and B. Lisoway, and Mr. Purdy did the same for Johnson.

[8] Shearing applied as well in this category but is unrepresented and did not appear.

[9] The Plaintiffs argue that the addition of the Applicant Defendants constituted correction of a misnomer and should not be set aside.

[10] All of the added Defendants except for C. Lisoway were served with the Amended Statement of Claim within a year of the issuance of the Statement of Claim. C. Lisoway was served within fifteen months.

[11] There is a two-year limitation period under the *Fatal Accidents Act*. The original Statement of Claim was filed in time, but the Amended Statement of Claim was filed some thirty-two months after the death of the miners.

[12] The eight Defendants did not pursue their motion to strike the Statement of Claim as disclosing no cause of action. Rather, they contend that the expiry of a limitation period is a ground to strike, and that by the time the Amended Statement of Claim which named the eight Defendants was filed, the limitation period had expired. Similar arguments are made for Johnson, Bettger and B. Lisoway.

[13] Before getting into the detail of the parties' submissions, or about the authorities cited, let me say this: The misnomer test so simply and clearly stated in ***Davies* v. *Elsby Brothers*** is easily applied in some circumstances, but not in others and the case at bar is in the latter category. The problem arises from the fact that many Defendants were substituted for the pseudonyms in the original Statement of Claim and from the fact that they were said to belong to a class of individuals comprising persons, corporations or entities, as one sees in paragraph 20 dealing with the Richard Roes, which included striking union members, supporters of such members, persons in authority over such members and security persons. The description of the John Does was more narrowly drawn, being limited to those persons, corporations or entities who were implicated with Warren in setting explosives, by either doing or omitting to do certain things. Shearing, unrepresented in this motion and Bettger, represented by Mr. Kelly, are in the latter category. Mr. Kelly also represents B. Lisoway who was a Richard Roe.

[14] Johnson, a Richard Roe, is represented by Mr. Purdy.

[15] None of Mr. Marshall's eight Defendants was examined for discovery or has filed an affidavit. Bettger and B. Lisoway, Mr. Kelly's clients, filed affidavits, were examined thereon and were discovered as well. Johnson, Mr. Purdy's client filed an affidavit, was examined thereon but was not discovered.

[16] Although authority was not cited on the point, I have concluded that evidence is admissible on an application to set aside the naming of parties under the misnomer rule. Evidence is not always needed to show that the Defendant must have known it was him, but where there are multiple Defendants and a variety of misconduct is alleged, it becomes more difficult without evidence to show that the Defendants must have known it was them.

[17] Evidence has been produced by the Plaintiffs to demonstrate that these Defendants' circumstances, positions or actions were such that they must reasonably have known that the Statement of Claim referred to them.

[18] In the course of argument for Johnson, Mr. Purdy pointed out parts of the evidence which he says have the contrary effect. When Johnson says, for example, "I knew nothing about" a certain thing, that operates against the Plaintiffs (who cited the evidence) by showing that he could not then reasonably have concluded that it must be him. Plaintiffs are bound by the answer, he says. I disagree, because I am not finding facts in this application. The way I approach it is this: Assuming the pleadings/evidence to be true would the John Does and Richard Roes know it was them? Do the pleadings describe actions about which a reasonable reader - clothed with the knowledge of a Defendant who had done these things - would be compelled to say "This is me"? Does the evidence, if true, demonstrate that he was clothed with the knowledge that it must be him? His own denial in an affidavit cannot assist. It is merely self-serving.

[19] Thus, where it becomes necessary to consider evidence, it will be necessary to match it to an averment in the Statement of Claim to see if it points necessarily to the now named Defendant in question.

The Issues

(A) Misnomer or addition of parties

[20] Mr. Purdy states the main issue succinctly: Is this a case of true misnomer or was it the addition of parties after expiry of the limitation period?

[21] Misnomer can amount to simply using the wrong name for a Defendant or, as is said by the Plaintiffs to have been done here, using a pseudonym to describe a real person alleged to have done specific acts until such time as his name can be discovered. The problem faced by the Plaintiffs here is the specificity of the actions described in the Statement of Claim.

[22] Mr. Marshall says that his clients were really added as parties as opposed to simply having been identified under pseudonyms. By reading the original Statement of Claim, they could not reasonably have known that they were the persons described as the Richard Roes without making inquiries. According to him, the test in ***Davies* v. *Elsby Brothers***, discussed below, has not been met.

B) Due diligence

[23] The amendment naming the Defendants comes after the expiry of the limitation period and it is said that there is no justification for this. Why did it take so long asks Mr. Marshall. The onus is on the Plaintiffs to demonstrate that they made timely inquiries which would have led them to the identity of the Richard Roes, and they have not met this onus.

C) Discoverability

[24] Mr. Sarabin for the Plaintiffs says that the limitation period should begin to run only when the identity of the Defendants became known.

D) Concealment by fraud

[25] Again Mr. Sarabin says that time should not begin to run against the Plaintiffs when the identity of the Defendants was hidden.

The Pleadings

[26] The relevant pleadings are set out in Schedule 1.

[27] Paragraphs 21 and 22 of the Statement of Claim allege duties of care and breaches thereof on the part of the Richard Roes who were replaced by the eight Defendants, B. Lisoway, Johnson and Evoy.

[28] Paragraphs 18, 21 and 22 allege duties of care and breaches thereof on the part of the John Does who were replaced by the Defendants Shearing, Bettger and Legge.

The Plaintiffs' Position

[29] Disallowance of the naming of the Defendants in place of the John Does and Richard Roes requires the application of the rule established in ***Davies* v. *Elsby Brothers Ltd.,*** [1960] 3 All E.R.672. The question to be asked here is whether a reasonable person reading the document would understand that he is the person referred to under a pseudonym. I will return to the authorities later, but I mention *Davies* and the following case now as a means of keeping the narrative focused on the principles.

[30] ***Rocklake Enterprises Ltd.* v. *Timberjack Inc.*,** (2001), 202 D.L.R. (4th) 98 is helpful for understanding the principle, although the facts are distinguishable.

[31] At page 107:

> Misnomer is often said to be an exception to the general rule barring addition or substitution of parties after the limitation period has expired. Strictly speaking, it is no exception at all. Where there is a true misnomer, the party is the same all along and need not be changed: ***Leesona* v. *Consolidated Textile Mills***, *supra*, at 8 (S.C.R.). Only a mistaken version of the party's name is corrected.

[32] At paragraph 60 of his submissions, Mr. Sarabin argues:

> The test in ***Davies* v. *Elsby Brothers Ltd.*** *supra*, requires that the litigating finger point to the proposed Defendant or Defendants…. In the case of a group of Defendants the litigating finger must point to a particular group or groups of individuals who are capable of being identified from the pleadings.

[33] I think that that is a fair conclusion to draw from the many authorities cited by both Plaintiffs and Defendants. I further agree that those decisions which hold that the litigating finger must point to the proposed Defendant and no one else are to be viewed with caution and in light of their facts. The test in ***Davies* v. *Elsby Brothers*** does not contain the additional words "and no one else". Those words might apply in circumstances where there was only one Defendant or one driver, for example, but where Defendants are members of a group alleged to be responsible, surely it is sufficient to adequately identify each Defendant as a member of that group.

[34] I take it to be the essence of Mr. Sarabin's argument that any person clothed with the characteristics of a Defendant described in Schedule A would say, upon reading the allegations, "I was there, I did that, it must be me they are referring to".

[35] The Plaintiffs also submit that this was a true case of misnomer and that they acted with reasonable diligence in seeking to identify and name the proposed Defendants.

[36] Alternatively, they say, applying the discoverability rule, time should not begin to run against the Plaintiffs until the material facts giving rise to the claim have been discovered and this means the identity of the Defendants as well as the other facts of the matter. Mr. Sarabin also raised the issue of concealment by fraud as a consideration in the running of time under the ***Limitation of Actions Act***.

The Authorities

[37] The rule on misnomer was stated in ***Davies* v. *Elsby Brothers Ltd.*,** [1960] 3 All E.R. 672 at 676.

[38] The test is:

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

[39] Courts in many jurisdictions have applied this rule, including the Alberta Court of Appeal. I will mention two of their decisions. The first is ***Rocklake Enterprises Ltd.* v. *Timberjack Inc.*,** *supra*, where the issue was, as it is here, using the misnomer doctrine to amend the Statement of Claim outside the limitation period. This case reminds us that true misnomer must be distinguished from substitution of parties - a thing which, generally speaking, is not allowed after expiration of the limitation period. It also emphasizes that the reasonable reader of the Statement of Claim would know it must be him without further inquiry. (page 6)

[40] This, as Mr. Purdy submits, makes the test a very stringent one.

[41] The second case is ***Nagy* v. *Phillips***, (1996), 187 A.R. 97. It introduces the elements of misleading, substantial injury, and due diligence into the misnomer inquiry.

[42] The issues are as stated at page 100, and to paraphrase:

1. Does a limitation apply?

2. If so, is this a case of misnomer?

3. If it is a case of misnomer, were the Appellants misled or substantially injured by the misnomer?

4. If the Appellants were not misled or injured, was the Respondent required to show due diligence?

[43] The statement of the issues which appears in the report caused some difficulty in interpretation during argument so I have chosen to paraphrase them according to my understanding of what was said and I believe that the Court answered as follows:

1. Yes, a limitation applies.

2. It was a case of misnomer.

3. The Appellants with whom we are concerned were not substantially misled or injured by the misnomer.

4. The Appellants not being misled or injured, the Respondent was still required to prove due diligence (paragraph 33).

[44] Paragraph 32:

> … even in a case of misnomer, a judge should not grant an application to substitute a defendant for the defendant named unless the applicant has been reasonably diligent in seeking to properly identify the desired defendant and to correct the misnomer. The reason for this is, of course, so that the defendant will have timely notice of the claim, and will not be unduly prejudiced in preparing a defence to it.

[45] Applying these principles to our case produces the following:

A. The limitation period had expired by the time the John Does and Richard Roes were named.

B. We must decide if this is a case of misnomer.

C. If it was we must decide if the Defendants were misled or substantially injured thereby. They concede that they were not.

D. If it was a misnomer the Plaintiffs must show that they were reasonably diligent in seeking to properly identify the desired Defendants and to correct the misnomer.

Were the John Does cases of misnomer?

[46] As I said earlier, the Plaintiffs can demonstrate misnomer either through the specificity of the pleading or by evidence which tends to link the substituted Defendant to the more general description in the pleading, or both.

[47] Shearing, Bettger and Legge are in this category. Of the three only Bettger was represented on this application, but what I have to say applies to all three. We turn to Schedule 1, paragraphs 18, 21 and 22.

[48] Paragraph 18 cannot be faulted for lack of specificity. It alleges, *inter alia*, that the John Does:

> … assisted Roger Wallace Warren to gain access to the Giant Mine or to find his way from the Akaitcho headframe to the point on the main 750 drift tunnel where Warren placed certain substances or who did any of the acts or failed to do any of the facts referred to in paragraph 22F hereof.

[49] It goes on to allege that the John Does acted in concert with Roger Warren in setting the explosives and failing to warn or prevent others from getting near them. (See paragraph 22E and F).

[50] Paragraph 21 is aimed, I believe, at those in a position of influence who were responsible for creating a climate of hostility which gave rise to unreasonable and foreseeable risk to persons lawfully upon the Giant Mine. By itself, paragraph 21 would not meet the test of misnomer.

The Evidence

[51] Evidence was referred to me relating to Bettger. His affidavit is a simple denial that he would have recognized himself. Cross-examination on this affidavit identified him as one of the striking miners; that he knew Roger Warren; that he knew one Ferris, a striking miner, and could have spoken with him about the explosion of September 18th, 1992; that he knew one Laughlin and could have spoken to him; that he knew Cook and Kendall; that he and Shearing broke into the mine on June 29th and sprayed graffiti at the 750 level; that one of the reasons they did this was to see how easy it would be to get into the mine and go underground undetected; that he was involved with Shearing, Legge and C. Lisoway in setting a vent shaft explosion in the mine. At this point I note that Shearing and Legge were John Does and C. Lisoway was a Richard Roe. This evidence is relevant on the question of whether the misnomer test is met for C. Lisoway and I will come back to it.

[52] Bettger, obeying the admonitions of his counsel, refused to answer many highly relevant questions which would have informed the question of misnomer but some of the answers he did give, in my view, support the already adequate recognition factor of the pleading itself.

[53] I hold that the John Does were true misnomers, even without supporting evidence.

[54] There is no evidence that they have been substantially misled or injured by the misnomer and Mr. Kelly has not argued that the Plaintiffs have shown a lack of due diligence in naming the John Does. That being so, the Plaintiffs' evidence that they acquired information leading to the identity of these people through conversations after September 12th with the R.C.M.P and with the Plaintiff Neill stands alone and is sufficient to demonstrate due diligence. (Tab B, Plaintiffs' Brief). The RCMP refused to give information until the criminal case was concluded - i.e. after expiration of the limitation period.

Were the Richard Roes Cases of Misnomer?

The Pleadings

[55] Paragraph 20 identifies certain persons, corporations or entities:

> … one or more of whom was a striking member of the Union, a supporter of such striking member or in a position of significant influence or control over a striking member of the Union, including Roger Wallace Warren, or the state of security in the Giant Mine.

[56] This is very general inasmuch as there were many striking union members and supporters. There would, on the face of it, be fewer persons in a position of significant influence or control over the striking members or over the state of security in the mine, so we can examine paragraph 21 to see if it narrows the field.

[57] Paragraph 21 describes the duty of care of the Richard Roes to avoid conduct which would create an unreasonable risk of harm and, as well, a duty to intervene or to prevent others from engaging in such conduct. The breadth of these allegations, taken by themselves does not survive the misnomer test. For the present purposes one can say that paragraph 21 does not help paragraph 20 to meet that test. Therefore, unlike the situation of the John Does, where I find that the pleadings in paragraphs 18 and 22 E and F were specific enough in themselves to satisfy the test, the Plaintiffs need evidentiary support for the Richard Roe cases.

The Evidence

[58] One of the Plaintiffs, Tracey Neill, filed an affidavit which contains discovery excerpts, from Defendant Seeton's exams (paragraphs 10 to 12 inclusive); Bettger's exam (paragraphs 16 to 18 inclusive); Shearing's exams (paragraphs 20 and 21); and B. Lisoway's exam (paragraph 23). The affidavit also exhibits strike bulletins and pictures of signage used by the strikers, union letters, (one from Seeton to The Minister of Labour dated September the 7th, 1992 (Tab B to affidavit) described the labour dispute as an "intense struggle which is turning into a virtual war"); and press clippings. This material describes a situation charged with such tension and animosity that, without resorting to hyperbole, it could be described as explosive. And explosive it proved to be.

[59] Some examples from the above material cited by Mr. Sarabin are:

> The Defendants Shearing and B. Lisoway, one a member of the union executive and the second a member of the union who had been offered a trusteeship, were involved in an incursion into the mine; Bettger and Shearing blew up a satellite dish; Shearing, Bettger, Legge and C. Lisowich bombed a ventilator shaft; no member of the union was ever sanctioned or disciplined for failure to follow union instructions; many individuals were involved in an altercation on mine

> property June the 14th, 1992 (Exhibit C of Neill affidavit); Shearing and Seeton disrupted the power to the mine from time to time (Exhibit F); there was a lot of tension and fighting and the Defendants Harold, David and Seeton were afraid somebody would get killed (Exhibit A); the union was aware that violence would destroy the chance for a settlement and both sides had a duty to minimize provocation and retaliations (Exhibit A); Seeton, Johnson and David were, at various times, responsible for preparing and vetting strike bulletins (Exhibit A).

[60] Some of these bulletins are reproduced after transcript pages 297, 302, 304, 311, 321, 329, 332 (Exhibit A) and 512 of (Exhibit B).

[61] In them, as well as in the signage approved by the union executive in most cases, one perceives a constant theme of vilification of replacement workers by describing them as scabs, "scabious slime ballius", cowards, people of little principle and very weak character, the slime club; their cafeteria serves garbage soup, sleaze burgers, scum casserole, slug and maggot pate, bull fly quiche, snail trail pie and slime jelly.

[62] There were accusations of bias against the police and the courts:

> It is becoming more obvious all of the time that the courts and cops are working hand and glove with Royal Oak in that upstanding company's American style war against us.

[63] And,

> - the company has the support of the courts …
>
> - present courts score - charges against CASAW 102 charges against company 6
>
> - cops getting out of hand - Gestapo types

[64] There were personal attacks:

> The Defendant Peggy Witte was referred to as "Piggy".
>
> Werner - Byberg-Witte - a waste of human … [illegible]
>
> A disgrace to mankind.
>
> A freak of nature.
>
> Tuma and Moizes - DP's.

> The $PIG stops here.
>
> Nick Luzny, Mike Roy - scab!
>
> Jim Gauthier - scab of the year.
>
> Harry Hobson - scab of the week.

[65] There was threatening language:

> There was one thing about scabs crossing the picket line, and that's that they are all in one place. Too bad we can't come up with something that would keep them in there 24 hours a day.

[66] There is more, but these examples provide at least some evidence that the union and its executive were deliberately fostering a climate of hostility and of dehumanizing and demonizing their opponents, notably the replacement workers, in the full realization that the situation was a violent one and that they feared someone might get killed. Does such evidence point the litigating finger at the Richard Roes? Specifically does it compliment paragraph 21 in pointing to Defendants whose conduct created an unreasonable risk of harm or who failed to intervene, or prevent others from engaging in such conduct? As Mr. Sarabin puts it, does the evidence help to clothe the Defendants with characteristics which would have enabled them to recognize themselves under the pseudonyms?

Dale Johnson

[67] Speaking for Johnson, Mr. Purdy replies that his client was well known in the community generally and as the strike coordinator between June and September of 1992. His appointment as such was published in the local paper. Would he not be entitled, upon reading the Statement of Claim, to think that it must <u>not</u> be referring to him? Why else would they not name him?

[68] There were 235 union members more or less at all relevant times (his affidavit 29th of February, 1996).

[69] The paragraph 20 allegations, he argues, could apply to many people besides Johnson. He would need to make further inquiries to see if it was him. This he clearly does not have to do.

[70] In examination on his affidavit, Johnson denied threatening anybody; there is no evidence that he failed to sanction anybody; he was not a member of the executive; he denies knowledge of the explosives being planted; and he had no influence or control over the mine workers who were killed. How then, could he prevent them from entering the mine?

[71] I agree with Mr. Purdy that the stringent test in ***Davies* v. *Elsby Brothers*** has not been met in Johnson's case.

[72] I am not influenced by his denials, but rather by the fact that even though he was a strike coordinator and, one might think, therefore in a position of influence or control, he was not named as a Defendant in the original Statement of Claim even though he and his position were well known in the community. Why must he have thought that Richard Roe referred to him? He would be reasonably entitled to say, "This could be me, but if it is, why did they not name me?"

[73] Johnson's case was not mere misnomer. Even if it were, given the fact that he was well known in the community generally, and as a strike coordinator, the substitution of his name for Richard Roe would be set aside for lack of due diligence.

[74] I hold further that neither the discoverability rule nor the doctrine of concealment by fraud can assist the Plaintiffs.

[75] In ***Burt* v. *LeLacheur*** (2000) 189 D.L.R. (4th) 193, the Nova Scotia Court of Appeal discussed the authorities on discoverability including, at page 7, ***Aguonie* v. *Galion Solid Waste Material Inc.*,** [1998] 38 O.R. (3rd) 161 which held that it was a rule of general application, and it applied to a case where the Claimant did not discover the existence of a potential tortfeasor until a later date. At page 10:

> It would be an injustice if a claimant could be barred before acquiring knowledge of the wrongdoer's identity …. Here there is a real issue whether the claimants discovered or should have discovered the identity of a possible tortfeasor.

[76] In Johnson's case, his identity should have been discovered within the limitation period.
[77] Concealment by fraud of the Defendant's identity would delay the running of time. There would need to be some unconscionable act of concealing from the Plaintiffs the existence of their right of action against him. ***Photinopoulos* v. *Photinopoulos*** *(1988),* 92 A.R. 122 (Alta.C.A.)

[78] In our case there is simply no evidence of wilful or conscious wrongdoing on the part of Johnson to conceal his identity. ***Wilson* v. *McDonnell Douglas Canada Ltd. et al,*** (1985), 52 O.R. (2nd) 74.

The Richard Roes other than Johnson

[79] As I said above, the pleadings alone do not bring home to the Richard Roe Defendants that it must be them. Does the evidence help?

[80] Conrad Lisoway as a Richard Roe, was said in paragraph 21 to be under a duty not to create a climate of hostility which created a foreseeable and unreasonable risk of harm to persons lawfully on mine property. But paragraph 21 bears close scrutiny. The first sentence (containing eleven lines) runs on, grammatically speaking. It lacks needed punctuation and the very fact that one must re-read it several times to decipher its meaning makes it improbable that any reader would necessarily see himself referred to without more. My best guess is that its meaning ties the duty of care to avoid certain conduct (the last half of the paragraph) to the exercise or attempted exercise of influence and control over Roger Warren or the state of security in the Giant Mine (the first half of the paragraph). And, while we have evidence that Conrad Lisoway conducted himself in a way likely to create a risk of harm to persons lawfully on the mine, I have been referred to none that showed him exercising or attempting to exercise influence or control over Warren or over the state of security in the mine.

[81] As for Blaine Lisoway, he was a member of the executive and a picket captain, but apart from evidence that he was in an altercation with someone who held a gun to his head, the rest of this cross-examination (Tab 1 - Neill Affidavit) tends to show that he was nonconfrontational. The test is not met in the case of either Blaine Lisoway or Conrad Lisoway.

[82] That leaves, amongst the Richard Roes, James Evoy, Robert Kosta, Harold David, J. Marc Danis, Bill Schram, James Mager, Wayne Campbell and Sylvain Amyotte. Evoy was dropped from the litigation. Harold David was a member of another union and was brought to Yellowknife to help with the strike. He had no official position, but provided guidance to the union.

[83] The others were members of CASAW Local 4. Schram was president of the union when the strike began (Examination on Affidavit of Sarah Kay), and Robert Kosta was a member of the executive. Danis was a former president of the union and he attended a number of union executive meetings between May and September of 1992.

[84] Kosta, Danis, Schram, Mager, Conrad Lisoway, Campbell and Amyotte were aware early on in the strike of Royal Oaks intention to utilize replacement workers. Mager was involved in a serious incident at the mine (Exhibit 1 - Neill Affidavit). These were people who, if the test is to be met, must have realized that the Statement of Claim was referring to them. There is plenty of evidence of outrageous conduct by striking union members. There is evidence that the union condoned it, or at least did nothing to curtail it, although it recognized that settlement would not be reached in a climate of violence. Some of the persons substituted for the Richard Roes probably had influence or control over Roger Warren through their office as members of the union executive and in this category I have mentioned Schram, Kosta and Danis.

[85] But I cannot say from the evidence I have seen that every member of the union executive conducted himself in a way that created a risk of harm as alleged. Putting the

Plaintiffs' case at its highest, it seems to me that any of the Richard Roes reading the Statement of Claim would have to say, "This could be me, I shall have to make further inquiries" - for example, by reviewing the strike bulletins to see if he had either authored or approved the scurrilous and inflammatory treatment of replacement workers to be seen there.

[86] In the case of the Richard Roes other than Johnson, I am not satisfied by the evidence that the Plaintiffs could not have discovered their identities within the limitation period. Nor is there any evidence that a Richard Roe wilfully or consciously concealed his identity.

Conclusion

[87] In the case of the John Does, the allegations in the pleadings are specific enough that a person clothed in the characteristics alleged would have to say, "This must be me". That is misnomer. The substitution of the names Bettger, Legge and Shearing stands.

[88] In the case of the Richard Roes, the generalized allegations in the pleadings together with the evidence are such that a person clothed in the characteristics alleged might say, "That could be me, I had better look into this". That is not misnomer. The substitution of every name in place of a Richard Roe is disallowed.

Costs

[89] Costs may be spoken to.

DATED at Yellowknife, NT this 14th day
of November, 2001.

_____

D.J.S.C.N.T.

SCHEDULE 1

18. John Doe Number One, John Doe Number Two and John Doe Number Three are those persons, corporations or entities whose identities are not presently known to the Plaintiffs, one or more of whom assisted Roger Wallace Warren to gain access to the Giant Mine or to find his way from the Akaitcho headframe to the point on the main 750 drift tunnel where Warren placed certain substances or who did any of the acts or failed to do any of the acts referred to in paragraph 22(F) hereof.

20. Richard Roe Number One, Richard Roe Number Two and Richard Roe Number Three are those persons, corporations, or entities whose identities are not presently known to the Plaintiffs, one or more of whom was a striking member of the Union, a supporter of such striking member or in a position of significant influence or control over a striking member of the Union, including Roger Wallace Warren, or the state of security in the Giant Mine.

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, John Doe Number One, John Doe Number Two, John Doe Number Three, Richard Roe Number One, Richard Roe Number Two 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.

22. The explosion and resulting mortal injuries to and death of the Nine Miners were caused

by the combined negligence of each of the Defendants or any one or more of them, particulars of which as are known to the Plaintiffs, include:

. . .

(E) As to Roger Wallace Warren:

(a) Placing along a passageway in the Giant Mine regularly travelled by miners, a substance comprised of ammonium nitrate and diesel fuel and a substance known as Magnafrac or either of them, in close proximity to a substance capable of causing the ammonium nitrate and diesel fuel and the Mangnafrac to explode, without taking care to determine whether the combination of some or all of those substances was explosive and created a foreseeable and unreasonable risk of harm;

(b) Manufacturing a device utilizing a switch, battery and pieces of wire, attaching the device to the one or more substances referred to in subparagraph (a) hereof, and placing the device and substances along a passageway in the Giant Mine regularly traveled by miners, without taking care to determine whether the device attached to the said substances and placed along the said passageway created a foreseeable and unreasonable risk of harm;

(c) Failing to warn or adequately warn any persons including the Nine Miners who might come into proximity with the device and substances referred to in subparagraph (b) hereof of the danger present and which he created;

(d) Utilizing a sufficient quantity of the one or more substances referred to in subparagraph (a) hereof in the circumstances described in subparagraph (b) hereof without taking care to determine whether they could cause mortal injury to and death of any person who came into close proximity thereto and that persons could and would be likely to come into close proximity thereto unless he gave adequate warnings;

(e) Failing to prevent any persons including the Nine Miners from proceeding down the passageway in question before the substances referred to in subparagraph (a) hereof were removed or disconnected from the device referred to in subparagraph (b) hereof;

(f) Accepting the assistance of John Doe Number One, John Doe Number Two or John Doe Number Three in gaining access to the point where he placed the substances referred to in subparagraph (a) hereof in the Giant Mine or in manufacturing the device referred to in subparagraph (b) hereof or in assembling or learning how to assemble the said device with the said substances;

(g) Failing to accept the advice of John Doe Number One, John Doe Number Two or John Doe Number Three in relation to giving any warning to any persons including

the Nine Miners from proceeding down the passageway in question before the substances referred to in subparagraph (a) hereof were removed or disconnected from the device referred to in subparagraph (b) hereof or accepting the advice of any of John Doe Number One, John Doe Number Two or John Doe Number Three as to the adequacy of such things as Roger Wallace Warren did to give a warning to said persons;

(h) Generally, conducting himself in such a negligent fashion as to cause the mortal injury to and death of the Nine Miners.

(F) As to John Doe Number One, John Doe Number Two and John Doe Number Three:

(a) Carrying out in concert with Roger Wallace Warren or causing Roger Wallace Warren to carry out any of the activities referred to in subparagraphs (a), (b), (d) and (h) of paragraph (E) hereof;

(b) Failing to carry out alone or in concert with Roger Wallace Warren any of the activities referred to in subparagraphs (c) and (e) of paragraph (E) hereof which the said Roger Wallace Warren failed to carry out;

(c) Assisting Roger Wallace Warren in gaining access to the point where Roger Wallace Warren placed the substances referred to in subparagraph (a) of paragraph (E) hereof in the Giant Mine or in manufacturing the device referred to in subparagraph (b) of paragraph (E) hereof or in assembling or teaching Roger Wallace Warren how to assemble the said device with the said substances;

(d) Failing to advise Roger Wallace Warren as to adequate warnings to any persons who might come into proximity with the device and substances referred to subparagraph (b) of paragraph (E) hereof;

(e) Permitting Roger Wallace Warren to carry out or failing to prevent Roger Wallace Warren from carrying out or to fail to carry out any of the acts or omissions referred to in subparagraphs (a), (b), (c), (d) and (e) of paragraph (E) hereof;

(f) Generally, conducting themselves in such a negligent fashion as to cause the mortal injury to and death of the Nine Miners.

Action No: 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, AEROSCAPE 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, 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 MR. JUSTICE E. P. MACCALLUM