Fullowka et al. v. *Royal Oak Mines Inc., et al*, 2001 NWTSC 76

Date: 2001 11 07
Docket: CV 05408

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE LOU SAWLER

Plaintiffs

- and -

ROYAL OAK MINES INC., MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVE TURNER, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA, Successor by Amalgamation to CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS and the Said CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, HARRY SEETON, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER, TERRY LEGGE, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, JAMES EVOY, DALE JOHNSON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE and RICHARD ROE NUMBER THREE

Defendants

- 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

MEMORANDUM OF JUDGMENT

[1] This Memorandum addresses the discovery and production issues argued in chambers on September 24 and 25, 2001.

[2] For the reasons given in my judgment of today's date in the companion case of *O'Neil* v. *Witte et al* (CV 07028), I direct that the authorized representative of the defendant Government of the Northwest Territories answer those questions numbered 1 and 4 as listed in the plaintiffs' Notice of Motion filed May 22, 2001. I have concluded that the defendant government has impliedly waived solicitor-client privilege with respect to the issue of non-issuance of an order to close the mine (as discussed more fully in my reasons in the *O'Neil* case). This does not, however, amount to a blanket waiver of privilege.

[3] With respect to the other specific questions and documents which were the subject of the hearing before me, I order as follows:

Question 2:

[4] This question relates to document J-6-1. I have examined this document and it is a draft of a letter to Royal Oak Mines from Mr. Gould dated May 29, 1992. It has a fax cover sheet from Ms. Perry to Mr. Gould. Plaintiffs' counsel says that it is "apparent" that J-6-1 is a draft of document M-65 which has already been produced. Whether it is or not, it is not apparent to me that the entire document J-6-1 is not in the nature of legal advice. Whether or not it is merely a draft of something already produced, it is a draft that is going between counsel and client. Also, it does not come within the purview of my order as to the scope of the government's implied waiver of privilege.

[5] On these questions of privilege generally, I adopt the approach set forth in *Descôteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860, to the effect that conflicting claims to privilege are to be resolved, absent any other clear choice, in favour of protecting confidentiality.

[6] Having said all that, however, the question posed by question number 2 is not one that would breach privilege. It is a question of fact and can be answered with a simple "yes" or "no". Therefore, I order that it be answered.

Question 3:

[7] I have been advised that the objection to this question has been withdrawn and that in fact it has already been answered.

Question 5:

[8] This question is in the nature of a compendious reliance question.

[9] In *Can-Air Services Ltd.* v. *British Aviation Ins. Co.*, [1989] 1 W.W.R. 750, the Alberta Court of Appeal disapproved of broad reliance questions, ones which ask "upon what facts do you rely for paragraph X of your pleading?", and held that they are always improper. On the other hand, such questions are considered quite proper in Ontario practice: *Six Nations* v. *Canada* (2000), 48 O.R. (3d) 377 (Div.Ct.).

[10] With great respect to the Alberta Court of Appeal, considering its significant influence in this jurisdiction, the strict approach in *Can-Air* is not necessarily appropriate in the context of the Northwest Territories Rules of Court. Rule 251, modelled on the relevant Ontario rule, states that the witness must answer any proper question relating to any "matter" in issue. As held in the *Six Nations* case, the word "matter" is wide enough to include both a question of fact and the actual position taken by a party on a legal issue. Therefore I do not consider this question, simply because it is a reliance question, improper. In any event, the question itself is modelled to some extent on the type of compendious question which the court in *Can-Air* (at 756) considered proper.

[11] I therefore order that this question be answered. Any answer can, and will of course, be limited to the witness' current knowledge, information and belief (to quote Rule 251) and subject to disclosure of any after-acquired facts and information (also as required by the rules).

Question 6:

[12] The objection to this question is to its omnibus nature and broad scope. While I share the defendants' concern about putting some limits on discovery, there is an obligation on the "corporate" representative of the defendant government to inform himself and to answer whether the defendant has any information contrary to or inconsistent with the evidence given by its former employee.

[13] I will therefore not relieve the defendant from the obligation to answer, but I will put two options: (1) Plaintiffs' counsel can break up the question into discrete specific subject matters (as opposed to the compendious nature of the question as presently framed); or, (2) the defendant can acknowledge that the information given by its former employee is not disputed unless it advises the plaintiffs of contrary information as soon

as it becomes aware of it (with a cut-off date of perhaps 6 months from now). When the deadline passes, the answers become the answers of the defendant and can be read in at trial by the plaintiffs. If the parties cannot agree on one of these options within 30 days, I will then entertain further submissions as to how best to deal with this question. If that is necessary, then I will also consider making an immediate order for costs.

Question 7:

[14] This question was dealt with at the hearing before me.

Question 8:

[15] This question in effect compels me to revisit once again the issue of the producibility of document 8064. Twice before, on March 29, 1999, and October 30, 2000 (see [2000] N.W.T.J. No. 72), I ruled that this document was protected by public interest immunity. I have not been asked, nor do I see any reason, to change that ruling. The question here (or, to put it more accurately, the series of questions contained within question number 8) is in effect nothing more than an attempt to obtain disclosure of the contents of the document.

[16] Plaintiffs' counsel submitted that whether a document has been ordered produced or not, that does not resolve the propriety of questions that may touch upon the document. While I may agree with that general statement, the question here goes beyond mere facts and endangers the confidentiality of the document itself. Therefore this question need not be answered.

Question 9:

[17] This question was also dealt with at the hearing.

Document Production:

[18] There are, by my notes, sixteen documents which are sought by the plaintiffs. The defendant government asserts a solicitor-client privilege over twelve of these documents and a public interest immunity claim to the remaining four. Again, this is not the first time I have dealt with these issues in the context of document production. Based on my records, this is at least the fifth time between 1998 and now that I have had to address questions of public interest immunity.

[19] With respect to these documents, I have reviewed each one. That is the process approved in *Descôteaux* (*supra*) and *Carey* v. *The Queen* (1986), 35 D.L.R. (4th) 161 (S.C.C.). As noted in many cases, privilege can only be claimed document by document.

[20] The documents for which a solicitor-client privilege is claimed are:

No. J-1-16:

[21] This is a memo containing a draft regulation. The sender is not a solicitor nor is the recipient. It is copied to Mr. Gilmour but that, in itself, is insufficient to establish that this is a communication made in the context of seeking or giving legal advice. There is an insufficient evidentiary basis to support the privilege claim. This document is producible.

No. 7-4-65 & No. J-5-8:

[22] These two are the same document. It is simply a "document cover page" and the document type is described as "external mail". It apparently refers to some document from the defendant Evoy (a non-government, non-lawyer party) to the Deputy Minister of Justice. I fail to see any privilege applying to these documents. They are producible (notwithstanding what appears to me to be their minimal materiality).

No. J-4-70:

[23] This document appears to be a draft of a letter from Minister Kakfwi to Mr. Evoy with notations to and/or from Minister Kakfwi and Deputy Minister Bickert. In my opinion, this document is privileged under both headings of solicitor-client privilege and public interest immunity.

No. J-5-3:

[24] This document is, as described, a draft letter with comments by the Deputy Minister of Justice. It is privileged and non-producible.

No. J-5-31:

[25] This is a document cover page. There is no basis to assess the privilege claim. No privilege issue is apparent. The document is producible.

No. J-6-1:

[26] I addressed this document above in relation to Question 2. This document is privileged.

No. J-6-2:

[27] This is a memo from Ms. Perry (staff legal counsel) to the Deputy Minister of Safety & Public Services. It is in the nature of legal advice. It is privileged.

No. J-6-3:

[28] This is a memo from the Assistant Deputy Minister of Justice (Mr. Gilmour) to the Secretary to Cabinet (Mr. Alvarez). This document is in the nature of legal advice and strategy. It is privileged.

No. J-6-4:

[29] This is a memo from the Deputy Minister of Justice (Mr. Bickert) to the Secretary to Cabinet. In my opinion, there is no discernible solicitor-client interest in this document. It appears to be more in the nature of some informal comments on political strategy. I also fail to see how disclosure of this document may impair government functioning. I will, nevertheless, give the defendant government 30 days to identify, if it can and if it wishes to do so, any interest which it may claim as sufficient to create a public interest immunity for this document. If the government does that, the plaintiffs have leave to challenge the claim and to submit a further request for production; if the government does not, then the document is to be produced.

No. J-6-5:

[30] Plaintiffs' counsel says that this document is apparently the same as document 6/39 produced by a third party in this action, the Government of Canada. Contained within document J-6-5 is a draft of document 6/39 but with notations and a covering memo by Mr. Bickert. The entire document is in the nature of legal advice and therefore privileged. The fact that the final version of the document has been disclosed does not necessarily make the draft producible (see my comments regarding document J-6-1 under "Question 2" above).

No. 8067:

[31] This document is a memo from Ms. Perry to the Deputy Minister of Safety & Public Services. It is in the nature of legal advice and therefore privileged.

[32] The documents for which a public interest immunity is claimed are:

No. J-2-55 & No. J-2-57:

[33] These two documents appear to be the same: drafts of a statement to be delivered by the then Premier. It is apparent that this statement was to be delivered in the Legislative Assembly since it commences with "Mr. Speaker". The only difference is that document J-2-55 is typed and attached to a fax cover page addressed to the Deputy Minister of Justice while document J-2-57 is hand-written with no indication by whom.

[34] Plaintiffs' counsel submitted that the description given by the defendant of these documents is insufficient to establish a public interest immunity claim. That description, however, claims immunity on the basis that these documents are drafts and, accordingly, they are recommendations as to the final form of the statement. In effect, it is claimed that these documents go to policy formulation. While I may agree with this general characterization, there are other factors that militate against immunity from production: (a) if it is policy formulation, then it is historical policy as opposed to any current one; and (b) it may shed light on the eventual position adopted and actions taken by the government especially in view of the government's pleading that it acted reasonably and in good faith within "the purview of the limited jurisdiction, authority and resources available to them" (as per paragraph 9 of the Statement of Defence).

[35] I therefore order that these documents be produced.

No. J-2-66:

[36] This document is a "Briefing Note". It does not state for whom (although there are references to the Minister of Justice) nor does it state who prepared it. There is no basis, aside from speculation, to assess the claim to immunity, therefore I direct that this document be produced.

No. 8087:

[37] This document consists of a memo from the Deputy Minister of Safety & Public Services to the Minister and attached to it is a copy of a document already produced (a letter dated June 29, 1992, from Leigh Wells to the Minister) with hand-written notations on it. In my opinion, the memo and the attached letter are producible, but with the hand-written notations deleted.

[38] These are my directions on the outstanding discovery and production issues. If I have overlooked anything, counsel may contact me.

[39] Costs will be in the cause.

J. Z. Vertes
J.S.C.

Dated: November 7, 2001

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

Counsel for the Defendant
(Government of the N.W.T.): P.J. Mousseau

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MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES