Fullowka et al v. *Royal Oak Ventures Inc. et al*, 2003 NWTSC 32

Date: 20030616
Docket: CV 05408

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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

Plaintiffs

- and -

ROYAL OAK VENTURES 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 VENTURES 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 plaintiffs' motion, filed April 24, 2003, seeking an order declaring the defendant, National Automobile, Aerospace, Transportation and General Workers Union of Canada (which I will refer to as "CAW"), to be in civil contempt and directing the defendant to answer certain discovery questions and undertakings.

[2] This application is merely the latest in a long-running dispute between these parties over the extent of this defendant's discovery obligations. The CAW is being sued as the successor to the Canadian Association of Smelter and Allied Workers ("CASAW") and, in

particular, that union's Local 4 which was the bargaining agent for the employees at the Giant Yellowknife mine. On October 3, 1994, the Canada Labour Relations Board issued a declaration that CAW Local 2304 was the successor bargaining agent of CASAW Local 4. This relates to certain issues that I have already decided are ones that will have to be decided at trial: (a) the inter-relationship of national and local unions; (b) the effect of the merger of unions; and, (c) whether the successor union or local are distinct legal entities, with no liability attaching to one for the actions of the other, or the actions of the predecessor union or local, or whether they are one entity with no distinction between them for purposes of liability.

[3] These issues, and the numerous attendant discovery problems, were canvassed by me in several previous decisions (see [2002] N.W.T.J. No. 11, [2002] N.W.T.J. No 21, and [2002] N.W.T.J. No. 104). I previously gave directions to the discovery officer for CAW to include, within the scope of his duty to inform himself, inquiries into the records and personnel of CASAW. Plaintiffs' counsel has maintained the view that the defendant failed to comply with this expanded duty or complied with it inadequately. Defendant's counsel has just as firmly outlined the difficulties confronting this party in obtaining the information sought by the plaintiffs. Plaintiffs' counsel, it is fair to say, has taken a meticulous approach to discoveries and does not accept the explanations offered on behalf of the defendant. Numerous discovery undertakings have been given, many questions taken under advisement, and the plaintiffs have continually complained that the defendant has failed to comply, or complied late, or complied inadequately.

[4] On this application, the plaintiffs identified 48 specific undertakings, enumerated in their Notice of Motion, as ones the defendant has failed to answer (either in accordance with my previous directions or as a result of undertakings given at a continuation of the discovery). However, I was advised at the hearing that, by the time of the hearing, the defendant had provided answers to all of the undertakings. The only items left for consideration are certain questions which I discuss below. Notwithstanding the provision of these answers, the plaintiffs still wanted to press ahead with their contempt application.

[5] The fact that I (in my capacity as the case management judge for these proceedings) have had to address these questions on several occasions merely begs the question of how extensive, or perhaps how painstaking, do we allow discoveries to become in order to meet the aims and objectives of the rules of civil procedure.

[6] It is almost trite to repeat that the modern approach to discovery is full disclosure with a view to ensuring that the parties know the case each is hoping to establish at trial, clarifying the issues, enhancing the possibility of settlement, and, if a trial is necessary, eliminating surprise and facilitating the efficient resolution of the issues that are in dispute.

The courts have, in modern times, adopted a liberal approach to the scope of discovery and, subject to certain exceptions such as claims to privilege, the key to the propriety of any question on discovery is relevance. But that does not mean that discovery has no limits. There are also questions of economy and reasonableness to consider. This was explained as follows by Addy J. of the Federal Court in *Wewayakum Indian Band* v. *Wewayaki Indian Band*, [1991] 3 F.C. 420 (T.D.), at para. 47:

> In deciding whether a question can properly form part of the discovery process, the Court must at times consider such matters as the probable amount of time, effort, research, work and expenditure involved in attempting to arrive at an answer and weighing them against such matters as the amount of money or the importance of non-monetary issues involved in a litigation, the degree of relevancy, the probable importance, value or usefulness which the answer might have in determining the basic issues of the litigation. However, where a question is relevant and not otherwise objectionable, it is not sufficient for the party refusing to answer to merely state in argument that obtaining an answer would involve unwarranted, unjustifiable or exceptionally onerous difficulties. Some evidence must be furnished or referred to in order to explain the difficulties and, where applicable to establish what reasonable though eventually unsuccessful efforts were made to obtain an answer.

[7] In this case I have heard all about the difficulties faced by defendant's counsel in tracking down information so as to respond to the discovery questions. I must admit to some sympathy with their situation in the circumstances. I think many of their explanations are reasonable ones. At the same time I recognize plaintiffs' desire to obtain the information sought. With these general comments, I turn to the two issues before me.

The Contempt Application:

[8] The plaintiffs seek an order declaring CAW to be in civil contempt. The Notice of Motion seeks, as a sanction, the striking out of this defendant's pleadings, or the imposition of a significant fine, or prohibiting CAW from further steps in this action until it has purged its contempt. The application is premised on the purported failure of the defendant to comply with certain deadlines I imposed in November, 2002, for responding to various undertakings.

[9] In my respectful opinion, the bringing of this application is a somewhat questionable tactic in these circumstances and, in particular, the continuation of this application even after the undertakings were answered was an unnecessary exercise. I say this for a number of reasons.

[10] First, I am of the view that a contempt proceeding, even though it is merely civil contempt, is a very serious matter and ought to be invoked in only the most extreme circumstances. It carries the potential of severe sanctions. All of this is illustrated by the

principles applicable to contempt proceedings: the allegations must be set forth with particularity; they must be proven beyond a reasonable doubt; the conduct complained of must be "wilful", that is to say deliberate and non-accidental; and, all applicable legal requirements must be strictly complied with (including the need for affidavits to be based on personal knowledge and not hearsay). For a review of these principles, one can refer to numerous cases, including *Northwest Territories Public Service Association* v. *Commissioner* (1980), 107 D.L.R. (3d) 458 (N.W.T.C.A.); *Bee Chemical Co.* v. *Plastic Paint & Finish Specialties Ltd.* (1980), 15 C.P.C. 288 (Ont.C.A.); *Ebrahim* v. *Ebrahim*, [2000] B.C.J. No. 1265 (C.A.); and, *Serhan Estate* v. *Bjornson* (2001), 303 A.R. 17 (C.A.)

[11] Second, the primary objective of exercising the civil contempt power is to secure compliance with a court order. The essence of civil contempt is the disregard of an order of the court. The primary purpose of a sanction for contempt is to compel compliance with an order. And, normally, if there has been compliance with the order by the time of the contempt application, no further sanction beyond an order for costs will be imposed. See *Poje* v. *British Columbia*, [1953] 1 S.C.R. 516; and, *TG Industries Ltd.* v. *Williams*, [2001] N.S.J. No. 241 (C.A.).

[12] Finally, it is significant that the allegation here, now that the undertakings have been answered, is not one of a deliberate disregard of my previous orders but of failure to adequately answer the undertakings and the delay in answering. How "adequate" the answers are is a highly subjective issue; how timely depends on the reasonableness of the efforts made by the defendant and the explanation for the delay. Plaintiffs' counsel stated before me that the inadequate answers and the delays in responding have effectively "subverted" the discovery process. I see no evidence of that. The defendant's counsel explained what was done and how it was done. I think that while they could have acted more quickly, they nevertheless acted responsibly.

[13] On a final note, it seems to me that if a party wishes to argue that another party is in contempt, that party should make certain that it has not engaged in dubious conduct. I had previously ordered that the plaintiffs pay costs to the entity known as CAW Local 2304 and to an individual who had been a party (but against whom the action had been discontinued). This was within the context of a separate action that is proceeding as a companion case to this one. The evidence before me on this application revealed that at one point plaintiffs' counsel attempted to impose a trust condition on the payment of those costs, that being the receipt of "complete and satisfactory" answers to the undertakings given by *this* defendant in *this* action. In my opinion, the attempt to impose these trust conditions was improper. My order fixed the costs payable, and I ordered them payable forthwith, and those costs were not linked in any way to the discoveries in this action.

[14] For these reasons, the application to declare CAW in civil contempt is dismissed.

Application to Compel Answers:

[15] The one remaining issue on which plaintiffs' counsel seeks a direction relates to a series of questions posed to the CAW representative regarding the retainer of legal counsel in earlier labour relations proceedings.

[16] The background to the questions relates to proceedings before the Canada Labour Relations Board which were subsequently continued in 1994 in the Federal Court and ultimately argued before the Supreme Court of Canada in 1995. The entity named in those proceedings was CASAW Local 4 and its lead counsel was a lawyer named Leo McGrady. Also listed as counsel before the Supreme Court was a Mr. L. Gottheil who was, or may be currently, the director of the CAW legal department. On discovery, plaintiffs' counsel wanted to know who was instructing Mr. McGrady in 1994 and 1995 and who was paying his fees. The defendant refused to answer on the ground of relevance (although it appears from the transcript that there may have been an off-the-record discussion on a question of privilege).

[17] Plaintiff's counsel argued that these questions are relevant to the issue of the legal effect of the merger of CAW and CASAW and the successor declaration issued by the Canada Labour Relations Board. The plaintiffs will argue at trial that CAW "stepped into the shoes" of CASAW Local 4. Therefore, the answers to these questions may shed light on the nature of the relationship between these various entities. Defendant's counsel argued that this line of questioning is irrelevant since it involves events after the union merger in 1994 and many years after the event that gave rise to the cause of action in this case.

[18] In my opinion, the issue of the inter-relationship of the union entities and the significant question of whether CAW, as a result of the merger in 1994, assumed the tort liabilities of CASAW or CASAW Local 4, is primarily a question of law. It may be informed by facts but those would be facts pre-dating the merger since anything after the merger is governed by the legal effect of the merger. If CAW assumed the potential liability of CASAW or CASAW Local 4 then it must be because of something done prior to the merger or because of the merger itself. It may of course be directly liable for its own actions and those of its officers and agents. But those actions must have pre-dated the cause of action. So, in my view, questions relating to the post-merger period are not relevant.

[19] In any event, there is some evidence already available on these questions. Among the documents produced on discovery is a memo, apparently authored by Mr. McGrady, in which he indicates that he has two instructing clients, referring specifically to Mr. Hemi Mitic (the CAW representative for discovery purposes) and to Mr. Harry Seeton (another named defendant who at various times was an officer of CASAW Local 4). The memo is dated November, 1993.

[20] What the internal arrangements were as between CAW and CASAW Local 4 in terms of retaining and instructing Mr. McGrady can be the subject of questioning so long as it does not encroach on areas of solicitor-client privilege. But such questions have to be related to the pre-merger period. A solicitor can represent two or more clients but that fact alone proves nothing. What passed from those clients, jointly or individually, to the solicitor is obviously protected (not from each other but from outside parties). Also, the mere fact that this representation continued after the merger proves nothing. The public record reveals that the issues before the Supreme Court of Canada dealt with issues of national importance relating to the obligation to bargain in good faith and the scope of remedies available to a labour relations board: see *Royal Oak Mines Inc.* v. *Canadian Association of Smelter and Allied Workers et al*, [1996] 1 S.C.R. 369. The case did not deal with any question relating to the merger or the assumption of liabilities.

[21] I am also of the opinion that the interest of "economy" in litigation warrants circumscribing the scope of this discovery. While events preceding the cause of action and even preceding the 1994 merger may have potential relevance, events after that would have no relevance or so little as to not justify the effort required to answer them (particularly if such inquiries may implicate questions of solicitor-client privilege).

[22] For these reasons the application to compel answers to these questions is also dismissed.

Costs:

[23] There were no specific submissions on the issue of costs. The plaintiffs' Notice of Motion sought an order fixing costs against CAW "payable forthwith and in any event and in an amount having due regard to the solicitor and their own client costs incurred by the Plaintiffs" for this and previous applications.

[24] If there had been any evidence put before me that the defendant responded to the undertakings only because of the threat posed by this application then I would have been inclined to award costs notwithstanding my dismissal of the contempt application. But there was no such evidence. And, as I stated previously, I saw no reason to proceed with the application in light of receiving the responses. It seems to me that the only objective

was a punitive one. I reject that. Even if the defendant did take too long to respond, it eventually did and I found its explanation for the delay to be reasonable, particularly since it had to rely on outside people to provide much of the information.

[25] The general policy is that, on a successful contempt application, the party who brought the motion, who in effect assisted the court in ensuring compliance with its order, should not be put out-of-pocket and therefore should be awarded solicitor-and-client costs: see, for example, *Pfizer Canada Ltd.* v. *Apotex Ltd*. (1998), 86 C.P.R. (3d) 33 (F.C.T.D.). Here, however, the application was not successful nor was I convinced that it was necessary. For these reasons, I award costs to the defendant CAW, payable forthwith and in any event of the cause. I fix those costs in the sum of $1,000.00.

J.Z. Vertes
J.S.C.

Dated this 16th day of June, 2003.

Counsel for the Plaintiffs: W.B. Russell
Counsel for the Defendant (CAW): L.S.R. Kanee

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