Date: 2002 12 13
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, TRANSPORTATION AND GENERAL 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 two outstanding issues from the hearing held on November 26, 2002: (1) the plaintiffs' application for directions as to the extent to which the authorized representative of the defendant, the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW-Canada"), must inform himself for discovery purposes; and (2) the plaintiffs' application to amend the Amended Statement of Claim.

The Duty to Inform Himself:

[2] The *Rules of Court* provide that the person being examined has a general duty to inform himself or herself as to the matters in issue: Rule 251(2). If we were dealing with a situation where the sources of information were present or former servants or agents, then the situation would be quite straightforward. The person being examined is obligated to obtain the information, if he or she can, unless it can be shown that it would be unreasonable to impose such a requirement. I outlined the obligations and possible responses of the party being examined, in a different context, in an earlier ruling in this case (at [1997] N.W.T.J. No.42) as follows:

> . . . the official representative of the corporate party to be examined has an obligation to inform himself or herself from the party's records and from present or past employees and agents and to disclose such information. The person being examined can be asked about all the knowledge deemed to be within the domain of the corporate party. If the examiner has information from current or past employees, the corporate representative may be asked and must answer whether that information is part of the party's information. If it is then the corporate party may accept it and, if it does, it becomes the evidence of that party. This is important because only discovery answers by parties may be read in at trial, not answers given by employees or others who are not the designated representative of the party. The corporate representative, however, may acknowledge that it is part of the party's information but may still reject it. Then the party has an obligation to disclose any contradictory information. The party may qualify it by other information. Or, the party may simply not accept or reject the information put to it by the examiner.

[3] These procedures are, of course, applicable to corporations. The parties have proceeded on the same basis notwithstanding the fact that the particular party here is a union. This seems to be a reasonable way of proceeding since unions are now considered to be legal entities capable of bringing suit or being sued in their organizational name.

[4] The issue here really turns on the extent to which the representative of this particular union must inform himself as to information obtained from members of other unions who had some involvement in the matters surrounding this lawsuit.

[5] One of the principal points of contention, as between the plaintiffs and the defendant CAW-Canada, is the inter-relationship, if any, between national unions and locals and between merged unions. Some of the background to this was previously canvassed by me (see [2002] N.W.T.J. No.21).

[6] The cause of action arises from the death of nine miners which occurred during a strike at the Giant Mine in 1992. At the time the bargaining agent for the striking miners was Local 4 of the Canadian Association of Smelter and Allied Workers ("Local 4"). In June 1994, the national Canadian Association of Smelter and Allied Workers ("CASAW") merged with CAW-Canada. By that merger all CASAW locals because CAW locals. Local 4 of CASAW became Local 2304 of CAW. In October 1994, the Canada Labour Relations Board declared that CAW Local 2304 was the successor to CASAW Local 4 and had acquired the rights of its predecessor as the bargaining agent at the Giant Mine.

[7] This action was commenced in 1994 naming CAW-Canada, as the "successor by amalgamation" to CASAW, as a defendant. The position advanced by the plaintiffs is that this includes not just CAW-Canada but all of its locals and predecessors. The defendant CAW-Canada, however, has maintained that there is a distinction between a "local" union and its "parent" or the "national" union. There is some authority on this point. In my previous decision, I held that this question should not be resolved on an interlocutory motion. It raises issues of law and fact that should be addressed at trial.

[8] In yet another previous decision (see [2002] N.W.T.J. No.11), I issued certain directions to the representative of CAW-Canada for discovery purposes. That representative is Mr. Hemi Mitic.

[9] My first direction was a general one addressing the scope of Mr. Mitic's inquiries so as to inform himself. I thought it was self-explanatory:

> Mr. Mitic is hereby directed to expand the scope of his inquiries, for discovery purposes, to include records and personnel of not only CAW-Canada but also CAW-Local 2304, CASAW, and CASAW-Local 4. This is without prejudice to any argument counsel wish to advance regarding the distinct legal identities of, or status of, these entities or their interconnection, if any, for purposes of this lawsuit.

[10] The second direction related to putting to Mr. Mitic information provided by another person and then asking Mr. Mitic whether or not that information is the information of CAW-Canada. This is using the procedure I outlined in a general way above in paragraph 2 of this Memorandum. It has come to be called by counsel the "Stearns Catalytic" protocol, in reference to *Esso Resources Canada Ltd.*. v. *Stearns Catalytic Ltd.* (1992), 20 Alta.L.R.(3d) 309 (Q.B.), appeal dismissed at 20 Alta.L.R.(3d) 313 (C.A.).

[11] The other person examined was Mr. Ross Slezak, an officer of CASAW up until the merger and a named defendant in his own right in a companion action (number CV 06964) arising from the same cause of action. I directed that Mr. Mitic inform himself so as to be able to answer questions relating to information given by Mr. Slezak. I said at the time:

> Whatever is the true status of the former CASAW union and the present CAW-Canada in terms of assumption of liabilities (an issue that will have to be determined at trial), there is a connection between these two entities by reason of the merger agreement of 1994. Mr. Slezak was an officer of CASAW up to the merger. Thus I directed that Mr. Mitic inform himself, as directed above, so as to be able to answer questions put to him relating to the information given by Mr. Slezak on his examination. The plaintiffs are entitled to a direct response as to whether or not the defendant CAW-Canada knows of the existence of the information being referred to in the question. If it has such information, then it should say so. These are not admissions in the sense of being binding on this defendant; this is merely confirmation or not of certain information given by another witness.

[12] The plaintiffs now seek a similar direction with respect to information from three specific individuals and *generally* with respect to information from officers, employees and members of CAW-Canada, CAW Local 2304, CASAW, and CASAW Local 4. The defendant CAW-Canada responds that this request is tantamount to treating this defendant as if it were those other entities, entities that have separate identities, and that are not parties to this action. If there is any logic to extending the "Stearns Catalytic" protocol to union members, it was submitted, then it must be restricted to information obtained from individuals who actually are or were employees of CAW-Canada itself.

[13] In my opinion there must be some connection between CAW-Canada and the individual whose information is being put to the representative of this defendant, and about which Mr. Mitic is to inform himself. The question is not whether any particular question can be put to Mr. Mitic but whether Mr. Mitic is under an obligation to make efforts to inform himself. The plaintiffs could put to him any information gleaned from any source and ask him if he can confirm or deny it. His answer may be a simple "I don't know". But there has to be some connection if Mr. Mitic is to be required to make inquiries so as to give an *informed* answer. For example, I allowed the plaintiffs to put Mr. Slezak's evidence to Mr. Mitic, and required Mr. Mitic to inform himself so as to be able to answer, because Mr. Slezak was an officer of CASAW prior to the merger and Mr. Mitic represents the merged entity. Hence there is the necessary connection.

[14] The connection need not be a formal one such as employer-employee. The modern approach to discovery is to encourage full disclosure so as to focus the issues. One of the ways this approach is fostered is by imposing generally a duty to inform oneself unless it is unreasonable to take the steps necessary to do so, not necessarily whether there is a particular type of relationship. For example, in *Scheuermann* v. *Jablanczy*, [1984] O.J. No. 394 (H.C.J.), the representative of a corporate defendant was required to inform himself as to information possessed by its parent company, a company not named as a defendant nor even based in Canada. In *Fedorczenko* v. *Jamieson*, [1986] O.J. No. 855 (H.C.J.), the plaintiff was required to use his best efforts to obtain clinical notes and records of doctors and hospitals.

[15] Defendants' counsel referred me to *Vulcan Iron Works* v. *Winnipeg Lodge No. 122, Ironmoulders' Union of North America* (1908), 9 W.L.R. 208 (Man.C.A.). That case held that the local union (a party defendant) cannot be compelled to produce documents held by the parent union (not a party). I have no reason to quarrel with that case although there is a distinction between compelling a party to produce records in the possession of a non-party and merely directing the party to make best efforts to inform itself. Also, I question whether the *Vulcan* case would necessarily be decided the same way in light of the modern approach to discovery.

[16] Mere membership in the union, whether of the national bodies or the locals, is not enough, in my opinion, to establish the necessary connection. This is because of the jurisprudence that establishes the proposition that unions are legal entities in and of themselves and not merely a group of individual members. This was explained in *Berry* v. *Pulley*, [2002] S.C.J. No.41 (S.C.C.), which affirmed the principle that a union is a legal entity for the purpose of discharging its functions and one which may be sued in tort or in contract. The Supreme Court set aside the notion that a union is nothing more than a web of contractual relationships between the individual members. What I take from this case, in the context of the particular issue before me, is that it is appropriate to treat a union as one would a corporation for discovery purposes. They are both legal entities that can be sued in their "corporate" names and they each can be liable to the extent of their "corporate" assets. But a mere member of a union is no more an agent or servant of the union than a mere shareholder is the representative of a corporation.

[17] Therefore, I refuse to issue a general direction as sought by the plaintiffs.

[18] The plaintiffs, however, also seek specific directions requiring Mr. Mitic to inform himself, as in the case of Mr. Slezak's information, with respect to evidence from three other individuals: Harold David, James Mager, and Robert Kosta. These

three individuals were named as defendants in this action and were examined as such. In 2001, however, in another decision (see [2001] N.W.T.J. No. 72), these individuals succeeded in having the action struck out against them on the basis that the amendments which named them as parties were not the correction of misnomers but unjustified substitutions of parties beyond the limitation period.

[19] One of the main reasons, of course, as to why the plaintiffs want to put this evidence to Mr. Mitic is to try to obtain admissions from the defendant CAW-Canada. But it must be remembered that any admissions obtained by this procedure are really nothing more than confirmation that the information provided by these other people is also part of the information of the defendant, or not. It is not necessarily an admission of the truth of the information nor does it predetermine how, if at all, such answers may be used at trial. This was explained in the *Stearns Catalytic* case (at para. 9):

> As a final comment, I am unable to accept the defendant's submission that the admissions obtained when a corporate officer acknowledges that excerpts from the discovery evidence of employees or former employees of the corporation form part of the information of that corporation are equivalent to the admissions obtained when a Notice to Admit is served upon a party pursuant to Rule 230 of the Alberta Rules of Court. The admissions of fact obtained under Rule 230 are formal admissions and are binding on the party making them. Those obtained when a corporate officer accepts discovery evidence of employees as information of the corporation are not binding on the corporation, conclusive or incontrovertible. The corporate officer is not being asked to admit the information as true or to say whether or not he believes it and the officer is provided with the opportunity to immediately qualify this admission. Therefore, this comparison does not withstand close scrutiny.

[20] Mr. Harold David was not an employee or officer of CAW-Canada or any other union body. There is discovery evidence showing that Mr. David was recruited by the president of CAW-Canada to go to Yellowknife to assist Local 4 and that he was paid by CAW-Canada for this assignment. There is conflicting evidence as to who, if anyone, directed Mr. David in his work or to whom, if anyone, Mr. David reported. Nevertheless I think a sufficient connection is established, as in Mr. Slezak's case, to warrant a similar direction. It is at least arguable that Mr. David was an agent of CAW-Canada.

[21] I therefore direct Mr. Mitic to take reasonable steps to inform himself so as to be able to answer questions put to him relating to the information given by Mr. David on his examination.

[22] Mr. James Mager was a member of CASAW and Local 4. But, it was conceded by the plaintiffs, he was only a member. This is not enough. I refuse the direction sought with respect to his discovery evidence.

[23] Mr. Robert Kosta was not just a member but also served as financial secretary for CASAW Local 4 and CAW Local 2304. In my opinion, this is the same type of connection that was present with Mr. Slezak. Mr. Kosta was an officer, albeit of what defendant's counsel maintains are separate legal entities. But those entities have some connection to CAW-Canada at least through the merger agreement. Additionally there is some evidence suggesting that in his role Mr. Kosta administered funds provided by CAW-Canada. There is also some evidence that, while many Local 4 records cannot be found, if they ever existed, some records were forwarded to CAW-Canada.

[24] I therefore direct Mr. Mitic to take reasonable steps to inform himself so as to be able to answer questions put to him relating to the information given by Mr. Kosta on his examination.

Amendment of Pleading:

[25] The plaintiffs' application to amend the Amended Statement of Claim relates to an issue previously referred to, that being whether the "national" unions, CASAW and CAW-Canada, and the "local" unions, Local 4 and Local 2304, are each a distinct legal entity, with no liability attaching to one for the actions of another, or whether they are one entity with no distinction between them for purposes of liability. Counsel agree that this will be a hotly contested issue at trial. I have already declined to decide this question since, in my opinion, it involves questions of law and fact that must be determined at trial.

[26] The proposed amendments are said by plaintiffs' counsel to be helpful so as to better reflect this issue. The proposed amendments are:

> 4. On May 23, 1992, as the result of a breakdown in collective bargaining between the Defendant, Royal Oak Mines Inc. (hereinafter called "Royal Oak"), being the owner, occupier and operator of the Giant Mine and the Defendant, Canadian Association of Smelter and Allied Workers (hereinafter called "CASAW"), Local 4 thereof then being the certified bargaining agent for the unionized employees of Royal Oak at the Giant Mine, Royal Oak locked its unionized workers out of work and the unionized workers went out on strike.
>
> 4A. The unit or division of CASAW known as Local 4 was replaced and succeeded as the certified bargaining agent for the said unionized employees of Royal Oak at the Giant Mine by National Automobile, Aerospace and General Workers'

Union of Canada, Local 2304, upon the amalgamation of CASAW with the continuation thereof, thereafter under the name of the Defendant, National Automobile, Aerospace and General Workers' Union of Canada.

16. CASAW amalgamated with and continued thereafter under the name of the Defendant, National Automobile, Aerospace and General Worker's Union of Canada, which thereby succeeded to and became responsible for all assets and inabilities of CASAW. Such amalgamated union is hereinafter called "the Union".

[27] Defendant's counsel submitted that the proposed amendments are unnecessary and do nothing to clarify or assist in determining this issue. On the contrary, it was submitted that they may obscure the real issue. The relationship between a local and a national union, the effect of a trade union succession, and the effect of the merger between CASAW and CAW-Canada, it was argued, are all questions of law and the proposed amendments do nothing to assist the resolution of those questions. While I think that this may be somewhat of an over-statement, particularly in the sense that there may be facts that bear on the legal questions, I agree generally with these submissions.

[28] The Amended Statement of Claim, the plaintiffs' Reply to the defendant's Demand for Particulars, and the Statement of Defence, all address the issue in question. Furthermore, the defendant is prepared to concede the fact that CAW Local 2304 succeeded CASAW Local 4 as bargaining agent for the Giant Mine employees and acquired its bargaining rights. The issue of the liability of CAW-Canada for the actions of CASAW, CASAW Local 4, or even CAW Local 2304, and their officers or members, is clearly joined.

[29] In my opinion, the amendments (other than the one to paragraph 16 as noted above) are unnecessary. With the exception of the amendment to paragraph 16, which is really in the nature of housekeeping, the plaintiffs' application is dismissed.

[30] Costs will be in the cause.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this 13th day of December 2002

Counsel for the Plaintiffs: J.P. Warner, Q.C., &
W.B. Russell

Counsel for the Defendant: L.S.R. Kanee
(CAW-Canada)