Fullowka et al v. *Royal Oak Ventures Inc. et al,* 2003 NWTSC 46

Date: 2003 08 22
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 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] The defendant, National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW-National"), brought an application before me, as the case management judge, to set down for determination, prior to or at the commencement of trial, two issues said to be issues of law:

(1) Are CAW-National and Canadian Association of Smelter and Allied Workers Local 4 ("CASAW Local 4") (or its successor National Automobile, Aerospace and Agricultural Implement Workers Union

of Canada, Local 2304 ("CAW Local 2304 ("CAW Local 2304")) distinct entities in law such that any liability for the conduct of CASAW Local 4 or CAW Local 2304 does not automatically rest with CAW-National?

(2) Did CAW-National assume liability for the conduct of CASAW Local 4 or CAW Local 2304 as a result of the merger between CAW-National and Canadian Association of Smelter and Allied Workers on June 24, 1994?

This Memorandum is a summary of my reasons, delivered orally on August 8, 2003, dismissing the application.

[2] It is precisely because I have been case managing these proceedings for so long, and because these issues have been addressed previously by me, that I was able to dismiss the application on a summary basis. I have said before, and I will repeat it here, that while these questions may be determined in an abstract basis as issues of law, in the circumstances of this case the resolution of these questions may very well depend on the facts.

[3] The defendant complains that the plaintiffs have consistently failed to distinguish between national and local unions. But this is one of the points in issue. The plaintiffs allege that there is no distinction. Thus the liability of one can be considered the liability of the other. This defendant says that there is a distinction in law and no liability can be imputed from one to the other; not on the basis of some contract theory, or vicarious liability, or agency, or otherwise. The issue is clearly joined.

[4] I accept, as Mr. Kanee submitted, that there is a body of case law holding, generally, that a local union is a distinct legal entity from the national union and that the relationship between a national and its local unions is contractural and governed by the union constitution and related documents. I also accept that the effect of a merger of unions is governed by the terms of the pertinent merger agreement and that there is authority to the effect that a local does not lose its pre-existing status as a union just because two national unions merge. If this were a contract dispute perhaps the questions posed can be resolved merely by the application of these legal principles to the documentary evidence. But it is a tort case. And it is one that will be primarily determined by the facts that will emerge at trial.

[5] This defendant also complains that, without a preliminary resolution of these issues, it would have to defend at trial every allegation made against the old CASAW Local 4. It may, or it may not, but that is more a point of trial strategy. It is not uncommon for a party to have to deal with all sorts of allegations and evidence before having a decision on legal issues.

[6] In any event, from this defendant's perspective, the question will be what it and its officers did that may have either led to an assumption of liability for the conduct of others or perhaps made them liable directly. It may also be a question of whether the conduct of this defendant's officers compromised the usual legal situation (as elucidated by the case law Mr. Kanee relies on). In short, it is far from clear that a preliminary determination of these issues will streamline the trial or save time. It will certainly not resolve the case. Mr. Kanee acknowledged that his client will still be involved in this trial as a defendant no matter what would be the outcome on the proposed preliminary determination.

[7] In *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.* (1991), 77 D.L.R. (4th) 557 (Alta.C.A.), Côté J.A. wrote that preliminary issues should not be difficult, should not be complex, and should not involve contested facts. The issues proposed here do not meet that test. Furthermore, putting these issues to a preliminary determination would not help to resolve matters at all.

[8] It is, of course, open to this defendant, at any point during the trial, to put to the trial judge the argument that some point of law should be determined before the conclusion of the trial. Such an argument then will at least have the benefit of an evidentiary context. It may be open to this defendant to bring a non-suit application. Again, that will have the benefit of context. Also, I expect, and the rules of court contemplate, that the pre-trial briefs of each party will set out with specificity the issues and their position. This should also help clarify matters and focus counsels' efforts.

[9] For these reasons, I dismissed the application.

[10] Plaintiffs' counsel sought costs fixed in an amount that would recognize in part the actual solicitor and client costs incurred by the plaintiffs on this motion. Part of the rationale for this is that, in the plaintiffs' opinion, what this defendant attempted to do is re-litigate matters that were previously considered by me, and which I said on several occasions should be dealt with at trial. What plaintiffs' counsel seeks is an award of costs in the sum of $13,000.00. This is based on "actual" solicitor and client fees in excess of

$19,000.00 based on docketed time of 91.5 hours multiplied by what was described to me as "special blended rates established for this case and which currently equate to about 80% of this firm's current standard rates". The docket shows times docketed by senior counsel, assisting counsel, a "legal assistant", and someone identified as simply "word processor".

[11] Perhaps I am naive, or merely ignorant of current practice, but I find it surprising to say the least that all of these resources, and so much time, can be expended on a motion that, as plaintiffs' counsel argued, sought to revisit points that I already suggested should be left to trial. That is not to say that this application was frivolous or misguided, merely that the result may have been fairly predictable (not to mention the fact that the entire motion took less than an hour to argue and was done by teleconference). Thus I am somewhat surprised at the expense generated by this motion. This is not meant, and should not be taken, as criticism of the quality of counsel's work, which, as always, was very thorough and helpful (as was the work of all counsel).

[12] In any event, party-and-party costs are the rule and should not be departed from except for some special reason (which I do not see here).

[13] On a previous motion in this case where this defendant was successful, I awarded costs on the basis of double Column 4. I see no reason to deviate from that approach. The plaintiffs will therefore recover their costs of this application on the basis of double Column 4 of the tariff of party-and-party costs, payable forthwith and in any event of the cause. Since the column does not account for written briefs on a complex motion, there will be an additional allowance of $2,000.00 as the fixed cost for the preparation of the plaintiffs' brief. For sake of specificity, there will be no costs to, or payable by, Mr. Redmond's client.

J.Z. Vertes
J.S.C.

Dated this 22nd day of August, 2003.

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

Counsel for the Defendant (CAW-National):	L.S.R. Kanee
Also appearing:	J.E. Redmond, Q.C. (Counsel for Plaintiff in action No. CV 07028)

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