

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] The defendants, Anthony W.J. Whitford, Dave Turner, and the Government of the Northwest Territories, have applied for an Order directing that the defendant, Roger Warren, undergo examination by a psychiatrist retained by these defendants. The application is supported by a number of other defendants to this action. The plaintiffs take no position on this application. The defendant Warren opposes it saying it is unnecessary. For the reasons that follow the application is granted.

[2] The application is brought pursuant to Rule 272 of the Supreme Court Rules:

272.(1) Where the physical or mental condition of a party to a proceeding is in question, the Court, on application, may order the party to undergo a physical or mental examination by one or more health practitioners.

(2) Where the question of a party's physical or mental condition is first raised by another party, an order under this rule may not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.

[3] Subrule (1) applies where the party to be examined has put his or her physical or mental condition in issue. This is generally the case, for example, where that party claims to have suffered some physical or psychological damage. The typical example is a plaintiff who seeks damages in a personal injury action. Subrule (2) applies where some other party has put a party's physical or mental condition in issue. That is the case here. Warren has not put his condition in issue. The issue has been raised by other parties. Thus the test is whether his physical or mental condition is "relevant to a material issue" and "there is good reason to believe that there is substance to the allegation".

[4] An examination, such as that contemplated in this case, is part of the discovery process. Here, the defendants, in particular the defendant Warren and the applicants, are adverse in interest in many ways. Thus, in the spirit of the broad scope to discovery, such an examination "will normally not be refused unless there is good reason to be concerned that (it) would be irrelevant, unnecessarily risky to the (party's) health, unfairly intrusive or an abuse of the court process": *Jobes v. Zolinski* (1999), 30 C.P.C. (4th) 232 (Man.C.A.), at pp. 235-236.

[5] The action arises from the death of nine miners as a result of an underground explosion at the Giant Yellowknife Mine during the course of a bitter strike. Warren was convicted of second-degree murder and is now serving a life sentence. He has in these proceedings admitted making and setting the bomb that caused the explosion. He has, however, denied that he intended to kill anyone. He says that his intent was merely to sabotage the mine causing physical damage only. The issue therefore is not whether he did the act that caused the deaths but his intent or motive in doing so.

[6] Warren has already undergone psychiatric evaluation by experts retained on behalf of the plaintiffs. This was not done pursuant to any order. It was done voluntarily on the part of Warren out of a sense of obligation to the plaintiffs. He did it as a way of atoning to the victims of his act (or so he says). However, he categorically refuses to undergo further examination; he says he will refuse to co-operate if an order is issued to that effect; and, he feels that the reports that have been prepared (reports that have been disclosed to all parties) should be sufficient.

[7] The examinations that have been conducted were directed to the questions of Warren's motivation in setting the bomb. This becomes pertinent since one of the main theories of tort liability being advanced by the plaintiffs is that the cumulative actions of the various defendants led to an atmosphere whereby it was reasonably foreseeable that some type of serious act of violence was likely to occur or that someone would be incited to such an act by the volatile atmosphere. The defendants, other than Warren, have by and large pleaded non-liability by reason of Warren's intervening criminal act. Thus, if Warren's motive was to kill, that may be a more significant intervening act, in the sense of being unforeseeable, than if his motive was merely industrial sabotage, something that perhaps should have been foreseeable. For this reason, an evaluation of Warren's psychological "make-up" may be highly relevant. And, if the plaintiffs have conducted such an evaluation, the defendants should be able to as well so that, as many cases have put it, the parties may be put "on a basis of equality". As counsel put it, the plaintiffs have put Warren's mental condition in issue and the defendants have to be able to respond to that.

[8] I do not think that it is sufficient for the defendants to merely rely on the reports that have already been prepared by the plaintiffs' experts. Undoubtedly the defendants' expert will want to conduct the examination in his or her own manner so as to be able to draw the appropriate opinions.

[9] For these reasons, I order as follows:

1. The defendant Warren shall undergo examination into his mental condition.
2. The examination shall be conducted by the applicants' designated health practitioner, Dr. Park Dietz, at such time as the applicants determine in consultation with the correctional authorities responsible for Warren's custody.
3. The examination shall be conducted at the Stoney Mountain Penitentiary.
4. The examination shall be video-taped.
5. All costs associated with the examination shall be the responsibility of the applicants.
6. Copies of the examination videotape and any report prepared as a result thereof shall be provided to all other parties to this proceeding.

[10] Concerning Warren's expressed intention to not co-operate with any such examination, that is an issue that will have to be addressed if and when it is necessary to do so. Realistically one cannot force Warren to co-operate and it is difficult to conceive of any meaningful sanctions for such non-cooperation in these circumstances. My hope is that he will co-operate so that these issues can be addressed in a meaningful fashion at trial, without undue delays or prejudice to any party.

[11] There will be no order as to costs of this application.

J.Z. Vertes
J.S.C.

Dated this 30th day of June, 2003.

Counsel for the Applicants: P.D. Gibson

Counsel for the Plaintiffs: J.B.Champion

The defendant Warren appeared on his own behalf

Counsel for the Defendant
Royal Oak Ventures Inc.: R.G. Nielsen

Counsel for the Defendant
Pinkerton's of Canada: N. Mitchell

Counsel for the Defendant
National Automobile Union: P. Nugent

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