
MEMO

To: You (counsel for the Appellants Fullowka et. al.)

From: Senior Partner

Date: September 22, 2009

Re: *Fullowka et. al. v. Pinkerton's of Canada Ltd.*

We have been retained by Ms. Fullowka and the other families of nine deceased miners to appeal their case to the Supreme Moot Court of Dalhousie. I filed the Notice of Appeal and will put together the appeal book for the case, but I need you to write the factum and argue the appeal for me.

Our factum is due on Thursday, October 22, 2009 between 9:00 a.m. – 11:00 a.m. in Room 207.

The appeal will be heard during the week of January 25-28, 2010. I am scheduled to be out of town in discoveries that week. You will need to check the Court's docket to determine the exact date and time of the appeal.

I've summarized the facts of the case below as found by the trial judge and set out our grounds of appeal. Feel free to use any other facts mentioned in the lower courts' decisions, if you think they might be useful.

Good luck!

Facts

On September 18, 1992, in the midst of a violent strike at Royal Oak's Giant gold mine in Yellowknife, NWT, a man car carrying nine miners underground detonated a hidden bomb. That bomb was deliberately set by one of the striking miners, Roger Warren. All nine miners were killed. The victims were replacement workers hired to keep the mine operational during the strike and miners who were members of the striking union but who had returned to work. Our clients are the widows (and in one case, the mother) of the deceased miners.

The strike began on May 23, 1992. Royal Oak decided to continue to operate the mine during the strike. Royal Oak hired replacement workers, and some union members crossed the picket line to return to work. The mine premises were vast and unfenced, with 23 entry points to the underground and 85-100 miles of underground tunnels.

Royal Oak retained Pinkerton's to provide security after a violent incident known as "Black Tuesday," after which Royal Oak's previous security firm quit. Royal Oak did not provide Pinkerton's with a complete list of entry points until after the bomb blast. Despite the security, the striking miners were able to infiltrate the mine repeatedly. They had ready access to explosives and knew how to use them.

As the strike dragged on for months, the striking miners resorted to escalating violence. Royal Oak and Pinkerton's received multiple warnings about potential acts of violence or sabotage, and threats of bodily harm and death. Replacement workers and their families were harassed and threatened. There were numerous clashes between striking miners, Pinkerton's guards, and the RCMP. Roger Warren had been fired after one of these clashes, and was no longer employed by Royal Oak when he set the bomb.

Pinkerton's and Royal Oak both gave assurances of safety to the miners who worked during the strike.

At 2:00 a.m. on September 18, 1992, Roger Warren gained access to the mine through the Akaitcho headframe, a remote and unguarded entrance to the mine. Pinkerton's had a guard drive by the Akaitcho headframe about once every hour or hour-and-a-half during the night, but Warren was able to enter and leave the mine undetected.

He gained access to the mine even though a ladder had been removed. He descended 750 feet then walked a mile underground. He used a front end loader to transport explosives and set a bomb to detonate when a man car passed over it. At 8:45 a.m. that morning, a man car carrying the nine miners triggered the bomb blast. All nine miners were killed instantly. Their bodies were blown apart.

Roger Warren was convicted of nine counts of second degree murder.

The Appellants commenced actions in tort against multiple defendants, including Warren.

In a lengthy trial decision found at 2004 NWTSC 66, Lutz J. held that the defendants owed a duty of care to the deceased miners to prevent the violence that was inflicted upon them. He found that Pinkerton's was an occupier of the mine. He found that the bombing was foreseeable, the Respondents were proximate, and the Respondents did not meet the standard of care expected of them. Pinkerton's failed to block all of the mine's underground entrances, and did not provide Royal Oak with a written security plan, audit, or survey (as required by company policy) before contracting to provide security at the mine. Lutz, J. held that no policy reasons negated a finding of a duty of care. He awarded \$10,731,672 in damages to our clients and apportioned fault between the parties, with 15% of the fault allocated to Pinkerton's. Pinkerton's and the other corporate, government, and institutional defendants appealed.

The Northwest Territories Court of Appeal allowed the appeals. The appeal decision can be found at 2008 NWTCA 04. The Court of Appeal concluded that the appellants did not owe a duty of care to prevent Warren's intentional criminal acts. Pinkerton's was not an occupier. Its duty was a duty in contract to provide security for its client – Royal Oak. They found that the trial judge applied the incorrect test to determine causation. The correct test for causation was the "but for" test, not the "material contribution" test. The Court of Appeal concluded that none of the defendants were liable to the families of the deceased miners in any way. They dismissed the plaintiffs' claims.

We appealed to the Supreme Court of Canada. The Supreme Court of Canada dismissed our appeal essentially on the same basis as set out in the NWTCA's reasons. After the NWTCA's decision, we settled with all of the remaining defendants except Pinkerton's. We've appealed the case against Pinkerton's to the Supreme Moot Court of Dalhousie.

First Issue:

1. Did Pinkerton's owe the miners a duty of care?

Second Issue:

2. If so, did Pinkerton's actions or inaction cause the plaintiffs' losses?

Sources

You will want to look at the NWTCA's decision at 2008 NWTCA 04. The trial judge's decision is available at 2004 NWTSC 66. It is more than 400 pages long. I do not expect that you will need to read the entire trial decision. I suggest you skim only those parts that are relevant to your issue. The decision includes a detailed table of contents that will help you to find the relevant portions quickly.

The Supreme Moot Court of Dalhousie prefers that counsel cite only the most relevant cases and authorities. You may cite up to five cases on each issue (including the cases mentioned above), any relevant legislation you feel should be brought to the Court's attention, and up to two secondary sources (such as journal articles.) Lower court decisions in this matter do not count towards the five case limit.