SCC File No.: 32735

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL 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

Appellants
(Respondents)

and

PINKERTON'S OF CANADA LIMITED, 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, TIMOTHY ALEXANDER BETTGER, AND ROYAL OAK VENTURES INC. (formerly ROYAL OAK MINES INC.)

Respondents
(Appellants)

AND BETWEEN:

JAMES O'NEIL

Appellant
(Respondent)

and

PINKERTON'S OF CANADA LIMITED, 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, AND TIMOTHY ALEXANDER BETTGER

Respondents
(Appellants)

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PART I – STATEMENT OF FACTS

A. Overview

1. On September 18, 1992, in the midst of a labour dispute at a gold mine, a mancar carrying nine miners underground, inside one of the mine's main tunnels, detonated a hidden bomb. That bomb was deliberately set by striking miner, Roger Warren. All nine miners were killed. Roger Warren was convicted of nine counts of second degree murder for his actions.

2. The Respondent Pinkerton's submits that Roger Warren, and only Roger Warren, should be held civilly liable for the murders of the nine miners.

B. Royal Oak Mines

3. In 1992, Royal Oak Mines Inc. ("Royal Oak") owned and operated an underground gold mine located approximately five kilometres from the City of Yellowknife, known as Giant Mine. The Giant Mine property was a vast, unfenced property that consisted of approximately 85 to 100 miles of underground tunnels. The site had administrative buildings, a refining plant and residences on the surface, which were located near the main entrance to the mine site. The Ingraham Trail, a public highway off which several roads lead to the mine site, bisected the mine property.[1]

4. There were 23 points of entry to the underground.[2] Pinkerton's had not been provided with a list of all mine openings prior to September 18, 1992.[3]

C. Strike Contingency Planning by Royal Oak

5. In early 1992, renegotiation of the collective bargaining agreement commenced as the existing agreement for the hourly workers at Giant Mine was due to expire on March 31, 1992.[4]

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[1] **Appellants' Record**: Reasons for Judgment at Trial ("Trial Reasons"), para. 17, (Vol. 1, Tab 2, pp. 11-12). **Respondents' Joint Record ("RJR")**: Exhibit 3, (Vol. 2, Tab 13).
[2] **Appellants' Record**: Trial Reasons, para. 177 (Vol. 1, Tab 2, p. 58).
[3] **Appellants' Record**: Trial Reasons, para. 175 (Vol. 1, Tab 2, p. 57).
[4] **Appellants' Record**: Trial Reasons, para. 37 (Vol. 1, Tab 2, p. 17).

6. In November 1991, in anticipation of a potential strike the following year, Royal Oak had commissioned a security company, Cambrian Alliance Protection Services ("Cambrian"), to review the above-ground portions of the mine site and prepare a safety survey and strike preparation plan.[5] A detailed "Security Survey" was completed by Cambrian's Bill Tolmie ("Tolmie").[6] Royal Oak subsequently retained Cambrian to provide security services for the strike and Tolmie was in charge of Cambrian operations at Giant Mine in the early days of the strike.[7]

7. By March 18, 1992, strike contingency planning was underway by Royal Oak as it had decided that the mine would continue to operate with replacement labour in the event of a strike.[8]

As part of its contingency planning, Royal Oak conducted its own internal security review and prepared a "Strike Contingency Plan".[9] A list of major security risks was included in this plan, with those areas of the property exposed or close to the highway being identified as particular areas of concern. The Akaitcho area in the northwest corner of the Giant Mine property was among those listed as a risk because a power line that fed underground pumps was located in the area.[10]

8. The Akaitcho area of the Giant Mine was not being actively mined in 1992 and the Akaitcho mine shaft had not been used as an entrance to the underground for some time. It was not well known as a means of entry in 1992, even with mine employees who had worked at Giant Mine for years.[11] Neither Royal Oak's Strike Contingency Plan nor Cambrian's Security Survey included a fixed guard post at the Akaitcho mine shaft. Cambrian's survey included a roving patrol for the entire northwest zone of the property.

9. Before the lockout, Royal Oak's management personnel took preventative measures to

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[5] **Appellants' Record**: Trial Reasons, para. 58 (Vol. 1, Tab 2, p. 24).
[6] **RJR**: Tolmie Evidence, 778:5-23 (Vol. 1, Tab 7); Exhibit 61, (Vol. 2, Tab 18,); Exhibit 62, (Vol. 2, Tab 17); Exhibit 63, (Vol. 2, Tab 18).
[7] **Appellants' Record**: Trial Reasons, para. 58 (Vol. 1, Tab 2, p. 24).
[8] **Appellants' Record**: Trial Reasons, paras. 47, 48, 54 (Vol. 1, Tab 2, pp. 20, 21, 22, 23).
[9] **RJR**: Exhibit 844, (Vol. 4, Tab 13); Exhibit 845, (Vol. 4, Tab 14).
[10] **Appellants' Record**: Trial Reasons, para. 59 (Vol. 1, Tab 2, p. 24); **RJR**: Byberg Evidence, 6217:21-40 (Vol. 2, Tab 2)
[11] **RJR**: O'Sullivan Evidence, 374:17-33, (Vol. 1, Tab 5); Allan Evidence, 6675:4-9 (Vol. 2, Tab 4); Tolmie Evidence, 807:40-808:4 (Vol.1, Tab 7).

ensure that striking miners could not gain entry into the underground during the strike.[12] It identified key areas of concern and undertook steps to prevent access to the underground, including a number of measures taken from inside the mine. For instance, the gates at portal entrances were secured to prevent someone from climbing over or underneath them. The locks on all buildings at Akaitcho were changed and secured, and the window on the northeast side of the collar house at Akaitcho was covered with plywood.[13] Further examples of Royal Oak's preventative measures, occurred during June, and included removing the top ladder of the Akaitcho manway, and chaining down the steel grate doors from underneath at one of the other entrances to the underground known as the B-3 entrance.[14] Royal Oak also changed the lock cores on all buildings and gates before the strike started.[15]

10. Noel O'Sullivan, the mine foreman for Royal Oak who personally completed a number of these security steps on behalf of Royal Oak, testified that he did not secure the grate at the Akaitcho mine shaft with a chain as he had done at other shafts in case mine personnel wanted to enter there and do an inspection.[16] Mr. O'Sullivan also testified that prior to the explosion, he visited the Akaitcho shaft regularly by accessing it through the underground and each time he checked for signs of unauthorized entry and saw none.[17]

D. Strike Begins

11. The negotiations between the union and Royal Oak on a new collective bargaining agreement were unsuccessful, and Royal Oak locked out the unionized employees on May 22, 1992. The strike began at midnight that night.[18]

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[12] **Appellants' Record**: Trial Reasons, para. 59 (Vol. 1, Tab 2, p. 24); **RJR:** Exhibit 67, Vol. 3, Tab 1).
[13] **Appellants' Record**: Trial Reasons, para. 60 (Vol. 1, Tab 2, p. 25); **RJR**: Exhibit 1068, (Vol. 8, Tab 2); Exhibit 1069, (Vol. 8, Tab 3); Power Evidence, 6034:44-6036:38 (Vol. 2, Tab 1); Power Evidence, 6037:20-33 (Vol. 2, Tab 1).
[14] **Appellants' Record**: Trial Reasons, para. 125 (Vol. 1, Tab 2, p. 43); **RJR**: O'Sullivan Evidence, 380:20-381:3, (Vol. 1, Tab 5); O'Sullivan Evidence, 381:18-27, (Vol. 1, Tab 5); O'Sullivan Evidence, 580:24-582:6, (Vol. 1, Tab 5).
[15] **Appellants' Record**: Trial Reasons, para. 60 (Vol. 1, Tab 2, p. 25); **RJR**: Allan Evidence, 6693:3-15 (Vol. 2, Tab 4).
[16] **RJR**: O'Sullivan Evidence 581:5-13, (Vol. 1, Tab 5).
[17] **RJR**: O'Sullivan Evidence 573:16-574:29, (Vol. 1, Tab 5); Byberg Evidence, 6187:8 – 28, (Vol. 2, Tab 2).
[18] **Appellants' Record**: Trial Reasons, paras. 69, 72 (Vol. 1, Tab 2, pp. 27, 28).

12. As a result of a number of incidents involving vandalism and intrusions onto the surface of the mine property throughout the first day of the strike, Royal Oak obtained a Court Injunction on May 23, limiting the number of picketers to five per gate.[19]

13. On May 26, a day that later came to be referred to as "Black Tuesday", striking miners entered the property, assumed total control of the surface of the mine in the area of the main entrance and committed numerous illegal acts. Royal Oak staff locked themselves in the C-Dry building for protection.[20] As a result of the events of "Black Tuesday", Cambrian left Giant Mine and Royal Oak contacted the Respondent Pinkerton's for assistance in dealing with the emergency.[21]

E. Security Services Provided by Pinkerton's

14. Pinkerton's reputation was that of an internationally well-known, professional security firm with extensive experience providing security during strike situations.[22]

15. On May 26, Pinkerton's CEO Paul St. Amour sent written confirmation to Royal Oak's Vice President of Operations, John Smrke, that security guards and services would be provided during the strike on certain conditions:[23]

> It is understood that Pinkerton is not an insurer; that any insurance will be obtained by the client, if any is desired. Pinkerton's makes no guarantee implied or otherwise that no loss or damage will occur or that the services provided will avert or prevent occurrences or losses.
>
> Pinkerton's of Canada Limited require that any and all legal costs as it relates to occurrences arising out of the performance of the duties assigned, shall be the sole responsibility of the client.

16. On May 27, six Pinkerton's personnel arrived at Giant Mine to find Royal Oak employees taking refuge in the C-Dry building from the previous night's invasion.[24] By the end

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[19] **Appellants' Record**: Trial Reasons, para. 72 (Vol. 1, Tab 2, p. 28)
[20] **Appellants' Record**: Trial Reasons, para. 82, 83, 84 (Vol. 1, Tab 2, pp. 30, 31)
[21] **Appellants' Record**: Trial Reasons, para. 85 (Vol. 1, Tab 2, p. 31); **RJR**: St. Amour Evidence, 6725:44-6727:4, (Vol. 2, Tab 5); Witte Evidence, 6406:19-6407:15, (Vol. 2, Tab 3).
[22] **Appellants' Record**: Trial Reasons, paras. 86, 242 (Vol. 1, Tab 2, p. 31, 78)
[23] **Appellants' Record**: Trial Reasons, para. 85 (Vol. 1, Tab 2, p. 31); **RJR**, Exhibit 1125, (Vol. 8, Tab 5); Exhibit 822, (Vol. 4, Tab 7); Exhibit 824, (Vol. 4, Tab 8).

of May 1992, there were fifty-two Pinkerton's guards on site, providing a combination of static posts and roving patrols.[25] By June 8, Pinkerton's was able to patrol the west side of the surface of the property, an area that had been dominated by the strikers when it arrived.[26]

17. Pinkerton's direct contact with Royal Oak management throughout the strike was Terry Byberg ("Byberg"), a member of Royal Oak's management team. Byberg's instructions from Royal Oak's CEO, Peggy Witte ("Witte"), were to "manage security effectively".[27] Royal Oak did not include security services as an expenditure in its 1992 budget.[28]

18. Pinkerton's contract with Royal Oak was to provide security guards and services to patrol the surface of Giant Mine during the strike. When Pinkerton's requested to view Royal Oak's storage of explosives underground, their request was denied. Royal Oak only relied on Pinkerton's to monitor where the strikers were on the surface.[29]

19. In mid-June, Byberg was advised by Pinkerton's on-site supervisor that the acts of violence and threats towards Pinkerton's by strikers were increasing in both frequency and severity. Byberg was also informed that evening trespasses by strikers were further testing Pinkerton's surface security measures. In spite of this advice, and in spite of believing that the Court Injunction limiting the number of strikers at the gates was ineffective in reducing the incidents of trespass onto mine property, Byberg and Witte were already discussing reducing security as a costs saving measure.[30]

20. On June 14, a riot occurred at the mine site near the main entrance.[31] The RCMP arrest team, riot squad and emergency response personnel were on hand and some responding RCMP

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[24] **Appellants' Record**: Trial Reasons, para. 88 (Vol. 1, Tab 2, p. 32); **RJR**, Shaw Read-in Evidence, 97:30-98:25, (Vol. 1, Tab 2).
[25] **Appellants' Record**: Trial Reasons, para. 94 (Vol. 1, Tab 2, p. 34); **RJR**, St. Amour Evidence, 6727:6-13, (Vol. 2, Tab 5).
[26] **Appellants' Record**: Trial Reasons, para. 247 (Vol. 1, Tab 2, pp. 79, 80); **RJR**: Dales Evidence, 3421:16-3422:15, (Vol. 1, Tab 18); Byberg Evidence, 6185:30-6186:8 (Vol. 2, Tab 2).
[27] **Appellants' Record**: Trial Reasons, para. 88 (Vol. 1, Tab 2, p. 32).
[28] **Appellants' Record**: Trial Reasons, para. 58 (Vol. 1, Tab 2, p. 24); **RJR**: Witte Evidence, 6437:29-39 (Vol. 2, Tab 3).
[29] **Appellants' Record**: Trial Reasons, para. 245 (Vol. 1, Tab 2, p. 79).
[30] **Appellants' Record**: Trial Reasons, paras. 112, 237 (Vol. 1, Tab 2, pp. 40, 76).
[31] **Appellants' Record**: Trial Reasons, para. 101 (Vol. 1, Tab 2, p. 37).

officers deployed tear gas, and fired warning shots before the strikers retreated.[32] As a result of the riot and the actions of the strikers during the riot, Pinkerton's was again unable to perform regular patrols on the west side of the highway until sometime in July.[33] After the riot, Royal Oak formally terminated 40 strikers for their participation in the riot, including Roger Warren.[34]

F. Strikers Enter the Mine

21. On June 29, three strikers (including the Respondent Bettger) surreptitiously entered the mine and sprayed graffiti in a number of locations. This incident became known as the "Graffiti Run".[35]

22. The RCMP conducted the investigation following the discovery of the graffiti.[36] Despite their investigation, the location of entry into the mine used by the strikers was not discovered by the RCMP or by Royal Oak until after the murders on September 18, 1992.[37] Following the discovery of the graffiti underground, Royal Oak management believed that the means of access was likely the UBC portal, and Akaitcho was discounted as a possibility because of its remote location, the general unfamiliarity with the area and the complexity of the tunnel system.[38] It was only during the murder investigation, and the questioning of witnesses in that investigation, that the RCMP concluded that the miners had used the remote Akaitcho shaft to gain entry into the mine on June 29 for the Graffiti Run.

23. Following the Graffiti Run, Royal Oak took further preventative measures to ensure that striking miners could not access the underground. For example, it put locks on the portal gates which were thought to have been used by the strikers to gain access, and the tops of the gates were reinforced to prevent someone from climbing over.[39]

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[32] **Appellants' Record**: Trial Reasons, para. 103 (Vol. 1, Tab 2, p. 38)
[33] **RJR**: Morton Read-in Evidence, 3887:14 – 3888:37 (Vol. 1, Tab 22)
[34] **Appellants' Record**: Trial Reasons, para. 109 (Vol. 1, Tab 2, p. 39)
[35] **Appellants' Record**: Trial Reasons, para. 116, 117, 118 (Vol. 1, Tab 2, pp. 41, 42)
[36] **Appellants' Record**: Trial Reasons, para. 121 (Vol. 1, Tab 2, p. 43); **RJR**: Exhibit 1018, (Vol. 7, Tab 3); N. Defer Evidence, 4998:33-44, (Vol. 1, Tab 28); N. Defer Evidence, 5001:32 – 41, (Vol. 1, Tab 28).
[37] **RJR:** Exhibit 1018, (Vol. 7, Tab 3).
[38] **Appellants' Record**: Trial Reasons, para. 120 (Vol. 1, Tab 2, pp. 42, 43); **RJR**: Allan Evidence, 6674:44 – 6675:9, (Vol. 2, Tab 4); Allan Evidence, 6699:42 – 6700:15, (Vol. 2, Tab 4).
[39] **Appellants' Record**: Trial Reasons, para. 121 (Vol. 1, Tab 2, p. 43); **RJR**: Exhibit 811, (Vol. 4, Tab 3); Allan Evidence, 6703:17 – 33, (Vol. 2, Tab 4).

24. Although the RCMP and Royal Oak remained unaware of the identities of those that entered the underground on June 29, or their location of entry before the murders, some of the union members, including one of the deceased miners, Vern Fullowka, knew who was responsible and how they had gotten underground.[40] However, that information was not passed on to Royal Oak or the RCMP. Roger Warren was also aware that the Akaitcho shaft had been used by the miners during the Graffiti Run to gain access to the underground.[41]

25. Pinkerton's was not responsible for investigating the Graffiti Run or any other incident during the strike. The RCMP had full responsibility for the investigation of all such strike-related incidents.[42]

G. Royal Oak Seeks to Reduce Costs by Downsizing Security Force

26. In the last week of June, notwithstanding the problems throughout June, Royal Oak's discussions with Pinkerton's were focused on Royal Oak's desire to downsize Pinkerton's security force.[43] In an effort to reduce cost, Witte mandated that the security force be reduced and that effective July 19, only twenty-five Pinkerton's guards would remain at Giant Mine.[44] Pinkerton's was not in favour of any downsizing and was on record that no forces should be withdrawn.[45] The RCMP were advised of the decrease and they too decided to decrease the number of police officers in Yellowknife around this time because they believed the violence had reduced.[46]

27. In response to Royal Oak's pressure to downsize, Pinkerton's, on its own initiative, sent its Vice President of Operations and Technology, Bill Twerdun ("Twerdun"), to Giant Mine to

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[40] **Appellants' Record**: Trial Reasons, paras. 118, 123, 272 (Vol. 1, Tab 2, pp. 42, 43, 89); **RJR:** Fullowka Evidence, 1057:41-1058:13 (Vol. 1, Tab 9); Fullowka Evidence, 1088:39 – 1089:12, (Vol. 1, Tab 9); Fullowka Evidence, 1092:19-44, (Vol. 1, Tab 9); Fullowka Evidence, 1095:47-1096:22, (Vol. 1, Tab 9).
[41] **Appellants' Record**: Trial Reasons, paras. 123, 167 (Vol. 1, Tab 2, pp. 43, 55); **RJR**: Warren Evidence, 7457:8-15, (Vol. 2, Tab 9).
[42] **Appellants' Record**: Trial Reasons, para. 256 (Vol. 1, Tab 2, p. 83); **RJR**: Exhibit 1130, (Vol. 8, Tab 6).
[43] **Appellants' Record**: Trial Reasons, paras. 122, 126 (Vol. 1, Tab 2, pp. 43, 44); **RJR**: Exhibit 813, (Vol. 4, Tab 5); Exhibit 814, (Vol. 4, Tab 6).
[44] **Appellants' Record**: Trial Reasons, para. 133 (Vol. 1, Tab 2, pp. 45, 46); **RJR**: Witte Read-in Evidence, 3854:6-46, (Vol. 1, Tab 21).
[45] **Appellants' Record**: Trial Reasons, para. 126 (Vol. 1, Tab 2, p. 44); **RJR**: Byberg Evidence, 6320:27-33, (Vol. 2, Tab 2); Morton Read-in Evidence, 251:32-252:27 (Vol. 1, Tab 3).
[46] **Appellants' Record**: Trial Reasons, para. 128 (Vol. 1, Tab 2, p. 44); **RJR**: E. Defer Evidence, 3828:40-47, (Vol. 1, Tab 20).

conduct a needs-based assessment on July 20.[47] Pinkerton's was looking at ways to supplement the reduction in private security manpower at Giant Mine with technology. Twerdun toured the surface of the mine site and concluded that there were several security concerns, including a lack of physical deterrence and access control.[48] Twerdun discussed his findings with Byberg after he completed the security audit.[49] Byberg was not receptive to the recommendations relating to electronic surveillance equipment.[50] Twerdun's report included reference to the use of electronic hardware as a way to supplement the reduction in Pinkerton's manpower at Giant Mine.[51] Although both Twerdun and later St. Amour discussed the results of the site survey with Byberg, Pinkerton's recommendations were rejected.[52]

28. On July 21, strikers surreptitiously gained access to Giant Mine's property and set explosives which blew a hole in a satellite dish located on a cliff directly above the town site.[53] The RCMP investigated the incident and Mine Safety officials warned Byberg about controlling unauthorized access to the mine site.[54] After consultation with Royal Oak, Pinkerton's responded by extending roving patrols with canine units to include this area of the town site.[55] The RCMP did not lay charges as a result of their investigation of the incident until after the murders.[56]

H. Pinkerton's Warnings to Royal Oak About Reduced Security

29. Facing continuous pressure from Royal Oak, from and after June, 1992, to reduce the number of security guards, Pinkerton's agreed in the early part of August to further reduce the number of guards on site to twenty on the condition that the decrease be compensated by the use

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[47] **Appellants' Record**: Trial Reasons, para. 138 (Vol. 1, Tab 2, p. 47); **RJR**: Byberg Evidence, 6172:25-6173:32 (Vol. 2, Tab 2); St. Amour Evidence, 6729:4-13, (Vol. 2, Tab 5); Twerdun Evidence, 6923:35-46 (Vol. 2, Tab 8).
[48] **Appellants' Record**: Trial Reasons, para. 139 (Vol. 1, Tab 2, p. 47); **RJR**: Twerdun Evidence, 6924:1-11 (Vol. 2, Tab 8); Twerdun Evidence, 6941:38-6942:6 (Vol.2, Tab 8).
[49] **RJR**: Byberg Evidence, 6318:25-31(Vol. 2, Tab 2)
[50] **RJR**: Twerdun Evidence, 6935:4-24 (Vol.2, Tab 8); Twerdun Evidence, 6938:10-17 (Vol.2, Tab 8).
[51] **RJR**: Exhibit 839, (Vol. 4, Tab 11); Twerdun Evidence, 6935:26-6937:46 (Vol. 2, Tab 8).
[52] **Appellants' Record**: Trial Reasons, para. 139 (Vol. 1, Tab 2, p. 47); **RJR**: Byberg Evidence, 6173: 34-41 (Vol. 2, Tab 2); Byberg Evidence, 6174:37 – 6175:3 (Vol. 2, Tab 2); St. Amour Evidence, 6764:30 – 6765:41, (Vol. 2, Tab 5).
[53] **Appellants' Record**: Trial Reasons, para. 135 (Vol. 1, Tab 2, p. 46);
[54] **Appellants' Record**: Trial Reasons, para. 137 (Vol. 1, Tab 2, pp. 46, 47);
[55] **Appellants' Record**: Trial Reasons, para. 136 (Vol. 1, Tab 2, p. 46);
[56] **Appellants' Record**: Trial Reasons, para. 278 (Vol. 1, Tab 2, p. 92); **RJR**: Exhibit 36, (Vol. 2, Tab 14); Exhibit 46, (Vol. 2, Tab 15).

of technology.[57] Pinkerton's threatened to remove all of its guards if Royal Oak pushed to reduce the number below twenty due to concerns over compromised security.[58] Paul St. Amour again identified alternatives to the use of guards, such as the use of electronic security systems and technology.[59] Royal Oak did not respond to St. Amour's recommendations.[60]

30. In addition to the concerns expressed by St. Amour to Royal Oak to maintain vigilance in the face of apparent calming conditions, Pinkerton's on-site supervisor, Chris Morton, voiced his concerns to both Witte and the RCMP that the apparent calm on the picket lines was deceiving and that the size of Pinkerton's complement as suggested by Royal Oak would not be effective.[61] Despite these warnings, Witte remained unresponsive leading Pinkerton's to make unsuccessful inquiries to find a replacement company to assume its contract with Royal Oak.[62]

31. In early August, a number of strikers crossed the picket line to return to work. A number of those contemplating returning, met with Byberg who assured them that the mine was secure and that security was available to assist them off property.[63]

32. On August 14, Dave Power, Surface Safety and Training Coordinator for Royal Oak, prepared a proposal to replace the Pinkerton's guards on site with an "in-house" security team. Power's plan relied heavily on continuing the same type of surface coverage that was being provided by Pinkerton's, but with only eighteen guards in total and with only two guards roving at night on the west side of the highway. There is no reference to a static post at the Akaitcho mine shaft in Power's security plan.[64]

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[57] **Appellants' Record**: Trial Reasons, para. 144 (Vol. 1, Tab 2, pp. 48, 49); **RJR**: St. Amour Evidence, 6776:19-24 (Vol. 2, Tab 5).
[58] **RJR**: Morton Read-in Evidence, 251:32 – 252:27 (Vol. 1, Tab 3); Exhibit 837, (Vol. 4, Tab 9).
[59] **Appellants' Record**: Trial Reasons, para. 145 (Vol. 1, Tab 2, p. 49); **RJR**: Exhibit 838, (Vol. 4, Tab 10).
[60] **Appellants' Record**: Trial Reasons, paras. 146, 253 (Vol. 1, Tab 2, pp. 49, 81); **Appellants' Record:** Trial Reasons, para. 715 (Vol. 2, p. 26-27); **RJR**:; St. Amour Evidence 6729:15-6731:22 (Vol. 2, Tab 5); St. Amour Evidence, 6764:30 - 6765:41, (Vol. 2, Tab 5).
[61] **Appellants' Record**: Trial Reasons, para. 144 (Vol. 1, Tab 2, pp. 48, 49); **RJR**: St. Amour Evidence, 6729:41-6731:22 (Vol. 2, Tab 5); Morton Read-in Evidence, 251:23 – 252:27(Vol. 1, Tab 3); St. Amour Read-in Evidence, 263:23-264:7, (Vol. 1, Tab 4); Miller Evidence, 6825:42-6826:10 (Vol. 2, Tab 6).
[62] **Appellants' Record**: Trial Reasons, para. 146, (Vol. 1, Tab 2, p. 49); MOJ, para. 116 (Vol. 3, Tab 6, p. 144)
[63] **Appellants' Record**: Trial Reasons, paras. 147, (Vol. 1, Tab 2, p. 49); Trial Reasons, paras. 713 (Vol. 2, p. 26); O'Neil Evidence, 1314:32-1315:18 (Vol. 7, Tab 99-23, pp. 60-61); O'Neil Evidence, 1316:1-20, (Vol. 7, Tab 99-24, p. 62); **RJR**: Fullowka Evidence, 1063:3-22 (Vol. 1, Tab 9);
[64] **RJR**: Exhibit 1072, (Vol. 8, Tab 4); Power Evidence, 6047:20-6047:43, (Vol. 2, Tab 1); Power Evidence, 6048:19-40, (Vol. 2, Tab 1); Power Evidence, 6049:1-6052:4, (Vol. 2, Tab 1); Power Evidence, 6107:16-38 (Vol. 2, Tab 1).

33. By the end of August, Pinkerton's had 20 guards on site, 15 assigned to the night shift and five assigned to the day shift.[65] They had static posts at key locations, a system of roving patrols in vehicles, and guards on foot with dogs to cover the property. The roving patrols were performed at random, rather than fixed schedules, in an attempt to avoid detection by the strikers who were known by Royal Oak to be trespassing on the mine site.[66]

34. In early September, the RCMP became aware of threats that, if the strike was not over by the end of September, the strikers would blow up the head frame and other buildings.[67] Despite knowledge of these threats, and in spite of continuing acts of vandalism and trespass, Royal Oak took no steps to increase the number of security guards at Giant Mine.

35. On September 2, an explosion occurred at the vent shaft plant.[68] The incident was reported to Mine Safety and the RCMP. As was the case throughout the strike, the RCMP assumed conduct of the investigation.[69] Pinkerton's responded by setting up a static guard post at the vent shaft plant, which because of Royal Oak's downsizing, left an even smaller guard force to cover the rest of the vast property with static and roving patrols.[70] Mine Safety officials spoke with Byberg about increasing security following the vent shaft blast and were advised that Royal Oak was addressing the security concerns.[71] Pinkerton's had no authority to increase the number of guards onsite without Royal Oak's approval.[72]

36. The Appellant O'Neil testified at Trial that following the vent shaft explosion, he was concerned about his safety and approached Byberg about the level of safety at the mine. Byberg advised O'Neil that he had no control over the situation as the decision about the number of

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[65] **Appellants' Record**: Trial Reasons, para. 150 (Vol. 1, Tab 2, p. 51); Miller Evidence, 6800: 5-41 (Vol. 2, Tab 6).
[66] **RJR**: Miller Evidence, 6804:25-33 (Vol. 2, Tab 6).
[67] **Appellants' Record**: Trial Reasons, para. 153 (Vol. 1, Tab 2, p. 51).
[68] **Appellants' Record**: Trial Reasons, para. 155 (Vol. 1, Tab 2, p. 52).
[69] **Appellants' Record**: Trial Reasons, para. 715 (Vol. 2, pp. 26-27); **RJR**: Exhibit 889, (Vol. 4, Tab 15).
[70] **Appellants' Record**: Trial Reasons, para. 156, 236 (Vol. 1, Tab 2, pp. 52, 76); **RJR**: Miller Evidence, 6826:18-6827:31, (Vol. 2, Tab 6).
[71] **Appellants' Record**: Trial Reasons, para. 157 (Vol. 1, Tab 2, pp. 52-53)
[72] **Appellants' Record**: Trial Reasons, paras. 156 (Vol. 1, Tab 2, pp. 52)

guards required to secure the property was made by Royal Oak's head office. Nonetheless, Byberg assured O'Neil that it was safe to continue working.[73]

37. In early September, Pinkerton's observed an increase in the frequency of incursions on the surface of the east side of the highway near the A-1 open pit, mill area, and the main head frame. As a result, additional surveillance was assigned to that area.[74]

38. On September 9, Pinkerton's delivered to Royal Oak a security survey outlining a number of recommendations to facilitate the manpower reductions required by Royal Oak, including the use of electronic security measures.[75] Despite being provided with a copy, Witte did not review the document until after the murders.[76]

39. By mid-September, the RCMP had entirely eliminated police patrols at Giant Mine. However, in response to Pinkerton's concerns about increasing incidents of trespass, Royal Oak and Pinkerton's requested an increased RCMP presence between midnight and 3 a.m.[77]

40. Randy Brown, the Pinkerton's guard responsible for roving the surface area of the northwest corner of the mine property, where Akaitcho is located, for the week of September 11 – 18, testified at trial that he patrolled Akaitcho every hour or hour and a half on the night of September 17.[78] He further testified that he noticed no intruders around the Akaitcho area in the week before the murders and stated that in a typical 12-hour shift, he passed Akaitcho eight to ten times.[79]

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[73] **Appellants' Record**: Trial Reasons, para. 1117 (Vol. 2, p. 151); Warren's evidence, (Vol. 7, Tab 99-26, 65:16-44); O'Neil Evidence, 1318:30 – 1320:21, (Vol. 7, Tab 99-26, p. 64:30-66:21).
[74] **Appellants' Record**: Trial Reasons, para. 160 (Vol. 1, Tab 2, p. 53); **RJR**: Shaw Read-in Evidence, 4727:44 – 4729:32, (Vol. 1, Tab 27).
[75] **Appellants' Record**: Trial Reasons, para. 161 (Vol. 1, Tab 2, p. 53-54); **RJR**: Exhibit 839, (Vol. 4, Tab 11); Exhibit 840, (Vol. 4, Tab 12).
[76] **Appellants' Record**: Trial Reasons, para. 162 (Vol. 1, Tab 2, p. 54); **RJR**: Witte Evidence, 6418:14-20, (Vol. 2, Tab 3).
[77] **Appellants' Record**: Trial Reasons, para. 163 (Vol. 1, Tab 2, p. 54); **RJR**: Exhibit 1028, (Vol. 7, Tab 4).
[78] **RJR**: Brown Evidence, 6891:1-41, (Vol. 2, Tab 7); Brown Evidence, 6892:32-6893:17, (Vol. 2, Tab 7).
[79] **RJR**: Brown Evidence 6892:32-93:17, (Vol. 2, Tab 7); Brown Evidence 6898:22-35, (Vol. 2, Tab 7); Exhibit 1131, (Vol. 8, Tab 7).

I. Roger Warren murders nine miners

41. Upon his employment being terminated by Royal Oak as a result of his participation in the June 14 riot, Warren was prohibited from being on the picket line.[80] He was, however, permitted to return to picket duty by September.[81] He described the picket line around this time as "quiet" and "pretty boring".[82] In the week prior to the murder, Warren began to trespass onto the Giant Mine property around the Akaitcho area.[83] He carried out his "reconnaissance" missions at night to gauge security at the mine site.[84] Around this time, Warren also began making preparations to enter the mine. For instance, he made a lamp and attempted to make a timing device, using a clock.[85] He bought the fish line that he used as the trip wire, at Canadian Tire the evening before his picket duty shift on September 18.[86]

42. On September 18, 1992, Warren left his picket line position at approximately 1:30 a.m. and retrieved a bag he had hidden in a ditch less than a mile from Akaitcho.[87] The bag contained supplies such as blasting caps he obtained on the picket line and had been hidden by Warren sometime before September 18 in contemplation of breaking into the mine.[88] He then proceeded to trespass onto the Giant Mine property and broke into the collar house through a window at the Akaitcho headframe.[89] Once inside the collar house, Warren removed the plywood covering to the manhole, lifted the steel grate, slid down the cables to the first landing and then descended the ladder system to about the 750 foot level of the mine, a descent of approximately 75 storeys.[90] He walked almost one mile underground to an active area of the mine, where miners

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[80] **Appellants' Record**: Trial Reasons, paras. 110, 111 (Vol. 1, Tab 2, p. 40); MOJ, para. 19 (Vol. 3, Tab 6, p. 90); **RJR**: Warren Evidence, 7302:7-15 (Vol. 2, Tab 9).
[81] **Appellants' Record**: Trial Reasons, para. 151 (Vol. 1, Tab 2, p. 51); **RJR**: Warren Evidence, 7302:15-20, (Vol. 2, Tab 9).
[82] **Appellants' Record**: Trial Reasons, para. 167 (Vol. 1, Tab 2, p. 55); Warren Evidence, 7305: 5-17, (Vol.9, Tab 139, p. 160); **RJR**: Warren Evidence, 7577:35-7578:17 (Vol. 2, Tab 9).
[83] **Appellants' Record**: Warren Evidence, 7305:23-40, (Vol. 9, Tab 139); Warren Evidence, 7306: 44-7307:9, (Vol. 9, Tabs 139, 140, pp. 161-162).
[84] **Appellants' Record**: Trial Reasons, para. 167 (Vol. 1, Tab 2, p. 55); Warren evidence, 7306:44-7308:29, (Vol. 9, Tabs 139, 140, pp. 161, 162, 163); **RJR**: Warren evidence, 7578:23-32, (Vol. 2, Tab 9).
[85] **RJR:** Warren Evidence, 7494:31-7495:20, (Vol. 2, Tab 9); Warren Evidence, 7498:15-38, (Vol. 2, Tab 9).
[86] **RJR**: Warren Evidence, 7493:10-30, (Vol. 2, Tab 9).
[87] **RJR**: Warren Evidence, 7311:30-7312:6, (Vol. 2, Tab 9).
[88] **Appellants' Record**: Trial Reasons, para. 167 (Vol. 1, Tab 2, p. 55).
[89] **Appellants' Record**: Trial Reasons, para. 168 (Vol. 1, Tab 2, p. 55-56); MOJ, para. 19 (Vol. 3, Tab 6, p. 90); Warren Evidence, 7314:46-7315:21, (Vol. 9, Tab 141, pp. 165-166).
[90] **Appellants' Record**: Trial Reasons, para. 168 (Vol. 1, Tab 2, p. 55-56); MOJ, para. 19 (Vol. 3, Tab 6, p. 90); **RJR:** Warren Evidence, 7506:46-7507:2, (Vol. 2, Tab 9); Byberg Evidence, 6188: 30-33, (Vol. 2, Tab 2);

were finishing their shift. He concealed himself until they left.[91] He then used a front-end loader to transport explosives to a small electrical locomotive, which he used to carry the materials to the location of the bomb blast. He used a full bag of Amex and 25-30 sticks of dynamite to make a bomb, which was intended to detonate when a mancar passed over it.[92]

43. Warren spent about four hours in the mine and left the underground by crawling through an opening under a gate at the I-38 portal, another area of the mine that he had been scouting during his various trespasses onto the mine property in the days before the murders.[93] Warren testified that he thought he was going to have a "heart attack" as a consequence of doing "a lot of climbing" and "breathing a bunch of smoke".[94] Arriving on surface, Warren was startled by a patrol vehicle, but remained undetected.[95] At approximately 8:45 a.m. on September 18, Warren's device detonated when a mancar carrying the nine miners triggered it.[96] The Appellant O'Neil was one of the first to arrive at the scene of the explosion.[97]

44. Warren testified that his act was "totally insane" and "crazy"[98] and admitted that he "didn't care" about the consequences of planting the explosives.[99] He further testified that he caused the explosion and the deaths of the nine miners, and that "nobody else did" and that his actions showed a "total reckless disregard for human life".[100] Warren's act was planned, deliberate and carried out with the knowledge that what he was doing would be lethal. Indeed, he admitted knowing that anyone within 75 or 80 feet of the explosion would be killed.[101]

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[91] **Appellants' Record**: Trial Reasons, para. 168 (Vol. 1, Tab 2, p. 55-56); Warren Evidence, 7315:37-7316:15, (Vol. 9, Tabs 141, 142, pp. 166-167).
[92] **Appellants' Record**: Trial Reasons, para. 168 (Vol. 1, Tab 2, p. 52); MOJ, para. 19 (Vol. 3, Tab 6, p. 90).
[93] **Appellants' Record**: Trial Reasons, para. 167 (Vol. 1, Tab 2, p. 55).
[94] **Appellants' Record:** Warren Evidence, 7324:1-12, (Vol. 9, Tab 143, p. 172); **RJR**: Warren Evidence, 7325:47-7326:10, (Vol. 2, Tab 9).
[95] **Appellants' Record**: Trial Reasons, para. 169 (Vol. 1, Tab 2, p. 56); Warren Evidence, 7324:17-29, (Vol. 9, Tab 143, p. 172);
[96] **Appellants' Record**: Trial Reasons, para. 170 (Vol. 1, Tab 2, p. 55); MOJ, para. 19 (Vol. 3, Tab 6, p. 90)
[97] **Appellants' Record**: Trial Reasons, para. 1118 (Vol. 2, p. 152)
[98] **Appellants' Record**: Trial Reasons, para. 281 (Vol. 1, Tab 2, p. 93); **RJR:** Warren Evidence, 7592:19-47, (Vol. 2, Tab 9)
[99] **RJR:** Warren Evidence, 7592:35 – 7593:16 (Vol. 2, Tab 9); Warren Evidence, 7594:22-33 (Vol. 2, Tab 9); Warren Evidence, 7596:21-46 (Vol. 2, Tab 9).
[100] **RJR:** Warren's evidence, 7593:22-37, (Vol. 2, Tab 9); Warren's evidence, 7593:10-16, (Vol. 2, Tab 9);
[101] **Appellants' Record**: MOJ, para. 19 (Vol. 3, Tab 6, p. 90); **RJR:** Warren's Evidence, 7593:39-7594:33 (Vol. 2, Tab 9)

45. Warren confessed to the murders on October 15, 1993. Although he subsequently recanted his confession, he was convicted of nine counts of second degree murder on January 20, 1995. His appeal of the conviction was dismissed. It was not until discovery proceedings in this case that Warren again admitted his role in setting the explosion, at the same time that his case was being investigated by the Association in Defence of the Wrongfully Convicted.[102]

J. Trial Judge's Decision

46. In his decision, the Trial Judge held that:

a. Pinkerton's, as the security provider, was an "occupier" of the mine premises, and therefore owed a duty of care to the miners;[103]

b. Murder was foreseeable as "the very likely thing that was going to happen";[104]

c. Pinkerton's breached its standard of care;[105]

d. Pinkerton's materially contributed to the deaths of the miners;[106] and,

e. Fifteen percent fault for the murders should be allocated to Pinkerton's;[107]

K. Court of Appeal Decision

47. The Court of Appeal of the Northwest Territories found that Pinkerton's did not owe a duty of care to the miners. The Court further found that the Trial Judge applied the incorrect test to determine causation and allowed the appeals.[108]

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[102] **Appellants' Record**: Trial Reasons, para. 171 (Vol. 1, Tab 2, p. 56)
[103] **Appellants' Record**: Trial Reasons, paras. 749, 750 (Vol. 2, p. 38)
[104] **Appellants' Record**: Trial Reasons, para. 661 (Vol. 2, p. 10)
[105] **Appellants' Record**: Trial Reasons, para. 764 (Vol. 2, p. 41)
[106] **Appellants' Record**: Trial Reasons, para. 765 (Vol. 2, p. 42)
[107] **Appellants' Record**: Trial Reasons, para. 1300 (Vol. 2, p. 211)
[108] **Appellants' Record**: MOJ, paras. 122, 205, 208 (Vol. 3, Tab 6, pp. 146, 185)

PART II – STATEMENT OF ISSUES

48. Pinkerton's respectfully submits that:

a. The Court of Appeal correctly concluded that Pinkerton's did not owe a duty of care;

b. The Court of Appeal was correct to conclude that even if a duty of care was owed to the miners, Pinkerton's actions did breach any standard of care; and,

c. The Court of Appeal was correct in concluding that the Trial Judge failed to apply the correct test of causation, and that the Appellants failed to establish that Pinkerton's caused the nine miners to die on September 18, 1992.

PART III – STATEMENT OF ARGUMENT

ISSUE 1: PINKERTON'S DID NOT OWE A DUTY OF CARE TO THE MINERS

A. Did Pinkerton's owe a duty of care to the deceased miners beyond its contractual obligations to Royal Oak?

49. As McLachlin, J. (as she then was) stated in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, "[T]he principles of tort set out in *Anns v. Merton London Borough Council*[109] [1978] A.C. 728, (sub nom. *Anns v. London Borough Council of Merton*) [1977] 2 All. E.R. 492 (H.L.), and repeatedly applied by this Court permit, and indeed require, the Court to take into account all relevant circumstances in assessing the duty of care which a particular defendant owes to a particular plaintiff."[110] It is respectfully submitted that Pinkerton's did not have an independent duty of care to the deceased miners. Nor did Pinkerton's step into Royal Oak's shoes and take over any special duty of care that Royal Oak might have had, either as employer or occupier, to provide a safe workplace. Any duty of care that Pinkerton's might have had to the deceased miners arose out of, and was circumscribed by the terms of the contract between Pinkerton's and Royal Oak.

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[109] ***Anns v. Merton London Borough Council***, [1978] A.C. 728 (H.L.) [**Respondents' Joint Authorities** ("**RJA**") Vol. 1, Tab 2]

[110] ***London Drugs Ltd. v. Kuehne & Nagel International Ltd***., [1992] 3 S.C.R. 299 at para. 139. [**RJA**, Vol. 2, Tab 24].

50. Pinkerton's job, pursuant to its contract, was to provide men, dogs and equipment for the purposes of guarding certain areas of the surface of the mine site, and patrolling other surface areas. All of Pinkerton's work was on the surface of the mine site.[111]

51. The Trial Judge found that Pinkerton's failed to ensure all of the entrances to the mine were not accessible. It is respectfully submitted, however, that the securing of the mine entrances was not part of Pinkerton's contractual obligations. That portion of the security function was retained by, and looked after by Royal Oak and its employees. It is submitted that Pinkerton's had no duty to the miners to ensure that all of the entrances to the mine were not accessible.

B. General principles of duty of care

52. The test for determining whether a duty of care exists as derived from A*nns v. Merton London Borough Council*, and as affirmed and explained by this Court requires answering two questions: [112]

a. Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care? and,

b. If a *prima facie* duty of care is established, are there residual policy reasons that ought to negate or limit that duty of care?

53. The first step in a duty of care analysis is to determine whether the duty being claimed is a novel one, or if it falls within, or is analogous to, a relationship previously recognized as giving rise to a duty of care. If the duty claimed fits within, or is analogous to, a previously recognized one, then a duty of care will have been established without the need to apply the *Anns* test.[113]

C. The claim does not fall within a previously recognized duty

54. The Respondent Pinkerton's submits that no Canadian court has previously determined that a private security company owes a duty to those persons legally entitled to be on premises, to

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[111] **Appellants' Record**: Trial Reasons, para. 245 (Vol. 1, Tab 2, p. 79).
[112] ***Cooper v. Hobart***, [2001] 3 S.C.R. 537 at paras. 30-32 [**RJA**: Vol. 1, Tab 20]; ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263 at paras 47-50 [**RJA**: Vol. 3, Tab 5]; ***Hill v. Hamilton-Wentworth Regional Police Services Board***, [2007] 3 S.C.R. 129 at para. 20 [**RJA**: Vol. 2, Tab 4].
[113] ***Childs v. Desormeaux***, [2006] 1 S.C.R. 643 at para. 15 [**RJA**: Vol. 1, Tab 19].

prevent injuries from an intentional and criminal act of a third party.

55. The Appellants submit otherwise and cite two cases in support, namely, *Osman v. 629256 Ontario Ltd.*[114] and *Correia v. Canac Kitchens.*[115] Pinkerton's submits that neither of those cases stands for the proposition enunciated by the Appellants and are readily distinguishable from the present case. In *Osman*, none of the defendants, including the security company, defended the action and thus the allegations contained in the Statement of Claim were deemed to be true by default.[116] Therefore, although the security company which provided services at a nightclub was found liable, it was done without any analysis of the foreseeability, proximity or policy factors underlying duty. In *Correia*, the duty of care found to be owed was different than the one being claimed in this case. In *Correia*, the security company was found to owe a duty of careful investigation, not a duty to prevent injuries resulting from an intentional, criminal act of a third party tortfeasor.[117]

56. The Trial Judge found that Pinkerton's was an "occupier" of the Giant Mine property under the common law of occupier's liability, and therefore owed the miners an independent duty of care. In doing so, he rejected the need to apply the *Anns* test as explained in *Cooper* when he said:[118]

> Pursuant to the principles articulated by Lord Denning in *Wheat v. Lacon & Co.*, supra, I find that Pinkerton's was operating under the guise of one with certain control, with obligations that flow with those of Royal Oak. Pinkerton's is deemed to appreciate that any failure on its part to take reasonable care might result in a threat to the well-being of those invited to be on the Giant property. I highlight that it is not necessary to find that Pinkerton's had exclusive control in order to find that it was an occupier at the relevant time. Pinkerton's owed a duty of care to the deceased miners, as did Royal Oak, and <u>it is unnecessary to apply the modified Anns test</u>. (Emphasis added.)

57. The Court of Appeal rejected the Trial Judge's conclusion that Pinkerton's was an "occupier" and held:[119]

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[114] **Appellants' Authorities**: ***Osman v. 629256 Ontario Ltd***, [2005] W.D.F.L. 3359 (Vol. 3, Tab 84)
[115] **Appellants' Authorities:** ***Correia v. Canac Kitchens***, 2008 ONCA 506, (Vol. 1, Tab 24)
[116] ***Osman v. 629256 Ontario Ltd***, [2005] W.D.F.L. 3359, at para. 2. [**RJA**, Vol. 3, Tab 7].
[117] ***Correia v. Canac Kitchens***, 2008 ONCA 506 at paras. 47, 69 [**RJA,** Vol. 1, Tab 21].
[118] **Appellants' Record**: Trial Reasons, para. 750 (Vol. 2, p. 38)
[119] **Appellants' Record**: MOJ, para. 110 (Vol. 3, Tab 6, p. 140)

> …Pinkerton's had no property interest in the mine, no separate mandate about the premises, and no occupation or control other than as the agent of Royal Oak. Pinkerton's presence on the land was totally derivative of the possession of its principal. Pinkerton's was not an occupier. Any duty owed by Pinkerton's must be derived from an application of the *Cooper* test, and not simply by labeling it an "occupier". (Emphasis added.)

58. Since no Canadian court has recognized the specific duty of care alleged by the Appellants against Pinkerton's where intentional and criminal acts of a third party are involved, it is necessary to apply the two-stage *Cooper* test. It is submitted that the failure of the Trial Judge to do so is an error of law, reviewable on a standard of correctness. Accordingly, for Pinkerton's to owe a duty of care to the miners, it must be established that: (1) it was reasonably foreseeable to Pinkerton's that if it was negligent in the performance of its contractual obligations to Royal Oak during the strike, injury to the miners would very likely result; (2) there was a relationship of close and direct proximity between Pinkerton's and the miners such that it would be fair and just to impose a duty of care; and, (3) there are no policy reasons external to that relationship for declining to impose such a duty of care. It is submitted that Pinkerton's had no duty of care to the miners for security services outside of its contractual obligations to Royal Oak.

D. The murders were not reasonably foreseeable

59. The basic premise underlying "reasonable foreseeability" is that everyone "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour," i.e., someone "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".[120] The questions with respect to foreseeability must be asked from the perspective of a reasonable person at the time of the activity in question and not with the benefit of hindsight.[121]

60. Where the question of a duty of care relates to a third party's deliberate criminal act, courts have required an enhanced level of foreseeability, reflecting the disinclination of the law to hold one party liable for the criminal and intentional acts of another. The act of the third party

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[120] ***Donoghue v. Stevenson***, [1932] A.C. 562 (H.L.), at p. 15 [**RJA**, Vol. 1, Tab 26].
[121] ***McArdle Estate v. Cox,*** 2003 ABCA 106, [2003] 6 W.W.R. 264, at para. 30, 31 [**RJA**, Vol. 2, Tab 28].

tortfeasor must have been "very likely to occur" before the law will consider it to have been foreseeable:[122]

> Few things are less certainly predictable than human behaviour, and if one is asked whether in any given situation a human being may behave idiotically, irrationally or even criminally the answer must always be that that is a possibility, for every society has its proportion of idiots and criminals. It cannot be said that you cannot foresee the possibility that people will do stupid or criminal acts, because people are constantly doing stupid or criminal acts. But the question is not what is foreseeable merely as a possibility but what would the reasonable man actually foresee if he thought about it, and all that Lord Reid seems to me to be saying[123] is that the hypothetical reasonable man in the position of the tortfeasor cannot be said to foresee the behaviour of another person unless that behaviour is such as would, viewed objectively, be very likely to occur. [Emphasis added.]

61. In cases involving deliberate criminal acts by third party tortfeasors, jurisprudence from Canada and elsewhere reflects the underlying principle that, except under extraordinary circumstances, individuals are generally entitled to conduct their affairs on the basis that third parties will not commit such intentional criminal acts. Where the act of a third party tortfeasor is egregious and in complete violation of societal norms, the degree of likelihood sufficient to find foreseeability should be very high.[124]

62. In this case, the Trial Judge found that the murder of nine miners was "but another unlawful act, elevated from earlier unlawful acts involving progressive illegal activities including physical injuries inflicted on persons, death threats, explosions that could have resulted in deaths, property damage, sabotage and the like."[125]

63. The Court of Appeal, although concluding that the Trial Judge's finding with respect to foreseeability did not disclose a palpable and overriding error, stated:[126]

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[122] **Appellants' Record**: MOJ, para. 53 (Vol. 3, Tab 6, p. 105), citing ***Lamb v. Camden LBC***, [1981] Q.B. 625 (C.A.) at 17-18 (QL) [**RJA**, Vol. 2, Tab18];
[123] ***Dorset Yacht Co. Ltd. v. Home Office***, [1970] A.C. 1004, at p. 23 **[RJA,** Vol. 1, Tab 27**].**
[124] ***Robertson v. Adigbite*** [2000] B.C.J. No. 1192 (S.C.) at paras 57-59 [**RJA**, Vol. 3, Tab 19); ***P.Perl (Exporters) Ltd. v. Camden London Borough Council***, [1983] 3 All E.R. 161 (C.A.), at p. 166, leave to appeal to the House of Lords refused [1983] 3 All E.R. at 172 (**RJA**, Vol. 3, Tab 10); ***James v. Meow Media, Inc***., 90 F.Supp.2d 798 (W.D.Ky. 2000), affm'd 300 F.3d 683, 2002 FED App. 0270P (6th Cir.) [**RJA**, Vol. 2, Tab 12]; ***Modbury Triangle Shopping Centre Pty. Ltd. v. Anzil***, [2000] HCA 61, 205 C.L.R. 254 at para. 29 [**RJA**, Vol. 3, Tab 1].
[125] **Appellants' Record**: Trial Reasons, para. 664 (Vol. 2, p. 11)
[126] **Appellants' Record**: MOJ, para. 55 (Vol. 3, Tab 6, p. 107)

> The law does not require that the exact way that the damage materialized be foreseeable, so long as it arises within the scope of the foreseeable risk. But even so, Warren's act was not necessarily foreseeable in law as a result. The improbability of the scenario, combined with the intervention of an intentional act of another party (Warren), pushes the legal concept of foreseeability to the edge, and overlaps with the policy reasons why one defendant should not be liable for the intentional tort of another. [Emphasis added.]

64. The Respondent submits that the Trial Judge's finding that Pinkerton's and the other Respondents ought to have foreseen the murders as something "very likely" to happen and therefore guarded against it, discloses a fundamental flaw in the Trial Judge's reasoning. The Respondent submits that the murders were not reasonably foreseeable on the facts of this case and the Trial Judge's finding of foreseeability was not correct. Indeed, it is submitted that finding amounted to an overriding and palpable error which ought to have been overturned by the Court of Appeal.

65. Not one single witness testified that they expected or foresaw anything in the nature of Roger Warren's crime. Indeed, numerous witnesses, including Roger Warren, testified to the unspoken credo amongst miners that miners did not hurt other miners underground.[127] Acts of vandalism, threats and physical confrontations on the surface of the mine site or in town, and the sole instance of graffiti found underground did not make murder underground reasonably foreseeable as the "very kind of thing that was likely to happen".[128] Simply describing the murders as a "reckless act"[129] or an "accident"[130] or as another unlawful act akin to vandalism is not sufficient to support the legal conclusion of reasonable foreseeability in this case. These descriptions grossly minimize the severity of Warren's egregious conduct, which the Trial Judge appears to have viewed as something in the nature of a misadventure rather than the conscious and deliberate act of a murderer.

66. The previous acts of vandalism and other physical confrontations were not of the "same general class" as the premeditated murder of nine miners by Warren, so as to weigh in favour of

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[127] **Appellants' Record:** Trial Reasons, para. 1117 (Vol. 2, p. 151); **RJR**: O'Neil: 1534:13 - 1535:16 (Vol. 1, Tab 12); Hourie: 0957:29-33 (Vol. 1, Tab 8); Vodnoski: 1191:39-1191:41 (Vol. 1, Tab 10); Fullowka: 1098:1-9; 1098:32-41 (Vol. 1, Tab 9); Neill: 2106:7-36 (Vol. 1, Tab 14); Tuma: 2239:3-36; 2247:4-9: 2256:21-23 (Vol. 1, Tab 15); Dales: 3432:27-39 (Vol. 1, Tab 18); **Exhibit 948**, Blatchford newspaper article (Vol. 7, Tab 1).
[128] **Appellants' Record**: Trial Reasons, para. 812 (Vol. 2, p. 62)
[129] **Appellants' Record**: Trial Reasons, para. 748 (Vol. 2, p. 37)
[130] **Appellants' Record**: Trial Reasons, para. 812 (Vol. 2, p. 62)

determining that the murders were foreseeable. To suggest otherwise threatens to dilute the "very likely to happen" requirement when intentional criminal acts are involved. There was no basis for the Trial Judge to conclude that the murders should have been seen as "very likely to occur". No one, including the striking miners, anticipated an act of premeditated murder, especially underground.

67. Essentially, the Trial Judge reasoned that because Pinkerton's and the other Respondents were aware of previous criminal acts, albeit mostly related to property damage, vandalism and trespass, they ought to have foreseen that murder was very likely to occur and ought to have guarded against that likelihood. This does not simply push the legal concept of foreseeability to the edge, it smashes the edge and expands the scope of compensable fault to new limits, a novel and dangerous proposition unsupported by Canadian law.

68. According to the Trial Judge, Pinkerton's was at Giant Mine to guard against the "very thing that happened" and concluded that "not only was it foreseeable, but it was actually foreseen."[131] In support of this, the Trial Judge referred to a letter from Pinkerton's to Royal Oak's CEO, Peggy Witte, expressing concern over Royal Oak's intention to downsize security coverage.

69. It is submitted that these warnings to Royal Oak about reduced security show nothing more than Pinkerton's general knowledge of the potential for crimes on the surface at Giant Mine. These warnings were not so specific as to suggest or acknowledge the likelihood that a murder would occur underground. Expression of concern about reduced security coverage is insufficient to demonstrate that Pinkerton's anticipated or ought to have anticipated that a murderer would sneak underground for the purpose of committing a heinous crime.

E. No relationship of close and direct proximity

70. This Court has established that mere foreseeability is not enough to find a *prima facie* duty of care. There must also be a close and direct relationship of proximity or neighbourhood.[132] Pinkerton's submits that it was at Giant Mine to fulfill its contractual obligations to Royal Oak and had no duty outside of that contract to Royal Oak or its employees, including the miners.

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[131] **Appellants' Record**: Trial Reasons, para. 661 (Vol. 2, p. 10)

[132] ***Cooper***, *Supra*, at para. 32; ***Syl Apps Secure Treatment Centre v. B.D.***, [2007] 3 S.C.R. 83, para. 26 [**RJA**, Vol. 3, Tab 27]; ***Hill,*** *Supra*, at para. 23

71. Even though the Court of Appeal found no palpable and overriding error with respect to the Trial Judge's finding on foreseeability, it still concluded that Pinkerton's did not owe a duty of care to prevent the intentional criminal act of Roger Warren. The Court stated:[133]

> The traditions of the common law are inconsistent with any general rule that one person is liable for the torts of another; liability is exceptional. The policy behind the law of tort is against such liability. Simply being able to foresee the torts of another is not enough. Liability is exceptionally found to exist when there is a "special relationship" between the plaintiff and the ancillary tortfeasor, or where the ancillary tortfeasor has some control over the immediate tortfeasor [Roger Warren].[134]

72. Upon an examination of the factors such as the parties' expectations, representations and reliance, the Court of Appeal concluded that there was no "special relationship" between Pinkerton's and the miners and further found that Pinkerton's had no control over Roger Warren.[135] At paragraph 111 of the Court of Appeal decision, the Court stated:[136]

> Pinkerton's clearly owed one duty to secure the mine, but it was a duty in contract, and it was owed to Royal Oak. The suggestion by the Trial Judge that Pinkerton's did not comply with its own internal policies, or discharge its obligations to Royal Oak under its contract to secure the mine properly, are somewhat beside the point. While the existence of a contract will often be relevant to the proximity analysis, the existence of a contract does not necessarily create a duty in tort. Pinkerton's was able to negotiate certain limitations on its liability in the contract with Royal Oak. Pinkerton's was unable to negotiate any limitations on its liability with the miners that Royal Oak employed to work in the mine. The proximity between Pinkerton's and the respondents arose because of that contract, and the respondents allege that their damage arose out of the performance of that contract by Pinkerton's. Whether Pinkerton's should be exposed to a greater liability towards the workers than it was towards their employer raises an important issue of policy.

73. The Fullowka Appellants argue that Pinkerton's assurances of safety and the miners' reliance on those assurances to their detriment created a "special relationship" between

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[133] **Appellants' Record**: MOJ, para. 98 (Vol. 3, Tab 6, p. 135)

[134] Contrary to the argument raised by the Appellant O'Neil in his Factum at paragraph 24, the Court of Appeal did not establish a new test for determining the existence of a duty of care. The Court simply used the terms "Immediate" and "Ancillary" tortfeasors as a way to distinguish between Warren and the other Respondents, rather than referring to Warren as the "third party", which as explained in footnote 72 of the Court of Appeal's decision, has another meaning in law.

[135] **Appellants' Record**: MOJ, paras. 111, 112 (Vol. 3, Tab 6, pp. 140, 141)

[136] **Appellants Record**, MOJ, para. 111 (Vol. 3, Tab 6, p. 140).

Pinkerton's and the miners, a relationship of the kind referred to in paragraph 37 of *Childs*:[137]

> The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large…In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise…

74. By accepting a contract to provide specified security services at Giant Mine, Pinkerton's was not exercising a public function nor engaging in a commercial enterprise that included implied responsibilities to the public at large. Pinkerton's responsibilities were owed to Royal Oak by virtue of its contract with Royal Oak, which required Pinkerton's to provide those security services that were requested and paid for by Royal Oak.[138] Pinkerton's provision of security services on the premises did not carry with it implied responsibilities of providing more men, more equipment or more services than Royal Oak was prepared to pay for. A private security company would invariably be found to be in a relationship of proximity if it was found that its assignment carried with it responsibilities beyond those contemplated by its contract with the owner of the premises. Such a conclusion would only serve to undermine the objective of the proximity analysis to avoid the "spectre of unlimited liability".[139]

75. On the basis of this analysis, the Court of Appeal dismissed the Trial Judge's finding of proximity. The Appellants' argue that the only basis upon which the Court of Appeal concluded that no duty was owed was because of policy reasons. That is erroneous, and is not what the Court of Appeal did.

76. At paragraph 99 of its decision, the Court of Appeal stated:[140]

> There are potentially three relationships in these appeals that might be "special" enough to support a duty of the appellants to be responsible for the torts of Warren: employer and employee, regulator and worker, and occupier and invitee. None is sufficient…<u>While these relationships are sufficient to create "proximity"</u>

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[137] ***Childs***, *Supra*, at para. 37.
[138] **RJR**: Exhibit 824, (Vol. 4, Tab 8).
[139] ***Canadian National Railway Co. v. Norsk Pacific Steamship Co.***, [1992] 1 S.C.R. 1021, per McLachlin J. at para. 49 [**RJA**, Vol. 1, Tab 13].
[140] **Appellants' Record**: MOJ, para. 99 (Vol. 3, Tab 6, p. 135).

> with respect to some risks, they do not extend far enough to qualify as a "special relationship" in this context. [Emphasis added.]

77. The Court of Appeal further confirmed that although *Cooper* recognized one established category of proximity as being where the defendant's overt act has directly caused the foreseeable physical harm to the plaintiff, it "does not necessarily follow that proximity also exists 'where the defendant fails to prevent the foreseeable, deliberate criminal act of another party that causes physical harm to the plaintiff'".[141] This case involves an allegation of a failure to act on the part of Pinkerton's (not an overt act on the part of Pinkerton's) and therefore does not fall squarely within any category recognized by this Court in *Cooper*, contrary to the argument advanced by the Appellant O'Neil in paragraph 31 of his Factum.

78. As this Honourable Court stated in *Childs*:[142]

> In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy.

79. In *Childs*, this Court identified three kinds of relationships of proximity that give rise to a positive duty to act: (i) relationships where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls.[143] These cases turn on the defendant's causal relationship to the origin of the risk faced by the plaintiff or on steps taken to invite others to subject themselves to a risk under the defendant's control; (ii) paternalistic relationships of supervision and control, such as those of a parent-child or a teacher-student.[144] The duty in these cases rests on the special vulnerability of the plaintiffs and the formal position of power of the defendant; and (iii) relationships involving defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large.[145]

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[141] **Appellants' Record**: MOJ, para. 59 (Vol. 3, Tab 6, p. 109, 110); See also, ***Childs***, *Supra*, para. 31; ***Design Services Ltd. v. Canada,*** [2008] 1 S.C.R. 737 at para. 26 [**RJA,** Vol. 1, Tab 24].
[142] ***Childs***, *Supra*, at para. 31.
[143] ***Childs***, *Supra*, at para. 35.
[144] ***Childs***, *Supra*, at para. 36
[145] ***Childs***, *Supra*, at para. 37;

80. The relationship between Pinkerton's and the miners does not fall within any of the three situations recognized by this Court in *Childs*. Pinkerton's did not invite the miners to work during the labour dispute, nor did it or could it, invite the miners onto Royal Oak's property. In addition, the relationship between Pinkerton's and the miners also cannot be characterized as one involving a paternalistic relationship involving supervision and control. Pinkerton's did not, nor could it, supervise or control the miners or their activities. The miners were aware of the situation in which they were working. Pinkerton's did not possess any greater knowledge of the threats or dangers being faced by the miners than the miners themselves.

81. The Court of Appeal stated that while expectations, representations and reliance form a part of the duty analysis, any expectations must be realistic and objectively reasonable.[146] There is no evidence to support the conclusion that Pinkerton's made any representations to the miners to engender reliance that personal safety was ensured. If such an expectation was held by the miners, it was unreasonable. Furthermore, the allegation that Pinkerton's made representations of safety to the miners is contrary to the fact findings made by the Trial Judge who concluded that the assurances of safety were coming from Royal Oak, and not Pinkerton's. The following paragraphs of the Trial decision illustrate the assurances of safety made by Byberg of Royal Oak, and not by Pinkerton's, to the miners:

> 53. In order to facilitate full operations, Royal Oak made the necessary arrangements with staff personnel, union members who wished to continue working and contract miners. Before the strike, Byberg spoke with some of the men he knew would not go on strike, including Norm Hourie, assuring them that they would be secure.[147]
>
> 147. Those contemplating a return to work liased with Byberg, who had assured them that the mine was secure, and that security was available to assist off property. The physical crossing of the picket line was the primary concern; however, Byberg stressed that, once they were on the property, there was no reason to worry.[148]
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> 231. Although he managed the operation, Byberg claimed to be unaware of significant matters such as whether or not the portals and other entrances had been

[146] **Appellants' Record**: MOJ, para. 121 (Vol. 3, Tab 6, p. 146)
[147] **Appellants' Record**: Trial Reasons, para. 53 (Vol. 1, Tab 2, p. 22)
[148] **Appellants' Record**: Trial Reasons, para. 147 (Vol. 1, Tab 2, p. 49, 50)

> secured. This wilful blindness did not prevent him offering assurances to those working underground that they were safe.[149]
>
> 712. It must be said that, despite advice of dangers that were said to be given birth during this strike, her [Witte] management personnel gave assurances of safety and security to those who were contemplating crossing the picket line and to those who had done so, including the contracted miners who were treated as Royal Oak's own.[150]

82. The Fullowka Appellants argue that the miners were not in as good a position as Pinkerton's to assess the risks of working at Giant Mine. The Appellants state that while Pinkerton's knew that Akaitcho had not been secured, the "miners did not know this crucial - and ultimately fatal - fact."[151] On the contrary, the evidence is clear that Royal Oak assumed the responsibility for securing all of the mine entrances, including Akaitcho, and that Pinkerton's was never asked to perform that function. There is no evidence that Pinkerton's was aware that Akaitcho was not secured before the murders. Royal Oak had taken what it perceived to be adequate steps to secure the gates and portal entrances before Pinkerton's arrival. Only after the murders and during the course of the RCMP murder investigation was it determined, by the RCMP, that the entrance to Akaitcho had been breached by those miners who participated in the Graffiti Run. Furthermore, evidence from the Trial is to the effect that some of the striking miners that crossed the picket line and returned to work, in fact, knew a lot more than Pinkerton's, Royal Oak, or even the RCMP, about the incursions into the underground through the Akaitcho mine shaft. The Trial Judge, while discussing the "Graffiti Run" of June 29 states:[152]

> 118. On entering the underground, Shearing et al proceeded to spray paint graffiti in various locations and take pictures of the resulting vandalism. Words such as "scabs beware" and "Molly McGuires" were left in white paint, and some messages identified specific workers. A list of Mining Safety Act violations was prepared by the trespassers and ultimately forwarded to the GNWT. Also, the strikers exited the underground possessing explosives taken from a powder bench and left a burnt miner's lamp behind. The incursion lasted about six hours. Shearing told other union members, including Vern Fullowka, about the ease of this incursion. (Emphasis added.)

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[149] **Appellants' Record**: Trial Reasons, para. 231 (Vol. 1, Tab 2, p. 74, 75)
[150] **Appellants' Record**: Trial Reasons, para. 712 (Vol. 2, p. 25)
[151] **Fullowka Appellants' Factum**, para. 43.
[152] **Appellants' Record**: Trial Reasons, para. 118 (Vol. 1, Tab 2, p. 42)

83. Pinkerton's was not in a relationship of sufficient proximity to the miners to warrant the imposition of a duty of care on Pinkerton's outside the scope of its contractual obligations. Pinkerton's had obligations to Royal Oak under its contract, it had a duty to the miners to perform its contractual obligations in such a way as not to cause the miners harm but Pinkerton's did not have greater obligations and duties to the miners than it did to Royal Oak under its contract. Pinkerton's did not give assurances of safety, raise any expectations, make any representations, or encourage any reliance on the part of the miners that would give rise to a greater duty to the miners than it had to Royal Oak. The fact that the miners may have felt safer by Pinkerton's presence, patrolling on the surface of the mine site, should not be sufficient to establish a relationship of sufficient proximity. Pinkerton's did not create or increase any danger to which the miners were already exposed as a result of the strike.

84. The Appellants argue that Pinkerton's counsel conceded that a duty of care was owed to the miners. The Respondent submits that it did not concede to owing a general duty directly to the miners outside the course and scope of its contractual obligations with Royal Oak. While the miners may well have been "neighbours" in respect of those duties and obligations specifically undertaken by Pinkerton's under its contract with Royal Oak, they were not "neighbours" in the sense of being owed a distinct and separate obligation whereby Pinkerton's was obliged to do things for their benefit outside of the scope of that contract. This same argument was made before the learned Trial Judge during oral submissions, and later written argument, and to the Court of Appeal.[153]

F. Policy factors dictate against imposing a duty

85. Notwithstanding its conclusion that there was no duty of care between the miners and the Respondent, the Court of Appeal commented on whether there were any residual policy considerations that militated against the imposition of such a duty of care.[154] Because of the Trial Judge's erroneous conclusion that Pinkerton's was an "occupier" of the premises, and because of his failure to undertake the *Cooper* test, he did not address public policy concerns relating to finding a private security company liable for the intentional and criminal acts of a trespasser.

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[153] **RJR**: **Mr. Hope's Closing Arguments**: 8610:41-8611:20; 8617:42-8619:33 (Vol. 3, Tab 12).
[154] **Appellants' Record**: MOJ, paras. 76-78 (Vol. 3, Tab 6, pp. 122, 123, 124)

86. The Respondent respectfully submits that the policy reasons outlined by the Court of Appeal for negating the imposition of a duty of care in this case are correct.

ISSUE 2: PINKERTON'S DID NOT BREACH ITS STANDARD OF CARE

87. While the Court of Appeal found that Pinkerton's owed no duty to the miners, it was satisfied that even if a duty was owed, Pinkerton's met any standard of care that might be imposed.[155]

88. In considering whether there has been a breach of the standard of care, a court must identify the alleged breach or breaches, define the standard of care required by the circumstances, and assess whether the act or acts fell below the required standard of care. "The standard is not perfection, or even optimum, judged from the vantage of hindsight".[156]

89. In his discussion of the standard of care, the Trial Judge focused on two alleged failures on the part of Pinkerton's in concluding that it breached its standard of care:

a. Pinkerton's failed to keep all of the entrances to the underground blocked from the strikers' access;[157] and,

b. Pinkerton's failed to complete a written security plan, audit or security survey, in accordance with its own corporate policy, before entering into the contract with Royal Oak.[158]

Pinkerton's submits that neither of these alleged failures amounted to a breach of Pinkerton's standard of care. To find otherwise, as the Trial Judge did in this case, amounted to a palpable and overriding error which the Court of Appeal was correct to reject.

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[155] **Appellants' Record**: MOJ, para. 115 (Vol. 3, Tab 6, pp. 143)
[156] ***Hill***, *Supra*, at para. 73
[157] **Appellants' Record**: Trial Reasons, para. 764, (Vol. 2, p. 41)
[158] **Appellants' Record**: Trial Reasons, para. 754, (Vol. 2, p. 39)

A. Pinkerton's obligations to keep the entrances to the underground blocked

90. It is submitted that the evidence is clear that any obligation to block the entrances to the underground was Royal Oak's and Royal Oak's alone. Pinkerton's had not contracted with Royal Oak to secure or block the entrances to the underground. Royal Oak was fully aware of the need to secure entrances to the underground long before Pinkerton's was retained. They knew of that need through their own security people and by virtue of the Security Survey undertaken by Bill Tolmie and Cambrian. Royal Oak and its employees took what they believed to be reasonable steps to ensure that the entrances were secure prior to commencement of the strike, and they continued to monitor those entrances with their own personnel during the strike. Royal Oak did not ask Cambrian to undertake that task, nor did they ask Pinkerton's to do so. It is clear from the testimony of Mr. Tolmie, Mr. Allan, Mr. O'Sullivan and Mr. Byberg that responsibility for securing the mine entrances was retained by Royal Oak which made sense because Royal Oak, as Mr. Allan testified, had a site management team "…that knew the mine", [159] and especially the underground.

91. Noel O'Sullivan was the Royal Oak employee who looked after the job of securing the entrances to the underground. He was a competent, experienced miner who knew the Giant Mine better than anyone. O'Sullivan described the steps he took at the various entrances to the underground and described why he took them. He also described how he checked the various access points (including Akaitcho) on a regular basis and found nothing out of the ordinary.[160] Royal Oak management was aware of the steps that had been taken by O'Sullivan to secure Akaitcho.[161] At no time was Pinkerton's requested to review the steps taken by Royal Oak or its employees to block the various entrances to the mine.

92. Prior to September 18, 1992, Pinkerton's had not been provided with the list of openings to the underground at Giant Mine. Contrary to his statement at paragraph 248 that Pinkerton's

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[159] **RJR**: Allan Evidence, 6671:35 – 6672:43, (Vol. 2, Tab 4).
[160] **RJR**: O'Sullivan Evidence, 378:10-30 (Vol. 1, Tab 5)
[161] **RJR**: Allan Evidence, 6672:45 – 6673:44, (Vol. 2, Tab 4); O'Sullivan Evidence, 580:24-581:17, (Vol. 1, Tab 5); Byberg Evidence, 6142:24-6143:5, (Vol. 2, Tab 2); Byberg Evidence, 6187:30-6188:1, (Vol. 2, Tab 2).

had been advised of all means of access to the underground,[162] at paragraph 710, the Trial Judge found:[163]

> …Regrettably, Royal Oak omitted to cause Pinkerton's to be duly familiar with the mine site's portals of entrances and exits….

Given the fact that Royal Oak had taken steps to secure the means of access to the underground and thought they had done so, it is understandable that they did not see fit to provide Pinkerton's with a list of all of the openings to the mine.

93. Placing a guard at each of the entrances to the underground was not an option that Pinkerton's had. It did not have the men or equipment on site to provide static posts at each of the entrances and they could not provide additional guards or equipment to Giant Mine without Royal Oak's approval. To suggest that Royal Oak would have approved additional forces to provide static posts at each mine entrance when they believed they had blocked the mine entrances, would have been totally contradictory to Royal Oak's continual efforts to minimize costs and downsize Pinkerton's forces. Contrary to the statement made by the Trial Judge at paragraph 243 that there were "no limitations to Pinkerton's mandate by Royal Oak"[164], he noted at paragraph 253 that the pressure to downsize was well documented in the evidence:[165]

> The pressure to downsize the security complement was well documented in the evidence. As a result, Pinkerton's believed the provision of electronics was a priority but did not receive a response from Witte.

94. At para. 241, the Trial Judge said:[166]

> It must have been evident, however, that from the first explosions that occurred after the strike began, though not required by law, the dynamite and related items should have been secured. Royal Oak ought to have known that some were being stolen from underground caches, that advice to lock down or better patrol Akaitcho should have been a priority and that reducing Pinkerton's personnel by one-half by July 19 was wrong in the face of ominous increasing criminal activity. It was inappropriate to adopt the stance that Pinkerton's personnel as the professionals would virtually guarantee safety for Royal Oak personnel and equipment, to ignore concerns of Pinkerton's and the RCMP, to provoke the

[162] **Appellants' Record**: Trial Reasons, para. 248, (Vol. 1, p. 80)
[163] **Appellants' Record**: Trial Reasons, para. 710, (Vol. 2, p. 24-25)
[164] **Appellants' Record**: Trial Reasons, para. 243, (Vol. 1, p. 78)
[165] **Appellants' Record**: Trial Reasons, para. 253, (Vol. 1, pp.81-82)
[166] **Appellants' Record**: Trial Reasons, para. 241, (Vol. 1, pp. 77-78)

> strikers with inflammatory public commentaries and to believe the RCMP would pick up any slack from Pinkerton's and the mine inspectors. No matter how well Royal Oak staff, Pinkerton's and the RCMP executed their mandate, it became clear that Royal Oak was into minimal spending for safety and security. It matters not whether you ascribe omission or wilful blindness to Royal Oak as far as its conduct is concerned. Unfortunately, the safety of the workers was trumped by the financial bottom line. (Emphasis added.)

At para. 715, the Trial Judge said:[167]

> If the incidents appeared to be criminal in nature, the RCMP were called. Occasionally, the mining inspector of the day paid a visit. As the strike wore on, Royal Oak became less communicative with Pinkerton's to the point where Witte would not acknowledge St. Amour's telephone calls and letters. At the same time, Royal Oak had forced Pinkerton's to reduce security to a dangerous level and refused to allow new technology to be acquired or considered; non-economic consequences were never of interest to Royal Oak. (Emphasis added.)

95. Therefore, with respect to the finding that Pinkerton's failed to ensure that all of the entrances to the underground were blocked, it is clear that Pinkerton's could have, if allowed, provided more men to guard more places for more hours, and indeed continually recommended that be done. Royal Oak, on the other hand, was the property owner paying the bills and was continually downsizing Pinkerton's contingent. Pinkerton's had no power or ability to add manpower. That was solely Royal Oak's decision.

B. Pinkerton's failure to complete a security plan, survey or audit in accordance with company policy before entering into the contract

96. The Respondent respectfully submits that Pinkerton's was contacted by Royal Oak once Cambrian had essentially been run out of Yellowknife by the strikers in the early days of the strike. Royal Oak's staff had taken refuge in the administration buildings and the strikers had assumed control of the west side of the mine property. Pinkerton's was retained to bring order to the situation and immediately sent six personnel to Yellowknife, to deal with the emergency. Shortly thereafter, there was a contingent of 52 men, providing a combination of static posts, roving patrols and an emergency response team. Pinkerton's main concern upon its arrival was to deal with an emergency and not to conduct a security survey or an audit. In fact, those steps had already been taken by Royal Oak and by Cambrian long before Pinkerton's arrival.

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[167] **Appellants' Record**: Trial Reasons, para. 715, (Vol. 2, pp. 26-27)

97. On July 20, 1992, Pinkerton's, in response to the downsizing pressures exerted by Royal Oak, sent Bill Twerdun to Giant Mine to conduct a mine site survey and assess the immediate and future needs for security on site. He toured the mine site and met with Byberg to discuss his recommendations with Byberg. A detailed Security Survey was then prepared by Pinkerton's and sent to Royal Oak's head office. Royal Oak ignored Pinkerton's recommendations.

98. Pinkerton's, contrary to the statement at paragraph 246 of the Trial decision, did inform Royal Oak of its concerns about critical situations at Giant Mine throughout the strike. The Security Survey which was submitted to Royal Oak on September 9, 1992 outlined a long-term security plan which included electronic security measures.

99. Pinkerton's had concerns about Royal Oak's pressure to further reduce the security force and warned Royal Oak on August 7 in writing about the perceived risks in doing so. Recommendations were also made by St. Amour about the advantages of electronic equipment to supplement the guard force. St. Amour stressed the need to maintain vigilance in the face of apparent calming conditions and the inadvisability of further reductions in security personnel.

100. In the circumstances and given the evidence of the limits on Pinkerton's mandate and resources, the Trial Judge made a palpable and overriding error in concluding that Pinkerton's breached the standard of care in this case. The Court of Appeal therefore properly concluded that even if Pinkerton's owed a duty of care, it met any standard of care that might be imposed. The Court of Appeal stated at paragraph 115:[168]

> While we have concluded that Pinkerton's owed no duty, in the alternative we are satisfied that it met any standard of care that might be imposed. Pinkerton's was focussing all its resources on keeping trespassers like Warren out of the mine. Warren, on the other hand, was doing everything he could to circumvent Pinkerton's efforts. It was essentially a cat and mouse game, and Warren won because of a combination of the limited resources available to Pinkerton's, Warren's superior knowledge of the mine, and because he had control of when, where and how he would attempt his intrusion. Warren was not under the control of Pinkerton's. In these circumstances it is inherently unrealistic to expect that a security company like Pinkerton's should be responsible for Warren's conduct,

[168] **Appellants' Record**: MOJ, para. 115 (Vol. 3, Tab 6, pp. 143)

> simply because Warren was eventually successful in defeating Pinkerton's defences.

101. The Appellants argue that the Court of Appeal mischaracterized the facts in reaching its conclusion. The Respondent disagrees. Roger Warren's actions were planned, deliberate and secretive. He conducted his "reconnaissance" missions surreptitiously so as not to get caught. He was working under the cloak of darkness and was not easily detectable. He was conducting scouting missions at other portals on the Giant Mine site, including the exit he used to leave the mine on September 18, 1992. Roger Warren testified that upon leaving the mine, he was startled by seeing a guard vehicle, but was able to get away undetected.

102. It is submitted that the Court of Appeal was correct in concluding that neither Pinkerton's nor the other Respondents breached the standard of care.

ISSUE 3: CAUSATION

A. General principles of causation

103. In *Hanke v. Resurfice Corp*., this Court affirmed that the traditional "but for" test remains "the primary test for causation in negligence actions"[169], even in cases involving multiple defendants. The plaintiff bears the onus to prove that "but for" the negligence of each defendant, the injury would not have occurred. If the injury would have occurred in any event, the defendant's conduct will not be found to be the cause.[170]

104. The application of the "material contribution" test instead of the "but for" test is justifiable only in rare cases that meet two requirements:[171]

> However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.
>
> First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility

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[169] ***Hanke v. Resurfice***, [2007] 1 S.C.R.333 at para. 21 [**RJA**, Vol. 3, Tab 18].
[170] ***Mooney v. British Columbia (Attorney General),*** 2004 BCCA 402, [2004] 10 W.W.R. 286 at para. 148 (**RJA**, Vol. 3, Tab 2).
[171] ***Hanke***, *Supra*, at paras. 24, 25

> must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach. (Emphasis added.)

B. Trial Judge's findings on causation

105. The Trial Judge stated that "the current test for causation is whether the defendant's negligence materially contributed to the injury or loss".[172] Having made that error, the Trial Judge analyzed causation with respect to Pinkerton's as follows:[173]

> There is no question there was a duty of care owed and breached, as delineated, *supra*, and I find that the breach materially contributed to the deaths of the nine miners for which Pinkerton's is responsible. (Emphasis added.)

106. The Trial Judge analyzed causation with respect the other Respondents in a similar fashion. For example, at paragraph 841, he found that the GNWT "materially contributed to the deaths".[174] At paragraph 961, the Trial Judge stated that "Bettger's conduct meets the material contribution test required to find a sufficient causal connection."[175] (Emphasis added.)

107. The Court of Appeal determined that the Trial Judge utilized the material contribution test to find causation and did so without considering if or why the primary "but for" test was unworkable.[176] The Court found that this amounted to an error of law, reversible on a correctness standard and the Respondent submits that the Court of Appeal was correct in its determination.

108. The Court of Appeal then identified an additional problem with the Trial Judge's causation analysis, because rather than considering the conduct of each of the Respondents separately he

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[172] **Appellants' Record**: Trial Reasons, paras. 746, 930, (Vol. 2, pp. 37, 95)
[173] **Appellants' Record**: Trial Reasons, para. 765, (Vol. 2, pp. 43)
[174] **Appellants' Record**: Trial Reasons, para. 841, (Vol. 2, pp. 68)
[175] **Appellants' Record**: Trial Reasons, para. 961, (Vol. 2, pp. 103)
[176] **Appellants' Record**: MOJ, para. 203 (Vol. 3, Tab 6, p. 184)

considered the conduct all of the Respondents collectively.[177] He then concluded that the actions or inactions of all of the Respondents combined to materially contribute to Roger Warren's criminal act. For example, at paragraph 901 of Trial decision, the Trial Judge stated:

> It is the cumulative effect and the progression of the acts of negligence of all the Defendants, including CAW National, as delineated herein, that materially contributed to Warren's act.

The Court of Appeal correctly held that this was a fundamental error in approach and that the proper application of the "but-for" test to determine causation requires a consideration of each Respondent's negligent acts and omissions in isolation from those of the other Respondents. This was also held to be a reversible error by the Court of Appeal.[178]

C. Question of "common causal" language and common sense

109. The Appellants suggest that the Trial Judge was simply using what they call "common causal terms" to express his conclusions with respect to causation. The Appellants cite a number of "examples" of the Trial Judge's use of common language to express his conclusions with respect to causation. For instance, paragraph 651 of the Trial decision is included in support of this argument. Paragraph 651 states that "Warren's act, on September 18 is not disputed and was *a reaction* to the negligent acts of other strikers". (Emphasis in Appellants factum.). The Respondent submits that this is not a conclusion on causation at all. A "reaction" to negligent acts does not satisfy either the "but for" or the "material contribution" test. The question is not: "But for the negligent acts of other strikers, would Warren have reacted the way he did?" The question is: But for the negligent act of the defendant, would the injury to the plaintiff have occurred? No such question was ever asked by the Trial Judge with respect to any of the Respondents in reaching his conclusions on causation.

110. The Appellants further argue that the word "contribution" used throughout the Trial Judge's causation analysis is used in the same sense as in the *Contributory Negligence Act*, R.S.N.W.T. 1988, ch. C-18, s. 5, under which the liability of the various Respondents was apportioned.

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[177] **Appellants' Record**: MOJ, paras. 204, 205 (Vol. 3, Tab 6, p. 184-185)
[178] **Appellants' Record**: MOJ, para. 205 (Vol. 3, Tab 6, pp. 185)

111. The Respondent submits that "contribution" in the Trial Judge's causation analysis differs significantly from "contribution" in the *Contributory Negligence Act*. "Contribution" in causation is fundamental to the ultimate determination of whether an individual can be found negligent, whereas "contribution" as used in the *Contributory Negligence Act* is a method of apportioning fault or blame amongst various parties that have already been found to be negligent. The relationship of a defendant's negligence to the plaintiff's injuries (cause) is different from the same defendant's blameworthiness (contribution). Apportionment of fault once negligence has been made out does not require the same analysis of the causation principles as is necessary to determine whether a defendant is negligent on the "but for" standard.[179]

112. The Appellants attempted to utilize the same or similar arguments before the Court of Appeal which rejected them at paragraph 184:[180]

> In fact, a careful examination of his reasons and his causation analysis with respect to each defendant demonstrates his reliance on the "material contribution" test as opposed to the "but for" test. This was not a case where the trial judge merely used the phrase "material contribution" colloquially, as was suggested by the respondents, while taking a robust and pragmatic view of causation that did in reality, if not in words, utilize the "but for" test.

113. The Appellants then attempt to argue that the Trial Judge simply used "common sense" to find causation. The Respondent submits that common sense cannot become a substitute for resorting to the evidence. As the House of Lords stated in *Fairchild v. Glenhaven Funeral Services* at paragraph 150:[181]

> [E]ven though it is always for the judge rather than for the expert witness to determine matters of fact, the judge must do so on the basis of the evidence, including the expert evidence. The mere application of "common sense" cannot conjure up a proper basis for inferring that an injury must have been caused in one way rather than another.

D. Application of the *Hanke v. Resurfice Corp.* exception:

114. As this Court stated in *Resurfice*, resort can be made to the "material contribution" test only in exceptional circumstances where two requirements are met: 1) it is impossible for the plaintiff

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[179] ***Cempel v. Harrison Hot Springs Hotel Ltd***. (1997), 43 B.C.L.R. (3d) 219 at para. 19 [**RJA**, Vol. 1, Tab 16].
[180] **Appellants' Record**: MOJ, para. 184 (Vol. 3, Tab 6, p. 176)
[181] ***Fairchild v. Glenhaven Funeral Services Ltd***., [2002] 3 All E.R. 305 at para. 150 [**RJA**, Vol. 1, Tab 31].

to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test; and 2) it is clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff suffered that form of injury. "The impossibility of establishing causation and the element of injury-related risk created by the defendant are central".[182] Both of these requirements must be satisfied in a case for it to qualify as "exceptional". The Respondent submits that neither requirement was satisfied in this case.

i) Not impossible to establish causation on but-for standard

115. The Respondent submits that the present case does not fit any of the recognized categories of cases where the onus has been relaxed. This is not a situation similar to the one in *Lewis v. Cook*,[183] where it was impossible to prove which of the two negligent hunters fired the bullet that struck the plaintiff. Nor is this a case similar to *Fairchild v. Glenhaven Funeral Home Services Ltd.*,[184] where it was impossible to prove which employer's breach of duty in exposing an employee to asbestos caused the employee's cancer. This case does not involve principles of causation unknown to modern science. The deaths of the miners were caused by the violent and deliberate act of Roger Warren. There is nothing unusual or difficult in this case about proving causation.

116. The Appellants argue that the Trial Judge would have been justified in using the exception to the "but-for" test because an expert was not permitted to give evidence as to Roger Warren's motives for committing the murders.[185] The Trial Judge concluded that the expert's evidence was inadmissible on grounds that he was "not properly qualified to give evidence in any of the areas proffered".[186] Inadmissibility of evidence on the basis of lack of relevance, reliability or necessity or lack does not fit any of the categories of cases where the courts have found it necessary to apply the "material contribution" test rather than the "but-for" test. This is not a case where medical science was necessary to prove causation. No amount of scientific evidence

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[182] ***Hanke***, *Supra*, at para. 28
[183] ***Lewis v. Cook***, [1951] S.C.R. 830 (S.C.C.).
[184] ***Fairchild***, *Supra* at paras. 40-43.
[185] **RJA**: Trial Judge, 5966:5-43, (Vol. 9, Tab 131, p. 135).
[186] **Appellants' Record:** Trial Judge, 5982:15-17, (Vol. 9, Tab 131, p. 151); Trial Judge, 5969:15-30, (Vol. 9, Tab 131, p. 138); Trial Judge, 5981:26-30, (Vol. 9, Tab 131, p. 150).

could make any clearer what was already obvious: Warren's crime was deliberate and egregious and the work of an individual who understood the consequences of his actions.

OTHER ISSUES

Personal Consumption Ratios in the Appellants' Dependency Claims

117. The Respondent supports and endorses the submissions respecting damages presented herein by the Respondent GNWT.

Tax Gross-up and Management Fees

118. The Respondent supports and endorses the submissions respecting damages in the Factum of the Respondent GNWT.

Damages Claimed by the Appellant O'Neil

119. The Respondent supports and endorses the submissions respecting damages claimed by the Appellant O'Neil in the Factum of the Respondent Bettger.

PART IV – SUBMISSION ON COSTS

120. Pinkerton's seeks costs of this appeal and affirmation of the determination by the Court of Appeal of the Northwest Territories of costs relating to each of the preceding steps.[187]

PART V – ORDER SOUGHT

121. Pinkerton's respectfully submits that the within appeal be dismissed with costs in the cause.

[187] ***Fullowka v. Royal Oak Ventures Inc.,*** 2008 NWTCA 9, [2008] 12 W.W.R. 60 (N.W.T.C.A.) at 37.

All of which is respectfully submitted, this _____ day of April 2009.

DUNCAN & CRAIG LLP

Solicitors for the Respondent Pinkerton's of Canada Limited

Per: _____
JOHN M. HOPE, Q.C.

Per: _____
MALKIT ATWAL

PART VI - TABLE OF RESPONDENTS' AUTHORITIES

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