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)

FACTUM OF THE RESPONDENT
THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)
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Part I Overview and Statement of Facts

Overview

1. Roger Warren murdered nine men on September 18, 1992. He acted alone and in secret. The central issue in this action is why anyone other than Warren should be held responsible for the murders he committed.

2. This Respondent has had the opportunity to review the Facta of the other Respondents in draft and adopts and supports the arguments made therein.

Statement of Facts

3. On May 22, 1992 a long and bitter strike began at the Giant Mine in Yellowknife. The Government of the Northwest Territories (the "GNWT)" had been concerned even before the strike began that the mine was vulnerable to acts of sabotage and that union officers might not be able to control "out of hand" strikers and noted that these matters fell within police jurisdiction (RFJ ¶ 61, V. 1)[1]. Indeed, the alarming nature of events at the beginning of the strike prompted the GNWT to ask the RCMP to supply a special task force to assist the local RCMP officers (about 30) who had all been seconded to deal with strike related occurrences (RFJ ¶ 79, V. 1).

4. By May 27 and 28, the Acting Chief Inspector of Mines for the Northwest Territories, Lloyd Gould, had become so alarmed by events at Giant that he sought direction or support from the Deputy Minister and then from the Minister of Safety and Public Services to issue an order to close the mine. He had never sought support from the Minister before but did so on this occasion as "he questioned his jurisdiction believing the situation to be inherently criminal" (RFJ ¶ 90, V. 1). The Minster refused to provide advice out of concern that it would be political interference in an order; an order that he as Minister might be asked to review on appeal (*ibid*). However, Gould did get legal advice from the Acting Deputy Minister of Justice, Jeff Gilmour,

[1] The Reasons for Judgment from trial ("RFJ") are reproduced under Part II, Tab 2 in Volume 1 and Volume 2 of the Joint Appellant's Record. All further references to the Reasons for Judgment from trial provide the paragraph citation and the Volume in which that paragraph is contained.

that "if an order was issued to close Giant, Royal Oak would be successful in overturning it in a matter of hours" (RFJ ¶ 91, V. 1). As found by the Trial Judge, Gould "ultimately decided not to intervene, for reasons aforementioned and in part due to discussions that he had with Gilmour about ongoing initiatives such as arbitration and mediation." (RFJ ¶ 91, V. 1)

5. The GNWT does not have jurisdiction over labour relations[2]. The anticipated arbitration and mediation initiatives would be by the Federal Minister of Labour and his department which had jurisdiction over the labour dispute under the *Canada Labour Code*, R.S.C. 1985, c.L-2. Members and Ministers of the GNWT were fairly extensively involved from the outset of the strike in attempts to prompt the Federal Minister to have his department take more immediate and interventionist steps to resolve the strike (see RFJ ¶¶ 213 - 220, V. 1).

6. The first weeks of the strike were highly volatile, with two alarming instances of incursions by large numbers of strikers onto working areas of the mine property on May 26 and June 14, in addition to already occupying the west side of the vast mine property (RFJ ¶ 78, V. 1). During these early weeks of the strike, Royal Oak applied to the Supreme Court of the Northwest Territories for injunctions to constrain picketing activities. After the events of June 14th, Royal Oak, having initially obtained an injunction to limit the number of picket sites and picketers, applied for a variation to empower the RCMP to arrest and remove anyone found to be violating the injunction. Justice deWeerdt granted the variation in a judgment issued on June 18th commenting on "the importance, which the Court indeed recognizes, of leaving matters as far as possible to the professional judgment of the police to deal with the present potentially volatile situation with a minimum of constraint in the form of directions or other orders from the Court" (RFJ 108, V. 1 and Exhibit 1179 at page 12) [3].

7. While the GNWT did not have jurisdiction over labour or criminal matters, it did have jurisdiction over occupational health and safety in mines. The Mine Safety Division had to address how to administer the *Mining Safety Act*, R.S.N.W.T. 1988, c. M-13 and the *Mining*

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[2] RFJ ¶ 213, V. 1 and see *Yellowknife (City) v. Canada (Labour Relations Board)*, [1977] 2 S.C.R. 729, (Respondents' Joint Book of Authorities ("RJA") Vol. III, Tab 36)

[3] Exhibit 1179, Reasons for Judgment of the Honourable Justice M.M. de Werdt date June 18, 1992, p. E-09109 (Respondents' Joint Record, ("RJR") Vol. VIII, Tab 8)

Safety Regulations R.R.N.W.T., 1990 c. M-16 (Part VII of this Factum) against the challenging and distracting background of this strike. Like others in the GNWT, even before the strike began the Mine Safety Division (or "MSD") was concerned about the potential for the strike at Giant to be difficult and violent. "It was determined and maintained that MSD would not take sides in the dispute but rather continue with business as usual." (RFJ ¶ 51, V. 1). The activities of the Mine Safety Inspectors were described by the Trial Judge as follows:

> "Throughout the strike, the MSD of the NWT conducted periodic and event-related inspections at Giant. It was almost daily that the inspector visited the mine, and if a tour was required then a committee member from the occupational health and safety committee was assigned to attend. From the beginning of the strike until the fatal blast, the MSD conducted 11 official inspections at Giant. Reports were always completed onsite and required the signature of the manager, and, when necessary, the inspector discussed his findings and any required remedies. On occasion, both the RCMP and mine inspectors responded to specific incidents. When it was determined that an event was not accidental, the RCMP assumed full responsibility for the investigation." (RFJ ¶ 256, V. 1)

8. While there were no further mass incursions onto the mine property after June 14th, the tension continued, as did acts of vandalism such as chains being thrown over power lines to short them out (RFJ ¶ 113, V. 1), holes being made in tailings lines (RFJ ¶ 127, V. 1) and suspicious fires being found at locations such as the garbage dump or a pump-house shack (RFJ ¶ 132, V. 1). While still tense, the general impression was that the strike had become less volatile by the end of June and into July, causing Royal Oak to reduce the number of Pinkerton's guards on site. "The RCMP was advised of the decrease and notified Royal Oak that the RCMP was also downsizing the number of officers in Yellowknife because they believed the violence had reduced . ." (RFJ ¶¶ 126 and 128, V. 1).

9. The sole incident involving the underground portion of the mine was at the end of June when graffiti was found in the mine. From that time up to mid-September, acts of vandalism and occasional confrontations continued on an irregular basis. As noted by the Trial Judge, by the end of July "the atmosphere at Giant appeared much less tense and anxious, with quieter picket lines and fewer, although more dangerous, disturbances" (RFJ ¶ 140, V. 1). The reference to

"more dangerous" disturbances is likely a reference to two occasions on which property on the surface at Giant Mine was damaged by the use of explosives; on July 21st when a bomb blew a watermelon sized hole in a television satellite dish on a hill above the town site on the mine property (RFJ ¶ 135, V. 1) and on September 2nd when another explosion damaged equipment at the vent shaft (RFJ ¶ 155, V. 1).

10. Then, on September 18th, nine miners travelling to work in a tunnel 750 feet below the surface were killed by the bomb Roger Warren had set early that morning. The details of this event and the shock and disbelief that was felt throughout the community have been related by other Respondents in their Facta and need not be repeated here.

11. The Appellants having sought to have this Honourable Court grant claims for tax gross-up and management fees that the Trial Judge dismissed, it is necessary to note that the Workers' Compensation Board of the Northwest Territories (the "WCB") paid tax free pensions to the nominal Plaintiffs and brought this subrogated action in their names. As noted by the Trial Judge:

> "I reiterate that it is only the WCB who has property in the award here. Two things must be noted at this juncture: firstly, the WCB is the beneficial plaintiff under the statute; and, secondly, depending on legal fees and costs recovered, the Plaintiffs might recover little or nothing under s. 13(4) of the Workers' Compensation Act. The costs issue will not be determined until after judgment is rendered. The statute renders it impossible to determine the compensation payable." (RFJ ¶ 1052, V. 2)

12. The WCB, as the *dominus litus*, made no attempt to assist the Court in determining whether it is was even possible for any of the award to be recovered by the nominal Plaintiffs; for example, by putting in evidence the amount of "all legal costs incurred" which would have to be fully recovered before any discretion to pay any portion of the award to the nominal Plaintiffs could arise.

13. The Trial Judge granted the action against eight Defendants, five of whom appealed. With one of the appellants, Royal Oak, settling after having filed its appeal, four Defendants, now the Respondents before this Honourable Court, proceeded to the Court of Appeal. The

Court of Appeal reversed the Trial Judge and dismissed the actions against those four Defendants, finding, in the case of the GNWT, that it did not owe a duty of care (CAMJ ¶¶ 99, 100 and 125 - 129)[4], that the Trial Judge had failed to articulate a standard of care for the GNWT (CAMJ ¶ 130), that the record did not disclose any negligent conduct by the mining inspectors (CAMJ ¶ 132) and that Trial Judge had erred in his causation analysis both in failing to apply the "but for" test and in failing to consider each Defendant's acts or omissions individually when determining causation (CAMJ ¶¶ 201 and 204 - 205).

Part II Statement of Issues

Issue 1 Duty of Care

- 1a) The murders were not reasonably foreseeable
- 1b) There was no proximate relationship with the GNWT to guard against murder
- 1c) Policy concerns would, in any event, negate any prima facie duty of care

Issue 2 The only standard of care in evidence was met by the GNWT

Issue 3 Causation

- 3a) The case at hand did not meet the criteria for applying the material contribution test
- 3b) Neither the facts found by the Trial Judge nor the evidence before him satisfied the but for test

Issue 4 The Trial Judge correctly dismissed the claims for tax gross up and management fees

Issue 5 The Trial Judge erred in over-assessing damages based on a novel theory offered by the Plaintiffs' expert that was without reliable foundation and was contrary to precedent

[4] The Court of Appeal's Memorandum of Judgment, "CAMJ", is reproduced at Part II, Tab 6 of the Appellant's Joint Record, Volume 3. All further references to the Court of Appeal's Memorandum of Judgment are to that Part, Tab and Volume.

Part III Statement of Argument

Issue 1 Duty of Care

Issue 1a) The murders were not reasonably foreseeable

14. The Court of Appeal provided a relatively brief analysis of foreseeability, commenting that "some cases have required an enhanced level of foreseeability in these situations", and that in the circumstances of the case at hand the "scenario, combined with the intervention of an intentional act of another party (Warren), pushes the legal concept of foreseeability to the edge", but then deferred to the Trial Judge on the basis that foreseeability is a matter of mixed fact and law and that they did not see any palpable and overriding error (CAMJ at ¶ 55).

15. With the greatest respect to the Court of Appeal, the Trial Judge erred in finding that Warren's murder of nine miners in the underground was reasonably foreseeable. Courts, including this Honourable Court, have held that losses caused by the intentional or criminal act of another party are reasonably foreseeable when the act causing the loss was the "very kind of thing likely to happen" [5]. While the Trial Judge did state the conclusion that Warren's act was the very kind of thing that was likely to happen, neither the facts as he found them nor his reasoning justified that result. It was a reversible error to conclude that the events occurring before September 18th made it reasonably foreseeable that someone would, as Warren did, murder miners in the underground.

16. The requirement that harm occasioned by the intentional, criminal act of another should be the "very kind of thing likely to happen" before it can be said to be reasonably foreseeable is sound in precedent and policy. As noted by the Court of Appeal:

> "In law, "foreseeable" does not mean "imaginable". The human mind is capable of imagining all sorts of fantastic and bizarre

[5] see *Home Office v. Dorset Yacht Co. Ltd*,. [1970] 2 All E.R. 294 (H.L.) per Lord Reid at p. 300 (RJA Vol. II, Tab 5), *Booth v. St. Catherines (City)*, [1948] S.C.R. 564 per Kerwin J. at 569 and per Estey J. at 584 (RJA Vol. I, Tab 10), and, generally, the cases reviewed under the heading of *novus actus interveniens* in the RFJ at ¶¶ 640 - 647, Vol. 2

> situations, but that does not make them "foreseeable" in law. The legal concept of foreseeability incorporates the idea that the event is not only imaginable, but that there is some reasonable prospect or expectation that it will arise. As Oliver L.J. said:
>
> > 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 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."[6]

17. Descriptive characterizations of what foreseeability amounts to as stated from time to time in general negligence cases are ill-suited to cases where one defendant is charged with being responsible for harm that was intentionally caused by someone else. The addition of an intentional or criminal actor bent on causing harm creates a remarkably broader range of possible results or risks than what might be expected when, as in the vast majority of cases, there is no such actor and all parties involved are assumed to be acting within the ranges of reasonable and normal behaviour.

18. To pick a basic scenario, a normal and reasonable person coming to someone's home might ring the door bell or leave a letter in the mail box or a parcel on the door mat. We can find that the home owner should owe a duty of care given those assumptions as it not unreasonable to expect the home owner to actually think about and prepare for such entrants and their expected activities; the burden so imposed on them is reasonably contained and not overly onerous.[7]

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[6] CAMJ at ¶ 55, citing *Lamb v. Camden LBC*, [1981] Q.B. 625 at 642 (C.A.)
[7] see for example *Jordan House v. Menow*, [1974] S.C.R. 239 at 247 (RJA Vol. II, Tab 14), cited in *Crocker v. Sundance Northwest Resorts Ltd*., [1988] 1 S.C.R. 1186 at 1195 - 1196, (RJA Vol. I, Tab 22)

19. The scenario is obviously different if one contemplates the prospect of an entrant bent on intentionally damaging property or injuring, or even killing, someone. The person and activity in question can no longer be described as "normal and reasonable". They are by definition abnormal and deviant. What acts might be committed by a thief, a vandal, an arsonist or a murderer? What about an entrant who is floridly psychotic, grossly inebriated or under the influence of a powerful hallucinogen? The reasonable person knows that there are such people and would have to admit, if asked, that it is possible that they could come on to their property. Should the law declare all such possible actors to also be reasonably foreseeable and thereby impose a requirement on the home owner to think of all possibilities in the remarkable range of acts that might be committed by any or all of these potential entrants and guard against the harm they might cause to themselves, to other persons on the property or to adjacent property?

20. Generalizations or descriptions of what "reasonable foreseeability" amounts to in general negligence cases would lead to startling results if applied to cases in which a defendant is sought to be held liable for harm intentionally caused by another. Reasonable foreseeability has been characterized in cases without such an intentional actor as being that "one can foresee in a general way the class or character of injury which occurred" and that it is not necessary to "foresee the "precise concatenation of events"" [8]. A homeowner knows, or should know, that a negligently operated barbeque may start a fire which could spread to and damage the house next door. Does the home owner owe a duty with respect to a fire caused by an arsonist trespassing on their property because the fire is of the "same class or character" as an accidental fire, with the involvement of the arsonist being irrelevant as the home owner does not need to have foreseen "the precise concatenation of events"?

21. On a superficial or rhetorical level, the damage or injury intentionally caused by an arsonist, thief, vandal or murderer may well be of the same "class or character" as damage or injury resulting from an accident. On that approach, and if no further consideration or limitation arises from the addition of an intentional criminal actor, the range of risks 'reasonably foreseeable' would be so extensive and varied that it would be unreasonable, unjust and probably

[8] Dickson J., in *Ontario (Minister of Highways) v. Côté*, [1976] 1 S.C.R. 595 at 604 (RJA Vol. III, Tab 6) as cited by the Trial Judge at RFJ ¶ 620, V. 1

absurd to seriously expect any home owner to anticipate all such potential risks and take steps, which could be equally absurd in their breadth, that would be necessary to prevent such harm. Our home owner may well lock their doors while away to protect against the intentional act of theft, but may not have locked the garden shed to prevent an arsonist from using the gas for the lawn mower to start a fire. If they had heard of a rash of arson in the neighbourhood they might think to lock the shed with the gas can in it, but would probably not also consider that the axe left by the wood pile might become a murder weapon or that a mentally ill person might use the ladder by the side of the garage to climb to the roof of the house and jump off thinking they could fly.

22. Secondly, the duty to foresee the acts of other persons acting normally and reasonably includes the assumption that those persons will act as allies in the avoidance of risks and prevention of losses; that they will also take reasonable care to protect themselves and others. This premise, usually presumed without the need to be stated, has occasionally been expressly recognized in formulating duty of care; for example, in the common law of occupiers' liability in which an occupier has a duty to guard against conditions that might pose a risk to invitees exercising reasonable care for their own safety.[9]

23. Again, the scenario is remarkably different if one contemplates the actor who is not acting so as to avoid damage or injury, or even acting carelessly, but is actually intent on causing damage or injury. Precautions that might work well to prevent accidents may prove wholly ineffective when a stranger is actually intent on causing damage or injury. The steps and measures to guard against losses caused by someone intent on committing them will probably be different, and no doubt more onerous, than the measures to prevent losses when other persons are assumed to be also acting to prevent them. Neither can it be presumed that all possible criminal or intentional acts of harm can be prevented with the same measures. One criminal might be deterred by making sure all windows and doors of a home are highly visible and well lit, for other criminals an armed police officer in the home does not prevent the crime but only becomes another victim.

[9] *Indermaur v. Dames*, [1866] 1 L.R. 274 at 288 (RJA Vol. II, Tab 7)

24. For the foregoing reasons, justice and common sense require that the intentional harm caused by another party has to be the 'very kind of thing that was likely to happen' before it will be considered to be reasonably foreseeable and thereby potentially justify the imposition of a duty of care on a defendant to take steps to guard against or prevent that harm. It is only in those cases where the Defendant is forewarned of the very act committed that they will be forearmed with the information that may allow them to prevent it. It is only when they have sufficient and specific knowledge of what kind of act is going to be committed, by what method and at what time and location that they will truly have any fair chance to prevent the loss. Holding that such losses are reasonably foreseeable in the absence of such information, and thereby imposing on a remarkably broad class of prospective defendants a duty to prevent such losses, does not achieve a fair balance but creates a unjustifiable disproportion between the burden so imposed and the sympathetic instinct to provide compensation to the victims of such intentional acts.

25. Recognizing that this is what reasonable foreseeability entails in such circumstances is actually not a new "test" or different standard. It is what the well recognized test for foreseeability produces when applied to this challenging factual scenario. As recently confirmed by this Honourable Court, it is the essence of the test for reasonable foreseeability to look at the harm that befell the Plaintiff and consider (without the benefit of hindsight) whether a reasonable person in the Defendant's situation at the time of the alleged act or omission would have actually thought that the Plaintiff would be "so affected", and indeed "so closely and directly" affected, by the act or omission:

> "25 The basic proposition 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" (*McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), *per* Lord Atkin, at p. 580). The question is whether the person harmed was "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected" (*McAlister (Donoghue) v. Stevenson*, at p. 580)."[10] (underlining added)

[10] *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83 at ¶ 25 (RJA Vol. III, Tab 27)

26. This is the test for reasonable foreseeability that must be considered, and considered carefully, when what is at stake is the imposition of a new duty of care.

27. The approach taken by the Trial Judge to foreseeability, and his reasoning in finding that element to be satisfied, were contrary to all of the precedents and principles outlined above. His view of how great he expected the GNWT's powers of foresight to be was expressed in a comment made when describing the ambit of their duties as he saw them - "They were required to be more vigilant during this strike, knowing day-by-day of the antics of all the parties involved." (RFJ ¶ 807, V. 2). While repeatedly stating that the murders were the "very kind of thing that was likely to happen" the only analysis or reasoning provided for this remarkable conclusion was that other criminal acts had been previously committed, that other incidents could have resulted in serious injury or death (but, obviously, did not) and so the murders were within the same "general class or character" as those prior events and ought to have been foreseen. For example:

> "The deaths of the 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. . . (RFJ ¶ 664, V. 2)
>
> "I reiterate once again that, with the imputed knowledge of these Defendants of the activities by the strikers, the killing by an unlawful act is but an elevation or extension of the threats to kill, the physical assaults occasioned on replacement workers, on Tolmie and Pinkerton's security and the explosions carried on, particularly of the vent shaft and satellite dish, any of which could have caused deaths." (RFJ ¶ 811, V. 2)
>
> "In other words, the killing was the very kind of thing that was likely to happen as I have illustrated herein. It is no defence that the accident was caused in a way that could not have been foreseen if the loss was of the same general class or character as the loss foreseeable." (RFJ ¶ 812, V. 2)
>
> "Mr. Polsky's attempt to isolate Warren's act and argue that it be treated singly does not accord with the evidence. It was but a part of a series of connected criminal activities. If, for example, one of Bettger's criminal acts caused a death, as it easily could have,

> would the same argument have been advanced? I doubt it." (RFJ ¶ 960 , V. 2)
>
> **"**I disagree with the argument that Warren's act was not "the very kind of thing which is likely to happen" as discussed at length in the section dealing with the defence of *novus actus interveniens, supra***.** I repeat that, firstly, there was talk of killing among the Defendants, particularly strikers, from the inception of the strike. Secondly, acts such as blowing up the satellite dish and vent shaft could have caused death. Thirdly, Warren's act was but an elevated crime in the hierarchy of criminal code offences that the strikers were committing virtually daily, no less or no more criminal than the offences that Bettger and Shearing committed and for which they were imprisoned." (RFJ ¶ 962, V. 2)

28. In order to justify the conclusion that the murders were reasonably foreseeable and that a duty of care might arise, the Trial Judge reasoned that the Defendants, knowing some criminal acts had been committed, then became responsible to foresee and guard against any possible 'criminal' act. The extensive fact findings by the Trial Judge reveal that 'criminal acts' had been committed at vulnerable points to the mine's operations (such as tailing lines, ventilation equipment or power lines) and non-vital points (like the satellite dish) and at locations well away from the mine site such as parking lots in town or even at the homes of replacement workers. They happened with varying, albeit decreasing, frequency during the nearly four months between the start of the strike and the day of the murders. To justify the imposition of a duty of care on the Defendants in this case, the Court of first instance formulated a level of reasonable foreseeability by which the Defendants were required to foresee, and guard against, any loss that any striker could cause by any criminal act at any time anywhere on or off of the vast Giant Mine property, above or below ground. Such powers of foresight do not sound like those of a "neighbour" but of some omniscient and omnipotent guardian.

29. Is mass murder the same "very kind of thing" as a fight in a parking lot or setting a bomb to go off at night to damage ventilation equipment? In what possibly relevant sense can it be said that murdering nine men is "no more criminal" than blowing up a TV satellite dish or ventilation equipment? Is it appropriate to postulate, or infer, that a mass murder is "but an elevation" from acts such as death threats, vandalism or strike line violence? Can it be inferred that the defendants should have expected such an 'elevation' to murder when no fact finding or

opinion explained why such an elevation was or ought to have been expected and that it would lead to such an extreme act?

30. In *Childs v. Desormeaux*, the Court of first instance when conducting the duty of care analysis concluded that it was "reasonably foreseeable that Desmond Desormeaux was not capable of driving and was putting his passengers, and other users of the highway, at grave risk"[11]. This Honourable Court found that this conclusion was in error. The trial judge's sole reasoning for finding that the Defendants should have known that Mr. Desormeaux was too drunk to drive was that he had driven while drunk in the past. This "inferential chain from drinking and driving in the past to reasonable foreseeability that this will happen again is too weak to support the legal conclusion of reasonable foreseeability . . ."[12]. In the case at hand the Trial Judge did not infer from a history of vandalism, rock throwing, vulgar abuse and threats that there would be further acts of vandalism, rock throwing, vulgar abuse and threats. He inferred, without providing any justification for this conclusion, that the Defendants should have reasonably foreseen that such acts would be 'elevated' or 'extended' to murder.

31. In summary, the only way to leap from the facts as found to the conclusion that the murders ought to have been reasonably foreseen is by resorting to speculative inferences or the use of hindsight. The murders were not reasonably foreseeable and so no prima facie duty of care could be owed by any of the Defendants.

Issue 1 b) There was no proximate relationship with the GNWT to guard against murder

32. The factors giving rise to proximity between a plaintiff and a public authority, if any, must arise from the governing legislation[13]. A review of the legislation at issue, the *Mining Safety Act*, R.S.N.W.T. 1988, c. M-13 and the *Mining Safety Regulations*, R.R.N.W.T. 1990, c. M-16, discloses no "close and direct" relationship between the miners murdered by Roger Warren and the GNWT and its mine safety inspectors. As stated by the Court of Appeal:

[11] 217 D.L.R. (4th) 217 (Ont. S.C.J.) at ¶ 98 (RJA Vol. I, Tab 18)
[12] *Childs v. Deormeaux*, [2006]1 S.C.R. 643 at ¶ 29 (RJA Vol. 1, Tab 19)
[13] *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at ¶ 43 (RJA Vol. I, Tab 20), *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 at ¶ 9 (RJA Vol. I, Tab 30)

> "A reading of the statute discloses, however, that it is concerned with accidents and workplace safety, and not with labour relations, crime prevention or criminal acts. The risk that materialized was completely outside the scope of the statute. Consequently, the *Mining Safety Act* did not fix the GNWT and its mining inspectors with the responsibility to reduce the risk of intentional criminal conduct. In the circumstances of this case, therefore, the statute does not create a relationship of proximity between the respondents and the GNWT that encompasses the risk that arose." (CAMJ ¶ 125)

33. Indeed, the Trial Judge came to very nearly the same conclusion concerning the purpose of this legislation, stating that "[t]he objective of the relevant statutes . . . [is] the promotion of safety through standards and practices intended to reduce the risk of accidents" (RFJ ¶ 804, V. 2). Oddly, and rather than realizing that this created an obvious disconnection between the legislation and the matters at issue in the action he concluded, without explanation, that "[t]here is a connection between the purpose, the context of the *Mining Safety Act* and matters that are in issue in this action" (RFJ ¶ 810, V. 2).

34. The Appellants suggest that both the Trial Judge and the Court of Appeal were wrong and that they ought to have concluded that object and scope of the *Mining Safety Act* did extend to the murders at issue on the basis that it is 'unsafe' to be the victim of a murderer and that general provisions in the legislation direct mine inspectors to order the cessation of work and removal of persons from any mine or portion of a mine that the inspector considers to be "unsafe" (s. 42(1), an argument bolstered by the observation that this general provision contains no exclusion for "strike related violence" (thereby assuming, presumably, that Warren's act of murder is appropriately described as such).

35. Such an argument turns the accepted principles for the interpretation of legislation on their head. The Appellant's analysis assumes, without admitting as much, that a general provision in a statute should be read on its own and, unless it is expressly limited, will be presumed to confer unlimited jurisdiction to any matter that could be argued to meet any possible

sense of the words it contains. The law does not support, but contradicts, such an approach. As confirmed by this Honourable Court:

> "In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[14] (underlining added)

36. A broad or general provision in a statute does not expand jurisdiction beyond the scope indicated by the rest of the statute; instead, the legislation, including statute and regulation, must be read as a whole to determine the proper scope of its objects, which scope then defines the ambit of any broad or general provision the legislation may contain. As one writer has described these principles:

> "General words in a legislative enactment can have their scope limited because of the aim of the legislation. *Cessante ratione legis, cessat lex ipsa*:
>
> > General words, however broad, in the absence of compelling reasons to the contrary, must be limited to the objects of the Act."[15]

37. When reading the legislation as a whole, two other, and arguably interrelated, considerations should be borne in mind; firstly, that each statue has a purpose, either to reform the common law, or, in the case of 'program legislation', to regulate a form of activity or address a social concern, and, secondly, that each statute does not stand in a vacuum but is part of an extensive legal framework including other statutes, the *Constitution Acts* of 1867 and 1982 and the common law[16]. Certainly the *Mine Safety Act* and *Regulations* have the purpose of reducing accidents, should they also have the purpose of dealing with "strike-related violence"? Arguably, the fact that crime and labour relations are dealt with specifically, and extensively, by

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[14] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at ¶ 26 (RJA Vol. 1, Tab 7)
[15] P-A. Coté, *The Interpretation of Legislation in Canada*, 3d ed. (Carswel: Scarborough, 2000) at 395 (RJA Vol. III, Tab 39)
[16] See R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 255 - 263, 411 - 412 and 459 - 461 (RJA Vol. III, Tab 44)

federal legislation makes it less likely as the proposed "purpose" has already been dealt with, and dealt with thoroughly.

38. Labour relations in the Northwest Territories are governed by the *Canada Labour Code* R.S.C. 1985, c. L-2. There is also under that legislation a specialized public authority, the Minister of Human Resources and Labour, and a specialized tribunal, the Canada Labour Relations Board, dedicated to overseeing the delicate balances in labour relations; a balance which fell to be reviewed by this Honourable Court with respect to this very strike[17].

39. Criminal activity is, of course, extensively dealt with by the *Criminal Code*, R.S.C. 1985, c. C-46, police forces and the criminal justice system. Indeed, it is well known that the police have a delicate role to play when enforcing the criminal law in the context of a labour dispute. As noted by the Ontario Court of Appeal:

> "Strikes and the picket lines that go with them are evolving human dramas where risks of property damage, personal injury or obstruction of lawful entry are best controlled by flexible and even-handed policing. Only where this fails should the court, with its blunt instrument of the injunction, be resorted to."[18]

40. As indicated in the above quote, the next level and venue for intervention when even-handed policing is alleged to be insufficient to deal with the risks arising from a strike is to seek the assistance of a tribunal such as the Courts through the injunction process, where, again, the risks of strike activity will be balanced against the rights to collective bargaining and freedom of expression.

41. It would seem distinctly odd to suppose that the general provisions in the *Mining Safety Act* would clothe the Mine Safety Inspectors with authority to issue orders to address "strike related violence" when far more specific and sophisticated legal regimes such as the *Criminal Code* and the *Canada Labour Code* exist to address such matters and when specialized experts in

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[17] *Royal Oak Mines Inc. v. Canada (Labour Relations Board),* [1996] 1 S.C.R. 369 (Appellants' Joint Book of Authorities, Vol. III, Tab 103)

[18] *Industrial Hardwood Products (1996) Ltd.* v. *I.W.A.-Canad , Local 2693*, (2001), 196 D.L.R. (4th) 320 (Ont. C.A.) at ¶ 16 (RJA Vol. II, Tab 8)

dealing with such issues, such as the Federal Department of Labour and Royal Canadian Mounted Police, are not only clearly tasked to deal with such matters but cautioned to deal with them delicately.

42. When all of these accepted methods of interpretation are applied the result is, as found by both the Trial Judge and the Court of Appeal, that the purpose and scope of the *Mining Safety Act* and *Regulations* is the prevention of accidents.

43. In marked contrast to the foregoing, the Appellants do not suggest that the scope and object of the legislation should be construed by reading it as a whole and in context using accepted methods of interpretation. Indeed, they use the same fallacious approach of ignoring the object and context of legislation in comparing the case at hand to the administrative review matter before the Federal Court of Appeal in *Martin v. Canada (Attorney General)*[19]. Perhaps it would be correct to interpret the occupational safety legislation that applies to Park Wardens performing law enforcement duties as extending to risks arising from criminal activities including acts of violence. Whether that is so cannot be determined from this decision given that it turned on an administrative tribunal's mishandling of evidentiary issues; a tribunal which, in any event, would be free to interpret the legislation incorrectly, so long as it was not unreasonable. Even if the *Martin* decision was about the correct interpretation of legislation, which it was not, the fallacy of comparing it to the case at hand is that even if the workplace safety legislation that applies to Park Wardens carrying out law enforcement duties did apply to risks of criminal activity that subject matter is obviously a marked contrast to a statute that applies exclusively to miners working in mines.

44. If possible, the other case cited by the Plaintiffs is of even less assistance[20]. The fact that an administrative tribunal dealt with a matter concerning violence in the workplace as being a workplace safety issue without any mention of reviewing the legislation as a whole, or even considering the issue of jurisdiction, is a rather poor basis to suggest that long standing principles

[19] 2005 FCA 165 (Appellants' Joint Authoritites, Vol. III, Tab 69)
[20] *Skyjack v. Hutchinson*, [2007] O.L.R.B. 92 (Appellants' Joint Authorities, Vol. III, Tab 107)

of interpretation should be suddenly abandoned (to be fair to the tribunal, there is no suggestion that such questions were raised by anyone).

45. Lastly, and in a further departure from accepted law, the Appellants suggest that the proximity necessary to ground their claim against the GNWT should be found not on a proper review of the legislation, but in two pieces of evidence gleaned from the trial record; the evidence of one of the widows of what she heard her husband say about the mine inspectors and the opinion expressed by one of the Plaintiffs' experts on the scope of occupational health and safety practices. There is no indication in the Reasons for Judgment that either piece of testimony was accorded any weight, or even accepted in evidence, by the Trial Judge.

46. To start with the testimony of Ms. Neill, the Appellants quote this at paragraph 22 of their Factum as showing that the "miners relied on government inspectors to make sure their workplace was safe", as Ms. Neill put it "any time the stuff happened". It is worth noting that the Plaintiffs are unable to provide any such statements from any of the nine trial witnesses who actually were miners. In any event, the next two lines of Ms. Neill's testimony after the portion quoted by the Plaintiffs probably explain why this testimony was not mentioned or even alluded to by the Trial Judge:

> "22 Q And these are views that Chris expressed to you?
> 23 A Absolutely." [21]

47. Patently, the evidence was hearsay, a fact which the Appellants do not acknowledge. The Plaintiffs can provide no citation to suggest that the Trial Judge accorded any weight to this evidence, or even accepted it as evidence for that matter, and provide no explanation for how or why this Honourable Court should do so now.

48. Indeed, it would appear that this single piece of hearsay testimony is the only thing they could find in the whole of this massive record to accord with their assertion that miners relied on the GNWT to protect them against criminal acts and violence. At paragraph 2 of their Factum they represent that it was a "fact" that "replacement workers relied on Royal Oak and

[21] Examination of Ms. Tracey Neill, (Joint Appellants' Record, Part IV, Vol. VII, Tab 99-56, p. 166)

Pinkerton's and on the Government of the Northwest Territories ("GNWT") to take reasonable steps to ensure that their workplace was safe" and then provide citations to two paragraphs from the Trial Decision and three from evidence given at trial. However, none of the sources so cited contain any mention of the GNWT or the Mine Inspectors.

49. The second piece of evidence the Plaintiffs ask this Honourable Court to adopt and use to find proximity without a proper review of the governing legislation is the expert opinion of Mr. Peter Strahlendorf (Appellants' Factum at ¶ 52). Again, they do not direct this Honourable Court's attention to the portion of the decision in which the Trial Judge accepted this evidence. Nor could they, as the Trial Judge's comments indicate that he disregarded the opinion they now ask this Honourable Court to accept and rely on:

> "In the result, Dr. Strahlendorf's evidence was a collection of anachronisms and clichés; an academic approach with little or no application to Giant at the relevant time, directed solely to criticism of Royal Oak's operation, all of which demonstrated little value and assistance to the Court because of its utopian viewpoint." (RFJ ¶ 470, V. 1)

50. Having not thought to mention that the opinion they wish this Honourable Court to rely on was found by the judge to have "little or no application to Giant", the Plaintiffs have also overlooked mentioning that they are asking this Honourable Court to overturn the Trial Judge's weighing of evidence and failed to provide any justification for that.

51. To summarize, reviewing the relevant legislation as a whole using accepted methods of interpretation confirms the conclusion of both the Court of Appeal and the Trial Judge that the *Mining Safety Act* and *Regulations* have as their object and scope the prevention of accidents and so, as found by the Court of Appeal, there is no proximate relationship between the GNWT and the Plaintiffs to create a duty of care with respect to the murders at issue. The Plaintiffs suggest, by their form or argument, that this well established approach to determining whether a public authority may owe a private law duty of care can be replaced by evidence from ordinary or expert witnesses that there was reliance on the public authority with respect to matters outside the scope of the legislation. Even if that approach accorded with the established law in this area,

which it does not, the snippets of record they suggest should be used for this purpose are a single piece of hearsay and an expert opinion the Trial Judge found to be useless.

Issue 1c) Policy concerns would, in any event, negate any prima facie duty of care

52. Further, and in any event, even if a *prima facie* duty of care were to be considered in this case, policy concerns would negative its imposition for those reasons as set out by the Court of Appeal (see CAMJ, ¶¶ 76 - 78 and 127 - 129).

Issue 2 The only standard of care in evidence was met by the GNWT

53. The Court of Appeal further dismissed the action against the GNWT on the grounds that the Trial Judge "failed to articulate the standard of care the GNWT had to meet", that "the record does not disclose any negligent conduct by the mining inspectors" (see CAMJ ¶¶ 130 - 132) and that it was difficult to see how the mining inspectors could be found liable when they had sought and relied on legal advice as to the scope of the *Mining Safety Act* (CAMJ ¶ 126). While these grounds are in and of themselves sufficient to support the dismissal of the action against the GNWT, the Appellants have not indicated any objection to the Court of Appeal's ruling on such points. Accordingly, the GNWT is satisfied to rest on such rulings, subject only to the following comments on the issue of standard of care; comments provided as a precaution against the possibility that it should strike this Honourable Court that the issue of standard of care, having not been determined by the Trial Judge, might have been over-looked and would be a potential candidate as an issue to be re-tried.

54. The only answer that a reasonable trier of fact could have reached with respect to the standard of care for the mine inspectors was that their actions accorded with the only standard of professional practice in evidence before the Court.

55. The Court heard not only from the NWT mine inspectors about their practices, but also from the Plaintiffs' expert, Ian Plummer, who had been the Acting Chief Inspector of mine

safety in Ontario. The Court discounted Mr. Plummer's submissions that the NWT Mine Inspectors should have required measures beyond what was explicitly contemplated in the statute or regulations. Mr. Plummer's suggestions for such practices were rejected when it was discovered in cross-examination that these measures were not part of any industry practice and, further, that neither Mr. Plummer nor his department had taken any such steps when they faced a strike at the Placer Dome mine in Ontario which featured, for example, complaints that the company was "using scab labour", that there were incidents of vandalism (reportedly, 265 such acts by one point), arson and violence, sabotage to tailings lines causing leaks of arsenic and, ultimately, that a seven year old boy found a homemade explosive device on a pipeline while out for a walk with his father[22]. Given that Mr. Plummer did not "practice what he preaches" the Trial Judge was not prepared to accept his opinion that the NWT mine inspectors should have adopted practices that he and his own department did not follow (see RFJ ¶¶ 489 - 491, V. 1).

56. However, what was overlooked was by rejecting Mr. Plummer's theory of expanding occupational safety beyond the act and regulations, and doing so on the basis of Mr. Plummer's evidence of his own conduct and that of his department when faced with a violent strike, the only evidence received by the Court was remarkably consistent not only on the accepted industry practices of mine inspectors but even on those practices in the context of a volatile labour dispute at a mine. For example, Mr. Plummer confirmed that communications issued by his department indicated that they would not be taking sides in the dispute, a decision which he agreed was probably sound[23]. He further agreed that a letter issued by his department explained an order to mine management on the basis that they were not being held to any harsher standard owing to the fact that there was a strike[24]. Such steps are obviously in keeping with the approach taken by the GNWT Defendants, as described in the judgment, that the "MSD would not take sides in the dispute but rather continue with business as usual" (RFJ ¶ 51, V. 1). And of course, there was no evidence that Mr. Plummer or his department ever issued an order to close the Placer Dome mine.

[22] Cross-Examination of Mr. Ian M. Plummer, pp. 4283:45 to 4291:31, (RJR Vol. I, Tab 23)
[23] Cross-Examination of Mr. Ian M. Plummer**,** pp. 4290:3 - 4290:46 (RJR Vol. I, Tab 23)
[24] Cross-Examination of Mr. Ian M. Plummer, pp. 4291:1 - 4291-31 (RJR Vol. I, Tab 23)

57. In the result the only evidence adduced from the Plaintiffs' mine safety expert that was accepted by the Trial Judge corroborated the practices of the Northwest Territories mine inspectors on the points such as sticking to the legislation and regulations, not getting involved in the labour dispute and attempting to continue business as normal without favouring either side.

58. Indeed, a document provided by Mr. Plummer further justified such an approach as it contained historical evidence of the alarmingly dangerous nature of mining. Mr. Plummer provided the Court with a paper he had prepared in 1996 for the Westray Mine Public Inquiry (Exhibit 0896)**,** a paper which reviewed four prior Public Inquiries concerning health and safety of mine workers[25]. The very brief descriptions of three these Inquiries stated that they were prompted by "an alarming number of worker fatalities in Ontario Mines", "the death of four miners in a single rock burst" and "a large number of fatal accidents in mines in 1987". Whatever else can be taken from this paper, two very clear points are that the risk of accidents in mines is a lethal danger and one that is notoriously difficult to control. Recognizing these points provides further justification for the approach taken by both the NWT mine inspectors and those in Mr. Plummer's own department - do your best to prevent a labour dispute from disrupting or distracting you, mine management or miners from trying to reduce the risk of accidents.

59. In short, the error of the trial court went beyond simply failing to articulate the applicable standard of care. The Trial Judge failed to note that the Plaintiffs failed to adduce any credible evidence of a standard of practice that the GNWT failed to meet, and instead wound up adducing evidence that corroborated the steps and approach taken by the GNWT inspectors. To the extent that one might hope to find something that would answer to an accepted course of conduct by mine inspectors when faced with a strike at a mine, the NWT mine inspectors met that standard. Unless a professional practice is so obviously negligent that the trier of fact can explain how it was unreasonable on a basis that requires no expert knowledge, it is an error to find negligence when a Defendant has followed accepted industry practices. As put by this Honourable Court:

> "Where a common and accepted course of conduct is adopted based on the specialized and technical expertise of professionals, it

[25] Exhibit 896, Report of Ian M. Plummer on the Internal Responsibility System, pp. E-05637 to E-05638 (RJR Vol. IV, Tab 16)

> is unsatisfactory for a finder of fact to conclude that such a standard was inherently negligent."[26]

Issue 3 Causation

60. The Court of Appeal found, among other errors, that the "but for" test should have been applied but was not. The Appellants have made the interesting argument that the Trial Judge was actually applying the "but for" test even though he repeatedly stated in sections of his Reasons titled "causation" that the defendants "materially contributed to the deaths" and expressly said that the material contribution test was the current test for causation. This argument has been refuted by other Respondents to this Appeal and needs no further comment.

61. However, the Appellants make the further arguments that the Trial Judge would have been justified in applying the material contribution test and that the "but for" test was met by the facts found by the Trial Judge. The refutation of each of these further arguments is dealt with hereunder.

Issue 3a) The case at hand did not meet the critera for applying the material contribution test

62. The Appellants argue that the material contribution test was the right one to apply because they tried to call an expert to testify that the Defendants caused Warren to commit the murders and the Trial Judge refused to hear the opinion on the basis, among others, that the evidence offered was novel science and was not reliable "because of a lack of scientific measure and data" [27]. This, they argue, shows that causation was impossible to prove due to current limits in scientific knowledge.

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[26] *ter Neuzen* v. *Korn*, [1995] 3 S.C.R. 674 at ¶ 44 (RJA Vol. III, Tab 29)
[27] Ruling re Qualifications of Dr. Julio E. Arboleda-Florez 5978:38 - 42 **(**Appellants' Joint Record, Part IV, Vol. IX, Tab 99-131, p. 147)

63. The Plaintiffs asked the Court to hear an opinion from Dr. Arboleda-Florez, a psychiatrist, about the interests of psychiatry and epidemiology in explaining the reasons for violence and, ultimately, to explain and provide reasons for Roger Warren's behaviour. The Trial Judge, after hearing evidence in chief and on cross-examination and argument on the nature of the opinion offered and its basis, concluded that it was not admissible in evidence under the test set out by this Honourable Court in *R. v. Mohan* [1999] 2 S.C.R. 9 [28].

64. The Trial Judge noted that Dr. Arbloleda-Florez would not be providing any opinion that Roger Warren was suffering from any mental illness that would impair his ability to function or prevent him from understanding the consequences of his actions[29]. He held that the opinion was not admissible as it was based for the most part on hearsay evidence[30], that the epidemiological articles he relied on provided little or no appropriate data for his opinion[31], that just psychiatry or just epidemiology were insufficient to comprehend terrorism[32], and, ultimately, that the Plaintiffs had failed to establish that the opinion offered was either necessary or relevant[33].

65. In essence, the Trial Judge found that he did not need scientific opinion evidence to decide the case and, in any event, the opinion offered was not scientific. It is only of passing interest to note that the Plaintiffs' argument distorts the latter point, that the opinion they sought to adduce lacked reliable scientific basis, into the proposition that no scientific opinion could have been offered by any expert. The more important and critical flaw in their reasoning is that they overlook the Trial Judge's determination that the opinion was not necessary to decide the case; a conclusion which is the very opposite of the critical requirement that must exist before the material contribution test can be properly applied - that it was "impossible" to prove causation using the "but for" test without this evidence[34].

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[28] Ruling re Qualifications of Dr. Julio E. Arboleda-Florez 5982:10 - 17, **(**Joint Appellants' Record, Part IV, Vol. IX, Tab 99-131), at p. 151
[29] *ibid*, 5969:3 - 9, at p. 138
[30] *ibid*, 5968:18 - 20, at p. 137
[31] *ibid*, 5969:15 - 19, at p. 138
[32] *ibid*, 5969:20 - 22, at p. 138
[33] *ibid*, 5982:10 - 17, at p. 151
[34] *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333 at ¶ 25, (Appellants' Joint Authorities, Vol. III, Tab 101)

66. Deciding that a proposed expert's opinion was without a reliable scientific foundation is a far cry from finding that the nature of issue of causation in the case at hand was one that only science could resolve and that science, regrettably, could not yet provide an answer. No doubt there are cases where the questions of causation are impossible to answer without a scientific explanation; questions such as why a vertebral disc would develop a bulge, what damaged the nerves in a person's eye or why a steel beam in a bridge would suddenly fail. The only thing to suggest that causation called for some scientific explanation in this case was the decision of the Plaintiffs to retain an expert and ask him to prepare a remarkably novel opinion. Retaining and attempting call a psychiatrist to speculate about the state of mind of a murderer who suffers from no mental problem or defect does not make causation a scientific issue. Courts have, literally for centuries, decided who committed a criminal act and what their state of mind was, and have done that on the more difficult standard of proof beyond reasonable doubt, without needing an expert in psychiatry and epidemiology.

Issue 3b) Neither the facts found by the Trial Judge nor the evidence before him satisfied the but for test

67. The Plaintiffs have also suggested that the Trial Judge did apply the "but for" test and in this regard have argued that the Trial Judge found "substantial causal connections between the Respondents' conduct and the deaths of the nine miners" (Appellants' Factum ¶ 69). They provide no citations to the Reasons for Judgment for this particular assertion. They could not provide any reference to such a finding as the Trial Judge never did state how any specific act committed or omitted by any Defendant had a causal connection to Warren's act of murder. To be sure, the Judgment contains many conclusions or generalizations implying that causation was made out. It contains the promise that the vital causal link to the GNWT would be "illustrated below" (RFJ ¶ 663. V. 2), and then later the claim that there were "detailed reasons set out above" (RFJ ¶ 841, V. 2), but when one reviews the intervening paragraphs one finds only more generalizations and conclusions, and never a single instance in which the Trial Judge explained that 'this defendant had a duty to do this specific act and, had they done it, Warren would not have committed murder'.

68. The Plaintiffs, knowing this void exits, have tried to fill it by quoting a portion of testimony from Roger Warren in which he claims that if there had been a board over the window he crawled though to get into the building over the Akaitcho shaft he would not have knocked the board off to get inside because he was "not into B&E's". They quote this and then state that the Trial Judge "accordingly found" a causal connection to the GNWT, which might lead the reader to assume that the Trial Judge actually did find this testimony to be credible, gave it great weight and used it to justify his conclusions on causation. Such an assumption would be mistaken. Warren's claim that he would not have removed a board from a window is not adopted, accepted, quoted or even alluded to anywhere in the trial decision.

69. Neither is it easy to see how any reasonable trier of fact would have believed this statement and found it sufficiently credible to establish causation. Warren, having lied under oath both in Court at his criminal trial and in discoveries in the civil action admitted, as he had to, that he would lie under oath to avoid incarceration or for honour and would lie if he thought it might help him[35]. The Trial Judge described Roger Warren as an habitual liar (he actually used the more colourful phrase - "inveterate fabulist" (RFJ ¶ 648, V. 2)). Against this backdrop, and while it may be reasonable to believe admissions Warren made against his own interest, it would be nothing less than naïve gullibility to believe the self-serving and incredible claim that while willing to sneak into the mine at night and crawl though hundreds of metres of ladders and tunnels to set a bomb and kill miners, he was otherwise a law abiding citizen who would not commit a "B&E".

70. In any event, this is again an instance of the failure to connect the elements of a tort analysis together as they must be connected to justify the imposition of liability. No evidence before the Court shows that it was negligent to fail to require Royal Oak to place a piece of wood over the window of the shack that housed the Akaitcho shaft. Moreover, and even if the statement were believed, all that it implies is that Warren would not have used Akaitcho to enter the mine. The fact findings clearly show he knew of another way into the mine, the portal he used to exit after planting his bomb, and the Plaintiffs have not supplied any finding or evidence

[35] Cross-examination of Roger Warren, 7556:6 - 7560:5 (RJR Vol. II, Tab 9)

to show that Warren would not have used another point of entry had the prospects at Akaitcho proved discouraging.

71. Along the same lines, the Appellants assert at ¶ 23 of their Factum that the GNWT could have ordered Royal Oak to secure Akaitcho (and provide a citation at footnote 42 to RFJ ¶ 260, V. 1, and portions of the evidence none of which say anything like this) and that if this had been done "Warren could not have set his device". This latter piece of causal reasoning does not appear anywhere in the Reasons for Judgment and the Plaintiffs provide no citation to either the trial decision or the evidence in support of such a conclusion. Apparently, they hope the reader will accept it without requiring either supporting fact findings by the Trial Judge or supporting evidence from the record.

72. If one were to enter into such deliberations, the fact findings by the Trial Judge indicate that it is highly doubtful that preventing one means of access to the underground would have prevented Warren from finding some other way to commit his crime. The Trial Judge found that Warren planned for months in advance:

> "Warren who, although he generally kept his thoughts to himself, stated that if he wanted to he could get underground and could probably set a blast that would scare the replacement workers sufficiently to force them to leave" (RFJ ¶ 263, V. 1)
>
> "As the strikers ramped up the rhetoric, Ross Slezak ("Slezak"), who on June 7, 1992, was the national president of the Canadian Association of Smelter and Allied Workers ("CASAW National"), in addressing a crowd assembled at the picket line, shouted that Margaret Witte ("Witte") "can expect severe confrontation in regards to the scab issue", prompting Conrad Lisoway ("Lisoway") to quizzically muse, "Does somebody have to die before we get rid of these fucking scabs?" That query was answered by striker Warren who amongst others overheard this comment and agreed, responding thusly, "They do - and we better soon get it done!" (RFJ ¶ 5, V. 1)
>
> ". . . his killing remark on June 7 was the beginning of a formulation of a plan that took shape as time wore on . . ." (¶ 652, V. 2)

> "In the week prior to September 18, 1992, Warren began reconnoitering on Giant property, for two to three hours at a time." (RFJ ¶ 167, V. 1)

73. The fact findings by the Trial Judge amply justify comments made by the Court of Appeal that Pinkerton's met any reasonable standard of care that might be found for them in the circumstances; comments just as telling on the point of how ***improbable*** it was that any different or further measures by anyone would have prevented Warren from carrying out the murders, but that any such different or further measures would more likely only have had the effect of re-routing his path to that ultimate result.

> "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." (CAMJ ¶ 115)

74. The Court of Appeal did not finish its analysis on causation as it was unnecessary to do so and also commented that such a review would be problematic given the volume of evidence and "unresolved issues of credibility". Again, with the greatest of respect to the Court of Appeal, the task is not as problematic as the Court of Appeal indicated given that the first level of review would be ask, for each Defendant, whether any negligent act or omission either as found or supportable on the record would satisfy the appropriate test. In this regard, and as pertains to the GNWT, the Court of Appeal could not help but note that it was unclear how alleged breaches of the *Mine Safety Act* and *Regulations*, such as putting a fence around the top of a shaft or inspecting emergency exits, were of any relevance, concluding that "[s]ince Warren went out of his way to enter the mine notwithstanding any obstacles put in his place, there is no basis for thinking that compliance with these regulations would have had any effect at all." (CAMJ ¶ 130).

75. Notwithstanding having heard considerable evidence over the course of a very long trial, the Trial Judge was unable to expressly identify a single concrete step that the GNWT

defendants ought to have taken, still less when and how that missing step should have been taken. Instead, there are extensive critical accusations, such as that the GNWT Defendants should have been "more vigilant" (RFJ ¶ 807, V. 2), that they "stumbled along in an atmosphere of uncertainty" (RFJ ¶ 822, V. 2) or "passed the buck" (RFJ ¶ 838, V.2) or had a ""not in my back yard" attitude" (RFJ ¶ 826, V. 2) or that inspections were "lacklustre" (RFJ ¶ 262, V. 2) all without ever being able to identify what actual step it was they should have taken but did not. In a case alleging negligence by omission, the only legitimate approach to causation is to determine the step or steps that were negligently omitted and then identify how such step or steps would have prevented the loss. It is impossible to perform that analysis, and reach any justified conclusion that causation is established, if the missing step or steps cannot even be identified.

76. The Plaintiffs also make reference to the findings that Lloyd Gould sought support for an order to close the mine in May, did not make the order when he instead got the advice of the Assistant Deputy Minster of Justice that such an order would be promptly and successfully appealed, and that the Chief Inspector did issue an order to close the mine after the murders of September 18th (Appellants' Factum at ¶¶ 55 and 56). However, and if it was the Trial Judge's intent to express the finding that it was negligent to have failed to make an order to close the mine, presumably at some time prior to the murders, the Trial Judge could not, even with all the evidence he heard, identify when such an order should have been made or what terms this hypothetical order would set for the length of closure or what conditions would have to be met in order to allow the mine to reopen. The Trial Judge being unable to provide such findings, it is impossible to even speculate that this hypothetical order would have fortuitously prevented Roger Warren from committing his act of murder.

77. In summary, the Trial Judge erred in not applying the but for test for causation. Further, no negligent act or omission found or suggested by the Trial Judge would satisfy the but for test and so the dismissal of the within action should be upheld on this ground as well.

Issue 4 The Trial Judge correctly dismissed the claims for tax gross-up and management fees

78. The Appellants claim that the Trial Judge erred in not awarding tax gross-up and management fees on the Plaintiffs' damages awards.

79. Due to the compensatory nature of damages, it is generally required in fatal accident cases that the Court award an appropriate allowance for the impact of any income tax (as established by the evidence) on income gained by investing lump sum damages for future pecuniary losses.[36] However, the within action is a subrogated action by the WCB of the Northwest Territories. The proceeds of the judgment were paid directly to the Board. The Board, after paying its own legal costs for recovery of the money, *may, at its discretion* pay to the individual Plaintiffs an amount equal to 25% of the gross amount received by the Board.[37]

80. The WCB pays no income tax on its earnings from such funds. Additionally, funds paid by the Board to the individual Plaintiffs, if any, do not incur tax.[38]

81. With respect to management fees, this Honorable Court has determined that the question of whether or not a plaintiff should be awarded management fees is essentially a question of fact in each case. [39] There was no evidence presented in this case as to the amounts the Plaintiffs would receive from the WCB, or whether they had the ability to obtain reasonable rates of return given their circumstances.

82. *Townsend v. Kroppmanns,* relied upon by the Appellants in support of their argument that a tax gross-up and management fees ought to have been awarded to the Plaintiffs, is not a

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[36] K. Cooper-Stevenson, *Personal Injury Damages in* Canada, 2nd ed., (Toronto: Carswell, 1995) at 707-709 (RJA Vol. III, Tab 38); *Daigle et al. v. Cape Breton Crane Rentals Ltd. et al* (1987), 91 NBR (2d) 189 (CA) (Appellants' Joint Authorities, Vol. I, Tab 28)

[37] *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, ss. 12 and 13 (RJA Vol. III, Tab 48)

[38] *Income Tax Act*, R.S.C. 1985, c.1 s. 149(1)(d) (RJA Vol. III, Tab 45)**;** *Daigle, supra*, note 36; Appellants' Joint Authorities, Vol. I, Tab 28) *Fullowka v. Royal Oak Mines Inc*. [1998] N.W.T.R. 217 (S.C), at ¶13 - 19 (RJA Vol. I, Tab 32)

[39] *Mandzuk v. Vieira*, [1988] 2 S.C.R. 650 at ¶2, (RJA Vol. II, Tab 26); *Li (litigation guardian of) v. Sandhu*,[2006] B.C.S.C. 949 (QB) at ¶¶23-24 (RJA Vol. II, Tab 22)

subrogated action case and is distinguishable on that basis alone. Moreover, *Townsend* confirmed that the most important principle to consider in awarding these damages is whether the Plaintiff has property in the award. [40]

83. The Trial Judge herein found as a fact that the nominal Plaintiffs did *not* have property in the award, rather the award was the property of the WCB,[41] which finding is clearly supported by the statutorily created control that the WCB enjoys over such actions. The WCB is the only entity that can accept the award or provide a release for it. What it ultimately does with the award is at its discretion.[42]

84. At ¶ 101 of their Factum, the Appellants argue that workers' compensation is a type of insurance, and cite authority that the existence of insurance should not be considered in awarding damages. The Appellants have misapplied the case law, which actually stands for the proposition that WCB and insurance *payments* cannot be taken into account in awarding damages. These authorities do not stand for the proposition that a court cannot take into account the identity and circumstances of the beneficial plaintiff when awarding damages specifically meant to compensate for the tax circumstances and investment abilities of the nominal Plaintiff.

85. As a result, there were and are both factual and legal impediments precluding an award for tax gross-up and management fees in this action.[43] The Respondents submit that the Trial Judge was correct in refusing to make such an award and this aspect of the Appellants' appeal should be dismissed.

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[40] *Townsend v. Kroppmanns*, [2004] 1 S.C.R. 315, at para. 21 (Appellants' Joint Authorities, Vol. IV, Tab 120)
[41] RFJ, ¶¶ 1052 and 1058, Vol. 2
[42] *Workers' Compensation Act, supra*, note 37, ss. 12 and 13 (RJA Vol. III, Tab 48)
[43] In addition, the provisional amount for tax gross-up set by the trial judge ($545,804.00) was not based upon the damages amounts he actually awarded, but on the damages amounts the plaintiffs claimed. Even if the trial judge's damages awards are upheld (and for the reasons below, they should not be) the trial judge's provisional assessment of the tax gross-up is incorrect.

Issue 5 The Trial Judge erred in over-assessing damages based on a novel theory offered by the Plaintiffs' expert that was without reliable foundation and was contrary to precedent

86. In light of its decision on liability, the Court of Appeal deemed it unnecessary to deal with the Respondents' Appeal on damages.[44] Should this Honorable Court reverse the Court of Appeal's findings on liability with respect to any of the Respondents, it would then be required to either return the issue to the Court of Appeal for a decision, or in the alternative, this Court could render a decision on the Respondents' appeal on damages itself.[45]

87. The Respondents' Appeal at the Court of Appeal was on the grounds that the learned Trial Judge erred in law in admitting and relying upon the expert opinion evidence of Cara Brown generally and regarding the novel methodology she used to derive her new personal consumption rates (also referred to as "personal consumption ratios" and "PCRs") which were incorporated into her estimates of some of the Respondent's dependency loss claims, with the effect of significantly inflating the assessment of those claims.

88. In general, the Trial Judge was very critical of Brown's methodology and evidence and found that she was asked to assume facts which were not always proven, giving her evidence the appearance of having "little relevance". He found that the scenarios Ms. Brown used "did not blend with the facts proven at the trial and thus were not helpful or reliable", that she used unworkable formulas, self-created factual foundations, relied on texts and studies whose authors were never authenticated, and created factors, formulas, contingencies and scenarios some of which bore "little or no resemblance or relevance to anything factual to date in the trial."[46]

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[44] CAMJ ¶ 207

[45] *Rules of the Supreme Court of Canada*, SOR/2002-156, R. 29(3) (RJA Vol. III, Tab 46)**;** Supreme Court Act, R.S.C. 1985, c. S-26, s. 46.1 (RJA Vol. III, Tab 47)

[46] RFJ ¶¶ 506, 509, 511, 513, 534, 541-543, 546-547, 550, 553 and 555, V. 1, the Trial Judge was also very critical of the Defendants' expert.

89. Despite rejecting the factual foundations of Ms. Brown's evidence, the Trial Judge accepted Ms. Brown's final numbers with respect to six of the nine dependency loss claims and six of the nine valuable services claims (although not the same six).[47] It is the submission of the Respondents that by accepting Ms. Brown's evidence in these circumstances and failing to give effect to the serious deficiencies in her evidence, the Trial Judge committed an error of law.[48]

90. With respect to PCRs, as acknowledged by Cara Brown in her testimony, until shortly prior to this trial, there were several studies generally used by economists to determine the PCR of an adult member of a family when estimating loss of dependency claims. Although these studies are not identical, they are largely consistent with one another.[49] These studies are also largely consistent with the basic rule of thumb employed frequently by Canadian Courts that the PCR of an adult family member is 30%, with a reduction of 4% for each child in the family, for up to three children. As a result, PCRs applied by Canadian Courts prior to this case generally fell within a range consistent with this rule of thumb.[50] Moreover, Ms. Brown's own opinion evidence in other cases related to loss of dependency and PCRs has reflected this rule of thumb.[51]

91. In this case, however, the PCRs employed by Ms. Brown were new PCRs, derived by her within the year prior to trial, and resulted in a significant departure from the generally accepted PCRs and dependency rates. The average PCRs employed by Ms. Brown in this case for 2

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[47] RFJ ¶¶ 1060-1082, V. 2

[48] *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*, [1991] A.J. No. 1021 (C.A.) at p. 6; aff'd [1994] 1 S.C.R. 552 (RJA Vol. I, Tab 5) and *MacDonald v. Alderson* (1982), 15 Man. R. (2d) 35 (C.A.) at para. 69; leave to appeal denied: (1982) 45 N.R. 180 n (RJA Vol. II, Tab 25)

[49] Exhibit 662, Report of Cara Brown, pp. E-04114 and E-04116, p. 24 and p. 36 **(**RJR Vol. III, Tab 6); Cross- Examination of Cara Brown, p. 2865:34-41; p. 2887:4-24 (RJR Vol. I, Tab 17)

[50] Ken Cooper-Stephenson, *Personal Injury Damages in Canada***,** *supra*, note 36 (RJA Vol. III, Tab 38) at ¶ 669-670; *Chernetz v. Eagle Copters Ltd.*, [2006] A.B.Q.B. 353 (Q.B.) at ¶ 351 (RJA Vol. I, Tab 17); *Millott Estate v. Reinhard* [2001] A.B.Q.B. 1100 (Q.B.) at ¶234-239 (RJA Vol. II, Tab 29)**;** *Sickel Estate v. Gordy*, [2004] S.J. No. 707 (Sask. Q.B.), at ¶42-45 (Appellants Joint Authorities, Vol. III, Tab 105); Exhibit 1040, Report of Gerry Taunton, p. E-07749 **(**RJR Vol. VII, Tab 5)

[51] *Millot Estate v. Reinhard*, *supra*, note 50, (RJA Vol. II, Tab 29) at ¶ 238; see also *LeBlanc v. Burcevski* (1995), 176 A.R. 373 (Q.B.) at ¶ 48 (RJA Vol. II, Tab 20) where Ms. Brown cited as authority for her testimony a paper she co-authored with Dr. Chris Bruce, which stated:
"Average dependency rates for two and three member families are approximately 70 to 74 percent respectively when the husband is deceased. Furthermore, dependency rates are not significantly affected by family income levels."

person families earning over $40,000 were 13-20%, rather than the 30% derived from the generally accepted studies and the rule of thumb.[52] To achieve these lower PCRs Ms. Brown does not remove "savings" from "Net Family Income" prior to calculating the PCR, in contrast to the traditionally accepted PCR methodology. [53]

92. Whether Ms. Brown's approach is correct or not is highly debatable. Nevertheless, the Respondents submit that Ms. Brown's proposed methodology is novel scientific evidence, which deviates from generally accepted standards. According to this Honorable Court in *R. v. Mohan:*

> "….expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets the basic threshold of reliability…".[54]

93. While this Honorable Court in *R. v. Mohan* kept the door open to novel science, rejecting the "general acceptance" test in favour of a form of the "reliable foundation" test more recently suggested by the U.S. Supreme Court, this Court has listed a number of factors that could be helpful in evaluating the soundness of a novel science or technique, including:

(a) whether the theory or technique can be and has been tested;

(b) whether the theory or technique has been subjected to peer review and publication;

(c) the known or potential rate of error or the existence of standards; and

(d) whether the theory or technique used has been generally accepted.[55]

94. As became clear during the cross-examination of Ms. Brown, her new Canadian PCRs and her novel approach regarding the treatment of savings:

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[52] RFJ ¶ 1016, V. 2, Cross-Examination of Cara Brown, pp. 2862:42- 2863:44 (RJR Vol. I, Tab 17); Exhibit 662, Report of Cara Brown, p. E-04130 (RJR Vol. III, Tab 6).
[53] Cross-Examination of Brown, pp. 2862:40-2863:44 (RJR Vol. I, Tab 17); Examination of Gerry Taunton, pp. 5393:5-5394:31 (RJR Vol. I, Tab 30)
[54] *R. v. Mohan*, [1994] 2 S.C.R. 9 at p. 25 (RJA Vol. III, Tab 14); *Wolfin v. Shaw*, [1998] B.C.J. No. 5 (B.C.S.C.) at ¶17 (RJA Vol. III, Tab 34)
[55] *R. v. J-L.J.*, [2000] 2 S.C.R. 650 at ¶ 33 (RJA Vol. III, Tab 13)

a) had never, other than inclusion in Ms. Brown's own text, been published in any peer-reviewed journal; [56]

b) were incorrectly derived or applied in Exhibit 662, which error was acknowledged by Ms. Brown, and resulted in her production of entirely new tables in Exhibit 663; [57]

c) were a significant departure from the current accepted PCRs and rules of thumb; [58]

d) had never been presented or accepted in any Canadian court; [59]

e) were not generally accepted among the experts in the area.[60]

95. The Respondents submit that the Trial Judge erred in law in relying upon Ms. Brown's novel methodology as to the calculation of new PCRs, without requiring that the Appellants lay the appropriate groundwork to provide a reliable foundation regarding the basis and validity of the new PCRs. These PCRs were applied to the dependency losses for Fullowka, Pandev, Hourie, Rowsell, Russell and Sawler, and the Respondents request that this Court direct a recalculation (or alter the trial awards) for those Plaintiffs, using the traditionally accepted PCR guidelines.

[56] Cross-Examination of Cara Brown, pp. 2868:14-2871:18 (RJR Vol. I, Tab 17)
[57] Exhibit 1040, Report of Gerry Taunton, pp. E-07754 to E-07757 (RJR Vol. VII, Tab 5); Exhibit 663, Revised Report of Cara Brown, p. E-04331 (RJR Vol. IV, Tab 1)
[58] Cross-Examination of Cara Brown, pp. 2868:14-2871:18; pp. 2872:18 - 2874:29 **(**RJR Vol. I, Tab 17); RFJ ¶ 541, V. 1 and RFJ ¶ 1016, V.2
[59] Cross-Examination of Cara Brown, p. 2886: 10-37 (RJR Vol. I, Tab 17)
[60] RFJ ¶ 541, V. 1

Part IV Submission on Costs

96. The GNWT 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 proceeding steps.

Part V Orders Sought

97. The GNWT respectfully asks that the within appeal be dismissed with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Edmonton, in the Province of Alberta, this 8th day of April.

Peter D. Gibson Christine J. Pratt

Counsel for the Respondent, the Government of the Northwest Territories

Part VI Table of Authorities

Case Authority

Note: Citations are to the Respondents' Joint Book of Authorities except for those where "AJA" appears before the Volume number, which citations are to the Appellants' Joint Book of Authorities

Volume and Tab		Para where cited	Footnote
Vol. I Tab 5	*Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*, [1991] A.J. No. 1021 (C.A.); aff'd [1994] 1 S.C.R. 552	89	48
Vol. I Tab 7	*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559	35	14
Vol. I Tab 10	*Booth v. St. Catherines (City)*, [1948] S.C.R. 564	15	5
Vol. I Tab 17	*Chernetz v. Eagle Copters Ltd.*, [2006] A.B.Q.B. 353 (QB)	90	50
Vol. I Tab 18	*Childs v. Desormeaux* (2002), 217 D.L.R. (4th) 217 (Ont. S.C.J.)	30	11
Vol. I Tab 19	*Childs v. Deormeaux*, [2006] 1 S.C.R. 643	30	12
Vol. I Tab 20	*Cooper v. Hobart*, [2001] 3 S.C.R. 537	32	13
Vol. I Tab 22	*Crocker* v. *Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186	18	7
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Vol. I Tab 30	*Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562	32	13
Vol. I Tab 32	*Fullowka v. Royal Oak Mines Inc.*, [1998] N.W.T.R. 217 (SC)	80	38
Vol. II Tab 5	*Home Office v. Dorset Yacht Co. Ltd.* [1970] 2 All E.R. 294 (H.L).	15	5
Vol. II Tab 7	*Indermaur v. Dames* [1866] 1 L.R. 274	22	9
Vol. II Tab 8	*Industrial Hardwood Products (1996) Ltd.* v. *I.W.A.-Canada , Local 2693*, (2001) 196 D.L.R. (4th) 320 (Ont. C.A.)	39	18
Vol. II Tab 14	*Jordan House v. Menow*, [1974] S.C.R. 239	18	7
Vol. II Tab 20	*LeBlanc v. Burcevski* (1995), 176 A.R. 373 (QB)	90	51
Vol. II Tab 22	*Li (litigation guardian of) v. Sandhu*, [2006] B.C.S.C. 949 (Q.B.)	81	39
Vol. II Tab 25	*MacDonald v. Alderson* (1982), 15 Man. R. (2d) 35 (C.A.); leave to appeal denied: (1982) 45 N.R. 180 n	89	48
Vol. II Tab 26	*Mandzuk v. Vieira*, [1988] 2 S.C.R. 650	81	39

Volume and Tab		Para where cited	Footnote
AJA Vol. III Tab 69	*Martin v. Canada (Attorney General)*, 2005 FCA 165	43	19
Vol. II Tab 29	*Millott Estate v. Reinhard*, [2001] A.B.Q.B. 1100 (QB)	90	50, 51
Vol. III Tab 6	*Ontario (Minister of Highways) v. Côté*, [1976] 1 S.C.R. 595	20	8
Vol. III Tab 13	*R. v. J-L.J.*, [2000] 2 S.C.R. 600	93	55
Vol. III Tab 14	*R. v. Mohan*, [1994] 2 S.C.R. 9	92	54
AJA Vol. III Tab 101	*Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333	65	34
AJA Vol. III Tab 103	*Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369	38	17
AJA Vol. III Tab 105	*Sickel Estate v. Gordy*, [2004] S.J. No. 707 (Sask. Q.B.)	90	50
AJA Vol. III Tab 107	*Skyjack v. Hutchinson* [2007] O.L.R.B. 92	44	20
Vol. III Tab 27	*Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83	25	10
Vol. III Tab 29	*ter Neuzen* v. *Korn*, [1995] 3 S.C.R. 674	59	26
AJA Vol. IV Tab 120	*Townsend v. Kroppmanns*, [2004] 1 S.C.R. 315	82	40
Vol. III Tab 34	*Wolfin v. Shaw*, [1998] B.C.J. No. 5 (BCSC)	92	54
Vol. III Tab 36	*Yellowknife (City) v. Canada (Labour Relations Board)*, [1977] 2 S.C.R. 729	5	2

Texts

Volume and Tab		Para where cited	Footnote
Vol. III Tab 38	Cooper-Stevenson, K., *Personal Injury Damages in Canada*, 2nd ed, (Carswell: Toronto, 1996)	79, 90	36, 50
Vol. III Tab 39	Coté, P-A., *The Interpretation of Legislation in Canada*, 3d ed. (Carswell: Scarborough, 2000)	36	15
Vol. III Tab 44	Sullivan, R., *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008)	37	16

Legislation and Regulations

Volume and Tab		Para where cited	Footnote
Vol. III Tab 45	*Income Tax Act*, R.S.C. 1985, c.1, s. 149 (1)(d)	80	38
Vol. III Tab 46	*Rules of the Supreme Court of Canada*, SOR/2002-156, R. 29(3)	86	45
Vol. III Tab 47	*Supreme Court Act* , R.S.C. 1985, c.S-26, s. 46.1	86	45
Vol. III Tab 48	*Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, ss. 12 and 13	79, 95	37, 43

Part VII Statutory Provisions

Mining Safety Act, R.S.N.W.T. 1988, c. M-13
Mining Safety Regulations R.R.N.W.T., 1990 c. M-16

[See Volume II of this Factum]