Federal Court  Cour fédérale

Date: 20201130

Docket: T-1938-19

Citation: 2020 FC 1106

Ottawa, Ontario, November 30, 2020

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

GRAIN WORKERS' UNION LOCAL 333 ILWU

Applicant

and

VITERRA INC.

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Grain Workers' Union Local 333 ILWU, seeks an order under Rules 466 and 467 of the *Federal Courts Rules*, SOR/98-106, finding the Respondent Viterra Inc. in contempt of court.

[2] The alleged contempt arises in the context of an arbitration award. The Applicant alleges the Respondent has not complied with the Arbitrator's cease and desist Order.

II. Background

[3] The Respondent operates two grain terminals at the port of Vancouver. The Applicant is certified under the *Canada Labour Code*, RSC 1985, c L-2 [Code] to represent employees at the two terminals.

[4] In July 2017, the Applicant filed two policy grievances alleging the Respondent was allowing employees to work in excess of 48 hours per week in violation of the overtime provisions of the Code.

[5] Arbitrator Sullivan was appointed to arbitrate the two grievances. The Respondent objected to the arbitration on various grounds, including jurisdiction. Arbitrator Sullivan found he had jurisdiction to deal with the grievances. The Respondent unsuccessfully sought judicial review of the jurisdiction decision in the British Colombia Superior Court (*Viterra Inc v Grain Workers' Union, Local 333*, 2018 BCSC 787) and an appeal was also dismissed (*Viterra Inc v Grain Workers' Union, Local 333*, 2018 BCCA 455).

[6] Following the jurisdiction question having been resolved, in July 2019, the parties returned before Arbitrator Sullivan. On October 28, 2019, he issued his Arbitration Award [the Award]. He found, based on the data relied upon by the Applicant for the period prior to the

grievance, that the Respondent was in contravention of the statutory overtime provisions contained in the Code. Arbitrator Sullivan then concluded:

> The union has requested that I issue a cease and desist order. I have considered the payroll data relied on by the Union for the period prior to the filing of the two grievances on July 14, 2017. Based on that data and the stipulations agreed by the parties in their May 10, 2018 correspondence, I have found that the Canada Labour Code has been violated and order the Employer cease and desist violating the Code. Going forward, I leave it to the parties to meet and determine what form of averaging arrangement can be agreed upon in the context of a 6-on/3-off continuous operation schedule that does not operate on a week-to-week basis.
>
> I remain seized with jurisdiction to resolve any dispute that may arise out of the implementation of this decision.

[7] The Respondent subsequently sought clarification of the Award from Arbitrator Sullivan. On November 28, 2019 he provided the following:

> For clarification, the award was based on stipulated evidence regarding the data and factual circumstances up to the date of the grievance. No evidence of data and/or factual circumstances occurring after the date of the grievance was led at the hearing and the award did not address this matter.

[8] On May 27, 2020 the Applicant and the Respondent again appeared before Arbitrator Sullivan for the purpose of seeking resolution by way of an averaging agreement as provided for in the Code and contemplated by the Award. The parties were unable to reach an agreement and on May 28, 2020 Arbitrator Sullivan issued a “Letter Decision” confirming his jurisdiction exhausted:

> By video conference on May 27, 2020 we reconvened under my retained jurisdiction for the purpose of seeking a resolution to the outstanding matter of an averaging agreement. No resolution was reached and my jurisdiction in relation to the grievance I was appointed by the parties to hear and determine is now exhausted.

[9] On September 14, 2020, Madame Prothonotary Kathleen Ring issued an *ex parte* Order directing the Respondent appear before this Court to hear proof of the Respondent's alleged breach of the Arbitrator's decision dated October 28, 2019 and to be prepared to present any defence that it may have to the charge.

[10] In advance of the hearing ordered by Prothonotary Ring the Respondent filed submissions challenging the propriety of the Court considering the alleged contempt on a number of grounds. The Parties proposed and the Court agreed that the hearing proceed in two parts. The Part 1 proceedings would hear and consider the legal issues raised by the Respondent. The Part 2 proceedings, if required, would hear evidence of the alleged contempt and address any evidentiary issues arising.

[11] For the reasons that follow, I am satisfied that the contempt proceeding should continue.

III. Filing of the Award

[12] Section 66 of the Code provides that those affected by the order or decision of an arbitrator may file the order in the Federal Court. On filing, the order is registered in the Court and upon registration the arbitrator's order has the same force and effect as a judgment obtained in the Court:

Filing of orders and decisions in Federal Court	**Exécution des décisions**
66 (1) Any person or organization affected by any order or decision of an arbitrator or arbitration board may, after fourteen days from	**66 (1)** La personne ou l'organisation touchée par l'ordonnance ou la décision de l'arbitre ou du conseil

the date on which the order or decision is made or given, or from the date provided in it for compliance, whichever is the later date, file in the Federal Court a copy of the order or decision, exclusive of the reasons therefor.	d'arbitrage peut, après un délai de quatorze jours suivant la date de l'ordonnance ou de la décision ou après la date d'exécution qui y est fixée, si celle-ci est postérieure, déposer à la Cour fédérale une copie du dispositif de l'ordonnance ou de la décision.
Idem	**Idem**
(2) On filing an order or decision of an arbitrator or arbitration board in the Federal Court under subsection (1), the order or decision shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order or decision were a judgment obtained in the Court.	**(2)** L'ordonnance ou la décision d'un arbitre ou d'un conseil d'arbitrage déposée aux termes du paragraphe (1) est enregistrée à la Cour fédérale; l'enregistrement lui confère la valeur des autres jugements de ce tribunal et ouvre droit aux mêmes procédures ultérieures que ceux-ci.

[13] Relying on section 66 of the Code, counsel for the Applicant wrote to the Registry on November 27, 2019 attaching a copy of the original Award for filing. The Registry issued a Certificate of Filing dated December 6, 2019. The certificate incorrectly stated that the Award had been filed pursuant to subsection 251.15(1) of the Code.

IV. Issues

[14] The Respondent argues that the contempt application should be dismissed or limited on the following grounds:

A. The filing and registration is a nullity and not capable of enforcement;

   i. The filing did not comply with the procedural preconditions of section 66 of the Code and the Certificate of Filing references the wrong section of the Code; and

   ii. The Award was filed at a time when Arbitrator Sullivan retained jurisdiction in respect of the implementation of the Award. It was not a final Award when filed with the Federal Court;

B. The Award is only declaratory in nature and therefore not capable of enforcement;

C. If the Award is capable of enforcement, it is only enforceable in respect of the period following the date on which Arbitrator Sullivan exhausted his jurisdiction.

[15] The Respondent also provided written submissions addressing the issue of hearsay evidence in contempt proceedings. Those submissions were not pursued in the Part 1 proceeding, and the issue is therefore not considered in this Order and Reasons.

V. The Law of Contempt

[16] Contempt encompasses a broad range of conduct but is "first and foremost a declaration that a party has acted in defiance of a court order" (*Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 35). In the civil context, contempt is viewed as being quasi-criminal in nature *(Bhatnager v Canada (Minister of Employment and Immigration)*, [1990] 2 SCR 217 at 224, *Canadian Union of Postal Workers v Canada Post Corporation*, 2011 FC 232 at para 25).

[17] Contempt proceedings in this Court are governed by Rules 466 to 472 of the Federal Courts Rules. The Rules reflect the serious and quasi-criminal nature of contempt proceedings. The party alleging contempt has the burden of proving an allegation of contempt beyond a reasonable doubt (Rule 469, *Canadian Union of Postal Workers v Canada Post Corporation*, 2015 FC 355 at para 9 [*Canada Post*]). Three elements must be established to prove contempt: (1) the existence of an order, (2) the respondent's actual knowledge of the order, and (3) an intention to disobey the order (*Rameau v Canada (Attorney General)*, 2012 FC 1286 at para 13, *Orr v Fort McKay First Nation*, 2012 FC 1436 at para 15, *Canada (Minister of National Revenue) v Vallelonga*, 2013 FC 115 at paras 18-19).

[18] For an order to be enforceable, the order must be clear and unambiguous. What is required, or not, for compliance must be evident on the face of the order (*Canada Post* at para 11).

VI. Analysis

A. The filing and registration of the Arbitration Award is not a nullity and the Award may be enforced

[19] The Respondent has advanced two separate grounds in support of the view that the filing of the Award is a nullity:

(1) First, the filing and registration is a nullity because it is inconsistent with the procedural preconditions of section 66 of the Code and/or because the Certificate of Filing incorrectly references subsection 251.15(1) of the Code.

(2) Second, the Arbitration Award was not final at the time of filing.

[20] The Respondent is incorrect on both accounts.

(1) The filing and registration was not inconsistent with section 66 of the Code nor does the error in the Certificate of Filing render the filing a nullity

[21] Contempt proceedings have the potential of impacting upon an individual's liberty interests and for this reason the Respondent submits, relying upon *Service Employees International Union v Brown*, [2000] OJ No 2749 that the doctrine of *strictissimi juris* applies. The doctrine provides that procedural requirements prescribed by law are to be interpreted and applied in the strictest manner. Where an applicant fails to strictly comply, the contempt application will be dismissed (see *Gilewich v Strand*, 2008 SKQB 326 at para 3 and *Divi v Divi*, 1992 SJ No 517).

[22] I acknowledge that the *strictissimi juris* doctrine applies in contempt proceedings before this Court (*Beloit Canada Ltee v Valvet Oy*, [1986] FCJ No 958). The doctrine does require that contempt proceedings be carried out with care and with close adherence to procedural requirements (*Friedlander v Claman*, 2016 BCCA 434 at para 26 [*Friedlander*] citing *Basett v Hagee*, 2015 BCCA 422 at paras 33-35). However, civil contempt is concerned with more than punishment. Enforcement and compliance with civil orders of the courts is also a primary objective of civil contempt proceedings (*Friedlander* at para 28 citing *Zhang v Chau* (2003), 229 DLR (4th) 298 at paras 29-31 (Que CA)).

[23] The doctrine of *strictissimi juris* is not intended to compel blind compliance with procedural obligations. Instead, it seeks to ensure the fairness of the contempt process, a process

that should be a last resort in response to non-compliance with a court's order (see for example *Claggett v Claggett*, [1945] 3 DLR 414 (BCCA) where the doctrine supported the conclusion that non-compliance with notice requirements under the rules was not to be condoned by the Court and *Friedlander* at para 54 where it was held that reliance on hearsay evidence was inconsistent with the *strictissimi juris* approach—both circumstances where fairness concerns were engaged).

[24] In my opinion neither the Applicant's failure to include Arbitrator Sullivan's clarification statement with the Arbitration award submitted for filing nor the issuance of a certificate incorrectly referencing section 251.15(1) of the Code invalidate the proceedings in this case.

[25] Section 66 of the Code provides that an affected person or organization may file a copy of the order or decision of an arbitrator "exclusive of the reasons therefor." Section 66 does not require the reasoning supporting an arbitrator's order or decision to be filed.

[26] In this instance, the Arbitrator's clarification statement confirms that the Award was based on stipulated evidence relating to circumstances occurring before the grievance date. This statement of clarification does not alter the Arbitrator's ultimate finding that the Respondent had violated the Code. Nor does the statement of clarification alter the Arbitrator's Order that the Respondent cease and desist in violating the Code. The statement of clarification does not form part of the Arbitrator's Order or decision. Section 66 neither provides for nor requires the filing of the statement of clarification on these facts. I would also note that at the time of filing,

November 27, 2019, the statement of clarification had not yet been provided, that having occurred on November 28, 2019.

[27] Turning now to the Certificate of Filing and its reference to subsection 215.15(1) of the Code. The evidentiary record demonstrates that the Applicant correctly requested that the Registry file the Award pursuant to subsection 66(1) of the Code. Apparently, an administrative or typographical error resulted in the Certificate of Filing making reference to subsection 215.15(1) and it appears this error was not noted until the Respondent raised the issue.

[28] Prothonotary Ring's September 14, 2020 *ex parte* Order correctly refers to subsection 66(1). The Applicant was ordered to serve the Respondent with a copy of the *ex-parte* Order and there was no suggestion that timely service did not occur. The Respondent has not argued, nor is there any evidence to suggest, that the error in the Certificate of Filing misled or otherwise prejudiced the Respondent.

[29] In *Steward v Canada (Minister of Employment and Immigration)*, [1988] 3 FC 452, the Court of Appeal found an error in the show cause process that resulted in no prejudice did not render the proceeding a nullity. I reach the same conclusion on these facts. The *stritcissimi juris* doctrine cannot be relied upon to render the registration of the Arbitration Award null and void in this instance.

[30] Having found the filing not to be inconsistent with requirements of section 66 of the Code and that the error contained in the Certificate of Filing is not prejudicial, I conclude the filing of the Award is not a nullity.

(2) The Arbitration Award was final at the time of filing

[31] Arbitrator Sullivan, having concluded that the Respondent had violated the Code and ordering that the Respondent cease and desist in that regard, then addresses the possibility of the parties negotiating an "averaging agreement." He declares that he remains "seized with jurisdiction to resolve any dispute that may arise out of the implementation of this decision." The Respondent submits that because Arbitrator Sullivan retained jurisdiction the Award was not final.

[32] The Applicant argues that Arbitrator Sullivan retained jurisdiction for a specific purpose: to assist should parties seek to negotiate an averaging agreement. The Applicant submits that retaining jurisdiction for this specific purpose does not alter the final nature of the Award in relation to the cease and desist Order. The Applicant argues that the cease and desist Order recognizes the Respondent's obligation to comply with a clearly prescribed statutory obligation; it raises no implementation issues and was a final award.

[33] Alternatively, the Applicant submits that if the cease and desist Order was subject to the Arbitrator's retained jurisdiction and therefore not final, the Arbitrator's jurisdiction was exhausted at the time the contempt proceeding was initiated in September 2020. In this

circumstance, the Applicant argues it would be absurd to now require the Applicant to refile the Award and recommence proceedings.

[34] The Respondent relies on *Tri-Line Expressways Ltd v Teamsters Local Union No 31*, [1995] FCJ No 1484 [*Tri-Line Expressways*] and *Canadian Air Line Pilots Assn v Canadian Airlines International*, [1989] FCJ No 151 [*Canadian Air Line*] to argue the Award was not a final order subject to enforcement on November 27, 2019, when submitted to the Registry for filing. It submits the filing was premature and therefore a nullity. I disagree.

[35] The Respondent reads *Tri-Line Expressways* and *Canadian Air Line* to mean that where an arbitrator retains jurisdiction for any purpose that the whole of the award is not final and therefore cannot be filed with the court for enforcement purposes. In my view, this is an overstatement of the underlying reasoning in *Tri-Line Expressways* and *Canadian Air Line*. In both of those cases, the awards were held to be unenforceable by the court not simply on the ground that jurisdiction had been retained. In both of those cases the outstanding issues were matters that had to be addressed in order to allow for implementation of the awards.

[36] This is not the case here. In this instance, the cease and desist Order is clear, unambiguous, and fully enforceable without anything further. The Code prescribes a maximum work-week of 48 hours. The Arbitrator concluded the Respondent was in violation of the Code requirement and ordered that the Respondent cease and desist. Nothing remains to be resolved to allow compliance with the cease and desist portion of the Award.

[37] I acknowledge that Arbitrator Sullivan does not articulate the specific purpose for retaining jurisdiction in the Award. However, in the May 28, 2020, "Letter Decision," the purpose for retaining jurisdiction is set out—the letter states that the parties were reconvened pursuant to his retained jurisdiction "for the purpose of seeking resolution to the outstanding matter of an averaging agreement." The issue left outstanding at the time of the Award was the possibility of a negotiated averaging agreement. An agreement not having been achieved, and Arbitrator Sullivan not being in a position to impose any such agreement, he then declares his jurisdiction exhausted.

[38] In the Award, Arbitrator Sullivan finally determined some matters and retained jurisdiction to assist with other matters. In *ATU, Local 569 v Edmonton (City)*, 2015 ABQB 620, the Alberta Court of Queen's Bench interpreted an arbitration award as final for the purposes of enforcement in respect of one issue where certain other issues remained to be addressed. The Court held that a reservation of jurisdiction to address other matters did not render a clear and unambiguous award, in that case reinstatement, conditional (at para 20). The same holds in this instance: retaining jurisdiction to assist in the negotiation of an averaging agreement does not render conditional the separate and distinct finding that the Respondent has violated the Code and must cease and desist.

[39] The cease and desist Order was final and enforceable at the time of filing.

[40] In light of my conclusion that the cease and desist portion of the Award was final and enforceable, I will only briefly address the Applicant's argument that any premature filing became valid upon the Arbitrator declaring his jurisdiction exhausted on May 28, 2020.

[41] In *Canadian Broadcasting Corporation v Canada*, [1992] FCJ No 871 [*CBC*] Justice Teitelbaum considered whether an award filed prior to the expiry of the 120 day period of retained jurisdiction had been filed prematurely. Justice Teitelbaum concluded that the filing was premature and therefore a nullity. However, he also recognized that the filing could become valid after the expiry of the 120 period. On this basis, he stayed the execution of the award "in the event… the filing of the decision becomes valid…" (*CBC* at pages 8-9).

[42] I find no fault in Justice Teitelbaum's approach. To adopt a different approach in the absence of any evidence indicating unfairness or some other prejudice would, as the Applicant has submitted, result in an inefficient employment of resources.

B. The Award is not declaratory

[43] The Respondent relies on a number of cases to argue that courts have declined to enforce declaratory orders as they lack the precision and specificity needed to allow a court to determine, without the benefit of additional evidence, whether contempt has occurred (*CUPW v Canada Post Corp*, [1987] FCJ No 1021 at page 5 [*CUPW*], *Telus Mobility v Telecommunications Workers Union*, 2002 FCT 1268 at para 39 [*Telus*] upheld on appeal *Telus Mobility v Telecommunications Workers Union*, 2004 FCA 59, *Goela v Via Rail Canada Inc*, 2006 FC 562

at para 30, *Sucker Creek Indian Band v Calliou*, [1999] FCJ No 1715, *Re United Steelworkers of America, Local 663, and Anaconda Company (Canada) Ltd*, [1969] BCJ No 406).

[44] The Respondent submits the Award in this case is declaratory only. The Award declares the Respondent to have violated the Code. It does not conclude the breach is ongoing and it does not direct the Respondent take specific steps to correct the violation. The Respondent argues that before the Court could enforce this Order it would be required to look beyond the Arbitration Award and consider new circumstances and evidence that was not before the Arbitrator. It is argued that this is not the Court's role and the Applicant's remedy is not contempt but a fresh grievance process that is again referred to a labour arbitrator for determination. Again, I disagree.

[45] To be enforceable an award must do more than merely set out an existing legal situation. It must compel the performance of specific actions or impose specific constraints (*CUPW* at page 5).

[46] In this case, the Award details the sections of the Code that establishes maximum weekly hours of work and overtime. Arbitrator Sullivan concludes "the Employer was in contravention of the statutory overtime hours of work per week," that the "*Canada Labour Code* has been violated," and then orders that the "Employer cease and desist from violating the *Code*." Specific findings have been made based on the evidence and specific future conduct has been ordered. Whether the Respondent's future conduct is consistent with the Order is readily ascertainable by reference to the Code.

[47] The Order, when read within the context of the decision as a whole, as it must be, is clear, precise, and specific (*Warman v Tremaine*, 2011 FCA 297 at para 57). The Order does not suffer from a lack of precision that would prevent the Respondent from taking the action required to comply or to explain a failure to comply in the course of a contempt proceeding (*Telus* at para 39).

[48] I am also not convinced that consideration of the alleged contempt would require the Court to look beyond the Arbitration Award or to consider new circumstances. In pursuing civil contempt an Applicant must satisfy a high evidentiary burden to succeed. It is trite to note that this requires presenting evidence to establish the Respondent's non-compliance with an order. In doing so an Applicant may seek to place evidence before the Court that goes beyond that relevant to non-compliance, but these are evidentiary matters relating to relevance that are to be addressed in the course of the evidentiary hearing. This possibility does not render an otherwise enforceable order unenforceable.

[49] The Respondent further argues that failure of the Award to specify a timeline for compliance should result in the Court refusing to enforce the Award. The Respondent relies on *Telus* in submitting that the courts have routinely refused to enforce orders or awards in this circumstance (at para 43).

[50] A specific time for compliance was not provided for in *Telus*. The Court held that this left open two possible interpretations, that the Order was immediately applicable and therefore incapable of being complied with or that it was to be complied with within a reasonable time.

The Court then proceeded to consider whether there had been timely compliance with the Order based on the evidence.

[51] The failure to specify a timeline for compliance in this instance may prove to be a reason not to enforce the Order. However, *Telus* does not teach that a contempt proceeding should fail simply on the basis that a time for compliance has not been specified. Instead, *Telus* recognizes that in the absence of a specified timeline, two interpretations are available to the Court and that those alternative interpretations are to be considered in light of the evidence. The significance or impact of the absence of a specified timeline for compliance in the Award is not a question to be considered in the absence of evidence.

[52] In summary, I find the Award is not declaratory; it is sufficiently specific and precise to allow its enforcement. Concerns relating to evidence and the Order's failure to set out a specified timeline for compliance are more properly addressed, should they arise, in the course of the evidentiary hearing.

C. The Award is capable of enforcement as of the date of the original Arbitration Order.

[53] The Respondent takes the position that if the Court finds the Order enforceable, then the Court's jurisdiction to find contempt is limited to the period following May 28, 2020, when Arbitrator Sullivan confirmed his jurisdiction was exhausted. The Respondent argues that it was only at this point that the cease and desist Order was final.

[54] I have previously concluded that Arbitrator Sullivan's reservation of jurisdiction was limited to assisting with the negotiation of an averaging agreement (paras 37-38). The reservation of jurisdiction did not extend to the cease and desist Order. As such the cease and desist Order was final and capable of enforcement as of the date of the original Arbitration Order, October 28, 2019.

VII. Conclusion

[55] The filing and registration of the Award is not a nullity and the Award is capable of enforcement. I am satisfied that the contempt motion may proceed. The Parties have identified their availability for a further hearing that will be set down by the Judicial Administrator.

ORDER IN T-1938-19

THIS COURT ORDERS that:

1. The Respondent's preliminary objections are dismissed.

2. The contempt motion may proceed.

3. The hearing date for the contempt motion shall be set down as determined by the Judicial Administrator.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1938-19
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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APPEARANCES:

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