Federal Court  Cour fédérale

Date: 20210401

Docket: T-1938-19

Citation: 2021 FC 292

Ottawa, Ontario, April 1, 2021

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 Respondent, Viterra Inc., objects to the admissibility of certain records which have been ordered produced by way of *subpoennas duces tecum* [the subpoenas].

[2] The subpoenas have issued further to Orders dated October 13, 2020 and March 11, 2021 in the context of a contempt proceeding pursuant to Rules 466 and 467 of the *Federal Court*

Rules, SOR/98-106 [*Rules*]. The Applicant, Grain Workers' Union Local 333 ILWU, alleges Viterra is in contempt of an arbitration award issued in favour of the Union.

[3] Viterra's admissibility objection was raised in the course of a case management conference where the Union sought an exchange of records in advance of the hearing to facilitate the efficient use of the scheduled hearing dates. Viterra also objects to providing the subpoenaed records to the Union in advance of an admissibility determination, arguing that requiring it to do so would be inconsistent with the values reflected in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[4] The subpoenaed records have not been reviewed by the Union and the Union has not yet sought to put any records into evidence. In written submissions, advancing the admissibility objection, Viterra has provided a general description of the records, and the circumstances relating to their creation but counsel has advised that the description is not to be construed as either evidence or an admission by Viterra. Neither the records in issue, nor evidence detailing the circumstances relating to their making, content, storage or reliability is before the Court.

[5] For the reasons that follow, I have concluded that Viterra's admissibility objection is premature. I also conclude that the objection to production is in effect an effort to quash the subpoenas, a matter that has been the subject of a prior unsuccessful motion brought by Viterra. I finally conclude, in the context of this proceeding, that requiring Viterra to produce the records in issue is not inconsistent with *Charter* values.

II. The Admissibility Objection is Premature

[6] Viterra objects to the admissibility of the subpoenaed records on the basis that the Union will tender the documents as proof of the facts they purport to assert, as such they constitute hearsay, which is presumptively inadmissible. Viterra further argues that the records are not necessary. It submits the Union has access to a superior source of evidence, the *viva voce* testimony of its members, the best evidence available. It is submitted, particularly in the context of a contempt proceeding, which is quasi-criminal in character, the Union should be required to rely on the *viva voce* evidence of its members, not the employer's records, to prove the contempt allegation.

[7] At common law, hearsay is presumptively inadmissible. However, this presumption is subject to the application of the "principled approach" to hearsay adopted by the Supreme Court of Canada in *R v Khan*, [1990] 2 SCR 531 and a number of traditional hearsay exceptions, including an exception for business records. The principled approach involves consideration of the hearsay evidences necessity and reliability. The Supreme Court in *R v Mapara*, [2005] 1 SCR 358 at 366-367 has set out the following framework where the admissibility of hearsay, on the basis of the common law, is being considered:

> The principled approach to the admission of hearsay evidence which has emerged in this Court over the past two decades attempts to introduce a measure of flexibility into the hearsay rule to avoid these negative outcomes. Based on the *Starr* decision, the following framework emerges for considering the admissibility of hearsay evidence:
>
> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.
>
> (See generally D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 95-96.)

[8] Provision is also made in the *Canada Evidence Act,* RSC 1985, c C-5, s 30 [CEA] for the admission in a legal proceeding of records made in the usual and ordinary course of business.

[9] In advancing its objection, I understand Viterra has essentially taken the position that potentially admissible hearsay may be inadmissible in a quasi-criminal contempt proceeding solely on the basis that direct evidence might be available. While the balancing of necessity and reliability or the requirements of section 30 of the CEA may lead to this result in a given circumstance, that result is not inevitable.

[10] The availability of direct evidence does not render otherwise admissible hearsay, inadmissible. The jurisprudence has recognized that there are instances where, even when a declarant is available to testify, the better evidence is the hearsay evidence—for example where the maker of a record lacks an independent recollection of the making of that record (*R v Shea*, 2011 NSCA 107 at paras 69-75).

[11] To conclude that the maker or source of information captured in a business record must testify, would also be at odds with the underlying rationale for a business records exception—documents made in the ordinary course of business are admitted to avoid the cost and inconvenience of calling the record keeper and the maker. Both the common law exception and Section 30 of the CEA would have accomplished little if the author of a business record were required, where possibly available to give direct evidence (*R v Martin*, [1997] SJ No 172 (SK CA) at paras 49-50).

[12] The broad legal principles governing admission of hearsay do not allow a determination on admissibility in a factual and evidentiary vacuum. Admissibility pursuant to the common law or section 30 of CEA is a question of mixed fact and law. In the absence of the records and relevant evidence relating to those records, Viterra's admissibility objection is premature.

III. Record Production has been Considered and Determined

[13] Viterra acknowledges that the *Charter* is of no direct application in this matter, however, relying on *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573 [*Dolphin Delivery*] it argues that *Charter* values must inform admissibility and production determinations in this matter. Viterra submits that to require it to provide the subpoenaed records to the Union prior to a ruling on admissibility would be inconsistent with the values reflected in *Charter* sections 8, the right to be secure against unreasonable search and seizure, 11(c), the right not to be a witness against oneself, and 11(d), the presumption of innocence, and that this in turn would be inconsistent with the principles of fundamental justice, section 7 of the *Charter*.

[14] Further to this position, Viterra argues that in reasons dismissing the motion to quash the subpoenas, the motions judge left two issues to be determined by the judge presiding at the show cause hearing: production of the records subject to the subpoenas and admissibility (2021 FC 187). Viterra relies upon the concluding paragraph of the motion judge's reasons where it is stated that "[a]lthough the issue of document production has been deferred the Union has been successful on the motion" (2021 FC 187 at para 53).

[15] The Union submits that Viterra has conflated issues of production and admissibility. It argues that the question of production has been determined by way of Viterra's motion seeking to quash the subpoenas. It also submits that in seeking to quash the subpoenas Viterra advanced *Charter* value type arguments relying on sections 7 (fundamental justice) and 11(c) (the right not to be compelled as a witness against oneself).

[16] The Union acknowledges that Viterra did not advance the argument that production prior to an admissibility determination would be contrary to the values reflected in section 8. However, the Union submits this failing does not mean Viterra may now raise a production argument as part of an objection to admissibility. The Union submits that in objecting to the subpoenas, including the requirement to produce certain documents, Viterra was required to put its best foot forward. The principles of issue estoppel and collateral attack prevent it from now advancing arguments that could have been made on the motion to quash (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 18 [*Danyluk*]).

[17] A reading of the motion judge's reasons as a whole, and in context, leads me to conclude that the issue of production has been addressed and decided.

[18] In its motion to quash, Viterra sought orders to (1) quash the subpoenas and (2) prohibit the Union from compelling Viterra from testifying in the contempt proceeding through its employees or the production of documents in its control.

[19] Viterra specifically sought an order prohibiting production, and that motion was dismissed. The admissibility issue, which was not raised on the motion, was unsurprisingly left to the hearing judge, in part because the hearing judge would be in a position to "hear full argument, review the documents and then rule on the admissibility of any specific document" (2021 FC 187 at para 46). These words contemplate production in accordance with the subpoenas.

[20] In addition, the motion judge expressly states that Viterra's "motion to quash the production of records by the employees is dismissed on the basis that it is more appropriate for the presiding judge at the contempt hearing to address the question of whether any documents produced are admissible" (2021 FC 187 at para 51). Again, this contemplates production as provided for in the subpoenas.

[21] I acknowledge the final paragraph of the motion judge's reasons stating "the issue of document production has been deferred" (2021 FC 187 at para 53). This is inconsistent with the portions of the reasons contemplating production, reproduced in the preceding two paragraphs. It

is also at odds with the relief sought on the motion and the result. The motion judge concludes the Union has been successful, and the motion dismissed. The result being the subpoenas ordering production were neither quashed nor altered. In considering the reasons in their full context, I am unable to conclude that the motion judge's Order left record production, as required by the subpoenas, undetermined.

[22] The motion sought to prohibit the production of documents and this issue was considered and decided by the motion judge. That decision is, in my view, conclusive on the issue of production unless reversed on appeal (*Danyluk* at para 19).

[23] I am further of the view, in the context of this contempt proceeding, that production of the records in issue is not contrary to values reflected in sections 7, 8, and 11 of the *Charter* and will address this issue briefly.

IV. Production of the Subpoenaed Records is not Contrary to *Charter* Values.

[24] The primary focus of Viterra's *Charter* values argument is section 8. Section 8 provides that "[e]veryone has the right to be secure against unreasonable search or seizure." Section 8 does not afford protection against all searches and seizures, but instead it affords protection against unreasonable searches and seizures.

[25] Generally, a reasonable search pursuant to section 8 of the *Charter* is one that has been subjected to a prior authorization process. The prior authorization process must involve a neutral and impartial arbiter capable of acting judicially and, having evidence on oath, engaging in a

balancing of competing interests. The arbiter must also be in a position to consider all relevant circumstances and impose any necessary conditions (*Hunter v Southam Inc*, [1984] 2 SCR 145 at 160-168) [*Southam*].

[26] A contempt proceeding pursuant to the *Rules*, including the issuance of a subpoena requiring the production of records, is not inconsistent with the process required under section 8 of the *Charter*. The contempt process in this instance was initiated by an *ex parte* motion (Rule 467). A judicial officer ordered a show cause hearing after being satisfied by evidence on oath that a *prima facie* case of contempt had been demonstrated (Rule 467(2)). The subpoenas were issued with leave of the Court again upon the filing of an *ex parte* motion in writing, supported by evidence on oath in accordance with Rule 41(4).

[27] Assuming, without deciding, that *Charter* values are to be considered in light of the objection to production, I am satisfied that the production ordered in this matter is not contrary to the values reflected in section 8 of the *Charter*. The subpoena process engaged pursuant to Rule 41(4) is analogous to the prior authorization process contemplated in *Southam* and allows for judicial consideration of a party's motion for the issuance of subpoenas. Beyond that process, further judicial scrutiny of the subpoenas was available to and pursued by Viterra through its motion to quash.

[28] Having concluded that record production in accordance with the subpoenas is not inconsistent with the values embodied in section 8 of the *Charter*, I similarly conclude that production and, if admissible, reliance on those records in a proceeding would not be

inconsistent with the values reflected in sections 11(c), 11(d) and section 7 of the *Charter*. To be clear, I reach this conclusion having presumed, without deciding, that *Charter* values are engaged.

V. Who Goes First?

[29] In objecting to admissibility, counsel for Viterra took the position that the Union was required to advance arguments on admissibility first, because it had the burden to establish admissibility. The Union submitted it was not in a position to proceed with submissions in the absence of arguments setting out Viterra's objection.

[30] I directed that Viterra advance its arguments first. It has done so but has specifically requested that this issue be addressed.

[31] In arguing that the Union has the burden and should have advanced its arguments first, Viterra cites a series of authorities as instructive (*White Burgess Langille Inman v Abbott and Haliburtion Co*, 2015 SCC 23 at para 48 [*White Burgess*]; *R v Morin*, [1991] OJ No 2528 (Ont Gen Div) at para 123 [*Morin*]; and *R v Kutynec*, [1992] OJ No 347 (Ont CA) at para 17). Viterra argues that requiring it to proceed first presumes admissibility and puts the cart before the horse.

[32] The general rule that the burden of establishing the admissibility of evidence rests with the party seeking admission, is not in dispute. However, the jurisprudence does not require a party seeking to admit evidence to guess at the nature and scope of an objection to admissibility.

[33] In *R v Yacoob* (1981), 72 Cr App R 313 (Eng CA), cited in *Morin*, it is stated that the burden to prove admissibility, or in that case competence, arises "once the issue of competence…is raised."

[34] In *White Burgess*, Justice Binnie addresses the admissibility of expert evidence stating that an expert must be fair, objective and non-partisan and that the appropriate threshold for admissibility flows from this duty. Although the circumstances differ significantly, in *White Burgess* Justice Binnie then found that a party opposing admission of expert evidence on the ground that the expert was not fair and objective, had to show a realistic concern that the expert evidence should not be received. Having done so the burden then remained with the party seeking to admit the evidence. This process did not shift or replace burdens rather it facilitates the efficient conduct of proceedings.

[35] An objection serves a purpose. The party objecting is required to form and articulate an objection that raises a concern with respect to admissibility. Having done so the party seeking admission retains the burden of establishing admissibility in the context of the identified concern. This is not a shifting of the burden, nor does it place the cart before the horse as counsel for Viterra has argued.

[36] The order of submissions has not arisen as an issue because of a failure to recognize the burden on the Union to establish the admissibility of evidence. It has arisen because the objection to admissibility has been advanced prematurely in the absence of a factual and evidentiary context and has been intertwined with the separate and distinct issue of production.

VI. Conclusion

[37] The admissibility of the subpoenaed records will be addressed in the course of the hearing. Viterra's objection to the production of the records prior to the hearing on the basis that pre-hearing production would be contrary to *Charter* values is dismissed.

[38] In the course of the hearing of this objection, counsel for Viterra advised the Court that the subpoenaed records had been identified and compiled by Viterra. Viterra shall provide the records subject to the subpoenas to the Applicant Union in advance of the hearing.

[39] Costs in the cause.

ORDER IN T-1938-19

THIS COURT ORDERS that:

1. Any admissibility objections will be addressed in the course of the evidentiary hearing;

2. The Parties shall exchange all records and documents the Parties anticipate will be relied on in the course of the show cause hearing, including all records and documents falling within the descriptions of records to be produced in the *subpoennas duces tecum* issued pursuant to this Court's Orders dated October 13, 2020 and March 11, 2021 not later than Friday, April 9, 2021; and

3. Costs in the cause.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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