Federal Court  Cour fédérale

Date: 20210226

Docket: T-1938-19

Citation: 2021 FC 187

Ottawa, Ontario, February 26, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

GRAIN WORKERS' UNION LOCAL 333 ILWU

Applicant

and

VITERRA INC.

Respondent

ORDER AND REASONS

I. Overview and Background Facts

[1] The motion now before the Court seeks an order quashing two *subpoenas duces tecum* [the subpoenas] issued pursuant to an October 13, 2020 Order made by Mr. Justice Gleeson.

[2] Before this motion was filed, the Grain Workers' Union Local 333 ILWU [the Union] sought an order under Rules 466 and 467 of the *Federal Courts Rules,* SOR/98 – 106 [the *Rules*]

finding that the employer, Viterra Inc., [the Employer], which employs members of the Union, is in contempt of court with respect to an arbitration award made in favour of the Union on October 28, 2019 [the Award].

[3] The Award was made by an Arbitrator appointed under the *Canada Labour Code*, RSC 1985, c. L-2 [*CLC*]. The relevant part of the Award, for the purpose of this motion, is that the Arbitrator found that the Employer had violated the overtime provisions of the *CLC*. The Arbitrator ordered the Employer to cease-and-desist from violating the *CLC*.

[4] On November 27, 2019, the Union filed the Award in this Court in accordance with section 66(1) of the *CLC*. On December 6, 2019, the Registry issued a Certificate of Filing. The effect of the Certificate of Filing is that the Award made by the Arbitrator is held to be of the same force and effect as a judgment of this Court. As such, all proceedings may be taken with respect to the Award as if it were a judgment of this Court.

[5] On August 31, 2020 the Union filed an *ex parte* motion pursuant to Rule 467 seeking a contempt hearing.

[6] On September 14, 2020, Prothonotary Ring issued a Show Cause Order against the Employer. The Prothonotary found that the Union had established a *prima facie* case that contempt had been committed by the Employer pursuant to Rule 467(3) of the *Rules* and ordered the Employer to appear before a judge by videoconference via Zoom on Tuesday, October 20, 2020 at 9:30 a.m., unless otherwise directed by the presiding Judge, to hear proof of the acts set

out in the Order, purportedly committed by the Employer. At the time of that hearing the Employer was to be prepared to present any defence that it may have to the charge.

[7] Further to the October 13, 2020 order issued by Mr. Justice Gleeson, two employees of the Employer were issued the *subpoenas duces tecum* at issue here.

[8] On October 19, 2020, following a Case Management Conference held on October 16, 2020, Mr. Justice Gleeson orally directed that the show cause hearing scheduled for October 20, 2020 be bifurcated. The Employer had raised several preliminary issues with respect to the filing and registration of the Award, its enforceability and, if enforceable, the period for which it is enforceable. Mr. Justice Gleeson heard arguments on those matters on October 20, 2020. The evidentiary portion of the contempt hearing was postponed to a date to be determined.

[9] On November 30, 2020, Mr. Justice Gleeson released his decision on the Employer's preliminary issues. For reasons set out in the Order, reported at 2020 FC 1106, he found that the Award is capable of enforcement and that the motion for contempt may proceed to a hearing.

[10] The Employer has advised that Mr. Justice Gleeson's November 30, 2020 Order is currently under appeal and, the show cause hearing is scheduled to be held March 23 – 25, 2021.

II. **The Employer's Motion to Quash**

[11] By notice of motion dated October 29, 2020 and filed on November 3, 2020, the Employer brought the motion now being considered.

[12] The Employer seeks two orders: (1) an order quashing the subpoenas, and (2) an order prohibiting the Union from compelling the Employer to testify contrary to Rule 470(2) of the *Rules*, either through compelling its employees or officers to testify or through the production of documents in the Employer's possession or under its control.

[13] The subpoenas require the employees to attend to give evidence in court (by videoconference) and at that time to bring with them and produce at the hearing the following:

> Records disclosing the number of hours worked by members of the Applicant employed by the Respondent each day from October 29, 2019 to the present, some of which may be referred to as "Exception Reports"; and
>
> Any other records for that period kept in satisfaction of the Respondent's obligations under the following sections of the *Canada Labour Standards Regulations*, CRC c 986 after which various parts of section 24 of the regulations are enumerated.

III. **The *Rules* Addressing Contempt**

[14] The Employer acknowledges the quasi-criminal nature of the law of civil contempt. Mr. Justice Gleeson agreed with that statement, as do I. For elaboration of this principle, see *Vidéotron Ltée v Industries Microlec Produits Électroniques Inc* [1992] 2 SCR 1065 at page 1075.

[15] Rules 466 to 472 contain the provisions addressing contempt of Court. The focus of the Employer's challenge to the subpoenas is under Rule 470(2) which provides that "a person alleged to be in contempt may not be compelled to testify."

IV. **Quashing a Subpoena**

[16] The legal test for quashing a subpoena recognizes two different grounds. One ground is the existence of an applicable privilege or other legal rule pursuant to which a witness should not be compelled to testify: *Yeager v Canada (Attorney General)*, 2015 FC 978, at paragraph 52, (internal citations omitted).

[17] The second ground to be considered is whether the evidence from the witness subpoenaed is relevant in regard to the issues the Court must decide: *Canada (Citizenship and Immigration) v Mahjoub*, 2010 FC 1193, at paragraph 7, (internal citations omitted).

[18] The Employer has not raised the relevance of the possible evidence as an issue.

[19] The Employer put forward a number of arguments to support its view that neither the employees nor the records stipulated in the subpoenas are compellable.

[20] The Employer argues that the legal rule against self-incrimination found in Rule 470(2) of the *Rules* applies to corporations. The Employer submits that not quashing the subpoenas would be tantamount to compelling the Employer to testify, contrary to Rule 470(2).

[21] The Employer also argues that compelling the employees to testify for the sole purpose of producing documents that are in the Employer's possession is also tantamount to compelling the Employer to testify and produce evidence.

A. *The employees are compellable witnesses*

[22] The Employer states that a corporation can only speak or "testify" through its employees and that compelling an employee to testify is therefore tantamount to compelling the Employer to testify in contravention of Rule 470(2).

[23] This argument fails on the basis of *Merck & Co v Apotex Inc,* [1996] 2 FC 223, [*Merck 1996*] in which Mr. Justice MacKay quashed a subpoena issued to an officer of a corporation facing a contempt allegation.

[24] Mr. Justice MacKay determined that as the officer was named in the Show Cause Order, he could not be compelled to testify. However, Justice MacKay refused to quash subpoenas issued to employees of the same corporation because they were neither parties to the action nor cited for contempt: *Merck 1996* at paragraphs 64 and 67.

[25] *Merck 1996* was unanimously upheld on appeal by a panel of three judges. The Supreme Court of Canada dismissed the application for leave to appeal, with costs and without reasons on May 22, 1997.

[26] In the current motion, neither of the two employees are parties nor is either cited for contempt. One of the employees is a Payroll Specialist and the other is an Administrative Assistant. There is no assertion by the Employer that either employee is an officer of the corporation.

[27] Given the facts set out above, and based on the *Merck 1996* decision which enjoys the approval of the Supreme Court of Canada, the subpoenas are valid with respect to the employees being compellable witnesses.

B. *Merck 1996 is still Good Law*

[28] The Employer next argues that *Merck 1996* was decided before Rule 470(2) came into effect and that it is therefore no longer good law. The Employer maintains that Rule 470(2) prohibits issuing *subpoenas* to the employee of a corporation cited for contempt. In support of this assertion, the Employer makes three main arguments:

1) The advent of Rule 470(2) in 1998 altered the law of contempt as applied in Merck;
2) The definition of "person" in Rule 470(2) includes corporations; and
3) When an employee is compelled to testify, in effect, the corporation itself is compelled to testify.

[29] Each of these arguments will be considered in turn.

(1) Rule 470(2) did not alter the law of contempt

[30] With respect to the first argument noted above, when Rule 470(2) came into force in 1998, it did not alter the law of contempt as applied in *Merck 1996*. Rather, *Rules* 466 to 472 inclusive codified the common law principles of contempt proceedings before the Federal Court: *Canada (Human Rights Commission) v Warman,* 2011 FCA 297 at paragraph 21. Leave to appeal to the Supreme Court of Canada dismissed on April 26, 2012, with costs.

(2) "Person" in Rule 470(2) does not include corporations

[31] Relying on s.35(1)of the *Interpretation Act* RSC c I-21, which expressly includes corporations in the definition of a "person", the Employer argues that a corporation is a person under Rule 470(2). The Employer states that as the corporation is a person by virtue of this interplay of the *Interpretation Act* and the *Rules*, the subpoenas should be quashed. The logic put forward is that compelling a corporation's employees to testify would in effect be compelling the corporation to testify contrary to Rule 470(2).

[32] However, even accepting, without determining, that a corporation is a person for the purpose of Rule 470(2), that does not lead to the conclusion put forward by the Employer.

(3) A corporation is not compelled to testify when its employee is compelled to testify

[33] The Employer argued that in *Regina v Bank of Montreal*, [1962] BCJ No 158, 36 DLR (2d) 45 ("*Bank of Montreal*"), the British Columbia Supreme Court found that to subpoena the Superintendent of the Bank, who was an officer of the bank, was to subpoena the corporation and require it to give evidence against itself. The Court held that this offended the common law doctrine against compelling testimony from the accused. The Employer relied on *Bank of Montreal* for the proposition that a corporation cannot be compelled to give evidence against itself through the compelling of its employees to give testimony.

[34] In *Regina v Judge of the General Sessions of the Peace, Ex Parte Corning Glass Works of Canada Ltd*, [1970] OJ No 1729 [*Corning Glass*], the Ontario Court of Appeal specifically rejected *Bank of Montreal* on this point. The Court found that six employees of a corporation were compellable witnesses to give evidence against it as they were not the "mouthpiece" of the corporation nor were they being called to speak for the corporation. While such witness must give evidence, they are entitled to the protection available to any witness and in particular the protection against self-incrimination: *Corning Glass* at paragraph 13.

[35] *Corning Glass*, was followed on this point by the Supreme Court of Canada in *Regina v NM Paterson & Sons Ltd*, [1980] 2 SCR 679 [*Paterson*] at paragraph 28, and in *Regina v Amway Corp*, [1989] 1 SCR 21 [*Amway*] at paragraph 15.

[36] Mr. Justice La Forest discussed the right against self-incrimination in the context of corporations in *Thomson Newspaper Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at 544 [*Thomson Newspaper*]. He concluded that corporations are incapable of being forced to testify against themselves and reaffirmed the Supreme Court's refusal to accept the argument that testimony compelled from corporate officers in their representative capacity should be construed as the testimony of the corporation itself: *Paterson* at 691 and *Amway* at 37-39.

[37] Mr. Justice La Forest went on to state (internal citations omitted):

> Holding that persons who are compelled to speak on behalf of a corporation have a right to object to the introduction of that testimony at their own subsequent trial in no way suggests that the corporation would have the same right at its subsequent trial. In

> fact, the exact opposite would seem to follow. For if the person compelled to testify on behalf of a corporation is entitled to the protection of the right against self-incrimination, it follows that the testimony is in fact his or her own testimony, at least in so far as entitlement to that particular right is concerned. Its use cannot, therefore, be self-incriminatory qua the corporation.
>
> (Emphasis added)

[38] Shortly before the hearing of this motion, the Supreme Court of Canada released *Quebec (Attorney General) v 9147-0732 Quebec inc*, 2020 SCC 32 [*Quebec inc*]. While *Quebec inc* considered whether corporations could claim the protection of section 12 of the *Canadian Charter of Rights and Freedoms* [*Charter*], the Court considered and commented upon sections 7 to 14 in the course of its analysis.

[39] In addition to *Corning Glass*, *Paterson*, *Amway* and *Thomson Newspaper*, the Supreme Court findings in *Quebec inc* reinforce that compelling testimony of a corporation's employee is not tantamount to compelling the corporation itself to testify contrary to Rule 470(2).

[40] In a unanimous decision, with two concurring judgments, *Quebec inc* recognizes that a corporation's legal personhood as an artificial entity does not afford them all of the protections provided to individuals.

[41] Madam Justice Abella, notes in her concurring reasons that only s.8 and 11(b) of the *Charter*'s legal rights in sections 7 to 14 have been found to apply to corporations: see paragraphs 128, 132. Abella J. also discusses s.11(c) of the *Charter* at paragraph 132 which offers a complete answer to the Employer's third argument:

> [132] Significantly, corporations have been found not to be included under both ss. 7 and 11(c). In *R. v. Amway Corp.*, [1989] 1 S.C.R. 21, the Court concluded that the s. 11(c) right not to be compelled to be a witness in proceedings does not apply to corporations. Sopinka J. concluded that since a corporation cannot testify, the right of an accused person not to be compelled to be a witness against himself in s. 11(c) is not available to a corporation. Applying a purposive interpretation to s. 11(c), Sopinka J. was of the view that it was "intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth" (p. 40). In his words, "it would strain the interpretation of s. 11(c) if an artificial entity were held to be a witness" (p. 39).
>
> (Emphasis added)

[42] Rule 470(2) reflects the right of any person charged with an offence not to be compelled as a witness in proceedings against that person. This right is enshrined by section 11(c) of the *Charter*. The inapplicability of s.11(c) of the *Charter* to a corporation, in addition to the cases referred to in the discussion above, supports the conclusion that Rule 470(2) does not apply to a corporation nor prevents its employees from being compelled to testify.

C. *Can the employees produce documents?*

[43] The final argument put forward by the Employer is that requiring the employees to produce documents under the control of the Employer amount to compelling the Employer to testify against itself.

[44] The Employer states that the two employees were subpoenaed for the sole purpose of producing certain documents that are in the custody of the Employer. The Employer submits that

to permit production of those documents in the prosecution of the Employer is tantamount to compelling the Employer to testify and produce evidence contrary to Rule 470(2).

[45] The Employer also submits that permitting documents to be produced through employees of the Employer would effectively shift the burden of proof to the Employer and compel it to testify against itself.

[46] With respect to the documents sought to be produced via the subpoenas, as was done in *Merck 1996*, I find this issue should be left to the judge presiding at the show cause hearing who may determine the question of whether any documents produced are admissible. The presiding judge will be in a position to hear full argument, review the documents and then rule on the admissibility of any specific document.

V. **Conclusion**

[47] Neither of the two grounds upon which a subpoena may be quashed have been proven.

[48] The Supreme Court has held that corporations are incapable of being forced to testify against themselves. Any compelled testimony is the testimony of the person and not that of the corporation.

[49] Finally, although *Merck 1996* was decided before amendments to the Rules codified the common law rule against self-incrimination in Rule 470(2), which was an argument made in passing by the Employer to distinguish *Merck 1996*, it is clear from *Quebec inc.* that a

corporation does not enjoy the protection of subsection 11(c) of the *Charter* and its employees may be compelled to testify. By extension, the Employer does not enjoy the protection of Rule 470(2), which is meant to parallel the protections afforded to individuals in s.11(c). The employees named in the subpoenas may testify.

[50] The Employer's motion to quash the subpoenas to prevent the employees from attending to give evidence in court is denied.

[51] The Employer'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.

[52] The motion to quash the subpoenas is dismissed for the reasons given.

[53] Although the issue of document production has been deferred the Union has been successful on the motion. It is entitled to costs under the middle column of Tariff B.

ORDER in T-1938-19

THIS COURT ORDERS that:

1. The motion is dismissed on the basis set out in this Order and Reasons.

2. The Applicant is entitled to costs under the middle column of Tariff B.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1938-19
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