Federal Court  Cour fédérale

Date: 20210903

Docket: T-1938-19

Citation: 2021 FC 920

Ottawa, Ontario, September 3, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

GRAIN WORKERS' UNION LOCAL 333 ILWU

Applicant

and

VITERRA INC.

Respondent

REASONS AND ORDER

I. Overview

[1] The Applicant, Grain Workers' Union Local 333 ILWU, has tendered *viva voce* testimony and documentary evidence in contempt proceedings against the Respondent, Viterra Inc. The Respondent objects to much of the Applicant's documentary evidence, arguing it is inadmissible hearsay.

[2] The Respondent had previously objected to the admissibility of the documents and records and I determined the admissibility objection was premature, having been advanced in a factual and evidentiary vacuum (*Grain Workers' Union Local 333 ILWU v Viterra Inc*., 2021 FC 292 at paras 5-12 [*Viterra Production Objection*]). Evidence having now been heard, the Respondent again advances the objection.

[3] The Applicant takes the position that the evidence in issue is admissible as either real evidence or because it is admissible hearsay.

[4] The documents have been entered into the Court's ETrial Toolkit. The ETrial Toolkit has assigned each document an "FC" number. The documents have also been identified on the record and in turn assigned a number for identification purposes. For ease of reference and to avoid confusion I refer only to the ETrial Toolkit-assigned "FC" document number in these reasons.

I. The Documents

[5] The Respondent objects to the admissibility of three categories of documents:

A. Time card reports: this category of document records the times employees punch into, and out from, the workplace on each shift. The documents also contain manually entered adjustments made by payroll personnel. All manual adjustments are recorded and reflected on the time card reports (FC document numbers FC00089 – FC00112; FC 00166 – FC 00181; FC00191 – FC00222);

B. Exception reports: this category of documents are handwritten reports generated daily by supervisors. They record any deviation from the standard schedule for employees. Payroll personnel cross-reference exception reports with other employee shift data to produce time card reports that reflect hours to be paid and pay rates for individual employees (FC document numbers FC00005 – FC-00088; FC00118 – FC00165). Should this category of documents be admissible, the Applicant, with the consent of the Respondent, intends to place additional exception reports before the Court; and

C. Diary entries: employees of the Respondent, Mr. McFeeters and Ms. Kerr, each record certain details regarding their daily shifts and pay entitlements related to each shift in a daily calendar or diary. Mr. McFeeters and Ms. Kerr have both provided *viva voce* evidence and the Applicant seeks to admit extracts from their diaries into evidence (FC document numbers FC00183 and FC 00189).

II. Hearsay

[6] An out-of-court statement that a party seeks to place in evidence for the truth of the contents is hearsay and presumptively inadmissible. Hearsay is presumptively inadmissible because its reliability cannot generally be tested on cross examination (*R v Evans*, [1993] 3 SCR

653 at 661; *R v Baldree*, 2013 SCC 35 at para 2; also see *R v Khelawon*, 2006 SCC 57 at para 56).

[7] However, where the circumstances relating to origins of the hearsay indicate the statement is inherently reliable or the circumstances permit the reliability of the statement to be tested, hearsay may be admissible in a proceeding (*R v Smith*, 2011 ABCA 136 at para 14). I briefly address the issue of the admissibility of hearsay at paras 7 and 8 of the *Viterra Production Objection*:

> [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 evidence's 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.

III. The time card reports and exception reports are admissible

A. *Business records*

[8] Business records have long been viewed as inherently reliable records and are admissible in proceedings as an exception to the general hearsay rule under both the common law and statute.

[9] Section 30 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA], provides that a record made within the ordinary course of business is admissible evidence:

30(1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in	**30 (1)** Lorsqu'une preuve orale concernant une chose serait admissible dans une procédure judiciaire, une pièce établie dans le cours ordinaire des affaires et qui contient des renseignements sur cette chose est, en vertu du présent article, admissible en preuve dans la

the legal proceeding on production of the record.	procédure judiciaire sur production de la pièce.

[10] The terms “business” and “record” are broadly defined at subsection 30(12):

business means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government; (*affaires*)	***affaires*** Tout commerce ou métier ou toute affaire, profession, industrie ou entreprise de quelque nature que ce soit exploités ou exercés au Canada ou à l’étranger, soit en vue d’un profit, soit à d’autres fins, y compris toute activité exercée ou opération effectuée, au Canada ou à l’étranger, par un gouvernement, par un ministère, une direction, un conseil, une commission ou un organisme d’un gouvernement, par un tribunal ou par un autre organisme ou une autre autorité exerçant une fonction gouvernementale. (*business*)
[…]	[…]
record includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4). (*pièce*)	***pièce*** Sont assimilés à une pièce l’ensemble ou tout fragment d’un livre, d’un document, d’un écrit, d’une fiche, d’une carte, d’un ruban ou d’une autre chose sur ou dans lesquels des renseignements sont écrits, enregistrés, conservés ou reproduits, et, sauf pour l’application des paragraphes (3) et (4), toute copie ou transcription admise en preuve en vertu du présent article en conformité avec le

paragraphe (3) ou (4).
(*record*)

[11] Double hearsay is admissible under both the common law business records exception and the CEA exception where those involved in the chain of information passage and recording are acting under a business duty (Paciocco and Steusser at 184 citing *R v Monkhouse*, 1987 ABCA 227 at para 15 *[Monkhouse]* for the common law rule and *R v Martin*, [1997] SJ No 172 (SKCA) at paras 48-49 [*Martin*] for admissibility under the CEA). Double hearsay signifies a situation where the record's author does not have first-hand knowledge of the information in the record.

[12] In circumstances where a business record does not satisfy the requirements for admissibility under either the common law or statute, the hearsay statement may nonetheless be admitted where necessary and reliable in accordance with the principled approach to hearsay (*R v Ramratten*, 2015 ONCJ 567 at paras 89 and 90 [*Ramratten*], citing *R v Wilcox*, 2001 NSCA 45 at paras 58 and 61).

B. *Position of the parties*

[13] The Applicant submits the time card reports and exception reports are admissible. First, the Applicant argues that the time card reports contain real evidence in the form of employee punch in and punch out times. This data is automatically generated and then reported by the Respondent's time management software. The Applicant acknowledges the time card reports also contain hearsay evidence and that the exception reports are hearsay but submits both reports are admissible as business records under both section 30 of the CEA and the common law.

[14] The Respondent takes the position that the time card reports do not contain real evidence, as the recording of punch in and out times requires human intervention. The Respondent argues that the time card reports and exceptions reports are hearsay; they are neither reliable nor necessary and therefore should not be admitted. The Respondent also submits that in considering whether the hearsay evidence is to be admitted, the Court must consider the nature of the proceeding – a contempt proceeding that is *quasi* criminal in character where the Applicant has the burden of establishing the alleged contempt against the criminal standard of proof (beyond a reasonable doubt). The Respondent argues that the alleged contempt can be proven through the first-hand and direct evidence of the Applicant's members and therefore hearsay evidence is unnecessary. Finally, the Respondent takes the position that the jurisprudence establishes that hearsay evidence is inadmissible in a contempt proceeding before this Court and on this basis the evidence must also be rejected.

C. *Summary of the evidence*

(1) Time Card Reports

[15] Ms. Chung and Ms. Hong are both administrative assistants employed by Viterra and they provided evidence with respect to the purpose and creation of the time card reports.

[16] Ms. Chung's evidence was that punch in and out times are generated when an employee clocks in or out using an employer-issued pass. Time card reports are an amalgam of the clock in and clock out times generated by employees using their employer-issued pass at shift start and end as well as the inputs from the exceptions recorded by supervisors in the exception reports. In

preparing the time card report all punch times would be confirmed as correct, exceptions entered and, in the event punches are missing for any employee or late punches are not accounted for in the exception report, follow-up would occur with the supervisor. Ms. Chung understands the accuracy of this data is important because it is the basis upon which employees are paid. Ms. Chung has no first-hand knowledge of employee hours worked.

[17] Ms. Hong testified that her tasks include inputting payroll data. She reported that she has two primary responsibilities with respect to payroll. First, she corrects inaccurately-reported hours worked from previous pay periods. Second, after conducting a final check of the payroll data to make sure everything is correct, she approves payroll. She noted common payroll errors requiring later correction include circumstances where a supervisor fails to record something in an exception report or an employee performs duties on a particular shift that are paid at a wage rate different from that authorized.

[18] Ms. Hong testified that time card reports are created by Ms. Chung and another administrative assistant, Ms. Olson. The time card reports are generated electronically when employees clock in and clock out by swiping their employee issued pass on a card reader. Ms. Chung and Ms. Olson also enter data that is captured on the time card reports. Ms. Hong understands the data is also kept for auditing purposes.

(2) Exception Reports

[19] Mr. Steve Larochelle and Ms. Rosie Montgomery are supervisors with Viterra and they provided evidence with respect to the making of exception reports.

[20] Mr. Larochelle testified that employees are expected to clock in and out for their shifts, but that he is unable to monitor whether each employee is punching in or out. He testified that he is responsible for maintaining a number of different records, including exception reports, in which he as the supervisor is responsible for recording and approving any exceptions to an employee's regular work hours. This is a daily responsibility and the exception reports capture such things as when an employee works less than a full eight hour shift or has taken a day off.

[21] Ms. Montgomery testified that as a supervisor she has record-keeping responsibilities that include creating entries in exception reports. She indicated exception reports may be initiated in advance of the date for which they are applicable, for example where a supervisor knows in advance an employee is taking a certain day off or will be sick for several days. She testified that exception reports record information such as an employee arriving late without prior notice. She also testified that it is not unusual for employees to make errors punching in and out and that she gets asked to fix these errors.

[22] Ms. Montgomery testified that she accurately records on the exception reports when employees come in for overtime of eight hours on their days off as she understands this to be part of her duty as a supervisor. Ms. Montgomery testified that she believed she would be subject to discipline if she did not perform her duties.

D. *Employee punch in and out times is real evidence*

[23] Relying on the evidence of Ms. Hong and Ms. Chung, the Applicant argues punch in and punch out times are automatically generated and recorded where an employee uses his or her

personal pass to punch in at the start of a shift and out at shift end. The Applicant relies on *Saturley v CIBC World Markets Inc*, 2012 NSSC 226 [*Saturley*] in submitting that data captured automatically and without human intervention is real evidence.

[24] The Respondent acknowledges that machine-generated data that is merely reported is real evidence, not hearsay. However, the Respondent submits that the recording of punch in and out times is an employee-initiated action; this data is not recorded by an autonomous device that is inconspicuously collecting data. Human intervention triggering collection coupled with the evidence that employees may intervene and change data on the time card reports distinguishes these circumstances from those disclosed in the jurisprudence (*Saturley* and *R v Smeland*, 54 BCAC 49 (BCCA)).

[25] I am satisfied that the punch in and punch out times as reflected in the time card reports is real evidence.

[26] In *Saturley*, Justice Wood reviewed the jurisprudence and commentary distinguishing between electronic information that may be considered real evidence as opposed to documentary evidence (*Saturley* at paras 11-28). Justice Wood concludes "that electronic information which is automatically generated by computer without human intervention should be considered for admission as real evidence, rather than documentary evidence" (*Saturle*y at para 21). Hearsay rules, of course, are of no application to real evidence.

[27] In this instance, the evidence establishes the punch in and out times reflected in time record reports are automatically generated. Although the generation of the data is triggered by a human action (the swipe of a card), the initiating human activity does not change the character of the evidence. Once triggered, the data is automatically generated and retained without intervention. The human triggering action is not, in my view, different in kind from the actions of a human investment advisor who initiates a stock trade the details of which are then recorded automatically, the situation in *Saturley*.

[28] The punch in and out data is objective information captured by an automated process.

[29] The Respondent argues that the time card reports contain documentary evidence inputted or altered by a human observer, which renders each report as a whole to be documentary evidence. This argument is not persuasive.

[30] The evidence of Ms. Chung and Ms. Hong demonstrates that payroll personnel inputs, including adjustments to punch times, are readily identifiable on the time card reports and each input or adjustment is recorded and detailed on the report. The automatically-generated punch in and out times are also readily identified on the reports. There is no suggestion in the evidence that the punch in and punch out information that results from employee action is not accurately reflected in the time card reports, nor is there evidence to indicate that the automated collection process described in the evidence is inaccurate or unreliable.

[31] The evidence indicating that employees make errors in punching in and out that require correction does not, in my view, alter the character of the automatically-generated punch in and punch out data. The accuracy of this evidence, which has some relevance to the issues before the Court, does not alter how the evidence is to be characterized. Instead, this is a matter that may be considered when assessing what weight is to be given the direct evidence.

[32] The punch in and out data contained in the time card reports is direct evidence and admissible in the proceeding (*Saturley* at para 25 citing *R v Hall*, [1998] BCJ No 2515 (BCSC) at para 64).

E. *The time card reports and exception reports are admissible hearsay*

[33] That the time card reports and the exception reports are hearsay is not in dispute.

[34] As I understand the Respondent's position, it is also not disputed that the time card reports and exception reports satisfy the prescribed requirements for admission under the business record exception at section 30 of the CEA. The records were made in the ordinary course of business and contain information in respect of a matter for which oral evidence would be admissible in this proceeding (the Respondent does submit the records are unnecessary, which I address below). Nor has the Respondent argued that the Applicants have not complied with the procedural requirements for the tendering of hearsay evidence in accordance with subsection 30(7) of the CEA.

[35] Instead, relying on *Ares v Venner*, [1970] SCR 608 and *R v Khan*, [1990] 2 SCR 531, the Respondent submits that before hearsay evidence compliant with section 30 of the CEA is admitted, the Court must be satisfied that the evidence is necessary and reliable. The Respondent submits the time cards reports and exception reports are neither.

[36] The Respondent argues that to be necessary hearsay, relevant and direct evidence must not be available. It is argued that the records in issue are not relevant or necessary to the matter in issue: weekly hours worked. Instead, the records demonstrate weekly hours paid. In addition, the Respondent submits that the evidence the Applicant seeks to admit may be placed before the Court through other means, such as by way of the testimony of the union's own members. I am not persuaded by the Respondent's position.

[37] Contrary to the Respondent's argument, I am not aware of any authority that prevents a party from relying on both direct evidence and hearsay evidence in establishing a material fact. The availability of direct evidence does not render business records that are admissible under section 30 of the CEA inadmissible. Were that to be the case, the effect of section 30 of the CEA would be significantly limited.

[38] The Applicant argues that the records are of relevance and necessary to assessing material facts surrounding the core issue of hours worked. While the Respondent may take issue with whether the records can be relied upon to determine hours worked, this is an issue of weight to be given the records and is of no assistance in assessing the admissibility of the records. I agree.

[39] Similarly, I am not convinced that necessity and reliability are to be as narrowly construed as the Respondent suggests where records satisfy the requirements of business records pursuant to section 30 of the CEA.

[40] Section 30 of the CEA incorporates a relevance requirement. To be admissible, records must not only have been made in the ordinary course of business; they must also relate to a matter for which oral evidence would be admissible in the legal proceeding. As was stated in *L(B) v Saskatchewan (Ministry of Social Services)*, 2012 SKCA 38, where these requirements are met, the evidence is admissible on the basis that the records are inherently reliable:

> [29] The approach the courts have taken to section 30 of the *Canada Evidence Act* is not inconsistent with the notion that the law seek circumstantial guarantees of trustworthiness and reliability before evidence is admissible. Business records are considered inherently reliable because they are created in a context where they are systematically stored, produced and relied on. They are made in circumstances of regularity and continuity which produce habits of precision. Therefore, provided the record complies with the statutory prerequisites, it is sufficiently credible and trustworthy to be admissible […]

[41] Threshold necessity and reliability are, in my view, satisfied where the record falls within the scope of section 30 of the CEA. The underlying purpose and intent of section 30 of the CEA establishes the necessity of the evidence, as was highlighted by the Court of Appeal for Saskatchewan in *Martin* where Justice Jackson stated:

> [49] As a general rule, documents made in the ordinary course of business are admitted to avoid the cost and inconvenience calling the record keeper and maker. As a matter of necessity the document is admitted. Proof that a document is made in the ordinary course of business prima facie fulfils the qualification that in order for hearsay to be admitted it must be trustworthy.

> [50] Section 30 would have accomplished little if the author of the data contained in the business record had to be called to testify. The complexity of modern business demands that most records will be composed of information gleaned by the maker from others.

[42] The Respondent's submissions relating to the reliability of the records – the failure to account for differences in paid breaks, the limitations of the records in establishing hours paid as opposed to hours worked, the manner in which exceptions are recorded and reflected in the time card reports, evidence that errors occur in the records and alleged inconsistencies between the records and other evidence the Applicants seek to admit – all relate to the determination of the ultimate reliability of the records, which is relevant to an assessment of the weight the records are to be given in determining material facts. Admissibility is concerned with threshold reliability. As I have stated above, where the requirements of section 30 have been met, threshold reliability is established.

[43] Where there is a doubt as to whether records meet the statutory definition for admission as business records, resort should be had to the principled approach to hearsay. This, in turn, requires a consideration of necessity and reliability. However, where the records fall within the scope of the statutory definition, as here, this analysis is not required (*Ramratten* at paras 89-90).

[44] The time card reports and the exception reports are admissible under section 30 of the CEA.

[45] I am also satisfied that the records are admissible under the common law business records exception.

[46] The common law business record exception was summarized by the Court of Appeal of Alberta in *R v O'Neil,* 2012 ABCA 162 at paragraph 44, citing *R v Monkhouse,* 1987 ABCA 227 at paras 23-25. A business record is admissible at common law where the record contains an original entry, made contemporaneously, in the routine of business by a recorder functioning in the usual and ordinary course of a system in effect for the preparation of business records who had a duty to make the record and who had no motive to misrepresent.

[47] The time card reports and the exception reports satisfy each of these criteria.

IV. The diary entries

A. *Past recollection recorded*

[48] The Applicant seeks admission of the diary entries of Mr. McFeeters and Ms. Kerr as "past recollection recorded". Under this exception to the hearsay rule, a witness who does not recall relevant events may testify to having recorded those events, and the record created then admitted as evidence where the following criteria are satisfied:

1. The past recollection was recorded in some reliable way;

2. At the time, the event was sufficiently fresh and vivid to be probably accurate;

3. The witness is able now to assert that the record accurately represented their knowledge and recollection at the time. The usual phrase requires the witness to affirm that they "knew it to be true at the time"; and

4. The original record itself is used, if it is procurable (*R v Fliss*, 2002 SCC 16 at para 63, citing *Wigmore on Evidence* (Chadbourn rev 1970), vol 3, c 28, s 744 *et seq*).

B. *Position of the parties*

[49] The Respondent objects to the admission of the diary entries, arguing the Applicant failed to follow the proper course in seeking to admit hearsay under the past recollection recorded exception. The Respondent relies on *C(J) v College of Physicians & Surgeons (British Columbia)*, [1990] BCJ No 159 [*C(J)*] in submitting that the Applicant was required to proceed by:

A. taking the witness to each date in the diary;

B. establishing the witness had no independent memory of the shift recorded in the diary entry;

C. after establishing no independent memory, referring the witness to the diary to determine if their memory could be refreshed; and

D. only in the event the witness' memory was not refreshed would the diary entry itself be admissible under the past recollection recorded exception.

[50] In failing to follow the procedure detailed in *C(J)*, the Respondent submits the Applicant has not permitted the Court to obtain a clear understanding of whether the diary entries refreshed the memories of the witnesses, in which case the records are not admissible under the exception.

The Respondent also argues that the witnesses did not give evidence to establish the diary entries accurately represented their knowledge and recollection at the time, thus failing to meet the third criteria set out in the Wigmore test and *Fliss*. Finally, the Respondent submits that the failure of the Applicant to produce every diary page was contrary to the Applicant's duty of full disclosure and the evidence should not be admitted on this basis.

[51] The Applicant argues that there was no requirement to take the witnesses to each and every diary entry and that the witnesses gave evidence to the effect that, without their diary entries, they would be unable to give evidence in respect of hours worked on any given day during the relevant period. While the diary entries may have revived Ms. Kerr's memory of specific events, the evidence does not indicate that the entries revived any recollection of hours worked on any given day – the evidence demonstrated neither Ms. Kerr nor Mr. McFeeters had an independent recollection of hours worked. The Applicant relies on *R v Sipes*, 2012 BCSC 834 in submitting total memory loss is not a prerequisite to the admission of a record under the past recollection recorded exception.

C. *Analysis*

(1) The evidence does establish the witnesses lacked an independent recollection of hours worked

[52] Mr. McFeeters testified that he lacked an independent recollection of hours worked on specific days during the relevant period:

> **Mr. Clements:** "Do you have a recollection of the hours you worked on the specific dates spanning November 2019 through to the end of January 2021?"

> **Mr. McFeeters:** "Do I know how much I worked each day without looking at my planner?"
>
> **Mr. Clements:** "Yes."
>
> **Mr. McFeeters:** "No."

[53] While the evidence does not address Mr. McFeeters' recollection on a day by day basis, his uncontradicted testimony as it related to the whole of the relevant period was that he lacked an independent recollection of hours worked daily during the relevant period.

[54] This, in my view, distinguishes these circumstances from those in *C(J),* where it was "conceded that the complainant had a present memory of *many* of the events about which she testified" [Emphasis added.] (*C(J)* at para 37) .

[55] In addition, *C(J)* does not, as the Respondent submits, stand for the proposition that the admission of records on the grounds of past recollection recorded requires a party to address each and every potential recorded entry to establish the witness lacks an independent recollection of the recorded information. Instead, *C(J)* suggests a process that may have been appropriate in the circumstances of that case: a limited number of incidents (10) involving a narrative of the past events.

[56] *C(J)* does not require a specific process be adopted where a party seeks to admit records on the basis of past recollection recorded. The Respondent's position in this regard is inconsistent with the jurisprudence and it loses sight of the real question before Court – whether the evidence demonstrates that a witness lacks an independent recollection of the recorded

evidence. In this case, Mr. McFeeters' uncontradicted testimony satisfies this requirement. There was no need for Mr. McFeeters to address each and every diary entry in light of his evidence that he had no recollection of his hours worked.

[57] Ms. Kerr provided evidence in her testimony similar to that of Mr. McFeeters:

> **Ms. Hassall:** "If we didn't have this calendar before you, would you be able to tell me what shift you worked on each day of 2020, and the hours you worked that day?"
>
> **Ms. Kerr:** "I'd be able to tell you what shift I worked, and I would be able to- I don't know that I would remember every hour of overtime I worked. But I mean, I could remember working."
>
> **Ms. Hassall:** "Do you remember, without the calendar before you, do you remember what position you worked, what hours you worked, and-"
>
> **Ms. Kerr:** "No. I would say no".
>
> …
>
> **Ms. Hassall:** "And without looking at this now do you have any memory of what you were doing on January the 12th of 2020?"
>
> **Ms. Kerr:** "No."
>
> **Ms. Hassall:** "And without looking at this calendar, do you have that specific memory for any of these days?"
>
> **Ms. Kerr:** "No."

[58] Ms. Kerr's testimony also establishes that she has no recollection of hours worked, but her evidence does suggest that in reviewing the diary entries her memory was refreshed with respect to certain aspects of specific work days. However, that refreshed memory was unrelated to the issue before the Court – hours worked on specific days. That Ms. Kerr, after reviewing diary entries in the course of her evidence, had a refreshed recollection of a meeting or having

worked outside on a specific day does not detract from the fact that her uncontested evidence was she lacked a recollection of hours worked on those days that are in issue in this proceeding. I agree with the conclusion reached in *R v Sipes*, 2012 BCSC 834 that total memory loss is not a prerequisite to admitting an exhibit under the past recollection recorded exception:

> [19] I am satisfied the Court has established the legal criteria for admitting the document as past recollection recorded. The witness has no recollection of *some* of the information recorded on the diagram; the information was recorded in a reliable way and at a time when the events were sufficiently fresh and vivid to be probably accurate; and the witness testified she was being truthful and that the record accurately represented her best recollection at the time" [Emphasis added.].

(2) The failure to explicitly address the accuracy of the evidence is not fatal

[59] The Respondent notes that neither witness explicitly testified as to the accuracy of the diary entries at the time they were made and therefore the third Wigmore criteria has not been satisfied.

[60] Although there is no express statement by either witness in this regard, the evidence the witnesses have provided coupled with the surrounding circumstances allows me to infer that the witnesses were confident in the accuracy of their diary entries at the time the entries were made (*R v Pilarinos*, 2002 BCSC 798 at para 46).

[61] The evidence of both witnesses was to the effect that the entries were made at the conclusion of their shifts and that the diaries were maintained to ensure they were paid accurately in light of the duties performed and any periods of overtime they were assigned. In light of the circumstances and in particular the interest of the witnesses in ensuring the

information was accurate at the time it was recorded, I am of the opinion that the third Wigmore criteria has been satisfied. Had I concluded otherwise, I would also have been prepared to admit the evidence as being both relevant and necessary by applying the principled approach to hearsay.

(3) Failure to disclose does not render the diary entries inadmissible

[62] I am also of the opinion that the Respondent's submission that disclosure concerns render the diary entries inadmissible is without merit. The Applicant takes the position that the disclosure obligation which flows from section 7 of 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*] and *R v Stinchcombe*, [1991] 3 SCR 326 is of no application in this proceeding.

[63] The *Charter* is not engaged in this proceeding, which involves litigation between private parties. Document production in a contempt proceeding may be analogous to disclosure requirements in a criminal proceeding and I am prepared to accept that *Charter* values may inform document production.

[64] Objections to the adequacy of disclosure need be timely and brought to the attention of the Crown where appropriate (*R v Greganti*, 2000 CanLII 22799 (ON SC)). In this instance the diaries were provided to the Respondent many months ago. It is evident on the face of the diaries, as produced, that they do not include all entries for the period in issue. There is no indication on the record and the Respondent does not submit that the production concern now

raised was previously brought to the Applicant's attention. There is also no indication on the record that the Respondent now seeks production of the missing entries from the Applicant.

[65] The Respondent identifies no prejudice arising from the alleged incomplete disclosure in written submissions. In oral submissions the Respondent has asserted that non-production itself is prejudicial. Further, the Respondent cites no authority in support of its position that the appropriate remedy for the alleged incomplete disclosure is the exclusion of the diary entries as produced. One might expect that production, an adjournment and, if necessary, recall of the relevant witnesses might be sufficient to remedy any prejudice.

[66] It remains open to the Respondent to request the documents in issue and to seek an adjournment. Should production be refused or an adjournment required, the Respondent may, of course, bring the matter to the Court's attention.

[67] Documents FC00183 and FC 00189 are admissible in this proceeding.

V. Use of hearsay in contempt proceedings

[68] As a final matter, the Respondent has argued that even if otherwise admissible, this Court and the Federal Court of Appeal have previously held that hearsay is not admissible in a contempt proceeding (*Bhatnager v Canada (Minister of Employment and Immigration)* [1986] 2 FC 3 at paras 12 - 13, affirmed on this point in *Bhatnager v Canada (Minister of Employment and Immigration)* [1988] 1 FC 171 at para 53 [*Bhatnager FCA*] and affirmed on other grounds in

Bhatnager v Canada (Minister of Employment and Immigration) [1990] 2 SCR 217). The Respondent submits that *Bhatnager FCA* is binding.

[69] While I agree that *Bhatnager FCA* is binding, I do not agree with the Respondent's interpretation of that decision. At both the trial level and before the Court of Appeal it is evident the Court was referring to other inadmissible hearsay. Admissible hearsay may be admitted and relied upon in a contempt proceeding as it may in a criminal proceeding.

VI. Conclusion

[70] The documentary evidence in issue is admissible.

ORDER IN T-1938-19

THIS COURT ORDERS that:

1. The Respondent's objections are dismissed;

2. FC document numbers FC00089 – FC00112; FC 00166 – FC 00181; FC00191 – FC00222 (the time card reports) are admitted and will be assigned exhibit numbers;

3. FC document numbers FC00005 – FC-00088; FC00118 – FC00165 (the exception reports) are admitted and will be assigned exhibit numbers; and

4. FC document numbers FC00183 and FC 00189, (the diary entries of Mr. McFeeters and Ms. Kerr) are admitted and will be assigned exhibit numbers.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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