Case Name:

Ontario Hydro and C.U.P.B., Loc. 1000, Re

[1988] O.L.A.A. No. 95

34 L.A.C. (3d) 97

Ontario
Labour Arbitration

G.G. Brent, B. Switzman, R. Abbott

Decision: April 29, 1988

(22 paras.)

Evidence -- Privilege

Process and Procedure -- Arbitration -- Production

The grievor was discharged. During the testimony of the grievor's area manager it was disclosed that someone from the employer's security had been instructed to investigate certain allegations with respect to the grievor's conduct. The area manager testified that he had received written reports of the investigation and that the reports were the basis for certain action which he took which eventually led to the discharge of the grievor. The union requested production of the reports, which were produced by order of the board and marked as an exhibit. The employer then took the position that the reports were privileged.

HELD: The employer's claim for privilege was rejected. Any claim for privilege was waived, as counsel for the union was provided with the material and was allowed to see every part of it. In the event privilege was not waived, the material was not privileged. While some of the matters may have originated in confidence, there was subsequent disclosure in the course of giving particulars. The employer did not point out a relationship of which confidentiality was an essential cornerstone. It seemed particularly inappropriate to preserve the statements of people who would be called to give evidence confidential; the statements provided the basis of the charges against the grievor. The probative value of the report outweighed any prejudicial aspects. Production of the documents was ordered.

Statutes, Regulations and Rules Cited:

Appearances:

S. T. Goudge, for the union.

J.B. West, for the employer.

INTERIM AWARD

1 At the request of the parties the board is issuing a written ruling regarding certain questions which have arisen in connection with the reports of an investigation conducted by Hydro into certain aspects of the grievor's conduct. The board has had the benefit of thorough written argument from both counsel, and will deal with the questions raised in those submissions.

2 Before answering those questions, it may be helpful to put the matter in context by describing how the issue arose regarding this document. The grievor has grieved his discharge. During the testimony of Mr. Mantha, his area manager, it was disclosed that Mr. Mantha had instructed someone from Hydro security to investigate certain allegations in connection with the grievor's conduct. In the course of cross-examination, Mr. Mantha testified that he had received written reports of the investigation and that the reports were the basis for certain action which he took which eventually led to the grievor's discharge. The written reports had not been introduced by Hydro during Mr. Mantha's examination-in-chief. Counsel for the union asked Mr. Mantha if he had the reports with him, and when an affirmative answer was given the production of the reports was requested. The reports were produced by order of the board and marked as ex. 28. It was at this point that certain questions and concerns were raised by Hydro regarding the reports, and those questions and concerns have eventually led to this ruling. As we understand, it was agreed that the documents were produced as if under the compulsion of a *subpoena duces tecum*.

3 We will deal with the matters raised in what we consider to be their logical order.

1. *Is the material marked as ex. 28 privileged?*

4 In asserting the privilege Hydro has relied on the decision of the Supreme Court of Canada in *Slavutych v. Baker* (1975), 55 D.L.R. (3d) 224, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620, which adopted the "Wigmore test" for the establishment of privilege. That test has been generally adopted in labour arbitrations where privilege has been asserted, and we accept that it is the proper test to be used in examining the question of privilege. The test, as reproduced at p. 228 of the decision, is set out below:

> "(1) The communications must originate in a *confidence* that they will not be disclosed.
>
> "(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> "(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> "(4) The *injury* that would inure to the relation by the disclosure of the

communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

5 Under the circumstances, we are inclined to agree that the claim of privilege seems to be being made somewhat late. The material was tendered pursuant to the board's direction and was marked as an exhibit with the only question being whether any limitations should be attached to the use to which it was put. With full knowledge of all concerned, counsel for the union was provided with the material and was allowed to see every part of it that was available that day. We are inclined to agree with counsel for the union that if any of the material was privileged that claim has been waived.

6 In the event that we are mistaken about waiver, we do not consider that all four of Professor Wigmore's conditions have been met. In the first place, while it is clear that the material originated in Hydro as internal confidential documents, it is also clear that the subjects discussed therein formed the basis for the charges which were disclosed to the grievor and the union as the grounds for the discharge. In the course of the discussion of the charges Hydro informed the grievor and the union of the particulars related to each accusation. In the course of those particulars names of sources were revealed to the union and to the grievor. Further, the material itself indicates that some people were informed that they could be needed to testify against the grievor and agreed to do so. It is therefore our view that, while some of the matters dealt with in the material may possibly be said to have originated in the confidence that they would not be disclosed, the fact of their subsequent disclosure in the course of giving particulars of the charges certainly makes it difficult to conclude that Hydro considered that they were relayed in the confidence that they would never be disclosed under any circumstances.

7 Further, we do not consider that confidentiality is the essential cornerstone of any relationship pointed to by Hydro in connection with the second Wigmore test. We have also nothing before us to suggest that the community considers that any alleged confidential relationship is one that should be fostered.

8 In connection with the fourth test, it is difficult to think of many situations outside of the usually accepted confidential relationships where one can say with certainty that the public interest in ensuring that someone receive a full and fair hearing should take a back seat to the interest in ensuring that the confidential relationship should be preserved. In this case we are not persuaded that it would be better to preserve any confidential relationship than to try to give both sides a full and fair hearing on the merits so that the case can be disposed of correctly. In particular, when it would appear that many of the people mentioned in the documents will be called to give evidence concerning their dealings with the grievor, the very thing discussed in the material, it would seem particularly inappropriate to preserve as confidential their statements made to Hydro which provided the basis of the charges made against the grievor.

9 For all of those reasons we do not consider that the material which comprises ex. 28 is inadmissible because it is privileged.

2. *Does the prejudicial aspect of the report outweigh the probative value?*

10 The fact that the grievance has been lodged and that Hydro must now prove its case against the grievor by calling evidence from those both inside and outside its organization may be prejudicial to Hydro's interests as an employer and as a business enterprise and to the interests identified in its submissions relating to its security department. That is something which is independent of ex. 28 and would occur even if ex. 28 did not exist. We have considered the decision in *D. v. National Society for Prevention of Cruelty to Children*, [1978] A.C.

171 (C.A) and (H.L.), and we do not consider that this is a case where there are competing public interests which would weigh against disclosure. As mentioned earlier, the majority of the names in the material, together with much of the information which those people disclosed, has already been made available to the union and the grievor, either through the evidence heard at this hearing or during the discussion of the charges against the grievor. We can see no basis for holding that the material ought not to be received because its prejudicial effect would outweigh its probative value. In our view, if the material can be said to prejudice any party in relation to the matters in dispute, it would be the union, because the material may contain accusations made against the grievor which may be either irrelevant or not proven by any evidence led by Hydro. There is no objection to the admission of the document coming from the union on the ground of prejudice. It is our view that the interests of Hydro in so far as they relate to the matters in dispute are not so injured by the admission of ex. 28 as to outweigh any probative value which the material may have, and that there is no overriding public interest which would demand that the material not be disclosed.

3. *Does the board have jurisdiction to place any limitations on the use of the report?*

11 The union has pointed out that the authorities relied on by Hydro deal with the discovery process and not with documents which are produced during the course of the hearing. Having considered the submissions and authorities cited to us by both parties, it is our view that the board has the jurisdiction to determine its own procedure, and that this may be characterized as a procedural matter. It may be that the particular procedure adopted by a board of arbitration will offend natural justice or exceed its jurisdiction; however, that does not affect the board's inherent jurisdiction to determine procedure.

4. *Should strict limits be placed on the union's right to use the report?*

12 The limitations which Hydro wishes to see imposed on the use of the document is set out below:

> ... they should not be circulated or copied within the union or shown to persons who are not parties to the litigation. Specifically, but not exclusively, they should not be shown or circulated to potential witnesses.

13 In its submissions Hydro relies primarily on *Riddick v. Thames Board Mills Ltd.*, [1977] 3 All E.R. 677 (C.A.); *U.S.W.A. v. Shaw-Almex Industries Ltd.*, [1984] O.L.R.B. Rep. April 659; *London & District Service Workers' Union, Loc. 220 v. Gordon-Nelson Development Co. Ltd.*, [1984] O.L.R.B. Rep. June 807, and *Mount St. Joseph Hosp. and Hosp. Employees' Union, Loc. 180* (1985), 19 L.A.C. (3d) 107 (Thompson) (B.C.). The union relies on *Home Office v. Harman*, [1982] 1 All E.R. 532 (H.L.); *Kyuquot Logging Ltd. v. B.C. Forest Products Ltd.; B.C. Forest Products Ltd., Third Parties* (1986), 30 D.L.R. (4th) 65, 12 C.P.R. (3d) 347, 15 C.P.C. (2d) 52 (B.C.C.A.); *Re Sorbara and Sorbara* (1987), 59 O.R. (2d) 153, 15 C.P.C. (2d) 4 (Ont. S.C.), and *Courts of Justice Act, 1984*, S.O. 1984, c. 11, as amended.

14 The *Riddick* case involved an action for defamation based on a memorandum which had to be disclosed in the course of discovery for a previous action for wrongful dismissal. The wrongful dismissal action was settled. Leaving aside his comments on whether an employer should be responsible for a confidential report made by one of its employees to another, the question which Lord Denning, M.R., put was whether someone who had obtained a document by virtue of an order for discovery could use the document to sue for libel (see p. 687). In the course of discussing the balance which must be drawn between the public interest involved in doing justice between the parties by compelling the disclosure of documents and the public interest involved in maintaining

confidential documents as confidential, Lord Denning said, at pp. 687-8:

> On the one hand discovery has been had in the first action. It enabled that action to be disposed of. The public interest there has served its purpose. Should it go further so as to enable the memorandum ... to be used for this libel action? I think not. The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party, or anyone else, to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice ... In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, or for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J:
>
> > "A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: nor to use them or copies of them for any collateral object ... If necessary an undertaking to that effect will be made a condition of granting an order."
>
> Since that time such an undertaking has always been implied, as Jenkins J said in *Alterskye v Scott*. A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose.

15 The thrust of the decision is that when documents are obtained on compulsion during discovery there is a limitation on the use to which they can be made. The limitation reflects the balance which the courts drew between the desirability of full disclosure and the need to protect private communications. The limitation applies to prohibit the use of the documents for purposes unrelated to the particular lawsuit for which they were produced.

16 Labour arbitrations, unlike civil actions at law, do not have a formal institutional discovery process by which parties can be compelled to produce documents prior to the hearing. In labour arbitrations the amount of disclosure which occurs prior to the hearing will vary depending on the relationship of the parties, the circumstances, and the view of the participants, including the arbitrator, regarding the ability to order production before the hearing has commenced. Of the cases which have been cited to us, two deal with documents which were the subject of *subpoenas duces tecum* issued by the Ontario Labour Relations Board. In *Shaw-Almex, supra*, the board relied on *Riddick, supra*, and said at p. 670 (in paras. 18 and 19):

> Although the passages and cases just cited all concern production of documents on discovery in civil actions, the principles set out therein bear equal application to any legally compelled production of documents which occurs in the course of a quasi-judicial proceeding otherwise than upon the admission of the documents into evidence

in a public hearing.

. . . . .

Production pursuant to the summons therefore precedes the attempted introduction of those documents into evidence ... In any event, the party attempting to introduce a document into evidence must necessarily see it before the attempt is made. Others may have to see it, in order to intelligently resolve any dispute over its admissibility. The contents of a party's confidential documents may thus become known to others before the documents are admitted in evidence. Documents so produced may sometimes not be admitted or, if circumstances warrant admitted only *in camera* ... In our view, there is an implied undertaking by a party to whom documents are produced as a result of the use of a summons *duces tecum* issued by the Board. It is an undertaking to the Board as much as to the party from whom production is compelled. The undertaking is that the documents will not be used for collateral or ulterior purposes. The undertaking is similar in scope and effect to the undertaking discussed in the cases cited above. Breach of the latter undertaking is a contempt of court, as is the breach of any undertaking given to a court. By virtue of section 13(c) of the *Statutory Powers Procedures Act*, breach of an undertaking to the Board may be the subject of contempt proceedings in the Supreme Court of Ontario ...

17 In *Gordon-Nelson, supra, Shaw-Almex, supra*, was cited with approval, and the board said, at p. 815 (para. 22):

While all of these cases relate to production at discovery or prior to trial, and different considerations may relate to documents properly admitted at a public hearing, it is our view that there is sufficient protection for the respondent against any abuse of the Board's subpoena, and, where, as here, arguably relevant documents are sought, they should be produced. With respect to the respondent's concern about confidentiality, we might note that this issue is addressed in section 9(1)(b) of the *Statutory Powers Procedure Act* dealing with *in camera* hearings. By implication, it does not relieve a party of the obligation to disclose such matters.

18 It would seem that one aspect of the Ontario Labour Relations Board decisions was directed to documents which had to be produced prior to the hearing, and which might not ever become evidence in any proceeding. These decisions deal with situations that are analogous to discovery, and do not deal with the question of limitations to be placed upon the use of documents which are admitted into evidence. It would also seem that the board was accepting the position that such limitations are properly implied when any documents are produced on compulsion. Clearly, the decision in *Kyuquot Logging, supra*, casts doubt on the validity of implying such a limitation outside of Great Britain.

19 In *Home Office v. Harman, supra*, the majority of the House of Lords decided that the implied limitation as enunciated in *Riddick, supra*, for example, did not end once the document was read out in public as part of the subsequent judicial proceedings. Again, *Kyuquot Logging, supra*, must be read as casting doubt on the unqualified acceptance of the *Harman* case as representing the law in every common law jurisdiction outside of Great Britain. Clearly, if there is an explicit order governing the use of documents, then a finding of contempt

could flow from the violation of the order; however, where no such limitation is implied, then no finding of contempt could flow from the violation of a non-existent limitation.

20 In this situation we are asked not to imply a limitation but to order one. The purpose of implying a limitation, or indeed of setting one, is not to inhibit the use of the material to pursue any legitimate purpose connected with the investigation of the allegations or with the progress or preparation of the litigation for which the material was tendered. In our view the limitation sought by Hydro is one which is related to the manner and means in which the material is used in connection with the very case for which the material was produced. We consider that, even if any limitation or undertaking were implied, such as that set out in *Riddick, supra*, and the two Ontario Labour Relations Board cases, it would not apply to limit the use to be made of the material in connection with the suit for which the material was produced.

21 There are, in our view, rules which govern the proper conduct of the parties who are engaged in this arbitration. For example, if witnesses are coerced, threatened or harassed, then the board can deal with such behaviour. The prohibition against such treatment of witnesses is something which need not be the subject of any specific order of the board to desist. In our view, the proper disposition of this request is to decline to make the order which Hydro has sought, and to remind the parties of their normal and usual obligations in relation to the proper conduct of this hearing, including the manner in which witnesses or potential witnesses must be treated. We will leave it to counsel to instruct those who will see or use this material for the purpose of investigating the allegations regarding the proper course of conduct to follow. Beyond that which is prohibited, and we include therein conduct which is prohibited by the board's order excluding witnesses, we must rely on the good sense and discretion of the parties. We will make no order limiting the use of the material in the terms requested by Hydro. Under the circumstances we need make no finding as to whether a "*Riddick* limitation" would or should be implied by a board of arbitration.

22 [R. Abbott dissented.]