

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260626

Docket: A-63-21 (lead file)

A-306-20

A-229-21

A-125-22

A-153-23

A-231-23

A-108-24

Citation: 2026 FCA 121

**CORAM: DE MONTIGNY C.J.
HECKMAN J.A.
WALKER J.A.**

BETWEEN:

VITERRA CANADA INC.

Appellant

and

**GRAIN WORKERS' UNION LOCAL 333
ILWU**

Respondent

Heard at Vancouver, British Columbia, on June 18, 2025.

Judgment delivered at Ottawa, Ontario, on June 26, 2026.

REASONS FOR JUDGMENT BY:

WALKER J.A.

CONCURRED IN BY:

DE MONTIGNY C.J.
HECKMAN J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

WALKER J.A.

[1] These proceedings find their genesis in a dispute between the parties that dates from 2017 when Grain Workers' Union Local 333 ILWU (the Union) filed two policy grievances alleging

violation by Viterra Canada Inc. (Viterra) of the maximum work hours provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the *Code*). Following an arbitral award in favour of the Union, the long-running dispute culminated in contempt proceedings initiated by the Union against Viterra in 2020 in the Federal Court.

[2] These reasons address Viterra's appeals of seven decisions of the Federal Court (collectively, the FC Decisions), each of which addressed a distinct stage or issue in the Union's contempt proceedings.

[3] This Court consolidated Viterra's appeals by Order dated May 9, 2024, and designated the appeal in file A-63-21 as the lead appeal. A copy of these reasons will be filed in each of A-306-20, A-229-21, A-125-22, A-153-23, A-231-23 and A-108-24.

[4] By way of letter to the Court dated May 26, 2025, Viterra summarized the grounds of appeal set out in its Notices of Appeal which it was no longer pursuing and which I will not address in these reasons. Notably, Viterra no longer asserts any of the grounds in its appeal of the Failure to Purge Order (described below) and Viterra's appeal of that Order will be dismissed.

[5] Viterra's appeals are best considered in the chronological order in which the FC Decisions were issued. The issues and conclusions set out in each FC Decision are largely independent of the issues addressed in the other FC Decisions, as are the arguments raised by Viterra in these appeals. However, the outcome of each FC Decision impacted the subsequent stages of the contempt proceedings and the FC Decisions made at those stages. The same is now

true of Viterra's appeals. Therefore, I have structured my analysis to address the issues and arguments raised on appeal of each FC Decision before turning to the next in time, consistent with the progression of the Federal Court contempt proceedings.

[6] For the following reasons, I would dismiss Viterra's appeals in files A-306-20, A-63-21, A-229-21, A-125-22, A-231-23 and A-108-24. I would allow the appeal in file A-153-23 (Penalty Appeal) in part solely to vary the Federal Court's award of costs on a solicitor-client basis throughout to an award of costs to the Union on a solicitor-client basis throughout except in respect of the preliminary hearing and the motion to quash the Subpoenas, as explained in paragraphs 171-177 of these reasons. I would also award costs to the Union on a solicitor-client basis in respect of the appeals.

I. Background

[7] Viterra operates two grain terminals in the Port of Vancouver. The Union is certified under the *Code* to represent employees of Viterra and, in July 2017, filed the policy grievances referred to above.

[8] An arbitrator was appointed to address the grievances. After some initial skirmishing regarding Viterra's unsuccessful challenge to the arbitrator's jurisdiction, arbitrator Christopher Sullivan issued his decision on the merits of the grievances on October 28, 2019. The arbitrator determined that Viterra "regularly and often" made its employees work more than 48 hours per

week, in violation of sections 169 to 172 of the *Code*. The arbitrator made the following Award (the Award):

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

I remain seized with jurisdiction to resolve any dispute that may arise out of the implementation of this decision.

[9] On November 27, 2019, the Union wrote to the Federal Court to request the filing of a copy of the Award pursuant to section 66 of the *Code*.

[10] Viterra subsequently requested clarification of the Award. On November 28, 2019, the arbitrator issued a statement (the Clarification Statement) that reads:

The Employer seeks clarification of my award dated October 28, 2019, specifically in regards to the factual basis for the decision. For clarification, the award was based on the stipulated evidence regarding the data and factual circumstances up to the date of the grievance. No evidence of data and/or factual circumstances occurring after the date of the grievance was led at the hearing and the award did not address this matter.

[11] On May 28, 2020, the arbitrator confirmed by way of letter (the Letter Decision) to the parties that his jurisdiction was exhausted:

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

[12] On August 31, 2020, the Union commenced contempt proceedings in the Federal Court pursuant to Rules 466 and 467 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules) alleging that Viterra was in contempt of the Award.

[13] Prothonotary Ring (as she then was) of the Federal Court found that the Union had established a *prima facie* case of contempt by Viterra and issued a show cause order pursuant to Rules 467(1) and (3) on September 14, 2020 (the Show Cause Order). The Show Cause Order directed Viterra to appear before the Federal Court on October 20, 2020, to hear proof of its alleged breach of the Award and to present any defence that it may have to the charge of contempt.

[14] By order dated October 13, 2020, the Federal Court issued *subpoenas duces tecum* (the Subpoenas) to two Viterra employees. The Subpoenas required the employees to attend to give evidence in court (by videoconference) and to produce at the contempt hearing records disclosing hours worked by Union members and any other records kept by Viterra to comply with sections of the *Canada Labour Standards Regulations*, C.R.C. c. 986.

II. Regulatory framework

[15] The relevant provisions of the Rules and the *Code* and certain other relevant legislative provisions are set out in Schedule A to these reasons.

III. The Appeals

[16] For ease of reference, Viterra's seven appeals (collectively, the Appeals) are:

1. The Preliminary Appeal (A-306-20): Appeal of *Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333) v. Viterra Inc.*, 2020 FC 1106, dated November 30, 2020, *per* Gleeson J. (the Preliminary Order).
2. The Subpoena Appeal (A-63-21) (Lead file): Appeal of *Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333) v. Viterra Inc.*, 2021 FC 187, dated February 26, 2021, *per* Elliott J. (the Second Subpoena Order).
3. The Evidence Appeal (A-229-21): Appeal of *Grain Workers' Union Local 333 v. Viterra Inc.*, 2021 FC 920, dated September 3, 2021, *per* Gleeson J. (the Second Admissibility Order).
4. The Contempt Appeal (A-125-22): Appeal of *Grain Workers' Union (ILWU, Local 333) v. Viterra Inc.*, 2022 FC 796, dated May 31, 2022, *per* Gleeson J. (the Contempt Order).
5. The Penalty Appeal (A-153-23): Appeal of *Grain Workers' Union Local 333 ILWU v. Viterra Inc.*, 2023 FC 766, dated May 31, 2023, *per* Gleeson J. (the Penalty Order).
6. The Failure to Purge Appeal (A-231-23): Appeal of *Grain Workers' Union Local 333 v. Viterra Inc.*, 2023 FC 1143, dated August 24, 2023, *per* Gleeson J. (the Failure to Purge Order).

7. The Application Costs Appeal (A-108-24): Appeal of *Grain Workers' Union (ILWU, Local 333) v. Viterra Inc.*, dated March 11, 2024, per Gleeson J. (the Application Costs Order).

IV. Standard of review

[17] The appellate standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33 (*Housen*), govern appeals of Federal Court decisions made in contempt proceedings: *Canadian Pacific Railway Company v. Teamsters Canada Rail Conference*, 2024 FCA 136 at para. 27, leave to appeal to SCC refused, 41508 (April 17, 2025); *Friedlander v. Claman*, 2016 BCCA 434 at para. 52 (*Friedlander*). A finding of contempt is a question of mixed fact and law subject to review for palpable and overriding error: *Simon v. Bacon St-Onge*, 2022 FCA 168 at para. 11 (*Bacon St-Onge FCA*). Other issues arising in the Appeals are questions of law that will be reviewed for correctness, while additional issues raised by Viterra are again questions of mixed fact and law or questions of fact that will be reviewed for palpable and overriding error: *Housen* at paras. 8, 33.

V. Analysis

[18] As stated above, my analysis of Viterra's Appeals follows the sequence of the FC Decisions.

A. *The Preliminary Appeal* (A-306-20)

[19] Prior to the contempt hearing scheduled for October 20, 2020, Viterra challenged the propriety of the Federal Court considering the alleged contempt. Viterra argued that the Award was not capable of enforcement through contempt proceedings because (1) its filing and registration were nullities; and (2) the Award was declaratory in nature. In response, the Federal Court agreed to split the contempt hearing into two parts, the first to deal with Viterra's preliminary objections and the second, if required, to address the evidentiary portion of the hearing.

[20] The Federal Court heard the parties' submissions regarding enforceability on October 20, 2020, the original date scheduled for the contempt hearing, and issued the Preliminary Order on November 20, 2020. Viterra appeals two of the Federal Court's findings in support of its conclusion that the Award met the requirements for enforceability in the Union's contempt proceedings.

[21] I would dismiss Viterra's appeal of the Preliminary Order.

(1) Filing and registration of the Award

[22] Subsection 66(1) of the *Code* permits a person affected by an arbitrator's order to file a copy of the order in the Federal Court. When filed and registered, the order has the same force and effect as a judgment of the Federal Court: subsection 66(2) of the *Code*. As such,

proceedings may be taken in respect of the Award as if it were a judgment obtained in the Federal Court.

[23] In November 2019, the Union sent a copy of the Award to the Federal Court Registry for filing and registration under section 66. On December 6, 2019, the Registry issued a Certificate of Filing that incorrectly indicated the Award had been filed pursuant to subsection 251.15(1) of the *Code*. Subsection 251.15(1) permits the filing and registration of a payment order issued under section 251.1 but very clearly does not apply to the Award.

[24] Viterra argued at the preliminary hearing that the Union's filing of the Award was a nullity because the filing did not comply with the procedural requirements of section 66 and the Certificate of Filing referred to the incorrect section of the *Code*. The Federal Court rejected Viterra's arguments.

[25] On appeal, Viterra submits that the Federal Court erred in law by misconstruing and incorrectly applying the doctrine of *strictissimi juris* by equating it with procedural fairness in the contempt process. Viterra emphasizes the quasi-criminal nature of contempt proceedings and the potential consequences of a finding of contempt that have led Canadian courts to consistently insist on strict compliance with all procedural steps. In Viterra's view, the Federal Court erred in referring to fairness and to an absence of prejudice to the Union in considering the procedural deficiencies it had identified. Viterra argues that such nebulous and uncertain concepts cannot override the requirement of strict compliance with the law.

[26] The scope of the doctrine of *strictissimi juris* is a determination of law reviewable for correctness while the application of the doctrine is reviewed for palpable and overriding error: *Housen* at paras. 8, 33.

[27] I agree with Viterra that contempt proceedings require strict compliance with procedural steps and formalities due to the potential impact on the person alleged to be in contempt, up to and including imprisonment: *Beniey v. Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 202 at para. 16, citing *Orr v. Fort McKay First Nation*, 2012 FC 1436 at para. 13; *Bassett v. Magee*, 2015 BCCA 422 at para. 35 (*Bassett*). The jurisprudence is unambiguous in this regard.

[28] I find, however, no error of law or palpable and overriding error in the Federal Court's conclusions that (1) the filing of the Award was not inconsistent with the requirements of section 66 of the *Code* and (2) the error in the Certificate of Filing did not render the filing of the Award a nullity and incapable of enforcement in contempt proceedings.

[29] Viterra's appeal arguments focus on the Federal Court's formulation of the substance of the doctrine of *strictissimi juris*. Although Viterra opened its written submissions stating that the Federal Court misconstrued and misapplied the doctrine, Viterra does not then relate the alleged error in construing the doctrine to the filing of the Award alone (without the Clarification Statement) or the erroneous Certificate, submissions it made before the Federal Court.

[30] The Federal Court recognized in the Preliminary Order that civil contempt is quasi-criminal in nature and acknowledged the application of the doctrine of *strictissimi juris* to the proceedings before it. The Court stated that the doctrine must be applied such that “proceedings are carried out with care and close adherence to procedural requirements”, referring to *Friedlander* at paragraph 26, which in turn relied on *Bassett*. The Federal Court then stated that the doctrine is not intended to require blind compliance with procedural requirements but “seeks to ensure the fairness of the contempt process”, a process that is to be a last resort for non-compliance with a court order.

[31] I find no error of law in the Federal Court’s statement that the doctrine of *strictissimi juris* does not require blind compliance with procedural obligations. The statement far from suggests a standard of mere fairness. Viterra emphasizes the Federal Court’s statement that the doctrine of *strictissimi juris* “seeks to ensure the fairness of the contempt process” but I am not persuaded that this statement reflects the Federal Court’s construction of the doctrine. Read with the Court’s repeated acknowledgement of the criminal nature of contempt proceedings and the requirements of strict - but not blind - compliance and close adherence to procedural requirements, its reference to fairness is explanatory, although not helpful.

[32] Strict compliance, fairness and procedural fairness, though related, are distinct. While the doctrine of *strictissimi juris* can generally be said to safeguard the fairness of the process, “fairness” is not, in my view, an adequate description of the requirements it imposes. The cases consistently emphasize the gravity of a contempt order (*Pro Swing* at para. 35) and require “close adherence to procedural requirements: a precision in pleadings, procedure and evidence

appropriate to the nature of the process which engages the court in a conflict with one of the parties”: *Bassett* at para. 5; *Beloit Canada Ltd. v. Valmet Oy*, [1988] F.C.J. No. 103 at para. 43, 1988 CanLII 10150 (FCA), leave to appeal to SCC refused, 20824 (June 30, 1988).

[33] The Federal Court’s finding that *strictissimi juris* or strict compliance does not require blind compliance is consistent with the jurisprudence. Definitionally, a requirement of strict compliance does not equate to blind compliance. The Federal Court’s “blind compliance” standard is, in my view, a different formulation of the same requirement of “close adherence to procedural requirements”, the formulation used by the B.C. Court of Appeal (BCCA) in *Bassett* (at para. 35; see also *Friedlander* at para. 26).

[34] By way of example, this Court has refused to intervene when a show cause order contained a typographical error that was not prejudicial in any way to the person alleged to be in contempt and which was nothing more than a technical defect: *Steward v. Canada (Minister of Employment and Immigration)*, [1988] 3 FC 452 , 1988 CanLII 9395 (FCA). In contrast, in *Bassett*, the BCCA relied on the presence of prejudice as a significant factor in concluding the procedure followed in a contempt proceeding was not adequate.

[35] The application of the doctrine by the Federal Court informs its reference to blind compliance and gives rise to no palpable and overriding error. The filing deficiency raised by Viterra was clearly a technical error on the part of the Federal Court registry. Viterra does not challenge the Federal Court’s factual finding that the reference to subsection 251.15(1) instead of subsection 66(1) in the Certificate of Filing caused it no prejudice. Viterra’s appeal submissions

rely heavily on criminal law cases in which the deviation from procedure in question was substantive but here, the issue raised speaks solely to technical non-compliance. I find that the Federal Court's refusal to require blind compliance with the registration requirement of section 66 of the *Code* was fully justified.

[36] In closing this section, I note that Viterra argued before the Federal Court that the Union's failure to file and register the Clarification Statement with the Award was not consistent with the procedural pre-conditions of section 66. The Federal Court disagreed and emphasized that subsection 66(1) permits a person to file a copy of an order or decision of an arbitrator "exclusive of the reasons therefor". As the Clarification Statement did not form part of the Award, the Union had committed no breach of section 66 in filing the Award alone. Viterra does not contest this conclusion on appeal.

(2) Is the Award declaratory?

[37] For ease of reference, the Award reads in part:

Based on that data and the stipulations agreed by the parties in their May 10, 2018 correspondence, I have found that the *Canada Labour Code* has been violated and order the Employer cease and desist from violating the *Code*.

[38] The parties agree that, to be enforceable in contempt proceedings, an order must be clear, precise and unambiguous on its face, and cannot be merely declaratory: *Canadian Union of Postal Workers v. Canada Post Corporation*, 2015 FC 355 at para. 11 (*Canada Post*), relying on

Telecommunications Workers Union v. Telus Mobility, 2004 FCA 59 at para. 4. What is required for compliance must be clear from the face of the order.

[39] In the Preliminary Order, the Federal Court correctly stated that an award must compel performance of specific actions to be enforceable; it cannot only set out an existing legal situation. The Federal Court found that:

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

[40] The Federal Court concluded that the Award, when read with the arbitrator’s decision as a whole, was clear, precise and specific, citing *Canada (Human Rights Commission) v. Warman*, 2011 FCA 297 at para. 57 (*Warman*), leave to appeal to SCC refused, 34542 (April 26, 2012). The Court stated that it would not be necessary to look beyond the Award to consider the alleged contempt. Further, neither the fact the Union would be required to present evidence to establish contempt nor the absence of a specific timeline for compliance rendered the Award unenforceable. In light of the unusual bifurcation of the contempt hearing in this case, concerns relating to (a) evidence to establish contempt, and (b) the impact of the absence of a definitive date for compliance (other than on the enforceability of the Award), were reserved to the evidentiary portion of the hearing.

[41] Viterra’s appeal of the Preliminary Order in 2020 alleged two errors in the Federal Court’s conclusion that the Award was clear, precise and enforceable, and was not merely declaratory. In 2022, Viterra appealed the Contempt Order and, among its grounds of appeal, raised arguments regarding the enforceability of the Award and the basis for certain findings in the Preliminary Order. I will address Viterra’s initial appeal arguments and those 2022 arguments that relate to the Preliminary Order in this section.

[42] First, Viterra submits that the Federal Court erred in law by reading in the clarity and precision required to enforce the Award by reference to the Clarification Statement, the Letter Decision and the provisions of the *Code*, contrary to the requirement that “compliance must be evident on the face of the order”. Viterra asserts that the Federal Court erroneously approached its analysis from the perspective of fairness and not strict compliance with the need for clarity in the Award itself.

[43] I do not agree. The Federal Court does not reference the Clarification Statement or the Letter Decision in its analysis of whether the Award was clear and precise. In fact, the Federal Court concluded earlier in the Preliminary Order that the Clarification Statement did not form part of the Award. The Federal Court’s mention of the Clarification Statement elsewhere in the Preliminary Order in response to Viterra’s argument that it formed part of the Award is not relevant to the Court’s finding that the Award was clear and precise on its face.

[44] The Federal Court does state that “[w]hether [Viterra]’s future conduct is consistent with the Order is readily ascertainable by reference to the Code” but awards can be enforced when

they reference legislation without including the words of the provisions themselves. An order must be read and interpreted in the context of the reasons for it: *Warman* at para. 57. The specific provisions of the *Code*, namely sections 169 to 172, are referenced in the arbitrator's reasons for the Award and the reasons explain Viterra's non-compliance with the *Code*:

The data relied upon by the Union for the period prior to the grievances supports a determination that the Employer was in contravention of the statutory overtime hours of work per week.

[45] To comply with the Award, Viterra was required to stop scheduling its employees to work more than 48 hours per week. Viterra was, in other words, compelled to take specific action. I am not persuaded by Viterra's argument that the reference to the *Code* requires the Court to read in the specifics of compliance to the Award.

[46] I find no palpable and overriding error in the Federal Court's interpretation of the Award or in its conclusion that the Award was sufficiently clear and precise on its face to permit enforcement. The Court considered the Award, its words, and the stringent requirements of certainty, clarity and precision against the relevant jurisprudence. As the Federal Court stated, the Award does not suffer from a lack of precision that would impede Viterra's ability to comply with it. Further, Viterra's submission that the Federal Court approached the question of clarity and precision in the Award as one of fairness and not the certainty required by the doctrine of *strictissimi juris* finds no basis in the Preliminary Order. The Federal Court's analysis of the elements of enforceability was rigorous. The Court weighed Viterra's arguments to ensure clarity and precision had been established beyond a reasonable doubt.

[47] Second, Viterra submits that the Award was based on specific shift and operational schedules such that the Award was declaratory of the state of affairs that existed when the Award was issued. Again, I disagree.

[48] The Union states that Viterra did not make this argument before the Federal Court and that it should not now be considered on appeal. Generally, a new issue cannot be raised on appeal although a court may do so in the interests of justice where the court has sufficient evidence and findings of fact to do so: *Kilback v. Canada*, 2023 FCA 96 at para. 30 (*Kilback*), citing *Quan v. Cusson*, 2009 SCC 62 at paras. 36-39; *Singh Brar v. Canada (Public Safety and Emergency Preparedness)*, 2024 FCA 114 at para. 70. My review of the Preliminary Order confirms the Union's position and Viterra has not alleged on appeal an omission on the part of the Federal Court to consider this argument. I would decline to consider Viterra's new argument for this reason.

[49] In any event, the fact that the Award was based on agreed evidence of the scheduling and operational measures in place at the time (referred to in the Award as "stipulations agreed by the parties") does not mean its enforcement is limited to those schedules. There is no such limitation in the Award and I see no reason to read into the Award a limitation that undermines its purpose and that of the provisions of the *Code* regarding maximum hours of work. The Award contains no stipulation as to the way in which the *Code* ought not to be violated. The Award states simply that Viterra must cease and desist from violating the relevant sections of the *Code* - the sections limiting the permissible weekly hours of work and overtime. The Award does not, as rephrased

by Viterra, direct Viterra, “based on certain agreed specifications that existed at the time the order was made”, to cease and desist from violating the *Code*.

(3) Time for compliance

[50] The Federal Court addressed the absence of a specific time for compliance in the Award as part of its assessment in the Preliminary Order of whether the Award was sufficiently clear and precise to be enforceable. In reliance on the decision in *Telus Mobility v.*

Telecommunications Workers Union, 2002 FCT 1268 (*Telus*), aff’d 2004 FCA 59, Viterra had argued that courts routinely refuse to enforce orders that fail to set out a time for compliance and that the Federal Court should find the Award unenforceable. The Federal Court disagreed and concluded that the Award was enforceable despite the fact it did not specify the date by which Viterra must cease and desist from violating the relevant provisions of the *Code*.

[51] As indicated above, Viterra did not raise this issue as a ground of appeal in its Notice of Appeal of the Preliminary Order, nor did it make submissions on the issue to this Court in its related memorandum of fact and law filed on February 1, 2021. Viterra reserved those submissions to its appeal of the Contempt Order and its appeal memorandum of September 4, 2024. There, Viterra argued that the Federal Court committed a reviewable error “by refusing to consider arguments relating to the significance of the lack of timeline for compliance in the Arbitration Award after [it] had previously directed the Appellant to bring those same arguments during the evidentiary hearing”.

[52] Viterra pursued these arguments in its oral appeal submissions. In my view, Viterra's submissions improperly conflate the issues of (a) enforceability of the Award in the absence of a specific time for compliance; and (b) evidence regarding Viterra's non-compliance with the Award within a reasonable time. The Federal Court distinguished these issues in the Preliminary Order:

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

[53] Viterra's appeal of the Contempt Order gives rise to four issues surrounding the omission of a compliance deadline from the Award. In this section, I will address Viterra's arguments alleging that the Federal Court erred in (1) refusing to consider arguments regarding the lack of a timeline and the enforceability of the Award in the evidentiary portion of the contempt hearing; (2) failing to turn its mind in the Preliminary Order to whether the Union had established enforceability beyond a reasonable doubt; and (3) finding that the Award was enforceable notwithstanding it does not set out a time by which Viterra was required to cease and desist from violating the relevant provisions of the *Code*. I will reserve my analysis of Viterra's fourth argument, contesting its alleged non-compliance with the Award, to my reasons dealing with the Contempt Appeal.

[54] I first find no error in the Federal Court's conclusion in the Contempt Order that the question of enforceability of the Award was definitively addressed in the Preliminary Order: Contempt Order at paras. 79, 87-94. In paragraph 89 of the Contempt Order, the Federal Court set out the paragraphs of the Preliminary Order that address enforceability, including paragraphs 51 and 52. These two paragraphs properly separate the requirement that an order be clear and precise to be enforceable in contempt proceedings from the evidence required to establish non-compliance with the order by the alleged contemnor.

[55] Viterra's focus on the first sentence of paragraph 51 of the Preliminary Order ignores the second sentence, that a contempt proceeding should not fail simply due to the absence of a compliance deadline. Paragraph 52 clearly sets out the two facets of the Federal Court's analysis:

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

[Emphasis added.]

[56] The Federal Court's refusal to entertain Viterra's submissions at the evidentiary hearing that the Award was not enforceable did not breach the principles of procedural fairness, specifically the principle of *audi alteram partem*. The Federal Court left open in the Preliminary Order only the narrow issue of whether the evidence to be presented in the second part of the contempt hearing would establish non-compliance by Viterra within a reasonable time.

[57] The Federal Court correctly concluded in the Contempt Order that Viterra was attempting to re-visit “the very issues” regarding enforceability of the Award addressed in the Preliminary Order. I am not persuaded by Viterra’s argument that the Federal Court did not turn its mind in the Preliminary Order to the legal questions Viterra posed regarding the essential need for a compliance deadline. The Court addressed those legal questions at some length. It was not open to Viterra to raise anew the question of enforceability.

[58] Second, Viterra submits that the Federal Court erred in law in failing to require the Union to establish beyond a reasonable doubt that the Award was clear and precise and, therefore, enforceable.

[59] Viterra states that the Federal Court did not recognize in the Contempt Order that there are different thresholds of proof required at different stages of the contempt process where the clarity and precision of an award is challenged. According to Viterra, precision and clarity are assessed on a *prima facie* basis at the time of registration; the later assessment of enforceability requires that precision and clarity be established beyond a reasonable doubt.

[60] The Court stated in the Contempt Order:

[91] [Viterra] has cited no authority in support of the view that precision and clarity are to be assessed against different thresholds at different procedural points in a contempt proceeding. Nor did [Viterra]’s written submissions in the Part 1 proceedings advance the view that this was the case. Instead, [Viterra]’s written submissions on these issues were advanced under the heading “The Arbitration Award is declaratory and not enforceable in the Federal Court”.

[Emphasis added in original.]

[61] Viterra argues that the Federal Court considered the issue of enforceability in the Preliminary Order in the context of the proper registration of the Award under the *Code* and on a *prima facie* basis only. In support of its position, Viterra states that the entirety of the preliminary hearing and resulting Preliminary Order were concerned with the registration of the Award. Viterra also suggested in response to questions posed by this Court that it was contesting the *ex parte* Show Cause Order in the preliminary hearing. Neither of these assertions is accurate.

[62] It is clear that the Preliminary Order addressed the registration of the Award and, separately, the enforceability of the Award in contempt proceedings. Further, the Show Cause Order was obtained by the Union on a *prima facie* basis pursuant to Rule 467(3) but Viterra did not appeal the Show Cause Order and it was not in issue in the preliminary hearing. Viterra has established no basis on which I can conclude that the entirety of the preliminary hearing was concerned with registration of the Award, that the Show Cause Order was at issue at the preliminary hearing or that the Federal Court assessed the enforceability of the Award against a *prima facie* standard of proof.

[63] I find no error in the Federal Court's statement at paragraph 91 of the Contempt Order, nor do I read the statement as inferring the Court was under any misapprehension of the correct threshold of proof to be applied to the question of enforceability. There was no reason for the Court to concern itself with different thresholds of proof in either the preliminary or evidentiary portion of the contempt proceeding.

[64] It is important to recall that the preliminary hearing and contempt (or evidentiary) hearing were two parts of what is typically a single contempt hearing. The Federal Court correctly laid out the test and burden of proof placed on the Union to establish contempt in both the Preliminary Order (at para. 17) and the Contempt Order (at paras. 80-81, citing *Carey v. Laiken*, 2015 SCC 17 at paras. 32-35). In the Preliminary Order, the Federal Court stated:

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

[65] In paragraph 18, the Federal Court turned to the first element of contempt and the question of enforceability. Recall that, to be enforceable in contempt proceedings, an order must be clear and precise and cannot be declaratory. Considering paragraphs 17 and 18 of the Preliminary Order and the Court's enforceability analysis that begins at paragraph 43, I find that the Federal Court correctly required the Union to establish that the Award was clear, precise and enforceable, and not merely declaratory, beyond a reasonable doubt: *Carey* at paras. 31-32. The Federal Court consistently referred to the need to establish all elements of contempt beyond a reasonable doubt in the Preliminary and Contempt Orders. There is no hint in either Order that the Court had inadvertently slipped back to the show cause stage of contempt proceedings and made any assessment on a *prima facie* basis.

[66] Third, I turn to Viterra’s submission that the Federal Court erred in the Preliminary Order in concluding that the Award was enforceable notwithstanding it did not set out a date for compliance. I note that Viterra also submits in the Contempt Appeal that the Federal Court could not find that the Award was enforceable because it incorporated by reference the relevant sections of the *Code*. I have addressed this latter submission in paragraphs 44-45 of these reasons.

[67] Viterra characterizes a deadline for compliance as an essential detail of an enforceable order, “without which an order may be found to be unclear”. Viterra argues that the Federal Court erred in relying on the reference in *Telus* to a “reasonable time” for compliance because the court in *Telus* recognized that the term “reasonable time” may lead to conflicting interpretations: *Telus* at para. 43.

[68] In *Telus*, the arbitral order at issue did not specify a time for compliance by Telus with a letter agreement that precluded the company from using cell phone activation technology in a way that excluded certain bargaining unit employees. The Federal Court found that the order suffered from a number of deficiencies, including the absence of mandatory directions to Telus to take specific steps to cure the underlying breach of agreement, and concluded that the order was declaratory in nature. The Federal Court also addressed the absence from the order of a deadline for compliance:

[43] Further, courts have consistently held that an order of contempt will not issue where time for compliance has not been specified: [...]. In the case at bar, there was no specific direction in the order as to the time period for compliance. No one could instruct Mr. Salvadori or the Employer as to specific time for compliance

failing which it would be in contempt. Without setting a time frame, there arises two possible interpretations of the order.

[69] The Federal Court went on to find that an interpretation that the order was immediately applicable would render compliance impossible but a second and more plausible interpretation was that “the Arbitrator intended that the order be complied with within a ‘reasonable period of time’”: *Telus* at para. 43. In the same paragraph, the Court cautioned that the parties’ understanding of what is a reasonable time may differ and that the parties before it had contrary positions regarding what would be a reasonable time. The Federal Court in *Telus* predicated its conclusion on its review of the evidence:

[48] *Telus* Mobility intended to comply with the Arbitrator's order and in good faith spent considerable time, care and money to remedy the breach. Its rationale in the interpretation of the order was reasonable. To say the least, the Arbitrator's order could give rise to ambiguity and as a result, this gives rise to a reasonable doubt which should be resolved in favour of the company and Mr. Wells.

[70] The Federal Court in the present case found that the Court in *Telus* did not conclude that the omission of a time for compliance by itself renders an order unenforceable: see also *Sound Contracting Ltd. v. Regional District of Comox-Strathcona*, 2005 BCCA 167 at paras. 9, 11 (*Sound Contracting*) and *Gabriola Island Local Trust Committee v. Fonseca*, 2022 BCCA 402 at paras. 6, 9-10, and 52-72 (*Gabriola Trust*). I agree. I find instructive the BCCA’s analysis in *Gabriola Trust* of the contextual interpretation of a reasonable time for compliance:

[66] While it may have been preferable to include in this Court’s order a date by which removal of the seawalls must be completed, I do not consider that the absence of a compliance date in the order necessarily defeats this application.

[67] Instead, what is required is a contextual interpretation of the temporal requirements of the order. As in *Sound Contracting*, it may fairly be read into the order that the Fonsecas were required to remove the seawalls within a reasonable period of time. What amounts to a reasonable time is a case-specific inquiry. It is, however, one that must be informed by the well-established proposition that the Fonsecas are entitled to the most favourable interpretation of the order.

[71] I agree with the Federal Court that the absence of a date for compliance does not automatically render an order unenforceable in a contempt proceeding, although the absence of a fixed compliance date may well increase the significant evidentiary burden borne by the party seeking to enforce the order.

[72] Finally, Viterra submits that the Federal Court usurped the role of the arbitrator and violated section 58 of the *Code* by making a finding that Viterra had a reasonable time to comply with the Award, effectively amending or supplementing the order made: *I.B.E.W. Local #529 v. Central Broadcasting Co.*, [1977] 2 F.C. 78 at para. 5, 1976 CanLII 2343 (FC) (*Central Broadcasting*).

[73] Subsection 58(1) of the *Code* provides that an order of an arbitrator is final and “shall not be questioned or reviewed in any Court”.

[74] I acknowledge the concerns expressed in *Central Broadcasting* that in fixing a time for compliance, the court would be tampering with the order in question. Here, however, I find that the Federal Court did not amend or vary the Award. I am not persuaded that the Court questioned or usurped the arbitrator’s authority or role in determining that Viterra was required to comply with the terms of the Award within a reasonable time. Upon registration under section 66 of the

Code, the Award became an order of the court. The interpretation of the Award was central to the Federal Court's role and is consistent with the approach taken in *Telus*. It is also consistent with the recent jurisprudence cited above that states an order is not unenforceable by way of contempt if it does not fix a compliance date; it is open to a court to interpret the order in question as requiring compliance within a reasonable time.

[75] In summary, I find no error of law or palpable and overriding error in the Federal Court's conclusion that the Award was sufficiently clear, precise and specific to allow enforcement and was not merely declaratory.

[76] Accordingly, I would dismiss the Preliminary Appeal.

B. *The Subpoena Appeal (A-63-21)*

[77] In the Second Subpoena Order, the Federal Court dismissed a motion by Viterra to quash the Subpoenas issued to two employees on October 13, 2020, and to prohibit the Union from compelling Viterra to testify either through its employees or through the production of certain documents in its possession or control as required in the Subpoenas.

[78] Viterra's motion focussed on Rule 470(2), as does this appeal. The Rule reads:

Testimony not compellable

(2) A person alleged to be in contempt may not be compelled to testify.

Témoignage facultatif

(2) La personne à qui l'outrage au tribunal est reproché ne peut être contrainte à témoigner.

[79] The Federal Court addressed as follows each of Viterra's arguments challenging the Subpoenas:

1. Rule 470(2) does not preclude an employee of a corporation from being compelled to testify whether or not the reference to "person" in Rule 470(2) includes corporations. A corporation is not compelled to testify when its employee is compelled to testify.
2. The two employees subject to the Subpoenas are compellable as witnesses and the Subpoenas are valid in this respect: *Merck & Co. Inc. v. Apotex Inc. (T.D.)*, [1996] 2 FC 223 (*Merck 1996*), aff'd [1996] FCJ No. 1485, 1996 CanLII 21811 (FCA), leave to appeal to SCC refused, 25723 (July 9, 1997). The employees are not parties to the contempt proceeding or cited for contempt by the Union, and they are not officers of Viterra.
3. Although *Merck 1996* was decided before Rule 470(2) was enacted, it remains good law. The introduction of Rules 466 to 472 codified the common law principles of contempt proceedings before the Federal Court: *Warman* at para. 21.
4. Viterra's motion to quash the production of records was dismissed. The question of whether the Reports sought to be produced via the Subpoenas are admissible should be left to the presiding judge at the evidentiary hearing.

[80] Viterra raises two over-arching arguments on appeal. Viterra argues first that the Federal Court erred in law in concluding that Rule 470(2) does not apply to corporations and that the employees to whom the Subpoenas were issued are compellable as witnesses. Second, Viterra argues that the Federal Court erred in law in failing to consider whether the issuance of the Subpoenas constituted an abuse of process.

[81] I find no error of law in the Federal Court's interpretation of Rule 470(2) and no palpable and overriding error in the Court's application of the Rule to the Subpoenas, the particular employees to whom they were issued and the production of corporate records.

(1) The Federal Court's interpretation of Rule 470(2)

[82] Viterra relies on subsection 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21 (the *Interpretation Act*), to submit that the Federal Court erred in law in the Second Subpoena Order in concluding that Rule 470(2) does not apply to corporations. In its view, the Rule extends the prohibition from being compelled to testify to corporations. Viterra submits on this basis that the Subpoenas issued to its employees effectively compel Viterra to testify against itself contrary to Rule 470(2) and must be quashed.

[83] The Federal Court initially left open in the Second Subpoena Order the question of whether a corporation is a person for purposes of Rule 470(2). Instead, the Court focussed on the application of Rule 470(2) to an employee who is compelled to testify via subpoena and their right, as an individual, to be protected from compelled testimony. For the Federal Court, the determinative question in the motion was whether, when an individual testifies as an employee in a proceeding involving their corporate employer, the employee testifies as or for the corporation or in their own right.

[84] The Federal Court found that employees of a corporation are compellable witnesses (*Merck 1996*) and that a corporation is not compelled to testify when its employees (as opposed

to officers or persons who can be said to be “directing minds” of a corporation) are compelled to testify, citing: *Regina v. Judge of the General Sessions of the Peace, Ex parte Corning Glass Works of Canada Ltd.*, [1970] 3 O.R. 398, [1970] O.J. No 1729 (*Corning Glass*); *R. v. N.M. Paterson & Sons Ltd.*, [1980] 2 S.C.R. 679 at p. 691 (*Paterson*); *R. v. Amway Corp.*, [1989] 1 S.C.R. 21 (*Amway*); and *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at p. 544 (*Thomson Newspapers*). The Federal Court concluded that the Subpoenas were valid with respect to the two named employees.

[85] In *Merck 1996* (at paras. 64-68), the Federal Court quashed a subpoena issued in the course of contempt proceedings to an officer of a corporation because he was named in the show cause order and could be cited for contempt personally. The Court refused to quash subpoenas issued to employees of the same corporation. Those employees were not named in the show cause order and could as a result be compelled to testify. The Federal Court also endorsed the production of the documents listed in the subpoenas issued to the employees and concluded (at para. 69):

Whether any documents so directed to be produced are admissible in evidence at the continuation of the show cause hearing I decline to rule upon [...] the admissibility of which may be questioned in the course of the proceedings.

[86] *Merck 1996* is consistent with the above-noted jurisprudence of the Supreme Court. A corporate employee testifies in their personal capacity and not on behalf of the corporation. In *Thomson Newspapers*, the Supreme Court stated (at p. 544):

The reality is that once a person is compelled to give testimony, it makes no difference whether that person speaks on behalf of himself or herself, or on behalf of the corporation. So long as such persons are liable to subsequent prosecution they are susceptible, in the absence of sufficient protection, to the prejudice against which the right against self-incrimination is intended to guard. This reality is one of the reasons this Court has on two occasions refused to accept the argument that testimony compelled from corporate officers in their representative capacity should be construed as the testimony of the corporation itself; see *R. v. N.M. Paterson and Sons Ltd.*, [1980] 2 S.C.R. 679, at p. 691, and *R. v. Amway Corp.*, *supra*, at pp. 37-39.

[Emphasis added.]

[87] The Federal Court turned to the question of whether Rule 470(2) applies to a corporation as part of its review of the jurisprudence regarding testimonial compulsion. The Court stated that those cases support a conclusion that the Rule does not apply to corporations, nor does it prevent a corporation's employees from being compelled to testify: Second Subpoena Order at para. 42.

[88] Subsection 35(1) of the *Interpretation Act* provides that in every federal enactment, unless a contrary intention appears, “**person**, or any word or expression descriptive of a person, includes a corporation” (emphasis in original). Rule 470(2), a federal regulation, uses the same word “[a] person alleged to be in contempt may not be compelled to testify”. Viterra argues that subsection 35(1) necessarily leads to the conclusion that Rule 470(2) applies to corporations. In addition, Viterra notes the word “person” is used elsewhere in Rules 466-472 and argues the word must be interpreted to have the same meaning each time it is used, consistent with the common law presumption of coherence.

[89] Viterra's focus on the text of Rule 470(2) ignores the modern principle of statutory interpretation that requires the Court to read the words of an act or regulation “in their entire

context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10. Thus, the text of Rule 470(2) must be considered in light of its purpose and context to determine its meaning. Viterra’s argument that the language must be taken as the polar star of interpretation, to the exclusion of a consideration of the context and purpose of the Rule, is not persuasive. A court’s statutory interpretation begins with the text of the provision in question but does not focus exclusively on the text devoid of context and purpose.

[90] Rule 470(2) was enacted in 1998 as part of amendments to the Rules to govern procedure in Federal Court contempt proceedings. The amendments were intended to codify the common law of contempt: *Warman* at para. 21; see *Canadian Maritime Engineering Ltd. v. Ionada Incorporated*, 2024 FC 878 at para. 59, citing *Lyons Partnership, L.P. v. MacGregor*, [2000] F.C.J. No. 341 (QL), 2000 CanLII 14898 (FC). The purpose of Rule 470(2) was to parallel the common law principles and statutory provisions that protect an accused individual who risks incarceration from being compelled to testify in criminal or quasi-criminal proceedings. Contextually, its role as a central element of the Rules dealing with contempt and the potential for imprisonment supports this purposive interpretation. In *Canadian Private Copying Collective v. Fuzion Technology Corp.*, 2009 FC 800 at para. 55, a decision addressing contempt allegations, the Federal Court stated that Rule 470(2) codified the constitutional protection against testimonial compulsion afforded by paragraph 11(c) 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).

[91] Viterra argues that, in enacting Rule 470(2), Parliament is presumed to have intended to create a distinct form of protection for all persons charged with contempt, including corporations. Parliament is also presumed to know the common law. At the time Rule 470(2) was enacted, the decision in *Amway* had been released and the drafters of Rule 470(2) could have specified that corporations are excluded from the scope of the Rule. They did not and, Viterra argues, should therefore be taken to have intended to include corporations within the ambit of the Rule.

[92] I find the opposite interpretation of Parliament's intention when enacting Rule 470(2) is equally persuasive. The legislative drafters would not have felt the need to specify that Rule 470(2) does not apply to corporations, relying on the Supreme Court's conclusion that paragraph 11(c), which uses the word "person", does not apply to corporations: *Amway* at paras. 34-35. I agree with the Union that, if Parliament intended to contradict a line of jurisprudence and extend the protection against testimonial compulsion to corporations, it would have done so explicitly.

[93] Viterra submits that the current Rules are more stringent than the common law: *Saugeen First Nation #29 v. Sebastian*, 2003 FCA 28 at paras. 41-42 (*Sebastian*). This Court's statement in *Sebastian* that the current Rules are more stringent than the *Federal Court Rules*, C.R.C. 1978, c. 663 (the Former Rules) was made in respect of the requirements for a show cause order under Rule 467(1) (*Sebastian* at para. 41). While the requirements of Rule 467(1) may differ from those imposed by the common law and the Former Rules, I am not persuaded that the Court's acknowledgement of this difference provides authority for Viterra's proposition that Rule 470(2)

is more stringent than the common law and constitutional prohibition against compelling an individual accused to testify.

[94] I am also not persuaded by Viterra’s argument that the Federal Court made an error of law in concluding that *Merck 1996* remained good law even though it was decided under the Former Rules. *Merck 1996* is consistent with the cases cited by the Federal Court: *Corning Glass*, *Paterson*, *Amway* and *Thomson Newspapers* and the scope of the common law rule protecting the individual from testifying. The Supreme Court in *Amway* (at para. 35) referred to “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”.

[95] Further, Viterra argues specifically that the Federal Court erred in interpreting Rule 470(2) by relying on the recent decision in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at para. 132 (*Québec inc.*) and the Supreme Court’s analysis of paragraph 11(c) of the *Charter*, the analogous constitutional provision. I do not agree.

[96] For ease of reference, paragraph 11(c) provides that any person charged with an offence has the right “not to be compelled to be a witness in proceedings against that person in respect of the offence”.

[97] Well prior to its decision in *Québec inc.*, the Supreme Court found that paragraph 11(c) of the *Charter* was intended to protect an individual against being compelled to testify “out of his

or her own mouth” when charged (*Amway* at para. 35) and that “a corporation cannot be a witness and therefore cannot come within s. 11(c)”: *Amway* at para. 35.

[98] In *Québec inc.*, the majority of the Supreme Court agreed with the conclusion in *Amway* that corporations are not included in section 7 and paragraph 11(c) of the *Charter*, quoting Sopinka’s J.’s reference to the “affront” to an individual’s dignity and privacy should they be forced to testify and give evidence contrary to their own interests: *Québec inc.* at para. 132.

[99] The Federal Court did not err in finding support in the decision in *Québec inc.* for its conclusion that Rule 470(2) does not apply to a corporation and does not prevent its employees from being compelled to testify. A consideration of the *Québec inc.* case returns the Court to the text of Rule 470(2). Both the Rule and paragraph 11(c) use the word “person” and yet both provisions have been interpreted purposively to apply to individuals facing penal consequences. I acknowledge that paragraph 11(c), as a *Charter* provision, has a long interpretive history but the analogy to a court’s textual and purposive interpretation of Rule 470(2) is appropriate. It was open to the Federal Court to consider the analogous *Charter* protection cases in interpreting Rule 470(2): see, e.g., *Canada v. BCS Group Business Services Inc.*, 2020 FCA 205 at paras. 25-32.

[100] Viterra makes much of the Federal Court’s statement that the concurring discussion by Justice Abella (as she then was) of paragraph 11(c) of the *Charter* “offers a complete answer to” Viterra’s argument. Viterra submits that this statement is an error of law because Rule 470(2) was not before the Supreme Court in *Québec inc.*, Justice Abella’s conclusion was made in specific reference to *Charter* protections and no application under section 52 of the *Charter* was

before the Federal Court. However, none of these factors precluded the Federal Court from looking to the Supreme Court's treatment of paragraph 11(c) in interpreting Rule 470(2).

Paragraph 11(c) of the *Charter* and Rule 470(2) use the same language and are directed at the same issue – the protection of the individual from being forced to testify when charged in a criminal or quasi-criminal proceeding, including civil contempt (*Sutherland Estate v. Murphy*, 2025 ONCA 227 at paras. 5, 30 *et seq*).

[101] In summary, I find no reviewable error in the Federal Court's conclusion that the relevant case law, including *Québec inc.*, supports the conclusion that Rule 470(2) does not apply to corporations. I would also make the finding that Rule 470(2) does not apply to corporations, consistent with the constitutional protection afforded to an individual in paragraph 11(c) of the *Charter*.

[102] It follows that I find no error of law or palpable and overriding error in the Federal Court's conclusion in the Second Subpoena Order that employees and officers of a corporation can be compelled to testify as representatives of the corporation as long as they are not themselves subject to a contempt order in their personal capacity. In my view, Rule 470(2) did not alter the common law of contempt. The jurisprudence uniformly supports the Federal Court's conclusion.

(2) Abuse of process

[103] Viterra submits that, even should this Court find that the Federal Court did not misinterpret Rule 470(2), the Federal Court committed an error of law in failing to consider its argument that the Subpoenas ought to have been quashed because they constituted an abuse of process and improperly ordered production of its documents. Viterra argues that the Subpoenas effectively afforded the Union a right of discovery thereby reversing the burden of proving contempt and violating Viterra’s “unassailable right to remain silent”.

[104] There is no evidence in the Appeal Book that the issue of abuse of process was raised before the Federal Court and no mention of an allegation of abuse of process in the Second Subpoena Order. In its appeal memorandum, Viterra asserts that the Federal Court erred “by refusing to consider arguments relating to the abuse of process affected by the *subpoenas duces tecum*” but Viterra’s motion materials and submissions are not in the Appeal Book. It is not possible for this Court to verify whether Viterra raised the issue at the Federal Court and, if so, on what grounds.

[105] In addition, Viterra’s appeal submissions regarding abuse of process can only be characterized as sparse. They rely in large part on a decision of the Federal Court that explained the absence of a discovery mechanism in light of the criminal nature of contempt: *Lill v. Canada (Attorney General)*, 2020 FC 551. Viterra makes no mention of Rule 41 which provides the procedure by which *subpoenas duces tecum* may be issued and under which the Subpoenas were issued in these proceedings. Viterra also provides no argument or analysis regarding the application to a corporation of section 7 of the *Charter* and the constitutionally protected right to remain silent (and see the contrary conclusion in *Québec inc.* at para. 132).

[106] Accordingly, I am left to assume abuse of process was not raised at the Federal Court and that Viterra is attempting to introduce a new issue on appeal, which cannot be entertained except “where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so”: *Kilback* at para. 30; *Clément v. Canada*, 2023 FCA 34 at para. 4. The evidentiary record in support of Viterra’s submissions is not before the Court and I see no reason to stray from the Court’s long-standing jurisprudence on this issue. I agree with the Union that this submission should not be considered. I will nevertheless briefly address two discrete and interrelated alleged errors of law raised by Viterra.

[107] As part of its abuse of process submissions, Viterra argues that the Federal Court erred in law in the Second Subpoena Order by failing to consider whether the Subpoenas improperly ordered document production.

[108] I agree with the Union that Viterra is again precluded from raising this argument. In the first admissibility order dated April 1, 2021 (the First Admissibility Order), the Federal Court considered Viterra’s objection to the admissibility of certain documents ordered produced by the Subpoenas. Justice Gleeson rejected Viterra’s objection:

[5] [...] 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.

[109] The Federal Court emphasized that Viterra had specifically sought an order prohibiting production. That motion was dismissed by the Federal Court in the Second Subpoena Order and

the admissibility issue was reserved to the hearing judge. The Court acknowledged the statement in paragraph 53 of the Second Subpoena Order that “the issue of document production has been deferred” but found that it was inconsistent with other paragraphs of the Order and with the relief sought by Viterra in its motion. Justice Gleeson was “unable to conclude that the motion judge’s Order left record production, as required by the [S]ubpoenas, undetermined”.

[110] Viterra has not appealed the First Admissibility Order and its reasons and conclusions stand unchallenged. Viterra cannot in this appeal mount what is, in substance, a collateral attack on that Order.

[111] Viterra submits as a third related argument under the rubric of abuse of process that the Federal Court erred in law by refusing to consider whether permitting production of documents (as distinct from permitting testimony by an employee) is the equivalent of compelling a corporation to testify against itself. Viterra again argues that the Federal Court wrongly categorized the issue as one of admissibility that should be placed before the presiding judge at the evidentiary part of the contempt hearing when the issue was one of production itself and the validity of the Subpoenas. The Federal Court stated in the Second Subpoena Order:

[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.

[112] The Federal Court correctly described Viterra’s motion as seeking two orders (Second Subpoena Order at para. 12): one to quash the Subpoenas and the second to prohibit the Union from compelling Viterra to testify either through its employees or “through the production of documents in [Viterra’s] possession or control”. The Federal Court also correctly set out Viterra’s argument that compelling its employees to testify “for the sole purpose” of producing its documents is tantamount to compelling Viterra to testify.

[113] I have found no error in the Federal Court’s conclusion, based on *Merck 1996* and the subsequent jurisprudence, that a corporation is not compelled to testify when its employees are compelled to testify. The jurisprudence extends this principle to the production of the employer’s documents by the employees subject to subpoena: *Merck 1996* at para. 69.

[114] Despite any ambiguity in paragraph 46 or 53, the Federal Court’s conclusion is clear:

[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.

[115] The Federal Court was alive to Viterra’s objections but dismissed Viterra’s motion in its entirety.

[116] In conclusion, and for all of the foregoing reasons, I would dismiss the Subpoena Appeal.

C. *The Evidence Appeal (A-229-21)*

[117] By way of background, Viterra’s objections to the admissibility of its corporate records made their way to the Federal Court on two occasions. In the First Admissibility Order, referred to above in relation to Viterra’s submissions regarding document production, Justice Gleeson concluded that Viterra’s admissibility objection was premature in the absence of the records themselves and evidence relating to them.

[118] Following production of the records and documents in question, the Federal Court assessed Viterra’s admissibility objections in the Second Admissibility Order. In the second Order, the Federal Court dismissed Viterra’s objections to all three contested categories of records: time card reports, “exception reports” generated by supervisors, and diary entries made by two Viterra employees (Mr. McFeeters and Ms. Kerr) recording their daily shifts and pay entitlements (the Diaries).

[119] On appeal, Viterra challenges only the Federal Court’s admission of the Diaries.

[120] The Federal Court admitted the Diaries of Mr. McFeeters and Ms. Kerr on the basis of the “past recollection recorded” exception to the hearsay rule:

[48] 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*).

[121] In the alternative, the Federal Court would have admitted the Diaries by applying the principled approach to hearsay: Second Admissibility Order at para. 61.

[122] Viterra does not dispute the Federal Court’s description of the past recollection recorded exception or its statement of the test for admission established in *R. v. Fliss*, 2002 SCC 16 (*Fliss*). Viterra does submit that the Federal Court erred by failing to properly assess whether the Union had established that the witnesses had a permanent lapse of memory and by finding that the third criterion of the *Fliss* test was satisfied. The errors alleged by Viterra involve questions of fact or mixed fact and law and will be reviewed for palpable and overriding error: *Bearspaw First Nation v. Lefthand*, 2025 FCA 56 at paras. 5, 23; see also *Alberta v. AUPE*, 2014 ABCA 197 at paras. 15-16, in the context of a contempt proceeding.

(1) Past recollection recorded

[123] Viterra submits that the Union did not follow the procedure required to establish a permanent lapse of memory by failing to walk Mr. McFeeters and Ms. Kerr through each event recorded in their respective Diary to confirm whether the witness remembered the entry: *C.(J.) v. College of Physicians & Surgeons (British Columbia)*, [1990] B.C.J. No. 159, 1990 Carswell BC

7 (*C.(J.)*). According to Viterra, the result of this failure was an insufficient evidentiary record on which the Federal Court could determine whether the evidence from the Diaries was admissible on the basis of past recollection recorded or present memory revived.

[124] The Federal Court's finding of a permanent lapse of memory was specific to the central question in issue. I agree with the Federal Court that the critical recollection of Mr. McFeeters and Ms. Kerr was the number of hours worked on a specific day and that the test for past recollection recorded does not require a loss of memory of all of the events or information recorded: *R. v. Sipes*, 2012 BCSC 834 at para. 21. Here, for example, Ms. Kerr stated that she could remember working on specific dates but could not remember the hours worked on any of the dates during the recorded period without referring to her Diary. The hours worked was the "event" that the Union sought to establish via the Diaries; the days worked was not. Indeed, the parties have been embroiled in a dispute since 2017 on the singular issue of number of hours worked by employees per week. The evidence set out in the Second Admissibility Order provides ample support for the Federal Court's conclusion that neither Mr. McFeeters nor Ms. Kerr had any recollection of the hours worked on a specific date.

[125] The Federal Court stated that the fact the Union did not take the witnesses to each Diary entry did not preclude a finding of past memory recorded. I agree despite Viterra's insistence that this omission was fatal to admission of the Diaries.

[126] In *C.(J.)*, there were 10 serious incidents of alleged misconduct by a doctor before a committee of inquiry of the provincial College of Physicians and Surgeons. The witness had a

present memory of a number of the critical events about which she testified: *C.(J.)* at para. 37. In this case, however, neither Mr. McFeeters nor Ms. Kerr had any recollection of the hours worked each day. The BCCA stated that the committee “could have” gone through each of the alleged incidents to establish whether the complainant had a present recollection of the incident (*C.(J.)* at para. 28) but, in my reading of the decision, the BCCA did not mandate a process to be used in every case. I find that the Federal Court properly distinguished *C.(J.)* on the facts of the case before it.

[127] The Federal Court reviewed the *viva voce* evidence of Mr. McFeeters and Ms. Kerr in response to specific questions from the Union as to whether they could remember, without reference to the particular Diary entry, the number of hours worked on a specific date. Each witness responded that they could not remember hours worked on any of the dates recorded. I acknowledge that the evidence given was not specific to each date but find no palpable and overriding error in the Federal Court’s reliance on that evidence as sufficient to establish a permanent lapse of memory for the relevant period.

(2) The third *Fliss* criterion

[128] The third *Fliss* criterion requires that:

[63] [...]

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”.

[129] The question before this Court is whether the Federal Court made a palpable and overriding error in inferring that the third *Fliss* criterion was met.

[130] Viterra emphasizes that neither Mr. McFeeters nor Ms. Kerr made any statement regarding the accuracy of their Diary entries. Viterra argues that the *Fliss* criteria must be strictly applied and that the Federal Court did not do so: *Fliss* at para. 64.

[131] The Federal Court acknowledged the absence of such a statement but found:

[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).

[132] The “surrounding circumstances” of the Diary entries referenced by the Federal Court were that (i) the entries were made by each witness at the end of their shifts, and (ii) they maintained the Diaries to ensure they were paid accurately. The Federal Court inferred from these circumstances that the Diary entries were accurate and that the third *Fliss* criterion had been satisfied.

[133] The issue before the Supreme Court in *Fliss* was the admissibility of an officer’s *viva voce* evidence of the confession the accused made to the officer. The confession was recorded with prior judicial authorization and a 50-page transcript prepared the following day. The transcript itself was declared inadmissible at trial. The Supreme Court noted that the officer’s testimony covered 34 pages of the single-spaced transcript and went well beyond his recollection

of the confession at the trial. Justice Binnie found that the officer's testimony did not qualify for admission as past recollection recorded because the third *Wigmore* (now *Fliss*) requirement was not met. The officer read the lengthy transcript the day following the confession and would have had a good recollection of it but "the appellant was entitled to hear him swear to it", although no particular form of words is required: *Fliss* at para. 64.

[134] The Federal Court relied on the decision in *R. v. Pilarinos*, 2002 BCSC 798 (*Pilarinos*) to infer the accuracy of the Diary entries. The *Pilarinos* decision followed 14 *voir dire*s for the admission of statements overheard and transcribed by police officers. The B.C. Supreme Court (BCSC) stated, at paragraph 21, that there are circumstances in which the third *Fliss* criterion can be inferred but emphasized that the circumstances must make clear the accuracy of the recorded recollection. The BCSC in *Pilarinos* admitted one statement as meeting the *Fliss* criteria for past recollection recorded, stating:

[46] [...] The officer recorded his notes immediately after he overheard them. Although the officer did not specifically say that these notes accurately represented his knowledge and recollection at the time, he did say that he tried to set out the conversation in the order that he overheard it and he believed he had done the best he could. In *Fliss*, *supra*, Binnie J. said that no specific words had to be spoken in order to meet the *Wigmore* test. I am satisfied from the circumstances of the note-taking in this case that his notes reflected in his appendix accurately represent his recollection at the time. It is the original record. It was made in a reliable way and at a time when it would be sufficiently fresh and vivid to be probably accurate. Any other faults with respect to the note-taking are a matter of weight.

[135] The Federal Court in the present case properly focussed on the question of reliability of the Diary entries. The entries were made by Mr. McFeeters and Ms. Kerr at the end of their shifts and contained discrete information, unlike the information at issue in *Fliss*. Each witness

testified that the purpose of the entries was to ensure the accuracy of their daily remuneration because of prior errors in payroll information. In my view, it was open to the Federal Court to infer from the discrete nature and purpose of the Diary entries, their contemporaneity to the event (the daily shift) and the witnesses' strong interest in accuracy, that the Diary entries were reliable and accurate. There is no suggestion in the Court's reasons that it conflated the first and third *Fliss* criteria, as Viterra argues. The Federal Court addressed each criterion, stated the correct test and underlying reason for the requirement, and considered the evidence relevant to the particular requirement, whether the absence of memory of the event for purposes of the first *Fliss* requirement or reliability of the recorded information for the third.

[136] I find no palpable and overriding error in the Federal Court's conclusion that the third *Fliss* criterion for admission of the Diaries had been met.

(3) Admission of evidence based on the principled approach to hearsay

[137] The Federal Court concluded, in the alternative, that the Diaries were admissible as being "both relevant and necessary" under the principled approach to hearsay.

[138] Viterra submits that the Federal Court erred in law by disregarding the reliability requirement that is fundamental to the principled approach to hearsay. Viterra also submits that, even if the Federal Court had assessed reliability, it was a palpable and overriding error to conclude that the Diaries were reliable on the evidence adduced.

[139] I am not persuaded by Viterra’s submission that the Federal Court applied the incorrect test for admission based on the principled approach to hearsay. The Court noted the primacy of reliability in the origins of the rules regarding hearsay at the beginning of the Second

Admissibility Order:

[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).

[140] In my view, the Federal Court’s statement that the diaries are “relevant and necessary” is not the test it applied. Throughout its reasons, the Federal Court focussed on the circumstances in which the Diary entries were made and their purpose in verifying proper pay. These factors speak to reliability and not relevance. I find that the use of “relevant” instead of “reliable” was a simple misstatement by the Federal Court and does not reflect the substance of its analysis.

[141] I also find that the Federal Court committed no palpable and overriding error in concluding that the Diaries were sufficiently reliable to warrant admission under the principled approach to hearsay. The Diaries were necessary because the witnesses could not remember the hours they worked each day, the two witnesses were subject to cross-examination and the entries were reliable for the reasons the Federal Court gave in the course of its assessment of the third *Fliss* criterion. The circumstances in which the Diary entries were made tend to show that they are procedurally and substantively reliable: *R. v. Khelawon*, 2006 SCC 57 at para. 67.

[142] In its reply submissions at the conclusion of the hearing of the Appeals, Viterra argued briefly and for the first time that the principled approach to hearsay is not properly before this

Court. Viterra stated that the Federal Court did not actually decide that the Diaries were admissible on the principled approach but this argument was raised too late and too briefly to be considered a serious argument. Viterra's appeal memorandum and oral submissions "in chief" alleged errors in the Federal Court's finding itself. The Union responded to those arguments. Viterra cannot at the last instance change tactics and expect the Court to consider the issue.

[143] In conclusion and for all of the foregoing reasons, I would dismiss the Evidence Appeal.

D. *The Contempt Appeal* (A-125-22)

[144] Having addressed Viterra's preliminary objections, challenges to the Subpoenas, production of the time card reports, exception reports and Diaries, and objections to the admission of the documentary evidence, the Federal Court turned its focus to the central question in these proceedings.

[145] On May 31, 2022, the Federal Court found Viterra guilty of contempt of the Award (Contempt Order at para. 139):

Having concluded the Award is enforceable by way of this proceeding, the Respondent failed to comply with the Award, intent not to comply can be inferred and the Respondent has had a reasonable time to comply, contempt has been established.

[146] I have addressed all but one of Viterra's appeal submissions regarding the Contempt Order in my reasons for dismissing the Preliminary Appeal. In this section, I will address

Viterra's remaining submission that the Federal Court committed a palpable and overriding error in concluding that Viterra had had a reasonable time to comply with the Award.

[147] Before addressing Viterra's submission, I note that the Federal Court made a series of factual findings in the Contempt Order regarding hours worked by unionized employees in the months after the Award. The findings were based predominantly on evidence produced in response to the Subpoenas and supported by *viva voce* testimony at the evidentiary hearing. The Federal Court concluded that the evidence established beyond a reasonable doubt that Viterra intentionally persisted in requiring employees to work in excess of 48 hours per week, thereby violating the *Code* and failing to comply with the Award. Viterra limits its appeal arguments regarding the Federal Court's evidentiary findings in the Contempt Order to stating that, if this Court quashes the Subpoenas and finds the Diaries inadmissible, the remaining evidence was insufficient to permit the Union to satisfy its burden of establishing Viterra's intentional acts of contempt beyond a reasonable doubt.

[148] As I would dismiss the Subpoena Appeal and refuse to quash the Subpoenas, and would dismiss the Evidentiary Appeal and Viterra's objections to the admissibility of the Diaries, Viterra's argument must fail. The Federal Court's factual findings regarding hours worked by Union members subsequent to the Award are unchallenged. There is no reason for this Court to displace the Federal Court's conclusion that Viterra failed to comply with the Award and that its intent not to comply can be inferred from the evidence.

[149] Viterra argues that the Federal Court, although concluding Viterra had had a reasonable time to comply with the Award, made no factual finding as to what period of time was a “reasonable time to comply”. In fact, Viterra states, the Federal Court could not have made such a finding because the Union brought forward no evidence on the point.

[150] Viterra’s argument does not accurately reflect the reasons and findings of the Federal Court in paragraphs 136 to 139 of the Contempt Order. The Federal Court began its analysis by stating that “[t]imely compliance requires a consideration of the surrounding circumstances”, citing *Sound Contracting* at paragraph 11 and *Telus* at paragraphs 46-47. Those circumstances may include the efforts to comply made by the alleged contemnor, the period of time elapsed and any obstacles to compliance. This latter circumstance or consideration speaks to what a reasonable time to comply might be. The Federal Court found that Viterra had made little (if any) effort to comply with the Award prior to April 2021 and there was no evidence of any actions by the Union to impede compliance. Recall in this regard that the Award was dated October 18, 2019, and that the Union initiated contempt proceedings on August 31, 2020. The Federal Court acknowledged the parties’ efforts to negotiate an averaging agreement to regulate hours worked but observed that those efforts ended in May 2020. The Federal Court concluded on these facts Viterra had had a reasonable time to comply with the Award.

[151] I am not persuaded that the Federal Court was required to specify a reasonable time for compliance. It is implicit in the Court’s assessment of the nature of the Award, Viterra’s capacity to comply and any obstacles that could have required more time for compliance than the time elapsed since the Award.

[152] I also find no palpable or overriding error in the Federal Court’s factual findings. They are consistent with the testimony of two Viterra operations supervisors and two Union members who each stated that they could not recall any action by Viterra prior to April (or February in one case) 2021 to comply with the Award. The witnesses provided evidence regarding the scheduling realities faced by Viterra and the absence of obstacles to compliance with the limitations in the *Code* on employees’ maximum work hours. The BCCA in *Sound Contracting* stated that judges routinely determine what is reasonable in many contexts and have the discretion in each case to determine a reasonable time for compliance. In my view, the evidence before the Federal Court supported its conclusion that Viterra had not complied with the Award within a reasonable period of time.

[153] Accordingly, I would dismiss the Contempt Appeal.

E. *The Penalty Appeal* (A-153-23)

[154] The Federal Court received written submissions from the parties and heard oral argument on penalty on October 3, 2022, following issuance of the Contempt Order.

[155] On May 31, 2023, the Federal Court ordered Viterra to comply with the Award and to pay: (1) a fine of \$400,000 (which could increase or decrease depending on Viterra’s promptness in purging its contempt); and (2) costs “throughout” to the Union on a solicitor-client basis.

(1) Quantum of fine

[156] Viterra argues that the Federal Court made palpable and overriding errors in relying on neutral and unproven factors in determining the gravity of its contempt and in identifying but failing to apply relevant mitigating factors to reduce the fine imposed. Viterra also argues that the amount of the fine imposed is demonstrably unfit.

[157] Contrary to Viterra's position, I see no error that would permit this Court to intervene to vary the penalty imposed by the Federal Court in the Penalty Order.

[158] Rule 472 sets out the range of penalties a judge may order where a person has been found in contempt. Those penalties include imprisonment and/or fines, and injunctive relief ordering the contemnor to do or to refrain from doing any act. A trial judge at the penalty phase of contempt proceedings has significant discretion in determining the appropriate nature and quantum of any penalty to be imposed on the contemnor: *Professional Institute of the Public Service of Canada v. Bremsak*, 2013 FCA 214 at para. 36 (*Bremsak*). Hence, appellate courts must show great deference in reviewing trial decisions imposing sentence and cannot vary a sentence because they might have imposed a different sentence or have weighted the relevant factors differently (*Bell Canada v. Adwokat*, 2023 FCA 106 at para.14):

Instead, absent an extricable error of law, intervention is only warranted where an appellate court is convinced that the penalty is demonstrably unfit or clearly unreasonable (Simon at paras. 6-12).

[159] Here, the Federal Court comprehensively analyzed the principles and purposes of sentencing in a civil contempt case. The Federal Court began by stating that the primary purpose of sentencing in a contempt proceeding is to obtain compliance with court orders. General and

specific deterrence, as well as denunciation, play key roles in a court's assessment of an appropriate penalty, reflecting the significant public interest in fostering compliance with the court order at issue and with court orders more generally: *Carey* at para. 31; *Bremsak* at para. 74; *Apotex Inc. v. Merck & Co.*, 2003 FCA 234 at paras. 85-87 (*Apotex*). The Federal Court also noted that the principles of sentencing from the criminal sentencing context apply in cases of civil contempt: citing *Tremaine v. Canada (Human Rights Commission)*, 2014 FCA 192 at para. 19 (*Tremaine*) and *Bremsak* at para. 29.

[160] I find that the Federal Court identified and applied the correct principles in determining the appropriate penalty. The Federal Court also weighed the factors relevant to Viterra and to its conduct in fixing an appropriate and proportionate penalty, including those factors set out by this Court in *Bremsak* (at para. 45). In my view, Viterra's arguments establish no basis for appellate intervention. They are no more than an invitation to this Court to reweigh the factors considered by the Federal Court.

[161] Viterra submits that the Federal Court erred in concluding that its contemptuous conduct was serious and at the high end of the scale in part because Viterra had knowledge of the Award. Viterra argues that awareness of an order is a prerequisite to a finding of contempt and should not be considered in determining penalty.

[162] An alleged contemnor's knowledge of an order is one of the elements of contempt but the Federal Court did not err in taking Viterra's knowledge of the Award into account in sentencing: *Tremaine* at para. 23. The Federal Court's reasoning does not stop at awareness. The Court noted

that Viterra was put on notice of its non-compliance by the Union and continued to schedule employees to work excess hours after the commencement of these contempt proceedings. It is clear from the reasons given that the considerable length of time during which Viterra had ignored the Award was a significant factor in the Federal Court's assessment of the gravity of Viterra's conduct. The Federal Court also referenced the fact that Viterra's contempt arose in the context of the federal labour law regime; a context in which arbitration has been described as a cornerstone of labour relations. As a result, public policy concerns underlined the serious nature of Viterra's non-compliance with the Award.

[163] Viterra argues that the Federal Court made two palpable and overriding errors in relying on safety as a factor establishing the serious nature of the contempt. Viterra states that there was no evidence before the Court suggesting its conduct had jeopardized employee safety and that the Federal Court should not have raised the issue of its own accord.

[164] The Federal Court did not find that employee safety had been jeopardized by Viterra's conduct. Indeed, the Court recognized that there was no evidence in this respect in its consideration of the mitigating factors put forward by Viterra. The Federal Court's reference to safety concerns was a continuation of its focus on the public policy interest in safeguarding compliance with arbitral awards. The Court factored into its assessment of the serious nature of Viterra's non-compliance the fact that the maximum hours of work provisions in the *Code* have been described as a safety net of minimum requirements for employees, citing *Bank of Montreal v. Li*, 2020 FCA 22 at para. 43. I find no palpable or overriding error in the Federal Court's

consideration of the public policy interest reflected in the *Code* and the “potential” issues of employee safety arising from Viterra’s failure to respect the Award.

[165] Viterra next submits that the fine of \$400,000 was demonstrably unfit in light of the relevant jurisprudence and the principle of proportionality. Viterra’s arguments in this respect centre on the Federal Court’s departure from the quantum of the fine imposed in *Bremsak* and its alleged failure to take into account the mitigating factors Viterra had established.

[166] The Federal Court considered the aggravating and mitigating circumstances put before it by both parties. The Court discounted Viterra’s argument that it had not wilfully disobeyed the Award and repeated its observation that Viterra’s non-compliance continued after commencement of contempt proceedings against it – an aggravating circumstance. Viterra relied on the lack of prejudice to employees who worked overtime as a mitigating circumstance but the Court found that the submission failed to take into account the broader public interest in having employers respect and comply with labour laws and standards and with arbitral awards.

[167] The Federal Court acknowledged as a mitigating circumstance that Viterra had not compelled employees to work excess hours, that the scheduled excess hours were voluntary and that the employees were fully compensated for those hours. In addition, there was no evidence of direct harm to individual employees or that Viterra’s conduct was directly motivated by profit.

[168] The Federal Court next considered Viterra’s size as a material subsidiary of a parent company, Viterra Limited, that had total assets exceeding US\$19 billion in 2021. The Court was

satisfied that Viterra's scale and resources demonstrated its ability to pay a substantial fine. Given Viterra's stature, any fine levied had to be of sufficient size to garner its attention in order to deter future non-compliance.

[169] Finally, the Federal Court reviewed the range of fines imposed in the jurisprudence and emphasized the importance of the unique circumstances of each case in assessing quantum. The Federal Court discussed this Court's decision in *Bremsak*, finding it the most comparable, but clearly set out its reasons for imposing a higher fine, including the gravity of Viterra's contemptuous conduct, its ability to pay a sizeable fine and the passage of time since the *Bremsak* decision.

[170] I am not persuaded that the fine imposed on Viterra is demonstrably unfit. The Federal Court focussed on the principle of proportionality throughout its analysis to ensure that the penalty imposed was a fit sentence in the circumstances of this case: *Bacon St-Onge* at para. 11, citing *Bremsak* at paras. 33-34. Viterra has established no palpable and overriding error in the penalty imposed on Viterra in the Penalty Order and no basis for this Court to set aside the Federal Court's exercise of its discretion in sentencing.

(2) Costs

[171] Viterra submits that the Federal Court erred in law in the Penalty Order by imposing costs throughout on a solicitor-client basis, even though:

- The Federal Court did not award costs in the Preliminary Order; and
- In the Second Subpoena Order, the Federal Court ordered Viterra to pay “costs under the middle column of Tariff B”.

[172] Viterra has not argued that the Federal Court otherwise erred in concluding that an award of costs on a solicitor-client basis was appropriate in the present case. Viterra argues only that the Federal Court was limited to considering and ordering costs in relation to the evidentiary hearing and the penalty hearing – hearings that resulted in the Contempt Order and Penalty Order, respectively.

[173] In *Exeter v. Canada (Attorney General)*, 2013 FCA 134 at paragraph 14, this Court stated that a judge’s decision whether or not to award costs on a motion cannot later be overridden by the judge deciding the underlying action or application. Further, an order on an interlocutory motion that is silent on costs is treated as an award of no costs.

[174] I acknowledge a trial judge’s broad discretion in fixing costs in general and the distinct nature of this and any contempt proceeding. I see no error in general in the Federal Court’s decision to award costs to the Union on a solicitor-client basis: *Apotex* at para. 93; *Lari v. Canadian Copyright Licensing Agency*, 2007 FCA 127 at para. 38 (*Lari*). The policy underlying the customary practice of awarding costs on a solicitor-client basis in contempt proceedings is to ensure that a party who assists the court in enforcing its orders should not be out of pocket in so doing: *Lari* at para. 38, citing *Pfizer Canada Inc. v. Apotex Inc.*, 86 C.P.R. (3d) 33 at para. 8, 1998 CanLII 8951 (FC).

[175] I am not convinced, however, that there exists in this case any justification for departing from the principles laid out in *Exeter* in respect of the Preliminary Order and Second Subpoena Order.

[176] Accordingly, I would allow Viterra's appeal of the Penalty Order in part to amend the Federal Court's award of costs on a solicitor-client basis throughout to an award of costs to the Union on a solicitor-client basis throughout except in respect of the preliminary hearing and the motion seeking to quash the subpoenas. The costs awards (if any) in the Preliminary Order and the Second Subpoena Order would remain unchanged and govern the payment of any and all costs in respect of those proceedings.

[177] In all other respects, I would dismiss the Penalty Appeal.

F. *The Failure to Purge Appeal (A-231-23)*

[178] In the Failure to Purge Order, the Federal Court dismissed Viterra's application seeking to demonstrate that it had purged its contempt and continued to comply with the Award.

[179] Viterra informed the Court on May 26, 2025, that it was not pursuing any of the grounds of appeal set out in its Notice of Appeal of the Failure to Purge Order and I would dismiss the Failure to Purge Appeal.

G. *The Application Costs Appeal (A-108-24)*

[180] The Application Costs Order addressed the parties' costs submissions in respect of two applications made by Viterra seeking to demonstrate it had purged its contempt. The applications were made on June 30 and November 30, 2023, respectively. Viterra failed in its first application (the Failure to Purge Order) but succeeded in the second where the Federal Court concluded that Viterra had purged its contempt as of September 3, 2023. The Union sought costs in respect of both purging applications on a solicitor-client basis. Viterra conceded the Union's request for costs on a solicitor-client basis in respect of the first purging application but argued that the same should not occur in respect of the second because the Union had taken no position in the second, successful purging application.

[181] The Federal Court nonetheless ordered Viterra to pay costs to the Union on a solicitor-client basis in respect of both purging applications for the reasons set out in paragraphs 102-106 of the Penalty Order. Speaking specifically to the second purging application, the Federal Court stated that there was no basis to deny the Union costs incurred in connection with its review of that application for the purpose of determining what, if any, position it would take in the second application.

[182] On appeal, Viterra submits that the Federal Court erred in principle in awarding costs on a solicitor-client basis in respect of its successful second application because, at that stage, the Union could no longer be said to be assisting the Court in the enforcement of the Award.

[183] I am not persuaded by Viterra's submission. The Federal Court explained its finding that the Union's review of Viterra's second purging application was a necessary step in its efforts to

assist the Court in enforcing the Award, referring to its own analysis at paragraph 102 of the Penalty Order. Viterra's disagreement does not warrant this Court's intervention.

[184] Accordingly, I find no reviewable error in the Federal Court's exercise of its discretion to order costs on a solicitor-client basis in respect of both purging applications and would dismiss the Application Costs Appeal.

VI. Costs

[185] Following the hearing of the Appeals, the parties informed the Court by letter dated June 24, 2025, that they had not reached agreement on costs.

[186] In the absence of such agreement, and in light of my proposed disposition of Viterra's appeals, I would award costs to the Union on a solicitor-client basis in respect of all Appeals. I would include in this award the Penalty Appeal, notwithstanding Viterra's limited success in contesting the Federal Court's awards of costs in the Preliminary and Second Subpoena Orders.

VII. Conclusion

[187] Accordingly, I would dismiss each of the Preliminary Appeal (A-306-20), Subpoena Appeal (A-63-21), Evidence Appeal (A-229-21), Contempt Appeal (A-125-22), Failure to Purge Appeal (A-231-23) and Application Costs Appeal (A-108-24).

[188] I would allow the Penalty Appeal (A-153-23) in part solely to vary the Federal Court’s award of costs on a solicitor-client basis throughout to an award of costs to the Union on a solicitor-client basis throughout except in respect of the preliminary hearing and the motion seeking to quash the subpoenas. The costs awards (if any) in the Preliminary Order and the Second Subpoena Order would remain unchanged and govern the payment of any and all costs in respect of those proceedings.

[189] Finally, I would award costs to the Union on a solicitor-client basis in respect of the Appeals.

"Elizabeth Walker"

J.A.

"I agree.
Yves de Montigny C.J."

"I agree.
Gerald Heckman J.A. "

SCHEDULE A

Federal Courts Rules, S.O.R./98-106**Contempt**

466 Subject to rule 467, a person is guilty of contempt of Court who

[...]

(b) disobeys a process or order of the Court;

[...]

Right to a hearing

467 (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt

(a) to appear before a judge at a time and place stipulated in the order;

(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(c) to be prepared to present any defence that the person may have.

Règles des Cours fédérales, D.O.R.S./98-106**Outrage**

466 Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque :

[...]

b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;

[...]

Droit à une audience

467 (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint :

a) de comparaître devant un juge aux date, heure et lieu précisés;

b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;

c) d'être prête à présenter une défense.

Ex parte motion

(2) A motion for an order under subsection (1) may be made *ex parte*.

Burden of proof

(3) An order may be made under subsection (1) if the Court is satisfied that there is a *prima facie* case that contempt has been committed.

Service of contempt order

(4) An order under subsection (1) shall be personally served, together with any supporting documents, unless otherwise ordered by the Court.

Burden of proof

469 A finding of contempt shall be based on proof beyond a reasonable doubt.

Testimony not compellable

470 (2) A person alleged to be in contempt may not be compelled to testify.

Canada Labour Code, R.S.C., 1985, c. L-2

Decisions not to be reviewed by court

58 (1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.

Requête ex parte

(2) Une requête peut être présentée *ex parte* pour obtenir l'ordonnance visée au paragraphe (1).

Fardeau de preuve

(3) La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis qu'il existe une preuve *prima facie* de l'outrage reproché.

Signification de l'ordonnance

(4) Sauf ordonnance contraire de la Cour, l'ordonnance visée au paragraphe (1) et les documents à l'appui sont signifiés à personne.

Fardeau de preuve

469 La déclaration de culpabilité dans le cas d'outrage au tribunal est fondée sur une preuve hors de tout doute raisonnable.

Témoignage facultatif

470 (2) La personne à qui l'outrage au tribunal est reproché ne peut être contrainte à témoigner.

Code canadien du travail, L.R.C. (1985), ch. L-2

Caractère définitif des décisions

58 (1) Les ordonnances ou décisions d'un conseil d'arbitrage ou d'un arbitre sont définitives et ne peuvent être ni contestées ni révisées par voie judiciaire.

No review by *certiorari*, etc.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of their proceedings under this Part.

Status

(3) For the purposes of the *Federal Courts Act*, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that Act.

Filing of orders and decisions in Federal Court

66 (1) Any person or organization affected by any order or decision of an arbitrator or arbitration board may, after fourteen days from the date on which the order or decision is made or given, or from the date provided in it for compliance, whichever is the later date, file in the Federal Court a copy of the order or decision, exclusive of the reasons therefor.

Interdiction de recours extraordinaires

(2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, *de certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre ou d'un conseil d'arbitrage exercée dans le cadre de la présente partie.

Statut

(3) Pour l'application de la *Loi sur les Cours fédérales*, l'arbitre nommé en application d'une convention collective et le conseil d'arbitrage ne constituent pas un office fédéral au sens de cette loi.

Exécution des décisions

66 (1) La personne ou l'organisation touchée par l'ordonnance ou la décision de l'arbitre ou du conseil d'arbitrage peut, après un délai de quatorze jours suivant la date de l'ordonnance ou de la décision ou après la date d'exécution qui y est fixée, si celle-ci est postérieure, déposer à la Cour fédérale une copie du dispositif de l'ordonnance ou de la décision.

Idem

(2) On filing an order or decision of an arbitrator or arbitration board in the Federal Court under subsection (1), the order or decision shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order or decision were a judgment obtained in the Court.

Enforcement of orders

251.15 (1) Any person who is affected by a payment order issued under subsection 251.1(1) or confirmed or varied under subsection 251.101(3) or by an order of the Board made under subsection 251.12(1), or the Head, may, after the day provided in the order for compliance or after 15 days following the day on which the order is issued, made, confirmed or varied, whichever is later, file in the Federal Court a copy of the payment order, or a copy of the order of the Board, exclusive of reasons.

Limitation

(1.1) However, a payment order is not to be filed while it is or may be the subject of a review under subsection 251.101(1) or an appeal under subsection 251.101(7) or section 251.11 or if an order of the Board is made under paragraph 251.12(1)(a) relating to the payment order.

Idem

(2) L'ordonnance ou la décision d'un arbitre ou d'un conseil d'arbitrage déposée aux termes du paragraphe (1) est enregistrée à la Cour fédérale; l'enregistrement lui confère la valeur des autres jugements de ce tribunal et ouvre droit aux mêmes procédures ultérieures que ceux-ci.

Exécution des ordres de paiement et des ordonnances

251.15 (1) Toute personne concernée par un ordre de paiement donné en vertu du paragraphe 251.1(1) ou confirmé ou modifié en vertu du paragraphe 251.101(3) ou par une ordonnance rendue en vertu du paragraphe 251.12(1), ou le chef, peut, après l'expiration d'un délai de quinze jours suivant la date où l'ordre a été donné, confirmé ou modifié ou l'ordonnance a été rendue, ou la date d'exécution qui y est fixée si celle-ci est postérieure, déposer à la Cour fédérale une copie de l'ordre de paiement ou du dispositif de l'ordonnance.

Restriction

(1.1) L'ordre de paiement ne peut toutefois être déposé tant qu'il peut faire ou fait l'objet d'une révision au titre du paragraphe 251.101(1) ou d'un appel au titre du paragraphe 251.101(7) ou de l'article 251.11 ou si une ordonnance est rendue en vertu de l'alinéa 251.12(1)a) à son sujet.

Enforcement of orders to debtors

(2) After the expiration of the 15 day period specified in an order to a debtor of the employer or of the director of a corporation made under section 251.13, the Head may file a copy of the order in the Federal Court.

Registration of orders

(3) On the filing of a copy of an order in the Federal Court under subsection (1) or (2), the order shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order were a judgment obtained in that Court.

Interpretation Act, R.S.C. 1985, c. I-21**General definitions**

35 (1) In every enactment,

[...]

person, or any word or expression descriptive of a person, includes a corporation; (*personne*)

Exécution des ordres de versement

(2) Le chef peut déposer à la Cour fédérale une copie de l'ordre de versement donné en vertu de l'article 251.13 aux débiteurs de l'employeur ou de l'administrateur d'une personne morale après l'expiration du délai de quinze jours qui y est mentionné.

Enregistrement

(3) La Cour fédérale procède à l'enregistrement de l'ordre de paiement, de l'ordonnance ou de l'ordre de versement dès leur dépôt; l'enregistrement leur confère valeur de jugement de ce tribunal et, dès lors, toutes les procédures d'exécution applicables à un tel jugement peuvent être engagées à leur égard.

Loi d'interprétation, L.R.C. (1985), ch. I-21**Définitions d'application générale**

35 (1) Les définitions qui suivent s'appliquent à tous les textes.

[...]

Personne Personne physique ou morale; l'une et l'autre notions sont visées dans des formulations générales, impersonnelles ou comportant des pronoms ou adjectifs indéfinis. (*person*)

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Charte canadienne des droits et libertés, partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, ch. 11

Proceedings in criminal and penal matters

Affaires criminelles et pénales

11 Any person charged with an offence has the right

11 Tout inculpé a le droit :

[...]

[...]

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

[...]

[...]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-63-21 (LEAD FILE)
A-306-20
A-229-21
A-125-22
A-153-23
A-231-23
A-108-24

STYLE OF CAUSE: VITERRA CANADA INC. v.
GRAIN WORKERS' UNION
LOCAL 333 ILWU

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: JUNE 18, 2025

REASONS FOR JUDGMENT BY: WALKER J.A.

CONCURRED IN BY: DE MONTIGNY C.J.
HECKMAN J.A.

DATED: JUNE 26, 2026

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