Federal Court  Cour fédérale

Date: 20220110

Docket: T-1862-17

Citation: 2022 FC 21

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Plaintiffs

and

BOŽO JOZEPOVIĆ

Defendant

REASONS FOR ORDER

PHELAN J.

I. Introduction

A. *Proceeding*

[1] This is the second stage of a motion brought by the Defendant pursuant to Rule 220(1) of the *Federal Courts Rules*, SOR/98-106, by which he seeks to have declared "inadmissible" certain documents relied on by the Plaintiffs and their expert for use at a trial.

[2] The Plaintiffs have relied on s 23 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA], for admission of these documents on the basis that they are certified by the United States Immigration Court [USIC] and/or the Prosecutor's Office at the International Criminal Tribunal for the Former Yugoslavia [ICTY] or its replacement, the United Nations International Residual Mechanism for Criminal Tribunals [Mechanism]. For ease of reference, I refer to the ICTY and the Mechanism as the ICTY unless delineation between the two is necessary.

[3] The principal issue is the admissibility under s 23 of the CEA of documents from the Prosecutor's Office of the ICTY. There was some argument directed at documents from the USIC but the Defendant's principal and principled contention is that documents from the Prosecutor's Office are not court documents and therefore are not admissible. The documents in question are those bearing certification as appears in Exhibit "A" in the affidavit of Karen Mendonca consisting of 17 documents listed (two of which – 14 and 15 – are not certified by either the Prosecutor's Office of the ICTY or the USIC).

[4] Section 23 of the CEA reads:

Evidence of judicial proceedings, etc.	**Preuve des procédures judiciaires, etc.**
23 (1) Evidence of any proceeding or record whatever of, in or before any court in Great Britain, the Supreme Court, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, any court in a province, any court in a British colony or possession or any court of record of the United States, of a state of the United States or	**23 (1)** La preuve d'une procédure ou pièce d'un tribunal de la Grande-Bretagne, ou de la Cour suprême, ou de la Cour d'appel fédérale, ou de la Cour fédérale, ou de la Cour canadienne de l'impôt, ou d'un tribunal d'une province, ou de tout tribunal d'une colonie ou possession britannique, ou d'un tribunal

of any other foreign country, or before any justice of the peace or coroner in a province, may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record, purporting to be under the seal of the court or under the hand or seal of the justice, coroner or court stenographer, as the case may be, without any proof of the authenticity of the seal or of the signature of the justice, coroner or court stenographer or other proof whatever.

d'archives des États-Unis, ou de tout État des États-Unis, ou d'un autre pays étranger, ou d'un juge de paix ou d'un coroner dans une province, peut se faire, dans toute action ou procédure, au moyen d'une ampliation ou copie certifiée de la procédure ou pièce, donnée comme portant le sceau du tribunal, ou la signature ou le sceau du juge de paix, du coroner ou du sténographe judiciaire, selon le cas, sans aucune preuve de l'authenticité de ce sceau ou de la signature du juge de paix, du coroner ou du sténographe judiciaire, ni autre preuve.

Certificate where court has no seal

(2) Where any court, justice or coroner or court stenographer referred to in subsection (1) has no seal, or so certifies, the evidence may be given by a copy purporting to be certified under the signature of a judge or presiding provincial court judge or of the justice or coroner or court stenographer, without any proof of the authenticity of the signature or other proof whatever.

Certificat si le tribunal n'a pas de sceau

(2) Si un de ces tribunaux, ce juge de paix, ce coroner ou ce sténographe judiciaire n'a pas de sceau, ou certifie qu'il n'en a pas, la preuve peut se faire au moyen d'une copie donnée comme certifiée sous la signature d'un juge ou du juge de la cour provinciale présidant ce tribunal, ou de ce juge de paix, de ce coroner ou de ce sténographe judiciaire, sans aucune preuve de l'authenticité de cette signature, ni autre preuve.

B. *Process*

[5] This proceeding is under Rule 220 which provides for a determination of a question of law or admissibility of evidence before trial. It permits parties to state questions in the form of a special case for determination before or in lieu of trial. The Rule has a two-step procedure. First, a motion must be made that a question should be determined. Second, if the order is granted, the question is argued in a separate hearing.

Preliminary determination of question of law or admissibility	**Décision préliminaire sur un point de droit ou d'admissibilité**
220 (1) A party may bring a motion before trial to request that the Court determine	**220 (1)** Une partie peut, par voie de requête présentée avant l'instruction, demander à la Cour de statuer sur :
(a) a question of law that may be relevant to an action;	**a)** tout point de droit qui peut être pertinent dans l'action;
(b) a question as to the admissibility of any document, exhibit or other evidence; or	**b)** tout point concernant l'admissibilité d'un document, d'une pièce ou de tout autre élément de preuve;
(c) questions stated by the parties in the form of a special case before, or in lieu of, the trial of the action.	**c)** les points litigieux que les parties ont exposés dans un mémoire spécial avant l'instruction de l'action ou en remplacement de celle-ci.

[6] Prothonotary Tabib granted the motion and stated the question to be determined as follows:

> The issue of whether the documents filed as Exhibit "C" to the affidavit of My Ngoc Thai, filed as part of the Defendant's motion record, are admissible in evidence pursuant to section 23 of the *Canada Evidence Act* if they bear the certification that appears as Exhibit "A" of the affidavit of Karen Mendonca, filed as part of

> the Plaintiffs' responding motion record, shall be determined as a preliminary issue pursuant to Rule 220(1)(b) of the *Federal Courts Rules*.

[7] The parties agree that there are 17 documents challenged for admissibility not the 10 referred to by Prothonotary Tabib. The documents are central evidence in the Defendant's citizenship revocation proceeding.

[8] The issue before the Court is a narrow one of admissibility. The Court is not asked nor will it opine on matters related to relevance, nor will it weigh truth or admissibility other than by s 23. Rule 220 is an unusual provision and it should not be interpreted or applied in a manner which interferes with the trial judge's obligation to assess evidence or understand the evidence in context. As such, Rule 220 orders that a determination should only be made where a court is satisfied that this exceptional step is necessary to ensure the just, least expensive and most expeditious determination of the issues.

[9] As noted in *Cantwell v Canada (Minister of the Environment)* 1990 CarswellNat 1316 at para 4, 2 WDCP (2d) 44 (FC) – the discretion to authorize the preliminary determination of admissibility "should be used with great restraint".

[10] As indicated in *Kirkbi AG v Ritvik Holdings Inc,* 1998 CanLII 7434 at para 18, [1998] FCJ No 254 (FC), such orders should be "confined to general questions of admissibility, rather than the admissibility of evidence where the context of the evidence is required to be assessed".

[11] The Learned Prothonotary having exercised the discretion and no appeal having been taken, the Court must answer the question for determination. I do so with caution and restraint having due regard for challenges which could confront the trial judge.

II. Background

[12] The underlying legal action has been brought by the Plaintiffs seeking a declaration that the Defendant obtained Canadian citizenship by false representation or fraud by knowingly concealing material circumstances with respect to the Defendant's involvement in war crimes or crimes against humanity.

[13] The Defendant is accused of the detention and murder of Muslim Bosnians in 1993. The declaration sought by the Plaintiffs would have the effect of revoking the Defendant's citizenship and potentially lead to his deportation.

[14] The 17 documents in question are described as follows:

Document Number	Name of Document
1	Criminal Charges, issued by the Security Services Center of Zenica
2	Report on Investigation, signed by Djuro Globlek for the Zenica Security Services Center
3	Official Record, Zenica Security Services Center, signed by Mirsad Bjelopoljak
4	Official Report, interview with witness Alija Topalović, signed by Asim Šaranović for the Zenica Security Services Center

Document Number	Name of Document
5	Official Note, Zenica Security Services Center
6	Official Report, Zenica Security Services Center
7	ICTY Witness Statement of Serif Ramovic
8	Diagram of the Exhumation site, BiH Municipal Secretariat for Internal Affairs, Department for Forensic Science Kakanj, signed by Bahtija Šahinović
9	Decision on Temporary Arrest, Mensur Hasagic Judge of the Superior Court of Zenica
10	ICTY Witness Statement of Faruk Turki
11	Register of Persons Engaged in the Homeland War which was kept by the Office of Defense for Kakanj
12	Excerpt from HVO weapons list
13	Letter of Graham Blewitt to Amir Ahmic
14	Data and documentation from official records, signed by Assistant Minister Martin Frančiščević
15	Employment Certificate signed by the Commander of the Defense Department Kakanj Ivo Kovačević
16	Document from the Republic of Croatia State Bureau for Statistics – Population of BiH ethnic composition by settlement from 1995
17	Figures taken from the ICTY website at http://www.icty.org/en/about/office-of-the-prosecutor/working-withthe-region

[15] Since the action commenced, there have been a number of steps and issues in the litigation. There has been disclosure of most of the Plaintiffs' Bosnian witnesses; however, elements of confidentiality remain outstanding. Documents from experts' reports have been disclosed although there are issues surrounding some of the documents including this matter of

CEA s 23. Issues of privilege and immunity remain outstanding as well as the possibility of further discovery.

III. Issues

[16] The Defendant has framed the issue as whether the documents are admissible under CEA s 23 if they bear the certification of the Prosecutor's Office of the ICTY.

[17] The Plaintiffs broaden the issues to contend that 13 of the 17 documents are certified records (there are four uncertified), and argue that five of the documents are admissible as certified records from the USIC and 12 are admissible by virtue of certification by the Prosecutor's Office of the ICTY. Some documents are certified at both institutions.

[18] The Plaintiffs also say that all of the documents including the remaining uncertified documents are admissible under other exceptions to the hearsay rule but are outside the scope of this determination.

[19] In my view, the issue to be settled is whether some or all of the 17 documents are admissible under CEA s 23.

IV. Analysis

A. *Section 23 – Purpose*

[20] CEA s 23 is rooted in the exception to the hearsay rule in respect of public/government documents. Part of the criteria for the exception was that an adjudicative function was not a prerequisite for the exception (*Levac v James*, 2016 ONSC 7727 at paras 116-117). More emphasis was given to the reliability and trustworthiness of the institution and officials charged with the duty to record or maintain the public records. The records were not necessarily admitted for the truth of their contents.

[21] CEA s 23 has been essentially the same concept since 1893 subject to court name changes. The purpose of the provision is to facilitate proof – to use a form of exemplification/authentication in lieu of an official sitting in the witness box to identify that records put to it are records from the institution.

[22] Earlier editions of *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* suggested that in respect of s 23, the records must come from judicial proceedings. The Defendant relies on these earlier comments. However, the law and the relevant commentary has moved beyond the earlier suggestion. In the most recent edition of the Sopinka text, the authors note a broadening of the documents covered by the public document exception:

> **§18.64** The contents of these documents, **whether judicial or non-judicial**, were allowed to be proved at common law by secondary evidence and without notice to produce the originals. Secondary evidence was ordinarily in the form of an exemplification (verified under seal) or examined (verified under oath) or certified copies. Oral evidence was ordinarily admissible only if the records had been destroyed. This common law exception was not limited to public documents but included other official documents whose removal would create inconvenience and which might be required in different places at the same time.
>
> [Emphasis added]

> (Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed (Toronto, Ontario: LexisNexis, 2018) at §18.64)

[23] The Ontario Court of Appeal's decision in *R v Caesar*, 2016 ONCA 599 [*Caesar*], is particularly germane and helpful in respect of s 23. The Ontario Court of Appeal considered s 23 in relation to whether the section could be relied upon to admit a previous guilty plea from a co-accused including whether its underlying facts were admissible by way of proving the original indictment and/or transcript of the guilty plea. The Court, having found the evidence admissible under common law, also addressed s 23.

[24] At para 40 of *Caesar*, the Court noted the purpose of providing evidence of a court record without the need to call a court officer. The Court also noted that unless the official had a duty to validate the truth of the records' contents, the procedure was simply a mechanism for proving the existence of the record:

> [40] The appeal can be resolved on the application of the foregoing principles, but the appellant seeks to rely as well on two additional avenues of proof: s. 23(1) of the *Canada Evidence Act* and the common law doctrine of exemplification. I accept that evidence of a court proceeding or record may be given in another proceeding by an exemplification or certified copy of the proceeding or record, under s. 23(1) (provided notice is given), or under the common law doctrine of exemplification (even without notice in appropriate circumstances): *C. (W.B.); R. v. Tatomir*, 1989 ABCA 233, 69 Alta. L.R. (2d) 305, leave to appeal to the Supreme Court of Canada refused (1990), 53 C.C.C. (3d) ii; *Bailey; R. v. John*, 2015 ONSC 2040, [2015] O.J. No. 1719. **Like the admissibility of public documents and judicial records, however, and absent the recorder's duty to validate the truth of the contents, these avenues of proof are just that, in my view – procedural mechanisms whereby evidence of the court proceeding or record may be proved, without having to provide proof of the authenticity of the document by calling the court officer or stenographer who made the record. In other**

> **words, they provide a shortcut to proof of authenticity.** However, they do not render the hearsay content of court proceedings or records admissible for the truth of their contents where they would not otherwise be admissible for that purpose in the circumstances.
>
> [41] This view is confirmed by s. 36 of the *Canada Evidence Act*:
>
> > This Part shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing Act, or existing law.
>
> [Emphasis added]

[25] The Defendant's position is that the documents from the Prosecutor's Office of the ICTY are not admissible because that Office is not a registrar of the court and does not oversee court proceedings.

[26] The Defendant constructs a structure of the ICTY as made up of three distinct organs – the Prosecutor's Office acting independently and charged with investigation and prosecution but not performing judicial functions; the Registry charged with court administration including document registry services; and the Chambers being the judges adjudicating serious violations of international humanitarian law in former Yugoslavia.

[27] The Defendant argues that the relevant records have not been brought before the Chambers nor reviewed by a judge.

[28] The Plaintiffs' position is that 13 of the 17 challenged documents meet the requirements of s 23 as they are certified by the Prosecutor's Office of the ICTY. In summary, there are four uncertified documents, five certified by the USIC and 12 by the ICTY – with some overlapping.

B. *USIC*

[29] There is less room for debate in respect of the documents from the USIC. It meets the definitions of a "court of record" outlined in *Brar v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 729 at para 256; *Barone v Canada (Minister of Citizenship and Immigration)*, [1996] IADD No 1352, 38 Imm LR (2d) 93. Therefore, the USIC is a court of record for purposes of s 23.

[30] While the Defendant, in written submissions, argues that USIC matters are outside the scope of Prothonotary Tabib's Order, he raised supplementary issues in oral argument. He relies on the fact that there is no "stamp" as a disqualification from s 23. However, there is clear evidence of a printed seal and an attestation which makes this objection frivolous.

[31] The Defendant does raise an issue in respect of an unsigned version of a letter from Graham Blewitt. The Plaintiffs put in their record a signed version of the same letter.

[32] With respect, if this remains an issue, it is better left to the trial judge given the record on this proceeding and the limitations contained in Prothonotary Tabib's Order. Otherwise the four remaining documents from the USIC fall within s 23.

C. *Prosecutor's Office*

[33] There seems to be no debate that certified records from the Chambers or Registry of the ICTY meet s 23 requirements.

[34] The decisions in *Canada (Citizenship and Immigration) v Halindintwali*, 2015 FC 390 [*Halindintwali*], *Canada (Citizenship and Immigration) v Rubuga*, 2015 FC 1073 [*Rubuga*] and *Canada (Citizenship and Immigration) v Kljajic*, 2020 FC 570 [*Kljajic*], establish this point.

[35] In Canada the records in a prosecutor's office, provincially or federally, are not considered court records. The separation between the court and prosecutors is a hallmark of the Canadian system (as well as other countries). In the absence of evidence of foreign law, domestic law is deemed to govern. However, in this case, there was expert evidence on the role of the Prosecutor's Office from an investigator with the Prosecutor's Office at the Mechanism. That evidence confirms the record keeping and evidence keeping function of the Prosecutor's Office, the rules for such preservation and the regime for evidence sharing with other domestic and national authorities.

[36] The evidence confirms that while there are three organs in the ICTY, they operate, unlike in the Canadian context, as a collective to meet the singular mandate of the ICTY "to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and thus contribute to the restoration and maintenance of peace in the region" ("Mandate and Crimes under ICTY Jurisdiction" online *United Nations*

International Residual Mechanism for Criminal Tribunals:
<https://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>).

[37] The Plaintiffs rely on the decision in *Kljajic* to argue that the Federal Court has previously accepted that documents certified by the Prosecutor's Office of the ICTY meet the s 23 requirements. On review of the record, including Justice Gascon's Order and Chief Justice Crampton's decision, the specific argument that documents certified by the Prosecutor's Office met s 23, was not made.

[38] However, what cases like *Kljajic*, *Halindintwali* and *Rubuga* confirm is that the ICTY organs are sufficiently reliable and trustworthy in keeping with the requirements of s 23 for purposes of certification and admissibility of their records.

[39] Given that the truth of their contents and the weight and meaning of the records is for the trial judge, it would be unreasonable and contrary to the purpose of s 23 to preclude admissibility of the records at issue in Prothonotary Tabib's Order.

[40] In finding these records to be admissible under s 23, it should be clearly understood that this Court is not addressing admissibility of other records nor admissibility and the evidentiary character on other grounds. These are matters for the trial judge.

V. Conclusion

[41] Given the Court's conclusion, the Defendant's motion for an order of inadmissibility of the documents contained in Exhibit "C" to the affidavit of My Ngoc Thai is dismissed with costs in the cause.

"Michael L. Phelan"
Judge

Ottawa, Ontario
January 10, 2022

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1862-17
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v BOŽO JOZEPOVIĆ
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