IN THE COURTS

SUPREME COURT OF CANADA RULES
CORPORATE WITNESS COMPELLABLE

The Supreme Court of Canada ruled on December 18, 1980 that an employee determined to be the directing mind and will of a corporation may be compelled to testify on behalf of the Crown in a criminal prosecution where the corporation is the accused (The Queen v. N.M. Paterson and Sons Limited). The judgment was delivered by Chouinard, J. and concurred in by the Chief Justice and by Martland, Dickson, Estey, McIntyre and Lamer, JJ.

The Respondent was charged with an offence under the Canada Grain Act. At the trial, Crown Counsel attempted to call Mr. Lyle Ramsdell as a witness on behalf of the Crown. Mr. Ramdsdell was the "Manager" of one of the Respondent's elevators. The Canada Grain Act defines such a manager as "the chief executive officer employed at" an elevator. Defence Counsel objected to Mr. Ramsdell being called. The Provincial Judges Court at Morden, Man. ruled on May 2, 1978 that Mr. Ramsdell was not a compellable witness and dismissed the charge for lack of evidence. That decision was upheld on August 2, 1978 by the County Court and on October 25, 1978 by the Court of Appeal for Manitoba. Allowing an appeal by the Crown and reversing those decisions, the Supreme Court of Canada ordered a new trial.

Counsel for the Respondent argued that Mr. Ramsdell was the "directing mind and will" of the corporation and was "thus so closely identified with it that to compel him as a witness (was) equivalent to compelling the accused corporation itself and denying it the privilege against self-crimination".

Chouinard, J., while expressing considerable doubt that Mr. Ramsdell could properly be described as "the directing mind and will" of the Respondent, noted that the Appellant had not raised that issue. He described the issue before the Court as follows:

> "Therefore, the true question in my view is whether there exists under the Criminal law of Canada a rule whereby an officer or employee of a corporation, determined to be the 'directing mind and will' of the corporation, is not compellable as a witness on behalf of the prosecution in a case where the corporation is the accused, on the basis that to rule otherwise would amount to a denial of the privilege of an accused against self-crimination."

The Court reviewed the jurisprudence, which is to some extent conflicting. The Manitoba Court of Appeal in Ettenhofer[1] and the British Columbia Supreme Court in Bank of Montreal[2] found a senior official in each case not to be compellable. However, the opposite conclusion was reached by the Ontario Supreme Court in Beamish[3] and by the Court of Appeal in Corning[4], by the Quebec Court of Appeal in Purzon[5], by the British Columbia Court of Appeal in Pacific Rim[6] and by the Alberta Supreme Court and District Court in Laurentide[7] and in United Grain Growers[8], respectively.

Chouinard, J. noted that the case at bar was not one where mens rea must be established nor where due diligence was available as a defence. He stated:

> "This, however, is not such a case. It is not a case where mens rea must be established and can only be established by imputing or attributing to a corporation the mind and will of its officers or employees. Neither is it a case where the corporation pleads due diligence and must prove the act which forms the basis of the offence was not that of the corporation but that of another person. I fail to see on what ground the concept of 'directing mind and will' could be extended to apply to a situation such as the present one with the result that an employee of a corporation would not be compellable to testify on behalf of the prosectuion while the same person in the same position and vested with the same authority would be compellable were his employer an individual person."

His Lordship, however, concluded by quoting with approval from the judgment of Arnup, J.A. in Corning Glass (at pages 208-209) wherein he distinguished between evidence given on an examination for discovery by a person produced by a

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[1] R. v. Ettenhofer Painting & Decorating Ltd., (1967) 1 C.C.C. 386

[2] R. v. Bank of Montreal (1963) 36 D.L.R. (2d) 45

[3] R. v. Beamish Construction Co. Ltd. (1967) 1 C.C.C. 301

[4] Regina v. Judge of the General Sessions of the Peace for the County of York, Ex Parte Corning Glass Works of Canada Ltd., (1971) 3 C.C.C. (2d) 204

[5] Purzon du Canada Ltee and Maranda v. Q. (1971) 22 C.R.N.S. 1

[6] R. v. Pacific Rim Mariculture Ltd., (1978) 3 W.W.R. 477

[7] Laurentide Finance Company v. R., (1978) 7 Alta L.R. (2d) 193

[8] R. v. United Grain Growers Ltd., (1978) 7 Alta L.R. (2d) 111

corporation and evidence at trial by an employee or officer of that corporation, as follows:

> "In my view, there are fundamental differences between evidence given on examination for discovery of a person produced by a corporation for that purpose and evidence given at trial by a witness who is an officer or employee of that corporation. On discovery, the witness literally speaks for the corporation. He has been described, as long ago as 1902, as the "mouthpiece" of the corporation: Morrison v. Grand Trunk R. Co. (1902), 5 O.L.R. 38, 2 C.R.C. 398. The term was adopted, with reference to a servant of the corporation, by Roach, J., in Fisher v. Pain et al., (1938) O.W.N. 74 at p.76, (1938) 2 D.L.R. 753n. As pointed out by Grant, J., if such a witness does not know the answer to a relevant question, he must inform himself from others employed by the corporation or from its records. Conversely, he may be examined only as to matters coming to his knowledge as an officer of the corporation. Knowledge which he has acquired otherwise than as such officer cannot be explored: Fisher v. Pain, supra.
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> At the trial, a witness subpoenaed to give evidence, who happens to be a servant, officer or even president and controlling shareholder of a corporate accused, is not called upon to speak "for" the corporation. He is not its "mouth-piece". He is required to testify as to all relevant facts within his knowledge, whether those facts were acquired by him during his employment or term of office or were acquired in circumstances completely unrelated to the corporation. He is in no different position from a witness who had been in complete charge of the corporation's affairs for many years, but has retired before the charge against it was laid. Both must tell what they know, so far as it is relevant and admissible. Both are entitled to all the protection that is available to any witness, and in particular, the protection against self-incrimination found in both the Canada Evidence Act, R.S.C. 1952, c.307, and the Ontario Evidence Act, R.S.O. 1960, c.125.
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> At trial the corporation is not a witness. It is not being "self-incriminated" because one of its managers is giving damaging evidence in the witness-box."

Chouinard, J. concluded the judgment by noting that the view he had expressed was in agreement with the jurisprudence of the United States Supreme Court and he referred to six judgments of that Court. In essence those decisions concluded that the privilege against self-incrimination is personal and cannot be used by corporations.

ALBERTA COURT FINDS COMBINES LAW CONSPIRACY SECTION VALID EXERCISE OF FEDERAL TRADE AND COMMERCE POWER

The Alberta Court of Queen's Bench, in a judgment delivered by The Honourable Mr. Justice Medhurst on December 16, 1980, found that s. 32(1)(c) of the Combines Investigation Act can be supported as valid federal legislation under the regulation of trade and commerce as well as under the criminal law head of the British North America Act. As such, the Court ruled that the Attorney General of Canada has jurisdiction to conduct proceedings in Alberta relating to an offence under s. 32(1)(c).

An Information was laid on November 5, 1979 on behalf of the Attorney General of Canada charging twenty highway transport companies and eleven individuals under s. 32(1)(c) with conspiring to prevent or lessen unduly competition in interprovincial transportation (Regina v. Alltrans Express Ltd. et al). On June 18, 1980 those charged appeared in the Provincial Court of Alberta in Calgary. Submissions were made on behalf of a number of them including Canadian Pacific Transport Limited that the proceedings in question related to a criminal offence and that only the Attorney General of Alberta had jurisdiction to conduct proceedings in Alberta relating to such an offence. The Provincial Judge ruled that the Attorney General of Canada was lawfully authorized to so act. Application was then made to the Court of Queen's Bench for an order in the nature of prohibition against the continuation of proceedings while being conducted on behalf of the Attorney General of Canada. Medhurst, J. defined the issue as:

> "...whether the Attorney General of Canada has the constitutional authority to prefer an indictment and to prosecute an offence under the Combines Investigation Act in Alberta or is he precluded from so doing because this falls within the exclusive jurisdiction granted to the provinces to deal with matters of administration of justice."