CASE COMMENTS AND NOTES

EVIDENCE—CORPORATE ACCUSED—PRIVILEGE AGAINST SELF INCRIMINATION—PRODUCTION OF DOCUMENTS—COMPELLABILITY AS CROWN WITNESS—*REGINA* v. *J. J. BEAMISH CONSTRUCTION CO. LTD.*

The recent case of *Regina* v. *J. J. Beamish Construction Co. Ltd.* (and eleven other corporations),[1] decided that an officer of a corporate accused, indicted under the Combines Investigation Act,[2] cannot refuse to testify on behalf of the Crown on the basis of privilege against self-incrimination. Jessup, J. declined to extend the privilege to the employees of a corporation, "notwithstanding they might be regarded as the directing minds and wills of their employers."[3]

The accused were indicted jointly as being in contravention of s. 32(1) (c) of the Combines Investigation Act[4] in that they did unlawfully conspire, agree or arrange together and with each other to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of sand, gravel, stone chips and asphalt used in the resurfacing and surface treatment of roads. The accused were acquitted, principally on the ground that competition was not limited "unduly" within the meaning of the Act. It was argued on behalf of the accused that a corporation was not capable of forming criminal intent and in rejecting this argument, the learned judge, in a very able and complete analysis of the case law on criminal responsibility of corporations, expressly approved the organic theory, that certain acts of corporate officers are for the purposes of criminal responsibility, the acts of the company; that the officers are the active directing mind and will of the corporation. At first glance, then, it would seem that Jessup, J. made inconsistent rulings. On the one hand, corporate officers *are* the corporation for the purposes of criminal responsibility, but on the other hand, the corporate officers are not the corporation for purposes of self-incrimination, or if they are, the corporation is to be denied the privilege simply because it is a corporation.

Jessup, J.'s statement of the issue shows the nature of the dilemma presented:

> The question is whether an employee who is regarded as the directing mind and will of a corporation and its *alter ego* is to be privileged against incriminating his employer when he would not have such privilege if he were the employee of a natural person. On the one hand, corporations, which are now capable of criminal responsibility in offences involving *mens rea* but were not at the time the rule against self-incrimination was laid down, are to be denied an ancient privilege of the common law and on the other hand they are to enjoy an immunity from incrimination by their servants which is not available to natural persons.[5]

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1 (1967), 59 D.L.R. (2d) 6; (High Ct. Ont.).
2 R.S.C. 1952, c. 314 as amended by 1960, c. 45.
3 (1967), 59 D.L.R. (2d) 6, 42.
4 *Supra*, n. 2.
5 (1967), 59 D.L.R. (2d) 6, 38-39.

It is submitted with due respect that Jessup, J.'s question, although it presents the dilemma, does not crystalliz the concept of the *alter ego,* for although enjoying an "immunity" if the privilege is allowed to a body corporate, that immunity is enjoyed only because the corporation, an intangible body, cannot have a mind of its own; that being the basis of the doctrine of the *alter ego,* it is *precisely because of the capacity of forming* intent in a natural person, that that natural person does not "enjoy an immunity" from the incriminating statements of his employees.

On the basis of English and Canadian authority, Jessup, J. found none that was binding upon him. However, it is submitted that the persuasive authority available to him in Canada and England, was contrary to his decision.

Webster v. *Solloway, Mills & Co.*,[6] and *Triplex Safety Glass Co. Ltd.* v. *Lancegaye Safety Glass* (1934) *Ltd.*,[7] both of which were cited in the judgment of Jessup, J. were both cases of a representative of a company declining to answer on examination for discovery on the basis that an answer or production of documents by the representative would tend to criminate the corporate defendant. In both cases, the claim of privilege was allowed, even though claimed on behalf of a corporation.

In the *Webster* case,[8] it was argued that the claim of privilege should be limited to natural persons and should not be allowed to a corporation. Harvey, C. J. A., in rejecting this argument, stated that the rule that one cannot be compelled to criminate himself has been firmly established "for centuries" in the common law and "must be deemed to exist except so far as it has been affected by legislation".[9]

Lord Du Parcq, L. J., in the *Triplex* case,[10] expressly agreed with the *Webster* decision and stated:[11]

> It is true that a company cannot suffer all the pains to which a real person is subject. It can, however, in certain cases, be convicted and punished, with grave consequences to its reputation and its members, and we can see no ground for depriving a juristic person of those safeguards which the law of England accords even to the least deserving of natural persons. It would not be in accordance with principle that any person capable of committing, and incurring the penalties of, a crime should be compelled by process of law to admit a criminal offence.

In still another civil case, *Klein et al.* v. *Bell*,[12] the privilege against self-incrimination was allowed to a corporate defendant, where an officer took objection on behalf of the company to produce documents. Kerwin, C. J. C. stated:[13]

> In the absence of any such remedial legislation the common law applies as well to an officer taking the objection on behalf of his company as to an individual litigant.

The only criminal case cited by Jessup, J. was that of *R.* v. *Bank of Montreal*,[14] in which the corporate accused was charged under the Industrial Relations and Disputes Investigation Act[15] with dismissing an

6 [1931] 1 D.L.R. 831 (Alta. S.C., App. Div.).
7 [1939] 2 K.B. 395 (C.A.).
8 *Supra*, n. 6.
9 *Id.*, at 834.
10 *Supra*, n. 7.
11 *Id.*, at 409.
12 [1955] S.C.R. 309 (S.C.C.).
13 *Id.*, at 315.
14 (1962), 36 D.L.R. (2d) 45; (B.C.S.C.). sub. nom. *Re Bank of Montreal's Prohibition Application.*
15 R.S.C. 1952, c. 152.

employee contrary to s. 4(4) of the Act. A deputy Police Magistrate issued a *subpoena duces tecum* ordering the Superintendent of the bank's British Columbia Division to produce documents and letters relating to the dismissal. The bank applied for a writ of prohibition to quash the *subpoena*. An order for prohibition was granted, not on the *narrow* ground of self-incrimination but on the basis of the common law rule that the accused is not compellable to produce evidence for the prosecution at his own trial. Hutcheson, J. stated:[16]

> This is not a case where the privilege or protection is claimed on the basis that documents would tend to incriminate the accused—a claim that might well need to be made under oath—*but the claim is here made on the broader basis that the accused is not required to give evidence or produce documents incriminating or otherwise.*[17]

It was further held that by serving subpoena on the bank superintendent, and calling on him to produce documents which were the property of the bank, the Crown in serving him was in fact serving the accused.

After citing the above authorities, Jessup, J. stated:[18]

> I took the view that the productions and the interrogatories, whether oral or written, of a corporation are peculiarly those of the corporation itself and that the foregoing decisions were therefore not apposite in considering whether an employee may claim privilege because his evidence may incriminate his corporate employer.

If by "apposite", Jessup, J. meant highly pertinent or appropriate, it is submitted that he was looking for very "apposite" authority indeed in order to apply it to the case in point. It is true that three authorities were civil cases of examination for discovery and that the criminal case was a prohibition application. However, the heart of the dilemma as stated in the issue by the learned judge was whether or not the privilege should be allowed to a corporation *because it is a corporation*, not whether the privilege is to be allowed according to whether the corporation claims the privilege on examination for discovery or in an application to quash a *subpoena*. Furthermore, if the "productions and the interrogatories, whether oral or written" are "peculiarly those of the corporation itself", does it follow that the evidence of an employee who is the *alter ego* of the corporation, is not evidence "peculiarly" that of the corporation? It is submitted that such a fine distinction cannot be drawn in principle, especially in the light of the finding in *R.* v. *Bank of Montreal*:

> That the safeguards, privileges and rights to which an accused being a natural person or individual is entitled, extend to and are enjoyed by an accused corporation is, in my opinion, clear from the following authorities. . . .[19]

Having decided there was an "absence of authority", Jessup, J. then sought to find the policy for the rule against self-incrimination. On this point he cites *Wigmore on Evidence.*[20] It is proposed to examine the policy for the rule in order to determine the status of the rule as applied to corporations in Canada today. Much of the literature on the rule, it is submitted, is written on the assumption that the accused is a natural person. Thus, even if a valid policy for the rule, as it applies to natural

16 (1962), 36 D.L.R. (2d) 45, 50.
17 Emphasis supplied.
18 (1967), 59 D.L.R. (2d) 6, 41.
19 (1962), 36 D.L.R. (2d) 45, 48.
20 McNaughten Revision, (1961) Vol. 8.

persons is found, it is still open to find that it is not valid as it applies to corporations.

The emergence of the rule against self-incrimination was largely due to the abuses of the power of interrogation given the Court of Star Chamber. The case of Lilburn's seditious libel charge in 1637 is a striking example of the depravity of criminal procedure in England at that time:

> Lilburn, who was charged in 1637 with sending seditious libels out of Holland into England, refused to take the oath, and was punished by being whipped from the Fleet to the pillory, receiving upwards of 500 lashes, then being made to stand in the pillory for two hours and fined £500.[21]

Due to such revolting procedure and the general public sentiment, the process was reversed and, after the abolition of the Star Chamber, the accused became an incompetent witness.[22] Subsequently, the accused became a competent witness for the defence, retaining the right not to be called by the prosecution.

The proponents of the rule argue that the abolition of it would lead to the enforcement of bad laws,[23] the restoration of coercive interrogation,[24] would not be "playing the game".[25] Further, they argue that the rule "contributes greatly to the dignity and apparent humanity of a criminal trial",[26] that the rule stimulates the search for independent evidence.[27]

Criticism of these assertions has prevailed ever since the inception of the rule. Bentham was adamant:[28]

> If all criminals of every class had assembled, and found a system after their own wishes, is not this rule the very first which they would have established for their security?

Thus the argument of the critics is that it protects only the guilty, because there would surely exist adequate safeguards against coercive interrogation today.[29] Moreover, argue the critics, the risk is not that there would be a return to ill treatment of the prisoner in the courts, but rather the risk that if the rule is not abolished and dangerous criminals cannot be examined before the court, the "frustrated" police may resort to "third-degree" tactics in order to obtain convictions.[30]

The argument that the rule tends to prevent the enforcement of bad laws has been countered by the proposition that the rule also tends to prevent the enforcement of good laws.[31] Although the analogy of a criminal trial to combat (i.e. the "fair game" argument) has been abhorred by some writers,[32] it is submitted that the public values a sense of "fairness" even in a criminal trial; in fact, this public sentiment is probably the basis of placing a high onus and standard of proof on the prosecution.

So far, the policy underlying the rule has not been discussed in

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21 Glanville Williams, *Proof of Guilt* 39 (3rd ed. 1963).
22 *Id.*, at 41.
23 *Id.*, at 50; John T. McNaughten, *The Privilege Against Self-Incrimination*, 51 J. of Criminal Law, Crimonology and Political Science 138, 144.
24 Williams, at 50; McNaughten, at 143; Wigmore, at 353.
25 McNaughten, at 145; Williams, at 50.
26 I Sir James Stephen, *History of The Criminal Law of England*, 441-442 (1st ed. 1883).
27 Williams, at 54; Stephen, at 141-142; Wigmore, at 353.
28 *Treatise on Judicial Evidence* (1825), cited in Williams, *Supra*, at 53.
29 Williams, at 50.
30 *Ibid.*
31 *Ibid.*
32 *Ibid.*

the particular context of a corporate accused. One main difference is suggested by Wigmore in a passage cited by Jessup, J.:

> Secondly, the privilege reflects a sentiment that requires the government to bear the entire burden of building a criminal case against an accused. This sentiment . . . is almost entirely confined to flesh and bone individuals. A practical consideration also militates against the application of the privilege on behalf of collective groups. Often the criminal acts of groups—especially of corporations, which virtually can act by written record only—are contained in writings only. They are virtually the sole evidential material on which a prosecutor can rely. A rule privileging the group's records from surrender would impose upon the prosecutor a task largely futile.[33]

In the United States, it has been held that a corporation is not a "person" within the meaning of the Fifth Amendment.[34] The privilege has been denied to corporations on the rationale of visitorial powers. In *United States* v. *White*,[35] the visitorial powers doctrine was stated by Murphy, J.:

> The fact that the state charters corporations and has visitorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records.[36]

A further distinction in the United States has been made according to the size of the group seeking to invoke the Fifth Amendment. The policy seems to be that the larger and more impersonal the group, the less is the likelihood of the privilege being invoked. Thus, it may be allowed to a small partnership or close corporation, but even the group interest test of *United States* v. *White*[37] has not been universally applied.[38]

The statutory provisions of the *Combines Investigation Act*[39] enable the Director of Investigation to conduct an Inquiry and to order the production of books, papers, records, or other documents during an Inquiry prior to a prosecution.[40] The Director of Investigation and Research under the Act has stated that on reading the Act, it is clear that Parliament contemplated that unless otherwise stated in the Act, the general procedure for enforcing the criminal law is to apply to the enforcement of the Act.[41]

Therefore, it is submitted that if the policy for the rule against self-incrimination no longer supports the rule, it may be because of the distinctive perplexities raised by the nature of the corporate personality itself, added to the tenuous justification for the rule, even when applied to natural persons, support the proposition of Jessup, J. that the rule should not be extended to corporations.

In conclusion, however, it is submitted that Jessup, J. went to great lengths to restrictively distinguish the English and Canadian authority available to him and that he may have come to the wrong conclusion on a fair application of *stare decisis*. Finally, in view of the long history and acceptance of the principle, at least in Canada and England, it may be that the rule as applied to corporations is best dealt with by statute.

33 Wigmore, at 353.
34 *Standard Oil Co.* v. *Roxana Petroleum Corp.* (1925), 9 F. (2d) 453 (S.D. Ill.).
35 (1944), 322 U.S. 694.
36 *Id.*, at 700.
37 *Supra*, at n. 35.
38 *In Re Greenspan* (1960), 187 F. Supp. 177 (S.D.N.Y.) The sole shareholder of a corporation was denied the privilege.
39 *Supra*, at n. 2.
40 *Id.*, ss. 8-11.
41 D. H. W. Henry, Q.C., Director of Investigation and Research under the Combines Investigation Act in *Law Society of Upper Canada, Special Lectures*, (1963), Vol 1, at 64.

Until adequate procedural legislation is passed, whether for the enforcement of specific offences or of universal application in the case of a corporate accused, the situation will remain, at best, confused.

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LABOUR DISPUTES — INTERIM INJUNCTION — UNDERTAKING FOR DAMAGES—*VIEWEGER CONSTRUCTION CO. LTD.* v. *RUSH & TOMPKINS CONSTRUCTION LTD.*

The interlocutory injunction is a powerful weapon in the hands of the person enjoying its benefit. It issues before the final determination of the rights of the parties involved and thus runs the risk of treading upon the right of the person against whom its issues—should his right ultimately prevail at trial. It is the purpose of this comment to discuss the respective rights of the parties to an interlocutory injunction and to illustrate the effect of the 1965 decision of the Supreme Court of Canada in *Vieweger Construction Co. Ltd.* v. *Rush & Tompkins*[1] on the defendant's right to compensation.

It is of significance to note the dilemma of the defendant against whom the injunction issues. The injunction is a strong remedy, acquiring strength through its method of enforcement. Failure to obey the injunction results in criminal sanctions, yet the normal safeguards afforded by the law are not present at its issuance. The injunction is granted on affidavit evidence, there is no opportunity for cross-examination or careful sifting of the facts, the truth of either side is difficult to ascertain, and in fact, there is not a final determination of the rights. Still the defendant must act in accordance with the injunction. How then can he be compensated for damage resulting to him from the operation of the injunction where the final determination of the rights is in his favour? Apart from the undertaking for damages which accompanies an application for an interim injunction he has little recourse to receive compensation. It is therefore of utmost importance to know the extent and scope which has been attributed to the undertaking.

Whether or not an inquiry as to damages will be directed is at the discretion of the court.

> The undertaking usually inserted in an interim injunction order is one not to the party, but to the Court to pay damages if the Court should be of the opinion that under the circumstances the plaintiff ought to pay damages, and puts himself in the power of the Court for that purpose independently of the suit.[2]

As with every equitable discretion, such discretion is not unlimited but adheres closely to principles which have been established as guide posts to its exercise. What then, are the principles upon which a court will exercise its discretion in favour of the defendant?

1 [1965] S.C.R. 195, 48 D.L.R. (2d) 507, reversing 45 D.L.R. (2d) 122.
2 *McBrantney* v. *Sexsmith*, [1924] 3 D.L.R. 84, 88 per Hyndman, J.