Court File No. 22637

IN THE SUPREME COURT OF CANADA
(BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

GEORGE ERNEST HUNT

Appellant
(Plaintiff)

AND:

LAC D'AMIANTE DU QUEBEC LTÉE, formerly known as LAKE ASBESTOS COMPANY LIMITED, ASBESTOS CORPORATION LIMITED, ATLAS TURNER INC., BELL ASBESTOS MINES LIMITED, JM ASBESTOS INC., THE QUEBEC ASBESTOS MINING ASSOCIATION and NATIONAL GYPSUM CO.

Respondents
(Defendants)

AND:

T&N, plc, CAREY CANADA INC., formerly known as CAREY-CANADA MINES LTD., FLINTKOTE MINES LIMITED, THE FLINTKOTE CO.

(Defendants)

AND:

WORKERS' COMPENSATION BOARD, and HENFREY SAMPSON BELAIR LTD., RECEIVER-MANAGER for VICTORIA MACHINERY DEPOT COMPANY LIMITED

(Third Parties)

AND:

THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF ONTARIO

Interveners

FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF ONTARIO

GEORGE THOMSON
DEPUTY ATTORNEY GENERAL
Constitutional Law and
Policy Division
720 Bay Street, 7th Floor
Toronto, Ontario M5G 2K1

Tel: (416) 326-4454
Fax: (416) 326-4015

MICHEL Y. HÉLIE
Of Counsel for the Attorney
General of Ontario

SOLOWAY WRIGHT
99 Metcalfe Street
Ottawa, Ontario
K1P 6L7
Tel: (613) 236-0111
Fax: (613) 238-8507

Ottawa Agents
ROBERT E. HOUSTON, Q.C.

LADNER DOWNS
900 Waterfront Centre
200 Burrard Street
Vancouver, B.C. V7X 1T2

Tel: (604) 687-5744
Fax: (604) 687-1415

Counsel for the Appellant
J.J. CAMP, Q.C.
DAVID P. CHURCH
STEPHEN ANTLE

OSLER HOSKIN & HARCOURT
1500 - 50 O'Connor Street
Ottawa, Ontario
K1P 6L2

Tel: (613) 235-7234
Fax: (613) 235-2867

Ottawa Agents
PATRICIA J. WILSON

RUSSELL & DuMOULIN
1700-1075 West Georgia Street
Vancouver, B.C. V6E 3G2

Tel: (604) 631-3131
Fax: (604) 631-3232

Counsel for the Respondent,
Lac D'Amiante du Québec Ltée
W.S. BERARDINO, Q.C.
AVON M. MERSEY

GOWLING, STRATHY & HENDERSON
2600 - 160 Elgin Street
Ottawa, Ontario K1N 8S3

Tel: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agents
HENRY S. BROWN

FARRIS, VAUGHAN, WILLS & MURPHY
2600-700 West Georgia Street
Vancouver, B.C. V6Y 1B3

Tel: (604) 684-9151
Fax: (604) 661-9349

Counsel for the Respondents,
Asbestos Corporation Limited,
Bell Asbestos Mines Limited
and Atlas Turner Inc.
JACK GILES, Q.C.
ROBERT J. McDONNELL

GOWLING, STRATHY & HENDERSON
2600 - 160 Elgin Street
Ottawa, Ontario K1N 8S3

Tel: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agents
HENRY S. BROWN

LINDSAY KENNEY
1700 - 700 West Pender Street
Vancouver, B.C. V6C 1G8

Tel: (604) 687-1323
Fax: (604) 687-2347

Counsel for the Respondent,
JM Asbestos Inc.
RICHARD B. LINDSAY
GREGORY S. MILLER

GOWLING, STRATHY & HENDERSON
2600 - 160 Elgin Street
Ottawa, Ontario K1N 8S3

Tel: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agents
HENRY S. BROWN

LANG MICHENER
2500-595 Burrard Street
Vancouver, B.C. V7X 1L1

Tel: (604) 689-9111
Fax: (604) 685-7084

Counsel for the Respondent,
The Quebec Asbestos Mining Association
LOUIS J. ZIVOT

LANG MICHENER
300 - 40 O'Connor Street
Ottawa, Ontario K1P 6L2

Tel: (613) 232-7171
Fax: (613) 231-3191

Ottawa Agents
DAVID WAKE

ARVAY, FINLAY
300 - 754 Broughton Street
Victoria, B.C. V8W 1E1

Tel: (604) 388-6868
Fax: (604) 388-4456

Counsel for the Defendant,
National Gypsum Co.
JOHN L. FINLAY

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Tel: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agents
W.G. BURKE-ROBERTSON, Q.C.

MINISTÈRE DE LA JUSTICE
1200, ROUTE DE L'ÉGLISE, 5E
Sainte-Foy, Québec G1V 4M1

Tel: (418) 643-1477
Fax: (418) 646-1696

Counsel for the Intervener,
the Attorney General of Québec

NOËL, BERTHIAUME, AUBRY
111, rue Champlain
Hull, Québec J8X 3R1

Tel: (819) 771-7393
Fax: (819) 771-5397

Ottawa Agents
SYLVIE ROUSSEL

INDEX

PART I FACTS

1. The Attorney General for the Province of Ontario intervenes in this appeal further to his Notice of Intention to intervene filed July 10, 1992 pursuant to Rule 32.

2. The Attorney General takes no position with respect to the facts of this case and intervenes solely to make submissions with respect to the constitutional question stated by this Court on June 2, 1992 and which provides as follows:

> Is section 2 of the Quebec Business Concerns Records Act, L.R.Q. 1977, c. D-12, ultra vires the National Assembly of Quebec or constitutionally inapplicable because its pith and substance is a derogation from extra-provincial rights?

PART II ISSUES

3. The Attorney General for Ontario takes no position on the issue of whether this Court should answer the stated constitutional question.

4. Should this Court decide to answer the stated constitutional question, the Attorney General respectfully submits that s.2 of the Quebec Business Concerns Records Act, L.R.Q. 1977, c. D-12 [the Act] is constitutionally inapplicable to prevent compliance with an order from a Canadian court which has properly assumed jurisdiction because of a real and substantial connection with the action. It is further submitted that the impugned provision is otherwise constitutionally valid and applicable.

PART III ARGUMENT AND LAW

5. Section 2 of the Quebec Business Concerns Records Act provides as follows:

> Subject to section 3, no person shall, pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside Québec, remove or cause to be removed, or send or cause to be sent, from any place in Québec to a place outside Québec, any document or résumé or digest of any document relating to any concern.

6. Section 1 of the Ontario Business Records Protection Act, R.S.O. 1990, c.B.19, provides in part as follows:

> No person shall, under or under the authority of or in a manner that would be consistent with compliance with any requirement, order, direction or summons of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point in Ontario to a point outside Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material in any way relating to any business carried on in Ontario, unless such taking, sending or removal....

7. Subject to the exception discussed below, the impugned provision is constitutionally authorized by classes 13, 14 and 16 of s.92 of the Constitution Act, 1867.

> A.G. Ontario v. Scott, [1956] S.C.R. 137.

8. The regulation of business in the province, including the regulation of business records located in the province, is

ordinarily a matter of property and civil rights in the province even if there are extraterritorial factors.

> Gregory & Co. v. Quebec (Securities Commission), [1961] S.C.R. 584, at 587 - 588.
>
> R. v. W. McKenzie Securities Ltd. (1966), 56 D.L.R. (2d) 56 (Man C.A.), at 60, 62, 63.
>
> R. v. Thomas Equipment Ltd., [1979] 2 S.C.R. 529.

9. The extent to which requirements imposed by foreign jurisdictions which are directed at the regulation of activity within the province are to be enforced, condoned or prohibited is ordinarily a matter of property and civil rights in the province and/or the administration of justice in the province.

> A.G. Ontario v. Scott, supra.

10. It is submitted that the purpose of the law is to defend against unwarranted foreign extra-territorial reaches into provincial jurisdiction over the regulation of business records. Professor Castel describes the origin of Ontario's counterpart to the impugned law as follows:

> Canada has adopted defensive measures in response to the extra-territorial application of foreign antitrust laws.
>
> As early as 1947, as a result of an investigation by the United States Department of Justice of the practices of the pulp and paper industry in the provinces of Quebec and Ontario and their effects on consumers within the United States, the legislature of Ontario passed a law which prohibits the removal of business records from the province pursuant to an order or subpoena of a legislative or judicial authority outside the province. Similar legislation was adopted by Quebec ten years later.
>
> J.-G. Castel, Extraterritoriality in International Trade, 1988, at 44.

See also: E. Groffier, La Communication de documents économiques à l'étranger (1984), 44 Revue du Barreau (4), 737, at 739-740.

11. In reviewing the mischief sought to be avoided by a similar federal law, the Foreign Extraterritorial Measures Act, R.S.C. 1985, c.F-29, Professor Graham concludes:

> This, and similar measures in other fields (the extra-territorial application of American law), has resulted in the situation where U.S. administrative and judicial authorities impose American law on non-resident foreigners in such a way that it clashes with the ability of other countries to enforce their own laws or implement their own policies over those who are resident in their territory. In the course of doing so American courts arrogate to themselves the power to determine unilaterally the public policy conflicts which arise in these cases between the United States and a foreign sovereign state, thereby undermining the ability of that state to govern within its own territory. That, for many international scholars outside of the United States, and indeed for many within it, constitutes a violation of international law by the United States.
>
> William C. Graham, The Foreign Extraterritorial Measures Act, (1986), 11 Cnd. Bus. L.J. 410, at 422 - 423.

12. Although American anti-trust legislation provides the bulk of examples of American extraterritorial reach, other examples include American export blocking laws, securities laws, and shipping laws.

Graham, supra, at 419-420.

13. The impugned provision prohibits compliance with, among other things, a foreign judicial order respecting the removal of business records from Quebec to the foreign jurisdiction. In that respect, it bears an aspect of legislation in respect of the conflict of laws. As Professor Graham, supra, notes:

> Unfortunately, international law is not as clear in its definition of the limits of jurisdiction as one might like, and the issue has been much debated in a variety of international organizations. We are faced here with what is really the possibility of concurrent jurisdiction over "trans-national" events. Sorting out which law or policy should prevail becomes a question of balancing the competing claims of two states having different policy objectives based upon different contacts justifying jurisdiction ("liens de rattachement") with persons and conduct in question. A great deal turns on which forum, and whose rules, control the disposition of these threshold jurisdictional issues.
>
> Graham, supra, at 421.

14. Subject to certain constitutional constraints discussed below, it is submitted that legislation in respect of the conflict of laws is legislation with respect to property and civil rights in the province and/or the administration of justice in the province.

> A.G. Ontario v. Scott, supra.

15. Where a foreign jurisdiction seeks the production of a document located elsewhere, extraterritorial implications necessarily arise in both jurisdictions. This fact alone is insufficient to raise a constitutional impediment.

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment ultra vires. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be ultra vires.
>
> Re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297, at 332.

16. It is submitted that this Court's decision in Morguard Investments Ltd. v. De Savoye, on the applicable conflict of laws rule governing the interprovincial recognition of provincial judgments establishes appropriate criteria for determining the constitutional limitations on extraterritoriality in conflicts cases. Although this Court found it "unnecessary to pronounce definitively" on the constitutional implications of its decision, several commentators have concluded that the judgment does impose a constitutional limitations. Professors Black and Swan conclude as follows:

> La Forest J. did not suggest that if a province were to legislate new restrictions to enforcement of inter-provincial judgments, for example, a statutory return to the traditional rules, that such legislation would be either of no force and effect or ultra vires. We believe, however, that this omission should not be regarded as indicating that there are not more significant constitutional implications to the decision. At the very least, the judgment in Morguard and that in the earlier case of Moran suggest that a province may not legislate rules for taking jurisdiction that exceed the limits that are implicitly stated in Moran.
>
> The acid test for the true constitutionality of the rule in Morguard will be the willingness of the Supreme Court to hold legislation that denies effect to judgment given by a court of another province that has met the Moran test invalid.
>
> Vaughan Black, John Swan, New Rules for the Enforcement of Foreign Judgments: Morguard Investments Ltd. v. De Savoye, (1991) 12 Advocates' Quarterly, 489, at 497.
>
> Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077.

17. Professor Hogg reviews this Court's decision in Morguard and concludes as follows:

> The effect of the De Savoye case is that there is now an implicit full faith and credit rule in the Constitution of Canada. The Courts of all provinces must recognize a

> judgment rendered by the court of another province, provided the judgment was rendered in compliance with the forum province's jurisdictional rules, and provided that those rules do not offend any constitutional principle. The constitutional principle of extraterritoriality is not offended where the court of one province renders a judgment against a resident of another province, provided the out-of-province defendant was served in compliance with the court's rules for service ex juris, and the defendant has a substantial connection with the forum province.
>
> Peter Hogg, Constitutional Law of Canada, (1992) 3rd ed., at 335.

18. It is submitted that the constitutional limitation on the province to legislate "in the province" means that when a Canadian court outside the province assumes jurisdiction appropriately, the province cannot block the enforcement of the ensuing judgment by legislation whose purpose is to defend against the reach of foreign demands. The appropriate assumption of jurisdiction requires a real and substantial connection with the action.

Morguard, supra, at 1109.

19. It is submitted that provincial laws which have a purpose independent of blocking foreign intrusions would continue to apply even interprovincially despite extraterritorial effect in a conflicts case.

Morguard, supra, at 1110.

Re Upper Churchill, supra.

20. Providing a constitutional footing for the rule enunciated in Morguard is appropriate in the interprovincial as opposed to the international conflicts arena because of the "need to balance the claims of each province to a sovereignty consistent with like claims for all provinces". Further, as the final court

of appeal for all provinces, this Court is in a position to ultimately control the application of the rule between competing jurisdictions in a way which it cannot internationally.

Black and Swan, supra, at 495.

21. In reference to this Court's decision in Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd., holding "that the Manitoba courts could not deal with matters that were already subject to proceedings in the courts of another province", Professors Black and Swan quote from the late Chief Justice Laskin:

> Since the two banks were already subject to the Québec garnishment when the Manitoba proceedings began, the Manitoba judgment calls upon them to be faithless to the competent order of a sister judicial district. This Court, with a reviewing and controlling authority over both the Courts of Manitoba and of Québec, cannot be expected to support such a call....[emphasis added].
>
> Black and Swan, supra, at 495-6.
>
> Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd., [1975] 2 S.C.R. 546.

22. In reference to this excerpt, Professors Black and Swan conclude as follows:

> This statement can, we believe, only be regarded as the assertion of a power of the Supreme Court to review and control the relations of the various provincial courts, to keep them within their proper boundaries -- a power that is not misdescribed as "constitutional".
>
> Black and Swan, supra, at 496.

23. It is respectfully submitted that the reasons which militated in favour of the rule enunciated in Morguard in the interprovincial context do not apply, at least from a

constitutional perspective, to international conflict cases. Foremost, as an economic and political union, Canada does enjoy at some level a Canadian public policy which requires in some cases a balancing of competing provincial public policies. This has no application internationally.

> In any event, the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction.
>
> Morguard, supra, at 1099.

24. Further, this Court listed a number of factors distinguishing interprovincial conflicts from international conflicts: 1) common citizenship, 2) interprovincial mobility of citizens, 3) common market pursuant to ss. 91(2), 91(10), 121, and the power for the peace, order and good government of Canada, 4) federal appointment of provincial superior courts, 5) this Court as the court of last resort and 6) sub-constitutional factors such as "the fact that Canadian lawyers adhere to the same code of ethics throughout Canada".

> Morguard, supra, at 1099-1100.

25. It is submitted that reading down the impugned provision, if necessary, so that it does not apply to prevent compliance with an order from a Canadian court which has properly assumed jurisdiction interferes less with the legislative objective than would striking down the provision.

> Schachter v. Canada, unreported decision of the Supreme Court of Canada, July 9, 1992.

PART IV ORDER REQUESTED

26. The Attorney General for the Province of Ontario respectfully submits that should this Honourable Court decide to answer the stated constitutional question, it should be answered in the affirmative only to the extent that section 2 of the Quebec Business Concerns Records Act is constitutionally inapplicable to prevent compliance with an order from a Canadian court which has properly assumed jurisdiction because of a real and substantial connection with the action. The question should otherwise be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF OCTOBER, 1992

MICHEL Y. HÉLIE
Of Counsel for the Attorney General
of Ontario, Intervener

PART V

TABLE OF AUTHORITIES

CASE LAW **PAGES**

ARTICLES