Court File No. 22637

**IN THE SUPREME COURT OF CANADA**

(APPEAL FROM THE COURT OF APPEAL FOR THE
PROVINCE OF BRITISH COLUMBIA)

BETWEEN:

GEORGE ERNEST HUNT

APPELLANT
(PLAINTIFF)

AND:

LAC D'AMIANTE DU QUEBEC LTEE, formerly
known as LAKE ASBESTOS COMPANY LTD.,
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-CANADIAN MINES LTD.,
FLINTKOTE MINES LIMITED, and
THE FLINTKOTE CO.

(DEFENDANTS)

AND:

THE ATTORNEY GENERAL FOR THE PROVINCE OF QUEBEC,
and
THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO

INTERVENORS

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**RESPONDENTS' FACTUM**
**ASBESTOS CORPORATION LIMITED,**
**ATLAS TURNER INC., and**
**BELL ASBESTOS MINES LIMITED**

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**LADNER DOWNS**
Barristers & Solicitors
900 - 200 Burrard Street
Vancouver, B.C. V7X 1T2
Tel: (604) 687-5744
Fax: (604) 687-1415

J. J. Camp, Q.C.
David P. Church
S. Stephen Antle
Counsel for the Appellant

**OSLER HOSKIN & HARCOURT**
Barristers & Solicitors
1500 - 50 O'Connor Street
Ottawa, Ontario K1P 6L2
Tel: (613) 235-7234
Fax: (613) 235-2867

Patricia J. Wilson
Ottawa Agents

**FARRIS, VAUGHAN, WILLS & MURPHY**
Barristers & Solicitors
2600 - 700 West Georgia Street
Vancouver, B.C. V6Y 1B3
Tel: (604) 684-9151
Fax: (604) 661-9349

Jack Giles, Q.C.
Robert J. McDonell
Counsel for the Respondents,
Asbestos Corporation Limited,
Atlas Turner Inc. and
Bell Asbestos Mines Limited

**GOWLING, STRATHY & HENDERSON**
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K1N 8S3
Tel: (613) 232-1781
Fax: (613) 563-9869

Henry S. Brown
Ottawa Agents

**LINDSAY KENNEY**
Barristers & Solicitors
1700 - 700 West Pender Street
Vancouver, B.C. V6C 1G8
Tel: (604) 687-1323
Fax: (604) 687-2347

Richard B. Lindsay
Gregory S. Miller
Counsel for the Respondent,
JM Asbestos Inc.

**GOWLING, STRATHY & HENDERSON**
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K1N 8S3
Tel: (613) 232-1781
Fax: (613) 563-9869

Henry S. Brown
Ottawa Agents

**LANG MICHENER LAWRENCE & SHAW**
Barristers & Solicitors
2500 - 595 Burrard Street
Vancouver, B.C. V7X 1L1
Tel: (604) 689-9111
Fax: (604) 685-7084

Louis J. Zivot
Counsel for the Respondent
The Quebec Asbestos
Mining Association

**LANG, MICHENER, HONEYWELL, WOTHERSPOON**
Barristers & Solicitors
300 - 40 O'Connor Street
Ottawa, Ontario K1P 6L2

David Burke
Ottawa Agents

**RUSSELL & DuMOULIN**
Barristers & Solicitors
1500 - 1075 West Georgia Street
Vancouver, B.C. V6E 3G2
Tel: (604) 688-3411
Fax: (604) 689-7503

W. S. Berardino, Q.C.
Avon M. Mersey
Counsel for the Respondent,
Lac D'Amiante du Quebec Ltee

**ARVAY, FINLAY**
Barristers & Solicitors
300 - 754 Broughton Street
Victoria, B.C. V8W 1E1
Tel: (604) 388-6868
Fax: (604) 388-4456

John L. Finlay
Counsel for the Respondent,
National Gypsum Co.

**NOEL, BERTHIAUME, AUBRY**
Barristers & Solicitors
111, rue Champlain
Hull, Quebec J8X 3R1
Tel: (819) 771-7393
Fax: (819) 771-5397

Counsel for the Attorney General
for the Province of Quebec

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

Counsel for the Attorney General
for the Province of Ontario

**GOWLING, STRATHY & HENDERSON**
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K1N 8S3
Tel: (613) 232-1781
Fax: (613) 563-9869

Henry S. Brown
Ottawa Agents

**BURKE-ROBERTSON**
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2

W. G. Burke-Robertson, Q.C.
Ottawa Agents

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## PART I

### STATEMENT OF RESPONDENTS' POSITION WITH RESPECT TO APPELLANT'S STATEMENT OF FACTS

These Respondents say the only facts which are relevant to the issue on this appeal are simply the following:

1. On February 14, 1990, Esson C.J.S.C. heard the Plaintiff's application for orders arising out of the failure of the Respondents who were Quebec residents to comply with the British Columbia rule of court requiring them to make discovery of documents.

Notice of Motion, Case on Appeal, Vol. I, page 47.

2. Under Rule 2(5) of the British Columbia Rules of Court, a party is liable to sanction for non-compliance with the rule where his failure to comply is without lawful excuse.

British Columbia Rules of Court, Rule 2(5)(d).

3. On February 23, 1990, the learned Chief Justice dismissed the Plaintiff's application holding that the QBCRA (which he found as a fact prohibited Quebec residents at the time of the non-compliance from removing documents from Quebec in response to a demand for discovery of documents from British Columbia) constituted a lawful excuse for the Respondents' failure to make discovery of documents in accordance with the rule.

Reasons for Judgment, Esson C.J.S.C., Case on Appeal, Vol. III, pages 591 *et seq*.

4. On June 6, 1991, the decision of the learned Chief Justice was affirmed by the Court of Appeal.

Oral Reasons for Judgment, Court of Appeal, Case on Appeal, Vol. III, pages 612 *et seq*.

## PART II

## STATEMENT OF THE RESPONDENTS' POSITION IN REGARD TO THE APPELLANT'S POINTS

5. The determinative issue on this appeal is whether there is any basis for an appellate court to interfere with the discretion exercised below to excuse non-compliance by Quebec residents with the British Columbia discovery rule - when it was proved as a fact in evidence that at the time of the non-compliance Quebec law prohibited compliance. If not, as the Respondents submit, the appeal must be dismissed, BECAUSE:

I. In British Columbia, the interpretation and enforceability of the laws of Quebec at any particular time are questions of fact (not law), which must be proved in evidence. Accordingly, so far as the interpretation and enforceability of the QBCRA at the time of the non-compliance are concerned, the decision below that the QBCRA excused non-compliance by Quebec residents was a finding of fact. It is a finding which is supported by the evidence and there is no basis in this case for an appellate court to disturb it. It follows from this that the points made by the Appellant under the following headings are without merit in this appeal:

A. the interpretation of the QBCRA;
B. the constitutional validity of the QBCRA;
C. the public policy of the QBCRA; or
D. "good faith efforts" to avoid the QBCRA.

II. Once the court of first instance has found as a fact that at the time of the non-compliance the QBCRA prohibited compliance, then the decision below under Rule 2(5) of the British Columbia rules that the QBCRA constituted a lawful excuse for that non-compliance was entirely a matter of discretion. As the Court of Appeal held, there is no basis for an appellate court to interfere with that discretion.

## PART III

## ARGUMENT

IA. The Interpretation of the QBCRA

6. Under this heading, the Appellant advances an interpretation of the QBCRA that he raises in this Court for the first time, namely: that properly interpreted the QBCRA does not apply interprovincially, i.e. it does not prohibit the removal of documents from Quebec pursuant to demands for discovery of documents from other provinces in Canada.

(i) In British Columbia, the Interpretation of the QBCRA is a Matter of Fact

7. The British Columbia courts had no jurisdiction to interpret the laws of Quebec as a matter of law. In the courts of British Columbia, the proper interpretation of the laws of another province is a matter of fact which has to be proved by evidence in the same manner as any other fact. The proper interpretation of the laws of Quebec as a matter of law is a matter for the courts of Quebec.

> Smith v. Smith, [1923] 2 W.W.R. 389 (Sask. C.A.), per Turgeon J.A., at page 391:
>
> "It is true that a Court in the province cannot take judicial notice of foreign law, but that such law must be dealt with as a question of fact to be testified to by a witness versed in the law of the foreign jurisdiction. (Sussex Peerage Case, 11 CI & Fin. 85, 8 Jur. 793; Concha v. Murietta, 40 Ch. D. 543, 60 L.T. 798). And it is also true, I think, that matters involving the consideration of civil rights in Canada where the law of more than one province is involved must be dealt with by the Courts of Saskatchewan according to the principles of private international law, in the same manner as

> if the other provinces of Canada were indeed foreign countries."
>
> Canadian National Steamships Company Ltd. v. Watson, [1939] S.C.R. 11, per Cannon J., at page 18.
>
> Pettkus v. Becker, [1980] 2 S.C.R. 834, per Dickson J., at page 853.

8. In this case, the British Columbia courts have found as a fact that at the time of the Respondents' non-compliance with the discovery rule the QBCRA prohibited the removal of documents from Quebec to a place outside Quebec in response to a demand for discovery of documents from British Columbia. This finding was supported by affidavit evidence, as well as the plain language of the QBCRA which, on its face, prohibited the removal of documents pursuant to "any judicial authority outside Quebec" to "a place outside Quebec". It is to be stressed that the statute says "outside Quebec" and not "outside Canada". The only exceptions were specifically provided for in section 3 of the QBCRA; the most pertinent is subsection 3(d), which reads as follows:

> "whenever such removal or sending is authorized by any law of Quebec or of the Parliament of Canada, in accordance with their respective jurisdictions."

There was no law of Quebec or of the Parliament of Canada in evidence that authorized the removal of any document from the province of Quebec pursuant to an interprovincial demand for discovery. Further, the evidence before the courts below included the orders made under the QBCRA by the Quebec courts which refer specifically to the demand for discovery of documents in this case.

> Case on Appeal, Vol. III, pages 593-595 and page 603, lines 8-19.
>
> Case on Appeal, Vol. II, pages 319 *et seq.*, pages 324 *et seq.* and pages 350 *et seq.*

9. There was no evidence in the record supporting the Appellant's new argument on the interpretation of the QBCRA. The two Quebec authorities cited by the Appellant in paragraphs 31 and 32 of his factum are, in fact, evidence against it, viz:

(a) The Renault case cited in Paragraph 31 of the Appellant's Factum (i.e. Paul F. Renault v. Bell Asbestos Mines Ltd. et al, [1980] C.A. 370 (Que. C.A.)

This is a decision of the Quebec Court of Appeal on appeal from a decision of the Quebec Provincial Court. The passage quoted in paragraph 31 of the Appellant's factum is from the decision of the Provincial Court and not the decision of the Court of Appeal. In the Court of Appeal, the decision of the Provincial Court was reversed and the passage relied upon by the Appellant and quoted in his factum was disapproved, *vide* page 372 of the report:

> "According to the Provincial Court, the main purpose of the Business Concerns Records Act is to protect Canadian firms or subsidiaries against the implementation of American or foreign anti-trust laws. There is nothing in the act which expressly states that this is the purpose of the act which does not contain a preamble."

Then, the Quebec Court of Appeal refers to a point which is repeatedly made in the Quebec decisions which are in evidence:

> "Furthermore, the Business Concerns Records Act is a remedial act whose purpose is to remedy abuses and furnish certain advantages to Quebec firms. Under section 41 of the Interpretation Act, such an act must be interpreted broadly and liberally in order to ensure the accomplishment of its objective and the execution of its requirements according to their true meaning, spirit and end."

and, finally on page 373, the Quebec Court of Appeal said this:

> "Contrary to what the Provincial Court has stated, nothing in the Business Concerns Records Act forces the petitioner who wishes to obtain an order under the said act to prove through his proceedings that the respondent company and its officers form the subject of suits emanating from a foreign government or from parties interested in knowing its true financial position."
>
> (Unofficial translation).

(b) The Benesh case cited in Paragraph 32 of the Appellant's Factum

In the Benesh case, a judge of the Quebec trial court held that the QBCRA did not prohibit the making of an order under the Quebec Special Procedure Act requiring that documents be produced and filed in the Quebec court record to satisfy the request of a foreign court. In its factum, the Appellant incorrectly cites the Benesh case as decided in 1986. In fact, it was decided in 1983. In 1984, the decision in the Benesh case was overruled by the Quebec court in Asbestos Corporation Limited v. Eagle-Picher Industries Inc., [1984] C.A. 151 (Que. C.A.), *vide* the opinion of Beauregard J. at page 155:

> "With respect, this proposition appears to me to be ill-founded. 'The law of Quebec' referred to in paragraph d) of Section 3 of the Business Concerns Records Act can only be a particular act which specifically authorizes the transport or sending of a document out of Quebec and not a provision such as Section 9 of the Special Procedure Act. This section permits the Superior Court of Quebec to assist a Foreign Tribunal in the summoning of witnesses and the production of documents under implicit reserve however of Section 2 of

> the Business Concerns Records Act. Before exercising its discretion in applying Section 9 of the Special Procedure Act and before assisting the Foreign tribunal, the Quebec tribunal must assure itself that the assistance given to the Foreign tribunal is not prohibited by the law of its country."
>
> (Unofficial translation).

Furthermore, the order made in the Benesh case was disapproved when the Quebec Court of Appeal subsequently suspended the *ex parte* order for discovery for 30 days in order that a third party who was not a party before the superior court have an opportunity to obtain revocation of the order in fresh proceedings:

> Nesmith v. Benesh, Friedlandler, Coplan & Aronoff et al, [1983] C.A. 549 (Que. C.A.) per Mr. Justice Jacques at page 551:
>
> "The appellant in the present case is not however without recourse, as he can take advantage of the provisions of Article 489 C.P. entitling a third party to oppose the judgment *a quo*.
>
> In the circumstances, there are grounds for granting the petition and dismissing the appeal, the whole with costs, but nevertheless for suspending execution of the judgment *a quo* for a period of thirty days in order to give the appellant the opportunity to file a motion in revocation, if he sees fit."
>
> (Unofficial translation).
>
> Also see Mr. Justice Bisson and Mr. Justice Larouche at page 552.

10. In the result, there are no grounds for disturbing the findings of fact made by the courts below as to the effect of the QBCRA at the time of the non-compliance in this case. Furthermore, the authorities show this Court will not entertain a new argument

which is raised in this Court for the first time when this Court cannot be satisfied it has all the evidence bearing upon it that could have been produced if the new argument had been raised *ab initio*.

> The Steamship "Euphemia", [1909] 41 S.C.R. 154, per Duff J., at page 164:
>
> "Is it then manifest that if this controversy had arisen at the trial no facts bearing on it, other than those which the record discloses, could have been brought to light? I cannot think that can be the case. There are many things I should like to be informed about before passing upon such a question."
>
> Perka v. The Queen, [1984] 2 S.C.R. 232, per Dickson J., at page 240:
>
> "A party cannot, however, raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial."

11. In the courts below, the Appellant did not argue that the QBCRA did not apply to interprovincial demands for discovery and filed no expert testimony expressing the opinion that, properly interpreted, the QBCRA did not apply to a demand for discovery of documents from another province of Canada. If this argument had been made, the Respondents would have had an opportunity to adduce evidence of their own directed to the issue, including evidence of historical facts. In addition, a fact of great importance is that there has been no investigation of the indication in the record of the proceedings in this case that the Appellant's lawyers are co-operating with and have an agency relationship with American lawyers acting in related claims against Quebec residents in the United States. It appears that documents removed or to be removed from Quebec pursuant to demands for document discovery from British

Columbia are going to go to the United States. On these facts, the Appellant's new argument is beside the point.

> Hunt v. T&N, plc, and others, per the Honourable Judge Wetmore, January 31, 1990.
>
> Hunt v. T&N, plc and others, per Esson C.J.S.C., March 5 and 6, 1992.
>
> See also cross-examination of Stephen Antle in this case on July 24, 1990. For example, with reference to Ness Motley, a law firm in South Carolina, Mr. Antle testified as follows at page 27, lines 31-39:
>
> "Q: In what ways -- way or ways -- do you deal with him?
> A: Principally we exchange information with him.
> Q: Yes, and why do you do that?
> A: For our mutual benefit in the litigation that we're handling.
> Q: And what is his benefit in respect of this litigation?
> A: He's counsel in asbestos litigation in the United States."

(ii) The Interpretation of the QBCRA as a Matter of Law

12. On this appeal, the Supreme Court of Canada does not have jurisdiction to give a judgment interpreting the QBCRA as a matter of law. This is so because this court is limited by section 45 of the Supreme Court Act to giving the judgment that the court whose decision is appealed against had the jurisdiction to give and the courts below had no such jurisdiction. Section 45 reads as follows:

> "The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded. R.S., c.S-19, s.47."

This Court does not have the jurisdiction to give a judgment interpreting the QBCRA that could have been given had the issue been raised in the Quebec courts.

> Boulevard Heights, Limited v. Veilleux, [1915] 52 S.C.R. 185, per Duff J., at page 192:
>
> "In my judgment, the appeal to this court is an appeal strictly so called, not an appeal by way of rehearing. The "Supreme Court Act" (sec. 51), expressly declares that this court should give the judgment which ought to have been given by the court below, ..."
>
> The K.V.P. Company Limited v. McKie, [1949] S.C.R. 698, per Kerwin J., at page 700:
>
> "It has been decided in Boulevard Heights v. Veilleux, that since section 46 of the Supreme Court Act provides that this Court may dismiss an appeal or give the judgment which the Court whose decision is appealed should have given, and since a provincial legislature may not extend the jurisdiction of this Court as conferred by Parliament, such a provision as the one here in question would not, even if it purported so to do, enable this Court to give a judgment that was impossible in law at the time of the decision of the Court of Appeal."
>
> A.G. Canada v. Canard, [1976] 1 S.C.R. 170, per Beetz J., at page 216:
>
> "The Courts of Manitoba could not on the other hand hear an appeal from the Minister's decision or otherwise review it. We sit in appeal from the decision of the Manitoba Court of Appeal and our own jurisdiction is limited to giving the judgment that it could and should have given (Supreme Court Act, R.S.C. 1970, c. S-19, s. 47), but not the one that could and should have been given had the issue been raised in the Federal Court."
>
> Cusson v. Robidoux, [1977] 1 S.C.R. 650, per Pigeon J., at pages 654 and 655:
>
> "An important difference between these two cases (Veilleux and McKie) and the case at bar should be mentioned at the outset. ... In both cases the subsequently passed retrospective statute was invoked to obtain in this Court a judgment different

from that delivered originally. The basis for refusing to do so was that the federal statute creating this Court does not empower it to give a judgment that the Court of Appeal could not have given. ... In the case at bar, respondent invokes the 1974 Act, not to ask this Court to give a judgment different from that of the Court of Appeal, but to have the appeal dismissed. In my view, there is not doubt that this Court has power to do so. There is nothing in the wording of the Supreme Court Act to prevent the conclusion sought by respondent from being granted. It in no way limits the grounds on which the Court may dismiss an appeal."

(Words in parenthesis by counsel).

Her Majesty The Queen v. P.L.S., [1991] 1 S.C.R. 909, per Sopinka J., at page 918:

"By virtue of s. 45 of the Supreme Court Act, R.S.C., 1985, c. S-26, the limitation on the powers (of the court appealed from) to which I have referred applies equally to this Court.

(Words in parenthesis by counsel).

13. Alternatively, even if this were a case where the Supreme Court of Canada did have jurisdiction to interpret the law of one province on appeal from another, the authorities show that it will not do so where the interpretation in issue had not been raised in the court whose decision is appealed against.

J. Castel, Droit International Privé Québécois, Butterworths, 1980, at pages 803-804:

"The Supreme Court, however, judicially peruses a law from a foreign province only if the said law was alluded to in the first instance."

(Unofficial translation).

Canadian National Steamships Company Ltd. v. Watson *supra*, per Cannon J., at page 18:

"The vessel being registered in the port of Vancouver, in the province of British Columbia, the law of that province on negligence might have applied if it had been alleged and proven. The absence of allegation distinguishes this case from

> that of Logan v. Lee (1907), 39 S.C.R. 311. This Court, in cases from the province of Quebec, must follow the rule that all facts in support of the action, e.g., the law of another province, must be alleged and proved; otherwise it would be unfair for this Court to take *suo motu* judiciary notice of the statutory or other laws of another province, ignored in the pleadings, when the Quebec courts did not consider them, and, forsooth were prohibited from considering them as applying to the case."

Pettkus v. Becker *supra*, per Dickson J., at page 854:

> "This Court however, does not take judicial notice of the law of another province unless that law has been pleaded in the first instance. As Cannon J. held in Canadian National Steamships Co. Ltd. v. Watson, [1939] S.C.R. 11, at p. 18, it would be unfair for this Court to take, *suo motu*, judicial notice of the statutory laws of another province, ignored in the pleadings."

14. In the case at Bar, it would be unfair for this court to consider the Appellant's interpretation as a matter of law for the first time, because a question of interpretation involves questions of fact as well as law. This appears from Churchill Falls (Labrador) Corporation Ltd. v. A.G. Newfoundland, [1984] 1 S.C.R. 297, which is cited in paragraph 34 of the Appellant's factum. This case also shows (contrary to the reason the Appellant appears to have cited the case) that evidence of the facts set out in the Appellant's factum, i.e. Premier Duplessis' speech, is not admissible. The pertinent passage is found at page 319:

> "In applying the above principles, I would say that the speeches and public declarations by prominent figures in the public and political life of Newfoundland on this question should not be received as evidence. They represent, no doubt, the considered views of the speakers at the time they were made, but cannot be said to be expressions of the intent of the Legislative Assembly. Much of the material tendered, concerning such matters as the Newfoundland demands for the recall of power, the background of the negotiations leading up to the development of the Power Contract, and the construction of the production facilities, I view

> as historical facts that were public knowledge in the Province of Newfoundland and may be considered. I am also of the view that the government pamphlet entitled, 'The Energy Priority of Newfoundland and Labrador', may be considered."
>
> See also Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714, per Dickson J., at page 721:
>
> "The object or purpose of the Act in question may also call for consideration though, generally speaking, speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight."

Further, any consideration of the Appellant's new interpretation must also involve an investigation of the indication in the record of the proceedings in this case that the British Columbia discovery rule is being employed to obtain documents to be used in proceedings in the United States.

15. In any event, the Respondents say the Appellant's new argument is without merit in this case given the plain language of the statute referred to in paragraph 8 above, as well as the historical record. The Respondents say the historical record will show that the QBCRA was first enacted in 1958 to protect Quebec businesses as part of its common patrimony. Its object is to prevent enquiries outside Quebec having an economic impact on Quebec business concerns, the industry of which they form a part, and the Quebec economy as a whole. The allegations in the Statement of Claim show this case is the same as many cases brought in British Columbia (many of which have Defendants resident in the United States and elsewhere outside Quebec), which have all the characteristics of the situation at which the statute is directed. A worldwide conspiracy is alleged which, it is said, has taken place in part in Quebec, in part in the United States, but in no part in British Columbia. The QBCRA is to protect Quebec industries in cases of this kind against the extraterritorial

effect of orders made by judicial authorities anywhere outside Quebec.

16. It must be kept in mind that the restriction on document production in this case arises only because the Appellant chose to ask the British Columbia courts to take extraterritorial jurisdiction over the Respondents by bringing this case in British Columbia and not in Quebec. All these cases are amenable to the jurisdiction of the Quebec courts. Quebec, as the place of domicile and operation of the Respondents, is a natural forum.

10 Bushell v. T&N, plc (1991), 60 B.C.L.R. (2d) 294 (S.C.). (Affirmed (1992), 67 B.C.L.R. (2d) 330 (C.A). Application for leave to appeal to this Court presently pending).

Oral Reasons of the Honourable Mr. Justice Callaghan in Hunt v. T & N, P.L.C. et al dated June 30, 1989. (Not reported).

Oral Reasons of the Honourable Mr. Justice Lambert refusing Leave to Appeal from the Judgment of the Honourable Mr. Justice Callaghan dated July 26,
20 1989. (Not reported).

17. Finally, any judgment of this court giving a new interpretation to the QBCRA, which did not exist at the time of the non-compliance at issue in this case, would not be relevant or necessary to a decision on the question in this appeal, namely: whether under the British Columbia rule there was a lawful excuse at the time of that non-compliance. An allegation of such a new interpretation should only be entertained in a properly constituted proceeding in Quebec and, if necessary, by this Court on an appeal from the Quebec courts.

30 IB. The Constitutional Validity of the QBCRA

18. Under this heading, the Appellant says the QBCRA is *ultra vires* or *ultra vires* in part and, therefore, any prohibition against

removing documents in response to a demand for discovery of documents from British Columbia is unenforceable in Quebec, and for this reason the QBCRA does not excuse non-compliance with the British Columbia discovery rule.

19. The British Columbia courts do not have jurisdiction to give a judgment declaring *ultra vires* the QBCRA or any statute of any other province. No authority exists which recognizes such a jurisdiction. The jurisdiction of courts are assumed to be territorially limited.

> P. Hogg, Constitutional Law of Canada, 2d ed., page 276.

20. There was no evidence before the courts below that the QBCRA is *ultra vires*. At the time of the non-compliance in this case, there was no decision of the Quebec courts or the Supreme Court of Canada on appeal from the Quebec courts holding the QBCRA *ultra vires*.

21. On the other hand, there is ample evidence that the QBCRA was and is *intra vires*. On its face, the QBCRA is a law of general application respecting movable property located in Quebec. It operates within the province and was not enacted with respect to the case at Bar. It, and its counterpart in Ontario, fall under heads 13 and 14 of section 92 of the Constitution Act, 1867. Any incidental extraterritorial effect that the QBCRA may have cannot affect its validity, see Churchill Falls *supra*, at page 332:

> "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 extraprovincial rights will not render the enactment *ultra vires*."

> See also Ladore v. Bennett, [1939] 2 W.W.R. 566 (P.C.).

Further, it is well established that a legislature is presumed to have legislated within the limits of its jurisdiction and clear evidence is required to underpin any finding of constitutional incompetence, *vide*:

> L. Davis, Canadian Constitutional Law Handbook, 1985 Canada Law Book Inc., at pages 502-503:
>
> "The intention to legislate outside its alloted field is not lightly to be imputed to the legislature ... Before the Court concludes that the Province has transcended its constitutional powers the evidence must be clear and unmistakable; ... "

Accordingly, the decision of the courts below to proceed on the basis that the QBCRA was a valid statute of Quebec is fully supported by the evidence.

22. On this appeal, the Supreme Court of Canada itself does not have jurisdiction to give a judgment declaring the QBCRA, or any part of it *ultra vires*. This is so because, on an appeal from the courts of British Columbia, the Supreme Court of Canada is limited by section 45 of the Supreme Court Act to giving the judgment that the court whose decision is appealed against had the jurisdiction to give and the courts below had no such jurisdiction. This Court does not have the jurisdiction to give a judgment declaratory of the constitutional validity of the QBCRA that could and should have been given had the issue been raised in the Quebec courts.

> See the authorities collected under paragraph 12 hereof.

23. Finally, any judgment by this Court that the QBCRA or some part of it is *ultra vires* which did not exist at the time of the non-compliance at issue in this case, would not be relevant or necessary to a decision on the question in this appeal, namely: whether under the British Columbia rule there was a lawful excuse

at the time of that non-compliance. An allegation that the QBCRA or any part of it is *ultra vires* should only be entertained in a properly constituted proceeding in Quebec and, if necessary, by this Court on an appeal from the Quebec courts.

IC. The Public Policy of the QBCRA

24. Under this heading, the Appellant says the QBCRA is contrary to the public policy of Canada and British Columbia and, therefore, any prohibition against removing documents in response to a demand for discovery from British Columbia is unenforceable in Quebec.

25. The courts below have found as a fact that at the time of the non-compliance in this case, the QBCRA prohibited the removal of documents from Quebec pursuant to a demand for discovery of documents from British Columbia. This finding is supported by the evidence and there was no finding anywhere that the QBCRA was contrary to the public policy of Canada, British Columbia, or anywhere else.

26. There was and is ample evidence that the QBCRA was not contrary to the public policy of British Columbia or Canada. The QBCRA, its earlier Ontario counterpart, the Business Records Protection Act, 1990 R.S.O. c.B.19, the specific statutory protection accorded the British Columbia asbestos industry in 1984 by the enactment of s.41.1(2) of the Court Order Enforcement Act, 1984 S.B.C. c.75, and the Uranium Information Security Regulations, Consolidated Regulations of Canada, 1978 c.366, declare a policy adopted in the public interest by each of these respective jurisdictions. It is a duty of all courts in the Canadian federation to respect such statutes. This is particularly so at Bar where by choosing to sue in British Columbia instead of Quebec, the Appellant is asking the British Columbia Court to take

extraterritorial jurisdiction over persons that are subject to the QBCRA.

27. The enactment of the QBCRA, constitutes a determination of public policy by the government of Quebec. It is submitted it is not open to a British Columbia court, when called upon to consider whether a Quebec statute was enforceable as a question of fact, to take issue with such a determination of public policy.

> Gulf Oil Corporation v. Gulf Oil Canada Limited, [1980] 2 S.C.R. 39.

28. On this appeal the Supreme Court of Canada has no jurisdiction to give a judgment declaring the QBCRA unenforceable as contrary to public policy as a matter of law. This is so because on appeal from the courts of British Columbia, the Supreme Court of Canada is limited by section 45 of the Supreme Court Act to giving the judgment that the court whose decision is appealed against had the jurisdiction to give and the courts below had no such jurisdiction. This Court has no jurisdiction to give a judgment declaratory of the enforceability of the QBCRA that could and should have been given had the issue of public policy been raised in the Quebec courts.

> See the authorities collected under paragraph 12 hereof.

29. Finally, any judgment by this Court that the QBCRA is unenforceable (because it is contrary to public policy) which did not exist at the time of the non-compliance at issue in this case, would not be relevant or necessary to a decision on the question in this appeal, namely: whether under the British Columbia rule there was a lawful excuse at the time of that non-compliance. An allegation that the QBCRA is contrary to public policy should only be entertained in a properly constituted proceeding in Quebec and, if necessary, by this Court on an appeal from the Quebec courts.

ID. "Good Faith Efforts" to Avoid the QBCRA

30. The courts below found as a fact that compliance with the discovery rule by the removal of documents from Quebec would have been a breach of the QBCRA, as well as the Orders made under it. This finding is fully supported by the evidence, *vide*:

(a) Le Club de Hockey Canadien, Inc. v. World Hockey Association, et al (28 May 1973; Quebec S.C.), per Mr. Justice Bélanger at page 9:

"The Court is satisfied that the scope of Section 2 is not made dependent on the use of the summary proceeding made available to the Attorney General or to every person having an interest in the business concern."

At page 10, he concludes:

"It is the view of this Court that a duty is created by the Act which is to be complied with not only when the special remedies of Section 4 or Section 5 of the same Act are used and that, in fact, the ordinary proceedings of our law may still be used although not as expeditiously. In other words, the Act is enforceable by the summary proceedings which it makes available to parties whose right to use them might otherwise be difficult to establish but it is also enforceable by the ordinary civil remedies.

This Court comes therefore to the conclusion that the imperative prohibition found in Section 2 of the Act remains binding on everyone even when the special remedies found in Sections 4 and 5 are not taken advantage of."

(b) Lac d'Amiante du Quebec Limitee v. Le Procureur General du Quebec et l'Association des Mines d'Amiante du Quebec, Unreported Que. C.A., May 16, 1989, Court File No. 500-09-001104-805, 500-02-039193-805, per Kaufman J.A., at page 4:

> " ... But to do so would not only have been cumbersome (and, I might add, ineffective inasmuch as these orders could, always, be amended by the appropriate courts), but it would also have been unnecessary since section 2 (quoted above) in any case probibits the removal of "any document or résumé of digest of any document relating to any concern". The prohibition, therefore, already exists, and section 4 is but an extension, designed to give the Act greater teeth. Viewed in this light, the order issued by the Provincial Court was perfectly legal, and it should not be set aside for this reason."

In the face of this evidence, which was accepted by the courts below, no question of "good faith efforts" can arise.

31. Moreover, it is an undisputed fact that the orders with respect to the Respondents were not obtained by the Respondents. They were obtained by a shareholder of the Respondents. The shareholder's conduct in obtaining these orders was expressly contemplated by and provided for in the QBCRA, see Section 4:

> " ... Every person having an interest in a concern may exercise the rights contemplated in this section."
>
> Case on Appeal, Volume II, pages 319 *et seq.* and pages 324 *et seq.*

II. Once the court of first instance has found as a fact that at the time of the non-compliance the QBCRA prohibited compliance, then the decision below under Rule 2(5) of the British Columbia rules that the QBCRA constituted a lawful excuse for that non-compliance was entirely a matter of discretion. As the Court of Appeal held, there is no basis for an appellate court to interfere with that discretion.

32. The principles upon which an appellate court should interfere with the discretion of a judge acting within his jurisdiction and on facts properly found in evidence are well established. This Court should not interfere unless it is clearly satisfied that the discretion has been wrongly exercised, either because the judge has acted upon some wrong principle of law, or because on other grounds the decision will result in some injustice being done.

Evans v. Bartlam, [1937] A.C. 473 (H.L.)

McKinnon Industries v. Walker, [1951] 3 D.L.R. 577 (P.C.), at page 579.

Pelech v. Pelech, [1987] 1 S.C.R. 801.

33. In considering the scope of this discretion, it is to be noted that the words "lawful excuse" in Rule 2(5), while not words of art, are words of wide import. They are wider than either "lawful authority" or "legal excuse". Further, the word "lawful" qualifies the excuse and not the non-compliance with the rule. Accordingly, a "lawful excuse" may be sufficiently established by the proof of a fact (the QBCRA), which is a lawful excuse in the sense it is not forbidden by law, or even that there is merely an honest and reasonable belief as to its effect.

Wong Poo Yin v. Public Prosecutor, [1955] A.C. 93 (P.C.), at pages 100-101.

Stroud's Judicial Dictionary, 4th ed., Vol. III, London: Sweet and Maxwell, 1973, page 1496.

Black's Law Dictionary, 5th ed., St. Paul, Minnesota: West Publishing Company, 1979, page 797.

34. Once the effect of the QBCRA in Quebec at the time of the non-compliance in this case was established in evidence as a fact, the exercise of the discretion was consonant with established authority. The applicable principles are set out in the decision of the Ontario Court of Appeal in Frischke et al v. Royal Bank of Canada et al (1977), 80 D.L.R. (3d) 393 (Ont. C.A.), and by the recent decision of this Court in De Savoye v. Morguard Investments Limited and Credit Foncier Trust Company, [1990] 3 S.C.R. 1077. The application of these principles by Esson C.J.S.C. is found in Case on Appeal, Volume III, commencing at page 603, line 21, and continuing to page 605, line 10, and in the Court of Appeal at page 617, line 20, to page 619, line 22.

35. It is submitted further that Esson C.J.S.C. properly distinguished the situation at Bar which involves the procedure in civil actions for discovery from a criminal case involving the ability to compel evidence at trial, i.e. Spencer v. Her Majesty the Queen, [1985] 2 S.C.R. 278. At page 605, line 10, in Case on Appeal, Volume III, Esson C.J.S.C. put it this way:

> "Furthermore, I think it questionable that it would be sound to apply the principle of Re Spencer to discovery of documents. That is a significant part of our procedure in civil actions but is considerably less vital to the fair and proper working of the system than is the ability to compel evidence at trial. The scope of discovery is very wide but that approach evolved on the assumption that the discovery would be made by a party within this jurisdiction. Although the rules also apply to parties resident out of the jurisdiction, they must be applied in a way that takes account of difficulties created by the law of the second jurisdiction."

36. In the result, the Respondents say that the courts below properly weighed the inconvenience to the Appellant that would flow

from limiting one method of obtaining documents* against the prejudice to the Respondents who were confronted as the Court of Appeal observed with an "unpalatable choice", i.e. "comply and be in breach of the absolute prohibition in the QBCRA; or refuse and risk the striking out of their respective statements of defence with potentially enormous financial consequences".

Case on Appeal, Volume III, p.616, ll.31-40.

37. Finally, it can well be maintained that in the face of the finding of fact in this case as to the effect of the QBCRA in Quebec at the time of the non-compliance, a decision in British Columbia that the QBCRA was not a "lawful excuse" under Rule 2(5), would be giving the British Columbia discovery rule an extraterritorial effect that was never intended by the legislature. As noted above, the jurisdictions of courts are assumed to be territorially limited.

P. Hogg, Constitutional Law of Canada *supra*.

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* The same conspiracy claim is made against other Defendants to this action, as well as other Defendants in actions in British Columbia and in the United States. Many of these Defendants are not residents of Quebec and their documents are all located outside Quebec and thus document production that is not limited by the QBCRA is available to the Appellant. Indeed, as the Appellant is well aware, all the documents of one of the Respondents' Co-Defendants in this action, namely, Carey Canada Inc., are located in Tampa, Florida, and have been made available to the Appellant.

## PART IV

## NATURE OF ORDER SOUGHT

38. That this appeal be dismissed with costs to the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Jack Giles, Q.C.

Robert J. McDonell
Counsel for the Respondents,
Asbestos Corporation Limited,
Atlas Turner Inc. and
Bell Asbestos Mines Limited

DATED: August 28, 1992

## PART V

## TABLE OF AUTHORITIES

Court No: 22637

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

GEORGE ERNEST HUNT,

APPELLANT
(PLAINTIFF)

AND:

LAC D'AMIANTE DU QUEBEC LTEE, 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)

AFFIDAVIT OF SERVICE

I, ROLAND WEISE, of the City of Ottawa, in the Regional Municipality of Ottawa-Carleton, Province of Ontario, make oath and say as follows:

1. I am employed by the law firm of Gowling, Strathy & Henderson, Ottawa Agents for the solicitors for the Respondents, Asbestos Corporation Limited, Atlas Turner Inc. and Bell Asbestos Mines Limited and as such have knowledge of the matters hereinafter deposed to;

2. I did on Monday, the 31st day of August, 1992, at approximately 3:35 p.m. serve Messrs. Lang, Michener, Lawrence &

Shaw, 300 - 40 O'Connor Street, Ottawa, Ontario, Ottawa Agents for the Solicitors for the Respondent, The Quebec Asbestos Mining Association, with three copies of the factum of the aforesaid Respondents by delivering to and leaving the said copies with a person who identified herself as Rachel Bigras;

3. I did on Monday, the 31st day of August, 1992, at approximately 4:15 p.m. serve Messrs. Burke-Robertson, 70 Gloucester Street, Ottawa, Ontario, Ottawa Agents for the Respondent, National Gypsum Co., with three copies of the factum of the aforesaid Respondents by delivering to and leaving the said copies with a person who identified herself to me as Mary Beyer;

4. I did on Monday, the 31st day of August, 1992, at approximately 4:22 p.m. serve Messrs. Soloway, Wright, 99 Metcalfe Street, Ottawa, Ontario, Ottawa Agents for the Attorney General of Ontario, with a copy of the factum of the aforesaid Respondents by delivering to and leaving the said copy with a person who identified herself to me as Patricia Marks;

5. Attached hereto and marked as Exhibit "A" to this my Affidavit is a copy of the factum of the aforesaid Respondents.

SWORN BEFORE ME at the City of Ottawa, Regional Municipality of Ottawa-Carleton, Province of Ontario, this 15 day of September, 1992.

ROLAND WEISE

A COMMISSIONER, ETC.

Court No: 22637

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

GEORGE ERNEST HUNT,

APPELLANT

AND:

LAC D'AMIANTE DU QUEBEC LTEE, ET AL,

RESPONDENTS

AND:

T&N, plc, CAREY CANADA INC., ET AL,

(DEFENDANTS)

# AFFIDAVIT OF SERVICE

GOWLING, STRATHY & HENDERSON
160 ELGIN STREET
OTTAWA, ONTARIO

OTTAWA AGENTS FOR THE SOLICITOR FOR THE RESPONDENTS, ASBESTOS CORPORATION LIMITED, BELL ASBESTOS MINES LIMITED and ATLAS TURNER, INC.