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S.C.C. 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

PLAINTIFF
(APPELLANT)

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.

DEFENDANTS
(RESPONDENTS)

AND:

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

DEFENDANTS

AND:

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

THIRD PARTIES

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PART I

STATEMENT OF RESPONDENT QAMA'S POSITION WITH RESPECT TO APPELLANT'S STATEMENT OF FACTS

The Respondent (Defendant) The Quebec Asbestos Mining Association ("QAMA") emphasizes the following facts:

1. On June 6, 1991 the British Columbia Court of Appeal affirmed the decision of Esson C.J.S.C. that the prohibitions contained in the Quebec Business Concerns Records Act: (Loi Sur Les Dossiers D'Enterprises (see Appendix "A") L.R.Q. 1977, c. D-12 (the "QBCRA"), (a) prevented the Quebec defendants from complying with a demand by the Plaintiff for production of a list of Quebec situated documents; and (b) that the QBCRA provisions constitued a lawful excuse under Rule 2(5)(d) (see Appendix "B") of the British Columbia Supreme Court Rules for non-compliance with that demand.

Reasons for Judgment Esson C.J.S.C., February 23, 1990, Case on Appeal Vol III, p. 591-607

Reasons, Court of Appeal, Case on Appeal, Vol III, p. 612-621

2. The finding of Esson C.J.S.C. that the listing and production of Quebec documents would be a breach of the QBCRA was founded upon his acceptance of the affidavit opinion evidence of Quebec lawyers adduced by this Defendant. The

Court of Appeal held that the learned Chief Justice did not err by relying on that evidence.

Reasons for Judgment Esson C.J.S.C. Case on Appeal Vol. III, p. 603 ll 8-19

Reasons, Court of Appeal, Case on Appeal, Vol. III, p. 620 ll 1-30

3. The finding of the Chief Justice Esson that the QBCRA prohibition constituted a lawful excuse under the British Columbia Supreme Court Rules was based on the evidence before him, his interpretation of Rule 2(5), and the application of the doctrine of judicial comity.

Reasons, Court of Appeal, Case on Appeal, Vol. III, p. 17 l 1-50, 618 ll 1-10

Case History

4. This case is one of a very large number of similar claims brought by the Workers' Compensation Board of British Columbia in exercise of its subrogation rights of paid workers claims.

Reasons, Court of Appeal, Case on Appeal, Vol. III p. 616 ll 10-30

5. QAMA is a non-profit organization whose members were and are exclusively the Quebec producers of asbestos. It has a Quebec charter. All officers, directors or members of QAMA were at all times located in Quebec.

Affidavit of Philippe Casgrain Q.C., June 29, 1989, Case on Appeal Vol II 218-219

6. At the commencement of this action, QAMA and the other Quebec Defendants filed a motion to have the British Columbia Courts decline jurisdiction on the grounds that the proper forum was the province of Quebec. On June 30, 1989 at the hearing of that motion before the Honourable Mr. Justice Callaghan, QAMA introduced expert evidence to illustrate the juridicial advantages of the Quebec and the juridicial disadvantages of the British Columbia forum including, inter alia, the effects that the QBCRA would have on the litigation in British Columbia.

Affidavit of Louis J. Zivot October 18, 1989, Opinion of Byers Casgrain, June 23, 1989, Case on Appeal, p. 345-349

7. The Plaintiff, through his counsel, was fully aware of what the Quebec Defendants' position would be with respect to production of documents based on previous advice.

Affidavit of Stephen Antle, October 3, 1989
Case on Appeal, Vol II, p. 221-222, para. 4 and
Exhibit "B" at p. 232-233

8. Mr. Justice Callaghan refused the Defendant's application to have the British Columbia Courts decline jurisdiction primarily because of the Court's concern about the Plaintiff being statute barred in Quebec and not as submitted in paragraph 8 of the Plaintiff's Factum that there was a way to avoid the QBCRA provisions.

Memorandum of Reasons of Callaghan, J., June 30, 1989,
Case on Appeal Vol. III, p. 563 ll 10-30

Demand for Documents

9. Following that application, the Plaintiff requested that the Defendants deliver their relevant Quebec documents. Contrary to paragraph 9 of the Plaintiff's Statement of Facts, QAMA did respond to Plaintiff counsel's proposal to make voluntary disclosure of documents by providing the further opinion of Byers Casgrain dated October 12, 1989

which stated that the course of action proposed by the Plaintiff would constitute an indirect and illegal attempt to circumvent the scope of the QBCRA.

Affidavit of Louis J. Zivot, October 18, 1989,
Opinion of Byers Casgrain, October 12, 1989
Case on Appeal, Vol. II, p. 355

10. QAMA was prohibited by the QBCRA from producing a list of documents or documents in its possession even in the absence of any order of the Quebec Court and therefore did not produce a list of documents when it received the Demand from the Plaintiff.

Reasons for Judgment, Esson C.J.S.C., Case on Appeal,
Vol. III, p. 601 ll 3-28

11. On October 2, 1989 Bell Asbestos Mines Limited brought an application against the QAMA before the Quebec Provincial Court pursuant to Section 4 of the QBCRA. An Order was granted by the Quebec Court on October 4, 1989. The Quebec application was brought prior to the Appellant's motion, filed October 3, 1989, to compel QAMA to produce a List of Documents in this action.

Motion to Obtain Orders under QBCRA, Affidavit of Stephen Antle, February 9, 1990, Case on Appeal, Vol. III, p. 477-480

Judgment on a Petition for Orders under the QBCRA, Affidavit of Stephen Antle, February 9, 1990, Case on Appeal, Vol. III p.481-485

12. A similar Order under Section 4 of the QBCRA had already been obtained by the Attorney General of Canada and was still in effect against a co-defendant Lac D'Amiante du Quebec Ltee (LAC) which Order was upheld by the Quebec Court of Appeal and leave to appeal was refused by this Court.

Reasons for Judgment of Quebec Court of Appeal, Affidavit of Stephen Antle, February 9, 1990, Case on Appeal, Vol. III, p. 552-559

PART II

STATEMENT OF QAMA'S POSITION ON THE APPELLANTS ISSUES ON APPEAL

13. The QAMA adopts the reasoning of the Courts below that held that the provisions of the QBCRA present a lawful excuse for refusing to comply with the Plaintiff's demand for a list and production of Quebec situated documents. In response to the points put in issue by the Plaintiff, the QAMA says:

A. Chief Justice Esson found as a fact that the QBCRA prohibited the listing and provision of Quebec situated documents in the face of a British Columbia demand. This finding should not be interferred with by this Court.

B. The QBCRA is a valid exercise in sovereignty by the legislature of Quebec over matters in or on its territory and is intra vires the Quebec Legislature. Any extra-provincial effect is purely incidental.

C. The finding by the Courts below that the QBCRA was a lawful excuse for non-compliance with the British Columbia Supreme Court Rules was based on the proper application by the British Columbia Court's of the doctrine of judicial comity. The use and application of that doctrine is a matter of discretion solely for the British Columbia Courts.

D. This Defendant has not acted in bad faith. The prohibitions of the QBCRA applied without any act of the Defendants. The Plaintiff chose the forum, commenced and maintained this action with full knowledge of the legal impediments imposed on the Quebec Defendants by the QBCRA.

PART III

ARGUMENT

A. The British Columbia Courts Correctly Interpreted the QBCRA

14. The question of the interpretation of foreign law is a question of fact to be decided upon expert evidence.

Gold v. Reinblatt and Kert, [1929] S.C.R. 74

15. Chief Justice Esson accepted the Defendant's expert opinion evidence that the QBCRA prohibited a response to the Plaintiff's Demand for discovery of documents. His interpretation was accepted by the Court of Appeal.

Reasons for Judgment, Esson C.J.S.C., Case on Appeal, Vol. III, p. 603 ll 8-19

Reasons, Court of Appeal, Case on Appeal, Vol. III, p. 620 ll 1-30.

16. The Plaintiff does not question the British Columbia Courts' finding that the QBCRA prohibits the provision of a list or disclosure of Quebec documents in the face of a demand described in that statute. Rather the Plaintiff now argues before this Court for the first time that the QBCRA

prohibitions do not apply to a demand from another province. The Defendants have not had the opportunity to present evidence or argument on this point and therefore it should not be considered by this Court.

Perka v. the Queen, [1984] 2 S.C.R. 232 per Dickson J., at p. 240

17. In any event the meaning and application of the QBCRA is clear on the language of that statute. Therefore, the Plaintiff's resort to external aids of interpretation is not proper or required.

Shavernoch v. Foreign Claims Commission et al., [1982] 1 S.C.R. 1092 per Estey J. at p.1098

18. The Plaintiff seeks to rely on newspaper reports of legislative debate on the QBCRA to aid in its interpretation(para 33). While some forms of extrinsic evidence may be referred to as background to the legislation it is clear that extrinsic evidence cannot be used as an aid to construction of a statute. Speeches of politicians such as those referred to by the Plaintiff are not to be received in

evidence at all as they cannot be said to be expressions of legislative intent.

> Re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297 at 318-319

19. The Plaintiff also suggests (para 35) that the Court should interpret the QBCRA based on the history of its use in Canada. But the use, misuse or disuse of a statute cannot be used as an aid to its interpretation. The meaning must be taken from the wording of the statute.

20. Section 2 of the QBCRA provides:

> 2. Subject to Section 3, no person shall, pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside Quebec, remove or cause to be removed, or send or cause to be sent, from any place in Quebec to a place outside Quebec, any document or resume or digest of any document relating to any concern.
>
> 2. Sous réserve de l'article 3, nul ne peut, à la suite ou en vertu d'une réquisition émanant d'une autorité législative, judiciaire ou administrative extérieure au Québec, transporter ou faire transporter, ou envoyer ou faire envoyer, d'un endroit quelconque au Québec à un endroit situé hors de celui-ci, aucun document ou résumé ou sommaire d'un document relatif à une entreprise.

21. The Quebec Court of Appeal has described the QBCRA as being a remedial act that under Section 41 of the Quebec

Interpretation Act S.Q., c.I-16 (Appendix "C") is to be interpreted broadly and liberally. The act is of general application, it has no preamble and does not state any particular purpose.

Renault v. Bell Asbestos, [1980] C.A. 370 at p. 372

Pelnar and Institute of Occupational and Environmental Health v. Insurance Company of North America in Re: Asbestos Insurance Coverage Cases, Quebec Court of Appeal June 25, 1985, No. 500-09 -001459-841 at p. 5-6

Asbestos Corporation Limited v. Eagle Picher Industries Inc. and Le Procureur General de la Province de Quebec, [1984] C.A. 151 at 155

22. The words "outside Quebec" ("extérieure au Québec") in Section 2 are unambiguous. Had the Quebec legislature sought to exempt from its application demands from other Canadian provinces it could have done so in express language. The internal context of the statute also confirms that the QBCRA's application is not restricted as the Plaintiff would argue.

The QBCRA does not Interfere with British Columbia Procedural Law

23. The Plaintiff chose British Columbia as the forum. The British Columbia Courts have assumed jurisdiction over the

parties to this lawsuit and a matter over which Quebec now claims exclusive jurisdiction. It is agreed that the procedural law of British Columbia applies to the case at bar. However, the fact that the Defendants are amenable to the jurisdiction of British Columbia does not mean that the Quebec parties are no longer subject to the substantive laws of Quebec such as the QBCRA. Moreover, the QAMA has pleaded that the Civil Code of Quebec must be applied to determine its liability, if any.

Statement of Defence, Case on Appeal, Vol. I, p. 43 ll 10-40

Interprovincial Co-operatives Limited and Dryden Chemicals Limited v. Her Majesty the Queen in Right of the Province of Manitoba, [1976] 1 S.C.R. 477 per Pigeon J. at 510

Bill 158, An Act to amend the Civil Code and the Code of Civil Procedure of the Province of Quebec (Appendix "D")

24. While the QBCRA may pose some difficulty for the Plaintiff and the Defendants in this action, it does not, as suggested by the Plaintiff (para 41), regulate the civil procedure of British Columbia. British Columbia Supreme Court Rule 2(5) contemplates that there will be "lawful excuses" for non-compliance with the Rules. Every lawful excuse whether arising within British Columbia or outside will have an effect on the litigation. It is a matter for

the Court's discretion as to whether any particular reason is a lawful excuse that would allow non-compliance with a particular procedural rule. It is the recognition by the British Columbia Courts of the QBCRA as a lawful excuse that has an effect on the litigation and not the Quebec statute.

B. The Constitutionality of the QBCRA

25. The Plaintiff argues that the QBCRA is ultra vires the legislature of Quebec as its purpose is to affect extra-provincial rights.

> Constitutional Question, Supplementary Case on Appeal, p. 2

26. The British Columbia Courts would not address this argument as they were of the view that they did not have the jurisdiction to consider the constitutionality of another provinces legislation and that it any event it would be unfair to address this issue either in the absence of the Attorney General of Quebec or at first instance on Appeal. It is submitted that this Court must also decline to decide the constitutional question as it is a matter that could not

have been determined by the British Columbia Courts and it would be unfair to determine this issue at first instance.

Reasons for Judgment, Esson C.J.S.C., Case on Appeal Vol. III, p. 598 ll 1-15

Reasons for Judgment, Court of Appeal, Case on Appeal, Vol. III, p. 614 ll 35-50, 615, 616 ll 1-10

Supreme Court Act, R.S.C. 1985 C. 26,section 45

27. Should this Court consider the vires of the QBCRA the onus of establishing that it is ultra vires is on the Plaintiff. The QBCRA is presumed to be intra vires the Quebec legislature as the legislature is presumed not to enact its statutes to operate extra-territorially.

Manitoba (A.G.) v. Metropolitan Store Ltd., [1987] 1 S.C.R. 110 per Beetz J. at p 125

A.G. Ontario v. Reciprocal Insurers, [1924] A.C. 328 at p. 345

28. The QBCRA has been held to be a valid exercise of sovereignty by the legislature of Quebec over matters in or on its territory. It has a legitimate provincial object and has been described as a remedial act whose purpose is to remedy abuses and furnish certain advantages to Quebec firms.

Asbestos Corporation Limited c. Eagle-Picher Industries Inc., C.S.M. 500-05-011933-825 jugement rendu en chambre par l'honarable juge Alice Desjardins le 29 juin 1984

Renault v. Bell Asbestos Mines Ltd., [1980] C.A. 370 (Que.) at 372

29. The Ontario legislature has passed similar legislation.

Ontario Business Records Protection Act, R.S.O. 1980, c. 56

30. The QBCRA is in pith and substance valid legislation falling within the fields of provincial legislative authority under the Constitution Act 1867 and in particular sections 92(13), property and civil rights in the Province, 92(14) Administration of Justice in the Province and 92(15) the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province.

31. Any effect that the QBCRA has on a right of the Plaintiff in British Columbia is only incidental or consequential and therefore does not render the impugned legislation ultra vires.

Reasons, Court of Appeal, Case on Appeal, Vol. III, p. 19 ll 1-20

Re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297 at 331-332

Interprovincial Co-operatives Limited and Dryden Chemicals Limited v. Her Majesty the Queen in Right of the Province of Manitoba, [1976] 1 S.C.R. 477

Cowen v. Attorney General of British Columbia, [1941] S.C.R. 321

Ladore v. Bennet, [1939] A.C. 297

Royal Bank of Canada v. the King, [1913] A.C. 283

32. The QBCRA is directed solely at acts and persons within the Province of Quebec. The decision to recognize that the Quebec law may have consequences for Quebec parties and the decision to apply the doctrine of comity is a matter of discretion solely exercisable by the British Columbia Courts, whose powers and process are not fettered by the QBCRA.

33. The Plaintiff's position suggests that a Province is incapable of taking any legislative step to protect its citizens and businesses from activities or demands outside the Province. British Columbia itself has taken steps to prohibit the enforcement of an extra-provincial judgment concerning the exposure to or use of asbestos mined in British Columbia. This legislation nullifies extra-

provincial lawsuits against British Columbia asbestos producers, an effect much greater than the QBCRA.

Court Order Enforcement Act, R.S.B.C., c. 75 s. 41.1 (Appendix "E")

34. Other legislation within British Columbia specifically prevents or limits the disclosure of certain documents or the giving of evidence in a civil lawsuit. The consequences of that legislation is similar to the effects the QBCRA has on Quebec parties. It is not a question of constitutionality.

Hyde and Hyde Estate v. The Institute of Chartered Accountants of British Columbia (1988), 24 B.C.L.R. (2d) 52 (B.C.S.C.)

Legal Profession Act, R.S.B.C. 1987 c. 25 s. 94

Mickle v. R (1987), 19 B.C.L.R. (2d) 266 (B.C.S.C.)

Welsh v. Northern International Motor Hotel Ltd., [1990] B.C.D. Civ. 3612, January 31, 1990, Kirkpatrick Master

C. The Courts Below Correctly Applied the Principles of Judicial Comity in the Excercise of Their Discretion to Recognize the QBCRA as a Lawful Excuse For Non-Compliance With the Plaintiff's Demand For a List and Disclosure of Quebec Documents

The Application of Comity is a Matter of Discretion

35. Mr. Justice La Forest in Morgard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at p. 1096 once again cited with approval the definition of comity from Hilton v. Guyot 159 U.S.(1985), p. 163 (see also Reasons of Mr. Justice Estey in Spencer v. Her Majesty the Queen, [1985], 2 S.C.R. 278 at 283).

It is implicit in this definition that the application of the principles of comity are a matter of discretion:

> "Comity in the legal sense, is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative executive or judicial acts of another nation having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws."

36. This Court in Morguard Investments, supra at p. 1098, indicated that the "considerations underlying the rules of comity apply with much greater force between the units of a federal state." In the view of Mr. Justice La Forest (at p. 1102), the Courts in one province should give full faith and credit to the judgments of another province. It is submitted that this statement extends to the legislation of another province.

37. That comity involves an exercise of discretion is also clear from the review of law conducted by Chief Justice Laskin, as he then was, in Gulf Oil Corp. v. Gulf Oil Canada Ltd., [1980] 2 S.C.R. 39 at p. 56-58. Gulf Oil, supra concerned an application from an American Court to enforce letters rogatory. Chief Justice Laskin referred at length to the reasons of Robins J. in Re Westinghouse Electric Corporation and Duquesne Light Co. (1977), 16 O.R. (2d) 273 at 290:

> "...It is also fundamental that comity will not be exercised in violation of the public policy of the state to which the appeal is made or at the expense of injustice to its citizens; and comity leaves to the Court whose power is invoked the determination of the legality, propriety or rightfulness of its exercise."

Chief Justice Esson Properly applied the Principles of Comity

38. It is submitted that Chief Justice Esson exercised his discretion on proper principles consistent with the public policy of British Columbia when he applied the doctrine of judicial comity and recognized the QBCRA as a lawful excuse. This proper exercise of discretion should not be interferred with by this Honourable Court.

Manitoba (A.G.) v. Metropolitan Store Ltd., supra p. 154-156

Martin v. Deutch, [1943] 4 D.L.R. 600 (Ont. C.A.) at p. 602

Blygh v. Solloway Mills & Company, Limited, [1930] 2 W.W.R. 208 (B.C.C.A.) at 210

39. Chief Justice Esson accepted the approach 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.) (Reasons, Case on Appeal, Vol. III, p. 604 ll 11-27, 605 ll 1-8) and adopted the Reasons of Mr. Justice Brooke who for that Court stated:

> In our respectful opinion, the learned Judge was in error in making the order requiring the bank and its named officers to require that information from the bank's employees in Panama, and so requiring them to break the law of that State. An Ontario Court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We respect those laws.
>
> Frischke, supra, at 403

40. The British Columbia Court of Appeal approved Chief Justice Esson's application of the Frischke principles.

> Reasons, Court of Appeal, Case on Appeal, Vol. III p. 617 ll 1-50, 618 ll 1-10

41. The Frischke case concerned the plaintiff's attempts to trace certain monies deposited in the Royal Bank of Canada

and later transferred to a branch of that Canadian Bank in Panama. Panamanian law prohibited persons from divulging information about banking transactions. Disclosure of the information was a breach of Panamanian Civil law and an offence against the other laws of Panama with penalties and punishment against both the bank and its employees (Frischke at p. 403). A Justice of the Ontario Supreme Court ordered the information disclosed in the Ontario proceeding. The Ontario Court of Appeal overturned the order to provide the information and adopted the language of American Courts that have established as a fundamental principle of international comity that our Courts should not take such action as may well cause a violation of the laws of a friendly neighbour.

> Frischke, supra, at 404

42. The Ontario Court of Appeal distinguished but did not doubt the correctness of Frischke in Spencer v. Her Majesty the Queen (1983), 145 D.L.R. (3d) 344 affirmed [1985] 2 S.C.R. 278 when it ordered a former manager of a Canadian bank in the Bahamas to give evidence in a quasi-criminal hearing under the Income Tax Act, notwithstanding a prohibition in the Bahamian statute. The witness was at the time a citizen and resident of Canada.

43. The Spencer case differs significantly from the case at bar in the following respects:

(a) the laws in conflict in the case at bar are the procedural laws of one province and the substantive laws of another province not that of a foreign state;

(b) the issue at bar arises in a civil lawsuit between private litigants not in a criminal or quasi-criminal matter;

(c) the Respondent and its officers and directors are, and have at all material times been, residents of Quebec and have not carried on any business in British Columbia;

(d) the Respondent and its officers and directors are currently residents of Quebec and therefore subject to the laws of Quebec including the sanctions imposed by the QBCRA and the various Court Orders made pursuant to that statute;

(e) the Bahamian law referred to in Spencer, unlike the QBCRA, provided for a means of obtaining the information sought.

44. The Superior Court of Quebec has also chosen to follow Frischke and the British Columbia Courts decisions in the case at bar in recognizing the Ontario Business Records Protection Act as a valid reason for non compliance with a subpoena duces tecum. The Honourable Mr. Justice Tannenbaum said:

> "FOR ALL THE ABOVE REASONS. I conclude therefore that the Courts of the Province of Quebec must respect and apply the Laws of sister provinces in matters of this nature, and accordingly, we should not issue orders that would compel persons to contravene or violate the laws of a friendly foreign jurisdiction to which they are subject. The defendants in this instance are governed by the Ontario statute invoked, and to compel them to comply with the duces tecum in this instance would be tantamount to compelling them to violate the law of the Province of Ontario. I am not prepared to sanction such a violation."
>
> 2632-7602 Quíbec Inc. v. Pizza Pizza Canada Inc. and Pizza Pizza Limited, Unreported, October 16, 1991 Quebec Superior Court No. 500-05-011-39-904

45. The Frishcke principles and the decision of Chief Justice Esson also accord with American jurisprudence including the decision of the Supreme Court of the United States in Societe Internationale v. Rogers 357 US 197, 2 L ed

1255, 78 S Ct 1087 (at p. 1266-1277 2 L ed). The American Court, in considering the prohibitions of the Swiss Banking laws, held that the fear of criminal prosecution constitutes a "weighty excuse" for non production of documents and that that excuse was not weakened because the laws preventing compliance are those of a foreign sovereign.

46. In Application of Chase Manhattan Bank the provisions of the Panamanian banking laws, as were reviewed in Frischke, were examined by the United States Court of Appeal Second Circuit and as in Frischke the Court deferred to the foreign law:

> The Government, as well as other litigants, has a real interest in civil and criminal cases in obtaining evidence wherever located. However, we also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own. As we recently said in modifying subpoenas duces tecum in another case, "upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbour or, at least an unnecessary circumvention of its procedures.
>
> Application of Chase Manhattan Bank 297 F.2d 611 (1962) at p. 613 (United States Court of Appeals Second Circuit)

The QBCRA and Public Policy

47. The Plaintiff argues that recognition of the QBCRA is against the public policy of Canada and British Columbia yet he agrees that an extra-provincial statute should be recognized where it is consistent with fundamental public policies of the province (para 57). The QBCRA is consistent with Canadian and British Columbia public policy.

48. The QBCRA, the Ontario Business Records Protection Act, and Section 41.1(2) of British Columbia's Court Order Enforcement Act, are examples of similar expressions of the public policy of those provincial legislatures. It is not for the Courts to take issue with legislative policy.

Gulf Oil Corp. v. Gulf Oil Canada Ltd., supra, at p. 59

49. Similar provisions in the Uranium Information Security Regulations P.C. 1977-2923, SOR/77-836 have been recognized by the Canadian Courts as a valid reason not to respond to demands that would violate Canadian public policy.

Gulf Oil Corporation v. Gulf Canada Ltd., supra

RE Westinghouse Corp. v. Duquesne Light Co. Ltd. (1977), 78 D.L.R. (3d) 3 (Ont. C.A.)

50. The Quebec legislature has for reasons of public policy enacted the QBCRA to protect legitimate concerns of Quebec businesses just as the British Columbia legislature has sought to protect certain industries and professions through its legislation. It is correct for the British Columbia Courts to respect this expression of Quebec policy and sovereignty in a federal system.

D. The Provisions of the QBCRA Are Mandatory and Binding on the this Defendant and Prevented this Defendant from Complying with the Plaintiff's Demand. It has not Acted in Bad Faith

Voluntary Disclosure of Documents Violates the QBCRA

51. The Plaintiff, through his counsel and their advisors, and from the outset, had full knowledge of the effects of the QBCRA and that it would be an impediment to the Respondent producing documents yet the Plaintiff chose British Columbia as the forum.

Affidavit of Stephen Antle, October 3, 1989, Case on Appeal, Vol. II p. 221-222, para. 4 and Exhibit "B" at p. 232-233

52. The Appellant has in his possession or control documents that either originate with or concern the Quebec Respondents but the extent of the documentation is not disclosed in the material before this Court.

Affidavit of Nicola Hands, October 10 1989, Case on Appeal, Vol. II, p. 241-249

53. The Plaintiff asserts, as it did under issue "A" herein, that the Court below was wrong in finding that the Quebec Defendants were precluded by the QBCRA from complying with their Demand for Discovery of Documents. The Plaintiff says that the Quebec Defendants could have voluntarily produced documents and therefore avoided the consequences of the QBCRA. This is a further attack on the findings of fact of the Courts below and should not be entertained by this Court.

Century Insurance Company of Canada v. N.V. Bocimar S.A., [1987] 1 S.C.R. 1247

Manitoba (A.G.) v. Metropolitan Store Ltd., supra, at p. 151

54. The "evidence" in support of the Plaintiff's proposition of voluntary disclosure is not admissible as it is anecdotal and double hearsay (Case on Appeal, Affidavit of Stephen Antle, October 3, 1989, Vol. II, p. 231-233). In further

support of this proposition the Plaintiff filed an affidavit of Monica Maynard, a Quebec Attorney, who opined that the QBCRA provisions could be waived as it was not an act of public order. This was rejected by Chief Justice Esson.

Reasons for Judgment, Esson C.J.S.C., Case on Appeal, Vol. III, p. 606 ll 17-28, 607 ll 3-6

55. Further, legal opinions in response to the Plaintiff's assertion were introduced by the Defendants that specifically stated that voluntary disclosure in the face of Section 2 of the QBCRA would still be a violation of the QBCRA. This is so as the QBCRA is an act of public order whose provisions cannot be waived by the parties.

Opinion of Byers Casgrain, October 12 1989, Affidavit of L.J. Zivot, October 18, 1989, Case on Appeal, Vol. II, p. 355-356

Affidavit of Christine Carron, February 9 1990, Case on Appeal, Vol. II, p. 359-363

Good Faith Efforts Could not Avoid the Effects of the QBCRA

56. The evidence accepted by Chief Justice Esson was that the prohibition contained in Section 2 of the QBCRA is operative and binding on the business concern even in the

absence of an order made under Section 4 of the QBCRA and that any courting of legal impediments was of no significance. This interpretation was upheld by the Court of Appeal.

Reasons for Judgment, Esson C.J.S.C., Case on Appeal, Vol. III, p. 600-601

Reasons, Court of Appeal, Case on Appeal, Vol. III, p. 619 ll 30-50, 620 ll 1-30

57. The Plaintiff suggests a lack of good faith on the part of the Defendants because he was not given notice of the Quebec QBCRA applications. The Plaintiff had no standing with respect to these applications and was not entitled to any notice.

58. The Plaintiff argues (para 69) that notwithstanding the prohibition of the QBCRA the Defendants were obligated to make good faith efforts to comply with their Demand for Discovery. It is submitted that American authorities cited by the Plaintiff for this proposition are distinguishable from the facts at bar.

59. The American Courts regard to a party's good faith efforts in the cases cited by the Plaintiff arises in the context of compliance with a court order and not a party's

demand for discovery of documents. In the leading American case of Societe Internationale v. Rogers, supra, a decision of the United States Supreme Court, the District Court had granted the Government's motion for a production order (at p. 1260) and the Societe Internationale then petitioned the court to have the order vacated. The burden to be discharged by the Petitioner in vacating that order was to show that it had made good faith efforts to comply with the order of the court (at p.1261). In the case at bar the British Columbia Courts refused the Plaintiff's request for a production order. There is no issue of good faith compliance with a court order.

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PART 4

NATURE OF ORDER SOUGHT

That this appeal be denied with costs to the Defendants.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Louis J Zivot
(Lang Michener)
Counsel for the Respondent, The Quebec Asbestos Mining Association

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Dated: August 26, 1992

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PART V

LIST OF AUTHORITIES

Westinghouse Electric Corporation and Duquesne Light Co. (1977), 16 O.R. (2d) 273 19

2632-7602 Quebec Inc. v. Pizza Pizza Canada Inc. and Pizza Pizza Limited, Unreported, October 16, 1991, Quebec Superior Court No. 500-05-011-39-904 23