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 Limited, ASBESTOS CORPORATION LIMITED, ATLAS TURNER INC., BELL ASBESTOS MINES LIMITED, JM ASBESTOS INC., THE QUEBEC ASBESTOS MINING ASSOCIATION, 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:

WORKERS' COMPENSATION BOARD and HENFREY SAMSON BELAIR LTD., Receiver-Manager for Victoria Machinery Depot Company Limited

(Third Parties)

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PART I

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

1. This Respondent, Lac d'Amiante du Quebec, Ltee ("LAQ"), takes issue with certain facts in the Appellant's Statement of Facts and submits additional facts.

2. The Appellant George Ernest Hunt (the "Plaintiff") appeals from a decision of the British Columbia Court of Appeal which affirmed an interlocutory Order of Esson, C.J.S.C. (the "Chambers Judge"). The interlocutory Order relates to a discrete and narrow question of practice and procedure under the British Columbia Rules of Court.

3. The Plaintiff commenced his action in the Supreme Court of British Columbia on October 28, 1988. It is now known that the real Plaintiff is the Workers' Compensation Board of British Columbia ("WCB"). This is so because the Plaintiff has "applied for and was granted compensation by the WCB which, under its statutory rights of subrogation has brought and maintains this action seeking to recover what it has paid out as well as any damages which Mr. Hunt may prove over and above that amount".

> Hunt v. T&N, plc, (10 August 1992), No. C885383 Vancouver Registry, (B.C.S.C.) at pp.3-4 per Esson, C.J.S.C.

4. The WCB is a sophisticated, well-funded and litigious entity and as such had the ability to pursue this claim against any or all of the Defendants in Quebec. The decision to pursue all of the Defendants in British Columbia was therefore made by the WCB and not by Mr. Hunt.

5. Some of the Defendants, namely the Quebec Asbestos Mining Association ("QAMA"), Atlas Turner Inc. ("Atlas"), Asbestos Corporation Limited ("ACL"), Bell Asbestos Mines Limited ("Bell"), JM Asbestos Inc. ("JM") and LAQ (the "Quebec Defendants"), are prohibited by the Quebec Business Concerns Records Act, L.R.Q. 1977, c. D-12 (the "QBCRA") from giving discovery of documents located within Quebec. The QBCRA has been in force in the Province of Quebec since 1958, well before this action was commenced.

6. The effect of the QBCRA is to prevent the physical removal or the sending out of Quebec of records of Quebec businesses which are located within the Province of Quebec.

7. The Plaintiff has noted in paragraph 21 of his Statement of Facts that there is an outstanding Order against LAQ under the QBCRA. The Attorney General of Quebec obtained this Order in 1980 in unrelated proceedings. The Order required the directors and officers of LAQ to give undertakings not to act in breach of the QBCRA. In 1980, at the conclusion of the unrelated proceedings (more than seven years before this action was commenced), LAQ applied to have the Order dissolved. The application was dismissed. On September 25, 1980, LAQ filed an Inscription appealing the dismissal of its application. The appeal was dismissed by the Quebec Court of Appeal on May 16, 1989. LAQ then applied for leave to appeal to this Court. Such leave was refused on November 23, 1989. There is no rule of proceeding or practice which required the Plaintiff to be given notice of LAQ's applications to have the Order made in unrelated proceedings vacated.

Reasons for Judgment of Esson, C.J.S.C., Case on Appeal, Vol. III, p.591 at p.599, ll.6-14
Affidavit of Christine A. Carron, Case on Appeal, Vol. II, p.359 at p.361, para. 6

8. During the pre-trial procedures, the Plaintiff demanded Lists of Documents from several of the Quebec Defendants. These Defendants did not deliver lists referring to documents in their possession within Quebec because of the prohibition in the QBCRA.

9. In October, 1989, the Plaintiff applied under Rule 2(5) of the British Columbia Rules of Court for Orders striking out the Appearances and Statements of Defence of certain of the Quebec Defendants or alternatively for Orders compelling production of Lists of Documents which include all documents located within Quebec.

10. Although no order was sought against it, LAQ took part in the Chambers motion by agreement of all parties because for practical purposes LAQ was in the same position as the other Quebec Defendants and would be directly affected by the result of the Plaintiff's application.

11. LAQ has produced several Lists of Documents which are in respect of documents located outside of the Province of Quebec. Furthermore, Plaintiff's counsel has had access to many trade association and other documents from U.S. attorneys specializing in asbestos litigation, which attorneys are actively assisting Plaintiff's counsel in this litigation. This point was made by Esson, C.J.S.C. in related proceedings in this action as follows:

> "The class of documents which constitutes by far the largest number in contention are copies obtained by Ladner Downs [counsel for the Plaintiff] of documents in the 'liability briefs' of Ness, Motley, a law firm in Charleston, S. Carolina which since the mid-1970s has been heavily engaged in prosecuting actions for damages caused by asbestos. In 1987 that firm was retained by the Workers' Compensation Board to prosecute subrogated personal injury actions in American courts. It was not retained to act in this action which was launched in October 1988 but, from early 1988 when Ladner Downs was first retained, the two firms have worked together to give Ladner Downs the benefit of Ness, Motley's great experience in the area."
>
> Hunt v. T&N, plc, (6 April 1992), No. C885383 Vancouver Registry, (B.C.S.C.) at p.2

12. The Chambers Judge observed that the ultimate goal of the Plaintiff in bringing his motion was to obtain an interlocutory Order striking out the defences of certain of the Quebec Defendants pursuant to Rule 2(5) of the British Columbia Rules of Court.

> Reasons for Judgment of Esson, C.J.S.C., Case on Appeal, Vol. III, p.591 at p.605, ll.20-22

13. Rule 2(5) provides as follows:

> "2(5) Where a person, contrary to these rules and without lawful excuse,
>
> (c) refuses or neglects to produce or permit to be inspected any document or other property,
>
> then
>
> (d) where the person is the defendant, respondent or a third party, or a present officer of a corporate defendant, respondent or third party, or a partner in or manager of a partnership defendant, respondent or third party, the court may order the proceeding to continue as if no appearance had been entered or no defence had been filed."
>
> (emphasis added)

14. Rule 2(5) is a rule of practice and procedure which applies to causes of action commenced in British Columbia.

15. The learned Chambers Judge found that the Quebec Defendants had a "lawful excuse" for failing to comply with the Plaintiff's demand for production of documents located in Quebec because production of these documents would place them in breach of the QBCRA. The Chambers Judge therefore dismissed the Plaintiff's motion.

16. During the course of the hearing before the Chambers Judge, the Plaintiff sought to place in issue the constitutional validity of the QBCRA. The Chambers Judge expressly declined to entertain this issue on the basis that the Supreme Court of British Columbia does not have jurisdiction to strike down Quebec legislation. The Chambers Judge also declined to entertain the constitutional issue because the Plaintiff had not given notice of its application to the Attorney General of Quebec. The Chambers Judge thus proceeded on the basis that the QBCRA

was valid legislation. In the course of his Reasons for Judgment, the Chambers Judge expressed his view that the Plaintiff's constitutional submissions were in any event without merit.

> Reasons for Judgment of Esson, C.J.S.C., Case on Appeal, Vol. III, p. 591 at p.598, ll.3-15

17. The Plaintiff appealed the decision of the Chambers Judge to the British Columbia Court of Appeal. This Appeal was unanimously dismissed. The Court of Appeal substantially confirmed the reasoning of the Chambers Judge. It confirmed the Chambers Judge's interpretation of Rule 2(5). It also confirmed that the courts of British Columbia do not have jurisdiction to strike down legislation of another province as constitutionally invalid.

> Reasons for Judgment of the B.C.C.A., Case on Appeal, Vol. III, p.612

Other Facts Raised by the Plaintiff

18. In paragraph 7 of his Statement of Facts, the Plaintiff refers to a jurisdictional challenge launched by the Quebec Defendants.

19. On June 30, 1989, certain of the Quebec Defendants applied for a declaration that the B.C. Supreme Court had no jurisdiction over them or should decline jurisdiction. The Plaintiff's theory in this case is that because the alleged injury done to the Plaintiff by the alleged conspiracy had its effect in British Columbia, the courts of British Columbia have jurisdiction. The case of Moran v. Pyle, [1975] 1 S.C.R. 393, has been relied upon by counsel for the Plaintiff to support this submission. While this is the leading case on the situs of the tort of negligence in products liability cases, the decision is concerned with the liability of a manufacturer of a defective product who was responsible for introducing the product into the stream of interprovincial commerce. The situs of the tort of conspiracy to cause personal injury alleged to have been committed by a non-resident supplier of raw material, remains an open question.

20. With respect to paragraph 8 of the Plaintiff's Statement of Facts, LAQ's principal submission was that the Supreme Court of British Columbia should decline to take jurisdiction over it by reason of its lack of contact with this Province.

Memorandum of Oral Reasons for Judgment of Callaghan, J., Case on Appeal, Vol. III, p.560 at p.561

21. LAQ commenced the development of a new mine in Quebec in 1952 and began to ship raw asbestos fibre in commercial quantities in 1958. Its sole customers were sophisticated manufacturers who incorporated asbestos fibre into the products which they in turn sold to end users. It is those products, not the raw fibre, which the Plaintiff alleges caused his illness. There is no allegation that these products contain fibres from LAQ's mine. LAQ did not sell to end users or deliver its fibres to the places where the manufactured products were used, and at no relevant time has it had any connection or link with British Columbia.

Affidavit of Roland Gagnon, Case on Appeal, Vol. I, p.64

22. While an argument was raised by one of the Quebec Defendants to the effect that the QBCRA placed the Defendants at a real disadvantage, that disadvantage was, in Mr. Justice Callaghan's view, offset by Plaintiff's counsel's suggestion that the issue could be resolved by agreement between the parties. An agreement of the parties is, in fact, irrelevant to the application of the QBCRA as a matter of law, and would certainly not be applicable to LAQ which is subject to the outstanding QBCRA order made in 1980.

Memorandum of Oral Reasons for Judgment of Callaghan, J., Case on Appeal, Vol. III, p. 560 at pp.561-62
Affidavit of Christine Carron, Case on Appeal, Vol. II, p.359 at p.360, para. 3 and p.362, para. 8

23. Callaghan, J., acting upon the assumption that the Plaintiff was an individual of limited means suffering from a terminal condition and unaware at the time of the WCB's involvement, exercised his discretion in favour of Mr. Hunt's choice of forum and declined to grant a stay of proceedings. The evidence before Callaghan, J. was that the Plaintiff would likely die within

six months from the date of the application and that he would not live long enough to present his case in another jurisdiction. It is the position of LAQ that the jurisdiction of the British Columbia Courts over LAQ is an open question to be decided at trial.

Memorandum of Oral Reasons for Judgment of Callaghan, J., Case on Appeal, Vol. III, p.560 at p.562
Affidavit of Stephen Antle, Case on Appeal, Vol. II, p.220 at p.233, para. 6
Reasons for Judgment of Lambert, J.A., Case on Appeal, Vol. III, p.564 at p.566, ll.10-20

PART II

ISSUES

I. Were the learned Chambers Judge and the Court of Appeal correct in holding that the provisions of the QBCRA constitute a lawful excuse within the meaning of Rule 2(5) of the British Columbia Rules of Court?

II. Does the Supreme Court of Canada have jurisdiction in the circumstances of this appeal to consider the constitutional validity of the QBCRA?

PART III

ARGUMENT

ISSUE I: Were the learned Chambers Judge and the Court of Appeal correct in holding that the provisions of the QBCRA constitute a lawful excuse within the meaning of Rule 2(5) of the British Columbia Rules of Court?

1. The Plaintiff's position is that the QBCRA does not constitute a lawful excuse for non-compliance with the British Columbia Rules of Court. The Plaintiff makes the following submissions in support of that position:

(1) the QBCRA properly interpreted does not prohibit a Quebec company from responding to a demand for discovery of documents from another province of Canada;

(2) if the QBCRA does prohibit such a response the Act:

(a) is ultra vires the National Assembly of Quebec;

(b) is contrary to public policy and should therefore not be recognized under principles of interprovincial comity; and

(c) does not provide a "lawful excuse" because the Quebec Defendants, other than LAQ, failed to make good faith efforts to comply with the demand for delivery of Lists of Documents.

A. THE INTERPRETATION OF THE WORDS OF THE QBCRA

2. The Plaintiff did not advance this argument before either the learned Chambers Judge or the Court of Appeal. The Plaintiff argues that the QBCRA properly interpreted does not prohibit a Quebec company from responding to a demand for discovery of documents from

another province. The Defendant LAQ submits that this interpretation is contrary to the plain language of the QBCRA and offends accepted principles of statutory interpretation.

3. Section 2 of the QBCRA reads as follows:

> "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."

4. The English version of Section 2 reads as follows:

> "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 of Quebec, any document or resume or digest of any document relating to any concern."
>
> (emphasis added)

4. It is clear that this provision prohibits the removal of documents within Quebec to any place outside of Quebec. Exceptions to this general prohibition are set out in Section 3 of the Act. The removal of documents for the purpose of discovery procedures in another province is not one of the exceptions.

5. Section 3(d) of the QBCRA most specifically confirms that the legislature did not intend to exempt from the general prohibition documents sent from within Quebec to another province for the purpose of discovery. Section 3(d) provides that removal from Quebec is permitted if authorized by a "law of Quebec or of the Parliament of Canada". If the legislature had intended to exempt documents demanded pursuant to the law of another province it would have done so in s. 3(d).

6. It is a fundamental principle of statutory interpretation that where the words of a statute are clear and unambiguous they must be followed.

E. A. Driedger, Construction of Statutes (2nd ed. 1985) at p.89

7. In Grand Trunk Pacific Railway v. Dearbron (1919), 58 S.C.R. 315 at 320, Chief Justice Davis said:

> "I cannot admit the right of the courts where the language of a statute is plain and unambiguous to practically amend such statute either by eliminating words or inserting limiting words."

The interpretation sought to be placed on the QBCRA by the Plaintiff would result in an amendment to the Act.

8. It is respectfully submitted that the only conclusion which can be made from a plain reading of the QBCRA is that persons subject to its terms are prohibited from sending documents outside of Quebec for any reason not authorized by s. 3 of the Act.

9. The Plaintiff seeks to have this Court ignore the plain meaning of the QBCRA and suggests an implied interpretation based upon case law, a single newspaper report of one speech given by a political figure, and certain principles of constitutional and conflicts of law. It is submitted that the Plaintiff's submissions are based upon unacceptable methods of interpreting the words of a statute and upon principles which have no application whatsoever to the circumstances of this case.

(a) the case law

10. The Plaintiff refers to the trial judgments in Renault v. Bell Asbestos Mines Ltd. and Benesh v. Insurance Management Services Inc. as authority for the proposition that the main purpose of the QBCRA is the protection of Canadian business interests from anti-trust laws of

foreign or American jurisdictions. However, on appeal, the Court of Appeal for Quebec in Renault specifically disapproved of this restricted interpretation of the QBCRA holding that "[t]here is nothing in the act which expressly states that this is the purpose of the act which does not contain a preamble."

> Renault v. Bell Asbestos Mines Ltd. (13 August 1980), District of Quebec, No. 09-000654-41 (Que. C.A.) at pp.4-5

11. The important point here, however, is that the courts of Quebec have made and confirmed an Order which at all material times applied specifically to LAQ and prohibits LAQ from removing documents from Quebec. In addition, there are Orders which specifically apply to the other Quebec Defendants. These Orders have been made and apply irrespective of whatever was the original purpose underlying the QBCRA.

(b) the historical record

12. The language of the QBCRA does not limit its application to documents sought to be sent from Quebec to the United States. Notwithstanding the Plaintiff submits that the plain language should be ignored in preference to one newspaper article summarizing one speech of Premier Duplessis which suggests the purpose of the QBCRA was to protect Quebec companies from demands for discovery from the United States. Speeches and public declarations by political figures are not admissible as extrinsic evidence. More importantly, extrinsic evidence, where admissible in a constitutional case to determine the purpose of an act, "is not receivable as an aid to construction of the statute".

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

13. Even if it could be said that the only original purpose of the QBCRA was to protect Quebec companies from demands for discovery from the United States (which finding the Defendant LAQ submits cannot be made on the basis of the admissible evidence in the record of this case), it would still be necessary, in order to achieve this purpose, for the Act to apply

to documents requested by the Plaintiff otherwise the entire statute could be easily circumvented through the flow of documents from this litigation to jurisdictions outside of Canada. This danger is particularly real given the plethora of asbestos litigation underway in the United States and the participation in this case of consulting counsel in the United States. In fact, in a recent decision in these proceedings, the Supreme Court of British Columbia refused to grant an injunction prohibiting the removal of documents from British Columbia to the United States.

> Hunt v. T & N, plc (31 January 1990), No. C885383 Vancouver Registry, (B.C.S.C.) per Wetmore J.

14. In paragraph 35 of his Factum the Plaintiff submits without referring to any evidence in support that aside from this case, the QBCRA has "never" been invoked to prevent a Quebec company sued in another province from disclosing documents located in Quebec. In the absence of evidence it is impossible to determine the frequency with which Quebec companies have been constrained from producing documents as a result of the QBCRA.

15. The Plaintiff also submits in paragraph 35 of his Factum that there are no cases applying the Ontario Business Records Protection Act, R.S.O. 1980, c. 56. This is incorrect. In 2632-7602 Quebec Inc. v. Pizza Pizza Canada Inc., a Quebec plaintiff brought an action against an Ontario resident in the courts of Quebec. Prior to trial, the plaintiff sought to examine on discovery an officer of the defendant and obtain certain documents pursuant to a subpoena duces tecum. The Ontario resident objected to the production on the basis of the Ontario Business Records Protection Act which contains in Section 1 a prohibition essentially identical to that contained in the QBCRA. Section 1 reads as follows:

> "No person shall, pursuant to or under or in a manner that would be consistent with compliance with any requirement, order, direction or subpoena 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 ..."

16. The Quebec court refused to compel the Ontario resident to produce the documents outside of Ontario contrary to the Ontario Business Records Protection Act. After reviewing the principles of comity and the case law, Mr. Justice Tannenbaum said (at p.11):

> "... 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 provisions of Article 398 C.P.C. respecting the duces tecum in this instance would be tantamount to compelling them to violate the law of the Province of Ontario."

It is submitted that this reasoning is applicable to the case at bar.

17. It is noteworthy that the refusal to order compliance with the discovery provisions of the Code of Civil Procedure in Pizza Pizza was made solely on the basis of comity and without resort to a "lawful excuse" provision similar to that relied upon by the Chambers Judge and the Court of Appeal in this case.

(c) conflicts of law principles

18. The principles of conflicts of law are utilized in resolving substantive and procedural issues "arising between private persons, or states, engaged in private transactions with contacts with two or more legal units". It is submitted that these principles are entirely inapplicable to the determination of the meaning of particular words in a statute.

> J.G. Castel, Conflicts of Laws: Cases, Notes and Materials (4th ed. 1978) at p.1-1

19. Under this heading, the Plaintiff also makes a number of submissions which the Defendant LAQ submits is based on a misapprehension of the relationship between the QBCRA and the British Columbia Rules of Court.

20. In paragraph 39 of his Factum the Plaintiff submits that once the Supreme Court of British Columbia assumed jurisdiction in this case it should follow that the law of British Columbia is "recognized throughout Canada as applicable to procedural issues in this action." In paragraph 41, the Plaintiff submits that no other province has a right to regulate the procedure in the case at bar. In paragraph 43, the Plaintiff submits this Court should not allow Quebec to nullify the British Columbia Rules of Court.

21. The procedural law of British Columbia quite obviously applies to an action commenced in British Columbia. The Plaintiff appears, however, to suggest that it is the law of Quebec and not the law of British Columbia that was applied by the Chambers Judge and the Court of Appeal in this case. It is submitted that this is not so.

22. The Chambers Judge did not apply Quebec law; rather, he applied Rule 2(5) of the British Columbia Rules of Court to the particular facts of this case. It is the British Columbia Rule which expressly contemplates and provides that laws in other jurisdictions may provide litigants in British Columbia with a lawful excuse for failure under the British Columbia Rule to deliver Lists of Documents.

(d) constitutional principles

23. In this part of his Factum the Plaintiff submits that unless his interpretation of the QBCRA is accepted the Act would have impermissible extra-territorial effect and would therefore be unconstitutional. The Plaintiff makes the same submission in a subsequent part of his Factum which addresses the vires of the QBCRA. This submission is really the Plaintiff's position on the constitutional question and will be dealt with later in this Factum.

24. The Plaintiff does rely on one principle of construction in support of his interpretation of the QBCRA. That principle is set out in the following extract from a judgment of Mr. Justice Fauteux:

> "There is a presumptio juris as to the existence of the bona fide intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that the general words in a statute are not intended to extends its operation beyond the territorial authority of the Legislature."
>
> Reference re The Farm Products Marketing Act, [1957] S.C.R. 198 at p.255

25. It is submitted that the QBCRA is a law of general application respecting movable property located in the Province of Quebec. It speaks only to persons and property located within the Province of Quebec. It was not enacted with respect to the case at bar. It is submitted therefore that as the words of the QBCRA themselves are not capable of making the Act operative outside the Province of Quebec recourse to the above principle as an aid to construction is unnecessary and inappropriate.

B. THE VIRES OF THE QBCRA

26. In this part of his Factum the Plaintiff submits that the QBCRA is ultra vires the National Assembly of Quebec. As mentioned this argument is the Plaintiff's position on the constitutional question posed by this Court and will be dealt with later in this Factum.

C. PRINCIPLES OF COMITY AND PUBLIC POLICY

27. The Plaintiff raises two objections to recognizing the QBCRA as a matter of interprovincial comity: (1) the QBCRA exceeds the legislative competence of the National Assembly of Quebec and (2) the QBCRA violates the public policy of Canada and British

Columbia. The first objection again is really a statement of the Plaintiff's position on the constitutionality of the QBCRA and will be dealt with later in this Factum. With respect to the second objection, the Defendant LAQ advances four points in support of its position that the provisions of the QBCRA do not offend the public policy of this country.

28. First, the very wording of Rule 2(5) of the B.C. Rules of Court demonstrates that British Columbia has no overriding policy objections to allowing non-compliance with its discovery provisions in certain circumstances. Rule 2(5) provides that sanctions for non-compliance with the Rules will be imposed only where a party is without lawful excuse. The learned Chambers judge dealt with this issue as follows:

> "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, it must be applied in a way that takes account of difficulties created by a law of the second jurisdiction. The ultimate goal of the Plaintiff in this action, if the Defendants continue to fail to respond to the demand for discovery, is to obtain an Order striking out the Defence. That remedy is provided for by Rule 2(5), the general Rule dealing with non-compliance. The granting of such an Order is always discretionary but, before the question of whether to exercise discretion is reached, two conditions must be satisfied. The first is the fact of non-compliance, the other is that the non-compliance is "without lawful excuse". Here, a lawful excuse has been established for the non-compliance in that the Defendants, who are subject to Quebec law, are prohibited by that law from complying."
>
> Reasons for Judgment of Esson, C.J.S.C., Case on Appeal, Vol. III, p.591 at p.605, ll.14-28 and p.606, ll.3-4

29. In short, there is no conflict between Rule 2(5) of the B.C. Rules of Court and the provisions of the QBCRA. To the contrary, the B.C. Rule expressly makes allowance for a lawful excuse for the failure of a litigant to comply with every aspect of B.C.'s rules for discovery, and "lawful excuse" has been interpreted to encompass the laws of other jurisdictions to which a litigant is subject.

30. Secondly, the very existence of the QBCRA, its earlier Ontario counterpart, the specific statutory protection accorded the British Columbia asbestos industry in 1984 by the enactment of section 41.1(2) of the Court Order Enforcement Act, 1984, S.B.C. 1984, c. 75 and the Uranium Information Security Regulations, C.R.C. 1978, c. 366, declare a policy adopted in the public interest by each of the respective jurisdictions. Whether this policy is found in laws of general application (Ontario and Quebec) or in legislation of a specific character (Canada and British Columbia) the result is the same. In the case of the Ontario and Quebec statutes, the effect of the Attorney General's power to apply ex parte and the provision for the process of contempt constitute express manifestations of public policy applicable to all without exception.

31. Thirdly, the rules of comity as applied by the courts of this country fully support the recognition of the QBCRA as a lawful excuse under the British Columbia Rules of Court. In Frischke v. Royal Bank of Canada (1977), 80 D.L.R. (3d) 393 at p.403, the Ontario Court of Appeal stated the principle thus:

> "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. The principle is well-recognized."

This principle was relied upon by the learned Chambers Judge and the Court of Appeal in the case at bar and by the Quebec Superior Court in refusing to compel a party to break the law of Ontario in the Pizza Pizza decision (which is discussed in paragraphs 15 to 17 herein).

32. Put another way, it would be contrary to the public policy of British Columbia to order a party who is subject to the laws of another province to break those laws. The legislative intent underlying Rule 2(5) therefore has a sound policy foundation.

33. Fourthly, the considerations underlying the rules of comity apply with much greater force as between the units of a federal state. Indeed, it is submitted this Court has implicitly recognized that our federal system has in fact created the equivalent of the "full faith and credit" clause contained in both the American and Australian Constitutions. The "full faith and credit" clause of the U.S. Constitution is found in section 1 of Article IV and requires that full faith and credit must be given by one State to the "public acts, records and judicial proceedings" of all other States.

> De Savoye v. Morguard Investments Ltd., [1990] 3 S.C.R. 1077 at p.1098 and pp.1100-1102

34. In the case at bar, the Supreme Court of British Columbia and the Court of Appeal gave "full faith and credit" to the QBCRA and to the judicial interpretations placed on it by the courts of Quebec. It is submitted that this is a proper principle to recognize and apply in a federal state such as Canada.

35. The decisions relied upon by the Plaintiff in support of his public policy position are distinguishable. In Spencer v. The Queen, [1985] 2 S.C.R. 278, this Court found that a Bahamian blocking statute did not excuse a non-party witness from testifying in a criminal action in Ontario. However, the individual affected was no longer resident in the Bahamas and was not, as a practical matter, subject to the law of that place. Moreover, the individual was not being asked to produce documentation that was located in the Bahamas. Mr. Justice La Forest, who delivered the judgment of the Court, expressly notes at page 281 that forcing the witness to comply with Ontario law did not put that individual at risk of punishment under the statute of the foreign jurisdiction. By contrast, the Defendants in this case remain subject to the jurisdiction of Quebec.

36. The Plaintiff also refers to Comaplex Resources International Ltd. v. Schaffhauser Kantonalbank (1990), 42 C.P.C. (2d) 230, and submits that in that case it was held that a blocking statute of Switzerland did not excuse a Swiss defendant from refusing to produce

documents in a civil action in Ontario. In fact, the Ontario Master, while making an Order for discovery, declined to decide the impact of the foreign law prohibitions or restrictions on disclosure of information. The Master held that any foreign law issues should be dealt with on a "subsequent motion to consider the imposition of sanctions for noncompliance with the discovery order." The discovery Order was made without prejudice to the right of the defendant to raise the effect of the prohibition in the Swiss statute on this subsequent motion. In the case at bar, the learned Chambers Judge dealt with the List of Documents issue on a motion like that contemplated by the Master and decided not to "sanction" the Defendants because he found the prohibition in the QBCRA to be a lawful excuse for non-compliance.

37. The Plaintiff also refers to Comexter Inc. v. Cassady (17 July 1987) Vancouver Registry No. CA007975. In that case, a single judge of the Court of Appeal sitting on an application for leave to appeal held that a Swiss blocking statute would not excuse a Plaintiff from refusing to produce documents in a civil case. The Plaintiff submits this refusal demonstrates the public policy of British Columbia with respect to blocking statutes. That position cannot be maintained in light of the decision of the learned Chief Justice of the Supreme Court of British Columbia and a unanimous panel of the Court of Appeal for British Columbia in this case. The position of the British Columbia courts with respect to the approach to be taken to the impact of a blocking statute on obligations under the British Columbia Rules of Court has now been definitively stated.

D. GOOD FAITH EFFORTS TO COMPLY WITH THE QBCRA

38. The Plaintiff submits that the Quebec Defendants (other than LAQ) cannot rely on the "lawful excuse" provisions of the Rules of Court because they demonstrated a lack of good faith by not voluntarily disclosing documents in their possession and by seeking out Orders under s. 4 of the QBCRA without giving notice to the Plaintiff.

39. The Plaintiff concedes in paragraph 67 of his Factum that this allegation of bad faith can have no application to LAQ because of the pre-existing Order issued against it in unrelated proceedings in 1980. It is the position of the Defendant LAQ, however, that this allegation as against the other Quebec Defendants is of no significance because the prohibition against sending documents out of Quebec exists irrespective of whether an Order is made under s. 4 of the Act.

40. The learned Chambers Judge held that efforts to obtain Orders under the QBCRA were irrelevant to the issue of "lawful excuse" because the prohibition against production of documents is grounded in s. 2 of the Act and operates independently of such Orders. In reaching that conclusion the learned Chambers Judge relied on the interpretation placed on the Act by the courts of Quebec, including the following of the Quebec Court of Appeal:

> "... section 2 ... in any case prohibits the removal of 'any document or resume or 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."
>
> Lac d'Amiante du Quebec Limitée v. Le Procureur Général du Québec et l'Association des Mines d'Amiante du Quebec, J.E. 89-996 (Que. C.A.) at p.4

41. The Quebec Superior Court has placed a similar interpretation on the provisions of the Act:

> "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.....
>
> The 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."
>
> Le Club de Hockey Canadien Inc. v. World Hockey Association (28 May 1973), No. 18-00419-73 (Que. S.C.) at pp.9-10

42. The evidence of counsel for the Plaintiff referred to in paragraphs 8 and 67 of his Factum does not constitute proper opinion evidence that voluntarily disclosure is permissible. Indeed, it is readily apparent from the above decisions that voluntary disclosure would be contrary to the Act. In addition, there was expert opinion evidence before the learned Chambers Judge that the word "demande" appearing in the definition of "requisition" in the French version of the QBCRA was inadequately translated in the English version as "demand". The evidence was that the word "demande" is more properly translated in English as "request". Therefore it was not open to the Quebec Defendants to accede to any "request" for voluntary disclosure. There was also expert evidence that parties to a law suit cannot derogate from the provisions of the QBCRA by consent.

> Affidavit of Christine Carron, Case on Appeal, Vol. II, p.359 at p.360, para. 3 and pp.362-63, para. 8 and 9

43. The Defendant LAQ further submits that the QBCRA should not be interpreted as inapplicable by this Court when the Quebec Crown Corporation which owns shares in ACL, Bell and Atlas has applied for and received an Order under the QBCRA. To do so would be to permit the Plaintiff to challenge the 1989 decisions of the Quebec courts by way of collateral attack in unrelated proceedings.

ISSUE II: Does the Supreme Court of Canada have jurisdiction in the circumstances of this appeal to consider the constitutional validity of the QBCRA?

44. The Defendant LAQ submits that this Honourable Court lacks jurisdiction in the circumstances of this appeal to consider the constitutionality of the QBCRA. LAQ further submits therefore that the only proper question to be considered on this appeal is whether the learned Chambers Judge and the Court of Appeal were right in holding that the provisions of a valid QBCRA constitute a lawful excuse within the meaning of Rule 2(5) of the British Columbia Rules of Court.

45. The Defendant LAQ advances two arguments in support of these submissions:

(A) This Court is empowered by statute to give only the decision which should have been given by the court whose decision is appealed. Thus this Court is without jurisdiction to pronounce on the constitutional validity of the QBCRA since the British Columbia courts are without such jurisdiction.

(B) The issue of the constitutionality of the QBCRA was never properly brought before the Supreme Court of British Columbia or the British Columbia Court of Appeal. In these circumstances, a determination by this Court of the constitutionality of the QBCRA would amount to an exercise of original jurisdiction which is a jurisdiction this Court does not have.

A. THE EXERCISE BY THIS COURT OF A JURISDICTION BEYOND THE JURISDICTION OF THE COURTS OF BRITISH COLUMBIA

46. It is the position of the Defendant LAQ that if the courts of British Columbia were without jurisdiction to pronounce on the constitutional validity of the QBCRA, this Court also is without jurisdiction to make this pronouncement due to its restricted powers under s. 45 of the Supreme Court Act, R.S.C. 1985, c. S-26.

47. Section 45 of the Supreme Court Act reads as follows:

"The Court may dismiss an appeal or give the judgment and award the process or proceedings that the court whose decision is appealed against should have given or awarded."

48. This Court has held that it cannot, under this section, do what the court of appeal could not do.

Hesseltine v. Nelles (1912), 47 S.C.R. 230

49. Professor Hogg has described the nature and role of this Court on an appeal from a province:

> "The Supreme Court of Canada, when sitting on appeal from a provincial court, is sitting as a court of that province, and is governed by the same rules as the provincial court (although it may differ from the provincial court as to what those rules are or what they mean)."
>
> Hogg, Constitutional Law of Canada (2nd ed. 1985) at p.276 fn.55.

50. It follows that if the courts of British Columbia lack jurisdiction to pronounce on the constitutionality of the QBCRA so too in the circumstances of this case does the Supreme Court of Canada.

A.G. Can. v. Canard, [1976] 1 S.C.R. 170

51. It is submitted the courts of British Columbia lack jurisdiction to declare an Act of the Legislature of another Province ultra vires. No authority exists which recognizes such a jurisdiction.

52. The general rule is that the jurisdiction of a court is territorially limited.

Hogg, Constitutional Law of Canada, (2nd ed. 1985), at p.276

53. This rule is illustrated by the history of the Supreme Court of British Columbia. The predecessor Court in the Mainland Colony of British Columbia was established by virtue of the Proclamation of June 8, 1859, s. 5 of which declared:

> "The said Supreme Court of Civil Justice of British Columbia shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the said Colony of British Columbia."

The jurisdiction of the Superior Court in the Colony of Vancouver Island was also territorially limited.

54. "The Supreme Courts Ordinance, 1869" continued the existence of two Supreme Courts in the united Colony of British Columbia until such time as a vacancy in the office of one of the Chief Justices occurred, at which time the two Courts would be merged with all the jurisdiction, powers and authorities of the two existing Supreme Courts. Section VI defined the respective jurisdictions of the two Courts: on the Mainland to "... over the former Colony of British Columbia and its Dependencies" and on Vancouver Island to "... only over the former Colony of Vancouver Island and its Dependencies previous to union.".

55. A vacancy arising, "The Courts Merger Ordinance, 1870" declared that as from March 29th, 1870 the merger was deemed to have taken place.

56. The present Supreme Court Act, S.B.C. 1989, c. 40, provides that the Supreme Court of British Columbia is continued under the name and style of the "Supreme Court of British Columbia" and that the Judges have all the powers, rights, incidents and immunities of a Judge of a superior court of record and all other powers, rights, incidents, privileges and immunities that on March 29, 1870 were vested in the Chief Justice and puisne Judges of the Court. The historical territorial link is therefore unbroken.

57. The Union of British Columbia with Canada did not change the territorial extent of the Colonial Court's jurisdiction. Section 129 of the "Constitution Act, 1867" provides for the continuance of Pre-Confederation Courts. The territorial jurisdiction of such Courts was unaltered.

58. In 1879 the Supreme Court of Canada determined that these Courts were:

> "... bound to execute all laws in force in the Dominion whether they are enacted by the Parliament of the Dominion or by the local Legislatures ..."
>
> Valin v. Langlois (1879), 3 S.C.R. 1 at p.19

59. It would be contrary to the Federal principle for the Supreme Court of British Columbia to declare that an Act of the Quebec National Assembly was a nullity because it lacked legislative competence under the Constitution Act, 1867. Compare: Buck v. Attorney General, [1965] 1 Ch. 745 at pp.770-771.

60. For one Provincial Court to determine the validity of another Province's exercise of its legislative powers is "officious intermeddling" and, as noted, is contrary to the Federal principle which recognizes each Province and its judicial system as self-contained. This point is made by Professor Castel in Canadian Conflict of Laws, (2nd ed. 1986) as follows:

> "... each province or territory is a legal unit except as to matters governed by Federal law, and Canada is a legal unit except as to matters governed by provincial or territorial law."
>
> See also: Maritime Bank v. Receiver General of New Brunswick, [1892] A.C. 437 at p.442, and Swan, Case Comments, Grimes v. Cloutier Prefontaine v. Frizzle (1990), 69 C.B.Rev. 538 at p.557.

61. It follows from the above that the courts of British Columbia lacked jurisdiction to pronounce on the constitutional validity of the QBCRA. The validity of that statute is to be determined by the courts of Quebec and, on appeal from the Court of Appeal of that Province, the Supreme Court of Canada, the latter of which gives the judgment the courts appealed from should have given. As that process was not followed in the case at bar it is respectfully

submitted that it is not open to this Court to give the constitutional relief which the Plaintiff seeks.

B. THE EXERCISE OF ORIGINAL JURISDICTION

62. On the original application brought by the Plaintiff, the Chambers Judge refused to consider the constitutionality of the QBCRA on the ground that the Plaintiff had failed to give notice of the application to the Attorney General of Quebec. His Lordship stated:

> "I know of no precedent for the courts of one province striking down legislation of another but, in any event, I would not seriously entertain a submission directed to that end without an opportunity having been given to the Attorney General of Quebec, or appropriate representative of the government of that province, to appear. This has not been done so I proceed on the basis that the act is a valid statute of Quebec."
>
> Reasons for Judgment of Esson, C.J.S.C., Case on Appeal, Vol. III, p.591 at p.598, ll.8-15

63. On Appeal, Mr. Justice Gibbs, who delivered the judgment of the Court of Appeal upholding decision of the Chambers Judge, said the following:

> "It is a venerable and fundamental principle of the common law that a court of original jurisdiction will not make an order or give judgment against a person without that person having been given an opportunity to appear and be heard.
>
> In order to be heard on the appeal the Attorney General of Quebec would have had to apply for, and be accorded, intervenor status. But then he would have had to accept the record as he found it unless he applied for, and was given, leave to introduce fresh evidence. Counsel for Mr. Hunt said that such applications, if made, would not have been opposed by them. However, we are of the view that it is not open to Mr. Hunt to impose an obligation of overt action upon the Attorney General of Quebec to overcome the shortcomings in the court below, even assuming that this Court has jurisdiction over the constitutional validity of

> the Quebec statute, and we are of the opinion that we do not have such jurisdiction.
>
> Chief Justice Esson proceeded 'on the basis that the Act is a valid statute of Quebec'. We think that this was the correct course to adopt and have done likewise."
>
> Reasons for Judgment of the B.C.C.A., Case on Appeal, Vol. III, p.612 at p.615, ll.20-50 and p.616, ll.1-10

64. The Defendant LAQ submits that as the constitutionality of the QBCRA was not properly brought before the lower courts this Honourable Court lacks jurisdiction to consider the matter on this appeal.

65. The jurisdiction of the Supreme Court of Canada has been considered by this Honourable Court on numerous occasions. In Wartime Housing Limited v. Madden, [1945] S.C.R. 169 at p.172, Chief Justice Rinfret, who delivered the judgment of the Court, said:

> "The Supreme Court of Canada is a statutory court whose jurisdiction is founded exclusively on the provisions of the Supreme Court Act; and, unless the right to appeal to this Court is expressed in the Act, it has no jurisdiction to hear any case not therein provided for."

66. The Supreme Court Act, R.S.C. 1985, c. S-26 confers on this Court two distinct jurisdictions: (1) an appellate jurisdiction under s. 35, and (2) a reference jurisdiction under s. 53. The constitutionality of the QBCRA was not raised by way of reference and thus the provisions of s. 53 are inapplicable to the case at bar. The question which arises therefore is whether it is open to this Court to consider the constitutionality of the QBCRA under the appellate provisions contained in s. 35 of the Act, which consideration would amount to an exercise of original jurisdiction.

67. Section 35 of the Act reads as follows:

> "The Court shall have and exercise an appellate, civil and criminal jurisdiction within and throughout Canada."

68. In Re Roberts, [1923] S.C.R. 152 at p.153, Mr. Justice Anglin, sitting in Chambers, held that the authority contained in s. 35 does not extend to an exercise of original jurisdiction. His Lordship stated:

> "Both in its constitution and in its jurisdiction, the Supreme Court is a purely statutory court. .... Notwithstanding the comma after the word 'appellate' in s. 35 (not found in the original s. 15 of the statute of 1875, c. 11), that section relates only to the appellate jurisdiction of the court. An attempt to confer on it general, original, civil and criminal jurisdiction would hopelessly transcend the power given by s. 101 of the 'B.N.A. Act', and would seriously impinge upon provincial legislative jurisdiction under s. 92(14) of the 'B.N.A. Act'."

69. The rationale for the holding in Re Roberts can be understood by examining the sources of judicial power in this country. By s. 92(14) of the Constitution Act, 1867 the provinces are allocated the power to make laws in relation to "the administration of justice in the province", which power expressly includes "the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction" and "procedure in civil matters in those courts". Pursuant to that power, the Supreme Court of British Columbia and the British Columbia Court of Appeal were created as "superior" courts of record; they are continued as such pursuant to s. 9(1) of the Supreme Court Act, S.B.C. 1989, c. 40 and s. 2(1) of the Court of Appeal Act, S.B.C. 1982, c. 7 respectively. By s. 9(1) of the former Act the Supreme Court of British Columbia is continued as a court of original and general jurisdiction.

70. The general jurisdiction of the provincial superior courts has not been extended under the constitution to the statutory courts which Parliament has created pursuant to s. 101 of the Constitution Act, 1867, namely the Supreme Court of Canada and the Federal Court of Canada.

The difference in jurisdiction between these courts was noted by this Court in Puerto Rico v. Hernandez, [1975] 1 S.C.R. 228 at 232, in the context of an analysis of the jurisdiction of the Federal Court of Canada:

> "I do not suggest that the concluding words of s. 3 of the Federal Court Act: 'shall continue to be a superior court of record having civil and criminal jurisdiction' are to be read as making, in federal matters, the Federal Court a 'superior court' within the same meaning of that expression as applied to the superior courts of the provinces, that is courts having jurisdiction in all cases not excluded from their authority or, as Ritchie C.J. put it in Valin v. Langlois at p. 19, 'Courts, bound to take cognizance of and execute all laws ...'."

71. A similar point was made by Mr. Justice Addy in Beauregard (the Hon. Mr. Justice Marc) v. R., [1981] 2 F.C. 543 at 551-52 (T.D.), as follows:

> " ... Justices of the Federal Court of Canada as well as those of the Supreme Court of Canada derive their existence, role and jurisdiction entirely from federal statute and do not enjoy the same constitutional status as Justices of the Superior Courts of the Provinces, who exercise a general jurisdiction throughout the provincial realms and who are constitutionally the true successors to the original King's Justices of the Central Courts of England."

72. The Defendant LAQ submits this Honourable Court cannot determine the constitutionality of a federal or provincial law in circumstances where the trial and appeal court have refused to do so by reason of a serious procedural defect, because such a determination would amount to an exercise of original jurisdiction which is a jurisdiction this Court does not have.

73. In the case at bar the Plaintiff applied to state a constitutional question pursuant to Rule 32(1) of the Rules of the Supreme Court of Canada (the "Rules"). That Rule reads in part as follows:

> "A constitutional question may be stated by the Chief Justice or a Judge on a motion brought by one of the parties within 60 days from the filing of the notice of appeal."

74. The power to make rules of court is contained in s. 97 of the Supreme Court Act, which reads in part as follows:

> "The judges, or any five of them, may make general rules and orders
>
> (a) for regulating the procedure of and in the Court and the bringing of cases before it from the courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;
>
> (f) with respect to matters coming within the jurisdiction of the Court ..."

It follows from these provisions that the Rules do not confer on the Supreme Court of Canada any jurisdiction not already given by the Supreme Court Act.

75. The Defendant LAQ respectfully submits, therefore, that Rule 32 does not authorize this Honourable Court to exercise an original jurisdiction over constitutional matters which the courts below have refused to exercise for want of notice to a proper party; it merely provides a mechanism by which a question is to be stated and notice is to be given to the attorneys general of the provinces once the constitutionality of a law has been properly raised before the lower courts.

76. In summary, the constitutionality of the QBCRA only arises on this appeal if this Honourable Court finds it has the statutory authority: (1) to exercise an original jurisdiction and (2) to pronounce on the constitutional validity of a Quebec statue on an appeal from the Court of Appeal for British Columbia. For the reasons given above, the Defendant LAQ submits that no such authority exists and that the constitutionality of the QBCRA should therefore not be considered on this appeal.

77. The specific constitutional question which has been posed by this Court was drafted by the Plaintiff. It reads 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?"

78. In paragraph 28 of his Factum the Plaintiff states his position on the constitutional question thus: s. 2 of the QBCRA is constitutionally inapplicable or, in the alternative, is ultra vires. The Defendant LAQ submits, however, that there is only one issue raised by this question, namely, whether the QBCRA is ultra vires the National Assembly of Quebec.

79. Where the pith and substance of a statute is the derogation from extra-provincial rights, it is ultra vires the legislature of the enacting province: See Re Upper Churchill Water Rights Reversion Act, supra, at p.332. It follows that s. 2 of the QBCRA cannot be at the same time constitutionally inapplicable as a derogation from extra-provincial rights and intra vires the National Assembly of Quebec. This Court must therefore strike down s. 2 of the QBCRA if it decides that the constitutional question (if it is to be answered at all on this appeal) should be answered in the affirmative.

80. The QBCRA is a law of general application respecting movable property located in the Province of Quebec. It operates on those within the Province and was not enacted with respect to the case at bar. It and its counterpart statute in Ontario fall under Heads 13 and 14 of Section 92 of the Constitution Act, 1867 as being matters of property and civil rights or procedure.

81. In paragraphs 49 and 50 of his Factum the Plaintiff says that if the QBCRA were interpreted to prohibit documents being removed from Quebec for the purpose of discovery in another province its pith and substance would be the derogation from extraprovincial rights. The

Defendant LAQ submits that this argument is based on a misapprehension of the manner in which the "pith and substance" doctrine operates.

82. The "pith and substance" doctrine is used by the Courts to identify the "matter" of the challenged law for the purpose of determining the head of legislative power to which the law is to be allocated under the Constitution.

Hogg, Constitutional Law of Canada, (2nd ed. 1985) at p.313

83. The "matter" of a law has been described as the name for "the content or subject matter" of the law.

Re Anti Inflation Act, [1976] 2 S.C.R. 373 at 450.

84. Once the subject matter of the law is determined to be in relation to a matter coming within the authority of the enacting legislature the law is valid notwithstanding that the law may affect matters outside of the legislature's jurisdiction. Professor Hogg makes this point as follows:

> "It is important to recognize that this "pith and substance" doctrine enables one level of government to enact laws with substantial impact on matters outside its jurisdiction."
>
> Hogg, Constitutional Law of Canada (2nd ed. 1985) at p.314

85. There can be no question that the "matter" of the QBCRA is in relation to property and civil rights and procedure within the Province of Quebec. The Plaintiff does not and cannot argue that the "matter" of the QBCRA is in relation to a head of power reserved exclusively for the Legislature of British Columbia. (Indeed such an argument would be inconsistent with the Plaintiff's position that the QBCRA was enacted to thwart intrusive measures undertaken by American courts and legislators).

86. The law with respect to incidental effect is set out by Professor Hogg as follows:

> "It is clear, therefore, that the impairment of extraprovincial rights (or other extraprovincial consequences) may be validly accomplished by a provincial Legislature as an incidental effect of a statute that is in relation to a matter territorially within the province and within a head of provincial legislative power."
>
> Hogg, Constitutional Law of Canada (2nd ed. 1985) at p.271
>
> See also: Ladore v. Bennett, [1939] A.C. 468 at p.482-83 and Re Upper Churchill Water Rights Reversion Act, supra at p.331-32

87. In the case at bar the Court of Appeal for British Columbia was unanimous in describing the effect of the QBCRA in British Columbia as "incidental":

> "The Quebec Business Concerns Records Act was not enacted to frustrate the claims of Mr. Hunt and his fellow claimants. It was promulgated in 1958, over 30 years ago, for the public policy purposes described by Chief Justice Esson at pages 393 and 394 of his judgment. We are advised that there is an identical statute in Ontario. The fact that now, in 1991, there is an incidental or consequential effect in British Columbia does not render the Act ultra vires."

There is nothing in the record to suggest that the Court of Appeal was anything but correct in reaching this conclusion.

88. It is respectfully submitted that as the QBCRA is a law of general application respecting movable property located in the Province of Quebec and operating only on those within that Province the National Assembly of Quebec was acting entirely within its authority under Heads 13 and 14 of the Constitution Act, 1867 when it enacted the QBCRA 34 years ago.

PART IV

NATURE OF ORDER SOUGHT

That the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

William S. Berardino, Q.C.
Counsel for the Respondent

Avon M. Mersey, Esq.
Counsel for the Respondent

August 28, 1992
Vancouver, B.C.

PART V

TABLE OF AUTHORITIES

AUTHORITIES

ENACTMENTS

TEXTS