S.S.C. 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, AND NATIONAL GYPSUM CO.

RESPONDENTS
(DEFENDANTS)

AND:

T & N, plc, CAREY CANADA INC., formerly known as Carey-Canadian Mines Ltd., FLINTKOTE MINES LIMITED, and THE FLINTKOTE CO.

(DEFENDANTS)

AND:

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

(THIRD PARTIES)

FACTUM OF THE RESPONDENT, NATIONAL GYPSUM CO.

SUBMITTED BY:

COUNSEL FOR THE RESPONDENT, NATIONAL GYPSUM CO.:

ARVAY FINLAY
BARRISTERS
2nd Floor, 754 Broughton St.
Victoria, BC V8W 1E1
Telephone: (604) 388-6868
Telecopier: (604) 388-4456

John L. Finlay

AGENT FOR THE RESPONDENT, NATIONAL GYPSUM CO.:

BURKE-ROBERTSON
BARRISTERS AND SOLICITORS
70 Gloucester Street
Ottawa, ON K2P 0A2
Telephone: (613) 236-9965
Telecopier: (613) 235-4430

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

COUNSEL	AGENT
For the Respondents, Lac d'Amiante du Quebec, Ltee:	
RUSSELL & DUMOULIN Barristers and Solicitors 1500 - 1075 West Georgia St. Vancouver, BC V6E 3G2 Telephone: (604) 688-3411 Telecopier: (604)689-7503	**GOWLING, STRATHY & HENDERSON** Barristers and Solicitors 2600 - 160 Elgin Street Ottawa, ON K1N 8S3 Telephone: (613) 232-1781 Telecopier: (613) 563-9869
W.S. Berardino, Q.C. **Avon M. Mersey**	**Henry S. Brown**
For the Applicant, George Ernest Hunt	
LADNER DOWNS Barristers and Solicitors 900 - 200 Burrard Street Vancouver, BC V7X 1T2 Telephone: (604) 687-5744 Fax: (604) 687-1415	**OSLER, HOSKIN & HARCOURT** Barristers and Solicitors 1500 - 50 O'Connor Street Ottawa, ON K1P 6L2 Telephone: (613) 235-7234 Telecopier: (613) 235-2867
J.J. Camp, Q.C. **David P. Church** **Stephen Antle.**	**Patricia J. Wilson**
For the Respondents, Asbestos Corporation Limited, Atlas Turner Inc. and Bell Asbestos Mines Limited	
FARRIS, VAUGHAN, WILLS & MURPHY Barristers and Solicitors 2600 - 700 West Georgia Street Vancouver, BC V6Y 1B3 Telephone: (604) 684-9151 Telecopier: (604) 661-9349	**GOWLING, STRATHY & HENDERSON** Barristers and Solicitors 2600 - 160 Elgin Street Ottawa, ON K1N 8S3 Telephone: (613) 232-1781 Telecopier: (613) 563-9869
Jack Giles, Q.C. **Robert J. McDonell**	**Henry S. Brown**

For the Respondent, JM Asbestos Inc.

LINDSAY KENNEY
Barristers and Solicitors
17th Flr, 700 W. Pender St.
Vancouver, BC V6C 1G8
Telephone: (604) 687-1323
Telecopier: (604) 687-2347

Richard B. Lindsay
Gregory S. Miller

GOWLING, STRATY & HENDERSON
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1N 8S3
Telephone: (613) 232-1781
Telecopier: (613) 563-9869

Henry S. Brown

For the Respondent, The Quebec Asbestos Mining Association

LANG MICHENER LAWRENCE & SHAW

Barristers and Solicitors
Box 49200 Three Bentall Centre
2500 - 595 Burrard Street
Vancouver, BC V7X 1L1
Telephone: (604) 689-9111
Telecopier: (604) 685-7084

Louis J. Zivot

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

David Burke

I N D E X

PART I

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

1. This Respondent agrees and adopts the facts as stated in the Factum of the Respondents, Asbestos Corporation Limited, Atlas Turner Inc. and Bell Asbestos Mines Ltd. This Respondent states that only those facts are relevant with respect to the issues on this Appeal.

PART II

STATEMENT OF THE RESPONDENT'S POSITION IN REGARD TO THE APPELLANT'S POINTS WHICH THIS RESPONDENT WISHES TO PUT IN ISSUE

2. There is no basis for interference by this Court in the discretion exercised by the Courts of British Columbia in determining that certain documents need not be produced because:

a) The courts of British Columbia were correct in declining to determine the constitutionality of Quebec legislation;

b) The Appellant has the right to challenge the validity of Quebec legislation in the courts of Quebec and he has declined to do so;

c) In the alternative, in any event, section 2 of the Quebec Business Concerns Record Act (QBCRA) is not, *ultra vires*, the National Assembly of Quebec and cannot be interpreted so as to be inapplicable in British Columbia.

PART III

ARGUMENT

A. The Courts of British Columbia Should Not Determine the Constitutionality of Quebec Legislation

3. Esson, CJSC, refused to determine the constitutionality of section 2 of the Quebec Business Concerns Record Act, L.R.Q. 1977, c.D-12 ("QBCRA") as follows:

> I know of no precedent for the courts of one province striking down the 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 other appropriate representative of the government of that province, to appear. That has not been done.
>
> Reasons for Judgment of Esson, CJSC, Supreme Court of British Columbia, February 23, 1990, Case on Appeal, Volume III, p. 598.

4. The Court of Appeal agreed with Esson CJSC's ruling:

> We are all of the view that the reasoning of the Chief Justice on this point could not be faulted so we did not find it necessary to call upon the Quebec companies to reply to the submissions made by the Appellant.
>
> Oral Reasons for Judgment of Macdonald, Gibbs and Hollinrake, JJA, Court of Appeal for British Columbia, June 6, 1991, Case on Appeal, Volume III, p. 615

5. Within areas of exclusive legislative competence, each province must be considered sovereign. In Reference re: Constitution of Canada (No.3) (1981), 120 D.L.R. (3rd) 385 (Que. C.A.), the provinces put forward a proposition that:

> Canada is a federation with two levels of government: Parliament on the one hand and the provincial legislatures on the other, each one being sovereign within its areas of exclusive competence. (at p. 396)

The Quebec Court of Appeal in that case reviewed the authorities respecting the status of provincial legislatures and concluded:

> In light of the legislative texts and the above-mentioned authorities, I find the first proposition of the provinces well-founded with respect to the federative character of the Canadian Constitution and with respect to the legislative sovereignty of the provinces in the areas of their exclusive competencies. (at page 398)

Quebec has legislative sovereignty with respect to property and civil rights in Quebec.

6. The jurisdictional competence of a provincial superior court to consider the *vires* of another province's legislation has not specifically been dealt with by Canadian courts. English courts have addressed the issue of making a declaration concerning the constitutionality of another sovereign's legislation. The English

Court of Appeal has held that it has no jurisdiction to make declarations as to the validity of the constitution of another state.

Buck v. Attorney General, [1965] 1 All E.R. 882.

7. The effect of the courts of British Columbia determining the constitutional validity of the laws of Quebec must, by necessity, be an assertion of jurisdiction by the courts of British Columbia over the laws of the Province of Quebec.

> Buck v. A.G. . . . makes it clear that in proceedings for declarations brought against the Attorney General of England, a court has no jurisdiction to make declarations as to the validity of the constitution of an independent sovereign state, in that case Sierre Leone. . . . Second, apart from any case where the question arises merely incidentally, the courts of England cannot pronounce on whether a law of an independent sovereign is valid within that state, for to do this would be to assert jurisdiction over that state.
>
> Manuel v. Attorney General; Noltcho v. Attorney General, [1982] 3 All E.R. 766 (Ch.D) at 794-95.

8. Each of the Provinces, and specifically Quebec, has a mechanism to allow for any party to challenge the constitutional validity of that province's legislation. This will be detailed below, but the Court of Appeal of British Columbia pointed out what

the Attorney General of Quebec would have to do in an attempt to uphold the legislation of Quebec before the courts of British Columbia:

> 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.
>
> Oral Reasons for Judgment of Macdonald, Gibbs and Hollinrake, JJA, Court of Appeal for British Columbia, June 6, 1991, Case on Appeal, Volume III, p. 615-16.

B. The Appellant Has the Right to Challenge the Validity of the Quebec Legislation in the Courts of Quebec and He Has Declined to Do So

9. The constitutionality of the QBCRA, if brought into question, should be determined through the Courts of Quebec. A declaratory action was introduced into the law of Quebec in the Code of Civil Procedure in 1966. Article 453 of the Code of Civil Procedure reads as follows:

> 453 Any person who has an interest in having determined immediately, for the solution of a genuine problem, either his status or any right, power or obligation which he may have under a contract, will or any other written instrument, statute, order in council, a resolution or by-law of a municipal corporation, may, by motion to the Court, ask for a declaratory judgment in that regard.

Article 95 of the Code of Civil Procedure reads as follows:

> 95 The constitutionality of any statute of the province or of Canada, or the validity of a proclamation or order of the Governor-General, Lieutenant-Governor, Governor-General in Council or Lieutenant-Governor in Council, cannot be put in question before the Courts of this Province unless the Attorney General has been notified thereof at least ten days before the date of the Hearing.
>
> Such notice is given by the party who intends to raise the question and must set forth both the nature of his pretensions and the grounds upon which he relies, which will be the only grounds upon which the Court can adjudicate.

It is open to the Appellant to challenge the constitutional validity of the QBCRA in the Courts of Quebec, which procedure would afford the Attorney General of that Province the full right to participate in the constitutional challenge. The Appellant has not done so in this case.

10. This Respondent submits that this Court should refuse to interfere with the discretion exercised by the Courts of British Columbia by finding that the superior courts of the provinces cannot adjudicate the constitutional validity of another province's laws. This appeal is not a reference by the Governor in Council pursuant to section 53(1) of the Supreme Court Act. The jurisdiction of this Court is limited by section 45 of the Supreme Court Act as follows:

> 45 The Court may dismiss an appeal or give the Judgment and award the process or other proceedings that the Court whose decision is appealed against should have given or awarded.
>
> Supreme Court Act, R.S.C. 1985 (c.S-26) s.45

11. Section 45 was considered in Attorney General of Canada v. Canard, [1976] 1 S.C.R. 170. Relief was denied by this Court to the Appellant on the ground that the Manitoba Court of Appeal could not have given the relief requested as it did not have jurisdiction even though, had the appeal been from the Federal Court of Appeal (which had jurisdiction), the Supreme Court of Canada could have granted the relief:

> I am however prevented from taking this course by what appears to be an insuperable jurisdictional difficulty. Once it is conceded that the Minister has jurisdiction to

> appoint an administrator, the exercise of this jurisdiction can only be reviewed in accordance with the Indian Act and the Federal Court Act and not by the Courts of Manitoba. It is true that the latter's jurisdiction had not been questioned by the Appellants, presumably because the action taken by the Respondent challenged the constitutional validity and operation of the Indian Act and the Manitoba Courts had jurisdiction to adjudicate upon this issue as well as upon the Appellant's counterclaim. The Courts of Manitoba could not on the other hand hear an appeal from the Minister's decision or otherwise review it. We sit in appeal from the decision of the Manitoba Court of Appeal and our own jurisdiction is limited to giving the judgment that could and should have been given, Supreme Court Act R.S.C. 1970, c.5-19 s.47 [now R.S.C. 1985, c.5-45 s.45], but not the one that could and should have been given had the issue been raised in the Federal Court. [emphasis added]
>
> Attorney General of Canada v. Canard, [1976] 1 S.C.R. 170 at 216, per Beetz J.

As the British Columbia courts did not have jurisdiction to determine the constitutional validity of the QBCRA, it is submitted that this Court does not have jurisdiction to determine the constitutional validity of the QBCRA on this appeal.

C. In the Alternative, In Any Event, Section 2 of the QBCRA Is Not *Ultra Vires* the National Assembly of Quebec and Cannot Be Interpreted so as to be Inapplicable in British Columbia

12. The Constitutional question before the Court is:

Is section 2 of the Quebec Business Concerns Record 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?

13. Section 2 of the QBCRA reads:

> Subject to section 3, no person shall, pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside of 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.

(i) Is the QBCRA *ultra vires* the National Assembly of Quebec.

14. If the pith and substance of the QBCRA is in relation to a specifically enumerated power of section 92 of the Constitution Act 1867, then extra-provincial incidental effects of that legislation will not derogate from the validity of the legislation.

> Churchill Falls (Labrador) Corporation Ltd. v. Attorney General of Newfoundland, [1984] 1 S.C.R. 297 at 332 per McIntyre J.

15. The QBCRA is in relation to property and civil rights (s.92(13)) in that it grants certain advantages to Quebec businesses:

> . . . the Business Concerns Record Act is a remedial Act whose purpose is to remedy abuses and furnish certain advantages to Quebec firms.

Renault v. Bell Asbestos Mines Ltd. (13 August 1980) District of Quebec, No. 09-000654-41 (Quebec Court of Appeal).

16. The National Assembly of Quebec is competent to legislate with respect to business carried on within Quebec and to regulate the conduct of those carrying on business in Quebec. This has been recognized as a valid exercise of the property and civil rights power.

The Queen v. Thomas Equipment Ltd., [1979] 2 S.C.R. 529 at 542, per Martlin J.

17. The British Columbia Court of Appeal recognized the business purpose behind the QBCRA:

> The Quebec Business Concerns Record 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*. Neither does the fact constitute a valid reason why the Courts of this province should refuse to take cognizance of the constraints it imposes upon the Quebec company.
>
> Oral Reasons for Judgment of Macdonald, Gibbs and Hollinrake JJA, Court of Appeal for British Columbia, June 6, 1991, Case on Appeal, Volume III, page 619.

18. The QBCRA is *prima face* within the legislative competence of the National Assembly of Quebec in that it regulates business concerns within that Province. It may have an incidental effect by prohibiting production of documents in lawsuits commenced in other jurisdictions. In doing so, the incidental effect is analogous to legislative schemes which provide market protection within a province, to privacy legislation and to limits placed on freedom of information. Such legislation is a valid exercise of provincial power pursuant to section 92 but such legislation may also have an incidental effect extra-provincially. The extra-provincial effect of the QBCRA in this action does not make the QBCRA *ultra vires* the National Assembly of Quebec.

(ii) If the QBCRA is not *ultra vires* the National Assembly of Quebec, should it be "read down" or interpreted in such a manner as to be constitutionally inapplicable in Canada outside of Quebec?

19. The Appellant submits that the QBCRA should be "read down" or interpreted such that it is effective to prevent production of

documents outside of Canada but so as not to prevent production of documents in actions commenced in Canada outside of Quebec.

Appellant's Factum, paragraph 42, 45, 46 and 47

20. This submission cannot be sustained on an examination of the wording of section 2 of the QBCRA. The prohibition contained in section 2 of the QBCRA is in reference to sending any document in Quebec to a place "outside of Quebec". Had the National Assembly intended the prohibition contained in the QBCRA to have effect only in the United States or outside of Canada, the Assembly would have used the words "outside of Canada", instead of "outside of Quebec".

21. The QBCRA is a statute of general application and is not restricted in its scope:

> Whatever the motives of the legislator may have been in adopting that Act, it is still of general application and is still in force.
>
> Asbestos Corporation Limited v. Eagle-Pitcher Industries Inc. (February 24, 1984), Montreal Registry No. 09001246 (C.A.), at 10 per Beauregard, J.

22. If the QBCRA is interpreted so as to be applied in limited circumstances, it would defeat the purpose the Appellants allege

the Act strives to meet. The Appellants submit that the QBCRA should be read only so as to restrict the production of documents in non-Canadian actions. It is well known in this action that documents are being passed between counsel in Canada and counsel in the United States and thus, the prohibition on foreign production would be frustrated. Accordingly, to interpret the QBCRA in this way is to make it meaningless.

23. It is submitted that the QBCRA, being a law of general application, cannot be read down so as to be inapplicable to an action in British Columbia.

PART IV

ORDER SOUGHT

That the appeal be dismissed with costs to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

JOHN L. FINLAY
Counsel for the Respondent
National Gypsum Co.

DATED at the City of Victoria, in the Province of British Columbia, this 26th day of August, 1992.

PART V

TABLE OF AUTHORITIES