SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-035383-077

DATE: March 30, 2007

THE HONOURABLE MR JUSTICE A. DEREK GUTHRIE

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY
Plaintiff and **Respondent in Revocation of Judgment**
v.
NICOLAS ZRIHEN
Petitioner in Revocation of Judgment

JUDGMENT

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[1] The Court has before it a Motion in Revocation of Judgment (the "Motion") made by a third party, Nicolas Zrihen ("Mr Zrihen"), in virtue of article 489 C.C.P.

The Facts

[2] On February 22, 2007, The Southern New England Telephone Company ("Plaintiff") presented before Madam Justice Hélène Poulin (acting in chambers) of the Superior Court of Québec a Motion to Obtain an Order for Examination of a Witness and Production of Documents. The same day Justice Poulin issued an order (the "Order") which Order concluded as follows :

"[5] ORDERS the examination under oath of Mr. Nicolas Zrihen in front of an official stenographer at Fasken Martineau DuMoulin, 800 Square Victoria, suite 3700, Montreal, Province of Quebec, at the latest by March 2, 2007;

[6] ORDERS that Mr. Nicolas Zrihen bring with him and produce all documents in his possession that relate to :

a) Net Tel Canada;

b) Nicolas Zrihen's or Net Tel Canada's acquisition of telecommunications equipment;

c) Nicolas Zrihen's Net Tel Canada's lease of telecommunications equipment; and

d) Communications relating to telecommunications equipment between Nicolas Zrihen or Net Tel Canada and Frank Gangi or any person representing or acting on behalf of any telecommunications company with which Mr. Gangi was associated in any way;

THE WHOLE without costs."

[3] The Order, rendered pursuant to section 9 of the *Special Procedure Act*[1] (the "SPA"), ordered Mr Zrihen (a) to be examined out of court at the law offices of Fasken Martineau DuMoulin in Montréal no later than March 2, 2007 and (b) to produce all the documents listed therein and in his possession.

[4] The Order was rendered in furtherance of a Letter Rogatory issued by Judge Janet Hall of the United States District Court, District of Connecticut, on February 9, 2007.

[5] The Order was obtained *ex parte* as Mr Zrihen was never served with Plaintiff's motion.

[6] On February 22, 2007, Plaintiff's attorney served Mr Zrihen with a subpoena ordering him to appear personally at Fasken Martineau DuMoulin with the documents on February 28, 2007 at 10:00 a.m.

[7] In the Motion, Mr Zrihen is asking this Court to revoke the Order.

[8] The parties agreed to postpone Mr Zrihen's examination pending judgment on the Motion.

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[1] R.S.Q., c. P-27.

The Parties' Arguments

[9] Mr Zrihen maintains, in the Motion, that the Order should be quashed because : (a) it breaches the provisions of the *Business Concerns Records Act*[2] (the "BCRA") and (b) the modalities of the proposed examination are unduly restrictive.

[10] At trial, Plaintiff argued that this Court has discretion to dismiss the Motion for the following reasons:

(a) the BCRA is inconsistent with the principles of international law and the doctrine of comity adopted by the Supreme Court of Canada and the Court of Appeal, principles which are reflected in the spirit of the *Civil Code of Québec*;

(b) the BCRA is not a rule of public order and has been applied inconsistently by Québec courts;

(c) the BCRA is anachronistic and obsolete;

(d) the Ontario equivalent, the *Business Records Protection Act*, has not been accepted as an impediment to cross-border discovery;

(e) the Court has discretion not to apply the BCRA; and

(f) the strategy of legislative interpretation that should be applied in light of the conflicts between the BCRA and the SPA is implied repeal.

Plaintiff also submits that the decision of the Supreme Court of Canada in *Hunt* v. *T&N PLC*[3] "opened the door to arguments that the BCRA is entirely unconstitutional".

[11] At trial, Mr Zrihen also argued that:

- because no notice pursuant to article 95 C.C.P. was ever given to the Attorney General of Plaintiff's intent to raise the constitutionality of the BCRA, such argument cannot be considered by the Court; and

- the Court does not have the power, under the principles of legislative interpretation, to determine that the BCRA has been impliedly repealed by the SPA.

Relevant Statute Law

[12] Section 2 of the BCRA, section 9 of the SPA, article 95 C.C.P. and article 3155 C.C.Q. are relevant to the discussion in this matter.

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2 R.S.Q., c. D-12.
3 [1993] 4 S.C.R. 289.

Loi sur les dossiers d'entreprises

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.

3. La prohibition stipulée à l'article 2 ne s'applique pas dans le cas de transport ou d'envoi d'un document hors du Québec

[…]

d) lorsqu'un tel transport ou envoi est autorisé par une loi du Québec ou du parlement du Canada, suivant leur juridiction respective.

Business Concerns Records Act

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

3. The prohibition enacted in section 2 shall not apply in the case of the removal or sending of a document out of Québec

[…]

(d) whenever such removal or sending is authorized by any law of Québec or of the Parliament of Canada, in accordance with their respective jurisdictions.

(Underlining by the undersigned)

Loi sur certaines procédures

9. Lorsque, sur requête à cette fin, il est prouvé à la Cour supérieure ou à l'un des juges de cette cour, chargé d'administrer la justice dans le district, qu'un tribunal de toute autre province du Canada, ou de toute autre possession britannique, ou d'un pays étranger, devant lequel est pendante une cause civile ou commerciale, désire avoir le témoignage de quelque partie ou témoin qui se trouve dans le district, le tribunal ou ce juge peut ordonner que la partie ou le témoin

Special Procedure Act

9. When, upon petition to that effect, it is shown to the Superior Court or to one of the judges thereof, charged with the administration of justice in the district, that a court of any other Province of Canada, or of any other British possession, or of a foreign country, before which any civil or commercial case is pending, desires to have the evidence of any party or witness in the district, such court or judge may order that such party or

soit interrogé sous serment, par questions écrites ou autrement, devant toute personne dénommée au dit ordre, et peut assigner, par le même ordre ou par un ordre subséquent, cette partie ou ce témoin à comparaître pour rendre témoignage et lui enjoindre de produire tous écrits ou documents mentionnés dans l'ordre, ou tous autres écrits ou documents relatifs à l'affaire et qui sont en sa possession.

La même règle s'applique, compte tenu des adaptations nécessaires, lorsqu'une commission d'enquête instituée par le gouverneur général en conseil ou le lieutenant-gouverneur en conseil d'une autre province canadienne désire avoir le témoignage d'un témoin.

witness may be examined under oath, either by means of question in writing or otherwise, before any person mentioned in the said order, and may summon, by the same or by a subsequent order, such party or witness to appear for examination, and may order him to produce any writing or document mentioned in the order, or any other writing or document relating to the matter, and which may be in his possession.

The same rule applies, with the necessary modifications, when an inquiry commission instituted by the Governor General in Council or by the Lieutenant-Governor in Council of another province of Canada desires to have the evidence of a witness.

(Underlining by the undersigned)

Code de procédure civile

95. Sauf si le procureur général a reçu préalablement un avis conformément au présent article, une disposition d'une loi du Québec ou du Canada, d'un règlement adopté en vertu d'une telle loi, d'un décret, arrêté en conseil ou proclamation du lieutenant-gouverneur, du gouverneur général, du gouvernement du Québec ou du gouverneur général en conseil ne peut être déclarée inapplicable constitutionnellement, invalide ou inopérante, y compris en regard de la Charte canadienne des droits et libertés (Partie I de l'annexe B de la Loi sur le Canada, chapitre 11 du recueil des lois du Parlement du Royaume-Uni pour

Code of Civil Procedure

95. Unless the Attorney General has previously received a notice in accordance with this section, no provision of a statute of Québec or Canada, of a regulation made thereunder, of an order, of an order in council or of a proclamation of the Lieutenant-Governor, the Governor General, the Gouvernement du Québec or the Governor General in Council may be declared inapplicable constitutionally, invalid or inoperative or of no force or effect, including in respect of the Canadian Charter of Rights and Freedoms (Part I of Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom)

l'année 1982) ou de la Charte des droits et libertés de la personne (L.R.Q., chapitre C-12), par un tribunal du Québec.

L'avis doit, de façon précise, énoncer la prétention et exposer les moyens sur lesquels elle est basée. Il doit être accompagné d'une copie des actes de procédure et être signifié par celui qui entend soulever la question au moins 30 jours avant la date de l'audition.

Le tribunal ne peut se prononcer que sur les moyens exposés dans l'avis.

or the Charter of human rights and freedoms (R.S.Q., chapter C-12), by a court in Québec.

The notice shall set forth, in a precise manner, the nature of the pretensions and the grounds relied upon. It shall be accompanied with a copy of the proceedings and served by the person who intends to raise the question not later than 30 days before the date of the hearing.

The court shall adjudicate only upon the grounds set forth in the notice.

(Underlining by the undersigned)

Code civil du Québec

3155. Toute décision rendue hors du Québec est reconnue et, le cas échéant, déclarée exécutoire par l'autorité du Québec, sauf dans les cas suivants:

1° L'autorité de l'État dans lequel la décision a été rendue n'était pas compétente suivant les dispositions du présent titre;

2° La décision, au lieu où elle a été rendue, est susceptible d'un recours ordinaire, ou n'est pas définitive ou exécutoire;

3° La décision a été rendue en violation des principes essentiels de la procédure;

4° Un litige entre les mêmes parties, fondé sur les mêmes faits et ayant le même objet, a donné lieu au Québec à une décision

Civil Code of Québec

3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:

(1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;

(2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;

(3) the decision was rendered in contravention of the fundamental principles of procedure;

(4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in

passée ou non en force de chose jugée, ou est pendant devant une autorité québécoise, première saisie, ou a été jugé dans un État tiers et la décision remplit les conditions nécessaires pour sa reconnaissance au Québec;	Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;
5° Le résultat de la décision étrangère est manifestement incompatible avec l'ordre public tel qu'il est entendu dans les relations internationales;	(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
6° La décision sanctionne des obligations découlant des lois fiscales d'un État étranger.	(6) the decision enforces obligations arising from the taxation laws of a foreign country.

(Underlining by the undersigned)

Discussion

[13] At the outset, the Court notes that Plaintiff does not contest that an application under article 489 C.C.P. is the correct procedural vehicle for attacking the Order.[4]

[14] The Court further notes that Plaintiff does not contest in any way that section 2 of the BCRA does not permit the documentary request contained in the Letter Rogatory and granted by Justice Poulin in conclusion 6 of the Order. Therefore, unless the Court can conclude that section 2 of the BCRA is unconstitutional, inoperative or of no force or effect in the present circumstances, the Motion must be granted, at least with respect to conclusion 6 of the Order.

[15] However, this Court must state that it shares the evident dislike of "blocking statutes" (such as the BCRA) expressed by La Forest J., who penned the unanimous judgment of the Supreme Court of Canada in *Hunt* v. *T&N PLC*:[5]

> "[…] The whole purpose of a blocking statute is to impede successful litigation or prosecution in other jurisdictions by refusing recognition and compliance with orders issued there. Everybody realizes that the whole point of blocking statutes is not to keep documents in the province, but rather to prevent compliance, and so the success of litigation outside the province that that province finds objectionable. This is no doubt part of sovereign right, but it certainly runs

[4] See *Nesmith* v. *Benesh*, [1983] C.A. 549 at 551; *Ram Laminating Products Inc.* v. *Unit Structures Inc.*, [1990] R.D.J. 330 at 331 (C.A.).

[5] *Supra* note 3 at 327.

> counter to comity. In the political realm it leads to strict retaliatory laws and power struggles. And it discourages international commerce and efficient allocation and conduct of litigation. […]"

Notice to the Attorney General under Article 95 C.C.P.

[16] In her Written Arguments of March 6, 2007, Plaintiff's attorney suggested that the Supreme Court's decision in *Hunt*, has "opened the door to arguments that the BCRA is entirely unconstitutional". However, in her Additional Written Argument of March 16, 2007, she "refines" Plaintiff's argument by stating that the Supreme Court's criticism of the BCRA in *Hunt* is merely support for "our argument for implied repeal".

[17] Notwithstanding the refinement of Plaintiff's argument based on *Hunt*, it still runs afoul of article 95 C.C.P. Leaving aside the phrase *"may be declared inapplicable constitutionally"*, the Court is still left with the prohibition that no provision of a Québec statute may be declared *"invalid or inoperative or of no force or effect"* unless a 30-day notice, setting forth in a precise manner the nature of Plaintiff's pretensions and the grounds relied upon, has been received by the Attorney General.

[18] If, in fact, the BCRA was "impliedly repealed" by the SPA (or for that matter by article 3155 C.C.Q.), it could certainly be said that the BCRA was "inoperative" or "of no force or effect".

[19] In the Court's opinion, failure to give the appropriate notice to the Attorney General under article 95 C.C.P. is fatal to all of Plaintiff's arguments.[6] However, in case this Court is wrong on this point, it will now consider Plaintiff's argument on "implied repeal".

Is the BCRA impliedly repealed by section 9 of the SPA?

[20] Based upon the rules of statutory interpretation, it is the Court's opinion that the BCRA has not been "impliedly repealed" by the first paragraph of section 9 of the SPA.

[21] The first paragraph of section 9 of the SPA has existed in its present form since March 19, 1921.[7]

[22] The BCRA did not come into effect until February 21, 1958,[8] i.e., the first paragraph of section 9 of the SPA existed for more than thirty-five years before the advent of the BCRA.

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6 See Denis Ferland and Benoît Emery, *Précis de procédure civile du Québec*, vol. 1, 3d ed. (Cowansville: Yvon Blais, 1997) at 167.

7 This first paragraph came into being as article 7541(a) of the R.S.Q. 1909 by 1921, 11 Geo. V, c. 88, s. 1. Such paragraph became section 16 of the R.S.Q. 1925, c. 277 and finally became the first paragraph of section 9 of c. P-27 of the present *Revised Statutes of Québec*.

8 See 1957-58, 6-7 Eliz. II, c. 42.

[23] The BCRA was adopted by the Québec legislature as remedial legislation because of perceived abuses under American discovery procedures in antitrust matters concerning Québec companies. As remedial legislation, the BCRA should be interpreted in a broad and liberal manner.[9]

[24] The plethora of modern legislation does sometimes make conflicts between rules contained in different statutory enactments inevitable, be they genuine or only apparent. However, courts are extremely reluctant to rule that there is a conflict between two statutory enactments. Furthermore, there is a strong presumption against implied repeal of one statutory enactment by another. Any interpretation permitting reconciliation is preferred because it assumes that this better reflects the work of a rational legislature.[10]

[25] Where two statutes are truly considered to be inconsistent, one may be deemed to repeal the other by implication, *"… if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together."*[11]

[26] Generally speaking, one grants priority to more recent enactments. As Pierre-André Côté points out:[12]

> "Giving priority to the more recent statute is almost self-explanatory. In adopting a statute, the legislature is presumed aware of the content of existing legislation. If the new enactment is inconsistent with a prior one, then Parliament is deemed to have intended to derogate from prior legislation. The more recent expression of the will of the legislature should be retained. […]"

[27] A few paragraphs later, Côté makes reference to the *Civil Code of Québec* and adds:[13]

> "Even though the *Civil Code* has, in private law, the character of fundamental law, it is firmly established that in principle, the provisions of the *Civil Code* (which is of general application) do not take precedence over earlier statutes of a particular nature, unless, evidently, the legislature has formally expressed the contrary."

[28] As the second paragraph of the Preliminary Provision of the *Civil Code* points out, *"the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it"*. In the Court's opinion, the BCRA is an exception to article 3155 C.C.Q.

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9 See *Renault* v. *Bell Asbestos Mines Ltd*, [1980] C.A. 370 at 372; cited by LeBel J. in *Walsh* v. *Gaitan & Cusack*, [1993] R.D.J. 621 at 626 (C.A.).

10 Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Toronto: Carswell, 2000) at 349.

11 See *Daniels* v. *White*, [1968] S.C.R. 517 at 526.

12 *The Interpretation of Legislation in Canada*, *supra* note 10 at 358.

13 *Ibid.* at 360.

[29] It is true that, in virtue of article 3155 C.C.Q., a Québec court has authority to declare a foreign decision enforceable, **but only "where applicable"**.

[30] In the present context, as the BCRA is the more recent statute, section 9 of the SPA, the earlier legislation, cannot be said to have "impliedly repealed" section 2 of the BCRA.

[31] Furthermore, the BCRA and the SPA are capable of "standing together". The BCRA is limited to documents relating to business concerns in Québec. Section 9 of the SPA deals not only with the examination of witnesses under letters rogatory in foreign civil or commercial cases, but also the production of any writing or document, provided such writing or document does not relate to a business concern in Québec.

[32] In fact, the Court of Appeal has already considered the interaction between section 2 of the BCRA and section 9 of the SPA:[14]

> "L'intimée nous propose que justement l'article 9 de la *Loi sur certaines procédures* est une loi du Québec qui autorise l'envoi des documents.
>
> Avec égard, cette proposition me paraît mal fondée. « La loi du Québec » à laquelle réfère le paragraphe d) de l'article 3 de la *Loi sur les dossiers d'entreprises* ne peut être qu'une loi particulière qui autorise spécifiquement le transport ou l'envoi d'un document hors du Québec et non pas une disposition comme celle de l'article 9 de la *Loi sur certaines procédures*. Ce dernier article permet à la Cour supérieure du Québec d'aider un tribunal étranger pour l'assignation de témoins et la production de documents sous la réserve implicite cependant de l'article 2 de la *Loi sur les dossiers d'entreprises*. Avant d'exercer sa discrétion en application de l'article 9 de la *Loi sur certaines procédures* et de venir en aide au tribunal étranger, le tribunal québécois doit s'assurer que l'aide au tribunal étranger n'est pas défendue par une loi de son pays."

[33] It is true that much information in today's business world is likely to have been recorded in writing or electronically. However, the BCRA should not be interpreted as shielding a witness from answering questions on which the witness has knowledge independently of the existence of any confirming documentation, be it printed or electronic. The BCRA is not information protection legislation; it protects documents and not information acquired independently of the documents.

[34] Finally, the words of Paré J. (acting in chambers) of the Court Appeal in *Asbestos Corporation* v. *Eagle-Picher Industries Inc.* are relevant:[15]

> "On objecte à ce motif que la politique en matière de commission rogatoire veut qu'on coopère avec les tribunaux étrangers dans l'administration de la justice et

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[14] *Asbestos Corporation Ltd* v. *Eagle-Picher Industries Inc.*, [1984] R.D.J. 253 at 259 (C.A.); see also *Teleglobe Communications* v. *B.C.E. Inc.* (July 7, 2005), Montréal 500-17-024842-059 (C.S.).

[15] [1983] R.D.J. 76 at 82 (C.A.).

> qu'il s'agit en l'espèce de recours normaux en dommages-intérêts que nos propres cours ne doivent pas indûment obstruer. Je crois plutôt que toute personne est en droit d'invoquer la loi qui lui procure un avantage et d'en exercer à son profit les dispositions. Il ne m'appartient pas de juger en l'espèce ni de la qualité de la loi ni des intentions de la requérante qui l'invoque."

[35] Notwithstanding the lack of enthusiasm expressed by several judges of the Québec Court of Appeal concerning the BCRA, Nichols J. summarized the situation best in *Pelnar* v. *Insurance Co. of North America*:[16]

> "Je réalise que la protection accordée par cette loi va très loin, peut-être même trop loin. Mais il s'agit là d'un domaine qui ne relève pas des tribunaux.
>
> Par les deux arrêts cités plus haut notre Cour a fait ressortir l'ampleur de la protection qu'on y trouve. Il ne saurait être question maintenant d'apporter des distinctions de pure accommodation. Il s'agit d'une loi frappée en termes généraux. Sa portée ne peut être restreinte que par l'autorité politique qui l'a adoptée."

[36] Because section 2 of the BCRA and section 9 of the SPA have existed side by side for almost fifty years, it is the Assemblée nationale of Québec that must decide the fate of the BCRA and not the courts of Québec, unless the constitutionality of this legislation is challenged in the proper manner.

FOR THESE REASONS, THE COURT:

> REVOKES conclusion 6 of the Order rendered February 22, 2007 by Justice Hélène Poulin, without costs.

A. Derek Guthrie, J.S.C.

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[16] [1985] R.D.J. 354 at 360 (C.A.).

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Date of hearing: March 6, 2007