



## THE EFFECT OF FOREIGN BLOCKING LEGISLATION IN CANADA

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Several countries have enacted so-called "blocking legislation". Blocking legislation mandates the confidentiality of information and documents and attempts to block foreign efforts to obtain evidence from residents of the enacting jurisdiction. It is often enacted by countries seeking to foster banking and financial industries, such as Switzerland, the Bahamas, Panama and Vanuatu. It generally prohibits residents of those countries and corporations doing business there disclosing confidential business information about others doing business there.

When persons connected with countries with blocking legislation become involved in Canadian litigation, they may feel prevented by the legislation from complying with Canadian discovery and trial procedures. They may seek to use the legislation as an excuse for not doing so. There are only a few Canadian decisions dealing with the Canadian courts' reaction to a party's use of blocking legislation. Some general principles can be extrapolated from those decisions.

Whether the Canadian courts will give effect to foreign blocking legislation appears to depend on the status in the Canadian litigation of the person seeking to rely on the legislation and on the jurisdiction in which they reside. If the person seeking to rely on blocking legislation is a true party in the Canadian litigation, with a real *lis* between it and another party, the Canadian courts will probably not give effect to the legislation. They will probably require the party to give evidence in the Canadian litigation. This is true whether the party is a plaintiff or defendant.

For example, in Comexter Inc. v. Cassidy (17 July 1987) Vancouver Registry No. CA007975, Taggart J.A. refused a Panamanian corporate plaintiff with a Swiss business address leave to appeal an order requiring it to deliver a further list of documents in a civil action in British Columbia. He held a Swiss blocking statute did not excuse the plaintiff from producing documents. The proposed appeal therefore had no merit. He held the plaintiff, with a real interest in the outcome of the litigation and a real *lis* with the defendant, could not rely on the



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blocking legislation to support its refusal to produce documents. This was so even though the legislation included penal sanctions for breaching it.

Similarly, in Comaplex Resources International Ltd. v. Schaffhauser Kantonalbank (1990), 42 C.P.C. (2d) 230, Master Sandler of the Ontario Supreme Court held a Swiss blocking statute did not excuse a Swiss defendant bank from producing documents and answering questions at an examination for discovery in a civil action in Ontario (see also (1991), 84 D.L.R. (4th) 343 (Ont. Ct. (Gen. Div.))).

Although Master Sandler did not permit the defendant to rely on the Swiss blocking statute to relieve it from its obligation to give discovery, he held the prohibition in the legislation was one of the factors the court would consider if the defendant did not give proper discovery and the plaintiff then applied for sanctions against it as a result.

In considering a sanctions application Master Sandler held the court should consider the following factors, derived from American jurisprudence:

- The vital national interests of each jurisdiction;
- The extent and nature of the hardship inconsistent enforcement actions would impose on the party;
- The extent to which the required discovery was to take place in the foreign state;
- The nationality of the party;
- The extent to which enforcement by either state could be expected to achieve compliance with its laws;
- The importance of the information and documents to the conduct of the litigation; and
- The good and bad faith of the party resisting discovery, including efforts to comply with the discovery requirements and whether the party's inability to do so was contributed to by its own conduct.



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If the person seeking to rely on the foreign blocking legislation is not a party but only a witness in the Canadian litigation, whether the Canadian courts will require them to give evidence despite the legislation appears to depend on where they reside.

If the witness resides in the foreign jurisdiction, they will probably not be ordered to violate its blocking legislation and expose themselves to the resulting penalties. For example, in Frischke v. Royal Bank of Canada (1977), 80 D.L.R. (3d) 393 the Ontario Court of Appeal held a Panamanian blocking statute did excuse a Canadian bank and its Canadian employees from giving evidence in a civil action in Ontario which would have to be obtained from the bank's employees in Panama. The Court would not make an order which would require Panamanian residents to break Panamanian law by revealing this information to the Bank's Canadian employees. While the bank was technically a defendant in the Ontario action, this was only to permit the plaintiff to trace the money which was the subject of the action. There was no real lis between the plaintiff and the bank.

On the other hand, in Re Spencer (1983), 145 D.L.R. (3d) 344 (Ont. C.A.); affirmed (1985), 21 D.L.R. (4th) 756, the Supreme Court of Canada affirmed the Ontario Court of Appeal's decision that a Bahamian blocking statute did not excuse a witness, who was a Canadian citizen resident in Ontario, from testifying in a criminal action in Ontario. The Court was influenced by the fact that the witness had not resided in the Bahamas for 11 years, so its decision did not put him in real jeopardy of prosecution under Bahamian law. In those circumstances, the Court would not allow the laws of a foreign country to frustrate the administration of Canadian justice in respect of a Canadian citizen in domestic litigation.

The Court commented that because of the serious consequences of penal sanctions for violating foreign blocking legislation, where that legislation permitted an application for an order authorizing information to be revealed, it would be preferable for the Canadian courts to give the foreign resident time to seek such an order, rather than forcing it to violate the blocking legislation. In Comaplex Resources (1990), supra, the Court implied the foreign party's efforts to obtain such an order would be considered on a subsequent application for sanctions for refusing to make proper discovery.



There is Canadian blocking legislation. When foreign courts seek to compel Canadians to violate Canadian blocking statutes by giving evidence in foreign litigation, the Canadian courts will probably not assist, at least where the Canadians are not parties. For example, in Gulf Oil Corp. v. Gulf Canada Ltd. (1980), 111 D.L.R. (3d) 74, the Supreme Court of Canada refused to order the Canadian subsidiary of an American defendant to produce documents in a civil action in the United States where that production would have violated a Canadian blocking statute, even though the legislation may have been ultra vires. This statute (actually a regulation) was enacted to protect Canada's uranium mining industry. The Court held that the public policy of Canada as represented by the regulation was paramount.

The Canadian courts have also held that, given the nature of the Canadian confederation, provincial blocking legislation can have no effect as among the Canadian provinces and territories. In Hunt v. T&N, plc (1993), 85 B.C.L.R. (2d) 1, the Supreme Court of Canada held the Quebec Business Concerns Records Act was ultra vires Quebec under the Constitution, because it did not respect minimum standards of order and fairness and ran counter to the fundamental principle of inter-provincial comity. The Court held the Act did not excuse a Quebec corporation from producing documents in civil litigation in British Columbia. This statute, and the similar Ontario Business Records Protection Act, were enacted to protect Canadian corporations from American anti-trust legislation.

This decision effectively overrules the Quebec Court of Appeal's decision in 2632-7502 Quebec Inc. v. Pizza Canada Inc. (1993), 103 D.L.R. (4th) 45. In that case the Court had held inter-provincial comity did not require the Ontario resident chief executive officer of an Ontario corporation to breach the Ontario Business Records Protection Act by bringing business records of the corporation to Quebec for an examination for discovery in a Quebec civil action.

There is nothing in Hunt to abrogate the paramountcy of Canadian public policy over foreign evidentiary requirements in Gulf Oil, supra. Canadian courts will probably not require Ontario and Quebec corporations and residents to breach their provinces' blocking legislation by producing documents and giving evidence in foreign litigation.

In summary, when a person tries to rely on foreign blocking legislation as an excuse for not complying with Canadian discovery and trial procedures the response of the Canadian courts



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appears to depend on the status in the Canadian litigation and the jurisdiction of residence of that person.

If the person is a true party in the Canadian litigation the Canadian courts will probably not permit them to use the blocking legislation as such an excuse, regardless of whether they are plaintiff or defendant and regardless of where they reside. If the person is a witness the Canadian courts' response will depend on their jurisdiction of residence. If they reside in the jurisdiction which enacted the blocking legislation the Canadian courts will probably not order them to violate it. If they reside elsewhere the Canadian courts will probably require them to comply with Canadian discovery and trial procedures.

The Canadian courts should give such a person time to apply to the foreign courts for an order permitting them to comply with the Canadian requirements, if such an order can be obtained under the blocking legislation. If the person continues to refuse to comply with Canadian requirements after the Canadian courts have held the foreign blocking legislation does not provide an excuse for doing so, the Canadian courts will consider the factors discussed in Comaplex Resources International in determining what sanctions should be imposed.