

# *Fordham International Law Journal*

---

*Volume 10, Issue 4*

1986

*Article 2*

---

## Recent Canadian Blocking Legislation: A Vehicle to Foster Extraterritorial Discovery Cooperation Between the United States and Canada?

Catherine Botticelli\*

\*

Copyright ©1986 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Recent Canadian Blocking Legislation: A Vehicle to Foster Extraterritorial Discovery Cooperation Between the United States and Canada?

Catherine Botticelli

## **Abstract**

This Note argues that the adoption of FEMA should signal to the United States that there is a need for a formalized agreement with Canada to minimize future discovery conflicts in civil litigation. Part I analyzes the trend in the United States federal courts towards enforcement of extraterritorial discovery orders. Part II discusses the ineffectiveness of pre-existing Canadian blocking statutes in limiting United States discovery. Part III examines the underlying purposes of FEMA's enactment and argues that now is an appropriate time for the United States to enter into a civil discovery treaty with Canada.

## NOTES

### RECENT CANADIAN BLOCKING LEGISLATION: A VEHICLE TO FOSTER EXTRATERRITORIAL DISCOVERY COOPERATION BETWEEN THE UNITED STATES AND CANADA?

#### INTRODUCTION

The increased enforcement of discovery orders beyond the borders of the United States<sup>1</sup> has invoked considerable criticism from Canada, which views these extraterritorial orders as contrary to the principle of sovereign equality.<sup>2</sup> Accordingly, Canada has taken steps to limit United States discovery within its borders.<sup>3</sup> The latest in a series of Canadian blocking statutes,<sup>4</sup> the Foreign Extraterritorial Measures Act<sup>5</sup>

---

1. See, e.g., *In re Société Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.) (discovery compelled in France), cert. granted, 106 S.Ct. 2888 (1986); *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984) (discovery compelled in Cayman Islands from Canadian banking corporation), cert. denied, 469 U.S. 1106 (1985); *In re Westinghouse Elec. Corp.*, 563 F.2d 992 (10th Cir. 1977) (discovery compelled in Canada); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979) (discovery compelled in Canada, Australia, South Africa and Switzerland).

2. See Campbell, *The Canada-United States Antitrust Notification and Consultation Procedure, A Study in Bilateral Conflict Resolution*, 56 CAN. B. REV. 459, 482-3 (1978); Gottlieb, *Extraterritoriality: A Canadian Perspective*, 5 NW. J. INT'L L. & BUS. 459, 456-57 (1983). Canada's sentiments are in accord with the widespread objection in the international community to intrusive United States extraterritorial discovery. See 1 B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 696-98 (2d ed. 1986); Fedders, Wade, Mann & Beizer, *Waiver By Conduct—A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAP. MKT. 1, 36 (1984) [hereinafter Fedders].

3. See, e.g., 3 CAN. CONS. REGS., ch. 366 (1978) [hereinafter SECURITY REGULATIONS] (prohibit removal from Canada of materials relating to Canadian uranium marketing activities during the period 1972-1975); ONT. REV. STAT. ch. 56 (1980) [hereinafter ONTARIO ACT] (disallows transfer of business records from province at request of foreign entity); QUE. REV. STAT. ch. D-12 (1977) [hereinafter QUEBEC ACT] (prevents removal of business records from province at request of foreign entity); see Note, *Foreign Blocking Legislation: Roadblocks to Effective Enforcement of American Antitrust Law*, (1981) ARIZ. ST. L.J. 945 n.5 [hereinafter Note, *Foreign Blocking Legislation*]; see also 1 B. HAWK, *supra* note 2, at 723 (recent Canadian blocking legislation is more extensive than any others).

4. See *supra* note 3. Discovery blocking statutes seek to limit compliance with foreign requests for business records and can include provisions holding foreign antitrust judgments unenforceable. See Fedders, *supra* note 2, at 35; Note, *Shortening the Long Arm of American Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213, 214 n.6 (1982).

(FEMA), can potentially eliminate foreign document discovery in Canada.<sup>6</sup>

This Note argues that the adoption of FEMA should signal to the United States that there is a need for a formalized agreement with Canada to minimize future discovery conflicts in civil litigation. Part I analyzes the trend in the United States federal courts towards enforcement of extraterritorial discovery orders. Part II discusses the ineffectiveness of pre-existing Canadian blocking statutes in limiting United States discovery. Part III examines the underlying purposes of FEMA's enactment and argues that now is an appropriate time for the United States to enter into a civil discovery treaty with Canada.

### I. *AMERICAN EXTRATERRITORIAL DISCOVERY JURISDICTION*

It is an established principle in the United States that its courts may order the production of documents in foreign countries, if the court has in personam jurisdiction over the party in control of the documents.<sup>7</sup> However, whether or not a United States court will exercise this power, when presented with a conflicting foreign law, is not as clear.

#### A. *Traditional Approach*

In *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*,<sup>8</sup> the plaintiffs refused to surrender documents located in Switzerland, arguing that to do so would violate Swiss penal and secrecy laws.<sup>9</sup> In response, the United States district court penalized the plaintiffs by dismissing the

5. CAN. STAT. ch. 49 (1985).

6. *Id.* § 4 (Attorney General of Canada permitted to seize discovery documents if there is reason to believe a blocking order issued pursuant to the statute will not be honored).

7. *United States v. First Nat'l City Bank*, 396 F.2d 897, 901 (2d Cir. 1968); see *In re Société Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), cert. granted, 106 S.Ct. 2888 (1986); *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); see also *United States v. Vetco Inc.*, 644 F.2d 1324 (9th Cir.) (*Société Internationale* did not absolutely bar extraterritorial discovery which violates foreign law), *aff'd*, 691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981).

8. 357 U.S. 197 (1958).

9. The Swiss laws at issue were Article 273 of the Swiss Penal Code which is concerned with the divulgence of business secrets and Article 47 of the Swiss Banking Law which relates to the secrecy of bank records. *Id.* at 199-200.

action<sup>10</sup> and the court of appeals affirmed.<sup>11</sup> The United States Supreme Court affirmed the validity of the discovery order, notwithstanding the Swiss statutes, and set forth three factors that governed its decision: 1) the strength of United States interests; 2) the importance of the documents to the litigation, and 3) the nationality of the party required to produce the relevant documents.<sup>12</sup> However, the Supreme Court overturned the dismissal and ordered the suit reinstated reasoning that the plaintiffs made extensive efforts in good faith to comply with the order,<sup>13</sup> and finding that "a fear of criminal prosecution constitutes a weighty excuse for nonproduction."<sup>14</sup>

In the years immediately following *Société Internationale*, the predominant view in the United States federal courts was that production orders that require parties to violate foreign laws should not be enforced.<sup>15</sup> The proponents of this comity view<sup>16</sup> expanded upon the rule—previously set forth by the

10. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. McGranery*, 111 F. Supp. 435, 438 (D.D.C. 1953), *aff'd as modified sub nom. Société Internationale pour Participations Industrielles et Commerciales, S. A. v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *rev'd sub nom. Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

11. *Société Internationale Participations Industrielles et Commerciales, S. A. v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *rev'd sub nom. Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

12. *Société Internationale*, 357 U.S. at 204-06.

13. *Id.* at 211-12.

14. *Id.* at 211.

15. See, e.g., *In re Application of Chase Manhattan Bank*, 297 F.2d 611, 612 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960); *First Nat'l City Bank v. Internal Revenue Serv.*, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960)

The formula emerging from these cases may be summarized as follows: Where production of records located in another country would place the witness ordered to furnish them in jeopardy of criminal liability under the laws of the country, the duty to proceed by appropriate process within the foreign country shifts to the party seeking production, while a vague duty to "cooperate" remains with the addressee of the subpoena. The only evidence necessary to cause this shift is proof of the foreign prescription and, in the face of such evidence, other factors appear irrelevant.

Note, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal*, 37 N.Y.U. L. REV. 295, 300 (1962).

16. See generally Note, *Compelled Waiver of Bank Secrecy in the Cayman Islands: Solution to International Tax Evasion or Threat to Sovereignty of Nations?*, 9 FORDHAM INT'L L.J. 680, 715 n.158 (1986); Comment, *Ordering Production of Documents from Abroad in Violation of Foreign Law*, 31 U. CHI. L. REV. 791, 794-96 (1964). "Comity is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws." United States v.

Supreme Court in *Underhill v. Hernandez*,<sup>17</sup>—that courts of the United States should not examine the validity of a foreign sovereigns' acts within the sovereigns' borders.<sup>18</sup>

### B. *Modern Approach*

United States federal courts now look beyond the mere existence of a foreign blocking law in determining whether to enforce extraterritorial discovery orders.<sup>19</sup> The comity view presently lacks support because its deferential stance disregards the interests of the United States and, in effect, allows local law to be dictated by foreign law.<sup>20</sup> The prevailing modern approach is factor analysis, set forth in the Restatement (Second) of the Foreign Relations Law of the United States<sup>21</sup> (Restatement Second), which is used to determine the appro-

Bank of Nova Scotia, 691 F.2d 1384, 1390 (11th Cir. 1982) (quoting *Sompportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972)), *cert. denied*, 462 U.S. 1119 (1983).

17. 168 U.S. 250 (1897).

18. *See id.* at 252.

19. For a broad discussion of current judicial approaches to the treatment of foreign blocking laws, see Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320, 1327-1339 (1983) [hereinafter Note, *Extraterritorial Discovery*]; Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877, 887-903 (1982) [hereinafter Note, *Compelling Production*]; Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 853-74 (1986) [hereinafter Note, *Strict Enforcement*].

20. *See*, *United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1389-1391 (11th Cir. 1982) (deferring to foreign law would emasculate the grand jury process), *cert. denied*, 462 U.S. 1119 (1983); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976) (adopting a comity approach would create an anomalous situation whereby foreign law would control local law), *cert. denied*, 429 U.S. 1096 (1977); *S.E.C. v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981) (allowing foreign entity to do business in the United States then resist accountability for its actions claiming anonymity under foreign law would be a travesty of justice); *see also* Note, *Extraterritorial Discovery*, *supra* note 19, at 1328; Note, *Strict Enforcement*, *supra* note 19, at 855-56.

21. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) [hereinafter RESTATEMENT SECOND]. The Restatement Second has been revised since 1965. *See infra* note 30 and accompanying text (discussion of the Restatement Revised Tentative Draft No. 7 factorial approach). The following cases demonstrate the widespread use of the Restatement factor approach in the federal courts: *In re Société Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), *cert. granted*, 106 S.Ct. 2888 (1986); *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); *In re Westinghouse Elec. Corp.*, 563 F.2d 992 (10th Cir. 1977); *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

priateness of sanctions in a case of noncompliance, as well as the validity of discovery orders.<sup>22</sup> The Restatement Second approach requires an examination of a wide number of factors, including a balancing of national interests.<sup>23</sup> In practice, the scale often tips towards the United States because the usual outcome favors the enforcement of the discovery order.<sup>24</sup>

A more stringent factorial approach is based on the *Société Internationale* decision.<sup>25</sup> This approach does not call for the

---

22. See, e.g., *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *United States v. Nova Scotia*, 691 F.2d 1384, 1390 (11th Cir.), cert. denied, 462 U.S. 1119 (1983); *In re Westinghouse Elec. Corp.*, 563 F.2d 992 (10th Cir. 1977); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789 (S.D.N.Y. 1984).

23. RESTATEMENT SECOND, *supra* note 21, § 40 requires an examination of five factors:

- (a) vital national interests of each of the states;
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person;
- (c) the extent to which the required conduct is to take place in the territory of the other state;
- (d) the nationality of the person; and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Various federal courts have expanded upon the Restatement Second approach using the five factors, as well as principles from the *Société Internationale* decision. See *United States v. Vetco Inc.*, 644 F.2d 1324, 1332 (9th Cir.) (in addition to the Restatement factors, court examined the importance of the documents to the litigation), *aff'd*, 691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *S.E.C. v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 118 (S.D.N.Y. 1981) (considered good faith of non-producing party, as well as Restatement factors, when determining appropriateness of sanctions).

24. See, e.g., *In re Société Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.) (district court properly ordered defendants to comply with plaintiff's discovery requests, despite existence of French blocking statute), cert. granted, 106 S.Ct. 2888 (1986); *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984) (upheld fine of US\$1,825,000 against Canadian bank for failure to comply with grand jury subpoena, despite bank's assertion that compliance would violate Cayman Islands bank secrecy laws), cert. denied, 469 U.S. 1106 (1985); *United States v. Chase Manhattan Bank, N.A.*, 584 F. Supp. 1080 (S.D.N.Y. 1984) (granted motion to compel production of summoned documents, despite potential violations of Hong Kong bank secrecy law); see also *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985) (upheld order requiring defendant to direct Cayman Islands bank to disclose his records, even though bank was subject to criminal liability under Cayman Law).

25. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); see, e.g., *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1145-48 (N.D. Ill. 1979) (court interpreted holding in *Société Internationale* to advocate a factorial approach that excludes an examination of the interests of the foreign government in its blocking legislation and limits its inquiry to different factors depending upon the stage of the controversy).

examination of the interests of the foreign country.<sup>26</sup> Instead, it utilizes a similar dissected mode of analysis found in *Société Internationale*.<sup>27</sup> At the discovery order issuance stage, the interests of the United States, document importance and the flexibility of the foreign government in the enforcement of its blocking law are reviewed.<sup>28</sup> In determining whether to sanction a noncomplying party, the examination is limited to a consideration of the non-producing party's overall conduct.<sup>29</sup> The most recent draft of the Restatement (Revised) of the Foreign Relations Law of the United States (Restatement Revised) advocates a factorial approach that essentially incorporates the Restatement Second and the *Société Internationale* dissected approach.<sup>30</sup>

The discretionary nature of these factorial approaches has led to increasing judicial enforcement of United States extra-territorial discovery orders.<sup>31</sup> Although both the Restatement Second and the Restatement Revised require the United States judiciary to evaluate the importance of the interests of the United States against those of the foreign government,<sup>32</sup> the federal courts have demonstrated that there exists a predisposition to favor United States interests.<sup>33</sup> The wide adoption of

---

26. See *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

27. See *supra* notes 11-13 and accompanying text.

28. See *In re Uranium Antitrust Litig.*, 480 F. Supp. at 1154-56, in which the court determined that a discovery order should issue compelling the defendants to produce documents located abroad after a consideration of the strength of United States interests in the litigation, the importance of the documents to the controversy and the degree of leniency in the application of the foreign blocking laws at issue.

29. See *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 307 (S.D. Cal. 1981) (upheld imposition of sanctions against plaintiff, despite Canadian blocking legislation, after a finding that relevant documents were purposefully housed in Canada in anticipation of United States antitrust litigation).

30. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 437 (Tent. Draft No. 7 1986) [hereinafter RESTATEMENT REVISED]. The Restatement Revised maintains the Restatement Second factors, but only to the extent of determining whether a discovery order should issue. *Id.* § 437(1)(c). When determining whether to impose sanctions the Restatement Revised limits the inquiry to a review of the good faith of the non-producing party. *Id.* § 437(2)(a)(b).

31. See *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), cert. denied 469 U.S. 1106 (1985); *United States v. Vetco Inc.*, 644 F.2d 1324 (9th Cir.), aff'd, 691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979).

32. See RESTATEMENT REVISED, *supra* note 30, § 437(1)(c); RESTATEMENT SECOND, *supra* note 21, § 40(a).

33. See *supra* note 24 and accompanying text.



blocking statutes internationally<sup>34</sup> is intended to offset this trend.<sup>35</sup>

## II. CANADIAN BLOCKING LEGISLATION

Three Canadian blocking statutes existed before the enactment of FEMA.<sup>36</sup> They include two provincial statutes, the Ontario Business Records Protection Act<sup>37</sup> (Ontario Act) and the Quebec Business Concerns Records Act<sup>38</sup> (Quebec Act) and, one federal blocking statute, the Canadian Uranium Information Security Regulations<sup>39</sup> (Security Regulations). These early statutes were promulgated to thwart United States antitrust investigations.<sup>40</sup>

### A. The Ontario and Quebec Acts

The Ontario Act was passed in response to a Sherman Act<sup>41</sup> antitrust investigation in which a United States grand jury issued a subpoena for records relating to the Canadian paper and pulp industry.<sup>42</sup> Over fifty Canadian companies were subject to the order.<sup>43</sup> The Ontario government protested, believing the order to be a clear violation of the province's sovereignty.<sup>44</sup> Thus, the Ontario Act was enacted to serve as a defense mechanism against future instances of intru-

34. See Fedders, *supra* note 2 (by 1984 at least twenty-six countries had enacted discovery blocking statutes).

35. See 1 B. HAWK, *supra* note 2, at 718-19; Note, *Strict Enforcement*, *supra* note 19, at 846-49; Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L. J. 612, 613 n.5 (1979).

36. CAN. STAT. ch. 49 (1985).

37. ONTARIO ACT, *supra* note 3.

38. QUEBEC ACT, *supra* note 3.

39. SECURITY REGULATIONS, *supra* note 3.

40. See *infra* notes 41-46, 60-64 and accompanying text.

41. 15 U.S.C. §§ 1-7 (1976). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is to be declared illegal . . ." *Id.* § 1. (emphasis added).

42. See Fedders, *supra* note 2, at 36; Note, *Foreign Blocking Legislation*, *supra* note 3, at 951; Note, *Shortening the Long Arm*, *supra* note 4, at 253; Note, *Taking Evidence Abroad*, 8 TEX. INT'L L. J. 57, 80 (1973) [hereinafter Note, *Taking Evidence Abroad*].

43. *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 133 F. Supp. 522, 529 n.2 (S.D.N.Y. 1955), *aff'd*, 243 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956).

44. *Id.* The Premier of Ontario commented: "no citizen of the United States should forget that Canadians are just as proud of their own nationality and just as jealous of their own sovereignty as is any citizen of their own country." *Id.*

sive United States extraterritorial discovery.<sup>45</sup> Quebec, soon after, enacted a substantively similar blocking law for much the same reason.<sup>46</sup>

The Ontario and Quebec Acts are similar in scope. They each prohibit the removal from the provinces of all materials relating to any business carried on within their respective jurisdictions, at the request of an order or subpoena from any legislative, administrative or judicial authority outside the province.<sup>47</sup> The statute, however, is not self-enforcing because a provincial court order must issue before one can be criminally liable for complying with a foreign discovery request.<sup>48</sup> Despite their enforcement provisions, the Ontario and Quebec Acts provide a number of exceptions which tend to emasculate their potential effectiveness in limiting foreign discovery.<sup>49</sup>

These provincial statutes have rarely been invoked in United States litigation. In fact, treatment of the Ontario Act by the federal courts has been merely incidental. Recent cases are exemplary. In both *General Atomic Co. v. Exxon Nuclear Co.*<sup>50</sup> and *In re Uranium Antitrust Litigation*,<sup>51</sup> the Ontario Act was raised as a bar to Canadian discovery.<sup>52</sup> The courts, however, never addressed the validity of the statute because a provincial court order had never issued.<sup>53</sup> Therefore, the defendants

45. See 130 Canadian Sen. Deb. 359 no. 18 (Dec. 18, 1984) [hereinafter Senate Debates].

46. See Fedders, *supra* note 2, at 36; Note, *Foreign Blocking Legislation*, *supra* note 3, at 951; Note, *Shortening the Long Arm*, *supra* note 4, at 253; Note, *Taking Evidence Abroad*, *supra* note 42, at 80 n.152.

47. ONTARIO ACT, *supra* note 3, § 1; QUEBEC ACT, *supra* note 3, § 2.

48. ONTARIO ACT, *supra* note 3, § 2; QUEBEC ACT, *supra* note 3, §§ 4 & 5.

49. See *Petruska v. Johns-Manville Corp.*, 83 F.R.D. 32, 36 (E.D. Pa. 1979); *American Indus. Contracting Inc. v. Johns-Manville Corp.*, 326 F. Supp. 879, 880 (W.D. Pa. 1971). Both statutes allow documents to leave their respective provinces if: (a) the company or agency is furnishing them to its head office or affiliate consistent with regular business practices; (b) the request is from a company engaged in the sale of securities within the province and the documents are being sent to another jurisdiction where the sale of the securities of the company has been also authorized; (c) a broker or security issuer doing business in the province is sending them to another territory where it is licensed to similarly operate, or (d) it is authorized by the law of the province or the Canadian Parliament. ONTARIO ACT, *supra* note 3, § 1(a)-(d); QUEBEC ACT, *supra* note 3, § 3(a)-(d).

50. 90 F.R.D. 290 (S.D. Cal. 1981).

51. 480 F. Supp. 1138 (N.D. Ill. 1979).

52. *General Atomic*, 90 F.R.D. at 294; *In re Uranium Antitrust Litig.*, 480 F. Supp. at 1143.

53. 90 F.R.D. at 294; 480 F. Supp. at 1143.

would not have been penalized, pursuant to the statute, for complying with the discovery order.

The Quebec Act was successful in blocking United States discovery in the earliest case in which it was raised in defense of non-production of documents.<sup>54</sup> The court stated that production of foreign records should not be ordered where it would cause "a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures."<sup>55</sup> Nevertheless, in later decisions, the Quebec Act proved to be ineffective.<sup>56</sup> In one action, a United States district court held the statute inapplicable since the information requested would be in the possession of the United States parent corporation in the ordinary course of business, rather than the Canadian subsidiary.<sup>57</sup> Thus, the discovery request came within the purview of one of the statutory exceptions which allows the removal of documents if the company or agency is furnishing them to its head office or affiliate consistent with ordinary business practices.<sup>58</sup> Similarly, in another case the court was able to circumvent the Quebec Act by taking a strict reading of its statutory provisions.<sup>59</sup>

### B. *The Security Regulations*

The Security Regulations resulted from a United States Department of Justice investigation of alleged price fixing among certain producers and suppliers of uranium, both inside and outside the United States.<sup>60</sup> Soon after the com-

---

54. See *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960).

55. *Id.* at 152.

56. See *infra* notes 57-59 and accompanying text.

57. See *American Indus. Contracting, Inc. v. Johns-Manville Corp.*, 326 F. Supp. 879, 880 (W.D. Pa. 1971).

58. See *id.*

59. See *Petruska v. Johns-Manville Corp.*, 83 F.R.D. 32 (E.D. Pa. 1979). The court upheld a production order directed at documents located in Quebec, finding that the order did not violate the Quebec Act. *Id.* at 36. The court noted that a provincial court order to block discovery was never obtained, and there was no indication that the Act would be violated if: 1) the defendants made copies of the relevant documents or 2) the defendants made the documents available in Quebec, instead of in the United States. *Id.*

60. I B. HAWK, *supra* note 2, at 549-50. For a general discussion of this controversy, see J. TAYLOR & M. YOKELL, *YELLOWCAKE: THE INTERNATIONAL URANIUM CARTEL AND ITS AFTERMATH* (1979); Comment, *The International Uranium Cartel: Litigation & Legal Implications*, 14 TEX. INT'L L.J. 59 (1979).

mencement of the investigation, the Canadian Legislature adopted the Security Regulations, pursuant to the authority of Canada's Atomic Energy Control Act,<sup>61</sup> to suppress the removal of materials relevant to the Canadian uranium industry.<sup>62</sup> The regulations have limited applicability, unlike the provincial statutes. They prevent the removal from Canada of information relating to uranium marketing activities during the period from 1972 to 1975.<sup>63</sup> The legislature sought to block the United States investigation because the Canadian Government apparently had encouraged its uranium producers to participate in an informal marketing arrangement to assist its failing uranium industry.<sup>64</sup>

The Security Regulations were invoked by several parties seeking to block extraterritorial discovery in Canada in the ensuing United States litigation concerning the alleged cartel activities, but the regulations were only partially successful.<sup>65</sup> In *In re Westinghouse Electric Corp.*,<sup>66</sup> a United States appellate court refused to uphold a contempt ruling against a United States corporation that did not comply with a discovery order concerning documents located in Canada.<sup>67</sup> After a balancing of United States and Canadian interests, fear of violating the Ca-

61. CAN. REV. STAT. ch. A-19 (1970).

62. SECURITY REGULATIONS, *supra* note 3, § 2. In 1975, the Canadian Legislature also amended its domestic antitrust law to allow Canadian nationals at the direction of the Restrictive Trade Practices Commission to disregard those foreign orders, laws or decrees that would adversely affect national interests. Note, *supra* note 4, at 255.

63. SECURITY REGULATIONS, *supra* note 2, § 2. Any knowing violation could subject a party to criminal prosecution punishable by imprisonment for up to five years and/or a fine not to exceed ten thousand dollars. *Id.*

64. *In re Westinghouse Elec. Corp.*, 78 D.L.R.3d 3, 24, 16 O.R.2d 273, 292 (Ont. High Ct. of Justice 1977). With the passage of the Security Regulations, the Minister of Energy and Resources for Canada issued a press release indicating government involvement in an uranium marketing arrangement to assist Canada's ailing uranium producers. *Id.* at 280. The press release implied that the United States contributed to Canada's uranium marketing problems, stating

The problems were compounded by United States policies which closed the large U.S. market to foreign uranium, and at the same time moved uranium from the U.S. government stockpile into the international market through conditions imposed on foreign users of U.S. uranium enrichment facilities. Concurrently, U.S. corporations were competing aggressively for sales outside of their protected domestic market.

*Id.*

65. See *infra* notes 66-72 and accompanying text.

66. 563 F.2d 992 (10th Cir. 1977).

67. *Id.* at 999.

nadian statute was deemed a valid excuse for non-production.<sup>68</sup> The court believed that Canada had a legitimate "national interest" in blocking the discovery request.<sup>69</sup>

In contrast, the court in *In re Uranium Antitrust Litigation*<sup>70</sup> upheld plaintiff's motion to compel the production of documents in Canada despite the Security Regulations.<sup>71</sup> In the court's view, they were promulgated for "the express purpose of frustrating the jurisdiction of the United States courts over the activities of the alleged international uranium cartel."<sup>72</sup>

Thus, both the Ontario and Quebec Acts have proven to be relatively ineffective in preventing the enforcement of United States extraterritorial discovery orders.<sup>73</sup> This ineffectiveness stems from the fact that they: 1) are provincial rather than national statutes; and therefore, have arisen infrequently in United States federal litigation proceedings;<sup>74</sup> 2) contain broad exceptions,<sup>75</sup> and 3) are not self-enforcing.<sup>76</sup> Canada's federal Security Regulations have also been unavailing because of their limited scope<sup>77</sup> and the suspect nature of their validity.<sup>78</sup> Hence, despite the many attempts to combat intrusive United States discovery orders, Canada remained unsuccessful at protecting its citizens from the aggressive overreach of United States courts.

### C. *The Foreign Extraterritorial Measures Act*

The enactment of FEMA,<sup>79</sup> Canada's first generally applicable federal blocking statute, is the result of a history of futile Canadian attempts to thwart intrusive United States discovery orders.<sup>80</sup> The statute is designed to put Canada on an equal footing with the United States in matters of extraterritorial dis-

---

68. *See id.*

69. *Id.* at 998.

70. 480 F. Supp. 1138 (N.D. Ill. 1979).

71. *Id.*

72. *Id.* at 1143.

73. *See supra* notes 50-59 and accompanying text.

74. *See id.*

75. ONTARIO ACT, *supra* note 3, § 1(a)-(d); QUEBEC ACT, *supra* note 3, § 3(a)-(d).

76. ONTARIO ACT, *supra* note 3, § 2; QUEBEC ACT, *supra* note 3, §§ 4-5.

77. SECURITY REGULATIONS, *supra* note 3, § 2.

78. *See supra* notes 72 and accompanying text.

79. CAN. STAT. ch. 49 (1985).

80. *See supra* notes 73-78 and accompanying text.

covery, so that Canadian interests will not continue to be ignored by the United States courts.<sup>81</sup> The statute is, in effect, a policy statement signalling to the United States that Canada is committed to protecting itself from United States discovery that infringes on Canadian sovereignty.<sup>82</sup> The hope of the Canadian government is that it will have a *preventive* effect, in that the United States will finally be forced to consider the concerns of Canada more seriously in relation to the extraterritorial application of United States discovery orders.<sup>83</sup>

FEMA is more extensive than its predecessor blocking statutes.<sup>84</sup> It prohibits, upon an order of the Canadian Attorney General, not only the disclosure of records in Canada, but also of documents located outside Canada if they are under the control of a Canadian citizen or resident.<sup>85</sup> The Attorney General can restrict any act in Canada that would facilitate the production or identification of such records to a foreign entity.<sup>86</sup> Moreover, he may obtain a court order to seize records located in Canada if evidence indicates that a non-production order will not be obeyed.<sup>87</sup> The statute also can prevent the enforcement or recognition of foreign antitrust judgments in Canadian courts<sup>88</sup> and contains a "clawback provision," which permits Canadian citizens, residents and corporations to sue for the return of all or part of a foreign antitrust judgment that they have paid.<sup>89</sup> Additionally, the statute allows the Canadian

---

81. 1 Canadian H.C. Deb. 1180, 1189 (Dec. 13, 1984) [hereinafter House of Commons Debates] in which Mr. Ian Waddell representing Vancouver-Kingsway stated:

We feel very strongly that we must be careful because we do not have an equal relationship with our great friends in the United States. The United States is a huge empire and we have become and are becoming more and more its colony. . . . [W]hen you are dealing with the Americans, it is like having the elephant dancing among chickens; every fellow for himself.

*Id.*

82. See Senate Debates, *supra* note 45, at 360.

83. See *id.* at 361 ("It may perhaps even be said that the type of legislation embodied in [FEMA] has a preventive effect, in that it signals to the outside world the concern of the Government of Canada with problems arising from extraterritorial application of foreign law.").

84. See *supra* notes 37-39 and accompanying text.

85. CAN. STAT. ch. 49, § 3(1)(a) (1985).

86. CAN. STAT. ch. 49, § 3(1)(b) & (c) (1985).

87. CAN. STAT. ch. 49, § 4 (1985).

88. CAN. STAT. ch. 49, § 8 (1985).

89. CAN. STAT. ch. 49, § 9 (1985).

government to respond in other situations involving intrusive foreign extraterritorial action.<sup>90</sup> Penalties, which may include a five year jail sentence, are provided for violators to ensure compliance with orders issued pursuant to the statute.<sup>91</sup>

### III. FEMA AND THE NEED FOR A TREATY BETWEEN THE UNITED STATES AND CANADA REGARDING EXTRATERRITORIAL DISCOVERY

#### A. *The Legislative History of FEMA and the Need for a Treaty*

Blocking measures are . . . used frequently as, arms programs by which countries provide themselves with negotiating weapons in diplomatic consultations to force compromises rather than as measures to block completely foreign [discovery] investigations.<sup>92</sup>

Canada was hesitant to adopt FEMA, and had considered a similar statute more than three years before FEMA was finally promulgated.<sup>93</sup> This reluctance demonstrates the Canadian belief that cooperation and consultation are the preferred routes to the settlement of controversies between nations.<sup>94</sup> Canada has statutes that call upon its courts to render assistance to foreign courts seeking evidence<sup>95</sup> and is open to the resolution of discovery conflicts through diplomatic channels.<sup>96</sup> However, the Canadian legislature believed, because of

---

90. CAN. STAT. ch. 49, § 5 (1985). For example, the Attorney General of Canada, with the concurrence of the Secretary of State of External Affairs, can prevent Canadian companies that are foreign owned or controlled from complying with export requirements set by those foreign countries. Senate Debates, *supra* note 45, at 362. The effects of this statute on other extraterritorial orders are beyond the scope of this Note and will not be discussed.

91. CAN. STAT. ch. 49, § 7 (1985). The statutory penalties include a maximum five year jail sentence and/or a ten thousand dollar fine. *Id.*

92. I B. HAWK, *supra* note 2, at 736.

93. See House of Commons Debates, *supra* note 81, at 1181. The statute was introduced earlier under the title Foreign Proceedings Judgments Bill. See Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Law*, 37 BUS. LAW. 697, 708 (1982).

94. See Senate Debates, *supra* note 45, at 361; see also Gotlieb, *supra* note 2, at 459-60.

95. *E.g.*, Canada Evidence Act, R.S. 1970, c.307, § 43; Ontario Evidence Act, R.S.O. 1960, c.125 § 58(1); Quebec Special Procedure Act, R.S.Q. 1941, c.342 § 16, reprinted in 2 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) (1986).

96. Senate Debates, *supra* note 45, at 361.

its previous inability to block intrusive United States discovery orders, that "such co-operation and consultation will be best assured only if Canada has the statutory authority to block unilateral measures of extraterritoriality."<sup>97</sup>

Presently, Canada is committed to renewing its relationship with the United States, a relationship it believes has deteriorated in recent years,<sup>98</sup> and endorses a policy intended to increase foreign investment in Canada.<sup>99</sup> The statute complements these goals because future conflicts can be avoided and diplomatic ties strengthened by leading the United States to the negotiating table.<sup>100</sup>

FEMA is clearly meant to be used as a last resort.<sup>101</sup> It was not promulgated for the express purpose of blocking discovery requests of the United States, but to foster cooperation between the two countries. The statute is purposely not self-enforcing and is triggered only after the Attorney General of Canada issues specific orders.<sup>102</sup> Such orders will issue if, in his opinion, a foreign tribunal has or is likely to exercise jurisdiction in a manner that adversely affects Canadian business interests or that otherwise infringes upon Canadian sovereignty.<sup>103</sup> This threshold determination must be made before any retaliatory action can be taken pursuant to the statute. Thus, FEMA, is designed to take effect only "after diplomatic efforts have been exhausted and irrenconcilable policy differences remain."<sup>104</sup>

### B. *United States Interests and the Need for a Treaty*

FEMA is a vehicle to force the United States to agree to resolve discovery conflicts inter-governmentally, and not in a unilateral fashion by United States courts.<sup>105</sup> It is intended to

97. *Id.*

98. *Id.* at 360-61.

99. The Canadian Parliament recently established a new agency called Investment Canada in order to encourage foreign investment. See House of Commons Debates, *supra* note 81, at 1189.

100. See Senate Debates, *supra* note 45, at 360.

101. See Senate Debates, *supra* note 45, at 361; House of Commons Debates, *supra* note 81, at 1181.

102. CAN. STAT. ch. 49, §§ 3(1), 5(1) & 8(1) (1985).

103. *Id.*

104. House of Commons Debates, *supra* note 81, at 1182.

105. Senate Debates, *supra* note 45, at 362.



be a shield, not a sword, "designed to ensure the preservation of Canadian authority in Canadian territory."<sup>106</sup> Nonetheless, it can be used as a sword because it gives the Canadian Attorney General discretion to obtain a court order to prevent the removal from Canada of documents relevant to foreign proceedings.<sup>107</sup> Indeed, FEMA is a powerful tool which can have serious implications for future United States extraterritorial discovery in Canada. Accordingly, it is in the best interest of the United States to look upon the statute's enactment as a signal to be more respectful of Canadian sovereignty when enforcing discovery requests. If not, the ability of the United States to obtain documents located in Canada relevant to United States judicial proceedings will be in jeopardy.<sup>108</sup>

The United States has already demonstrated an interest in mitigating discovery conflicts with Canada. A criminal discovery treaty between Canada and the United States was signed in 1985 and is awaiting ratification.<sup>109</sup> In 1984, the two nations entered into a new Understanding concerning antitrust discovery.<sup>110</sup> The Understanding provides detailed provisions for notification,<sup>111</sup> consultation,<sup>112</sup> and information gathering,<sup>113</sup> at the early stages of antitrust investigations or proceedings that are conducted by either country. It also calls for similar inter-governmental participation in private antitrust actions.<sup>114</sup>

---

106. *Id.*

107. CAN. STAT. ch. 49, § 4 (1985).

108. See Note, *Compelling Production*, *supra* note 19, at 908.

109. Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, done at Quebec City, March 18, 1985 (copy on file at the *Fordham International Law Journal*).

110. Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, reprinted in 23 I.L.M. 275 (1984) [hereinafter *1984 Understanding*]. This Understanding was meant to supercede previous similar agreements between the two countries regarding antitrust discovery—the Fulton-Rogers Understanding and its successor, the Basford-Mitchell Understanding. *Id.* § 12. Both suffered from procedural and substantive defects which rendered them relatively ineffective in impeding or resolving antitrust conflicts between the countries. See generally Campbell, *supra* note 2; Comment, *The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes*, 6 Nw. J. INT'L L. Bus. 1065, 1082-86 (1984-85) [hereinafter Comment, *New Guidelines*].

111. See *1984 Understanding*, *supra* note 110, §§ 2-3.

112. *Id.* §§ 4-5.

113. *Id.* §§ 8-9.

114. *Id.* § 11.

The overall effectiveness of the new Understanding is questionable,<sup>115</sup> however, as indicated by Canada's adoption of FEMA less than a year after the 1984 Understanding entered into force.<sup>116</sup> Accordingly, a formal treaty regarding all civil discovery is needed,<sup>117</sup> which will provide a definite framework for resolving conflicts involving competing national policies, as well as procedural devices for obtaining evidence.<sup>118</sup>

*C. Proposed Provisions of a Canada-United States Extraterritorial Civil Discovery Treaty*

A civil discovery treaty between Canada and the United States should not include a provision that gives either party the option to ignore agreed procedures,<sup>119</sup> and should provide for

---

115. As a vehicle to minimize potential discovery conflicts between the United States and Canada, the 1984 Understanding is weak in three respects. First, it specifically states that it is an understanding and not an agreement, 1984 Understanding, *supra* note 110, § 12, indicating that the United States need not accord it such weight as an agreement or treaty. In a recent decision, the Supreme Court indicated that the word 'treaty' in an act of Congress may encompass executive agreements, absent contrary legislative intent. See *Weinberger v. Rossi*, 456 U.S. 25, 36 (1982). Secondly, although both the United States and Canada agree to give "careful consideration to the significant national interests of the other," 1984 Understanding, *supra* note 110, § 6, the Understanding does not contain means to ensure that competing national interests will be fairly reconciled. Comment, *New Guidelines*, *supra* note 110, at 1068. It is precisely when there is a clear divergence between the policies of both countries that tensions are high and clear guidance is needed. Finally, the 1984 Understanding does nothing to minimize discovery disagreements between the United States and Canada in other areas of civil litigation, aside from private antitrust actions. 1984 Understanding, *supra* note 110, § 11. *But cf.* 1 B. HAWK, *supra* note 2, at 796 (1984 Understanding successful in mitigating discovery conflicts between United States and Canada in recent Justice Department investigation regarding takeover of Canadian firm by United States firm).

116. The Foreign Extraterritorial Measures Act was entered into force in February of 1985. 2 B. RISTAU, *supra* note 95, at CI-32A.

117. See Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747, 773 (1974) (advocates adoption of antitrust discovery treaty between, at least, the United States, United Kingdom, Switzerland, the Netherlands and Canada).

118. See 1 B. HAWK, *supra* note 2, at 795.

119. The ability of a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, done March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, to refuse to follow agreed procedures has been a factor leading to its ineffectiveness in facilitating cooperative extraterritorial discovery. Note, *Strict Enforcement*, *supra* note 19, at 851-52; see also Atwood, *Blocking Statutes and Sovereign Compulsion: Recent Developments and the Proposed Restatement*, 1985 *FORDHAM CORP. L. INST.* 327, 333 (B. Hawk ed. 1986) (the Hague Convention has been of little assistance in antitrust litigation because Art. 23 of the Convention au-

the channelling of irreconcilable conflicts to the diplomatic level.<sup>120</sup> For instance, a special committee can be appointed with one delegate chosen by each country and a third delegate appointed by both. While diplomatic negotiations are pending, a final determination of the case should be suspended and no sanctions imposed on the noncomplying party.<sup>121</sup> To ensure that conflicting national interests be fairly reconciled where intergovernmental discussions fail, the treaty should provide for an arbitration mechanism to permit an impartial party, like the Organization for Economic Cooperation and Development<sup>122</sup> (OECD), to resolve the dispute.<sup>123</sup> Court inquiries should be limited to evidentiary determinations of the relevancy of the documents in question and whether, if relevant, they can be obtained without resorting to an extraterritorial order.

Finally, the treaty should supply incentives for parties to obey discovery orders, in order to avoid the abuse of the diplomatic process for dilatory purposes. Severe sanctions should be imposed if a noncomplying party did not attempt to secure a waiver of the blocking law, "courted the legal impediments"<sup>124</sup> by deliberately placing documents outside the jurisdiction of the court in anticipation of litigation, or otherwise acted in bad faith. For example, the treaty could impose ret-

---

thorizes a signatory to declare at the time of ratification that it will not cooperate in pretrial discovery of documents as conducted in common law countries). Canada is not a signatory to the Convention. Note, Anshuetz, *International Discovery American-Style, and the Hague Evidence Convention*, 19 N.Y.U. J. INT'L L. & POL. 87, 88 n.15 (1986). For a broad discussion of the Hague Convention, see Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Convention*, 19 VAND. J. TRANSNAT'L L. 239 (1986); Radvan, *The Hague Convention on Taking Evidence Abroad for Commercial Matters; Several Notes Concerning its Scope, Methods and Compulsion*, 16 N.Y.U. J. INT'L L. & POL. 1031 (1984); Note, *Gathering Evidence Abroad: The Hague Evidence Convention Revisited*, 16 L. & POL'Y INT'L BUS. 963 (1984).

120. See Note, *supra* note 117, at 773 (recognizes need for diplomatic negotiation provisions in general antitrust discovery agreement).

121. *Id.*

122. The OECD has been active in encouraging business cooperation and minimization of discovery conflicts between nations, particularly in the antitrust context. 1 B. HAWK, *supra* note 2, at 741.

123. Note, *supra* note 117, at 773-74.

124. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208-09 (1958) (a finding that one has deliberately courted legal impediments can have a vital bearing on the justification for dismissal of the action).

roactive monetary sanctions computed from the original day the order was disobeyed.

*CONCLUSION*

FEMA is the result of frustrated Canadian attempts to block intrusive United States discovery orders. The potent enforcement provisions of the statute are meant to signal to the United States the strong interest Canada has in protecting itself from extraterritorial discovery which infringes on its sovereignty. The United States should respond to this outcry by entering into a formal civil discovery agreement with Canada, which will minimize future conflicts by indicating mutual respect for the sovereign interests of both nations.

*Catherine Botticelli\**

---

\* J.D. Candidate, 1988, Fordham University School of Law.