Court of Queen's Bench of Alberta

Citation: Geophysical Service Incorporated v Encana Corporation, 2016 ABQB 230

Date: 20160421

Docket: 0701 04061, 1101 15306, 1301 14139, 1301 02933, 1401 00777, 0901 08210, 1201 16166, 1201 05556, 1401 00646, 1401 03449, 1301 09664, 1301 07573, 1201 12278, 1401 00904, 1001 05568, 1301 09665, 0901 08209, 1301 15085, 1401 12230, 1301 07809, 1201 15228, 1401 05316, 1201 11934, 1301 07877, 1301 10045

Registry: Calgary

Action no. 0701 04061

Between:

Geophysical Service Incorporated

Plaintiff

- and -

Encana Corporation

Defendant

Action no. 1101 15306

And between:

Geophysical Service Incorporated

Plaintiff

- and -

612469 Alberta Limited Carrying on Business Under The Trade Name CalWest Printing & Reproductions

Defendant

Action no. 1301 14139

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Exxonmobil Canada Ltd. and Imperial Oil Limited

Defendants

Action no. 1301 02933

And between:

Geophysical Service Incorporated

Plaintiff

- and -

ARCIS Seismic Solutions Corp., Her Majesty The Queen In Right of Canada As Represented By The Attorney General of Canada On Behalf of The National Energy Board, Canada-Newfoundland and Labrador Offshore Petroleum Board and Companies A-Z

Defendants

Action no. 1401 00777

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Exploration Geosciences (UK) Limited, Her Majesty The Queen In Right of Canada As Represented By The Attorney General of Canada On Behalf of The Department of Natural Resources Canada and The National Energy Board and ABC Corporation Ltd.

Defendants

Action no. 0901 08210

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Lynx Canada Information Systems Ltd., Lynx Canada Information Systems Ltd., Operating as Lynx Information Systems Ltd., The Said Lynx Information System Ltd., Her Majesty The Queen In Right of Canada As Represented by The Attorney General of Canada On Behalf of Public Works and Government Services, The Department of Natural Resources Canada, The National Energy Board and Companies A-Z

Defendants

- and -

Her Majesty The Queen In Right of Canada As Represented by Public Works and Government Services Canada, The Department of Natural Resources Canada and The National Energy Board

Third Parties

Action no. 1201 16166

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Olympic Seismic Ltd., Her Majesty The Queen In Right of Canada As Represented by The Attorney General of Canada On Behalf of The National Energy Board and Companies A-Z

Defendants

Action no. 1201 05556

And between:

Geophysical Service Incorporated

Plaintiff

- and -

West Canadian Digital Imaging Inc., West Canadian Industries Group Ltd. and ABC Corporation Ltd.

Defendants

Action no. 1401 00646

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Plains Midstream Canada ULC, BP Canada Energy Group ULC and Companies A-Z

Defendants

Action no. 1401 03449

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Total S.A., Total E&P Canada Ltd., and The Canada-Newfoundland and Labrador Offshore Petroleum Board

Defendants

Action no. 1301 09664

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Edison S.P.A. and Edison International S.P.A.

Defendants

Action no. 1301 07573

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Conocophillips Canada Resources Corp., Canadian Natural Resources Limited, MGM Energy Corp., Kogas Canada Ltd., and Companies A-Z

Defendants

Action no. 1201 12278

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Canadian Discovery Ltd. and ABC Corporation Ltd.

Defendants

Action no. 1401 00904

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Antrim Energy Inc.

Defendant

Action no. 1001 05568

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Husky Oil Limited and Husky Oil Operations Limited

Defendants

Action no. 1301 09665

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Nalcor Energy – Oil and Gas Inc.

Defendant

Action no. 0901 08209

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Suncor Energy Inc.

Defendant

Action no. 1301 15085

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Murphy Oil Company Ltd.

Defendant

Action no. 1401 12230

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Devon ARL Corporation and ABC Company

Defendants

Action no. 1301 07809

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Statoil Canada Ltd.

Defendant

Action no. 1201 15228

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Anadarko Petroleum Corporation, Anadarko US Offshore Corporation (formerly Kerr McGee Oil & Gas Corporation), Canadian Natural Resources Limited and Companies A-Z

Defendants

Action no. 1401 05316

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Her Majesty The Queen In Right of Canada As Represented by The Attorney General of Canada Itself, and On Behalf of The Department of Natural Resources and The National Energy Board

Defendants

Action no. 1201 11934

And between:

Geophysical Service Incorporated

Plaintiff

- and -

NWEST Energy Corp., Shoal Point Energy Ltd. and Vulcan Minerals Inc.

Defendants

Action no. 1301 07877

And between:

Geophysical Service Incorporated

Plaintiff

- and -

JEBCO Seismic UK Limited; JEBCO Seismic (Canada) Company; JEBCO Seismic, LP; JEBCO/SEI Partnership LLC; and Companies A-Z

Defendants

Action no. 1301 10045

And between:

Geophysical Service Incorporated

Plaintiff

- and -

Corridor Resources Inc.

Defendant

Reasons for Judgment on the Copyright and Regulatory Common Issues
of the
Honourable Madam Justice K.M. Eidsvik

Table of Contents

I Introduction

[1] The Plaintiff, Geophysical Services Incorporated, ("GSI"), is a Canadian company that conducted offshore marine seismic surveys in the Canadian Atlantic and Arctic. It licences this marine seismic material (also referred to as "seismic data") to oil and gas companies mainly for exploration purposes.

[2] Over the years, some of GSI's seismic material has been deposited with Canadian and Provincial government authorities including the National Energy Board (the "NEB"), the Canada Newfoundland and Labrador Offshore Petroleum Board (the "Newfoundland Board") and the Canada Nova Scotia Offshore Petroleum Board (the "Nova Scotia Board") (collectively "the Boards") pursuant to legislative and policy requirements. Following the expiry of certain confidentiality periods, copies of the seismic material have been made available to the public.

[3] GSI claims that it owns the copyright in the seismic material that was deposited with the Boards and that its copyright has been breached by the copying of the material without compensation and without its consent. GSI limits its claims to the copying of the seismic material it created on its own behalf, as opposed to seismic material created for a specific client. The materials it created on its own behalf are variously referred to as "speculation data", "non-exclusive data", and "non-proprietary data".

[4] GSI also claims for losses from the conversion of its seismic material, breach of confidence, unjust enrichment, breach of contractual license agreements, negligent misrepresentation and contractual interference. As I will explain, these claims are not now before me.

[5] GSI has commenced 25 actions in Alberta against the Boards, numerous oil and gas exploration companies, seismic companies, and copying companies (a complete list of Defendants at the hearing is attached as Schedule A). There are also other actions revolving around the same issues in other jurisdictions such as the Federal Court and in the Newfoundland and Nova Scotia Courts.

[6] The Defendants' position is that GSI does not have copyright in the seismic material filed with the Boards (or at all). The ability to conduct seismic surveys on the Canadian frontier, and its use thereafter, including the deposit of the material, the term of confidentiality and public access to it, is strictly regulated by legislation ("the Regulatory Regime"). The Regulatory Regime vests only certain rights and allows the copying of the material in question after the confidentiality period has expired. Accordingly, the Defendants argue, there have been no breaches of any property rights in GSI's seismic material.

[7] In April 2015, Chief Justice Wittmann took over case management of these actions in light of numerous interlocutory applications that were filling the Court docket. To help streamline the many GSI actions in front of this Court, and after much input from the parties and many hearings on the issue, on June 2, 2015, the Chief ordered the trial of two common issues, which in sum are as follows ("the Chief's Order"):

1. What is the effect of the Regulatory Regime on GSI's claims?
2. Can copyright subsist in seismic material of the kind that are the subject matter of GSI's claims?

II Procedure

[8] The evidence for the trial of the common issues was submitted mostly in written form. It consisted of seven lay witness affidavits, with their transcripts of cross-examination and answers to undertakings, and five expert reports. Two of these experts, Dr. Wren and Mr. Vasey, were called to give evidence and were cross-examined. All of these documents and physical exhibits (such as tapes, CDs, paper seismic sections, etc.) were marked as exhibits. The documents were also provided in electronic format (USB sticks or CDs) and many of these also were marked as exhibits.

[9] As for argument, the Plaintiff filed one comprehensive brief and the Defendants filed two, one on the copyright issue and one on the Regulatory Regime issue. The briefs were filed in a hyperlinked format and all authorities were also submitted electronically. The Chief ordered the Defendants to coordinate their submissions by designating counsel to handle discrete issues

instead of allowing each of the 35 or so counsel to make separate submissions. This worked very well for both the written and oral submission phases of the trial.

[10] During the oral hearing I had access to almost all of the documentation in an electronic format and was able to access it on a computer on the bench. Considering the volume of material, accessing it in this way worked very well and ultimately kept things organised beyond what was possible in paper format. This is especially important now considering that cut backs to clerk staff has meant that large files like these simply cannot be managed without documents being lost – as was the case with many paper exhibits here sadly.

[11] The Defendants largely maintained the same position on all issues. The one exception was the Defendant Olympic Seismic Ltd., which agreed with the Plaintiff that the seismic material was copyright protected, but concurred with the rest of the Defendants that the Regulatory Regime allowed it to be copied in the circumstances before this Court.

[12] Interspersed with the trial of the common issues was the trial of one of the 25 actions that already had been set for trial before the common issues were added: GSI v 612469 Alberta Limited Carrying on Business under the trade name CalWest Printing & Reproductions. The common issues bind that action. Ten lay witnesses were called. I will render the decision dealing specifically with the CalWest action separately.

[13] Subsequent to the hearing, I asked for submissions on a copyright issue that was not addressed at trial, namely, whether the seismic material was a protected sound recording pursuant to s 18 of the ***Copyright Act***, RSC 1985, c C-42. The Defendants object to my consideration of this issue on the basis that the Plaintiff did not plead it and that there was no evidentiary focus on this possibility.

[14] Although the general wording of the common issue on copyright could include all sections under the ***Copyright Act***, I agree with the Defendants that the pleadings in the various actions must trump the general question. Protection under s 18 of the Act is not pled and no application has been forthcoming. Accordingly, for present purposes, even though it appears on the evidence before me that s 18 may well apply to protect the seismic material, it would be unfair to rule on this definitively without proper notice and an opportunity for all parties to address the issue with the appropriate evidence and argument. If the Plaintiff wishes to pursue this further, it should bring the appropriate application.

[15] Another issue that came up at the end of the common issues hearing was whether Canadian or American law should apply to determine whether the seismic material is copyright protected in Canada. This arose because the Defendants objected to the expert report of Andrew Goldberg on American copyright law being made an exhibit in light of their view that only Canadian law applied. As a result, they submitted that this report was irrelevant and improper. The argument on copyright in the common issues hearing had been based on Canadian law to that point. GSI had not argued that American law applied and had only mentioned in its brief that even if American law did apply, GSI had the right to copyright protection in Canada.

[16] The seismic material at issue in these common actions is all purportedly presently owned by the Plaintiff, a Canadian company, and was collected and created over Canadian waters and subsequently on Canadian soil (in Calgary). In some of the actions however, the former owners and creators of the seismic data in question were American.

[17] Since this issue is not common to all of the parties, I will not deal with it in this decision. The issue is squarely before the Court in the CalWest action since an American company created the seismic data in that case, so I will deal more fully with this issue in that decision.

[18] The decision on the copyright issue in these reasons is based on Canadian law. Ultimately, the Greenberg affidavit was allowed in without objection to ensure that there is an evidentiary base of American copyright law in case I am overruled on this procedural finding.

[19] The Plaintiff also objected to some of the evidence found in the Defendants' lay witness affidavits on the basis that they contained opinions and argument. The application was dismissed and the affidavits allowed other than paragraph 10 in the Millar affidavit and paragraph 20 of the Harrison affidavit which contained argument rather than facts.

[20] The only other major procedural issue arose with respect to Mr. Vasey's evidence. The Plaintiff objected to his evidence alleging bias since he had been an employee of the Defendant Olympic Seismic Ltd. in the past. I ruled, based on the test set out in the recent Supreme Court of Canada case, ***White Burgess Langille Inman v Abbott and Haliburton Co.***, 2015 SCC 23, that this past employment would not render his evidence biased in these circumstances. I accepted that his evidence would be independent and impartial for the purposes of this common issues trial.

[21] I also remarked that although our Rules of Court may not necessarily require that objections on the basis of an expert's qualifications must be raised on an advance basis (as is the case for an objection to the opinion being tendered - see Rule 5.36), it is better practice to make such an objection in advance. If the objection had been upheld in this case, it could have led to an adjournment of the trial to allow the Defendants to seek other rebuttal expert evidence, which would have been very unfortunate.

[22] Turning to the substantive issues, despite the fact that the Chief's Order set question 1 as the Regulatory Regime issue and question 2 as the Copyright issue, I will discuss these issues in reverse order for reasons that will become obvious as you read my decision.

III Can copyright subsist in GSI's seismic data?

A Introduction

[23] The protection of many intellectual property rights are created by statute. This includes copyright where, in Canada, the definition and protection of those rights are found in the ***Copyright Act.*** Indeed, even the term "copyright" is defined in s 2. It states that "copyright" means, in the case of a "work", the rights described in s 3. Section 3 protects the sole right to reproduce the work; the protection is time limited.

[24] In GSI's actions before this Court, the time limit of the protection of the seismic material is really at the heart of the claims. As will be discussed, the Regulatory Regime protects the seismic material deposited with the Boards for a period of 5 to 15 years. By contrast, copyright protection lasts for 50 or more years. It is this extra protection that GSI seeks and says has been breached.

[25] To determine whether s 3 bestows copyright protection on the seismic material the first question is whether the seismic material meets the conditions to qualify as a "work". The conditions for property to be considered a "work" are numerous and stringent, and the determination is a factual one.

[26] The Chief's Order outlines the kind of seismic materials at issue. It includes:

(i) Raw seismic field data, or raw seismic, magnetic, and gravity data;

(ii) Seismic related navigation data;

(iii) Processed and reprocessed seismic data;

(iv) Selections, arrangement and compilations of raw, processed and reprocessed seismic data;

(v) Productions and reproductions of seismic data in various forms and media including physical, electronic, magnetic and digital works;

(vi) Interpretations, derivations and translations of the seismic data; and

(vii) Related seismic data materials.

[27] The Defendants have argued that the first types of data (raw or navigation data) are not the subject of the claims, which may be correct. However, unlike the sound recording issue, the copyright protection of this type of data was specifically included as an issue to be determined, and the parties led evidence and argument on this point so I will deal with it.

[28] GSI argues that its seismic material is protected as a compilation of a literary or artistic work. GSI proferred the evidence of its principals, Mr. Davey Einersson (now retired) and Mr. H. Paul Einersson, as well as the expert evidence of Dr. Wren, Mr. Harper, Mr. Gill and Mr. Greenberg to support its position.

[29] Relying on this evidence, GSI argues that the seismic material is "original" and qualifies as a "work", in that it is created by the involvement of human skill and judgment with the aid of computers. It is a literary and/or artistic "production" in the scientific domain. The seismic material is fixed onto tapes, CDs, digital sticks, or other formats depending on when it was created, and ultimately displayed as "seismic sections", long squiggly lined paper documents (or digital images), which can then be interpreted by professional geophysicists.

[30] The Defendants relied upon the expert evidence of Mr. Vasey. They argued that the seismic material does not satisfy the requirement for copyright because the works were created by computer programs, not the "skill and judgment" of human authors. They submit the creation of seismic data is purely a mechanical exercise, the expression of any ideas are limited by common industry practice, practical considerations, utility and are directed by parties other than the author; hence, the seismic material is not "original" and cannot be considered a "work" as defined in the ***Copyright Act***.

B Can seismic data be considered "a work"?

1 The law

[31] The relevant portion of s 3 of the ***Copyright Act*** states as follows:

> 3(1) For the purposes of the Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, ...

[32] Section 5 sets out the necessary conditions for copyright to exist:

> 5(1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions are met:
>
> (a) In the case of a work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country;

[33] Section 2 defines "every original literary, dramatic, musical and artistic work":

> "every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science.

[34] Section 2 also defines "literary work" and "artistic work":

> "literary work" includes tables, computer programs, and compilations of literary works
>
> "artistic work" includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works

[35] "Compilation" is defined to mean (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data.

[36] Thus, the question becomes whether GSI's seismic material can be considered an original production in the literary, scientific or artistic domain in its various forms of expression, which include tapes, CDs, computer sticks, seismic sections, and written final reports, and as such constitute an original literary or artistic work.

[37] Section 34.1(1) of the ***Copyright Act*** provides that in any civil proceedings under the ***Act*** in which the defendant puts in issue either the existence of the copyright or the plaintiff's title to it, "(a) copyright shall be presumed, unless the contrary is proved, to subsist in the work ...sound recording... as the case may be". So I must start with a presumption that GSI has copyright in the seismic material in issue.

[38] GSI also registered its copyright, which gives further presumptions; however, GSI has filed an undertaking that it will not seek to rely against the Defendants in these actions upon the registration of any one or more of the certificates because they are currently being challenged in Federal Court.

[39] As noted above, the main dividing issue between the parties is whether the seismic material can be considered "original" as interpreted by our courts. Both parties have offered a plethora of cases and extracts from learned authors who have written on this issue. I will return to the details and application of these cases shortly, although I note that many are dated or are from other jurisdictions and must be interpreted in light of the seminal case from our Supreme

Court which defines the term "original": ***CCH Canadian Ltd. v Law Society of Upper Canada***, 2004 SCC 13.

[40] After a thorough review of the authorities and differing interpretations of the term "original" in other jurisdictions, Chief Justice McLachlin concluded as follows at para 16 of ***CCH*** about the meaning of the term "original" in the ***Copyright Act***:

> I conclude that the correct position falls between these extremes [pure labour versus creativity]. For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. **What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.** This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work. [Bold emphasis and addition in square brackets mine]

[41] The Defendants raised a secondary, but related, issue: whether GSI has shown that its work derives from a human author.

[42] It is with these issues in mind that I now turn to the evidence on these points.

2 Evidence

[43] As noted above, the Chief's Order identifies several types of seismic material. This material can be divided into two general categories: the raw or field seismic data (items (i) and (ii) in the Chief's Order), and the processed data (items (iii), (iv), (v), and (vi) in the Chief's Order).

[44] The most relevant evidence on the issue surrounding the creation of the seismic material was given by Mr. Paul Einersson, especially in exhibit 14 to his affidavit sworn on July 13, 2015, and by Dr. Wren and Mr. Vasey.

[45] Generally, the Plaintiff's and Defendants' experts were fairly consistent regarding the process of acquiring and refining seismic data, especially when Mr. Vasey accepted that the only type of seismic data being considered in these proceedings is non-exclusive, or as he put it, non-proprietary data. The difference, for copyright purposes, is that when GSI is hired by an oil company, for example, many of that company's expert geophysicists and other scientists might direct decisions about the acquisition and processing of the seismic data so that it could be their "skill and judgment" that is being called upon rather than GSI's. Mr. Vasey conceded that his comments that suggested GSI had no choice on certain decisions would not apply in the case of non-exclusive or "speculative" data acquisition.

[46] I now turn to the more specific evidence about field data and processed data. I will then proceed with the analysis of whether seismic data meets the originality criteria set out by the Supreme Court in ***CCH*** and whether the data qualifies as a literary or artistic work in the scientific domain.

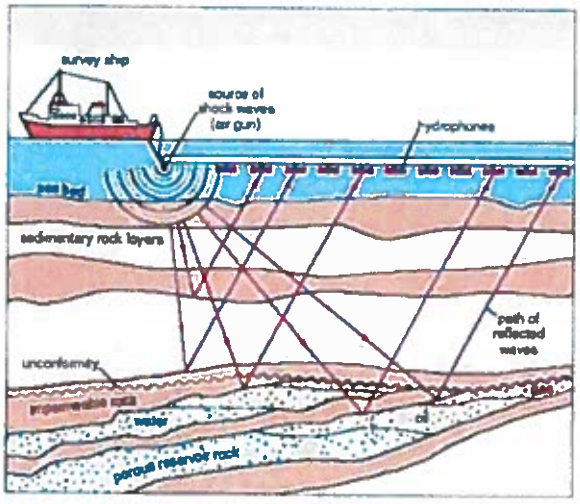
3 Field seismic data

[47] "Field data" is a defined term in the Association of Professional Engineers and Geoscientists of Alberta ***Guideline for Ethical Use of Geophysical Data***, Edmonton: ***APEGGA***, 2010, p 5 (the "***APEGGA Guidelines***"). It is described as "[t]he original recorded geophysical data, sometimes referred to as basic or raw data, together with the description of the complete recording parameters. For seismic data in particular, this means geophysical shot record, survey information and observers' reports."

[48] Both experts appended drawings of the marine seismic creation process. I reproduce Mr. Vasey's simple illustration here showing the components of a marine seismic operation:

The components are:

1) The Vessel
2) Air Guns
3) Compressor to Power the Air Guns
4) Hydrophones built into a streamer
5) Recording Instruments
6) Navigation Instruments



[49] This illustration shows the acquisition process for seismic data. Before the ship arrives at the location to start recording the data, there is much planning and decision making about where to acquire the data. Commercial realities influence these decisions, along with knowledge of the area, permit acquisition, etc. GSI must have a general idea of the geology of an area, since it is only going to image where it ultimately hopes exploration companies can use the data to find oil and gas.

[50] There is also technical planning in advance of the survey operation to determine how the earth's floor will be imaged. For instance, the "source array" must be determined, tuned and tested. Presently, the most prevalent marine seismic source in use is the air-gun. The air guns are steel cylinders with ports in their side. As described by Dr. Wren at p 9 of his report:

> They are towed behind the vessel and submerged. They are filled with highly compressed air and when the ports are opened the air escapes creating a large

> bubble that expands, collapses and creates a pressure or sound wave that travels through the water....Decisions regarding size, placement, and clustering of the air guns ensure the maximum amount of useful information is obtained for the location being surveyed.

[51] Dr. Wren testified that there are no industry standards that apply to the design of the source array. Computers are used to help with the design but they do not do it by themselves. The decisions about the number of guns, size, spacing and depth are technical ones. These decisions can be compared to a symphony, where the result is an array of frequencies that can be used to best image the subsurface geology.

[52] The seismic receiver array is also determined in advance. The arrangement changes from one survey to the next. The receivers are enclosed in long streamers that can vary in length from 5 to 12 kms. The streamers contain the hydrophones that respond to the sound waves emitted by the air guns and send the signal to the recording instruments on the ship. The type, number and location of the hydrophones must be determined, as well as the spacing between streamers, the number of streamers and their depth.

[53] During the recording of the acoustic signals, the seismic team onboard monitors many factors, including the equipment, weather, waves, other vessels, currents, marine life, etc. because they all can affect the quality of the signal being recorded. The team makes decisions about the quality of the recording as it is being realised and they make adjustments if there is too much noise or interference, otherwise the collection may have to be interrupted or stopped, and the creation may have to be re-done.

[54] Dr. Wren explains the recording of seismic field data at p 10 of his report:

> Field data is a product of the careful design of the source and receiver configurations as well as the parameter settings of the recording system. The design criteria are selected to optimise the data quality.
>
> The recording of seismic data is therefore very similar to the careful parameter settings in the practice of photography, and perhaps more closely aligned with the graphic equalizer or mixing board in the music recording studio.

[55] The field data that is created was originally stored on paper records, but with the advent of the digital era data was stored on open reel tapes, tape cartridges and ultimately on high capacity Exabyte cartridges and CDs. Examples of many of these formats were marked as exhibits during the trial. These products are the result, in Dr. Wren's view, of substantial intellectual effort in the planning, execution, and recording of the seismic program. The data is a digital recording of reflected sound waves and related information. The creation of this data is through the technology of seismic reflection theory.

[56] Mr. Vasey described the evolution of the marine seismic collection industry in his report. He discussed the progression from a single streamer being towed behind a ship, to purpose built ships with multiple streamers and the explosion of data that came on board, now stored by computers whose power has grown over the years. Once it was made clear that only speculative data is at issue as discussed above, there was nothing in Mr. Vasey's opinion that took away from or contradicted Dr. Wren's views that skill and judgment are necessary in the decisions that must be made to plan the survey and to gather the data, other than his emphasis on the role of a computer in performing these tasks.

4 Processed data

[57] The next stage of seismic data acquisition is for the field data to be processed. Before processing, the field data is basically a string of binary numbers. Importantly though, these binary numbers are fixed on various forms of media, as discussed above, and can be reproduced. For industry purposes, however, the field data must be carefully processed to be meaningfully interpreted by the geoscientists on paper sections or on computer workstations.

[58] Processed data is called "geophysical data derived product" in the ***APEGGA Guidelines***. It is "any product derived, generated or created from the data, including, but not limited to, any and all processed and reprocessed data, interpretations, maps or analyses, regardless of the form or medium on which it is displayed or stored."

[59] Dr. Wren summarised the processing step as follows at p 13 of his report:

> In general terms, processing involves the filtering of noise, repair of signal, and repositioning of all data samples into their "true" spatial locations. In addition, attempts will be made to generate proper amplitude values. The practices of processing 2D data are common to 3D while 3D data has it own particular problems and processing solutions.
>
> In general, all field data is processed with a flow or sequence of individual algorithm steps, each designed to pre-condition the data for the next step. The "menu" is a fairly routine system but is subjective in the sense that different companies have different software with different approaches, and the choice of parameters in each step is also subjective. Thus geophysicists have preferred processors, usually individual as opposed to a company, in much the same way people have preferences for family doctor, dentist, car mechanic, etc.

[60] Dr. Wren describes 23 basic processing steps at pages 13 - 14 of his report. He explains that each step requires the seismic processor or geophysicist to make decisions based on his or her skill and judgment. At page 15 of his report, he writes:

> For example, during the "data reformat" the seismic processor must compare the format of the incoming data with the reformatted data to be sure the reformat was done correctly without abnormalities. Likewise a "seismic data merge" requires scrutiny of the data headers to make sure the merge has taken place properly. The trace data must then be edited for wild and bad traces and analysed to determine if there is too much noise to make it useful.

[61] In describing the process, Dr. Wren explains that many of the steps can only be done by an experienced processor because selecting the wrong parameters or picking the wrong data can affect the final image, such that it could be interpreted entirely differently and even erroneously.

[62] Further, some of the steps involve iterative processing, which means that the activity must be performed multiple times choosing and selecting different applications or settings until the processor believes he has the best product.

[63] In his testimony, Dr. Wren described a situation known as a "turkey shoot": oil companies that have paid for the acquisition of raw data will ask several different processors to process some of the data and will choose the processor who does the best job.

[64] Dr. Wren's evidence about the collection and processing of seismic data was not contradicted on cross-examination. He was challenged about his opinion that two processing companies given the same data would come up with different seismic sections. He was asked if it would be an error if these two different processing companies did not both see a salt dome "the size of Everest" in the data. Dr. Wren agreed that "on that scale" both companies would have seismic sections that showed a salt dome. Nonetheless, the sections would not be exactly the same and the scale of difference would depend on the processing company's skill.

[65] The focus of Dr. Wren's cross-examination was to distinguish the technological versus human involvement in the seismic data processing. For instance, he was asked to confirm that a human ear can hear the airgun blast, but only the hydrophones, a technological piece of equipment, can hear the reflection back. Further, technological recording equipment then records the seismic signal. He confirmed that the digital recording of reflected sound waves and related information are recorded in binary format. He was then asked about the computer involvement and the quality control aspect of data processing. He confirmed that a "plotter", driven by a computer, produces the zebra stripes or wiggly lines seen on seismic sections. Dr. Wren confirmed that scientific principles will drive the processing and that there are certain "rules of thumb", or industry standards, which have evolved over the years.

[66] Mr. Vasey did not disagree with Dr. Wren's description of the decisions that need to be made in the processing stage of seismic data acquisition. His main points were that processors use common industry standards and that creativity is not rewarded; quality control systems ensure that the scientific method is applied. He opined that "two well respected competing seismic data processing centres would produce a product that is substantially the same." He opined and emphasised that computers do all of the work.

[67] In cross-examination, however, Mr. Vasey conceded that "turkey shoots" happen in the industry as described by Dr. Wren. He discussed meetings in which three seismic processing groups were brought into a room and their seismic sections were put on the wall to compare and contrast. Further, he confirmed that re-processing the raw data may lead to different and better results the second time around.

[68] Mr. Vasey also acknowledged that seismic processing is done by teams who make the processing decisions and that the order and types of steps vary. For instance, certain noise reduction steps can occur at the beginning or at the end and industry standards exist for some steps of the process, in that they are "hard wired", but not for all. He also acknowledged that even once the processing team determines the type and order of the steps in the process, the parameters may be altered in response to test results throughout the process.

[69] Finally, Mr. Vasey confirmed there is more than one set of "industry standards" for the acquisition and processing of seismic data. Indeed, he stated "no more than there's one set of standards in this room", referring to the 35 legal counsel who were busy taking notes.

[70] Based on all of the above, I accept that the scientists involved in acquiring and processing seismic data do the best they can, since this is a scientific endeavour, with the technological tools available to them, to create an accurate product that exploration companies can rely on. I find that there is much skill and judgment involved along the way to create this product and it is not fair to say that there is just one way of doing things, or an "industry standard", in that regard.

[71] The evidence of Mr. Chip Gill, which I accept, was also illuminating on the question of whether seismic data is "original". Mr. Gill has 35 years' experience in the oil and gas industry and was the President of the International Association of Geophysical Contractors between 2001 and 2014. He provided the following opinion at p 19 of his report:

> Like when seismic data is acquired, when seismic data is processed and reprocessed, and regardless of whether acquired exclusively or non-exclusively for licence, the geophysicists and other experts carrying out the work will select and order the processing and reprocessing schemes to tailor the results based on input from the acquisition project itself, the imaging and commercial objectives and other relevant factors. For instance, they will choose among a variety of possible velocity models for migration, choose specific and detailed migration techniques and select specific gain parameters for the processing and reprocessing. Thus, the acquired and processed seismic data, whether the data is to be owned exclusively or non-exclusively and made available for licence, is *tailored, unique and original to its owner.*

[72] During the trial I was shown various "seismic sections", the final image of the processed seismic data. In court, we reviewed paper sections, although it was explained that presently these sections are stored in digital format, called SEG-Y data files, on tapes or DVDs, and now are interpreted on computer workstations.

[73] Each paper seismic section had a summary in a fairly standard "side label" of some of the processing steps that had been taken and the signature of the head processor (somewhat like a professional engineer who signs architectural plans). Even on the few examples pointed out to me, it was obvious that few steps are alike. The different choices are made by professionals using their skill and judgment, which of course considers industry and scientific standards; one would expect no less from any professional scientific product.

5 Discussion on seismic data being a "work"

[74] As discussed above, there was little debate between the parties that the field data and processed data are productions in the scientific domain. The field data is fixated on various media such as tapes, cartridges and CDs and the processed data is stored in digital format and also stored in SEG-Y data files on tapes or DVDs. The processed data is also converted to seismic sections, which can be printed on long paper as squiggly or zebra lines or viewed on computer workstations.

[75] In my view, the raw seismic field data and written reports are a literary work or a compilation of a literary work. Like in ***Apple Computer Inc. v Mackintosh Computers Ltd.***, (1987), 28 DLR (4^{th}) 178 (FCTD) at para 40, [1990] 2 SCR 209, the collected field data is a compilation of binary numbers that constitute a literary work. I rely in particular on the ***Apple*** trial decision, in which Justice Reed discusses the fact that writings in the form of alphanumeric code (i.e. in electrical impulses) have been included within the definition of compilation of a literary work. Or, as described by Justice Cory in the ***Apple*** Supreme Court decision at para 15, "programs in assembly language... are protected by copyright under s. 3 (1) of the *Copyright Act*."

[76] I find the seismic sections, i.e. the squiggly or zebra lines, fit within the definition of an artistic work, similar to a map, plan or chart, or a compilation of an artistic work since the product is the result of selection or arrangement of the data, or sound recordings, from the geology of the subsurface.

[77] Based on the evidence before this Court, the data becomes a "work" when it is compiled. One ping from a hydrophone would not suffice; it is the collection, arrangement, distillation and compilation that creates the work – both at the raw data level and then at the more refined processed data level (see too ***Robertson v Thompson Corp.***, 2006 SCC 43 at paras 36 and 37).The more difficult question is whether these literary or artistic products are "original", as defined in ***CCH***, so as to qualify as "works" within the meaning of the ***Act***.

[78] In my view, based on the evidence presented, both the raw or field data and the processed data meet the "skill and judgment" test laid out by the Supreme Court in ***CCH*** and should be considered "original" artistic or literary productions in the scientific domain, therefore protected "works".

[79] "Skill" is required to produce seismic field data because its production requires the "knowledge, developed aptitude and practiced ability" of the seismic crew. The planning stage involves various decisions, but the true creative effort occurs as the air guns create the sound that is recorded by the hydrophones and collected in a certain way to make it usable for the next stage of processing. The data is created, not merely collected, through the intervention of human skill.

[80] The Plaintiff argued that data creation is akin to taking a photograph. I agree. In this case, the photograph is not just a quick snapshot; rather, it is one that requires careful selection of the location, angle of technological instruments (e.g. the size and depth of the airguns, the length and depth of the streamers, and the number and placement of hydrophones), and finally the filtering and refining of the product.

[81] Dr. Wren's comparison is even more compelling – he suggests the creative effort compares to that of the conductor of an orchestra, who ensures that some instruments are played louder, or softer, or faster or slower, to make a beautiful creation. The same types of decisions are made on board the seismic acquisition ship to obtain "beautiful" raw seismic data.

[82] Judgment is evident in the production of field data through the multitude of decisions made by the seismic crew. The crew must have the "capacity for discernment or ability to form an opinion or evaluation by comparing different possible options." Mr. Paul Einersson's evidence was helpful on this point. As he put it, the field data is analysed as it is being acquired and checked for its quality. To the extent that there are problems that could affect the quality beyond certain parameters, the collection process may have to be restarted with different parameters. Only skilled experts are able to make these decisions.

[83] As for the processed data, the processors exercise skill and judgment in the decisions they make to create a usable product from the field data. The raw data is not simply pumped into a computer and a useful product comes out. The evidence is clear that the processed product can be quite different depending on the skill of the processor and that exploration companies have their favourite processors who create the best quality product for their purposes.

[84] The fact that on a gross basis the product may be similar – like in cases where a geological formation is as big as Everest, to use the Defendants' example, does not take away from the fact that to get a more refined product, (i.e. one that can be relied upon by exploration

companies for their exploration investment), the best image will be made by the processor with the most skill.

[85] For all of the above reasons, I conclude that the seismic data is an "original" work.

[86] I have considered the Defendants' arguments to the contrary but find none to be compelling. They argue that copyright cannot subsist if there are limited ways to express an idea; if the expression uses common industry practice; or, if the expression is in part utilitarian or determined by practical considerations. These suggestions come from various cases where originality was not found. They are all ways of saying that a work is not original. But these are not the tests for originality; the test is in ***CCH***, as quoted above.

[87] Keeping this general remark in mind, I will explain why I do not accept the Defendants' analysis on each ground, roughly following the order of the objections in their brief.

6 Human author

[88] Clearly a human author is required to create an original work for copyright purposes. The Defendants argue, however, at para 102 of their brief that "copyright does not subsist in a work which is created by a computer with little if any human input." They rely on the Australian case ***Telstra Corporation Limited v Phone Directories Company PTY Ltd***, (2010) FCAFC 149.

[89] First, I do not accept that seismic data is created with "little if any human input". I reject the suggestion that the data is created by simply throwing a microphone in the ocean and pushing the "record" button on a computer. Human input is involved continuously through the acquisition stage, like creating a sound recording, as eloquently described by Dr. Wren's report.

[90] I agree with the conclusion in ***Telstra*** that putting together a generic telephone book may not require the human skill and judgment necessary to attract copyright protection if all that is being done is listing names in alphabetical order. I note that in the Canadian case, ***Tele-Direct (Publications) Inc. v American Business Information Inc.*** (1998), 154 DLR (4^{th}) 328 (FCA), however, the court found that copyright existed in the yellow pages – copyright was rejected only for the mundane act of inserting block ads. Furthermore, ***Teledirect*** pre-dates ***CCH*** and emphasizes the need for creativity beyond what our Supreme Court now says is required. I also note that when more human input is required for the creation of directories, such as specific groupings of people, like Italians in the ***Ital-Press Ltd. v Sicoli*** (1999), 170 FTR 66 (FCTD) or oil and gas directories in ***B&S Publications Inc. v Max-Contacts Inc.*** (2001), 287 AR 201 (QB), Canadian courts have accepted that the compilation is "original".

[91] Ultimately, however, these are all factual determinations. In ***Telstra***, the court concluded that the process was mechanical and involved little human input. Chief Justice Keane said at para 4, "the compilations were brought into the form in which they were published primarily by an automated computer process". And later at para 33, "A majority of the creation process of the WPD and the YPD was heavily automated. Human intervention was regulated and controlled..." In that case, the computers virtually took over all the necessary decisions involving skill and judgment. That is not the case on the facts before me. Even though many technical instruments are used in the production of seismic data, they require human intervention, in the form of expert scientific skill and judgment to make them work. The seismic data produced through this exercise of skill and judgment is "tailored and unique" to the author. In my view, the human authorship element has been satisfied.

[92] The Defendants also argue that GSI's claims should fail because they have not proven the identity of the specific person who created the seismic data. Such proof is unnecessary given the nature of the common issues question: "can" copyright exist in the seismic data not "does" it exist.

[93] I further point out that the law does not appear to require the identification of a specific author to assert copyright. Indeed, s 6.1 of the ***Copyright Act*** contemplates situations in which the author is unknown (in terms of the length of the term of protection). Further, the case law references multiple authors as being the "author" when employees put together a work as a team (see ***Tremblay v Orio Canada Inc.***, 2013 FC 109 at para 34;affd 2013 FCA 225, where the plaintiff through its employees was found to be the author of the computer program; ***B&S Publishing*** at para 1 where the "help of staff" was credited; and, ***Ital-Press*** where multiple authors worked on the guide).

[94] The evidence here indicates that various employees of GSI (old and new) lead the seismic data creation process at different times. As noted at paras 31- 34 in ***Tremblay***, the author is the one who "clothes the work with form," or "expresses the idea," or uses their skill to fix the work in tangible form. So in this situation, the creator or "human" author of the field data is likely the head of the seismic crew on the ship (the "party chief") and the "human" author of the processed data is the person in charge of the processing (who, early on, was called "the computer"). It is he who will sign the seismic section (for instance, Mr Clink signed the seismic section in evidence in this trial). For ownership purposes, the author will be GSI, since s 13 of the ***Copyright Act*** provides that the employer will be the owner when an employee is retained to do the work. While this may be controversial in some situations, it is not an issue here.

[95] Also, I note that s 34.1(2) of the ***Copyright Act*** states:

> Where any matter referred to in subsection (1) is at issue...(a) if a name purporting to be that of (i) the author of the work...is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author, performer, maker or broadcaster.

Applying this principle here, Mr. Clink would be the presumed author of the seismic section in evidence since his name is printed on the document.

7 Ideas and facts are not protected

[96] The Defendants argue that the seismic data in question are not an expression of the thoughts or ideas of any person. They submit that the subsurface of the earth is unknown; therefore, no one can claim to have drawn an accurate picture of it, based on his or her thoughts or ideas. Rather, a scientific expedition is undertaken to discover the relevant facts and to collect the relevant data. They suggest that GSI is seeking to obtain an exclusive right to information and knowledge and that copyright does not extend to this type of material.

[97] The Defendants, in my view, are correct in their submission that copyright extends to the expression of an idea, i.e. the work, not the idea or facts contained therein. I differ from them in finding that the seismic data is an expression of GSI's views of what the image of the subsurface of the surveyed areas represents. The creation is obtained by a series of sounds emanating from the subsurface that have been collected, selected and arranged in a very particular fashion and

stored on various media. The facts themselves, the rocks, are still at the bottom of the sea available for anyone else to survey.

[98] Alternatively, if one says that an individual ping of sound is a "fact" then these too can be obtained by someone else who wants to go to the same location and bounce sound waves off the bottom of the sea (although it is unlikely that the new person would get exactly the same sound for the reasons discussed above). The tapes of the collections of sounds are no different from a negative of a photograph or the tape recording of a symphony. It is the compilation that makes them a protected work. The ***Copyright Act*** does not require a "preconceived" idea to protect its expression.

8 Trivial and purely mechanical

[99] The Defendants submit that the raw seismic data is the product of a purely mechanical exercise, like the editorial efforts in correcting judicial decisions for publication, save for the headnote, as found in ***CCH***. This argument is really a matter of degree. While the minor editorial efforts to correct a judgment is not enough to warrant copyright protection, for the reasons described above, I conclude that the creation of field and processed data requires the exercise of sufficient skill and judgment of the seismic crew and processors to satisfy the requirements of ***CCH***.

9 Limited ways of expression/common industry practice/practical or utilitarian expressions

[100] The Defendants argue there is no entitlement to copyright protection when there is a limited way to express an idea; where the selection or arrangement is directed by accepted and common industry practices; or, where practical considerations are directed by utility or externally imposed requirements. They rely on cases involving mobile phone telephone lists (***Forensic Telecommunications Services LTD v Chief Constable of West Yorkshire Police***, [2011] EWHC 2892 (Ch)); the improvement of a software program (***Delrina Corp. v Triolet Systems Inc.*** (2002), 58 OR (3d) 339 (CA) and ***Harmony Consulting Ltd v G.A. Foss Transport Ltd.***, 2011 FC 340, affd 2012 FCA 226); a pharmaceutical label form (***Distrimedic Inc. v Dispill Inc*** [2013] FC 1043 (FC TD)); and payroll books and payroll statements (***Bonnette v Enterprise Dominion Blueline Inc*** (2005), 41 CPR (4^{th}) 331 (Que CA)).

[101] In my view, these cases do not stand for such steadfast rules or copyright criteria. Certainly, these considerations were part of the analysis in those cases in deciding whether the production was an original work, but they are not the test. The judge in each case made a factual determination about whether sufficient skill and judgment was brought to the work to merit the "original" finding.

[102] In ***Forensic Telecommunications***, the collection of telephone numbers did not meet the British test; the plaintiff had not used skilled judgment and labour "in devising the form of expression of the addresses" and there was no "intellectual creation". The facts in ***Forensic Telecommunications*** are not so different from ***Telstra***, yet the Canadian telephone book cases take a more generous view of the amount of skill and judgment necessary to create the compilation. Either way, the telephone book cases are distinguishable from this situation, in which much more skill and judgment is used to create the sound and the imaging of seismic data. Furthermore, "intellectual creation" or "creativity" is not an element of the test for copyright in Canada.

[103] In ***Delrina*** and ***Harmony***, the courts considered that the modifications to the software programs were not sufficient to be original works. In ***Harmony***, the modifications were "mechanical amendments" and in ***Delrina***, the court found that there was only a limited number of ways to express the same idea, so the threshold of originality was not met. Here, we are not dealing with modifications of a product, so ***Harmony*** is not helpful. And in light of Dr. Wren and Mr. Vasey's evidence, I have rejected the notion that there is only a limited number of ways to create seismic data.

[104] ***Distrimedic*** also does not apply. If all that was at issue in the seismic data was the copyright status of the side label, there might be some analogy to the pharmaceutical label. But we are dealing with a much vaster amount of product, so the analogy to the pharmaceutical label in the ***Distrimedic*** case is not applicable.

[105] The Defendants rely on ***Distrimedic*** and ***Delrina*** to argue that there can be no copyright when the selection and arrangement of data are directed by practical considerations, utility or externally imposed requirements. Although there are certain industry standards in play for some of the decisions made during the acquisition and processing of seismic data, they do not form the substantial amount of the product here. In other words, the original skill and judgment that comes to bear on the final product of the seismic work far outweighs the portion of "hard wired" industry standards in play.

10 Other Canadian Decisions

[106] The Defendants refer to two trial level decisions that have held there is no copyright in raw seismic data and submit that these are rightfully decided and should be followed by this Court: ***Geophysical Service Inc. v Canada-Nova-Scotia Offshore Petroleum Board***, 2014 FC 450 (the ***Board*** case) and ***ResourceEye Services Inc. v Atrum Coal Groundhog Inc.***, 2015 BCSC 821.

[107] In the ***Board*** case, GSI sought an interim injunction to prevent the respondent board from incorporating some of the final migrated seismic line data GSI had submitted to the board in maps that were included in a call for bids document the board posted on its website. The board argued that although it was clear GSI had created the raw seismic data, the limited evidence before the court suggested that a separate company, Canadian Superior Energy Inc., had done the processing and had exercised the skill and judgment to transform the raw seismic data (SEG-D) into the compilation (SEG-Y) that was submitted to the board. There was no evidence that a licence had been obtained by this Company from GSI.

[108] Justice Annis found no copyright in the data itself at para 24:

> No copyright can subsist in geophysical data or seismic data. The copyright must exist in the compilation analysis thereof (see *Tele-Direct (Publications) Inc v American Business Information, Inc*, [1997] FCJ No 1430 [CA] at paras 28 and 29, 221 NR 113).

[109] The judge noted at paras 26 and 27, however, that despite the paucity of evidence the presumption of copyright applied:

> ...there remains at least a serious issue over copyright ownership given all of the facts that otherwise demonstrate GSI's ownership of the data and major role in its collection and compilation. In other words, CGG's name on the material is insufficient to overcome the serious issue that the presumption of copyright applies.

[110] Ultimately, Annis J dismissed the application because very little of GSI's material had been used in the map so there was no serious issue of infringement of GSI's copyright, there was no irreparable harm, and the balance of convenience favoured the board.

[111] The *obiter* comments in the ***Board*** case about the copyright on limited evidence in an injunction application do little to support the Defendants' case here.

[112] In ***Atrum Coal***, copyright was asserted over geophysical core samples and the location of drill holes taken by the plaintiff as part of a geological survey of a potential mining operation. An application was brought to add parties to the litigation. The court held that the raw data in question was incapable of attracting copyright protection. After quoting the one phrase from the ***Board*** case that "no copyright can subsist in geophysical data," Justice Harvey added at para 42:

> Absent any suggestion of the material comprising original work or a report setting out the analysis and evaluation of the project, the subject matter of the alleged breach of copyright displays none of the originality, creativity, skilled labor or judgment that arguably attracts the protection of copyright.

[113] Again, it appears there was a paucity of evidence on the copyright issue on this interim application. Furthermore, there is a significant difference between "core samples" and the compilation of sound recordings that constitute the field seismic data in this case. Although the decision is not entirely clear, it appears the judge is referring to a sample of the actual rocks from the ground, not an indirect measurement of those rocks using sound technology to create a recording or compilation of data. I agree that the rocks at the bottom of the sea are not copyrightable.

11 Industry Practice

[114] It was interesting to read Mr. Andrew Clifford Greenberg's expert opinion about whether seismic data has copyright protection in the United States. He notes at the outset of his opinion at para 20 that "There exist no cases expressly deciding whether Seismic Data is copyrightable under the American Copyright Act." GSI argues that until it commenced the actions herein, copyright in seismic data was acknowledged and respected by oil companies and government. This perspective is also affirmed in various codes of conduct, such as the ***APEGGA's Guideline***, and in the expert reports of Mr. Harper and Mr. Gill.

Many of the oil companies involved in these actions and the Government of Canada have entered into licence agreements with GSI expressly acknowledging that the seismic data and any reprocessed seismic data was copyright protected. Accordingly, it should come as little surprise that there is a dearth of judicial comment on the topic.

C Conclusion on the copyright issue

[115] In conclusion, the raw or field seismic data is an original literary compilation work and the processed data is both an original literary compilation work and an artistic compilation work in the scientific domain. As such, they are protected under s 3 of the ***Copyright Act***. For the reasons I have outlined, there is no need to resort to or rely on any presumption of copyright afforded in the ***Copyright Act.***

IV Regulatory Regime

[116] Having determined that copyright can subsist in GSI's seismic material, the question then is whether the Defendants have breached the copyright in GSI's seismic data by copying, or allowing others to copy, data that was submitted to various government entities pursuant to the Regulatory Regime. The seismic data in question was copied between 2007 and 2014, although it was collected from GSI, and by others whose data GSI purchased, as far back as 1982. The Defendants take the position that the Regulatory Regime is a full answer to the copyright infringement claims. Very briefly, the parties' positions are as follows.

A Parties Positions:

1 GSI's position

[117] GSI submits that the Boards have implemented policies and procedures that have misappropriated its rights to the intellectual property in its seismic data. It submits that the Boards have no legislative authority under the Regulatory Regime to enact these policies and procedures and that they are of no force or effect.

[118] GSI takes the position that the Regulatory Regime must be read in a manner that promotes coherence between the regime and the ***Copyright Act***. It submits that this Court should not adopt an interpretation of the Regulatory Regime that infringes on existing copyright, absent express language requiring such a construction.

[119] Further, GSI argues the Boards' policies and procedures respecting disclosure and copying of seismic data ignore the existing, statutorily mandated procedures for copying government documents set out in the ***Access to Information Act***, RSC 1985, c A-1 (the ***"AIA"***). GSI takes the position that the Boards should be following the processes provided under the ***AIA*** in response to requests for data.

[120] GSI relies on the principles outlined in the Supreme Court of Canada's decision in ***Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168***, 2012 SCC 68 (***"Re Broadcasting"***) for the proposition that the policies set out by the Boards should be subordinate to the ***Copyright Act*** and the ***AIA***, therefore can have no force or effect.

2 Defendants' position

[121] The Defendants argue that, properly construed, the Regulatory Regime confers jurisdiction on and authorizes the Boards to act as they did; more specifically, to copy geophysical data and disclose it to the public after the expiry of a privilege period. The Boards have not simply implemented policies that, over time, have permitted disclosure; rather, they have the statutory authority to disclose and so, the Defendants argue, the principles in ***Re Broadcasting*** are not applicable.

[122] The Defendants point to some interlocutory decisions that have interpreted the Regulatory Regime in their favour and they argue that these *obiter* comments should inform my conclusions. These cases are ***Geophysical Service Inc. v Canada-Newfoundland Offshore Petroleum Board***, 2003 FCT 507 (***"GSI v CNOPB"***), in which the court, at para 75, suggested that it was "entirely open" for the Newfoundland Board to make seismic information available to a requester after the expiry of the 5-year confidentiality period; ***Geophysical Service Inc. v Canada-Nova Scotia Offshore Petroleum Board***, 2014 NSSC 172 at para 35 (currently under appeal) (***"GSI v CNSOPB"***), in which the court held that it was part of the governing authority's

rules that information was no longer confidential after a certain period of time and that regulations dealing with the copying of data were within the Board's power; and, ***Geophysical Services Incorporated v TGS-NOPEC Geophysical Services***, Texas District Court – March 30, 2015, civil action No. 14-1368 ("***NOPEC***"), in which the court found that the Regulatory Regime granted the Boards a broad authority to allow copying and distribution of seismic data, and that GSI, in effect, had given the Board an implied licence to do so. This latter case is also under appeal.

[123] The Defendants submit that the disclosure of seismic data in the manner permitted by the Regulatory Regime balances two competing policy objectives: the objective of protecting confidential information long enough to allow for recuperation of the expenses incurred in undertaking a non-exclusive seismic project against the objective of stimulating natural resource exploration and development by making such information publicly available. These specific objectives, and the Regulatory Regime that puts them in place, override the general application of the ***Copyright Act***.

[124] The Defendants argue that GSI holds no independent rights in the data outside of those it obtained under the Regulatory Regime. Its ability (and that of its predecessors) to gather data was subject to the Regulatory Regime at the outset, and any rights in the data exist only to the extent contemplated by that Regime – i.e. a time limited right to complete exclusivity with the reciprocal duty to allow disclosure thereafter.

[125] The Defendants submit that the "rules of the regime" have been in place for decades. GSI knew the rules and must live by them. The rules include the right to disclose and copy GSI's data after the confidentiality period has expired; as such, there is no infringement under the ***Copyright Act***.

[126] The Defendants argue that the ***AIA*** does not apply to the disclosure provisions in the Regulatory Regime since the ***AIA***'s general purpose is to promote, not exclude, access to documents. If GSI's argument was accepted, its data would never be disclosable, a result that flies in the face of the purposes and plain meaning of the Regulatory Regime and the ***AIA***.

B Issue

[127] This common issue in the Chief's Order asks: What is the effect of the Regulatory Regime on GSI's claims?

[128] The Regulatory Regime contemplated in the Chief's Order is attached at Schedule B. The Regime includes the various pieces of federal and provincial legislation that have regulated the Eastern and Northern Canadian offshore development of oil and gas since 1985. These areas shall be referred to as the "offshore and frontier lands".

[129] It is common ground that the Regulatory Regime as a whole consists of certain key aspects, namely:

> 1) Entities wishing to conduct seismic exploration in offshore and frontier lands must obtain authorization under the relevant legislation;
>
> 2) Authorizations are granted on the basis that any data collected pursuant to the authorization will be submitted to the appropriate governing entity (regulator) under the applicable legislation; and,

3) The information provided to the regulator as a part of the permit/authorization process is considered privileged for a defined period.

[130] I will mention the permit requirements only briefly later in these reasons. They are not contentious and it is conceded that they contain nothing to suggest that seismic data is assigned or licenced to the regulatory bodies. My emphasis will be on the submission and disclosure requirements, as these go hand in hand in the various Acts and Regulations and are the key to determining the copyright infringement question.

[131] To understand the effect of the Regulatory Regime on GSI's claims and to address the arguments of the parties made in this case, I will consider three subsidiary questions:

1. Is the ***Canada Petroleum Resources Act***, RSC 1985, c 36 (2nd Supp) (the "***CPRA***") silent with respect to the Boards' ability to copy seismic data?
2. Should the Boards have processed disclosure requests through the procedure set out in the ***AIA***?
3. Have the Boards and recipients of seismic data breached GSI's rights under the ***Copyright Act***?

C Decision in brief

[132] The ***CPRA***, properly interpreted, allows for disclosure without restriction after a defined period of time. It is a complete and specific code that applies to all oil and gas property in the offshore and frontier lands, including seismic data. Its provisions supplant any more general pieces of legislation, such as the ***Copyright Act*** or the ***AIA*** to the extent that they conflict. Therefore, the Boards and recipients of seismic data have not breached GSI's copyright rights. Under the existing Regulatory Regime, it is not unlawful for the Boards to disclose data after the expiry of the privilege period in the manner that they have been doing. There is no need to resort to the procedures set out in the ***AIA*** to respond to requests for data.

D Subsidiary Questions

1 Is the *CPRA* silent with respect to the Boards' ability to copy seismic data?

i. Rules of statutory interpretation

[133] The parties have agreed the modern approach to statutory interpretation applies, as articulated by the Supreme Court of Canada in ***Re Rizzo & Rizzo Shoes Ltd***, [1998] 1 SCR 27, in which the Court held, at para 21:

> ...Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[134] In ***Bell ExpressVu Limited Partnership v Rex***, 2002 SCC 42 at para 27 the court further commented on the application of Driedger's principle:

> ...where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. ...

[135] And the court commented more recently, in ***Re Broadcasting***, at para 12:

> ... The entire context of the provision thus includes not only its immediate context but also other legislation that may inform its meaning (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 411).

[136] In other words, in interpreting a legislative provision, the court must form an impression of the meaning of the text, taking into account the purpose of the provision and all relevant contexts, including established legal norms.

[137] Sullivan also suggests in her text *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at para 9.65 that a review of the legislative history, tracing its evolution from inception, through successive amendments, to its current formulation is another way of establishing legislative purpose:

> Tracing may reveal past decisions by the legislature to adopt a new policy or strike out in a new direction; it may reveal a gradual trend or evolution in legislative policy; or **it may reveal the original purpose of legislation and show that this purpose has remained constant through successive amendments to the present.** [Bold emphasis added.]

a Statutory framework

[138] The starting point to determine whether the ***CPRA*** is silent with respect to the Boards' ability to copy seismic data is s 101. The section is headed "Disclosure of Information." The relevant portions read as follows (please see Schedule C for the complete text of this section):

> Disclosure of Information
>
> Privileged information or documentation
>
> 101(2) **Subject to this section, information or documentation is privileged** if it is provided for the purposes of this Act or the *Canada Oil and Gas Operations Act*, other than Part 0.1 of that Act, or any regulation made under either Act, or for the purposes of Part II.1 of the *National Energy Board Act*, whether or not the information or documentation is required to be provided.
>
> Disclosure
>
> 101(2.1) **Subject to this section, information or documentation that is privileged under subsection (2) shall not knowingly be disclosed without the consent in writing of the person who provided it,** except for the purposes of the administration or enforcement of this Act, the *Canada Oil and Gas Operations Act* or Part II.1 of the *National Energy Board Act* or for the purposes of legal proceedings relating to its administration or enforcement.
>
> ...

Information that may be disclosed

(7) **Subsection (2) does not apply in respect of** the following classes of information or documentation obtained as a result of carrying on a work or activity that is authorized under the *Canada Oil and Gas Operations Act*, namely, information or documentation in respect of

...

(d) geological work or **geophysical work** performed on or in relation to any frontier lands,

(i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in any other case, **after the expiration of five years following the date of completion of the work**; [Bold emphasis added.]

[139] "Geophysical work" is defined in section 101(1) and includes the type of work performed by GSI. Therefore, subsection (2) applies to make the information privileged, subject to the rest of the language in the section.

[140] The parties agree that this privilege means that materials provided to the boards cannot be disclosed without written consent (except as provided under s 101(2.1), (5) (6.1) and (6.2), which are not in issue in this litigation). Further, they agree that this privilege applies to the material deposited whether or not it is otherwise protected as confidential, patented, trademark protected or copyrighted.

[141] The parties did not dispute that s 101(7) applies to the seismic materials submitted by GSI and that are now held at the NEB's Frontier Information Office (the "FIO") and with the provincial boards in question. The interpretation differences between the parties arise in relation to what happens upon the expiry of the five-year privilege period.

[142] Before turning to the various statutory interpretation arguments I will review the legislative history since, in my view, it is key to determining the meaning of s 101(7). I will also outline the procedural history surrounding the collection, storage, and access of GSI's seismic data.

b Legislative history

[143] The Chief's Order listed a number of pieces of legislation that were understood to form the Regulatory Regime (listed in Schedule D). It quickly became clear at the hearing that to put the ***CPRA*** into context, we needed to look as far back as the 1950s and trace, in particular, the

regulations that were promulgated under earlier legislation, since they continued to be in force through transition provisions into later Acts.

[144] The following Acts and Regulations will be referenced in the discussion of the legislative history below:

> ***Territorial Lands Act***, SC 1950, c 22 (the "***1950 Territorial Lands Act***")
> ***Territorial Lands Act***, RSC 1952, c 263 (the "***1952 Territorial Lands Act***")
> ***Territorial Oil and Gas Regulations***, SOR 53/123 (the "***1953 Territorial Regulations***")
> ***Public Lands Grants Act***, RSC 1952, c 224
> ***Canada Oil and Gas Regulations***, SOR 60/182 (the "***1960 COGL Regulation***") & the ***Canada Oil and Gas Land Regulations***, SOR 61/253 (the "***1961 COGL Regulation***"), (collectively, the "***COGL Regulations***")
> ***Canada Oil and Gas Land Regulations,*** CRC, c 1518 (the "***1978 COGL Regulations***")
> ***Canada Oil and Gas Act***, SC 1980-81-82, c 81 ("***COGA (1982)***")
> ***Oil and Gas Production and Conservation Act***, RSC 1985, c O-7, renamed in 1992 the ***Canada Oil and Gas Operations Act*** ("***COGOA***")
> ***Canada Petroleum Resources Act***, RSC 1985, c 36 (2nd Supp) (the "***CPRA***")
> ***Canada-Newfoundland and Labrador Atlantic Accord Implementation Act***, SC 1987, c 3 (the "***Federal Accord Act***")
> ***Canada Oil and Gas Geophysical Operations Regulations***, SOR 96/117 (the "***1996 COGOA Regulations***")
> ***Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act***, RSNL 1990, c C-2 (the "***Provincial Accord Act***")
> ***Newfoundland Offshore Area Petroleum Geophysical Operations Regulations***, SOR 95/334 (the "***Accord Regulations***")

c Federal legislation

[145] As previously discussed, I will focus on the submission and disclosure provisions for seismic data in these pieces of legislation, rather than the permit requirements. The ***Territorial Regulations***, first promulgated in the 1950s and 1960s, required holders of exploratory licences to submit "information" that included "a map showing the area covered by the survey or surveys..." and "a summary giving the generalized regional data obtained" (***1953 Territorial Regulations***, ss 5(a) and 5(c)). Section 30(b) required "maps showing factual data obtained in the geological or geophysical examination..." Section 71(b) provided that the information furnished would be kept "confidential and not be released" until one year after the termination of the last licence or permit renewal.

[146] It is interesting to note that there was no specific reference to seismic data in these early regulations. GSI and Mr. Harrison advised at trial that exploration of offshore and frontier lands, including marine seismic work, did not begin until the 1960s and not in earnest until the 1970s. To this end, the ***1960 COGL Regulation*** required submission of a geophysical report of the area investigated and made specific reference to seismic data (s 29(c)(ii)).

[147] The ***1961 COGL Regulation*** clarified the required contents of the geophysical report (s 54(1) and (2)) and changed the disclosure provision, so that the information provided would not be released for two years after the cancellation or expiry of the permit "at the discretion of the Minister" (s 107). It appears the ***1978 COGL Regulations*** simply changed the section numbers.

[148] As a whole, the ***COGL Regulations*** were carried forward through transitional provisions of subsequent legislation. As I will discuss later, the submission requirements were not amended until 1996. In practice this meant that final reports and maps were being filed with government agencies pursuant to the regulations. The material was filed in paper and mylar format and was of relatively poor quality compared to what is presently required. The field data was not required, and so, it was not submitted.

[149] In spite of the ability, under regulation, to release the submitted data after two years, the evidence given by Mr. John Clink, then President and Manager of Arctic Marine Exploration for the Old GSI (also known as GSI Delaware), at the Senate Hearings in 1986 (the ***Proceedings of the Standing Committee on Energy and Natural Resources***, no 4 (18 November 1986) (Bill C-6) at p 4:28-29) suggests that, prior to 1983, the Minister of Energy, Mines and Resources (the "Minister") generally did not exercise his discretion to release non-exclusive or speculative data, and the Minister of Indian Affairs did not release the speculative seismic reports until 10 years after submission. At the time, the Ministers had divided authority over the offshore and frontier lands.

[150] Things changed with the 1970s "oil crisis" and the government's efforts to make Canada more self-sufficient in its energy consumption. In 1976, the Minister introduced a White Paper in the House of Commons, ***An Energy Strategy for Canada: Policies for Self-Reliance*** (Ottawa: Energy, Mines and Resources Canada, 1976), setting out nine major policy elements and five major energy related targets. The report discussed the degree of uncertainty that remained in the offshore and frontier lands and the need to find out more about hydrocarbon reserves. Policies were suggested to prompt oil companies to explore and drill. One priority was the earlier release of geological information "to facilitate greater efficiency in exploration activity". This government policy was echoed in another 1976 White Paper, ***Statement of Policy: Proposed Petroleum and Natural Gas Act and new Canada Oil and Gas Land Regulations***" (Ottawa: Energy, Mines and Resources Canada & Indian and Northern Affairs, 1976).

[151] In 1977, Bill C-20, ***An Act to regulate the disposition and development of oil and gas rights*** was proposed in Parliament. The disclosure requirements contained in the Bill stated that information obtained by government pursuant to the legislation should not be "published or released" for five years. It also referred to a perpetual confidentiality provision over certain data "where a person received a written commitment by the Government of Canada before May 19, 1976 that this information would be guarded". There is no evidence that GSI obtained any such commitment. In any event, Bill C-20 was never promulgated. I mention it because it is relevant to some of GSI's arguments, (i.e. the use of the word "published"), which I will come to later.

[152] Subsequently, ***COGA (1982)*** was passed to govern the Canadian Eastern and Northern offshore areas. The Act, introduced in 1980 as Bill C-48, was part of the then National Energy Program. ***COGA (1982)*** replaced the ***1952 Territorial Lands Act*** and the ***Public Lands Grants Act***, which governed the disposition and management of oil and gas rights in the offshore and frontier lands. The ***1978 COGL Regulations***, which contained the provisions governing submission and disclosure of seismic data, remained in place to the extent they were consistent with ***COGA (1982)***: see the transitional provisions at ss 62(1) and (2). Therefore, ***COGA (1982)***'s proclamation in March 1982 did not impact the submission requirements found in the ***1978 COGL Regulations***, although it did modify the disclosure process for the deposited data.

[153] Section 50 of ***COGA (1982)*** addressed the disclosure of information provided pursuant to the permit process. The salient subsections state:

> 50(1) **Information or documentation furnished under this Act** or the *Oil and Gas Production and Conservation Act* **is privileged and shall not knowingly be disclosed without the consent** in writing of the party who provided it except for the purposes of the administration or enforcement of either Act or for the purposes of legal proceedings relating to such administration or enforcement.
>
> ...
>
> (3) **Notwithstanding subsection (1)**, information or documentation furnished in respect of the following matters **may be disclosed**, in the manner prescribed as follows:
>
> ...
>
> (d) in respect of geological or geophysical work performed on or in relation to Canada lands, **on the expiration of five years** following the completion of the work or on the reversion of the lands to Crown reserve lands, whichever first occurs

[154] Thus, ***COGA (1982)*** provided that the government could disclose geophysical information at the end of a five year period.

[155] As a comparison, section 45 of ***COGA (1982)*** referred to drilling orders and gave the Minister authority to require companies holding rights to drill a well to "provide exploration information or documentation relating to a significant discovery on the relevant Canada lands to any interest owner". Interestingly, however, the use that could be made of such information was restricted. Section 45(4) reads:

> 45(4) Subject to section 50, the recipient of information or documentation provided under subsection (2) shall use it only for the purposes of drilling as ordered by the Minister.

[156] Section 50, related to the disclosure of seismic data contained no such restriction as to use of the information after disclosure was made.

[157] ***COGA (1982)*** also introduced the controversial "crown share" in s 27, wherein 25% of an interest granted under the Act was to be reserved for the Crown. At the same time, s 61(2) made it clear that there was no entitlement to compensation:

> No party shall have any right to claim or receive any compensation, damages, indemnity or other form of relief from Her Majesty in right of Canada or from any servant or agent thereof for any acquired, vested or future right or entitlement or any prospect thereof that is replaced or otherwise affected by this Act, or for any duty or liability imposed on that party by this Act.

[158] A review of the various debates and readings surrounding the introduction and ultimate passing of Bill C-48 in 1980, ***An Act to regulate oil and gas interests in Canada lands and to amend the Oil and Gas Production and Conversation Act***, which introduced ***COGA (1982)***, clearly demonstrates the government's intent to provide for the disclosure of reported seismic data following a pre-determined period of confidentiality. Ensuring a greater degree of control

over the timing, rate, and level of natural resource exploration and development was one of the key governmental objectives. The release of proprietary information (following a period of time) to the public to promote further exploration was also a primary legislative goal.

[159] These intentions are evident in the clause-by-clause presentation of Bill C-48 to Parliament (**Bill C-48, *Canada Oil and Gas Act*, *clause-by-clause description and briefing book***, January 20, 1981 (the "***COGA clause-by-clause***")) at p 72:

> Under the existing and future regulations operators on Canada lands are required to submit to the government copies of all factual data, technical and interpretational reports resulting from their exploration or development programs. All such data is a proprietary asset of the company which it will use to maintain its competitive advantage with respect to the exploration of the lands involved, and may use it in trade for other data or sell it for partial recovery of costs
>
> ...
>
> However, the length of the confidential period has been shortened in some instances in order to ensure that, after allowing the operator a reasonable period of time within which to evaluate or trade his data, **it is made freely available to other companies, and to government and university research geologists** to generate new exploration concepts and to stimulate a wide range of companies interested in acquiring new lands in continuing exploration of the area in question.

[160] It is interesting that the ***COGA clause-by-clause*** document suggests the period of confidentiality would be shortened when the ***1978 COGL Regulations*** had a two year confidentiality period – so, in fact, the period was lengthened. As noted by Mr. Clink in the Senate hearings, however, it appears that in practice the two year period routinely was lengthened by policy or was maintained in perpetuity for speculative data. (see para 148 above).

[161] Specifically with respect to section 50(3), the ***COGA clause-by-clause*** document stated at p 73:

> This subsection defines the periods of confidentiality for the various types of information received by the departments, and **allows publication or release** following the periods described below...

[162] The House of Commons debates provide further insight into Parliament's intent in passing the Bill. The following excerpt illustrates the purpose behind early disclosure (***House of Commons Debates***, 32nd Parl, 1st Sess, No 5 (16 December 1980) at 5833 (Hon Maurice Foster):

> With this bill geological and geophysical information **will be made public** earlier than in the past, thus promoting exploration by interested parties who would not otherwise have access to this knowledge.

[163] In 1981, the Canada Oil and Gas Lands Administration (the "COGLA") was created to administer the ***COGA (1982)*** oil and gas regime. COGLA acted as the regulatory agency for offshore and frontier lands. It replaced the general ministerial oversight and discretion that existed previously. Indeed, Mr. Clink testified that, in his view, ***COGA (1982)*** made it "incumbent" on the Director General of the Resource Evaluation Branch of COGLA to release

data after five years. In my view, however, disclosure remained permissive, not obligatory, under the legislation in question.

[164] ***COGA (1982)*** was repealed in 1987 upon the passing of the ***CPRA***. Since 1987, disclosure has been governed by s 101 of the ***CPRA***, which replaced s 50 of ***COGA (1982)***. Although the wording of s 101 has changed slightly over the years since the ***CPRA*** was passed, there have been no substantive amendments. Portions of the current version of s 101, found under Part IX, Administration and Enforcement, were set out earlier in these reasons (the full version is at Schedule C).

[165] Section 112 of the ***CPRA*** provides that the ***1978 COGL Regulations*** continue to be in force under the ***CPRA*** to the extent they are consistent with it and until they are revoked. As I will come back to, these regulations were not replaced until 1996.

[166] The 1986 Parliamentary debates surrounding the introduction of Bill C-5, *An Act to regulate interests in petroleum in relation to frontier lands, to amend the Oil and Gas Production and Conservation Act and to repeal the Canada Oil and Gas Act*, which became the ***CPRA***, shed some light on the intent behind the ***CPRA*** provisions. The clause-by-clause given during the introduction of the ***CPRA***, (Bill C-92, later Bill C-5) assists in determining the underlying legislative intent.

[167] During third reading of Bill C-5 on October 14, 1986, Minister Marcel Masse, indicated that the new legislation would implement:

> ...a system that not only recognizes the rights of owners and promoters where resources are concerned but also frees the development of frontier lands from cumbersome and useless administrative impediments.
>
> ...
>
> It is common knowledge that both the costs and risks involved in the exploration of oil and gas resources in Canada's North and our offshore regions are far greater than in our other regions.
>
> These considerations are reflected in the Bill before the House today, which establishes fair and straightforward regulations to promote the development of petroleum resources in our frontier lands. [*House of Commons Debates*, 33rd Parl, 2nd Sess, No 1 (14 October 1986) at 354 (Hon Marcel Masse)]

[168] Earlier, at the committee level, the Minister noted that the crown share, "which gave governments the right to confiscate property", would be eliminated (***Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-92***, No 1 (6 May 1986) at 1: 40. The ***CPRA*** repealed the controversial "crown share" provision from ***COGA (1982)***, but the "no compensation" clause remained (it is now s 111 of the ***CPRA***). Further, the drilling order exception for disclosure of information remained as s 34 of the ***CPRA***.

[169] In discussing s 101(1), the Bill C-5, ***Canada Petroleum Resources Act, clause-by-clause description and briefing book***, January 1986 (the "***CPRA clause-by-clause***") states at p 81:

> The purpose of this section is to provide that information or documentation submitted to the Crown for the purpose of the *CPRA* or the *Oil and Gas Production and Conservation Act* is privileged and shall not be disclosed, but that different types of information may be disclosed after specified intervals or in

> other limited circumstances. The definitions contained in this subsection are solely for the purposes of section 101. They are all provided to enable the setting of different confidentiality periods for different types of information.
>
> The section prevails over the general provisions of the *Access to Information Act* by virtue of its inclusion in Schedule II of that Act (see subsection 129(2) below).

[170] In reviewing s 101(2), the ***CPRA clause-by-clause*** confirms that this section is meant to establish the general principle that all information or documentation provided under the legislation is privileged. Of note, it states at p 84:

> ...Much of this information, especially seismic surveys...has commercial value and, indeed, is actively bought, sold or traded by the petroleum industry. It is important, therefore, that the Crown respect its confidentiality.

[171] The ***CRPA clause-by-clause*** goes on to discuss the interplay between this provision and the objectives of promoting natural resource exploration and development at p 84:

> However, the Crown, as owner and manager of the resource, has an interest in controlled dissemination of certain types of information so as to enhance safety and to enable third parties to use the information in making their own assessment of the frontier lands. The industry finds itself in something of a dilemma in that individual members want the confidentiality of their own information maintained but at the same time want access to the information of others. The provisions of this section strike a balance by generally protecting confidentiality but then, in subsection (7), creating a number of exceptions whereby certain types of information may be disclosed after specified periods.

[172] I note that the ***CPRA clause-by-clause*** made this very point about s 101(6). In discussing the restriction on recipients from further disclosing information, the author explained that the recipient can disclose once the time period in (7) has expired.

[173] It is also interesting that in the original ***CPRA***, s 101(8) had the words "may be disclosed'. It stated:

> Notwithstanding subparagraph 101(7)(d)(ii) [the 5 year expiration] any information or documentation in respect of geological work or geophysical work that is performed after the commencement of the drilling of the well may be disclosed, but shall not be disclosed prior to the period referred to in paragraph (a)...

[174] The ***CPRA clause-by-clause*** concludes by indicating that s 101(2) of the ***CPRA*** is substantially the same as s 50(1) in ***COGA (1982)***, despite the slight changes.

[175] The records of proceedings of the Standing Committee on Energy and Natural Resources demonstrate that GSI's concerns were made known (through its predecessors) during the debates on Bill C-5. A review of the proceeding transcripts demonstrates the tension between the companies involved in spending large sums of money to obtain seismic data on a non-exclusive or speculative basis and the government's desire to disseminate information to the public to encourage exploration and development.

[176] Indeed, Senator Hays specifically mentioned seismic companies who create speculative seismic data in reference to the proposed disclosure provision at s 101(7)(d). On October 22,

1986, after discussing the high cost of seismic acquisition, he commented on the proposed disclosure provisions:

> The five-year period, in light of current prices, and the effect that that will have on the demand for geophysical information that they have gathered in this way, is very short and this information – which must be given to the government – will be released and constitutes, in effect, to track your language earlier today, "a retroactive confiscation", if you will, of this valuable asset that they have obtained by carrying out geophysical work. [***Proceedings of the Standing Senate Committee on Energy and Natural Resources***, no 1 (22 October 1986) (Bill C-5) at 1:46]

[177] At the Minister's request, Mr. Carruthers, the Deputy Administrator of COGLA, responded to Senator Hays' question. He answered that this section "is contained in the current legislation" and was "widely discussed with the industry" and that "to date we have never had a concern raised" (this was confirmed by Mr. Harrison's evidence at trial). He went on to state at 1:46:

> ...I think the concern that has been raised is really to do with a non-oil company, a company whose job it is to go out and shoot on what they call "speculative seismic" and they would like to be able to keep it to themselves. It is always one of these balancing acts. In a sense, some people say "well why don't you make it public immediately so everyone else can know what is out there so they can go out and look for oil and gas?" The companies say "Well, we would like to keep it private to ourselves, for at least five years" and other companies say "Well we would like to keep it private for 10, 15, or 17 years." In a sense, after extensive consultation with industry it was felt that the five-year provision that remains in the proposed new legislation continued to be the kind of balance that one needed to balance the public good, which would tend to move you toward, "Well, let's make it public as soon as possible," and, the private good, which tended to say, "Well, let's keep it secret as long as possible."

[178] It appears Senator Hays was not satisfied with that answer. He pointed out that there was also a public interest in providing a longer period of time, to provide an incentive to seismic companies to continue to shoot speculative data in their free time. He asked that "serious consideration should be given to revisiting that time frame in consultation with the people who are doing the work" (at p 1:47).

[179] The testimony given by and questioning of Mr. John Clink a month or so later, on November 18, 1986, also demonstrates specific concerns about the five-year confidentiality period. Mr. Clink explained that there is a great deal of expense, effort and risk in developing speculative seismic data for licence, yet the cost of duplicating the produced data is very small. In summarizing his position, Mr. Clink stated:

> As to the five-year limit, this becomes an emotional issue when upper management is approached and asked to spend so many millions of dollars on a survey and there is an element of chance in terms of making their money back. They know full well that the government will release the information in five years and that, after three or four years, people will realize that in another year or two they will have free access to that information. It becomes an emotional issue with

> management, and I am sure that senators understand the managers' viewpoint. [***Proceedings of the Standing Committee on Energy and Natural Resources***, No 4 (18 November 1986) (Bill C-6) at 4:31]

[180] Mr. Clink raised similar concerns in a letter dated October 7, 1986 sent to the Minister. In it he stresses that it often takes more than five years to recuperate the expenses incurred in developing a non-exclusive or speculative survey. In taking the position that governmental release of speculative data without compensation is in effect the confiscation of private property, he asks the Minister to amend the legislation to:

> 1) Hold "Speculative" or "Non-exclusive" data confidential in perpetuity, or failing that,
>
> 2) Hold it confidential for a greatly extended time, such as fifteen years (our [GSI's] normal restriction with the licensee in other areas of the world), when presumably it would have little or no commercial value, [...]

[181] While the legislation was not amended to include explicit protection for speculative data or to extend the 5 year period to 15 years as a result of such lobbying, the concerns were arguably addressed to a certain extent in due course. For instance, in a letter to Mr. Clink from the Minister dated April 8, 1987, the Minister advises that he has asked the officials within COGLA to consult with their provincial colleagues regarding the disclosure period and to keep in mind the interests held by those in the geophysical services industry who are advocating for an extended confidentiality period for non-exclusive or speculative data.

[182] On February 16, 1988, Mr. Campbell, the Director General of COGLA authored a letter to Mr. Clink agreeing that the current disclosure periods had the potential to harm non-exclusive geophysical service companies and that an appropriate period of confidentiality for non-exclusive data should be 15 years. The letter advised that the issue might be addressed administratively by way of a Ministerial directive within the context of the applicable legislation. It continued:

> The directive would stipulate that the appropriate Minister or Board would not disclose non-exclusive data following the appropriate confidentiality period under the legislation for a further ten years period. However, should an application for data be made under the *Access to Information and Privacy Act* during this ten-year period, the onus will rest with the company which submitted the data to establish an exemption under the appropriate provisions of the *Access to Information and Privacy Act*.

[183] Ultimately, in 1991 and 1994, the COGLA's regulatory responsibilities were transferred to the National Energy Board (the "NEB") under its governing legislation, the ***NEB Act***, and ***COGOA*** and its associated regulations. The NEB is responsible for regulating oil and gas operational activities, including seismic activities on offshore and frontier lands, and has the authority to compel the submission of geophysical data.

[184] ***COGOA*** is operational legislation. Its purpose is set out at s 2.1 (although this section was not added until 1992):

> 2.1 The purpose of this Act is to promote, in respect of the exploration for and exploitation of oil and gas,

(a) safety, particularly by encouraging persons exploring for and exploiting oil or gas to maintain a prudent regime for achieving safety;

(b) the protection of the environment;

(b.1) the safety of navigation in navigable waters;

(c) the conservation of oil and gas resources;

(d) joint production arrangements; and

(e) economically efficient infrastructures.

[185] Section 4 of ***COGOA*** provides that no one may conduct seismic activities (amongst other things) unless they hold an operating licence and an authorization to do so. Section 5 of the Act grants the NEB the power to grant these licences and authorizations. Section 5(3) states that such operating licences "shall be subject to such requirements as the National Energy Board determines or as may be prescribed". Similarly, the authorizations granted are also "subject to such approvals as the National Energy Board determines or as may be granted in accordance with the regulations and such requirements and deposits as the National Energy Board determines" (s 5(4)). By way of example, the types of requirements that might be attached to an authorization include compliance with environmental programs.

[186] Finally, s 5.3(1) provides that the NEB may publish guidelines and interpretation notes with respect to the issuance of operating licences and authorizations. ***COGOA*** is silent with respect to any disclosure provisions, as it is an operational Act, thus disclosure continued to be governed by ***COGA (1982)*** and later by the ***CPRA***.

[187] Section 14(1)(e) of ***COGOA*** provides that the Governor-in-Council may make regulations concerning the approvals to be granted as conditions of any authorizations issued by the NEB. Such regulations may be made "for the purposes of safety, the protection of the environment, and accountability as well as for the production and conservation of oil and gas resources." The Regulations associated with ***COGOA***, the ***1996 COGOA Regulations***, were not passed until 1996.

[188] Under the existing ***1996 COGOA Regulations***, all geophysical operations on frontier lands must be authorized by the NEB before they begin. Section 5 of ***COGOA*** requires operators to obtain an operating licence and a geophysical licence from the NEB. Section 38 of the ***1996 COGOA Regulations***, found in Part V, Reporting Requirements, contains the requirements for the authorizations, conduct, and reporting of geophysical operations on frontier lands. It states that certain materials (collectively, the "Seismic Information") must be provided to the NEB. The full section can be found at Schedule D.

[189] These ***1996 COGOA Regulations*** require far more detailed submissions that what was previously required. Mr. Paul Einersson indicated that this level of high quality data, some of which is submitted digitally, makes it is easy to copy a very usable section, thereby reducing the need to license data.

[190] Interestingly, s 38(3) exempts operators who have conducted a non-exclusive or speculative survey from having to provide the extremely detailed information and materials described in paragraphs (1)(n) to (q), if those data are available for purchase by the public. Under s 38(5), however, the purchaser of the data (where the costs of the purchase of the data are credited against deposit or rental requirements of the interest) must then file this information.

Furthermore, under s 38(4), if an operator ceases to make such information available for purchase, the requirement to submit is re-engaged. These provisions mirror in part the recommendations Mr. Clink made in the late 1980s.

[191] It is noteworthy, also, that the original field data, log notes, and re-processed data must be retained by the operator in Canada, yet it need not be submitted to the Board. The information to be retained includes, at 39(7), "the most recent fully processed, migrated seismic sections on reproducible film".

[192] Historically, the COGLA applied an administrative policy to keep non-exclusive seismic data confidential for an additional 10 years following the expiry of the five-year privilege period legislated under s 101(7)(d)(ii) of the ***CPRA*** (or previously s 50 of ***COGA (1982)***).

[193] It is clear that the decision to extend the confidentiality period was reached as a result of an ongoing dialogue between the geophysical seismic industry (namely Mr. Clink) and the federal government, as discussed above.

[194] Upon subsuming the COGLA's role, the NEB followed the same administrative policy. Bharat Dixit, who served as the Chief Conservation Officer of the NEB from 2005 to 2009, swore an affidavit attesting to the NEB's data release policies and practices.

[195] Individuals may attend at the FIO to view, print (copy), or borrow the Seismic Information submitted to the NEB following the expiry of the 15 year period. For the last 30 years, both the NEB and its predecessor COGLA published a catalogue through which members of the public can look up materials whose confidentiality period has expired.

[196] If a member of the public wishes to borrow Seismic Information, they must sign a "liability agreement" which, beginning in 2003, contained language to the effect that the materials might be protected under Canada's intellectual property regime. In 2006, the liability agreements were amended. They currently state that the information borrowed may be subject to copyright law and that the FIO does not authorize any infringement of this law. A sign containing similar language was posted in the FIO at the time. All versions of the liability agreements note that the information contained on the form may be subject to an ***AIA*** request and possible disclosure under that legislation.

[197] The NEB also adopted the COGLA's practice of requiring operators to submit one set of the Seismic Information in paper form (from which two microfiche copies were made) and one set in a reproducible (mylar) format. By the mid-2000s, changes in technology changed the NEB's practice. It moved away from mylar and microfiche to electronic images. The NEB now requests the Seismic Information in paper copy and in electronic format, meaning a CD with an electronic file in either .tif or .pdf or .jpg. These digital images have replaced the information previously submitted in mylar format. Contrary to Mr. Einarsson's assertions in his evidence, I accept that the NEB does not release data in SEG-Y format.

d Provincial legislation

[198] Historically, Newfoundland and Labrador, as well as Nova Scotia, passed provincial legislation similar to what was in place federally. That is, under the provincial regimes the seismic operator required a permit, there was an obligation to submit data, and the data could be disclosed at the end of a five-year confidentiality period. As a result, seismic operators required dual authorizations.

[199] Ultimately, the federal government entered into accords with both provinces that provided for joint management of offshore and frontier lands through two regulators, the Newfoundland Board and the Nova Scotia Board.

[200] The accord with Newfoundland and Labrador was implemented though mirror federal and provincial legislation, namely the ***Federal Accord Act*** and the ***Provincial Accord Act*** (together, the "***Accord Acts***"). The ***Accord Acts*** govern the operation of the Newfoundland Board. The section numbers between the ***Accord Acts*** are not always the same, so I will refer to the provisions in the ***Federal Accord Act*** for ease of reference.

[201] Similar to the provisions in ***COGOA***, the ***Federal Accord Act*** requires an operator to obtain an operating licence and an authorization to carry on work in offshore or frontier lands (ss 137 and 138). These sections are found under Part III, Petroleum Operations, and the ***Federal Accord Act*** expressly states at s 135.1 that:

> The purpose of this Part is to promote, in respect of the exploration for and exploitation of petroleum,
>
> (a) safety, particularly by encouraging persons exploring for and exploiting petroleum to maintain a prudent regime for achieving safety;
>
> (b) the protection of the environment;
>
> (c) the conservation of petroleum resources; and
>
> (d) joint production arrangements.

[202] Section 135.1 mirrors the s 2.1 purpose section put into ***COGOA*** in 1992, which deals with the establishment of supervisory and advisory boards, safety considerations, waste, spills, and enforcement measures. The purpose section of the ***Federal Accord Act*** does not apply to Part II, Division IX, Administration and Enforcement, which addresses issuing licences and authorizations, drilling orders, discovery licences and the registration, transfer and assignment of such licences, and importantly, which contains the s 119 disclosure provision.

[203] The ***Accord Regulations*** set out the submission requirements and the types of information that an operator must provide to the Chief Conservation Officer during and upon termination of the geophysical operations (ss 24 and 25). These reporting requirements are very similar to those contained in s 38 of the ***1996 COGOA Regulations*** and need not be reproduced here.

[204] Section 119(2) of the ***Federal Accord Act*** creates a privilege over information or documentation provided pursuant to that Act and the ***Accord Regulation***, using language similar to s 101(2) of the ***CPRA***. Section 119(5)(d)(ii) creates an exception to subsection (2) for geological or geophysical work, again, similar to s 101(7)(d)(ii) of the ***CPRA***. The evidence is clear that the same policy considerations were at play in drafting the statutes and regulations forming the federal and provincial legislative regimes. The actual wording of the section is as follows:

> 119(2) Subject to section 18 and this section, **information or documentation provided** for the purposes of this Part or Part III or any regulation made under either Part, whether or not such information or documentation is required to be provided under either Part or any regulation made thereunder, **is privileged and shall not knowingly be disclosed without the consent** in writing of the person

> who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.
>
> ...
>
> (5) **Subsection (2) does not apply** to the following classes of information or documentation obtained as a result of carrying on a work or activity that is authorized under Part III, namely, **information or documentation** in respect of
>
> ...
>
> (d) geological work or **geophysical work** performed on or in relation to any portion of the offshore area,
>
> ...
>
> (ii) in any other case, **after the expiration of five years** following the date of completion of the work;

[205] Given the similarities between the wording of the ***CPRA*** and the ***Accord Acts***, and for ease of reference, when discussing the principles of statutory interpretation, my findings as to s 101 of the ***CPRA*** will apply equally to the ***Accord Acts***, unless otherwise expressly noted.

[206] Pursuant to section 151.1 of the ***Federal Accord Act***, the Newfoundland Board may issue guidelines or interpretation notes in relation to any regulations made concerning production and conservation or development plan approval. As with the federal legislation, the provinces also were involved in discussions with non-exclusive or speculative seismic surveyors regarding the appropriate amount of time documents submitted under the ***Accord Acts*** should remain privileged. Much of this discussion is reflected in the August 27, 2015 affidavit of Mr. John Andrews, former Director of Legal, Regulatory and Public Affairs for the Newfoundland Board. Of note is a letter from the Newfoundland Board to the federal Ministers of Mines and Energy and Natural Resources Canada:

> The [Newfoundland Board] has adopted a new policy extending the confidentially period for non-exclusive geological work (mainly seismic surveys) and geophysical work from 5 years to 10 years. The new policy is consistent with that followed by the [Nova Scotia Board]. The NEB provides for a confidentially period of 15 years for non-exclusive surveys as does the Province in its onshore regime.

[207] Mr. Andrews' affidavit makes it clear that the policy was adopted to address the concerns expressed by non-exclusive seismic companies that the initial investment involved in performing survey work simply could not be recovered during the legislated five-year period. The adoption of a policy extending the legislated period by an additional five years was thought to make the offshore area more attractive to geophysical companies conducting non-exclusive surveys.

[208] When the 10 year confidentiality period expires, the Newfoundland Board makes those materials available for disclosure to those who make a request. Board staff process requests for these non-privileged materials. Requestors are permitted to view "released" materials and to make copies of such materials, through the use of external copying companies.

[209] A review of the "***Geophysical, Geological, Environmental and Geotechnical Program Guidelines***" appended to Mr. Andrews' affidavit shows that the guidelines authored by the Board contain a "release of data" section advising readers that following the five-year statutory period and a further extension of five years for non-exclusive programs, data ceases to be privileged.

[210] Similar to the NEB's practices, not all of the Seismic Information provided to the Newfoundland Board is released to a requesting party. According to Mr. Andrews' affidavit evidence, which I accept, only copies of the paper (or mylar) reports are disclosed. SEG-Y data is not made available for disclosure.

e Summary

[211] The historical review of the Regulatory Regime makes it clear that ever since marine seismic data has been created by seismic companies on Canadian offshore and frontier lands, there has been a regulated process for obtaining permits coupled with a requirement to submit data to various regulatory bodies, and that this data has been made available for disclosure to the public after a certain period of time without compensation to the seismic data owners.

[212] The amount and type of data that must be submitted has become more extensive, especially under the ***1996 COGOA Regulations***, but the legislated period of confidentiality has actually increased over time (from 2 to 5 years). Also, barring the evidence suggesting that no speculative data was released to the public pre-***COGOA***, despite the Minister's ability to do so, the restriction on public access to data has been further extended by policy to a 15 year period for the material submitted to the NEB and to a 10 year period for the material submitted to the Newfoundland Board.

ii. Discussion

[213] With this legislative history in mind, I turn to the various arguments that the parties have made, along with their analysis, about how the words of s 101(7) should be interpreted.

a Plain meaning of the words: No use of "may be disclosed" in s 101 (7)

[214] The main argument GSI makes is that s 101 (7) is silent when it comes to permission to disclose data deposited with the Boards.

[215] GSI relies heavily on the omission of the phrase "may be disclosed" in the transition from ***COGA (1982)*** to the ***CPRA***. Section 101(7) of the ***CPRA***, unlike its predecessor legislation, does not expressly provide that the materials *may be disclosed* at the end of the privilege period, although the margin note suggests this is the case. By contrast, s 50(3) of ***COGA (1982)***, expressly stated that notwithstanding the privilege provided under s 50(1), "...information or documentation...*may be disclosed*" five years following the completion of the geophysical work.

[216] GSI submits that the omission of the phrase "may be disclosed" is significant. That is, if Parliament intended to provide for disclosure of the information, it would have done so expressly, as it had in the past. GSI argues its choice to depart from previously used language must signify a deliberate change in policy.

[217] It also notes in this regard that the word "publish", as suggested in Bill C-20, was not added to the legislation and GSI cites this as further proof that Parliament was silent with respect to the ability of the Boards to copy the data.

[218] In response, the Defendants argue that the only interpretation possible based on the plain and ordinary meaning of the statutory words is that five years after the date of completion of geophysical work, the privilege established by subsection (2) does not apply.

[219] They submit that when s 101(2) no longer applies, there is no prohibition against disclosure without the consent of the person who provided the material. Accordingly, the material may be disclosed without such consent.

[220] The Defendants submit that the language of the provision clearly creates a relationship between "privilege" and "disclosure", such that when material is privileged, it must not be disclosed. The corollary is that when material is no longer privileged, it may be disclosed.

[221] Further, they submit there was no need to use the word "publish" in the section. Parliament left the mechanics of disclosure to the regulatory bodies, without any obligation to publish the information themselves.

[222] I agree with the simple argument the Defendants make about the proper grammatical way to read s 101. It is a somewhat backward way of coming about it, but reading it the way GSI suggests does not make grammatical sense. If you could not disclose without consent after the 5 year period, what would be the purpose of s 101(7)? The plain meaning of s 101(7) is that the consent required in s 101(2) is not required after 5 years.

[223] It is notable that Parliament was aware and did impose certain disclosure restrictions on material deposited with the Board during the confidentiality or privilege period in the subsections preceding s 101(7) and that these include restrictions on use of the material by the recipients. As noted in the historical review, these types of restrictions were also present when dealing with information provided under drilling orders (s 34 of the ***CPRA***). The issue was also addressed in the old s 101(8). Had Parliament wanted to put further restrictions on disclosure in s 101(7), it could have done so. In my view, the absence of such restrictions was intentional.

[224] I find further support for my conclusions in the headings and margin notes of the legislation. The general heading for s 101 of the ***CPRA*** (and s 119 of the ***Federal Accord Act***) reads "Disclosure of Information" and the margin of s 101(7) (as well as s 119(5) of the ***Federal Accord Act***) reads "information that may be disclosed". I note that the ***Interpretation Act***, RSC 1985, c I-21, permits the use of preambles and margin notes as aids to statutory construction, but is silent with respect to headings (see ss 12 & 13).

[225] Nonetheless, as Ruth Sullivan writes at page 394 of her leading text, "...headings are a valid indicator of legislative meaning and should be taken into account in interpretation." E.A. Driedger, in ***Construction of Statutes***, 2d ed, (Toronto: Butterworths, 1983), states at page 138 that "headings, like marginal notes, are also included in the body of a statute but are not a grammatical part of the enacted words. However, they have a higher status than marginal notes." He concludes, at 147, that:

> If, however, the object of the statute cannot be clearly deduced from its terms, then this "minor evidence" becomes more important and may provide sufficient evidence to tip the balance. It is submitted here that it is not correct to say that non-literary context may be considered only if there is doubt about the meaning of words; it is more realistic to say that if the enacting words do not clearly show the object of the statute, then it is permissible to look at the non-literary context in order to find the object.

b *ejusdem generis* argument

[226] GSI urges this Court to closely examine the list of exceptions described in s 101(5) to 101(6.3) as an aid to interpreting s 101(7) (see Schedule C for the full s 101). Section 101(5) provides that information otherwise privileged under s 101(2) "may be disclosed" pursuant to resource management and revenue sharing agreements entered into between the government and an organization representing any aboriginal peoples of Canada. I note that such disclosure is limited in that the recipient of materials under this section is precluded from further disclosing the materials, except as expressly provided.

[227] Sections 101(6.1) and 101(6.2) provide that the NEB "may disclose" materials it receives under the ***CPRA*** or the ***COGOA*** to the federal or provincial government (or a foreign government) for the purposes of a federal, provincial, or foreign law dealing with petroleum related activities, including the exploration for and the management, administration and exploitation of petroleum resources. Section 101(6.2) gives the NEB authority to disclose the same information to the Minister. The recipients of material pursuant to ss 101(6.1) and 101(6.2) are precluded from further disclosing them absent written consent from the NEB, and the NEB may only provide consent for further disclosure if it is authorized to do so (s 101(6.3)).

[228] GSI submits that the wording used in s 101(7) can be distinguished from these preceding provisions. First, as discussed above, ss 101(7), in particular subsections (a) through (i), does not contain any language to indicate that materials contained in these subsections "may be disclosed"; second, s 101(7) does not expressly authorize the NEB to take any action respecting the disclosure of such information; and third, it does not deal with other government entities.

[229] GSI argues that Parliament could not have intended to create specific exceptions to privilege allowing for closely controlled disclosure to government in subsections (5) through (6.3), and then created a broad ability to disclose materials to the public at large under subsection (7), without expressly stating so in the legislation.

[230] It submits that under the rule of *ejusdem generis*, s 101(7) must be interpreted as a general non-privilege provision against the specific government-related disclosure provisions provided for in ss 101(5) through 101(6.3). This means that s 101(7) is simply a general provision linked to governmental uses of any materials; it does not relate to public access to these materials. As Driedger describes in his text at p 111, "general words may be restricted to the same genus as the specific words that precede them".

[231] The Defendants, on the other hand, submit that GSI is misconstruing the *ejusdem generis* rule and that s 101(7) should not be viewed as a general subsection to be linked to the preceding specific subsections in ss 101(5) through 101(6.3). I agree.

[232] In my view, s 101(7) is not a general provision linked only to governmental uses of material. Notably, ss 101(5) and 101(6) deal with instances where information *that is otherwise privileged* under s 101(2) may nonetheless be disclosed to provincial governments and aboriginal organizations. Conversely, s 101(7) deals with disclosure *after the privilege period has expired.* It is not of the same general nature as the preceding subsections.

[233] Furthermore, as stressed by the Defendants, ss 101(6.1) to 101(6.3) were not added to the ***CPRA*** until well after s 101(7) (see SC 2014, c 2, s 36), thus detracting from any argument that s 101(7) represents the general in relation to the specific preceding subsections. I also note that the ***Federal Accord Act*** has a provision parallel to s 101(7), namely s 119(2), but does not contain

subsections similar to ss 101(5) through 101(6.3). Accordingly, the rationale for applying the *ejusdem generis* rule is absent.

c Presumption against affecting rights

[234] I am cognisant of GSI's argument that there is a presumption against interpreting legislation in a manner that interferes with existing rights. GSI relies, in part, on L'Heureux-Dube J's reasons in ***2747-3174 Québec Inc v Quebec (Régie des permis d'alcool),*** [1996] 3 SCR 919, in which she examined the interaction between statutory and common law, stating, at para 95:

> Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law. ... [*Halsbury's Laws of England* (3rd ed. 1961), vol. 36, at p. 412, at para. 625.]
>
> Acts should not be taken to limit common law rights, or otherwise alter the common law, unless they do so clearly and unambiguously. . . . [*Halsbury's Laws of England* (4th ed. 1995), vol. 44(1), at p. 876, at para. 1438.] ...

[235] GSI submits that the ***CPRA*** should not be given a construction that prejudicially affects its accrued rights unless the statutory language expressly requires such a construction: see also ***Spooner Oils Ltd v Turner Valley Gas Conservation Board***, [1933] SCR 629.

[236] I am of the view that the ***CPRA*** expressly affects GSI's rights in its data once the 5 year privilege period is expired. The section says so plainly. The historical review of the implementation of ***COGA (1982)*** and later the ***CPRA*** makes it clear that Parliament was aware it would be treading on property rights of the owners, not only of seismic data, but also very confidential and valuable well and other exploration data. Senator Hays in particular complained of the "confiscatory nature" of the legislation especially in regards to the speculative data of seismic companies who did not enjoy tax incentives.

[237] Indeed, both ***COGA (1982)*** and later the ***CPRA*** incorporated "no compensation" clauses in its legislation (s 61(2) and s 111(2) respectively). In my view, this acknowledges Parliament's intent to confiscate private property in return for a policy it believed to be in the public interest to promote early exploration of its resources in the offshore and frontier lands. Section 101(7) must be interpreted with this intent in mind, unfair as it may be to GSI.

d Technological advances were not anticipated

[238] GSI also argues that Parliament could not have envisaged the technological advances when it first introduced the privilege provisions in 1953 and that the release and copying of seismic information could not have been intended. The Defendants respond to state that the privilege provisions have always addressed the length of time that seismic information would remain confidential before release to the public at large. The provisions have never prescribed the mechanics of how disclosure is made.

[239] While technology may have changed, the Defendants submit that the basic concept of release of data following a period of privilege has not changed from one enactment to the next. The legislative language has been amended from time to time, but they argue the language related to disclosure is technology neutral.

[240] I agree. Notwithstanding that the term "disclosure" was expressly used in prior legislation and did not find its way into s 101(7) of the ***CPRA***, other than in the margin, I find that Parliament intended no functional change to this provision when it replaced s 50 of ***COGA (1982)*** with s 101 of the ***CPRA***. The Defendants spent much of their time during argument reviewing the various policy papers, Hansard extracts, clause-by-clause readings and Standing Committee Proceedings' testimony in an effort to demonstrate Parliamentary intent. The more salient portions of this evidence have been reproduced above. Tracking the evolution of this legislation as part of a purposive analysis has highlighted that the purpose has remained constant, in spite of slightly different legislative language.

[241] The Parliamentary debates surrounding Bill C-5 (which became the ***CPRA***) demonstrate a belief that the twin objectives of protecting confidentiality in seismic data and promoting resource exploration and development would be best met by imposing a period of privilege over geophysical works and then allowing such materials to be disclosed without further restrictions.

[242] The language used in the debates clearly demonstrates this understanding and intention. The *CPRA* clause-by-clause document speaks repeatedly of disclosure of certain types of material following the legislated privilege period. In specific reference to s 101(7) it states that the balance is to be struck by "creating a number of exceptions whereby certain types of information *may be disclosed* after specified periods". It is clear that Parliament intended that, following the five-year period, such data would be "disclosed" or "released", although this language is not expressly used in the body of s 101(7).

[243] In my view, Parliament could have put restrictions on use of the material in question after the confidentiality period expired, but it did not. This is a clear indication that the original owner's rights to control disclosure would be affected. Indeed, as mentioned above, Senator Hays suggested that the effect of s 101(7) would be confiscatory in nature and urged a "re-visiting" of the confidential period before passing the legislation. But the ***CPRA*** went into force the following February without any amendment to the five-year period, or special consideration for speculative data.). Further, Parliament chose to keep s 111 (formerly s 61(2) in ***COGA***), which denies any right to claim compensation if a "vested right" is affected by the ***CPRA***.

[244] The technological changes that have happened over the years were somewhat recognised in the ***1996 COGOA Regulations***, in that the regulations appear to acknowledge that some of the more technical and detailed information no longer had to be submitted. Nonetheless, I do not accept GSI's argument that the interpretation of s 101 should change in light of new technology.

e Other purpose arguments

[245] GSI makes reference to the purpose section that was added to ***COGOA*** in 1992 (s 2.1). GSI argues that encouraging exploration is not part of the legislative purpose, as such, it should not be used as a consideration in interpreting s 101(7). The Defendants argue that this purpose section is not relevant since it is not found in the ***CPRA***.

[246] I agree. The purpose clause in ***COGOA***, the operational statute, would help in the determination of what material is to be submitted in the first place. It does not apply to the disclosure provisions contained in the ***CPRA***. I note that the similar purpose section in the ***Federal Accord Act*** is limited to the operational portions of the Act and does not apply to the disclosure provision in s 119.

[247] GSI is attempting to suggest that all of the extrinsic evidence about what Parliament intended in passing both ***COGA (1982)*** and the ***CPRA*** should be ignored because of a purpose section passed some years later in separate, but related, legislation. This is not reasonable and goes against basic statutory interpretation law.

[248] In any event, as discussed in ***GSI v CNSOPB***, which considered the similarly worded ***Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act***, SC 1988, c 28, the stated purpose does not arguably restrict disclosure. The court reviewed the purpose section of that Act, which mirrors the one in ***COGOA***, and held that the regulations with respect to the reporting requirements for seismic data fit within the broad statutory purpose. The court stated at para 33:

> I find that the seismic operations performed by the Applicant are part of that overall scheme for exploration and development of Nova Scotia's offshore petroleum resources. I find that the data and information requirement of the Board are an integral part of and consistent with the overall purpose, objectives and scheme of the Acts and the Regulations. The Board has a duty to accumulate and manage "Geological Records".

f Disclosure does not include copying

[249] GSI's further argument is that even if information may be disclosed, this does not mean it may be copied. Section 101 never uses the word "copy" or "copying" and, GSI argues, such silence is meaningful.

[250] The Defendants submit that upon review of s 101, it is clear disclosure must include access and copying. For instance, in s 101(6), a recipient of what is otherwise privileged material cannot further disclose it. It states:

> 101(6) The recipient of information or documentation disclosed pursuant to an agreement referred to in subsection (5) [disclosure to a government ...] shall not disclose that information or documentation except as otherwise provided in this section.

[251] This restriction is meaningful only if the recipient had copies of the material. Similarly, the sections referring to disclosure to other government bodies would not make sense if copies were not permitted.

[252] I agree that s 101(7) does not explicitly say that the information deposited with the Boards may be "copied". I am also cognisant that s 100 of the ***CPRA*** grants the Governor-in-Council authority to make Regulations, including to prescribe fees for making copies or certified copies of documents.

[253] Nonetheless, I agree with the Defendants that s 101 read in its entirety does not make sense unless it is interpreted to mean that permission to disclose without consent after the expiry of the 5 year period, or under the conditions found in s 101(6) must include the ability to copy the information. In effect, permission to access and copy the information is part of the right to disclose.

iii. Conclusion on the silence question

[254] In conclusion, in my view, the ***CPRA*** is not silent as to the Boards' ability to copy seismic data. The only reasonable interpretation of s 101 of the ***CPRA*** and s 119 of the ***Federal***

Accord Act is that it gives the statutory authority to the regulatory boards to disclose material without restriction and without the consent of the owner of such material, once the confidentiality period has expired.

2 Should the Boards have processed disclosure requests through the procedure set out in the *AIA*?

i. GSI's position

[255] GSI submits that, in spite of the historic practices, the regulatory bodies have got it all wrong. They argue that once the ***CPRA***'s confidentiality period expires, since the ***CPRA*** is silent with respect to copying, and even if the section is interpreted to allow "disclosure", any request for such disclosure of seismic data should have been processed through the ***AIA*** regime. Doing so would also give the Boards statutory protection for their alleged breaches of the ***Copyright Act***.

[256] GSI claims that the Boards have created their own copying policies that are not statutorily permitted. Rather than follow the disclosure regime set out in the ***AIA***, the Boards built their own parallel process for disclosure that is not authorized under the legislation and have attempted to justify it based upon Canada's evolving energy policy as debated during the passing of the ***CPRA***. As such, GSI argues, the Boards' internally imposed procedure for disclosure is derived from jurisdiction they have conferred upon themselves.

[257] GSI further submits that the Regulatory Regime intentionally does not bestow any such jurisdiction upon the Boards because a process already exists to govern the disclosure of data following the expiry of the five-year privilege period. According to GSI, the interplay between the Regulatory Regime, the ***Copyright Act*** and the ***AIA*** is as follows.

[258] Section 101of the ***CPRA*** and s 119 of the ***Federal Accord Act*** state that information provided to the Boards is privileged, but that the privilege no longer applies five years after the completion of seismic work.

[259] GSI submits that these sections must be read in tandem with s 24 of the ***AIA***, which prohibits disclosure by the government of any information restricted under Schedule II:

> 24(1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

[260] Schedule II lists s 101 of the ***CPRA*** and s 119 of the ***Federal Accord Act***. These provisions ensure that the Regulatory Regime and the ***AIA*** work together to ensure seismic data remain confidential for a five-year period.

[261] Section 20 of the ***AIA*** provides for the disclosure of third party data:

> 20(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

> (b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans [...]
>
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

[262] Section 27 of the ***AIA*** requires the government institution, which in this case would be the Board, to give notice, in this case to GSI, of any intention to release data that might contain information falling under ss 20(b) to (d). Section 28 then would give GSI an opportunity to argue why such data should not be released. This regime acknowledges that there may be a need for ongoing protection of third party information. The procedure for dealing with third party records under the ***AIA*** was recently discussed in ***Merck Frost Canada Ltd v Canada (Health),*** 2012 SCC 3 and need not be repeated here.

[263] GSI submits that the only reasonable interpretation of the Regulatory Regime, the ***AIA***, and the ***Copyright Act*** is to assume that Parliament contemplated that disclosure would occur through the ***AIA*** as a means to continue to balance third party proprietary rights in data against the public's right to information. By contrast, the schemes adopted by the Boards simply make all data available on a wholesale basis following the expiry of the additional, discretionary, confidentiality period.

[264] GSI says that unlike the approach championed by the Defendants, its suggested approach to disclosure provides complete consistency between the privilege period set out in the Regulatory Regime and the provisions of the ***AIA*** and the ***Copyright Act.*** It points to s 32.1 of the ***Copyright Act*** in support of its argument that the three regimes are meant to co-exist cohesively. Section 32.1 reads:

> 32.1(1) It is not an infringement of copyright for any person
>
> a) to disclose, pursuant to the *Access to Information Act*, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material;
>
> (b) to disclose, pursuant to the *Privacy Act*, personal information within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like information;
>
> (c) to make a copy of an object referred to in section 14 of the *Cultural Property Export and Import Act*, for deposit in an institution pursuant to a direction under that section; and
>
> (d) to make a fixation or copy of a work or other subject-matter in order to comply with the *Broadcasting Act* or any rule, regulation or other instrument made under it.
>
> (2) Nothing in paragraph (1)(a) or (b) authorizes a person to whom a record or information is disclosed to do anything that, by this Act, only the owner of the

> copyright in the record, personal information or like information, as the case may be, has a right to do.

[265] GSI says that it is only through production via the ***AIA*** that copyright is not breached and that it is notable that there is no reference to the ***CPRA*** in the list which grants an exemption to copyright breach.

[266] Section 8(1.1) of the ***Access to Information Regulations***, SOR/83-507 (the "***Access*** Regulation") appears to acknowledge concerns that underlying copyright may exist in the requested data. It reads:

> Where a person is given access to a record or part thereof under the control of a government institution, the head of the institution shall provide the person with an opportunity to examine the record or part thereof, rather than with a copy of the record or part thereof, where providing a copy to that person is prohibited by or under another Act of Parliament.

[267] GSI rejected the notion that allowing a person to look at seismic data at the FIO would be acceptable. It suggested that disclosure, or even viewing, should proceed through the s 20 ***AIA*** process to benefit from s 8(1.1) of the ***Access Regulation***.

[268] GSI relies in part on ***Husky Oil Operations Ltd v Canada-Newfoundland and Labrador Offshore Petroleum Board,*** 2014 FC 1170, in support of its argument that the ***AIA*** is the proper forum through which to make requests for materials, and that the provisions in the ***AIA*** supersede any discretion claimed by the Boards over the release of the materials. In that case the Board was not allowed to have access to confidential information protected under the ***Federal Accord Act*** on the basis of public policy safety concerns.

ii. Defendants' position

[269] The Defendants' argue that the ***AIA*** is supplementary and does not replace the disclosure procedures set out in the Regulatory Regime. They point to s 2(2) of the ***AIA***, which reads as follows:

> This Act is intended to **complement and not replace existing procedures for access to government information** and is not intended to limit in any way access to the type of government information that is normally available to the general public.

[270] They submit that the Regulatory Regime already provides a procedure to access data supplied to the Boards and that the interpretation promoted by GSI would be contrary to the intention stated in s 2(2), as it would place additional limitations on the access to information.

[271] Moreover, they suggest that it would be near impossible to make a successful application under the ***AIA***, because, by GSI's own submissions, this type of material would always fall under s 20(1) of the ***AIA*** (i.e. it would contain trade secrets, would qualify as scientific or technical confidential information, would be information the disclosure of which would reasonably be expected to result in financial loss to GSI, etc.). As disclosure would never be permitted under the ***AIA***, it would completely frustrate the legislative aims of the ***CPRA***.

[272] The Defendants suggest that ***Husky*** confirmed only that material cannot be disclosed under the ***AIA*** when it is confidential and protected by legislation. ***Husky*** does not stand for the

proposition that after the confidentiality period is over, the information must be accessed under the ***AIA*** regime.

[273] Further, they argue that the ***AIA*** only came into force in January 1983, many years after the Regulatory Regime was in place. There is no indication that its enactment was intended to replace the Regulatory Regime's disclosure practices, and indeed s 2(2) says the opposite.

[274] Section 24(1) of the ***AIA*** acknowledges that government should not disclose information under s 101 of the ***CPRA*** and s 119 of the ***Federal Accord Act*** respectively, but this restriction only applies during the confidentiality period when disclosure is prohibited by those Acts.

iii. Discussion on the *AIA* question

[275] I agree with the Defendants that the Boards need not process disclosure requests through the ***AIA***. GSI's suggested interpretation of the ***AIA*** flies in the face of the ***AIA***'s stated purpose at s 2(2), which is to promote, not limit, access to information. GSI's interpretation would severely restrict what, in my view, is public access to information under s 101 of the ***CPRA***.

[276] I find the ***AIA*** references the ***CPRA*** and ***Federal Accord Act*** only with respect to information that is restricted under s 101 and s 119 respectively. The ***AIA*** does not suggest that its procedures should be used once the information is not restricted. In my view, it is purposefully silent in this respect.

[277] I agree that ***Husky*** stands only for the following proposition: there cannot be public disclosure of information that is otherwise protected by legislation. In other words, information that is confidential must not be released on the basis of general public policy.

[278] The one exception where the ***AIA*** might apply is when the legislated confidentiality period has expired, but the Board maintains a restriction on access based on its own policies, as described earlier in these reasons. Section 24 of the ***AIA*** would no longer apply because the material would no longer be "restricted" by the ***CPRA*** or by the ***Federal Accord Act***. It is questionable whether the material would be disclosed, however, since GSI would then have the right to be notified and would no doubt object. I have no evidence that anyone has attempted to access seismic data after the statutory confidentiality period, but within the additional protected period granted by the Boards' policies.

[279] Interestingly, the Minister wrote to Mr. Clink about the potential use of the ***AIA*** in this manner by letter dated February 16, 1988. The Minister acknowledged that a lengthier period of confidentiality may be appropriate, but went on to say that GSI would have to defend any ***AIA*** applications. The potential use of the ***AIA*** in these circumstances makes sense since the government in those instances would be restricting access by virtue of its discretionary extension of the confidentiality period. The ***AIA*** should not be used to further restrict access in other instances, as suggested by GSI.

[280] I will deal with GSI's argument that disclosure via the ***AIA*** could provide protection from copyright infringement more fully in the next section of these reasons.

[281] In conclusion, the Boards are not required to process disclosure requests through the procedures set out in the ***AIA***. The purpose of the ***AIA*** is to promote access to information in the government's possession, not the opposite as suggested by GSI. The ***CPRA*** and the ***Federal Accord Act*** give their respective Boards the statutory authority they need to support their respective guidelines and policies. Prior to the expiry of the confidentiality period, the ***AIA*** does

not apply. The ***AIA*** might be used in an attempt to access otherwise protected material after the expiry of the statutory confidentiality period, but during the extra period the Boards have discretionally decided to keep the material protected.

3 Have the Boards and recipients of seismic data breached the *Copyright Act*?

i. GSI's position

[282] GSI's submissions on this issue are straightforward: since the Boards do not have its permission to copy its seismic data, they have breached GSI's rights to control copying of its copyrighted material. Disclosure via the ***AIA*** is the only permissible way to disclose this data and it is common ground that disclosure has not been occurring in that fashion.

[283] GSI suggests the ***Copyright Act*** balances public and private rights to information and that these rights should be respected for the period set out in that ***Act***, rather than the shorter five-year period set out in the ***CPRA***. GSI argues that the balance found in the Regulatory Regime is not right, that it takes more than five years to recover the large investment required to create seismic data and that even old data continues to have great commercial value. For instance, Dr. Evans testified that reshooting seismic data in the St. Lawrence Seaway is fraught with environmental and other problems and he wondered if it could ever be done again in the present political climate – making GSI's 30-year-old data in that area very valuable.

[284] As noted above, GSI points to s 32.1 of the ***Copyright Act*** and argues that the Regulatory Regime is not excepted, so the ***Copyright Act*** must prevail. GSI submits that in implementing the disclosure part of the Regulatory Regime, the Boards have created their own laws, through policies and guidelines, that they had no authority to implement. GSI argues that the Supreme Court of Canada's decision in ***Re Broadcasting*** is dispositive of this issue.

[285] In ***Re Broadcasting***, the majority found that a subordinate legislative body, the Canadian Radio-television and Telecommunications Commission (the "CRTC"), could not enact a regulation or attach conditions under the ***Broadcasting Act*** that conflicted with provisions of the ***Copyright Act***. The majority held that jurisdiction-granting provisions contained in legislation are express grants of specific authority from Parliament and must be distinguished from general regulation making or licensing authority. It further confirmed that the policy statements found in the ***Broadcasting Act*** were not jurisdiction-conferring provisions and could not operate to extend the powers of a subordinate entity.

[286] GSI submits that similar to what the CRTC tried to do, the Boards here are attempting to use extrinsic evidence of the policy underling the ***CPRA*** (coupled with their regulation making authority) to confer jurisdiction upon themselves to establish a regime whereby seismic data may be disclosed – and that this legislative power is not conferred by any of the Acts comprising the Regulatory Regime. Moreover, as subordinate bodies, the Boards cannot interfere with statutory rights contained in the ***Copyright Act***.

[287] It argues that the ***CPRA*** is subordinate to the ***Copyright Act*** and so, given ***Re Broadcasting***, any conflict between the regimes should make the Regulatory Regime as a whole subordinate to the ***Copyright Act***.

ii. Defendants' position

[288] As discussed earlier in these reasons, the Defendants submit that GSI does not have any copyright in the seismic data, and that the Regulatory Regime grants the only rights GSI can claim, i.e. full confidential protection of its data for 5 years.

[289] In the alternative, if there is copyright in the data, it has not been breached because the Regulatory Regime is a complete code for the use of such data. To the extent that there is any conflict with the ***Copyright Act***, the Regulatory Regime supersedes it. By participating in the Regime, GSI has impliedly agreed to licence its data for use as required under the Regime's legislation.

[290] Furthermore, the Newfoundland Board submits that section 4 of the ***Federal Accord Act*** provides that the Act as a whole takes precedence over other federal legislation applicable to offshore and frontier lands, which is a complete answer for any copying of seismic data held by the Newfoundland Board. This section gives the ***Federal Accord Act*** precedence, not just over the ***CPRA*** to avoid potential conflict, but also over the ***Copyright Act***.

[291] The Defendants argue that no recourse is necessary to s 32.1 of the ***Copyright Act*** because the Regime has its own balancing of policy factors, unlike the other statues listed therein.

[292] Finally, ***Re Broadcasting*** is not applicable here since there is statutory authority for disclosure, unlike the situation in that case.

iii. Discussion on the Copyright question

iv. Issues already dealt with

[293] As discussed above, I do not accept that GSI's copyright in its seismic data has been breached by disclosing the material by means other than the procedures in the ***AIA***.

[294] Also, as discussed, I do not accept that there is no copyright in the seismic data and that GSI's only rights are those defined in the Regulatory Regime. Instead, in my view, the Regulatory Regime creates an exception to GSI's exclusive rights to control the dissemination of its data.

v. Conflict

[295] In my view, there is a conflict between the ***Copyright Act*** protections and the provisions of the Regulatory Regime that allow disclosure without the owner's consent. Justice Rothstein's discussion on the statutory interpretation of such conflicting provision in ***Re Broadcasting*** at paras 41 to 45 is helpful here. He points out that conflict is defined narrowly and that unavoidable conflicts only occur when two pieces of legislation are directly contradictory, when their concurrent application would lead to absurd results, or where the practical effect of one would frustrate the purpose intended by Parliament of the other.

[296] Here, the rights afforded to owners of copyrightable material created in the Canadian offshore conflict head on with the rights and obligations under the Regulatory Regime. In simple terms, it is the difference of a few decades of protection (approximately 50 years) under the ***Copyright Act*** versus 5 to 15 years under the Regulatory Regime (as it is presently applied).

[297] Parliament was aware of the commercial value of seismic data and attempted to take this into consideration in its legislative drafting. The considerations balanced in this regard are the

same as those found in the ***Copyright Act***, i.e. the rights of the creator versus the rights of the public to access data. To the extent that GSI feels that this policy is misplaced, its rights are political ones – it is not for this Court to change the intent of Parliament, unfair as it may be to GSI's interests.

[298] The Regulatory Regime preserves the rights of seismic operators until after the expiry of the privilege period, thereby achieving an internal balance between allowing for commercialization of the information and the public interest in the wider dissemination of that information. Parliament made the logical decision to deal with disclosure of material filed under the Regulatory Regime exhaustively through provisions contained within the Regime itself.

[299] Using the test elucidated by Justice Rothstein, absurd results would occur if the copyright provisions were applied at the same time as the Regulatory Regime disclosure process. Accordingly, we must look for a solution.

[300] Here the solution is found in the rule of statutory interpretation that the more specific legislative regime must apply over the more general one. In this regard, I refer to Justice Hall's comments in ***Geophysical Service Incorporated v Martin*** (2013), 343 Nlfd & PEIR 180 (Nfld TD), at para 59:

> Where two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the more general: it does not matter which was enacted first. ...

[301] See also ***Society of Composers Authors and Music Publishers of Canada v Canadian Association of Internet Providers*** 2004 SCC 45.

[302] The Regulatory Regime providing for the disclosure of seismic data is encompassed in a larger legislative framework that deals with the material obtained while exploring Canada's frontier and offshore lands with the specific objective of promoting exploration of those lands. It is clear that the purposes and objects of the Regulatory Regime are more specific than the more general objectives in the ***Copyright Act*** (see ***Re Broadcasting*** at para 122).

[303] Interestingly, as noted by the Defendants with respect to data submitted to the Newfoundland Board, s 4 of the ***Federal Accord Act*** codifies the conclusion that the Regulatory Regime takes precedence over other federal legislation, which would obviously include the ***Copyright Act***.

[304] Accordingly, with respect to the disclosure provisions, the specific legislated authority in the Regulatory Regime that allows disclosure and copying, as described above, prevails over the general rights afforded to GSI in the ***Copyright Act.*** The ***CPRA*** creates a separate oil and gas regulatory regime wherein the creation and disclosure of exploration data on Canadian territory is strictly regulated and, in my view, not subject to the provisions of the ***Copyright Act*** to the extent that they conflict.

vi. GSI's views on the *Re Broadcasting* case

[305] I do not agree that ***Re Broadcasting*** is an answer to GSI's position. In that case, the CRTC was found to have made guidelines without the statutory authority required under the ***Broadcasting Act***, and in any event, the guidelines conflicted with specific rights in the ***Copyright Act***. Whereas here, the Boards have statutory authority to disclose and copy –

Parliament has granted these powers. The extrinsic evidence regarding the policies underlying the ***CPRA*** helped with its interpretation, but this evidence is not the foundation of the Boards' jurisdictional authority to permit disclosure and copying; it is clear from the analysis earlier in these reasons that the legislation itself provides that authority. Accordingly, the interpretation that GSI wishes upon this Court is not accepted.

vii. Section 32.1 of the *Copyright Act*

[306] Section 32.1 exists to create a narrow defence to infringement of copyright in circumstances where there is a statutory obligation to disclose or copy potentially copyrighted material in fulfilment of the purposes of the four statutes enumerated in that provision. The Regulatory Regime is similar in that it is also an exception to copyright, but the exception is contained within the regime itself.

[307] In my view, the ***CPRA***'s inclusion in s 32.1 would have codified the common law principle that the more specific ***CPRA*** prevails over the more general ***Copyright Act*** for the reasons stated above; however, its inclusion in s 32.1 is not necessary.

viii. Compulsory Licence

[308] As noted above, the Defendants argue that by participating in the Regulatory Regime, GSI impliedly licenced its data for public use pursuant to the "rules of the regime". The Defendants rely on ***Robertson***; ***NOPEC***; ***Robert D. Sutherland Architects Ltd. v Montykola Investments Inc*** (1996), 150 NSR (2d) 281 (CA); and, ***R v Wholesale Travel Group Inc***, [1991] 3 SCR 154.

[309] This is another way of viewing the allegedly competing legislation, that is, to take the view that s 101 of the ***CPRA*** creates a mandatory or compulsory licensing system for seismic data, once the confidentiality period has expired.

[310] The music and broadcast business also has compulsory licencing requirements and, in a way, the situation here is similar. For instance, in ***Re Broadcasting*** at paras 51 to 59, Justice Rothstein reviewed the retransmission regime for communication signals that is encompassed in the ***Copyright Act***. He pointed out that regime creates an exception to the exclusive right of the copyright owner to control the communication of their works to the public by telecommunication. Indeed, in the case of transmission of local signals, the exception does not allow for any compensation. In effect, there is a mandatory licence without compensation, very similar to the situation here. The regime under consideration in ***Re Broadcasting*** had allowed for compensation and so was found to be *ultra vires*.

[311] The concept of an "implied licence" was discussed at length in the Texas ***NOPEC*** case. In direct reference to GSI's seismic data, the court said at p. 20:

> Geophysical is a Canadian company and had dealt frequently with the Petroleum Board before agreeing to subject itself to the Act and Regulations, including filing its 1982 seismic lines with the Board. Geophysical knew that the Board would treat the seismic lines as confidential for only 10 years. Geophysical also knew that after that period, the Board's practice was to make copies and disclose the seismic line data to third parties who asked for it. By giving the Petroleum Board its copyrighted seismic lines under those conditions, with no effort to restrict the Board's use whether before giving the seismic lines to the Board or after the

> confidentiality period ended, Geophysical granted the Board an implied license to use the seismic lines and to make copies of them for third parties.

[312] The Texas court went on to reject GSI's argument that the authorisation was limited to showing the data on-site (a position not put forward before me). The court held:

> The statutory and regulatory language does not show that Geophysical had the authority to restrict the Petroleum's Board's ability to copy and distribute the seismic lines in this fashion. Instead, the language shows that that Board had the authority to send requesting third parties copies of the seismic lines and did not have to limit third party access to on-site inspection.

[313] An implied licence was also found in the ***Montykola Investments*** case. An architectural firm had deposited site plans under the Nova Scotia *Planning Act* as part of a development proposal (in which it was involved as a partner). The court held the firm had impliedly consented to the use of its plans in a development agreement entered into between the municipality and another developer of the same parcel. The court held that a proposed developer who owns copyright in materials submitted as part of the process must be taken to have consented or to have granted a voluntary license for the reasonable and appropriate use by the municipality of any copyright materials. The action for infringement was denied.

[314] Further, in ***Wholesale Travel***, the Supreme Court discussed the fact that persons who participate in a regulated field are "taken to have accepted certain terms and conditions of entry" (at p 232). Indeed, the court noted that regulatory measures are the primary mechanism employed by the governments of Canada to implement policy objectives and are of fundamental importance (at p 220).

[315] A lot of time was spent at the hearing discussing GSI's knowledge of the use to which deposited seismic data would be put. I have reviewed some of this evidence above. The Defendants say that GSI knew all along about the "rules of the regime" and so must be bound by them. Consent may be implied through knowledge and conduct of the copyright holder and need not be in writing (***Tremblay*** at para 53).

[316] Upon a more careful review, however, it appears to me that these so-called rules have changed somewhat over time, in the form of legislative changes and the discretionary decision over disclosure made by Ministers and Boards. Nonetheless, the basic statutory rule, that data could be disclosed to third parties (subject to some discretion being exercised over the implementation of this rule) was always in place. The timing of the disclosure changed somewhat, but it was always a possibility.

[317] It is also clear that GSI fought against this disclosure policy for years (and obviously is still fighting). To suggest that it has "consented" to the disclosure of its very valuable seismic data, impliedly or not, does not sit well with me. In my view, GSI has been forced to grant, in effect, a compulsory licence to permit its offshore seismic data to be released and used by the public. The Regulatory Regime provides for this, as discussed above. GSI may not have liked to do so, it certainly never "consented" and it may be unfair, but it is the Regulatory Regime approved by Parliament.

[318] In conclusion on this question, I find the Boards have not breached GSI's rights under the ***Copyright Act*** by copying, or allowing others to copy, the seismic data GSI deposited with them. The specific legislative authority in the ***CPRA*** and ***Federal Accord Act*** overrides the general

rights contained in the ***Copyright Act***. Further, or in the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have the authority to copy, and as a result they are not infringing the ***Copyright Act*** when they do so.

E Conclusion on the Regulatory Regime Issue

[319] In conclusion, GSI's submissions ignore the reality that Parliament's purpose and intention when it enacted the ***CPRA*** was to allow for public disclosure of seismic data after a period of time to allow for necessary oil and gas exploration of the Canadian offshore and frontier lands. The wording of the ***CPRA***, properly interpreted, allows for disclosure without restriction after a defined period of time. It is a complete and specific code that applies to all oil and gas intellectual property in the offshore and frontier lands, including seismic data. Its provisions supplant any more general pieces of legislation, such as the ***Copyright Act*** or the ***AIA***.

[320] The ***AIA*** provisions that GSI submits are applicable for disclosure requests would only serve to thwart the public disclosure of seismic material, which is obviously contrary to Parliament's intention. I cannot agree that this legislation, which was enacted years after the Regulatory Regime was in full swing, is applicable in these circumstances.

[321] Having said this, I disagree with the Defendants' position that the Regulatory Regime did not provide for proprietary rights in the seismic material. Instead, in my view, GSI has full copyright and other proprietary rights over its seismic data, but the Regulatory Regime applies to the extent that it conflicts with the ***Copyright Act***; the Regulatory Regime, in effect, creates a compulsory licence over the data in perpetuity after the expiry of the confidentiality or privileged period.

[322] As pointed out by Senator Hays some 30 years ago, the Regulatory Regime has confiscated the seismic data created over the offshore and frontier lands and the ***CPRA*** is not apologetic for it – indeed, it makes clear that there is no compensation for any confiscation under the Act (s 111 (2)). GSI was fully aware that some of its data would have to be submitted and that it would be made public when it undertook its work on these offshore and frontier lands. It is perhaps true that the provisions for submission have become more onerous over time and that the quality of the materials submitted have become better, further encroaching on GSI's ability to licence its data to others, but the provisions have always been there. Unfair as this may seem, it is not for this Court to re-write the legislation comprising the Regulatory Regime.

[323] In sum, I accept the Defendants' submissions regarding the effect of the Regulatory Regime. It is a complete answer to the suggestion that the Boards acted unlawfully in disclosing the information and documentation to the public. The Regulatory Regime is also a complete answer to whether the copying companies and organizations were entitled to receive and copy the information and documentation for customers. For the oil companies, it establishes that there is nothing unlawful about accessing or copying the information from the Boards, leaving open other contractual issues in each case.

Heard on the 23rd, 24th, 27th, and 30th day of November, 2015 and the 1st, 2nd, 3rd, 4th, and 9th days of December, 2015.
Dated at the City of Calgary, Alberta this 21st day of April, 2016.

K.M. Eidsvik
J.C.Q.B.A.

Appearances:

T. C. Platnich
Caron & Partners

M. Lemmens
F. Tosto
Borden Ladner Gervais LLP
For the Plaintiff

M. Vesely
T. Kruger
Lawson Lundell LLP
For the Defendant National Energy Board

J.W. Rose, Q.C.
M.R. Lindsay, Q.C.
Rose LLP
For the Defendants BP Canada Energy Group and the Canada-Newfoundland Offshore Petroleum Board

C. Hunter, Q.C.
L. L'Hirondelle
Norton Rose Fulbright Canada LLP
For the Defendants Imperial Oil Limited and Exxon Mobil Canada Ltd.

D.R. McKinnon
Bennett Jones LLP
For the Defendants 612469 Alberta Limited carrying on business under the trade name CalWest Printing & Reproductions, Corridor Resources Inc. and Plains Midstream Canada ULC

T. MacDonald
C.O. Alcock
Burnet Duckworth & Palmer LLP
For the Defendants Murphy Oil Company Ltd., Suncor Energy Inc., Devon ARL Corporation and Devon NEC Corp.

M. McCachen
D.G. Samuelson
Blake, Cassels & Graydon LLP
For the Defendant Encana Corporation

D. Babiuk-Gibson
J.R. Elford
Department of Justice
For the Defendant Attorney General of Canada

T.P. O'Leary
R. Howie
Dentons Canada LLP
For the Defendants Total S.A. and Total E&P Canada Ltd., Edison S.P.A. and Edison International S.P.A.

J.L. Lebo, Q.C.
J. Biernaskie
McLennan Ross LLP
For the Defendants Husky Oil Limited and Husky Oil Operations Limited

L. MacFarlane
T.W. Kathol
Field LLP
For the Defendant Olympic Seismic Ltd.

M. Killoran, Q.C.
K. Osaka
Osler, Hoskin & Harcourt LLP
For the Defendants Vulcan Minerals Inc., Statoil Canada Ltd., ConocoPhillips Canada Resources Corp., Anadarko Petroleum Corporation, Nalcor Energy Oil and Gas Inc. and MGM Energy Corp.

P.D. Fitzpatrick
Burstall Winger Zammit LLP
For the Defendant NWest Energy Corp.

SCHEDULE A

LIST OF DEFENDANTS

1. Encana Corporation
2. ExxonMobil Canada Ltd. and Imperial Oil Limited
3. Plains Midstream Canada ULC, BP Canada Energy Group ULC
4. Total S.A., Total E&P Canada Ltd.
5. Edison S.P.A., Edison International S.P.A.
6. ConocoPhillips Canada Resources Corp., Canadian Natural Resources Limited MGM Energy Corp
7. Husky Oil Limited, Husky Oil Operations Limited
8. Nalcor Energy – Oil and Gas Inc.
9. Suncor Energy Inc.
10. Murphy Oil Company Ltd.
11. Devon ARL Corporation, Devon Canada Corporation and Devon NEC Corporation
12. Statoil Canada Ltd.
13. Anadarko Petroleum Corporation, Anadarko US Offshore Corporation
14. NWest Energy Corp., Shoal Point Energy Ltd., Vulcan Minerals Inc.
15. Corridor Resources Inc.
16. 612469 Alberta Limited carrying on business under the trade name CalWest Printing and Reproductions
17. Arcis Seismic Solutions Corp.
18. Exploration Geosciences (UK) Limited
19. Lynx Canada Information Systems Ltd.
20. Olympic Seismic Ltd.
21. Canadian Discovery Ltd.
22. Jebco Seismic UK Limited, Jebco Seismic (Canada) Company, Jebco Seismic, LP; Jebco/Sei Partnership LLC

SCHEDULE B

REGULATORY REGIME IN THE CHIEF'S ORDER

Canada Oil and Gas Operations Act, RSC 1985, c O-7

Canada Petrolum Resources Act, RSC 1985, c 35 (2nd Supp)

Canada Oil and Gas Geophysical Operations Regulations, SOR/96-117

National Energy Board Act, RSC 1985, c N-7

Canada-Newfoundland and Labrador Atlantic Accord Implementation Act, SC 1987, c 3

Newfoundland Offshore Area Petroleum Geophysical Operations Regulations, SOR/95-334

Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act, RSNL 1990, c C-2

Offshore Area Petroleum Geophysical Operations Newfoundland and Labrador Regulations NLR 16/97

Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, SC 1988, c 28

Nova Scotia Offshore Area Petroleum Geophysical Operations Regulations, SOR/95-144

Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act, SNS 1987, c 3

Nova Scotia Offshore Area Petroleum Geophysical Operations Regulations, NS Reg 191/95

All Regulations made under or in respect of the foregoing.

SCHEDULE C

Canada Petroleum Resources Act, R.S.C. 1985, c. 36 (2nd Supp.)

PART IX
ADMINISTRATION AND ENFORCEMENT

Disclosure of Information

Delineation well

"delineation well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that there is a reasonable expectation that another portion of that accumulation will be penetrated by the first-mentioned well and that the drilling is necessary in order to determine the commercial value of the accumulation;

Development well

"development well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that it is considered to be a well or part of a well drilled for the purpose of production or observation or for the injection or disposal of fluid into or from the accumulation;

Engineering research or feasibility study

"engineering research or feasibility study" includes work undertaken to facilitate the design or to analyse the viability of engineering technology, systems or schemes to be used in the exploration for or the development, production or transportation of petroleum on frontier lands;

Environmental study

"environmental study" means work pertaining to the measurement or statistical evaluation of the physical, chemical and biological elements of the lands, oceans or coastal zones, including winds, waves, tides, currents, precipitation, ice cover and movement, icebergs, pollution effects, flora and fauna both onshore and offshore, human activity and habitation and any related matters;

Experimental project

"experimental project" means work or activity involving the utilization of methods or equipment that are untried

or unproven;

Exploratory well

"exploratory well" means a well drilled on a geological feature on which a significant discovery has not been made;

Geological work

"geological work" means work, in the field or laboratory, involving the collection, examination, processing or other analysis of lithological, paleontological or geochemical materials recovered from the surface or subsurface or the seabed or its subsoil of any frontier lands and includes the analysis and interpretation of mechanical well logs;

Geophysical work

"geophysical work" means work involving the indirect measurement of the physical properties of rocks in order to determine the depth, thickness, structural configuration or history of deposition thereof and includes the processing, analysis and interpretation of material or data obtained from such work;

Geotechnical work

"geotechnical work" means work, in the field or laboratory, undertaken to determine the physical properties of materials recovered from the surface or subsurface or the seabed or its subsoil of any frontier lands;

Well site seabed survey

"well site seabed survey" means a survey pertaining to the nature of the surface or subsurface or the seabed or its subsoil of any frontier lands in the area of the proposed drilling site in respect of a well and to the conditions of those lands that may affect the safety or efficiency of drilling operations;

Well termination date

"well termination date" means the date on which a well or test hole has been abandoned, completed or suspended in accordance with any applicable regulations respecting the drilling for petroleum made under the Canada Oil and Gas Operations Act.

Privileged information or documentation

(2) Subject to this section, information or documentation is privileged if it is provided for the purposes of this Act

or the Canada Oil and Gas Operations Act, other than Part 0.1 of that Act, or any regulation made under either Act, or for the purposes of Part II.1 of the National Energy Board Act, whether or not the information or documentation is required to be provided.

Disclosure

(2.1) Subject to this section, information or documentation that is privileged under subsection (2) shall not knowingly be disclosed without the consent in writing of the person who provided it, except for the purposes of the administration or enforcement of this Act, the Canada Oil and Gas Operations Act or Part II.1 of the National Energy Board Act or for the purposes of legal proceedings relating to its administration or enforcement.

Production and evidence

(3) No person shall be required to produce or give evidence relating to any information or documentation that is privileged under subsection (2) in connection with any legal proceedings, other than proceedings relating to the administration or enforcement of this Act, the Oil and Gas Production and Conservation Act or Part II.1 of the National Energy Board Act.

Registration of documents

(4) For greater certainty, this section does not apply to a document that has been registered under Part VIII.

Disclosure pursuant to resource management and revenue sharing agreements

(5) Information or documentation that is privileged under subsection (2) may be disclosed to any government of a province or to any organization representing any aboriginal people of Canada, where such disclosure is made pursuant to an agreement between the Government of Canada and the government of that province or that organization respecting resource management and revenue sharing in relation to activities respecting the exploration for or the production of petroleum carried out on any frontier lands.

Idem

(6) The recipient of information or documentation disclosed pursuant to an agreement referred to in subsection (5) shall not disclose that information or documentation except as otherwise provided in this section.

Disclosure - governments and agencies

(6.1) The National Energy Board may disclose any information or documentation that it obtains under this Act or the Canada Oil and Gas Operations Act - to officials of the Government of Canada, the government of a province or a foreign government or to the representatives of any of their agencies - for the purposes of a federal, provincial or foreign law, as the case may be, that deals primarily with a petroleum-related work or activity, including the exploration for and the management, administration and exploitation of petroleum resources, if
(a) the government or agency undertakes to keep the information or documentation confidential and not to disclose it without the Board's written consent;
(b) the information or documentation is disclosed in accordance with any conditions agreed to by the Board and the government or agency; and
(c) in the case of disclosure to a foreign government or agency, the Minister consents in writing.

Disclosure - Minister

(6.2) The National Energy Board may disclose to the Minister the information or documentation that it has disclosed or intends to disclose under subsection (6.1), but the Minister is not to further disclose that information or documentation unless the Board consents in writing to that disclosure or the Minister is required by an Act of Parliament to disclose that information or documentation.

Consent

(6.3) For the purposes of paragraph (6.1)(a) and subsection (6.2), the National Energy Board may consent to the further disclosure of information or documentation only if the Board itself is authorized under this section to disclose it.

Information that may be disclosed

(7) Subsection (2) does not apply in respect of the following classes of information or documentation obtained as a result of carrying on a work or activity that is authorized under the Canada Oil and Gas Operations Act, namely, information or documentation in respect of
(a) an exploratory well, where the information or documentation is obtained as a direct result of drilling the well and if two years have passed since the well termination date of that well;

(b) a delineation well, where the information or documentation is obtained as a direct result of drilling the well and if the later of
(i) two years since the well termination date of the relevant exploratory well, and
(ii) ninety days since the well termination date of the delineation well,
have passed;
(c) a development well, where the information or documentation is obtained as a direct result of drilling the well and if the later of
(i) two years since the well termination date of the relevant exploratory well, and
(ii) sixty days since the well termination date of the development well,
have passed;
(d) geological work or geophysical work performed on or in relation to any frontier lands,
(i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or
(ii) in any other case, after the expiration of five years following the date of completion of the work;
(e) any engineering research or feasibility study or experimental project, including geotechnical work, carried out on or in relation to any frontier lands,
(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or
(ii) in any other case, after the expiration of five years following the date of completion of the research, study or project or after the reversion of the lands to Crown reserve lands, whichever occurs first;
(f) any contingency plan formulated in respect of emergencies arising as a result of any work or activity authorized under the Canada Oil and Gas Operations Act;
(g) diving work, weather observations or the status of operational activities or of the development of or production from a pool or field;

(g.1) accidents, incidents or petroleum spills, to the extent necessary to permit a person or body to produce and to distribute or publish a report for the administration of this Act, or of the Canada Oil and Gas Operations Act, in respect of the accident, incident or spill;

(h) any study funded from an account established under subsection 76(1), if the study has been completed; and

(i) an environmental study, other than a study referred to in paragraph (h),

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in any other case, if five years have passed since the completion of the study.

(8) [Repealed, R.S.C. 1985, c. 21 (4th Supp.), s. 4]

SCHEDULE D

Canada Oil and Gas Geophysical Operations Regulations, SOR/96-117

PART V REPORTING REQUIREMENTS

Final Report

SECTION 38

38(1) Subject to subsection (3), within 12 months after the date of termination of a geophysical operation, every operator shall submit to the Chief Conservation Officer a report that includes

(a) a title page that indicates the number that is assigned to the operation that is the subject of the geophysical operation authorization, the report title, the type of operation conducted, the location of the operation, the duration of operations at that field location, the names of the contractors, the operator, the interest owners, if any, as defined in section 2 of the Canada Petroleum Resources Act, and the author, and the date of the report;

(b) a table of contents;

(c) an introduction or abstract;

(d) location maps that show the boundaries of the area that is subject to each interest covered by the operation and the identification number of each such interest;

(e) a summary of significant dates, the number of members of the complement, if applicable, the number of members of the geophysical crew, the type and number of each type of equipment used, the production data, the total distance surveyed, the downtime per day, and the number of kilometres of data recorded per day;

(f) a summary of weather, sea, ice and topographic conditions and their effect on the operation;

(g) a general description of the operation including the instrument type, the accuracy of the navigation, positioning and survey systems, the parameters for the energy source and recording system and the field configuration of the source lines and the receiver lines;

(h) a detailed description of the geophysical data processing method including the processing sequence and the processing parameters for seismic, magnetic, gravimetric and other geophysical surveys;

(i) shotpoint maps, track plots, flight lines with numbered fiducial points, gravity station maps and, for seabed surveys, location maps for core holes, grab samples and seabed photographs;

(j) a fully processed, migrated seismic section for each seismic line recorded and, in the case of a 3-D survey, each line generated from the 3-D data set;

(k) a high-resolution section for each line recorded in a well-site seabed survey or a pipeline route survey;

(l) a series of gravity and magnetic profiles across all gravimetric and magnetic surveys for which interpretative maps have not been made;

(m) shotpoint location data;

(n) bathymetric and topographic maps that are compiled from the data collected;

(o) interpretative maps that are appropriate to the data collected including

(i) structure and isopach maps, time structure and time interval maps, velocity and residual velocity maps, and seismic amplitude and character change maps,

(ii) final Bouguer gravity maps and any residual or other processed gravity maps, and

(iii) final total magnetic intensity contour maps and any residual, gradient or other processed magnetic maps;

(p) synthetic seismograms and seismic modelling studies that use synthetic seismograms, vertical seismic profiles at wells that were used in the interpretation of the operation data, amplitude versus offset studies, and seismic inversion sections, if any; and

(q) the interpretation of maps and seismic sections including

(i) geological and geophysical correlations,

(ii) where applicable, correlations between gravity, magnetic and seismic data,

(iii) in the case of seabed surveys, the geophysical correlation of shallow seismic data with data from cores and geotechnical boreholes,

(iv) details of corrections or adjustments that were applied to the data during processing or compilation, and

(v) the operator's velocity information that was used in a time-to-depth conversion.

(2) An operator shall incorporate in a map submitted pursuant to paragraph (1)(o) any previous data collected by the operator that are related to the area covered by the map and that are of a type similar to the data from which the map was produced.

(3) An operator who has conducted a non-exclusive survey need not, in the report required by subsection (1), provide the information and materials described in paragraphs (1)(n) to (q) in respect of data that are available for purchase by the public.

(4) Where an operator who has conducted a non-exclusive survey ceases to make available for purchase by the public any data from that survey that were so available, the operator shall, within 12 months after the date on which the operator ceased to make the data available, submit to the Chief Conservation Officer a supplementary report that contains the information and materials described in paragraphs (1)(n) to (q) in respect of the data, unless the Chief Conservation Officer has received a report pursuant to subsection (5) that includes such information and materials.

(5) Every purchaser of geophysical data that arise from a geophysical operation in an area that is subject to an interest, where the costs of the purchase of the data are credited against deposit or rental requirements of the interest, and every participant shall submit to the Chief Conservation Officer a report that contains all of the information and materials described in paragraphs (1)(n) to (q) that have been prepared by or for that purchaser or participant.

(6) Where a purchaser of geophysical data that arise from a geophysical operation in an area that is subject to an interest has reprocessed the data and the costs of the reprocessing are credited against deposit or rental requirements of the interest, the purchaser shall submit to the Chief Conservation Officer a report that contains the information and materials described in paragraphs (1)(a), (h), (j) to (l) and (o) to (q) that have been prepared in respect of the reprocessed data by or for the purchaser.

(7) The reports required by subsections (5) and (6) shall be submitted

(a) in the case of a participant, within 12 months after the date of termination of the geophysical operation; and

(b) in the case of a purchaser, by the time the costs referred to in subsection (5) or (6) are credited.

(8) A person who has submitted a report referred to in this section shall, in respect of data that pertain to the location of shotpoints or stations, immediately notify the Chief Conservation Officer of any errors, omissions or corrections identified in or made to the data subsequent to the submission of the report.

(9) A report referred to in this section shall be submitted in the form, manner and quantity approved by the Chief Conservation Officer.