# Court of Queen's Bench of Alberta

**Citation: Geophysical Service Incorporated v Total SA, 2020 ABQB 730**



**Date:**
**Docket:** 1401 03449
**Registry:** Calgary

Between:

**Geophysical Service Incorporated**

Plaintiff

- and -

**Total SA and Total E&P Canada Ltd**

Defendants

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**Reasons for Judgment**
**of the**
**Honourable Madam Justice R.E. Nation**

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## 1. Introduction

[1] This is a contractual dispute. Geophysical Service Incorporated (the "Plaintiff") seeks damages against Total SA ("Total France") and Total E&P Canada Ltd ("Total Canada") (collectively, the "Defendants") for a breach of contract due to the misappropriation of copyrighted seismic data shot in Newfoundland and Labrador.

## 2. Issues

[2] The issues addressed in this judgement are as follows:

1. How should the words "noted as owned" as used in the contract be interpreted?
2. Should a notice term be implied into the contract?
3. Is clause 2(f)s(iii) a clause in restraint of trade?
4. Was the action started within the relevant limitation period?

5. Should a duty of good faith apply to this contract?
6. Should there be an adverse inference drawn from the failure of the Defendants to call certain employees?
7. What is the proper assessment of damages?
8. What is the applicable interest rate?
9. When is the proper time for the conversion of damages in American dollars to Canadian dollars?
10. Should any judgement be against both Defendants?

## 3. Statements of Facts

[3] The following are the facts on which this judgement is based:

1. The Plaintiff is a corporation that was incorporated in 1993 in Alberta. It is in the business of acquiring, collecting, processing, reprocessing, storing, and licensing seismic data.

2. The defendant, Total SA, is a company incorporated in France in the business of worldwide oil and gas exploration and development, and is the successor to TotalFinaElf SA. Both entities will be referred to as Total France.

3. The defendant, Total E&P Canada Ltd, is a Canadian corporation and is the successor to TotalFinaElf E&P Canada. Both entities will be referred to as Total Canada. At all material times, Total Canada was a subsidiary of Total France.

4. The Plaintiff has been the sole owner of the seismic data in issue in this lawsuit, Newfoundland 1979 (NF-79) and Labrador 1982 (LB-82), since 1999. It originally purchased that seismic data, along with other seismic data referred to collectively as "acquired data," in 1993 from a company called Geophysical Speculative Corp. Geophysical Speculative Corp had purchased the data from Haliburton Geophysical Services, which had purchased the data from Geophysical Service Inc, a division of Texas Instruments ("Old GSI"). There is no corporate relationship in law between the Plaintiff and Old GSI, although they bear virtually the same name, differing only as to whether the word incorporated is abbreviated or not.

5. As part of the regulatory scheme governing the creation of marine seismic data, operators generating seismic data were required to file reports, which included paper and/or mylar copies of processed seismic data, with the Canada-Newfoundland and Labrador Offshore Petroleum Board (the "Board"). After the expiry of applicable privilege periods, the filed acquired data became available to the public through data requests submitted to the Board. Old GSI shot the NF-79 and LB-82 data, filed it with the Board along with the other acquired data as required by the license, and the privilege period had expired by 2000.

6. In previous court proceedings, ***Geophysical Services Incorporated v Encana Corporation***, 2016 ABQB 230, aff'd 2017 ABCA 125, (the "Common Issues

Trial") it was determined that the seismic data like that filed by Old GSI, but now owned by the Plaintiff (acquired data) was capable of being protected by copyright. However, that decision held that the regulatory regime allowed the copying of acquired data by the public after the expiry of the applicable privilege period without paying for licensing rights. That decision expressly did not address contractual rights and obligations that may exist between the Plaintiff and its licensees, based on specific contractual terms. This action addresses the contractual terms between these parties.

7. In September of 2000, the Plaintiff and Total France entered into a Master Data License Agreement (the "MDLA"), as well as the first supplementary agreement. It was the Plaintiff's practice to have a MDLA with each client, and then execute short supplementary agreements for specific data that was licensed. It was an agreed fact in this trial that both defendants are bound by the MDLA, and it has not been amended since 2000.

8. Pertinent to this litigation, the MDLA includes this clause:

    2(f)(iii) The Licensee shall not obtain from any governmental agency any seismic data noted as owned by GSI. Should the Licensee obtain any such seismic data it shall immediately enter into a Supplemental Agreement with respect to such Seismic Data at a licensing fee equal to 150% of the current licensing fee charged by GSI for such Seismic Data.

9. The licensed data provided under the first supplemental agreement included data in the form of CDs and tape media. On some of this digital data, there was a notification that read: "Copyright-1999 by Geophysical Service Incorporated-not for resale-all data and information represented on these media contain proprietary trade secret and copyright information. Subject to non-disclosure restrictions. This notice supersedes all other statements." The CD of the navigation survey had a longer notice, indicating that the CD contained confidential trades secrets of Geophysical Services Incorporated, which were: "copyright protected @2000 by the Geophysical Services Incorporated (GSI)".

10. Twelve further supplemental agreements were negotiated and signed between the Plaintiff and either Total France or Total Canada, the last being in 2009. These supplemental agreements licensed seismic data in the Atlantic Canada region, some covering acquired data, and some covering seismic data shot after 2000 by the Plaintiff itself.

11. At the time of negotiation of several of the supplemental agreements, Total Canada and Total France had each accessed some data from the Board. That fact was not disclosed to the Plaintiff at any time during any subsequent negotiations of supplemental agreements. In fact, disclosure of any access of acquired data from the Board by either defendant was only confirmed by that defendant to the Plaintiff after this lawsuit was started.

12. The first set of data in issue in this lawsuit involves the survey NF-79. Paper copies of seismic lines were requested by Total France in February 2001 from the Board. The parties agree that 995 kilometres of data was received.

13. The seismic data NF-79 has a side label on the data, which identifies at the top: "Geophysical Service Inc. (a subsidiary of Texas Instruments)". At the bottom it has the words Geophysical Service Incorporated, Calgary Alberta under a picture of a globe, with the letters GSI on a ribbon around the globe. Mr. Paul Einarsson, the chairman of the Plaintiff testified that this globe insignia was used by Old GSI since 1932, and continued to be used by the Plaintiff. It is a trademark currently owned by the Plaintiff. There is also writing on the data sheet that says: "All data and information shown on this section are proprietary to Geophysical Services Inc (GSI) and its affiliates. Disclosure to third parties is restricted."

14. The second set of data in issue in this litigation involves the survey LB-82 that was requested by Total Canada from the Board in 2006. Paper copies of seismic lines were requested. Later requests were made to obtain related seismic interpretation reports, seismic data, and maps. Total Canada engaged a third-party company to digitalize the LB-82 data.

15. The seismic data LB-82 has a notation of the name Geophysical Service Inc (a division of Texas Instruments) with the globe insignia on the bottom and well as a similar proprietary notice as set out on NF-79 data.

16. The Board identified data that was filed with it using initials that identified the company that submitted the data. Both sets of data, NF-79 and LB-82 were given the identifier G 5, which was the identifier for Old GSI. The evidence was that the data the Board holds identifies the submitter, the Board does not track ownership if the ownership of data is changed.

17. Staff of the Defendants would have reviewed some seismic data in the Newfoundland and Labrador regions respectively and have some knowledge of the area and the data shot to determine the lines to license directly with the Plaintiff, and also, to know what seismic data to request directly from the Board.

18. In 2000, when the MDLA was signed, the Plaintiff knew: (1) that the Board considered that ten-year privileged period to deny public access to the acquired data was over, and (2) that the Board was taking the position that the public could request data from it and reproduce that data. The Plaintiff took the position that its copyright would protect the data, but was nervous and clearly feared some oil and gas companies would gain access to this copyrighted data directly from regulatory boards. As a result, the Plaintiff made requests under the freedom of information process to see who had requested seismic data from the Board.

19. Ultimately, a request in 2013 identified the requests made by both defendants, leading to this ligation which was commenced on March 28, 2014.

20. The Plaintiff sent an invoice in November of 2014 to Total France for US$11, 074,873.01, which included a stated interest rate of 1.5 percent a month. This invoice was a calculation of the cost of the data which the Plaintiff believed both defendants had accessed from the Board.

## 4. Contractual Interpretation

[4] The issue around contractual interpretation focuses on the meaning of the words "noted as owned" used in clause 2(f)(iii) of the MDLA set out in bullet 8 of paragraph 3 above. It is admitted that the Defendants obtained the relevant seismic data from the Board, the question is whether it was "noted as owned".

### 4.1 Position of the Parties

[5] The Plaintiff argued that when viewed in the factual matrix of the contract, the words "noted as owned" mean notice that the Plaintiff owned the material. It argued that as all parties were familiar with the acquired data during the negotiations for the MDLA, all parties knew it was created by Old GSI, clearly marked as such, and was now owned by the Plaintiff. The terms of the MDLA confirmed the Plaintiff's ownership of this data. The intent of the insertion of the words "noted as owned" into the MDLA was argued to be so the Defendants would avoid unexpected liability if they came into possession of seismic material inadvertently, without knowing it was data that the Plaintiff owned or licensed. The Plaintiff argued that the words "noted as owned" mean that it would be clear to the Defendants from the face of the data that it was owned by the Plaintiff.

[6] The argument of the Defendants was more restrictive. They argued that for the phrase to have meaning, some data at the Board would be noted as owned by GSI, some was not. They argued that the plain and simple meaning is that the Plaintiff had to be noted on the data as the owner, not some other corporate entity. The Defendants argued that there was only notation of the Old GSI on the NF-79 and LB-82 data, and there is no corporate connection in law between the Plaintiff and Old GSI. They argued that the factual matrix should not overwhelm the wording chosen by the parties.

[7] The Defendants argued that if there is ambiguity, clause 2(f)(iii) is a covenant in restraint of trade, as it seeks to restrict the licensee from exercising a public right. As a result, the words should be interpreted strictly and narrowly if there is an ambiguity

[8] Also, they argued that if the factual matrix is to be considered, the MDLA was expected to be a long-term association, and the parties were aware of the side labels. GSI intended to shoot new data, that would be subject to a ten-year restrictive period, and it was that data, which would be clearly "noted as owned" by the Plaintiff, not this acquired data shot by Old GSI.

### 4.2 Law of Contractual Interpretation

[9] The Alberta Court of Appeal has provided a recent overview of the law on contractual interpretation in ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 [***IFP***]. The goal is to determine the objective intent of the parties at the time when the contract was made, through the application of legal principles of interpretation. One must decide what a reasonable person would objectively have understood from the words of the

document, read as a whole and from the factual matrix. The written words are not to be looked at in isolation, or divorced from the context against which the words were chosen (***IFP*** at para 81).

[10] The Supreme Court of Canada in ***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 [***Creston Moly***], acknowledged that the interpretation of contracts has evolved toward a practical, common-sense approach not dominated by technical rules of construction. A decision maker has to read the contract as a whole, giving words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. (***Creston Moly*** at para 47). The surrounding circumstances may be looked at as an objective interpretive aid to determine the meaning of the words of the parties used (***Creston Moly*** at paras 59–61).

[11] It has been expressed by courts that when dealing with restrictive covenants (usually covenants in restraint of trade), if there is an ambiguity, a restrictive covenant will be interpreted strictly, with clear language being required to create one (see ***Rhebergen v Creston Veterinary Clinic,*** 2014 BCCA 97 at paras 55, 74).

### 4.3 Application of the Law to the Facts

[12] Although the MDLA was based on a standard form, Mr. Einarsson testified that a change of some terms from the standard form was negotiated with parties, so at times standard terms were modified or removed. An examination of the MDLA indicates that in places headers were left in, noted as "intentionally left blank." In the MDLA, this included clauses about remedies and other clauses (for example, clause 2(g)).

[13] The words "noted as owned" would in plain English be those noted in a manner to show they were owned by the Plaintiff. The words are not ambiguous, but to interpret their meaning in this contract dispute, it is necessary to consider them in the context of the factual matrix.

[14] The contracting parties were both sophisticated corporations, one supplying seismic data which the other wished to access and license so it could use it for oil and gas exploration. I find from the evidence that in 2000, it would be known to the parties that it may be possible to access seismic data directly from the Board, otherwise there would be no reason for clause 2(f)(iii). Regardless of the position the Board was taking, the legal status of the data was not clear. That issue was not decided until the Common Issues Trial in 2017.

[15] I find from the evidence that representatives of Total France, before entering into the MDLA and the first supplemental agreement would have had exposure to personnel from the Plaintiff, who since 1999 had been marketing the company as a potential customer. As Mr. Einarsson testified, the paper or mylar forms of some representative data was shown to Total France as a type of quality inspection and so they could decide what lines they wished to license in the supplemental agreement to the MDLA. This is a product where companies do not necessarily buy a whole "package," but rather they buy distinct lines of data based on a fee per kilometre. That process would involve viewing some data that had the side labels described in bullets 9 and 13 in paragraph 3 above.

[16] Clause 2.2 of the MDLA outlined that the data that was being licensed by the agreement was the property of the Plaintiff and clause 2.3 acknowledged intellectual property rights that were held by the Plaintiff.

[17] Looking at the wording of the MDLA and the factual commercial matrix set out above, "noted as owned" as used in the MDLA meant bearing notations that connected the data

ownership to the Plaintiff. The notations on the NF-79 and LB-82 data were replete with reference to Geophysical Service Incorporated, GSI, the trademark of the globe with GSI on it, albeit technically Old GSI at the time it was filed. Looking at the background to and wording of the contract and the dealings between the parties leading to the contract, the NF-79 and LB-82 data was "noted as owned" by the Plaintiff, who clearly was the owner and was marketing the acquired data, originally shot and filed by Old GSI.

[18] I find that the characterization of the words suggested by the Defendants is too restrictive. Although the clause is a penalty clause, and a restraint of a public right, the contract deals with the licensing of data that is understood by both parties to be proprietary, and there was an ongoing relationship between the parties.

[19] As a result, I find that it was a breach of contract by both Total France when it obtained the NF-79 data and Total Canada when it obtained the LB-82 data from the Board in 2001 and 2006 respectively.

[20] The data involved was "noted to be owned" by the Plaintiff, as all parties would know the notations on the data identified it as data that was the proprietary information and owned by the Plaintiff.

## 5. Should a Notice Term be Implied into the Contract?

### 5.1 The Positions of the Parties

[21] The Plaintiff argued that a clause should be implied into the contract that required the Defendants to notify the Plaintiff if they went to the Board and obtained data. A supplemental agreement could not have been entered into between the Plaintiff and the Defendants, if the Plaintiff did not know firstly, that data was obtained from the Board and secondly, the distance of the lines, as price was set on a per kilometre basis.

[22] The Defendants argued against this implied term, pointing out that there was no evidence of any negotiations around this term, and stating that there is no commercial reason that it would be implied.

### 5.2 The Law on Implied Terms

[23] The law allows terms to be implied into a contract in one of three ways: based on custom or usage; as the legal incident of a particular class or kind of contract, or based on the presumed intention of the parties where the term is necessary to give business efficacy to a contact, being a term which the parties would have obviously assumed (Geoff R Hall, ***Canadian Contractual Interpretation Law***, 2nd ed (Markham: LexisNexis, 2012) p 149. It was the third way that was argued by the Plaintiff as support to imply a contractual term.

### 5.3 Application of the Law to the Facts

[24] There was no evidence about the negotiation of the specific terms of the MDLA, or any discussion around notice of a breach. Would the parties have obviously assumed this term? Does it give business efficacy to the contract?

[25] The MDLA does have an entire agreement term in clause 17.07 that indicates it is the complete contract between the parties. This does not in law preclude against implying terms, but is one consideration as it sets out the parties' contractual intentions.

[26] I find it difficult to imply or presume an intention between the parties that would require either of the defendants to advise the Plaintiff if it obtained acquired data from the Board. These are sophisticated parties who addressed the issue (and the result) of obtaining information from the Board. One would presume they turned their minds to the ability to obtain this data and their contractual relations as a result.

[27] The Court should be hesitant to imply a term into a written contract, unless clearly necessary to give business efficacy to a contract. Generally, sophisticated parties are left to negotiate the complete terms of their contracts, and a court should be careful to intervene and imply terms. It would be unusual to require the breaching party to give notice to the other party of its breach in order that an assessment of damages occur, unless the parties in their specific circumstances negotiated for that to occur.

[28] I do not find in this case that business efficacy requires this term, or that it is a term that the parties would have obviously assumed. Clearly, they negotiated the terms of the MDLA and specifically removed certain terms, leaving only headers. Some of the terms removed related specifically to remedies.

### 6. Is This a Clause in Restraint of Trade?

[29] The Defendants argued that clause 2(f)(iii) is a clause in restraint of trade, but the Defendants did not ask that it be held unenforceable; rather they asked that it be interpreted strictly and narrowly in the case of ambiguity.

[30] The position of the Defendants was that the covenant is in restraint of trade as it seeks to prohibit the licensee from exercising a public right to access information from the Board, a public agency. It cited the case of ***Stephens v Gulf Oil Canada Ltd***, 1975 CarswellOnt 809 (Ont CA) [***Stephens***]. This case approved a description of a covenant in restraint of trade to be a contract in which one party agrees with the other to restrict their liberty in the future to carry on trade with other persons not parties to the contract in such manner as they choose. This case points out that if a contract is in restraint of trade, the restrictions must be justified as being reasonable both in the interest of the parties and of the public in order that it be enforceable. (***Stephens*** at paras 21, 24)

[31] Notably, the question is whether the restraint goes further than to afford adequate protection to the party in whose favour it is granted (***Stephens*** at para 30). Further, it was noted that reason and justice would seem to prescribe that an agreement between the parties should not be upset for some fancied and problematical injury to the public welfare (***Stephens*** at para 54).

[32] This contract clearly has a clause in restraint of trade, and it should be interpreted strictly and narrowly in the case of ambiguity. Clearly, it is not the type of contract that would be unenforceable, as the parties were on equal footing in negotiating the contract, and at the time of contracting, the public right to obtain information from the Board without licensing it was legally uncertain. The clause is not unconscionable.

## 7. Limitation Issues

### 7.1 The Position of the Parties

[33] The Plaintiff argued that this lawsuit, which was filed on March 28, 2014, was within two years of when it knew of the two breaches of contract. The Plaintiff did not receive full disclosure from the Board until 2013, which was the first time the Board notified the Plaintiff of the requests for data by the Defendants. The Plaintiff argued that in the circumstances it could not have known of the breach before this 2013 disclosure, and it was not for lack of trying to get that information from the Board. It pursued all avenues open to it to get this information.

[34] In relation to the ten-year limitation, which applies only to the 2001 breach by Total France, the Plaintiff argued that there was an obligation on the Defendant to advise that it had obtained data, so that a licensing agreement could be concluded. It argued that the breach continued for every day there was no disclosure, so the ten-year rule was not offended. In addition, it argued that the Defendant fraudulently concealed the breach, which effectively stayed the running of the ten-year limitation period.

[35] The position of the Defendants was that the Plaintiff was out of time to sue. It argued that the Defendants did not bring the action within two years of when they ought to have known of the breaches. Also, in relation to the 2001 breach, Total France argued that the Plaintiff was clearly outside of the ten-year limitation period. Total France took the position that the breach of contract was clearly in 2001, there is no ongoing breach of the contract. It argued that its conduct was not fraudulent concealment as described in the limitation legislation.

### 7.2 The Legislation

[36] The relevant portions of the *Limitations Act*, RSA 2000, c L-12 (the "*Limitations Act*") provide:

> s 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11,
> if a claimant does not seek a remedial order within
>
> > (a) 2 years after the date on which the claimant first knew, or in
> > the circumstances ought to have known,
> >
> > > (i) that the injury for which the claimant seeks a
> > > remedial
> > > order had occurred,
> > > (ii) that the injury was attributable to conduct of the
> > > defendant, and
> > > (iii) that the injury, assuming liability on the part of
> > > the
> > > defendant, warrants bringing a proceeding,
> > > or
> >
> > (b) 10 years after the claim arose,
> > whichever period expires first, the defendant, on pleading this Act,
> > as a defence, is entitled to immunity from liability in respect of the
> > claim.
>
> s 3(3) For the purposes of subsections (1)(b) and (1.1) (b),
>
> > (a) a claim or any number of claims based on any number of

breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

s 3(5) Under this section,
(a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a) or (1.1) (a), and
(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b) or (1.1) (b).

s 4(1) The operation of the limitation period provided by section 3(1)(b) or (1.1) (b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.
(2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) or
(1.1) (b) was suspended.

### 7.3 The Two-Year Limitation Period

#### 7.3.1 The Law

[37] In paragraph 56 of ***Nasrin Karim Professional Corp v Bank of Nova Scotia***, 2007 ABCA 10, the Alberta Court of Appeal discussed the meaning of discoverability as used in the *Limitations Act*. It confirmed that while the principle of discoverability does not require perfect knowledge, mere suspicion is not sufficient to trigger the running of a limitation period. A plaintiff can be said to have "known" of the claim only when they have some support for their suspicion. This was approval of the discussion about discoverability in two previous Court of Appeal cases: ***De Shazo v Nations Energy Co***, 2005 ABCA 241 and ***Photinopoulos v Photinopoulos***, 1988 ABCA 352.

#### 7.3.2 Application of the Law to the Facts

[38] Section 3(5) of the *Limitations Act* requires a plaintiff to prove that it started the action within the two-year time period defined in section 3(1)(a) of the *Limitations Act* – that it started an action within two years of when the claimant first knew, or in the circumstances ought to have known, of the breach, and its resulting loss. The facts of this case are clear that both for the 2001 breach and the 2006 breach, the Plaintiff did not have actual knowledge of the actions of the Defendants until it received the 2013 disclosure by the Board. The action was started within two years of that knowledge.

[39] The contested issue is whether the Plaintiff ought to have known of the breach prior to March 28, 2012, which would be two years before the action was commenced.

[40] The answer to this question is factual. The Plaintiff clearly knew at the time of entering into the MDLA in 2000 that the Board was taking the position that the acquired data could be

requested from it and copied by members of the public. The Plaintiff did not agree with that conduct of the Board, due to the copyright it owned, and its position that this was proprietary data. The Plaintiff clearly had suspicions that oil and gas companies may try to get data directly from the Board to avoid paying the Plaintiff a license fee. However, the question is whether they had any support for any suspicion that the Defendants specifically were accessing data.

[41] I accept the evidence of Mr. Einarsson about the steps which the Plaintiff took to obtain information from the Board to find out if licensees were requesting data. The Plaintiff took steps from 1999 onwards to submit requests under the relevant access to information legislation to determine what the Board was doing with any requests for the acquired data after the expiry of the privileged period. The Board refused to provide the Plaintiff with the names of third parties who had requested and gained access to the acquired data in possession of the Board. As a result, in late 2000, the Plaintiff instituted proceedings in the Federal Court to compel the Board to disclose the names and addresses of all third parties who had requested and were granted access to the acquired data of the Plaintiff. The Plaintiff was successful in 2003 in that action.

[42] After this, the Plaintiff initiated requests in 2003, 2004, 2005, and 2006 asking for information as to who had accessed the acquired data. The responses from the Board indicated between one and three requests a year, none of which were from the Defendants or any other major oil and gas company. In 2011, the Plaintiff started making the requests in different ways. In August of 2013, a request asking for all records from 1970 to 2013 related to Total, Fina, and Elf from 1970 to 2013 resulted in a response that for the first time identified the request from each defendant, which lead ultimately to this lawsuit.

[43] On May 8, 2012, the Plaintiff sent a letter to Total Canada indicating that it was aware of some instances where information requests had been made for its seismic data from various regulatory boards and requesting that Total Canada confirm in writing if it had requested or obtained such data from the government. The evidence is that the Plaintiff had no specific knowledge that either Total company had done this, and that this was a form letter sent to most of its clients. This resulted in some communication between the Plaintiff and Total Canada, but no one at Total Canada advised the Plaintiff at that time that Total France or Total Canada had obtained data from the Board. From the evidence at trial, this letter was received by Mr. Shawn Hinch in the legal department, but he did not initiate a substantial inquiry, due to the lack of details which the Plaintiff could provide.

[44] When I look at these facts, I am satisfied that the Plaintiff had suspicions that oil and gas companies may be accessing the acquired data from the Board in breach of agreements it had with them. The Plaintiff took reasonable steps to inquire if this was occurring. The Plaintiff has established that 2013 was the first time it knew or ought to have known that the Defendants had accessed data from the Board, and thus the action is within the requisite two-year period.

### 7.4 The Ten-Year Limitation Period

[45] The action against Total France was initiated in 2014 based on its actions in obtaining data in 2001. Section 3(5)(b) of the *Limitations Act* puts the onus on the defendant to prove the action was not brought within ten years after the claim arose. Total France argued that the data was requested and thus the contract breached in 2001, some 13 years before the action was commenced.

[46] The Plaintiff argued that the breach of contract continued daily, and that it was an ongoing breach every day that the Defendants did not approach the Plaintiff to negotiate a contract for the data it obtained from the Board. In addition, it argued that the operation of the ten-year period should be suspended as allowed for in section 4(1) of the *Limitations Act*, as Total France fraudulently concealed the fact that the injury had occurred. The onus to prove this later contention is on the Plaintiff pursuant to section 4(2) of the *Limitations Act*.

### 7.4.1 When Was the Breach of the Contract?

[47] The Plaintiff argued that the Alberta Court of Appeal in ***Champagne v Sidorsky***, 2018 ABCA 394 [***Champagne***], gave a guide to the interpretation of when the "injury" occurred under the *Limitations Act* in a breach of contract scenario. The case set out that a breach could be a failure to perform: (1) a single obligation, where the breach occurs once and the date is from the breach; (2) when obligations are to be performed periodically, as with monthly payments, so there is a breach of the contract as each period's obligation is breached; and (3) breaches of continuing obligations that require performance at all times, so the claim arises on every date that the obligation is not performed (***Champagne*** at para 9). The Plaintiff argued that this contract should be read as inferring a continuing duty to negotiate a contract to license the data, which would be an ongoing obligation. Thus, each new day that the data was not licensed would be a breach and a new start for the limitation period until the license agreement was negotiated.

[48] I have not inferred a term into the MDLA that Total France had a duty to inform of the breach. The date of breach of this contract was when Total France obtained the NF-79 data from the Board. The terms of the contract set out what the remedy was if the contract was breached. That was to license the data "immediately". There was not an ongoing breach each and every day it did not license the data, it breached that term when it went to the Board and got the data and failed to license that data with the Plaintiff in 2001.

[49] Thus, Total France has met the onus to show that ten years has passed from the breach of the contract.

### 7.4.2 Was There Fraudulent Concealment?

#### 7.4.2.1 The Law

[50] The Alberta Court of Appeal has addressed the question of what is necessary to find fraudulent concealment in the context of the *Limitations Act*. In ***Huet v Lynch***, 2000 ABCA 97 [***Huet***], the Court found that deceit or common law fraud is not necessary, and that equitable fraud will be sufficient. Equitable fraud is conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do toward the other (***Huet*** at paras 26–27). This may be active concealment of a wrongdoing or passive failure to inform of a wrongdoing knowingly or recklessly committed. Lack of malice or dishonest motives on the part of the defendant when he carried out the wrongdoing may be irrelevant (***Huet*** at para 35). In addition, the plaintiff must show that the fraud concealed the existence of the plaintiff's cause of action – in other words, the fraud must have concealed some material fact which the plaintiff has to prove to succeed at trial (***Huet*** at para 28). The plaintiff may still be required to exercise reasonable diligence to discover the fraud and thereby uncover the cause of action (see also ***Milavsky v Milavsky***, 2011 ABCA 231).

[51] In ***Atlanta Industrial Sales Ltd v Emerald Management & Realty Ltd***, 2006 ABQB 255 [***Atlanta Industrial Sales***], Phillips J considered fraudulent concealment in the context of the

*Limitations Act*. In paragraph 204, the Court adopted a discussion by Lord Denning in the ***King v Parsons & Co***, [1973] 1 All ER 206 case, where he commented that a person might do a wrong or commit a breach of contract secretly. He discussed that the person is aware that what they are doing may well be wrong, but they turn a blind eye or take the risk of it being so. They refrain from further inquiry. The Court will not allow them to get away with conduct of that kind. They may have no dishonest motive, but that does not matter. They have kept the plaintiff out of the knowledge of a right of action. Lord Denning went on to say that if the defendant was unaware that they were committing a breach of contract, it would be different as it would be an honest blunder. Justice Phillips outlined the concept of a passive failure to inform a plaintiff of some wrongdoing recklessly committed. She adopted the definition of reckless knowledge as being a person's awareness that a prohibited circumstance may exist, regardless of which the person accepts the risk and goes on to act (***Atlanta Industrial Sales*** at para 205).

**7.4.2.2 Application of the Law to the Facts**

[52] The *Limitations Act* puts the onus on the plaintiff to prove fraudulent concealment. In this case, the Plaintiff has the onus to prove to the Court that there was a special relationship between the parties in the context of which it would be unconscionable for Total France to act the way it did.

[53] The relevant communications to the Board by Total France requesting the data are heavily redacted, and there is no insight into what employee requested the data, and for what reason. There was no evidence to link the person or department who negotiated the MDLA and the first supplemental agreement to this request for data. There was no evidence by either party as to who signed the MDLA or early supplemental agreements on behalf of Total France. There was no evidence connecting the employees or department who obtained the NF-79 data to the Plaintiff. Mr. Einarsson testified that he may have met Mr. Jean-Michel Buchoud, but there was nothing linking Mr. Buchoud, or any other employee to the 2001 breach of contract, only the 2006 breach. Other than the seismic data in NF-79 being in the area of Atlantic Canada, no link was made between the acquired data licensed by Total France in 2000 and 2001 and the NF-79 data.

[54] This contract did not set up a special relationship between the two contracting parties. There was no fiduciary relationship. Nor is this a case, like other reported cases such as ***Geophysical Service Inc v Devon ARL Corp***, 2017 ABQB 463 [***Devon ARL***] where there was a notice clause or audit provisions. There is no evidence that establishes intentional breach of the contract or reckless conduct.

[55] Furthermore, although the Plaintiff suspected some requests for information, there is no evidence that it ever, in the 13 years between the breach and notification by the Board, asked by email, correspondence or in person if Total France had accessed data. That opportunity was available as the two parties negotiated further supplemental agreements.

[56] The policy reason behind the ten-year ultimate limitation period is so that actions are dealt with in a timely matter, and on the best evidence available, without the difficulties that arise with a stale action such as fading memories or loss of evidence. I do not find that the Plaintiff has met the onus of proof to show fraudulent concealment by Total France. Therefore, the operation of the ten-year limitation period should not be suspended.

[57] The action against Total France is therefore barred by the ten year limitation period.

## 8. Arguments About a Duty of Good Faith and Adverse Inferences

[58] The Plaintiff argued that a duty of good faith affected contractual relations under the MDLA. In addition, the Plaintiff argued for several adverse inferences to be made against the Defendants. A decision in these matters does not affect the outcome of my decision, but I will deal with the arguments as they became issues before the Court in this trial.

### 8.1 Duty of Good Faith

[59] The Plaintiff argued that the duty of good faith required the Defendants to advise the Plaintiff that it had breached the contract.

#### 8.1.1 The Law

[60] The case of ***Bhasin v Hrynew***, 2014 SCC 71 [***Bhasin***], was argued by the Plaintiff as establishing a duty of good faith, which in this situation would require the Defendants to disclose the breach of contract, so a license agreement could be negotiated. ***Bhasin*** discussed the law of contract and set out a duty to perform contracts honestly and in good faith. It did not place fiduciary duties on arm's length parties to a contract, but stressed that a basic level of honest conduct is necessary for the proper functioning of the contract. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of parties (***Bhasin*** at para 60).

[61] In paragraphs 65, 66, and 86, ***Bhasin*** goes on at some length to point out that the intention is not to create fiduciary duties, such as is the case with insurance contracts or other types of contracts recognized to give rise to utmost good faith and fiduciary relationships. However, the list of particular situations for good faith is not closed. In any contract, a party may not seek to undermine contractual interests in bad faith. In some cases, honesty and good faith may be important for private ordering and certainty in commercial affairs. Contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. A clear distinction can be drawn between a failure to disclose a material fact, or even a firm intention to end the contractual arrangement, and active dishonesty.

[62] In ***Devon ARL***, this Court used ***Bhasin*** to find a duty on Devon to disclose a breach of contract. However, it must be noted that the Devon contract with GSI had a specific notification clause in it, which is not found in the MDLA in this lawsuit and is a distinguishing point.

#### 8.1.2 Application of the Law to the Facts

[63] I do not find that the application of the principles in ***Bhasin***, for this particular contract, establish a duty of good faith between these parties that would place an obligation on the Defendants to disclose to the Plaintiff the fact that they had obtained some data from the Board. The parties were sophisticated companies, who negotiated the terms of how the Defendants would license data they wanted, which the Plaintiff owned. They knew the Board had some data and was allowing it to be copied. The Defendants agreed to a prohibition as a negotiated term of the contract. The parties dealt very specifically with how the parties were to deal with a breach of that restriction, the Defendants were to enter into a supplemental agreement for the data, at a rate which included a penalty. They could easily have dealt with a contractual duty to notify if they wished.

[64] I am reluctant to use the duty of good faith to require the Defendants to advise the Plaintiff of any breach of contract in this case. This is another way to argue the issue of whether a notice provision should be implied into the contract, an issue dealt with in section 5 of this decision. Courts should use caution in using a duty of good faith to imply notice provisions into a damages and remedy section that was negotiated between the parties. The issue here is not a misrepresentation or lack of candor during the negotiation of the contract; it was a breach of contract years ago about which the specific details around the breach are unknown.

**8.2 Should an Adverse Inference be Drawn**

[65] The Plaintiff asked that this court draw an adverse inference of several facts, as the Defendants did not call any evidence from employees involved in actually obtaining the data from the Board, nor did the Defendants explain their failure to do so. The three specific inferences that the Plaintiff asked this court to draw were as follows:

1. That the factual matrix around the formation of the contract as put forth by Mr. Einarsson be accepted, as neither defendant called any evidence about the factual matrix. It argued that the Court should assume that any evidence the Defendants had to give about what was known or understood about the Plaintiff, Old GSI and the data would be harmful to the position of the Defendants.

2. That the failure of the Defendants to call the employees who obtained or received delivery of the NF-79 and LB-82 data from the Board as witnesses at trial should be taken to mean that those witnesses would have given evidence that they were aware of the MDLA and asked for the data from the Board knowing that they were in breach of the MDLA.

3. That the Court should infer actual concealment of evidence by the Defendants, as there were investigations made by the Defendants after the lawsuit commenced around the details of the data in issue, and how it come into the Defendants' possession on which solicitor-client privilege was claimed. It was agreed that the Defendants chose not to call any evidence about the outcome of these investigations, and thus the Court should find active and fraudulent concealment by the Defendants that they had broken the contract.

**8.2.1 The Law**

[66] A trial judge's ability to draw an adverse inference from a failure to call a witness is discussed in ***Howard v Sandau,*** 2008 ABQB 34 [***Howard***]. A judge is allowed to draw an adverse inference when a party does not call a material witness over whom he or she has exclusive control and does not explain it away. This ability is discretionary, both as to whether the inference is drawn and the extent of the inference. The logic behind the rule is that one assumes that a party who knows crucial facts and who is in control of the witnesses capable of shedding light on crucial facts would have a reason for not calling those witnesses. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. One has to consider if there is a legitimate explanation for the failure to call the witness, whether that witness has material evidence to provide, whether the witness is the only or best person to provide the evidence, and whether the witness is in the exclusive control of one party (see ***Howard*** at paras 38–43).

### 8.2.2 Application of the Law to the Facts

[67] A great deal of the evidence in this case went in through an agreed statement of facts, which was of great assistance to the Court. The only witnesses called were: Mr. Einarsson, the officer of the Plaintiff; the two experts who testified about damages; and Mr. Hinch, the legal manager at Total Canada, who was produced by that Defendant for cross-examination at the request of the Plaintiff.

[68] There was not a great deal of contentious evidence. The Defendants made little argument about the credibility and reliability of Mr. Einarsson's evidence, other than evidence he gave around the negotiation of the MDLA, pointing to his earlier evidence on questioning where he testified that he could not remember details of the actual negotiation of the MDLA.

[69] There was no evidence called by the Defendants about the employee or employees who requested the data from the Board in 2001 or 2006, nor of details of the circumstances around acquisition of the NF-79 or LB-82 data. The Defendants simply admitted that the NF-79 and LB-82 data was requested and received. This could be because this was a large organization, it could be that the Defendants were attempting to hide intentional deceit, or it could be that with the passage of time that evidence was not available. I do note that the Plaintiff read-in evidence from Mr. Lance Valeroso, the officer of Total Canada that indicated that the LB-82 data was found in the possession of Total Canada through a search of the database, but Mr. Valeroso was not sure exactly how Total Canada came into possession of the data.

[70] I have to consider here that the litigation took many years, and the Plaintiff's counsel are experienced litigators who have issued many lawsuits on these contracts in the Courts in Alberta. They had questioning rights, and the ability to ask to question employees who they wanted to examine on aspects of the case (for instance Mr. Bouchoud's involvement with both corporate defendants).

[71] When I consider the three adverse inferences that the Plaintiff invited the Court to draw, in the circumstances of this case, I exercise my discretion as follows:

1. The factual matrix or background to the contract testified to by Mr. Einarsson is accepted. His evidence did not include the actual negotiation of specific terms of the contract. The acceptance of the factual matrix is not due to an adverse inference, but merely the assessment of the credibility and reliability of his evidence, in light of the agreed statement of facts and the lack of any other evidence on the issue.

2. I do not find an adverse inference because of the failure to call anyone as a witness who involved in getting data from the Board in 2001 and 2006. The fact that data was requested from the Board was admitted. The contentious issue was the interpretation of the contractual words. The read-ins suggest at least that Total Canada did not know how the data come into its possession.

3. I do not infer that employees of the Defendants acted with fraudulent intention to hide the fact they had obtained data from the Board. The actions of the employees were in 2001 and 2006, and this trial was in 2020: 19 and 14 years later, respectively. One has to be aware of the passage of time. There was no challenge to the claim of solicitor-client privilege.

## 9. Damages

### 9.1 The Position of the Parties

[72] The Plaintiff argued that the damages should be calculated as set out in clause 2(f)(iii) – 150 percent of the Plaintiff's list price per kilometre for the data multiplied by the distance of data. This, the Plaintiff argued, should be as calculated by Mr. Michael Royan, the expert who the Plaintiff called as a witness. Mr. Royan did a straight calculation from the 2013 list price (date of discovery and also same list price at the date of trial). He took the length of 6,985.51 kilometres in LB-82 times the price per kilometre for a total of US$1,225,595, grossed up to 150 percent, resulting in US$1,838,392. He calculated the 2001 breach involving the NF-79 data using 995 kilometres multiplied by the price in the 2013 price list, for a total of US$374,120, increased at 150 percent to US$561,180.

[73] The Defendants took the position that damages for any breach of contract, if found by the Court, should be the actual loss to the Plaintiff, in accordance with the general statement of the law applicable to damages for breach of contract – that the Plaintiff should be put in the same position that it would have been had the contract been performed. It argued that the formula of 150 percent should not be used, as the data received from the Board was not the data outlined in the price list of the Plaintiff, but rather far inferior. The Plaintiff did not license only paper or mylar data in 2001 or 2006 – it also licensed reprocessed, superior data. As a result, the Defendants argued that damages should be assessed as a nominal sum, or alternatively, on the value that a party bargaining with the Plaintiff would have paid for the actual paper and mylar data of the same quality as that actually obtained from the Board. To that end, the Defendants called an expert who calculated damages for the LB-82 breach to be in the range of CAN$246,401 to CAN$256,401.

### 9.2 The Effect of the Penalty Provision

[74] Cases have examined the situation where a contract outlines the damages to be paid for breach of contract. Firstly, there is a question whether the clause is a penalty clause, or a pre-estimate of damages. Secondly, there is a question of whether the amount negotiated between the parties should be enforced, or whether there should be relief from forfeiture. These principles are discussed in the context of different contracts in ***Canadian Wheat Board v Pigeon Hill Elk Farm***, 2009 SKQB 437, and ***Fern Investments Ltd v Golden Nugget Restaurant (1987) Ltd***, 1994 ABCA 153 [***Fern Investments***]. The latter case states that a penalty clause in a contract is enforceable unless it would be unconscionable or oppressive to give effect to it, keeping in mind the circumstances of the case at the time when enforcement was sought (***Fern Investments*** at para 18).

[75] Some indicia of unconscionability are set out in ***Redstone Enterprises Ltd v Simple Technology Inc***, 2017 ONCA 282 at para 30. These include: inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of *bona fide* negotiations, the nature of the relationship between the parties, the gravity of the breach, and the conduct of the parties.

[76] Clause 2(f)(iii) is a penalty clause, not a pre-estimate of damages. It included a formula for calculating the price to be paid for the data obtained from the Board, which involved a premium on the regular price list. This was clearly a penalty in an attempt to stop customers who

had licensed data from requesting further data, albeit inferior, from the Board. Is it unconscionable to enforce this penalty?

[77] I do not find that the clause is unconscionable. This was a negotiated contract. It set out a method to determine payment if the Defendants broke their promise not to seek seismic data from the Board directly. The penalty was agreed to as a term of the contract between two corporations who had sophistication and knowledge about highly specialized data, and its use in oil and gas exploration. The parties were aware of the ability to request data from the Board, and they were dealing with that ability directly in their negotiated contract. They would both know there were copyright issues around the data. Mr. Einarsson described it as an attempt to protect the acquired data, which was copyrighted material which the Plaintiff had purchased. He indicated that the fear was that companies would look at data and "cherry-pick" small amounts of lines they wanted and then only license those instead of a larger area.

[78] As a result, I find that the penalty stated in the contract is enforceable.

### 9.3 The Expert Evidence

[79] Each party called an expert who spoke to the calculation of damages.

#### 9.3.1 The Report by Michael Royan

[80] Mr. Royan, an expert called by Plaintiff's counsel, was qualified as an expert in the area of loss of revenue quantification. He is a chartered business evaluator. His approach was to take the price list of the Plaintiff, (expressed in dollars per kilometre) and apply it to the length of the data acquired. As there may be two applicable times, he calculated the damages using the price list at both the time when each defendant requested the data from the Board and also using the 2013 price list, which was still the price list in effect when he prepared his report in 2020. He reviewed a number of contracts negotiated between the Plaintiff and other parties to determine if the price list was a valid indicator of price, and testified that a reasonable number of the contracts provided were negotiated at a price close to the list price.

[81] Mr. Royan confirmed that his report was based on two assumptions: first, that there was an accurate measuring of the distance of the data (which he was given by the Plaintiff); and second, that the applicable clause of the MDLA meant that the fee to be used was 150 percent of the current licensing fee. He admitted in cross examination that he used only the column applicable to reprocessed data, not the "as is" column. His rationale was that the "as is" column was not in use in the 2013 price list, so he used the reprocessed column for both the 2001 and 2006 breaches in order to use a consistent process. He made no adjustment for any quality difference that might apply to data received from the Board and that which the Plaintiff might provide for licensing using the price list.

#### 9.3.2 The Report by Doug Uffen

[82] Mr. Doug Uffen was called as an expert by the Defendants' counsel. He was qualified as a geophysicist to give opinion evidence in the field of seismic data analysis and evaluation. He undertook an evaluation of the LB-82 seismic material as obtained by Total Canada from the Board, which was a paper/mylar, non-digital form of data. He calculated the price that would be paid for that exact form of data by a willing buyer from a willing seller in 2006.

[83] Mr. Uffen outlined the various considerations that go into pricing seismic data, such as location, quality, and age of the data. He testified about the various forms of seismic data; the

paper data would be considered "as is." It is possible to take that data, scan it, digitize it, and then reprocess it by applying algorithms to make it more useful in terms of the information it provides. He confirmed that in reality, had a buyer and seller been negotiating for data in a real-life situation in 2006, the Plaintiff as seller would have been providing a superior product than the paper product obtained from the Board. Customarily, with the shot data (the actual seismic lines recorded), a licensee would also want and receive from the seller the field data and reports and information, subject to copying charges.

[84] Mr. Uffen applied the "as is" pricing using the Plaintiff's 2006 price list to his measurement of 6,985.51 kilometres to arrive at a value of US$638,809 American or CAN$709,809. To this he applied a discount of 5 percent because of the age and quality of the data, to reduce the price to CAN$354,904. He then looked at the cost to digitalize the data, as in 2006 companies would want to work with digital data, and estimated that cost at CAN$113,598. He deducted that from the price, to arrive at an estimated value of CAN$246,401 to $256,401 for the paper/mylar data in the form that it was actually received from the Board.

[85] Mr. Uffen admitted in cross-examination that this valuation had no reference to the clause in the MDLA. His instructions were to put a value that would be expected in a free market between a willing buyer and seller. He also acknowledged that had Total Canada gone to the Plaintiff in 2006 to license this data, it would be unlikely to license the paper data, it would be looking for digital and reprocessed data, and possibly to copy the original field work materials.

[86] Mr. Uffen pointed out that the data bought in the first supplementary agreement with Total France was discounted about 25 percent from list value. He used this to opine that the discount from list price could be 25 percent, but he would apply 50 percent due to the age and limitations and quality he ascribed to the data. He did not address Mr. Einarsson's evidence that there was a discount on the price of the first supplemental agreement in order to obtain Total France as a first-time customer.

### 9.3.3 Consideration of the Two Experts

[87] The two experts took fundamentally different approaches in their reports. Mr. Royan is a chartered business evaluator and looked at the calculation in accordance with an interpretation of the contractual terms. He had no expertise to determine the quality of the data, or any other material or reprocessing that may have gone with a standard licensing agreement price. He did look at the other supplemental agreements between the Plaintiff and the Defendants to determine if the price list was generally followed between the two parties. He noted that 9 out of the 11 agreements were done within 10 percent of the Plaintiff's then-current price list.

[88] Mr. Uffen set out to determine what price would have been negotiated between two parties had they negotiated a license agreement only for the paper and mylar documentation that Total Canada obtained from the Board in 2006. He recognized this is an artificial situation, as no client would have been approaching the Plaintiff and buying only that material in 2006 or after because they would want the digital, reprocessed data being sold by the Plaintiff. Thus, he used the price list in 2006 for "as is" materials, and then deducted from that price the cost of converting it to digital product. He also attributed a 25 or 50 percent deduction due to age limitation and quality.

[89] Mr. Royan's approach attempted to follow the contractual "words." although he had no qualifications to decide if the "as is" column or reprocessed column was appropriate. He did two

calculations, as the date of calculation of damages was unclear. He made no consideration for the quality of the data received from the Board.

[90] Mr. Uffen looked at a theoretical situation if two parties were negotiating for exactly what the Defendants got from the Board. It is theoretical as parties in 2006 would not have been negotiating just for paper data. Also, this way of looking at damages ignores the contractual terms, which set a penalty.

### 9.4 The Argument for a Nominal Sum

[91] The Defendants argued that the Court should not use the terms of clause 2(f)(iii) to determine damages, but rather award a nominal sum. This is based on an argument that the general principle of damages is that it should put the Plaintiff in the position they would have been had the Defendants performed their contractual obligations. Here, the Defendants received paper and mylar material from the Board. They argued that the price list referred to data the Plaintiff was licensing, which would have been digital, reprocessed data, superior to what they received. As a result, they argued that there was no current licensing fee applicable to this data, and thus the Court must do its best to assess the loss to the Plaintiff.

[92] The Defendants argued that the attempt is to put the Plaintiff in the position it would have been if the Defendants had not obtained the data from the Board, and that is in exactly the same place – essentially, their argument is that there was no evidence of any loss.

[93] The Defendants argued that an assessment of nominal damages might be in the amount of CAN $25,000, as provisionally assessed by Eidsvik J in the case of ***Geophysical Service Inc v 612469 Alberta Ltd***, 2016 ABQB 356. This was a case where there was no contract between the parties. A copying company was being sued solely for the act of copying data. The facts are clearly distinguishable.

[94] The Defendants also raised the issue of restitutionary damages, which may arise where the commission of the wrong results in a benefit to the wrongdoer that exceeds or outstrips the loss to the person wronged, who suffers a lesser loss or no loss at all. (see H McGregor, **McGregor on Damages**, 19th ed (London, UK: Thomson Reuters, 2014 at 447). This argument was partially based on the fact that the Plaintiff bought all of the acquired seismic data for $475,000 from Geophysical Spec and had licensed it many times. Therefore, the Defendants argued that the Plaintiff essentially sustained no damages.

[95] These arguments overlook the basic tenants of contract law. The business of the Plaintiff was to license data. It did so, and spent money not only on the acquisition of data, but also in its enhancement, reprocessing, and digitalization. What the Plaintiff originally paid to buy the acquired data and the amount of money made from licensing is not the question. It is clear that what the Plaintiff lost was the opportunity to contract with the Defendants directly to license the data which the Defendants wanted, but in breach of contract got directly from the Board (and then in the case of the 2006 data, paid to digitalize). Aware of the issues around getting the data from the Board, and the legal uncertainty of positions, the Plaintiff negotiated terms to protect its business product and contracted to prevent the licensees going directly to the Board to obtain data, albeit inferior, that the parties would otherwise come to the Plaintiff to license.

[96] This is not a case where there is no way to determine the licensing fee. The parties contracted that the Defendants would not obtain from any governmental agency any seismic data noted as owned by the Plaintiff. There was a recognition of the confidential, proprietary right the

Plaintiff had in that property. They contracted that if the Defendants obtained any such seismic data, they would enter into a supplemental agreement at a licensing fee equal to 150 percent of the current licensing fee for the data. The Defendants chose to go to the Board for data in breach of the contract, presumably to avoid paying the licensing fee to the Plaintiff. It cannot now argue that what it got was inferior and thus, no damages are owing under the contract.

[97] The nominal and restitutionary damages argument ignores the contractual terms.

### 9.5 Determining Damages

[98] The clause before the Court is unusual in that it prohibited the Defendants from obtaining any of the Plaintiff's seismic data from the Board, but then set out a remedy on how to deal with the situation if they did. The remedy was to immediately enter into a supplemental agreement with respect to such seismic data at a licensing fee equal to 150 percent of the current licensing fee charged by the Plaintiff.

[99] The Plaintiff argued that the first time the word seismic data is used in clause 2(f)(iii) it is in small letters, but the last two times it is mentioned it is capitalized. Counsel argued that this has a meaning as the capitalized letters of "Seismic Data" denote a defined term in the MDLA, meaning seismic, gravity, or magnetic data and any related material or product identified in all supplemental agreements. The Plaintiff argued this meant that the Defendants had agreed to pay the list price for data that would be licensed by the Plaintiff at the time, even if this was of superior quality than that obtained from the Board. Thus, the party was not contracting for the seismic data it obtained from the Board, but rather that which the Plaintiff was licensing as "Seismic Data." The charge was to be at 150 percent of the current price, a healthy upcharge.

[100] In determining damages, in order to interpret the contractual terms, the Court must determine what the "current" licensing fee is. Although the Plaintiff argued that this should be the licensing fee set out in the 2013 schedule, being the date of the discovery of the breach (or trial, as there was not change in the price list after 2013), I do not find that to be appropriate. The breach of the contracts here was in 2001 and 2006. The appropriate price would be the "as is" prices, as the material obtained from the Board was not reprocessed, it was the "as is" shot material, and in the words of Mr. Einarsson, inferior to the quality of the data actually sold by the Plaintiff. Also, the general rule is that damages for breach of contract are to be assessed at the date of the breach. I do not find any special circumstances to depart from this general rule.

#### 9.5.1 Length of Data in LB-82

[101] There was a dispute over the length of the LB-82 data. The Plaintiff calculated the length of the copied LB-82 data to be 6,985.51 kilometres, the Defendant calculated it to cover 6,884.74 kilometres. The difference in their measurement was explained by Mr. Uffer to be as that the Plaintiff used the actual length of seismic "shot" in the line lengths (which it would sell), while Mr. Uffer measured the processed seismic display images that make up the paper hardcopies actually obtained from the Board. He explained that paper data may cut off various shot points. He agreed that the length of the shot data or raw data is 6,985.51 and that would be the length generally used if one was negotiating a license agreement for that data.

[102] As the contractual terms discuss the entering into a supplemental agreement, and in the industry and general course of dealings between the parties the shot distance would be used, I find that distance of 6,985.51 kilometres should be used in calculating the damages on the LB-82 data breach.

### 9.5.2 The Calculation of Damages

[103] As a result, the damages for the NF-79 breach of the contract in 2001 by Total France would be calculated according to the price list in force in 2001 which was in Canadian dollars, for the "as is" data at 995 km times CAN$132 for a total of CAN$131,340, increased 150 percent to CAN$197,000. These are provisionally assessed as they are not allowed due to the missed limitation date.

[104] The damages for the LB-82 data breach of contract in 2006 by Total Canada are calculated according to the graduated formula in the 2006 price list, which is in American dollars, at 1000 kilometres times US$120 for a total of US$120,000, 2000 kilometres times US $96 for a total of US$192,000, and 3,985.51 kilometres times US$84 for a total of US$334,782.84, which added together total of US$646,782.84 increased 150 percent to US$970,174.68.

### 9.5.3 Conversion from American to Canadian Currency

[105] It is general practice in Canada for a judgement to be expressed in Canadian dollars. A discussion about the date of conversion from a foreign currency to Canadian dollars is presented by ***SRG Takamiya Co Ltd v Sprung Instant Structures Ltd***, 2017 ABQB 668. Judicial discretion can be used to determine if the conversion is at the date of breach or the date of judgment. No evidence was led on this point, nor were any special circumstances of the parties discussed. The contract term would suggest that the contract would be negotiated immediately, meaning the license fee would be paid at the time of breach.

[106] Having no evidence before me of the different rates, and thus no equity is in issue, I direct that the damages that were calculated in US dollars due to the price list being in US dollars, shall be converted to Canadian dollars at the rate on the date of the breach, to be taken as April 4, 2006.

## 10. Interest

[107] The MDLA set out in clause 14.4 that invoices were payable upon receipt and if payment was not made within 30 days, interest would be payable at the rate of 18 percent per annum from the date of the invoice until payment. On November 5, 2014, after this litigation had started, an invoice was issued to Total France only. The invoice was for US$11,074,873 which included among other things, the two areas in issue here. It indicated at the bottom of the invoice that interest would be at 1.5 percent per month.

[108] The Plaintiff asked that interest at 18 percent per annum be assessed at the contractual rate from the date of the breach to the date of judgement and thereafter in accordance with the Judgment Interest Act, RSA 2000, c J-1(the "*JIA*").

[109] The Defendants argued that if there is any amount outstanding, contractual interest runs only from invoicing and there was never an invoice to Total Canada, only to Total France. The Defendants took the position that the only interest should be post judgment interest under the *JIA*.

### 10.1 The Law

[110] The *JIA* provides that where a person obtains a judgement for the payment of money, the Court shall award interest from the date the cause of action arose to the date of judgment. Section

2(2) sets out exceptions to this mandatory provision, which includes whether there is an agreement between the parties in respect of interest. Section 2(3) accords the Court discretion to refuse interest or to award interest at a rate higher or lower than prescribed under the regulations, where the Court considers it just to do so having regard to changes in the market interest rate, the circumstances of the case, or the conduct of the action.

[111] The Plaintiff argued the case of ***Horst Tyson Dahlem Professional Corporation v John F Schneider Professional Corporation (Canmore Legal Services)***, 2017 ABCA 97. In that case, the Court at paragraph 38 limited the effect of section 2(3) of the *JIA* to a contract that did not prescribe a rate of interest. The Court appeared to limit the ability of the Court to depart from an agreed interest rate to circumstances that would verge on the unconscionable.

### 10.2 Application of the Law to the Facts

[112] The only contractual term in the MDLA was to pay interest at 18 percent running from the date of invoice.

[113] There was no invoice generated to Total Canada in relation to the 2006 breach, and thus the contractual terms do not apply. As I have assessed damages as of the date of the breach of contract, generally interest would be assessed from the date of the breach, April 4, 2006, to the date of this judgment in accordance with the rates for the pre-judgement interest set by the regulations under the *JIA*.

[114] I have to consider whether I should exercise my discretion to vary the fact of interest or the rate. Would it be just to do so considering the circumstances of the case or conduct of the action? This action took six year to get to trial. This is not inordinate, considering the Common Interest Trial had to be held first, and there was an appeal of that decision.

[115] What is unusual is that eight years went by from the breach in 2006 to 2014, when the action was commenced. It is not clear that either party had specific knowledge of the breach prior to the action being started, there is no evidence of fraud or a direct attempt to cover up the breach. The only evidence is that the data was discovered in Total Canada's database, and that Total Canada presumed it was obtained from the Board.

[116] In these circumstances, I find it just that interest on the judgement will run from the date this action was started, on March 28, 2014, when the focus of both parties was on what data was obtained from the Board at set dates and by whom. Interest will be at the pre-judgment interest rate as set by regulation under the *JIA*.

## 11. The Relationship Between the Corporate Defendants

[117] The Plaintiff asked for judgment jointly against the two defendants for both breaches, regardless of their separate corporate existence. It argued that this was appropriate as the evidence showed that they were partners, they shared a database, and they did not act as separate and distinct companies.

[118] The Defendants oppose this, indicating that there is not sufficient evidence or reason to pierce the corporate veil.

[119] The Plaintiff relied on evidence from the questioning Mr. Valeroso, the corporate representative of Total Canada, which was read in as part of the Plaintiff's case. The read-ins confirm that Total Canada found mylar, paper, and CD's from LB-82 from an "e-search"

database (tracking physical data). Total Canada does not have information as to how Total Canada came into possession of those items, but surmised it was obtained from the Board. Both Total Canada and Total France can access the e-search database. Both defendants could also access a Petrovision database (storing physical data).

[120] The agreed statement of facts sets out the details of the two corporate defendants, and that all material times, Total Canada was a subsidiary of Total France. The facts state that Total Canada requested the LB-82 data and Total France requested the NF-79 data.

[121] The book of agreed exhibits includes the MDLA and the various supplementary agreements. The MDLA was originally between the Plaintiff and Total France. The third supplemental agreement dated November 16, 2000 was the first agreement between Total Canada and the Plaintiff, it incorporated the terms of the MDLA, and as a result Total Canada became bound by those terms. The sixth supplemental agreement between the Plaintiff and Total France was the first agreement that had a place for delivery of the data specified, and that was to an address in France, to the attention of Ms. Dominique Amoilhon. All subsequent licensing agreements were between the Plaintiff and Total France. They specified delivery to France, to one of Ms. Amoilhon, Mr. Buchoud or Mr. Benoit Mouly, all at an address in France. Mr. Buchoud referenced in the seventh supplemental agreement was a Total France employee who worked for Total Canada in Canada from 2005 to 2009.

[122] The response to the request by the Plaintiff to the Board in October 2013, which gave various redacted information that led to the Plaintiff initiating this action, identified an initial request for data in 2001 by Total France using a French address. Further emails indicate communication requesting data to be sent to France, and the invoice to "our subsidiary" in Calgary. No employee name could be discerned from the redacted request in evidence.

[123] The emails with the Board in relation to the 2006 request are from Total Canada, using a Calgary address. The only employee names that are ascertainable around the redactions are reference to Mr. Buchoud, "Nicole", "Jean Michel" and a reference to "Jean-Michel's Excel file."

[124] Thus, the evidence is that each defendant contracted separately with the Plaintiff for data. Each defendant was responsible for a separate breach of the contract, involving different data. The elements that would support a lifting of the corporate veil were: (1) evidence that both corporations shared access to the same database to search for data; (2) one was the subsidiary of the other; and (3) in 2006 there was communication with the Board by Mr. Buchoud.

[125] I do not find that this evidence is sufficient to suggest that the two defendants were working with the data in some type of partnership, or that the way the data was requested or stored suggests that the corporate veil should be lifted and each defendant is responsible for any liability of the other defendant under the contract. As a result, each defendant is only responsible for its own breach of contract.

## 12. Conclusion

[126] The Plaintiff shall have judgement against the defendant, Total Canada for the amount of US$970,174.68, converted to Canadian currency on April 4, 2006.

[127] The Plaintiff is entitled to interest on that amount at the pre-judgement interest rate prescribed by regulation under the *JIA* from March 28, 2014 to the date of this judgement.

[128] The action against the defendant Total SA is dismissed.

[129] Should they be unable to agree on appropriate costs, the parties are at liberty to speak to costs at a future date.

Heard on the September 28th to October 5th, 2020.
**Dated** at the City of Calgary, Alberta this 25th day of November, 2020.

**R.E. Nation**
**J.C.Q.B.A.**

**Appearances:**

Timothy C. Platnich and Lucinda A. Wong
for the Plaintiff

Thomas P. O'Leary and Steven A. Latos
for the Defendants