THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON and RUSSELL JOHN EINARSSON

Disputing Investors

-and-

on behalf of

GEOPHYSICAL SERVICE INCORPORATED

Enterprise

-and-

THE GOVERNMENT OF CANADA

Party

NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION UNDER NAFTA CHAPTER ELEVEN

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Counsel for Theodore David Einarsson, Harold Paul Einarsson, Russell John Einarsson and Geophysical Service Incorporated

Pursuant to Articles 1116, 1117 and 1119 of the *North American Free Trade Agreement*[1] ("NAFTA"), and with a view to resolving this dispute amicably through the consultations and negotiations contemplated by NAFTA Article 1118, the disputing investors, Theodore David Einarsson, Harold Paul Einarsson and Russell John Einarsson (collectively, the "Einarssons" or "Investors"), as investors on their own behalves, and through the Canadian enterprise that they directly own and control, Geophysical Service Incorporated ("GSI"), respectfully serve the Government of Canada ("Government" or "Canada") with this Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA.

I. DISPUTING INVESTORS

1. The Einarssons submit this Notice of Intent to Submit a Claim to Arbitration under NAFTA Article 1116 as investors on their own behalves through their investment: Geophysical Service Incorporated ("**GSI**" or the "**Investment**").

2. The Einarssons' name and address information is as follows:

Theodore David Einarsson
2115, 24001 Cinco Village Center Blvd.
Katy, TX 77494

Harold Paul Einarsson
403, 655 India Street
San Diego, CA 92101

Russell John Einarsson
27103 Skiers Crossing Drive
Katy, TX 77493

II. CLAIM BY AN INVESTOR ON BEHALF OF AN ENTERPRISE

3. The Einarssons submit this Notice of Intent to Submit a Claim to Arbitration under NAFTA Article 1117 as investors on behalf of an enterprise, GSI. GSI is a corporation organized under the laws of

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[1] *North American Free Trade Agreement*, 32 ILM 289, 605 (1993) [***NAFTA***].

Canada (the *Canada Business Corporations Act*) with its registered office in Calgary, Alberta, and is an entity owned solely by Theodore David Einarsson and Harold Paul Einarsson.

III. LEGAL REPRESENTATION

4. The legal counsel for the Investors and GSI is Matti Lemmens of Borden Ladner Gervais LLP. Correspondence should be directed to:

Borden Ladner Gervais LLP
Attention: Matti Lemmens
1900, 520 3rd Ave. S.W.
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IV. EXECUTIVE SUMMARY

5. From 1969 until 2009, GSI and its predecessors created marine seismic data in offshore Canada. The seismic data was created according to seismic industry practice and, ultimately, attracted the protection afforded to certain works under the *Copyright Act*, RSC 1985, c C-42, as amended ("**Copyright Act**").

6. Creating marine seismic data is no small feat. It requires significant investment in order to produce a final product that is then most often used to explore for oil and gas under the seabed. Seismic surveys cost millions of dollars and it is well known in the oil and gas industry that such surveys are closely guarded secrets. Gaining access to this secret seismic data often costs many millions of dollars and is governed by strict licensing agreements, relating to its confidentiality and its reproduction. This is the once-lucrative business of GSI that employed over 250 employees over the course of its operations.

7. Since the commencement of these seismic operations in Canada, there has been a requirement to submit routine information about the seismic surveying acquisition and processing undertaken by GSI and its predecessors, including a copy of the seismic data itself, to the Canadian Government. Those submissions were made pursuant to legislation aimed at safety and, eventually, environmental regulation.

8. The experience of GSI and its predecessors was that the seismic data submitted to the Canadian Government remained confidential while in the Government's possession. That experience changed over the course of time, as policies and technology evolved.

9. In or around early 2000, GSI wished to know more about how the submitted seismic data was used by the Canadian Government. What it eventually uncovered was shocking and ultimately led to the decimation of GSI's Canadian operations.

10. GSI submitted information requests under the *Access to Information Act*, RSC 1985, c A-1 ("**AIA**") to the Canadian Government to seek information in respect of all third parties who had, within the preceding years, requested and been granted access to information concerning, or provided by, GSI to the Canadian Government.[2] The Canadian Government denied those requests on the basis that the information that GSI requested was privileged, confidential and shall not knowingly be disclosed without the consent in writing of the third parties that were the subject of those requests.[3] This reasoning was ironic, considering GSI maintained and protected the confidentiality of the seismic data and yet it appeared that its seismic data was not being treated as such. In other words, its seismic data was not treated with the same confidentiality as the records containing the details of the third parties accessing that data. In time, the Canadian Government was taken to task on its refusal to provide responses to the information requests on third party access and the Federal Court of Canada determined that GSI was entitled to full disclosure, including the names of those who requested of the Canadian Government the release of information or data provided to the Canadian Government by GSI and its predecessors, and the link between each such requester and the data requested.[4]

11. The Canadian Government then began its protracted response to GSI's information requests, taking until approximately 2010 in some instances and in others the response continues until this day.

12. Based on the responses, GSI then began the long, arduous process of commencing actions against the third parties that had been accessing its seismic data through the Canadian Government and

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[2] *Geophysical Service Inc v Canada-Newfoundland Offshore Petroleum Board*, 2003 FCT 507 at para 9 [***GSI v CNOP***].
[3] *GSI v CNOP*, *supra* at para 10.
[4] *GSI v CNOP*, *supra* at para 89.

committing copyright infringement and breaching confidentiality in that data. The third parties defended by alleging that seismic data was not copyright, that GSI did not own the seismic data, and that they relied upon the *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp) ("**CPRA**") and the Canadian Government's actions.[5] GSI also sued the Canadian Government, to which the Canadian Government responded by alleging the same defences, but furthermore, also alleging that it owns the copyright in the seismic data.[6]

13. The culmination of all of these claims was a trial in the Court of Queen's Bench of Alberta in which GSI took on 41 Defendants through 25 court actions, including the Canadian Government, to answer two questions:

(a) Can copyright subsist in seismic material of the kind that are the subject matter of GSI's claims?

(b) What is the effect of the Regulatory Regime (hereinafter defined) on GSI's claims?[7]

14. The Court determined that seismic data is copyrightable. In a companion decision from the Court, it determined that GSI owned the copyright in its seismic data.[8] However, in respect of the second question, as a result of the fact that copyright subsists in seismic data, the Court held that there was a conflict between the Copyright Act and CPRA, which Acts both touch upon seismic data. To resolve the conflict, the Court determined that, through the statutory interpretation principle of *lex specialis*, CPRA overrode the Copyright Act to reduce the term of copyright protection from life of the author

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[5] For example, Court of Queen's Bench of Alberta Action No. 0901-08210, Statement of Defence to Amended Amended Statement of Claim of Attorney General of Canada at paras 39-45, 47-50 at 54.

[6] For example, Court of Queen's Bench of Alberta Action No. 0901-08210, Statement of Defence to Amended Amended Statement of Claim of Attorney General of Canada at para 46: If copyright subsists in the GSI Materials or Geophysical Data, which is denied, the GSI Materials and Geophysical Data were published by or under the direction and control of the Crown. As such, the Crown is the owner of the copyright in the GSI Materials and Geophysical Data. The AGC pleads and relies on section 12 of *Copyright Act*, RSC 1985, c C-42 [***Copyright Act***].

[7] *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230 at para 7 [***QB Decision***].

[8] *Geophysical Service Incorporated v 612469 Alberta Limited (CalWest Printing & Reproductions)*, 2016 ABQB 356.

plus 50 years to a measly five years. The Court held that CPRA "confiscated the seismic data created over the offshore and frontier lands".[9]

15. The Alberta Court of Appeal confirmed that CPRA is confiscatory,[10] as "GSI's exclusivity to its seismic data ends, for all purposes including the Copyright Act, at the expiry of the mandated privilege period".[11] For the first time during the lengthy litigation process, Canada stated that its conduct amounted to confiscation of seismic data.

16. The Supreme Court of Canada denied leave to appeal.[12] The saga came to an abrupt end in a twist that none of the parties anticipated: in the eyes of Canada, the seismic data was expropriated. As a consequence, there was no action to be taken in copyright infringement or breach of confidentiality against third parties.

17. The Alberta Courts determined that, as against its very customers, GSI has no copyright protection. Its seismic data is freely accessible, and with the advent of advancements in scanning and reproduction technology, can be freely scanned, copied and translated into various forms, including derivative works. Not only was GSI required to compulsorily license its seismic data to the Canadian Government, but also to compulsorily sub-license to further third persons in Canada, thereby transferring its proprietary knowledge. Furthermore, GSI's licensees appear to no longer consider themselves bound to any of the licensing terms they once agreed to and the Canadian Courts have sanctioned that activity, as well.[13]

18. When Canada signed NAFTA, the Canadian Government committed to provide all American investors with core investment protections, including that: it would not require the transfer of proprietary knowledge to its persons from investors (Article 1106), it would not disclose confidential information of investors to its persons (Article 1111), investors would be treated in accordance with international law (Article 1105), and investors would be protected against uncompensated

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[9] *QB Decision*, *supra* at para 322.
[10] *Geophysical Service Incorporated v EnCana Corporation*, 2017 ABCA 125 at para 106 [***CA Decision***].
[11] *CA Decision*, *supra* at para 104.
[12] *Geophysical Service Incorporated v EnCana Corporation*, 2017 SCC 37634.
[13] *Geophysical Service Incorporated v Murphy Oil Company Ltd*, 2017 ABQB 464 [***GSI v Murphy***].

expropriations (Article 1110). In these circumstances, Canada has blatantly contravened international law, failed to live up to its commitments and should remedy that failure.[14]

19. The pattern of concealment by the Canadian Government allowed it to stall from taking a position with respect to the copyright status of seismic data. In any event, the Canadian Government's actions and the Canadian Courts' interpretation of CPRA amounted to a breach of Canada's NAFTA obligations. The delay, the naïve determination of a conflict between the Copyright Act and CPRA, and the ultimate resolution through *lex specialis* have led the Investors down the proverbial "garden path" with their significant investment in GSI. Canada has enabled the wholesale reproduction of GSI's seismic data by undertaking measures in violation of Canada's obligations under NAFTA, including under the Berne Convention and the Geneva Convention (both hereinafter defined). Where the Canadian Courts have acted contrary to prior decisions and adopted interpretations of Canadian legislation that relies on the reading-in of words which do not appear on the face of the provisions, how can the Investors or GSI possibly know the law in such a circumstance?[15] Surely, the reasonable expectation would be for Canada to act fairly and consistently with existing jurisprudence to protect private property interests from being taken without compensation.

20. If the intent is to confiscate GSI's seismic data through CPRA, then that was a politically-driven decision for which Canada should compensate GSI for the fair market value of the seismic data it expropriated and the consequential losses of its business, or the Investors for the significant devaluation of their investments as a result of said expropriation and consequential losses. This taking for the alleged public good at the expense of GSI and the Investors is a confiscatory policy, one which NAFTA does not condone. The confiscation of GSI's seismic data has substantially deprived GSI and the Investors of the approximate value of a billion dollars with further damages.

V. FACTUAL BASIS OF THE CLAIM

A. Investments

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[14] In the United States, the American Government can request the submission of seismic data but does not release marine seismic data for 25 years for processed data and 50 years for field data. It is unclear whether a similar issue will arise in the United States as has arisen in this case since the issue has not come before the American Courts, yet.

[15] *R v McIntosh*, [1995] 1 SCR 686 (SCC), [1995] SCJ No 16 [***McIntosh***].

21. The Investors are all citizens of the United States of America and have been at all relevant times, including prior to making their respective contributions to the Investment and throughout the duration of their interests in the Investment. The Investors were resident in the United States of America at the time that they made their investment in GSI and remain resident in the United States of America currently.

22. The Investors, individually or collectively, began investing in GSI in or around 1994.

23. GSI is a corporation formed under the laws of Canada with its head office in Calgary, Alberta and has carried on business in Alberta and elsewhere since 1994. At the relevant times, GSI has provided seismic data services to the oil and gas industry, including non-exclusive seismic data acquisition, and licensing, storage and processing of seismic, gravity and magnetic data.

24. GSI owns certain field and processed seismic, gravity, magnetic, bathymetric and navigation data, and derivative works thereof, that is in respect of Canadian offshore areas, and which are listed in **Schedule "A"** hereto (the "**Seismic Data**"). The Seismic Data is a significant component of GSI's total seismic data assets.

25. This dispute involves the following types of "investments", as defined by NAFTA Article 1139, and as further described herein:

(a) Investments made by GSI:

(i) property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(b) Investments made by the Investors:

(i) an enterprise;

(ii) an equity security of an enterprise;

(iii) a loan to an enterprise;

(iv) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(v) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or loan; and

(vi) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory under contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.

(a) Investments Made by GSI

26. The following sub-sections identify the investments made by GSI for which it seeks compensation as a result of Canada's breaches of NAFTA. In particular, GSI seeks compensation for: (1) Canada's breach of its obligations to protect GSI's proprietary knowledge and confidential information and to treat GSI in accordance with international law; and in the alternative (2) Canada's failure to protect GSI from uncompensated expropriation of the Seismic Data. For both of these alternatives, Canada's numerous breaches of NAFTA have resulted in damage to GSI's copyright and confidential information, and consequential harm associated with the loss of licensing fees, goodwill and its business.

(i) Copyright

27. The Seismic Data is comprised of original literary, artistic and sound recording works, within the meanings ascribed to such terms pursuant to:

(a) the *Copyright Act*, RSC 1985, c C-42, as amended, and its predecessor legislation (hereto referred as "**Copyright Act**"); and

(b) the Copyright Laws of the United States pursuant Title 17 of the United States Code, as amended, and its predecessor legislation.

28. The Seismic Data was created by GSI employees during the course of their employment or the copyright thereto has been acquired from other predecessor entities, including entities incorporated in the United States of America, who authored and owned the copyright in the Seismic Data.

29. GSI has predecessors in interests and assignors of interests, relevant to this Action, which were incorporated in the United States of America (the "**Predecessors**"), who assigned all of their interests related to the portions of the Seismic Data they created to GSI, including the proprietary rights in those portions of the Seismic Data, the books and records that recorded certain representations made to the Predecessors and licensing agreements for the Seismic Data with their corollary obligations, all as further detailed in this Notice of Intent.

30. GSI owns the copyright in the Seismic Data. GSI's exclusive rights in copyright in the Seismic Data are guaranteed by: the *Convention for the Protection of Literary and Artistic Works concluded at Berne on September 9, 1886, as revised by the Paris Act of 1971* ("**Berne Convention**"), the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, signed in Rome on October 26, 1961 ("**Rome Convention**"), and the *Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971* ("**Geneva Convention**"), as implemented in section 91 of the Copyright Act, and as Canada is obliged to recognize under Chapter 17 of NAFTA.

31. In particular, GSI and the Predecessors have not granted Canada a license or an ability to sub-license to do any of the following with the Seismic Data: produce, reproduce, publish, distribute, translate, create derivatives therefrom (in whole or in part), or authorize any of the foregoing by third parties.

32. Furthermore, GSI and the Predecessors have not:

(a) assigned their copyright in the Seismic Data to Canada;

(b) granted Canada any copyright license; and

(c) authorized, consented or acquiesced to that conduct of Canada which is inconsistent with their exclusive rights as the owner of copyright under the Copyright Act, resulting in all such uses

by Canada and third parties deriving the Seismic Data from Canada being in breach of the Copyright Act, including NAFTA Chapter 17.

33. Similarly, GSI and the Predecessors never assigned their copyright in the Seismic Data or otherwise granted any copyright license to any third parties to do any acts in any manner inconsistent with the exclusive rights of GSI as the owner of copyright under the Copyright Act, including under NAFTA; nor did GSI and the Predecessors ever consent, authorize or acquiesce to same, resulting in all such acts by any third party recipients of the Seismic Data from Canada constituting infringement of the copyright in the Seismic Data under the Copyright Act, including under NAFTA.

(ii) Confidential Information

34. GSI and the Predecessors have consistently treated the Seismic Data as a trade secret, such that the Seismic Data has the necessary quality of confidence about it. But for Canada's measures complained of herein, the Seismic Data is secret and is generally not known among or readily accessible to persons that normally deal with the kind of information in question, has actual or potential commercial value because it is secret and GSI and the Predecessors have taken reasonable steps under the circumstances to keep it secret. Those steps include measures such as secured storage with access limited to the Investors, strict licensing terms and restricted viewing by potential licensees.[16]

35. Even in dealing with Canada, GSI and the Predecessors always communicated the Seismic Data to Canada in circumstances imparting an obligation of confidence, including marking the Seismic Data as proprietary to GSI.

36. GSI and the Predecessors have not granted Canada a license in respect of the Seismic Data, nor have they authorized or consented to Canada to disclose any of the Seismic Data to third parties. Any disclosure by Canada has been contrary to the confidentiality maintained by GSI and the Predecessors in the Seismic Data, which is, and has been, to the detriment of GSI.

(iii) Licensing Agreements

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[16] In the United States, it is well settled that seismic data is protected as a trade secret in such circumstances. See *In re Bass*, 113 SW 3d 735, 738 (Tex 2003); *Lamont v Vaquillas Energy Lopeno Ltd, LLP*, 421 SW 3d 198 (Tex. 2013).

37. From time to time, GSI and the Predecessors voluntarily entered into commercial licensing arrangements of the Seismic Data with third party licensees (the "**Licensing Agreements**"). Pursuant to the Licensing Agreements, the licensees thereunder (the "**Licensees**") are generally obligated to GSI to:

(a) not disclose the Seismic Data to any third party, unless explicitly permitted under the Licensing Agreements and only pursuant to restrictions that are agreeable to GSI, and to indemnify GSI for any breaches of this obligation;

(b) not submit the Seismic Data to the Crown Agencies (as hereinafter defined) in exchange for "work expenditure" credits as the Licensees do not own the proprietary rights in the Seismic Data that would enable such submission;

(c) pay for acquiring access from the Crown Agencies to other portions of the Seismic Data not licensed by the Licensees; and

(d) pay for distributing, disseminating, reproducing for and otherwise making accessible the Seismic Data to other third parties

(collectively, the "**Licensing Obligations**").

38. The Licensees are obliged to pay GSI fees pursuant to the Licensing Agreements for the Licensing Obligations. The licensing fees that are generated from the Licensing Obligations are a material component of GSI's business revenues.

(iv) Goodwill

39. Throughout the course of its operations and business in Canada, GSI has built, and has had, a reputation of obtaining or creating high-quality marine seismic data, creating high-quality processed and reprocessed forms of seismic data, including the Seismic Data, and maintaining reasonable terms in the Licensing Agreements.

40. As a result of that strong and well-known reputation, GSI built a strong customer base and was a leader in the area with substantial goodwill in its name and its seismic data, including the Seismic Data (collectively, the "**Goodwill**").

(v) The Business

41. GSI operated a seismic acquisition business and its processing business (the "**Business**") with approximately 250 employees until approximately 2011. The seismic acquisition business included two seismic ships, the GSI Admiral and the GSI Pacific, and related seismic equipment. The processing business included a processing centre in Calgary and related processing equipment.

(b) Investments Made by the Investors

42. The Investors have contributed a significant amount towards the Investment throughout the relevant times. The following sub-sections identify the investments made by the Investors for which they seek compensation as a result of Canada's breaches of NAFTA, recognizing that the value of types of investments directly attributable to the Investors is highly dependent upon the treatment of those investments made by GSI. Canada's breaches of its obligations to protect GSI's proprietary knowledge and confidential information and to treat GSI in accordance with international law, and in the alternative Canada's failure to protect GSI from uncompensated expropriation of the Seismic Data, and the related consequential losses thereto, amount to a failure to protect the Investors' investments, contrary to its NAFTA obligations. Such breach and failure has resulted in significant adverse impacts on the Investors' interests in the Investment, including the devaluation of securities in the Investment and the reduced ability to obtain repayment of debt owing by the Investment. Furthermore, the Investors' interests in remunerative contracts with GSI have also been significantly devalued.

(i) Securities in GSI

43. Theodore David Einarsson and Harold Paul Einarsson own all of the issued and outstanding securities in GSI. The value of these securities is based upon the copyright and confidentiality in the Seismic Data, the Licensing Agreements, Goodwill and the Business.

(ii) The Investor Loans

44. The Investors have loaned funds to GSI over the course of the relevant times (the "**Loans**"). The Loans amount to $5,945,076, plus interest, and have not been repaid as a result of the measures undertaken by Canada complained of herein.

(iii) The Remunerative Contracts

45. The Investors have held positions with GSI throughout all relevant times, including as directors, officers and employees of GSI, that entitled them to remuneration depending substantially on the revenues and profits of GSI (the "**Remunerative Contracts**").

B. Conclusion on Investments

46. In conclusion, the Investors invested significant financial sums and efforts into GSI, a Canadian enterprise, including equity securities, Loans and the Remunerative Contracts with GSI. In turn, GSI owns and owned property, the copyright and trade secret rights in the Seismic Data, the Licensing Agreements with the Licensing Obligations giving rise to licensing fees, the Goodwill and the Business. The measures undertaken by Canada complained of herein have devalued or taken the property of GSI such that the Investors' investment in GSI has been completely devalued and taken from them.

VI. CANADA'S BREACH OF CHAPTER 11 OBLIGATIONS

47. The Investors submit that the interpretation of CPRA, as eliminating GSI's copyright in and the confidentiality of the Seismic Data, as determined by the Alberta Courts in *Geophysical Service Incorporated v. Encana Corporation*, 2016 ABQB 230 (the "**QB Decision**") and *Geophysical Service Incorporated v. Encana Corporation,* 2017 ABCA 125 (the "**CA Decision**", and collectively with the QB Decision, the "**Alberta Decisions**"), refused leave to appeal 2017 SCC 37634, is erroneous as such interpretation is in blatant contravention of Canada's NAFTA obligations. The Alberta Decisions result in a domestic law framework that fails to meet Canada's obligations under Section A of Chapter 11 of NAFTA, including, but not limited to, the following provisions:

(a) Article 1105 – International Law Standards of Treatment

(b) Article 1106 – Performance Requirements

(c) Article 1111 – Special Formalities and Information Requirements

48. Canada, however, has taken the position that CPRA applies to the Seismic Data so as to effect confiscation. In the event that Canada's position is accepted, Canada has breached its obligations under Section A of Chapter 11 of NAFTA, including, but not limited to, the following provisions:

(a) Article 1110 – Expropriation

VII. ISSUES RAISED

49. This claim raises at least the following issues:

(a) Has the Government of Canada taken measures inconsistent with its obligations under Articles 1105, 1106 and 1111 of NAFTA?

(b) If the answer to A is yes, what is the quantum of compensation to be paid to the Investors as a result of the failure of the Government of Canada to comply with its obligations under Chapter 11 of NAFTA?

(c) In the alternative, has the Government of Canada taken measures inconsistent with its obligations under Article 1110 of NAFTA?

(d) If the answer to C is yes, what is the quantum of compensation to be paid to the Investors as a result of the failure of the Government of Canada to comply with its obligations under Chapter 11 of NAFTA?

VIII. CANADA'S DOMESTIC LAW

A. Copyright and Trade Secrets

50. The crux of the dispute lies in the alleged conflict between the Copyright Act and CPRA.

51. Canada is obliged to grant copyright protection for the minimum standard of protection under the Berne Convention, pursuant to NAFTA Article 1701, and to provide measures to protect trade secrets

without limiting the duration of such protection pursuant to NAFTA Article 1711. Canada implemented the Berne Convention through section 91 of the Copyright Act and has generally provided protection for trade secrets through its common law jurisprudence in accordance with NAFTA.

52. Article 7(1) of the Berne Convention requires Canada to protect the copyright in seismic data, at a minimum, for the life of the author plus fifty years after his death. Under the Berne Convention, authors have the exclusive right to authorize reproduction of their copyright works,[17] translations of their copyright works,[18] and adaptations or alterations of their copyright works.[19]

53. Trade secrets are indefinitely protected from disclosure so long as they remain confidential.

B. Disclosure of the Seismic Data by Canada

54. There are a number of statutes governing the disclosure of offshore seismic data in Canada. The Alberta Decisions have determined that the proprietary knowledge in the Seismic Data is transferable and disclosable by Canada to third parties, including, without limiting the foregoing, oil and gas companies, competitors of GSI, researchers and the general public (the "**Third Parties**"), after a unilaterally imposed "privilege" period, pursuant to various statutes and regulations, including:

(a) the *Canada Oil and Gas Land Regulations*, SOR 61-253, under the *Territorial Lands Act*, RSC 1952, c 263, as amended;

(b) the *Canada Oil and Gas Act,* SC 1981, c 81, as amended ("**COGA**");

(c) the *Canada Petroleum Resources Act*, RSC 1986, c C-36 (2nd Supp), as amended (hereto referred as "**CPRA**");

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[17] *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, UNTS 828 at 221, Article 9 [***Berne Convention***].
[18] *Berne Convention*, Article 8.
[19] *Berne Convention*, Article 12.

(d) the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3, as amended and mirror legislation;

(e) the *Canada Nova Scotia Offshore Atlantic Accord Implementation Act*, SC 1988, c 28, as amended and mirror legislation; and

(f) any legislation implementing the Accord between the Government of Canada and the Government of Quebec for the shared management of the petroleum resources in the Gulf of St. Lawrence,

(collectively, the "**Disclosure Legislation**"). The provisions of the Disclosure Legislation pursuant to which Canada has asserted its right to transfer and disclose the Seismic Data to Third Parties are listed in **Schedule "B"** hereto.

55. In particular, the Alberta Decisions focused on the interpretation of the following provisions of CPRA:

> 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.
>
> 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;

56. The intent of CPRA, according to Canadian Parliamentary debates, is to regulate oil and gas development on federal lands that are owned by Canada.

57. Pursuant to the discretion provided to Canada under the Disclosure Legislation, to the best of the Investors' knowledge, and within the knowledge of Canada, portions of the Seismic Data have been transferred and disclosed to the Third Parties from time to time and will continue to be transferred and disclosed in the future. Further, the formats of the Seismic Data that Canada asserts can be transferred and disclosed to the Third Parties has been unilaterally expanded under Canada's discretion, from time to time.

58. Canada has unilaterally extended the privilege period in some circumstances by policy that is not determined on a case-by-case basis. GSI has never been notified by Canada that the Seismic Data was disclosed to the Third Parties. Canada inconsistently retained records of the disclosure and does not retain any records of current disclosure since approximately 2012, since having to respond to GSI's AIA requests for such records, concealing the disclosure from GSI.

C. Submission of the Seismic Data by GSI

59. Canada routinely compelled GSI and the Predecessors to submit to the Canadian Government the Seismic Data and related confidential commercial information, including the costs to create the Seismic Data, pursuant to various regulations, including:

(a) the Canada Oil and Gas Land Regulations, SOR 61-253, under the *Territorial Lands Act*, RSC 1952, c 263, as amended;

(b) the Canada Oil and Gas Geophysical Operations Regulation, SOR/96-117, under the *Canada Oil and Gas Operations Act*, RSC 1985, c O-7 ("**COGOA**");

(c) the Newfoundland Offshore Area Petroleum Geophysical Operations Regulations, SOR 95-334, under the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3, as amended and mirror Legislation;

(d) the Nova Scotia Offshore Petroleum Geophysical Operations Regulations, NS Reg 191/95, under the *Canada-Nova Scotia Offshore Atlantic Accord Implementation Act*, SC 1988, c 28, as amended and mirror legislation

(collectively, the "**Submission Legislation**" and together with the Disclosure Legislation, the "**Legislation**" or the "**Regulatory Regime**").

60. The Seismic Data submitted was routinely in the form of "final reports" after each data set was created and included proprietary knowledge of GSI in the form of the Seismic Data. In some cases starting in or around the 1990s, Canada unilaterally imposed a commitment upon GSI to submit to it digital copies of the Seismic Data in certain instances. In some of those cases, Canada imposed a commitment upon GSI to submit digital copies of the Seismic Data to it on a retroactive basis, prior to Canada enacting legislation that enabled such form of submission.

61. But for the Submission Legislation and various representations made to GSI by Canada, as further detailed in this Notice of Intent, GSI and the Predecessors would not have provided the Seismic Data to Canada.

62. Canada compelled such submissions of the Seismic Data through various crown agencies between 1969 and present, including:

(a) Canada Oil and Gas Lands Administration ("**COGLA**");

(b) Northern Affairs Canada;

(c) National Energy Board (Frontier Information Office);

(d) Canada Newfoundland and Labrador Offshore Petroleum Board ("**CNLOPB**"); and

(e) Canada Nova Scotia Offshore Petroleum Board ("**CNSOPB**")

(together, the "**Crown Agencies**").

63. The provisions of the Submission Legislation pursuant to which GSI and the Predecessors submitted the Seismic Data to Canada are listed in **Schedule "C"** hereto.

64. GSI and its licensees have reprocessed the Seismic Data since it was created and obtained, which reprocessed data and derivatives of the Seismic Data have also been submitted to Canada by the Licensees in exchange for "work expenditure" credits that apply to reduce cash obligations for leases, and from which GSI derives no benefit.

65. The Submission Legislation also imposes a commitment upon GSI to finance the costs to secure, store and retain the Seismic Data in Canada, including all iterations of the Seismic Data, and, if GSI elects to remove the Seismic Data or any processed form of the Seismic Data from Canada, Canada can compel the transfer to it thereof prior to the removal from Canada of the Seismic Data.

D. Alberta Decisions

(a) Interpretation of CPRA

66. The Alberta Decisions involved the statutory interpretation of CPRA and the Copyright Act. Relevant to that exercise is the state of Canadian law regarding statutory interpretation. The Alberta Decisions correctly applied the Copyright Act in finding that copyright subsists in seismic data and that owners of seismic data have full copyright and other proprietary rights over their seismic data. However, the Alberta Decisions failed to apply fundamental principles of statutory interpretation with respect to CPRA, resulting in domestic law that is internally inconsistent and in clear contravention of Canada's international commitments under NAFTA.

67. The Supreme Court of Canada has confirmed that legislation is to be interpreted in accordance with Elmer Driedger's modern principle of interpretation, the leading authority on statutory interpretation in Canada, which is articulated as follows:

> 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.[20]

68. The legislature is presumed to know all that is necessary to produce rational and effective legislation and legislative schemes are presumed to be coherent and effective.[21]

69. The legislature is credited with a vast body of knowledge and competence, including:

(a) knowledge of legislative facts, including "the social and historical context in which [Parliament] makes its intention known", and whatever facts are relevant to the conception and operation of legislation it is enacting;[22]

(b) knowledge of the law, which Professor Ruth Sullivan, leading scholar on statutory interpretation in Canada, explains is "presupposed by the presumption that the legislature does not intend to change existing law or to violate international law";[23] and

(c) linguistic precision, such that provisions are presumed to be straightforward, exact, grammatically correct, concise and consistent.[24]

70. Given the knowledge and competence that the legislature is credited with, the following presumptions, amongst others, apply in the exercise of statutory interpretation:

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[20] Elmer Driedger, Construction of Statutes, 2nd ed (Toronto: Butterworths) at 87.
[21] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada) at 206-207 [***Sullivan on Statutes***].
[22] *Willick v Willick*, [1994] SCJ No 94 (SCC), 119 DLR (4th) 405 at 699; *Donovan v Mccain Foods Limited*, [2004] NJ No 70, 2004 NCLA 12 at paras 37-38.
[23] *Sullivan on Statutes*, *supra* at 207.
[24] *Sullivan on Statutes*, *supra* at 207.

(a) the presumption that the legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects;[25]

(b) the presumption that the legislature does not intend to change existing law or depart from established principles or practices;[26]

(c) the presumption that legislation is meant to comply with Canada's international law obligations;[27] and

(d) the presumption that the legislature intends to comply with any limits on its jurisdiction.[28]

71. The QB Decision made the following findings with respect to section 101 of CPRA:

(a) the proper grammatical way to read section 101 is "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";[29]

(b) "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";[30]

(c) had Parliament wanted to put further restrictions on disclosure in section 101(7), it could have done so. In the Court's view, the absence of such restrictions was intentional;[31]

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[25] *Morguard Properties Ltd. v City of Winnipeg*, [1983] 2 SCR 493 (SCC), 3 DLR (4th) 1 at para 26.
[26] *Parry Sound (District) Welfare Administration Board v OPSEU, Local 324*, 2003 SCC 42, [2003] SCJ No 42 at paras 39-41; *R v T (V)*, [1992] 1 SCR 749 (SCC), [1002] 3 WWR 193 at paras 22-23.
[27] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292; *Ordon Estate v Grail*, [1998] 3 SCR 437, [1998] SCJ No 84; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 SCR 45.
[28] *R v McKay*, [1965] SCR 798 (SCC), [1965] SCJ No 51; *Castillo v Castillo*, 2005 SCC 83, [2005] 3 SCR 870; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 (SCC), [1989] SCJ No 45.
[29] *QB Decision*, *supra* at paras 219, 221.
[30] *QB Decision*, *supra* at para 221; Justice Eidsvick accepted this meaning in paragraph 222 without re-stating it.
[31] *QB Decision*, *supra* at para 223.

(d) the disclosure provisions provide specific legislation that allows disclosure and copying and prevail over the general rights afforded to GSI in the Copyright Act;[32]

(e) viewed another way, CPRA creates a mandatory or compulsory licensing system over seismic data in perpetuity once the confidentiality period has expired under which the Boards have the authority to copy GSI's seismic data;[33] and

(f) the Regulatory Regime does not only allow the Boards to copy GSI's seismic data, but allows third parties who receive copies from the Boards, to further copy.[34]

72. The Court in the QB Decision determined that, through the statutory interpretation principle of *lex specialis*, CPRA overrode the Copyright Act to reduce the term of copyright protection from life of the author plus 50 years to a measly five years. The Court further held that CPRA "confiscated the seismic data created over the offshore and frontier lands".[35]

73. The Alberta Court of Appeal confirmed that CPRA is confiscatory,[36] as "GSI's exclusivity to its seismic data ends, for all purposes including the Copyright Act, at the expiry of the mandated privilege period".[37]

74. These findings were made in spite of the fact that CPRA does not use the term "copy", nor do they refer to and exempt their provisions from application of the Copyright Act. CPRA does not use the terms "copy", "distribute", "publish", "reproduce", "sell", "rent", "adapt", "translate" or "convert". These rights, along with the ability to authorize same, are the rights specifically afforded to a copyright owner under sections 3 and 27 of the Copyright Act, and under NAFTA Article 1701 through the Berne Convention, and last for 50 years after the death of the last surviving author.[38]

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[32] *QB Decision*, *supra* at para 304.
[33] *QB Decision*, *supra* at paras 309, 321.
[34] *QB Decision*, *supra* at para 318, 323.
[35] *QB Decision*, *supra* at para 322.
[36] *CA Decision*, *supra* at para 106.
[37] *CA Decision*, *supra* at para 104.
[38] *Copyright Act*, s 23.

75. Furthermore, CPRA does not refer to trade secrets, which have unlimited protection under NAFTA Article 1711. The Alberta Decisions essentially read words in where they did not exist and misinterpret the intention of Parliament to "disclose" (which is also a breach of NAFTA Article 1711) as opposed to "copy", given that the technology to copy did not even exist at the relevant times. The application of *lex specialis* by the Alberta Decisions is arbitrary, as the Copyright Act is, at worst, equally specific to the issue at hand, if not more so. The legitimate expectation of an investor would be that the rights of a copyright owner or trade secret owner are not interfered with by CPRA.[39]

76. The Alberta Decisions effectively change the term of protection afforded to a copyright and trade secret holder in seismic data to a mere five years. In breach of Canada's obligations under NAFTA, the Alberta Decisions substantially lower the term of protection which the Berne Convention and NAFTA require, despite the fact that the Disclosure Legislation does not expressly or otherwise provide for the removal of copyright protections.

77. Further, there is precedent for how Parliament can draft legislation to vary the rights afforded under the Copyright Act. The *Olympic (1976) Act*, SC 1973-74, c 31 specifically limited the rights afforded to a copyright holder while such copyright work was located at an Olympic site.[40] The *Olympic (1976) Act* did so, however, by unequivocally expressing Parliament's intention to limit specific rights with direct reference to the Copyright Act.[41] The Alberta Courts should have required the same express, unequivocal wording from legislature as it has demonstrated its ability to provide in the past.

78. The interpretation of CPRA in the Alberta Decisions ignored other fundamental interpretation principles which an investor would reasonably expect Alberta Courts to comply with. For instance, the Seismic Data is submitted pursuant to COGOA, a different statute with an entirely different purpose. COGOA does not mention section 101 of CPRA, disclosure, copyright or trade secrets. Essentially, a seismic data provider is required to submit its seismic data pursuant to COGOA, which purpose is to control and manage, in respect of the exploration for, and exploitation of, oil and gas:

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[39] *McIntosh, supra.*
[40] *Olympic (1976) Act*, SC 1973-74, c 31, s 16 [***Olympic Act***].
[41] *Olympic Act*, s 16.

(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.01) accountability in accordance with the "polluter pays" principle;

(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.

79. None of foregoing purposes are in line with CPRA resulting in a bait and switch for seismic data companies, in breach of Canada's obligations under NAFTA.

80. In any event, regardless of the fact that CPRA's purpose is to promote offshore oil and gas development, making non-exclusive seismic data, which is already available for license, available for free to anyone does not promote offshore oil and gas development. Canada's policies on offshore development have changed since the passage of CPRA such that it cannot be concluded that Canada discloses the Seismic Data to promote offshore oil and gas development, since the Seismic Data has been disclosed in instances where offshore oil and gas development is forbidden due to environmental restrictions. Therefore, it is not clear what the purpose of disclosing the Seismic Data is, and therefore, it is impossible to discern how Canada exercises its discretion to disclose the Seismic Data to assess whether disclosure can even occur. Given that the Seismic Data is already available for license directly from GSI, Canada's disclosure competes with GSI's business and undermines its ability to earn licensing fees and to manage its assets through terms and conditions imposed on licensing arrangements.

81. In looking to the history of section 101 of CPRA, a form of it has been in place since 1953, albeit with different wording, at a time when modern technology was not available and the process by which offshore seismic data is created had yet to be invented. To suggest that the interpretation of differently worded provisions which were enacted in different social circumstances, and before the very existence

of the offshore seismic data technology, is indicative of Parliament's intention is meritless and unsupportable. In fact, a review of the Canadian Parliamentary debates confirms that the intention of Parliament in enacting the legislation is far from what the Alberta Courts held.

82. As early as 1952, in Parliamentary debates leading to the enactment of an earlier iteration of the section 101 of CPRA, the value of U.S. investment in exploring Canada's oil and gas resources was recognized and praised.[42] There was no suggestion in these debates that such value would be decimated; rather, it was to be protected. These debates also explicitly state that the Canadian Government would "not compete with or duplicate the efforts" of private industry in respect of supplying surveys to third party private interests.[43] Nevertheless, that is exactly what the Alberta Decisions contemplate. This, despite recognition by Parliament that there is a high element of risk at the initial exploration stage for natural resources,[44] a risk that GSI bore and yet its ability to be rewarded for that risk is now taken away by the Alberta Decisions. At no time was copying discussed, which makes sense in consideration of the fact that the technology to make any copies of seismic data had not yet been invented, so the determination by the Alberta Decisions that the intent of Parliament was to copy is inconsistent with the reality of the times.

83. Even in 1976, it is clear that copying of seismic data was not being contemplated by Parliament, and only exclusive, as opposed to non-exclusive, data would be affected.[45] In 1986, as CPRA was being debated in Parliament, it was noted that CPRA was "non-confiscatory" legislation that "emphasize[s] private-sector solutions to the problems" and respecting "the rights of companies regardless of nationality".[46] In 1987, in discussing section 101 of CPRA as it relates to well data, it was determined that information that "might prove prejudicial to commercial interests" would not be disclosed.[47]

(b) Interference with Licensing Agreements

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[42] House of Commons Debates, 21 Parliament, 6th session, Vol 2 at 1607 per Dinsdale.
[43] House of Commons Debates, 21 Parl, 6th Sess, Vol 4 at 3455 per Prudham.
[44] House of Commons Debates, 22 Parl, 5th Sess, Vol 1 at 267 per Simmons.
[45] House of Commons Debates, 30 Parl, 1st Sess, Vol 13 at 13688 per Gillespie.
[46] House of Commons Debates, 33 Parl, 1st Sess, Vol 9 at 13139 per Carney.
[47] House of Commons Debates, 33 Parl, 2nd Sess, Vol 9 at 10507 per Masse.

84. A further issue has arisen as a result of the Alberta Decisions, which involves the Licensees' failure to fulfill the Licensing Obligations by relying upon the Legislation and Alberta Decisions, which the Alberta Courts have held to effectively undermine the Licensing Obligations. For instance, the obligation to not obtain the Seismic Data from the Canadian Government, an obligation which was undertaken and accepted by licensees of the Seismic Data from GSI, was found in subsequent decisions of the Court of Queen's Bench of Alberta to be moot as a result of the finding that the Seismic Data was available for free from the Canadian Government.[48] In other words, the Alberta Decisions are being applied even further to find that contractual obligations between private parties need not be complied with, despite those private relations contemplating the potential harm of the Canadian Government's actions, and GSI negotiating to protect itself by not doing business with third parties unless they agreed to honour GSI's copyright and trade secrets.

85. As a result of findings by the Alberta Courts, such as this, none of GSI's licensees are abiding by the terms of the Licensing Agreements and GSI is no longer able to collect the associated licensing fees due to it under same, amounting to further confiscation at the hands of Canada by not only taking the copyright in and confidentiality of the Seismic Data itself, but also effectively eliminating all ongoing Licensing Obligations from which GSI is intended to benefit. The Licensing Agreements are voluntary licensing arrangements of trade secrets which have been impeded by Canada's measures, contrary to Canada's obligation to protect trade secrets pursuant to Article 1711 of NAFTA.

86. GSI is currently litigating against several of its licensees for unpaid licensing fees pursuant to the Licensing Obligations. To the extent that it is unable to collect those licensing fees as a result of Canada's conduct complained of herein, damages arising from the loss of enforceability of the Licensing Obligations is sought from Canada.

IX. CANADA'S DEALINGS WITH GSI AND THE INVESTORS

A. Canada's Representations

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[48] *GSI v Murphy*, *supra* at paras 12, 60, 68.

87. The Alberta Decisions now serve to justify Canada's conduct that was contrary to NAFTA, by sanctioning the disclosure of the Seismic Data by Canada. Furthermore, Canada's dealings with GSI and the Investors created reasonable expectations which Canada failed to meet in contravention of its NAFTA obligations. Canada's conduct involved various activities, including, but not limited to, making various representations to GSI, the Predecessors and the Investors.[49]

88. These representations included intentional omissions and often involved Canada having communications with or developing practices to deal with GSI and the Predecessors. These representations were apparently made to mislead or deceive GSI and the Investors, given the findings of the Alberta Decisions. These representations and their relevant and material background facts are as follows:

(a) Throughout the relevant and material times when GSI and the Predecessors submitted seismic data under the Submission Legislation, the purpose of the Submission Legislation was for safety and environmental regulation, not for the purported purpose of the Disclosure Legislation, which is to promote Canadian offshore oil and gas development. The purpose of the Submission Legislation represented to GSI and the Predecessors that the Seismic Data was only required by Canada for the purpose of safety and environmental regulation, when in fact, Canada has, on occasion, represented that the purpose of the Disclosure Legislation also applies to the submission of the Seismic Data to Canada, thereby intentionally deceiving GSI and the Predecessors. Currently, it is unclear whether the purpose of the Disclosure Legislation is to promote offshore oil and gas development, given that environmental and other regulation has superseded the implementation of the Disclosure Legislation and is to the effect that oil and gas developments in certain areas regulated by Canada under the Disclosure Legislation are prohibited or severely restricted. Yet, the Seismic Data related to those areas continues to be disclosed by Canada without any indication as to its purpose. This ongoing disclosure with no connection to Canada's once purported purpose of disclosure of the

[49] At all relevant times, including prior to the creation of the CNLOPB and CNSOPB, the Provinces of Newfoundland and Labrador and Nova Scotia, and the Canadian Government coordinated their practices with respect to seismic data and made the same representations to GSI, the Predecessors and the Investors.

Seismic Data goes unchecked as Canada has fettered its discretion by not exercising its discretion to disclose on a case-by-case basis.

(b) Throughout the relevant and material times, the permits issued to GSI and the Predecessors under the Submission Legislation did not indicate any connection to the Disclosure Legislation and represented by omission that the Seismic Data would not be disclosed as they failed to refer to disclosure (and certainly did not refer to copying), thereby intentionally deceiving GSI and the Predecessors.

(c) Throughout the relevant and material times, the Disclosure Legislation has not employed the term "copy", has not referred to the Copyright Act, has not amended the Copyright Act, and has not been enacted notwithstanding the Copyright Act, representing to GSI, the Predecessors and the Canadian public that copying or reproduction of the Seismic Data was not intended by the terms "release" or "disclose" as employed in CPRA.

(d) Throughout the relevant and material times, and at least since the 1990s, the Crown Agencies have represented, at their offices where the Seismic Data is held, that intellectual property laws of Canada must be respected, including copyright, when accessing the Seismic Data.

(e) Throughout some of the relevant and material times, and at least since the 1990s until approximately 2012, the Crown Agencies employed liability forms that were executed by the Third Parties accessing the Seismic Data, representing that intellectual property laws of Canada, including copyright, would be complied with by those third parties.

(f) In or around the 1970s to 1980s, the Province of Newfoundland and Labrador represented to the Predecessors that disclosure of the Seismic Data was not possible without mutual agreement with the Predecessors as to that disclosure. The Predecessors never made any agreement to disclose the Seismic Data.

(g) In or around the 1970s to 1980s, the Province of Nova Scotia represented that seismic data need not be submitted by the geophysical contractor, but only the exclusive data owners,

representing that Nova Scotia understood the difference between exclusive and non-exclusive seismic data sets.

(h) In or around 1976, Canada prepared and issued the 1976 *Statement of Policy: Proposed Petroleum and Natural Gas Act and New Canada Oil and Gas Land Regulations*, which does not refer to the Crown Agencies permitting "copying" any information for third parties. This Policy suggests a shorter confidentiality period for proprietary information, representing that the practice of Canada was to hold proprietary information confidential for extended periods of time, although there was no practice of disclosure of the Seismic Data at this time so it is not clear that the Policy was aimed at seismic data as opposed to other types of information, such as well data. Ultimately, the confidentiality period for seismic data was actually extended rather than shortened, representing to GSI and the Predecessors that this Policy was not either not implemented by Canada or not in relation to seismic data.

(i) In or around 1977, Bill C-20 *An Act to regulate the disposition and development of oil and gas rights* was tabled in Canadian Parliament. Bill C-20 never received royal assent and does not have the force of law. Bill C-20 employs the term "published" in conjunction with "released", "publication" being a term defined by the Copyright Act at section 2.2, as "(a) in relation to works, [...] (i) making copies of a work available to the public". The term "published" has not been part of the Disclosure Legislation, which represented to GSI and the Predecessors that Canada intended to not include that specific term and its accompanying effects.

(j) In or around 1980, Bill C-48 *An Act to regulate oil and gas interests in Canada lands and to amend the Oil and Gas Production and Conservation Act* was tabled in Canadian Parliament. Bill C-48 never received royal assent and does not have the force of law. Bill C-48 included a specific provision addressing the "publication" of information furnished under that Act, recognizing that the Governor in Council would need to delineate a process for publication of seismic data and consider whether to prescribe fees in connection therewith, representing to GSI and the Predecessors that Canada acknowledged that, if access to such information was to be provided, such access would require a regulated process associated with it.

(k) On or around March 5, 1982, COGA was proclaimed in force and the representations of Canada contained in the seismic data permits did not change. Section 50(3) of COGA states "[...] information or documentation furnished in respect of the following matters may be disclosed, in the manner prescribed [...]". These words require regulations to prescribe the "manner" by which information or documentation, including geophysical works, could be disclosed. No regulations were ever enacted to prescribe the manner of disclosure. The term "published" is not employed, in contrast to Bill C-20 and Bill C-48. COGA represented to GSI and the Predecessors that Canada purposefully excluded or intentionally omitted prescription of the manner of disclosure, which misled and deceived GSI and the Predecessors to believe that such disclosure of the Seismic Data would not occur.

(l) In or around November 1982, COGLA issued Guidelines for Approvals and Reports. These Guidelines omit reference to any privilege period or confidentiality matters, representing by exclusion or intentionally omitting to deceive GSI and the Predecessors that the Seismic Data would not be disclosed.

(m) In or around January 1983, COGLA issued revised Guidelines for Approvals and Reports, again with no mention of a privilege period or confidentiality matters, representing by exclusion or intentionally omitting to mislead or deceive GSI and the Predecessors that the Seismic Data would not be disclosed.

(n) In or around June 1983, COGLA issued correspondence to the Predecessors representing that Canada was collecting seismic reflection data on Canada lands to create a database accessible only to designated federal government geophysicists exclusively with no access by industry with respect to confidential data, representing that the Seismic Data would not be disclosed to GSI's potential customers.

(o) In or around March 1984, COGLA issued revised Guidelines referring for the first time to confidentiality matters.

(p) In or around that same year, in 1984, unbeknownst at the time to the Predecessors and to GSI until 2015, COGLA purportedly issued the first report Released Geophysical and Geological

Reports – Canada Lands that was available in print format at the office of COGLA, listing seismic data in the Canadian offshore areas that COGLA was making available to the Third Parties. This Report was never drawn to the attention of GSI or the Predecessors, and therefore, to the Investors.

(q) In or around June 1986, with specific reference to amendments to section 50 of COGA, which when amended became section 101 of CPRA, Canada prepared and issued the *Briefing Book – Canada Petroleum Resources Act*, representing that Canada agreed that confidentiality protection should increase as the value of seismic data increases and that seismic data may be released, but there is no obligation on the Crown to release information or documentation upon expiration of the relevant periods of privilege as that is a matter of discretion, which represented that the Seismic Data could only be released upon an appropriate exercise of Canada's discretion. This Briefing Book was never brought to the attention of GSI or the Predecessors, and therefore, to the Investors.

(r) In or around October 7, 1986 and November 18, 1986, the Predecessors affirmed to Marcel Masse, Minister of Energy, Mines & Resources and to the Standing Senate Committee on Energy and Natural Resources that there was reliance upon the representations of Canada regarding the confidentiality and copying of non-exclusive seismic data, stating, *inter alia*:

(i) Canada's policies with respect to non-exclusive seismic data have changed over time;

(ii) no seismic data was provided to Canada in earlier times;

(iii) after a period of time, the Crown Agencies requested black-line copies of seismic data for internal use only;

(iv) after a further period of time, Canada allowed the Third Parties to look at seismic data older than 10 years, but only by attendance at Canada's offices;

(v) non-exclusive seismic data, which is the nature of the Seismic Data, was never released for viewing;

(vi) in or around the late 1970s, Canada began requesting mylar sections rather than hard copy prints and reduced the confidentiality period from 10 years to five years with respect to exclusive seismic data;

(vii) the Director of COGLA orally represented to the Predecessors that Canada does not release non-exclusive seismic data; and

(viii) the Director of COGLA represented to the Predecessors that COGA required, with no discretion to be exercised, the disclosure of non-exclusive seismic data since such type of data was governed by the Disclosure Legislation, despite the Disclosure Legislation not explicitly referring to non-exclusive seismic data and incorporating a discretionary element to disclosure.

(s) In or around the mid-1980s, the industry developed the ability to reproduce paper and mylar seismic data, but the reproductions were of such low quality that they were unusable.

(t) From in or around June 1987 to February 1988, Canada engaged in a dialogue with the Predecessors and the Canadian Association of Geophysical Contractors (CAGC), an association of which GSI and the Predecessors are and have been members. Those involved include Marcel Masse, the Director General of the Resource Evaluation Branch, M.E. Taschereau (Administrator), the CPA Negotiating Subcommittee Meeting with Graham Campbell of COGLA, and others. The CAGC affirmed to Canada its reliance on the pattern of Canada's conduct to maintain confidentiality of seismic data. Canada represented that CPRA provides for disclosure of seismic data within the discretion of the Minister or his designate, and that such discretion encompasses the type of data to be disclosed, the form of disclosure, and the ultimate schedule of disclosure. Canada further represented that they would engage with their counterparts in Newfoundland and Nova Scotia to delay disclosure of the Seismic Data. Canada further represented that the best solution to the matters in dialogue between the CAGC and Canada was to amend CPRA to differentiate between

confidentiality periods for each class of non-exclusive and exclusive seismic data and the types thereof that could be disclosed. Ultimately, COGLA represented to the Predecessors that it agreed to extend the confidentiality period and would do so by way of a Ministerial Directive. GSI and the Predecessors relied upon that representation that a Ministerial Directive would be issued, since it could be challenged through appropriate judicial processes, if necessary. Such Ministerial Directive has ultimately yet to be issued.

(u) In or around 1989, the software and hardware to enable scanning and digitizing seismic data, including the Seismic Data, was invented, but the use of this software was limited by labour intensive processes and resulting expense.

(v) On or around October 5, 1993, Canada entered into a license agreement with GSI affirming that certain of the Seismic Data is proprietary to GSI, copyright, and cannot be disclosed, representing to GSI that Canada was recognizing and acknowledging GSI's proprietary rights, including copyright.

(w) In or around the late 1990s, the CNLOPB issued permits to GSI that required that GSI waive its rights under AIA, whereunder Canada is mandated under section 20 to refuse to disclose records requested thereunder that contain:

(i) trade secrets of a third party;

(ii) 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;

(iii) 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;

(iv) 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

(v) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party ("**AIA Third Party Records**").

The Seismic Data constitutes AIA Third Party Records.

(x) In or around 2000, GSI commenced submitting requests to Canada under AIA seeking information regarding the use of the Seismic Data by Canada, and in response, Canada represented and misled by omission of information, concealed or deceived GSI, that the Seismic Data was not being accessed or copied by the Third Parties.

(y) In or around 2000 to present, the responses received to GSI's requests under AIA indicated that AIA Third Party Records are consistently redacted from Canada's responses, representing by conduct to and misleading GSI that Canada abides by the provisions of AIA and does not disclose copies of confidential and copyright information to third parties requesting same from Canada, including the Seismic Data.

(z) On or around October 4, 2000, Jim Dickey, Chief Executive Officer of the CNSOPB, represented to GSI that non-exclusive seismic data would not be disclosed for viewing until 10 years have passed from its submission, but that exclusive seismic data would not be disclosed until only five and a half years have passed from its submission.

(aa) In or around 2000 to 2004, Canada engaged in negotiations with the Canadian Association of Petroleum Producers (CAPP), CAGC and GSI in which Canada represented that it only sought to disclose, without copying, and that a license agreement with the data owner shall be used for copying, with accompanying license fees.

(bb) In or around the early 2000s, computers were invented that had processors and memory sufficient to operate the software and process digitization of seismic data.

(cc) In or around January 2002, Dan Whelan, Director General, Energy Resources Branch, Natural Resources Canada represented to CAPP, including GSI, that Canada was unilaterally changing its policy to expand its release to digital formats of processed versions of seismic data, including the Seismic Data.

(dd) In or around May 2002, Rudi Klaubert, Regulatory Information Administrator, National Energy Board, represented to GSI that the appropriate policy approach by Canada to disclosure of seismic data is to ensure that non-exclusive seismic data is always available for sale at fair market value. GSI has consistently made the Seismic Data available for license at reasonable fees.

(ee) On or around April 30, 2004, Jacob Verhoef, Director of the Geological Survey of Canada (Atlantic), Natural Resources Canada, entered into an agreement on behalf of Canada with GSI, affirming that certain of the Seismic Data was non-public, strictly confidential and proprietary in nature, confirming that certain of the Seismic Data would not be disclosed to the Third Parties.

(ff) On or around May 16, 2006, the CNSOPB issued a news release representing to the public at large that its new policy was to require submission of digital seismic data for use by scientists and researchers. The CNSOPB further represented that digital submission will enhance the ability of prospective explorers to become involved in the offshore, but provided no details regarding when or how that would take place.

(gg) On or around May 29, 2006, Bill Dooks, Energy Minister, Nova Scotia, in relation to the *Coasting Trade Act*, SC 1992, c 31 acknowledged that there have been significant differences in describing the same set of facts by parties involved, including Canada, representing that there was confusion as between the parties involved and that there were factual representations made with recklessness or indifference about the veracity of those facts, with the intention of

deceiving and misleading GSI and others regarding the application and developments of policies about geophysical data creation and exploration activity.

(hh) On or around July 25, 2006, Michael McPhee, General Counsel, Secretary of the Board and Manager, Regulatory Policy, CNSOPB, represented to GSI that the CNSOPB intended to come to an agreement with GSI to disclose digital TIFF images that were akin to print formats of seismic data, with disclosure of digital seismic trace data in SEGY format, with appropriate license agreements, only to bona fide research institutes once confidentiality expired.

(ii) On or around January 6, 2009, Michael McPhee, General Counsel, Secretary of the Board and Manager, Regulatory Policy, CNSOPB, represented to GSI that, to date, none of the Seismic Data had been made available for disclosure by the CNSOPB and that CNSOPB had deferred the implementation of its Digital Data Disclosure Policy in respect of non-exclusive seismic data, including the Seismic Data.

(jj) In or around the late 2000s, the National Energy Board represented, through access and liability forms prepared by Canada that are executed by the Third Parties as recipients of the Seismic Data, that those third party recipients of the Seismic Data should not violate the copyright of the owner, GSI.

(kk) On or around June 4, 2010, Marc D'Iorio, Director General, Office of Energy Research and Development, Natural Resources Canada, represented to GSI that it:

(i) would not disclose copies of the Seismic Data to third parties,

(ii) would direct third parties interested in certain of the Seismic Data to GSI,

(iii) acknowledged seismic data ownership when presenting the Seismic Data,

(iv) would not publish the Seismic Data without prior written permission of GSI,

(v) would not create translations of the Seismic Data without prior written consent from GSI, until it obtained a clear legal opinion from Justice Canada

on potential intellectual property issues, representing that Canada would accede to and abide by its intellectual property laws in respect of the Seismic Data and not override them, and

(vi) would protect copyright and intellectual property of third party data, including the Seismic Data.

(ll) In or around 2009 to 2014, Canada filed Statements of Defence in Court of Queen's Bench of Alberta Action Nos. 0901-08210, 1201-05556, 1201-16166, 1401-00777, 1401-05316, all commenced by the Plaintiff, alleging and thereby representing by admission to GSI that, *inter alia*:

(i) copyright and confidentiality do not exist in the Seismic Data;

(ii) alternatively, that GSI's and the Predecessor's submission of the Seismic Data to Canada impliedly or expressly consented to the Disclosure Legislation, even in spite of the protective provisions of both the Copyright Act and AIA;

(iii) alternatively, that Canada owns the copyright in the Seismic Data;

(iv) alternatively, that GSI does not own the copyright in the Seismic Data;

(v) alternatively, that Canada did not copy or use the Seismic Data for motive of gain and merely hosted the Seismic Data as a library or archive, in spite of the pattern of conduct of Canada in pursuit of the alleged purpose of the Disclosure Legislation to promote Canadian offshore oil and gas development; and

(vi) alternatively, that GSI was not deprived, in spite of the determination that GSI's exclusivity to the copyright in the Seismic Data ends when the Disclosure Legislation discloses the Seismic Data, and that the copyright in the Seismic Data is confiscated, which decision was made by the Court of

Queen's Bench of Alberta, and was affirmed on appeal with leave to appeal to the Supreme Court of Canada denied,

(collectively, the "**Representations**").

89. GSI states, and the fact is, that policies and legislation of the Canadian government in respect of Canadian offshore non-exclusive seismic data were evolving throughout the relevant times and have not been clear, resulting in the Representations.

B. Fettering Discretion

90. The current policy of the Canadian Government is to disclose seismic data after expiration of the privilege period, without exercising any form of discretion. As a result, the Canadian Government does not notify GSI of its disclosures of the Seismic Data, does not apply an administrative process in exercising its discretion and, ultimately, fetters its discretion by not assessing disclosure on a case-by-case basis and in consideration of GSI's private property rights.

C. Amendments to the Coasting Trade Act

91. GSI has experienced dealings with the Canadian Government since GSI began asserting its intellectual property rights in the Seismic Data. These dealings demonstrated retaliatory conduct by Canada with the intent to eliminate GSI and its Canadian business once GSI started challenging the Canadian Government's interpretation of CPRA.

92. For instance, GSI was specifically targeted by a repeal of legislation that once protected its Canadian investments.

93. GSI was once the owner and operator of the ship, GSI Admiral, which was Canadian-registered and flagged, and was at all those times the only Canadian-flagged ship equipped to perform seaborne seismic surveys. GSI invested millions of dollars in registering and flagging the GSI Admiral as Canadian. GSI undertook this expensive task because, at all relevant times, the *Coasting Trade Act*, SC 1992 c. 31 ("**CTA**") prohibited foreign ships from engaging in the coasting trade, including the performance of seismic surveying, except and unless no suitable Canadian ship was available.

94. Pursuant to section 3(1) of CTA, foreign ships were prohibited from engaging in the coasting trade except under a license issued by the Minister of Public Safety and Emergency Preparedness and such a license to a foreign ship could only be issued if the minister was satisfied by a determination of the Canadian Transportation Agency that there was no Canadian ship suitable and available to perform the proposed work.

95. Pursuant to section 4(1) of CTA, the proponent seeking to engage a foreign vessel to perform work, was required to apply to the Canadian Transportation Agency for a determination that there was no Canadian ship suitable and available to provide the service or perform the activities for which the foreign vessel was desired.

96. Upon any such application, the Canadian Transportation Agency was required to notify owners of Canadian ships which might be suitable and available, which owners were then permitted to object and to seek a ruling of the Canadian Transportation Agency requiring that the owners' Canadian ship be employed to perform the proposed work. In the case of seismic vessels, it was the invariable practice of GSI to so object, and as GSI was the owner of the only Canadian ship equipped to perform seaborne seismic surveys, the Canadian Transportation Agency would rule that employment of the GSI Admiral was required for the proposed work whenever she was suitable and available.

97. However, in or around 2008 to 2009, contemporaneous to the initial responses to the AIA requests of GSI, the Canadian Government intentionally avoided the application of the protective measures of CTA that would have required that GSI be considered for seismic acquisition work for the Canadian Government. Specifically, the Canadian Government conspired with a third party, Fugro Canada Corp., to employ an Italian-flagged marine vessel, the OGS Explora, to conduct this seismic project for the Canadian Government, with the intention of avoiding the protective measures of CTA and ultimately not awarding GSI the lucrative contract work worth approximately €5,138,324. In fact, the Canadian Government amended the contract for the sole purpose of explicitly avoiding the application of CTA.

98. GSI, as the sole Canadian-flagged seismic marine vessel, was entitled to Canadian protection, for its significant monetary investment in that marine vessel, work and its employees. As a result of Canada's conspiracy to undermine the protection afforded to the GSI Admiral, GSI no longer received the

legislative protection that enabled it to compete for business in Canada, which is in itself costly, requiring Canadian employee content, significant regulatory costs and high taxes. The very purpose of the Canadian protection under CTA was to ensure that Canadian companies' investments were protected from foreign competition and to promote Canadian investment. As a result of the undermining of this Canadian protection by Canada in the circumstances, GSI's business suffered significant losses at a critical time, during the 2008 financial crisis, directly leading to its demise. GSI was unable to maintain its Canadian-flagged seismic vessel, which was the equipment required to continue to create further non-exclusive seismic data that GSI licenses to third parties to support the maintenance of its business operations.

99. As a result of the regulatory requirements to drydock every five years, GSI was forced to put both of its ships out of service for inspections, dis-assembly and re-fit during late 2007 and 2008, reducing revenues during the 2008 financial crisis, and requiring over USD$20,000,000 in upgrades and additions to its ships and equipment. This set of circumstances made it critical in 2008-2009 for GSI to obtain as much work as possible, through the Canadian protection under CTA.

100. This undermining of its own legislation gave the Government the impetus to then amend CTA to eliminate the Canadian protection only for seismic marine vessels, with GSI as the sole target of such amendment as the sole Canadian-flagged seismic vessel. This amendment formalized the actions of Canada that already took place in respect of the 2009 UNCLOS Survey by eliminating the Canadian protection of GSI's investment. GSI had expended significant funds on upgrading its seismic marine vessel to meet Canadian requirements, investing in its business under the auspices of the Canadian protection of CTA, without notice or regard to the damage it would cause, only for that protection to be eliminated and for which consequent compensation is owed to GSI.

D. Arbitrary Benefits

101. Additionally, there have been several instances in which Canada has favoured and provided beneficial treatment to other seismic data industry participants. Canada has protected these other participants' copyright and guaranteed their confidentiality in their data while arbitrarily not treating GSI and the Seismic Data in the same manner, including through entering into lucrative contracts for projects for the Canadian Government with other seismic data industry participants to ensure these benefits.

E. Federal Court Decisions

102. There have also been Federal Court of Canada proceedings that GSI has been forced to take in reaction to Canada's conduct and have circumvented GSI's efforts to obtain redress. Canada has essentially added insult to injury.

103. At the commencement of GSI's investigation, in 2000, GSI made requests under AIA for information from the CNLOPB. The requests were to provide the names and addresses of all third parties who had, within the previous decade, requested and been granted access to information concerning or provided by GSI to the CNLOPB, together with details of the information provided. The CNLOPB denied the requests on the grounds that the information requested was privileged. GSI challenged that denial before the Federal Court of Canada in *Geophysical Service Inc. v. Canada-Newfoundland Offshore Petroleum Board*, 2003 FCT 507.

104. The Federal Court ultimately found that GSI was entitled to such information, thereby clarifying that the Canadian Government was actively concealing information regarding the disclosure of the Seismic Data to which GSI was entitled. Canada's denial disguised from GSI the reality of its disclosure of the Seismic Data. It was nothing more than a stall tactic and revealed Canada's cavalier refusal to acknowledge, let alone accept the very existence of, GSI's intellectual property rights.

105. Then, the Canadian Government took the unprecedented step of creating records to respond to the requests made of it under AIA, rather than disclosing copies of the records it held, all with an effort to conceal the truth of the Canadian Government's actions in disclosing the Seismic Data from GSI. Not until nearly a decade later did the Canadian Government respond to GSI's requests for information under AIA, at which time GSI began to determine that, in respect of the Seismic Data, the Canadian Government was disclosing, copying and facilitating copying and intending to continue those practices into the future. As a result, GSI set out to assert its intellectual property rights by taking the National Energy Board to task on its intention to disclose the Seismic Data.

106. In 2010, the NEB issued three letters to GSI setting out the NEB's understanding of CPRA and indicating that the NEB was of the view that it was only required to keep confidential geophysical data in accordance with CPRA for a five-year period and for an additional 10-year period under a policy initiated by Indian and Northern Affairs Canada and adopted by the NEB.

107. In this particular circumstance, the NEB indicated that the seismic data that was the subject of the correspondence of the NEB to GSI could not be published until 2023. GSI asserted that CPRA does not supersede the protections provided by the Copyright Act and the law respecting confidential information, but the NEB was unpersuaded. GSI commenced a judicial review of the three letters, attempting to challenge them as indicative of decisions made by the NEB as part of the Canadian Government, which was heard by the Federal Court of Appeal in *Geophysical Service Inc. v. National Energy Board*, 2011 FCA 360. The Federal Court of Appeal held that GSI's attempt to assert its intellectual property rights was premature, as the particular seismic data at issue in that case was, under then current law, not disclosable until 2023. The Court held that the policies of Canada could change before 2023. The Federal Court of Appeal ignored the fact that a significant other portion of the Seismic Data was being disclosed by the Canadian Government at the time. This decision caused significant delay and consternation for GSI who, then without an affirmation of its intellectual property rights, continued to have to assert them against those third parties who infringed those rights.

108. Every step that GSI has taken in its protracted litigation has been with a view to consistently asserting its intellectual property, and in particular, its copyright and trade secrets, in the Seismic Data.

X. CLAIMS

A. Canada's Domestic Law Violates Article 1106

109. Canada is obligated to comply with certain standards in respect of business within its jurisdiction. Article 1106 provides, in part:

> **Article 1106: Performance Requirements**
>
> 1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> > (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement...

110. Canada's interpretation of section 101 of CPRA is in direct contradiction of its obligation under NAFTA Article 1106. The Alberta Decisions interpreted into existence and enforce a system by which Canada imposes upon GSI a transfer of proprietary knowledge to third parties by providing the Seismic Data to oil and gas companies in an effort to develop the offshore oil and gas industry. The breach by Canada of NAFTA Article 1106 is blatant and intentional.

B. Canada's Failure to Protect the Seismic Data Violates Article 1111

111. Canada is obligated to comply with certain standards in respect of business reporting within its jurisdiction. Article 1111(2) provides:

> **Article 1111: Special Formalities and Information Requirements**
>
> 2. **Notwithstanding Articles 1102 or 1103, a Party may require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment.** Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law. [emphasis added]

112. GSI and the Predecessors provided routine information concerning the Seismic Data to Canada after every seismic survey project was completed in the form of a final report which included the Seismic Data. However, it is apparent that Canada did not use the final reports solely for informational or statistical purposes; Canada used the final reports, and the Seismic Data contained therein, for the purported purpose of promoting offshore oil and gas development.

113. Needless to say, Canada did not protect such business information, which is highly confidential, from disclosure. In fact, Canada has taken the position that it promotes, to the prejudice of GSI, free access and copying of the Seismic Data for GSI's potential customers. Again, the breach by Canada of NAFTA Article 1111 is blatant and intentional.

C. Canada's Conduct Violates Article 1105

114. Canada is obliged to provide the Investors with the minimum standard of treatment under customary international law. Article 1105 provides:

> **Article 1105: Minimum Standard of Treatment**
>
> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
>
> 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
>
> 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

115. The Investors had legitimate expectations that Canada would act consistently with:

(a) its NAFTA obligations under Chapter 17 incorporating the Berne Convention;

(b) the Copyright Act; and

(c) its previous jurisprudence on statutory interpretation protecting private property interests.

116. Instead, Canada has acted arbitrarily with respect to GSI by not meeting the minimum standards of copyright protection required under NAFTA Chapter 17, the Berne Convention and the Copyright Act by reducing the period of protection from life of the author plus 50 years to five years. Canada has acted arbitrarily by acting contrary to Supreme Court of Canada jurisprudence that protects private property interests from encroachments by the Canadian government through legislation.

117. The Alberta Decisions further demonstrate that Canada acted arbitrarily, first by finding a conflict between two very different terms, "disclose" under CPRA and "copy" under the Copyright Act, and then second, by resolving the conflict it created by applying the doctrine of *lex specialis* to enable

CPRA to trump the Copyright Act, as if oil and gas legislation is more specialized than the Copyright Act when it comes to protection of copyright.

118. Canada has discriminated against geophysical companies in the seismic industry by failing to afford the same copyright protection to them as any other copyright owner, as is required by Canada's own laws, enshrined in the Copyright Act, and as enshrined in NAFTA Chapter 17 through incorporation of the Berne Convention.

119. Canada has acted arbitrarily, and without transparency, by fettering its discretion when it created a policy to disclose seismic data in every instance, rather than considering any such disclosure on a case-by-case basis and asking whether copyright protection still applies.

120. Canadian Parliamentary debates from the 1950s to present demonstrate that the initial intention of Canada was not to disclose marine seismic data under previous iterations of section 101 of CPRA. A process to create marine seismic data had not even yet been invented. However, Canada then possibly envisioned a re-purpose of section 101 in 1976, with the issuance of its White Paper. If that White Paper even applied to seismic data, such a re-purpose does not include reproduction and copying, which is never mentioned – only releasing of proprietary information provided to Canada pursuant to the relevant legislation that is exclusive seismic data owned by oil companies; not non-exclusive seismic data such as the Seismic Data. It is clear from the Representations that Canada was confused about the different types of seismic data at various times.

121. Nevertheless, even at that time, the technology to reproduce marine seismic data through scanning and vectorization had not yet been invented. Once it was invented, it was not until the 2000s that the technology was available in the marketplace. It was the legitimate expectation of the Investors that, just because technological advancements made reproduction and translation of the Seismic Data possible, the legislated provisions would not be re-purposed or re-interpreted so as to affect its private property interests in the Seismic Data.

122. Canada has also not met the international minimum standard of transparency in its dealings with GSI. The pattern of concealment and denial of information to GSI who was legitimately inquiring with

Canada about its treatment of the Seismic Data demonstrate Canada's lack of transparency. In fact, Canada never notified GSI that the Seismic Data was being disclosed; instead, Canada:

(a) has represented otherwise on numerous occasions;

(b) represents that it respects intellectual property laws of Canada when it allows access to, makes copies and facilitates copying of the Seismic Data at its sites;

(c) has implemented policies since 2012 that circumvent the recording of information related to the disclosure of the Seismic Data so that such records can no longer be obtained under AIA, rendering the disclosure and copying not traceable; and

(d) has required the submission of the Seismic Data under legislation aimed at protecting the environment and safety and yet disclosed it under different legislation with a differing purpose.

123. Canada further failed to act in good faith in making numerous misrepresentations about its disclosure practices to GSI and the Predecessors, and in conspiring against GSI by avoiding the application of CTA in order to eliminate GSI from the Canadian seismic industry because GSI was challenging Canada's disclosure policies. Canada has further arbitrarily provided significant benefits to other seismic industry participants, including affirming their intellectual property rights, and not treated GSI in the same manner.

124. Ultimately, when the Supreme Court of Canada denied leave to hear an appeal of the Alberta Decisions, it improperly deprived GSI of its intellectual property rights, amounting to a denial of justice.

D. Canada's Expropriation of the Seismic Data Violates Article 1110

125. In the alternative, if Canada is not found to be in breach of Articles 1106, 1111 or 1105, then it is in breach of Article 1110. In fact, even Canada itself has held, through the Alberta Decisions, that its conduct under CPRA is confiscatory.

126. Article 1110 provides:

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

> 8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

127. The measures taken by Canada to disclose the Seismic Data are tantamount to unlawful expropriation of the Seismic Data. Canada has disrupted the seismic market that GSI once operated in, neutralizing GSI's existence to a moot point now that it is unable to acquire and create seismic data, and submit it to Canada. GSI's contractual relations have been interfered with and undermined with its clients resulting in breaches and non-compliance by its licensees who rely on the Alberta Decisions to suggest that they need not abide by Licensing Obligations since the Seismic Data is freely available for copying from the Canadian Government. Through the copying and disclosure of the Seismic Data, Canada's measures have made it impossible to collect licensing fees under the Licensing Agreements, resulting in protracted and expensive litigation with third party licensees of GSI to attempt to enforce the Licensing Obligations against them.

128. Canada adopted the measures knowing very well that it was likely to negatively impact the business of GSI and the Predecessors, and to ultimately push them out of the seismic market and out of business altogether. Through the measures adopted by Canada, including CPRA and the Alberta Decisions, Canada has destroyed the value of the Investment.

129. Canada asserts that the Seismic Data was taken for a public purpose – to promote offshore oil and gas development – but the relationship between such purported purpose and the taking is unclear and misguided. If Canada is of the view that providing offshore seismic data to oil and gas companies for free promotes offshore exploration and development, its plan is shortsighted. In fact, faced with that prospect, most geophysical companies in the seismic industry will no longer acquire and create seismic data only to have their efforts taken for free. No one works for free in Canada. There is no reason that geophysical companies are any different. There is no reason that the oil and gas companies, with their sizable revenues, require this form of subsidization at the expense of geophysical companies such as GSI. This is discrimination against seismic companies.

130. The protection afforded by the Copyright Act encourages geophysical companies to explore, acquire and create further seismic data, supplementing the existing seismic data available to oil and gas companies for license.

131. Further, Canada has failed to pay compensation to GSI for the expropriation of the Seismic Data. This failure has resulted in a devaluation of the Investors' investments in GSI. The Investors are entitled to full reparation for their losses, including restitution of the assets expropriated or compensation at their fair market value, as well as payment for any consequential damages suffered as a result of Canada's breach of Article 1110.

XI. CONCLUSION

132. The measures taken by Canada have inflicted extensive damages on GSI. GSI has been unable to license the Seismic Data at all since Canada has asserted its position to disclose the Seismic Data. Further, as a result of Canada's conduct, GSI's licensees breach the Licensing Obligations such that none of GSI's licensees are abiding by the terms of the licenses signed with GSI and Canadian Courts are not enforcing the Licensing Agreements.

133. Following the losses resulting from the inability to license the Seismic Data, GSI was also forced out of the seismic acquisition market in Canada after it invested significant sums to maintain the sole Canadian-flagged and registered seismic marine vessel, the GSI Admiral, when Canada, after facing GSI's repeated assertions of its intellectual property rights, decided to eliminate the protections once afforded to such a vessel. Canada's conspiracy to first circumvent and then amend CTA to avoid the protective measures that GSI invested in the GSI Admiral in order to attract such protections led to the demise of GSI's seismic acquisition business.

134. GSI has laid off approximately 250 employees as a result of Canada's conduct.

135. By relying on decisions of the Alberta Courts that are inconsistent with the legitimate expectations of an investor in Canada, Canada has failed to uphold its own laws regarding intellectual property rights and has further undermined the contractual obligations of third parties under their licensing agreements with GSI. GSI's investment in the Seismic Data has been harmed and is at risk of suffering further damage and loss as a result of Canada's undermining of GSI's licensing agreements with third parties. GSI has been forced to incur legal costs and negotiate settlements with some third parties rather than pursue its full entitlement to fees for breaches of its licensing agreements as a result of the inconsistent decisions of Canadian courts in protecting private property interests and judicial delay. GSI's property has effectively been taken.

136. Furthermore, due to Canada's breaches of its NAFTA obligations as related to GSI, the Investors suffered substantial loss with respect to their investments. The damages Canada inflicted upon GSI's investments in turn resulted in damages to the Investors' investments. The value of the Investors' interests in GSI has diminished significantly as a result of Canada's failure to protect GSI's proprietary knowledge and confidential information, and to treat GSI in accordance with international law; and in the alternative Canada's failure to protect GSI from uncompensated expropriation of the Seismic Data.

137. To date, Canada has not compensated GSI or the Investors for the foregoing breaches of its obligations.

138. The actions of Canada constitute an abrogation of the rights of GSI under the Copyright Act and NAFTA Chapter 17. Canadian domestic legislation cannot unilaterally abrogate the rights created under international law, including the Berne Convention, as implemented by NAFTA Chapter 17 and the Copyright Act.

139. Regardless of the rights under the Copyright Act, NAFTA obligates Canada to treat the Investors and the Investment in accordance with Articles 1105, 1106 and 1111. In particular, if CPRA is interpreted and applied as Canada contends – confiscating the Seismic Data – Canada has interfered with the right of GSI to the protection of its proprietary knowledge and competitive information.

140. In the alternative, if CPRA applies as Canada contends, then NAFTA obligates Canada to treat the Investors and the Investment in accordance with Article 1110.

141. The Investors reserve the right to give notice of additional and further claims under Chapter 11 of NAFTA.

XII. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED

142. The Investors seek, through consultations, to have the Government of Canada rectify the situation of non-compliance resulting from the foregoing issues and remedy other violations of the investment obligations owed to the Einarssons regarding the investments, as set out at the commencement of this Notice. The Investors propose that consultations of at least one-day in-person meetings occur in Houston, Texas, as Theodore David Einarsson is unable to travel due to medical conditions as a result of his age.

143. If the consultations are unsuccessful, the Einarssons will submit, in their own right, and on behalf of their enterprise, GSI, a claim for arbitration pursuant to Article 1120 of NAFTA. That claim will seek compensation for the damages caused by or arising out of Canada's measures that are inconsistent with its obligations contained in Part A of Chapter 11 of NAFTA, pursuant to the ICSID Convention, including:

(a) Damages of not less than US$1,000,000,000 as compensation for the damages caused by or arising out of Canada's measures that are inconsistent with its obligations in Chapter 11 of NAFTA;

(b) Costs associated with the proceedings, including all professional fees and disbursements;

(c) Fees and expenses incurred to oppose the effect of Canada's measures;

(d) Pre-award and post-award interest at a rate to be fixed by the Tribunal;

(e) Tax consequences of the award to maintain the integrity of the award; and

(f) Such further relief as counsel may advise and the Tribunal may deem appropriate.

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