Federal Court

Cour fédérale

Date: 20180628

Docket: T-1023-17

Citation: 2018 FC 670

Ottawa, Ontario, June 28, 2018

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

GEOPHYSICAL SERVICE INC.

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY ATTORNEY GENERAL OF CANADA

Defendant

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY ATTORNEY GENERAL OF NEWFOUNDLAND

Defendant

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY ATTORNEY GENERAL OF NOVA SCOTIA

Defendant

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY ATTORNEY GENERAL OF QUEBEC

Defendant

ORDER AND REASONS

I. Overview

[1] The Plaintiff, Geophysical Service Incorporated (“GSI”), has brought this action seeking indemnification by way of damages and other relief from Her Majesty the Queen in right of Canada and in right of several provinces for what it claims is the *de facto* expropriation of its intellectual property rights over seismic data it has either acquired from its predecessor or collected. The Court is seized of the Defendant Her Majesty the Queen in Right of Canada’s motion for an order striking out the Statement of Claim.

[2] According to the Statement of Claim, the expropriation was effected through a legislative and regulatory scheme enacted and operated pursuant to various statutes, including primarily the *Canada Petroleum Resources Act*, RSC 1985, c C-36 (2nd Supp.), but also a host of other statutes such as the *Territorial Lands Act*, RSC 1952, c 263; the *Canada Oil and Gas Operations Act*, RSC 1985, c O-7; the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3; the *Canada Nova Scotia Offshore Atlantic Accord Implementation Act*, SC 1998, c 28; the *Canada Oil and Gas Act*, SC 1981, c 81; legislation implementing the accord between the Government of Canada and the Government of Québec for the shared management of the petroleum resources in the Gulf of St. Lawrence; and regulations enacted pursuant to theses statutes.

[3] The Statement of Claim alleges that, pursuant to this legislative scheme, GSI was required to submit to various Crown agencies marine seismic data over which it owns copyright.

Through this scheme, the Crown agencies were then permitted to, did and will in the future, disclose the data to third parties without GSI's knowledge or consent. The Statement of Claim thus asserts that the legislative scheme effectively takes away GSI's copyright and other confidentiality and proprietary rights over the data, without compensation. The Statement of Claim further asserts that the *de facto* expropriation of its copyright has also injuriously affected the value of its other assets, including the licensing agreements it had entered into with third parties in relation to the data.

[4] The Statement of Claim refers to and relies upon determinations previously made by other courts as to the Crown agencies' rights in respect of the data under the legislative scheme and the effect of the scheme on GSI's copyright. These determinations were made in the context of a series of six actions for breach of copyright brought before the Alberta Court of Queen's Bench by GSI against her Majesty the Queen, various Crown agencies, and third parties who have obtained from the Crown agencies seismic data over which GSI claims copyright. Pursuant to a case management process, these actions proceeded to a Common Issues Trial, which resulted in the decision of the Alberta Court of Queen's Bench cited as *Geophysical Service Incorporated v EnCana Corporation*, 2016 ABQB 230, upheld at 2017 ABCA 125, leave to appeal to the Supreme Court dismissed 2017, CarswellAlta 2545 ("*GSI v EnCana*").

[5] On a motion to strike a statement of claim as disclosing no reasonable cause of action, no evidence is admissible and the Court must take allegations made in the statement of claim as true. However, the Court may take judicial notice of the determinations made in *GSI v EnCana*. Further, because GSI and Her Majesty the Queen in Right of Canada were both parties to the

Alberta actions, the determinations of fact and law made in these actions are binding upon them, and it is appropriate for the Court to take them into account on this motion.

[6] As further explained below, these determinations are to the effect that rights over the data were, from the moment they were created, encumbered by the superseding provisions of the regulatory regime. As a result, GSI never had nor acquired the full, unfettered copyright it claims has been expropriated. Legislation cannot expropriate rights which never existed. I therefore find that it is plain and obvious that GSI's action, to the extent it is based on *de facto* expropriation or injurious affection, cannot succeed and must be struck.

II. The determinations made in in *GSI v EnCana*

[7] Two issues were to be determined in *GSI v EnCana*:

1. Can copyright subsist in seismic material of the kind that is the subject of GSI's claims?
2. What is the effect of the regulatory regime on GSI's claims?

[8] Having first considered and concluded that the seismic data at issue is subject to protection under the *Copyright Act*, RSC 1985 c C-42, the Alberta Court of Queen's Bench next engaged in a thorough review and analysis of the regulatory scheme and of its legislative history and intent in order to determine the regime's effect on GSI's copyright. However, at the outset, it identified the following non-contentious context and features of the regulatory scheme; these features are crucial to the determination of the present motion:

> 129. It is common ground that the Regulatory Regime, as a whole, consists of certain key aspects, namely:
>
> 1) <u>Entities wishing to conduct seismic exploration on offshore and frontier lands must obtain authorization</u> under the relevant legislation.
>
> 2) <u>Authorizations are granted on the basis that</u> any data collected pursuant to the authorization will be submitted to the appropriate governing entity (regulator) under the applicable legislation; and
>
> 3) The information provided to the regulator as part of the permit/authorization process is considered privileged for a defined period.
>
> (Emphasis added)

[9] The scheme provides that the Crown agencies may "disclose" the data after the expiration of the defined privilege period.

[10] With respect to the effect of the regulatory scheme, the particular issues between the parties were whether the right of the Crown agencies to "disclose" the data includes the right to unfettered copying and to authorize others to copy and re-copy the data; whether disclosure should be subject to the mechanism of the *Access to Information Act*, RSC 1985 c A-1; and whether disclosure and copying under the regulatory regime constitute a breach of copyright.

[11] The Alberta Court of Queen's Bench held that "disclosure" did allow for copying and that, once the privilege period has expired, the regulatory regime constitutes a complete code that supplants both the *Access to Information Act* and the *Copyright Act*:

> 319 In conclusion, GSI's submissions ignore the reality that Parliament's purpose and intention when it enacted the CPRA was to allow for public disclosure of seismic data after a period of time

> to allow for necessary oil and gas exploration of the Canadian offshore and frontier lands. The wording of the CPRA, properly interpreted, allows for disclosure without restriction after a defined period of time. It is a complete and specific code that applies to all oil and gas intellectual property in the offshore and frontier lands, including seismic data. Its provisions supplant any more general pieces of legislation, such as the *Copyright Act* or the AIA.
>
> 320 The AIA provisions that GSI submits are applicable for disclosure requests would only serve to thwart the public disclosure of seismic material, which is obviously contrary to Parliament's intention. I cannot agree that this legislation, which was enacted years after the Regulatory Regime was in full swing, is applicable in these circumstances.
>
> 321 Having said this, I disagree with the Defendants' position that the Regulatory Regime did not provide for proprietary rights in the seismic material. Instead, in my view, GSI has full copyright and other proprietary rights over its seismic data, but the Regulatory Regime applies to the extent that it conflicts with the *Copyright Act*; the Regulatory Regime, in effect, creates a compulsory licence over the data in perpetuity after the expiry of the confidentiality or privileged period.
>
> (Emphasis added)

[12] The Alberta Court of Appeal agreed with the Queen's Bench determinations (the applicability of the *Access to Information Act* was not raised on appeal):

> 103 The Trial Court correctly concluded that the *Canada Petroleum Resources Act* is both more specific and more recent legislation than the *Copyright Act*; thus, to the extent that there is conflict between the two statutes, there exists rational and intra vires bases for that conflict. We agree with the Trial Judge that it is not necessary to read-down the *Canada Resources Petroleum Act* in deciding how to resolve this apparent conflict. We are not aware of any binding authority standing for the proposition that it would be illegal for legislators to create the very sort of implied exception captured within the boundaries of the Regulatory Regime, nor would we endorse any such suggestion.
>
> 104 As found by the Trial Judge, there is no breach of copyright in this matter by the Boards' disclosure of seismic data after the privilege period, including allowing data to be copied. "The

> specific legislative authority of the [*Canada Petroleum Resources Act*] and the *Federal Accord Act* overrides the general rights contained in the *Copyright Act*. Further, or in the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have authority to copy": Decision, para 318. Here, that means GSI's exclusivity to its seismic data ends, for all purposes including the *Copyright Act*, at the expiry of the mandated privilege period. Thereafter, GSI has no legal basis or lawful entitlement to interfere or object to any decisions made by the Boards relating to its collected data.
>
> (Emphasis added)

III. Analysis

[13] In bringing this action, GSI appears to be latching on to the Alberta Courts' description of the regulatory regime as "confiscatory" in nature and having the effect of a "compulsory license" as grounds to claim compensation for *de facto* expropriation or the determination of a compulsory royalty rate.

[14] GSI might have been in a better position to assert the existence of an arguable case if the regulatory regime had been enacted after it acquired its copyright, if the statutory privilege period had been reduced after the copyright had been created or acquired, or even if the creation of its rights over the seismic data had arisen independently from the regulatory scheme. However, that is not the case. The decisions of the Alberta Courts conclusively establish that the relevant features of the regulatory regime have been in place since the 1950s, and thus well before 1969, when the first of the seismic data at issue was collected. The decisions also establish that the statutory privilege period has never been shortened. Accordingly, I need not determine whether GSI's claim could have succeeded in these alternative circumstances.

[15] By focussing on the aspects of the regime that terminate the enjoyment of its rights, what GSI's argument ignores is that the regulatory regime, as interpreted by the Alberta Courts, is a complete and congruent scheme which governs the rights asserted by GSI from their creation to their termination.

[16] As stated by the Alberta Court of Queen's Bench:

> 211 The historical review of the Regulatory Regime makes it clear that ever since marine seismic data has been created by seismic companies on Canadian offshore and frontier lands, there has been a regulated process for obtaining permits coupled with a requirement to submit data to various regulatory bodies, and that this data has been made available for disclosure to the public after a certain period of time without compensation to the seismic data owners.
>
> (…)
>
> 304 Accordingly, with respect to the disclosure provisions, the specific legislated authority in the Regulatory Regime that allows disclosure and copying, as described above, prevails over the general rights afforded to GSI in the *Copyright Act*. The CPRA creates a separate oil and gas regulatory regime wherein the creation and disclosure of exploration data on Canadian territory is strictly regulated and, in my view, not subject to the provisions of the *Copyright Act* to the extent that they conflict.
>
> (Emphasis added)

[17] On appeal, the Alberta Court of Appeal reviewed in detail the trial Judge's approach to statutory interpretation, including the legislative history as it appears on the record. It highlighted in its conclusion the following facts and features of the regime, which are of particular relevance to the manner in which the rights at issue owe their creation to and are inextricably bound by the regulatory regime:

> 97 The Trial Court made the correct finding, which in our view was amply supported, that whether a data collector is operating under the *Federal Accord Act* or the parallel provincial legislation, the extant legislation confers upon the provincial Boards, as regulators, sole authority to collect seismic data and authorize a data collector to acquire data on frontier land or offshore. The lawful participation of data collectors in these geographical areas has always had conditions attached; in particular, permission must be obtained to enter onto Crown interests to acquire sought-after data, the data collector must report data acquired under the Regulatory Regime, and the Boards thereunder have legislated authority to release the reported data publicly after a period of time, for use by the broader community.
>
> (Emphasis added)

[18] It is clear from the above that the regulatory regime, as concerns seismic data, is not merely an instrument to extinguish copyright or establish a compulsory license system. It is the instrument pursuant to which the copyright itself was allowed to be created and acquired. Neither GSI nor its predecessor had the right to access the lands or offshore areas upon which the data at issue was collected, or to carry out the work required to collect it, without obtaining an authorization pursuant to the regulatory regime. This authorization in turn carries, and has always carried, the conditions of which GSI now complains: the obligation to turn the data over to the Crown agencies with the explicit disclosure provisions that bring an end to GSI's exclusivity and copyright therein at the expiry of the mandated privilege period. As found by the Alberta Courts, the regulatory regime did not operate to prevent GSI or its predecessor from acquiring "full" copyright over the data. However, as also found by the Alberta Courts, the provisions of the *Copyright Act*, as they might otherwise apply to the data acquired pursuant to the regulatory regime, are modified and overridden by the regime to the extent they conflict with it.

[19] The copyright created and acquired over the seismic data at issue was therefore, from its inception, one that was limited in time to the statutory privilege period, after which it essentially came to an end.

[20] *De facto* expropriation is the statutory taking of property rights by the Government. It is trite that there can be no taking of a right that never accrued. Given the judgements in *GSI v EnCana*, it is plain and obvious that nothing was taken by the statutory scheme that GSI ever had. Rather, the copyright created pursuant to the statutory scheme over the data was one that was limited and encumbered, from its inception, by the disclosure provisions of the scheme.

[21] To the extent GSI's claim is based on the law of expropriation, it is a claim for the loss of a right it never had. Such a claim is destined to fail and must be struck.

IV. Other issues and claims raised in the Statement of Claim

[22] Although the essence of GSI's claim is clearly one for expropriation, the Statement of Claim does contain allegations and prayers for relief that may go beyond a claim for expropriation. I consider below whether any of the allegations of the Statement of Claim, or any of its claims for relief, could be read or construed as raising a reasonable cause of action independent of the claim for expropriation.

A. *Unjust enrichment*

[23] The Statement of Claim pleads unjust enrichment in the alternative. As correctly observed by the Crown in its written representations, the three essential elements of a valid claim for unjust enrichment are: a benefit derived by the defendant, the corresponding deprivation of the plaintiff and the absence of a juristic reason for the defendant's enrichment.

[24] As explained above, GSI never had rights in the data that were not encumbered by the provisions of the regulatory regime, and it can accordingly not have been deprived of any rights or benefits in respect of the data. That in itself is sufficient to strike the claim for unjust enrichment.

[25] In addition, it is plain and obvious that the regulatory regime stands as a valid juristic reason for the situation of which GSI complains.

[26] To overcome this obstacle, the Statement of Claim originally alleged the unconstitutionality of both the federal and the provincial portions of the regime as being *ultra vires* each level of government's powers. However, GSI's counsel advised at the hearing of this motion that GSI withdraws that portion of the Statement of Claim. With that concession, the allegations to the effect that GSI has been deprived and the Crown correspondingly enriched are no more than another way of presenting an expropriation claim: if no compensation is paid to GSI for the alleged loss of its rights under the regulatory regime, and given the corresponding

enrichment of the Crown, then GSI will have been unjustly expropriated without compensation. For all the reasons given above, this argument is devoid of any merit.

B. *Request for an order requiring the Defendants to provide notice to GSI when they disclose data to third parties*

[27] The Statement of Claim alleges that the Crown is obliged, pursuant to the principles of natural justice and procedural fairness, to provide it with notice every time it discloses some of its data to third parties. It therefore requests an order requiring that such notice be given.

[28] Such a measure might be construed as a necessary accessory to GSI's claim for compensation in this action. In that context, such a measure would ensure that compensation owed to GSI could be properly accounted for and assessed, and it might arguably be one the Court would be capable of granting. However, given that GSI has no reasonably arguable claim for compensation arising from disclosure of its data by the Crown, the request for a notification order must be considered as if it were a claim for relief arising from an independent right.

[29] GSI has not identified any statutory or regulatory authority from which an obligation to provide notice of disclosure might arise. Rather, it asserts that these obligations arise pursuant to the principles of natural justice and procedural fairness. However, obligations to conform to the principles of natural justice and procedural fairness only arise in the context of judicial or administrative adjudicative processes, the existence of which has not been asserted. No factual or legal bases have been pleaded to support an independent right for such relief.

[30] In any event, the proposed order is in the nature of *mandamus*, as it seeks to direct the Crown agencies to perform an act. While this Court has jurisdiction to issue a writ of *mandamus* against federal boards or tribunals, such a remedy can only be obtained by way of an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*.

[31] It is plain and obvious that GSI's claim for this relief in the context of this action is doomed to fail.

C. *Request for an order requiring the Attorney General to mandate the Copyright Board of Canada to administer the compulsory license scheme created by the regulatory regime.*

[32] It appears that this relief was requested as an alternative, in the event of the Court were to "fully and finally" determine that the regulatory regime is a compulsory licensing scheme. The principal proposition put forward by GSI in this action is that the regulatory regime constitutes a *de facto* expropriation, an argument which I found to be without merit.

[33] Construing this request for relief as an independent claim therefore requires reading GSI's position as being to the effect that: 1) the necessary conclusion to be drawn from the Alberta Courts' determination is that the regulatory regime creates and establishes a compulsory license scheme; and 2) there is an obligation on the part of the Attorney General to give a mandate to the Copyright Board to administer that scheme. I need not determine whether there is merit to this argument, although I harbour significant doubts as to the reasonableness of its second branch. It is sufficient to note that both the claim and the relief requested are clearly in the nature of a *mandamus*, requiring an agent of the Crown to perform an act which he or she is

by law required to do. Such a claim can only proceed by way of an application for judicial review pursuant to section 18.1 of the *Federal Courts Act* and it is plain and obvious that it is not available in the context of an action.

D. *The allegations to the effect that the Defendants have acted beyond the scope of the regulatory regime and sometimes prior to the expiry of the privilege period.*

[34] A bald allegation is made at paragraph 36 of the Statement of Claim to the effect that "through the conduct of the Defendants pursuant to the Legislation and their actions beyond the scope of the Legislation and sometimes prior to the expiry of the privilege period under the Disclosure Legislation, contrary to the proprietary rights of GSI, the Defendants have, from time to time, taken or regulated away most or all reasonable uses of the Seismic Data, without providing GSI compensation for same".

[35] As already determined, there is no reasonable cause of action in expropriation for the Crown's conduct and actions pursuant to the regulatory regime. However, allegations to the effect that servants or agents of Crown have acted beyond the scope of their statutory powers or contrary to the provisions of the statute are not claims for *de facto* expropriation under statute but claims for unauthorized taking. In other words, these allegations would raise a claim based on the Crown's vicarious liability arising out of the tort of its servants or agents under the *Crown Liability and Proceedings Act*, RSC 1985, c C-50. This claim, if properly pleaded, might give rise to reasonable cause of action. However, the bald allegation contained in paragraph 36 of the Statement of Claim fails to meet the basic requirements of pleadings, in that it is a mere conclusory statement devoid of any material facts. It entirely fails to provide the "who, when,

where, how and what" that is required of proper pleadings, and as such, must be struck (*Mancuso v Canada (Minister of National Health and Welfare)*, 2015 FCA 227).

[36] GSI will, however, be granted leave to amend, but only to the extent it can assert and properly plead a cause of action arising from the Crown's vicarious liability pursuant to the *Crown Liability and Proceedings Act*.

ORDER

THIS COURT ORDERS that:

1. The Statement of Claim is hereby struck, with leave to amend, but only to assert and properly plead a cause of action arising from the Crown's vicarious liability in respect of alleged actions of Crown servants or agents going beyond the scope of the legislation or of alleged disclosure made prior to the expiration of the privilege period.

2. Any Amended Statement of Claim must be served and filed no later than 30 days from the date of this order.

3. Costs, in the amount of $3,650.00, shall be paid by the Plaintiff to the Defendant Her Majesty the Queen in Right of Canada.

"Mireille Tabib"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1023-17
STYLE OF CAUSE:	GEOPHYSICAL SERVICE INC.v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY ATTORNEY GENERAL OF CANADA ET AL.
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APPEARANCES:

Ms. Matti Lemmens	FOR THE PLAINTIFF
Mr. James Elford Ms. Deborah Babiuk-Gibson	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Barristers and Solicitors Calgary, Alberta	FOR THE PLAINTIFF
Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT