Federal Court  Cour fédérale

Date: 20190319

Docket: T-1023-17

Citation: 2019 FC 337

Ottawa, Ontario, March 19, 2019

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

GEOPHYSICAL SERVICE INC.

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by ATTORNEY GENERAL OF CANADA

Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF QUEBEC as represented by ATTORNEY GENERAL OF QUEBEC

Defendant

ORDER AND REASONS

[1] The Plaintiff, Geophysical Services Incorporated [GSI], has brought a motion pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], as amended, for a partial appeal of the Order and Reasons of Madam Prothonotary Tabib issued on June 28, 2018. The Prothonotary struck out GSI's Statement of Claim, 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 and disclosure by its servants or agents.

[2] GSI advances the following grounds for the motion:

1. The Prothonotary erred in law in finding that *de facto* expropriation, confiscation, regulatory or compulsory taking is the statutory taking of property rights by the Government, when it can also be the taking of property rights by the Government through its actions or conduct.
2. The Prothonotary erred in law by ignoring or giving no weight to jurisprudence finding that the legislative scheme regarding offshore seismic data in Canada is confiscatory or a compulsory license.
3. The Prothonotary erred in her interpretation of the terms "confiscatory" and "compulsory license".
4. The Prothonotary erred in ignoring the *Berne Convention for the Protection of Literary and Artistic Works, 1886* [*Berne Convention*], as implemented by section 91 of the *Copyright Act*, RSC 1985, c C-42.
5. The Prothonotary erred in law in finding that GSI can only plead vicarious liability against the Crown arising from the tort of its servants or agents under the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

I. Background

[3] GSI, including its predecessors, have provided and continue to provide seismic data services to the oil and gas industry, including non-exclusive seismic data acquisition, and the licensing, storage and processing of seismic, gravity, and magnetic data.

[4] Pursuant to various statutes and regulations of the federal government and the governments of Québec, Newfoundland and Labrador, and Nova Scotia [collectively, the Defendants] - primarily the *Canada Petroleum Resources Act*, RSC 1985, c C-36 (2nd Supp.), and 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 Oil and Gas Act*, SC 1981, c 81 [collectively, the Regulatory Regime or Regime] - GSI is required to submit to various Crown agencies marine seismic data over which it owns copyright.

[5] The Regulatory Regime has operated in generally the same way since the 1960s. To obtain permission to conduct seismic surveys, seismic exploration companies like GSI are required to turn over a copy of a portion of the survey to the governments who, in turn, make it publicly available after a certain amount of time [the privilege period].

[6] Under the Regime, the privilege period is five years. By policy though, this period is extended by another 10 years for a total of 15 years. In making the privilege period, Canada balanced the ability of the seismic survey companies to recoup their costs and make a profit, with

the public's interest in the dissemination of seismic information in regions where oil and gas exploration posed many challenges.

[7] In July 2017, GSI filed a Statement of Claim in which it alleged that the data it is required to share with the governments is protected by copyright and is treated as a trade secret or as confidential information. But for the Regulatory Regime, the Defendants would not be in possession of the seismic data nor entitled to use it without a license, consent, or other authorization from GSI. GSI claims it has not, implicitly or expressly, authorized, granted or consented to the granting of a license, in any form, to the Defendants in respect of the seismic data, to do any activities that are exclusive to copyright owners under the *Copyright Act* or in breach of GSI's confidentiality in the data. GSI also claims this data is being disclosed to third parties from time to time and will continue to be disclosed in the future.

[8] GSI alleges that, as a result of the Regulatory Regime and the Defendants' conduct pursuant to and beyond the scope of the Regime, the Defendants have taken or regulated away most or all reasonable uses of GSI's seismic data by way of a *de facto* expropriation or regulatory or constructive taking, without providing GSI compensation.

[9] In October 2017, the Defendant, Her Majesty the Queen in Right of Canada [Canada], filed a notice of motion requesting an order striking out GSI's Statement of Claim, or in the alternative an order for a stay of proceedings.

[10] On June 28, 2018, Madam Prothonotary Tabib struck out the Statement of Claim, 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 Regulatory Regime and alleged disclosures made prior to the expiration of the privilege period.

II. The Prothonotary's Decision (2018 FC 670)

[11] The Prothonotary found that GSI's rights over the seismic data were, from the moment they were created, encumbered by the superseding provisions of the Regulatory Regime. In her view, GSI never had nor acquired full, unfettered copyright in its seismic data: its claims had been expropriated; and because legislation could not expropriate rights which never existed, she concluded it was plain and obvious that GSI's action, to the extent it is based on *de facto* expropriation or injurious affection, cannot succeed and had to be struck.

[12] In view of the decisions in *Geophysical Service Incorporated v EnCana Corporation*, 2016 ABQB 230, upheld at 2017 ABCA 125, (leave to appeal to SCC dismissed case number 37634) [*GSI v EnCana*], the Prothonotary stated that, while the Regulatory Regime did not operate to prevent GSI from acquiring "full" copyright over the data, the provisions of the *Copyright Act*, as they might otherwise apply to the data acquired pursuant to the Regime, were modified and overridden by the Regime to the extent they conflict with it. The Prothonotary thus concluded that the copyright created and acquired over the seismic data was, from its inception, limited in time to the privilege period, after which it essentially came to an end.

[13] In the Prothonotary's view, since legislation could not expropriate rights which never existed, she found it plain and obvious that GSI's action, to the extent it was based on *de facto* expropriation or injurious affection, could not succeed and consequently it was struck. In this regard, the Prothonotary stated:

> [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.

[14] The Prothonotary also struck out GSI's claim for unjust enrichment. In her view, GSI never had rights in the data that were not encumbered by the provisions of the Regulatory Regime and, consequently, it could not have been deprived of any rights or benefits in respect of the data. For the Prothonotary, this was sufficient to strike the claim for unjust enrichment.

[15] As to GSI's allegation that principles of natural justice and procedural fairness obliged the Crown to provide it with notice every time some of its data was disclosed to third parties, the Prothonotary found procedural fairness only arose in the context of judicial or administrative adjudicative processes. In any event, the order requested by GSI in this regard was in the nature of *mandamus*, and this remedy could only be obtained by way of an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, as amended, and not in the context of an action. In the Prothonotary's view, it was plain and obvious that GSI's claim for this relief in the context of an action was doomed to fail.

[16] The Prothonotary found that she did not have to determine whether there was a legal basis for the Copyright Board of Canada to administer a compulsory licensing system created by the Regulatory Regime to dispense royalties. The order requested by GSI in this regard was, in her view, in the nature of *mandamus*; and it was thus plain and obvious that this relief was not available in the context of an action.

[17] As to GSI's claim that the Defendants have acted beyond the scope of the Regulatory Regime, giving rise to a claim based on the Crown's vicarious liability for the actions of its servants or agents under the *Crown Liability and Proceedings Act*, the Prothonotary found that this claim, if properly pleaded, might give rise to a reasonable cause of action. However, as pleaded in the Statement of Claim, the Prothonotary determined that this claim did not meet the basic requirements of pleadings; in that it was a mere conclusory statement devoid of any material facts and failed to provide the "who, when, where, how and what" that is required of proper pleadings. As such, this claim was struck, although GSI was granted leave to amend, but only to the extent to assert and properly plead a cause of action arising from the Crown's vicarious liability pursuant to the *Crown Liability and Proceedings Act*.

III. Issues

[18] This appeal motion raises two issues:

1. Whether the Prothonotary ignored or gave no weight to jurisprudence finding that the Regulatory Regime concerning offshore seismic data in Canada is confiscatory or a compulsory license and misinterpreted the terms "confiscatory" and "compulsory licence"; and

2. Whether the Prothonotary erred in holding that Canada's conduct does not amount to *de facto* expropriation, confiscation, or unauthorized regulatory or compulsory taking, such that it should only be pleaded as vicarious liability against the Crown under the *Crown Liability and Proceedings Act*.

IV. Standard of Review

[19] GSI acknowledged at the hearing of this motion that the standard of review for a prothonotary's decision established in *R v Aqua-Gem Investments Ltd*, [1993] 2 FC 425 (FCA), 149 NR 273, has been eclipsed by the Federal Court of Appeal's decision in *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331 [*Hospira*].

[20] In *Hospira*, the Court of Appeal adopted as the standard of review for a discretionary decision of a prothonotary that emanating from *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*]:

> [66] In *Housen*, the Supreme Court enunciated the standard of review applicable to decisions of trial judges. More particularly, it concluded that with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness (paragraphs 19 to 37 of *Housen*)
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> ….
>
> [79] I therefore conclude that we should apply the *Housen* standard to discretionary decisions of prothonotaries. I am also of the view that the *Housen* standard should apply in reviewing discretionary decisions of judges.

[21] In *Canada v South Yukon Forest Corporation*, 2012 FCA 165, [2012] FCJ No 669,

Justice Stratas stated that:

> [46] Palpable and overriding error is a highly deferential standard of review… [citations omitted]. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

V. Rule 221

[22] Whether to strike all or part of a pleading, with or without leave to amend, is governed by Rule 221 of the *Rules*. This Rule provides that:

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	**a)** qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	**b)** qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	**c)** qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	**d)** qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	**e)** qu'il diverge d'un acte de procédure antérieur;

(f) is otherwise an abuse of the process of the Court,	**f)** qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[23] The test on a motion to strike a statement of claim is a strict one. The Supreme Court's decision in *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45, offers the following guidance:

> [17] … A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: [citations omitted]. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: [citations omitted].
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> …
>
> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson.* Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

VI. GSI's Submissions

[24] GSI says the Prothonotary's decision directly conflicts with the decisions of the Court of Queen's Bench of Alberta and the Court of Appeal of Alberta in *GSI v EnCana*. GSI notes that the following determinations by the Court of Queen's Bench were adopted and upheld by the Court of Appeal:

> a) "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";
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> b) "GSI has been forced to grant, in effect, a compulsory licence to permit its offshore seismic data to be released and used by the public"; and
>
> c) "the Regulatory Regime has confiscated the seismic data created over the offshore and frontier lands".

[25] GSI also notes that the Court of Appeal clarified that "GSI's exclusivity to its seismic data ends, for all purposes including the *Copyright Act*, at the expiry of the mandated privilege period."

[26] GSI maintains that the issue of whether the Regulatory Regime confiscates its intellectual property rights in the seismic data is *res judicata,* and that the Prothonotary's decision conflicts with the findings in *GSI v EnCana* because of issue estoppel or cause of action estoppel.

[27] For issue estoppel to apply, GSI says three pre-conditions must be present: (1) the same question has been decided; (2) the judicial decision which is said to have created the estoppel

was final; and (3) the parties to the judicial decision were the same persons as the parties to the proceedings in which estoppel is raised. In GSI's view, the decisions in *GSI v EnCana* question the effect of the Regulatory Regime, so the same question has been decided; the finding of confiscation in the Alberta courts should not be disturbed as leave to appeal to the Supreme Court of Canada was denied, so the judicial decision was final; and the parties were the same parties as the parties in this proceeding.

[28] GSI says the Prothonotary took a marked departure from the findings in *GSI v EnCana* by determining there was no *de facto* expropriation since no property interest was taken from GSI. According to GSI, she erred by finding, contrary to the decisions in *GSI v EnCana*, that the copyright GSI has in the seismic data did not arise independently from the Regime. GSI claims that finding was not open to the Prothonotary to make in the face of the findings in *GSI v EnCana* that its copyright was "confiscated" and that it was forced to grant a "compulsory license".

[29] In GSI's view, it is plain and obvious that Canada has taken the position in prior proceedings that there was a confiscation of the seismic data. GSI says Canada is estopped in this action from asserting that seismic data was not confiscated by the Crown on the basis of cause of action estoppel. GSI notes that the courts in *GSI v EnCana* determined that the Regulatory Regime takes intellectual property rights in its seismic data, and that the copyright in the seismic data exists regardless of the Regime.

[30] GSI says the Prothonotary ignored the finding by the Alberta courts that the Regulatory Regime is confiscatory, and also erred by ignoring the *Berne Convention*, which sets the term of copyright protection at 50 years after the author dies. According to GSI, the Alberta courts recognized that copyright could not be limited to only five years in respect of the seismic data, and instead found the copyright had been confiscated and compulsorily licensed after the five-year period, rather than the copyright not existing after the five-year period.

[31] In GSI's view, the Prothonotary erred in law by finding GSI can only plead vicarious liability against the Crown arising out of the torts of its servants or agents under the *Crown Liability and Proceedings Act* for unauthorized taking. According to GSI, she also erred in law in finding that *de facto* expropriation is the statutory taking of property rights by the government. GSI says *de facto* expropriation can also take the form of taking private property rights by the government through its actions or conduct.

[32] GSI further says the Prothonotary misunderstood its Statement of Claim by erroneously concluding that the Regulatory Regime takes away copyright and other confidentiality and proprietary rights in the data. According to GSI, she also misunderstood *de facto* expropriation because she did not recognize that it could be affected through the exercise of discretion or the operation of a regulatory scheme enabled by legislation, and not by legislation *per se*.

VII. Canada's Submissions

[33] Canada contends that *res judicata* does not apply. And even if it did, it should not be applied since neither issue estoppel nor cause of action estoppel apply. Canada notes that if the

three pre-conditions for issue estoppel have been met, the Court then considers, as a matter of discretion, whether issue estoppel should be applied. According to Canada, the ultimate consideration is whether applying the doctrine would achieve fairness and not cause an injustice.

[34] In Canada's view, only the loose language of "confiscatory" was used in *GSI v EnCana* and no finding of expropriation was made. According to Canada, GSI's claim, that the Court of Queen's Bench of Alberta made a finding on the issue of *de facto* expropriation, is without merit. Whatever language that court may have used, it did not make a finding in relation to a claim that was not before it, *de facto* expropriation.

[35] Even if *de facto* expropriation was before the Alberta courts, Canada says GSI has never transferred copyright to the regulators. According to Canada, copyright is simply a statutory right to exclude others from doing certain things with respect to the copyrighted work, and it cannot be the basis for *de facto* expropriation. In Canada's view, without something being taken by a transfer from one person to another, there is no taking, and this cannot be the basis for *de facto* expropriation. Canada claims *de facto* expropriation could not be found because GSI did not possess more rights than it could acquire under the Regulatory Regime and, even if it could, no interest was transferred as Canada gained no rights under copyright that it could exercise.

[36] Canada says the Prothonotary did not treat *de facto* expropriation as if it were only by statute. In Canada's view, she recognized this by allowing GSI an opportunity to amend its Statement of Claim to advance the allegation that Crown servants or agents released material beyond the scope of the Regulatory Regime.

[37] Canada further says GSI should not be granted the total restoration of its Statement of Claim, if successful on this appeal motion, because it has not challenged the dismissal of its claims which were clearly matters for judicial review or its claim for unjust enrichment.

VIII. Analysis

[38] The Prothonotary found *GSI v EnCana* stood for the proposition that the Regulatory Regime required GSI to disclose its seismic data and this Regime superseded the *Copyright Act*. She further found GSI's rights over the data were, from the moment they were created, encumbered by the superseding provisions of the Regime and, consequently, GSI never had nor acquired the full, unfettered copyright it claims has been expropriated. The Prothonotary then went on to find that legislation cannot expropriate rights which never existed.

[39] These findings by the Prothonotary, in my opinion, collectively constitute a palpable and overriding error. The decisions in *GSI v EnCana* held that, while seismic data can receive protection under the *Copyright Act*, those elements of the *Copyright Act* which conflict with the Regulatory Regime, such as the right to exclude others from unauthorized use of the copyrighted work, were overridden. Those decisions held that there was no violation of the *Copyright Act*, not that there was no expropriation.

[40] In my view, the Prothonotary erred by finding that legislation could not expropriate "rights which never existed." GSI still retains copyright in its seismic data and will do so for the time permitted by section 91 of the *Copyright Act*. The Regulatory Regime diminishes GSI's ability to act to prevent unauthorized use of its seismic data after the privilege period expires.

There is still copyright in the seismic data, even after the privilege period expires; but by virtue of the Regime it is a modified or restricted copyright. Copyright is more than just the right to exclude others from unauthorized use. There are, for example, still moral rights in the seismic data and these rights survive.

[41] In my opinion, the Prothonotary misapprehended the cause of action for confiscation or *de facto* expropriation. She erred in law by finding that GSI can only plead vicarious liability against the Crown under the *Crown Liability and Proceedings Act* arising out of unauthorized taking by its servants or agents.

[42] The Prothonotary also erred in law by finding (in paragraph 20 of her reasons) that *de facto* expropriation is the statutory taking of property rights by the government. The Prothonotary misunderstood *de facto* expropriation because she did not recognize that it could be effected by government through its actions or conduct, the exercise of discretion or the operation of a regulatory scheme enabled by legislation, and not by legislation itself. In my view, the Prothonotary incorrectly confused *de facto* expropriation with vicarious liability.

IX. Conclusion

[43] For the reasons stated above, GSI's motion should therefore be granted. Its Statement of Claim should be restored save and except for those paragraphs alleging unjust enrichment and those which the Prothonotary correctly found were matters properly raised in an application for judicial review and not in the context of an action. Paragraphs 1(e), 1(f) and 1(g), and paragraphs 52 to 59 (inclusive), shall not be restored.

[44] GSI has succeeded on its appeal motion and, therefore, is entitled to costs.

[45] In post-hearing correspondence, the parties have advised and agreed that a lump sum amount of $1,350.00 shall be payable to the successful party on this appeal motion. In addition, the amount of $3,650.00 in costs was ordered to be paid by GSI to Canada in the underlying motion before the Prothonotary. The parties have agreed that if GSI is successful on its appeal motion, Canada will pay GSI costs of $1,350.00 in respect of this motion and costs of $3,650.00 in respect of the underlying motion, for a total of $5,000.00.

ORDER in T-1023-17

THIS COURT ORDERS that:

1. The motion by Geophysical Service Inc. is granted and its Statement of Claim restored save and except for paragraphs 1(e), 1(f) and 1(g), and paragraphs 52 to 59 (inclusive) of the Claim.

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 $5,000.00, shall be paid by the Defendant, Her Majesty the Queen in Right of Canada, to Geophysical Service Inc., within 30 days of this Order.

"Keith M. Boswell"
Judge

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 AND HER MAJESTY THE QUEEN IN RIGHT OF QUEBEC as represented by ATTORNEY GENERAL OF QUEBEC
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	DECEMBER 5, 2018
ORDER AND REASONS:	BOSWELL J.
DATED:	MARCH 19, 2019

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