May 8, 2017

Claims to Copyright Trumped by Expiration of Statutory Confidentiality Period

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Case Commented On: *Geophysical Service Incorporated v EnCana Corporation*, 2017 ABCA 125

In reserved reasons, a unanimous Court of Appeal has affirmed Justice Eidsvik's decision at trial (2016 ABQB 230) in this contentious proceeding. This litigation has pitted the seismic company, GSI, against most, if not all, of the major exploration and production companies operating in Canada, as well as the federal regulators, the National Energy Board, and the Canada/Newfoundland Offshore Petroleum Board. GSI claims that seismic data that it generated is protected by copyright for the usual term of the *Copyright Act*, RSC 1985, c C-45 and that the various (and many) defendants have breached that protection by copying or facilitating the copying of protected materials once the confidentiality period protecting data filed with the regulators has expired.

At trial, Justice Eidsvik ruled that seismic data was in principle protected by the *Copyright Act*. There was no cross-appeal on this point. However, Justice Eidsvik also concluded that the provisions of the relevant federal legislation which permitted the "disclosure" of seismic data after a prescribed period (and therefore led to the loss of confidentiality) should be read as also authorizing the federal regulators to copy that data and to authorize third parties to do so as well. Disclosure could only be effective if disclosure was interpreted to include copying.

In my comment on the trial decision I suggested that this was an unnecessarily broad interpretation of the word "disclose" and one that was inconsistent with the status of seismic data as a form of property under the *Copyright Act*. I put the point this way:

> [This interpretation of the section] confounds the different qualities of the rights (and liberties) associated with the data. The creator of the data has copyright in that data. Copyright is a form of property. It is true that as a creature of statute this particular form of property is hedged around with all sorts of limitations (e.g. duration and fair dealing) but it is still a form of property. Under s.3 of the *Copyright Act*, the rights of the creator of data in which copyright subsists are "… the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever … or, if the work is unpublished, to publish the work or any substantial part thereof … and to authorize any such acts."
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> Copyright does not protect confidentiality, but the creator of the data can, as a matter of common law, maintain the confidentiality of that data provided that it takes the necessary steps to do so (e.g. by not sharing it broadly and by imposing non-disclosure obligations

> upon those with whom the data is shared). This data when deposited with the Board is both confidential and protected by copyright. All that subsections 101(2) and (7) speak to is the quality of confidentiality. All that subsection (7) speaks to is the compulsory loss of confidentiality (subject to any contractual obligations pertaining thereto). In Hohfeldian terms there is now a liberty of access where there was formerly a duty not to provide access. Nobody commits a wrong after the expiration of the statutory period by allowing access. But there is no change in the duty not to copy or to the duty not to facilitate illegal copying by others after the expiration of the statutory period. It is a huge leap to suggest that the legislature has also dealt with the property issues *en passant*.

None of this was persuasive to, or even remotely interesting for, the Court of Appeal. Justice Schutz for the Court reasoned that the proper interpretation of s. 101 of the *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd supp) (*CPRA*) and the equivalent provisions in the Offshore Accords statutes was to be resolved through the application of the principle endorsed by *Rizzo v Rizzo Shoes*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at para 21: "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."

Context led the Court to focus on the purposes of the regulatory regime and in particular the policy objectives associated with disclosure of seismic data. In sum (at para 81):

> … in our view the Trial Court was correct in determining that the plain and obvious intention of the legislators was to identify, weigh and balance a variety of disparate interests, so as to achieve two policy objectives. First, to attract investment by companies with the capacity to acquire geophysical data regarding petroleum resources in the challenging frontier and offshore. Second, to regulate dissemination of geophysical data at a pace that would broadly encourage further interest and study by the resource and investments industries, and academia, in frontier and offshore resource exploration and development, for the benefit of all Canadians.

Although the Court suggests that in so concluding it is "[l]eaving aside, for the time being, GSI's more specific argument about the meaning of the word 'disclose' as found in the Regulatory Regime," the only way to read this passage is as a conclusion by the court that, given these objectives, disclosure required copying.

The Court then moved to examine "The Record," that is to say the admissible extrinsic evidence that might be considered in interpreting a statute. That Record made it clear that it was well understood that the collection of seismic data was subject to the terms and conditions of a regulatory regime which would allow the release of confidential data to the public (at para 97) "after a period of time, for use by the broader community." This in turn supported the more general conclusion (at para 99) that "[w]hile section 101 of the *Canada Petroleum Resources Act* does not explicitly provide that seismic data may be 'copied', the extensive provisions thereunder as to 'disclosure' do not provide any restrictions beyond the privilege period. This makes the ability to copy data thereafter not only a rational interpretation of the Boards' right to disclose, but the only one in keeping with the dual objectives of the legislation."

It is only at this point that the Court really turned to examine GSI's *exclusive* rights under the *Copyright Act*. But these rights were of no moment because the Court (agreeing at paras 103 and 104 with Justice Eidsvik) concluded that the *CPRA* was both more specific and more recent legislation than the *Copyright Act*. Parliament must be taken to have either endorsed a "limited exception" to the rights conferred by the *Copyright Act* or created a compulsory licensing scheme.

That was enough to decide the case in favour of the respondents. The Court found it unnecessary to consider GSI's position with respect to supplementary rules of statutory interpretation including the rule (at para 35) that potentially confiscatory legislation should be strictly construed in favour of the party whose rights are affected and the rule (at para 38) that enactments should be construed harmoniously.

The appellant did have another ground of appeal which related to Justice Eidsvik's alleged misinterpretation of the ambit of s. 111(2) of the *CPRA*. I discussed this issue at some length in my earlier post and I think that the appellant is surely correct on this point. However, the Court found it unnecessary to decide the issue, ruling that even if Justice Eidsvik were wrong on this point it was not a sufficiently material error to taint her overall conclusions.

Commentary

In considering the reasoning in this case I think that it is important to distinguish the difference between the exercise of statutory interpretation and the assessment of what might or might not be good public policy: see the Court's contemporaneous decision in *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124, a decision in which Justice Schutz sided with the majority in observing that a court (at para 92) "has no ability to create exceptions to the statute based on general considerations of fairness or public policy." It is quite possible to concede that Parliament intended to facilitate exploration on federal lands and to that end conclude that confidential information should lose its quality of confidentiality after a certain period of time without necessarily concluding that the owner of that confidential information had also lost all intellectual property rights associated with that information. If that were the intention of Parliament one might have anticipated that there should be something in the record that demonstrated that Parliament at least realized what was at issue. The word "disclose" alone cannot demonstrate that awareness and the balance of the record as summarized in the judgement confirms that the protection of (or the loss of protection of) intellectual property rights was not before Parliament at all.

The Court's discussion of the relationship between the two statutory schemes — the *CPRA* and the *Copyright Act* — is extraordinarily brief, encompassing three short paragraphs and largely turning on the assertion that the *CPRA* was both the more specific and the more recent statute. But there are important assumptions built into this assertion. It is certainly true that the *CPRA* is the more recent statute but is it the more recent statute in relation to the same subject matter i.e. intellectual property? The answer is clearly "no". Similarly, in what sense is the *CPRA* the more specific law? It is specific in relation to the term of protection for the confidentiality of data (although that is apparently extendable by mere administrative dictate) but the *Copyright Act* is not concerned with confidentiality, so in what relevant sense is the *CPRA* the more specific statute?

This may be a surprising analogy but I think that this case has some parallels with the Supreme Court of Canada's split decision in *Stores Block*: *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII), [2006] 1 SCR 140 (*Stores Block*). That case is a utility case and a true administrative law case but what is interesting about it in the present context is that the most significant difference between the majority and dissent in *Stores Block* relates to the way in which the issue is framed in the leading judgements. For the majority (and for ATCO as the aggrieved party) the case was all about the property rights of the utility company. For the minority the case was all about the right of a utility regulator to balance the interests of the utility and its consumers in light of the regulator's understanding of the overall public interest. The case at hand is, from GSI's perspective, about its (intellectual) property rights. From the perspective of the respondents this case is all about the regulatory regime for encouraging oil and gas exploration on federal lands. The perspective one begins with, or the frame of reference that one adopts, is likely determinative of the outcome. It is I think no coincidence that most of the reasons for decision in this case are concerned with the overall regulatory regime, necessarily therefore focusing on the *CPRA* and its predecessor legislation. The discussion of copyright is perfunctory and there is no discussion of the object or purpose underlying the *Copyright Act*.

One final analogy. In my earlier post I suggested that a Hohfeldian analysis was useful. I still think that because it allows one to discern more clearly and precisely what jural relations (in this case rights, duties, liberties and no right (not)) are at stake. But another academic paper also offers insights I think. Consider GSI's claim that it has a legal entitlement that merits protection. Calabresi and Melamed, in "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harvard Law Review 1089, suggest that we can protect an entitlement in a number of different ways: by property rules, by liability rules and by making an entitlement inalienable. In the present case GSI undoubtedly begins with a property entitlement — it has the right to veto anybody else's acquisition or copying of its data. A licensing scheme (with the payment of real licence fees) would be a liability entitlement. But in this case GSI loses its right to withhold consent to the acquisition or copying of data without any economic compensation in return. On the ruling in this case GSI's "entitlement" is transformed from an entitlement protected as property to a non-entitlement (without passing through the middle ground of a liability entitlement) or as I put it my earlier post it is open season on GSI's "entitlement" – a free-for-all, or an open access commons. This is a huge conceptual or categorical change. Is the word "disclose" really an apt vehicle to effect such a massive change?

Should GSI appeal GSI may well be hoping that the newly appointed Justice Rowe will be sitting on the bench for the leave application. Justice Rowe's dissenting opinion in *Hibernia Management and Development Company Ltd. v. Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2008 NLCA 46 (CanLII), suggests that he might not be so ready to conclude that GSI's property rights disappeared by sleight of hand and in an absence of mind.

This post may be cited as: Nigel Bankes "Claims to Copyright Trumped by Expiration of Statutory Confidentiality Period" (8 May, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/05/Blog_NB_GSI_Appeal.pdf