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Expiration of Confidentiality also gives Boards the Liberty to Copy and Distribute

By: Nigel Bankes

Case Commented On: *Geophysical Services Incorporated v Encana Corporation*, 2016 ABQB 230

This decision involves rights to seismic data. Under Canadian law (and here specifically the rules established for federal lands in the north and the east coast offshore) seismic data filed with government is treated as privileged or confidential for a period of years. The principal issue in this case was the question of what rules apply once that protection comes to an end. Is it open season or do the creators of the seismic data retain some rights and in particular their copyright entitlements? In her decision Justice Kristine Eidsvik has decided that it is open season.

The decision is part of complex case-managed litigation commenced by Geophysical Services Inc (GSI) in 25 actions against the National Energy Board (NEB), the Canada-Newfoundland Offshore Petroleum Board (CNOPB) (the Boards) and numerous oil and gas companies, seismic companies and companies providing copying services. GSI claims that copyright subsists in seismic data and that its copyright protection survives the confidentiality period. Furthermore, it claims that access to the seismic information after the loss of confidentiality is governed by the *Access to Information Act*, RSC 1985, c A-1 (*AIA*) and that there is no open season on access or copying.

Chief Justice Wittman as the case management judge set down two preliminary issues for the parties to address: (1) does copyright subsist in seismic data, and (2) what is the effect of the regulatory regime (i.e. the term limited protection of confidentiality referred to above) on any rights that GSI might claim? This judgement addresses those two issues. GSI also maintains other claims based on contract, unjust enrichment and breach of confidence but those issues are not the subject of this judgement.

Justice Eidsvik concluded that seismic data is protected by copyright. This seems correct to me and I offer no further comment. On the second issue, Justice Eidsvik held that once the confidentiality period is over, not only does GSI as the owner of the data lose the quality of confidentiality but it also loses all of the rights that it has under the *Copyright Act*, RSC 1985, c C- 42 as owner of the copyright in that data. Thus, the Boards are free to allow others not only to have access to this data but to make copies of it. Furthermore, access is not governed by the *AIA*. Justice Eidsvik reaches these conclusions in two steps. The first step is to hold that the statutory regime allowed disclosure at the end of the confidentiality period and that there must also be a liberty to copy and a liberty to facilitate copying by others. The second step is to conclude that any resulting conflict between the protection offered by the *Copyright Act* and the implied liberty to copy must be resolved in favour of the more specific regime which in this case was the regulatory regime rather than the *Copyright Act*. Neither could the plaintiffs secure additional protection from the *AIA* regime. That regime could have no application during the legislated

period of privilege because the *AIA* regime is fundamentally concerned with enhancing access to information (at para 275). While the *AIA* regime might have some application during any longer discretionary extension of the confidentiality period (again to enhance access), it could have no application to protect the release of information after the expiration of this longer discretionary period (see paras 275 – 281). I think that Justice Eidsvik is correct on the *AIA* regime point and thus will have no further comment on that here but I have serious misgivings about her conclusions in relation to two issues: (1) her conclusion that the liberty to disclose includes the liberty to copy and to facilitate copying by others, and (2) her decision to resolve the resulting conflict between the regulatory regime and the *Copyright Act* by treating the *Copyright Act* as inapplicable to the creators of seismic data. This post will focus on those two issues. I will begin by describing the applicable regulatory regime and then address these two issues.

The Regulatory Regime

As noted above, this case deals with the regulatory regime for protecting seismic data in relation to federal lands in the north and federal lands on the east coast subject to the so-called Accord regime. The two regimes are essentially the same and to keep this simple I, like Justice Eidsvik, will focus on the northern regime. The current northern regime is based on two statutes – the *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd supp) (*CPRA*) and the *Canada Oil and Gas Operations Act*, RSC 1985, c O-7 (*COGOA*). Justice Eidsvik's judgement also deals with the historical evolution of these two statutes but not much seems to turn on that except for several references to a provision in the *CPRA* (s.111) which was designed to protect the Crown from any claims to compensation when old permit rights were rolled over into rights under the new regime, whether the Liberal's National Energy Program regime represented by the infamous or (famous depending on one's perspective) Bill C-48, the *Canada Oil and Gas Act* (*COGA*) with its Crown Share provisions, or the Conservative version – the current *CPRA* (which repealed and replaced *COGA*). More on that provision and its relevance below.

Of the two statutes (i.e. the *CPRA* and *COGOA*) it is the *CPRA* that it is crucial here. The principal significance of *COGOA*, the regulatory statute (or as Justice Eidsvik prefers, the "operations statute") is that *COGOA* requires Board approval for seismic programs (see *Hamlet of Clyde River et al. v. Petroleum Geo-Services Inc. (PGS) et al*, 2015 FCA 179) and the regulations under *COGOA* (the *Canada Oil and Gas Geophysical Regulations*, SOR/96-117) require operators to submit seismic data to the Board as part of their reporting requirements. The confidentiality and disclosure provisions however are in the *CPRA*. Section 101 (headed "Disclosure of Information") provides, so far as is relevant here, as follows:

> Privileged information or documentation
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> (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*, ... or any regulation made under either Act ... whether or not the information or documentation is required to be provided.
>
> 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,...
>
> **(ii)** in any other case, after the expiration of five years following the date of completion of the work;…

While this provision creates a statutory privilege or confidentiality period of five years, it appears that as a matter of practice (at paras 192 – 195) the NEB (and its predecessor regulators under the *CPRA*) have consistently applied an administrative policy of not releasing non-exclusive seismic data (the speculative or "spec" seismic at issue here) for an additional ten years (i.e. 15 years in total). The Newfoundland Board has applied a policy (at paras 206 – 208) of an additional five years (i.e. 10 years in total). After this, other persons have been able to view, print (copy) or borrow the seismic information.

What are the implications of the expiration of the period of privilege?

One would have thought that a party that wanted to copy or authorize the copying of seismic material deposited with the Board at the end of the privilege period (whether as established by statute or as extended by policy) would have to show two things. First, that the necessary implication of the loss of privilege is that the information may be disclosed, and second, that disclosure (or more precisely the loss of privilege) must also allow copying. The first proposition does seem to follow from the statutory juxtaposition of privilege and disclosure (in the heading of, and marginal notes for, the section) and Justice Eidsvik so held (at paras 214 – 215). The second hurdle is much more challenging but Justice Eidsvik has little difficulty in finding that it too can be met. Her reasons are as follows (at paras 252 – 253):

> I agree that s 101(7) does not explicitly say that the information deposited with Board may be "copied". I am also cognisant that s 100 of the *CPRA* grants the Governor-in-Council authority to make Regulations, including to prescribe fees for making copies or certified copies.
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> Nonetheless, I agree with the Defendants that s 101 read in its entirety does not make sense unless it is interpreted to mean that permission to disclose without consent after the expiry of the 5 year period, or under the conditions found in s 101(6) must include the ability to copy the information. In effect, permission to access and copy the information is part of the right to disclose.

I think that this is an unnecessarily broad interpretation of the section which 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."

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*. Justice Eidsvik seems to deal with this argument (the vested rights argument) as part of her more general discussion (at paras 234 – 237) of the implications of loss of privilege (i.e. disclosure) and does not do so specifically in the context of concluding that disclosure allows copying. Furthermore, in her discussion of the vested rights argument she refers (at paras 236 – 237 and see also at para 243) to the no-compensation rule of s.111(2) of the *CPRA* and the predecessor provision in *COGOA*. Section 111 provides in full as follows:

> Replacement of rights
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> 111 (1) Subject to section 110 and subsections 112(2) and 114(4) and (5), the interests provided for under this Act replace all petroleum rights or prospects thereof acquired or vested in relation to frontier lands prior to the coming into force of this section.
>
> No compensation
>
> (2) No party shall have any right to claim or receive any compensation, damages, indemnity or other form of relief from Her Majesty in right of Canada or from any servant or agent thereof for any acquired, vested or future right or entitlement or any prospect thereof that is replaced or otherwise affected by this Act, or for any duty or liability imposed on that party by this Act.

Once one looks at this provision in its full context (rather than just subsection (2) in isolation), including its heading, it is, with respect, crystal clear that it is not concerned with the risk to government that might flow as a result of any interference with the rights of creators of seismic data through the operation of s.101(7). Rather, s. 111 was intended to deal with the risk that the government felt it faced insofar as it was requiring old permittees to roll over their rights into new forms of rights – exploration agreements (*COGA*) or licences (*CPRA*) under the new legislation. The title to s.111 makes this clear as does subsection 1.

Regime Conflict

Having decided that the liberty to disclose included the liberty to copy and the liberty to facilitate copying by others, Justice Eidsvik then had to deal with the conflict between the implied liberty to copy and the express duty not to copy a creator's work without consent under the terms of the *Copyright Act*. Justice Eidsvik begins her discussion of this issue by referring to Justice Rothstein's majority judgement in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489, 2012 SCC 68. Justice Eidsvik then suggests that each of these two regimes is concerned to balance the same types of interests (at para 298). Parliament hit on one balance in the *Copyright Act* and another in the *CPRA* – the difference is (at para 296) "a few decades of protection". It would lead to absurdity, concludes Justice Eidsvik, if the longer periods of protection under the *Copyright Act* could frustrate

Parliament's decision to establish a more limited regime under the *CPRA*. Accordingly, the conflict should be resolved by preferring the more specific regime (at para 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.

I think, with respect, that there are several weaknesses in this chain of reasoning. The test for conflict (and Justice Eidsvik acknowledges this) is narrowly defined and not readily assumed. Justice Rothstein in *Re Broadcasting,* drawing on earlier authority, puts it this way (at para 41): "For the purposes of statutory interpretation, conflict is defined narrowly … overlapping provisions will be given effect according to their terms, unless they 'cannot stand together' (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at p. 499 *per* Anglin J." The presumption then is that both laws will be given effect to. Justice Rothstein puts the presumption as follows (at paras 37 and 61):

> Parliament is presumed to intend "harmony, coherence, and consistency between statutes dealing with the same subject matter" (*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 (CanLII), [2001] 2 S.C.R. 867, at para. 52; Sullivan, at pp. 325-26)…
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> … the presumption of coherence between related Acts of Parliament requires avoiding an interpretation of a provision that would introduce conflict into the statutory scheme.

It is not enough that the statutes deal with the same subject matter, it is only if there is an "unavoidable conflict" which arises "when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results." (Justice Rothstein (and it is his emphasis) relying on *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14 (CanLII), [2007] 1 SCR 59 per Bastarache J., writing for the majority and in turn relying on (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000)).

If we apply these ideas to the supposed conflict between the *CPRA* regime and the *Copyright Act* it is far from obvious that there is an irremediable conflict. First, it is not clear that the statutes actually deal with the same subject matter. The *Copyright Act* is a property statute. The *CPRA* is an oil and gas statute and its s.101 is concerned with *confidentiality* and with *disclosure*. The *Copyright Act* is not a disclosure statute and has nothing whatsoever to say about confidentiality. Second, even were we to admit that the statutes are concerned with the same subject matter, there is no direct contradiction. Justice Eidsvik *creates* the contradiction by reading the liberty to copy into the *CPRA's disclosure* regime whereas in my view she should have preferred a reading that avoided conflict and allowed each regime to cover its specialized interest. Third, "absurdity" is subjective. There is nothing inherently absurd in saying that we should have one rule for disclosure (confidentiality) and one rule for copying (property). This doesn't make copying impossible; it simply means that until the expiration of the term of copyright the erstwhile copier will have to pay the creator for the privilege – but at least the copier will know, by virtue of disclosure, what it wants to copy!

In addition to ruling that the *Copyright Act* is inapplicable to the extent of any conflict (at para 304), Justice Eidsvik also endorses in the alternative (and perhaps logically this alternative argument should come first since it is another way of *avoiding* conflict) a way in which the two regimes may be reconciled and that is through the mechanism of a compulsory licensing scheme under the *Copyright Act*. There is perhaps even a suggestion of an implied licence (see at paras 311 – 317) which Justice Eidsvik disposes of by saying that GSI clearly never consented to release and certainly never consented to the copying of its data. As for a compulsory licensing scheme, Justice Eidsvik offers very little in the way of reasoning to support her conclusion other than to draw an analogy (at para 310) to the compulsory licensing regime for the music and broadcast business and then simply to assert, at the end of her judgement (at para 318), that "… in the alternative [to inapplicability based on a theory of conflict] the Regulatory Regime created a compulsory licensing scheme through which the Boards have the authority to copy, and as a result they are not infringing the *Copyright Act* when they do so." The difficulties with this assertion and the comparisons with licensing regime for broadcasting music are two-fold. First, the scheme in the *Copyright Act* for the music and broadcast business (ss. 53 *et seq*) is a real licensing scheme. It is an exception within the Act itself. Second, the *CPRA* simply does not contain a compulsory licensing scheme. It does not expressly address data copying and it certainly does not create an express compulsory licensing scheme that makes lawful what would otherwise be unlawful (the definition of a license). The claim that the *CPRA* establishes a compulsory licensing scheme is nothing more than an unsupported assertion.

Conclusion

In conclusion, creators of seismic data and especially the creators of "spec" seismic data will typically wish to preserve the confidentiality of that data in order to recover their costs from persons who wish to acquire this data. They may do so to some extent by way of contract but they will be required to file that data with government regulators. At some point in time, the relevant statutes prescribe that the data must be made available to the public. At that point in time the creator loses its right to confidentiality but that is all that the creator loses. The creator has other entitlements including rights under the *Copyright Act*. These rights are property rights and as such are conceptually distinct from the right to confidentiality. It is not necessary to erase these property rights in order give sense to the *CPRA's* disclosure regime. Or, if government takes the view that it is, then by all means let it do so explicitly rather than by sleight of hand. That is to say (and taking some liberties with para 297 of Justice Eidsvik's reasons and Justice Pitney's judgment in *International News Service v Associated Press*, 248 US 211 (1918)), if those who wish to get seismic data for free consider that it is a misguided policy to extend the protections of the *Copyright Act* to the creators of seismic data for the full duration of the copyright term, then they should make that political case – "it is not for this Court to change the intent of Parliament, unfair as it may be to" those who would wish to reap where they have not sown.