

# Alberta Court of Queen's Bench confirms the Regulatory Regime is a complete code that applies to all oil and gas resources on offshore and frontier lands

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On April 20, 2016 the Alberta Court of Queen's Bench released *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230, following a common issues trial<sup>[1]</sup> involving a broad representation of oil and gas industry participants. The Court found that, though copyright can exist in seismic data, the Regulatory Regime<sup>[2]</sup> that applies to all oil and gas resources in the offshore and frontier lands is a complete code that permits the disclosure of seismic data to the public following the applicable privilege (or confidentiality) period.<sup>[3]</sup>

On the copyright issue, the Court considered ss. 3(1) and 5(1) of the *Copyright Act* and concluded that raw seismic data is an original literary compilation work and processed seismic data is both an original literary compilation work and an artistic compilation work in the scientific domain. This finding is significant to industry participants as it applies to the treatment of seismic data obtained from non-exclusive (or speculative) seismic companies. The judgment serves to confirm as valid a contractual term often found in seismic licence agreements that expressly acknowledges that copyright over seismic data is held by the licensor.

The Court further held that the Regulatory Regime creates an exception to copyright protection over seismic data. The Regulatory Regime permits disclosure of seismic data without restriction after a defined period of time. Consistent with the rules of statutory interpretation, the Court held that the specific provisions contained in the Regulatory Regime override the more general provisions contained in the *Copyright Act*.

The decision affirms the existing understanding in the oil and gas industry, namely, that once the privilege period expires over seismic data governed by the Regulatory Regime the owner no longer has exclusive rights to control the public dissemination of its data.

## Background

The Plaintiff, Geophysical Services Inc. (GSI) commenced 25 actions against various oil and gas companies, government entities, and other industry participants (the Defendants) in Alberta. GSI conducted offshore marine surveys in the Canadian Atlantic and Arctic and licensed its seismic data to the Defendants on a non-exclusive basis. In exchange for permission to conduct marine surveys, GSI was required to deposit its seismic data with government entities including the National Energy Board, the Canada Newfoundland and Labrador Offshore Petroleum Board and the Canada Nova Scotia Offshore Petroleum Board

(collectively the Boards). The Boards made the GSI seismic data available to the public following the expiry of certain privilege periods as set out in the governing legislation. GSI claims, among other things, that it owns the copyright in the seismic data that was provided to the Boards and that the Defendants breached that copyright by obtaining the seismic data without GSI's consent following the expiration of the applicable privilege period .

The trial was an innovative way to address two common issues arising in 25 actions. The evidence was adduced in affidavits, cross-examination transcripts, and answers to undertakings filed with the Court. Expert reports were exchanged and two of the copyright experts provided *viva voce* evidence at trial. The Defendants filed joint briefs on the copyright and Regulatory Regime issues. By streamlining the common issues in 25 actions into one trial, the parties (working cooperatively with the Court) avoided taxing the Alberta court system with 25 individual hearings.

## Decision

Justice Eidsvik of the Alberta Court of Queen's Bench first considered whether copyright could subsist in raw and processed marine seismic data. The expert evidence adduced by the parties was mainly in agreement regarding the process of acquiring and refining seismic data.

The dividing issue involved the steps taken to process the seismic data with the Plaintiffs' expert testifying that the geophysicist overseeing the process makes decisions based on his or her skill and judgment and the Defence expert testifying that processors use common industry standards and quality control systems to obtain like outcomes. The Court found for the Plaintiff and concluded that "there is much skill and judgment" involved in the creation of the product. The seismic data entered as evidence in the trial led the Court to conclude that it was "obvious" that few steps taken during the process are alike.

The Court further held that seismic data is "work" pursuant to ss. 5(1) of the *Copyright Act*. Raw seismic data and written field reports are a literary work or a compilation of a literary work akin to a map, plan or chart based on the collection and arrangement of data that requires the intervention of human skill. Similarly, processed data is not simply the product of a computer algorithm but the result of decisions made by processors of varying individual skill and ability. The Court concluded that raw and processed seismic data are protected pursuant to the *Copyright Act*.

On the second common issue the Court agreed with the Defendants' position that the Regulatory Regime was a complete response to GSI's copyright infringement claims. The Court canvassed the legislative history of the Regulatory Regime and concluded that the purpose of the statutes was to address the tension between: (i) companies seeking a return on investment on funds spent to obtain speculative seismic data; versus, (ii) the governments' desire to disclose information to the public to encourage exploration and development.

The above purpose is achieved through a regulated process that requires: (i) one to acquire permits to obtain seismic data; (ii) that seismic data is submitted to the Boards; and (iii) that data will be publicly disclosed following the expiry of the privilege period without compensation to the seismic data owners. The Court held that as "unfair" as this process seems to GSI, the government was unapologetic for it, and it is not the Court's place to re-write the legislation.

Finally, the Court addressed the conflict between: (i) approximately 50 years of protection provided by the *Copyright Act*; versus, (ii) the 5 to 15 year protective privilege periods

pursuant to the Regulatory Regime. The Court found that the Regulatory Regime is “a complete and specific code” for the “creation and disclosure of exploration data on Canadian territory” and its provisions supplant the more general provisions contained in the *Copyright Act* to the extent that they conflict.

In a statement that will assure many oil and gas companies involved in GSI litigation across Canada, and internationally, the Court concluded that the Regulatory Regime “establishes that there is nothing unlawful about accessing or copying the information from the Boards.”

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<sup>[1]</sup> The common issues before the Court were:

1. Can copyright subsist in seismic material of the kind that are the subject matter of the plaintiff's claims?
2. What is the effect of the Regulatory Regime on the plaintiff's claims?

<sup>[2]</sup> *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp); *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28.

<sup>[3]</sup> On April 26, 2016, the Plaintiff filed a Notice of Appeal in the Alberta Court of Appeal on the Regulatory Regime common issue.