IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES (1976)

-between-

THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON, RUSSELL JOHN EINARSSON, and GEOPHYSICAL SERVICE INCORPORATED

("Claimants")

-and-

THE GOVERNMENT OF CANADA

("Respondent")

ICSID CASE NO. UNCT/20/6

EXPERT REPORT OF NIGEL BANKES

CER-01

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Relationship with the parties

1. Canada. I was a professor in residence with the Department of Foreign Affairs and International Trade, Canada between 1999 and 2000. My work was principally concerned with issues of international environmental law. I have also undertaken contract consulting work for various departments of the government of Canada, including work for Global Affairs Canada most recently in 2019. This work related to the treatment of straddling hydrocarbon deposits in delimitation and framework agreements.

2. Claimants. I have no relationship with the claimants. I had some email correspondence with Paul Einarsson at the time of the Alberta Court of Appeal decision in the common issues litigation, in the course of which I provided him with a copy of my ABlawg commentary (see below) on the Court of Appeal's decision.

Relationship with counsel

3. I have had no relationship with counsel for Canada.

4. I have had no relationship with current counsel for the claimants and have never been retained by counsel for the claimants prior to being asked to prepare this expert opinion.

5. I have and continue to have a relationship with Tim Platnich (now retired from the practice of law) who was co-counsel for Geophysical Service Incorporated (GSI) in the common issues litigation and other related litigation. I regard Tim Platnich as personal friend although I have not seen him in some years. At the time of the common issues litigation, Mr Platnich, knowing that I had an interest in the case, provided me with a copy of a draft of GSI's factum (for the Court of Appeal, 2016). I provided him with some written comments on the draft. I was not formally retained or paid to provide those comments. I would have understood that I had a duty of confidentiality in relation to my correspondence with Mr Platnich.

Relationship with members of the arbitral tribunal

6. I have no relationship with any member of the arbitral tribunal

The questions and my statement of independence

7. You have asked for my expert opinion on two questions: (1) The legal effect of the Canadian Courts' decision in *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230, 2017 ABCA 125 and 2017 CanLII 80435 (SCC); and (2) The Canadian legal interpretation principle of the doctrine of *lex specialis*.

8. I do not believe that my prior relationships with either party or with a former counsel to GSI precludes me from providing an independent expert opinion on either of these two questions.

Other matters

9. I take the facts, so far as relevant to be those as stated in the judgments on which I was asked to comment. I have not been provided with any additional documents other than the Notice of Arbitration (April 18, 2019) in this matter.

10. As for methods and sources pertaining to question two, I have relied on two standard texts on the interpretation of statutes in Canada and my understanding of the relevant case law. The two principal texts are: *Ruth Sullivan on the Construction of Statutes* (6th ed, 2014) and Pierre-André Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada* (4th ed, 2011).

11. I am an emeritus professor of law at The University of Calgary where I held the chair in natural resources law from 2008 until my retirement in 2021. My curriculum vitae is attached as Appendix A to this Witness Statement.

12. I affirm that I have a genuine belief in the opinions and conclusions expressed in this expert report.

I. The legal effect of the Canadian Courts' decision in *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230, 2017 ABCA 125 and 2017 CanLII 80435 (SCC)

13. I acknowledge that I provided contemporaneous commentary on the Queen's Bench[1] and Court of Appeal[2] decisions by way of two blog posts on ABlawg, a blog site hosted by the Faculty of Law at the University of Calgary.[3] ABlawg does not have a blind peer review policy but posts are subject to editorial review by the blog editor who has at all times been a member of faculty. ABlawg posts, including posts written by the author of this Expert Opinion, have been cited by all levels of Canadian courts including the Supreme Court of Canada.[4]

14. I will deal sequentially with each of the three levels of decision in this case.

Background

15. Geophysical Service Incorporated (GSI) commenced 25 actions in the Alberta Court of Queen's Bench[5] against various parties alleging breach of its copyright in marine seismic material, also referred to as seismic data. In an effort to manage this litigation Chief Justice Wittman ordered the trial of two issues that were common to these actions namely:

a. What is the effect of the Regulatory Regime on GSI's claims?

b. Can copyright subsist in seismic material of the kind that are the subject matter of GSI's claims?[6]

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[1] See Nigel Bankes, Expiration of Confidentiality also gives Boards the Liberty to Copy and Distribute" (17 April 2016), https://ablawg.ca/wp-content/uploads/2016/04/Blog_NB_GSI_April2016-1.pdf. Attached as Appendix B to this witness statement.
[2] See Nigel Bankes "Claims to Copyright Trumped by Expiration of Statutory Confidentiality Period" (8 May, 2017), online: ABlawg, http://ablawg.ca/wpcontent/uploads/2017/05/Blog_NB_GSI_Appeal.pdf. Attached as Appendix C to the is witness statement.
[3] See https://ablawg.ca/ .
[4] See, for example, *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII), [2018] 2 SCR 765, <https://canlii.ca/t/hvhcj> and *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 (CanLII), [2019] 1 SCR 150, <https://canlii.ca/t/hx95f>.
[5] 2016 ABQB 230 at para 5.
[6] Ibid at para 7.

The Decision of Justice Eidsvik

16. Justice Eidsvik answered these two questions in reverse, order beginning with the copyright issue and then turning to consider the regulatory regime issue.

The copyright issue

17. Justice Eidsvik concluded that the seismic data collected and created by GSI, both the raw or field data and the processed data, met the skill and judgment test laid down by Canadian courts and, as such, "should be considered 'original' artistic or literary productions in the scientific domain", and therefore entitled to copyright protection as protected 'works' [7] within the meaning of Canada's *Copyright Act*.[8]

18. Copyright is a form of intellectual property the parameters of which are determined by the terms of the *Copyright Act*. In particular, the Act (s 3(1)) provides that copyright "means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, ...".[9] In general these rights endure for the life of the author/creator plus 50 years.[10]

19. Subject to any qualifications that might be established by Justice Eidsvik's response to the regulatory regime question, Justice Eidsvik's judgment concludes that seismic data collected and created by GSI is protected by copyright for the term (duration) set out by s 6 of the *Copyright Act*. That conclusion was not contested on appeal.

The regulatory regime issue

20. The other common question that Justice Eidsvik had to address concerned "the effect of the Regulatory Regime on GSI's claims". The "regulatory regime" is defined by way of a list of seven federal and provincial statutes as well as five regulations (as well as potentially other regulations passed pursuant to these norms). The statutes and regulations are all listed in Schedule B of Justice Eidsvik's judgment. In brief they are comprised of: (1) federal oil and gas disposition and conservation statutes and regulations for federal lands (principally in northern Canada, and

[7] Ibid at para 78 referencing *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 and also at para 115 "Conclusion on the copyright issue".
[8] RSC 1985, c C-42.
[9] As set out in 2016 ABQB 230 at para 31.
[10] *Copyright Act* (n 8), s 6. The duration or term of copyright is referred to in several places in Justice Eidsvik's judgment eg at paras 24 & 93

referred to as the frontier lands),[11] and (2) oil and gas disposition and conservation statutes and regulations with similar content designed to implement the offshore accords between the federal government and each of the provinces of Nova Scotia and Newfoundland and Labrador (referred to as the offshore or Accord lands).[12] Although not contained in this list, it seems to have been understood that the federal *Access to Information Act* (*AIA*)[13] might also be relevant. Indeed, under heading "IV Regulatory Regime", Justice Eidsvik discusses two distinct issues: (1) the privilege and disclosure provisions of the regulatory regime, and (2) the relevance and applicability of the *AIA* procedures.

The Privilege and Disclosure Provisions of the Regulatory Regime

21. Under the regulatory regime, parties conducting oil and gas exploration activities on frontier or offshore lands must file certain information including seismic data with the relevant regulator for those lands: most recently and at the time of the litigation this was the National Energy Board (now replaced by the Canadian Energy Regulator[14]) for frontier lands and the relevant offshore board for Accord lands on the east coast: the Canada-Nova Scotia Offshore Petroleum Board or the Canada–Newfoundland and Labrador Offshore Petroleum Board. The relevant statutes classify this information as privileged and impose a duty on the relevant regulator not to disclose that information for a prescribed period.[15] The prescribed period varied over time (initially two years, later five) but the evidence placed before the court also established that, as matter of practice, the relevant regulators (as above) did not open speculative seismic data (such

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[11] *Canada Oil and Gas Operations Act*, RSC 1985, c O-7; *Canada Petroleum Resources Act*, RSC 1985, c 35 (2nd Supp); *Canada Oil and Gas Geophysical Operations Regulations*, SOR/96-117; *National Energy Board Act*, RSC 1985, c N-7. Justice Eidsvik also lists the precursor statutes and regulations to the current scheme: 2016 ABQB 230 at para 144.

[12] *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3; *Newfoundland Offshore Area Petroleum Geophysical Operations Regulations*, SOR/95-334; *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1990, c C-2; *Offshore Area Petroleum Geophysical Operations Newfoundland and Labrador Regulations* NLR 16/97; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28; *Nova Scotia Offshore Area Petroleum Geophysical Operations Regulations*, SOR/95-144; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, SNS 1987, c 3 and *Nova Scotia Offshore Area Petroleum Geophysical Operations Regulations*, NS Reg 191/95. I refer to the Accord Acts as the *Nova Scotia Accord Act* and the *Newfoundland Accord Act*. My references are to the federal version of this mirror legislation.

[13] RSC 1985, c A-1.

[14] See Canadian Energy Regulator Act, SC 2019, c 28.

[15] For frontier lands the relevant provision is s 101 of the *Canada Petroleum Resources Act*; for Nova Scotia Acord lands the relevant provision is s 122 of the *Nova Scotia Accord Act*; and for Newfoundland Accord lands the relevant provision is s 119 of the *Newfoundland Accord Act*. As the Court of Appeal acknowledged 2017 ABCA 125 at para 19, note 1, Justice Eidsvik did not explicitly refer to the relevant Nova Scotia Accord statutes.

as that generated by GSI) for disclosure until a further period had passed (an additional ten years in the case of the National Energy Board and its predecessor Canada Oil and Gas Lands Administration[16] and an additional five years in the case of the offshore boards[17]). Furthermore, the record suggested that some data (SEG-Y data) was not disclosed.[18] The evidence also demonstrated that at least one of the regulators (the National Energy Board) did have some concerns that disclosure involving copying might also engage the rights of copyright owners.[19]

22. Justice Eidsvik concluded that the relevant legislation in each case implicitly authorized disclosure of the privileged information filed with the relevant regulators at the end of the period of privilege prescribed by the legislation.[20]

23. Justice Eidsvik also concluded that the statutory permission to disclose after the period of privilege had expired "must include the ability to copy the information. In effect, permission to access and copy the information is part of the right to disclose."[21] She elaborated on this later in her judgment where she concluded that there was a conflict between the statutory protection period afforded by the *Canada Petroleum Resources Act* (*CPRA)* and the *Accord Acts* (including the regulatory practice of extended protection) and the protection period of the *Copyright Act*.[22] That conflict should, in her opinion be resolved in favour of the more specific regime created by the *CPRA* and *Accord Acts* provisions rather than the more general provisions of the *Copyright Act*.[23] It was not necessary for parliament to expressly provide a defence to a claim for infringement of copyright once the period of privilege had ended by including the *CPRA* and *Accord Acts* within s 32.1 of the *Copyright Act* since this result was already achieved by application of the *lex specialis*

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[16] 2016 ABQB 230 at paras 192 and 194.
[17] Ibid at para 206 and the summative statement at para 212.
[18] Ibid at paras 196 and 210; and 2017 ABCA 125 at paras 6 and 20(7).
[19] 2016 ABQB 230 at para 196.
[20] Ibid at paras 222 – 225.
[21] Ibid at para 253.
[22] Ibid at para 296.
[23] Ibid at paras 300 – 305. Justice Eidsvik also noted [at para 303] that the *Accord Acts* might also trump the *Copyright Act* on the basis of the common s 4 of those Acts which provides that:

> In case of any inconsistency or conflict between
>
> (a) this Act or any regulations made thereunder, and
>
> (b) any other Act of Parliament that applies to the offshore area or any regulations made under that Act, except the *Labrador Inuit Land Claims Agreement Act*,
>
> this Act and the regulations made thereunder take precedence.

Section 4 of the *Nova Scotia Accord Act* is identical barring the reference to the *Labrador Inuit Land Claims Agreement Act*.

principle. Express inclusion of these statutes would simply "have codified the common law principle …".[24]

24. In the alternative, the provisions of the *CPRA* and the *Accord Acts* created a licensing system that afforded the regulators the authority to make available and copy seismic data once the period of privilege had terminated.[25]

25. In sum, the legal effect of Justice Eidsvik's decision on the regulatory issues was that a disclosure involving copying of copyrighted material after the expiry of the period of privilege was authorized by the relevant legislation and did not therefore breach GSI's copyright. Justice Eidsvik understood that this amounted to a "confiscation" of GSI's "copyright and other proprietary rights over its seismic data".[26]

26. It was also Justice Eidsvik's view that the *CPRA* included a "no compensation clause" and that this clause was intended to cover the taking of GSI's property rights:

> In my view, this acknowledges Parliament's intent to confiscate private property in return for a policy it believed to be in the public interest to promote early exploration of its resources in the offshore and frontier lands. Section 101(7) must be interpreted with this intent in mind, unfair as it may be to GSI.[27]

The Relevance and Applicability of the *AIA* Procedures

27. GSI had argued that after the period of privilege had expired, disclosure of seismic data should only occur pursuant to the terms of the *Access to Information Act,* including those provisions of the *AIA* which preclude the disclosure of third party data. Justice Eidsvik concluded that the procedures of the *AIA* did not apply to disclosure of such data held by the regulatory boards

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[24] Ibid at para 307.
[25] 2016 ABQB 230 at paras 318 and 321.
[26] Ibid at para 321.
[27] Ibid at para 237 and see also at para 322. Justice Eidsvik was referring to and relying on s 111(2) of the *CPRA*. Section 111(2) provides that:

> 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.

The equivalent provisions in the Accord Acts would be s 128(2), *Newfoundland Accord Act* and s 131(2) *Nova Scotia Accord Act*.

after the period of privilege had expired. Justice Eisdvik reached this conclusion on the basis of s 2(2) of the *AIA* which provides that the Act "is not intended to limit in any way access to the type of government information that is normally available to the general public." It was her view that, with the expiry of the period of privilege, seismic data was available to the public.[28] Justice Eidsvik did however concede that the *AIA* regime might have some applicability if one or other of the regulatory boards were to exercise its discretion to decline to disclose data beyond the statutory five-year period.[29]

28. In sum, the effect of Justice Eidsvik's decision on the *AIA* matters was that GSI was not entitled to the benefit of the *AIA* provisions to protect disclosure of its data once the statutory privilege period under the *CPRA* and *Accord Acts* had expired. These provisions would only be relevant in the event of a person seeking access to this data after that period and where one of the regulatory boards was exercising its discretion to extend the period of non-disclosure beyond the statutory five-year period.

The Decision of the Court of Appeal

29. Authored by Justice Schutz for a unanimous three person panel, the judgment of the Court of Appeal is designated as a reserved judgment. In accordance with the practice of the Alberta Court of Appeal this connotes that a draft of the judgment was circulated to all members of the Court of Appeal for comment before it was finalized. The Court of Appeal has described this practice as follows:

> For many years, this Court has required circulation of draft written decisions containing new law to all members of the Court for their comment. A number of other courts of appeal in Canada also follow this procedure. Making new law is important, and so deserves more care and checking; comments from judges off the panel are a very valuable safety net. All judges who wish to comment on the principles of law are given a chance to suggest improvements, clarification, or criticisms. Circulation of a draft is not a plebiscite but rather a chance to criticize, improve, and debate principles of law.[30]

GSI stated two grounds of appeal

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[28] 2016 ABQB 230 at para 275.
[29] Ibid at paras 278 – 281.
[30] *R. v. Arcand*, 2010 ABCA 363 (CanLII), <https://canlii.ca/t/2dnsp> at para 209 and referencing at para 210 the Court's Practice Direction on this point.

a. The Trial Court erred in finding that the Regulatory Regime is a complete answer to GSI's disclosure and copyright infringement claims; and

b. The Trial Court erred in considering section 111(2) of the *Canada Petroleum Resources Act* and finding that it provides for the confiscation, without compensation, of GSI's vested property rights, including copyright, in seismic data.

30. There was no cross appeal with respect to Justice Eidsvik's finding that both the raw and processed seismic data were entitled to copyright protection.

31. Since both issues before the Court of Appeal raised pure questions of law, the standard of review applied by the panel was that of correctness.[31]

32. Central to the Court of Appeal's decision was its statement of the correct approach to statutory interpretation[32] which emphasized the need to take into account the purpose, or what it described as the dual objectives, of the legislation, namely:

> 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.[33]

33. Seen in that light, the Court of Appeal was of the view that Justice Eidsvik committed no reviewable error[34] emphasizing in particular that while s 101 of the *CPRA* does not explicitly refer to 'copying' but only 'disclosure', disclosure must be taken to include copying given the dual objectives of the legislation.[35]

> In our view, the statutory interpretation most consistent with the rational inferences drawn by the Trial Court, and most compatible with common

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[31] 2017 ABCA 125 at para 75.
[32] See at ibid para 77 quoting the standard authority of *Rizzo v Rizzo Shoes Ltd, (Re)*, [1998] 1 SCR 27 at para 21, and, in turn, its endorsement of Driedger's statement to the effect that:
> 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.
[33] 2017 ABCA 125 at para 81 (and see also at para 99).
[34] Ibid at para 98.
[35] Ibid at para 99.

> sense, is that there is to be free and unfettered dissemination of acquired and retained data following the requisite privilege period to encourage national and international academic and entrepreneurial engagement. And, put in place to entice the broadest possible commitment of intellectual, technological, financial, and resource management assets from the widest potential pool of players, and ensure that development of Canadian resources from non-conventional sources would be to the economic benefits of all Canadians. In short, the legislators intended that the data be disseminated to facilitate its use; "disclosure" must then be interpreted in a manner which readily allows the data to be used. Permitting the data to be copied, squarely meets with that intention.[36]

34. The Court went on to say:

> In the result here, the Regulatory Regime confers on the Boards the unfettered and unconditional legal right after expiry of the privilege period to disseminate, in their sole discretion as they see fit, all materials acquired from GSI and collected under the Regulatory Regime. The correct interpretation of "disclose" also confers on these Boards the legal right to grant to others both access and opportunity to copy and re-copy all materials acquired from GSI and collected under the Regulatory Regime. That the Boards have administratively decided to extend the time during which the statutory privilege period subsists, and have made other administrative decisions about dissemination of some types of seismic data (SEG-Y), is strictly within their regulatory and administrative prerogatives.[37]

35. Furthermore, to the extent that this resulted in a conflict with the *Copyright Act* the *CPRA* is both more recent and specific than the *Copyright Act* and thus the *CPRA* must prevail and override the general rights contained in the *Copyright Act*.[38] Further, or in the alternative, the majority also supported Justice Eidsvik's conclusion that s 101 of the *CPRA* could be interpreted as creating a compulsory licensing system which means that "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."[39]

36. In sum, there three steps in the Court of Appeal's analysis. The first step was to confirm Justice Eidsvik's view that the legislated right to disclose after the prescribed period of privilege

[36] Ibid at para 100.
[37] Ibid at para 102.
[38] Ibid at paras 103 and 104.
[39] Ibid at para 104.

was a legislated right to copy.[40] The Court of Appeal based this conclusion largely upon the dual objectives of the legislation. The second step in the Court of Appeal's analysis was the conclusion that there was a conflict between the five year term of protection against disclosure/copying offered by the *CPRA* and the term of life of creator plus 50 years offered by the *Copyright Act*. The third step was to resolve that conflict in favour of the more specific provisions of the *CPRA* and *Accord Acts* with the result that GSI, and persons in the same position as GSI, were held to have lost the protection offered by the *Copyright Act,* at least where copying of copyrighted material occurs as part of disclosure by a regulatory body.

37. The Court of Appeal considered that it did not need to deal with GSI's second ground of appeal with respect to Justice Eidsvik's conclusion that the "no compensation" provision of s 111(2) of the *CPRA* was intended to speak to the loss of GSI's property rights. The Court did however observe that Justice Eidvik's determination that Parliament intended the regulatory regime to be of a "confiscatory nature" was correct, given the dissemination purpose of the limited privilege period.[41] The Court of Appeal was further of the view that Justice Eidsvik's overall conclusion with respect to the interpretation of s 101 of the *CPRA* was "was neither undertaken nor premised upon s 111 (discussed in only 3 paragraphs of the 323 paragraph Decision)" and as such it "did not impact the core findings in the Decision." Thus, while the parties put forward differing interpretations as to the proper scope of s 111(2,) the Court of Appeal itself offered "no opinion" as to which might be the better view.

The Decision of the Supreme Court of Canada

38. There is no right of appeal to the Supreme Court of Canada (SCC) from a decision of a provincial Court of Appeal in a civil matter such as that raised by GSI. Instead, a party must first seek leave from the SCC. The standard(s) for granting leave are established by s 40 of the *Supreme Court Act:*

> … an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court … where, with respect to the particular case sought to be appealed, the Supreme Court is of the

[40] Ibid at para 105.
[41] Ibid at para 106.

> opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.[42]

39. The current practice of the SCC is to consider applications for leave based on the papers and without oral submissions. The SCC does not provide reasons when deciding to grant or deny leave to appeal.

40. The SCC's decision to deny leave in this case without reasons (2017 CanLII 80435) is consistent with this practice.

41. The legal effect of the SCC's denial of leave to appeal in 2017 CanLII 80435 is that the decision of the Alberta Court of Appeal is final and as such represents a definitive and final and binding statement of the relevant applicable law in Canada with respect to the issues between the parties. Section 52 of the *Supreme Court Act* provides that

> The Court shall have and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive.

II. The Canadian legal interpretation principle of the doctrine of *lex specialis*

The context for discussing the principle of *lex specialis*

42. The doctrine (or principle) of *lex specialis* is part of a complex body of interpretive principles that Canadian courts use to interpret statutes based on a court's assessment of the presumed intention of the legislature.[43] The overall approach to statutory interpretation in Canada is best captured by what is referred to as "Driedger's Modern Principle". Elmer Driedger was the author of the authoritative text *The Construction of Statutes*, first published in 1974 and, since the third edition of that text in 1994, now under the author/editorship of Ruth Sullivan.

[42] RSC 1985, c S-26, <https://canlii.ca/t/544lt>.
[43] *City of Lévis v Fraternité des policiers de Lévis Inc and Danny Belleau*, [2007] 1 SCR 591 at para 58, per Justice Bastarache (McLachlin, Binnie and Charron JJ concurring) (hereafter *City of Lévis*).

43. Driedger's Modern Principle states that

> 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.

44. The Supreme Court of Canada endorsed Driedger's Modern Principle in 1998 in *Re Rizzo and Rizzo Shoes Ltd*[44] where a unanimous court recognized that the principle meant that "statutory interpretation cannot be founded on the wording of the legislation alone".[45] In addition, a court must pay attention to the scheme of the Act, its object or the intention of the legislature, and the context of the particular words to be interpreted.[46] The issue in *Rizzo Shoes* was whether an employee was terminated by an employer within the meaning of Ontario's *Employment Standards Act* (*ESA*) when the termination occurred as a result of bankruptcy.

45. The Ontario Court of Appeal had concluded that termination by bankruptcy was termination by operation of law and not termination by an employer. The Supreme Court considered that this plain meaning approach was "incompatible with both the object of the Act and with the object of the termination and severance pay provisions" of the Act[47] which were "broadly premised upon the need to protect employees."[48] As for statutory context, the Court was of the view that the transitional provisions of the *ESA* supported the view that the legislature anticipated that the duty to pay severance would be triggered by bankruptcy.[49] And finally, the scheme of the legislation made it clear that it was "benefits-conferring legislation" and as such should be "interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant."[50]

46. This expert opinion does not canvass the totality of principles relevant to the exercise of statutory interpretation in Canada, but the important point for present purposes is that any examination or application of the principle of *lex specialis* must fall within the overall approach

[44] [1998] 1 SCR 27.
[45] Ibid at para21.
[46] Ibid at para 23.
[47] Ibid at para 27.
[48] Ibid at para 25.
[49] Ibid at paras 31 – 35.
[50] Ibid at para 36.

of Driedger's Modern Principle which, above all else, emphasises the importance of the entire context, including the particular provisions at issue, the entirety of that statute, as well as other statutes that address cognate subjects. Thus, a Court cannot fasten on the *lex specialis* principle in isolation from a broader consideration of context. Furthermore, insofar as the *lex specialis* principle is a principle for resolving conflicts between different statutory provisions, the contextual and purposive approach of Driedger's Modern Principle must also be brought to bear in assessing whether or not there is a conflict that triggers the application of the *lex specialis* principle in the first place.

47. In sum, a court can only call upon the *lex specialis* principle if it has ascertained that the application of Driedger's Modern Principle, supported by other relevant interpretive principles, leads to the identification of a conflict.

Is there a conflict?

48. It is not easy to establish the existence of a conflict. This is because "the governing principle" is the presumption of coherence.[51] "It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole."[52] As Justice La Forest wrote for the Supreme Court of Canada in one of the leading cases *Friends of the Oldman River Society v Canada (Minister of Transport)* "… there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments." [53] Or as Justice Bastarache put it in the *City of Lévis* case: "The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable."[54]

49. The Supreme Court of Canada has identified two circumstances in which a conflict is unavoidable.[55] The first type of conflict is operational conflict which occurs "when there is an

[51] *Ruth Sullivan on the Construction of Statutes* (6th ed, 2014) at 337, para 11.2.
[52] Ibid. See also *Thibodeau v. Air Canada*, 2014 SCC 67 (CanLII), [2014] 3 SCR 340 at para 98.
[53] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3 at 38.
[54] *City of Lévis* (n 43) at para 47.
[55] *Reference re Broadcasting Regulatory Policy, CRTC 2010-167 and Broadcasting Order 2010-168*, [2012] 3 SCR 489 esp at para 44 per Rothstein J for the majority (italics in original); Justices Cromwell and Abella make a similar distinction at para 92.

impossibility of compliance with both provisions."[56] There will be an operational conflict "where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other."[57] The second type of conflict is incompatibility of purpose. In such a case "there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the *purpose* intended by Parliament in another."[58] Some authorities label this form of conflict as a conflict that leads to absurdity such that the "concurrent application" of two statutes "would lead to unreasonable or absurd results."[59] "Absurdity" in this context "refers to situations where the practical effect of one piece of legislation would be to frustrate the *purpose* of the other."[60] Other authorities suggest that this form of conflict arises when it is apparent from all the circumstances that "one of the provisions constitutes an exhaustive declaration of the applicable law. If one provision is exhaustive, the other cannot apply."[61]

50. For example, in *Reference re Broadcasting* the majority found that there was a conflict of purpose between the provisions of the *Copyright Act* that deemed certain retransmission communications not to constitute an infringement of copyright, and certain rules proposed by the regulator (the Canadian Radio-Television and Telecommunications Commission (CRTC)) that would have allowed broadcasters to negotiate with retransmitters such as cable and satellite companies for a fee.[62] For the majority this created both an operational conflict and incompatibility of purpose conflict. The operational conflict arose because the proposed rule would "*grant* broadcasters a retransmission authorization right against [retransmitters] that was *withheld* by the scheme of the *Copyright Act*."[63] And there was incompatibility of purpose conflict because:

> … s. 21(1) [of the *Copyright Act*] represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those

[56] *Reference re Broadcasting,* ibid at para 44.
[57] *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.CR 161 at 191 and quoted with approval in *City of Lévis* (n 42) at para 49 by Bastarache J and by Deschamps and Fish JJ in concurring reasons at para 88.
[58] *Reference re Broadcasting* (n 55) at para 44 (emphasis in original).
[59] *City of Lévis* (n 43) at para 47
[60] *Reference re Broadcasting* (n 55) at para 43.
[61] *Thibodeau v Air Canada* (n 52) at para 92; see also Sullivan 6th edition, (n 51) at 338, para 11.7..
[62] *Reference re Broadcasting* (n 55).
[63] Ibid at para 62 (emphasis in original).

> signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding [retransmitters] from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime.[64]

51. Having found a conflict it was not necessary in this particular case for Justice Rothstein to resort to an interpretive presumption such as that of *lex specialis* because the identified conflict was a conflict between an Act of Parliament and delegated powers exercised by the CRTC. In such a case the hierarchical trumping power of the statute resolves the conflict.

52. The dissent in this 5:4 decision discerned no conflict.[65] The dissent considered that the two rule systems had different objectives and could work together.

53. In another recent case, *Thibodeau v Air Canada*, the 5:2 majority declined to find a conflict. The case involved an alleged conflict between a provision of the federal *Official Languages Act* (*OLA*) allowing a court to order an "appropriate and just remedy" for breach of obligations under the *OLA*, and the limitation on damages liability set out in the *Convention for the Unification of Certain Rules for International Carriage by Air* (the "*Montreal Convention*") as implemented in domestic law by the *Carriage by Air Act*. There was no direct contradiction between the two provisions so this was a case that turned on the question of whether or not it could be shown that the legislature intended that the provisions of the *OLA* were to be exhaustive. In concluding that there was no conflict between the two provisions, Justice Cromwell's analysis of the jurisprudence suggested that where the statutes in question have very different purposes it may be hard to conclude that the legislature intended that one statute should apply to the complete exclusion of the other.[66] In *Thibodeau* the conflict was avoided by interpreting the appropriate and just remedy provision as precluding a court from making "orders in breach of Canada's international undertakings which have been incorporated into federal law."[67] This also confirms that, in addition to the presumption of coherence, a court may also have reference to additional principles and

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[64] Ibid at para 67.
[65] Ibid per Cromwell and Abella JJ, at paras 109 to 122.
[66] A case often cited in this context and discussed by Justice Cromwell is *Myran v. The Queen*, 1975 CanLII 157 (SCC), [1976] 2 S.C.R. 137 where the alleged conflict was said to be between a statute affording Indigenous peoples a right to hunt on certain lands and another statute making it an offence to hunt without due regard to the safety of others. The statutes had different purposes; there was no real conflict, and both could apply.
[67] *Thibodeau* (n 52) at para 117.

presumptions so as to avoid finding a conflict. In *Thibodeau* the relevant additional presumption was the presumption of compliance with international law.[68]

54. *Thibodeau* is consistent with the much older decision of the Supreme Court of Canada in *City of Ottawa v. Town of Eastview et al*.[69] The issue here was the relationship between special statutes dealing the authority of the City of Ottawa to deliver utilities and the jurisdiction of the Ontario Municipal Board (OMB) to consider an application from neighbouring municipalities receiving water utility service from Ottawa. The City of Ottawa relied upon the *lex specialis* principle (referred to as the principle of *generalia specialibus non derogant)* to argue that the Board had no jurisdiction to hear the application, but the Court concluded that there was no need to resort to this principle since there was no conflict between the special statutes dealing with the authority of the City of Ottawa and the more general statutes applied by the OMB.[70]

55. Another older case in which the Supreme Court of Canada declined to apply the principle of *generalia specialibus non derogant* (even thought it had been relied upon by the lower courts) is *R v Williams*.[71] This widely cited case involved an alleged conflict between regulations passed under *Gold Export Act* and regulations adopted under the *War Measures Act (WMA)*. The former regulated the export of gold, the latter regulated the export of all forms of property and provided for the forfeiture of property that a party sought to export in breach of the Foreign Exchange Control Order under the *WMA*. Williams argued that since the *Gold Export Act* expressly addressed the export of gold it was the more specific statute and should prevail. But the majority held that there was no need to resort to the *lex specialis* principle because there was no conflict, both regulations could apply. As Justice Kerwin put it:

> I am unable to convince myself that there is any reason why a licence should not be required under the *Foreign Exchange Control Order* as well as under The *Gold Export Act* and its regulations where the latter Act and regulations are applicable.[72]

56. Justice Hudson was of the same opinion:

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[68] Sullivan 6th ed (n 51) at 566, para 18.5.
[69] *City of Ottawa v. Town of Eastview et al*., 1941 CanLII 9 (SCC), [1941] SCR 448.
[70] Ibid at 465.
[71] [1944] SCR 226.
[72] Ibid at 236, per Kerwin J, Rinfret CJ and Taschereau J concurring.

> In the present case there is no repugnancy. Two measures were passed for different purposes and are to be enforced through different organs of the Government. The *Foreign Exchange Control Order* is very comprehensive, covering the whole field of currency securities and commodities. I do not think that the Court could properly imply an intention to exclude from "currency" gold coins and from "commodities" fine gold, which nominally determines the value of all currency and monetary obligations.[73]

57. In sum, before a court can apply the *lex specialis* principle to resolve a conflict between laws of similar status it must first of all conclude that there is a conflict. In order to do so it must rebut the presumption of coherence or the presumption that overlapping statutes are meant to operate fully in accordance with their terms.[74] While the courts have adopted various labels to categorize or describe the different forms of conflict, broadly speaking the courts have recognized two forms of conflict, operational conflict and purposive conflict, the latter arising where there is an incompatibility of purpose between statutory provisions that leads to an absurdity or where the legislature has expressed the intention that one statute should apply exhaustively to the factual circumstances arising.

The *lex specialis* principle

58. As noted above, the *lex specialis* principle (also referred to *generalia specialibus non derogant*) is a presumption that the legislature intended that in the event of conflict between a general rule and a more specific rule, the more specific rule should apply to the exclusion of the general rule. Sullivan, following Driedger, refers to this strategy as an "implied exception" that is to say, "the specific provision implicitly carves out an exception to the general one."[75] Sullivan states the principle, or strategy, as follows:

> When two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be resolved by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.[76]

[73] Ibid at 240. Justice Rand dissented but he also was of the view (at 242) that *generalia specialibus non derogant* maxim was inapplicable.
[74] Sullivan 6th edition (n 51) at 338, para 11.7
[75] Ibid at 364, para 11.59.
[76] Ibid at 364 at para 11.5, references omitted.

59. The principle infers the presumed intention of the legislature as to how it would be expected to resolve a conflict between statutes.[77] It follows therefore that if the legislature has prescribed some other priority for resolving a conflict (eg a provision stating that one rule should apply notwithstanding the terms of another Act) then that ordering will prevail.[78] Furthermore, and as Côté notes, a principle like the *lex specialis* is simply a principle and "The courts have made a point of ensuring themselves considerable latitude in this area, and while they may apply these principles, they refuse to be shackled by them." [79]

60. A straightforward example of the application of the *lex specialis* strategy is *Masicotte v Boutin* which involved a conflict between s 41 of the *Supreme Court Act* and s 64 of the *Divorce Act*, both dealing with the question of the limitation period within which an appeal had to be commenced.[80] The Court resolved the clear conflict in this case in favour of the *Divorce Act* on the basis that it dealt exhaustively with all matters related to the single subject of divorce, whereas the *Supreme Court Act* dealt generally with the establishment and appellate jurisdiction of the Supreme Court of Canada.

61. In *Alberta (Registrar, South Alberta Land Registration District) v. Clark & Associates Surveys*,[81] the Alberta Court of Appeal had to resolve a conflict between one section of the provincial *Land Titles Act* (s 172) which dealt with the circumstances under which a final judgment could be entered against the Registrar of Land Titles and a provision in the same Act dealing with the power of the court to award costs (s 196). Justice Hunt writing for the court considered that both the language and policy of s 172 protected the registrar from a costs order and reinforced this conclusion by reference to the *lex specialis* principle:

> What about the use of the term "costs" in the *LTA*? Section 196 gives a court or judge authority to make costs awards. This authority, however, is worded in a general way. Section 172 deals with a specific situation (costs in a damages suit when the joint tortfeasor is able to pay). The specific

[77] Pierre-André Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada* (4th ed, 2011) at 382.
[78] Ibid at 382 – 383.
[79] Ibid at 385, also referring to the interpretive principle that the more recent should prevail over the older expression of legislative intent in the event of a conflict.
[80] [1969] SCR 818.
[81] *Alberta (Registrar, South Alberta Land Registration District) v. Clark & Associates Surveys*, 2004 ABCA 258.

> direction in s. 172 must prevail over the general in s. 196 (*Sullivan and Driedger, supra* at 273).

62. In a police discipline matter, the majority of the Supreme Court in *City of Lévis,* concluded that there was a conflict between s 119 of the *Police Act* and s 116 of the *Cities and Towns Act* (*CTA*) of Quebec and that the former should prevail. Justice Bastarache gave three reasons for thinking that the provisions dealing with dismissal in the case of criminal conduct by an officer *Police Act* should prevail.[82] First, it was the more recent,[83] second it was the more specific,[84] and third the application of the *Police Act* in preference to the *CTA* was more consistent with legislative intent as revealed in the legislative record of the debate.[85] Justice Bastarache considered that s 119 of the *Police Act* was more specific in the context of disciplinary matters because the Act applied to the training, employment and organization of police officers and established the requirements for disciplinary regulation and made provision for automatic dismissal for criminal conduct.[86] "By contrast, the *Cities and Towns Act* is a general statute providing for the organization and operation of municipalities generally. Section 116 is not focused exclusively on discipline and also serves to prevent certain persons from taking up municipal employment."[87]

63. It may not always be easy to determine which is the more specific provision.[88] For example, in *Lorencz v Talukdar*, the Saskatchewan Court of Appeal had to determine how to resolve a conflict between the limitation period established by a provision of the *Medical Profession Act* (*MPA*) and that established by the *Fatal Accidents Act*.[89] The Chambers judge had resolved the conflict in favour of the *MPA* on the basis that the *MPA* was the "more precisely relevant", but the Court of Appeal was not so readily convinced:

> Reversing the reasoning of the Chambers judge, it could be said that the *Medical Profession Act* is general in nature because it applies "in any action arising out of the provision of professional services" by a doctor – it does not matter what the nature of the damages are or if death ensued. On the other hand, the *Fatal Accidents Act* applies only when death has been

[82] *City of Lévis* (n 43).
[83] Ibid at para 59.
[84] Ibid at para 60.
[85] Ibid at paras 61 – 67.
[86] Ibid at para 60.
[87] Ibid.
[88] Sullivan (n 51) at 365, para 11.61 "Often matters are not so clear."
[89] *Lorencz v Talukdar*, 2020 SKCA 28.

> caused by wrongful act, neglect, or default and then only to advance claims of a very specific nature or kind.[90]

64. In the end the Court concluded that neither statute could be said to be the more specific and looked elsewhere for guidance as to how to resolve the conflict. The Court found that guidance by returning to Driedger's modern principle of statutory interpretation and taking a purposive approach to both pieces of legislation "to determine if a common goal or goals of the corpus of legislation can be discerned".[91] This led the Court to prefer the longer limitation period of the *Fatal Accidents Act* as best reconciling the purposes of the two statutes and thus identifying a fatal accident claim as an exception to the *MPA*.

65. In sum, the *lex specialis* principle is a principle or strategy that courts refer to in resolving conflicts between statutory provisions. It is one among a number of principles upon which a court may draw in resolving the overriding objective of inferring legislative intent as to which statutory provision should prevail in the event of conflict. The *lex specialis* principle has no particular lexical priority in relation to other interpretive principles that may be brought to bear, and it is subordinate to the overriding objective of determining the intent of the legislator.

III. Conclusion

66. I make this witness statement in support of the Claimants in this proceeding and for no other purposes.

67. I swear this witness statement in English and anticipate giving testimony at the hearing of this proceeding in English.

68. I affirm that the contents of this witness statement are true.

Signed at Calgary, Alberta on August 30, 2022

[Signed]

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[90] Ibid at para 90.
[91] Ibid at para 139.

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Present Position: Retired. Emeritus Professor of Law, The University of Calgary

Date of Birth: November 17, 1956

Marital Status: Married, two children

Citizenship: Canadian and British

Education:

1980	LL.M., the University of British Columbia, main area of concentration: international resources and environmental law. Thesis Topic: The International Law of Shared Resources.
1978	B.A., (Law) University of Cambridge, England.

Awards:

2001	Environment Canada, Citation of Excellence "in recognition of your contribution to the successful negotiation of UNEP's Stockholm Convention on Persistent Organic Pollutants".
2001	Head of the Public Service Award for Excellence in Policy: awarded to the Negotiating Team for the Global Convention on Persistent Organic Pollutants.
2004	Distinguished service award for legal scholarship, the Law Society of Alberta and the Canadian Bar Association (Alberta Branch) (lifetime award)
2008	Harold Tidswell Teaching Excellence Award, Faculty of Law, University of Calgary
2013	Harold Tidswell Teaching Excellence Award, Faculty of Law, University of Calgary

2015	Great Supervisor Award, Faculty of Graduate Studies, University of Calgary
2018	Clyde O Martz Teaching Award, lifetime award of the Rocky Mountain Mineral Law Foundation (US and Canada) for meritorious teaching in the area of natural resources law.
2019	Killam Annual Professor in recognition of commitment to excellence in research and teaching as well as service to the University of Calgary and the wider academic community.
2019	Canadian Law Blog Award (Clawbie) in the category of Best Bloggers on a Platform or Shared Blog.
2021	Inducted as a Fellow of the Royal Society of Canada (FRSC).

Honorary Doctoral Degree

2010	Honorary doctorate conferred by the University of Akureyri, Iceland, September 2010, for contributions to the development of Arctic law in the areas of natural resources law, international environmental law and the rights of indigenous peoples.

Professional Employment:

2008-2021	Chair in Natural Resources Law Faculty of Law, The University of Calgary.
1996-2021	Full Professor, Faculty of Law, The University of Calgary.
2012 – 2019	Adjunct Professor of Law II, The University of Tromsø, Norway
1999 - 2000	Professor in Residence, Department of Foreign Affairs and International Trade, Oceans, Environmental and Economic Law Division, files included Biosafety Protocol and the Stockholm Persistent Organic Pollutants Convention.
1994-1996	Associate Dean, Faculty of Law, The University of Calgary.
1984-1996	Associate Professor, Faculty of Law, The University of Calgary.
1988-90, 1996-97 and 1998-99	Director of Research and Graduate Program, Faculty of Law, The University of Calgary.
2013 - 2014	Director of Graduate Program, Faculty of Law, The University of Calgary
1981-1984	Research Associate, Canadian Institute of Resources Law, The University of Calgary.
1981 (summer)	Researcher, Inuit Tapirisat of Canada.
1980 (summer)	Sessional Instructor II for a course in International Law, Simon Fraser University, Burnaby, British Columbia.
1980	Researcher, Canadian Arctic Resources Committee, Ottawa.
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Visiting Fellowships etc:

Visiting Research Fellow, Melbourne University, Faculty of Law, 1990.

Visiting professor, University of Copenhagen, Faculty of Law, January – June, 2006.

Visiting professor, University of Akureyri, Iceland, January, 2016.

Visiting professor, University of Lapland, Rovaniemi, Finland, November 2017.

Publications:

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Nigel Bankes, Book review of J. Schneider, *World Public Order of the Environment*, (1980), 14 University of British Columbia Law Review 388.

Rapporteur and editing responsibilities:

Acted as Canadian Oil and Gas Rapporteur for the *Mineral Law Newsletter* of the Rocky Mountain Mineral Law Foundation from 1997 - 2011.

Editor, Journal of Energy and Natural Resources Law, 2007 – 2011.

Member, Editorial Board of the Journal of World Energy Law & Business (JWELB), May 2012 to 2018

Member, Editorial Board, Journal of Energy and Natural Resources Law, 2011 - date

Member of the Editorial Board, Yearbook of Polar Law, 2009 – date.

National editor (Canada), and Member Editorial Board, Arctic Review of Law and Politics, 2009 – date.

Web published commentaries on government reports etc

Nigel Bankes and Arlene Kwasniak "Submission with respect to the Draft Water Management Plan for the South Saskatchewan River Basin" December 2005, http://law.ucalgary.ca/system/files/Bankes_kwasniak_ssrbsubmissionFinal_december2005-1.pdf

Nigel Bankes - Comments on the International St. Mary – Milk Rivers Administrative Measures Task Force, Report to the International Joint Commission, April 2006, http://www.ijc.org/rel/pdf/smmr2/Bankes.pdf, 9pp.

Selected published and unpublished consulting papers:

(with Elizabeth Brennan), "Enhanced oil recovery and the geological sequestration of carbon dioxide: regulation and carbon crediting", a report prepared for Natural Resources Canada, March 2013, 124pp + appendices. http://www.law.ucalgary.ca/files/law/final_june7_enhanced-oil-recovery-and-the-geological-sequestration-of-carbon-dioxide.pdf

"Research report: is there currently a moratorium on the disposition of Crown oil and gas rights in Lancaster Sound?", prepared for Oceans North, October 2010, 13pp. http://law.ucalgary.ca/system/files/Bankes_Lancaster_Sound_Research_Report_October29_2010.pdf

(with Sasha Russell), "A Comparative Review of the Long Term Liability Rules for Carbon Capture and Storage", a report prepared for ICO_2N, August 2010, 43pp http://www.ico2n.com/wp-content/uploads/2011/08/Liability-Review.pdf

"Legal Considerations relevant to Developing a Commercial Fisheries Moratorium in the Canadian part of the Beaufort Sea", prepared for Oceans North, April 2010, 50pp.

(with Jenette Poschwatta-Yearsley and Trevor Ference), "The Legal and Regulatory Treatment of Carbon Capture and Storage in Canada and the United States", a report prepared for Natural Resources Canada, March 2010, 96pp.

"Dealing with Credits for Carbon Capture and Storage Projects within Carbon Emissions Trading Systems: Alberta's Specified Emitters Regulations", a report prepared for ICO_2N, December 2009.

"The ownership of forest bio fibre and the sequestration potential of forests on crown forest lands in Alberta", a report prepared for Alberta Sustainable Resource Development, February 2008, 50pp.

"A Policy Review of the Mackenzie Gas Project Socio-economic Agreement", 24pp, prepared for Alternatives North, August 2007, and available online at http://www.alternativesnorth.ca/pdf/BankesMGPSEAReviewforAlternativesNorthAug15.pdf

with Jim Tanner, Marc Stevenson and Barry Hochstein, (Fish Creek Consulting), *Traditional Ecological Knowledge*, prepared for Cumulative Environmental Management Association, 2003, 112 pp.

with Shaun Fluker, *Regulatory Tribunals and Public Policy: an overview of general principles and selected case studies*,

prepared for the Government of the Northwest Territories, 2003, 85 pp.

Comparative Unitization Regimes prepared for Total Exploration Production Bolivie, 2002, 62 pp.

Discussion Paper on Fisheries Regulations for Nunavut, for the Nunavut Regulatory Review Committee, May 2001, 99pp.

Review of Conservation Area Legislation in Nunavut, December 1998, 168 pp.

(with Cheryl Sharvit, Irene McConnell and Linda McKay-Panos), *A Review of Selected Environmental Problem Areas: Creating a Niche for the Arctic Council*, 1997, 121 pp.

Indian Government Taxation: Issues in Relation to Natural Resources, prepared for the Department of Finance, 1993, 69 pp. & 10 pp. appendix.

(contributor), *Comments on the Draft Law of the Russian Federation on Oil and Gas*, Canadian Institute of Resources Law, March 1993.

(with J.O. Saunders) *Alberta Sulphur: Legal and Regulatory Issues* prepared for the Alberta Department of Energy and Natural Resources, September, 1983, 61 pp.

Aboriginal Land and Resources Issues, a paper prepared for the Department of Indian Affairs and Northern Development, December, 1982, 86 pp.

Settlement of Aboriginal Claims: The Process, a paper prepared for the Department of Indian Affairs and Northern Development January 1983, 17 pp.

Expert testimony (public record):

2007	*Imperial Oil Resources Limited v. Canada (Attorney General)*, 2008 FC 1037 (CanLII), <http://canlii.ca/t/20vdg>. The matter involved the characterization of royalty regimes and the allocation of production and costs. I prepared a written report and was qualified as an expert; followed by examination in chief and cross examination. Retained by Osler as counsel to Imperial.
2016	*Toyota Tsusho Wheatland Inc v Encana Corporation*, 2016 ABQB 209 (CanLII), <http://canlii.ca/t/gphm5> The matter involved characterizing the differences between a royalty carved out of a fee interest and a royalty carved out of a leasehold interest. I prepared an expert report. The admissibility of that report was contested (but not decided) as discussed in this judgment. The matter has subsequently been settled by the parties. Retained by McCarthy Tétrault as counsel to Toyota.

Teaching Materials Unpublished:

Property Law (including sections on Landlord and Tenant, Land Titles, Dower, and Bailment) and with various co-instructors (1984 – 2015)

Natural Resources Law, 1985 - 89, 1991 - 93, 1999, 2001, 2005 - 2007

Water Law and Forest Law, 1983 - 84.

Regulatory Boards and the Oil and Gas Industry in Alberta, 1984 (with C.D. Hunt, and J.O. Saunders).

Energy Law, 1983 and 1991 – 92; 2013 – 2019.

International Environmental Law, 1990, 2003, 2004 - 2011

Advanced Oil and Gas Law, 1992 - 93, 1997, 2003 – 2008

Courses Taught:

2012 - 2018	Faculty of Law, The University of Tromsø, *Comparative Energy Law*
2006	Faculty of Law, The University of Copenhagen *Resource Regimes in International Law* (not the precise title)
2005	The University of Calgary (OLADE Program, Quito, Ecuador) *International Energy and Environmental Agreements*
2005	The University of Calgary *Legal Perspectives*
1992-1997 2002-2008	The University of Calgary *Advanced Oil and Gas Law*
1997	The University of Calgary *Selected Legal Issues, Northern Canada*
1989, 1999 2000 to 2002 & 2004-05	The University of Calgary, *Graduate Seminar on Legal Theory, Legal Education and Research Methodologies.*
1988-1989	The University of Calgary *Communications Law*
1987-1990	The University of Calgary *Bailment Workshops*
1986, 1992, 1993, 1995, 1996 2000 – 2004; 2007 2008 and 2014	The University of Calgary *Aboriginal Law*
1984-1988	The University of Calgary *Administrative Process*
1984-1990 1991-1997 1998-1999 2000 – 2001 2009 - 2015	The University of Calgary *Property Law*
2001	The University of Calgary *Fairness in International Law and Institutions* (based on the book by Franck)
2003, 2004 2006, 2007	The University of Calgary *International Environmental Law*

2009 - 2011

2010	The University of Calgary *Water Law*
1983-1989, 1992, 1993 1999, 2001- 2002, 2006 – 2007	The University of Calgary *Natural Resources Law*
2008	The University of Calgary *Selected problems: indigenous peoples and the law* (with Koshan and Watson Hamilton)
1983	The University of Calgary Continuing Education, *Oil and Gas Law*
1982, 1991-1992, 1997 & 2013 -2019	The University of Calgary *Energy Law*
1980	Simon Fraser University, *Public International Law*

Thesis Supervision and Examination:

Co-supervisor, Hilde Woker, PhD Thesis, "The Law-Science Interface within the Law of the Sea. A Case study of the Continental Shelf" UIT, The Arctic University of Norway, June 4, 2020

External examiner, Pegah Pornouri, "The Merits of the Iranian Petroleum Contract Model to Meet the Development Needs of Iran's Oil Resources Sector*"*, PhD Thesis, Western Sydney University, November 2020.

Supervisor, Endalew Lijalem, "The Rights of Indigenous Peoples to Marine Space and Marine Resources under International Law", PhD Thesis, UIT, The Arctic University of Norway, May 8, 2020.

External examiner, Sandile Nogxina, "The Paradox of Transformative Constitutionalism and the Regulation of Minerals Rights in South Africa: 1994-2015", PhD thesis, University of Witwatersrand, February 2020.

External examiner, Lisa Pettenuzzo, "If there is a right to say "yes" is there a right to say "veto"? UNDRIP's Implementation in Canada; the effects for and on the Inuit of Nunavut" MA thesis, University of Akureyri, September 18, 2019.

External examiner, Mana Tugend, "The Rights of Indigenous Peoples and the Establishment of Marine Protected Areas in the Traditional Inuit Territory", LLM thesis, University of Akureyri, May 16, 2019.

Chair of examining committee, Natalia Ermolina, "The Law of Shared Hydrocarbon Resources and the Question of Shared State Responsibility for Environmental Harm Arising from Their Cooperative Management", PhD Thesis UIT, The Arctic University of Norway, May 7, 2019.

Supervisor, Marius Grønnbakk, "The Prescription of Provisional Measures under Article 290 of the Law of the Sea Convention and its Facilitative Role in International Dispute Settlement", LLM Thesis, UiT, The Arctic University of Norway, August 2019.

Member of supervisory and examining committees, Rita Sewornu, "Securing Land and Land Transactions in Accra: Land Registration and Off-register Strategies. The Case of Dansoman and Oyibi." PhD thesis, University of Calgary, Department of Geomatics Engineering, Faculty of Law and Department of Political Science, June 18, 2018.

Supervisor, Garima, "Tribal Land Ownership and the Forest Rights Act: Is India Truly International?" LLM by thesis, University of Calgary, March 28, 2018.

Supervisor, Elizabeth Whitsitt, "Prospects for Unity in International Economic Law", PhD, law, University of Calgary, September 8, 2017.

Examiner, Kent Jones, "Alternative Dispute Resolution Mechanisms to Define Aboriginal Parcel Boundaries in Canada" MSc, Geomatics Engineering, University of Calgary, August 30, 2017

Supervisor, Julia Gaunce, "The General Duty of 'Due Regard' under the United Nations Convention on the Law of the Sea", LLM by thesis, University of Calgary, August 28, 2017.

Supervisor, Maria Madalena das Neves, "The Legal Framework for Norway's External Energy Trade and Investment Relationships", PhD, University of Tromsø, February 24, 2017.

Supervisor, Heather Lilles, "The Statutory Liabilities of Joint Operators and Non-participating Parties", LLM by thesis, University of Calgary, December 1, 2016.

Supervisor, Salimah Janmohamed, "A comparative assessment of the Clean Development Mechanism and Alberta's Carbon Offset System", LLM by thesis, Calgary, October 15, 2016.

Examiner: H van Niekerk, "Towards a new understanding of mineral tenure security: the demise of the property law paradigm", PhD, University of Cape Town, South Africa, April 2016

Examiner: Kevin Marechal de Carteret, "Comparing Water Allocation in Western United States and Southern Alberta: Does the Crown's Fiduciary Obligation to Protect the Aboriginal Interest in Reserve Lands Hold any Water?", LLM by thesis, Calgary, May 13, 2015.

Supervisor, Astrid Kalkbrenner, "Compensating for Harm: the role and design of compensation funds", PhD, law, Calgary, April 15, 2015.

Supervisor, David Poulton, "Conservation Offset Policy for Alberta: A Comparative Legal Analysis", LLM by thesis, Calgary, September 11, 2014.

External examiner: Durgeshree Devi Raman, "Governance of International Rivers: Threat, Gaps and Best Practices", PhD, University of Waikato, New Zealand, July 2014.

Supervisor: Jennifer Hocking, "The Role of the National Energy Board in Regulating Access to Pipelines", LLM by thesis, Calgary, June 25, 2014.

Supervisor, Nelson Atanga, "Offshore Petroleum Pollution and compulsory insurance", LLM by thesis, Calgary December 18, 2013.

External examiner, Simon Alexander Robb, "A Best Practice Regulatory Proposal for Shale Gas Production" PhD thesis, University of Western Australia, November 2013.

Supervisor, Theodore Nsoe Adimazoya, "Governance of Resource Revenues in Ghana's Mineral and Petroleum Sectors", LLM by thesis, Calgary, November 28, 2012.

Supervisor, Rolandos Viaciulis, "Linking Emissions Trading Schemes with the European Union", LLM, Calgary,

November 2012.

Supervisor, Ana Marie Radu, LLM, Calgary, "Carbon capture and storage projects within the clean development mechanism", October 29, 2012.

External examiner, (anonymous candidate), Offshore transboundary petroleum deposits: cooperation as a customary obligation", University of Tromso, "small thesis", 51pp, October 2011.

External examiner, (anonymous candidate), "International Legal Framework for Risk Assessment and Management regarding Storing of CO2 in Sub-seabed Geological Formations", University of Tromso, "small thesis", 61pp, October 2011.

Supervisor, Sasha (Ransom) Russell, LLM by thesis Calgary, "The Treatment of Carbon Capture and Storage Projects within Emissions Trading Systems", April 6, 2011.

External examiner, Anatole Boute, "The Modernization of the Russian Electricity Production Sector: Regulatory Risks and Investment Protection", PhD thesis University of Groningen, Netherlands, January 31, 2011.

Supervisor, Jenette Yearsley (Poschwatta), LLM by thesis, Calgary, "Tort Theory and Liability Rules for Carbon Capture and Storage Projects", December 7, 2010

External examiner, anonymous student, short thesis, "International Legal Aspects of Carbon Dioxide Storage into the Sub-seabed Geological Formations" University of Tromsø, Faculty of Law, September 2010.

Supervisor, Elena Mihai, LLM by thesis, Calgary, "International Civil Liability Regimes for Nuclear, Oil Transport and Industrial Activities", August 13, 2010.

Supervisor, Martin Ayisi, LLM by thesis, Calgary, "Ghana's new mining law: an evaluation of its competitiveness", October 22, 2009.

Member, examining committee, Seun Kelani, LLM, Calgary, "Towards a comprehensive legal framework for the decommissioning …." June 22, 2009.

Member, supervising and examining committee, Stephen Andrew Lines, "Partitioning Effects: Environmental Impact Statement Guidelines in Support of an Ecosystemic Approach to Caribou Impact Assessment and Monitoring", MSc, Calgary, April 2009.

External examiner, Linda Hjjar Leib, "Human Rights and Environment: the emergence of environmental rights in international, regional and domestic law" Ph D Thesis, Macquarie University, Sydney, Australia, November 2008.

Supervisor, Isabela Figueroa, "The Ecuadorian multicultural state: implications for indigenous land rights", LLM Thesis, Calgary, October 2008. This thesis was awarded the Chancellor's Award, the University of Calgary for a master's thesis for the 2008 – 2009 academic year (awarded at Convocation, November 2009).

Member, examining committee, Teshager Worku Dagne, "Trade, Environment, WTO and unilateral trade measures", LLM Thesis, Calgary, September 4, 2008.

Supervisor, Chilenye Nwapi, "The Legal Framework for Public Participation in Oil and Gas Decision-Making in Nigeria", LLM Thesis, Calgary, July 2008.

External examiner, Lindsay Marie Kendall, "A Sustainable Fiscal Rule for Managing Non-renewable Resource Revenues: Oil Sands as a Second Chance for Alberta", MA Department of Economics, Calgary, April 2008

Co-supervisor, Veronica Potes, "Taking Duties Seriously: The State Obligations to Consult and to Accommodate

Indigenous Peoples' Rights", LLM Thesis, Calgary, August, 2007.

Co-supervisor, Daniela Chimisso dos Santos, "Deconstructing Establishment Rights in International Investment Law", LLM Thesis, Calgary, December 2006.

Opponent (External Examiner), Christina Allard, "Two Sides of the Coin: Rights and Duties, The Interface between Environmental Law and Saami Law Based on Comparison with Aoteoaroa/New Zealand and Canada", LuleΔ University of Technology, LuleΔ, Sweden, September 2006.

Member (supervisory committee), Ph.D. Candidacy examination, Resources and the Environment Program, Calgary, Andrew Bearrobe, April 2006.

Supervisor, Elizabeth Abena Addabar, "The Regulation of Transnational Corporations: An Assessment of the Alternatives and the Role of Multilateral Development Banks", LLM Thesis, Calgary, December 2005.

Supervisor, Ibironke Tinuola Odomosu, "Reforming Gas Flaring Laws in Nigeria: the Transferability of the Alberta Regulatory Framework", LLM Thesis, Calgary, June 2005.

Supervisor, William Mackay, "Implementation of Multilateral Environmental Agreements in Canada: the role of legitimacy", LLM Thesis, Calgary, June 2005.

Member of thesis committee and examining committee, Jennifer Grant, "Driving Forces and Barrier to Transboundary Wildlife Management: the Crown of the Continent Ecosystem Experience", MSc Thesis, Calgary, Resources and the Environment Program, July 2005.

Member, PhD advisory committee and member of candidacy examining committee, Brenda L. Parlee, "Dealing with Ecological Variability and Change: Perspectives from the Denesoline and the Gwich'in of Northern Canada", Natural Resources Institute, University of Manitoba, 2004

Supervisor, Janet McCready, "Labelling Genetically Modified Foods", LLM, Calgary. 2004.

Supervisor, Yoseph Endeshaw, "A Legal Regime for the Nile Basin: The Relationship Between the Principles of Equitable Utilization and No Significant Harm", LLM Thesis, Calgary, 2003.

Supervisor, Shaun Fluker, 'The Alberta Energy and Utilities Board: Ecological Integrity and the Law", LLM, Calgary, 2003.

Member, examining committee, Laurie McIntyre, "Aboriginal Management of Pacific Salmon in Canada and United States: Expanding Environmental Justice" LLM Thesis, Calgary, December 2002 and August 2003.

Member, examining committee, Teall Crossen, "Responding to Global Warming: A Legitimacy Critique of the Proposed Kyoto Protocol Compliance Regime", LLM Thesis, Calgary, November 2003.

Supervisor, John Donihee, "Returning Wildlife Management to Local Control in the Northwest Territories", LLM, Calgary, 2002.

External examiner, Dianna Kyles, **"**The concept of customary international law: explaining the creation of the Exclusive Economic Zone through the use of legal rules" MA thesis political science, international relations, October 2002.

Member, examining committee, Philip Abraham, "Decommissioning of Oil and Gas Facilities Off the East Coast of Canada: An Analysis Based on the International Legal Context and Regulatory Decision-Making Theory", LLM Thesis, Calgary, 2002.

External examiner, Noelle Bacalso, “Contractual Hazards Associated with Power Purchase Arrangements” MA Economics, Calgary, 2000.

Supervisor, Cheryl Sharvit, “A Sustainable Co-Existence? Aboriginal Rights and Resource Management in Canada”, LLM, Calgary, 1999.

Supervisor, Michael Wenig, “The Fisheries Act as a Legal Framework for watershed Management”, LLM, Calgary, 1999.

External examiner, Tracy Campbell, “An Assessment of Aboriginal Co-management of Non-renewable Resources on Treaty or Traditional Territory”, M.A., Calgary, 1996.

Supervisor, Shaunnagh Grace Dorsett, “The Obligations of the Crown to Aboriginal People”, LL.M., Calgary, 1996.

Supervisor, Doris Katai Katebe Mwinga, “The Biodiversity Convention and Zambia”, LL.M., Calgary, 1996.

External examiner, Robert Clark, “The Role of Corporate Decision Making in Developing Environmental Legislation”, MBA., Calgary, 1995.

Member of examining committee, Long Thanh Le, "Mekong Basin Cooperation and the IJC", LL.M., Calgary, 1995.

External, PhD Comprehensive examination: Jim Maher, Political Science, Calgary, 1992.

Supervisor, Sharon Mascher, "Environmental Impact Assessment in Nunavut: Meeting Inuit Needs", November 1994, LL.M., Calgary.

External examiner, Aviva Farbstein, "The Implications of Convergence in Canadian Communications Policy", M.A. Communication Studies, Calgary, 1994.

Supervisor, Mark Christopher Phares, "Ecocentric Endangered Species Protection: A New Paradigm for Protecting the Grizzly Bear in Canada and the United States", LLM, Calgary, 1994.

Supervisor, E. Mitchell Shier, "Climate Change and the Constitution", June 1994, LL.M., Calgary.

Supervisor, Elizabeth Adjin-Tettey, "Law and a Sustainable Energy Future", March 1993, LL.M., Calgary.

External Examiner, Norman Conrad, "Sustainable Development: in the Constitution", June 1992, M.E.D., Calgary.

Member of Examining Committee, David Dzidzornu, "Law and Marine Environment Protection", August 1992, LL.M., Calgary

External Examiner, Donald Rothwell, "Antarctica Under Threat", December 1986, M.A., Calgary.

External examiner, Frances Craig, "A Critical Analysis of Land Impact Assessment and Management in Energy Resource Development", December 1982, M.E.D., Calgary.

Course-based LLM, major paper supervision and examination

Supervisor, Gary Perkins, “Canadian Pipeline Projects and The National Energy Board: The Public Interest Challenges Beyond Jim Cooney’s Social Licence to Operate”, April 2019.

Second reader, Larry Wu, “Lessons from the LARP ….”, January 2019.

Supervisor, Sharilyn Nagina, "Review of Competition Regulation in the Alberta Electricity Industry", May 2018.

Second reader, Stephanie Leitch, "Proportionality: An Appropriate Element for Fair and Equitable Treatment", April 2016.

Supervisor, Zahrasadat Sheykholeslamshoostari, "The interpretation and application of the legality requirement in international investment treaties", January 2016.

Supervisor, Omar Chehade, "Indirect expropriation of oil and gas contracts under BITs and MITs" May 2015.

Second Reader, Romeo Rojas, "Nationality in International Investment Law", May 2015.

Supervisor, Kimberley Howard, "Hydraulic Fracturing and Communication Issues", April 2015.

Supervisor, Matthew Ducharme, "The European Fuel Quality Directive and its Compatibility with the GATT", January 2012, 59pp.

Supervisor, Rachel Hird, "Thomas Walde and Fair and Equitable Treatment" 51pp, September 2011.

Second reader for major paper for Henrietta Falasinnu, Risk Service Contracts (Iraq and Mexico), August 2011, 59pp.

Supervisor, Rick Nilson, "A proposed legal framework for third party access to Carbon Capture and Storage Infrastructure in Alberta", April 2011.

Supervisor, Davin McIntosh, 2009, Water Transfers in Alberta, a review of the market to 2009

Supervisor, Assel Amanova, 2009, Transit Pipelines

Second reader, 2009, paper on wind power projects.

Second reader, September 2010, paper on liability issues associated with offshore CCS projects.

Directed research supervision

Supervised directed research on a variety of topics including: crown grazing leases in Alberta; riparian rights; orders of the Surface Rights Board; forest management agreements and environmental protection; international liability for environmental damage; the rights of indigenous peoples in international law; the fiduciary duty of the Crown, the duty to consult and various other Aboriginal law subjects; energy de-regulation and privatisation; economic and social rights in Nigeria; international investment law.

Grants Received:

1986-1987	Institute for Research on Public Policy, Aboriginal Rights in British Columbia (team project with Frank Cassidy and Norman Dale)
1986	University Research Grant, Indian Water Rights in B.C.
1987	Foundation for Legal Research, The Constitution Act, 1982 and the Territories.
1990-1992	SSHRC Grant in the applied ethics program for a team project on global warming (team member, principal investigator, Howard Coward).

1993-1994	Grant from the Department of Foreign Affairs and the Canadian Council on International Law for work on forests and international watercourse law.
1994-1995	Grant from Wildlife Habitat Canada for work on the Public Trust Doctrine in Canada.
1994-1995	Grant from The Canadian Arctic Resources Committee for work on the Hudson Bay - James Bay Watershed.
1997	Grant from DFAIT (Canada) for work on international environmental law in circumpolar world.
1998	Grant from the Canadian Arctic Resources Committee to support graduate student work on free entry mining regimes and aboriginal title.
1999	Grant from the Inuit Circumpolar Conference (ICC) to support graduate student work on monitoring and enforcement regimes for an international agreement on persistent organic pollutants
2003	Grant from the Government of the Northwest Territories to support graduate student work on administrative tribunals and public policy.
2004	Grant from the Alberta Ingenuity Fund for water law research.
2009 -2011	Grant from ISEEE for work on carbon capture and storage
2009 – 2012	Grant from Alberta Ingenuity for water law research (multidisciplinary project, project leader Ed McCauley)
2011 – 2013	Grant from Carbon Management Canada for research on legal aspects of carbon management (Bankes is project lead, collaborators are Shi Ling Hsu (UBC), Meinhard Doelle (Dalhousie), and Shaun Fluker (Calgary)
2009 – 2011	Grant from the Nordic Council for work on indigenous property rights and the Nordic Saami Convention (co principal investigator, Timo Koivurova, University of Lapland, Finland)

SSHRC 4A list, 1990 and 1997

University and Faculty Committee Service:

I have served on a range of faculty and university level committees. At the university level I have served on the Committee on Admissions and Transferability (1994 - 96), Research Grants Committee (1987 - 89), the Research Policy Committee (1991 - 93), the Dean Selection Committee for the Faculty of Law (1989), Dean Selection Committee for the Faculty of Management (1999), Dean Selection Committee for the Faculty of Environmental Design (2003), the Library Committee (1984 - 1987), the University Planning Committee (2002 - 2005), the University Budget Committee (2002-2005, and chair as of April 2003), the Position Re-allocation Committee (2003 -2005) and the President's Working Group on Revenue Generation (2003).

At the faculty level I have served on or chaired the following committees: admissions, mooting and debating, law library, graduate studies, computers, promotion and merit, recruitment, tenure, strategic planning, academic planning, associate dean selection committee, and visiting speakers.

I have served on organizing committees for several conferences including the first two Banff Conferences on Natural Resources Law, 1983 and 1985. I have chaired two ad-hoc faculty committees: (1) to review the relationship between the Faculty of Law and CRILF, and (2) the Grading Review Committee (1994 - 95) and co-chaired the Curriculum

Review Committee (2006 – 2008).

Peer Review:

I have acted as a reviewer for SSHRC on numerous grant applications, for several Canada Research Chair renewals and for an application for the Leger fellowship. I have also acted as a reviewer for the National Academies of Finland, Norway Austria and Iceland.

I have served as a reviewer for a number of journals including Canadian Bar Review, Queen's Law Journal, Dalhousie Law Journal, Alberta Law Review, Ocean Yearbook, Revue québécoise de droit international, McGill Law Journal, Osgoode Hall Law Journal, Ottawa Law Review, University of British Columbia Law Review, Melbourne Journal of International Law, Transnational Environmental Law, University of New Brunswick Law Journal, Canadian Public Policy, Energy Policy, Saskatchewan Law Review, Centre for Constitutional Studies, Arctic, Polar Record, Polar Geography, Journal of Canadian Comparative Analysis, Ambio, Asper Review of International Business and Trade Law, International Journal of Public Law and Policy, ICES Journal of Marine Science and Arctic, Marine Policy.

I have also reviewed book length manuscripts for the University of Calgary Press, Captus Press, McGill-Queen's, Resources for the Future, UBC Press, Brill, Routledge, CIRL and the Royal Commission on Aboriginal Peoples.

I have acted as a peer reviewer for promotion\tenure applications at Ottawa (2), Dalhousie, Otago, Victoria, UBC and Melbourne.

Other Service:

1992 - 1995	Chair, Canadian Arctic Resources Committee (a national NGO)
1988 - 1997	Member of the Board, member of executive 1992 - 1997, Canadian Arctic Resources Committee.
1992 - 1996	Member of the Board, Calgary Legal Guidance Member of the Executive, 1993 – 95
1988 - 90 and 1992 – 2020	Member of the Board of the Canadian Institute of Resources Law. Vice chair, 2011 - 2020
1989	Organized and chaired a seminar on Indian Law for Continuing Legal Education, Alberta.
1986 - 88	Member, of the Research Committee of the Canadian Bar Association=s Committee on Native Justice, and editor of commissioned papers.
2006 – 2012	Member of the Board, Calgary Legal Guidance Member of the Executive (Secretary) 2008 – 2009 Vice-chair, 2009 – 2010 Chair, 2010 – 2011 Past-Chair, 2011 - 2012 Chair of communications committee, 2009 – 2010 Member, premises committee (lease renewal) Member, human resources committee (2011 – 2012)
2000	Organized and chaired a seminar on Oil and Gas Law for Continuing Legal Education, Alberta.
2003 – 2015	Member, Water Initiatives Advisory Committee, Columbia Basin Trust

2008 – 2017	Director, Alberta Law Reform Institute; chair, communications committee, 2013 - date
2009	Chaired and organized a CLE event on Environmental Impact Assessment Law
2009	Organized and chaired a continuing legal education seminar on environmental impact assessment law
2018	Organized and chaired a workshop on Indigenous rights in marine areas, Tromsø, June 2018
2018	Chair of the organizing committee Polar Law Symposium, Tromsø, October 2018.

Consulting experience:

I have provided consulting advice to a number of parties including federal, provincial and territorial governments, Indigenous organizations, law firms, non-governmental organizations, public policy organizations, and oil and gas corporations on a variety of matters. Further details available.

Presentations: (listed here are principally public policy presentations; a full list of academic conference presentations available on request)

Presentation to The House of Commons Standing Committee on Environment and Sustainable Development with respect to its study of Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, April 4, 2018

Presentation to the House of Commons and Senate Standing Committees on Foreign Affairs and International Trade on Bill C-6, *an Act to Amend the International Boundary Waters Treaty Act*, respectively May 2001 and December 2001.

Presentation on behalf of CARC to the House of Commons Standing Committee on Aboriginal Affairs, on Bill C-6, the Mackenzie Valley Resource Management Act, November, 1997 (principal author).

Presentation to the House of Commons Standing Committee of Foreign Affairs and International Trade, on Canadian Foreign Policy in the Circumpolar Arctic, summer 1996.

Presentation, on behalf of CARC, to House of Common Standing Committee on Fisheries and Oceans, on Bill C-98, Canada Oceans Act, October 24, 1995 (principal author).

Presentation on behalf of CARC to the House of Commons Standing Committee on Environment and Sustainable Development on Bills C-23 and C-24: Proposal Amendments to the Migratory Birds Convention Act and the Canada Wildlife Act, May 26, 1994, Minutes of Proceedings, Issue No. 28, pp. 2A 41 - 61 (principal author).

Presentation on behalf of the Freedom of Information and Privacy Association to all Party Committee of the Legislature to review Bill 1, Access to Information and Protection of Privacy Act, Fall 1993 (principal author).

Presentation to the Joint Committee of Parliament on International Relations, on behalf of the Tungavik Federation of Nunavut, April 1986.

Presentation on "Interim Protection Strategies and Compensation" to the Speaker's Forum on Canadian Wildlands, Ottawa, December 7 - 8, 1992.

Submission (with J. Keeping) to the Panel to Review the *Electric Energy Marketing Act*, 1992.

Submission (with J. Keeping) to the National Energy Board on Inter-Utility Trade Review, 1993.

Numerous presentations to Canadian Bar Association Subcommittees (Vancouver, Calgary, Edmonton, Whitehorse) on a range of matters including the Skagit Dam Controversy; Registration and Transfer of Crown Mineral Interests under the Alberta Mines and Minerals Act; Intergovernmental Agreements within Confederation; the General Provisions of Comprehensive Land Claim Agreements in the North; Negotiating Comprehensive Land Claim Agreements; Construction Law on First Nation lands; the running of covenants in oil and gas leases; Researching International Law; perpetuities legislation of NWT and Yukon; *Williston Wildcatters* and the calculation of damages for unlawful production; the application of provincial laws on reserve; the lands taken up provisions of the prairie treaties; 'litigating' oil and gas legal issues before regulatory tribunals; oil and gas liability regimes; power markets; NEB modernization; coal law and policy in Alberta; *Vavilov* and standard of review.

April 28, 2016

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
>
> (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.
>
> 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
>
> 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)…
>
> … 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.

May 8, 2017

Claims to Copyright Trumped by Expiration of Statutory Confidentiality Period

By: Nigel Bankes

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."
>
> 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