

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

**-BETWEEN-**

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

**(the “Claimants”)**

**-AND-**

**GOVERNMENT OF CANADA**

**(the “Respondent”)**

**(ICSID CASE NO. UNCT/20/6)**

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**CLAIMANTS’ MEMORIAL**

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## I. INTRODUCTION

1. A ruling of the Court of Queen’s Bench of Alberta allowed the Government of Canada (“Canada”) to confiscate the copyright in valuable seismic data created over the Canadian offshore without paying any compensation to the owner of that copyright, the Claimant, Geophysical Service Incorporated (“GSI”):

[322] [t]he Regulatory Regime has confiscated the seismic data created over the offshore and frontier lands and the CPRA is not apologetic for it - indeed, it makes clear that there is no compensation for any confiscation under the Act (s 111 (2)).... Unfair as this may seem, it is not for this Court to re-write the legislation comprising the Regulatory Regime.<sup>1</sup> [Emphasis added.]

2. That finding became final on November 30, 2017, when Canada’s highest Court – the Supreme Court of Canada – denied GSI’s application for leave to appeal. By doing so, the Court crystallized Canada’s expropriation of GSI’s most valuable asset, left GSI unable to enforce the copyright in its seismic data and ultimately destroyed the business that laid the foundation for the offshore Canadian oil and gas industry.
3. The Claimants, Theodore David Einarsson (“Davey”), Harold Paul Einarsson (“Paul”) and Russell John Einarsson (“Russell”) and, collectively with Davey and Paul, the “Einarssons”) are a father and son team of American investors who built GSI into a key player in the Canadian seismic data industry. The Einarssons commenced this Arbitration to obtain compensation for the destruction of GSI’s business and the resulting substantial deprivation of the Claimants’ investments by taking Canada to task for its breaches of Chapter 11 of the North American Free Trade Agreement (“NAFTA”).
4. This Memorial will provide background information about the Claimants, seismic data and the seismic data industry. After that, the Memorial will describe the chaotic evolution of Canada’s offshore oil and gas regulatory framework, GSI’s efforts to investigate Canada’s promises that it would protect GSI’s intellectual property rights in its seismic data and the Canadian court decisions at issue in this Arbitration. The Memorial will then establish that the Tribunal has jurisdiction over the Claimants’ claims in this Arbitration. After that, the

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<sup>1</sup> **R-001**, *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230, Reasons for Judgment on the Copyright and Regulatory Common Issues, April 21, 2016 (“ABQB Common Issues Decision”) at ¶ 322.

Memorial will detail how the Canadian court decisions breached Articles 1110 and 1106(1)(f) of NAFTA before finally addressing the appropriate quantum of compensation.

5. As the Memorial proceeds, the Tribunal should bear one overarching consideration in mind. There is no disputing that something was taken from GSI as a result of the Canadian court decisions at issue. Instead, the dispute between Canada and the Claimants appears to be over whether the Tribunal has jurisdiction to address the Claimants' claims, including whether the Claimants somehow consented to Canada's confiscation of GSI's copyright in its seismic data before the Canadian court decisions were rendered. As this Memorial will establish, the Tribunal does have jurisdiction to hear the Claimants' claims. It follows that the only real issue for the Tribunal in this Arbitration is how much money Canada has to pay the Claimants to compensate them for its breaches of Chapter 11 of NAFTA. According to the Claimants' expert, that figure exceeds \$500 million Canadian dollars.

## **II. FACTUAL BACKGROUND**

### **A. The Einarsson Family Founded, Grew and Managed GSI into the Largest Marine Seismic Data Company in Canada and the Largest Private Marine Seismic Company in the World**

#### **(1) The Einarsson Family Are Veterans of the Marine Seismic Data Industry**

6. The Einarsson family has been involved in the marine seismic data industry since the 1950s.
7. Davey has worked in the marine seismic data industry since 1956.<sup>2</sup> At that time, Davey began working for a predecessor to GSI, an entity named "Geophysical Service Inc." that was incorporated in Delaware, United States ("GSI Delaware") in 1938.<sup>3</sup> Between 1956

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<sup>2</sup> **CWS-03**, Witness Statement of Theodore David Einarsson, dated December 2, 2019 ("Davey Einarsson Witness Statement") at ¶ 7; **CWS-06**, Witness Statement of Harold Paul Einarsson, dated September 27, 2022 ("Paul Einarsson Witness Statement") at ¶ 73.

<sup>3</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶¶ 3, 7 and 29; **C-124**, Certificate of Incorporation of GSI Delaware, dated December 23, 1938.



and 2019, Davey established himself as a pioneer in the marine seismic data industry and, as discussed below, founded GSI.<sup>4</sup>

8. Russell worked with his father in the marine seismic data industry from 1992 through 2013.<sup>5</sup> During that time, Russell was employed by an affiliate of GSI as Vice President in its office in Houston, Texas, United States.<sup>6</sup>
9. Paul has worked in the seismic data industry full-time since 1997.<sup>7</sup> In that year, Paul, who has a background in finance, relocated from California, United States to Calgary, Alberta, Canada to assist his father in supporting and growing GSI.<sup>8</sup>
10. As detailed below, the Einarssons built GSI into the largest marine seismic data company in Canada and the largest private marine seismic data company in the world through a series of acquisitions, shrewd management, a substantial investment of time and money, and garnering goodwill with contacts in the oil and gas industry.

**(2) Seismic Data is Used to Map the Geology of the Earth’s Subsurface and is Used for Hydrocarbon Exploration**

11. “Seismic data” is a term that describes information used to map the geology of the Earth’s subsurface.<sup>9</sup> It is often used by the oil and gas industry to identify areas of interest to explore, develop and produce hydrocarbons.<sup>10</sup>
12. In its fully processed and finished form, marine seismic data is an illustrative map of the geological layers beneath the Earth’s surface/seabed, and is the product of creating sounds,

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<sup>4</sup> **C-125**, Canadian Society of Exploration Geophysicists, “Something no one ever did before!”: An interview with Davey Einarsson: (2008), Recorder 33:5.

<sup>5</sup> **CWS-05**, Witness Statement of Russell John Einarsson, dated August 4, 2022 (“Russell Einarsson Witness Statement”) at ¶¶ 6-7.

<sup>6</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶ 6.

<sup>7</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶¶ 4, 73 and 83.

<sup>8</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 37.

<sup>9</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 32; **CER-03**, Expert Report of “Chip” Gordon C. Gill, dated September 13, 2022 (“Gill Expert Report”) at ¶¶ 20-21; **CWS-06**, Paul Einarsson Witness Statement at ¶ 20; **C-084**, *Guideline for Ethical Use of Geophysical Data*, The Association of Professional Engineers, Geologists and Geophysicists of Alberta at Section 1 (“APEGGA Guideline”).

<sup>10</sup> **CER-03**, Gill Expert Report at ¶¶ 20, 22-23; **CWS-06**, Paul Einarsson Witness Statement at ¶ 20.

recording of reflected sounds and remote sensing technology, all involving the application of skill and judgment in enhancing that imaging.<sup>11</sup> In a simplistic form, seismic data is somewhat similar to a photograph, except that instead of recording reflected light or other radiation, it is a recording of reflected sound waves created by the seismic operator, which are recorded, and processed to eventually produce a digital product and also images.<sup>12</sup> Marine seismic data creates that illustrative map using sound reflections of the subsurface/subsea strata and rocks.<sup>13</sup>

13. Raw or unprocessed seismic data is often referred to as “field data” or “raw seismic”, and is recorded on field tapes (also known as “SEG-D” data, and sometimes initially recorded and stored in “SEG-A” and “SEG-B”).<sup>14</sup> The processed product, once it has been filtered, corrected and manipulated using skill and judgment to select and use various algorithms, then contributes to a digital product and image of the subsurface, known as “SEG-Y” or “processed” data.<sup>15</sup> Oil and gas companies prefer seismic data in SEG-Y format because it can be loaded onto powerful work stations that can enhance and manipulate the data.<sup>16</sup> Being able to manipulate the SEG-Y data allows oil and gas companies to gain much more utility from the data to explore, develop and produce hydrocarbons in an area.<sup>17</sup>

**(3) The Seismic Data Industry Focuses on Licensing Seismic Data to Oil and Gas Companies for Hydrocarbon Exploration**

14. The seismic data industry focuses on, among other things, the creation and licensing of seismic data.<sup>18</sup> Oil and gas companies obtain seismic data, often by purchasing or licensing that data from seismic operators, to provide themselves with geologic characteristics (such

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<sup>11</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 32; CER-03, Gill Expert Report at ¶¶ 20-21; CWS-06, Paul Einarsson Witness Statement at ¶ 21.

<sup>12</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 32; CER-03, Gill Expert Report at ¶ 23; CWS-06, Paul Einarsson Witness Statement at ¶ 21.

<sup>13</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 33; CWS-06, Paul Einarsson Witness Statement at ¶ 21.

<sup>14</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 35; CWS-06, Paul Einarsson Witness Statement at ¶ 23.

<sup>15</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 35; CWS-06, Paul Einarsson Witness Statement at ¶ 23.

<sup>16</sup> CWS-4, Witness Statement of Ralph Maitland, dated August 24, 2022 (“Ralph Maitland Witness Statement”) at ¶ 3; CWS-06, Paul Einarsson Witness Statement at ¶ 23.

<sup>17</sup> CWS-4, Ralph Maitland Witness Statement at ¶ 3; CWS-06, Paul Einarsson Witness Statement at ¶ 23.

<sup>18</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 44; CER-03, Gill Expert Report at ¶ 4; CWS-06, Paul Einarsson Witness Statement at ¶ 30.

as hardness, gas, liquid and other characteristics) and an image of the configuration and depth of the various geological layers beneath the Earth's surface to determine whether to explore and commence drilling activities for hydrocarbons in a particular area.<sup>19</sup> Historically, seismic data was treated as a valuable commodity because of its inherent informative value and, as a result, seismic data was kept confidential and its copying was strictly restricted.<sup>20</sup>

15. Seismic data created by seismic operators can fall into one of two categories commonly used in the seismic data industry. Seismic data that is created by a seismic operator for the exclusive use of a single oil company or a joint venture of oil companies is referred to as “exclusive” seismic data.<sup>21</sup> Seismic data that is created by a seismic operator for its own account for licensing to multiple parties is referred to as “speculative” or “non-exclusive” seismic data.<sup>22</sup> In practice, the difference between the two categories is that a seismic operator can license non-exclusive seismic data to multiple customers but cannot license exclusive seismic data to customers because it is owned by and proprietary to the oil and gas company or joint venture that commissioned the exclusive seismic data.<sup>23</sup>
16. The marine seismic data business is time and capital-intensive.<sup>24</sup> Non-exclusive seismic surveys are only licensed to a small number of customers over a long period of time at a high cost to compensate the seismic operator for the associated high upfront expenses and risks in the creation of non-exclusive seismic surveys.<sup>25</sup> Seismic operator expenses include the high purchase (or leasing) and operating costs of the ship and its crew, the planning, environmental, safety and permit process to operate the ship, the expensive source and

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<sup>19</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 46; **CWS-4**, Ralph Maitland Witness Statement at ¶ 3; **CER-03**, Gill Expert Report at ¶ 4; **CWS-06**, Paul Einarsson Witness Statement at ¶ 30.

<sup>20</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 47; **CWS-06**, Paul Einarsson Witness Statement at ¶ 30; **C-084**, APEGGA Guideline at Section 5.1 (“Copyright and Confidentiality” section).

<sup>21</sup> **CER-03**, Gill Expert Report at ¶ 29; **C-084**, APEGGA Guideline at Section 1.3, definition of “Proprietary Data”; **CWS-06**, Paul Einarsson Witness Statement at ¶ 31.

<sup>22</sup> **R-001**, ABQB Common Issues Decision at ¶ 3; **CER-03** Gill Expert Report at ¶ 30; **C-084**, APEGGA Guideline at Section 1.3, (definition of “Speculative (spec) data” and Section 2.3.1, “Non-exclusive, Multi-client, Trade or Spec Data”); **CWS-06**, Paul Einarsson Witness Statement at ¶ 31.

<sup>23</sup> **CER-03**, Gill Expert Report at ¶¶ 29-30, 37; **CWS-06**, Paul Einarsson Witness Statement at ¶ 31.

<sup>24</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 44; **CER-03** Gill Expert Report at ¶ 31; **CWS-06**, Paul Einarsson Witness Statement at ¶ 32.

<sup>25</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 44; **CER-03**, Gill Expert Report at ¶¶ 30, 37; **CWS-06**, Paul Einarsson Witness Statement at ¶ 32.

recording equipment, processing, research and development, staff, offices, equipment, marketing, legal costs, secure storage, upgrading of media and periodic reprocessing.<sup>26</sup>

**(4) GSI Was Formed Through a Series of Corporate Transactions Spearheaded by Davey in the 1990s**

17. Davey founded GSI in 1993.<sup>27</sup> As noted, prior to founding GSI, Davey had worked for GSI Delaware since the 1950s.<sup>28</sup> GSI Delaware was the beginnings of, and eventually evolved into, Texas Instruments Inc. in the 1950s.<sup>29</sup>
18. Texas Instruments Inc. continued its seismic business as a key component of its enterprise into the 1980s.<sup>30</sup> In 1989, Halliburton acquired GSI Delaware from Texas Instruments Inc., including all of the Canadian offshore seismic data that GSI Delaware had been creating since the early 1970s.<sup>31</sup> Davey began working for Halliburton after that acquisition.<sup>32</sup>
19. After his employment with Halliburton ended in 1991, Davey acquired the Canadian seismic data business that had been carried on by GSI Delaware.<sup>33</sup> In 1992, Davey established a company called Geophysical Speculative Investment Corp. (“Geophysical Speculative”).<sup>34</sup> Geophysical Speculative was based in Texas, United States.<sup>35</sup> Shortly thereafter, on March 18, 1993, Davey incorporated a Canadian corporation that eventually became GSI through a series of name changes and acquisitions.<sup>36</sup> Davey had a very strong reputation in the seismic industry given his many years in it, during which time he had

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<sup>26</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 45; CWS-06, Paul Einarsson Witness Statement at ¶ 32.

<sup>27</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 3; CWS-06, Paul Einarsson Witness Statement at ¶ 74.

<sup>28</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 7; CWS-06, Paul Einarsson Witness Statement at ¶ 74.

<sup>29</sup> CWS-03, Davey Einarsson Witness Statement at ¶¶ 8 and 13; CWS-06, Paul Einarsson Witness Statement at ¶ 74. (along with along with several subsidiaries, joint ventures or other related firms, Phoenix Ventures Ltd., Eureka Exploration Ltd. and Geophoto).

<sup>30</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 75.

<sup>31</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 13.

<sup>32</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 14.

<sup>33</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 16; C-126, Davey Einarsson, *a life of adventure*, (Calgary: Theophania Publishing, 2015) (“Life of Adventure Book”) at pp. 302-304.

<sup>34</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 16.

<sup>35</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 16.

<sup>36</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 3.

pioneered Canadian offshore work and many of the techniques for creating marine seismic data.<sup>37</sup> Davey founded GSI to capitalize on the high returns on investment for speculative seismic data in Canada, particularly due to the expansion in development of the offshore Canadian energy industry in the late 1980s and early 1990s.<sup>38</sup>

20. In 1993, Geophysical Speculative purchased the Canadian seismic data business of Halliburton Geophysical Services, Inc., Halliburton's affiliate and a predecessor to GSI (the "Geophysical Speculative Acquisition").<sup>39</sup> The intention, purpose and effect of the Geophysical Speculative Acquisition was to transfer the entire Canadian seismic data business of Halliburton Geophysical Services, Inc. to Geophysical Speculative, including physical records of field seismic data, processed seismic data, magnetic, gravity, and navigation data, all intellectual property rights therein, including copyrights and trade secrets, and contractual rights and obligations of all existing license agreements, together with all client correspondence and agreement files, relating to the acquired seismic data to Geophysical Speculative (the "HGS Interests").<sup>40</sup> The Geophysical Speculative Acquisition also transferred the lease to the facility in Calgary, Alberta, Canada, where all the HGS Interests were stored and from which it conducted its seismic data business, along with the employees who worked in that business and all the business records related to that business.<sup>41</sup>
21. Following the Geophysical Speculative Acquisition, the right, title and interest in the HGS Interests were eventually transferred to GSI through the following series of corporate transactions:
- (a) Seismic Data Purchase Agreement dated May 8, 1994 between Geophysical Speculative (as seller) and GSI (as buyer);<sup>42</sup>

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<sup>37</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 79.

<sup>38</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 29.

<sup>39</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 26.

<sup>40</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 26.

<sup>41</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 26.

<sup>42</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 30(a); C-050, Seismic Data Purchase Agreement, dated May 8, 1995.

(b) Seismic Data Purchase Agreement dated September 30, 1995 between Ardal Resources Inc. (as buyer) and GSI (as seller);<sup>43</sup> and

(c) Corporate amalgamation between Ardal Resources Inc. and GSI on January 1, 1999;<sup>44</sup>

(collectively, the “GSI Acquisitions”).

22. As GSI expanded in size, Davey involved his sons, Paul and Russell, in GSI.<sup>45</sup> As noted above, Paul became employed by GSI full-time in 1997 as GSI’s Chief Operating Officer and Russell became employed by a subsidiary of GSI full-time as Vice President in 1992, after which he worked out of an office in Houston, Texas during the entirety of his time with subsidiaries of GSI.<sup>46</sup>

**(5) GSI’s Business Expanded Significantly from the Late 1990s through the 2000s**

23. GSI’s business expanded significantly from the late 1990s through the 2000s and became very profitable due to revenues from licensing what was the largest collection of marine seismic data in Canada to oil and gas companies.<sup>47</sup>

24. In 1997, GSI began reinvesting the profits in its business to create further marine seismic data.<sup>48</sup> Between 1998 and 2000, GSI chartered several ships to create further marine seismic data to add to its non-exclusive collection.<sup>49</sup>

25. In 1999, GSI bought a seismic data processing centre in Canada called Precision Seismic Processing & Consultants Ltd. (“Precision Processing”) to better process the marine

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<sup>43</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 30(b); C-051, Seismic Data Purchase Agreement, dated September 30, 1995.

<sup>44</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 30(c); C-152, Certificate of Amalgamation, dated January 1, 1999.

<sup>45</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 83.

<sup>46</sup> CWS-05, Russell Einarsson Witness Statement at ¶ 6.

<sup>47</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 84.

<sup>48</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 17; C-126, Life of Adventure Book at p. 305; CWS-06, Paul Einarsson Witness Statement at ¶ 85.

<sup>49</sup> C-126, Life of Adventure Book at pp. 305-306; CWS-06, Paul Einarsson Witness Statement at ¶ 85.

- seismic data and to no longer be reliant on contracted third parties to do so.<sup>50</sup> GSI subsequently converted that seismic processing centre from being able to process only land seismic data to also being able to process marine seismic data.<sup>51</sup> After that conversion was complete, Precision Processing was used as a branch office of GSI and was eventually amalgamated with GSI.<sup>52</sup>
26. In 2002, GSI purchased a vessel named the GSI Admiral to create marine seismic data and no longer be reliant on charters or contractors.<sup>53</sup> The GSI Admiral was the only Canadian-flagged seismic ship with the capability to create both two dimensional and three dimensional seismic data.<sup>54</sup>
  27. In 2004, GSI purchased a second vessel, the GSI Pacific, to create two dimensional marine seismic data.<sup>55</sup>
  28. By the early 2000s, GSI's business had grown to approximately 250 employees and had become a fully integrated full-service seismic company.<sup>56</sup>
  29. Through its efforts between 1993 and 2009, GSI amassed the largest collection of Canadian marine seismic data in the world (the "Seismic Works").<sup>57</sup>
  30. The Seismic Works are unique.<sup>58</sup> Seismic data of similar vintages available from sources other than GSI tends to be of poor quality, has degraded and not been reprocessed, resulting in many datasets of similar vintages being abandoned.<sup>59</sup> Much of the Seismic Works are

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<sup>50</sup> **C-126**, Life of Adventure Book at pp. 306-307; **CWS-06**, Paul Einarsson Witness Statement at ¶ 86.

<sup>51</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 20; **CWS-06**, Paul Einarsson Witness Statement at ¶ 86.

<sup>52</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 86; **C-127**, Articles of Amalgamation Between GSI and Precision Seismic Processing & Consultants Ltd., dated December 24, 2012.

<sup>53</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 19; **CWS-06**, Paul Einarsson Witness Statement at ¶ 87; **C-126**, Life of Adventure Book at p. 306; **C-128**, GSI Specification Sheet for Marine Seismic Survey Vessel M/V GSI Admiral, Undated.

<sup>54</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 87.

<sup>55</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 88; **C-126**, Life of Adventure Book at p. 307; **C-129**, GSI Specification Sheet for Marine Seismic Survey Vessel M/V GSI Pacific, Undated.

<sup>56</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 52; **CWS-06**, Paul Einarsson Witness Statement at ¶ 89.

<sup>57</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 25; **C-047**, **C-047**, Seismic Survey Assets; **CWS-06** Paul Einarsson Witness Statement at ¶ 7.

<sup>58</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 42; **CWS-06**, Paul Einarsson Witness Statement at ¶ 90.

<sup>59</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 42; **CWS-06**, Paul Einarsson Witness Statement at ¶ 90.

also unique because they relate to locations where no other seismic data has been created, can no longer be created due to subsequent environmental “off-limits” restrictions (which moratoriums change over time) or is not otherwise available.<sup>60</sup>

31. The efforts of GSI to create, acquire and license the Seismic Works were, and still are, instrumental to the development of the offshore oil and gas industry in Canada.<sup>61</sup> Without those efforts, the offshore oil and gas industry of Canada would not be what it is today.<sup>62</sup>
32. The Seismic Works have directly led to the discovery of some of Canada’s largest offshore oil fields, including Sable Island, Bay Du Nord and the Hibernia oil field off the coast of Newfoundland and Labrador, and the Amauligak oil field in the Beaufort Sea.<sup>63</sup> In fact, GSI or GSI Delaware was the first geophysical company to create three dimensional seismic data, and in most cases, two dimensional seismic data in these areas.<sup>64</sup>
33. The importance of the work that GSI and the Einarssons have done in Canada’s offshore areas has been publicly recognized. In the early 2000s, an underwater mountain called a seamount off the coast of Newfoundland was named the “Einarsson Seamount” after the Seismic Works led to its discovery.<sup>65</sup>

**B. GSI Owned the Intellectual Property Rights in its Seismic Works and Dutifully Safeguarded Them**

34. GSI acquired the intellectual property rights in the Seismic Works that were originally created by GSI Delaware as a result of the Geophysical Speculative Acquisition and the GSI Acquisitions.<sup>66</sup> The Court of Queen’s Bench of Alberta has confirmed that those

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<sup>60</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 90; **C-130**, Order Prohibiting Certain Activities in Arctic Offshore waters, SOR/2019-280.

<sup>61</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 91.

<sup>62</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 91.

<sup>63</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 92.

<sup>64</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 92.

<sup>65</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 93; **C-126**, Life of Adventure Book at p. 308; **C-131**, Michael E. Enachescu, “Conspicuous deepwater submarine mounds in the northeastern Orphan Basin and on the Orphan Knoll, offshore Newfoundland”, *The Leading Edge*, (2004) 23(12): 1290-1294.

<sup>66</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶¶ 26 and 30; **C-050**, Seismic Data Purchase Agreement, dated May 8, 1995; **C-051**, Seismic Data Purchase Agreement, dated September 30, 1995; **C-052**, Certificate of Amalgamation, dated January 1, 1999.



intellectual property rights were conveyed in the Geophysical Speculative Acquisition and the GSI Acquisitions.<sup>67</sup>

35. Under Canadian copyright legislation, GSI owns the intellectual property rights in the Seismic Works that it directly created by virtue of those Seismic Works being created by its employees in the ordinary course of GSI's business.<sup>68</sup>
36. GSI and its predecessors understood the importance of keeping the Seismic Works confidential to protect the intellectual property rights in them, and to maintain the value of the Seismic Works.<sup>69</sup> It is well known in the seismic industry that seismic data is a valuable commodity that must be kept confidential and maintained as a trade secret.<sup>70</sup>
37. Both GSI Delaware and Halliburton kept their Canadian offshore seismic data confidential, with access to the data only permitted through licensing.<sup>71</sup> Similarly, GSI has always treated the Seismic Works as confidential since they were acquired, and continues to take a strict approach to doing so, which approach was also taken by GSI's predecessors, including a comprehensive suite of measures, such as:
  - (a) strict licensing arrangements limiting the copies and usage of the Seismic Works by the licensees;
  - (b) previews of the Seismic Works being monitored in controlled, supervised environments;

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<sup>67</sup> **C-132**, *Geophysical Service Incorporated v 612469 Alberta Limited (Calwest Printing & Reproductions)*, 2016 ABQB 356, Reasons for Judgment, June 28, 2016 (“*Calwest*”) at ¶¶ 31-32.

<sup>68</sup> **C-133**, *Canadian Copyright Act* at Section 13(3) (“Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright...”); **CWS-06**, Paul Einarsson Witness Statement at ¶ 98.

<sup>69</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 99.

<sup>70</sup> **C-084**, APEGGA Guideline at Section 5.1 (“Geophysical data is considered by industry as being confidential information used for competitive advantage in addition to being an asset which is bought and sold”); **C-134**, *re Bass*, 113 S.W.3d 735, 742 (Tex. 2003) at \*\*15 (“Having determined that seismic data are treated as trade secrets both in the industry and in the courts of several jurisdictions...”); see also, **C-135**; *Musser David Land Co v Union Pac. Res.*, 201, F.3d 561, 569 (5<sup>th</sup> Cir. 2000); **CWS-03**, Davey Einarsson Witness Statement at ¶ 47; **CWS-06**, Paul Einarsson Witness Statement at ¶ 99.

<sup>71</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 16; **CWS-06**, Paul Einarsson Witness Statement at ¶ 99.

- (c) the Seismic Works being stored in locked facilities only accessible by select GSI personnel;
  - (d) the Seismic Works never being broadcast and only being available in an electronic format, delivered in physical form to a customer;
  - (e) use of the recommended practices set out in The Association of Professional Engineers, Geologists and Geophysicists of Alberta Guideline for Ethical Use of Geophysical Data;<sup>72</sup>
  - (f) use of the Quality Inspection Standards of the International Association of Geophysical Contractors (“IAGC”); and
  - (g) the use of prescribed confidentiality agreements when licensees disclose any data or work products to potential acquirers or joint venture partners, vendors and contractors, which confidentiality agreements must be executed by such third parties prior to access the data.<sup>73</sup>
38. Throughout the course of its active business operations, GSI followed a general practice regarding the licenses it entered into with third party oil and gas companies to provide them with the Seismic Works.<sup>74</sup> Establishing a practice was important, as the high licensing fees for the Seismic Works were the lifeblood of GSI’s business.<sup>75</sup> GSI therefore endeavoured to make its license agreements as watertight as possible, including by acknowledgements that GSI maintained ownership in the Seismic Works covered by those licenses, and by making the Seismic Works licensed under the license agreements and the license rights themselves, non-transferrable such that there was no sharing between companies.<sup>76</sup>
39. GSI also went through considerable time and effort to register with the Canadian Intellectual Property Office its copyright in each of the approximately 135 seismic surveys

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<sup>72</sup> C-084, APEGGA Guideline.

<sup>73</sup> CWS-03 Davey Einarsson Witness Statement at ¶ 50; CWS-06, Paul Einarsson Witness Statement at ¶ 100.

<sup>74</sup> CWS-06 Paul Einarsson Witness Statement at ¶ 101.

<sup>75</sup> CWS-06 Paul Einarsson Witness Statement at ¶ 101.

<sup>76</sup> CWS-06 Paul Einarsson Witness Statement at ¶ 101.

that comprise the Seismic Works.<sup>77</sup> Those copyright registrations give rise to a presumption under Canadian copyright legislation that GSI owns the copyright in the Seismic Works.<sup>78</sup>

**C. Canada Implemented a Regulatory Regime Requiring Submission of Seismic Data to Provincial Agencies, While Never Indicating to GSI that its Copyright Would Be Confiscated**

**(1) GSI and GSI Delaware Obtained Permits to Create the Seismic Data and Submitted Copies of the Seismic Works to the Government of Canada Under Certain Legislation**

40. In order to conduct Canadian offshore seismic survey work, Canadian law required GSI and its predecessors to obtain regulatory permits before commencing the work.<sup>79</sup> As described below, as a condition of operating under those permits, Canadian regulations required GSI and GSI Delaware to submit routine information to Canadian regulatory bodies about the seismic surveying, acquisition and processing undertaken by GSI and GSI Delaware (the “Submission Legislation”).<sup>80</sup> GSI and GSI Delaware created final reports that complied with those regulatory requirements, which reports GSI and GSI Delaware would not otherwise have created (the “Submissions”).<sup>81</sup> The copies of the Seismic Works that were included in the Submissions were scaled-down and less detailed versions of the Seismic Works that GSI and its predecessors kept for themselves to license to customers.<sup>82</sup>

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<sup>77</sup> **C-136**, Bundle of GSI Canadian Copyright Registrations for Seismic Works.

<sup>78</sup> **C-133**, Canadian *Copyright Act* at Section 53(2) (“A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright”).

<sup>79</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 55; **R-001**, ABQB Common Issues Decision at ¶ 129.

<sup>80</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 145-148; **CWS-06**, Paul Einarsson Witness Statement at ¶ 104; **C-137**, *Territorial Oil and Gas Regulations*, SOR 53/123 at Section 30(1)(b) (“1953 Territorial O&G Regulations”); **C-138**, *Canada Oil and Gas Land Regulations*, SOR 61-253 at Sections 52 and 54(2) (“1961 COGLR Regulations”); **C-139**, *Canada Oil and Gas Land Regulations*, CRC, 1978 c 1518; **C-140**, *Newfoundland Offshore Area Petroleum Geophysical Operations Regulations*, SOR 95-334 at Section 25; **C-141**, *Nova Scotia Offshore Petroleum Geophysical Operations Regulations*, SOR 95-144 at Section 25; **C-142**, *Canada Oil and Gas Geophysical Operations Regulations*, SOR/96-117 at Section 38(1) (“1996 COGOA Regulations”).

<sup>81</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 105; **C-143**, Final Report for 8620-G5-4P (Excluding the Enclosed Seismic Works).

<sup>82</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 105.

41. After 1996,<sup>83</sup> the Submission Legislation required the following to be included in the Submissions:
- (a) a report that includes a title page, title, the type of operation conducted, the location of the operation, the duration of operations at that field location, the names of the contractors, the operator, the interest owners, the author, the date of the report, a table of contents and an introduction or abstract;
  - (b) location maps that show the boundaries of the area subject to each interest covered by the operation;
  - (c) a summary of significant dates, the number of members of the complement, the number of members of the geophysical crew, the type and number of each type of equipment used, the production data, the total distance surveyed, the downtime per day and the number of kilometres of data recorded per day;
  - (d) a summary of the weather, sea, ice, topographic conditions and their effect on the operation;
  - (e) a general description of the operation including the instrument type, the accuracy of the navigation, positioning and survey systems, the parameters for the energy source and recording system and the field configuration of the source lines and the receiver lines;
  - (f) a detailed description of the geophysical data processing method including the processing sequence and the processing parameters for seismic, magnetic, gravimetric and other geophysical surveys;
  - (g) shotpoint maps, track plots, flight lines with numbered fiducial points, gravity station maps and, for seabed surveys, location maps for core holes, grab samples and seabed photographs;

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<sup>83</sup> **R-001**, ABQB Common Issues Decision at ¶ 189 (prior to 1996 the requirements were much less stringent).

- (h) a fully processed, migrated seismic section for each seismic line recorded and, in the case of a 3-D survey, each line generated from the 3-D data set;
  - (i) a high-resolution section for each line recorded in a well-site seabed survey or a pipeline route survey;
  - (j) a series of gravity and magnetic profiles across all gravimetric and magnetic surveys for which interpretative maps have not been made; and
  - (k) shotpoint location data.<sup>84</sup>
42. The Seismic Works contained in the Submissions were detailed enough to enable an oil and gas company to explore and exploit oil and gas resources.<sup>85</sup>
43. The operating permits and program authorizations obtained by GSI and GSI Delaware do not state that the Submissions are assigned or licensed to the Canadian regulatory bodies they are submitted to.<sup>86</sup> In fact, they do not address the intellectual property rights in the Submissions at all.<sup>87</sup>
44. In the mid-2000s, the Canada Newfoundland Offshore Petroleum Board (“C-NLOPB”) began unilaterally inserting language into the program authorizations, without notice to GSI that stated that GSI consented to the disclosure of the Seismic Works under Canadian access to information legislation, but that language never referenced intellectual property rights, assignments or licenses.<sup>88</sup> GSI notified the C-NLOPB that it did not consent and inquired with the C-NLOPB about the language it unilaterally added to the program

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<sup>84</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 145-148; **C-142**, 1996 *COGOA Regulations* at Section 38(1).

<sup>85</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 105.

<sup>86</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 106.

<sup>87</sup> **R-001**, ABQB Common Issues Decision at ¶ 130; **CWS-06**, Paul Einarsson Witness Statement at ¶ 106; **C-144**, C-NLOPB Geophysical Program Authorization for Program No. 8924-G005-001P, dated January 10, 1998; **C-145**, Letter to GSI from C-NSOPB regarding Geophysical Program Authorization No. NS24-G005-2P, dated April 9, 1998; **C-146**, Letter to GSI from NEB regarding Oil and Gas Operating License No. 869, dated March 17, 1997; **C-147**, Bundle of Permits and Authorizations for GSI Surveys Conducted Prior to 1986, Various Dates.

<sup>88</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 107; **C-148**, C-NLOPB Geophysical Program Authorization for Program No. 8924-G005-003P.

authorizations, but the C-NLOPB never responded to GSI and the language at issue did not appear in the permits after GSI's inquiry.<sup>89</sup>

45. The scope and content of the Submissions expanded and changed significantly between the 1950s and 2000s, during which time the Canadian laws governing seismic exploration in the Canadian offshore were also changing.<sup>90</sup> Until 1996, the scope and content of the Submissions had been unchanged since 1961, and simply consisted of a geophysical report accompanied by paper or mylar copies of the seismic data created during the survey.<sup>91</sup> In 1996, the Submission Legislation was amended to require more detailed submissions, including more high quality Seismic Works, some of which was in digital format.<sup>92</sup> Starting in the mid-2000s, Canadian regulatory agencies began requiring GSI to submit one paper copy of the Submissions and one copy in electronic format in the form of a CD with an electronic file in TIF, PDF or JPG format.<sup>93</sup>
46. In addition to requiring the Submissions as a condition of operating the seismic creation business, the Submission Legislation also impose a perpetual commitment upon GSI to finance the costs to secure, store and retain the Seismic Works in Canada, including all iterations of the Seismic Works.<sup>94</sup>
47. Even though the Submission Legislation changed to introduce new statutes, the content of the Submissions set out in the regulations did not change. In 1982, the enabling statute, the *Canada Oil and Gas Operations Act* (“*COGOA*”) began to include a purpose statement, which provided that its purpose was to promote safety, environmental regulation, conservation of oil and gas resources, and related items in the exploration of oil and gas in

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<sup>89</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 107; **C-149**, Letter from GSI to C-NLOPB.

<sup>90</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 145-148.

<sup>91</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 145-148.

<sup>92</sup> **R-001**, ABQB Common Issues Decision at ¶ 189; **C-142**, *1996 COGOA Regulations* at Section 38(1).

<sup>93</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 108.

<sup>94</sup> See, **C-142**, *1996 COGOA Regulations* at Section 39.

the Canadian offshore.<sup>95</sup> Other relevant enabling statutes in other Canadian jurisdictions had the same purpose statement.<sup>96</sup> The purpose statement in *COGOA* states:

**2.1** The purpose of this Act is to promote, in respect of the exploration for and exploitation of oil and gas,

(a) **safety, particularly by encouraging persons exploring for and exploiting oil or gas to maintain a prudent regime for achieving safety;**

(b) the protection of the environment;

(b.1) **the safety of navigation in navigable waters;**

(c) the conservation of oil and gas resources;

(d) joint production arrangements; and

(e) economically efficient infrastructures.<sup>97</sup> [Emphasis added.]

48. In accordance with the purpose statement in *COGOA*, the stated purpose of the Submission Legislation is not to promote the exploration for and exploration of oil and gas, whether through the disclosure of the Seismic Works or otherwise. Instead, the purpose of the Submission Legislation is restricted to the items enumerated therein, such as the promotion of safety and environmental protections. As described below, the Submission Legislation in force prior to 1983 did state that the Submissions were confidential but may be “released” following the cancellation or expiry of the applicable permit “[a]t the discretion of the Minister”,<sup>98</sup> but the Government of Canada departments responsible for overseeing the Submission Legislation prior to 1983 did not release the Submissions.<sup>99</sup>

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<sup>95</sup> **C-150**, *Canadian Oil and Gas Operations Act*, RSC 1985, c. 07, at Section 2.1 (“*COGOA*”).

<sup>96</sup> See, **C-151**, *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c. 3 at Section 135.1 (“*Federal Newfoundland Implementation Act*”); **C-152**, *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c. 28 at Section 138.1 (“*Federal Nova Scotia Implementation Act*”); **C-153**, *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1990, c. C.2 at Section 131.1 (“*Provincial Newfoundland Implementation Act*”); **C-154**, *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, SNS 1987, c.3 at Section 133A (“*Provincial Nova Scotia Implementation Act*”) (there are minor variations between the statements of purpose in the various statutes that comprise the Submission Legislation, but those variations are not relevant for the purposes of this Arbitration).

<sup>97</sup> **C-150**, *COGOA* at Section 2.1.

<sup>98</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 147-148.

<sup>99</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 145 and 149.

**(2) The Government of Canada Introduced a Regulatory Regime Providing for the Submissions to Remain Privileged for a Prescribed Period of Time, at the Discretion of Canada**

49. As discussed below, the Submission Legislation was accompanied by legislative provisions that allowed for the Submissions to be “released” or “disclosed” after a prescribed period of time (the “Disclosure Legislation” and, together with the Submission Legislation, the “Regulatory Regime”). That period of time set out in the Disclosure Legislation referred to the Submissions being “confidential” or “privileged”. The length of the confidential or privilege period increased throughout the evolution of the Disclosure Legislation from one year, to two years, to five years, to more years prescribed by policies. All of the periods of time that the Submissions remained “confidential” or “privileged” under the Disclosure Legislation were shorter than the length of time copyright protection is afforded to copyright holders in Canada, which is the life of the author plus fifty years.<sup>100</sup> GSI never consented to truncating its intellectual property rights.<sup>101</sup>
50. The Disclosure Legislation has been in place since the 1950s. Throughout the history of the Disclosure Legislation, the disclosure of the Submissions from GSI and its predecessors have been permissive and discretionary rather than obligatory.<sup>102</sup> However, contrary to what Canada submits in its Statement of Defence,<sup>103</sup> the key detail of the Disclosure Legislation, the length of time that the Submissions remain privileged, and the policies regarding the exercise of the discretion to release or disclose the Submissions by the applicable Government regulatory bodies, changed considerably from the 1950s to the present day.<sup>104</sup>
51. In the 1950s and 1960s, the Submission Legislation and the Disclosure Legislation were set out in the same statute.<sup>105</sup>

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<sup>100</sup> C-133, Canadian *Copyright Act* at Section 6.

<sup>101</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 110.

<sup>102</sup> R-001, ABQB Common Issues Decision at ¶ 163.

<sup>103</sup> Statement of Defence of Government of Canada, dated June 9, 2022 (“Canada Statement of Defence”) at ¶ 8.

<sup>104</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 111.

<sup>105</sup> R-001, ABQB Common Issues Decision at ¶ 145.



52. The applicable Canadian regulations from 1953 provided that Submissions would be kept confidential and not be released until one year after the termination of the last license or permit renewal:

71. Information furnished by a licensee, permittee or lessee under these regulations:

...

(b) respecting any other operation under a licence or permit shall be kept confidential and shall not be released until **one year after** the termination of the last renewal of the licence or permit . . .<sup>106</sup> [Emphasis added.]

53. The applicable Canadian regulations that came into force in 1961 were similar to those in force between 1953 and 1960, but provided that the Submissions would be kept confidential and not be released until two years after the cancellation, surrender or expiry of the permit:

107(1) Except as provided in this section, the information furnished under these Regulations shall not be released.

...

(5) Information submitted by a permittee or lessee concerning a surface geological or photogeological survey and factual information obtained from a magnetometer, gravity, seismic or other survey may, in the discretion of the Minister, be released

(a) **two years after** the cancellation, surrender or expiry of (i) the permit of the area on which the work was done, or (ii) all oil and gas leases granted pursuant to section 55 within the permit area on which the work was done whichever is later; or

(b) **two years after** the cancellation, surrender or expiry of the oil and gas lease of the area on which the work was done.<sup>107</sup> [Emphasis added.]

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<sup>106</sup> R-001, ABQB Common Issues Decision at ¶ 145; C-137, 1953 Territorial O&G Regulations at Section 71.

<sup>107</sup> R-001, ABQB Common Issues Decision at ¶ 147; C-138, 1961 COGLR Regulations at Section 107.

**(3) The Regulatory Regime Evolved Significantly Between 1974 and 2010, During Which Time Canada told the Einarssons and GSI that their Intellectual Property Rights in the Seismic Works Would be Protected**

54. After the slight revision to the length of the confidentiality period in 1961, the Regulatory Regime remained the same until the 1970s. At that time, and following on the heels of the 1973 oil crisis, the Regulatory Regime and its impact on the Claimants descended into a decades-long state of chaos and confusion.
55. As discussed below, legislative and policy changes between 1974 and 2010 separated the Submission Legislation and the Disclosure Legislation into different statutes. Those legislative and policy changes also increased the length of time before the Submissions could be disclosed, appointed various regulatory agencies to administer the Regulatory Regime, including the Canada Oil and Gas Land Administrator (“COGLA”), the National Energy Board (the “NEB”), the C-NLOPB and the Canada Nova Scotia Offshore Petroleum Board (the “C-NSOPB”) (collectively, the “Boards”), and divided jurisdiction over the Canadian offshore between Canada and certain Canadian provinces.
56. Along the way, the Boards implemented various retroactive policy changes to the Regulatory Regime, such as revising the length of time the Submissions remained privileged and threatening to disclose the Seismic Works in SEG-Y format and to disclose the field data.<sup>108</sup> With some exceptions, those policies and the status of their implementation were unknown to the Claimants until the proceedings resulting in the Alberta Decisions (defined below).<sup>109</sup> The policy changes were also implemented to Submissions retroactively.<sup>110</sup>
57. Throughout all of the changes that took place in that decades-long period, at various times Canada, Newfoundland, Nova Scotia, Natural Resources Canada (“NRC”, which is a department of the Federal Government of Canada) and the Boards led Davey, Paul and/or

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<sup>108</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 112.

<sup>109</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 112.

<sup>110</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 112.

GSI to believe, either through explicit representations or conduct, that the intellectual property rights in the Seismic Works would be protected. That made sense to Davey, Paul and GSI, as the Disclosure Legislation has never employed the terms “copy”, “reproduce”, “copyright” or “publish”, has not referred to Canadian copyright legislation, has not amended Canadian copyright legislation and has not been enacted notwithstanding Canadian copyright legislation.<sup>111</sup> The lack of connection of the Disclosure Legislation to Canadian copyright legislation indicated to Davey, Paul and GSI that copying or reproduction of the Submissions was not intended.<sup>112</sup>

58. The key events that took place between 1974 and 2010 are detailed in the chronology below:

- (a) **September 1974** - the Province of Newfoundland and Labrador represented to GSI Delaware and Davey that the Submissions could not be released unless GSI Delaware consented,<sup>113</sup> pursuant to the following term of a permit that GSI Delaware had obtained to create Seismic Works off the coast of Newfoundland and Labrador:

[3.] The Interim Permittee [GSI Delaware] shall, within a reasonable time after completion of operations, submit a full report to the Director of Energy Resources on the results of all exploratory work carried out under the authority of this Interim Permit and the Province shall keep all such data confidential until such release date as may be mutually agreed upon.<sup>114</sup> [Emphasis added.]

During that time, and continuously after the creation of the C-NLOPB, Davey, and later GSI, understood that Newfoundland and Canada coordinated their practices with respect to the Regulatory Regime.<sup>115</sup>

- (b) **November 1974** - Nova Scotia represented to GSI Delaware and Davey that non-exclusive seismic data did not need to be included in the Submissions and that only

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<sup>111</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 61(c); CWS-06, Paul Einarsson Witness Statement at ¶ 115(a).

<sup>112</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 61(c); CWS-06, Paul Einarsson Witness Statement at ¶ 115(a).

<sup>113</sup> CWS-03, Davey Witness Statement at ¶ 61(f).

<sup>114</sup> C-155, Letter from Government of Newfoundland and Labrador Department of Mines and Energy, dated November 18, 1974 at enclosed Interim Permit, Section 3 (there was no legislation or regulation in Newfoundland and Labrador that set out a confidential or privilege period at this time).

<sup>115</sup> CWS-03, Davey Witness Statement at ¶ 61(f); CWS-06, Paul Einarsson Witness Statement at ¶ 115(a).

exclusive seismic data needed to be included in the Submissions.<sup>116</sup> During that time, and continuously after the creation of the C-NSOPB, Davey and later GSI understood that Nova Scotia and Canada coordinated their practices with respect to the Regulatory Regime.<sup>117</sup>

- (c) **1976** – in response to an oil crisis and in an effort to make Canada more self sufficient in its energy consumption, the Minister of Energy, Mines and Resources of the Government of Canada introduced a paper in the Canadian Parliament that outlined an energy strategy for Canada to become self reliant.<sup>118</sup> One of the strategies proposed in that paper was the earlier release of geological information to facilitate efficient exploration activity.<sup>119</sup> GSI did not exist at that time. As described immediately below, subsequent Bills or Acts introduced by the Government of Canada trying to alter the length of the privilege period in the Disclosure Legislation did not become law or lengthened the privilege period.
- (d) **1977** – the Liberal Party, which was the party governing Canada at the time, introduced Bill C-20 in Parliament, which Bill stated that the Submissions would not be “published or released” for *five years* after their submission:

49. (1) Subject to subsection (2), information or documentation furnished pursuant to this Act or the *Oil and Gas Production and Conservation Act* and any regulations made pursuant to those Acts or either of them shall not be published or released by the persons receiving it without the consent in writing of the holder of the interest to which the information or documentation relates except for the purposes of the administration or enforcement of those Acts or either of them or for the purposes of legal proceedings relating to such administration or enforcement, and in accordance with any applicable regulations made pursuant to those Acts or either of them.

(2) Information or documentation furnished in respect of the following matters may be published or released, in accordance with any applicable regulations under this Act, on the expiration of the following periods, namely, . . .

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<sup>116</sup> **CWS-03**, Davey Witness Statement at ¶ 61(g); **C-156**, Letter from Nova Scotia Department of Mines to Geophysical Service Incorporated enclosing Permit No. 5, dated November 28, 1974.

<sup>117</sup> **CWS-03**, Davey Witness Statement at ¶ 61(g); **CWS-06**, Paul Einarsson Witness Statement at ¶ 115(b).

<sup>118</sup> **R-001**, ABQB Common Issues Decision at ¶ 150.

<sup>119</sup> **R-001**, ABQB Common Issues Decision at ¶ 150.

...

(d) in respect of any geological or geophysical work performed on or in relation to Canada lands, on the expiration of 5 years following the completion of the work or on the reversion of the lands to Crown reserve lands, whichever first occurs...<sup>120</sup> [Emphasis added.]

The term “published” has a specific meaning in Canadian copyright law.<sup>121</sup> The term “published” has never been used in the Disclosure Legislation, except in Bill C-20, which was never promulgated and did not become law in Canada.<sup>122</sup> That indicated to Davey that Canada would not be publishing the Submissions by making them available to the public.<sup>123</sup>

- (e) **1979** – the Progressive Conservative Party defeated the Liberal Party to become the new Party leading the Government of Canada.<sup>124</sup>
- (f) **1980** – the Liberal Party defeated the Progressive Conservative Party to become the new Party leading the Government of Canada.<sup>125</sup>
- (g) **1980** – Bill C-48, *An Act to regulate oil and gas interest in Canada lands and to amend the Oil and Gas Production and Conservation Act*, was tabled in Canadian Parliament.<sup>126</sup> Bill C-48 included a specific section addressing the “publication” of information furnished under the applicable Submission Legislation, whereby the Governor in Council may make regulations for publication of the Submissions and for any fees payable in connection therewith.<sup>127</sup> Bill C-48 later became *COGA (1982)* (defined immediately below), but that section on publication of the

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<sup>120</sup> **R-001**, ABQB Common Issues Decision at ¶ 151.

<sup>121</sup> **C-133**, Canadian *Copyright Act* at Section 2.2(1), definition of “publication” (“For the purposes of this Act, publication means (a) in relation to works, (i) making copies of a work available to the public, (ii) the construction of an architectural work, and (iii) the incorporation of an artistic work into an architectural work, and (b) in relation to sound recordings, making copies of a sound recording available to the public...”).

<sup>122</sup> **R-001**, ABQB Common Issues Decision at ¶ 151.

<sup>123</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(i).

<sup>124</sup> **C-157**, Canada Elections Database: 1979 Federal Election

<sup>125</sup> **C-158**, Canada Elections Database: 1980 Federal Election

<sup>126</sup> **C-159**, An Act to regulate oil and gas interests in Canada lands and to amend the Oil and Gas Production and Conservation Act, Bill C-48, First Reading, December 9, 1980 (Canada, 32d Parl., 1<sup>st</sup> sess.) (“Bill C-48”).

<sup>127</sup> **C-159**, Bill C-48 at ¶ Section 54(1)(n) (“54. (1) The Governor in Council may make regulations for the purposes of this Act, including regulations... (n) providing for the publication of any information or documentation submitted under this Act and for any fees payable in connection therewith”).

Submissions was not included in *COGA (1982)* when it became law,<sup>128</sup> indicating to Davey that Canada acknowledged that if access to such information was to be provided, that access would need to be governed by a specific process that could ascribe value to the Submissions and the Seismic Works therein, which process was never set out nor implemented.<sup>129</sup>

- (h) **March 1982** –the *Canada Oil and Gas Act* (“*COGA (1982)*”) came into force.<sup>130</sup> *COGA (1982)* repealed part of the Submission Legislation, although the technical requirements for Submissions were kept intact to the extent that they were not inconsistent with *COGA (1982)*.<sup>131</sup> *COGA (1982)* further provided that the Submissions were privileged and could not be “[d]isclosed” until the expiration of *five years* following completion of the seismic survey at issue:

50 (1) Information or documentation furnished under this Act or the *Oil and Gas Production and Conservation Act* is privileged and shall not be disclosed without the consent in writing of the party who provided it except for the purposes of the administration or enforcement of either Act or for the purposes of legal proceedings relating to such administration or enforcement.

...

(3) Notwithstanding subsection (1), information or documentation furnished in respect of the following matters may be disclosed, in the manner prescribed as follows:

...

(d) in respect of geological or geophysical work performed on or in relation to Canada lands, on the expiration of five years following the completion of the work or on the reversion of the lands to Crown reserve lands, whichever first occurs.<sup>132</sup> [Emphasis added.]

Around the time of *COGA (1982)*, the COGLA was created to administer the Regulatory Regime, acting as the regulatory agency for offshore and frontier

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<sup>128</sup> **R-001**, ABQB Common Issues Decision at ¶ 152; **C-160**, *Canada Oil and Gas Act*, SC 1980-81-82, c 81 (“*COGA (1982)*”) (where Section 54(1)(n) is no longer included in the legislation).

<sup>129</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(j).

<sup>130</sup> **R-001**, ABQB Common Issues Decision at ¶ 152.

<sup>131</sup> **R-001**, ABQB Common Issues Decision at ¶ 152.

<sup>132</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 153-154; **C-160**, *COGA (1982)* at Section 50.

lands.<sup>133</sup> The COGLA replaced the general ministerial oversight and discretion that had existed under the Regulatory Regime previously.<sup>134</sup>

- (i) **November 1982** - the COGLA issued Guidelines for Approvals and Reports, which Guidelines did not reference any privilege period, confidentiality matters or copyright, indicating to Davey that the Seismic Works in the Submissions would not be disclosed or copied.<sup>135</sup>
- (j) **January 1983** - the COGLA issued revised Guidelines for Approvals and Reports, which did not reference any privilege period, confidentiality matters or copyright, indicating to Davey that the Seismic Works in the Submissions would not be disclosed or copied.<sup>136</sup>
- (k) **June 1983** - the COGLA issued correspondence to GSI Delaware representing that Canada was collecting seismic reflection data on Canadian lands to create a database accessible only to designated federal government geophysicists exclusively with no access by industry with respect to confidential data, indicating to Davey that the Submissions would not be disclosed or copied for third parties in industry.<sup>137</sup>
- (l) **1984** – the Progressive Conservative Party defeated the Liberal Party to become the new Party leading the Government of Canada.<sup>138</sup>
- (m) **1984** – Canada submitted a reference to the Supreme Court of Canada to settle a dispute over, among other things, whether Canada or the Province of Newfoundland had “[l]egislative jurisdiction to make laws in relation to the exploration and exploitation of” mineral and natural resources in the seabed and subsoil of the continental shelf in the areas of offshore Newfoundland” (the

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<sup>133</sup> **R-001**, ABQB Common Issues Decision at ¶ 163.

<sup>134</sup> **R-001**, ABQB Common Issues Decision at ¶ 163.

<sup>135</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(l).

<sup>136</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(m).

<sup>137</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(n); **C-161**, Letter from Canada Oil and Gas Lands Administration to Geophysical Service Inc., dated June 22, 1985.

<sup>138</sup> **C-162**, Canada Elections Database: 1984 Federal Election.

“Newfoundland Continental Shelf Reference”).<sup>139</sup> The Province of Nova Scotia made submissions in the Newfoundland Continental Shelf Reference as an intervener.<sup>140</sup> The Supreme Court of Canada concluded that Canada had jurisdiction in relation to the right to explore and exploit in the continental shelf off Newfoundland.<sup>141</sup>

- (n) **1986** – world oil prices collapsed.<sup>142</sup>
- (o) **June 1986** – Canada prepared and issued the Briefing Book – Canada Petroleum Resources Act, which specifically referenced amendments to section 50 of *COGA (1982)*, indicating that Canada believed that confidentiality protection should increase as the value of seismic data increases and yet simultaneously indicating that it had the ability to release seismic data.<sup>143</sup> However, there was no obligation on the Crown to release information or documentation upon expiration of the relevant periods of privilege as that was a matter of discretion, indicating to Davey that the Submissions may not be released without due process and consideration.<sup>144</sup> As a result of the Briefing Book, Davey became concerned by the Canadian Government’s change in policy from years of non-disclosure.<sup>145</sup>
- (p) **October-November 1986** – between October 7, 1986 and November 18, 1986, John Clink, a former employee of GSI Delaware (but not GSI), affirmed to Marcel Masse, Minister of Energy, Mines & Resources, and to the Standing Senate Committee on Energy and Natural Resources, that there was reliance upon the

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<sup>139</sup> **C-163**, *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86, Judgment, March 8, 1984 at p. 89 (“*Newfoundland Reference*”).

<sup>140</sup> **C-163**, *Newfoundland Reference* at p. 88.

<sup>141</sup> **C-163**, *Newfoundland Reference* at p. 129.

<sup>142</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 113.

<sup>143</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(p); **C-164**, Briefing Book, Canada Petroleum Resources Act, June 1986.

<sup>144</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(p).

<sup>145</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(p).



representations of Canada regarding the confidentiality and copying of non-exclusive seismic data, stating, *inter alia*:

- (i) Canada's policies with respect to non-exclusive seismic data have changed over time;
  - (ii) no seismic data was provided to Canada in earlier times;
  - (iii) after a period of time, Canada requested black-line copies of seismic data for internal use only;
  - (iv) after a further period of time, Canada allowed third parties to look at seismic data older than 10 years old, but only by attendance at Canada's offices and in paper form, without copying;
  - (v) non-exclusive seismic data was never released for viewing;
  - (vi) in or around the late 1970s, Canada began requesting reproducible mylar sections rather than hard copy prints and unilaterally reduced the confidentiality period from 10 years to five years with respect to exclusive seismic data (and not non-exclusive data);
  - (vii) the Director of the COGLA orally represented to GSI Delaware that Canada does not release non-exclusive seismic data; and
  - (viii) the Director of COGLA represented to GSI Delaware that *COGA (1982)* required, with no discretion to be exercised, the disclosure of non-exclusive seismic data, which was not true.<sup>146</sup>
- (q) **1987** – the Government of Canada repealed *COGA (1982)* and replaced it with the *Canada Petroleum Resources Act* (the “*CPRA*”).<sup>147</sup> The *CPRA* applies to Canadian

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<sup>146</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(q); **C-165**, Letter from John Clink to Marcel Masse, dated October 7, 1986; **C-166**, Background Information for the Senate Committee on Energy, November 18, 1986.

<sup>147</sup> **R-001**, ABQB Common Issues Decision at ¶ 164; **C-167**, *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp) (“*CPRA*”).

offshore areas other than those that fall under the jurisdiction of the Province of Newfoundland and Labrador and the Province of Nova Scotia, which are the areas off the coastlines of those respective Canadian Provinces.<sup>148</sup> Like *COGA (1982)*, the *CPRA* provided that that the Submissions were privileged and could not be “[d]isclosed” until the expiration of five years following completion of the seismic survey at issue:

(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*, other than Part 0.1 of that Act, or any regulation made under either Act, or for the purposes of Part II.1 of the *National Energy Board Act*, whether or not the information or documentation is required to be provided.

...

(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,

(i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in any other case, after the expiration of five years following the date of completion of the work...<sup>149</sup> [Emphasis added.]

- (r) **June 1987 – February 1988** – Between June 1987 and February 1988, Canada engaged in a dialogue with Davey and Mr. Clink, in his capacity as President and Manager of Arctic Marine Exploration of GSI Delaware and the Canadian Association of Geophysical Contractors (“CAGC”).<sup>150</sup> The Canadian

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<sup>148</sup> **C-167**, *CPRA* Sections 2 (definition of “frontier lands”) and 5.

<sup>149</sup> **R-001**, ABQB Common Issues Decision at ¶ 138; **C-167**, *CPRA* at Section 101(7).

<sup>150</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(s); **C-168**, Letter from Minister of Energy, Mines to Davey T.D. Einarsson, dated June 1, 1987; **C-169**, Government of Canada Memorandum, dated July 31, 1987 re Disclosure of Geophysical Data (“Canada Disclosure Memorandum”); **C-170**, Disclosure of Geophysical Data: Discussion Paper

representatives included Marcel Masse, the Director General of the Resource Evaluation Branch, M.E. Taschereau (Administrator), the CPA Negotiating Subcommittee with Graham Campbell of COGLA, and others.<sup>151</sup> During that dialogue, the CAGC affirmed to Canada its reliance on the pattern of Canada's conduct to maintain confidentiality of seismic data.<sup>152</sup> Canada represented that:

- (i) the CPRA provides for disclosure of seismic data within the discretion of the Minister or his designate, and that such discretion encompasses the type of data to be disclosed, the form of disclosure and the ultimate schedule of disclosure;
- (ii) Canada would engage with its counterparts in Newfoundland and Nova Scotia to delay disclosure of the Seismic Works; and
- (iii) the best solution to the matters in dialogue between the CAGC and Canada was to amend the CPRA to differentiate between confidentiality periods for each class of non-exclusive and exclusive seismic data and the types thereof that could be disclosed.<sup>153</sup>

Ultimately, COGLA represented to Mr. Clink that it agreed to extend the confidentiality period and would do so by way of a Ministerial Directive.<sup>154</sup> Davey, who was privy to the correspondence to Mr. Clink and GSI Delaware were receiving from COGLA, relied on that representation that a Ministerial Directive would be issued, since it could be challenged through appropriate judicial

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on Modification to the Five Year Confidentiality Period, Draft II, Undated, at Appendix A, Correspondence and Background Information Concerning Disclosure of Non-Exclusive Geophysical Data ("Discussion Paper"); **C-171**, Letter from Canada Oil and Gas Lands Administration to John Clink, dated February 16, 1988 ("Ministerial Directive Letter").

<sup>151</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(s); **C-170**, Discussion Paper at Appendix A.

<sup>152</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(s); **C-169**, Canada Disclosure Memorandum; **C-170**, Discussion Paper; **C-171**, Ministerial Directive Letter.

<sup>153</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(s); **C-171**, Ministerial Directive Letter ("The [Ministerial] directive would stipulate that the appropriate Minister or Board would not disclose non-exclusive data following the appropriate confidentiality period under the legislation for a further ten year period").

<sup>154</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(s); **C-171**, Ministerial Directive Letter.

processes, if that was necessary.<sup>155</sup> However, no such Ministerial Directive was ever issued.<sup>156</sup>

- (s) **1988** – despite the outcome of the Newfoundland Continental Shelf Reference, Canada and the Province of Newfoundland and Labrador enacted mirror legislation governing offshore petroleum resource management in the Canadian waters in offshore Newfoundland and Labrador (the “Newfoundland Offshore Area”).<sup>157</sup> That legislation incorporated the disclosure provisions from the *CPRA* and appointed the C-NLOPB to administer offshore petroleum resource management in the Newfoundland Offshore Area.<sup>158</sup> The C-NLOPB was created by Canada to be a separate a separate legal entity from Canada that still constitutes part of the Canadian government.<sup>159</sup> When the C-NLOPB was formed, the Submissions related to the Newfoundland Offshore Area that were previously submitted by GSI Delaware were then copied from the COGLA for the C-NLOPB, unbeknownst to GSI at that time.<sup>160</sup>
- (t) **1988** – Canada and the Province of Nova Scotia enacted joint legislation governing offshore petroleum resource management in the Canadian waters in offshore Nova Scotia (the “Nova Scotia Offshore Area”), ending a lengthy jurisdictional dispute between the parties that dated back to 1970.<sup>161</sup> That legislation incorporated the disclosure provisions from the *CPRA* and appointed the C-NSOPB to administer offshore petroleum resource management in the Canadian waters in the Nova Scotia

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<sup>155</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(s).

<sup>156</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(s).

<sup>157</sup> **C-151**, *Federal Newfoundland Implementation Act* at preamble, Section 2 (definition of “offshore area”) and Section 8(1); **C-153**, *Provincial Newfoundland Implementation Act* at preamble, Section 2 (definition of “offshore area”) and Section 8(1).

<sup>158</sup> **C-151**, *Federal Newfoundland Implementation Act* at Sections 9(1) and 17(1); **C-153**, *Provincial Newfoundland Implementation Act* at Sections 9(1) and 17(1) (the “C-NLOPB” was originally known as the “C-NOPB” until the Province of Newfoundland changed its name to the Province of Newfoundland and Labrador in 2011).

<sup>159</sup> **C-151**, *Federal Newfoundland Implementation Act* at Section 9(3); **C-153**, *Provincial Newfoundland Implementation Act* at Section 9(3).

<sup>160</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 113.

<sup>161</sup> **C-152**, *Federal Nova Scotia Implementation Act* at preamble, Section 2 (definition of “offshore area”) and Section 8(1); **C-154**, *Provincial Nova Scotia Implementation Act* at preamble, Section 2 (definition of “offshore area”) and Section 8(1); **C-172**, Rowland J. Harrison, “Jurisdiction over the Canadian Offshore: A Sea of Confusion” (1979), 17:3 *Osgoode Hall Law Journal*.

Offshore Area.<sup>162</sup> The C-NLOPB was created by Canada as a separate legal entity from Canada that still constitutes part of the Canadian government.<sup>163</sup> When the C-NSOPB was formed, the Submissions related to the Nova Scotia Offshore Area that were previously submitted by GSI Delaware were then copied from the COGLA for the C-NSOPB, unbeknownst to GSI at that time.<sup>164</sup>

- (u) **1990** – Lynx Information Systems Ltd. (“Lynx”) opens an office in Calgary, Alberta, Canada and begins offering to vectorize seismic data for a fee to oil and gas companies or other interested parties.<sup>165</sup> Vectorizing allows paper or mylar versions of seismic data to be reverse engineered with digital scanning turning it into SEG-Y format, which, as noted, is the format oil and gas companies prefer because it can be manipulated electronically on powerful workstations to explore for hydrocarbons.<sup>166</sup>
- (v) **~1990** – the Boards and other Canadian regulatory bodies began representing, at their offices where the Seismic Works contained in the Submissions are held, that intellectual property laws of Canada must be respected, including copyright, when viewing or accessing the Submissions.<sup>167</sup> For example, the division of the NEB where parties copy the Submissions, the Frontier Information Office (“FIO”), has had a prominent notice that states the following:

The Frontier Information Office library contains material that is subject to copyright, owned by those providing the material. The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Copying may be an infringement of copyright law. The Frontier Information Office is not responsible for, nor does it authorize, either implicitly or explicitly, any infringement of this law.<sup>168</sup> [Emphasis added.]

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<sup>162</sup> **C-152**, *Federal Nova Scotia Implementation Act* at Sections 9(1) and 17(1); **C-154**, *Provincial Nova Scotia Implementation Act* at Sections 9(1) and 17(1).

<sup>163</sup> **C-152**, *Federal Nova Scotia Implementation Act* at Section 9(3); **C-154**, *Provincial Nova Scotia Implementation Act* at Section 9(3).

<sup>164</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 113.

<sup>165</sup> **CWS-04**, Ralph Maitland Witness Statement at ¶¶ 8 and 9.

<sup>166</sup> **CWS-04**, Ralph Maitland Witness Statement at ¶¶ 3 and 9.

<sup>167</sup> **CWS-03**, Davey Witness Statement at ¶ 61(d); **CWS-06**, Paul Einarsson Witness Statement at ¶ 114(b); **C-173**, Frontier Information Office Copyright Notice.

<sup>168</sup> **C-173**, Frontier Information Office Copyright Notice.

- (w) **~1990** – the Boards, FIO and other Canadian regulatory bodies began using liability forms that were executed by third parties who accessed seismic data, which forms stated that intellectual property laws of Canada, including copyright, would be complied with by those third parties:

The Frontier Information Office library contains material that is subject to copyright, owned by those providing the material. The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Copying may be an infringement of the copyright law. The Frontier Information Office is not responsible for, nor does it authorize, either implicitly or explicitly, any infringement of this law.

...

I am aware that the information and data contained in these materials may be protected under the intellectual property laws of Canada and may only be used in a manner consistent with those laws. I hereby certify that I am authorized to incur this liability on behalf of [borrower name].<sup>169</sup> [Emphasis added.]

- (x) **October 1993** – Canada, on behalf of the Geological Survey of Canada, entered into a license agreement with GSI, the terms of which affirmed that at least certain of the Seismic Works are proprietary to GSI, protected by copyright and as a trade secret, and that they would not be disclosed to third parties.<sup>170</sup> That license included the following terms:

[1.2] ALL DATA DELIVERED OR CONVEYED HEREUNDER ARE PROPRIETARY TO GSI AND GSI MAINTAINS TRADE SECRET AND COPYRIGHT INTEREST IN SAID DATA. COMPANY [Canada] ACKNOWLEDGES GSI MAINTAINS TITLE TO THE DATA AND ALL RIGHTS OF OWNERSHIP IN AND TO THE DATA AND MAY AT ANY TIME LICENSE THE SAME DATA TO OTHER THIRD PARTIES.

...

[3.1] COMPANY [Canada] may use the Data delivered hereunder on a non-exclusive and non-transferrable basis. COMPANY [Canada] shall not have the right to disclose the Data or any maps, analysis, interpretations or information related thereto or derived therefrom to an other party (except as

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<sup>169</sup> **C-174**, Bundle of NEB Liability Agreements Regarding Copying and Borrowing of Submissions.

<sup>170</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(w); **C-175**, General License Agreement #GSC0893 Between GSI and Her Majesty the Queen in the Right of Canada, dated October 5, 1993 (“Canada License”).

hereinafter provided), without the expressed, prior written consent of GSI.<sup>171</sup>  
 [Emphasis added.]

- (y) **1994** – The regulatory functions of the COGLA, which had been administering the Regulatory Regime in Canadian offshore areas (other than the Offshore Newfoundland Area and the Offshore Nova Scotia Area after 1987 and 1988, respectively) since the early 1980s, were transferred to the National Energy Board (“NEB”), an administrative tribunal established under Canadian legislation.<sup>172</sup> The NEB was an independent regulator, as a court of record, created by the Government of Canada.<sup>173</sup>
- (z) **2004** – the Claimants became aware of a proposed policy of the C-NSOPB regarding the disclosure of digital formats of the Submissions.<sup>174</sup>
- (aa) **2006** – the C-NSOPB published a notice regarding its plan to move forward with disclosing the Submissions in digital image formats and in SEG-Y format to educational institutions, following the expiry of the privilege period set out in the applicable Disclosure Legislation and the C-NSOPB policies.<sup>175</sup> The C-NSOPB subsequently indicated that it would proceed to implement that policy.<sup>176</sup>
- (bb) **2007** – the C-NSPOB, the IAGC and the CAGC engaged in negotiations regarding the C-NSOPB’s proposal to disclose the Submissions in SEG-Y format, during which time C-NSOPB’s position on release of digital formats of non-exclusive seismic data evolved to a more aggressive position.<sup>177</sup> The C-NSOPB also began demanding/requiring GSI to retroactively submit SEG-Y versions of the

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<sup>171</sup> **C-175**, Canada License at Sections 1.2 and 3.1.

<sup>172</sup> **C-176**, *Act to amend the Canada Oil and Gas Operations Act, the Canada Petroleum Resources Act and the National Energy Board Act and to make consequential amendments to other acts*, CSC 1994, c 10 at Section 18; **C-177**, *National Energy Board Act*, RSC 1985, c N-7 at Section 3(1) (“*NEB Act*”).

<sup>173</sup> **C-177**, *NEB Act* at Sections 3 and 11(1) (the NEB became the Canada Energy Regulator on August 28, 2019).

<sup>174</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 134.

<sup>175</sup> **CER-03**, Gill Expert Report at ¶ 71; **C-178**, Letter from C-NSOPB to Stakeholders, dated February 23, 2006.

<sup>176</sup> **C-179**, C-NSOPB News Release regarding CNSOPB Reaches Digital Data Disclosure Decision, dated May 16, 2006.

<sup>177</sup> **CER-03**, Gill Expert Report at ¶ 72.

Submissions it had made in prior years and later announced that it would disclose the SEG-Y versions of the Submissions on the Internet.<sup>178</sup>

- (cc) **2009** – after extensive lobbying by the IAGC, CAGC and GSI, the C-NSOPB agreed to defer the implementation of its policy regarding the disclosure of digital formats of non-exclusive Submissions.<sup>179</sup> The C-NSOPB further advised GSI that none of the Seismic Works were uploaded to the platform by which the Submissions could be made available in electronic format (the Shared Data Repository).<sup>180</sup>
- (dd) **2009** – the C-NLOPB proposed revising its policy on the disclosure of the Submissions to disclose them in SEG-Y format following the expiration of a 15-year privilege period.<sup>181</sup> Shortly thereafter, the C-NLOPB engaged in negotiations with NRC regarding the disclosure of the Submissions in SEG-Y format and requested retroactive copies of the Submission in SEG-Y format,<sup>182</sup> recommended the disclosure of digital field data,<sup>183</sup> and requested retroactive copies of the Seismic Works in SEG-Y format from GSI.<sup>184</sup> GSI refused the C-NLOPB's request and eventually commenced a lawsuit against the C-NLOPB alleging that, among other things, the C-NLOPB did not have the ability to disclose the Submissions in SEG-Y format.<sup>185</sup> GSI came to learn from representations made by an official of the C-NLOPB during the proceedings that culminated in the Alberta Decisions that the

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<sup>178</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 137; **C-180**, Letter from Paul Einarsson to C-NSOPB, dated May 24, 2007; **C-181**, C-NSOPB Press Release, dated October 2, 2007.

<sup>179</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 135; **C-182**, Letter from C-NSOPB to Anthony J. Jordan, dated January 6, 2009.

<sup>180</sup> **C-182**, Letter from C-NSOPB to Anthony J. Jordan, dated January 6, 2009.

<sup>181</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 137; **C-183**, CNLOPB Memorandum Regarding Seismic Data Disclosure Policy – Additional Considerations, dated February 3, 2009.

<sup>182</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 137; **C-184**, Email from Frank Smyth to Pierre Tobin and Eric Landry, dated April 20, 2010; **C-185**, Email from Nicholle Carter to Frank Smyth regarding Data Release – Type and Format, dated January 25, 2011.

<sup>183</sup> **C-186**, Letter from C-NLOPB to Minister of Natural Resources of Newfoundland & Labrador and Minister of Natural Resources Canada, dated June 18, 2010.

<sup>184</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 137.

<sup>185</sup> **R-004**, *Geophysical Service Incorporated v. Canada-Newfoundland and Labrador Offshore Petroleum Board and Her Majesty in Right of Newfoundland and Labrador* (Case No. 2011 01G 5430), Supreme Court of Newfoundland and Labrador Trial Division (General), Statement of Claim, 10 August 2011.



C-NLOPB ultimately did not disclose the submissions in SEG-Y format.<sup>186</sup> GSI has not received any further regarding disclosures made by the Boards to third parties that were made after 2012.<sup>187</sup>

- (ee) **2010** – NRC (a department of the Federal Government of Canada) issued a letter to Paul Einarsson and GSI advising that, among other things, NRC would not provide reproductions or digital versions of any third party seismic data to any individuals outside of NRC, would not present or publish images of seismic data owned by others without prior written permission of the owner and would not copy the Submissions into digital SEG-Y versions without prior written consent of GSI until Justice Canada (a department of the Federal Government of Canada) provided a legal opinion to the NRC on the intellectual property issues associated with doing so.<sup>188</sup> Since that time, the NRC has never indicated to the Claimants whether it has obtained that legal opinion or made clear whether its position has changed.<sup>189</sup> NRC also suggested that it would be taking steps to protect GSI's intellectual property rights in the Submissions, as follows:

Thank you for raising your concerns with us as it has given the GSC [Geological Survey of Canada] the opportunity to reinforce its procedures to ensure that we protect copyright and intellectual property of third party data. It is critical that the GSC develops and maintains strong relationships with data providers and owners such as yourself and I look forward to enhanced collaboration in the future.<sup>190</sup> [Emphasis added.]

As a result of NRC's letter, Paul and GSI were under the impression that Canada recognized that GSI likely had copyright and other intellectual property rights in the Submissions, and would be taking steps to limit the disclosure or dissemination of the Submissions.<sup>191</sup>

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<sup>186</sup> CWS-06 Paul Einarsson Witness Statement at ¶ 138.

<sup>187</sup> CWS-06 Paul Einarsson Witness Statement at ¶ 138.

<sup>188</sup> C-187, Letter to GSI from NRC, dated June 4, 2010 ("June 2010 NRC Letter").

<sup>189</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 114(e).

<sup>190</sup> C-187, June 2010 NRC Letter.

<sup>191</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 114(e).

59. In addition to the conduct referenced in the chronology set out above, the Einarssons relied on the following conduct of Canada when making their investments in GSI:
- (a) the purpose of the Submission Legislation related to safety and environmental regulation. The Submission Legislation never had a purpose statement that related to the promotion of Canadian offshore oil and gas development. The purpose of the Submission legislation indicated to Davey, Paul and GSI that the Submissions were only required for that purpose – safety and environmental regulation;<sup>192</sup>
  - (b) the permits and other authorizations issued to GSI and GSI Delaware under the Submission Legislation did not reference copyright, intellectual property rights or copying, indicating to Davey, Paul and GSI that the intellectual property rights in the Submissions remained intact;<sup>193</sup>
  - (c) the Submissions Legislation differentiated between exclusive and non-exclusive seismic data, indicating to Davey, Paul and GSI that exclusive and non-exclusive seismic data would be treated differently.<sup>194</sup> However, the Disclosure Legislation did not differentiate between exclusive and non-exclusive data.<sup>195</sup> Canada also often conflated or confused the difference between exclusive and non-exclusive seismic data in its policies implementing the Disclosure Legislation;<sup>196</sup>
  - (d) the Boards and the FIO, never gave Davey, Paul or GSI notice that the Submissions were being copied, instead allowing GSI to proceed with its business on the understanding that the Submissions were not being copied;<sup>197</sup> and

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<sup>192</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(a); **CWS-06**, Paul Einarsson Witness Statement at ¶ 115(b).

<sup>193</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(b); **CWS-06**, Paul Einarsson Witness Statement at ¶ 115(c); **R-001**, ABQB Common Issues Decision at ¶ 130; **C-144**, C-NLOPB Geophysical Program Authorization for Program No. 8924-G005-001P, dated January 10, 1998; **C-145**, Letter to GSI from C-NSOPB regarding Geophysical Program Authorization No. NS24-G005-2P, dated April 9, 1998; **C-146**, Letter to GSI from NEB regarding Oil and Gas Operating License No. 869, dated March 17, 1997; **C-147**, Bundle of Permits and Authorizations for GSI Surveys Conducted Prior to 1986, Various Dates.

<sup>194</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(t); **CWS-06**, Paul Einarsson Witness Statement at ¶ 115(d).

<sup>195</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 115(d).

<sup>196</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(t).

<sup>197</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 115(e).

(e) GSI and GSI Delaware labelled each of the Seismic Works with notices that demonstrate and assert ownership over it, seismic data and to provide proprietary, copyright and confidentiality notices.<sup>198</sup> Neither Canada nor the Boards commented or rejected the labelling practices of GSI or GSI Delaware to identify the Seismic Works contained in the Submissions, indicating to Davey, Paul and GSI that Canada did not disagree with the notices or the contents of them.<sup>199</sup> Those notices variously state:

- (i) “Contains proprietary trade secret and copyright property of Halliburton Geophysical Services, Inc. — Not for Resale — Subject to Non-Disclosure Restrictions. Copyright. Halliburton Geophysical Services, Inc.”;<sup>200</sup>
- (ii) “All data and information shown on this section are proprietary to Geophysical Service Incorporated and its affiliates. Disclosure to third parties is restricted.”<sup>201</sup>
- (iii) “All data and information shown on this section are proprietary to Geophysical Service Inc. and its affiliates (“GSI”) and are furnished by GSI to [blank space] (Company”) under restrictions of disclosure and reproduction contained in the Agreement” between GSI and “Company” dated [blank space];<sup>202</sup>
- (iv) “All data and information represented on these media contain proprietary trade secret and confidential information – not for resale – subject to non-disclosure restrictions, copyright, Halliburton Geophysical Services 1990. This Notice supercedes all other statements”;<sup>203</sup> and

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<sup>198</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 61(c).

<sup>199</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 60; **CWS-06**, Paul Einarsson Witness Statement at ¶ 115(f).

<sup>200</sup> **C-188**, Notice – Line LB-82-1FM, merge of LB-82-1F + LB-82-1G; **C-192**, Notice – L-SGS02-0055.

<sup>201</sup> **C-188**, Notice – Line LB-82-1FM, merge of LB-82-1F + LB-82-1G; **C-191**, Notice – Line ST-508-1.

<sup>202</sup> **C-188**, Notice – Line LB-82-1FM, merge of LB-82-1F + LB-82-1G.

<sup>203</sup> **C-188**, Notice – Line LB-82-1FM, merge of LB-82-1F + LB-82-1G; **C-189**, Notice – Line NK-89-385.

- (v) “All data, analyses, studies, compilations, reports and other information represented on or contained in these media and the media itself constitute confidential information and trade secrets of Geophysical Service Incorporated (“GSI”). GSI retains all proprietary rights [...]”.<sup>204</sup>
- (f) from time-to-time, GSI also wrote letters to the Boards requesting that they place further notices and stickers on the Seismic Works contained in the Submissions.<sup>205</sup> The Boards never responded to those letters with any objection or disagreement with GSI’s assertion of intellectual property rights, including copyright, nor does GSI know whether the Boards ever placed those additional notices and stickers on the Seismic Works.<sup>206</sup> The lack of objections to those letters from the Boards indicated to Davey, Paul and GSI that the Boards and Canada did not object to GSI’s intellectual property rights in the Seismic Works.<sup>207</sup>

(collectively, with the conduct and representations listed in the chronology at paragraph 58(a) to 58(ee), the “Government Conduct and Representations”).

**D. GSI Initiated Access to Information Requests and Litigation to Investigate Whether Its Intellectual Property Rights in the Seismic Data It Had Submitted Had Been Breached and to Preserve Those Rights**

**(1) GSI Began Investigating Through Access to Information Act Requests Whether its Intellectual Property Rights in the Seismic Works Were Being Breached**

60. Prior to 1999, GSI was not aware of what disclosure, if any, of the Seismic Works included in the Submissions was being made to third parties by the Boards.<sup>208</sup> However, in the fall

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<sup>204</sup> C-188, Notice – Line LB-82-1FM, merge of LB-82-1F + LB-82-1G; C-190, Notice – Line FC83-3A S.P. 484 to 7290.

<sup>205</sup> C-193, Letter from GSI to C-NLOPB, dated February 29, 2000.

<sup>206</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 115(g).

<sup>207</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 115(g).

<sup>208</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 118.

of 1999, GSI became concerned that the Boards, or some of them, were allowing third party access to the Seismic Works that were included in the Submissions.<sup>209</sup>

61. Concerns arose by the fall of 1999 about the protection of Seismic Works for several reasons.<sup>210</sup> First, changes in technology meant that seismic data could be more readily viewed, copied and distributed.<sup>211</sup> Second, the emergence of “data copy companies” (companies whose sole or major business was to access and copy the data of others for resale) became evident at industry trade shows.<sup>212</sup> Third, in GSI’s discussions with the Boards, and specifically the C-NSOPB, there was talk of a “shared data repository” being created, which suggested that traditional confidentiality and intellectual property protection for seismic data could be compromised going forward.<sup>213</sup> Fourth, GSI was becoming concerned that oil and gas companies were not treating the seismic data of others with the same degree of proprietary care that had been historically customary or that they practiced with their own proprietary information, including seismic data.<sup>214</sup>
62. As a result of its concerns, beginning in the fall of 1999, GSI took steps to determine what the Boards were doing with the Seismic Works in their possession.<sup>215</sup> GSI’s inquiries with the Boards at that time were out of a general concern that the Boards were not honouring GSI’s intellectual property rights, despite the Government Conduct and Representations to the contrary.<sup>216</sup> The response of the Boards at that time led GSI to believe that the Boards were not being forthright with GSI regarding their treatment of the Seismic Works.<sup>217</sup> Consequently, in 2000, Paul commenced making requests under Canadian access to information (“AIA”) legislation on behalf of GSI, as that was the only avenue for compelling information from the Boards.<sup>218</sup>

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<sup>209</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 118.

<sup>210</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 119.

<sup>211</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 119.

<sup>212</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 119.

<sup>213</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 119.

<sup>214</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 119.

<sup>215</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 120.

<sup>216</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 120.

<sup>217</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 120.

<sup>218</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 120.

63. GSI had made AIA requests to each of the NEB, the C-NLOPB and the C-NSOPB in both 1999 and 2000.<sup>219</sup> Those AIA requests sought information about the identities of parties who accessed the Seismic Works from each Board, along with details of what each Board provided in response to the request.<sup>220</sup> In response, the NEB told GSI that only a handful of parties had accessed information provided by it, which GSI later confirmed to be untrue, while the C-NLOPB and the C-NSOPB refused the requests on the basis that GSI was seeking privileged information.<sup>221</sup>
64. After GSI could not reach a resolution with the C-NLOPB and the C-NSOPB about the privilege issue, GSI brought three applications before the Federal Court of Canada challenging the Boards' refusals to provide the records that GSI requested in its AIA requests.<sup>222</sup> Those three applications were heard together by Order of the Federal Court of Canada in 2003.<sup>223</sup> Contrary to Canada's assertion in its Statement of Defence,<sup>224</sup> GSI commenced those applications to discover if the Boards were disclosing the Submissions, and to determine the scope, nature and identities of third parties, if any, who were receiving disclosure, not to stop the Boards from disclosing the Submissions.<sup>225</sup>
65. GSI succeeded in each of its three applications to have the Boards comply with its AIA requests.<sup>226</sup> In making its findings, the Federal Court of Canada noted that each of the Boards had, in substance, refused GSI's initial AIA requests,<sup>227</sup> before concluding that:

[89.] [n]one of the Boards can succeed in resisting disclosure of the names of requesters and the link between those names and the information requested on any of the grounds of exemption asserted by it. **Put another way, I conclude that the Applicant [GSI] is entitled to disclosure to it of the names of those**

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<sup>219</sup> **C-194**, Letter from GSI to NEB enclosing Canadian Access to Information Request; **C-195**, Letter from GSI to C-NLOPB enclosing Canadian Access to Information Request; **C-196**, Letter from GSI to C-NSOPB enclosing Canadian Access to Information Request.

<sup>220</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 121; **C-194**, Letter from GSI to NEB regarding Canadian Access to Information Request.

<sup>221</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 121.

<sup>222</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 122; **C-197**, *Geophysical Service Inc. v. Canada Newfoundland Offshore Petroleum*, 2003 FCT 507, Reasons for Orders, ("Federal Court AIA Decision") at ¶¶ 1-2.

<sup>223</sup> **C-197**, *Federal Court AIA Decision* at ¶ 2.

<sup>224</sup> Canada Statement of Defence at ¶ 10.

<sup>225</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 122; **C-197**, *Federal Court AIA Decision* at ¶ 6.

<sup>226</sup> **C-197**, *Federal Court AIA Decision* at ¶¶ 88-89.

<sup>227</sup> **C-197**, *Federal Court AIA Decision* at ¶ 15.

**who requested of a Board the release of information or data provided to that Board by the Applicant [GSI] and the link between each such requester and the data requested.**<sup>228</sup> [Emphasis added.]

66. Accordingly, the Federal Court of Canada ordered each of the Boards to provide GSI with the names and addresses of all third parties who, in the 154 months (180 months in the case of the NEB) preceding March 1, 2000, requested and were granted access to the Seismic Works that were included in the Submissions.<sup>229</sup>
67. Despite its success in obtaining orders of the Federal Court, GSI became embroiled in a lengthy, adversarial AIA process with the Boards that continues to this day.<sup>230</sup>
68. The responses the Boards provided to comply with the orders of the Federal Court stated that only a limited number of third parties were accessing the Seismic Works included in the Submissions and did not include any evidence that the Boards were allowing copying of the Seismic Works included in the Submissions, which indicated to GSI that no copying was occurring and its intellectual property rights in the Seismic Works were being upheld.<sup>231</sup> At the time, GSI was not aware that the Boards were creating lists to respond to the AIA requests that were based on underlying source documents, such as the liability forms and emails from third parties requesting for Seismic Works to be copied.<sup>232</sup> In other words, the Boards were not disclosing the actual documents responsive to the AIA requests, which is typical practice to respond to AIA requests.<sup>233</sup> Instead, the Boards were creating and disclosing spreadsheet lists of third-party names that had limited information and did not indicate that copying occurred.<sup>234</sup>

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<sup>228</sup> **C-197**, *Federal Court AIA Decision* at ¶ 89.

<sup>229</sup> **C-198**, Order of the Honourable Justice Gibson responding to NEB Access to Information Request; **C-199**, Order of the Honourable Justice Gibson responding to C-NLOPB Access to Information Request; **C-200**, Order of the Honourable Justice Gibson responding to C-NSOPB Access to Information Request.

<sup>230</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 123.

<sup>231</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 124.

<sup>232</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 124.

<sup>233</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 124.

<sup>234</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 124.

69. GSI submitted a number of follow-up AIA requests in the ensuing years, such that by 2006, GSI knew the following:
- (a) based on the responses received from the Boards to that date, GSI believed that relatively few third parties were accessing the Seismic Works contained in the Submissions; and
  - (b) GSI did not believe that copying was occurring as there was no evidence that any of the Boards, Canada or third parties were copying or facilitating copying of the Seismic Works contained in the Submissions.<sup>235</sup>
70. GSI continued submitting AIA requests after 2006.<sup>236</sup> By 2010, GSI learned of the general practice where the Boards paid GSI's licensees (through allowable expenditure credit applications and otherwise) to submit Seismic Works to the Boards that licensees only licensed from GSI ("Secondary Submissions").<sup>237</sup> The allowable expenditure credit applications were made by GSI's licensees to recoup portions of work commitment bid deposits that they had paid to develop an exploration area.<sup>238</sup> Under Canadian law, one of the costs that can be recouped through such an application is the cost for purchasing seismic data for exploration purposes.<sup>239</sup> GSI was shocked that Canada was reimbursing its licensees for the costs of obtaining the Seismic Works in exchange for copies of those Seismic Works.<sup>240</sup>
71. The Secondary Submissions all followed an identical procedure and were put under codes indicating that they were owned by the submitting oil company with no mention of GSI, despite the Seismic Works contained in the Secondary Submissions often being labelled as property of GSI.<sup>241</sup> The licensed Seismic Works were submitted by GSI licensees who

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<sup>235</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 125.

<sup>236</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 126.

<sup>237</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 126.

<sup>238</sup> C-201, *Geophysical Service Incorporated v Encana Corporation*, 2017 ABQB 466, Reasons for Judgment, dated July 26, 2017 ("*Encana Corporation*") at ¶ 71; CWS-06, Paul Einarsson Witness Statement at ¶ 126.

<sup>239</sup> C-201, *Encana Corporation* at ¶ 71; CWS-06, Paul Einarsson Witness Statement at ¶ 126.

<sup>240</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 126.

<sup>241</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 127.



incorrectly stated that they “owned” them.<sup>242</sup> The Boards accepted those licensed Seismic Works as if they were owned by the licenses without proof of transfer.<sup>243</sup> The Boards would then disclose the licensed Seismic Works that had been submitted by licensees to third parties, often prior to the expiry of otherwise applicable administrative privilege periods for non-exclusive data, as the Boards treated the data as if it was exclusive data under the Regulatory Regime (which had shorter privilege periods).<sup>244</sup> The result of the Secondary Submissions was that more content and different versions of the Seismic Works were submitted to the Boards than was necessary for compliance with the Submission Legislation, since GSI’s seismic data was non-exclusive.<sup>245</sup> GSI never authorized or consented to its licensees submitting the Secondary Submissions, as it was contrary to GSI’s licensing terms.<sup>246</sup>

72. By 2011, the Boards’ responses to the AIA requests were finally providing GSI with some clarity as to the Boards’ actual use and disclosure of the Seismic Works, and GSI was horrified by what it found: the Boards were copying and publishing the Seismic Works contained in the Submissions either in-house or through copying companies and were allowing third parties to do the same.<sup>247</sup> That included the NRC, which had previously indicated to GSI that it would abide by GSI’s intellectual property rights in the Seismic Works.<sup>248</sup> Around that time, GSI also discovered that the C-NLOPB and Canada were engaging in discussions with stakeholders in the Canadian offshore seismic industry to amend legislation to make it more difficult for GSI to bid on contract seismic exploration work off the coast of Newfoundland and Nova Scotia.<sup>249</sup>
73. GSI continued submitting AIA requests after 2011, but, since the Supreme Court of Canada Decision (defined below), the Boards’ responses to those AIA requests have slowed to a

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<sup>242</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 127.

<sup>243</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 127.

<sup>244</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 127.

<sup>245</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 127.

<sup>246</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 127.

<sup>247</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 128.

<sup>248</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 128.

<sup>249</sup> C-202, Letter to Paul Einarsson from the Canadian Transportation Industry, dated July 19, 2013 at p. 38.

crawl.<sup>250</sup> Additionally, the Boards have created new digital forms of disclosure where there was no record of who accessed the Seismic Works or otherwise ceased keeping records of the parties that accessed or copied the Seismic Works, effectively ending GSI's ability to police the infringement of the Seismic Works and its licensees' compliance with their license agreements.<sup>251</sup>

74. As a result of the Boards' conduct, GSI did not receive proper responses to the AIA requests it submitted after 2011 until many years later.<sup>252</sup> While GSI now knows that the Seismic Data was being disclosed and copied by Canada for some time, GSI still does not know when that conduct started because only viewing of seismic data occurred for a long time.<sup>253</sup> The Claimants were unaware of any copying or disclosure of the Seismic Works at the time of their investments.<sup>254</sup> In fact, GSI obtained the majority of the information and evidence that it has regarding Canada's disclosure and copying of the Seismic Works just prior to commencing and during the proceedings that resulted in the Alberta Decisions (defined below).<sup>255</sup>
75. GSI's current understanding of the Boards' disclosure practice is that it evolved significantly from no disclosure at all, to viewing with no note taking in government controlled offices, to loaning out documents often with copyright notices and borrowing agreements, then to Boards making copies and sending Seismic Works to copy firms that they had agreements with to make copies of the Seismic Works.<sup>256</sup> GSI's current understanding of the latter arrangement is that the Boards would send the copies of the Seismic Works to third parties and then bill those third parties for the time it took the Board to pull the Seismic Works and the copy company would bill the recipient for shipping, copying and media costs.<sup>257</sup> GSI's understanding is that after that, the disclosure evolved to the point where the C-NSOPB sought to skip the work with third party copy companies

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<sup>250</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 129.

<sup>251</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 129.

<sup>252</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 130.

<sup>253</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 130.

<sup>254</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 64; CWS-06, Paul Einarsson Witness Statement at ¶ 130.

<sup>255</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 130.

<sup>256</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 131.

<sup>257</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 131.

by releasing SEG-Y digital data online in a “Shared Data Repository”, which GSI understands has been up and running for years but is not able to find out what is being disclosed.<sup>258</sup>

76. GSI continues to have some AIA requests outstanding and is still receiving AIA responses periodically, some over 10 years after the AIA request was first made.<sup>259</sup> GSI also continues to request reviews from the Office of the Information Commissioner of Canada (and, in some cases, the equivalent body in various provinces) to address the Boards’ conduct, which conduct the commissioners have been critical of.<sup>260</sup> In fact, GSI received a further response to one of its AIA requests for NRC on August 10, 2022, which request was first made on March 4, 2013 and was first responded to on September 24, 2013 with heavy redactions and missing information.<sup>261</sup>
77. The response from August 10, 2022 removes the redactions from the NRC’s initial response.<sup>262</sup> That revision was prompted by the result of an investigation conducted by the Office of the Information Commissioner of Canada, which was requested by GSI and confirmed that the NRC should provide the unredacted information.<sup>263</sup> Based on the unredacted information, GSI learned that the NEB had provided a copy company, Lynx with Seismic Works for copying and that the NEB was aware that Lynx could convert paper seismic images into SEG-Y, and even asked for a copy, the very data that Canada asserts in its Statement of Defence is not being disclosed by Canada.<sup>264</sup> As such, GSI learned that while Canada and the Boards claim not to or apparently do not disclose the

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<sup>258</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 131.

<sup>259</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 131.

<sup>260</sup> See, C-203, Information Commissioner’s Final Report, dated September 21, 2022 regarding GSI Complaint Against C-NSOPB; C-284, Information Commissioner’s Final Report regarding GSI Complaint Against Canada Energy Regulator, dated September 26, 2022; C-285, Information Commissioner’s Final Report regarding GSI Complaint Against Natural Resources Canada, dated September 13, 2022.

<sup>261</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 132; C-204, Letter from NRC to Paul Einarsson, dated August 10, 2022 (“August 2022 AIA Response”).

<sup>262</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 133.

<sup>263</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 133; C-204, August 2022 AIA Response.

<sup>264</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 133; Canada Statement of Defence at ¶ 36.

Seismic Works in SEG-Y format, they knowingly disclose the Seismic Works to third parties in formats that are then easily scanned and reconstructed/converted to SEG-Y.<sup>265</sup>

**(2) GSI Commenced Litigation to Enforce its Intellectual Property Rights in the Seismic Works**

78. Between 2007 and 2015, as it was receiving the AIA responses from the Boards and other Government entities, GSI began commencing lawsuits against various parties who it discovered were either in breach of their license agreements with GSI or infringed its intellectual property rights in the Seismic Works.<sup>266</sup> GSI was forced to commence those claims to enforce the intellectual property rights that were the foundation of its business or be deemed to abandon them.<sup>267</sup> By 2015, GSI had commenced approximately 30 lawsuits against oil and gas companies, Boards and Canadian government agencies, and copy companies (collectively, the “Domestic Actions” and each a “Domestic Action”).<sup>268</sup> The Domestic Actions were generally sorted into the following categories according to the identity or nature of the defendants involved:
- (a) claims regarding the Regulatory Regime against the Boards or other government bodies such as the NRC, the Department of Public Works and Government Services Canada (“Public Works”) and Canada itself;
  - (b) claims against oil and gas companies that are (or were) all licensees of GSI pursuant to written license agreements or came to possess GSI’s licensed data from a licensee; and
  - (c) claims against data companies and copy companies that were either seismic companies in competition with GSI that copied the Seismic Works from the Boards

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<sup>265</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 133.

<sup>266</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 139.

<sup>267</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 139.

<sup>268</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 140.

and were offering it for re-sale or companies whose business was to copy the Seismic Works for other third parties or the Boards.<sup>269</sup>

79. GSI commenced the claims against oil and gas companies because it was investigating its licensees' compliance with their license agreements in conjunction with the AIA requests to gain a better understanding of what was happening.<sup>270</sup> As a result of those investigations and the AIA responses from the Boards, GSI came to learn that many of the oil and gas companies that were its existing licensees were not only copying Seismic Works from the Boards, but were also breaching one or more terms of their existing license agreements with GSI.<sup>271</sup> GSI also came to learn that those breaches of its license agreements were becoming more prevalent as the oil and gas companies began copying the Seismic Works from the Boards and often sharing them with other oil and gas companies.<sup>272</sup>
80. In the course of the Domestic Actions, some of the defendants began asserting that the Boards or other Government bodies were responsible for the disclosure and copying of the Seismic Works, sometimes even that the NEB hired third party copy companies to copy that data.<sup>273</sup> As a result, as alternative relief, GSI amended some of its Domestic Actions or commenced additional Domestic Actions to add alternative claims against the Boards, the NRC, Public Works or Canada under Canadian law for expropriation (the "Government Domestic Claims").<sup>274</sup> The primary position of GSI in the Government Domestic Claims remained that the original defendants were liable for copyright infringement and the alternative claims for expropriation were not actively pursued by GSI.<sup>275</sup> The Government Domestic Claims are discussed further below. As noted in those paragraphs, the Government Domestic Claims were not continued after the Claimants commenced this Arbitration on April 18, 2019 and had been inactive prior to that date.

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<sup>269</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 140.

<sup>270</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 141.

<sup>271</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 141.

<sup>272</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 141.

<sup>273</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 142.

<sup>274</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 142.

<sup>275</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 143.

81. Around the same time as GSI was commencing the Domestic Actions, and now that it had discovered the copying of the Seismic Works, GSI also attempted to stop future disclosure of the Seismic Works.<sup>276</sup> In spring and summer 2010, the NEB wrote to GSI to set out its then current understanding of the law relating to the period for which it must keep the Seismic Works privileged, pursuant to the terms on which it had authorized GSI to conduct a non-exclusive marine seismic survey in 2008.<sup>277</sup> The letters further stated that the NEB was bound by the *CPRA* not to disclose the Submissions for five years, and that a policy initiated by Indian and Northern Affairs Canada, and adopted by the NEB, requires that the information be kept confidential for another 15 years.<sup>278</sup> As a result, the information at issue could not be published for 15 years from when the survey was completed (i.e., until 2023).<sup>279</sup>
82. GSI commenced a judicial review of these letters before the Federal Court of Canada, which then also led to an appeal before the Federal Court of Appeal of Canada (the “FCA NEB Appeal”).<sup>280</sup> The Federal Court of Appeal determined that, since the data at issue in the FCA NEB Appeal would remain confidential until 2023, the issues raised by GSI were “[n]ot ripe for decision”, reasoning that:

[12] **It is not clear from GSI’s submissions in the proceedings before us whether, or to what extent, GSI alleges, let alone has established, that its 2008 non-exclusive seismic data are protected by copyright or the law relating to confidential information.** That there is a dispute between the NEB and GSI as to whether it is entitled to protection for its non-exclusive seismic data beyond the fifteen-year period does not make these proceedings non-hypothetical. **The dispute poses no present threat to whatever private law rights GSI may be asserting.**<sup>281</sup> [Emphasis added.]

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<sup>276</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 143.

<sup>277</sup> C-205, *Geophysical Service Incorporated v National Energy Board*, 2011 FCA 360, Reasons for Judgment of the Court, December 15, 2011, at ¶ 1 (“FCA NEB Appeal”); C-206, Letter from Geophysical Service Incorporated to National Energy Board, dated April 22, 2010; C-207, Letter from National Energy Board to H. Paul Einarsson, dated May 21, 2010 (“May 2010 NEB Letter”); C-208, Letter from Geophysical Service Incorporated to National Energy Board, dated July 27, 2010; C-209, Letter from National Energy Board to H. Paul Einarsson, dated 12 August 2010.

<sup>278</sup> C-205, *FCA NEB Appeal* at ¶ 2; C-207, May 2010 NEB Letter.

<sup>279</sup> C-205, *FCA NEB Appeal* at ¶ 2.

<sup>280</sup> C-205, *FCA NEB Appeal* at ¶ 5.

<sup>281</sup> C-205, *FCA NEB Appeal* at ¶¶ 6 and 12.

83. Accordingly, in 2011, a Canadian Court avoided determining whether the intellectual property rights that GSI has in the Seismic Works were overridden or altered by the Regulatory Regime.<sup>282</sup> In fact, the FCA NEB Appeal considered the issue to be premature because the policies could change,<sup>283</sup> despite the fact that GSI had already made its Submission and a change in policy after it was submitted would mean that GSI was unaware of the policies that would apply to the Submission in any given instance.
84. GSI made a similar attempt to stop disclosure of the Seismic Works in 2014. At that time, GSI applied to the Federal Court of Canada for a permanent injunction and damages for breach of copyright against the C-NSOPB.<sup>284</sup> The C-NSOPB had used Seismic Works in SEG-Y format that were contained in Submissions to create a map of prospects in the Nova Scotia Offshore Area, which map was then posted on the C-NSOPB website for interested oil and gas companies.<sup>285</sup> GSI sought an interlocutory injunction to compel the C-NSOPB to remove the map from its website while the underlying application for a permanent injunction was pending.<sup>286</sup>
85. The Federal Court of Canada dismissed GSI's application for an interlocutory injunction.<sup>287</sup> In doing so, the Court found that "[N]o copyright can subsist in geophysical data or seismic data. The copyright must exist in the compilations analysis thereof...".<sup>288</sup> Accordingly, although the finding was made in an interlocutory motion, as of 2014, the only Canadian Court that had made a finding in respect of copyright in seismic data found that GSI did not have copyright in the Seismic Works.
86. A similar issue to the one before the Federal Court of Appeal in the FCA NEB Appeal arose when one of the Alberta-based Domestic Actions proceeded to an application for summary disposition in 2015. In *Geophysical Service Incorporated v Antrim Energy Inc*

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<sup>282</sup> C-205, *FCA NEB Appeal* at ¶¶ 11-12.

<sup>283</sup> C-205, *FCA NEB Appeal* at ¶ 9.

<sup>284</sup> C-210, *Geophysical Service Incorporated v Canada-Nova-Scotia Offshore Petroleum Board*, 2014 FC 450, Order and Reasons, May 5, 2014 ("*GSI v C-NSOPB*") at ¶ 17.

<sup>285</sup> C-210, *GSI v C-NSOPB* at ¶¶ 11-13, 31.

<sup>286</sup> C-210, *GSI v C-NSOPB* at ¶ 1.

<sup>287</sup> C-210, *GSI v C-NSOPB* at ¶ 54.

<sup>288</sup> C-210, *GSI v C-NSOPB* at ¶ 24.

(“*Antrim*”), the defendant, Antrim Energy Inc. sought to summarily dismiss GSI’s claim for copyright infringement because the defendant had Seismic Works copied from the C-NLOPB.<sup>289</sup> Antrim Energy Inc. had inquired with GSI about licensing that particular set of the Seismic Works for conducting offshore oil and gas exploration, but was deterred by the high cost and copied it from the C-NLOPB instead.<sup>290</sup> Antrim Energy Inc. applied to summarily dismiss GSI’s claim on the basis that Canadian law, including the Regulatory Regime, allowed the defendant to copy the Seismic Works from the C-NLOPB.<sup>291</sup>

87. The Court of Queen’s Bench of Alberta was unwilling to summarily dismiss GSI’s claim for copyright infringement, concluding that the defence of Antrim Energy Inc. that relied on Canadian law, including the Regulatory Regime, did not meet the threshold of being “[s]o compelling that the likelihood it will succeed is very high”.<sup>292</sup> In light of *Antrim*, the effect of Canadian law, including the Regulatory Regime, on GSI’s on intellectual property rights in the Seismic Works contained in the Submissions remained unclear for GSI and the Canadian Courts until the Alberta Decisions.

**E. The Court of Queen’s Bench of Alberta and the Court of Appeal of Alberta Held that GSI Had Valid and Enforceable Copyright in its Seismic Data, But Declared that that Copyright was ‘Confiscated’ Without Compensation**

88. The Alberta-based Domestic Actions were proceeding through their initial phases until 2014, at which time 26 of the defendants in 17 of the Alberta-based Domestic Actions, including Canada and the NEB in the Government Domestic Claims, applied for security for costs against GSI.<sup>293</sup> The Court of Queen’s Bench of Alberta ultimately ordered that GSI pay \$1,434,164.50 into trust as security for costs to the 26 defendants, which included

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<sup>289</sup> **C-211**, *Geophysical Service Incorporated v Antrim Energy Inc.*, 2015 ABQB 482, Memorandum of Decision, July 31, 2015, at ¶¶ 1 and 5 (“*Antrim Decision*”).

<sup>290</sup> **C-211**, *Antrim Decision* at ¶¶ 1, 5-7.

<sup>291</sup> **C-211**, *Antrim Decision* at ¶¶ 16, 39-41.

<sup>292</sup> **C-211**, *Antrim Decision* at ¶ 41.

<sup>293</sup> **C-212**, Canada Application for Security for Costs from Action No. 0901-08210 (Lynx); **C-213**, Canada Application for Security for Costs from Action No.1401-00777 (Exploration Geosciences); **C-214**, Canada Application for Security for Costs from Action No. 1401-05316 (Canada and NEB); **C-215**, Canada Application for Security for Costs from No. 1201-05556 (Western Canadian Digital) **C-216**, Canada Application for Security for Costs from Court of Queen’s Bench Action No. 1201-16166 (Olympic Seismic); **C-217**, Canada Application for Security for Costs from Action No.1301-02933 (Arcis)



\$328,000 for the NEB and \$49,850 for Canada.<sup>294</sup> The Einarssons were forced to give up the priority that their loans to GSI had, as was the case previously, as a result of the security for costs order and stop any payments of principal or interest on those loans.<sup>295</sup> The rearrangement of the Einarssons' debt obligations jeopardized their loan investments in GSI,<sup>296</sup> which was partially due to the conduct of Canada and the NEB.

89. In early 2015, GSI and one of the Defendants in an Alberta-based Domestic Action, Calwest Printing & Reproductions, agreed for their case to be set down for trial in late 2015 (the "Calwest Trial").<sup>297</sup>

90. Once the defendants in the other Alberta-based Domestic Actions learned of the upcoming Calwest Trial, they sought to participate because the decision in the Calwest Trial would act as a precedent in the other Domestic Actions.<sup>298</sup> Ultimately, that led to GSI and the defendants in the Alberta-based Domestic Actions agreeing to two common issues for determination in conjunction with the Calwest Trial.<sup>299</sup>

91. In April 2015, the Chief Justice of the Court of Queen's Bench of Alberta took over case management of the various Alberta-based Domestic Actions.<sup>300</sup> The Chief Justice ordered the trial of those two issues, which were common to the Domestic Actions and which were set out as follows:

- (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?

(collectively, the "Common Issues" and each a "Common Issue").<sup>301</sup>

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<sup>294</sup> **C-218**, *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 49, Memorandum of Decision, January 22, 2016 at ¶ 57.

<sup>295</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 147.

<sup>296</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 147.

<sup>297</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 149; **C-219**, Request to Schedule Trial Date, Action No. 1101-15306, dated February 26, 2015.

<sup>298</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 149.

<sup>299</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 149.

<sup>300</sup> **R-001**, ABQB Common Issues Decision at ¶ 7.

<sup>301</sup> **R-001**, ABQB Common Issues Decision at ¶ 7.

92. On April 21, 2016, the Court of Queen’s Bench of Alberta released its decision on the Common Issues (the “Common Issues Decision”).<sup>302</sup> On the second Common Issue, the Common Issues Decision found that copyright could subsist in the Seismic Materials, stating:

[115] In conclusion, the raw or field seismic data is an original literary compilation work and the processed data is both an original literary compilation work and an artistic compilation work in the scientific domain. As such, they are protected under s 3 of the Copyright Act. For the reasons I have outlined, there is no need to resort to or rely on any presumption of copyright afforded in the *Copyright Act*.<sup>303</sup> [Emphasis added.]

93. Regarding the first Common Issue, the Common Issues Decision found that GSI had full copyright and other proprietary rights in the Seismic Materials, but that the Regulatory Regime created a compulsory license over them in perpetuity that overrode the protections afforded to GSI’s copyright in the Seismic Materials under Canadian copyright law:

[317] It is also clear that GSI fought against this disclosure policy for years (and obviously is still fighting). To suggest that it has “consented” to the disclosure of its very valuable seismic data, impliedly or not, does not sit well with me. **In my view, GSI has been forced to grant, in effect, a compulsory licence to permit its offshore seismic data to be released and used by the public.** The Regulatory Regime provides for this, as discussed above. GSI may not have liked to do so, it certainly never “consented” and it may be unfair, but it is the Regulatory Regime approved by Parliament.

[318] In conclusion on this question, I find the Boards have not breached GSI’s rights under the *Copyright Act* by copying, or allowing others to copy, the seismic data GSI deposited with them. The specific legislative authority in the *CPRA* and *Federal Accord Act* overrides the general rights contained in the *Copyright Act*. **Further, or in the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have the authority to copy,** and as a result they are not infringing the *Copyright Act* when they do so.<sup>304</sup> [Emphasis added.]

94. The Common Issues Decision arrived at that finding by determining there was a conflict between the Regulatory Regime, which the Common Issues Decision found to allow copying, and Canadian copyright law, which prohibited copying the Seismic Works

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<sup>302</sup> **R-001**, ABQB Common Issues Decision at headnote (“Date: 20160421”).

<sup>303</sup> **R-001**, ABQB Common Issues Decision at ¶ 115.

<sup>304</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 317-318.

contained in the Submissions.<sup>305</sup> That conflict only existed if the Regulatory Regime allowed copying of the Seismic Works contained in the Submissions.<sup>306</sup> The Common Issues Decision applied the doctrine of *lex specialis* to reconcile the apparent conflict between the Regulatory Regime and Canadian copyright law,<sup>307</sup> finding that:

[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.<sup>308</sup> [Emphasis added.]

95. In Canadian law, the doctrine of *lex specialis* is a principle of legislative interpretation.<sup>309</sup> The outcome of a Court’s *lex specialis* analysis is generally unknown to litigants prior to the Court’s application of the principle, as it involves complex principles of statutory construction.<sup>310</sup>
96. The Common Issues Decision further stated that GSI was not entitled to any compensation for the compulsory license over the Seismic Materials, which the Common Issues Decision described as a “[c]onfiscation”:

[322] [t]he Regulatory Regime has confiscated the seismic data created over the offshore and frontier lands and the *CPRA* is not apologetic for it – indeed, it makes clear that **there is no compensation for any confiscation** under the Act (s 111 (2))...<sup>311</sup> [Emphasis added.]

97. In response to arguments made by the defendants in the Common Issues Decision, including Canada, the Common Issues Decision found that GSI never consented to the Regulatory Regime or the disclosure of the Seismic Works:

[317] It is also clear that GSI fought against this disclosure policy for years (and obviously is still fighting). **To suggest that it has “consented” to the**

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<sup>305</sup> **R-001**, ABQB Common Issues Decision at ¶ 304; **CER-01**, Expert Report of Nigel Bankes, dated August 30, 2022 (“Nigel Bankes Expert Report”) at ¶ 23.

<sup>306</sup> **CER-01**, Nigel Bankes Expert Report at ¶ 25.

<sup>307</sup> **CER-01**, Nigel Bankes Expert Report at ¶ 25.

<sup>308</sup> **R-001**, ABQB Common Issues Decision at ¶ 304.

<sup>309</sup> **CER-01**, Nigel Bankes Expert Report at ¶ 42.

<sup>310</sup> **CER-01**, Nigel Bankes Expert Report at ¶¶ 42, 48 and 57.

<sup>311</sup> **R-001**, ABQB Common Issues Decision at ¶ 332.

**disclosure of its very valuable seismic data, impliedly or not, does not sit well with me.** In my view, GSI has been forced to grant, in effect, a compulsory licence to permit its offshore seismic data to be released and used by the public. The Regulatory Regime provides for this, as discussed above. **GSI may not have liked to do so, it certainly never “consented” and it may be unfair, but it is the Regulatory Regime approved by Parliament.**<sup>312</sup>  
[Emphasis added.]

98. GSI appealed the Common Issues Decision to the Court of Appeal of Alberta (the “Common Issues Appeal”).<sup>313</sup> The defendants in the Alberta-based Domestic Actions, including Canada, did not appeal any of the findings in the Common Issues Decision, including the findings of a compulsory license or that GSI’s intellectual property rights in the Seismic Works had been “confiscated”.<sup>314</sup>
99. GSI had two grounds of appeal in the Common Issues Appeal:
- (a) the Common Issues Decision erred in finding that the Regulatory Regime is a complete answer to GSI’s disclosure and copyright infringement claims; and
  - (b) the Common Issues Decision erred in considering section 111(2) of the *CPRA* and finding that it provides for the confiscation, without compensation, of GSI’s vested property rights, including copyright, in seismic data;
- (collectively, the “Grounds of Appeal” and each a “Ground of Appeal”).<sup>315</sup>
100. The Court of Appeal of Alberta released its decision on the Common Issues Appeal on April 28, 2017.<sup>316</sup>
101. Regarding the first Ground of Appeal, the Court of Appeal of Alberta found that the Common Issues Decision was correct in finding that the Regulatory Regime created a compulsory license over the Seismic Works, meaning GSI’s intellectual property rights in the Seismic Works end at the expiry of the privilege period set out in the Disclosure

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<sup>312</sup> **R-001**, ABQB Common Issues Decision at ¶ 317.

<sup>313</sup> **R-002**, *Geophysical Service Incorporated v. Encana Corporation, et al.*, 2017 ABCA 125 at ¶ 1 (“ABCA Common Issues Appeal”).

<sup>314</sup> **R-002**, ABCA Common Issues Appeal at ¶ 1.

<sup>315</sup> **R-002**, ABCA Common Issues Appeal at ¶ 27.

<sup>316</sup> **R-002**, ABCA Common Issues Appeal at p. 1 (“Date: 20170428”).

Legislation and that GSI could not interfere with decisions made by the Boards to disclose the Submissions:

[104] As found by the Trial Judge, there is no breach of copyright in this matter by the Boards' disclosure of seismic data after the privilege period, including allowing data to be copied. "The specific legislative authority of the [*Canada Petroleum Resources Act*] and the *Federal Accord Act* overrides the general rights contained in the *Copyright Act*. Further, or in the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have authority to copy": Decision, para 318. Here, that means 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.**<sup>317</sup> [Emphasis added.]

102. Given its finding on the first Ground of Appeal, the Court of Appeal of Alberta found that the Second Ground of Appeal did not need to be addressed.<sup>318</sup> However, the Court agreed with the analysis of the issue in the Common Issues Decision, stating:

[106] Given our findings on the first ground of appeal, this issue need not be dealt with. **The correct statutory interpretation was reached by the Trial Court in determining the legislation's "confiscatory nature" as to the data collected under the Regulatory Regime; again,** in keeping with its intended purpose of dissemination following the privilege period. The Regime's confiscatory nature, as determined by the Trial Court, was not only Parliament's intent, but was well-known to GSI: Decision, paras 236-237, 322.

[107] The parties have put forth competing interpretations of s 111(2) of the *Canada Petroleum Resources Act*, and whether it could lend support to the trial judge's findings. **Irrespective of those interpretations, on which we offer no opinion, it is clear that the Trial Court's extensive analysis as to the intention and nature of s 101 of the Act and the resulting conclusion, was neither undertaken nor premised upon s 111 (discussed in only 3 paragraphs of the 323 paragraph Decision), which did not impact the core findings in the Decision.**<sup>319</sup> [Emphasis added.]

103. In light of its findings on the Grounds of Appeal, the Court of Appeal of Alberta dismissed GSI's appeal of the Common Issues Decision.<sup>320</sup>

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<sup>317</sup> R-002, ABCA Common Issues Appeal at ¶ 104.

<sup>318</sup> R-002, ABCA Common Issues Appeal at ¶ 106.

<sup>319</sup> R-002, ABCA Common Issues Appeal at ¶ 106.

<sup>320</sup> R-002, ABCA Common Issues Appeal at ¶ 108.

**F. The Supreme Court of Canada Denied Leave to Appeal the Alberta Decisions, Which Made Them Final and Unappealable**

104. On October 30, 2017, GSI filed an application for leave to appeal the Common Issues Appeal to the Supreme Court of Canada.<sup>321</sup> On November 30, 2017, the Supreme Court of Canada denied GSI’s application for leave to appeal (the “Supreme Court of Canada Decision” and, collectively with the Common Issues Decision and the Common Issues Appeal, the “Alberta Decisions”).<sup>322</sup> As is customary in Canada, the Supreme Court of Canada Decision did not provide any reasons for denying GSI’s application for leave to appeal.<sup>323</sup>
105. The Supreme Court of Canada Decision meant the findings in the Common Issues Decision and the Common Issues Appeal were final and not subject to any further right of appeal.<sup>324</sup>
106. The outcome of the Alberta Decisions was surprising to both GSI and the Canadian legal community.<sup>325</sup> The compulsory license and corresponding confiscation that the Alberta Decisions imposed was not set out in the Regulatory Regime, nor was it set out in the Board guidelines or policies.<sup>326</sup> The outcome of the Alberta Decisions was also contrary to the Government Conduct and Representations, which created an expectation on the part of the Claimants that Canada would abide by GSI’s intellectual property rights in the Seismic Works.<sup>327</sup>
107. The legal result of the Alberta Decisions was that GSI’s claims with respect to the Regulatory Regime in the Domestic Actions were effectively dismissed, and GSI was no

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<sup>321</sup> **CER-01**, Nigel Bankes Expert Report at ¶¶ 38-40 (The highest appellate court in Canada – the Supreme Court of Canada – does not hear appeals of civil cases, such as the Common Issues Appeal, as of right. Instead, to appeal the Common Issues Appeal, GSI had to apply to the Supreme Court of Canada for leave to hear the appeal. The Supreme Court of Canada would only hear the appeal of the Common Issues Appeal if it first granted leave to appeal).

<sup>322</sup> **R-003**, *Geophysical Service Incorporated v Encana Corporation, et al.*, 2017 SCC 37634 (the “Supreme Court of Canada Decision”)

<sup>323</sup> **CER-01**, Nigel Bankes Expert Report at ¶ 40.

<sup>324</sup> **CER-01**, Nigel Bankes Expert Report at ¶ 41.

<sup>325</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 153; **CER-01**, Nigel Bankes Expert Report at ¶ Appendix “B” (Case comment on *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230: “Expiration of Confidentiality also gives Boards the Liberty to Copy and Distribute”).

<sup>326</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 153.

<sup>327</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 153.

longer able to enforce its intellectual property rights in the Seismic Works against third parties.

**G. Unable to Enforce the Copyright in its Seismic Data Against Infringers, GSI's Business was Destroyed**

108. The Alberta Decisions destroyed GSI's business and substantially deprived the Claimants of their investments.<sup>328</sup>
109. GSI hoped to recover damages for the breaches of its intellectual property in the Seismic Works through the Domestic Actions.<sup>329</sup> The Alberta Decisions rendered GSI unable to pursue any of those claims in the Domestic Actions, outside of contractual rights, regarding disclosure from the Boards as of the date of the Supreme Court of Canada Decision – November 30, 2017. In fact, after the Supreme Court of Canada Decision GSI had to discontinue many of the Domestic Actions and GSI had to pay significant sums in costs to various defendants in those Domestic Actions in relation to those discontinuances.<sup>330</sup>
110. The Alberta Decisions also rendered the Secondary Submissions (the majority of which included the Seismic Works in SEG-Y format) accessible to the public for free. With that, the Seismic Works that GSI licensed to licensees, which were more valuable than the Seismic Works included in the Submissions, were also in the general public domain and could no longer be licensed.<sup>331</sup>
111. Ultimately, the Alberta Decisions allowed third parties, many of whom would ordinarily have been GSI's customers, to access and copy the Seismic Works from the Boards after the expiration of the privilege period, which was not enough time for GSI to recoup its investment in each seismic survey.<sup>332</sup> The Alberta Decisions also prohibited GSI from doing anything to protect its copyright in the Seismic Works.<sup>333</sup> As a result, third parties

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<sup>328</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 154.

<sup>329</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 155.

<sup>330</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 155.

<sup>331</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 156.

<sup>332</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 157.

<sup>333</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 157; R-002, ABCA Common Issues Appeal at ¶ 104.

stopped licensing the Seismic Works from GSI.<sup>334</sup> No longer benefitting from the revenue generated by its licensing fees, GSI had to liquidate assets, lay off its remaining staff and, ultimately, halt its operations entirely.<sup>335</sup>

112. As a result of the Alberta Decisions, GSI's once proud, successful business as the only large, fully private marine seismic company is effectively no more.<sup>336</sup> The entire value of the enterprise has, in the words of the Court of Queen's Bench of Alberta in the Common Issues Decision, been "confiscated".

#### **H. Institution of this NAFTA Claim and Initiation of the Arbitration Proceedings**

113. On October 16, 2018, Claimants, by personal service, delivered to Canada a Notice of Intent to Submit a Claim to Arbitration in accordance with Article 1119 of NAFTA (the "NOI").<sup>337</sup>
114. On April 18, 2019, Claimants delivered to Canada a Notice of Arbitration (the "NOA") in accordance with Article 1120 of NAFTA.<sup>338</sup> The NOA was also accompanied by a written Consent to Arbitration and Waiver of Rights of Disputing Investor and Enterprise.<sup>339</sup> By doing so, the Claimants consented to arbitration of this dispute.
115. On November 8, 2019, the Claimants appointed Trey Gowdy, a United States national, to the Tribunal.<sup>340</sup>
116. On December 6, 2019, Canada appointed Toby Landau, Q.C., a British national, to the Tribunal.<sup>341</sup>

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<sup>334</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 157.

<sup>335</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 157.

<sup>336</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 158.

<sup>337</sup> C-220, GSI Pamphlet of Capabilities.

<sup>338</sup> C-221, Letter from the National Energy Board to H. Paul Einarsson; C-222, Letter to Deputy Minister of Justice and Deputy Attorney General serving NOA, April 18, 2019.

<sup>339</sup> C-223, Consent to Arbitration and Waiver of Rights of Disputing Investor and Enterprise, dated April 3, 2019.

<sup>340</sup> C-224, Letter from Borden Ladner Gervais LLP to Trade Law Bureau regarding Appointment of Arbitrator, dated November 8, 2019.

<sup>341</sup> C-225, Letter from Trade Law Bureau to Borden Ladner Gervais LLP, dated December 6, 2019.



117. On July 8, 2020, the Claimants requested that the International Centre for Settlement of Investment Disputes (“ICSID”) serve as appointing authority to select the presiding arbitrator in this dispute pursuant to Article 1124 of NAFTA.<sup>342</sup>
118. On July 16, 2020, the Secretary-General proposed a ballot procedure to appoint the presiding arbitrator, pursuant to NAFTA Article 1123, and invited the Parties to indicate whether they agreed to the proposed method of appointment.<sup>343</sup> The ICSID Secretary-General further explained that, should the Parties fail to agree on any of the ballot candidates, the Secretary-General would proceed to make the appointment in accordance with NAFTA Article 1124(3) from the ICSID Panel of Arbitrators.<sup>344</sup> On July 23, 2020, the Parties agreed to the proposed ballot procedure.<sup>345</sup>
119. On August, 26, 2020, the ICSID Secretary-General informed the Parties that, pursuant to the Parties’ agreement under NAFTA Article 1123, the Parties had agreed to appoint Ms. Carita Wallgren-Lindholm, a Finnish national, as the presiding arbitrator in this case, and Ms. Wallgren-Lindholm had accepted her appointment.<sup>346</sup>
120. The Tribunal was thus deemed to be constituted and this Arbitration proceeding commenced.
121. On October 14, 2020, the Tribunal held an Initial Procedural Meeting with the Parties.<sup>347</sup> On October 22, 2020, the Tribunal circulated the finalized Initial Procedural Meeting minutes to the Parties, which incorporated their comments.<sup>348</sup>
122. At the Initial Procedural Meeting, it was agreed that ICSID be engaged as the Administrative Authority for these proceedings.<sup>349</sup> The Parties further agreed that the 1976

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<sup>342</sup> **C-226**, Letter from ICSID to Borden Ladner Gervais LLP, dated July 9, 2020.

<sup>343</sup> **C-227**, Letter from ICSID to Borden Ladner Gervais LLP and Trade Law Bureau, dated July 16, 2020.

<sup>344</sup> **C-227**, Letter from ICSID to Borden Ladner Gervais LLP and Trade Law Bureau, dated July 16, 2020.

<sup>345</sup> **C-228**, Letter from Borden Ladner Gervais LLP and Trade Law Bureau to ICSID, dated July 23, 2020.

<sup>346</sup> **C-229**, Letter from ICSID to Borden Ladner Gervais LLP and Trade Law Bureau, dated August 26, 2020.

<sup>347</sup> **C-230**, Letter from Tribunal to Borden Ladner Gervais LLP and Trade Law Bureau, dated September 11, 2020 regarding Initial Procedural Meeting.

<sup>348</sup> **C-231**, Email from Tribunal to Borden Ladner Gervais LLP and Trade Law Bureau, dated October 22, 2020 regarding minutes for Initial Procedural Meeting.

<sup>349</sup> Initial Procedural Meeting Minutes, dated October 14, 2020.

- UNCITRAL Arbitration Rules (the “UNCITRAL Arbitration Rules”) would apply, as modified by NAFTA, and that the place of arbitration, or seat, would be Calgary, Alberta, Canada.<sup>350</sup>
123. On October 27, 2020, ICSID accepted its appointment as the Administrative Authority for the present proceedings.<sup>351</sup>
124. On May 18 and 19, 2021, the Tribunal held a hearing the Claimants’ Motion to Disqualify certain counsel to Canada in this Arbitration.<sup>352</sup>
125. On February 24, 2022, the Tribunal issued its Decision on the Claimants’ Motion to Disqualify Counsel.<sup>353</sup> In that decision, the Tribunal disqualified Ms. Edith Alexandra Dosman from representing Canada in this Arbitration.
126. On March 9, 2022, the Claimants designated the NOA as their Statement of Claim, pursuant to Article 18 of the UNCITRAL Arbitration Rules.<sup>354</sup>
127. On April 13, 2022, the Disputing Parties had a meeting with the Tribunal to discuss outstanding issues between the Disputing Parties regarding their negotiation of a Procedural Order No. 1 and a Confidentiality Order.<sup>355</sup>
128. On May 10, 2022, the Tribunal issued Procedural Order No. 1 and an accompanying Procedural Schedule.<sup>356</sup>
129. On June 9, 2022, Canada served its Statement of Defence to the Claimants’ Statement of Claim.<sup>357</sup>

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<sup>350</sup> Initial Procedural Meeting Minutes, dated October 14, 2020.

<sup>351</sup> **C-232**, Letter from ICSID to Borden Ladner Gervais LLP and Trade Law Bureau, dated October 27, 2020; Initial Procedural Meeting Minutes, dated October 14, 2020.

<sup>352</sup> Decision Regarding Motion to Disqualify, dated February 24, 2022 (“Disqualification Decision”).

<sup>353</sup> Disqualification Decision.

<sup>354</sup> **C-235**, Letter from Borden Ladner Gervais LLP to Tribunal, dated March 9, 2022.

<sup>355</sup> Minutes of Meeting, dated April 13, 2022 Disqualification Decision.

<sup>356</sup> Procedural Order No. 1, dated May 10, 2022 and Appended Annex II: Procedural Calendar.

<sup>357</sup> Canada Statement of Defence.

130. On June 13, 2022, the Claimants and Canada executed a Confidentiality Order that had been issued by the Tribunal.<sup>358</sup>

### III. THE TRIBUNAL HAS JURISDICTION TO DECIDE THE CLAIMANTS' CLAIMS

131. The Claimants have satisfied all requirements under NAFTA for the Tribunal to have jurisdiction to decide the Claimants' claims in this Arbitration.

132. The requirements for the Tribunal to take jurisdiction over the Claimants' claims in this Arbitration are:

- (a) Article 1101 is met;
- (b) that a claim has been brought in accordance with Articles 1116 and/or 1117; and
- (c) that all pre-conditions and formalities required under Articles 1118 to 1121 are satisfied.<sup>359</sup>

133. If those requirements are met, a tribunal has jurisdiction over an arbitration pursuant to Article 1122 of NAFTA.<sup>360</sup>

134. In this Tribunal's assessment of whether it has jurisdiction, the relevant NAFTA Articles should be interpreted in accordance with the *Vienna Convention on the Law of Treaties* (the "VCLT").<sup>361</sup> Article 31(1) of the VCLT states that the general rule of interpretation is that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to

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<sup>358</sup> Confidentiality Order, dated June 13, 2022.

<sup>359</sup> See, **CLA-031**, *Methanex Corporation v United States of America*, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility, 7 August 2002 ("*Methanex Jurisdiction*") at ¶ 120 ("In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied)."); see also, **CLA-032**, *Canfor Corporation v United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 ("*Canfor Preliminary Questions*") at ¶ 171; **CLA-033**, *Merrill & Ring Forestry L.P. v Government of Canada*, ICSID Case No. UNCT/07/01, ICSID Administered, Decision on a Motion to Add a New Party, 31 January 2008 at ¶¶ 28-29.

<sup>360</sup> **CLA-031**, *Methanex Jurisdiction* at ¶ 120.

<sup>361</sup> **CLA-034**, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969 ("VCLT").

be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>362</sup>

135. The Claimants submit that the requirements set out in Article 1122 of NAFTA have been met and the Tribunal has jurisdiction over this Arbitration as a result.

#### **A. The Claimants Satisfy The Criteria under Article 1101 of NAFTA**

##### **(1) Section 1101 of NAFTA is the ‘Gateway’ to Section A of Chapter 11**

136. Article 1101 of NAFTA establishes the scope and coverage of the substantive protections under Chapter 11 of NAFTA.<sup>363</sup> Article 1101(1) states:

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) investments of investors of another Party in the territory of the Party; and
- (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.<sup>364</sup>

137. The Claimants must satisfy the criteria of Article 1101 for their claims to fall within the scope of Section A of Chapter 11 of NAFTA.<sup>365</sup> Because of that, NAFTA tribunals have described Article 1101 as the “gateway” to Chapter 11.<sup>366</sup>

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<sup>362</sup> **CLA-034**, *VCLT* at Article 31(1).

<sup>363</sup> **CLA-035**, *Mesa Power Group, LLC v Government of Canada*, UNCITRAL, PSA Case No. 2012-17, Award, 24 March 2016 (“*Mesa Power*”) at ¶ 252.

<sup>364</sup> *North American Free Trade Agreement*, 17 December 1994, (1993) 32 I.L.M 289, 605 (“NAFTA”), Chapter 11, Article 1101(1).

<sup>365</sup> **CLA-035**, *Mesa Power* at ¶ 253; **CLA-036**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 (“*Apotex*”), at ¶ 6.2.

<sup>366</sup> **CLA-037**, *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, January 28, 2008 at ¶ 127 (“Thus, the ‘gateway’ to Chapter 11 – Article 1101...”); **CLA-038**, *Westmoreland Coal Company v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022 (“*Westmoreland*”) at ¶ 197 (“Article 1101(1) Article 1101(1) specifies the requirements which must be satisfied for a putative claimant to be entitled to the protection provided by Chapter 11, thus operating as the gateway to the remaining Articles of Chapter 11.”).

138. NAFTA tribunals have clarified that the criteria in Article 1101(1) are:
- (a) the claims must target “measures adopted or maintained by a Party”; and
  - (b) the measures must be “relating to” either:
    - (i) “investors of another Party”;
    - (ii) “investments of investors of another Party in the province or territory of the Party”; or
    - (iii) “investments in the territory of the Party”.<sup>367</sup>
139. The Criteria in 1101(1) implicate a number of defined terms in Chapter 11.<sup>368</sup> In applying Article 1101(1), the Tribunal should consider the requirements of Article 1101(1) within the context of NAFTA’s Chapter 11 and the nature of the Claimants’ substantive claims that the Alberta Decisions breached Articles 1110 and 1106(1)(f) of NAFTA.<sup>369</sup>

**(2) The Alberta Decisions are ‘Measures’ for the Purposes of Article 1101(1)**

140. The first criteria of Article 1101(1) is whether the Claimants claim implicates “measures adopted or maintained by a Party”.<sup>370</sup>
141. Article 201 of NAFTA defines “measure” as: “includes any law, regulation, procedure, requirement or practice”.<sup>371</sup> Prior NAFTA tribunals have confirmed that a domestic court decision can constitute a “measure adopted or maintained by a Party” for the purposes of

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<sup>367</sup> See, **CLA-035**, *Mesa Power* at ¶ 253 (“[i]n order for the claims to fall within the scope of Section A of Chapter 11, they must target “measures adopted or maintained by a Party” ... affecting investors or the investments of investors of another Party ((b) below.)”); **CLA-038**, *Westmoreland* at ¶ 197; **CLA-039**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 at ¶ 168 (“*Cargill*”); **CLA-040**, Meg Kinnear, Andrea Kay Bjorklund and John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006) – Annotations on Article 1106 at p. 1101-40 (“A measure adopted or maintained by a Party must also relate to at least one of the following: ‘investors of another Party’; ‘investments of investors of another Party in the territory of a Party’; and ‘with respect to Articles 1106 [Performance Requirements] and 1114 [Environmental Measures], all investments in the territory of the Party’”).

<sup>368</sup> **CLA-039**, *Cargill* at ¶ 163.

<sup>369</sup> **CLA-036**, *Apotex* at ¶ 6.3.

<sup>370</sup> **CLA-035**, *Mesa Power* at ¶¶ 253-254.

<sup>371</sup> NAFTA, Chapter Two, Article 201, definition of “measure”.

NAFTA.<sup>372</sup> Canada is responsible in international law for the conduct of its organs, including the judiciary.<sup>373</sup>

142. The NOA pleads that the Alberta Decisions are the measures at issue in this Arbitration.<sup>374</sup>

143. With respect to Canada's breach of Article 1110 of NAFTA, the NOA pleads:

[29(c)] **The Alberta Decisions** have deprived GSI of the copyright and trade secret protections to which GSI was entitled with respect to the Seismic Data, and which the Claimants legitimately expected Canada to provide and, as a result, have deprived GSI of substantially all of its value and the Claimants of substantially all of the value of their investment, without compensation, contrary to Article 1110 of the NAFTA.<sup>375</sup> [Emphasis added.]

144. Similarly, the NOA pleads that the Alberta Decisions are the source of Canada's breach of Article 1106(1)(f) of NAFTA:

[28(b)] **The Alberta Decisions** establish and enforce a system by which Canada imposes upon the Claimants and GSI a requirement to transfer proprietary knowledge to third parties in Canada to develop Canada's offshore oil and gas industry, contrary to Article 1106(1)(f) of the NAFTA.<sup>376</sup> [Emphasis added.]

145. The NOA also asserted a claim for a breach of Article 1105 of NAFTA.<sup>377</sup> Despite the conduct of Canada towards the Claimants, the Claimants' damages and losses are captured

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<sup>372</sup> **CLA-041**, *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction, 5 January 2001, ("*Loewen*") at ¶ 54 ("An adequate mechanism for the settlement of disputes as contemplated by Chapter 11 must extend to disputes, whether public or private, so long as the State Party is responsible for the judicial act which constitutes the 'measure' complained of, and that act constitutes a breach of a NAFTA obligation, as for example a discriminatory precedential judicial decision."); **CLA-042**, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1, 1999 ("*Azinian*") at ¶ 99.

<sup>373</sup> **CLA-043**, *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, ("*Eli Lilly*") at ¶ 221 ("Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility."); **CLA-044**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 ("*UN Responsibility for Internationally Wrongful Acts*") at Article 4(1).

<sup>374</sup> See NOA at ¶¶ 20-23.

<sup>375</sup> NOA at ¶ 28(c).

<sup>376</sup> NOA at ¶ 28(b).

<sup>377</sup> NOA at ¶ 28(a).

by their claims under Articles 1110 and 1106(1)(f). As such, the Claimants are no longer pursuing a claim under Article 1105 in the interest of procedural efficiency.

146. The Alberta Decisions were decisions of Canadian courts. As such, in accordance with guidance from past NAFTA tribunals and public international law, the Alberta Decisions were “measures adopted or maintained by” Canada and satisfy the first criterion in Article 1101(1). Canada’s Statement of Defence does not dispute that the Alberta Decisions satisfy Article 1101(1).<sup>378</sup>

**(3) The Claimants’ “Investments” Satisfy Articles 1139 and 1101(1) of NAFTA**

147. Articles 1110 and 1106(1)(f) of NAFTA both relate to “investments”, meaning the investments at issue in the Claimants’ claims must constitute “investments” located in Canada within the meaning of Chapter 11 for this Tribunal to have jurisdiction over their claims.<sup>379</sup>

148. Article 1139 of NAFTA provides that “investment” means among the following:

- (a) “an enterprise”;
- (b) “an equity or security of an enterprise”;
- ...
- (d) “a loan to an enterprise:
  - (i) where the enterprise is an affiliate of the investor, or
  - (ii) where the original maturity of the loan is at least three years
 but does not include a loan, regardless of original maturity, to a state enterprise”;...
- ...

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<sup>378</sup> Canada Statement of Defence at ¶ 32 (“[t]he Claimants have no credible basis to argue that Canada’s measures, including the Alberta Court Judgments...”).

<sup>379</sup> NAFTA, Chapter 11, Article 1110(1) (“No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party...”); NAFTA Chapter 11 Article 1106(1)(f) (“No Party may impose or enforce any of the following requirements.... In connection with ... an investment of an investor of a Party or of a non-Party in its territory”).

- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
  - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
  - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise...<sup>380</sup>

149. The Claimants' investments at issue in their claims each satisfy the definition of "investment" in Article 1139 of NAFTA and were in the "territory" of Canada within the meanings of Articles 1101(1)(b) and 1101(1)(c).

150. Regarding Article 1139(a), GSI is an "enterprise" as that term is defined in Article 201 and used in Article 1139(1) of NAFTA.<sup>381</sup> Regarding Articles 1101(1)(b) and 1101(1)(c), GSI is also an "enterprise of a party" as that term is defined in Article 201 of NAFTA and operated in the "territory" of Canada.<sup>382</sup> Canada's Statement of Defence does not dispute that GSI is an "enterprise" that operated in the "territory" of Canada.

151. Regarding Article 1139(b), Paul and Davey each own shares of GSI and each did so as of the date of the Alberta Decisions.<sup>383</sup> Those shares constitute "an equity or security of an enterprise" within the meaning of Article 1139(b).<sup>384</sup> Regarding Articles 1101(1)(b) and

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<sup>380</sup> NAFTA, Chapter 11, Article 1139, definition of "investment".

<sup>381</sup> NAFTA, Chapter Two, Article 201, definition of "enterprise" ("enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association").

<sup>382</sup> NAFTA, Chapter Two, Article 201, definition of "enterprise of a Party" ("enterprise of a Party means any entity constituted or organized under applicable law, whether or not for profit, and whether privately owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;"); NAFTA, Chapter Two, Article 201, definition of "territory" ("a) with respect to Canada, the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources;"); C-234, Certificate of incorporation of GSI, dated January 1, 2013; CWS-06, Paul Einarsson Witness Statement at ¶ 6.

<sup>383</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 2; CWS-06, Paul Einarsson Witness Statement at ¶ 94; C-235, Paul Share Certificate for ██████████ Shares, dated ██████████; C-236, Paul Share Certificate for ██████████ Shares, dated ██████████; C-237, Davey Share Certificate for ██████████ shares, dated ██████████; C-238, Davey Share Certificate for ██████████ dated, ██████████.

<sup>384</sup> NAFTA, Chapter 11, Article 1139, definition of "equity or debt securities" ("equity or debt securities includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants;").



1101(1)(c), GSI operated in Canada, so the shares were “investments” in the “territory” Canada.

152. Regarding Article 1139(d), each of Paul, Davey and Russell also have outstanding loans to GSI, or its subsidiaries, that were in place at the time of the Alberta Decisions.<sup>385</sup> Those loans are as follows:

- (a) loan from Davey to GSI dated June 15, 2001, in the amount of CAD\$900,000, plus interest,<sup>386</sup>
- (b) loan from Russell to GSI dated June 15, 2001, in the amount of CAD\$900,000, plus interest,<sup>387</sup>
- (c) loan from Paul to GSI dated June 15, 2001, in the amount of CAD\$564,901.30, plus interest,<sup>388</sup> which loan was subsequently increased by a promissory note to CAD\$820,946.67;<sup>389</sup>
- (d) loan from Paul to Precision Processing (at the time a wholly-owned subsidiary of GSI)<sup>390</sup> dated June 15, 2001, in the amount of CAD\$74,132,<sup>391</sup> which loan was subsequently increased by a promissory note to CAD\$79,605 (the “Precision Loan”);<sup>392</sup>

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<sup>385</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 2; **CWS-06**, Paul Einarsson Witness Statement at ¶ 94; **CWS-05**, Russell Einarsson Witness Statement at ¶ 8.

<sup>386</sup> **C-239**, Loan Agreement between T. David Einarsson and Geophysical Service Incorporated, dated June 15, 2001 (“Davey Loan”).

<sup>387</sup> **C-056**, Loan Agreement between Russell J. Einarsson and Geophysical Service Incorporated, dated June 15, 2001 (“Russell Loan”).

<sup>388</sup> **C-240**, Demand Loan Agreement between H. Paul Einarsson and Geophysical Service Incorporated, dated June 15, 2001 (“Paul GSI Loan No. 1”).

<sup>389</sup> **C-241**, Promissory Note from Geophysical Service Incorporated to H. Paul Einarsson, dated October 31, 2003 (“Second Promissory Note for Paul GSI Loan No. 1”).

<sup>390</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 16(c); **C-250**, Corporation/Non-Profit Search for PRECISION SEISMIC PROCESSING & CONSULTANTS LTD.

<sup>391</sup> **C-242**, Agreement between H. Paul Einarsson and Precision Seismic Processing & Consultants Ltd., dated June 15, 2001 (“Paul Precision Loan”); **C-243**, Promissory Note between Precision Seismic Processing & Consultants Ltd. and H. Paul Einarsson, dated June 15, 2001 (“Paul PSPC Promissory Note No. 1”).

<sup>392</sup> **C-244**, Promissory Note Between Precision Seismic Processing & Consultants Ltd. and H. Paul Einarsson, dated June 1, 2002 (“Paul PSPC Promissory Note No. 2”).

- (e) loan from Alexandra Holdings Ltd. (a holding company wholly owned by Paul)<sup>393</sup> to GSI dated February 19, 2004, in the amount of CAD\$113,578.53;<sup>394</sup> and
- (f) loan from Paul to GSI dated May 5, 2005, in the amount of USD\$350,000;<sup>395</sup>
- (collectively, the “Loans”).
153. In order to qualify as an “investment” under Article 1139(d), the Loans must have been a loan to an “enterprise” either: (i) made by an “affiliate” of that “enterprise”; *or* (ii) the “original maturity of the loan” was at least three years.<sup>396</sup>
154. Each of the loans were made to an “enterprise”, within the meaning of Article 1139(d). NAFTA contains two definitions of “enterprise” that are applicable to the Loans. The general definition of “enterprise” in Article 201 captures GSI, meaning all of the Loans except Paul’s Precision Loan would be captured by that definition.<sup>397</sup> However, Article 1139 also includes its own definition of “enterprise” that includes “[a] branch of an enterprise”.<sup>398</sup> GSI acquired Precision Processing to operate as its “branch” dedicated to processing the Seismic Works.<sup>399</sup> As such, Paul’s Precision Loan also falls within the scope of “loan made to an enterprise” as set out in Article 1139(d).
155. Turning to Article 1139(d)(i), each of the Loans were also made by an “affiliate” of an enterprise. Only one NAFTA tribunal considered the definition of “affiliate” within the meaning of Article 1139(d)(i) and did so in the context of affiliated corporations instead of

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<sup>393</sup> **C-245**, Corporation/Non-Profit Search for ALEXANDRA HOLDINGS LTD., dated September 13, 2022.

<sup>394</sup> **C-246**, Loan Agreement between Alexandria Holdings Ltd. and Geophysical Service Incorporated, dated February 19, 2004 (“Alexandra Loan”) (the Alexandra Loan was repayable to Paul, see Alexandra Loan at Appendix “A”, Promissory Note).

<sup>395</sup> **C-247**, Demand Loan Agreement between H. Paul Einarsson and Geophysical Service Incorporated, dated May 5, 2005 (“Paul GSI Loan No. 2”).

<sup>396</sup> NAFTA, Chapter 11, Article 1139(d); **CLA-045**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, January 12, 2011 (“*Grand River*”) at ¶ 109.

<sup>397</sup> As noted, Article 201 of NAFTA defines “enterprise” as “means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association”.

<sup>398</sup> NAFTA, Chapter 11, Article 1139, definition of “enterprise” (“enterprise means an “enterprise” as defined in Article 201 (Definitions of General Application), and a branch of an enterprise”).

<sup>399</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 86.

affiliated individuals, as is the case here. However, the tribunal’s guidance on the meaning of the term “affiliate” is as follows:

[146.] NAFTA does not define “affiliate,” but as used in legal and financial contexts, the term typically indicates **a degree of ownership or control of one enterprise by another, or subsidiaries owned by a single parent.** *Black’s Law Dictionary* describes an “affiliate company” as one “effectively controlled by another company.”....<sup>400</sup> [Emphasis added.]

156. Each of Paul, Davey and Russell was an “affiliate” within the meaning established by that prior NAFTA tribunal.
157. Davey and Paul (and Paul through Alexandra Holdings Ltd.) were “affiliates” of GSI because they own all of the issued and outstanding shares of GSI.<sup>401</sup>
158. Russell was also an “affiliate” within that definition. Russell was a shareholder of Ocean Geophysical Service Incorporated (“OGSI”), which was an affiliate of GSI and a branch of GSI that Russell and Davey worked for in Houston, Texas, United States.<sup>402</sup> By virtue of his shareholdings in OGSI, Russell had the ability to exercise control in a manner that was sufficient to make him an “affiliate” of OGSI, a branch of GSI. That was sufficient to satisfy the “affiliate” requirement in Article 1139(d)(i).
159. The Loans also satisfy the requirement under Article 1139(d)(ii), as each of the Loans had an “original maturity” of more than three years. The Loans do not stipulate specific maturity dates.<sup>403</sup> However, no repayments were made on the Loans prior to three years

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<sup>400</sup> **CLA-045**, *Grand River* at ¶ 110

<sup>401</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 2; **CWS-06**, Paul Einarsson Witness Statement at ¶ 94; **C-235**, Paul Share Certificate for [REDACTED] dated [REDACTED]; **C-236**, Paul Share Certificate for [REDACTED] dated [REDACTED]; **C-237**, Davey Share Certificate for [REDACTED] dated [REDACTED]; **C-238**, Davey Share Certificate for [REDACTED] dated [REDACTED]

<sup>402</sup> **C-248**, Certificate of Incorporation of Ocean Geophysical Service Inc., dated September 22, 2003; **C-249**, OGSI Directors’ Meeting and Resolution Approving Issuance of Shares, dated December 24, 2003.

<sup>403</sup> **C-239**, Davey Loan at Section 2.01(c) and Schedule “A”; **C-056**, Russell Loan at Section 2.01(c) and Schedule “A”; **C-240**, Paul GSI Loan No. 1 at Schedule “A”; **C-241**, Second Promissory Note for Paul Demand Loan No. 1; **C-242**, Paul Precision Loan; **C-243**, Paul PSPC Promissory Note No. 1; **C-244**, Paul PSPC Promissory Note No. 2; **C-246**, Alexandra Loan at Section 2.01(b) and Schedule “A”; **C-247**, Paul GSI Loan No. 2 at Section 2.01(b) and Schedule “A”.

- from the date they were issued.<sup>404</sup> As such, the “original maturity” of the Loans was for more than three years and they satisfy the requirement under Article 1139(d)(ii).
160. With respect to Articles 1101(1)(b) and 1101(1)(c), each of GSI and Precision Processing were Canadian corporations that operated in Canada, so the Loans were “investments” in the “territory” Canada.<sup>405</sup>
161. Finally, with respect to Article 1139(h)(ii), each of Davey, Paul and Russell had written or oral contracts with for remuneration with GSI where that remuneration depended wholly on the “[p]roduction, revenues or profits” of GSI (the “Remunerative Contracts”).<sup>406</sup>
162. No NAFTA tribunals have substantively addressed Article 1139(h)(ii) of NAFTA. However, the Einarssons’ Remunerative Contracts fall within the scope of the ordinary meaning of the Article. The Einarssons’ Remunerative Contracts saw them commit “resources” in Canada by way of their time and labour.<sup>407</sup> In exchange, they were to be compensated by GSI. Davey was employed by GSI at the time of the Alberta Decisions, Paul left GSI on January 1, 2017 as a result of the Alberta Decisions and Russell left an affiliate of GSI in 2013, but would have been re-hired but for the Alberta Decisions.<sup>408</sup> As noted above, GSI was an enterprise in Canada for the purposes of Articles 1101(b) and 1101(c).
163. In light of the foregoing, the Claimants’ “investments” at issue in their claims satisfy Article 1101(1) of NAFTA.

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<sup>404</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 17.

<sup>405</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 6; C-250, Corporation/Non-Profit Search for PRECISION SEISMIC PROCESSING & CONSULTANTS LTD; C-234, Certificate of Incorporation of GSI, dated January 1, 2013.

<sup>406</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 18; C-251, Paul Einarsson Employment Agreement, dated [REDACTED] [REDACTED] CWS-05, Russell Einarsson Witness Statement at ¶¶ 6-7; CWS-03, Davey Einarsson Witness Statement at ¶ 54.

<sup>407</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 18; CWS-05, Russell Einarsson Witness Statement at ¶¶ 6-7.

<sup>408</sup> CWS-06, Paul Einarsson Witness Statement at ¶¶ 4, 18 and 172(a).

#### (4) The Alberta Decisions “Related to” The Claimants’ Investments

164. Article 1101(1) provides that the coverage under Section A of Chapter 11 only applies if the measures adopted or maintained by Canada were “relating to” either:
- (a) “investors of another Party”;
  - (b) “investments of investors of another Party in the territory of the Party”; or
  - (c) “with respect to Articles 1106 and 1114, all investments in the territory of the Party”.<sup>409</sup>
165. Many NAFTA tribunals have considered the “relating to” requirement under Article 1101(1). The NAFTA tribunal in *Resolute Forest Products* recently conducted a lengthy review of prior awards from NAFTA tribunals and other sources, before articulating the “relating to” standard as follows:
- [242.] “[t]he Tribunal should ask **whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment**... it is not necessary that the measure should have targeted the claimant or its investment... Nor is it necessary that the measure imposed legal penalties or prohibitions on the investor or the investment itself. However, a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose”.<sup>410</sup> [Emphasis added.]
166. With respect to GSI as an investment, the Alberta Decisions directly targeted GSI and its Seismic Works. The Alberta Decisions found that GSI’s intellectual property rights in the Seismic Works were “confiscated”<sup>411</sup> and that GSI “[h]as no legal basis or lawful entitlement to interfere or object to any decisions made by the Boards relating to its collected data”.<sup>412</sup> In doing so, the Alberta Decisions stripped GSI of its intellectual property rights in the Seismic Works that were contained in the Submissions and the

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<sup>409</sup> NAFTA, Chapter 11, Article 1101(1).

<sup>410</sup> **CLA-046**, *Resolute Forest Products Inc v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 (“*Resolute*”) at ¶ 242; see also, **CLA-038**, *Westmoreland* at ¶ 212 (“the challenged measure must “directly address, target, implicate, or affect the claimant” or have a “direct and immediate effect on the claimant”).

<sup>411</sup> **R-001**, ABQB Common Issues Decision at ¶ 322.

<sup>412</sup> **R-001**, ABCA Common Issues Appeal at ¶ 104.

Secondary Submissions, and substantially deprived GSI of its business. As such, GSI satisfies the “relating to” standard under Article 1101(1).

167. The Einarssons’ personal investments were also affected by the Alberta Decisions in a non-tangential or consequential way that satisfies the “relating to” requirement of Article 1101(1).
168. The Einarssons’ personal investments were either to finance GSI through equity investments, Loans or their own time and labour. The Einarssons each took a substantial amount of risk in financing and supporting GSI, and relying on its financial performance for their livelihood, a factor which should be considered in assessing whether the “relating to” standard is satisfied.<sup>413</sup> The Common Issues Decision noted that Paul and Davey were the principals of GSI, acknowledging that they would be impacted by any negative result that GSI received.<sup>414</sup> That is exactly what happened. Paul, Davey and Russell’s investments, each of which depended on GSI, are now worthless as a direct result of the Alberta Decisions’ impact on GSI.<sup>415</sup> That is sufficient for their investments to satisfy the “relating to” standard under Article 1101(1).

**(5) The Einarssons were Each an “Investor of Another Party” at the Relevant Times**

(a) Article 1101(b) Required the Einarssons to be “Investors of Another Party” to Fall Within the Scope of Section A of Chapter 11

169. Article 1101(1)(b), which is applicable to the Claimants’ Article 1110 claim in this Arbitration, states that each of the Einarssons must be an “investor of another Party” to obtain the applicable protections in Section “A” of Chapter 11.<sup>416</sup> A similar limitation exists in Articles 1116(1) and 1117(1) of NAFTA, which state that the Einarssons could

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<sup>413</sup> **CLA-038**, *Westmoreland* at ¶ 212 (“[T]he Tribunal,, merely acknowledged the fact that to be entitled to Chapter 11 protection, an investor must have accepted risk”).

<sup>414</sup> **R-001**, ABQB Common Issues Decision at ¶ 28.

<sup>415</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 159.

<sup>416</sup> NAFTA, Chapter 11, Article 1101(1)(a) and 1101(1)(b) (Article 1101(1)(c) expressly excludes the “investor of a Party” requirement for the purposes of Article 1106, which itself states that it applies to “[a]n investment of a Party or of a non-Party in its territory...”).

- only submit arbitration claims that “[a]nother Party” or “[t]he other Party”, respectively, has breached an obligation under Chapter 11.<sup>417</sup>
170. Article 1139 of NAFTA does not define “investor of another Party”, but does define the term “investor of a Party” as a “Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment”.<sup>418</sup> Article 201 of NAFTA defines “national” as “a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1”.<sup>419</sup>
171. Each of the Einarssons are dual citizens of the United States and Canada.<sup>420</sup>
172. NAFTA is silent on the treatment of claims by dual citizens. However, Article 1131 of NAFTA provides that the Tribunal shall decide this Arbitration “[i]n accordance with this Agreement and applicable rules of international law”.<sup>421</sup> Customary international law includes the established principle that an individual or entity cannot maintain an international claim against its own State.<sup>422</sup> Coupled with the limitations in Articles 1101(1)(b), 1116(1) and 1117(1), the plain language of Chapter 11 indicates that a claim for a breach of Section A of Chapter 11 can only be made by an investor of one Party against a different Party.
173. As Canada notes in its Statement of Defence, customary international law indicates that each of the Einarssons will be considered an “investor of another Party” for the purposes of Articles 1101(1)(b), 1116(1) and 1117(1) of NAFTA if their dominant and effective nationality was of the United States at the relevant times.<sup>423</sup> In Canada’s Statement of

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<sup>417</sup> NAFTA, Chapter 11, Article 1116(1) (“An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation...”); NAFTA, Chapter 11, Article 1117(1) (“An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation...”).

<sup>418</sup> NAFTA, Chapter 11, Article 1139, definition of “investor of a Party”.

<sup>419</sup> NAFTA, Chapter Two, Article 201, definition of “national”.

<sup>420</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 2; **CWS-06**, Paul Einarsson Witness Statement at ¶ 51; **CWS-05**, Russell Einarsson Witness Statement at ¶¶ 3-5.

<sup>421</sup> NAFTA, Chapter 11, Article 1131.

<sup>422</sup> **CLA-047**, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137, Article 4.

<sup>423</sup> Canada Statement of Defence at ¶ 26; see, **CLA-048**, *Nottebohm Case (second phase)*, I.C.J. Reports 1955, Judgement of April 6th, 6 April 1955 (“*Nottebohm Case*”), pp. 22-24; **CLA-049**, *Iran-United States Claims Tribunal*,

Defence, it agrees that those times are the time of the alleged breach and the time of submitting the claims to Arbitration.<sup>424</sup>

174. Previous NAFTA tribunals have identified the date at which the breaches of NAFTA at issue in this Arbitration occurred as follows:
- (a) Article 1106(1) – the date the performance requirement at issue was enforced;<sup>425</sup> and
  - (b) Article 1110 – the date the expropriation occurs, which is the date that the Claimants were substantially deprived of their investment.<sup>426</sup>
175. Where a decision of a Canadian court is the measure at issue, NAFTA tribunals have found that the date of the breach of each of Articles 1110 and 1106 is the date the Canadian court decision becomes final.<sup>427</sup> In the context of this Arbitration, that means each of the breaches occurred when the Alberta Decisions became final, which was the date of the Supreme Court of Canada Decision – November 30, 2017.<sup>428</sup>
176. To assess each of the Einarssons’ dominant and effective nationality, the Tribunal should determine which of the two nationalities of each of Davey, Paul and Russell was ‘dominant and effective’ based on having stronger ties between either Canada or the United States at the relevant times.<sup>429</sup> Doing so will require the Tribunal to examine the connections and the closeness of the bond that each of Davey, Paul and Russell had with Canada and the

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*Case No. A/18-FT (“Iran Tribunal Case”)* at ¶ **CLA-050**; See *Marvin Roy Feldman Karpa v. United Mexican State* (ICSID Case No. ARB(AF)/99/1) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 (“*Feldman*”) at ¶¶ 30-32.

<sup>424</sup> Canada Statement of Defence at ¶ 26.

<sup>425</sup> **CLA-051**, *Mobil Investments Canada Inc v Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018 (“*Mobil No. 2*”) at ¶ 152.

<sup>426</sup> **CLA-046**, *Resolute* at ¶ 154.

<sup>427</sup> **CLA-051**, *Mobil No. 2* at ¶ 152 (“Due to the challenge brought by Mobil in the Canadian courts, it was not until 19 February 2009, when the Supreme Court of Canada dismissed Mobil’s petition for leave to appeal and thus ended the challenge in the Canadian courts, that the Guidelines were actually enforced... against Mobil or that Mobil could have acquired knowledge that they would be enforced.”); **CLA-043**, *Eli Lilly* at ¶ 170 (“[t]he Tribunal finds the relevant dates for the commencement of the limitation period to be 8 December 2011 and 16 May 2013, when the Supreme Court denied Claimant leave to appeal the invalidation of the Strattera Patent and the Zyprexa Patent, respectively.”).

<sup>428</sup> **CER-01**, Nigel Bankes Expert Report at ¶ 41.

<sup>429</sup> **CLA-048**, *Nottebohm Case* at p. 22; **CLA-049**, *Iran Tribunal Case* at p. 25.



United States at the relevant dates.<sup>430</sup> That examination should be holistic in nature considering all of the relevant facts,<sup>431</sup> although the State of habitual residence is one of the most important factors in the analysis.<sup>432</sup> Factors related to the life of the Einarssons prior to the critical dates are relevant, but should be analyzed with a view towards determining the Einarssons’ connection with Canada and the United States as of the dates of the breaches of Chapter 11 – November 30, 2017 – and the date of the NOA – April 18, 2019.<sup>433</sup>

177. The recent decision by an UNCITRAL Tribunal in *Michael Ballantine and Lisa Ballantine v The Dominican Republic* (“*Ballantine*”) reviewed a number of factors that may be relevant to the Tribunal’s assessment of dominant and effective nationality.<sup>434</sup> The Tribunal in *Ballantine* grouped those factors into several broad categories, each of which included a number of non-exhaustive sub-factors. Those factors are as follows:

- (a) habitual residence:
  - (i) place of birth;
  - (ii) place where majority of lives spent;
  - (iii) place of permanent residence;
- (b) the individual’s personal attachment for a particular country:
  - (i) personal and professional relationships;

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<sup>430</sup> **CLA-052**, *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019 (“*Ballantine*”) at ¶ 552.

<sup>431</sup> **CLA-048**, *Nottebohm Case* at p. 22 (“Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”); **CLA-049**, *Iran Tribunal Case* at p. 25; **CLA-052**, *Ballantine* at ¶ 556.

<sup>432</sup> **CLA-052**, *Ballantine* at ¶ 186; **CLA-048**, *Nottebohm Case* at p. 22 (“[t]he habitual residence of the individual concerned is an important factor”).

<sup>433</sup> **CLA-052**, *Ballantine* at ¶ 558.

<sup>434</sup> **CLA-052**, *Ballantine* at ¶ 559; **CLA-048**, *Nottebohm Case* at p. 22 (the factors in *Ballantine* are based on those reference in the *Nottebohm Case*).

- (ii) place of education;
  - (iii) place of civic, religious or other community groups;
  - (iv) personal attachment to particular country;
- (c) the center of the individual's economic, social and family life;
- (i) state where capital was generated to make the investment;
  - (ii) state where banking and investment accounts were located;
  - (iii) state where any other corporations or organizations controlled were operated;
- (d) the circumstances in which the second nationality was acquired, bearing in mind the specific context of the dispute:
- (i) when the second citizenship was acquired;
  - (ii) why the second citizenship was acquired;
  - (iii) how the claimants presented themselves.<sup>435</sup>
178. The analysis should be holistic in nature and should consider both the factors set out above and any other facts that may be relevant to the dominant and effective nationality inquiry.<sup>436</sup>
- (b) *The Application of the Dominant and Effective Nationality Factors to Each of the Einarssons Shows They Were American at the Relevant Times*
179. Applied to each of the Einarssons, the applicable factors show that the dominant and effective nationality of each of them was American, both as of November 30, 2017 and April 18, 2019.

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<sup>435</sup> CLA-052, *Ballantine* at ¶¶ 559-584.

<sup>436</sup> CLA-052, *Ballantine* at ¶ 558.

Davey Einarsson

180. Davey's dominant and effective nationality has been American since 1975.
181. Davey Einarsson was born in 1932 in Arborg, Manitoba, Canada.<sup>437</sup> Davey was the son of a Canadian father and an American mother.<sup>438</sup> Davey grew up in Manitoba and, in 1956, graduated from the University of Manitoba with a Bachelor's Degree in Science.<sup>439</sup>
182. In May 1956, Davey began working for GSI Delaware.<sup>440</sup> Davey accepted a job offer from GSI Delaware because he was promised he would have the opportunity to travel the world.<sup>441</sup>
183. Davey worked for GSI Delaware in Manitoba, Saskatchewan and Alberta, Canada, throughout 1956 and early 1957. In August 1957, GSI Delaware asked him to report to Texas, United States, after which he was subsequently assigned to work for GSI Delaware in Indonesia.<sup>442</sup> Davey worked in Indonesia for approximately two years, after which GSI Delaware assigned him to work in Libya in 1959.<sup>443</sup>
184. Paul and Russell were born in Libya in 1964 and 1965, respectively, while Davey was working there.<sup>444</sup> Paul and Russell's mother, Gina, was Italian-Egyptian and born in Cairo, Egypt.<sup>445</sup>
185. Davey worked in Libya for GSI Delaware until 1969, after which time he briefly worked for the Chappaqua Oil Company in Libya before it was nationalized by the Government of Libya.<sup>446</sup>

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<sup>437</sup> C-126, Life of Adventure Book at p. 132; C-252, Certificate of Birth of Theodore David Einarsson, dated [REDACTED]

<sup>438</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 5; C-253, [REDACTED]

<sup>439</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 7; C-126, Life of Adventure Book at pp. 24-50.

<sup>440</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 7.

<sup>441</sup> C-126, Life of Adventure Book at pp. 61-62.

<sup>442</sup> C-126, Life of Adventure Book at pp. 82-84; CWS-03, Davey Einarsson Witness Statement at ¶ 8.

<sup>443</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 8; C-126, Life of Adventure Book, at p. 139.

<sup>444</sup> C-126, Life of Adventure Book at pp. 161-163.

<sup>445</sup> C-126, Life of Adventure Book at p. 149.

<sup>446</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 9.

186. In late 1970, Davey returned to work at GSI Delaware and became its Vice-President, with oversight of its Canadian and Alaskan operations.<sup>447</sup> Davey's family relocated to Canada around that time and, beginning in 1971, Davey, Gina, Paul and Russell resided in Calgary, Alberta.<sup>448</sup> Davey's third and final son, David Jr., was born in 1973 in Calgary.<sup>449</sup>
187. In August 1975, GSI Delaware promoted Davey and requested that he and his family relocate to Texas, United States.<sup>450</sup> After Davey's family moved to Texas in 1975, Davey has never resided in Canada. Davey became Vice-President of Worldwide Marine Marketing Operations of GSI Delaware in 1978 and then the manager of Worldwide Marine Operations and Data Processing for GSI Delaware in 1980.<sup>451</sup>
188. Davey enjoyed living in Texas so much that he applied for American citizenship. He was ultimately granted American citizenship in 1978.<sup>452</sup> Davey applied for American citizenship instead of claiming it through his mother because the process to do so was easier.<sup>453</sup>
189. Davey has resided in Texas continuously since 1975 and identifies as an American and a Texan, in addition to being a Canadian with Icelandic heritage.<sup>454</sup>
190. In light of the foregoing, Davey's dominant and effective nationality became American in 1978. As of the relevant dates – November 30, 2017 and April 18, 2019 – Davey had been continuously residing in Texas, United States for over 40 years. Accordingly, Davey was an “investor of another Party” at each of those times within the meaning of Articles 1101(1)(b), 1116(1) and 1117(1) of NAFTA. Given his obvious dominant and effective American nationality at those dates, a further detailed analysis of other *Ballantine* factors is unnecessary.

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<sup>447</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 10.

<sup>448</sup> C-126, Life of Adventure Book at pp. 222-223.

<sup>449</sup> C-126, Life of Adventure Book at p. 223.

<sup>450</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 12; C-126, Life of Adventure Book at p. 263.

<sup>451</sup> C-126 Life of Adventure Book at ¶ 12.

<sup>452</sup> C-126, Life of Adventure Book at p. 264.

<sup>453</sup> C-126, Life of Adventure Book at p. 265.

<sup>454</sup> C-126, Life of Adventure Book at p. 264.

Paul Einarsson

191. Paul Einarsson's dominant and effective nationality was American, both as of November 30, 2017 and April 18, 2019.

(a) *Background, Education and Habitual Residence*

192. Paul Einarsson was born in Libya in 1964 and then briefly resided in Calgary, as a child – from 1971 until 1975 – before his family settled in Texas, United States in late 1975.<sup>455</sup> Although he was technically Libyan by birth until he naturalized to American citizenship in 1990,<sup>456</sup> Paul grew up as an American, was educated in America and lived in the United States continuously from 1975 until 1997.<sup>457</sup> Paul does not maintain ties with his Libyan citizenship whatsoever, if he even still has it.<sup>458</sup>

193. Paul was educated in the United States. He attended grades 5 through 12 in Texas before obtaining an undergraduate degree from the University of Texas at Dallas in 1986 and a Master's of Business Administration from Southern Methodist University in 1988.<sup>459</sup> During his post-secondary studies in Texas, Paul met his wife, [REDACTED] [REDACTED]<sup>460</sup> They married in 1989 in Dallas, Texas.<sup>461</sup> Their first marital home was in Dallas, Texas, which they owned from 1988 until approximately 1995.<sup>462</sup> They resided in California from approximately late 1995 to April 1997, at which

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<sup>455</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 33; C-254, CERTIFICATO DI NASCITA for Harold Paul Einarsson.

<sup>456</sup> C-255, Paul Einarsson Resident Alien Card Certificate, [REDACTED] C-256, Paul Einarsson Certificate of Naturalization, [REDACTED]

<sup>457</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 34.

<sup>458</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 34.

<sup>459</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 35; C-257, Paul Einarsson Bachelor of Arts in Economics and Finance from the University of Texas at Dallas; C-258, Harold Paul Einarsson Master of Business Administration from Southern Methodist University.

<sup>460</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 35; C-259, [REDACTED] Master of Business Administration from Southern Methodist University.

<sup>461</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 35; C-260, Wedding Certificate for Paul, dated [REDACTED]

<sup>462</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 35.

- time Paul worked for other entities, not GSI.<sup>463</sup> Paul's children were both born in Dallas, Texas in the years following his graduation from Southern Methodist University.<sup>464</sup>
194. In 1997, Davey and GSI asked Paul to relocate with his family to the business hub for Canada's oil and gas industry, Calgary, Alberta, to support and grow GSI's expanding Canadian seismic business.<sup>465</sup> At that time, Paul understood that GSI intended for him to reside in Canada for only a few years, after which he would return to the United States leaving staff in Calgary to manage the well-established business.<sup>466</sup>
195. Paul and [REDACTED] purchased a residential home in Calgary in 1997, in which they intended to reside for only a few years. They ultimately generally resided in Calgary between 1997 and 2011.<sup>467</sup> Paul had intended for his family to eventually permanently reside in the United States the entire time he resided in Canada.<sup>468</sup> Paul and [REDACTED] frequently travelled back to the United States during that time because that is where their friends and family were located.<sup>469</sup>
196. In 2004, Paul purchased a farm in Alberta, Canada that would be used to store the Seismic Works in Canada due to the requirements of the Regulatory Regime (the "Farm").<sup>470</sup>
197. In October 2006, after they had been in Canada several years longer than GSI originally promised, Paul and [REDACTED] decided to move back to California, United States for at least the winters.<sup>471</sup> Shortly thereafter, Paul and [REDACTED] engaged a realtor in California to assist them with finding a permanent home in California.<sup>472</sup> Paul also asked the former CFO of GSI,

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<sup>463</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 36.

<sup>464</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 35; C-261, Certificate of Vital Record for [REDACTED] C-262, [REDACTED] Passport of United States of America issued [REDACTED]

<sup>465</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 37.

<sup>466</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 37.

<sup>467</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 38.

<sup>468</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 38.

<sup>469</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 38.

<sup>470</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 39.

<sup>471</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 40.

<sup>472</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 40.

[REDACTED], who had experience in tax and financial planning, to assist Paul with organizing his finances in preparation to move back to the United States.<sup>473</sup>

198. Paul and [REDACTED] subsequently put an offer on a home in San Diego, California that was accepted in September 2008; however, due to the stock market crash at the end of September 2008, the transaction did not close.<sup>474</sup> Around that time, Paul’s daughter was applying to universities in the United States (and none in Canada), including in California.<sup>475</sup>

199. In 2011, Paul and [REDACTED] finally purchased a home in San Diego, California.<sup>476</sup> They wanted the San Diego home for several reasons, including because they were visiting the United States so frequently and wanted a place to stay there and because they wanted to leave Canada.<sup>477</sup> At the time Paul and [REDACTED] purchased the San Diego home, GSI’s business in Canada no longer had ships operating and Paul’s children had left Canada and returned to the United States to attend University.<sup>478</sup> In January 2012, Paul purchased a new vehicle for the family to use in California.<sup>479</sup>

200. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]<sup>481</sup>

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<sup>473</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 40; C-263, Letter from [REDACTED] to Paul Einarsson regarding Tax Planning, 2006.

<sup>474</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 41.

<sup>475</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 41.

<sup>476</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 42; C-264, Subject Property History Report for [REDACTED] [REDACTED] C-265, Buyer’s Estimated Closing Statement and Escrow Documents, dated November 19, 2011.

<sup>477</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 42.

<sup>478</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 42.

<sup>479</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 42; C-266, Lexus San Diego Statement, dated January 25, 2012.

<sup>480</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 43; C-267, Paul Einarsson U.S. Customs and Border Protection entry-exit records, 2020; C-268, Travel History from January 1, 2011 to May 26, 2020 for H. Paul Einarsson.

<sup>481</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 43.

201. [REDACTED]
202. In 2013, Paul and [REDACTED] arranged to have their home in Calgary, Alberta renovated in anticipation of selling it since they had relocated back to the United States for a large part of the year.<sup>484</sup> Paul also sold the Einarsson family homestead called Oxara, in Arborg, Manitoba in 2013, which sale was in preparation for his family's permanent relocation to the United States.<sup>485</sup>
203. In July 2015, Paul and [REDACTED] sold a commercial building investment they purchased in downtown Calgary, Alberta to provide liquidity for the litigation expenses that GSI was incurring in its litigation.<sup>486</sup>
204. In October 2015, Paul and [REDACTED] put their home in Calgary, Alberta on the market in anticipation of departing from Canada permanently.<sup>487</sup> However, the depressed economy in Calgary in 2015 and 2016 due to a crash in oil prices meant that the Calgary home stayed on the market longer than Paul or [REDACTED] anticipated.<sup>488</sup>
205. On September 9, 2016, Paul and [REDACTED] entered into an agreement to sell their Canadian residence in Calgary, Alberta.<sup>489</sup> Paul and [REDACTED] had only resided in their Calgary home for less than half of each year since 2011, and it was sold to pay for GSI's legal fees arising from the proceedings leading up to the Calwest Trial and the Common Issues Decision.<sup>490</sup>

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<sup>482</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 44.

<sup>483</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 44.

<sup>484</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 45.

<sup>485</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 45; C-269, Letter from [REDACTED] to Paul Einarsson, dated August 23, 2013.

<sup>486</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 46; C-270, Offer to Purchase, dated July 22, 2015.

<sup>487</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 47.

<sup>488</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 47.

<sup>489</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 48; C-271, Residential Purchase Price Contract, dated November 21, 2016.

<sup>490</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 48.



206.

(b) *Paul's Personal Attachment for a Particular Country*

207. Paul self-identifies as American and has a deep attachment with the United States.
208. Paul was born as a Libyan, Canadian and American national by virtue of being born in Libya, and his father, Davey, being both a Canadian and American citizen.<sup>493</sup> However, in 1990, Paul applied for his American citizenship (naturalization) instead of claiming it through Davey due to his attachment with America.<sup>494</sup>
209. Paul has relatives in Manitoba, Canada due to Davey's history in the latter.<sup>495</sup> However, beyond his relatives in Manitoba, the vast majority of Paul's personal, family and professional connections are located in the United States or other countries outside of Canada.<sup>496</sup>
210. When Paul arrived in Calgary in 1997 to work for GSI, his family had to start from scratch in terms of making connections.<sup>497</sup> While he was living in Canada, those connections were generally related to Paul's work for GSI and friends of his children who were in local schools at that time.<sup>498</sup> Paul generally spent his spare time in the United States, traveling there frequently, including for annual family reunions that they never miss and to take care of their aging parents, resident in Texas and Florida, respectively.<sup>499</sup> Paul and his family

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<sup>491</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 48; C-272, Joint Departing Tax Return, dated [REDACTED]

<sup>492</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 49; C-273, Grant, Bargain and Sale Deed, dated February 22, 2017; C-274, ALTA Settlement Statement – Buyer, dated February 27, 2017.

<sup>493</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 51.

<sup>494</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 51.

<sup>495</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 52.

<sup>496</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 52.

<sup>497</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 53.

<sup>498</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 53.

<sup>499</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 53.

also attended every Christmas and American Thanksgiving (with the exception of one) in the United States during the time they were living in Canada.<sup>500</sup>

211. Paul's personal, family and professional connections in Canada have been nearly non-existent since 2012 and even less after they left Canada in January 2017.<sup>501</sup> After purchasing the San Diego home in 2011, Paul's focus was on solidifying the connections and relationships he had in the United States or creating new connections or relationships as part of his plans to be in the United States full time.<sup>502</sup> Other than his relatives in Manitoba, the connections and friendships that Paul has had in Canada since 2011 have been largely related to the ongoing Domestic Actions, such as with accountants, lawyers, bankers, insurers and former GSI employees or industry connections (who sometimes serve as witnesses or consultants in the Domestic Actions).<sup>503</sup>

(c) *The Center of the Individual's Economic, Social and Family Life*

212. Since he moved to the United States as a child in 1975, the center of Paul's economic, social and family life has always been, and continues to be, in the United States, including while he was stationed in Canada by GSI.
213. The United States has been the center of Paul's economic life.
214. Paul built his economic base in the United States from 1986 onward and has continuously held a large portion of his personal assets in the United States to the present day.<sup>504</sup> Between 1986 and 1988, while he was attending Southern Methodist University, Paul worked in the United States and founded both a security system business and real estate investing business, the latter of which saw Paul own between three to eight condominium rental investments in Dallas at any given time.<sup>505</sup> After he graduated from Southern Methodist University, Paul held several jobs in the United States, eventually working his way up to Assistant Vice President of Providian Bancorp in San Francisco, California, a

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<sup>500</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 53.

<sup>501</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 54.

<sup>502</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 54.

<sup>503</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 54.

<sup>504</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 56.

<sup>505</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 56.

position he held until 1997.<sup>506</sup> Paul used his hard work in the United States between 1986 and 1997 to generate the funds he ultimately invested in GSI.<sup>507</sup>

215. Paul continued to hold some of his assets in the United States after being stationed in Canada by GSI in 1997.<sup>508</sup> Paul has maintained almost all of his banking and investment accounts in the United States continuously since the 1980s.<sup>509</sup> Paul also owned a one-third interest in an affiliate of GSI, OGSI, which built, serviced and rented marine seismic source and receiver systems out of a 10 acre commercial property (owned by OGSI) located in Pearland, Texas from 2004 to 2014.<sup>510</sup> Paul also acquired and held a number of vehicles from the United States after 1997, being an avid collector of Toyotas, and a member of a Toyota Supra car club and the Toyota Owners and Restorers Club that regularly meet in California and Nevada.<sup>511</sup> Paul also had investments in real estate in Dallas, Texas, a one third ownership in a 10 acre commercial warehouse property in Texas through his one third ownership of OGSI and a wine property in Napa, California between 2005 and 2015.<sup>512</sup>
216. Paul has owned, or currently owns, several assets in Canada, all of which are directly either related to GSI and were necessary for its business, or were maintained by Paul for convenience purposes due to his station in Calgary with GSI and having his wife and children there with him.
217. In 2012, Paul purchased an office in Calgary, Alberta for GSI to operate out of and store its seismic materials.<sup>513</sup> That office was sold for a loss in 2021.<sup>514</sup> As noted, Paul also owns the Farm, which is located in Alberta, Canada.<sup>515</sup> Both the office and the Farm have been owned solely to comply with the requirements in the Regulatory Regime that GSI

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<sup>506</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 57.

<sup>507</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 57.

<sup>508</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 58.

<sup>509</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 58(a).

<sup>510</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 58(b); C-275, Option to Purchase, dated December 30, 2004; C-276, Commercial Contract – Improved Property

<sup>511</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 58(c).

<sup>512</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 58(d).

<sup>513</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 60; C-277, Commercial Real Estate Purchase, dated July 5, 2012.

<sup>514</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 60; C-278, Commercial Purchase Contract, dated December 15, 2021.

<sup>515</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 60.

- must store the Seismic Works in Canada.<sup>516</sup> At this time, the only remaining real estate asset that Paul owns in Canada is the Farm, which cannot be sold due to GSI's ongoing obligation under the Regulatory Regime to store the Seismic Works in Canada.<sup>517</sup>
218. Although Paul has held certain Canadian bank accounts, including an investment account, retirement accounts and a chequing account, these accounts were not where his main net worth resided.<sup>518</sup> Paul essentially closed his Canadian investment account in 2015, but it remains open to hold a few delisted stocks in Canadian companies.<sup>519</sup> Paul continues to maintain Canadian chequing accounts for convenience purposes due to his occasional travels to Canada to support the Domestic Actions, but stopped using that account as his primary personal account in 2012.<sup>520</sup>
219. As an American, Paul has always paid taxes in the United States, including from 1997 through 2016 while he was living in Canada.<sup>521</sup> However, during his time in Canada, Paul also had to pay Canadian taxes prior to [REDACTED].  
[REDACTED] Given that Paul was going to incur extra taxes as a result of relocating to Canada, GSI agreed to pay for all of Paul's tax preparation and tax advice in Canada.<sup>523</sup> GSI also agreed to reimburse Paul for any additional taxes he paid in Canada and upon his departure from Canada, which GSI ultimately did.<sup>524</sup>
220. The United States has also been the center of Paul's social life since he was a child.
221. Paul is, or has been, a member of a number of social and professional organizations based in the United States, including throughout the time he was stationed in Canada.<sup>525</sup> Those social organizations are detailed as follows:

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<sup>516</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 60; C-142, 1996 COGOA Regulation at Section 39.

<sup>517</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 60.

<sup>518</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 61.

<sup>519</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 61.

<sup>520</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 61.

<sup>521</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 62.

<sup>522</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 62.

<sup>523</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 62.

<sup>524</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 62.

<sup>525</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64.

- (a) Paul started and was President of the Dallas Young Republicans (“DYR”) throughout his time in university, and beyond university, between 1986 and 1995, before leaving DYR.<sup>526</sup> Paul made many personal and professional connections based in the United States during his time with DYR, many of whom he has kept in touch with since then and throughout his time in Canada.<sup>527</sup> In fact, Paul’s connections at United States based lenders, whom he met through DYR, ended up providing tens of millions of dollars in financing for GSI to acquire its ships in Canada.<sup>528</sup> Paul also met George W. Bush many times, who went on to become Governor of Texas and President of the United States, during his time with DYR.<sup>529</sup>
- (b) Paul was a member of the Council for National Policy, a conservative political networking organization based in the United States from 2006 through 2011.<sup>530</sup> Paul maintained his membership in that organization during his time in Canada from 2006 and 2011, and attended meetings held three to four times per year for it in the United States during that time.<sup>531</sup> Paul remained close with the founder and President of a related organization, the Pacific Justice Institute, who Paul grew up with in Texas.<sup>532</sup>
- (c) Paul was also a member of The Executive Committee (now called Vistage), an executive coaching group based in California, United States, from approximately 2001 to 2011.<sup>533</sup> Paul maintained his membership in that organization throughout his time in Canada, attending meetings in the United States from time-to-time.<sup>534</sup>
- (d) Paul has been a member of Supras in Vegas, the world’s largest annual Toyota Supra owners gathering in Las Vegas, Nevada, United States, continuously since

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<sup>526</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(a).

<sup>527</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(a).

<sup>528</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(b).

<sup>529</sup> C-279, Photograph of Paul Einarsson with George W. Bush at DYR Event.

<sup>530</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(b).

<sup>531</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(b).

<sup>532</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(b).

<sup>533</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(c).

<sup>534</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(c).

2010.<sup>535</sup> Paul maintained his membership in Supras in Vegas throughout his time in Canada and attended annual meetings held by Supras in Vegas in Las Vegas during that time.<sup>536</sup> Paul has made many personal and professional connections based in the United States through Supras in Vegas and the Toyota Owners and Restorers Club, many of whom he keeps in touch with and kept in touch with during his time in Canada.<sup>537</sup>

- (e) Paul was an active board member of the IAGC in Houston, Texas between 2000 and 2011, during which time the IAGC was actively involved in industry issues, creating template seismic data license agreements, attending meetings in Canada with government and government lobbying.<sup>538</sup>

222. Paul was a member of several organizations during his time in Canada between 1997 and 2011, but those organizations were all affiliated with the business of GSI.<sup>539</sup> As consideration for requiring Paul to relocate to Canada, GSI agreed to pay membership fees and for all expenses incurred by Paul at the Calgary Golf and Country Club and the Calgary Petroleum Club during his employment with GSI.<sup>540</sup> Those were the two forums where Paul met and entertained clients of GSI in Canada.<sup>541</sup> Paul ceased his memberships with those Canadian clubs in 2008, as he was involved in the Domestic Actions and many defendants in those lawsuits would spend time at those Canadian clubs, providing for awkward encounters.<sup>542</sup>

223. The United States has also been the center of Paul's family life since he was a child.

224. With the exception of a handful of relatives in Manitoba, Canada, Paul's family resides in the United States and has done so for Paul's entire life since their relocation to the United

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<sup>535</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(d).

<sup>536</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(d).

<sup>537</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(e).

<sup>538</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 64(e).

<sup>539</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 65.

<sup>540</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 65; C-251, Paul Einarsson Employment Agreement, dated [REDACTED]

<sup>541</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 65.

<sup>542</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 65.

States in 1975.<sup>543</sup> Over time, Paul's extended family also resided in the United States.<sup>544</sup> As noted, [REDACTED] is also from the United States, as is her entire extended family.<sup>545</sup>

225.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Paul's son lives

in the United States and is married to a Russian national.<sup>550</sup>

(d) *The Circumstances Regarding Paul's Use of his Canadian Nationality*

226. Paul's use of his Canadian nationality has been declining since 2012 and any such use of his Canadian nationality has been related to GSI.

227. Paul's immigration records from Canada and the United States indicate that Paul has predominately (almost exclusively) used his United States citizenship to enter both Canada and the United States since mid-2012.<sup>551</sup> Since that time, Paul has only used his Canadian passport when his United States passport or his Nexus card was unavailable.<sup>552</sup>

228. Paul also used his Canadian residency to obtain Canadian controlled corporation tax advantages for GSI and to satisfy Canadian director residency requirements for GSI until 2016.<sup>553</sup> Those tax advantages were premised solely on Paul being resident in Canada,

<sup>543</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 67.

<sup>544</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 67.

<sup>545</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 67.

<sup>546</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 68.

<sup>547</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 68.

<sup>548</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 68; C-280, [REDACTED] Passport of United States of American, issued [REDACTED]

<sup>549</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 68; C-281, [REDACTED] Doctor Degree Joint, the University of Queensland Oschsner Clinical School Certificate.

<sup>550</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 68.

<sup>551</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 70; C-267, Paul Einarsson U.S. Customs and Border Protection entry-exit records; C-268, Travel History from January 1, 2011 to May 26, 2020 for H. Paul Einarsson.

<sup>552</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 70.

<sup>553</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 71.

were not related to his Canadian citizenship and do not result in Paul feeling more connected to Canada.<sup>554</sup>

229. Between 2009 and 2014, Paul was attempting to spread awareness of the issues GSI was facing in getting information from the Boards and Canada regarding the use and disclosure of the Seismic Works under the Regulatory Regime.<sup>555</sup> During that time, Paul was quoted in many newspapers and appeared in online videos wherein he described the ordeal that GSI was facing.<sup>556</sup> In several of those newspaper articles or videos, Paul identified himself as a resident of Alberta or as a Canadian.<sup>557</sup> Paul's statements around that time were correct, as he did have a residence in Alberta up to 2016 and was, and still is, a Canadian.<sup>558</sup> He believed that saying so would attract more attention to the issues and avoid anti-American bias he often encountered when he told his story.<sup>559</sup> Those statements did not change the facts of his dominant and effective nationality being American.

(e) *Weighing the Relevant Factors for Paul*

230. When considered in the context of Paul's entire life, the relevant evidence before the Tribunal indicates that Paul's dominant and effective nationality was American both as of the dates of the breaches of Chapter 11 of NAFTA – November 30, 2017 – and as of the date the NOA was served – April 18, 2019.
231. Paul was born Libyan, but grew up in America, was educated in America, voluntarily claimed his American citizenship and started his career in America. In 1997, Paul relocated to Canada at the request of GSI, which promised to reimburse Paul for the various business-related costs he would incur during his time in Canada and that he would not be in Canada for more than a few years. From 1997 onward, Paul continued travelling back to the United States to maintain his social and family ties there.

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<sup>554</sup> C-282, Government of Canada Website on Canadian-controlled private corporation; CWS-06, Paul Einarsson Witness Statement at ¶ 71.

<sup>555</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 72.

<sup>556</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 72.

<sup>557</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 72.

<sup>558</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 72.

<sup>559</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 72.



232. In 2006, Paul and [REDACTED] made efforts to relocate to the United States, as was originally promised by GSI. Paul and [REDACTED] search for several years then attempted to buy a home in the United States in 2008, but ultimately did not purchase one until 2011 due to the stock market crash in 2008.
233. Between 2011 and 2016, Paul spent 45% or more of his time in the United States, as well as time in other countries outside of Canada, but did spend some of his time in Canada dealing with the Domestic Actions. Paul sold an office building in Calgary in 2015, his Canadian residence in 2016 and filed a departing Canadian tax return effective January 1, 2017. Paul's only remaining asset in Canada are the Farm and his minimal account holdings, the former of which Paul has to keep due to the requirements of the Regulatory Regime.
234. Paul's dominant and effective nationality has been American continuously since 1975. Throughout his time in Canada, Paul maintained strong ties to the United States. Those ties were established prior to his residency in Canada and continued to be strengthened during his time in Canada and, when Paul left Canada, Paul's footprint in Canada withered and was eventually reduced to almost nothing in 2016. By January 1, 2017, Paul and [REDACTED] *officially* left Canada for good after [REDACTED]  
[REDACTED]
235. In light of the foregoing, Paul's dominant and effective nationality at the relevant dates was American. Paul and [REDACTED] permanently left Canada nearly 11 months prior to the first critical date, November 30, 2017, and over two years prior to the second critical date, April 18, 2019. Accordingly, Paul was, and is, an "investor of another Party" for the purposes of Articles 1101(1)(b), 1116(1) and 1117(1) of NAFTA.

Russell Einarsson

236. Russell Einarsson's dominant and effective nationality was also American as of November 30, 2017 and April 18, 2019.

237. Russell was born in Libya in 1965,<sup>560</sup> resided in Calgary, Alberta, Canada from 1971 until 1975.<sup>561</sup> Russell's family relocated to Texas in 1975.<sup>562</sup> Russell grew up as an American and has resided in the United States continuously since 1975.<sup>563</sup>
238. Russell was born a Libyan, and dual Canadian and American national by virtue of his father, Davey, being both a Canadian and American citizen. However, in 2005, Russell applied for his American citizenship instead of claiming it through his father, due to his attachment with the United States.<sup>564</sup>
239. From 1992 to 2013, Russell worked indirectly for GSI as the Vice President of OGS, where he was based in Houston, Texas.<sup>565</sup> Russell was stationed in Houston, Texas for the duration of that employment, traveling frequently to market the marine seismic business of GSI in the United States.<sup>566</sup> After 2013, Russell found alternate, albeit much less lucrative, self employment in Texas.<sup>567</sup>
240. Russell has not resided in Canada since 1975, has never had any significant assets in Canada other than his loan to GSI and self identifies as American.<sup>568</sup> Russell's former wife and children were born in the United States, live in Texas and, while his children are eligible to use their Canadian citizenship, they have not done so.<sup>569</sup>
241. In light of the foregoing, Russell's dominant and effective nationality was American both as of November 30, 2017 and April 18, 2019. At those times, Russell had been continuously residing in Texas, United States for nearly 40 years. Accordingly, Russell was an "investor of another Party" at each of those times within the meaning of Articles 1101(1)(b), 1116(1) and 1117(1) of NAFTA. Given his obvious American dominant and

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<sup>560</sup> **CWS-06**, Russell Einarsson Witness Statement at ¶ 3; **C-283**, CERTIFICATO DI NASCITA for Russell John Einarsson.

<sup>561</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶ 4.

<sup>562</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶ 4.

<sup>563</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶ 4.

<sup>564</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶ 4.

<sup>565</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶¶ 6-7.

<sup>566</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶¶ 6-7.

<sup>567</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶¶ 6-7.

<sup>568</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶ 5.

<sup>569</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶ 5.

effective nationality at those dates, a further detailed analysis of other *Ballantine* factors is unnecessary.

**B. The Claimants Satisfy the Jurisdictional Requirements Under Articles 1116 and 1117 of NAFTA**

242. The Claimants also satisfy the requirements to bring their claims under Articles 1116 and 1117 of NAFTA, as applicable.

**(1) The Einarssons have Standing to Bring Claims on their Own Behalves Under Article 1116(1)**

243. Each of the Einarssons has standing to bring claims under Article 1116(1).

244. Article 1116 covers harm suffered by investors.<sup>570</sup> Article 1116(1) authorizes an “[i]nvestor of a Party” to submit to arbitration a claim that another Party has breached its obligations under Chapter 11 “[o]n its own behalf” if it has incurred “[l]oss or damage by reason of, or arising out of” Canada’s breach of Chapter 11.<sup>571</sup>

245. As noted above, each of the Einarssons had “investments” (shares and/or the Loans) that fall within the scope of Article 1139 of NAFTA. Moreover, each of the Einarssons was an “investor of a Party” at the date of Canada’s breaches of Chapter 11 and when their claims were submitted to Arbitration.

246. Based on the plain language of Article 1116(1), the Einarssons must satisfy two additional requirements to have standing to claim under Article 1116(1):

- (a) they must each be claiming on their own behalf such that they held the investment at the time of the alleged breach and are not bringing the claim on another’s behalf; and

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<sup>570</sup> **CLA-038**, *Westmoreland* at ¶ 200; **CLA-053**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007 (“*UPS*”) at ¶ 32; **CLA-054**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 (“*Mondev*”) at ¶ 79.

<sup>571</sup> NAFTA, Chapter 11, Article 1116(1).

(b) they must each have suffered loss or damage “[b]y reason of, or arising out of” Canada’s breach of Chapter 11.<sup>572</sup>

247. The Einarssons each satisfy those two additional requirements and, as such, have standing to bring their claims on their own behalves under Article 1116(1).
248. Regarding the first requirement, each of Davey, Paul and Russell held their investments at the time of Canada’s breaches of Articles 1110 and 1106(1)(f) of NAFTA. Davey and Paul both acquired their shares in GSI well before November 30, 2017 and continue to hold them as of today.<sup>573</sup> The Loans were also all issued well before November 30, 2017,<sup>574</sup> and they remain outstanding today.<sup>575</sup> The Einarssons also had the Remunerative Contracts as of November 30, 2017, or would have had them but for the impact of the Alberta Decisions.<sup>576</sup>
249. Moreover, each of the Einarssons are making their claims under Article 1116(1) on their own behalves and not on another’s behalf. Paul and Davey’s claims on the basis of their shares are that the value of their own shares and their rights to receive assets upon the dissolution of GSI and to receive dividends that are granted by their shares were destroyed by Canada’s breaches of Chapter 11.<sup>577</sup> Similarly, the Einarssons’ claims regarding the Loans and the Remunerative Contracts are that Canada’s breaches of Chapter 11 have made the Loans and the Remunerative Contracts impossible to collect upon.<sup>578</sup> Those claims are

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<sup>572</sup> See, **CLA-038**, *Westmoreland* at ¶ 200; see also, **CLA-035**, *Mesa Power* at ¶¶ 312-313.

<sup>573</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 2; **CWS-06**, Paul Einarsson Witness Statement at ¶ 94; **C-235**, Paul Share Certificate for [REDACTED], dated [REDACTED]; **C-236**, Paul Share Certificate for [REDACTED], dated [REDACTED]; **C-237**, Davey Share Certificate for [REDACTED], dated [REDACTED]; **C-238**, Davey Share Certificate for [REDACTED], dated [REDACTED].

<sup>574</sup> The Loans were all issued between June 15, 2001 and May 5, 2005; see, **C-239**, Davey Loan (made June 15, 2001); **C-056**, Russell Loan (made June 15, 2001); **C-240**, Paul GSI Loan No. 1 (made June 15, 2001); **C-241**, Second Promissory Note for Paul Demand Loan No. 1; **C-242**, Paul Precision Loan (made June 15, 2001); **C-243**, Paul PSPC Promissory Note No. 1; **C-244**, Paul PSPC Promissory Note No. 2; **C-246**, Alexandra Loan (dated February 19, 2004); **C-247**, Paul GSI Loan No. 2 (dated May 5, 2005).

<sup>575</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 53; **CWS-05**, Russell Einarsson Witness Statement at ¶ 8; **CWS-06**, Paul Einarsson Witness Statement at ¶ 17.

<sup>576</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 4, 18 and 172(a).

<sup>577</sup> See NOI at ¶¶ 42-44 and 136; See NOA at ¶ 29(a).

<sup>578</sup> See NOI at ¶¶ 42-44 and 136; See NOA at ¶ 29(a); **CWS-06**, Paul Einarsson Witness Statement at ¶ 159(c).

being advanced on each of the Einarssons own behalves and fall squarely within the scope of Article 1116(1).

250. Secondly, each of the Einarssons suffered losses or damages “[b]y reason of, or arising from” Canada’s breaches of Articles 1110 and 1106(1)(f). At the jurisdictional stage of this Arbitration, the Einarssons do not need to prove that they have actually suffered loss or damage.<sup>579</sup> Instead, Article 1116(1) merely requires the Einarssons to “claim” that they suffered loss or damage due to Canada’s breaches of Articles 1110 and 1106(1)(f).<sup>580</sup>

251. The losses claimed by the Einarssons under Article 1116(1) are as follows:

- (a) Davey and Paul each suffered losses or damages due to the total diminution in the value of their shares in GSI and the rights conferred by those shares, including a loss of any dividends, by reason of or arising from the Alberta Decisions;<sup>581</sup>
- (b) Davey, Paul and Russell each suffered losses or damages due to being unable to collect on the Loans, by reason of or arising from the Alberta Decisions;<sup>582</sup> and
- (c) Paul, Davey and Russell each suffered losses or damages due to losses of their respective remuneration and reputations, by reason of or arising from the Alberta Decisions.<sup>583</sup>

252. In light of the foregoing, the Einarssons have standing to bring claims on their own behalves under Article 1116(1).

**(2) Davey has Standing to Bring Claims on Behalf of GSI Under Article 1117(1)**

253. Davey has standing to submit claims on behalf of GSI under Article 1117(1).

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<sup>579</sup> **CLA-035**, *Mesa Power* at ¶¶ 313.

<sup>580</sup> **CLA-035**, *Mesa Power* at ¶ 313 (“[I]t [Article 1116] merely requires the investor to “claim” that it has incurred harm due to the breach. It is not for the investor to prove at this early stage that it has actually suffered a loss or damage. Proof of actual damage is a matter for the merits, as opposed to the jurisdiction phase of the arbitration.”).

<sup>581</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 159(a).

<sup>582</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 53; **CWS-05**, Russell Einarsson Witness Statement at ¶ 8; **CWS-06**, Paul Einarsson Witness Statement at ¶ 159(b).

<sup>583</sup> **CWS-05**, Russell Einarsson Witness Statement at ¶ ; **CWS-06**, Paul Einarsson Witness Statement at ¶ 159(c).

254. Article 1117 covers harm suffered by an enterprise in the territory of the State where the measure applied. Article 1117(1) provides, in the relevant parts, that an “[i]nvestor of a Party” can submit claims “[o]n behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly” that the other Party has breached an obligation under Section A of Chapter 11 and the enterprise has “[i]ncurred loss or damage by reason of, or arising out of, the breach”.<sup>584</sup>
255. As noted above, Davey is an “investor of a Party” for the purposes of Article 1139 of NAFTA. Davey was also an “investor of a Party” as of the date Canada breached Chapter 11 and the date GSI’s claim was submitted to Arbitration.
256. As noted above, GSI is an “enterprise” within the meaning of Article 1139. Similarly, GSI is an “enterprise of a Party” as that term is defined in Article 1139,<sup>585</sup> as GSI is a privately-owned corporation incorporated pursuant to the laws of Canada and doing business in Canada.<sup>586</sup>
257. Based on the plain language of Article 1117(1), the two other requirements for Davey to bring a claim on behalf of GSI are:
- (a) Davey owned or controlled GSI as of the date of Canada’s breach of Chapter 11 and the date the claim was submitted to Arbitration;<sup>587</sup> and
  - (b) GSI suffered loss or damage “[b]y reason of, or arising out of” Canada’s breach of Chapter 11.
258. First, Davey owned or controlled GSI as of the date of Canada’s breaches of Chapter 11 – November 30, 2017 – and the date the claim was submitted to Arbitration – April 18, 2019.

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<sup>584</sup> NAFTA, Chapter 11, Article 1117(1).

<sup>585</sup> NAFTA, Chapter 11, Article 1139, definition of “enterprise of a Party” (“enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying on business activities there.”).

<sup>586</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 6; **C-234**, Certificate of Incorporation of GSI.

<sup>587</sup> A NAFTA tribunal recently confirmed that the relevant date for the “[o]wns or controls” criteria is the date of the breach of Chapter 11, see **CLA-055**, *B-Mex, LLC and Others v United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019 (“*B-Mex*”) at ¶¶ 145; 147-153.

259. NAFTA does not define the phrase “owns or controls”, or either of the two terms implicated therein. However, two very recent NAFTA tribunals considered the definition of “owns or controls”.<sup>588</sup> One of those tribunals, *B-Mex LLC v Mexico*, clarified that Article 1117 will apply whenever the investor:
- (a) “owns all of the outstanding shares in an enterprise (an enterprise that the investor ‘owns’);”;
  - (b) “owns a lesser number of shares that is still sufficient in the specific circumstances to confer the legal capacity to control (an enterprise that the investor ‘controls’);”  
or
  - (c) “does not own a number of shares sufficient to confer the legal capacity to control but is otherwise able to exercise de facto control (also an enterprise that the investor ‘controls’).”<sup>589</sup>
260. Davey fell into category (b) as of November 30, 2017 and April 18, 2019. In assessing that, the circumstances regarding the structure of GSI and the nature of the *de facto* control of GSI are relevant to determining whether Davey had the requisite degree of control over GSI at the relevant dates.<sup>590</sup>
261. The structure of GSI is such that Davey owns (and owned all the relevant dates<sup>591</sup>) the majority of the issued and outstanding shares of GSI [REDACTED] and Paul owns the remaining issued and outstanding shares of GSI [REDACTED]:

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<sup>588</sup> See **CLA-055**, *B-Mex* at ¶¶ 198-205; see also **CLA-056**, *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020 at ¶¶ 187-197.

<sup>589</sup> **CLA-055**, *B-Mex* at ¶ 205

<sup>590</sup> **CLA-057**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006 (“*International Thunderbird*”) at ¶ 108 (“It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of the enterprise... ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions...”).

<sup>591</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 94 [REDACTED]

[REDACTED] **C-287**, Articles of Amalgamation Between GSI and Daval Holdings Ltd., filed December 29, 2016.

[REDACTED]

[REDACTED]

262. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

263. Despite Paul’s majority voting right, the father-son relationship between Davey and Paul, as well as the foundation of GSI being built on Davey’s legacy and reputation in the industry, meant that, prior to [REDACTED] Paul and Davey discussed the key decisions for GSI on a regular basis.<sup>595</sup> While they generally agreed on everything, Davey had a veto right over the key decisions for GSI, and was in control of the key strategic decisions and direction for GSI.<sup>596</sup> [REDACTED] Paul has been solely in control of GSI since November 2019.<sup>597</sup> In fact, there has never been a circumstance in which Davey and Paul disagreed about the affairs of GSI and, as such, all matters are by unanimous vote.<sup>598</sup>

264. In light of his majority ownership of GSI and his veto over key decisions that GSI made as of the relevant dates, Davey owns or controls GSI for the purposes of Article 1117(1) of NAFTA.

265. Regarding the second requirement of Article 1117(1) – that GSI claims to have suffered loss or damage resulting from Canada’s breaches of Chapter 11 – GSI is obviously claiming that it suffered losses or damages by reason of, or arising out of, Canada’s

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<sup>592</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 2; CWS-06, Paul Einarsson Witness Statement at ¶ 94; C-235, Paul Share Certificate for [REDACTED] dated [REDACTED]; C-236, Paul Share Certificate for [REDACTED] dated [REDACTED]; C-237, Davey Share Certificate for [REDACTED] dated [REDACTED]; C-238, Davey Share Certificate for [REDACTED] dated [REDACTED]

<sup>593</sup> C-288, Share Structure Schedule of GSI.

<sup>594</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 95.

<sup>595</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 96.

<sup>596</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 96; CWS-03, Davey Einarsson Witness Statement at ¶ 24.

<sup>597</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 96.

<sup>598</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 96.



breaches of Chapter 11 due to the Alberta Decisions.<sup>599</sup> As set out in Section V (below), the damages claimed by GSI for the loss of its fair market value exceed \$500,000,000. As with Article 1116, that claim for losses or damages satisfies the jurisdictional requirements of Article 1117(1).<sup>600</sup>

266. In light of the foregoing, Davey has standing to bring a claim on behalf of GSI in accordance with Article 1117(1) of NAFTA.

**(1) Canada’s Purported Jurisdictional Objections for Articles 1116(1) and 1117(1) Have no Merit**

267. Canada objects to the Claimants’ standing to bring claims under Articles 1116(1) and 1117(1) on the bases that:

- (a) the Einarssons’ claims are for “reflective loss” that is not compensable under Article 1116; and
- (b) none of the Einarssons have established ownership or control sufficient to bring claims on behalf of GSI.<sup>601</sup>

268. The Claimants submit that neither of Canada’s jurisdictional objections have any merit.

269. With respect to both objections, the Claimants have clarified the nature of the claims being asserted under both Articles 1116(1) and 1117(1). That includes identifying the types of losses claimed by each of the Einarssons pursuant to Article 1116(1) and clarifying that Davey owned and controlled GSI at the relevant dates for the purposes of Article 1117(1). No further clarification of those facts is required and the Claimants do not consider it necessary to address Canada’s second objection.

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<sup>599</sup> See NOA at ¶¶ 28(c) and 29(a).

<sup>600</sup> **CLA-035**, *Mesa Power* at ¶ 313 (“[I]t [Article 1116] merely requires the investor to “claim” that it has incurred harm due to the breach. It is not for the investor to prove at this early stage that it has actually suffered a loss or damage. Proof of actual damage is a matter for the merits, as opposed to the jurisdiction phase of the arbitration.”).

<sup>601</sup> Canada Statement of Defence at ¶¶ 28-30.

270. Regarding Canada’s first objection, the objection is not an appropriate jurisdictional objection, the Einarssons are not making claims for reflective losses and, in any event, the types of losses claimed by the Einarssons on their own behalves are within the scope of Article 1116(1) of NAFTA.
271. First, it is also important to understand the nature of Canada’s objection about “reflective losses”, which is not a jurisdictional issue. The NAFTA tribunal in *UPS v Canada* confirmed that by expressly stating that the issue of whether a claim should be brought under Article 1116 or Article 1117 is not relevant to whether a tribunal has jurisdiction over claims made in an Arbitration:

[35] ...[t]he distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada. If there were multiple owners and divided ownership shares for UPS Canada, the question of how much of UPS Canada’s losses flow through to UPS – the question posed by Canada here – may have very different purchase [sic]. **As it is, there is no reason to ask that question in the instant proceeding. Whether the damage is directly to UPS or directly to UPS Canada and only indirectly to UPS is irrelevant to our jurisdiction over these claims....**<sup>602</sup> [Emphasis added.]

272. Article 1116(1) establishes basic standing requirements for investors, like the Einarssons, to bring claims in their personal capacity. At the jurisdictional stage, tribunals are not concerned with matters such as whether there was sufficient directness for the Einarssons’ claims to be made under Article 1116(1) or whether the Einarssons can prove that they actually suffered a loss or damage.<sup>603</sup> Those are matters for the merits of this Arbitration. The Einarssons “claim” that they suffered loss or damage on their own behalves as a result

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<sup>602</sup> CLA-053, *UPS* at ¶ 35.

<sup>603</sup> CLA-058, *Gami Investments Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004 at ¶ 33 (“The Tribunal does not accept that directness for the purposes of NAFTA Article 1116 is a matter of form. The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.”); CLA-035, *Mesa Power* at ¶ 313.

of Canada's breaches of Chapter 11 and that is sufficient to establish standing under Article 1116(1) of NAFTA.<sup>604</sup>

273. Further, the Einarssons' claims made under Article 1116(1) are made on their own behalves for losses that they each have suffered.
274. Davey and Paul's claims for a diminution of the value of their shares and the loss of their right to dividends are based on their personal rights as shareholders.
275. As noted above, Paul and Davey's shares fall within the scope of protected investments under Chapter 11. Those shares were assets that have intrinsic value.<sup>605</sup> [REDACTED]  
[REDACTED]  
[REDACTED]
276. The Alberta Decisions resulted in the destruction of the value of Paul and Davey's shares in GSI as assets.<sup>607</sup> The Alberta Decisions also confiscated GSI's assets, its intellectual property rights in the Seismic Works,<sup>608</sup> and frustrated its ability to pay dividends to Paul and Davey by destroying its business.<sup>609</sup> Paul and Davey each personally incurred losses or damages by reason of, or arising out of, the breaches of Chapter 11 flowing from the Alberta Decisions. Those claims fall within the scope of Article 1116(1).
277. Similarly, Davey, Paul and Russell's claims that are based on the inability to receive repayment of the Loans or make payments under the Remunerative Contracts are based on their personal rights under those Loans and Remunerative Contracts.
278. As noted above, the Loans and Remunerative Contracts fall within the scope of protected investments under Chapter 11. Like the shares, the Loans have their own intrinsic value as debt owed to them. Additionally, each of Davey, Paul and Russell had the right to be

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<sup>604</sup> **CLA-035**, *Mesa Power* at ¶ 313.

<sup>605</sup> See **CLA-059**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012 at ¶ 248 (“[S]hares are qualified as a ‘kind of assets’ ...”).

<sup>606</sup> **C-288**, GSI Share Structure Schedule at Sections 2(c) and 2(d)

<sup>607</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 159(a).

<sup>608</sup> **R-001**, ABQB Common Issues Decision at ¶ 322.

<sup>609</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 159(a).

repaid the principal under the Loans.<sup>610</sup> The Remunerative Contracts similarly afforded each of Davey, Paul and Russell the rights to be paid by GSI.

279. The Alberta Decisions resulted in the destruction of the value of the Loans as debt assets.<sup>611</sup> The Alberta Decisions also frustrated GSI's ability to repay the Loans and pay the Remunerative Contracts by destroying its business.<sup>612</sup> Davey, Paul and Russell each personally incurred losses or damages by reason of, or arising out of, the breaches of Chapter 11 flowing from the Alberta Decisions. Those claims also fall within the scope of Article 1116(1).
280. Finally, the types of losses or damages claimed by the Einarssons on their own behalves are within the scope of Article 1116(1) of NAFTA.
281. Article 1116(1) of NAFTA itself does not prohibit investors from claiming for indirect or 'reflective' loss. It merely states that an investor may make a claim if it incurred loss or damage "[b]y reason of, or arising out of," a breach of Chapter 11.<sup>613</sup> It follows that as long as an investor can establish that its losses or damages were sustained by reason of, or arising out of, a breach of Chapter 11, that is sufficient to make a claim under Article 1116(1).<sup>614</sup>
282. Many NAFTA tribunals have considered the issue of reflective loss. The majority of those tribunals have held that Article 1116(1) does not prohibit claims for reflective loss and have specifically rejected arguments from the respondent NAFTA Party that Article 1116(1) prohibits reflective loss.<sup>615</sup> One NAFTA tribunal recently concluded that Article

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<sup>610</sup> **C-239**, Davey Loan at Section 2.01(c); **C-056**, Russell Loan at Section 2.01(c); **C-240**, Paul GSI Loan No. 1 at Section 2.03; **C-242**, Paul PSPC Loan; **C-246**, Alexandra Holdings Loan at Section 2.01(b); **C-247**, Paul GSI Loan No. 2 at Section 2.01(b).

<sup>611</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 159(b).

<sup>612</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 159(c).

<sup>613</sup> NAFTA, Chapter 11, Article 1116(1).

<sup>614</sup> See, **CLA-058**, *Gami Investments Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004 ("*Gami Investments*") at ¶ 33; **CLA-035**, *Mesa Power* at ¶ 313.

<sup>615</sup> See **CLA-060**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, ("*Pope & Talbot Damages Award*") at ¶ 80 ("In the view of the Tribunal [sic] it could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise..."); **CLA-054**, *Mondev* at ¶ 79; **CLA-058** *Gami Investments* at ¶ 33.

1116(1) should be interpreted against allowing reflective loss, but the claims in that case were ultimately found to be claims made by the investor for direct loss in any event.<sup>616</sup>

283. The prior decision of a NAFTA tribunal that considered the issue of ‘reflective loss’ and is most analogous to this Arbitration is *GAMI Investments v Mexico*.<sup>617</sup> In that case, an American company that owned 14.18% of the shares of a Mexican company that in turn owned sugar mills in Mexico brought a claim under Article 1116(1) after the Government of Mexico expropriated two of the Mexican company’s sugar mills.<sup>618</sup> The claimant’s claim was that Mexico breached Articles 1105, 1102 and 1110, whereby “[t]he value of its shareholding was adversely affected by measures which caused [the Mexican company’s] business to suffer”.<sup>619</sup> The United States made a non-disputing submission that Article 1116(1) does not reflect “an intent to derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation”.<sup>620</sup>
284. While the case ultimately lost on the merits, the NAFTA tribunal in *GAMI Investments v Mexico* dismissed the non-disputing submission from the United States and took jurisdiction over the claim, stating that:

[33.] The Tribunal does not accept that directness for the purposes of NAFTA Article 1116 is a matter of form. The fact that a host state does not explicitly interfere with share ownership is not decisive. **The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment.** Whether GAMI can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.<sup>621</sup> [Emphasis added.]

285. The finding in *GAMI Investments v Mexico* has been applied by other international tribunals to find that minority investors in an enterprise are not prohibited from bringing a

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<sup>616</sup> See, **CLA-061**, *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019 at ¶¶ 389 and 396.

<sup>617</sup> **CLA-058**, *Gami Investments*.

<sup>618</sup> **CLA-058**, *Gami Investments* at ¶¶ 1, 17-22 and 23.

<sup>619</sup> **CLA-058**, *Gami Investments* at ¶¶ 23.

<sup>620</sup> **CLA-058**, *Gami Investments* at ¶¶ 29.

<sup>621</sup> **CLA-058**, *Gami Investments* at ¶¶ 33.

claim that their interests lost value as a result of a breach that affected the enterprise.<sup>622</sup> A tribunal also found that there is “[n]o bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders”.<sup>623</sup>

286. The finding in *GAMI Investments v Mexico* is similar to the claims made by the Einarssons under Article 1116(1) of NAFTA. Canada’s breaches of Chapter 11 destroyed GSI’s business. The destruction of GSI’s business in turn impacted the value of the Einarssons’ investments in GSI. However, unlike *GAMI Investments v Mexico*, the Einarssons also suffered losses or damages due to the diminution of specific rights under their shares, their Loans and their lost employment remuneration that fall firmly within the scope of Article 1116(1).
287. Allowing investors to claim for the types of losses sought by the Einarssons is consistent with the applicable objects and purposes of NAFTA. According to Article 102(1), the objectives of NAFTA include to “[i]ncrease substantially investment opportunities in the territories of Parties”.<sup>624</sup> The purpose of Chapter 11, which Article 1115 states is to “[e]stablish a mechanism for the settlement of investment disputes that assures... equal treatment among investors of the Parties...” is consistent with that overarching object.<sup>625</sup> International tribunals have found that providing protection to minority shareholders by making claims for indirect damages available is consistent with those types of policy objectives.<sup>626</sup> The Einarssons took a risk in investing in GSI, financing GSI and devoting

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<sup>622</sup> See, **CLA-062**, *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, May 11, 2005 at ¶ 64; see also, **CLA-063**, *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, February 18 2020 at ¶ 143.

<sup>623</sup> **CLA-064**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 at ¶ 48.

<sup>624</sup> NAFTA, Chapter One, Article 102(1).

<sup>625</sup> NAFTA, Chapter 11, Article 1115.

<sup>626</sup> See, **CLA-065**, *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, May 25, 2006 at ¶ 77 (“[D]isregard of the actual treatment of the company representing the investment, by removing it from the BIT’s coverage, would therefore require a restrictive interpretation of the BIT’s terms contrary to its object and purpose.”); **CLA-066**, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, February 22, 2006 at ¶ 80; see also, **CLA-067**, Julien Chaisse and Lisa Zhuoyue Li, “Shareholder Protection Reloaded Redesigning the Matrix of Shareholder Claims for Reflective Loss”, *Stanford Journal of International Law*, 52:1 at p. 94 (“[i]nternational arbitration tribunals should find it an important policy consideration to protect foreign investment. This policy consideration is a favourable factor

their time and effort to GSI. They all deserve to be compensated, provided they fall within the scope of Article 1116(1) of NAFTA, which they do.

288. In light of the foregoing, Canada's jurisdictional objections on the basis of Articles 1116(1) and 1117(1) of NAFTA have no merit.

**(2) The Claimants' Claims are Timely Under Articles 1116(2) and 1117(2) of NAFTA**

289. The Claimants' claims in this Arbitration are timely under Articles 1116(2) and 1117(2) of NAFTA.

290. Articles 1116(2) and 1117(2) of NAFTA provide that an investor may not make a claim on their own behalf or on behalf of an enterprise if "[m]ore than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage".<sup>627</sup>

291. NAFTA tribunals have stated that the triggering date for assessing Articles 1116(2) and 1117(2) of NAFTA is the date that the claimant acquires knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result.<sup>628</sup> Accordingly, each of the following conditions must be satisfied to trigger the time-bar under Articles 1116(2) and 1117(2): (i) the alleged breach must have actually occurred; (ii) the resulting damage must actually have been incurred; and (iii) the Claimants must have known, or be in a position such that they should have known, of the facts alleged to constitute the breach and the resulting damage.<sup>629</sup>

292. The three-year time-bar is triggered on the latter of the Claimants acquiring knowledge of the breach or acquiring knowledge of the fact that they suffered loss or damage.<sup>630</sup> In assessing the date that knowledge was acquired (and the merits of a claim), many NAFTA

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for a rule that foreign investors as shareholders should be able to recover loss resulting from the diminution of share value").

<sup>627</sup> NAFTA, Chapter 11, Articles 1116(2) and 1117(2).

<sup>628</sup> **CLA-046**, *Resolute* at ¶ 153; **CLA-043**, *Eli Lilly* at ¶ 167.

<sup>629</sup> **CLA-046**, *Resolute* at ¶ 153.

<sup>630</sup> **CLA-046**, *Resolute* at ¶ 153.

tribunals have found that a claimant’s submissions can include facts outside the three-year limitations period that provide the factual background to a claim.<sup>631</sup>

293. As noted, prior NAFTA tribunals have also found that where a decision of a Canadian court is the measure at issue, the date that the decision became final (i.e., the date the Supreme Court of Canada denied leave to appeal) was the date of the breach for the purposes of Article 1116(2) and 1117(2).<sup>632</sup> That was the case in *Eli Lilly*, in which an investor alleged that a pair of Canadian court decisions breached Articles 1110 and 1105, and in *Mobil Investments*, in which an investor alleged that a Canadian court decision enforced a performance requirement in breach of Article 1106.<sup>633</sup>
294. Applying the principles to this Arbitration, the Claimants submitted their claims to this Arbitration on April 18, 2019.<sup>634</sup> Accordingly, the critical date for assessing compliance with the three-year limitations period in Articles 1116(2) and 1117(2) is April 18, 2016. Canada agrees that is the salient date for assessing the limitations period in this Arbitration.<sup>635</sup>
295. The first step in assessing the three-year limitations period requires reviewing the NOA to determine what “measures” that breached Chapter 11 are at issue in this Arbitration.<sup>636</sup>
296. As noted above, the Claimants’ claims assert that the Alberta Decisions are the measures at issue in this Arbitration.<sup>637</sup>

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<sup>631</sup> **CLA-068**, *Grand River Enterprises Six Nations, Ltd., et al v United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 at ¶ 86 (“In the circumstances here, the Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events. As the Permanent Court observed, while ‘a dispute may presuppose the existence of some prior situation or fact ... it does not follow that the dispute arises in regard to the situation or fact.’); **CLA-069**, *Glamis Gold, Ltd v United States of America*, UNCITRAL, Award, June 8, 2009 (“*Glamis*”) at ¶¶ 349-350; **CLA-043**, *Eli Lilly* at ¶¶ 172-173.

<sup>632</sup> **CLA-043**, *Eli Lilly* at ¶¶ 140 and 170; **CLA-051**, *Mobil No. 2* at ¶ 152.

<sup>633</sup> **CLA-043**, *Eli Lilly* at ¶¶ 5, 140 and 170; **CLA-051**, *Mobil No. 2* at ¶¶ 6 and 152.

<sup>634</sup> **C-222**, Letter to Deputy Minister of Justice and Deputy Attorney General serving NOA

<sup>635</sup> Canada Statement of Defence at ¶ 17.

<sup>636</sup> **CLA-043**, *Eli Lilly* at ¶ 163; **CLA-069**, *Glamis* at ¶ 349.

<sup>637</sup> See NOA at ¶¶ 20-23.



297. Claims that the Alberta Decisions are the measure at issue in this Arbitration are squarely within the three-year limitations period under NAFTA, which is something Canada concedes in its Statement of Defence.<sup>638</sup> The Common Issues Decision was released on April 21, 2016, two years, 11 months and 28 days before the service of the NOA.<sup>639</sup> The Court of Appeal of Alberta dismissed GSI's appeal of the Common Issues Decision on April 28, 2017.<sup>640</sup> The Supreme Court of Canada then denied leave to appeal that decision on November 30, 2017, one year, four months and 19 days before the date of the NOA.<sup>641</sup> November 30, 2017 was the date that the findings in the Common Issues Decision became final.<sup>642</sup>
298. Given the nature of the Claimants' claims as set out in the NOA, each of them are well within the three-year limitations period under Articles 1116(2) and 1117(2) of NAFTA because they both involve breaches resulting from the Alberta Decisions. Consistent with past findings of NAFTA tribunals in similar circumstances, the date of the breach resulting from the Alberta Decisions was the date of the Supreme Court of Canada Decision – November 30, 2017.<sup>643</sup> The Claimants commenced this Arbitration less than a year and a half after that date.
299. The limitation date implicated by the NOA is also consistent with the nature of the Claimants' claims in this Arbitration.
300. The Claimants' Article 1110 claim is that the Alberta Decisions resulted in the substantial destruction of GSI's value and the Einarssons' investments in GSI.<sup>644</sup> The critical date for assessing the timeliness of a claim under Article 1110 is the date of the breach, which is the date that the Claimants were substantially deprived of their investment in GSI.<sup>645</sup>

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<sup>638</sup> Canada Statement of Defence at ¶ 21 (“While the Claimants are not time-barred under Articles 1116(2) and 1117(2) from claiming that the court proceedings constitute a denial of justice under international law...”).

<sup>639</sup> **R-001**, ABQB Common Issues Decision at headnote (“**Date:** 20160421”).

<sup>640</sup> **R-002**, ABCA Common Issues Appeal at headnote (“**Date:** 20170428”).

<sup>641</sup> **R-003**, The Supreme Court of Canada Decision.

<sup>642</sup> **CER-01**, Bankes Expert Report at ¶ 41.

<sup>643</sup> See, **CLA-043**, *Eli Lilly* at ¶¶ 140 and 170; **CLA-051**, *Mobil No. 2* at ¶ 152.

<sup>644</sup> NOA at ¶ 29(c).

<sup>645</sup> **CLA-043**, *Eli Lilly* at ¶ 167; see also, **CLA-046**, *Resolute* at ¶ 153.

301. The Claimants were not substantially deprived of their investment in GSI until GSI was unable to enforce its copyright in the Seismic Works.<sup>646</sup> That did not occur until the Supreme Court of Canada Decision denied leave to appeal the Common Issues Appeal on November 30, 2017, which made the findings in the Common Issues Appeal and the Common Issues Decision final.<sup>647</sup> After the date of the Supreme Court of Canada Decision, GSI was barred from pursuing the Boards or any third parties for breach of copyright as a result of the Regulatory Regime and, as a direct result, GSI effectively ceased operations.<sup>648</sup>
302. Similarly, the Claimants' Article 1106 claim is that the Alberta Decisions enforced a performance requirement for GSI to transfer its proprietary knowledge in the Seismic Works to third parties.<sup>649</sup> The critical date for timeliness, the date of the breach, was the date that performance requirement was enforced against GSI.<sup>650</sup> As noted, the NAFTA tribunal in *Mobil Investments* found that where the enforcement of a performance requirement was at issue, the date of the breach of Article 1106 is the date the Supreme Court of Canada denied leave to appeal the enforcement of that performance requirement.<sup>651</sup>
303. The Alberta Decisions decided whether the Regulatory Regime could override the copyright that GSI had in the Seismic Works.<sup>652</sup> In doing so, the Alberta Decisions found that the system set out in the Regulatory Regime, whereby GSI made the Submissions and the Boards subsequently disclose those Submissions to third parties, was lawful in transferring the proprietary knowledge in the Seismic Works to third parties.<sup>653</sup> Prior to that date, no Canadian court had yet adjudicated the lawfulness of the disclosure and copying of the Submissions in relation to GSI's intellectual property rights in the Seismic

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<sup>646</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 155.

<sup>647</sup> CER-01, Nigel Banks Expert Report ¶ 41.

<sup>648</sup> R-002, Common Issues Appeal at ¶ 104 (“[H]ere, that means 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.”). CWS-06, Paul Einarsson Witness Statement at ¶ 158.

<sup>649</sup> NOA at ¶ 28(b).

<sup>650</sup> CLA-051, *Mobil No. 2* at ¶ 152.

<sup>651</sup> CLA-051, *Mobil No. 2* at ¶ 152.

<sup>652</sup> R-002, ABQB Common Issues Decision at ¶ 318.

<sup>653</sup> R-002, ABQB Common Issues Decision at ¶ 318.

Works.<sup>654</sup> Accordingly, the performance requirement for GSI to make the Submissions so that Canada could allow third parties to view and copy them for the purpose of developing the Canadian offshore oil and gas industry was declared lawful and enforced as of the date of the Supreme Court of Canada Decision. Prior to that date, the Claimants were contesting the lawfulness of that performance requirement, but lost the ability to do so as of November 30, 2017.

304. In light of the foregoing, the Claimants' claims in this Arbitration were initiated within the three-year limitations period set out in Articles 1116(2) and 1117(2) of NAFTA. As such, the Tribunal has jurisdiction *ratione temporis* over the Claimants' claims in this Arbitration.

**(3) Canada's Objections to the Timeliness of the Claimants' Claims Have No Merit**

305. Canada objects to this Tribunal's jurisdiction *ratione temporis* on the basis that the Claimants knew of the effect of the Regulatory Regime well before the Alberta Decisions. In particular, Canada's Statement of Defence asserts that there is "[v]oluminous evidence of the Claimants' actual and constructive knowledge of the alleged breaches and alleged loss many years prior to April 18, 2016".<sup>655</sup> That objection is based on mischaracterizations of the Claimants' claims in this Arbitration and the applicable evidence. As such, this Tribunal should not give that objection any consideration.
306. First, the three-year limitation period under Articles 1116(2) and 1117(2) of NAFTA cannot start running prior to the occurrence of a breach.<sup>656</sup> The Claimants' claims arise from the Alberta Decisions breaching Chapter 11, the last appeal of which was dated

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<sup>654</sup> See, **C-205**, *FCA NEB Appeal* at ¶ 12 (refusing to consider whether the Regulatory Regime overrides GSI's intellectual property rights in the Seismic Works); **C-211**, *Antrim Decision* at ¶ 41 (refusing to decide whether Canadian law precluded GSI's claim for copyright infringement against a party who obtained Seismic Works from the C-NLOPB).

<sup>655</sup> Canada Statement of Defence at ¶ 18.

<sup>656</sup> **CLA-043**, *Eli Lilly* at ¶ 169.

- November 30, 2017.<sup>657</sup> The Claimants were not required to submit their claims prior to that date.<sup>658</sup>
307. In any event, the Claimants could not have submitted their claims prior to the Alberta Decisions.
308. The Regulatory Regime enabled the infringement of GSI’s intellectual property rights by allowing third parties to access and copy the Submissions prior to the expiration of the associated intellectual property rights under Canadian law, which GSI was challenging in the Domestic Actions. However, the Alberta Decisions imposed a perpetual compulsory license that “confiscated” GSI’s intellectual property rights,<sup>659</sup> found that third parties could copy the Submissions at the end of the privilege period with impunity,<sup>660</sup> and expressly forbid GSI from objecting to or challenging the infringement of its intellectual property rights in the Submissions after the expiry of the privilege period.<sup>661</sup>
309. It was impossible for the Claimants to know that GSI was unable to enforce its intellectual property rights in the Submissions until the Alberta Courts ruled that GSI could not do so. Canada’s *ratione temporis* objection would require the Claimants to have engaged in hypotheticals and speculation, which Articles 1116(2) and 1117(2) do not require.<sup>662</sup>
310. Fundamentally, Canada’s objection asserts that the “gravamen” of the Claimants’ claims in this Arbitration is the Regulatory Regime, not the Alberta Decisions.<sup>663</sup> Canada’s assertion is incorrect.

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<sup>657</sup> **R-003**, Supreme Court of Canada Decision.

<sup>658</sup> **CLA-043**, *Eli Lilly* at ¶ 169 (“[A]rticles 1116(2) and 1117(2) do not require investors to bring claims for possible future breaches on the basis of potential (and therefore necessarily hypothetical) losses to their investments or the increased risks of such losses.”).

<sup>659</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 318, 321-322.

<sup>660</sup> **R-002**, ABCA Common Issues Appeal at ¶ 102 (“[T]he 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.”).

<sup>661</sup> **R-002**, ABCA Common Issues Appeal at ¶ 104 (“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.”).

<sup>662</sup> **CLA-043**, *Eli Lilly* at ¶ 169.

<sup>663</sup> Statement of Defence at ¶ 20-21.

311. The NOA explicitly pleads that the Alberta Decisions are the measures at issue in this Arbitration.<sup>664</sup> The measure at issue in this Arbitration must be identified, at least at first instance, by reference to the Claimants' submissions.<sup>665</sup> While the Regulatory Regime is an important part of the factual background or "factual predicate" to the claims at issue in this Arbitration, it is not itself the legal basis for the claims.
312. The Claimants could not have had knowledge of Canada's breaches of Chapter 11 or that they had suffered losses or damages therefrom prior to the date of the Alberta Decisions. That is because Canada's breaches of Chapter 11 only occurred as of the date of the Supreme Court of Canada Decision, not prior to it, as Canada asserts.
313. In particular, Canada's breach of Article 1110 of NAFTA only occurred once the Supreme Court of Canada Decision was rendered. The Alberta Decisions imposed a compulsory license over the submissions, "confiscating" GSI's copyright therein.<sup>666</sup> The Alberta Decisions also expressly prohibited GSI from enforcing its intellectual property rights in the Submissions by finding that it had "[n]o legal basis or lawful entitlement to interfere or object to any decisions made by the Boards about its collected data" after the expiration of the privilege period set out in the Disclosure Legislation.<sup>667</sup> Those holdings stripped GSI of its intellectual property rights in the Submissions after the expiration of the privilege period, removed its ability to enforce those intellectual property rights and resulted in the destruction of GSI's business.<sup>668</sup> Those holdings were not in place prior to the Alberta Decisions, making it impossible for the Claimants to have been aware of the breach of Article 1110 at issue in this Arbitration, or any damages arising therefrom, prior to the Alberta Decisions.
314. Similarly, Canada's breach of Article 1106(1)(f) only occurred once the Supreme Court of Canada Decision was rendered.

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<sup>664</sup> See NOA at ¶¶ 20-23 and 28.

<sup>665</sup> **CLA-043**, *Eli Lilly* at ¶ 163; **CLA-069**, *Glamis* at ¶¶ 348-349.

<sup>666</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 318, 321-322.

<sup>667</sup> **R-002**, ABCA Common Issues Appeal at ¶ 104.

<sup>668</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶¶ 154-158.

315. The Alberta Decisions declared lawful and enforced a performance requirement whereby GSI was required to make the Submissions pursuant to the Submission Legislation and then Canada, through the Boards, allowed third parties to copy them for free to promote the development of the offshore oil and gas industry with impunity.<sup>669</sup> The legality and enforcement of that performance requirement was at issue in the Alberta Decisions, as GSI had challenged the ability of the Boards and third parties to copy the Submissions from the Boards, even after the expiration of the privilege period set out in the Disclosure Legislation.<sup>670</sup> Prior to the Alberta Decisions, it was unclear in Canadian law whether third parties were entitled to copy the Submissions from the Boards or not.<sup>671</sup> As such, it was impossible for the Claimants to know of Canada's breach of Article 1106(1)(f) of NAFTA, or any damages arising therefrom, before the Alberta Decisions declared the transfer of proprietary knowledge from GSI to third parties lawful and enforceable.
316. Canada's objection is premised on the assertion that the Claimants knew about Canada's breaches of Chapter 11 and the associated damages well before the Alberta Decisions, including because of the Government Domestic Claims.<sup>672</sup> However, Canada's objection ignores the evidence that no party – not the Claimants and not Canada – knew about the holdings of the Alberta Decisions before they were rendered. In particular, prior to the Alberta Decisions, although GSI asserted that it had intellectual property rights in the Seismic Works, that was highly contested, and neither GSI nor Canada knew that those intellectual property rights were confiscated or subject to an compulsory license.

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<sup>669</sup> See, **R-002**, ABCA Common Issues Appeal at ¶ 102 (“[t]he 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.”).

<sup>670</sup> See, **C-289**, Order of Chief Justice N.C. Wittmann, filed June 10, 2015; see also, **R-002**, ABCA Common Issues Appeal at ¶ 101 (“The position taken by GSI as to the limited meaning of ‘disclosure’, namely ‘expose to view’, is not tenable and is wholly inconsistent and incompatible with the intention of the Regulatory Regime.”).

<sup>671</sup> See, **C-205**, *FCA NEB Appeal* at ¶ 12 (refusing to consider whether the Regulatory Regime overrides GSI's intellectual property rights in the Seismic Works); **C-211**, *Antrim Decision* at ¶ 41 (refusing to decide whether Canadian law precluded GSI's claim for copyright infringement against a party who obtained Seismic Works from the C-NLOPB).

<sup>672</sup> Canada Statement of Defence at ¶ 18.

317. The fact is that prior to the Alberta Decisions, Canada had vigorously contested that GSI had intellectual property rights in the Seismic Works. Further, no Canadian court had found that GSI had intellectual property rights in the Seismic Works.
318. As noted above at paragraphs 84 to 85, in 2014, the Federal Court of Canada dismissed GSI's application for an injunction against the C-NSOPB, finding that "[N]o copyright can subsist in geophysical data or seismic data...."<sup>673</sup> Prior to the Alberta Decisions, that was the only statement in Canadian law addressing whether copyright could subsist in the type of seismic data at issue in this Arbitration.<sup>674</sup>
319. A fundamental component of the Claimants' Article 1110 claim is that the Alberta Decisions confiscated GSI's copyright in the Submissions through a compulsory license.<sup>675</sup> However, neither Canada nor the Claimants could have known those rights had been confiscated prior to the Alberta Decisions because the only relevant decision of a Canadian court found those rights did not even exist.
320. Further, as noted above at paragraphs 86 to 87, prior to the Alberta Decisions, Canadian Courts in the FCA NEB Appeal and the *Antrim* case refused to adjudicate on whether GSI's intellectual property rights in the Seismic Works were impacted by the Regulatory Regime. In 2011, GSI put the issue before the Federal Court of Appeal in the FCA NEB Appeal, but the Court refused to resolve the issue because it was "[n]ot ripe for decision".<sup>676</sup> Similarly, in early 2015, just prior to the Calwest Trial, *Antrim* found that the effect of Canadian laws, including the Regulatory Regime, on GSI's copyright infringement claim in that action was not "[s]o compelling" that GSI was very unlikely to succeed.<sup>677</sup> In light of the FCA NEB Appeal and *Antrim*, no party, not GSI, not the Einarssons and not Canada, was capable of knowing that GSI's intellectual property rights were taken from it prior to the Alberta Decisions.

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<sup>673</sup> C-210, *GSI v C-NSOPB* at ¶ 24.

<sup>674</sup> R-001, ABQB Common Issues Decision at ¶¶ 106-113.

<sup>675</sup> See NOA at ¶ 29(a) ("The Alberta Decisions have deprived GSI of the copyright and trade secret protections to which GSO was entitled with respect to the Seismic Data...").

<sup>676</sup> C-205, *FCA NEB Appeal* at ¶ 12.

<sup>677</sup> C-210, *Antrim Decision* at ¶ 41.

321. Adding to the confusion, the Government Conduct and Representations indicated to GSI, the Einarssons or both that GSI would be able to enforce its intellectual property rights in the Submissions, implying that they had not been confiscated or were subject to a compulsory license:
- (a) in the 1990s, the Boards and other Canadian regulatory bodies began posting notices at their offices that indicated copying the Submissions “[m]ay be an infringement of copyright law”;<sup>678</sup>
  - (b) in the 1990s, the Boards, the FIO and other Canadian regulatory bodies began asking third parties to execute liability forms that indicated copying the Submissions “[m]ay be an infringement of the copyright law”;<sup>679</sup>
  - (c) in 1993, Canada, on behalf of the Geological Survey of Canada (a department of the federal Government of Canada) executed a license agreement with GSI whereby it agreed that “ALL DATA DELIVERED OR CONVEYED HEREUNDER ARE PROPRIETARY TO GSI AND GSI MAINTAINS TRADE SECRET AND COPYRIGHT INTEREST IN SUCH DATA”, acknowledging that GSI had proprietary rights in seismic data;<sup>680</sup>
  - (d) in 2010, the NRC wrote a letter to GSI that indicated that the NRC and Canada would “[p]rotect copyright and intellectual property of third party data”;<sup>681</sup> and
  - (e) throughout the operation of GSI and its predecessors, neither Canada nor the Boards commented or rejected the practice of GSI and its predecessors to include labels on the Submissions that asserted GSI or its predecessors had proprietary rights in the Submissions.<sup>682</sup>

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<sup>678</sup> C-173, Frontier Information Office Copyright Notice.

<sup>679</sup> C-174, Bundle of NEB Liability Agreements Regarding Copying and Borrowing of Submissions.

<sup>680</sup> C-175, Canada License at Sections 1.2 and 3.1.

<sup>681</sup> C-187, June 2010 NRC Letter

<sup>682</sup> CWS-06, Paul Einarsson Witness Statement at ¶¶ 115(f)-115(g).



322. It is incongruous for Canada to suggest that GSI knew it had lost its intellectual property rights in the Seismic Works prior to the Alberta Decisions when Canada itself was representing that GSI had those rights and that there were or could be proprietary rights in seismic data, including the Seismic Works.
323. Finally, neither the Claimants nor Canada were capable of knowing that GSI's intellectual property rights in the Seismic Works were confiscated or subject to a compulsory license prior to the Alberta Decisions because no Canadian court had applied the doctrine of *lex specialis* to resolve the conflict between the Regulatory Regime and Canadian copyright legislation.
324. The Alberta Decisions made their determination of confiscation by applying the legislative interpretation doctrine of *lex specialis*.<sup>683</sup> Canadian courts have considerable discretion over when and how to apply the doctrine of *lex specialis*.<sup>684</sup> Given the complex nature of the *lex specialis* doctrine and its significant judicial discretionary element, the confusion between GSI, Canada, the Boards and Canadian Courts about GSI's intellectual property rights in the Seismic Works was not surprising. Only a court can apply the doctrine of *lex specialis*, since it is a doctrine which requires a Canadian Court to be faced with a legislative conflict that it then must resolve. As a result, no party – not GSI, not Canada, not the Boards and not the Canadian Courts – was capable of knowing that GSI's copyright in the Seismic Works was confiscated or subject to an compulsory license before the Alberta Decisions applied that doctrine.
325. The final assertion in Canada's objection is that the Government Domestic Claims “[d]emonstrate conclusively” that this Tribunal lacks jurisdiction *ratione temporis* because those claims sought damages for expropriation under Canadian law.<sup>685</sup>

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<sup>683</sup> CER-01, Nigel Banks Expert Report at ¶ 23.

<sup>684</sup> CER-01, Nigel Banks Expert Report at ¶ 57.

<sup>685</sup> Canada Statement of Defence at ¶ 19.

326. The Government Domestic Claims were hypothetical. Since GSI had not been told that it could not enforce its intellectual property rights in the Seismic Works yet, GSI continued to pursue infringement claims as its foremost concern.<sup>686</sup>
327. The hypothetical nature of those claims resulted in confusion. The particulars of the Government Domestic Claims only demonstrate how little GSI, the Boards and Canada itself knew about the effect of the Regulatory Regime on GSI's intellectual property rights in the Seismic Works.
328. First, none of the Government Domestic Claims referred to any "compulsory license".<sup>687</sup> That compulsory license is the crux of why the Alberta Decisions breached Article 1110 of NAFTA. Since they do not address that compulsory license, the Government Domestic Claims do not relate to the same measure that is at issue in this Arbitration.
329. Second, the particulars of the Government Domestic Claims had significant variations between them that demonstrate how little GSI knew about the alleged "expropriation". The Government Domestic Claims alleged variously that each of Public Works, the NRC, the NEB, the C-NLOPB and Canada expropriated the Seismic Works and GSI's business therein.<sup>688</sup> In doing so, the Government Domestic Claims contradicted themselves and demonstrated that GSI did not even know who or what was responsible for the alleged

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<sup>686</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 142.

<sup>687</sup> See, **R-005**, *Geophysical Service Incorporated v. Canada-Newfoundland and Labrador Offshore Petroleum Board and Her Majesty in Right of Newfoundland and Labrador* (Case No. 2011 01G 5430), Supreme Court of Newfoundland and Labrador Trial Division (General) Amended Statement of Claim, 7 January 2013 ("Newfoundland Claim"); **R-006**, *Geophysical Service Incorporated v. Olympic Seismic Ltd., Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the National Energy Board; and Companies A-Z* (Case No. 1201-16166), Statement of Claim, 19 December 2012 ("Olympic Claim"); **R-007**, *Geophysical Service Incorporated v. Arcis Seismic Solutions Corp., Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the National Energy Board; Canada-Newfoundland and Labrador Offshore Petroleum Board and Companies A-Z*, Case No. 1301-02933, Statement of Claim dated 6 March 2013 ("Arcis Claim"); **R-008**, *Geophysical Service Incorporated and Lynx Canada Information Systems Ltd.* (Case No. 0901-08210), Amended Amended Statement of Claim, 4 June 2013 ("Lynx Claim"); **R-010**, *Geophysical Service Incorporated v. Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada itself, and on behalf of the Department of Natural Resources Canada; and the National Energy Board* (GSI Claim Case No. 1401-05316), Statement of Claim, 14 May 2014 ("Canada Claim").

<sup>688</sup> See, **R-005**, *Newfoundland Claim* at ¶ 26 (alleging that the C-NLOPB and the Province of Newfoundland and Labrador were liable); **R-006**, *Olympic Claim* at ¶ 51 (alleging that the NEB was liable); **R-007**, *Arcis Claim* at ¶ 34 (alleging that the NEB and the C-NLOPB were liable); **R-008**, *Lynx Claim* at ¶ 42 (alleging that each of Public Works, the NRC and the NEB were liable); **R-010**, *Canada Claim* at ¶¶ 23-24 (alleging that each of Canada, the NRC and the NEB were liable).

“expropriation”. Only one party could have expropriated GSI’s intellectual property rights in the Seismic Works or its business. The Claimants cannot have known about the confiscatory effect of the Alberta Decisions as of the dates of the Government Domestic Claims when GSI did not even know which party or entity to pursue.

330. The confusion about which entity or body committed the expropriations alleged in the Government Domestic Claims is exacerbated by the fact that, one of the defendants in those claims is the C-NLOPB, which is a distinct legal entity from Canada with its own corporate powers.<sup>689</sup> The C-NLOPB is entirely separate from Canada and claims against the C-NLOPB were not made against Canada. Again, these distinctions indicate GSI’s lack of knowledge of the particulars of any expropriation that had occurred.
331. The particulars of the Government Domestic Claims against the NEB, Public Works and the NRC raise a similar issue about the lack of GSI’s knowledge of particulars of any “expropriation”. The NEB was also an independent regulatory agency that was a court of record and, therefore, claims made against the NEB were not claims against Canada.<sup>690</sup> In fact, in the Alberta Decisions, the NEB had separate counsel from Canada.<sup>691</sup> Similarly, neither Public Works nor the NRC are directly responsible for administering the Regulatory Regime, so neither of those bodies could have been responsible for any expropriation resulting from the Regulatory Regime.
332. The particulars of the Government Domestic Claims were also inconsistent in their characterization of what exactly was expropriated. Several of the Government Domestic Claims focused on subsets of the Seismic Works, such as the “New Data”<sup>692</sup> or the “Lynx Copied Seismic Materials”.<sup>693</sup> The Claimants cannot be taken to have known of Canada’s

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<sup>689</sup> **C-151**, *Federal Newfoundland Implementation Act* at Section 9(3); **C-153**, *Provincial Newfoundland Implementation Act* at Section 9(3).

<sup>690</sup> **C-177**, *NEB Act* at Section 3(1).

<sup>691</sup> See, **R-001**, ABQB Common Issues Decision at headnote (the NEB was represented by M. Vesley and T. Kruger, while the Attorney General of Canada was represented by D. Babiuk-Gibson and J.R. Elford).

<sup>692</sup> **R-006**, *Olympic Claim* at ¶ 51.

<sup>693</sup> **R-008**, *Lynx Claim* at ¶ 41.

breaches of Chapter 11 prior to the Alberta Decisions when GSI could not even consistently articulate what had been expropriated.

333. Further, the lack of knowledge of the confiscation of GSI's intellectual property rights in the Seismic Works prior to the Alberta Decisions is borne out by the defences to the Government Domestic Claims. In those defences, the NEB, C-NLOPB and Canada denied that any expropriation had occurred on various contradictory grounds, including:

- (a) “Any rights that GSI might have in the Seismic Data would be insufficient and not of the kind to support a cause of action for expropriation...”;<sup>694</sup>
- (b) “[G]SI has expressly or impliedly consented to the use and release of information, documentation of data in accordance with the Regulatory Regime, the Act, regulations, Guidelines and applicable Geophysical Program Authorizations”;<sup>695</sup>
- (c) GSI “[d]oes not have any property rights in the Seismic Material so as to give rise to a claim of expropriation”;<sup>696</sup>
- (d) “[a]ny property rights in the Seismic Material are held by and vest in the Crown”;<sup>697</sup>
- (e) “[t]he plaintiff and any predecessors of the plaintiff consented to the acts of the Crown and the plaintiff is estopped from asserting a claim for expropriation against the Crown”;<sup>698</sup> and
- (f) “[t]he Crown did not receive any benefit that could cause it to be liable to the plaintiff, or entitle the plaintiff to the relief claimed”.<sup>699</sup>

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<sup>694</sup> C-290, NEB Statement of Defence to Amended Amended Amended Statement of Claim, filed in Court File No. 1201-05556 on September 13, 2013 at ¶ 35.

<sup>695</sup> C-291, Statement of Defence of C-NLOPB, filed in Court File No. 1301-02933 on July 24, 2015 at ¶ 20(h).

<sup>696</sup> C-292, Statement of Defence of Attorney General of Canada, filed in Court File No. 1401-05316 on June 25, 2014 (“AGC Defence in File No. 1401-05316”) at ¶ 22(a).

<sup>697</sup> C-292, AGC Defence in File No. 1401-05316 at ¶ 22(b).

<sup>698</sup> C-292, AGC Defence in File No. 1401-05316 at ¶ 22(c).

<sup>699</sup> C-292, AGC Defence in File No. 1401-05316 at ¶ 22(d).

334. The various defences to the Government Domestic Claims indicate that the defendants in those claims did not consider that any expropriation had occurred and were uncertain of the effect of the Regulatory Regime on GSI's intellectual property rights in the Seismic Works. They also did not assert that GSI's copyright term had been shortened by the Regulatory Regime, or that a compulsory license had been granted to Canada and that GSI was deprived of legal recourse as a result, which was the impact of the Alberta Decisions. Instead, the defences to the Government Domestic Claims alleged, among other things, that GSI did not have any intellectual property rights in the Seismic Works at all that could be expropriated, or that GSI did not own those intellectual property rights because the Regulatory Regime gave Canada Crown copyright over the Seismic Works. Both of those arguments were rejected in the Alberta Decisions.<sup>700</sup> Contrary to Canada's assertion in its Statement of Defence, that indicates the opposite of any party being aware of the effects of the Alberta Decisions before they were issued.
335. Ultimately, until the Alberta Decisions were rendered, no party knew whether GSI had intellectual property rights in the Seismic Works or how those rights were affected, including GSI. The Alberta Decisions decided those issues. The Claimants are not clairvoyant, nor were they required to be.
336. In light of the foregoing, the Tribunal does have jurisdiction *ratione temporis* over the Claimants' claims and Canada's objection to the contrary has no merit.

**C. The Claimants Satisfied the Pre-Conditions and Formalities Under Articles 1118 through 1121 of NAFTA**

**(1) The Claimants Attempted to Settle their Claims with Canada in Accordance with Article 1118 of NAFTA**

337. Article 1118 of NAFTA provides that “[t]he disputing parties should first attempt to settle a claim through consultation or negotiation”.<sup>701</sup> NAFTA tribunals have generally found

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<sup>700</sup> R-001, ABQB Common Issues Decision at ¶¶ 6 and 321.

<sup>701</sup> NAFTA, Chapter 11, Article 1118.

that compliance with Article 1118 is a pre-condition to submit a claim to arbitration under Chapter 11.<sup>702</sup>

338. The Claimants attended a settlement meeting with Canada pursuant to Article 1118 on January 28, 2019, which date was after the NOI was served but before the NOA was served.<sup>703</sup> During that settlement meeting, the Disputing Parties were unable to resolve the dispute at issue in this Arbitration and Canada did not even extend an offer.<sup>704</sup>
339. Canada's Statement of Defence does not contest that the Claimants have complied with Article 1118 of NAFTA. The Claimants' good faith attempt to reach a settlement of this dispute with Canada in the January 28, 2019 settlement meeting satisfies the requirements of Article 1118 of NAFTA.

**(2) The Claimants' NOI Met the Requirements of Article 1119 of NAFTA**

340. Article 1119 of NAFTA required the Claimants to deliver to Canada "[w]ritten notice of [their] intention to submit a claim at least 90 days before the claim is submitted".<sup>705</sup> Article 1119 required that notice, which was the NOI, to specify:
- (a) "the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise";
  - (b) "the provisions of this Agreement alleged to have been breached and any other relevant provisions";
  - (c) "the issues and the factual basis for the claim"; and

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<sup>702</sup> See, **CLA-035**, *Mesa Power* at ¶ 118 ("Another condition to submit a claim to arbitration is set out in Article 1118, which provides that the parties must attempt to settle their dispute amicably."); see also, **CLA-031**, *Methanex Jurisdiction* at ¶ 120; **CLA-032**, *Canfor Preliminary Questions* at ¶ 171; but also see, **CLA-055**, *B-Mex* at ¶¶ 112-113 (where the tribunal noted Article 1118's use of the word "should" and accepted that: "It is common ground that a failure to pursue such settlement discussions however is no bar to Treaty arbitration.").

<sup>703</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 163; **C-293**, Letter from Borden Ladner Gervais to Canada regarding settlement conference of January 28, 2019, dated March 21, 2019.

<sup>704</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 163.

<sup>705</sup> NAFTA, Chapter 11, Article 1119.

- (d) “the relief sought and the approximate amount of damages claimed”.<sup>706</sup>
341. The NOI was served more than 90 days before the Claimants’ claims were submitted to this Arbitration. The Claimants served the NOI on Canada by way of personal service on October 16, 2018, which was 184 days prior to the Claimants initiated this Arbitration.<sup>707</sup> As such, the Claimants’ NOI complied with the 90-day time requirement in Article 1119.
342. The contents of the NOI also complied with the requirements of Article 1119 of NAFTA:
- (a) the NOI included the names and addresses of each of Davey, Paul and Russell, and the name of GSI as well as the location of its registered office;<sup>708</sup>
  - (b) the NOI set out the relevant provisions of NAFTA that Canada breached, as well as the provisions of Chapter 11 and Chapter 17 that are relevant to this Arbitration;<sup>709</sup>
  - (c) the NOI set out the issues and factual basis for the claims;<sup>710</sup> and
  - (d) the NOI set out the relief sought and the approximate amount of damages claimed by the Claimants.<sup>711</sup>
343. In light of the foregoing, the Claimants complied with the requirements of Article 1119 of NAFTA. Canada’s Statement of Defence does not contest that the Claimants complied with the requirements of Article 1119.

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<sup>706</sup> NAFTA, Chapter 11, Article 1119.

<sup>707</sup> **C-294** Letter from Borden Ladner Gervais serving NOI, dated October 10, 2018; **C-295**, Letter from Borden Ladner Gervais serving NOI, dated October 15, 2018

<sup>708</sup> NOI at ¶¶ 2-3 (the NOI does not set out GSI’s address, but notes that it has a “[r]egistered office in Calgary, Alberta”. NAFTA tribunals have found that in these circumstances, the Tribunal will not be deprived of jurisdiction based on such trivial omissions, to the extent it constitutes one, which is not admitted, see, **CLA-055, B-Mex** at ¶ 120 (where the tribunal found the failure to include certain information required by Article 1119(a) (the *identity* of certain Claimants) did not deprive it of jurisdiction over them); see also, **CLA-070 Ethyl Corporation v The Government of Canada**, UNCITRAL, Award on Jurisdiction, 24 June 1998 at ¶ 85 (technical non-compliance with Article 1119 did not deprive the tribunal of jurisdiction).

<sup>709</sup> NOI at ¶¶ 47-48; 51-52; 109-110, 111-113, 114, 125-126, 139-140.

<sup>710</sup> NOI at ¶¶ 21-46; 49; 50-108.

<sup>711</sup> NOI at ¶ 143.

**(3) The Claimants' NOA Complied with the Requirements of Article 1120(1) and the UNCITRAL Arbitration Rules**

344. Article 1120(1)(c) of NAFTA provides that the Claimants may submit their claims to arbitration pursuant to the UNCITRAL Arbitration Rules,<sup>712</sup> “[p]rovided that six months have elapsed since the events giving rise to a claim”.<sup>713</sup> Article 3(1) of the UNCITRAL Arbitration Rules provides that the Claimants shall initiate an arbitration thereunder by giving “[t]o the other party... a notice of arbitration”.<sup>714</sup> Article 1137 of NAFTA provides that a claim submitted to arbitration under the UNCITRAL Arbitration Rules is submitted when the NOA was “[r]eceived by the disputing Party”.<sup>715</sup> Article 3(3) of the UNCITRAL Arbitration Rules prescribes certain contents that must be contained in the notice of arbitration.<sup>716</sup>
345. The Claimants’ NOA complied with the procedural requirements under Article 1120(1) of NAFTA and the UNCITRAL Arbitration Rules.
346. The service of the NOA complied with the six-month time period prescribed by Article 1120. The Claimants delivered the NOA to Canada on April 18, 2019.<sup>717</sup> The date of the event giving rise to the Claimants’ claims was November 30, 2017, the date of the Supreme Court of Canada Decision, which was sixteen months and 19 days before the NOA was served.<sup>718</sup> As such, the service of the NOA complied with the six month time requirement in Article 1120(1).

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<sup>712</sup> The 1976 UNCITRAL Arbitration Rules govern this Arbitration, pursuant to Section 5 of Procedural Order No. 1; 1139 of NAFTA also provides that the term “UNCITRAL Arbitration Rules” (which term is used in Article 1120(1)(c)) means “the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976”).

<sup>713</sup> NAFTA, Chapter 11, Article 1120(1).

<sup>714</sup> **CLA-002**, *United Nations Commission on International Trade Law Arbitration Rules*, 15 December 1976, General Assembly Resolution 31/98 (“UNCITRAL Arbitration Rules 1976”).

<sup>715</sup> NAFTA, Chapter 11, Article 1137(1).

<sup>716</sup> **CLA-002**, UNCITRAL Arbitration Rules 1976 at Article 3(3).

<sup>717</sup> **C-222**, Letter to Deputy Minister of Justice and Deputy Attorney General serving NOA, April 18, 2019.

<sup>718</sup> **R-003**, Supreme Court of Canada Decision.



347. The NOA also contains all of the contents required by Article 3(3) of the UNCITRAL Arbitration Rules.<sup>719</sup> Article 3(3) of the UNCITRAL Arbitration Rules states that the NOA “[s]hall include the following”, all of which the NOA includes as denoted in the footnotes below:

- (a) “A demand that the dispute be referred to arbitration”;<sup>720</sup>
- (b) “The names and addresses of the parties”;<sup>721</sup>
- (c) “A reference to the arbitration clause or the separate arbitration agreement that is invoked”;<sup>722</sup>
- (d) “A reference to the contract out of or in relation to which the dispute arises”;<sup>723</sup>
- (e) “The general nature of the claim and an indication of the amount involved, if any”;<sup>724</sup>
- (f) “The relief or remedy sought”;<sup>725</sup> and
- (g) “A proposal as to the number of arbitrators (i.e., one or three), if the parties have not previously agreed upon them”.<sup>726</sup>

348. Canada’s Statement of Defence does not contest that the Claimants complied with the requirements of Article 1120. In light of the foregoing, the Claimants complied with the requirements of Article 1120 of NAFTA.

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<sup>719</sup> **CLA-002**, UNCITRAL Arbitration Rules at Article 3(3).

<sup>720</sup> NOA at ¶¶ 1-4.

<sup>721</sup> NOA at ¶¶ 4-5.

<sup>722</sup> NOA at ¶ 6.

<sup>723</sup> NOA at ¶ 7.

<sup>724</sup> NOA at ¶¶ 8-27.

<sup>725</sup> NOA at ¶ 29.

<sup>726</sup> NOA at ¶ 30.

**(4) The Claimants Complied with the Waiver Requirement under Article 1121 of NAFTA**

- (a) Article 1121 of NAFTA Required the Claimants to Waive Claims Regarding Canada's Breaches of NAFTA Before Domestic Courts or Administrative Tribunals

349. Articles 1121(1) and 1121(2) of NAFTA provide that, as a condition of Canada's consent to arbitrate under Chapter 11, the Claimants must:

[w]aive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.<sup>727</sup>

350. The purpose of Article 1121 is to prevent the Claimants from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes or lead to double redress for the same conduct or measure.<sup>728</sup> Accordingly, it is possible for domestic proceedings to coexist simultaneously with this Arbitration as long as those domestic proceedings do not involve the measures in breach of NAFTA that are at issue in this Arbitration.<sup>729</sup>

351. Article 1121 imposes several formal requirements. The waiver should be in writing, be submitted alongside the NOA and must be clear, explicit and categorical.<sup>730</sup> The waiver must provide that the Claimants waived the right to initiate or continue any proceeding before other Courts or tribunals with respect to the measures in breach of the NAFTA provisions at issue in this Arbitration.<sup>731</sup>

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<sup>727</sup> NAFTA, Chapter 11, Article 1121(1) (pursuant to NAFTA Article 1117(2), the same obligation applies with respect to an investment of an investor).

<sup>728</sup> **CLA-057**, *International Thunderbird* at ¶ 118

<sup>729</sup> **CLA-071**, *Waste Management, Inc. v. United Mexican States* ICSID Case No. ARB(AF)/98/2, Arbitral Award, June 2, 2000 at ¶ 27.3 (“*Waste Management No. 1*”).

<sup>730</sup> **CLA-071**, *Waste Management No. 1* at ¶¶ 18.1.

<sup>731</sup> **CLA-071**, *Waste Management No. 1* at ¶ 24.

352. Article 1121 also imposes a substantive element. The waiver must be voiced or made manifest by any required conduct of the Claimants.<sup>732</sup> As such, where the manifestation of the waiver is challenged, as Canada has done in this Arbitration,<sup>733</sup> the Tribunal must assess the conduct of the Claimants in making the waiver.<sup>734</sup>

353. NAFTA tribunals have held that technical non-compliance with Article 1121 will not invalidate the submission of a claim if the non-compliance is remedied at a later stage of the proceedings.<sup>735</sup>

(b) *The Claimants Complied With Both the Formal and Substantive Requirements of Article 1121 of NAFTA*

354. The Claimants complied with both the formal and substantive requirements of Articles 1121(1) and 1121(2) of NAFTA.

355. On April 18, 2019, the Claimants served Canada with a Consent and Waiver (the “Waiver”) alongside the NOA, pursuant to the formal requirement in Article 1121 of NAFTA.<sup>736</sup> The Waiver was signed by, or on behalf of,<sup>737</sup> each of the Claimants, and was clear, explicit and categorical, stating as follows:

Pursuant to Article 1121(1)(b) of NAFTA, Theodore David Einarsson, Harold Paul Einarsson and Russell John Einarsson, on their own behalves and on behalf of Geophysical Service Incorporated, hereby waive their right to

<sup>732</sup> **CLA-071**, *Waste Management No.1* at ¶ 24.

<sup>733</sup> Canada Statement of Defence at ¶¶ 22-25.

<sup>734</sup> **CLA-071**, *Waste Management No. 1* at ¶ 24.

<sup>735</sup> **CLA-057**, *International Thunderbird* at ¶ 117 (“The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings...”); **CLA-072**, *Pope & Talbot Inc v The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (the “Harmac Motion”), 24 February 2000 at ¶ 18 (“The requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made. Rather it is a requirement that before the Tribunal entertains the claim the waiver shall have been effected. That has now been done. Canada has sustained no prejudice in this respect...”).

<sup>736</sup> **C-223**, Consent and Waiver of Theodore David Einarsson, Harold Paul Einarsson and Russell John Einarsson, dated April 3, 2019; **C-294**, Letter from Borden Ladner Gervais serving NOI, dated October 10, 2018; **C-295**, Letter from Borden Ladner Gervais serving NOI, dated October 15, 2018.

<sup>737</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 164 (Paul has powers of attorney authorizing him with authority to manage this Arbitration on behalf of Davey and Russell to streamline matters); **C-296**, Statutory Durable Power of Attorney for Russell John Einarsson, [REDACTED] **C-297**, Statutory Durable Power of Attorney for Theodore David Einarsson, [REDACTED]

initiate or continue before any administrative tribunal or court under the laws of any Party, or other dispute settlement procedures, **any proceedings with respect to the measures of the Government of Canada which Theodore David Einarsson, Harold Paul Einarsson and Russell John Einarsson, on their own behalves and on behalf of Geophysical Service Incorporated allege to be breaches of NAFTA obligations referred to in Article 1116 and 1117**, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of Canada. [Emphasis added.]

356. The Claimants also complied with the substantive requirements of Articles 1121(1) and 1121(2) by taking a number of steps to discontinue any Domestic Actions “[w]ith respect to the measure[s]” at issue in this Arbitration.
357. GSI discontinued a domestic Court action for *de facto* expropriation in Federal Court of Canada File Number T-1023-17 (the “De Facto Expropriation Claim”) prior to the service of the Waiver and in anticipation of commencing this Arbitration. The De Facto Expropriation Claim, which was filed on July 12, 2017, generally alleged that Canada and the Canadian Provinces of Quebec, Newfoundland and Labrador, and Nova Scotia committed a *de facto* expropriation, regulatory or constructive taking of GSI’s intellectual property rights in the Seismic Works and its business by virtue of the Regulatory Regime.<sup>738</sup> The De Facto Expropriation Claim was discontinued as against Newfoundland and Labrador and Nova Scotia through a discontinuance filed on March 21, 2018,<sup>739</sup> and against Canada and Quebec on April 17, 2019,<sup>740</sup> the day before the NOA was served.
358. GSI also discontinued the Government Domestic Claims that, despite not being pursued for some time, were technically still on the Court record in the years leading up to the service of the NOA even though they had been determined by the Alberta Decisions.<sup>741</sup> GSI discontinued or settled all of the Government Domestic Claims as follows:
- (a) *Geophysical Service Incorporated v. West Canadian Digital Imaging Inc., West Canadian Industries Group Ltd., Her Majesty the Queen in Right of Canada as*

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<sup>738</sup> C-298, Statement of Claim in Federal Court of Canada File Number T-1023-17, filed July 12, 2017.

<sup>739</sup> C-299, Notice of Discontinuance in Federal Court of Canada File Number T-1023-17, filed March 21, 2018.

<sup>740</sup> C-300, Notice of Discontinuance in Federal Court of Canada File Number t-1023-17, filed April 17, 2019.

<sup>741</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 165(b).

represented by the Attorney General of Canada on behalf of the National Energy Board (Court of Queen's Bench of Alberta Case No. 1201-05556) – GSI discontinued the claim as against Canada and the NEB on February 14, 2018,<sup>742</sup> which discontinuance was declared effective by a Court Order filed March 19, 2018, after the NEB applied to set aside the Notice of Discontinuance filed by GSI;<sup>743</sup>

- (b) *Geophysical Service Incorporated v. Olympic Seismic Ltd., Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the National Energy Board; and Companies A-Z* (Case No. 1201-16166) – GSI discontinued the claim against Canada and the NEB on March 8, 2018,<sup>744</sup> which discontinuance was declared effective by a Court Order filed March 19, 2018;<sup>745</sup>
- (c) *Geophysical Service Incorporated v. Arcis Seismic Solutions Corp., Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the National Energy Board; Canada-Newfoundland and Labrador Offshore Petroleum Board and Companies A-Z* (Case No. 1301-02933) – GSI discontinued the claim as against Canada, the NEB and the C-NLOPB on February 14, 2018,<sup>746</sup> which discontinuance was declared effective by a Court Order filed March 19, 2018, after the NEB applied to set aside the discontinuance filed by GSI;<sup>747</sup>
- (d) *Geophysical Service Incorporated v. Lynx Canada Information Systems Ltd.; Lynx Canada Information Systems Ltd. operating as Lynx Information Systems Ltd.; the said Lynx Information Systems Ltd.; Her Majesty the Queen in the Right of Canada as represented by the Attorney General of Canada on behalf of Public Works and Government Services, the Department of Natural Resources Canada, and the*

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<sup>742</sup> **C-301**, Discontinuance of Action in QB Action No. 1201-05556 on February 14, 2018.

<sup>743</sup> **C-302**, Order of Honourable Justice K.M. Horner in QB Action No. 1201-05556 on March 19, 2018 at ¶ 1.

<sup>744</sup> **C-303**, Discontinuance of Action in QB Action No. 1201-16166 on March 8, 2018.

<sup>745</sup> **C-316**, Order of Honourable Justice K.M. Horner in QB Action No. 1201-16166 on March 19, 2018 at ¶ 1.

<sup>746</sup> **C-304**, Discontinuance of Action in QB Action No. 1301-02933 on February 14, 2018.

<sup>747</sup> **C-305**, Order of Honourable Justice K.M. Horner in QB Action No. 1301-02933 on March 19, 2018 at ¶ 1.

*National Energy Board; and Companies A-Z* (Case No. 0901-08210) – GSI discontinued the claim against Canada, Public Works, NRC and the NEB on March 8, 2018,<sup>748</sup> which discontinuance was declared effective by a Court Order filed March 19, 2018;<sup>749</sup>

- (e) *Geophysical Service Incorporated v. Exploration Geosciences (UK Limited); Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the Department of Natural Resources Canada and the National Energy Board and ABC Corporation Ltd.* (Case No. 1401-00777) – GSI discontinued the claim against Canada, NRC and the NEB on February 14, 2018,<sup>750</sup> which discontinuance was declared effective by a Court Order filed March 19, 2018, after the NEB applied to set aside the discontinuance filed by GSI;<sup>751</sup> and
- (f) *Geophysical Service Incorporated v. Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada itself, and on behalf of the Department of Natural Resources Canada; and the National Energy Board* (Case No. 1401-05316) – GSI discontinued the entire claim against all defendants on March 21, 2018.<sup>752</sup>

359. Finally, GSI resolved two Government Domestic Claims in Newfoundland that it had not actively continued for some time but were still technically on the Court record:

- (a) *Geophysical Service Incorporated v. Canada-Newfoundland and Labrador Offshore Petroleum Board and Her Majesty in Right of Newfoundland and Labrador* (Case No. 2011 01G 5430) – GSI discontinued that claim against Her

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<sup>748</sup> **C-306**, Partial Discontinuance of Action in QB Action No. 0901-08210 on March 8, 2018.

<sup>749</sup> **C-307**, Order of Honourable Justice K.M. Horner in QB Action No. 0901-08210 on March 19, 2018 at ¶ 1.

<sup>750</sup> **C-308**, Partial Discontinuance of Action in QB Action No. 1401-00777 on February 14, 2018.

<sup>751</sup> **C-309**, Order of Honourable Justice K.M. Horner in QB Action No. 1401-00777 on March 19, 2018 at ¶ 1.

<sup>752</sup> **C-310**, Discontinuance of Action in QB Action No. 1401-05316 on March 21, 2018.

Majesty in Right of Newfoundland and Labrador on August 2, 2019,<sup>753</sup> after which GSI settled its claim against the C-NLOPB on June 8, 2020;<sup>754</sup> and

- (b) *Geophysical Service Incorporated v Canada Newfoundland and Labrador Offshore Petroleum Board, Her Majesty in Right of Newfoundland and Labrador, and others* (Case No. 2013 01G 1671) – that action was summarily dismissed by consent on February 2, 2020 on the basis that it was *res judicata* as a result of the Alberta Decisions,<sup>755</sup> after which GSI negotiated a settlement of the costs with the C-NLOPB on June 8, 2020.<sup>756</sup>

360. The two Newfoundland-based Government Domestic Claims had been inactive since the NOA was served.<sup>757</sup> Although the two Newfoundland-based Government Domestic Claims were technically not discontinued or dismissed on the record of the Supreme Court of Newfoundland and Labrador until several months after the Waiver, they were not actively continued since before April 18, 2019.<sup>758</sup> GSI also had no intention to continue those two Newfoundland-based Government Domestic Claims, as the Alberta Decisions became the law in Newfoundland and Labrador after the Supreme Court of Canada Decision and then would prevent GSI from continuing them.<sup>759</sup> As the Supreme Court of Newfoundland and Labrador found in Case No. 2013 01G 1671, the cases were *res judicata* due to the Alberta Decisions.
361. The resolution of the Newfoundland-based Government Domestic Claims after the Waiver is sufficient to comply with Articles 1121(1) and 1121(2) of NAFTA. The purpose of those Articles is to ensure that the Claimants did not continue any Domestic Actions after the

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<sup>753</sup> **C-311**, Notice of Discontinuance against Her Majesty in Right of Newfoundland and Labrador in Case No. 2011 01G 5430, filed August 2, 2019.

<sup>754</sup> **C-312**, Satisfaction Piece filed by Canada-Newfoundland and Labrador Offshore Petroleum Board in Case No. 2011 01G 5430 on June 8, 2020.

<sup>755</sup> **C-313**, Order of Justice Faour in Court File No. 2013 01G-1671, dated February 20, 2020.

<sup>756</sup> **C-314**, Satisfaction Piece filed by Canada-Newfoundland and Labrador Offshore Petroleum Board in Case No. 2013 01G 1671 on June 8, 2020.

<sup>757</sup> **R-005**, *Geophysical Service Incorporated v. Canada-Newfoundland and Labrador Offshore Petroleum Board and Her Majesty in Right of Newfoundland and Labrador* (Case No. 2011 01G 5430), Supreme Court of Newfoundland and Labrador Trial Division (General) Amended Statement of Claim, 7 January.

2013; **CWS-06**, Paul Einarsson Witness Statement at ¶ 166.

<sup>758</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 166.

<sup>759</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 166.

Waiver that either: (i) risked conflicting outcomes between the Domestic Action and this Arbitration; or (ii) risked GSI being awarded double recovery in this Arbitration and the Domestic Action.<sup>760</sup> The Newfoundland-based Government Domestic Claims posed no risk of conflicting outcomes or double redress, as they were not actively “continued” after the Waiver and were *res judicata* due to the Alberta Decisions.<sup>761</sup>

362. Since the Waiver, GSI has only continued claims in the Domestic Actions that involve claims against third parties for breaches of private law remedies, including but not limited to contractual and obligatory license claims or transmission of licensed data to a non-licensee that give rise to equitable or tort claims.<sup>762</sup> None of the claims in the Domestic Actions that GSI has continued after the Waiver involved claims against Canada, Canadian provinces or Boards with respect to the Alberta Decisions or the Regulatory Regime.<sup>763</sup> Private third parties do not have the ability to impose the measures imposed by the Alberta Decisions that are at issue in this Arbitration, which further demonstrates the absence of any overlap between this Arbitration and the Domestic Actions that GSI has continued since the Alberta Decisions.
363. In light of the foregoing, the Claimants have complied with both the formal and substantive requirements of Article 1121 of NAFTA. While GSI continues to pursue the Domestic Actions, those proceedings are not “[w]ith respect to the measure[s]” at issue in this Arbitration.<sup>764</sup> The Domestic Actions that GSI has continued since the Waiver have been brought in respect of private claims against third parties under domestic law, do not risk conflicting outcomes and do not raise any issues of double recovery. Because of that, those Domestic Actions and this Arbitration can and should coexist.

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<sup>760</sup> **CLA-057**, *International Thunderbird* at ¶ 117.

<sup>761</sup> **C-313**, Order of Justice Faour in Court File No. 2013 01G-1671, dated February 20, 2020.

<sup>762</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 167.

<sup>763</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 167.

<sup>764</sup> NAFTA, Chapter 11, Article 1121(1) (“[w]aive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach...”).



(c) *Canada's Objection to the Claimants' Compliance with Article 1121 of NAFTA has No Merit*

364. Canada's Statement of Defence asserts that the Claimants did not comply with Article 1121 of NAFTA because GSI has continued some of the Domestic Actions following the service of the NOA.<sup>765</sup> Moreover, Canada's Statement of Defence asserts that the Claimants must prove that, as of the date of filing the NOA, they: "[t]erminated all ongoing or outstanding damages claims involving GSI's seismic data at issue in this NAFTA arbitration".<sup>766</sup>
365. Canada's Statement of Defence on this point is overly broad. It mischaracterizes the scope of the Claimants' claims in this Arbitration and the nature of the ongoing Domestic Actions.
366. First, Canada's Statement of Defence mischaracterizes the scope of the Claimants' claims in this Arbitration.
367. As noted, the Alberta Decisions are the measures at issue in the Claimants' claims in this Arbitration. Conversely, the Domestic Actions that GSI has continued since the date of the Waiver are being pursued against third parties for private law claims in respect of licensed data for breach of contractual licenses or transmission of licensed data to a non-licensee for tort or equitable claims.<sup>767</sup> There is no overlap in the measures at issue in this Arbitration and the private third party conduct at issue in the Domestic Actions.
368. Similarly, there is no overlap between the damages claimed by the Claimants in this Arbitration and the damages claimed by GSI in the Domestic Actions. This Arbitration seeks damages under NAFTA for Canada's breaches of public international law. The Domestic Actions seek damages for breaches of GSI's private law rights, such as damages for breach of contractual licenses, conversion of Seismic Works or torts.<sup>768</sup> Those damages

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<sup>765</sup> Statement of Defence at ¶ 24.

<sup>766</sup> Statement of Defence at ¶ 25.

<sup>767</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 167.

<sup>768</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 167.

in respect of originally licensed versions of the Seismic Works are different damages than those sought in this Arbitration.

369. Contrary to Canada’s assertion in the Statement of Defence, the Domestic Actions do not seek damages because third parties “[a]llegedly accessed from the Regulatory Boards” the Seismic Works.<sup>769</sup> As noted, any such claims in the Domestic Actions were dismissed by the Alberta Decisions, the findings of which were made within, and therefore are binding in, the Domestic Actions.<sup>770</sup>
370. Canada’s misinterpretation of the nature of the Domestic Actions is borne out by the so-called “examples” in its Statement of Defence of Domestic Actions that are allegedly offside Article 1121:
- (a) *Geophysical Service Incorporated v. Total S.A. and Total E&P Canada Ltd.* (Court of Queen’s Bench of Alberta No. 1401-03449) (“*Total*”), was an action commenced by GSI against an oil and gas company and its Canadian subsidiary for breach of a license agreement that expressly prohibited the defendants from obtaining the Seismic Works from the Boards;<sup>771</sup> and
  - (b) *Geophysical Service Incorporated v. Anadarko Petroleum Corporation* (Case No. 4:15-cv-02765, U.S. Dist. Tx) (“*Anadarko*”), was an action commenced by GSI against an oil and gas company that alleged the defendant breached various laws of the United States as a result of its dealings with the Seismic Works.<sup>772</sup> *Anadarko* was originally scheduled to proceed to trial on February 6, 2017, but was stayed as of June 17, 2016,<sup>773</sup> before being settled in February 2021, after sitting dormant for years and not being continued since the date the stay was issued.<sup>774</sup>

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<sup>769</sup> Canada Statement of Defence at ¶ 24.

<sup>770</sup> **R-001**, ABQB Common Issues Decision at ¶ 12.

<sup>771</sup> **C-286**, *Geophysical Service Incorporated v Total SA*, 2020 ABQB 730 at ¶ 3 (GSI was ultimately successful at trial, see ¶ 126).

<sup>772</sup> **R-012**, *Geophysical Service Incorporated v. Anadarko Petroleum Corporation* (Case No. 4:15-cv-02765, U.S. Dist. Tx), Complaint, 22 September 2015.

<sup>773</sup> **C-315**, Order Granting the Parties’ Joint Motion Seeking Temporary Suspension of Case Schedule Deadlines Pending Disposition of Defendants’ Motion to Dismiss, filed in Case No. 4:15-cv-02765 on June 17, 2016.

<sup>774</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 168.

371. The two Domestic Actions noted in Canada’s Statement of Defence are entirely unrelated to the measures at issue in this Arbitration (the Alberta Decisions). Both of the claims involved GSI’s enforcement of private contractual and intellectual property rights and, in any event, neither of those claims are ongoing because GSI won the *Total* case at trial on November 25, 2020 and settled *Anadarko* on February 27, 2021.<sup>775</sup>

#### **IV. THE ALBERTA DECISIONS BREACHED CANADA’S OBLIGATIONS UNDER NAFTA CHAPTER 11**

##### **A. Canada Expropriated the Claimants’ Investments in Contravention of Article 1110 of NAFTA**

###### **(1) Article 1110(1) of NAFTA Prohibits Expropriation of an Investment Without Compensation**

364. Article 1110(1) of NAFTA prohibits expropriation of an investment without compensation except where certain conditions are met:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.<sup>776</sup>

365. Article 1110(1) prohibits several different forms of expropriation. Direct expropriation includes measures resulting in a state taking or confiscating ownership of an investment.<sup>777</sup> Indirect expropriation includes measures resulting in the investor losing control over an investment or from having the benefit of an investment despite technically retaining title

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<sup>775</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 168.

<sup>776</sup> NAFTA, Chapter 11, Article 1110(1).

<sup>777</sup> CLA-073, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (“*Metalclad*”) at ¶¶ 102-103.

to the investment.<sup>778</sup> The application of Article 1110 to both direct and indirect forms of expropriation was described by the NAFTA tribunal in *Metalclad Corporation v The United Mexican States* as follows:

[103] Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, **but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.**<sup>779</sup> [Emphasis added.]

366. The difference between direct and indirect expropriation was similarly described by the NAFTA tribunal in *Archer Daniels Midland Company et al v The United Mexican States* as follows:

[238] Of course, a taking of property may be understood in a strict sense - when there is a direct transfer of the property title, but it also applies just as obviously to indirect expropriation - *i.e.*, to State measures not directly aimed at the expropriation of an investment, but which have equivalent effects. **Expropriation may take place through State measures other than direct taking of tangible property, such as taxation. When such interference occurs, the legal title to the property remains in the owner but, as a result of the host State measure, the investor's rights to use of the property are rendered nugatory, or lack the economic value they previously had.**<sup>780</sup> [Emphasis added.]

367. Article 1110 also protects against measures that are “[t]antamount to nationalization or expropriation”.<sup>781</sup> The distinction between expropriation, whether direct or indirect, and measures tantamount to expropriation, is that measures tantamount to expropriation require “[n]o actual, transfer, taking or loss of property by any person or entity”.<sup>782</sup> Instead, measures tantamount to expropriation need only render the ownership of the foreign investor’s property ineffective or irrelevant.<sup>783</sup>

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<sup>778</sup> CLA-073, *Metalclad* at ¶¶ 102-103.

<sup>779</sup> CLA-073, *Metalclad* ¶¶ 103.

<sup>780</sup> CLA-074, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*. ICSID Case No. ARB(AF)/04/05, Award of 21 November 2007 (“*Archer Daniels*”) at ¶ 238.

<sup>781</sup> NAFTA, Chapter 11, Article 1110(1).

<sup>782</sup> CLA-075, *Waste Management, Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (English), April 30, 2004 (“*Waste Management No. 2*”) at ¶ 143.

<sup>783</sup> CLA-075, *Waste Management No. 2* at ¶ 143.

368. Regardless of whether a measure is a direct expropriation, an indirect expropriation or a measure tantamount to expropriation, the Claimants' investments will only have been expropriated where the measure at issue amounts to a 'substantial deprivation' of the investment, the standard for which is discussed below.<sup>784</sup>

**(2) Article 1110(7) of NAFTA References the Treatment of Intellectual Property Rights in Chapter 17 of NAFTA**

369. Article 1110(7) of NAFTA confirms that interference with intellectual property rights can give rise to a violation of Article 1110 where that interference is inconsistent with Chapter 17 of NAFTA. Article 1110(7) states:

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter 17 (Intellectual Property).<sup>785</sup>

370. The effect of Article 1110(7) of NAFTA is that, for any expropriation involving "[i]ntellectual property rights", any "[l]imitation" or "[r]evocation" thereof that would be permissible under the terms of Chapter 17 cannot form the basis of an expropriation claim under Chapter 11.<sup>786</sup> In other words, only a "[r]evocation" or "[l]imitation" of "[i]ntellectual property right" that would violate Chapter 17 of NAFTA can be a violation of Article 1110. Contrary to Canada's assertion in its Statement of Defence, the reference to Chapter 17 into Article 1110(7) does not mean that the Claimants are improperly pursuing a claim for a breach of Chapter 17 in this Arbitration.<sup>787</sup>

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<sup>784</sup> **CLA-076**, *Chemtura Corporation v Government of Canada*, UNCITRAL, Award, August 2, 2010 ("*Chemtura*") at ¶ 242; see also **CLA-077**, *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Interim Award, June 26, 2000 ("*Pope & Talbot Interim Award*") at ¶ 102.

<sup>785</sup> NAFTA, Chapter 11, Article 1110(7).

<sup>786</sup> See generally, **CLA-078**, James Billingsley, *Eli Lilly And Company v. The Government of Canada and the Perils of Investor-State Arbitration*, Appeal: Review of Current Law and Law Reform, Volume 20, 27-42.

<sup>787</sup> Canada Statement of Defence at ¶ 37.

**(3) The Alberta Decisions Will Breach Article 1110 if They Also Breach Chapter 17 of NAFTA, Without More**

371. NAFTA tribunals have confirmed that a domestic court decision can constitute a “measure adopted or maintained by a Party” for the purposes of NAFTA.<sup>788</sup> Consistent with those findings, the analysis of an expropriation claim pursuant to Article 1110 applies regardless of whether the measure at issue arises from the conduct of a legislative branch of the Government of Canada or the judicial branch of the Government of Canada. Canada is responsible in international law for the conduct of its organs, including the judiciary.<sup>789</sup>
372. The interaction of the principles of State responsibility and decisions of domestic courts that give rise to breaches of NAFTA was affirmed by the NAFTA tribunal in *Azinian v Mexico* (“*Azinian*”), which approvingly quoted former International Court of Justice President Eduardo Jiménez de Aréchaga’s observation that:

Although independent of the Government, the judiciary is not independent of the State: *the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.*

**The responsibility of the State for acts of judicial authorities may result from three different types of judicial decision. The first is a decision of a municipal court clearly incompatible with a rule of international law.** The second is what is known traditionally as a ‘denial of justice.’ The third occurs when, in certain exceptional and well defined circumstances, a State is responsible for a judicial decision contrary to municipal law”.<sup>790</sup> [Italics in original; bolding and underlining added.]

373. Consistent with the quote in *Azinian*, there is no requirement to establish any elements of a breach of Article 1110 that are not set out in the Article. For example, it is not necessary for the Claimants to show a ‘denial of justice’, as Canada asserts in its Statement of

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<sup>788</sup> CLA-041, *Loewen*, at ¶ 54; CLA-042, *Azinian* at ¶ 99.

<sup>789</sup> CLA-043, *Eli Lilly* at ¶ 221; CLA-044, *UN Responsibility for Internationally Wrongful Acts* at Article 4(1).

<sup>790</sup> CLA-042, *Azinian* at ¶¶ 98-99 (based on the quote from Eduardo Jiménez de Aréchaga, the NAFTA tribunal concluded that a decision of a domestic court may breach NAFTA if it can be shown that “[t]he court decision itself constitutes a violation of the treaty”).

Defence.<sup>791</sup> Instead, in the context of this Arbitration, it is necessary for the Claimants to show that the Alberta Decisions:

- (a) constituted an “expropriation” that resulted in a substantial deprivation of the Claimants’ investments;
- (b) did not satisfy one or more of the exceptions to expropriation set out in Article 1110(1); and
- (c) were inconsistent with Chapter 17, which would satisfy the criterion from the quote in Azinian that the Alberta Decisions were “clearly incompatible with a rule of international law”.

374. That analytical framework is consistent with the plain construction of Article 1110 of NAFTA and the decisions of prior tribunals considering expropriation claims involving decisions of domestic courts.

375. First, the plain construction of Article 1110 does not impose any additional requirements for a decision of a domestic court to constitute a breach of that Article. The only additional element that is imposed is found in Article 1110(7), which stipulates that the compulsory license imposed by the Alberta Decisions must be inconsistent with Chapter 17 to be a breach of Article 1110.<sup>792</sup> Requiring the Claimants to also prove a ‘denial of justice’ would be inconsistent with the scheme set out in Article 1110.

376. Second, prior tribunals have found that a domestic judicial decision can give rise to an expropriation when it results in substantial deprivation of an investment and violates a rule of international law. That latter requirement has included the impugned judicial decision being contrary to principles of international law and the New York Convention,<sup>793</sup>

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<sup>791</sup> Canada Statement of Defence at ¶ 31.

<sup>792</sup> NAFTA, Chapter 11, Article 1110(7).

<sup>793</sup> **CLA-079**, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009 at ¶ 170 (“[t]he Tribunal concludes that the revocation of the arbitrators’ authority was contrary to international law, in particular to the principle of abuse of rights and the New York Convention”); see also, **CLA-080**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010 at ¶¶ 123-125 (“[T]he extinguishment of the Claimant’s right to arbitration by the Jordanian courts this violated both the letter and the spirit of the Turkey-Jordan BIT.”).

providing “manifestly and grossly inadequate” compensation for expropriated property,<sup>794</sup> or depriving a claimant of its contractual and property rights.<sup>795</sup> Tribunals have also found that it is not necessary for a claimant to show that a domestic court decision constituted a denial of justice to pursue an expropriation claim.<sup>796</sup>

**(4) The Alberta Decisions Breached Article 1110 by Expropriating and Substantially Depriving the Claimants of Their Investments**

377. The Alberta Decisions breached Article 1110 of NAFTA by confiscating GSI’s copyright in the Seismic Works through a compulsory license in a manner tantamount to expropriation.
378. The Seismic Works and GSI’s intellectual property rights therein were the lifeblood of GSI’s business. Throughout the 1990s and 2000s, the Seismic Works allowed GSI to generate substantial revenues that it reinvested in its business, purchasing ships and a processing center that would allow it create further Seismic Works quickly by decreasing its reliance on third party contractors and vendors.<sup>797</sup> It was a business model that was very profitable, but it all revolved around GSI being able to keep the Seismic Works confidential by maintaining control of them and limiting their publication and copying.<sup>798</sup>
379. Under both Canadian and international law, one of the fundamental rights GSI had by virtue of its copyright in the Seismic Works was the ability to prevent the public

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<sup>794</sup> **CLA-081**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008 at ¶¶ 705-706 (“[d]espite the fact that the valuation of the shares was, unusually, made by the Presidium rather than by either of the inferior tribunals, there was no evidence that it was not made ‘in accordance with due process of law’... Nevertheless, for reasons which the Tribunal will discuss... the valuation placed on Claimants’ shares was manifestly and grossly inadequate... The Tribunal accordingly holds that the expropriation by the Presidium was unlawful.”).

<sup>795</sup> **CLA-082**, *Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 at ¶ 118 (“[I]t is well established that the abrogation of contractual rights by a State, in the circumstances which obtained in this case, is tantamount to an expropriation of property by that State. The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree.”).

<sup>796</sup> **CLA-083**, *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 at ¶¶ 359 and 701; see also, **CLA-084**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 at ¶¶ 457-458.

<sup>797</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 87.

<sup>798</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 99.



distribution and copying of the Seismic Works.<sup>799</sup> GSI commenced the Domestic Actions to do just that: protect its business by enforcing its copyright in the Seismic Works, particularly those that were included in the Submissions.<sup>800</sup> Before the Supreme Court of Canada Decision was issued, GSI was not barred from seeking to enforce its copyright in the Seismic Works and none of the Domestic Actions were struck on the basis that GSI's claims were vexatious, spurious or abusive. Instead, GSI was permitted to advance its infringement claims based on the Regulatory Regime in the Domestic Actions.

380. The Court of Queen's Bench of Alberta eventually recognized the importance and centrality of the two Common Issues in the Alberta-based Domestic Actions:

- (a) what is the effect of the Regulatory Regime on GSI's claims?; and
- (b) can copyright subsist in seismic data of the kinds that are the subject matter of GSI's claims?<sup>801</sup>

381. The findings in the Alberta Decisions admitted that GSI's copyright in the Seismic Works were confiscated through the imposition of a compulsory license.<sup>802</sup> The Alberta Decisions also confirmed that compulsory license allowed the Boards to disclose the Seismic Works to third parties and allow them to copy the Seismic Works following the expiration of the privilege period set out in the applicable Disclosure Legislation.<sup>803</sup>

382. The effect of the Alberta Decisions was to reduce the temporal scope of GSI's copyright in the Seismic Works from the standard under Canadian copyright law (life of the author plus 50 years),<sup>804</sup> to the length of the privilege period under the applicable Disclosure

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<sup>799</sup> **C-133**, *Copyright Act* at Section 3(1)(a) (“[c]opyright... means the sole right to produce or reproduce the work or any substantial part thereof in any material for whatsoever... and to authorize such acts.”); see also, NAFTA, Chapter 17, Article 1705(2) (“Each Party shall provide to authors and their successors... the right to authorize or prohibit: ... (b) the first public distribution of the original and each copy of the work by sale, rental or otherwise; (c) the communication of a work to the public...”).

<sup>800</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 155.

<sup>801</sup> **C-289**, Order of Chief Justice N.C. Wittmann, filed June 10, 2015.

<sup>802</sup> **R-001**, ABQB Common Issues Decision at ¶ 318.

<sup>803</sup> **R-002**, ABCA Common Issues Appeal at ¶ 105.

<sup>804</sup> **C-133**, Canadian *Copyright Act* at Section 6.

Legislation and Board policies, which was five years.<sup>805</sup> The Court of Appeal of Alberta found that meant GSI was stripped of its copyright in the Seismic Works that were included in the Submissions at the expiration of that privilege period:

[104] As found by the Trial Judge, there is no breach of copyright in this matter by the Boards' disclosure of seismic data after the privilege period, including allowing data to be copied. 'The specific legislative authority of the [Canada Petroleum Resources Act] and the *Federal Accord Act* overrides the general rights contained in the *Copyright Act*. Further, or in the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have authority to copy' ... Here, that means 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.**<sup>806</sup> [Emphasis added.]

383. Tribunals have characterized the threshold for an expropriation that results in substantial deprivation in many ways, including (with all emphasis added):

- (a) “[an] **action that is *confiscatory***, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property”;<sup>807</sup>
- (b) “There is ample authority for the proposition that a property has been expropriated **when the effect of the measures taken by the state has been to *deprive the owner of title, possession or access to the benefit and economic use of his property***”;<sup>808</sup> and
- (c) “An effective deprivation requires... **a total loss of value of the property such as when the property affected is *rendered worthless* by the measure, as in the case of direct expropriation, even if formal title continues to be held**”.<sup>809</sup>

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<sup>805</sup> **R-001**, ABQB Common Issues Decision at ¶ 321; **R-002**, ABCA Common Issues Appeal at ¶ 104.

<sup>806</sup> **R-002**, ABCA Common Issues Appeal at ¶ 104.

<sup>807</sup> **CLA-077**, *Pope & Talbot Interim Award* ¶ 102.

<sup>808</sup> **CLA-085**, *Compania Del Desarrollo de Santa Elena, SA v The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, February 17, 2000 at ¶ 76.

<sup>809</sup> **CLA-086**, *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, December 27, 2010 at ¶ 195.

384. Tribunals have endorsed a variety of factors for establishing whether a measure gives rise to an indirect expropriation or is tantamount to expropriation that causes substantial deprivation, including:
- (a) the degree of interference with the property right and whether the state took any other actions ousting the investor from full ownership of the investment;
  - (b) whether the investor remained in control of its investment;
  - (c) whether the state took proceeds of sales other than through taxation; and
  - (d) whether the state prevented the distribution of dividends to shareholders.<sup>810</sup>
385. Based on the standards and factors set out by prior tribunals, the Alberta Decisions substantially deprived the Claimants of their investments through a measure tantamount to expropriation.
386. First, the degree of interference with GSI's copyright in the Seismic Works was very high because GSI no longer has a functional title in the Seismic Works. Although GSI technically retains formal title to the Seismic Works, in the sense that the title has not been formally transferred or assigned to Canada, the Alberta Decisions rendered GSI's formal title useless by stripping GSI of its intellectual property rights after the expiration of the applicable privilege period. That substantially impaired GSI's ability to recoup its investment in the Seismic Works by curtailing its term of exclusivity,<sup>811</sup> but it also confiscated GSI's right to enforce that exclusivity in Canadian courts, contrary to its rights under Canadian copyright legislation. The result is that GSI is no longer able to make a return on its investment in the Seismic Works.<sup>812</sup> Instead, the Seismic Works are effectively rendered worthless because any party can access them for free from the Boards if it waits out the length of the privilege period in the Disclosure Legislation.

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<sup>810</sup> See **CLA-077**, *Pope & Talbot Interim Award* at ¶ 100; **CLA-076**, *Chemtura* at ¶ 242; see also, **CLA-087**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007 at ¶ 245 (applying the factors to an instance of 'tantamount to expropriation').

<sup>811</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 157.

<sup>812</sup> **CWS\_06**, Paul Einarsson Witness Statement at ¶ 157.

387. Similarly, while GSI technically remains in control of its business, it has lost the ability to control the dissemination of the Seismic Works, the most important aspect of its business.<sup>813</sup> In the wake of the Alberta Decisions, third parties, all of whom were either GSI's former customers, former prospective customers or former competitors, have free reign to access and copy the Seismic Works from the Boards for free.<sup>814</sup> Those third parties can do so with impunity and unencumbered by any concerns about infringing GSI's intellectual property rights therein or GSI taking action to prevent that infringement.<sup>815</sup>
388. Third, GSI's licensing proceeds were effectively transferred to Canada by the Alberta Decisions. Historically, third parties would have had to pay GSI fees to view or license the Seismic Works.<sup>816</sup> However, Canada is now offering for free the same products that GSI once sold to the public, using GSI's property to promote and subsidize oil and gas exploration. Canada also provides significant credits in exchange for the valuable Seismic Works in the form of the Secondary Submissions from GSI's former customers. In effect, the licensing profits GSI once realized have been transferred to Canada, which receives offshore oil and gas royalties arising from the offshore development it seeks to promote. By handing out the Seismic Works for free, Canada is confiscating the Seismic Works for its own benefit and at the Claimants' expense.
389. Finally, the Alberta Decisions resulted in no dividends being paid to Davey or Paul because GSI is effectively out of business now that it is unable to recover its investment into the Seismic Works, has lost the ability to control the dissemination of the Seismic Works and is unable to enforce those intellectual property rights against third parties. Instead, GSI's profit streams have completely evaporated and it has been forced to liquidate its assets, minus the Seismic Works, to maintain an existence while it seeks to recover its losses.<sup>817</sup> The further result of that is that GSI is unable to repay the Loans or pay the Einarssons pursuant to the Remunerative Contracts.

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<sup>813</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 57; CWS-06, Paul Einarsson Witness Statement at ¶ 100.

<sup>814</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 156.

<sup>815</sup> R-001, ABQB Common Issues Decision at ¶ 322; R-002, ABCA Common Issues Appeal at ¶ 104.

<sup>816</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 57.

<sup>817</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 157.

390. At the end of the day, the Alberta Decisions confiscated GSI's most valuable asset – its copyright in its Seismic Works. GSI's lifeblood was the licensing fees it derived from the Seismic Works,<sup>818</sup> but those licensing fees have completely evaporated now that its former customers and former prospective customers can obtain the Seismic Works for free from the Boards.<sup>819</sup> The result is that GSI is effectively out of business, unable to repay the Loans to the Einarssons, unable to pay dividends to Paul and Davey and unable to pay out the Remunerative Contracts to the Einarssons.<sup>820</sup> The Alberta Decisions destroyed GSI's business – a company that laid the foundation for what the offshore Canadian oil and gas industry is today.

### **(5) The Alberta Decisions Denied Compensation for the Expropriation**

391. Article 1110(1) provides four exceptions that, if satisfied, mean there has been no breach of that Article. Those exceptions include “[p]ayment of compensation in accordance with paragraphs 2 through 6”.<sup>821</sup> Canada will be in breach of Article 1110(1) where no compensation has been paid.
392. Neither GSI nor the Einarssons have received any compensation for the expropriation of their investments. The Alberta Decisions expressly found that GSI was not entitled to any compensation for the “confiscation” of its copyright in the Seismic Works.<sup>822</sup> As a result, the Alberta Decisions breached Article 1110 of NAFTA.

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<sup>818</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 57.

<sup>819</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 57; CWS-06, Paul Einarsson Witness Statement at ¶¶ 156-157.

<sup>820</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 159.

<sup>821</sup> NAFTA, Chapter 11, Article 1110(1).

<sup>822</sup> R-001, ABQB Common Issues Decision at ¶ 322; R-002, ABCA Common Issues Appeal at ¶¶ 106-107.

**(6) The Alberta Decisions Were Inconsistent with Chapter 17 of NAFTA**

(a) Chapter 17 of NAFTA Protects Intellectual Property Rights and Article 1705 Covers Copyright

393. Chapter 17 of NAFTA is devoted exclusively to providing a uniform minimum standard of intellectual property law and enforcement under which member nations must operate.<sup>823</sup>

Article 1721 of NAFTA defines the phrase “intellectual property rights”, as follows:

intellectual property rights refers to copyright and related rights, trademark rights, patent rights, rights in layout and design of semiconductor integrated circuits, trade secret rights, plant breeders’ rights, rights in geographical indications and industrial design rights;<sup>824</sup> [Emphasis added.]

394. Article 1701(1) of NAFTA states that Canada shall provide “[n]ationals of another Party”, such as the Claimants, “[a]dequate and effective protection and enforcement of intellectual property rights”.<sup>825</sup> Article 1701(2) further provides that, in order to “[p]rovide adequate and effective protection and enforcement of intellectual property rights”, Canada must also give effect to the substantive provisions of various international treaties, including the *Berne Convention for the Protection of Literary and Artistic Works, 1971* (the “*Berne Convention*”).<sup>826</sup>

395. Chapter 17 of NAFTA is divided into subsections addressing the various types of intellectual property rights. Article 1705(1) of NAFTA relates to copyright and sets out the specific protections that Canada must provide to copyright holders, stating:

1. Each Party shall protect the works covered by Article 2 of the Berne Convention, including any other works that embody original expression within the meaning of that Convention. In particular:

(a) all types of computer programs are literary works within the meaning of the Berne Convention and each Party shall protect them as such; and

(b) **compilations of data or other material, whether in machine readable or other form, which by reason of the selection or**

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<sup>823</sup> **CLA-088**, Neil Jetter, “NAFTA: The Best Friend of an Intellectual Property Right Holder Can Become Better” (1994) 9:2 Fla J Intl L 331 at p. 332.

<sup>824</sup> NAFTA, Chapter 17, Definition of “intellectual property rights”.

<sup>825</sup> NAFTA, Chapter 17, Article 1701(1).

<sup>826</sup> NAFTA, Chapter 17, Article 1701(2).

**arrangement of their contents constitute intellectual creations, shall be protected as such.**

The protection a Party provides under subparagraph (b) shall not extend to the data or material itself, or prejudice any copyright subsisting in that data or material.<sup>827</sup> [Emphasis added.]

396. The *Berne Convention* that is referenced in Article 1705(1) deals with the protection of copyrighted works and the rights of their authors.<sup>828</sup> Article 2 of the *Berne Convention* provides among the following with respect to “literary and artistic works”:

[(1)] “The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science”;<sup>829</sup>

...

[(3)] “Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work”;<sup>830</sup> and

...

[(5)] “Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections”.<sup>831</sup>

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<sup>827</sup> NAFTA. Chapter 17, Article 1705(1).

<sup>828</sup> **CLA-089**, *Berne Convention for the Protection of Literary and Artistic Works, 1971* (“*Berne Convention*”) at Article 1.

<sup>829</sup> **CLA-089**, *Berne Convention* at Article 2(1).

<sup>830</sup> **CLA-089**, *Berne Convention* at Article 2(3).

<sup>831</sup> **CLA-089**, *Berne Convention* at Article 2(5).

397. Article 1705(2) of NAFTA further states that Canada “[s]hall provide, to both authors and their successors in interest, those rights enumerated in the *Berne Convention*”, including the rights to “[a]uthorize or prohibit”, among other things:

[(a)] “the first public distribution of the original and each copy of the work by sale, rental or otherwise”; and

[(c)] “the communication of a work to the public”.<sup>832</sup>

398. The *Berne Convention* sets out further rights of authors that are protected in accordance with Article 1705(2) of NAFTA, including:

(a) “[t]he author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs [Article 2]”,<sup>833</sup>

(b) “Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation”,<sup>834</sup>

(c) “Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising **the reproduction of these works, in any manner or form**”,<sup>835</sup>

(d) “Authors of literary and artistic works shall enjoy the exclusive right of authorising:

(i) the broadcasting of their works or the communication thereof to the public by any other means of **wireless diffusion** of signs, sounds or *images*;

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<sup>832</sup> NAFTA, Chapter 17, Article 1705(2).

<sup>833</sup> **CLA-089**, *Berne Convention* at Article 2<sup>bis</sup>(3).

<sup>834</sup> **CLA-089**, *Berne Convention* at Article 6<sup>bis</sup>(1).

<sup>835</sup> **CLA-089**, *Berne Convention* at Article 9(1).



- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one;

...

- (e) “Authors of literary or artistic works shall enjoy the exclusive right of authorising **adaptations, arrangements and other alterations** of their works”.<sup>836</sup>

399. Article 7 of the *Berne Convention* further states that a work covered thereunder has a “[t]erm of protection” of “[t]he life of the author and fifty years after his death”, with specific exemptions that are not relevant to this Arbitration.<sup>837</sup>

400. Article 1705(5) provides that Canada must confine limitations or exceptions to the rights provided for in Article 1705. In particular, Article 1705(5) states:

[5.] Each Party shall confine limitations or exceptions to the rights provided for in this Article to certain **special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder**.<sup>838</sup> [Emphasis added.]

- (b) *The Compulsory Licence Granted by the Alberta Decisions Do not Comply With the Three-Step Test in Article 1705(5) of NAFTA*

401. The compulsory license granted by the Alberta Decisions will only be consistent with Chapter 17 of NAFTA for the purposes of Article 1110(7) if it satisfies the three-step test set out in Article 1705(5). In other words, if the compulsory license does not satisfy that three-step test, Canada will be liable for a breach of Article 1110.

402. At the outset, the Seismic Works fall within the scope of “intellectual property rights” as defined in Article 1721 because they are copyrighted works under Article 2 of the *Berne Convention*. The Alberta Decisions confirmed that the Seismic Works are both an “original

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<sup>836</sup> **CLA-089**, *Berne Convention* at Article 12.

<sup>837</sup> **CLA-089**, *Berne Convention* at Article 7(1) (the exceptions are set out in Articles 7(2) (cinematographic works), 7(3) (anonymous or pseudonymous works) and 7(4) (applied art), which are not applicable to the subject matter of the Seismic Works).

<sup>838</sup> NAFTA, Chapter 17, Article 1705(5).

literary compilation work” and an “artistic compilation work” under Canadian copyright law,<sup>839</sup> which law incorporates the *Berne Convention*.<sup>840</sup> The Court of Queen’s Bench of Alberta has also confirmed that GSI owns the copyright in the Seismic Works.<sup>841</sup>

403. Moving to the three-step test from Article 1705(5), the three distinct components of that test are:

- (a) the compulsory license must be confined to “[c]ertain special circumstances”;
- (b) the compulsory license must not “[c]onflict with a normal exploitation of the work”; and
- (c) the compulsory license must not “[u]nreasonably prejudice the legitimate interests of the rights holder”.<sup>842</sup>

404. Article 1705(5) of NAFTA has not been considered by any tribunals, nor has it been the subject of significant commentary. However, a panel of the World Trade Organization has considered Article 13 of The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), which is virtually identical to Article 1705(5) of NAFTA (the “WTO Panel Decision”).<sup>843</sup> Article 13 of TRIPS states:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.<sup>844</sup>

405. The WTO Panel Decision involved a complaint by the member states of the European Community that certain exceptions to copyright protection set out in U.S. copyright

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<sup>839</sup> **R-001**, ABQB Common Issues Decision at ¶ 115.

<sup>840</sup> **C-133**, Canadian *Copyright Act* at Section 91.

<sup>841</sup> **C-132**, *Calwest* at ¶ 18 (“[F]or the reasons I discuss in my common issues decision, the creation of the 1982 Data meets the Canadian skill and judgment test laid out by the Supreme Court of Canada... and should be considered original artistic or literary compilation productions in the scientific domain, and therefore copyright works.”).

<sup>842</sup> NAFTA, Chapter 17, Article 1705(5).

<sup>843</sup> **CLA-090**, Report of the World Trade Organization Panel on *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, 15 June 2000 (“WTO Award”).

<sup>844</sup> **CLA-091**, Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 3; 33 I.L.M. 1197 (1994) at Article 13.

legislation contravened TRIPS and the Berne Convention.<sup>845</sup> In response, the United States invoked Article 13 of TRIPS, which allows for limitations or exceptions to TRIPS' copyright protections.<sup>846</sup>

406. The WTO Panel Decision featured an extensive interpretation of the three-step test under Article 13 of TRIPS, which included all of the elements of the virtually identical three-step test under Article 1705(5) of NAFTA. The WTO Panel Decision performed that interpretation in accordance with the VCLT, just as this Tribunal must do with Article 1705(5) of NAFTA.
407. Regarding the first step of the test, the WTO Panel Decision found that the ordinary meaning of “certain special cases” (in contrast to the language “certain special *circumstances*”) used Article 1705(5), means that the exception “[s]hould be clearly defined and should be narrow in its scope and reach”.<sup>847</sup>
408. Regarding the second step of the test, the WTO Panel Decision found that the ordinary meaning of “not conflict with a normal exploitation of the work” means the potential impact of the limitation should not interfere with the ways that rights holders normally extract economic value from the work.<sup>848</sup> The WTO Panel Decision clarified that the analysis is concerned with the potential impact of an exception rather than on its actual effect on the market at a given time.<sup>849</sup> The WTO Panel Decision also noted that an exception or limitation will conflict with the normal exploitation of the work where it may enter into competition with rights holders and deprive them of significant or tangible commercial gains.<sup>850</sup>
409. Regarding the third step of the test, the WTO Panel Decision found that the ordinary meaning of “not unreasonably prejudice the legitimate interests of the right holder” must consider the degree of prejudice suffered by the rights holder and whether that prejudice

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<sup>845</sup> **CLA-090**, WTO Award at ¶ 3.1.

<sup>846</sup> **CLA-090**, WTO Award at ¶ 3.1.

<sup>847</sup> **CLA-090**, WTO Award at ¶ 6.112.

<sup>848</sup> **CLA-090**, WTO Award at ¶ 6.183.

<sup>849</sup> **CLA-090**, WTO Award at ¶ 6.184.

<sup>850</sup> **CLA-090**, WTO Award at ¶ 6.183.

unreasonably interferes with the economic values of those rights.<sup>851</sup> The WTO Panel Decision clarified that “[p]rejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner”.<sup>852</sup>

410. The interpretations of TRIPS provided by the WTO Panel Decision do not bind this Tribunal, but they illustrate what the ordinary meaning of each element of the three-step test set out in Article 1705(5) of NAFTA will likely entail in accordance with the *VCLT*.
411. Based on the WTO Panel Decision and the ordinary meaning of each of the elements of the three-step test under Article 1705(5), the compulsory license issued by the Alberta Decisions does not satisfy any element of the test. As a result, Canada’s breach of Article 1110 does not fall within the exception set out in Article 1110(7).
412. First, the compulsory license issued by Alberta Decisions was not confined to certain special circumstances because it was poorly defined and not narrow in scope or reach.
413. For example, the compulsory license has been used to justify disclosing the Seismic Works that were obtained through the Secondary Submissions even though neither GSI nor its predecessors submitted them under the Submission Legislation.<sup>853</sup>
414. The compulsory license was also extremely broad in both its scope and reach. The compulsory license allows any individual or entity in Canada to access the Seismic Works for free. In the WTO Panel Decision, the breadth of potential users of an exception was the primary reason that exception did not comply with the first step of the test under Article 13 of TRIPS.<sup>854</sup> The compulsory license issued by the Alberta Decisions is even broader

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<sup>851</sup> **CLA-090**, WTO Award at ¶¶ 6.227 and 6.229.

<sup>852</sup> **CLA-090**, WTO Award at ¶¶ 6.229.

<sup>853</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 156.

<sup>854</sup> **CLA-090**, WTO Award at ¶ 6.133 (“The factual information presented to us indicates that a substantial majority of eating and drinking establishments and close to half of retail establishments are covered by the exemption... Therefore, we conclude that the exemption does not qualify as a ‘certain special case’ in the meaning of the first condition of Article 13.”).

than the exception considered by the WTO Panel Decision because its scope of users is potentially unlimited.

415. For those reasons, the compulsory license issued by Alberta Decisions does not meet the first step of the three-step test set out in Article 1705(5) of NAFTA. That alone renders the compulsory license inconsistent with Chapter 17 and outside the scope of the exception in Article 1110(7).
416. Second, the compulsory license issued by the Alberta Decisions directly conflicts with the normal exploitation of the Seismic Works by GSI.
417. GSI earned its revenues by licensing the Seismic Works to a small number of licensees and limiting the distribution of the Seismic Works to the public.<sup>855</sup> Once the Alberta Decisions allowed parties to access and copy the Seismic Works for free, GSI no longer had a customer base to license the Seismic Works to and its business was ruined.<sup>856</sup> The Alberta Decisions also forbid GSI from interfering with or objecting to that access and copying, eliminating GSI's ability to enforce its rights.<sup>857</sup>
418. As the WTO Panel Decision noted, an exception or limitation will conflict with the normal exploitation of the work where users of the exception may enter into competition with rights holders and deprive them of commercial gains.<sup>858</sup> That is exactly what the compulsory license issued by the Alberta Decisions allows. It is difficult to imagine a more direct example of a compulsory license conflicting with the normal exploitation of a copyright work than when an exception makes copyright works that are traditionally licensed under strict terms available for free to anyone with no threat of recourse.
419. For those reasons, the compulsory license issued by the Alberta Decisions does not meet the second step of the three-step test set out in Article 1705(5) of NAFTA. Again, that

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<sup>855</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶¶ 84 and 98-101.

<sup>856</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 57; **CWS-06**, Paul Einarsson Witness Statement at ¶¶ 156-157.

<sup>857</sup> **R-002**, ABCA Common Issues Appeal at ¶ 104.

<sup>858</sup> **CLA-090**, WTO Award at ¶ 6.183.

alone renders the compulsory license inconsistent with Chapter 17 and outside the scope of the exception in Article 1110(7).

420. Third, the compulsory license issued by the Alberta Decisions unreasonably prejudices the rights of the holder of the copyright in the Seismic Works, GSI.
421. The compulsory license issued by the Alberta Decisions prejudices GSI. The *Berne Convention*, which is expressly incorporated into Chapter 17 by Article 1705(2), sets the term of copyright protection at 50 years after the author dies.<sup>859</sup> The compulsory license issued by the Alberta Decisions is inconsistent with that term because it limits the term of GSI's copyright protection to the length of the privilege period set out in the Disclosure Legislation, which is five years.<sup>860</sup> By having its rights to prevent the public distribution of the Seismic Works, the communication of the works to the public and the reproduction of the Seismic Works curtailed, GSI is unable to make a return on its investment in the Seismic Works,<sup>861</sup> which is the very reason for the standard copyright term of protection.
422. The prejudice accruing to GSI as a result of the compulsory license issued by the Alberta Decisions is also unreasonable. As the WTO Panel Decision found, “[p]rejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner”.<sup>862</sup> That is exactly what has happened to GSI. Canada and the Boards are now direct competitors of GSI, except Canada and the Boards offer the Seismic Works to GSI's former customers or potential customers for free. The purpose of doing so is development of the Canadian offshore oil and gas industry, which benefits Canada through oil and gas revenues and lease fees. Destroying GSI's business to subsidise the work of offshore oil and gas companies by giving them the Seismic Works for free is both excessive and grossly unreasonable.

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<sup>859</sup> **CLA-089**, *Berne Convention* at Article 7(1).

<sup>860</sup> **R-002**, ABCA Common Issues Appeal at ¶ 104.

<sup>861</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 157.

<sup>862</sup> **CLA-090**, WTO Award at ¶ 6.229.

423. For the reasons set out above, the compulsory license issued by the Alberta Decisions does not meet any of the steps of the test set out in Article 1705(5) of NAFTA. As a result, Canada is liable for a breach of Article 1110 of NAFTA.

**(7) Canada’s Defences to the Claimants’ Article 1110 Claim Have no Merit**

424. Canada’s defences to the Claimants’ Article 1110 claim have no merit and should be disregarded by the Tribunal for the reasons set out below.

(a) *GSI did not Consent to the Regulatory Regime and Canada is Estopped from Re-Litigating the Findings from the Alberta Decisions*

425. Canada’s Statement of Defence asserts that “[s]ubmission of certain seismic materials to the Regulatory Boards and the disclosure of this material at the end of the confidentiality period were voluntarily accepted by GSI as the basis upon which a geophysical program authorization to acquire the seismic data would be granted in the first place”.<sup>863</sup> That assertion is untrue and was decided against Canada in the Alberta Decisions.

426. First, the permits and authorizations Canada references in its Statement of Defence (but did not exhibit thereto) did not include any assignment of intellectual property rights, did not reference the Copyright Act and did not indicate that GSI’s intellectual property rights would be curtailed in any way.<sup>864</sup> Moreover, the permits and program authorizations were inconsistent in their description of the impact of the Regulatory Regime on the Seismic Works, if any reference was made at all. For example some of the permits that GSI’s predecessors received indicated that the Seismic Works would never be disclosed without the consent of the owner, or that the Seismic Works did not need to be submitted at all.<sup>865</sup> Those permits accompanied the other Government Conduct and Representations detailed above that indicated to the Claimants that Canada would protect GSI’s intellectual property rights in the Seismic Works.

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<sup>863</sup> Canada Statement of Defence at ¶ 35.

<sup>864</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 106.

<sup>865</sup> C-155, Letter from Government of Newfoundland and Labrador Department of Mines and Energy, dated November 18, 1974 at enclosed Interim Permit, Section 3; C-156, Letter from Nova Scotia Department of Mines and Geophysical Service Incorporated enclosing Permit No. 5, dated November 28, 1974.

427. Second, both the terms of the permits and GSI's alleged consent to the Regulatory Regime were already adjudicated in the Alberta Decisions and Canada is estopped from re-litigating those issues.
428. The Common Issues Decision found as a fact that the permits and program authorizations did not say anything about GSI assigning or licensing the Seismic Works to Canada or Canadian regulatory bodies.<sup>866</sup> The Common Issues Decision also found as a fact that GSI did not consent to the Regulatory Regime:

[317] It is also clear that GSI fought against this disclosure policy for years (and obviously is still fighting). To suggest that it has "consented" to the disclosure of its very valuable seismic data, impliedly or not, does not sit well with me. In my view, GSI has been forced to grant, in effect, a compulsory licence to permit its offshore seismic data to be released and used by the public. The Regulatory Regime provides for this, as discussed above. GSI may not have liked to do so, it certainly never "consented" and it may be unfair, but it is the Regulatory Regime approved by Parliament.<sup>867</sup> [Emphasis added.]

429. By raising issues that were already settled in the Common Issues Decision, Canada is attempting to disregard findings of fact that it already litigated. That is improper. Canada is estopped from re-litigating the findings of the Alberta Decisions. Those findings bind Canada and Canada never appealed them.
430. The doctrine of issue estoppel has been recognized by tribunals, including a prior NAFTA tribunal.<sup>868</sup> The doctrine of issue estoppel provides that a finding concerning a right, question or fact made in a prior proceeding between parties may not be re-litigated in subsequent proceedings between those parties if, in the prior proceeding:

- (a) it was put in issue;

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<sup>866</sup> **R-001**, ABQB Common Issues Decision at ¶ 130 ("I will mention the permit requirements only briefly later in these reasons. They are not contentious and it is conceded that they contain nothing to suggest that seismic data is assigned or licensed to the regulatory bodies....").

<sup>867</sup> **R-001**, ABQB Common Issues Decision at ¶ 317.

<sup>868</sup> See, for example, **CLA-036**, *Apotex* at ¶ 7.23 ("The Tribunal recognises that historical differences as to issue estoppel have existed and, to a lesser extent, still exist in national laws between certain common law and certain civil law systems.... It is also clear that international courts and tribunals have regularly examined under international law a prior tribunal's reasoning, and the arguments it considered, in determining the scope, and thus the preclusive effect, of the prior award's operative part..."); see also **CLA-092**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011 at ¶ 103.



- (b) the court or tribunal actually decided it; and
- (c) the resolution of the right, question or fact was necessary to resolving the claims before that court or tribunal.<sup>869</sup>

431. Each of the elements to apply the doctrine of issue estoppel to this Arbitration are satisfied:

- (a) Canada was a defendant in the Alberta Decisions and actively participated in those proceedings;<sup>870</sup>
- (b) whether GSI consented to the Regulatory Regime was at issue in the Alberta Decisions;<sup>871</sup>
- (c) whether the permits or program authorizations impacted GSI's rights in the Seismic Works was at issue in the Alberta Decisions;<sup>872</sup>
- (d) the Alberta Decisions came to a clear conclusion on whether GSI consented to the Regulatory Regime and whether the permits or program authorizations impacted GSI's intellectual property rights in the Seismic Works;<sup>873</sup>
- (e) the Alberta Decisions' conclusions on whether GSI consented to the Regulatory Regime and whether the permits or program authorizations impacted GSI's intellectual property rights in the Seismic Works were necessary for the Alberta Decisions to decide the issues that they did; and
- (f) Canada did not appeal the findings made in the Alberta Decisions.<sup>874</sup>

432. Policy reasons support the application of issue estoppel to estop Canada from re-litigating findings from the Alberta Decisions in this Arbitration. Like the doctrine of *res judicata*,

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<sup>869</sup> **CLA-036**, *Apotex Holdings* at ¶ 7.20.

<sup>870</sup> **R-001**, ABQB Common Issues Decision at headnote (D. Babiuk-Gibson, J.R. Elford appeared at the Common Issues Trial on behalf of the Attorney General of Canada).

<sup>871</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 315-318.

<sup>872</sup> **R-001**, ABQB Common Issues Decision at ¶ 130.

<sup>873</sup> **R-001**, ABQB Common Issues Decision at ¶¶ 130 and 318.

<sup>874</sup> **R-002**, ABCA Common Issues Appeal.

the doctrine of issue estoppel produces positive effects, such as increasing the efficiency of proceedings, non-contradiction and consistency.<sup>875</sup> All of those considerations are at play in this Arbitration. It would be a significant waste of resources for Canada to re-litigate whether GSI consented to the Regulatory Regime when the Alberta Decisions already found that GSI did not consent.

433. In light of the foregoing, Canada’s defence regarding GSI’s alleged consent to the Regulatory Regime is without merit. In any event, Canada cannot re-litigate findings of fact that were made in the Alberta Decisions that bind it due to the doctrine of issue estoppel.

(b) Canada Knowingly Discloses the Seismic Works in SEG-Y Format

434. Canada’s Statement of Defence asserts that the Claimants were not substantially deprived of their investment because Canada does not disclose the “more valuable” SEG-Y versions of the Seismic Data.<sup>876</sup> However, Canada’s defence is based on a misunderstanding of the nature of the Seismic Works and the seismic industry.

435. It is true that oil and gas companies prefer working with seismic data in SEG-Y format.<sup>877</sup> However, the formats of the Seismic Works that are disclosed by the Boards can be easily scanned/copied into SEG-Y format through a process called vectorizing.<sup>878</sup> Vectorizing, which is also referred to as “digitizing” and “reconstruction” is a process whereby paper or mylar sections or seismic data are scanned and vectorized to transform the paper or mylar sections into seismic data in SEG-Y format.<sup>879</sup>

436. Vectorizing was invented in 1989 and became commercially available in Canada in 1990.<sup>880</sup> GSI was not aware of the existence of vectorizing software.<sup>881</sup> Through a recent

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<sup>875</sup> **CLA-093**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Dissenting Opinion by Arbitrator Mauro Rubino-Sammartano, April 21, 2015 at ¶¶ 9-12, 29-34 (Arbitrator Rubino-Sammartano distinguishes between *res judicata* and issue estoppel, but his analysis accepts that both doctrines can have the same positive effects).

<sup>876</sup> Canada Statement of Defence at ¶ 36.

<sup>877</sup> **CWS-04**, Ralph Maitland Witness Statement at ¶ 3; **CWS-06**, Paul Einarsson Witness Statement at ¶ 23.

<sup>878</sup> **CWS-04**, Ralph Maitland Witness Statement at ¶ 9.

<sup>879</sup> **CWS-04**, Ralph Maitland Witness Statement at ¶¶ 4-5.

<sup>880</sup> **CWS-04**, Ralph Maitland Witness Statement at ¶ 9.

<sup>881</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 56.

AIA response, the Claimants learned that Canada has known of vectorizing and been employing third parties to use it to convert the Seismic Works to SEG-Y format from the Submissions since the 1990s.<sup>882</sup> The NEB has also been aware of vectorizing since the early 1990s, during which time Lynx was scanning paper and mylar sections from the Boards to build a repository of seismic data in SEG-Y format for resale to third parties.<sup>883</sup>

437. Were it not for vectorizing, and the Secondary Submissions, the Seismic Works would only be available to the general public in SEG-Y format from GSI.<sup>884</sup> However, because even the paper or mylar copies of the Seismic Works that are disclosed by the Boards can easily be converted to SEG-Y format, which Canada is aware of,<sup>885</sup> the Boards are effectively making the Seismic Works available to the public in SEG-Y format. As a result, while the Boards claim to not technically disclose the Seismic Works in SEG-Y format, practically they do. It follows that Canada's defence is hollow or, at worst, disingenuous.
438. In any event, while the Boards may claim to not currently disclose the Seismic Works in SEG-Y format, the conduct of the Boards indicates that they likely will do so eventually. As noted above, both the C-NSOPB and C-NLOPB each threatened to do so in the 2000s.<sup>886</sup> Given the threats of the C-NSOPB and the C-NLOPB, the Claimants are unwilling to foreclose the possibility of the Boards disclosing the Seismic Works in SEG-Y format in the future.
439. In light of the foregoing, Canada's defence that the Claimants were not substantially deprived of their investment because the Boards do not disclose the Seismic Works in SEG-Y format has no merit and is disingenuous. As Canada is aware, the Seismic Works that are definitely disclosed by the Boards can easily be converted to SEG-Y format, meaning that Canada directly competes with GSI regarding GSI's most valuable form of Seismic Works. The only difference is that Canada makes the product available to anyone for free.

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<sup>882</sup> C-204, August 2022 AIA response.

<sup>883</sup> CWS-04, Ralph Maitland Witness Statement at ¶ 10.

<sup>884</sup> CWS-03, Davey Einarsson Witness Statement at ¶ 58; CWS-06, Paul Einarsson Witness Statement at ¶ 156.

<sup>885</sup> C-204, August 2022 AIA response; CWS-04, Ralph Maitland Witness Statement at ¶ 10.

<sup>886</sup> CWS-06, Paul Einarsson Witness Statement at ¶¶ 134-138.

**(8) Conclusion on the Claimants' Expropriation Claim**

440. In light of the foregoing, the Alberta Decisions breached Article 1110 of NAFTA. The Alberta Decisions confiscated GSI's copyright in the Seismic Works without compensation by imposing a compulsory license that diminishes the term of GSI's copyright protection significantly.<sup>887</sup> Coupled with the Alberta Decisions' direction for GSI to stop objecting to the Boards' conduct, the compulsory license destroyed GSI's business and substantially deprived the Claimants' of their investments, including the investments made personally by the Einarssons, by rendering GSI unable to recoup its investment in the Seismic Works and enforce its copyright.<sup>888</sup> The compulsory license was inconsistent with Chapter 17 of NAFTA and, as a result, Canada is liable for a breach of Article 1110.

**B. The Alberta Decisions Breached Article 1106(1)(f) by Enforcing the Performance Requirement in the Regulatory Regime**

**(1) Article 1106(1)(f) of NAFTA Prohibits The Enforcement of Performance Requirements Requiring the Transfer of Proprietary Knowledge to Third Parties**

441. Article 1106 of NAFTA is titled "Performance Requirements".<sup>889</sup> The relevant portions of Article 1106(1) of NAFTA state:

1. No Party may impose or *enforce* any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an *investment* of an investor of a Party or of a non-Party in its territory:

...

(f) to transfer technology, a production process or other *proprietary knowledge* to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged

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<sup>887</sup> R-001, ABQB Common Issues Decision at ¶ 322.

<sup>888</sup> CWS-06, Paul Einarsson Witness Statement at ¶¶ 156-157.

<sup>889</sup> NAFTA, Chapter 11, Article 1106.

violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or...<sup>890</sup> [Emphasis added.]

442. No tribunals have considered a claim under Article 1106(1)(f). Moreover, claims under Article 1106 itself are infrequent, with several tribunals noting that there is a lack of guidance on how to address a claim thereunder.<sup>891</sup>
443. With that said, academics have provided guidance on the interpretation of Article 1106 and 11106(1)(f), in particular. The purpose of Article 1106 is to prohibit performance requirements because their “[u]se distorts international trade and investment flows”.<sup>892</sup> Similarly, another academic has suggested that the purpose of Article 1106(1)(f), in particular, is to prevent Canada from imposing requirements on foreign investors with respect to technology transfer and dissemination, as such requirements may violate international intellectual property laws.<sup>893</sup>

**(2) The Claimants’ Article 1106(1)(f) Claim Asserts that the Alberta Decisions Enforced a Performance Requirement to Transfer Proprietary Knowledge to Third Parties in Canada**

444. The Claimants’ performance requirement claim asserts that the Alberta Decisions breached Article 1106(1)(f) by enforcing a performance requirement for GSI to transfer its proprietary knowledge in the Seismic Works to third parties in Canada to develop Canada’s offshore oil and gas industry.<sup>894</sup>

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<sup>890</sup> NAFTA, Chapter 11, Article 1106(1).

<sup>891</sup> **CLA-039**, *Cargill* at ¶ 313 (“The Tribunal notes that, as both Parties point out, claims under Article 1106 have been infrequent. Thus, there is little guidance on the interpretation of its provisions...”); **CLA-094**, *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, February 29, 2008 at ¶ 542 (“[F]ew tribunals had addressed performance requirements”).

<sup>892</sup> **CLA-095**, Meg Kinnear, Andrea Kay Bjorklund and John F.G. Hannaford, *Investment Disputes Under NAFTA: AN Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006) – Annotations on Article 1106 at p. 1106-7.

<sup>893</sup> **CLA-096**, Andrew Newcombe and Lluís Paradel, *Law and Practice of Investment Treaties: Standards of Treatment*, at p. 428.

<sup>894</sup> NOA at ¶ 28(a) (“The Alberta Decisions establish and enforce a system by which Canada imposes upon the Claimants and GSI a requirement to transfer proprietary knowledge to third parties in Canada to develop Canada’s offshore oil and gas industry, contrary to Article 1106(1)(f) of the NAFTA.”).

445. The Alberta Decisions decided whether the Regulatory Regime could override the intellectual property rights that GSI had in the Seismic Works.<sup>895</sup> In doing so, the Alberta Decisions found that the system set out in the Regulatory Regime, whereby GSI made the Submissions and the Boards subsequently disclosed those Submissions to third parties, was lawful in transferring GSI's proprietary knowledge in the Seismic Works to third parties. Prior to that date, no Canadian court had yet adjudicated the lawfulness of the disclosure and copying of the Submissions in terms of the intellectual property rights in the Seismic Works.<sup>896</sup> In fact, prior to the Alberta Decisions, the Claimants were contesting the lawfulness of that performance requirement and had previously attempted to block the disclosure of the Seismic Works, to no avail.<sup>897</sup>

**(3) Assessing the Claimants' Claim Requires Interpreting Article 1106(1)(f) of NAFTA and Distilling Its Elements**

446. This Tribunal's assessment of the Claimants' Article 1106(1)(f) claim first requires interpreting the scope of the Article and distilling its elements. Interpreting Article 1106(1)(f) requires the Tribunal to construe the Article in accordance with the *VCLT*.<sup>898</sup> Article 31(1) of the *VCLT* provides that NAFTA shall be interpreted in "[g]ood faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".<sup>899</sup>

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<sup>895</sup> **R-001**, ABQB Common Issues Decision at ¶ 318; **R-002**, ABCA Common Issues Appeal at ¶¶ 103-106.

<sup>896</sup> See, **C-205**, *FCA NEB Appeal* at ¶ 12 (refusing to consider whether the Regulatory Regime overrides GSI's intellectual property rights in the Seismic Works); **C-211**, *Antrim Decision* at ¶ 41 (refusing to decide whether Canadian law precluded GSI's claim for copyright infringement against a party who obtained Seismic Works from the C-NLOPB).

<sup>897</sup> **C-205**, *FCA NEB Appeal* at ¶¶ 6 and 12.

<sup>898</sup> **CLA-097**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012 ("*Mobil No. 1*") at ¶ 210.

<sup>899</sup> **CLA-034**, *VCLT* at Article 31(1); see also **CLA-097**, *Mobil No 1* at ¶ 210.

447. In accordance with the *VCLT*, Article 1106(1)(f) requires several distinct elements to be established to support a breach of that Article. In the context of this Arbitration, those elements are as follows:

- (a) the Alberta Decisions imposed or enforced a “requirement”, or enforced a “commitment or undertaking”;
- (b) the requirement, commitment or undertaking was “[i]n connection with” the “establishment, acquisition, expansion, management, conduct or operation” of GSI;
- (c) the requirement, commitment or undertaking was to “[t]ransfer technology, a production process or other proprietary knowledge to a person in its territory”; and
- (d) the requirement, commitment or undertaking was not “[e]nforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement”.

448. Each of those elements are addressed below.

#### **(4) The Alberta Decisions Enforced a ‘Requirement’ on GSI**

449. NAFTA does not define the term “enforce”. The ordinary meaning of the legal term “enforce” is “[t]o put into execution; to cause to take effect; to make effective...”.<sup>900</sup>

450. NAFTA also does not define the term “requirement”. The ordinary meaning of the term “requirement” includes “something needed or necessary” or “an official rule about something that is necessary to have or to do”.<sup>901</sup>

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<sup>900</sup> CLA-098, *Black’s Law Dictionary*, Online, *sub verbo* “enforce”.

<sup>901</sup> CLA-099, *Cambridge Dictionary*, Online, *sub verbo* “requirement”.

451. The definitions of “enforce” and “requirement” accord with prior decisions of NAFTA tribunals, which have found that the enforcement of any alleged performance requirement must have a degree of compulsion or legal obligation.<sup>902</sup>
452. Based on those definitions, the Alberta Decisions clearly enforced a mandatory requirement on GSI. The Alberta Decisions declared lawful the system set out in the Regulatory Regime and expressly forbid GSI from mounting any further legal challenges to it.<sup>903</sup> In other words, GSI was legally obligated to comply with third parties copying the Seismic Works contained in the Submissions.

**(5) The Requirement Enforced by the Alberta Decisions was ‘In Connection With’ the ‘Conduct’ or ‘Operation’ of GSI**

453. NAFTA does not define the phrase “in connection with”. However, in the context of Article 1106, NAFTA tribunals have accepted that the phrase requires a measure to have had a detrimental effect on the profitability of an investment or impose conditions on an investment with respect to its management, conduct or operation in Canada.<sup>904</sup>
454. NAFTA also does not define the terms “conduct” or “operation”. The ordinary meaning of the term “conduct” includes “The conduct of a task or activity is the way in which it is organized or carried out”.<sup>905</sup> The ordinary meaning of the term “operation” includes “an activity of a business or organization”.<sup>906</sup> While NAFTA tribunals have not specifically defined those terms within the context of Article 1106, they have accepted that a

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<sup>902</sup> **CLA-097**, *Mobil No. 1* at ¶ 233 (“[A]rticle 1106 refers to a ‘requirement’... Indeed, it follows that a degree of legal obligation is necessary for the 2004 Guidelines and their implementation, to be caught by Article 1106.”); **CLA-077**, *Pope & Talbot Interim Award* at ¶ 75 (“[t]he Tribunal concludes that the Investor has not made out a valid claim under Article 1106(1)(a) because the Regime does not ‘impose \* \* \* requirements’.... While the Regime undoubtedly deters increased exports to the U.S., that deterrence is not a ‘requirement’ for establishing, acquiring, expanding, managing, conducting or operation a foreign owned business in Canada.”).

<sup>903</sup> **R-002**, ABCA Common Issues Appeal at ¶ 104 (“[G]SI’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.”).

<sup>904</sup> **CLA-074**, *Archer Daniels* at ¶ 227 (“[T]hese advantages – consisting of an exemption from the Tax – were provided in connection with the Claimants’ investment in Mexico because they had a detrimental effect on the profitability of the investment.”); **CLA-097**, *Mobil No. 1* at ¶ 211.

<sup>905</sup> **CLA-100**, Collins Dictionary, Online, *sub verbo* “conduct”.

<sup>906</sup> **CLA-101**, Britannica Dictionary, Online, *sub verbo* “operation”.



performance requirement must impose conditions on an enterprise with respect to its management, conduct or operation in a territory to engage the Article.<sup>907</sup>

455. Based on those definitions and principles, the Alberta Decisions enforced a requirement that was in connection with the conduct or operation of GSI. The Alberta Decisions directly related to the conduct of GSI and the operation of its business in light of the Regulatory Regime. The requirement enforced by the Alberta Decisions also had a substantial detrimental effect on the profitability of GSI and imposed conditions with respect to its conduct and operations in Canada by forbidding it from contesting the disclosure of the Seismic Works under the Regulatory Regime.

**(6) The Requirement Enforced by the Alberta Decisions was to Transfer GSI's 'Proprietary Knowledge' in the Seismic Works to Third Parties in Canada**

456. The requirement enforced by the Alberta Decisions was for GSI to transfer its proprietary knowledge in the Seismic Works to persons in Canada to expand oil and gas operation in the Canadian offshore.
457. NAFTA does not define the phrase “to transfer”. The ordinary meaning of the term “transfer” includes “to cause to pass from one to another”.<sup>908</sup>
458. NAFTA also does not define the term “proprietary knowledge”. The ordinary meaning of the term “proprietary” includes “something that is used, produced, or marketed under exclusive legal right of the inventor or maker”.<sup>909</sup> The ordinary meaning of the term “knowledge” includes “[i]nformation that has been obtained by experience or study, and that is either in a person’s mind or possessed by people generally”.<sup>910</sup>
459. Article 201 of NAFTA defines “person” as “a natural person or an enterprise”.<sup>911</sup>

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<sup>907</sup> CLA-097, *Mobil No. 1* at ¶ 211.

<sup>908</sup> CLA-102, Merriam Webster Dictionary, Online, *sub verbo* “transfer”.

<sup>909</sup> CLA-103, Merriam Webster Dictionary, Online, *sub verbo* “proprietary”.

<sup>910</sup> CLA-104, Cambridge Dictionary, Online, *sub verbo* “knowledge”.

<sup>911</sup> NAFTA, Chapter Two, Article 201, definition of “person”.

460. Based on those definitions, the Alberta Decisions enforced a requirement for GSI to transfer its proprietary knowledge in the Seismic Works to persons in Canada.
461. The purpose of the Alberta Decisions was to determine whether the Boards' transfer of the Seismic Works to third parties by disclosing the Seismic Works and making them available for copying was lawful. GSI had "proprietary knowledge" in the Seismic Works by virtue of its intellectual property rights, which was confirmed by the Alberta Decisions. By declaring the Regulatory Regime lawful and forbidding GSI from contesting third parties' ability to obtain copies of its copyrighted Seismic Works from the Boards, the Alberta Decisions enforced a requirement to transfer that proprietary knowledge within the meaning of Article 1106(1)(f).

**(7) The Performance Requirement Enforced by the Alberta Decisions Does Not Engage an Exception Under Article 1106(1)(f) and Was Inconsistent with NAFTA**

462. Article 1106(1)(f) is qualified by an exception therein whereby the enforcement of a requirement, commitment or undertaking will not contravene that Article if it was "[i]mposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement".<sup>912</sup>
463. The exception in Article 1106(1)(f) does not apply to the requirement enforced by the Alberta Decisions, nor does Canada assert that it does in its Statement of Defence.
464. First, the Alberta Decisions did not address competition laws at all and is not enforced by a competition authority, which clearly indicates that the performance requirement has no relation to competition laws. Further, making the Seismic Works available for free to anyone does nothing to engage competition laws.

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<sup>912</sup> NAFTA, Chapter 11, Article 1106(1)(f).

465. Second, the requirement enforced by the Alberta Decisions is contrary to Article 1111(2), which required Canada to protect confidential business information (like the Seismic Works) from any disclosure that would prejudice GSI:

2. Notwithstanding Articles 1102 or 1103, a Party may require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes. **The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment.** Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law. [Emphasis Added.]<sup>913</sup>

466. In light of the foregoing, the exception in Article 1106(1)(f) does not apply to the performance requirement enforced by the Alberta Decisions.

**(8) The Requirement Enforced by the Alberta Decisions Does Not Engage an Exception Under Article 1106(2)**

467. Article 1106(2) also provides an exception to Article 1106(1)(f), stating:

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.

468. The exception in Article 1106(2) also does not apply to the requirement enforced by the Alberta Decisions, nor did Canada assert that it does in its Statement of Defence.

469. The requirement enforced by the Alberta Decisions did not require GSI to use any specific technology, meaning the exception in Article 1106(2) is not applicable. Moreover, the purpose of that requirement was to foster the development of the Canadian offshore oil and gas industry, not to meet generally applicable health, safety or environmental requirements. Although that was the purpose of the Submission Legislation, it was not the purpose of the Disclosure Legislation, which is the performance requirement.

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<sup>913</sup> NAFTA, Chapter 11, Article 1111(2).

**(9) The Requirement Enforced by the Alberta Decisions Does Not Engage a Reservation Under Article 1108**

470. Finally, the performance requirement enforced by the Alberta Decisions does not engage any reservation under Article 1108 of NAFTA.
471. Article 1108 of NAFTA permitted Canada to reserve or exempt certain measures from certain NAFTA obligations, including the prohibition on performance requirements in Article 1106.<sup>914</sup> Annex I, II and III of NAFTA set out the specific reservations and exemptions. Annexes I and III of NAFTA set out reservations or exemptions for existing measures that do not conform with NAFTA, while Annex II of NAFTA includes reservations or exemptions for measures that Canada may adopt in the future.<sup>915</sup>
472. The Claimants' claim under Article 1106(1)(f) does not engage any of the reservations or exceptions under Article 1108 of NAFTA, nor does Canada's Statement of Defence assert that it does. Therefore, Canada's breach of Article 1106(1)(f) is not saved by the reservations made under Article 1108 of NAFTA.

**(10) Conclusion on Claimants' Article 1106(1)(f) Claim**

473. In light of the foregoing, the Alberta Decisions breached Article 1106(1)(f) of NAFTA by enforcing a requirement for GSI to transfer its proprietary knowledge in its Seismic Works to third parties to support the development of the offshore Canadian oil and gas industry. That performance requirement was explicit, obvious and Canada has not pleaded any exception that would exempt it from liability.

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<sup>914</sup> **CLA-105**, Meg Kinnear, Andrea Kay Bjorklund and John F.G. Hannaford, *Investment Disputes Under NAFTA: AN Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006) – Annotations on Article 1108 at p. 1108-11.

<sup>915</sup> NAFTA, Chapter 11 at Article 1108(1).

## V. DAMAGES

### A. NAFTA Empowers the Tribunal to Tailor a Damages Award for Breaches of Articles 1110 and 1106 that Compensates the Claimants for their Losses as a Result of Canada's Breaches of Chapter 11

474. Article 1135(1) of NAFTA provides that the Tribunal may award the Claimants, separately or in combination, only monetary damages and any applicable interest, or monetary damages and applicable interest in lieu of restitution of property:

1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.<sup>916</sup>

475. Article 1110(2) of NAFTA provides guidance on the quantum of damages for a legal expropriation, stating that compensation shall be equivalent to fair market value immediately before the expropriation took place:

2. **Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place** ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.<sup>917</sup> [Emphasis added.]

476. Other than the guidance provided in Article 1110(2) of NAFTA regarding compensation for legal expropriation, Chapter 11 does not provide any specific guidance on the assessment of damages or interest in accordance with Article 1135.<sup>918</sup>

477. The lack of express guidance on the principles for awarding damages in Article 1135 gives Tribunals discretion to award the most appropriate compensation for the damage incurred

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<sup>916</sup> NAFTA, Chapter 11, Article 1135(1).

<sup>917</sup> NAFTA, Chapter 11, Article 1110(2).

<sup>918</sup> **CLA-074**, *Archer Daniels* at ¶ 277.

by the Claimants in accordance with international law.<sup>919</sup> That discretion was articulated by the Tribunal in *S.D. Myers, Inc. v The Government of Canada* as follows:

478. [t]he drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA.<sup>920</sup>
479. Under principles of customary international law, a breach of an investment treaty is an internationally wrongful act that triggers the obligation to make full reparation for the injury caused.<sup>921</sup> That means the Claimants are entitled to be compensated in order to “wipe out all the consequences of the illegal act” and in an effort to restore the *status quo* as much as possible.<sup>922</sup> Assessing that value may require using a ‘but for’ approach, whereby the position of the Claimants, had the breach not occurred, is compared with the position of the Claimants reflecting the breach.<sup>923</sup> The Claimants can choose the higher amount of damages based on whether the valuation was performed as of the date of the breach of Chapter 11 or the date of the award, known as an *ex ante* valuation and an *ex post* valuation, respectively.<sup>924</sup>
480. The Claimants must establish a sufficiently clear link between Canada’s breaches of NAFTA and their losses to trigger Canada’s obligation to compensate them for their injuries.<sup>925</sup> In that regard, compensation encompasses both the loss suffered and the loss of profits, such that any direct damage is to be compensated.<sup>926</sup> The Tribunal is responsible for ensuring that the damages awarded are appropriate as a direct consequence of Canada’s

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<sup>919</sup> **CLA-074**, *Archer Daniels*, at ¶ 279; **CLA-106**, *SD Myers Inc v Government of Canada*, UNCITRAL, First Partial Award, 13 November 2000 (“*SD Meyers First Partial Award*”) at ¶ 309.

<sup>920</sup> **CLA-106**, *SD Meyers First Partial Award* at ¶ 309.

<sup>921</sup> **CLA-074**, *Archer Daniels* at ¶ 275.

<sup>922</sup> **CLA-107**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J (ser. A) No. 17 (September 13, 1928) (“*Chorzów*”) at p. 47; **CLA-106**, *SD Meyers First Partial Award* at ¶ 315.

<sup>923</sup> **CLA-108**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award of the Tribunal, 20 September 2021 (“*Lion*”) at ¶ 627; see also, **CLA-039**, *Cargill* at ¶ 447.

<sup>924</sup> **CLA-109**, *Hulley Enterprises Limited (Cyprus) v. Russia*, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014 (“*Hulley*”) at ¶ 1763.

<sup>925</sup> **CLA-074**, *Archer Daniels* at ¶ 282.

<sup>926</sup> **CLA-074**, *Archer Daniels* at ¶ 281.

breaches of NAFTA and to determine the scope of those damages, measured in an amount of money.<sup>927</sup>

**B. The Claimants Should be Awarded Damages for the Destruction of GSI's Business and the Losses Suffered by the Einarssons**

481. The Alberta Decisions destroyed GSI's business by breaching Articles 1110 and 1106(1)(f).
482. The Alberta Decisions allowed third parties, many of whom would have otherwise been GSI's customers or prospective customers, to access and copy the Seismic Works from the Boards for free.<sup>928</sup> The Alberta Decisions also forbade GSI from interfering or objecting to that practice,<sup>929</sup> forcing GSI to discontinue many of the Domestic Actions and pay substantial costs to the defendants.<sup>930</sup>
483. As a result of the Alberta Decisions, GSI's former customers and prospective customers stopped licensing the Seismic Works from GSI because they could obtain the Seismic works for free from the Boards.<sup>931</sup> No longer benefitting from the revenue generated by its licensing fees – the lifeblood of its business – GSI was forced to limit its creation of new data, limit new investment, liquidate assets, lay off its remaining staff and, ultimately, halt its operations entirely.<sup>932</sup> The destruction of GSI's business frustrated the Einarssons' personal investments in GSI, reducing the value of Davey and Paul's shares to zero, eliminating any dividends, making it impossible for GSI to repay the Loans and leaving GSI unable to pay the Einarssons.<sup>933</sup>
484. Whether the effects of the Alberta Decisions are considered through the lens of Article 1110 or 1106, the result is the same. The damages suffered by GSI and the Claimants as a

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<sup>927</sup> **CLA-074**, *Archer Daniels* at ¶ 282.

<sup>928</sup> **R-001**, ABQB Common Issues Decision at ¶ 322; **R-002**, ABCA Common Issues Appeal at ¶ 104.

<sup>929</sup> **R-002**, ABCA Common Issues Appeal at ¶ 104.

<sup>930</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 155.

<sup>931</sup> **CWS-03**, Davey Einarsson Witness Statement at ¶ 57; **CWS-06**, Paul Einarsson Witness Statement at ¶¶ 156-157.

<sup>932</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 157.

<sup>933</sup> **CWS-06**, Paul Einarsson Witness Statement at ¶ 159.

result of the Alberta Decisions are the value of GSI's business and the value of the losses suffered personally by the Einarssons.

485. PricewaterhouseCoopers LLP (“PwC”) was engaged to perform a valuation of the Claimants’ losses in Canadian dollars (“CAD”) in a but-for scenario as of the date of Canada’s breaches of Articles 1110 and 1106(1)(f), on November 30, 2017. PwC additionally performed a valuation of those losses on June 30, 2022, a date closer to the time of the Award.<sup>934</sup> PwC also calculated the appropriate interest rate and interest applicable to those losses.<sup>935</sup> Those interest amounts are included in the losses set out below.

**(1) Damages Incurred from the Loss of the Fair Market Value of GSI**

486. Consistent with the guidance provided in Article 1110(2), the Tribunal has discretion to decide which valuation criteria is appropriate to determine the fair market value of GSI.<sup>936</sup> Those valuation methods can include going concern value (such as enterprise value or market capitalization), asset value (including declared tax value) or any other applicable valuation methods.<sup>937</sup> In assessing the market value of GSI, it is important to account for any goodwill in GSI, as the free market may not necessarily derive the same economic use from GSI as the Claimants do.<sup>938</sup>
487. PwC’s valuation of the fair market value of GSI in a but-for scenario utilized a capitalized cash flow method to determine the enterprise value of GSI, which it tested for reasonableness against comparable public company metrics and transaction multiples.<sup>939</sup> Under that method, PwC used the reported earnings of GSI for a representative period of preceding years to forecast the future cash flow of GSI in a but-for scenario, after which

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<sup>934</sup> **CER-02**, Expert Report of Paul Sharp of PricewaterhouseCoopers LLP dated September 26, 2022 at Appendix “A” (“Paul Sharp Expert Report”), p. 5.

<sup>935</sup> **CER-02**, Paul Sharp Expert Report at Section 2, Selected Valuation Approach, Section 3: Valuation Analysis – Summary of Losses at ¶¶ 151-154.

<sup>936</sup> NAFTA, Chapter 11, Article 1110(2).

<sup>937</sup> **CLA-073**, *Metalclad* at ¶ 118; see also **CLA-074**, *Archer Daniels* at ¶ 283.

<sup>938</sup> **CLA-106**, *SD Meyers First Partial Award* at ¶ 277; **CLA-110**, *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*, Case No. ARB (AF)/00/2, Award, dated May 29, 2003 at ¶¶ 39, 184 and 198.

<sup>939</sup> **CER-02**, Paul Sharp Expert Report at Section 2, Selected Valuation Approach, Section 3: Valuation Analysis at ¶¶ 127-132.



those values were divided by a capitalization rate to arrive at the going concern value of GSI.<sup>940</sup> That analysis also took into consideration relevant licensing revenues that GSI would have realized but-for the Alberta Decisions, such as licensing revenues from the Boards' disclosure of the Seismic Works to third parties, and normalized GSI's revenues.<sup>941</sup>

488. On the basis of its valuation analysis, PwC calculated a range of enterprise and fair market values of GSI in CAD.<sup>942</sup> Those values as at November 30, 2017, which GSI has elected,<sup>943</sup> are as follows:

Value	Low Range (Excluding Interest)	High Range (Excluding Interest)	Low Range (Including Interest)	High Range (Including Interest)
Enterprise Value of GSI	██████████	██████████	N/A	N/A
Fair Market Value to Paul and Davey <sup>944</sup>	██████████	██████████	N/A	N/A
Fair Market Value to Shareholders <sup>945</sup>	██████████	██████████	N/A	N/A
Fair Market Value of Equity <sup>946</sup>	██████████	██████████	██████████	██████████

<sup>940</sup> CER-02, Paul Sharp Expert Report at Section 2, Selected Valuation Approach: Income Approach – Capitalized Cash Flow at ¶¶ 77-79.

<sup>941</sup> CER-02, Paul Sharp Expert Report at Section 2, Selected Valuation Approach: Income Approach – Capitalized Cash Flow at ¶¶ 80-98.

<sup>942</sup> CER-02, Paul Sharp Expert Report at Section 3, Valuation Analysis – Summary of Value at ¶¶ 140-141, 156.

<sup>943</sup> See, CLA-109, Hulley at ¶ 1763.

<sup>944</sup> CER-02, Paul Sharp Expert Report at Section 3, Valuation Analysis – Summary of Value at ¶ 137 (this figure: “[r]epresents the value of GSI that would be attributed to Mr. Paul Einarsson and Mr. Davey Einarsson as shareholders of the Company as well as the value of any related party debt owed to Messrs. Einarsson”).

<sup>945</sup> CER-02, Paul Sharp Expert Report at Section 3, Valuation Analysis – Summary of Value at ¶ 138 (this figure: “[is] equal to FMV to Messrs. Einarsson minus the amount owed by GSI to Mr. Russell Einarsson, who is not a shareholder of the Company.”).

<sup>946</sup> CER-02, Paul Sharp Expert Report at Section 3, Valuation Analysis – Summary of Value at ¶ 139 (this figure represents: “[a]fter deducting amounts due to shareholders, we concluded on an equity value of GSI...”).

489. Based on PwC’s valuation, as of the date of Canada’s breaches of Articles 1110 and 1106(1)(f) of NAFTA, the fair market value of GSI’s business that was destroyed by the Alberta Decisions was between [REDACTED]. Those losses are payable to GSI by Canada pursuant to Article 1117 of NAFTA.<sup>947</sup>

**(2) Damages Incurred by Davey and Paul for the Losses Suffered by them as Shareholders of GSI**

490. Based on PwC’s valuation, as of the date of Canada’s breaches of Articles 1110 and 1106(1)(f) of NAFTA, the loss of value to Davey and Paul as shareholders of GSI in accordance with Article 1116 was equal to the loss suffered by GSI’s shareholders in the but-for scenario.<sup>948</sup> Those figures equate to the following losses suffered by Davey and Paul as a function of their respective shareholdings in GSI:

Shareholder	Low Range	High Range
Davey <sup>949</sup>	[REDACTED]	[REDACTED]
Paul <sup>950</sup>	[REDACTED]	[REDACTED]

**(3) Damages Incurred by the Einarssons for GSI’s Inability to Repay the Loans**

491. GSI is not able to repay the Loans due to the destruction of its business as a result of Canada’s breaches of Articles 1110 and 1106(1)(f) of NAFTA.<sup>951</sup> The Einarsson have elected June 30, 2022 as the date for these losses.

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<sup>947</sup> NAFTA, Chapter 11, Article 1117.

<sup>948</sup> CER-02, Paul Sharp Expert Report at Section 3, Valuation Analysis – Summary of Value at ¶ 142 (“[t]he entirety of GSI’s value in a But-for scenario is equal to the loss suffered by GSI’s shareholders related to its value”).

<sup>949</sup> Davey owns 54.75% of the issued and outstanding shares of GSI.

<sup>950</sup> Davey owns 45.25% of the issued and outstanding shares of GSI.

<sup>951</sup> CWS-06, Paul Einarsson Witness Statement at ¶ 159(b).

492. PwC calculated the outstanding amounts of the Loans from GSI's financial records in CAD as follows<sup>952</sup>:

Loan Category	Loss as of November 30, 2017 (Excluding Interest)	Loss up to June 30, 2022 (Including Interest – Low Range)	Loss up to June 30, 2022 (Including Interest – High Range)
Loss on Loan From Shareholder of Affiliate (Russell)	\$1,382,000	\$1,511,000	\$1,658,000
Loss of Shareholder's Loan - Davey	\$2,391,000	\$2,616,000	\$2,870,000
Loss of Shareholder's Loan - Paul	\$1,478,000	\$1,616,000	\$1,773,000

493. The Einarssons are entitled to be repaid the outstanding amounts of the Loans as of November 30, 2017 in accordance with their claims under Article 1116 of NAFTA.

**(4) Damages Incurred by the Einarssons for Lost Employment Earnings**

494. Each of Davey, Paul and Russell have forgone payment of their remuneration under the Remunerative Contracts as a result of Canada's breaches of Articles 1110 and 1106(1)(f).<sup>953</sup> The Einarsson have elected June 30, 2022 as the date for these losses.
495. PwC calculated the lost employment earnings in CAD suffered by each of Davey, Paul and Russell from April 18, 2016 (the limitation date) to the dates of their anticipated retirements.<sup>954</sup> Based on PwC's calculations, those losses were as follows:

<sup>952</sup> CER-02, Paul Sharp Expert Report at Section 3, Valuation Analysis – Summary of Losses at ¶¶ 143-145, 157.

<sup>953</sup> CWS-05, Russell Einarsson Witness Statement at ¶¶ 607; CWS-06, Paul Einarsson Witness Statement at ¶ 13 and 172(a).

<sup>954</sup> CER-02, Paul Sharp Expert Report at Section 3, Valuation Analysis – Summary of Losses at ¶¶ 146-150, 159-161.

<b>Einarsson</b>	<b>Low Range of Lost Employment Earnings (Excluding Interest)</b>	<b>High Range of Lost Employment Earnings (Excluding Interest)</b>	<b>Low Range of Lost Employment Earnings (Including Interest)</b>	<b>High Range of Lost Employment Earnings (Including Interest)</b>
Davey	██████████	██████████	██████████	██████████
Paul	██████████	██████████	██████████	██████████
Russell	██████████	██████████	██████████	██████████

496. Based on PwC’s calculations, the Einarssons are entitled to be compensated for their lost earnings under the Remunerative Contracts in accordance with their claims under Article 1116 of NAFTA. The Einarssons’ earnings directly depended on the success of GSI’s business. When that business was destroyed as a result of the Alberta Decisions, the Einarssons’ remuneration went along with it. The Einarssons are entitled to compensation for those losses.

## **VI. CONCLUSION**

497. In this Memorial, the Claimants have demonstrated that the Tribunal has jurisdiction over the Claimants’ claims in this Arbitration and that the Alberta Decisions breached Articles 1110 and 1106(1)(f) of NAFTA. The Alberta Decisions destroyed GSI’s business by confiscating its copyright in the Seismic Works and enforcing a requirement for GSI to transfer its proprietary knowledge in the Seismic Works to third parties. By doing so, the Alberta Decisions substantially deprived the Claimants of their investments, including the investments made by the Einarssons personally. The only question for the Tribunal is how much money Canada must pay to the Claimants to compensate them for their losses.

## **VII. RELIEF SOUGHT BY THE CLAIMANTS**

498. In light of Canada’s breaches of Articles 1110 and 1106(1)(f) of NAFTA, the Claimants respectfully request that the Tribunal render an award in favour of the Claimants that awards the following amounts against Canada in CAD:

- (a) payment of \$506,909,000 to GSI, in accordance with Article 1117 of NAFTA;

- (b) in the alternative to (a), payment to Davey and Paul in the following amounts, pursuant to Article 1116 of NAFTA:
  - (i) Davey - \$237,304,567.50;
  - (ii) Paul - \$196,128,432.50;
- (c) payment for the Loans in the following amounts, pursuant to Article 1116 of NAFTA:
  - (i) due to Russell - \$1,658,000;
  - (ii) due to Davey - \$2,870,000;
  - (iii) due to Paul - \$1,773,000;
- (d) payment to Davey, Paul and Russell for lost employment earnings in the following amounts, pursuant to Article 1116 of NAFTA:
  - (i) Davey – \$1,294,000;
  - (ii) Paul – \$10,555,000;
  - (iii) Russell - \$6,356,000;
- (e) costs of this Arbitration on a solicitor-client, full indemnity-basis, including ICSID fees, Tribunal fees, legal fees, witness fees and other related costs and disbursements.

All of which is respectfully submitted on behalf of the Claimants this 27<sup>th</sup> day of September, 2022

**BORDEN LADNER GERVAIS LLP**

[Signed]

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Matti Lemmens and Zachary Seymour