Court of King's Bench of Alberta

Citation: Geophysical Service Incorporated v Canadian Natural Resources Limited, 2024 ABKB 491

Date: 20240812
Docket: 2001 07678
Registry: Calgary

Between:

Geophysical Service Incorporated

Plaintiff/Respondent/Cross-Applicant

- and –

Canadian Natural Resources Limited and Companies A-Z

Defendants/Applicant/Cross-Respondent

Reasons for Decision
of the
Honourable Justice J.C. Price

I. Introduction

[1] The matter before me, being the latest instalment in a long-running litigation battle, consists of dueling applications in which each party seeks summary determination. Canadian Natural Resources Limited ("CNRL") applies for an order to strike or to summarily dismiss the Statement of Claim filed by Geophysical Services Incorporated ("GSI") on June 17, 2020 (the "New Action"). GSI cross-applies for summary judgment, alleging that CNRL has no defence to its claims which include copyright infringement, breach of confidence, unjust enrichment, conversion and detinue.

[2] For the reasons that follow, I grant CNRL's application for summary dismissal of GSI's claims and dismiss GSI's application for summary judgment.

II. Background

A. History of the Parties

[3] GSI is in the business of creating, collecting, producing, reproducing, purchasing, processing and storing seismic data that it licenses to oil and gas companies for a fee. It was formed in 1993 as 599720 Alberta Ltd., a seismic service company. It purchased from the original Geophysical Service Incorporated ("Original GSI") seismic data agreements that Original GSI had entered into with CNRL's predecessors. The numbered company changed its name to GSI and carried on the business established by Original GSI.

[4] The agreements entered into between Original GSI and CNRL's predecessors that were purchased by GSI and that remain in dispute are[1]:

(a) Original GSI and Norcen Energy Resources Ltd. (or its subsidiaries or affiliates, Norcen Explorer Inc. and Norcen International Ltd.) entered into a letter agreement dated October 30, 1982, a participant licensing agreement on September 4, 1987, and general license agreements on or around February 1, 1991, and December 9, 1993 (collectively, the "Norcen Agreements"); and

(b) Original GSI and Champlin Petroleum Corporation entered into a general license agreement on or around December 1, 1978 (the "Champlin Agreement").

[5] CNRL's chronological amalgamation history relevant to the Norcen Agreements and the Champlin Agreement is as follows:

(a) Great Plains Development Company of Canada ultimately became Norcen Energy Resources Ltd. ("Norcen") in 1975;

(b) Champlin Petroleum Corporation ("Champlin") amalgamated with Rocky Mountain Energy Company to become Union Pacific Resources Inc. ("Union Pacific") in 1987;

(c) Norcen amalgamated with Union Pacific to form Union Pacific Resources in May 1998;

(d) Union Pacific changed its name to Anadarko Canada Corporation ("Anadarko Canada") in July 2000;

(e) Anadarko Canada amalgamated with 771851 Alberta Inc. and continued as Anadarko Canada in December 2004;

(f) Anadarko Canada amalgamated with some numbered companies in December 2006;

[1] Certain allegations made by GSI against CNRL's predecessors referenced in the Action that pertain to the 1992 Sceptre Agreement and the Norlands and Ranger Agreements entered into from 1974-1976 and in 1996 were withdrawn by GSI by letter dated November 17, 2021.

(g) Anadarko Canada amalgamated with a numbered company in December 2006 to form ACC-CNR Resources Corporation ("ACC-CNR Resources"); and

(h) ACC-CNR amalgamated with CNRL on January 1, 2008 to form CNRL.

[6] CNRL's involvement in the New Action and in the action that preceded it arose through its predecessors' involvement with GSI and/or Original GSI.

B. Communications re: Licensing

[7] The corporate transactions set out above led to a lengthy series of correspondence between GSI and various other entities. The following exchanges and events were outlined in the Compendium of Facts prepared by CNRL and filed April 26, 2023:

(a) September 12, 2001 - Anadarko Canada wrote to GSI to advise that it had reviewed the licenses with Norcen and Champlin and requested that GSI sign its letter to indicate a release from GSI regarding license issues.

(b) October 12, 2001 - GSI acknowledged receipt of Anadarko Canada's documentation regarding the predecessor data and stated that "[t]hese old license agreements are no longer valid to use going forward. Although we are willing to license this data to Anadarko without a transfer fee, we require it to be licensed under our current license agreement."

(c) October 25, 2001 - GSI wrote to Anadarko Canada to offer commercial terms "[s]ubject to all of the data and any future data being covered by our modern license agreement which is enclosed".

(d) January 10, 2002 - GSI wrote to Anadarko Canada about the Amauligak survey and advised that the data was non-transferable and that Anadarko Canada did not have a valid license.

(e) March 25, 2002 - Anadarko Canada wrote to GSI to confirm that it was the successor to Norcen and, as such, the successor to the Amauligak agreement.

(f) August 15, 2006 - GSI wrote to Anadarko Canada, stating: "This letter outlines [GSI's] position regarding GSI's speculative seismic data that has been acquired by, or is in the possession of Anadarko Canada and the predecessor companies that make up Anadarko Canada." In this letter, GSI outlined its position regarding data that had been acquired by or was in the possession of Anadarko Canada and advised that GSI required Anadarko Canada to sign a current license agreement.

(g) September 13, 2006 – Anadarko Canada stated "as discussed, APC [Anadarko Petroleum Corporation] will retain the properties identified as Arctic, MacKenzie Delta, Scotian Shelf and Yukon...".

(h) July 26, 2007 – CNRL responded to an inquiry from GSI, confirming that it did not receive any marine seismic data from Anadarko Canada as part of the transactions above.

(i) August 3-17, 2011 – GSI wrote to Anadarko Petroleum Corporation ("APC") to inquire about what may or may not have been transferred to CNRL as part of the transactions.

(j) October 18, 2011 – APC wrote to GSI to confirm its understanding that seismic data in the possession of Anadarko Canada remained with it following its acquisition by CNRL.

(k) August 20, 2012 – GSI wrote to APC to advise of a number of issues in respect of what CNRL and APC were saying about the data held by Anadarko Canada.

C. Litigation History

[8] GSI filed a Statement of Claim against CNRL on November 29, 2012 (the "Old Action"). The Old Action also named APC and Anadarko US Offshore Corporation, formerly Kerr McGee Oil & Gas Corporation ("Anadarko US Offshore"). In the Old Action, GSI alleged, among other things, that CNRL and the other named defendants wrongfully possessed copies of its seismic data ("GSI Seismic Data"). GSI claimed that the defendants were in breach of contract, infringed GSI's copyright, interfered with GSI's contractual relations, wrongfully converted the GSI Seismic Data, and were unjustly enriched.

[9] In 2018, CNRL served GSI with an application to summarily dismiss the Old Action. In support of its application, CNRL filed affidavit evidence of three of its employees who swore that CNRL did not possess GSI Seismic Data (the "Affidavit Evidence"). This application was never heard and the matter never went to trial. Rather, the parties agreed to dismiss GSI's claims as against CNRL. A Consent Order was issued on June 20, 2018 (the "Consent Dismissal").

[10] GSI continued to pursue APC and Anadarko US Offshore in the Old Action and questioned their corporate representative in 2019. These defendants led GSI to believe that CNRL did in fact have GSI Seismic Data, leading GSI to commence the New Action in June 2020. The New Action alleges virtually the same wrongful acts that GSI had advanced against CNRL in the Old Action. It was served on CNRL in or about October 2020. CNRL defended and, on November 19, 2020, applied to strike or summarily dismiss GSI's claims. Subsequently, the parties exchanged many affidavits and questioning on affidavits took place.

[11] Sometime in December 2020, GSI learned that contrary to the Affidavit Evidence, CNRL did have GSI Seismic Data in its possession. CNRL discovered several boxes of GSI Seismic Data ("Mystery Boxes") in a warehouse in 2020 and, in an undertaking response in 2021, disclosed that it had identified one line of GSI Seismic Data and possibly 13 others ("Electronic Data") in its electronic seismic database. The Mystery Boxes have been returned to GSI and the Electronic Data has been deleted from CNRL's database. CNRL says that the Mystery Boxes were packed up in 2006 to be sent to APC pre-acquisition. For reasons unknown to CNRL, they were not sent, but CNRL says that they sat unopened and unused until their discovery in 2020. There is no evidence to the contrary in the record before me.

[12] GSI filed its summary judgment application on June 27, 2022. The parties then filed further affidavits and conducted further questioning. I was assigned to the matter in 2023 by then acting Associate Chief Justice Paul Jeffrey and heard it on December 5, 2023.

III. The Applications

[13] On November 19, 2020, CNRL applied to strike or summarily dismiss the New Action. It relies on Rules 3.68(2)(b)(c)(d)(e) or, in the alternative, Rule 7.3. On June 27, 2022, GSI applied for summary judgment pursuant to Rule 7.3.

[14] The general question in this application and cross-application is whether, based on the record before me, I can resolve the dispute fairly on a summary basis in favor of either CNRL or GSI. I must determine whether the discovery of GSI Seismic Data in CNRL's possession warrants setting aside the Consent Dismissal, whether there is merit to GSI's claims against CNRL and whether CNRL has a defence to GSI's claims. If I am not able to decide the dispute fairly on a summary basis, then the matter must proceed to trial.

[15] The Court of Appeal set out the applicable principles as follows in ***Giustini v Workman***, 2021 ABCA 65 at para 23:

> The law with respect to summary judgment in Alberta is set out in ***Weir-Jones***, para 47 and ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343, paras 5, 12-13, 52, 145. In ***Weir-Jones***, this Court summarized the governing principles:
>
> (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> (b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute. [Emphasis in ***Weir-Jones***.]

[16] Thus, the court's ability to determine a matter summarily depends upon the sufficiency of the record before it. In this case, I have the benefit of an extensive record. The following is a list of all the documents that form part of the record before me, all of which I have reviewed:

	DESCRIPTION	FILED DATE	SIZE
1	Statement of Claim (Action No. 1201-15228)	November 29, 2012	5,836KB
2	Affidavit of Neil Orr, sworn on November 7, 2017 (Action No. 1201-15228)	November 7, 2017	13,677KB
3	Affidavit of Debra Addinall, sworn on November 3, 2017 (Action No. 1201-15228)	November 7, 2017	153KB
4	Affidavit of Shauna Logan, sworn on November 7, 2017 (Action No. 1201-15228)	November 7, 2017	3,829KB
5	Consent Order (Action No. 1201-15228)	June 21, 2018	44KB
6	Examination Transcript of Michael Seeber, held February 28, 2019, March 1, 2019, June 27, 2019	October 21, 2021	3,939KB
7	Statement of Claim (Action No. 2001-07678)	June 17, 2020	9,639KB
8	Statement of Defence of CNRL	November 19, 2020	1,405KB
9	Notice to Admit Facts (with enclosure) - served	November 19, 2020	1,932KB
10	Application to Strike or to Summarily Dismiss in the alternative	November 19, 2020	735KB
11	Affidavit of Neil Orr, sworn on November 16, 2020	November 19, 2020	34,442KB
12	Reply to Notice to Admit Fact – served	November 30, 2020	392KB
13	Examination Transcript of Jeffrey Thomson, held November 20, 2020	October 21, 2021	3,939KB,
14	Reply to Defence	December 10, 2020	79KB
15	Affidavit of James Lamb	December 15, 2020	1,122KB
16	Affidavit of Mike Hird, sworn on January 20, 2021	November 23, 2023	393KB
17	Affidavit of Jeffrey Thompson (enclosing information regarding the Anadarko action)	January 22, 2021	2,538KB
18	Affidavit of Paul Einarsson (implied undertaking)	January 25, 2021	1,749KB
19	Transcript of Oral Questioning of Michael Charles Hird, held February 11, 2021	April 30, 2021	663KB
20	Undertaking Responses of Michael Hird given at Feb 11, 2021 Questioning	June 3, 2021	1,255KB
21	Transcript of Oral Questioning of James Lamb, held February 11, 2021	April 30, 2021	965KB
22	Undertaking Response of James Lamb given at Questioning on February 11, 2021	September 23, 2021	9,420KB

23	Transcript of Questioning of Jeffrey Thompson	April 30, 2021	449KB
24	Affidavit of Jennifer Gorrie sworn April 30, 2021	Unfiled	4,623KB
25	Affidavit of Neil Orr, sworn on September 9, 2021	September 10, 2021	4,408KB
26	Revised Undertakings of Mike Hird	September 23, 2021	8,453KB
27	Affidavit of Jennifer Gorrie	October 5, 2021	864KB
28	Transcript of Oral Questioning of Michael Charles Hird, held October 1, 2021	October 29, 2021	771KB
29	Undertaking Responses of Mike Hird, held October 1, 2021	March 4, 2022	2,967KB
30	Transcript of Oral Questioning of James Lamb, held October 1, 2021	October 29, 2021	693KB
31	Transcript of Oral Questioning of Shauna Leeann Logan, held October 12, 2021	October 29, 2021	757KB
32	Undertaking Responses of Shauna Leeann Logan, October 12, 2021	January 4, 2022	1,092KB
33	Transcript of Oral Questioning of Debra Addinall, held October 12, 2021	October 29, 2021	3,544KB
34	Undertaking Responses of Debra Addinall, October 12, 2021	January 4, 2022	1,208KB
35	Transcript of Oral Questioning of Neil Orr, held October 13, 2021	October 29, 2021	3,183KB
36	Undertaking Responses of Neil Orr, October 13, 2021	March 4, 2022	4,866KB
37	Transcript of Oral Questioning of Harold Paul Einarsson, held November 15, 2021	November 25, 2021	8,689KB
38	Undertakings and Responses from the Questioning of H. Paul Einarsson on November 15, 2021	April 26, 2023 [Tab 10 of Compendium of Facts]	5,688KB
39	Affidavit of Neil Orr, sworn November 30, 2021, appending James Lamb's Undertaking Request responses given at Questioning on February 11, 2021	December 1, 2021	5.55MB
40	Response to Request for Particulars	February 18, 2022	304KB
41	Affidavit of Brandi Hughes, sworn on January 20, 2022	February 18, 2022	3,713KB
42	Compendium of Facts	February 18, 2022	40,935KB
43	Transcript of Oral Questioning of Harold Paul Einarsson, held October 5, 2022	Sent for filing	328KB
44	Application for Summary Judgment	June 27, 2022	284KB
45	Affidavit of Michael Royan	August 24, 2022	937KB
46	Affidavit of Paul Einarsson [Including Confidential Exhibit]	September 7, 2023	28,707KB
47	Restricted Court Access Order	September 8, 2022	697KB

48	Undertaking Responses from the Questioning of Paul Einarsson held on October 5, 2022	January 16, 2023	40KB
49	Expert Report – Affidavit of Ronald Newman	February 28, 2023	4,984KB
50	Transcript of Questioning of Ronald Edwin Newman	July 7, 2023	350KB
51	Expert Report – Affidavit of Easton Wren	September 8, 2023	5,032KB
52	Affidavit of Kira Lyseng	September 8, 2023	1,409KB
53	Examination Transcript of Easton Wren, held September 25, 2023	October 11, 2023	778KB
54	Consent Order of Applications Judge Farrington re Relief from Implied Undertaking Rule	December 1, 2020	372KB
55	Revised Endorsement of Applications Judge Farrington	July 9, 2021	868KB
56	Order re Further and Better Responses to Undertakings	July 22, 2021	952KB
57	Affidavit of Jennifer Gorrie, sworn August 5, 2021	August 11, 2021	1,530KB
58	Order of Applications Judge Farrington re adjournment of hearing of Costs Application	October 20, 2021	928KB
59	Application to Compel Responses to Undertaking and Objections by GSI	January 4, 2022	1,028KB
60	Affidavit of Rhonda Lastockin	January 21, 2022	2,816KB
61	Application to Defer Further Questioning by CNRL	February 18, 2022	314KB
62	Affidavit of Jennifer Gorrie	February 18, 2022	15,892KB
63	Endorsement of Applications Judge Farrington re Deferral Application	May 16, 2022	861KB
64	Endorsement #3 from Applications Judge Farrington	August 29, 2022	671KB
65	Amended Procedural Order	October 19, 2023	460KB
66	The Brief of the Applicant Canadian Natural Resources Limited and Authorities	November 7, 2023	567KB and 17MB
67	Plaintiffs Brief of Law (GSI) and Authorities	November 7, 2023	337KB and 5MB
68	Plaintiff's Brief of Law (GSI Reply) and Authorities	November 21, 2023	293KB and 6MB
69	Reply Brief of Canadian Natural Resources Limited to the Plaintiff's Cross-Application for Summary Judgment	November 22, 2023	492KB

IV. Issues

[17] In the circumstances of this case it is not surprising, given the application and cross-application, the parties have raised a number of issues. In its application, CNRL seeks to have the New Action struck on a number of the grounds enumerated in Rule 3.68(2). CNRL argues that the New Action discloses no reasonable claim, is frivolous and is an abuse of process. It asserts, among

other things, that the New Action is duplicative of the Old Action, that the claims in the New Action cannot succeed in light of the Consent Dismissal and that the claims in the New Action are limitations barred.

[18] For its part, GSI raises issues respecting copyright infringement, breach of confidence, breach of contract, unjust enrichment, conversion, detinue and damages.

V. Law and Analysis

A. Rule 3.68, Rule 7.3 and *Limitations Act*

[19] As noted above, CNRL relies upon various parts of Rule 3.68, which provides:

> 3.68 (1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out; ...
>
> (2) The conditions for the order are one or more of the following:
>
> (a) the Court has no jurisdiction;
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
>
> (c) a commencement document or pleading is frivolous, irrelevant or improper;
>
> (d) a commencement document or pleading constitutes an abuse of process;
>
> (e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.
>
> (3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2).

[20] Both CNRL and GSI rely upon Rule 7.3, which provides:

> 7.3 (1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.

[21] As noted above, CNRL has raised issues of limitations, citing both s 3(1)(a) and s 3(1)(b) of the *Limitations Act*, RSA 2000, c L-12, which read:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to the conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or
>
> (b) 10 years after the claim arose, whichever period expires first, the defendant, on pleading this Act, as a defence, is entitled to immunity from liability in respect of the claim.

[22] I will address the parties' arguments somewhat out of order as I believe that this will allow for a more coherent narrative. I will begin by addressing CNRL's application for striking or summary dismissal, then deal with GSI's application for summary judgment.

B. CNRL's Application for Summary Dismissal

1. Procedural Irregularity – Rule 3.68(2)(e)

[23] CNRL's brief sets out very little argument on this point, saying only the following:

> Further to the above, GSI's claim is self defeating because it relies on events that took place more than ten years before the claim was filed, and it repeats allegations that were dismissed by consent.

[24] GSI's brief speaks to this point in greater detail, citing cases in support of its position that a consent judgment can be set aside if it was obtained by fraud. I will return to this point later in these Reasons.

[25] With respect to the procedural issue, GSI makes these arguments in its brief:

> With respect to how GSI may seek to set aside the [Consent Dismissal], Alberta courts have held that a party may request a court exercise its discretion to set aside a consent judgment either by bringing an application, an appeal or a separate action. While the court has inherent jurisdiction to set aside a consent judgment in the original action, whether it is more appropriate to set a consent judgment aside by application, appeal or separate action will depend on the facts of each case.

> ...
>
> GSI submits that in the present circumstances, where there are allegations of fraudulent misrepresentation, significant issues with CNRL's credibility, and the need to allow for GSI to conduct full discovery of CNRL's evidence, it was more appropriate for it to commence this [New] Action than seek to set aside the [Consent Dismissal] in the [Old] Action.
>
> Further, the [Old] Action proceeded to setting a trial date with APC, such that the [Old] Action was at a different stage with a different party, such that commencing a new action ensured that only the appropriate parties are involved in this [New] Action. [All citations omitted.]

[26] To the extent that there is an issue in this regard, I have no difficulty with GSI's decision to proceed by way of a separate action, particularly given the stage of proceedings in the Old Action. While it is not clear to me that this is a basis upon which CNRL seeks summary dismissal of GSI's claim, I find that it would not be appropriate to dismiss the claim for this reason.

2. Other Rule 3.68 Arguments

[27] CNRL does, however, make clear that it sees the Consent Dismissal as a bar to GSI's claims in this New Action. It asserts that GSI's claims in the New Action are duplicative of those in the Old Action that were settled by the Consent Dismissal. CNRL argues that this "attempt to re-litigate" is both hopeless and an abuse of process.

[28] I agree with GSI that the Consent Dismissal does not constitute such a bar if GSI can establish that it was obtained through fraud. GSI cites ***KEM Presentations Inc v Shell Canada Products Ltd***, 2001 ABQB 389, aff'd 2003 ABCA 217.

[29] Accordingly, the salient question is whether CNRL acted fraudulently by filing affidavits stating that it did not have GSI Seismic Data when in fact it did. As will be seen later in these Reasons, this question is also relevant to the limitations analysis.

3. Did CNRL Commit Fraud?

[30] Two things are undisputed. First, CNRL filed three affidavits in the Old Action stating that it did not possess GSI Seismic Data. Second, those affidavits were inaccurate. CNRL did have GSI Seismic Data in the Mystery Boxes and the Electronic Data.

[31] GSI argues in its briefs that "it is clear that CNRL perpetrated fraud by failing or refusing to disclose to GSI that it was in possession and using the GSI Seismic Data." GSI also makes rather hyperbolic statements that CNRL was "caught red-handed" in "wrongful and deceitful conduct that has spanned over 15 years". GSI asserts that "Anadarko and CNRL repeatedly provided GSI with conflicting, and ultimately false, information on whether either of them received GSI Seismic Data" and states rather snidely that "the GSI Seismic Data ... did not vaporize".

[32] No one suggests that it did. Clearly, and indeed admittedly, CNRL was in possession of the Mystery Boxes and the Electronic Data. The information in the affidavits was false. But there is a distinction between false and fraudulent.

[33] In its Compendium of Facts, CNRL described its process for dealing with seismic data in the course of corporate transactions (all footnotes omitted):

> As part of an acquisition or divestiture, CNRL takes the following steps, among others, to identify, filter through and process seismic data during corporate acquisitions:
>
> (a) Identification and retention of valuable seismic in areas where CNRL is active;
>
> (b) Identification and storage/transfer of any data, including seismic data, that may be excluded from the acquisition and to which CNRL is not entitled;
>
> (c) Review of seller-owned seismic data vs seller-licensed seismic data that CNRL is acquiring;
>
> (d) Transfer or destruction of seismic data that is not valuable to CNRL, or has otherwise been scanned and digitized; and
>
> (e) Scanning physical seismic data into digital seismic data.
>
> The volume of incoming records and inherent complexity of acquisitions can make this a challenging process. CNRL is a massive company with over 10,000 employees worldwide. Managing physical and electronic records requires proactive management across multiple departments. CNRL's records are managed by a number of departments, including Records Management, Data Provisions Services, A&D, Legal, HR, Land and Document Control.
>
> The Amalgamation involved a review of transferrable and non-transferrable data from [Anadarko Canada] to CNRL. As part of that process, [Anadarko Canada] employee Debra Addinall was tasked with separating all of [Anadarko Canada's] marine seismic data from its database and repositories to ensure that it was excluded from the Amalgamation for the purpose of sending back to [Anadarko Canada's] parent companies Tristone and [APC]. Debra relied on a list to identify and label boxes that were to be excluded from the Amalgamation. These boxes, which included the Mystery Boxes..., were previously stored at CGG or Divestco. Ms. Adinall confirmed that CNRL has no GSI seismic data.

[34] Subsequently, CNRL stated as follows with respect to the discovery of the Mystery Boxes (all footnotes omitted):

> On December 29, 2020 GSI wrote to advise that it had been advised by [APC] that CNRL had contacted it about a number of boxes that relate to the Amalgamation. CNRL investigated and tendered the Affidavit of Mike Hird in response to GSI's

Allegations. Mr. Hird provides the facts surrounding the discovery of the boxes. To summarize:

(a) Mr. Hird is the Lead, Records Management, Acquisitions & Divestitures, Offsite and Destruction at CNRL;

(b) CNRL has a great deal of electronic and physical records that are managed by a number of different departments;

(c) Mr. Hird's department, Records Management ("RM") administers OmniRim, a physical records management system that organizes records in an indexed application system;

(d) CNRL has 202,037 boxes in storage at Iron Mountain. 35,928 of these boxes are related to the 2006 acquisition of Anadarko Canada and were previously in storage;

(e) CNRL completed multiple projects since 2006 to identify and deal with the 35,928 boxes;

(f) A remaining 8028 Anadarko Canada boxes related to the 2006 acquisition were the subject of 2020 efforts to identify and classify for indexing into OmniRim. This task began in March 2020;

(g) In March 2020 Mr. Hird contacted [APC's] successor Occidental to arrange delivery of 131 boxes that were identified as being owned by [APC]. Occidental asked for the boxes to be sent to its records office, and later requested the shipment to be held as it was under a shelter in place order at the time;

(h) Mr. Hird identified a total of 285 boxes to be sent to Occidental by the end of his inventory project;

(i) As CNRL does not own the boxes, it did not open them to inventory the contents;

(j) Nothing has been "concealed". The boxes have been in storage since at least 2006 and their contents are unknown to CNRL. As the boxes were not indexed in OmniRim they were not discovered until Mr. Hird's inventory project.

A number of boxes were inspected by GSI and subsequently returned to it. In response to an Undertaking, Mr. Hird provided a spreadsheet of the boxes that were permanently checked out to GSI and confirmed that all of the boxes were received at Iron Mountain in 2008 and they sat is storage until Mr. Hird's 2020 indexing project. There is no evidence that these were known to CNRL prior to Mr. Hird's project.

[35] In my view, the sheer volume of boxes in question is relevant to my assessment of the alleged fraud. GSI notes in its brief that 285 Mystery Boxes were identified. There appears to be no dispute that the transactions leading to the allegation of fraud involved 35,928 boxes of documents. Thus, the Mystery Boxes comprise only 0.78% of the number of boxes of documents relevant to the transactions. I have little difficulty believing that such a small fraction of such an enormous number of boxes could inadvertently go astray.

[36] In light of the evidence provided by CNRL, I find that the affidavit evidence filed in the Old Action was given in error. However, while the statements in the affidavits to the effect that CNRL did not possess GSI Seismic Data were wrong, I do not accept GSI's argument that they must, *ipso facto*, have been fraudulent. I find that CNRL's affiants were simply mistaken.

[37] GSI admits that the New Action is in respect of wrongful possession and use of the GSI Seismic Data, as was the Old Action. GSI's position is that it entered into the Consent Dismissal only on the basis of CNRL's affidavit evidence that it did not possess GSI Seismic Data and under the pressure of CNRL's summary dismissal application in the Old Action. Since CNRL's affidavit evidence has turned out to be false, GSI seeks to have the Consent Dismissal set aside as fraudulent. As I have found that CNRL's affidavit evidence, while erroneous, was not fraudulent, I decline to exercise my jurisdiction to set aside the Consent Dismissal.

4. Limitations

[38] CNRL also asserts that the New Action is barred by either or both of the limitation periods set out in the *Limitations Act*.

[39] GSI argues that the New Action is not out of time because it was filed in June 2022, less than two years after GSI's discovery in 2020 that CNRL indeed possessed GSI Seismic Data. I am satisfied that the New Action is not barred on this basis.

[40] However, GSI also must contend with the 10-year limitation period contemplated by s. 3(1)(b) of the *Limitations Act*. CNRL takes the position in its brief that "By fall 2001, GSI knew that [Anadarko Canada] was in possession of some licensed GSI Seismic Data and told [Anadarko Canada] that it couldn't rely on predecessor license agreements." On this basis, CNRL argues that the New Action is barred by the 10-year limitation period.

[41] It is clear that GSI was unaware of CNRL's possession of the Mystery Boxes and the Electronic Data until CNRL so advised it in 2020. Nevertheless, the case law is clear that a plaintiff can be barred from suit by the ultimate limitation period even before the right to sue has accrued.

[42] In ***Bowes v Edmonton (City)***, 2007 ABCA 347 at paras 116-119, 136-138 and 143, the Court of Appeal discussed at length the ultimate limitation period and its potential unfairness to plaintiffs:

> ...the big complaint of the plaintiffs is that the time for them to sue expired before they knew that they had a claim, maybe even before they had a claim which the law would act upon. They say that is unjust. Their statement is correct in fact. And if one looks only at the plaintiffs, it is unfair.

> That is as far as some court decisions look. Many trial-level cases try to interpret limitations legislation so that no reasonable plaintiff is ever harmed, or could be. Indeed, some cases hint that barring any suit good (or arguably good) on its merits is improper.
>
> We must start by recalling the main purpose of limitations legislation. It is enacted to prevent certain plaintiffs from suing on good causes of action. If pressed to trial, poor causes of action will not likely succeed on the merits; they will be dismissed.
>
> What is the policy reason for barring such suits? To eliminate the harm to defendants of very belated litigation. ...
>
> The legal history recited above made legislative reform of limitations law urgent. ... Since both plaintiffs and defendants and fairness to both are involved, the sound solution was to enact two different limitation periods. The defendant could succeed if the plaintiff sued after either period had expired.
>
> The first time period codified the approach in modern case law. A plaintiff had a few years to sue after he discovered (or should reasonably have discovered) the elements allowing him to sue (or making a suit reasonable or worthwhile). That limitation period looked at the plaintiff's point of view and encouraged his or her diligence and promptness, but did not penalize any plaintiff who acted reasonably and diligently.
>
> The second time period was a much longer automatic unconditional time period with very few exceptions. It removed any danger that the time to sue might never start to run, or that its staring point or calculation would be uncertain. That ultimate unconditional period was a compromise. It gave the defendant the protection which the courts had removed by importing discoverability, but chose a limitation period longer than had been common. ...
>
> Barring some suits, before harm or a chance to sue, was deliberate.

[43] Thus, it is clear that, in ordinary circumstances, the ultimate 10-year limitation period will toll against a plaintiff such as GSI even if it is unaware of the potential claim.

[44] There is, however, a caveat to this. The limitation period will not toll against a plaintiff in circumstances where the defendant has fraudulently concealed its wrongdoing. Section 4 of the *Limitations Act* provides as follows:

> 4(1) The operation of the limitation period provided by section 3(1)(b) or (1.1)(b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.
>
> (2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) or (1.1)(b) was suspended.

[45] GSI acknowledges that it has the burden of establishing fraudulent concealment. It cites ***P(W) v Alberta***, 2014 ABCA 404 at para 34 for the following criteria:

(a) the defendant must have perpetrated some kind of fraud;

(b) the fraud concealed the fact of the plaintiff's injury; and

(c) the plaintiff exercised reasonable diligence to discover the fraud.

[46] GSI says that CNRL acted fraudulently by having its employees swear affidavits saying that it did not possess GSI Seismic Data when in fact it did. GSI says that "CNRL's fraud in respect of its possession of the GSI Seismic Data concealed GSI's injury". More specifically, GSI explains that the injury is:

(a) that CNRL had possession and use of the GSI Seismic Data without any agreement or authorization from GSI in breach of the Copyright Act and the APEGA Guidelines; and

(b) that CNRL had possession and use of the GSI Seismic Data without having paid any licensing fees or compensation to GSI.

[47] GSI says that it also meets the third part of the test for fraudulent concealment because it made several inquiries of CNRL about GSI Seismic Data before commencing the Old Action, but received false responses.

[48] As noted above, I find that CNRL's averment that it did not possess GSI Seismic Data, while incorrect, was a product of inadvertent error rather than fraud. Consequently, I find that there was no fraudulent concealment that prevented the 10-year limitation period from running against GSI. The injury of which GSI complains arose in the course of the transactions that led to the Old Action. Subsequent changes in corporate structure do not operate to extend the limitation period. In the absence of fraud, the New Action, based on the same transactions and making substantially the same claims as the Old Action, was filed out of time.

5. Conclusion on Striking and Summary Dismissal

[49] CNRL sought either an order striking the Statement of Claim in the New Action or, in the alternative, summary dismissal of the New Action.

[50] In my view, it would not be appropriate to strike the New Action pursuant to Rule 3.68. CNRL argues that the pleadings in the New Action are duplicative of those in the Old Action that were resolved by the Consent Dismissal. Strictly speaking, this is true, but it ignores GSI's argument that the Consent Dismissal was procured by fraud.

[51] In order to arrive at my assessment of the alleged fraud, I have found it necessary to review and consider a variety of evidence contained within the fulsome record on this application. Among other things, I have considered the evidence put before me respecting CNRL's data storage practices and the circumstances in which the Mystery Boxes and the Electronic Data were discovered.

[52] It is undisputed that Rule 3.68(3) requires that an application to strike be decided without reference to evidence. Accordingly, I decline to grant CNRL's application to strike the New Action. However, given my findings that CNRL did not commit fraud in filing the inaccurate affidavits with regard to possession of GSI Seismic Data and that GSI filed the New Action after the expiration of the 10-year limitation period, I find that CNRL has established that there is no merit to GSI's claims in the New Action. Therefore, I grant CNRL's application for summary dismissal of the New Action pursuant to Rule 7.3 - I find that there is no merit to any of the claims advanced by GSI against CNRL in the New Action as the claims advanced by GSI were filed outside the 10-year limitation period.

C. GSI's Application for Summary Judgment

[53] In the event that I am wrong in my finding that the New Action was filed outside the 10-year limitation period, I will consider the merits of GSI's application for summary judgment.

[54] In the New Action, GSI alleges CNRL's predecessors breached licensing agreements for the use of GSI Seismic Data and that CNRL and its predecessors wrongfully possessed and used GSI Seismic Data. GSI applied for summary judgment against CNRL for damages in the amount of $43 million.

[55] As set out above, Rule 7.3(1)(a) requires a party seeking summary judgment to establish that there is no defence to a claim or part of it. GSI cites ***Weir-Jones*** at para 47 for the proper approach to summary judgment:

> The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> (b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

> (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

[56] GSI also cited ***Hannan v Medicine Hat School District No 76***, 2020 ABCA 343 at para 159:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. This will be the case when the process:
>
> (1) allows the judge to make the necessary findings of fact,
>
> (2) allows the judge to apply the law to the facts, and
>
> (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[57] GSI asserts that the facts, record and law are clear in this case and that there is no genuine issue requiring a trial. Based on the twin pillars that GSI owned the GSI Seismic Data and that CNRL was in possession of it, GSI contends that CNRL is liable for copyright infringement, breach of confidence, unjust enrichment, conversion and detinue. It argues that CNRL is liable for the obligations of its predecessors and that there are no valid defences.

[58] I am not satisfied that the matter is as straightforward as GSI portrays.

[59] In its reply brief, CNRL asserts that GSI's claims are without merit because there is "no credible proof" that CNRL intentionally misused, disseminated or profited from GSI Seismic Data. Moreover, it articulates defences to each of GSI's claims. For example, it argues that the *Canadian Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp) provides a complete answer to GSI's claim of copyright infringement. It disputes GSI's claim that it sold GSI Seismic Data to the CNR Arctic Partnership.

[60] With respect to GSI's claims of unjust enrichment, breach of confidence, conversion and detinue, CNRL argues that there is no evidence that it used, let alone misused, GSI Seismic Data.

[61] GSI points to CNRL's statement that its practice was to delete or return seismic materials for which it had no license and/or use. GSI argues that since CNRL did not delete or return the GSI Seismic Data, that must mean it had a use for it.

[62] This, in my view, does not follow logically. It might do so if I were satisfied that CNRL was aware of its possession of GSI Seismic Data, but I have found that it was not. I do not accept that CNRL's unknowing possession of GSI Seismic Data equates to use thereof. To the contrary, I find that CNRL's failure to either delete or return the GSI Seismic Data was the natural result of being unaware of its existence.

[63] Accordingly, I find that GSI has not established on a balance of probabilities that CNRL has "no defence" to the claims set out in the New Action. Rather, while the fact of CNRL's possession of GSI Seismic Data is undisputed, I find that there is a genuine issue requiring trial as to its use thereof, if any, and the consequences of such use.

VI. Conclusion

[64] In summary, I find that CNRL has established on a balance of probabilities that GSI's claims in the New Action are limitations barred. Therefore, I exercise my judicial discretion to grant summary dismissal of the New Action.

[65] In addition, I find that, in the absence of fraud, GSI's claims in the New Action are duplicative of those in the Old Action that were resolved by the Consent Dismissal. GSI's reiterated claims depend upon its assertion that CNRL acted fraudulently. As I have found that was not the case, GSI's claims are doomed to failure and I would have granted summary dismissal on that basis as well.

[66] GSI has not made out its case for summary judgment on a balance of probabilities. In my view, CNRL has viable defences to GSI's claims in the New Action. Therefore, even if I had not found that CNRL is entitled to summary dismissal of the New Action, I would have refused summary judgment and sent the matter to trial.

[67] As the successful party, CNRL is entitled to costs. If the parties are unable to reach an agreement on the amount, they may provide written submissions, not to exceed 10 pages each, within 60 days of the date of these Reasons.

Heard on the 5th day of December, 2023.
Dated at the City of Calgary, Alberta this 12th day of August, 2024.

J.C. Price
J.C.K.B.A.

Appearances:

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