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## The Confidentiality of Seismic Data

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*The authors review the common law, common contractual language and statutory law relating to the confidentiality of seismic information. The extent of the rights of the Canada-Newfoundland and Labrador and Canada-Nova Scotia Offshore Petroleum Boards to receive, use and make seismic data public is considered in light of freedom of information and protection of privacy legislation. The authors discuss the different treatment of specified user and speculative seismic data, and explore copyright.*

*Les auteurs examinent la common law, la langue contractuelle habituelle et le droit législatif qui régit le caractère confidentiel des données sismiques. La portée des droits des deux organismes (l'Office Canada – Terre-Neuve-et-Labrador des hydrocarbures extracôtiers et l'Office Canada – Nouvelle-Écosse des hydrocarbures extracôtiers) de recevoir, d'utiliser et de divulguer des données sismiques est examinée à la lumière des lois sur l'accès à l'information et sur la protection des renseignements personnels. Les auteurs discutent du traitement différent accordé aux données destinées à un utilisateur précis et aux données sismiques spéculatives; ils étudient également le droit d'auteur.*

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*Introduction*

I. *Background*

II. *Analysis*

1. *Contract*

- a. *Definition of confidential information*
- b. *Obligation to not disclose or use confidential information*
- c. *Permitted uses of confidential information*

2. *Breach of confidence*

- a. *Confidential information*
- b. *Communicated in confidence*
- c. *Misuse [to the detriment of the confider]*
- d. *Remedies*

3. *Breach of fiduciary duty*

4. *Statute – east coast*

- a. *Breach of copyright*
- b. *Breach of confidence*
- c. *Access to Information Act*
- d. *Freedom of Information and Protection of Privacy Legislation*

III. *Conclusion*

IV. *Addendum: Update on digital data disclosure*

*Introduction*

Until satellite x-ray technology takes the mystery out of hydrocarbon exploration, seismic surveys will continue to provide the best guide to exploratory drilling locations. Some seismic surveys are done for a specific customer or group of customers on a contract basis, usually covering areas licensed by, or adjacent to areas licensed by that customer or group of customers; other surveys are done by geophysical service providers who hope to market the resulting data to interested explorers.

Many governments recognize the value of seismic information as a facilitator of exploration activity and require, as a consequence, that: (a) seismic information must be submitted to government as a condition to the regulatory permission to conduct the survey; and (b) seismic information may be disclosed to third parties after certain hold periods have expired.

In this paper we review some of the public and private issues of confidentiality of seismic data. The first part of the paper will examine the two main legal mechanisms used to protect confidential seismic data

from improper disclosure or use: contractual provisions and the common law duty of confidence. It will also briefly address the concept of breach of fiduciary duty and its declining importance in addressing misuse of confidential information. The second part of this paper will examine the statutory regimes governing the Canada-Newfoundland and Labrador and the Canada-Nova Scotia Offshore Petroleum Boards and other authorities regulating the exploration for oil and gas and other minerals, particularly in light of copyright and access to information and protection of privacy legislation. Our goal is to determine the balance between the private rights of the producers/owners of seismic data and the public responsibility to encourage the development of Canada's natural resources.

### I. *Background*

The word seismic is derived from the Greek "seismos" meaning "shock." Traditionally, the word seismic was associated with earthquakes and other natural movements of the earth's crust. However, since the discovery that low frequency sound waves can be used to explore subsurface geology in order to identify areas of potential hydrocarbon presence, the word has also come to be associated with this exploration technique.

In *A Dictionary for the Petroleum Industry*,<sup>1</sup> "seismic data" is defined as "detailed information obtained from earth vibration produced naturally or artificially."<sup>2</sup> A more helpful definition is that of "seismic survey":

An exploration method in which strong low-frequency sound waves are generated on the surface or in the water to find subsurface rock structures that may contain hydrocarbons. The sound waves travel through the layers of the earth's crust; however, at formation boundaries some of the waves are reflected back to the surface where sensitive detectors pick them up. Reflections from shallow formations arrive at the surface sooner than reflections from deep formations, and since the reflections are recorded, a record of the depth and configuration of the various formations can be generated. Interpretation of the record can reveal possible hydrocarbon-bearing formations.<sup>3</sup>

As noted above, the primary use of seismic data by oil and gas exploration companies has been to assist in searching for hydrocarbons. This paper refers to seismic data throughout; however, most comments would apply equally to other types of geophysical data as well.

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1. The University of Texas at Austin, *A Dictionary for the Petroleum Industry*, 3d ed. (Austin: Petroleum Extension Service, 1999).

2. *Ibid.* s.v. "seismic data."

3. *Ibid.* s.v. "seismic survey."

Generally speaking, there are two important bundles of rights that one may have in seismic data.<sup>4</sup> The first is a proprietary interest, or "ownership" of the seismic data. Where the data is owned by one party, it is sometimes referred to as "100% proprietary" data. Where the data is jointly owned by more than one party, it is sometimes referred to as "partnered proprietary" data. Where one or more people have a proprietary interest in seismic data, they "own" the data and may, subject to any agreement between them, do with it as they wish. They may, for example, sell, license, or otherwise disclose the data as they see fit.

The second type of interest one may have in seismic data is a licence to use it for certain purposes. A licence may be granted by the owners of the data to one or more parties who wish to use the data. The licensor of the data in such a situation is often a geophysical company formed to acquire proprietary seismic data with a view to licensing it to multiple parties. The protection of the confidentiality of licensed seismic data is of critical importance to geophysical companies because any sharing of the data between a licensed user and a potential licensee may remove a potential client from what may be a very small group of parties interested in such data.

In both circumstances, the parties with an interest in the data (whether as owner or licensee) will wish to keep the information confidential to protect its value. However, there may be circumstances when disclosure of seismic data is desirable for business reasons. For example, a company that is a licensor of seismic data will have to disclose the data in order to license it to potential licensees. For proprietary data, the owner or owners may wish to disclose the data to potential financiers, to joint venturers, or, in the context of a sale or acquisition, to promote a contemplated transaction. Whenever seismic data is shared, concerns arise that it may be disclosed or used for purposes other than those intended by the party disclosing the information. In the case of the licensing of seismic data, this may decrease the number of potential licensees and thus the economic value of the data. For others, such unintended disclosure or use may deprive the owner of a valuable business opportunity by giving a competitor information that may be used to the detriment of the party disclosing the data.

Thus, owners and licensees of seismic data will generally have a keen interest in ensuring that where confidential seismic data is to be disclosed to third parties, appropriate safeguards are in place to ensure that the data is not improperly disclosed or used by the party receiving the data.

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4. There are undoubtedly other sorts of rights that one may have in seismic data, but for the purposes of this paper it is sufficient to focus on these two.

## II. Analysis

### 1. Contract

Where confidential seismic data is to be provided by one party to another, the party providing the data (the confider) and the party receiving the data (the confidee) will typically enter into an agreement setting out the terms and conditions upon which the confider will provide the data to the confidee. Such an agreement may restrict, expand, or entirely exclude any duty of confidentiality that would exist at common law.<sup>5</sup> In *Cadbury Schweppes Inc. v. FBI Foods Ltd.*,<sup>6</sup> Binnie J. stated:

Just as contractual terms can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity ... The ability of parties to contract out of, or limit, general duties otherwise imposed by law has been labeled "private ordering", and the general principles applicable here [where there is both a contract and a duty of confidentiality] would be analogous to the principles considered by this court in the context of concurrent remedies in tort and contract ...<sup>7</sup>

Similarly, in *Lac Minerals Ltd. v. International Corona Resources Ltd.*,<sup>8</sup> in considering the effect of evidence as to industry practice, La Forest J. indicated that the courts should take great care in reading terms into the bargain between the parties by suggesting "[w]hen the parties have reduced their understandings to writing, it is obviously the proper course for courts to be extremely circumspect in adding to the bargain they have set down."<sup>9</sup>

Express confidentiality provisions will not always entirely exclude the common law duty of confidentiality, and in some circumstances there may be both contractual and common law confidentiality obligations. In *Visagie v. TVX Gold Inc.*,<sup>10</sup> the confidee was found to have breached both the terms of a confidentiality agreement and its common law duty of confidentiality when it used confidential information to bid successfully on a mining property to the exclusion of the confider who had provided the information in the context of discussions about entering a joint venture

5. See *ERSS Equity Retirement Savings Systems Corp. v. Canadian Imperial Bank of Commerce*, 2002 BCSC 1462, (2002), 8 B.C.L.R. (4th) 340 at paras. 15-16 [*ERSS Equity*]. The common law duty of confidentiality is discussed more fully in Part II.2 of this paper.

6. [1999] 1 S.C.R. 142 [*Cadbury Schweppes*].

7. *Ibid.* at para. 36.

8. [1989] 2 S.C.R. 574 [*Lac Minerals*].

9. *Ibid.* at para. 168.

10. (2000), 49 O.R. (3d) 198 (C.A.) [*Visagie*].

arrangement to bid for the same property.<sup>11</sup> If the intent of the parties is for the contractual provisions to supplant entirely the common law duty of confidentiality, this intention should be expressed very clearly in the agreement.

Confidentiality agreements concerning the provision of seismic data will typically address several important concepts. These include:

1. a definition of the confidential information subject to the agreement;
2. an obligation on the confidee to not disclose or use the confidential information except as otherwise permitted; and
3. what is permitted to be done with the confidential information.<sup>12</sup>

There are, of course, numerous other provisions that may be included in such an agreement, many of which will be no different than one would expect to see in a typical commercial agreement. The purpose of this section of the paper is not to exhaustively set out and examine all the clauses that are typically found in a confidentiality agreement, but rather to briefly identify a few of the more interesting clauses that may appear in confidentiality agreements concerning seismic data.

a. *Definition of confidential information*

A balancing of competing interests must be undertaken in defining what the confidential information subject to the agreement will be. Generally, information that is or becomes publicly available, or that the confidee becomes aware of independently, without a breach of any obligation to the confider by the confidee or any other person, is excluded from the definition. In some cases, the definition is drafted very broadly to include all information provided to the confidee that is not in the public domain. Such a broad definition may cause difficulties for the confidee by restricting what it can do with information that subsequently becomes public or otherwise comes to its attention through proper means. Such a

11. See also *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102, (2006), 58 B.C.L.R. (4th) 217 [*Minera Aquiline*] where the Court also found both a breach of a confidentiality agreement and the common law duty of confidentiality.

12. For a more in-depth examination of typical provisions in confidentiality agreements in the context of the oil and gas industry, see Mungo Hardwicke-Brown, "Confidentiality and Dispositions in the Oil and Gas Industry" (1997) 35 Alta L. Rev. 356; Kevin Plowman, Doris Reimer & Wayne Fedun, "Good Faith and Fiduciary Obligations in the Handling of Confidential Seismic Data" (Paper presented to New Developments: Seismic Data and Technologies Conference, March 2002).

broadly worded clause may cause the confidee not to be able to make use of information that every other person who has not signed the confidentiality agreement may use. In other circumstances, the definition is far narrower and is limited by referring to information provided by the confider to the confidee concerning a certain area or project. Such a narrow definition may cause difficulties for the confider if there is a chance that confidential information about other projects or areas may be disclosed in the course of discussions between the confider and the confidee. A court may find that the confidentiality agreement did not restrict the use of such “other” information. This would be particularly problematic if the agreement was also drafted so as to exclude entirely the common law obligation of confidentiality as between the parties without reference to the definition of confidential information.<sup>13</sup>

b. *Obligation to not disclose or use confidential information*

There will often be a general prohibition on the use or disclosure of the confidential information, except as expressly permitted by the confidentiality agreement. This may take the form of a blanket prohibition on the use of the information except for the purpose of determining whether or not to enter into the contemplated transaction.

In addition, there are sometimes additional express restrictions placed on the confidee. One of the more common, and troublesome, clauses for confidees is the “area of exclusion clause.” While the terms of such a clause will vary, the essential purpose is to define an area around the property or properties that are the subject of the contemplated transaction in which the confidee will be prohibited from acquiring any interest for a period of time without the consent of the confider. Such clauses should be examined carefully in light of the particular transaction, as they may have unintended consequences for both the confider and the confidee.<sup>14</sup> In particular, the confidee should take care to determine whether the area of exclusion clause would restrict it from an area in which it is legitimately interested regardless of the data to be shared pursuant to the agreement.

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13. Several recent cases deal with issues concerning the scope of the definition of what constitutes confidential information under a confidentiality agreement: *ERSS Equity*, *supra* note 5; *Minera Aquiline*, *supra* note 11; and, in particular, with respect to issues about what information is or becomes public, *Visagie*, *supra* note 10.

14. Several recent cases have interpreted the area of exclusion clauses. The differing results in these cases are illustrative of the importance of the careful drafting of these clauses. See *Novawest Resources Inc. v. Anglo American Exploration (Canada) Ltd.*, 2006 BCSC 769, [2006] B.C.W.L.D. 5130 and *Minera Aquiline*, *supra* note 11.



c. *Permitted uses of confidential information*

A confidentiality agreement will often expressly permit, as an exception to the covenant not to disclose or use the confidential information, certain uses that would otherwise be a breach of the agreement. For example, the confidee may be permitted to share the information with its third party experts, or its financiers, so long as appropriate confidentiality measures are implemented.

There may also be express provisions setting out in detail how the confidential information may be examined and handled. Such provisions may permit the confidee to use the confider's or the confidee's computer programs; it may address the provision of raw or interpreted data; it may permit the making of copies, notes, drawings, etc.; or it may permit only viewing of the raw data.

Thus, contractual arrangements are often used to set out particular terms for the protection of confidential seismic data that is to be shared among the parties to the contract. These arrangements may restrict, expand or even entirely eliminate the confidentiality obligations that would exist at common law. In the next section, this common law duty of confidentiality will be examined in detail.

2. *Breach of confidence*

Canadian courts have come to recognize a common law duty to protect confidences in certain circumstances, and a concomitant cause of action for the breach of such duty. The elements of the cause of action for breach of confidence were articulated by the Supreme Court of Canada in *Lac Minerals*, where La Forest J. stated:

The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated.<sup>15</sup>

This duty is not dependent upon doctrines of property, contract, or equity, and has been described by the Supreme Court of Canada as *sui generis*, with roots in both equity and the common law. In his dissenting opinion in *Lac Minerals*, Sopinka J. stated:

The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is *sui generis* relying on all three to enforce the policy of the law that confidences be respected ... This multi-faceted

15. *Supra* note 8 at para. 129.

jurisdictional basis for the action provides the Court with considerable flexibility in fashioning a remedy. The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy.<sup>16</sup>

The majority in *Lac Minerals* did not appear to disagree with Sopinka J. with respect to this statement, which was later taken up, with apparent approval, by Binnie J. in *Cadbury Schweppes*. He confirmed that the *sui generis* concept was adopted to recognize the flexibility that the courts had applied in the past in order to uphold confidentiality and to craft a remedy appropriate to the circumstances, without being constrained by the doctrinal principles of property, contract, or equity.<sup>17</sup>

The following is a brief overview of the content of each of the three elements of the test for breach of confidence.

a. *Confidential information*

The Supreme Court of Canada has indicated that there is a relatively low threshold in respect of what kinds of information may be the subject of a breach of confidence. In *Cadbury Schweppes*, Binnie J. stated:

Equity has set a relatively low threshold on what kinds of information are capable of constituting the subject matter of a breach of confidence. In *Coco v. A.N. Clark (Engineers) Ltd.*, *supra*, Megarry J., ... considered that "some product of the human brain" applied to existing knowledge might suffice. A similarly expansive concept was adopted in [*Lac Minerals*] ... by Sopinka J., ... Gurry in *Breach of Confidence*, gives instances of information which were protected from disclosure because they were otherwise inaccessible, despite the fact that they possessed little or no actual value ...<sup>18</sup>

The question of whether information has the required nature of confidentiality will be dependent upon the facts of the particular case. Information that is in the public domain will rarely be considered to be confidential. However, where such information is subsequently manipulated, processed, analyzed, or interpreted to create new information, the new information may be considered confidential, even though the underlying information is not.<sup>19</sup>

In *Pharand Ski Corp. v. Alberta*,<sup>20</sup> Mason J. set out a non-exclusive list of factors to consider in determining whether information is confidential:

16. *Ibid.* at paras. 73-74.

17. *Supra* note 6 at para. 28.

18. *Ibid.* at para. 75.

19. *Supra* note 10 at para. 45; *Ridgewood Resources Ltd. v. Henuset*, [1982] A.J. No. 641 (C.A.) (Q.L.) at para. 26 [*Ridgewood*].

20. (1991), 80 Alta. L.R. (2d) 216 (Q.B.) [*Pharand*].

- 1) The extent to which the information is known outside the owner's business;
- 2) The extent to which it is known by employees' and others involved in the owner's business;
- 3) The extent of measures taken by him to guard the secrecy of the information;
- 4) The value of the information to him and his competitors;
- 5) The amount of money or effort expended by him in developing the information;
- 6) The ease or difficulty with which the information could be properly acquired or duplicated by others [i.e., by their independent endeavours].<sup>21</sup>

It is submitted that in most circumstances, seismic data (whether raw, processed, or reprocessed) will be considered to be confidential if it has not been widely shared outside the seismic producer's business without appropriate safeguards (i.e., confidentiality arrangements), and appropriate steps have been taken to keep it confidential. In most circumstances, it will be clear that it is valuable to keep the data secret because significant amounts of money and effort were expended in acquiring the data. Seismic data may not be found to be confidential where it has been widely shared without appropriate safeguards, or where it has been publicly disclosed pursuant to law (and any applicable confidentiality period has expired).

b. *Communicated in confidence*

This element of the test requires that the plaintiff prove that the information was communicated in a confidential manner such that the confidee knew, or ought reasonably to have known, that it was being disclosed in confidence. When information of a commercial nature is communicated in a business context, the confidee carries a heavy burden if he or she wishes to deny that there is an obligation of confidence.<sup>22</sup>

An oft-cited articulation of the requirements of this element of the test is Megarry J.'s decision in *Coco v. A.N. Clark (Engineers) Ltd.*,<sup>23</sup> where he stated:

It seems to me that if the circumstances are such that any reasonable

21. *Ibid.* at 246.

22. Julie A. Thorburn & Keith G. Fairbairn, *Law of Confidential Business Information* (Aurora: Canada Law Book, 2006) at 5-7.

23. [1968] F.S.R. 415, [1969] R.P.C. 41 [*Coco*].

man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence ...<sup>24</sup>

The courts have made it clear that a duty of confidence and an action for the breach of such duty may lie even where the party alleged to have committed the breach is a stranger to the confider, and there has been no communication directly between them. In *Cadbury Schweppes*, Binnie J. stated:

Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.<sup>25</sup>

Similarly, in *Murphy Oil Co. v. Predator Corp.*,<sup>26</sup> Nation J. stated:

The law may and has extended an obligation of confidence to the receipt of information in the knowledge that it was confidential. In these situations, where there is not a direct relationship between the parties, and confidentiality does not arise out of contractual terms, equity examines the circumstances of the disclosure to determine if the defendants' conscience is bound to keep the information confidential.<sup>27</sup>

Nation J. continued:

Once a confidence has been broken, equitable jurisdiction may lie against third parties who receive that confidential information. If a third party has actual knowledge that he is receiving information in breach of confidence at the time when the information is communicated to him, he will be affixed with an obligation of confidence at the time he receives the information... Professor Gurry states:

A third party who acquires confidential information with

24. *Ibid.* at 47.

25. *Supra* note 6 at para. 19.

26. 2006 ABQB 680, (2007), 67 Alta. L.R. (4th) 325 [*Murphy*].

27. *Ibid.* at para. 61.

knowledge, whether actual, imputed, or constructive, that the acquisition is facilitated by a breach of confidence, will therefore, be liable from the date of acquisition. Any unauthorized use of the information will render him liable to account for profits derived from that use, and further use will be restrained, in appropriate circumstances, by injunction.<sup>28</sup>

c. *Misuse [to the detriment of the confider]*

In *Lac Minerals*, the third element of the test was described by La Forest J. as follows:

In establishing a breach of a duty of confidence, the relevant question to be asked is, "what is the confidEE entitled to do with the information?" and not, "to what use he is prohibited from putting it?" Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidEE to show that the use to which he put the information is not a prohibited use ...<sup>29</sup>

This excerpt suggests a relatively low threshold in that any use, except for one that is expressly permitted, will amount to a misuse sufficient to sustain a claim of breach of confidence. Thus, the receipt of confidential information in circumstances of confidence establishes a positive duty on the confidEE not to use that information for any purpose other than for which the information was conveyed. Any use outside of these purposes may be considered a misuse.

It should be noted that there appears to be an open question, at least in Canadian law, as to whether or not the misuse of the confidential information must result in detriment to the confider. In *Lac Minerals*, La Forest J. did not explicitly include the requirement of detriment when he articulated the test.<sup>30</sup> However, in the same paragraph, he quoted the decision of Megarry J. in *Coco*, which stated that the third element of the test was "unauthorized use of that information to the detriment of the party communicating it."<sup>31</sup> Sopinka J., on the other hand, did not articulate his view of the elements of the cause of action for breach of confidence. He simply set out, in a summary way, how the lower courts addressed the elements of the test. He indicated that the question in the lower courts was: "Did Lac by acquiring the Williams property to the exclusion

28. *Ibid.* at para. 62.

29. *Supra* note 8 at para. 139.

30. *Ibid.* at para. 129.

31. *Ibid.*

of Corona misuse or make an unauthorized use of the information?"<sup>32</sup> This was under the heading for the third element of the test "Misuse of Information." However, Sopinka J. noted that the trial judge had found that Lac had made use of the information to the detriment of Corona.<sup>33</sup>

These differences have led the Canadian case law and commentary to develop such that it is uncertain whether or not it must be proven that the confider suffered detriment when the confidee misuses the confidential information. In *Cadbury Schweppes*, the Supreme Court of Canada noted this issue, but was not required to address it because the parties had agreed prior to trial that evidence concerning losses would be deferred to a post-trial reference. In Alberta, there have been conflicting cases considering whether or not detriment is a required element to make out the cause of action. In *Pharand*, it appears that proof of detriment was not required.<sup>34</sup> On the other hand, in *Ridgewood*, it appears that detriment was considered to be a required element.<sup>35</sup> In *Murphy*, Nation J. stated:

There have been divergent views expressed in the law as to whether detriment must be proven as a necessary element to establish a breach of confidence. Initial statements of the law, and the three part test, generally expressed the third element of unauthorized use of the confidential information to the detriment of the plaintiff.<sup>36</sup>

Nation J. proceeded to survey the case law and then continued:

The discussion about detriment may be somewhat academic, because in cases in which it cannot be shown, it will usually be unlikely that an action will be pursued ... In the context of the discussion about detriment, especially as it relates to remedy, courts have been clear that inferences may have to be drawn from the evidence as to what would likely have happened "but for" the breach.<sup>37</sup>

Nation J. avoided making a conclusive statement on the requirement for detriment to be proven and determined that in any event, if proof of detriment was required, there had been such detriment in that case.

Thus, it would appear to still be an open question as to whether or not detriment must be proven in order to make out the cause of action for breach of confidence. However, in light of Sopinka J.'s silence on the requirement, and La Forest J.'s reference to the test as set out by Megarry J.

32. *Ibid.* at para. 54.

33. *Ibid.* at para. 65.

34. *Supra* note 20 at 18.

35. *Supra* note 19 at paras. 20 & 24.

36. *Supra* note 26 at para. 106.

37. *Ibid.* at paras. 109-110.

in *Coco* (which included detriment as a requirement), the best view would appear to be that detriment must be proven in order to make out a breach of confidence. However, as Nation J. made clear in *Murphy*, inferences may have to be drawn from the evidence as to what would likely have happened "but for" the breach.

d. *Remedies*

In *Lac Minerals*, the majority of the Supreme Court found that but for the breach of confidence by Lac, Corona would have acquired the lands that Lac secured by the improper use of the confidential information.<sup>38</sup> The Court concluded that the most appropriate remedy in those circumstances was to impose a constructive trust over the lands in favour of Corona.<sup>39</sup> In *Cadbury Schweppes*, Binnie J. stated:

The result of *Lac Minerals* is to confirm jurisdiction in the courts in a breach of confidence action to grant a remedy dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations. See J.D. Davies, "Duties of Confidence and Loyalty", [1990] *Lloyd's Mar. & Com. L.Q.* 4, at p. 5:

There is much to be said for the majority view [in *Lac Minerals Ltd.*] that, if a ground of liability is established, then the remedy that follows should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization.<sup>40</sup>

Similarly, in *Murphy*, Nation J. concluded that it was likely that but for the misuse of confidential information by Predator, Murphy would have acquired the leases in question, and on this basis she concluded that the most appropriate remedy in the circumstances was a constructive trust.<sup>41</sup> She stated:

Generally, the cases about the misuse of confidential information, and breach of confidence, establish that if the wrongdoer acquires actual property that would otherwise have been acquired by the plaintiff, an *in rem* remedy such as a constructive trust may well be suited to right the wrong, especially if it directs the title of the property to the party in whose name it would have been "but for" the breach.<sup>42</sup>

38. *Supra* note 8 at paras. 121 & 198.

39. *Ibid.*

40. *Supra* note 6 at para. 24.

41. *Supra* note 26 at paras. 115 & 122.

42. *Ibid.* at para. 121.

Thus, with respect to crafting an appropriate remedy for a breach of confidence, courts will be free to consider all the circumstances and craft a remedy that fits those circumstances.

### 3. *Breach of fiduciary duty*

Traditionally, courts have found a party to be under a fiduciary obligation only where the relationship was one that fell into a closed category of relationships, such as principal/agent, trustee/beneficiary, or solicitor/client. However, the Supreme Court of Canada in *Guerin v. The Queen*<sup>43</sup> suggested that the categories of fiduciary relationships should not be closed in all cases. This was expanded upon in *Frame v. Smith*,<sup>44</sup> where the Supreme Court of Canada set out a test for determining when a relationship would be considered to be fiduciary in nature. Madam Justice Wilson (dissenting on other grounds) articulated a three-part test:

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>45</sup>

Madam Justice Wilson also reiterated that, generally speaking, commercial dealings at arm's length would not create fiduciary obligations:

Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arms-length ... The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.<sup>46</sup>

In *Lac Minerals*, the Supreme Court of Canada again considered whether or not a fiduciary duty existed between two arm's-length commercial parties, where a senior mining company used confidential information provided by a junior mining company in the context of joint venture negotiations in

43. [1984] 2 S.C.R. 335 [*Guerin*].

44. [1987] 2 S.C.R. 99 [*Frame*].

45. *Ibid.* at para. 60.

46. *Ibid.* at para. 63.



order to acquire a mining lease for its own benefit to the exclusion of the junior. In an awkwardly split decision, three of the five judges concluded that no fiduciary duty existed, but that the senior mining company had a duty of confidence in dealing with the information provided by the junior, and that it breached that duty.<sup>47</sup>

In *Cadbury Schweppes*, the Supreme Court again considered whether fiduciary obligations were owed by one contractual party to another in an arm's-length commercial situation. The Court again reinforced its view, as articulated in *Frame* and *Lac Minerals*, that the policy objectives underlying fiduciary obligations should not generally apply to sophisticated business entities dealing with each other at arms-length.<sup>48</sup>

Based upon the *Frame*, *Lac Minerals*, and *Cadbury Schweppes* trilogy of Supreme Court of Canada decisions, it now seems clear that, at least where two sophisticated commercial entities are dealing with each other at arm's-length, it will only be in extraordinary circumstances that a fiduciary duty is owed by one to the other. Thus, where seismic data is shared between parties in an arm's-length commercial context, the relationship will, in most circumstances, not attract fiduciary obligations.

This part of the paper has focused on the two main legal mechanisms to protect confidential seismic data from improper use or disclosure: contractual provisions and the common law duty of confidence. We first examined some of the provisions commonly encountered in contractual arrangements for the protection of confidential seismic data. We then examined the elements of the common law duty of confidentiality, and how this doctrine has developed in recent years. We also briefly touched upon the law of fiduciary duty and noted its apparent declining importance with respect to addressing misuse of confidential information. In the next part of this paper, we will examine the statutory regime governing the Canada-Newfoundland Offshore Board and the Canada Nova Scotia Offshore Board as it affects the balance between the private rights of the producers/owners of seismic data and the public responsibility to encourage the development of Canada's natural resources.

#### 4. Statute – east coast

In the continental shelf off the east coast of Canada, s. 119(2) of the *Canada-Newfoundland Atlantic Accord Implementation Act*<sup>49</sup> and s. 122(2) of the *Canada-Nova Scotia Offshore Petroleum Resources Accord*

47. *Supra* note 8 at paras. 38 & 111.

48. *Supra* note 6 at para. 30.

49. S.C. 1987, c. 3, as amended [*Newfoundland Accord Act*].

*Implementation Act*,<sup>50</sup> respectively, afford strong protection for the confidentiality of seismic data. The Nova Scotia section is as follows:

122(2) Subject to section 19 and this section, information or documentation provided for the purposes of this Part or Part III or any regulation made under either Part, whether or not such information or documentation is required to be provided under either Part or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.

Section 19 of the *Nova Scotia Accord Act* (s. 18 in the *Newfoundland Accord Act*) allows the federal and provincial ministers access to any information which the Canada-Nova Scotia Offshore Petroleum Board<sup>51</sup> has:

19(1) The federal Minister and the Provincial Minister are entitled to access to any information or documentation relating to petroleum resource activities in the offshore area that is provided for the purposes of this Act or any regulation made thereunder and such information or documentation shall, on the request of either Minister, be disclosed to that Minister without requiring the consent of the party who provided the information or documentation.

19(2) Section 122 applies, with such modifications as the circumstances require, in respect of any disclosure of information or documentation or the production or giving of evidence relating thereto by a Minister as if the references in that section to the administration or enforcement of a Part of this Act included references to the administration or enforcement of the Provincial Act or any Part thereof.

Section 122(5) of the *Nova Scotia Accord Act* (s. 119(5) in the *Newfoundland Accord Act*) provides an exception to the privilege and non-disclosure obligations set out in Section 122(2):

122(5) Subsection (2) does not apply to the following classes of information or documentation obtained as a result of carrying on a work or activity that is authorized under Part III, namely, information or documentation in respect of

50. S.C. 1988, c. 28, as amended [*Nova Scotia Accord Act*].

51. Hereinafter, the Canada-Nova Scotia Offshore Petroleum Board is referred to as the "Canada-Nova Scotia Board," and the Canada-Newfoundland Offshore Petroleum Board is referred to as the "Canada-Newfoundland Board," and collectively, they are referred to as the "Boards."

- (a) an exploratory well, where the information or documentation is obtained as a direct result of drilling the well and if two years have passed since the well termination date of that well;
- (b) a delineation well, where the information or documentation is obtained as a direct result of drilling the well and if the later of
  - (i) two years since the well termination date of the relevant exploratory well, and
  - (ii) ninety days since the well termination date of the delineation well, have passed;
- (c) a development well, where the information or documentation is obtained as a direct result of drilling the well and if the later of
  - (i) two years since the well termination date of the relevant exploration well, and
  - (ii) sixty days since the well termination date of the development well, have passed;
- (d) geological work or geophysical work performed on or in relation to any portion of the offshore area,
  - (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;
- (e) any engineering research or feasibility study or experimental project, including geotechnical work, carried out on or in relation to any portion of the offshore area,
  - (i) where it relates to a well and 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 research, study or project or after the reversion of that portion of the offshore area to Crown reserve areas, whichever occurs first;
- (f) any contingency plan formulated in respect of emergencies arising as a result of any work or activity authorized under Part III;

- (g) diving work, weather observation or the status of operational activities or of the development of or production from a pool or field;
- (g.1) accidents, incidents or petroleum spills, to the extent necessary to permit a person or body to produce and to distribute or publish a report for the administration of this Act in respect of the accident, incident or spill;
- (h) any study funded from an account established under subsection 76(1) of the *Canada Petroleum Resources Act*, if the study has been completed; and
- (i) an environmental study, other than a study referred to in paragraph (h),
  - (i) where it relates to a well and 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, if five years have passed since the completion of the study.

In summary, s. 122(2) protects all information and documentation submitted to the Nova Scotia Board pursuant to Parts II and III of the *Accord Acts* from disclosure. It provides that seismic data, seismic reports, well data, well reports, and other information provided to the Board pursuant to Parts II or III of the *Nova Scotia Accord Act* or regulations made thereunder “is privileged and shall not knowingly be disclosed” by the Board (or under s. 19 by either the provincial or federal Minister), without the consent of the provider of the information.

Section 122(5) limits the s. 122(2) protection. It provides that s. 122(2) does not apply to certain classes of information obtained as a result of carrying on an activity authorized under Part III of the Act after certain specified time periods have expired. Accordingly, when the Nova Scotia Board grants a work authorization to do work that results in the accumulation of data, it frequently includes a condition that certain data and other information required thereunder may be disclosed after the expiry of the relevant hold periods.

Section 122(2) of the *Nova Scotia Accord Act* and Section 119(2) of the *Newfoundland Accord Act* impose two restrictive terms on which the respective Boards must hold information provided to them pursuant to Parts II or III of the respective *Accord Acts*. The first restrictive term is that the information is privileged. “Privilege” is a term of art operating in

the litigation context. A party cannot be compelled to produce privileged information in the course of legal proceedings. Privilege from disclosure in litigation is usually granted if, and only if, the four conditions enunciated in *Wigmore on Evidence* are satisfied:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.<sup>52</sup>

The second restriction under s. 122(2) is that the information may not be disclosed. This non-disclosure obligation is general in nature and goes beyond the privilege obligation, which applies only in the litigation context. Under s. 122(5) both the privilege and non-disclosure obligations of the Board become inapplicable to specified information after specified periods of time.

The effect of s. 119(5) of the *Newfoundland Accord Act* was discussed in *Geophysical Service Inc. v. Canada-Nova Scotia Offshore Petroleum Board*,<sup>53</sup> where Gibson J. concluded that:

I am satisfied that it is beyond doubt that the seismic data provided by the Applicant to the Canada-Newfoundland Board was information or documentation provided for the purposes of Part II or Part III and thus fell within the ambit of the privilege provided by subsection 119(2) of the [*Newfoundland Accord*] Act. I am equally satisfied that, by virtue of paragraph 119(5)(d), and in particular subparagraph (ii) of paragraph (d), that privilege expired five (5) years following the date of completion of the seismic work to which the information or documentation related. Thus, on the expiration of that five (5) year period, it was entirely open to the Canada-Newfoundland Board to make such information or documentation available to a requester.<sup>54</sup>

The issue in *GSI* was whether the Canada-Nova Scotia Board, the Canada-Newfoundland Board and the National Energy Board were able to

52. See e.g. *Re Inquiry Into the Confidentiality of Health Records in Ontario* (1979), 98 D.L.R. (3d) 704 at para. 33; rev'd on other grounds [1981] 2 S.C.R. 494.

53. 2003 FCT 507, 26 C.P.R. (4th) 1990 [*GSI*].

54. *Ibid.* at para. 75.

withhold from a requestor the identity of organizations that had previously sought access to geophysical information under the *Access to Information Act*.<sup>55</sup> Accordingly, while the above statement by Gibson J. supports the proposition that ss. 122(2) and (5) of the *Nova Scotia Accord Act*, and ss. 119(2) and (5) of the *Newfoundland Accord Act* allow the Board to disclose information after the expiry of the privilege period, that conclusion was not central to the case and the decision did not expressly address the effect on the Canada-Nova Scotia Board's disclosure rights of: (i) copyright; (ii) the law of confidential information; (iii) the *Access to Information Act*;<sup>56</sup> or (iv) the *Freedom of Information and Protection of Privacy Act*.<sup>57</sup>

The practice of making available natural resource exploration and production data and other information after statutory hold periods is common in most Canadian jurisdictions.<sup>58</sup> The natural resource industry, and the oil and gas sector in particular, have been submitting exploration and other data to regulators for decades in the knowledge that it may be disclosed in accordance with applicable legislation.

The Board has followed the practice of disclosing hard copies of seismic data collected on paper tape (hereinafter referred to as Hard Copy Data) after the applicable hold periods, which reflects the first objective of the *Canada-Nova Scotia Offshore Petroleum Resources Accord*: to achieve the *early* development of petroleum resources in the offshore area.

From a policy perspective, there is clearly a balance of interests to be struck between the provider of data, which wants to reap the fullest private reward from its expertise, cost and effort in producing the data, and the governments of Canada, Nova Scotia and Newfoundland and Labrador, which want to encourage exploration of the offshore resource. That balance has been addressed statutorily by s. 122 of the *Nova Scotia Accord Act*, which gives the provider of the data certain periods of exclusivity during which that provider may take the absolute benefit of the information in whatever manner it chooses, but purports to relax that exclusivity thereafter. Some legislation that provides for the disclosure of seismic data does so more clearly than Section 122(5) by expressly permitting or mandating the disclosure of seismic data to any person requesting such disclosure after the expiry of the relevant hold period. Section 50(1) and (3)(d) of the predecessor to the current accord

55. R.S.C. 1985, c. A-1, as amended [ATIA].

56. *Ibid.*

57. S.N.S. 1993, c. 5, as amended [FOIPOP].

58. See *infra* note 67.

implementation legislation—the *Canada Oil and Gas Act*<sup>59</sup>—is an example of legislation that permits such disclosure:

50. (1) Information or documentation furnished under this Act or the *Oil and Gas Production and Conservation Act* is privileged and shall not knowingly 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;

Section 50 of the *Canada Oil and Gas Act* is very much like s.122(2) of the *Nova Scotia Accord Act*. The wording of s. 50(3), however, is different in that it expressly permits the disclosure of information. Section 122(5), on the other hand, simply provides that the privilege and non-disclosure requirements of Section 122(2) no longer apply after the hold period expires. By not expressly permitting the disclosure of information after the hold periods, the current legislation leaves open the applicability of copyright protection and the common law protection of confidential information to seismic data held by the Boards pursuant to Sections 119(2) and 122(2) respectively.

We turn, accordingly, to a consideration of the extent to which copyright and the common law protection of confidential information affect the disclosure provisions of s. 122. Then we discuss the impact of access to information and protection of privacy legislation on government's authority to disclose seismic information.

#### a. *Breach of copyright*

Under the *Copyright Act*,<sup>60</sup> copyright subsists in all original literary, dramatic, musical, and artistic work. Copyright protection, however, does not extend to data, ideas, or facts, but is limited to the expression thereof. To qualify as an original work, there must be some exercise of skill and

59. S.C. 1981, c. 1.

60. R.S.C. 1985, c. C-42.

judgment on the part of the author of the work. Therefore, raw data or information is not subject to protection, although a compilation of data or a report may be.<sup>61</sup>

The existence of copyright in processed, reprocessed, and finally processed seismic data must be determined in each case on its own merits. An argument may be made that the processing and reprocessing of the seismic data involves the application of skill and judgment in such manner as to attract copyright protection. Just running the data through a processing program will not convert the raw data into a copyrightable work. If, however, judgment is exercised in the selection of program variables, based perhaps on reviewing the effect of different processing techniques on certain portions of the data, then this process may constitute a sufficient application of skill and judgment to attract copyright.

With respect to information other than raw data, s. 25 of the *Canada-Nova Scotia Offshore Petroleum Geophysical Operations Regulations*<sup>62</sup> requires every operator to file a report within twelve months of the termination of a geophysical operation. The report contains a variety of documents including descriptions, summaries, maps, studies, and interpretations. To the extent that these documents require the use of skill and judgment in the analysis, organization, and compilation of data, they are protected and their disclosure would likely constitute a violation of the *Copyright Act*.

That portion of the information and documentation which does not constitute raw data may not, under copyright law therefore, be viewed by or disclosed to members of the public, as such viewing or disclosure would constitute publication prohibited under copyright law, unless s. 122(5) prevails in the manner suggested by Gibson J. in *GSJ*, or unless the provider of the information has consented to such viewing or disclosure.

An argument could be made that the long-term practice of Boards to disclose certain seismic data (e.g. Hard Copy Data) after the hold periods constitutes implied consent by the submitters to the disclosure of such data. This argument is somewhat strengthened when the Boards add a covering letter enclosing the work authorizations specifying that the information will be disclosed after those certain time periods. The implied consent argument is somewhat less persuasive in respect of forms of seismic data which the Boards have not traditionally disclosed and which are not

61. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339.

62. N.S. Reg. 191/95, s. 25.



specifically described as being subject to release in cover letters enclosing work authorizations.

b. *Breach of confidence*

As discussed above, in order to prove an action for breach of confidence, all three of the following tests must be met:

1. The information conveyed was confidential, i.e., having a quality of confidence about it;
2. The information was communicated in confidence, i.e., in circumstances in which it is reasonable to conclude that the information was imparted in confidence. No contract between the parties is necessary.
3. The information was misused or used in an unauthorized manner by the party to whom it was communicated.<sup>63</sup>

We examine these three elements in this statutory context where disclosure to the Boards constitutes a statutorily mandated disclosure.

Focusing on the first part of the test will help determine what will be considered "confidential information." In *Lac Minerals*, the Court cites Lord Greene in *Saltman Engineering Co. v. Campbell Engineering Co.*:

The information, to be confidential, must ... apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.<sup>64</sup>

Therefore, there are two types of confidential information. The first type includes information which is not public property and not public knowledge, and the second type includes information which is essentially work product, having a value-added component as a result of the process of the maker assembling the information into the work product.

The *Pharand Ski Corp.* test, discussed above, sets out the several factors which should be considered when determining whether information

63. *Supra* note 8 at para. 129.

64. *Ibid.* at para. 58, citing (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.).

has a confidential quality about it.<sup>65</sup> A review of these factors leads to the conclusion that the information provided to the Boards pursuant to Parts II and III of the *Accord Acts*, particularly the seismic information, is confidential information. Factors 3 through 6 listed above offer the strongest support that this type of information is confidential. It is a well known industry practice that the owners of seismic information take substantial measures to safeguard their information. As well, the information is valuable to competitors. This information could not easily be duplicated by others since this would require a work authorization and licence for that particular area. The first element to prove a breach of confidence would, therefore, likely be met.

The second element of the test is whether the information was communicated in confidence. The standard to be used is the "reasonable person test"; that is whether a reasonable person in the same circumstances would have concluded that the information was being imparted to the Board in confidence. This will be a question of fact. For example, in *Coco*, the Court stated: "However secret and confidential the information, there can be no binding obligation of confidence for information that is blurted out in public or is communicated in other circumstances which negative a duty of holding it confidential."<sup>66</sup>

In addition to the Offshore Boards' practices, many Canadian laws in many Canadian jurisdictions provide for the disclosure of exploration information by government agencies under certain conditions, usually specified time periods or upon the authorization of the government.<sup>67</sup>

As stated by Mungo Hardwicke-Brown:

Confidential information can enter the public domain in three ways:

- (1) ...
- (2) disclosure pursuant to applicable law;

65. See *Pharand*, *supra* note 20 at 246. 1) The extent to which the information is known outside the owner's business; 2) The extent to which it is known by employees and others involved in the owner's business; 3) The extent of measures taken by him to guard the secrecy of the information; 4) The value of the information to him and his competitors; 5) The amount of money or effort expended by him in developing the information; 6) The ease or difficulty with which the information could be properly acquired or duplicated by others (i.e., by their independent endeavours).

66. *Supra* note 23 at 47-48.

67. These laws include *Nova Scotia's Petroleum Resources Act*, R.S.N.S. 1989, c. 342, as amended; *Mineral Resources Act*, S.N.S. 1990, c. 18, as amended; *Prince Edward Island's Oil and Natural Gas Act*, R.S.P.E.I. 1988, c. O-5; *British Columbia's Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361; *Alberta's Oil and Gas Conservation Regulations*, Alta. Reg. 151/1971; *Newfoundland Accord Act*, *supra* note 49; *Canada Petroleum Resources Act*, R.S.C. 1985 (2<sup>nd</sup> Supp.), c. 36.

(3) ....

In the context of oil and gas exploration and development, information that is in the public domain includes information released by the Alberta Energy and Utilities Board (AEUB) pursuant to the *Oil and Gas Conservation Regulations*.<sup>68</sup>

To the extent, then, that the Offshore Boards have lawfully disclosed seismic information, the quality of confidentiality in that information is lost.

The Boards are, within the scope of offshore accord legislation, the regulators of the resource on behalf of the owner of the resource. The rules for participating in the exploration and development of that resource are set out in the *Accord Acts*, and one of the conditions to which industry submits in order to participate in that resource is the partial relinquishment of the privilege and non-disclosure protections of s. 122(2) (Nova Scotia) or s. 119(2) (Newfoundland and Labrador) pursuant to the hold period expiration provisions of s. 122(5) (Nova Scotia) and s. 119(5) (Newfoundland and Labrador).

Moreover, the "Canada-Nova Scotia Offshore Petroleum Board Geophysical and Geological Programs in the Nova Scotia Offshore Area Guidelines for Work Programs, Authorizations & Reports" created in 1992, and mirrored in the Newfoundland and Labrador context, states under section 9 entitled "Confidentiality":

Exclusive geophysical and geological reports, maps, data and other materials are kept confidential for 5 1/2 years after termination of the field work.

Non-Exclusive or Speculative geophysical data, reports and maps will be kept confidential for at least ten years from the completion of the field work.

For site survey information, the geological and geophysical data, report and materials will be kept confidential for the same period of time as information for the well over which the site investigation was conducted. Where a well is not drilled, the period of confidentiality for the report and data will be five and one-half years from the date of completion of the field work.

Reports and data are made available to the public at the termination of relevant confidentiality periods.

During the confidentiality period, the Chief Conservation Officer may

68. Hardwicke-Brown, *supra* note 12 at 370.

inform other operators in the area if a relevant hazard is detected by a site survey.<sup>69</sup>

The *Guidelines* were created to clarify and standardize the program authorization and reporting requirements for geological and geophysical exploratory work and seabed surveys conducted in offshore Nova Scotia. The Board's practice has been to disclose Hard Copy Data after the expiry of the hold periods set out in the *Guidelines*.

In certain instances (and it is, we understand, now the standard practice), the Geophysical/Geological Work Authorizations granted by the Nova Scotia Board contain a condition similar to the following:

Exclusive geophysical and geological reports, maps and data and other materials will be kept confidential for five and one half years after termination of the field work. Non-exclusive or speculative geophysical and geological data, reports and maps will be kept confidential for at least ten years from the completion of the field work. Hard copy of data, report and maps will be made available for public disclosure at the termination of the relevant confidentiality periods.

The Offshore Boards' policy on disclosure of Hard Copy Data after the expiry of the relevant hold period is well-known to those participating in the offshore oil and gas industry. Clearly, there is an expectation of confidentiality during the relevant hold period. However, after the expiration of such hold period, there can be no reasonable expectation of confidentiality with respect to Hard Copy Data because of the Boards' long-standing practice, and the express indication in the cover letter enclosing the work authorization that such data will be disclosed after the expiry of the relevant hold period. Thus, in these circumstances, the second element of the test for breach of confidence would likely not be met.

The third element of the test for breach of confidence is whether the information is misused. As noted above, any use that is not a permitted use is prohibited and amounts to a breach of the duty of confidentiality.<sup>70</sup>

Given the conclusion above as to the second element of the test in respect of Hard Copy Data, it is not necessary to explore the third element

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69. Canada-Nova Scotia Offshore Petroleum Board, "Geophysical and Geological Programs in the Nova Scotia Offshore Area Guidelines for Work Programs, Authorizations & Reports" (1992) at s. 9 [*Guidelines*].

70. See *supra* note 8 and accompanying text.

of the test. Accordingly, the disclosure by the Boards of Hard Copy Data after the hold periods will likely not constitute a breach of confidence.<sup>71</sup>

c. *Access to Information Act*

The *Access to Information Act* (*ATIA*) applies to "government institutions" as set out in s. 4:

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.<sup>72</sup>

Government institutions are those bodies included in Schedule I to the *ATIA*. Schedule I includes the Canada-Nova Scotia Offshore Petroleum Board and the Canada-Newfoundland and Labrador Offshore Petroleum Board. Therefore the *ATIA* applies generally to these Boards.

The purpose of the *ATIA* is set forth in s. 2:

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

It is important to note that s. 2(2) is clear that the intent of the *ATIA* is not to define the sole parameters through which a government institution

71. Trade secrets are sometimes discussed in the context of confidentiality of information. The term "trade secret" has two general meanings. One is as a synonym for confidential or proprietary information, in which case the analysis herein applies equally to trade secrets as to confidential information. The other meaning of trade secret is a reference to confidential plans, processes, tools, mechanisms or formulae. We do not think any information or documentation provided under Part II or III of the Offshore Accord Acts constitutes a trade secret within that second meaning.

72. *Supra* note 55.

can disclose information. On the contrary, it is to complement other mechanisms for the disclosure of information.

The *ATIA* also contains the following provision:

24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

Schedule II includes, among other references, references to ss. 19 and 122 of the *Nova Scotia Accord Act* and to s. 119 (but oddly not to s. 18) of the *Newfoundland Accord Act*. The effect of s. 24 of the *ATIA* is to render any information that is inaccessible under ss. 19 and 122 of the *Nova Scotia Accord Act* or s. 119 of the *Newfoundland Accord Act* inaccessible under the *ATIA*. Section 24 therefore reinforces the privilege and non-disclosure provisions of s. 119(2) (*Newfoundland Accord Act*) and s. 122(2) (*Nova Scotia Accord Act*), but has no application after the expiry of the s. 122(5) and s. 119(5) time periods.

Section 20 of the *ATIA* makes it mandatory for the head of a government institution to refuse to disclose certain classes of information when they are requested under the *ATIA*:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record *requested under this Act* that contains

- (a) trade secrets of a third party;
- (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party; ...
- (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
- (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.<sup>73</sup>

The purpose of the *ATIA* is to add an additional avenue for access to government information for those circumstances where—absent the *ATIA*—there might not be any right of access. If the *ATIA* were the only avenue to

73. *Ibid.* [emphasis added].

gain access to seismic data, then s. 20(1) would act to bar that disclosure to the extent that it fell into one of the categories set out therein. However, s. 20(1) does not create a free-standing obligation to keep information confidential in a context other than an application for access to information under the *ATIA*.

The *ATIA* is not required to gain access to Hard Copy Data as the Board regularly discloses such information after the expiry of the relevant hold periods, and s. 20(1) would not apply to restrict disclosure of such data. With respect to Digital Data, an application could be made under the *ATIA* for access to such information after the expiry of the relevant hold periods because this data is not usually disclosed by the Boards. In these circumstances, the Boards may look to s. 20(1) and refuse to grant access to such Digital Data on one of the grounds set therein.

d. *Freedom of Information and Protection of Privacy Legislation*

Some proponents of more severe restrictions on government disclosure of seismic data may seek to rely not only on the *ATIA*, but also on provincial freedom of information legislation in support of their position.

The *Freedom of Information and Protection of Privacy Act (FOIPOP)*<sup>74</sup> sets out its application in s. 4:

4 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records.

Whether an organization is a public body depends upon the definition of "public body" in s. 3(1) of *FOIPOP*:

j) "public body" means

(i) a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, *all the members of which* or all the members of the board of management or board of directors of which

(A) *are appointed by order of the Governor in Council, or*

(B) *if not so appointed, in the discharge of their duties are public officers or servants of the Crown,*

and includes, for greater certainty, each body referred to in the Schedule to this Act ....<sup>75</sup>

74. *Supra* note 57.

75. *Ibid.* [emphasis added].

The Nova Scotia Offshore Petroleum Board is not listed in the Schedule to *FOIPOP*. Whether this Board is a public body for the purposes of *FOIPOP*, therefore, depends upon the constitution of the Board and whether it fits within the above definition of "public body."

The Board is appointed in the manner contemplated in s. 10 of the *Nova Scotia Accord Act*. This section provides that the Board is comprised of five persons, including the four "regular members," two of whom are appointed by either the federal or provincial governments. They may be jointly appointed by the provincial and the federal governments under s. 10(4), but this has not been the practice. It is our conclusion that *all* the members of the Board are not necessarily appointed by order of the Governor in Council (though that may be possible under s. 10(4)).

Under s. 11(2) of the *FOIPOP* not more than two members of the Board may be public servants and not more than one may be appointed by each government. The members of the Board, therefore, are independent of both governments (in accord with s. 2.02 of the *Canada-Nova Scotia Offshore Petroleum Resources Accord*), do not carry out their functions as public officers or servants of the Provincial Crown, and, in fact, two of them cannot be public servants in either government.

Consequently, the Nova Scotia Offshore Petroleum Board does not fit within the definition of "public body" and *FOIPOP* is not applicable to it.

### III. Conclusion

There are conflicting values which the confidentiality and disclosure provisions of the Offshore Accord legislation try to balance. Industry promotes the confidentiality of seismic data as a normal right of ownership. Industry supports the position that non-consensual disclosure will discourage seismic work and thus diminish knowledge of and interest in (and ultimately the exploration of) the offshore area. Governments, on the other hand, as owners of the resource which is the subject of seismic exploration, want to enhance the value of their resource by disseminating information about its hydrocarbon potential.

If the level of discontent of the government in the confidentiality provisions is approximately equal to the level of discontent of industry in the disclosure provisions, one might assume that the balance struck by the legislation is not an unreasonable one, though an amendment to clarify the relationship between the provisions of the Offshore Accord legislation, the *Copyright Act* and the common law of confidentiality would be helpful.



Finally, it is submitted that federal access to information legislation and provincial privacy legislation are a bit of a red herring:

1. The *Access to Information Act* only applies to requests made under that act and does not attempt to alter any information release/confidentiality provisions of any other act. It does not, therefore, interfere with the privilege and disclosure provisions of s. 122 of the *Nova Scotia Accord Act* or s. 119 of the *Newfoundland Accord Act*.

2. The *Freedom of Information and Protection of Privacy Act* does not apply because the Nova Scotia Offshore Petroleum Board is not a "public body" thereunder.

#### IV. *Addendum: Update on digital data disclosure*

Technological advances in collecting, storing and using the seismic data have created an issue beyond the scope of this paper. Digital seismic data is considerably more easily manipulated and considerably more valuable than Hard Copy Data and the issue is the extent to which this altered state of the data may modify the discussions and conclusions presented above.

Industry and the regulators are in the midst of negotiations. The Nova Scotia Offshore Board has asked industry, other government agencies and research institution representatives for comment on the appropriate parameters of disclosure of digital data. That input has been received; it includes the following three-part proposal from the Canadian Association of Petroleum Producers (C.A.P.P.):

1. Industry would grant a free licence to the regulators for the unrestricted internal use of digital processed data in connection with their resource management activities. This data would remain copyright protected and disclosure to third parties would be prohibited.

2. Industry would make "paper equivalent" electronic documents available through free, limited use licences to allow the Board to disclose such information after the expiry of the privilege and non-disclosure periods set out in section 122.

3. Bona fide, not-for-profit research and educational institutions which sign appropriate confidentiality agreements would be able to obtain free data licences from the data owner.

While the C.A.P.P. proposal appears to represent a workable middle ground, no resolution has been reached as of April 2008.