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April 18, 2019

DELIVERED BY COURIER AND EMAIL

Email: Nathalie.g.drouin@justice.gc.ca

Office of the Deputy Minister of Justice and Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
Canada

Dear Madam:

Re: Claim by the Investors of Geophysical Service Inc. ("GSI") under the North American Free Trade Agreement ("NAFTA")

We have the pleasure of acting as counsel for Theodore David Einarsson, Harold Paul Einarsson and Russell John Einarsson, the investors of GSI. With this letter, we are serving you with their Notice of Arbitration pursuant to Chapter 11 of the North American Free Trade Agreement.

Finally, we will be seeking documentation production from you relating to the measures at issue in this matter. We request that you take steps to preserve all relevant and necessary materials pending an order by any possible Tribunal hearing in this matter.

Yours truly,

BORDEN LADNER GERVAIS LLP

A handwritten signature in blue ink, appearing to read 'Matti', is written over the printed name of the sender.

Per: Matti Lemmens

Enc.

cc shane.spelliscy@international.gc.ca
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NOTICE OF ARBITRATION
UNDER THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON and RUSSELL
JOHN EINARSSON
Disputing Investors

-and-

on behalf of
GEOPHYSICAL SERVICE INCORPORATED
Enterprise

-and-

THE GOVERNMENT OF CANADA
Party

April 18, 2019

A. DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

1. Pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (the “UNCITRAL Arbitration Rules”) and Articles 1116, 1117 and 1120 of the North American Free Trade Agreement (“NAFTA”), the Claimants THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON and RUSSELL JOHN EINARSSON, on their own behalf and on behalf of the enterprise, GEOPHYSICAL SERVICE INCORPORATED (“GSI”), hereby demand and initiate arbitration against the Respondent, the Government of Canada (“Canada”).
2. Pursuant to Article 1119 of the NAFTA, the Claimants delivered a Notice of Intent to Submit a Claim to Arbitration to Canada on October 15, 2018, more than ninety days prior to the submission of this claim.
3. Pursuant to Article 1121 of the NAFTA, the Claimants and GSI consent to arbitration in accordance with the procedures set out in the NAFTA. The Claimants and GSI hereby waive their rights to initiate or continue before any administrative tribunal or any court, or any other dispute settlement procedures, any proceedings with respect to the measures outlined herein, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving payment of damages, before an administrative tribunal or court under the laws of Canada. The executed consents and waivers of the Claimants and GSI are attached to this Notice of Arbitration.

B. NAMES AND ADDRESSES OF THE PARTIES

4. The Claimants are:

Theodore David Einarsson
2115, 24001 Cinco Village Center Blvd.
Katy, TX 77494
United States of America

Harold Paul Einarsson
403, 655 India Street
San Diego, CA 92101
United States of America

Russell John Einarsson
27103 Skiers Crossing Drive
Katy, TX 77493
United States of America

5. The Government of Canada is a Party to this arbitration. It is represented by:

Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
Canada

C. ARBITRATION CLAUSE OR SEPARATE ARBITRATION AGREEMENT INVOKED

6. The Claimants invoke Section B of Chapter 11 of the NAFTA, and specifically Articles 1116, 1117, 1120 and 1122 of the NAFTA, as authority for this arbitration.

D. CONTRACT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

7. The dispute arises in relation to the Claimants' investment in Canada and the damages that the Claimants and GSI have suffered from Canada's breach of its obligations under Section A of Chapter 11 of the NAFTA.

E. GENERAL NATURE OF THE CLAIM AND AMOUNT INVOLVED

8. This claim arises out of Canada's breaches of its international legal obligations with respect to its handling of proprietary marine seismic data (the "Seismic Data") owned by GSI. The Seismic Data had been created and otherwise acquired by GSI over many years. By its unlawful conduct, Canada confiscated the intellectual property rights in the Seismic Data and effectively destroyed GSI's business.
9. GSI is a company organized under the *Canada Business Corporations Act*, with its registered office in Calgary, Alberta. It is owned solely by Theodore David Einarsson and Harold Paul Einarsson.
10. For approximately 50 years, GSI and its predecessor companies created, licensed, stored, processed and reprocessed the Seismic Data, principally for use in oil and gas exploration

in the Canadian offshore. For much of its existence, GSI's business was highly lucrative and employed over 250 employees over the course of its operations.

11. Creating marine seismic data is a capital-intensive and time-consuming process. It requires significant investment in order to produce final works, which are, in turn, extremely valuable. Seismic surveys cost millions of dollars to create and are closely guarded trade secrets governed by strict licensing agreements relating to the confidentiality and reproduction of the data. In this instance, the estimated costs expended to create the Seismic Data are approximately USD\$781,000,000, with estimated outstanding returns from existing license agreements with third parties for the Seismic Data worth approximately USD\$2,529,000,000.
12. The Seismic Data is, and was, entitled to protections under Canadian and international law as copyright works and trade secrets.
13. GSI and its predecessors were required for many years to submit to the Canadian Government the Seismic Data and related confidential, commercial information, pursuant to various regulations, including:
 - a. the Canada Oil and Gas Land Regulations, SOR 61-253, under the *Territorial Lands Act*, RSC 1952, c 263, as amended;
 - b. the Canada Oil and Gas Geophysical Operations Regulation, SOR/96-117, under the *Canada Oil and Gas Operations Act*, RSC 1985, c O-7;
 - c. the Newfoundland Offshore Area Petroleum Geophysical Operations Regulations, SOR 95-334, under the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3, as amended, and mirror legislation; and
 - d. the Nova Scotia Offshore Petroleum Geophysical Operations Regulations, NS Reg 191/95, under the *Canada-Nova Scotia Offshore Atlantic Accord Implementation Act*, SC 1988, c 28, as amended, and mirror legislation(collectively, the “Submission Legislation”).

14. The Seismic Data submitted was routinely in the form of “final reports”, authored by employees of GSI and its predecessors to include each data set created. GSI has expended extensive efforts and expense to create and otherwise acquire those final reports. But for the Submission Legislation and various representations made to the Claimants by Canada, GSI and its predecessors would not have provided the Seismic Data to Canada.
15. GSI and its licensees have reprocessed the Seismic Data multiple times since it was created and obtained. These reprocessed versions of the Seismic Data and derivatives of the Seismic Data have also been submitted to Canada by GSI’s licensees without compensation to GSI.
16. There are a number of statutory provisions governing the privilege afforded to offshore seismic data in Canada, including provisions pursuant to:
 - a. the *Canada Oil and Gas Land Regulations*, SOR 61-253, under the *Territorial Lands Act*, RSC 1952, c 263, as amended;
 - b. the *Canada Oil and Gas Act*, SC 1981, c 81, as amended;
 - c. the *Canada Petroleum Resources Act*, RSC 1986, c C-36 (2nd Supp), as amended (“CPRA”);
 - d. the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3, as amended, and mirror legislation;
 - e. the *Canada Nova Scotia Offshore Atlantic Accord Implementation Act*, SC 1988, c 28, as amended, and mirror legislation; and
 - f. any legislation implementing the Accord between the Government of Canada and the Government of Quebec for the shared management of the petroleum resources in the Gulf of St. Lawrence

(collectively, the “Privilege Provisions”).

17. Under the purported authority of the Privilege Provisions, to the best of the Claimants' knowledge, and within the knowledge of Canada, portions of the Seismic Data have been transferred and disclosed to third parties in Canada from time to time without the consent of, or notice to, GSI or the Claimants and will likely continue to be transferred and disclosed in the future. Further, Canada's position on the formats of the Seismic Data that Canada has requested from GSI and its predecessors has been unilaterally and significantly expanded by Canada over time. It is unknown to GSI what of the Seismic Data, including what formats, are disclosed to third parties.
18. It is GSI's understanding that Canada's retention of records of its disclosure of the Seismic Data has been inconsistent, and Canada has recently stopped creating or retaining any records regarding disclosure, coinciding with GSI's requests to Canada for production of such information. It appears that Canada has intentionally concealed the disclosure from GSI and the Claimants.
19. Canada's unilateral disclosure of the Seismic Data to third parties and denial of recourse for such disclosure violates the protections afforded to copyrighted works and trade secrets under Canadian and international law. As the Seismic Data are copyrighted works, Canada is obliged to protect those copyrights in accordance with the *Copyright Act*¹ and Canada's international obligations, including those under the *Berne Convention for the Protection of Literary and Artistic Works*,² ("Berne Convention") and Article 1701 of the NAFTA for, at a minimum, the life of the author plus fifty years after his or her death. Canada's disclosure also violated GSI's rights, and Canada's obligations under Articles 9, 8 and 12 of the *Berne Convention*, which provide authors (or owners) the exclusive right to authorize reproduction of their copyright works, translations of their copyright works, and adaptations or alterations of their copyright works. Moreover, the disclosure of GSI's trade secrets violated Canada's obligations under domestic common law and international law, including Article 1711 of the NAFTA, which require Canada to protect those trade secrets for an unlimited duration.

¹ RSC 1985, c C-42.

² 9 September 1886, UNTS 828 at 221.

20. GSI has attempted to challenge the infringement of its copyright and trade secret protections, without success. In a decision by the Alberta Court of Queen's Bench, which was upheld by the Alberta Court of Appeal (collectively the "Alberta Decisions")³ and for which leave to appeal to the Supreme Court of Canada was refused,⁴ the courts determined that the *CPRA* overrode the *Copyright Act*. By such determination, the Canadian Courts eliminated GSI's recourse to protect its copyright in, and the confidentiality of, the Seismic Data. In line with that determination, the Canadian Courts held that, pursuant to the Privilege Provisions, the proprietary knowledge in the Seismic Data is transferable and disclosable by Canada to third parties, including, oil and gas companies, competitors of GSI, researchers and the general public, after a "privilege" period expires, which period is unilaterally determined by Canada.
21. The minimum "privilege period" under the *CPRA* is five years. Canada has not honoured the applicable term of copyright protection granted to copyright works of "life plus 50 years" to which the Seismic Data is entitled under Canada's international obligations.
22. The Alberta Decisions effectively changed the term of protection afforded to GSI as a copyright and trade secret holder in the Seismic Data to a mere five years, contrary to Canada's international obligations.
23. In the words of the Alberta Courts, the *CPRA* is confiscatory,⁵ as "GSI's exclusivity to its seismic data ends, for all purposes including the *Copyright Act*, at the expiry of the mandated privilege period"⁶ and that the *CPRA* "confiscated the seismic data created over the offshore and frontier lands".⁷
24. Moreover, the Alberta Decisions have enabled GSI's licensees' to violate the terms of their licensing agreements with GSI related to the Seismic Data and have deprived GSI of legal recourse for those violations. For example, the Alberta Decisions have been relied upon

³ *Geophysical Service Incorporated v. Encana Corporation*, 2016 ABQB 230 (the "QB Decision") and *Geophysical Service Incorporated v. Encana Corporation*, 2017 ABCA 125 (the "CA Decision").

⁴ 2017 SCC 37634.

⁵ *CA Decision*, *supra* at para 106.

⁶ *CA Decision*, *supra* at para 104.

⁷ *QB Decision*, *supra* at para 322.

by subsequent domestic court decisions to declare that the Seismic Data is now available for free from the Canadian Government regardless of any contractual provisions with GSI's licensees that provide otherwise.⁸

25. As a result, none of GSI's licensees are abiding by their licensing agreements and GSI is no longer able to collect the associated licensing fees due to it under those agreements.
26. The violations of Canada's international obligations for the protection of intellectual property as a result of the Alberta Decisions have been exacerbated by Canada's extensive record of concealing the disclosure from GSI when they attempted to discover whether, to whom, and to what extent, the Government of Canada and the Governments of the Provinces of Newfoundland and Labrador and Nova Scotia were improperly disclosing the Seismic Data. Those Governments have avoided responding to legitimate requests for such information from GSI. This conduct included misleading representations and apparently deliberate material omissions to the Claimants, GSI and its predecessors.⁹ Canada's bad faith conduct will be described in detail during the course of this arbitration.
27. The result of Canada's conduct is that GSI is effectively out of business as it is unable to market the Seismic Data now that it is otherwise available for free from the Canadian Government. GSI has lost its ability to collect significant revenues from licensing the Seismic Data and, in turn, its ability to finance its other operations in acquisition and processing seismic data. It has laid off its workforce. This once lucrative business was destroyed when its intellectual property rights were confiscated and its recourse to protect them was denied.

F. THE BREACHES OF CHAPTER 11 OF THE NAFTA

28. As a result of the measures and conduct described above, Canada has breached its obligations under Chapter 11 of the NAFTA, including:

⁸ *Geophysical Service Incorporated v Murphy Oil Company Ltd*, 2017 ABQB 464, at paras 12, 60, 68; aff'd 2018 ABCA 380.

⁹ At all relevant times, including prior to the creation of the CNLOPB and CNSOPB, the Provinces of Newfoundland and Labrador and Nova Scotia, and the Canadian Government coordinated their practices with respect to seismic data and made the same representations to the Claimants and their predecessors.

a. Article 1105 – International Law Standards of Treatment

Canada and the Governments of Newfoundland and Labrador and Nova Scotia, have concealed from the Claimants and GSI, and misrepresented, the extent of their disclosures of the Seismic Data, contrary to Canada's obligation in Article 1105 of the NAFTA to accord fair and equitable treatment to investors and their investments.

b. Article 1106 – Performance Requirements

The Alberta Decisions establish and enforce a system by which Canada imposes upon the Claimants and GSI a requirement to transfer proprietary knowledge to third parties in Canada to develop Canada's offshore oil and gas industry, contrary to Article 1106(1)(f) of the NAFTA.

c. Article 1110 – Expropriation

The Alberta Decisions have deprived GSI of the copyright and trade secret protections to which GSI was entitled with respect to the Seismic Data, and which the Claimants legitimately expected Canada to provide and, as a result, have deprived GSI of substantially all of its value and the Claimants of substantially all of the value of their investment, without compensation, contrary to Article 1110 of the NAFTA.

G. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED

29. The Claimants claim:

- a. Damages of not less than USD\$2,529,000,000 as compensation for the direct and indirect damages caused by or arising out of Canada's measures that are contrary to its obligations contained in Part A of Chapter 11 of the NAFTA;
- b. Costs associated with these proceedings, including all professional fees and disbursements, including the fees of the arbitral tribunal and any other arbitral costs;
- c. Pre-award and post-award interest;

- d. Tax consequences of the award to maintain the integrity of the award; and
- e. Such further relief that counsel may advise and that this Tribunal may deem appropriate.

H. NUMBER AND APPOINTMENT OF ARBITRATORS

- 30. Pursuant to Article 1123 of the NAFTA, the Claimants propose that this dispute shall be decided by three arbitrators, with one arbitrator appointed by each of the disputing parties. The Claimants propose that the third (presiding) arbitrator be appointed by agreement of the disputing parties, or failing such agreement, by the two-party appointed arbitrators.

BORDEN LADNER GERVAIS LLP



MATTI LEMMENS
MATTHEW KRONBY
CRAIG CHIASSON
Counsel for the Claimants

SERVED ON:

Office of the Deputy Minister of Justice and Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
Canada

Nathalie G. Drouin
The Deputy Minister of Justice and Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

CONSENT AND WAIVER

Theodore David Einarsson, Harold Paul Einarsson and Russell John Einarsson, on their own behalves and on behalf of Geophysical Service Incorporated, pursuant to Article 1121(1)(a) of the North American Free Trade Agreement (“NAFTA”), hereby consents to arbitration in accordance with the procedures set out in NAFTA and under the UNCITAL Arbitration Rules.

Pursuant to Article 1121(1) (b) of NAFTA, Theodore David Einarsson, Harold Paul Einarsson and Russell John Einarsson, on their own behalves and on behalf of Geophysical Service Incorporated, hereby waive their right to initiate or continue before any administrative tribunal or court under the laws of any Party, or other dispute settlement procedures, any proceedings with respect to the measures of the Government of Canada which Theodore David Einarsson, Harold Paul Einarsson and Russell John Einarsson, on their own behalves and on behalf of Geophysical Service Incorporated allege to be breaches of NAFTA obligations referred to in Article 1116 and 1117, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of Canada.

Dated this 3rd day of APRIL, 2019.



Theodore David Einarsson

Harold Paul Einarsson



Russell John Einarsson

Geophysical Service Incorporated

Per: _____
Harold Paul Einarsson

Nathalie G. Drouin
The Deputy Minister of Justice and Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8


CONSENT AND WAIVER

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Dated this 3 day of April, 2019.

Theodore David Einarsson



Harold Paul Einarsson

Russell John Einarsson

Geophysical Service Incorporated

Per: 

Harold Paul Einarsson