

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20111215**

**Dockets: A-474-10  
A-296-10  
A-297-10  
A-340-10**

**Citation: 2011 FCA 360**

**CORAM: BLAIS C.J.  
EVANS J.A.  
LAYDEN-STEVENSON J.A.**

**Docket: A-474-10**

**BETWEEN:**

**GEOPHYSICAL SERVICE INCORPORATED**

**Appellant**

**and**

**NATIONAL ENERGY BOARD**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondents**

**and**

**THE ATTORNEY GENERAL OF NOVA SCOTIA**

**Intervener**

**Dockets: A-296-10  
A-297-10  
A-340-10**

**AND BETWEEN:**

**GEOPHYSICAL SERVICE INCORPORATED**

**Applicant**

**and**

**NATIONAL ENERGY BOARD  
and  
THE ATTORNEY GENERAL OF CANADA**

**Respondents**

Heard at Calgary, Alberta, on December 15, 2011.

Judgment delivered from the Bench at Calgary, Alberta, on December 15, 2011.

REASONS FOR JUDGMENT OF THE COURT:

EVANS J.A.

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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Ottawa, Ontario, on December 15, 2011)**

**EVANS J.A.**

[1] At issue in these proceedings are three letters written in May, July and August 2010 on behalf of the National Energy Board (NEB) in response to correspondence from Geophysical Service Incorporated (GSI). The letters set out the NEB's understanding of the law relating to the period for which it must keep confidential geophysical data that GSI was required to submit to the NEB pursuant to the terms on which it had authorized GSI to conduct a non-exclusive marine seismic survey in the Northern Labrador Sea in 2008.

[2] The letters state that the NEB is bound by the *Canadian Petroleum Resources Act*, R.S.C. 1985, c. 36 (2nd Supp.), subparagraph 101(7)(d)(ii) (CPRA) not to disclose for five years the information filed by GSI, and that a policy initiated by Indian and Northern Affairs Canada (INAC), and adopted by the NEB, requires that the information be kept confidential for another ten years. Consequently, the information at issue could not be published until 2023. The letters also state that it is the policy of the Board to disclose to the public the kind of information submitted by GSI, after the expiry of the fifteen-year period. These provisions have been in place for many years.

[3] NEB explained to GSI the rationale for this delay in the disclosure of non-exclusive seismic data: to strike a balance between the public interest in the development and exploration of

frontier lands, and explorers' interest in protecting the confidentiality of the commercially sensitive data that they had collected. The NEB stated that it was not persuaded that it was appropriate to modify the current policy on disclosure.

[4] The letters were written in the course of a series of meetings and communications in which NEB staff urged GSI to discharge its reporting obligations, and GSI sought undertakings from the NEB that it would keep the information confidential for longer than the total of fifteen years prescribed by the CPRA and the INAC policy.

[5] GSI took the position that the fifteen-year period of confidentiality does not supersede the protections provided by private law: the *Copyright Act* and the law respecting confidential information, in particular. Unable to persuade the NEB to its view of the law, GSI commenced the present proceedings in this Court (an appeal and three applications for judicial review), in order to challenge the view of the law and policy expressed in the letters written on behalf of the NEB.

[6] We are all of the opinion that GSI's appeal and applications for judicial review should be dismissed on the ground that they are premature. Since the NEB is currently required to keep GSI's information confidential until 2023, and has no intention of disclosing it earlier (assuming no change in the law), the issues raised by GSI are not yet ripe for decision.

[7] Prematurity is a well established basis on which courts may exercise their discretion to refuse to grant relief on an application for judicial review: see Donald J.M. Brown and John M.

Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing Inc., 2011), 3-62 and following.

[8] While not generally regarded as discretionary in the same way as applications for judicial review, appeals may also be dismissed for prematurity because, among other reasons, the issue raised is not ripe for decision: Donald J.M. Brown, *Civil Appeals*, looseleaf (Toronto: Canvasback Publishing Inc., 2011), 5-21 and following.

[9] The public interests in both the conservation of scarce judicial resources and judicial restraint militate against the courts unnecessarily deciding legal questions when legal rights and other protected interests have not been infringed and are not likely to be in peril in the near future. Moreover, since it is impossible to know now what the relevant law and policy will be in 2023 (or closer thereto), or what the NEB's position may then be, it is difficult to see what useful purpose could be served by the Court's answering the questions put to it by GSI in these proceedings.

[10] Whether the NEB is obliged to refrain from disclosing the information for some further period is also purely hypothetical, and for the reasons set out above, courts are also reluctant to answer hypothetical questions: *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136 at paras. 109-110.

[11] That a ruling on the substantive issues raised in the appeal and the applications for judicial review may be useful to GSI in the action that it has commenced in the Alberta Court of Queen's

Bench with respect to other data does not warrant a positive exercise of this Court's discretion to determine the issues before us. Nor is it sufficient that the industry might like to know now whether the present law and policy on disclosure supersede any other legal rights relating to confidential or copyrighted material. Courts do not normally render advisory opinions.

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

[13] Finally, we would emphasize that we have been able to dispose of these proceedings without determining whether the letters in question constitute either a "decision or order" of the NEB so as to be subject to appeal under section 22 of the *National Energy Board Act*, R.S.C. 1985, c. N-7, or a "decision, order, act or proceeding" for the purpose of enabling the Court to grant declaratory relief under paragraph 18.1(3)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Nothing in these reasons should be taken as expressing a view on these questions.

[14] For these reasons, GSI's appeal and its applications for judicial review will be dismissed, with one set of costs payable by GSI to the Attorney General of Canada and the Attorney General of Nova Scotia. A copy of these reasons will be inserted in each of the Court Files.

“John M. Evans”

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J.A.



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-474-10

**STYLE OF CAUSE:** Geophysical Service Incorporated v.  
National Energy Board and The  
Attorney General of Canada and the  
Attorney General of Nova Scotia

**PLACE OF HEARING:** Calgary, Alberta

**DATE OF HEARING:** December 15, 2011

**REASONS FOR JUDGMENT OF THE COURT BY:** BLAIS C.J., EVANS AND  
LAYDEN-STEVENSON JJ.A.

**DELIVERED FROM THE BENCH BY:** EVANS J.A.

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**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-296-10

**STYLE OF CAUSE:** Geophysical Service Incorporated v.  
National Energy Board and The  
Attorney General of Canada

**PLACE OF HEARING:** Calgary, Alberta

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**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-297-10

**STYLE OF CAUSE:** Geophysical Service Incorporated v.  
National Energy Board and The  
Attorney General of Canada

**PLACE OF HEARING:** Calgary, Alberta

**DATE OF HEARING:** December 15, 2011

**REASONS FOR JUDGMENT OF THE COURT BY:** BLAIS C.J., EVANS AND  
LAYDEN-STEVENSON JJ.A.

**DELIVERED FROM THE BENCH BY:** EVANS J.A.

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**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-340-10

**STYLE OF CAUSE:** Geophysical Service Incorporated v.  
National Energy Board and The  
Attorney General of Canada

**PLACE OF HEARING:** Calgary, Alberta

**DATE OF HEARING:** December 15, 2011

**REASONS FOR JUDGMENT OF THE COURT BY:** BLAIS C.J., EVANS AND  
LAYDEN-STEVENSON J.J.A.

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