

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

-between-

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

(“Claimants”)

-and-

THE GOVERNMENT OF CANADA

(“Respondent”)

ICSID CASE NO. UNCT/20/6

WITNESS STATEMENT OF RUSSELL JOHN EINARSSON

CWS-11

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I. Introduction

1. This supplemental Witness Statement is filed in support of the Claimants' Reply Memorial.
2. I address below, amongst other things, my concerns regarding Mr. Robert Hobbs, one of Canada's experts in this matter, as I believe that his opinion cannot be perceived as unbiased and impartial due to his previous relationship with one of GSI's competitors and litigants in the United States at the time, TGS Nopec ASA ("TGS"). Mr. Hobbs served as Chief Operating Officer ("COO") and then Chief Executive Officer ("CEO") of TGS from 2008-2016¹, during which time GSI and TGS were involved in an acrimonious litigation in the United States over the obtaining from Canada and use of GSI's seismic data, part of which is the subject of the present NAFTA arbitration proceedings.

II. GSI's and TGS' Acrimonious History as Competitors

3. As stated in my Witness Statement dated August 4, 2022, from 1992 to 2013, I worked indirectly for GSI as the Vice President of GSI's affiliate, Ocean Geophysical Service Incorporated, based in Houston, Texas. I was stationed in Houston, Texas for the duration of that employment, traveling frequently to market the marine seismic business of GSI in the United States.
4. During this time, GSI had many dealings with TGS, a global publicly-traded seismic data company and one of GSI's principal competitors at the time. These dealings were mostly adversarial and negative, to say the least.
5. During my tenure at GSI, TGS did not own any seismic vessels. TGS rather chartered or contracted with third-party companies to acquire non-exclusive seismic data. TGS utilized numerous tactics in its agreements with marine seismic acquisition companies to increase their bottom line, and at that time, TGS had a reputation in the industry for being abusive.
6. For instance, I do recall an occasion when GSI was conducting a survey for a client, an oil company. This client contracted a former TGS employee to be its client representative on the vessel. This representative repeatedly tried to renegotiate GSI's acquisition agreement, while GSI was in the middle of conducting the survey. This representative notably convinced the oil company to only charge for full fold kilometers instead of the contractually agreed line kilometers,

¹ **RER-02**, Expert Report of Robert Hobbs dated January 14, 2023 [**RER-02**, Hobbs] at para 4.

which amounted to a 10% or more loss in GSI's income on such project. This type of adversarial and bad faith behavior would go on constantly during this survey, which created tensions between GSI and TGS.

7. In this industry, marine seismic contractors are forced to operate their seismic vessels at cost or very low margins due to over capacity or low oil prices. A 10% reduction in income, such as those imposed by TGS, could be devastating to a marine seismic contractor who had a steady flow of substantial expenses every month to operate a seismic vessel. It is my understanding that many of these companies went out of business due to TGS' bad faith business manoeuvres, while keeping its profits very high even in downtimes.

8. Another example of TGS' adversarial behavior towards GSI occurred when, at the time, GSI created a large non-exclusive data set offshore of Nova Scotia. TGS was also competing in the same area to create non-exclusive data set offshore of Nova Scotia. As it is customary in the industry with nonexclusive data, I had a meeting with TGS to provide it with the coordinates of GSI's planned seismic survey. This was done so that TGS would not record data directly over GSI's, but rather offset the data so the data sets could complement each other, and each company would be able to license the data to as many customers as possible. This was also done for environmental reasons, as it is environmentally damaging to record two surveys over the exact same coordinates and expose marine life to the constant sound of two ships for the exact same data. However, TGS used the coordinates of GSI's planned seismic survey to collect data directly over GSI's data by following its ship by a few hundred miles, contrary to the parties' agreement. I believe this was done to ensure that GSI would never be able to market the data to the clients TGS signed up for their survey and to limit GSI's profitability.

III. The United States Litigation Proceedings between GSI and TGS

9. As admitted by Mr. Hobbs in his Witness Statement², while he was COO/CEO of TGS, GSI initiated litigation in 2014 against TGS before the United States District Court of Southern District of Texas regarding TGS's copying and use of GSI's seismic data in the United States (the "US Litigation").

² RER-02, Hobbs at para 5.

10. Specifically, GSI sued TGS for copyright infringement, alleging that TGS contributorily infringed GSI's copyrighted seismic survey data by asking the Canadian regulatory board to copy the data and send it to TGS. GSI also alleged that the TGS surveys made at the locations disclosed in the GSI surveys obtained from the Canadian regulatory board were derivative works. Lastly, GSI alleged that TGS infringed its copyrights by providing licenses to oil and gas companies to use the data collected in the TGS surveys made using GSI's data to plan their surveys (high-grade and cherry-pick), and by distributing the survey results without attaching GSI's copyright-management information.³

11. During the course of the US Litigation, the parties engaged in adversarial and acrimonious litigation over the use of GSI's seismic data by TGS. These proceedings involved, for a period of time spanning from 2014 to 2020, the presentation of numerous contested motions⁴, the issuance of multiple judgments from all levels of the United States' court system, i.e., from the United States District Court of Southern District of Texas⁵, The United States Court Of Appeals For The Fifth Circuit⁶ and the Supreme Court of the United States.⁷ Surprisingly, CNLOPB board members were even called by TGS as witnesses. Ultimately, GSI's case was unsuccessful before all court levels and was ordered to pay significant costs (approximately one million dollars).

12. As appears from the US Litigation's Court Docket before the United States District Court of Southern District of Texas⁸, during Mr. Hobbs' tenure as COO/CEO of TGS (2014-2016), among other things:

- a. the United States District Court of Southern District of Texas issued a final judgment on November 9, 2015 dismissing GSI's complaint⁹;
- b. a notice of appeal to The United States Court Of Appeals For The Fifth Circuit was filed by GSI on December 12, 2015¹⁰; and

³ See pp. 1-2 of **C-376**, the United States District Court of Southern District of Texas's Memorandum and Opinion dated March 30, 2015.

⁴ As appears notably from **C-377**, the Court Docket of the US Litigation [**C-377, US Litigation Court Docket**].

⁵ As appears notably from **C-378**, certain of the judgments issued by United States District Court of Southern District of Texas.

⁶ As appears notably from **C-379**, certain of the judgments issued by The United States Court Of Appeals For The Fifth Circuit.

⁷ As appears notably from **C-380**, the judgment denying GSI's writ of certiorari before the Supreme Court of the United States.

⁸ **C-377**, US Litigation Court Docket at Entries # 43-44.

⁹ **C-381**, United States District Court of Southern District of Texas issued a final judgment on November 9, 2015.

¹⁰ **C-377**, US Litigation Court Docket at Entry # 48.

- c. the parties completed several other steps before The United States Court Of Appeals For The Fifth Circuit.¹¹

13. Considering that a final judgment was rendered by the lower court in the US Litigation and that appeal proceedings were filed during Mr. Hobbs' tenure at TGS, I therefore find it very difficult to believe when Mr. Hobbs states in his Witness Statement that:

[a]s CEO, I was not informed of details regarding the litigation, only that there was a process ongoing [...] I do not recall being informed by the legal department of the outcome of the litigation during my tenure at TGS¹²

14. The US Litigation drained an important amount of resources from GSI, which was forced to pay for approximately a million dollars in costs to TGS and incur millions of dollars in legal fees.

IV. TGS' Dealings with Canada

15. TGS was granted special temporary exemption status under the *Coasting Trade Act*, SC 1992, c 31 to flag a foreign vessel rather than use GSI's vessel, which was the only Canadian seismic vessel available to conduct seismic surveying work. Only months prior, the Canadian Transportation Agency had indicated that GSI's vessel was suitable for that type of work and therefore denied flagging that vessel to be chartered by another seismic company, Multi-Klient Invest.¹³ Despite the foregoing, TGS was nonetheless allowed to gain an exemption on an expedited basis, to the detriment of GSI, as the owner of the only Canadian-flagged seismic vessel.¹⁴ Canada later removed GSI's protection under the *Coasting Trade Act* altogether in 2012 by adding an exemption in favour of foreign ships engaged in seismic activities.¹⁵

V. My Earnings Following My Departure from GSI

16. After my departure from GSI in 2013, I could not gain employment in the seismic industry, nor in the oil and gas industry, and ultimately engaged in real estate renovations in a self-employment capacity that does not have any particular income stream or guarantee of earnings.

¹¹ C-377, US Litigation Court Docket at Entries # 48-53.

¹² RER-02, Hobbs at para 5.

¹³ C-382, Decision 203-W2011.

¹⁴ C-383, Decision 278-W2011.

¹⁵ See Section 3(2)(c.1) of the C-384, *Coasting Trade Act*, SC 1992, c 31 as well as its amending legislation, and see C-385, Division 38 of Part 4 of the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

Between 2013 to 2018, I estimate that my earnings have amounted to [REDACTED] approximately on an annual basis. [REDACTED]

VI. Conclusion

17. In light of the foregoing, I was shocked when I learned that Mr. Hobbs, an ex-CEO of one of GSI's fiercest competitors and litigants, filed an expert report in support of Canada's position, which position as expert requires Mr. Hobbs to provide the Tribunal with an unbiased and impartial opinion.

18. However, considering Mr. Hobbs' tenure at TGS during a period where GSI and TGS developed an acrimonious relationship as competitors and litigants, and TGS' close and profitable dealings with Canada over the years, I believe that Mr. Hobbs' opinion offered in the context this arbitration in support of Canada's position cannot be perceived as unbiased and impartial.

19. I have personal knowledge of the matters hereinafter deposed to, except where based upon information and belief, and where so based, I verily believe the same to be true, to the best of my recollection.

20. I make this witness statement in support of the Claimants' claim in this proceeding and for no other purposes.

21. This witness statement was originally prepared in the English language and I anticipate giving testimony at the hearing of this Arbitration in the English language.

Signed at _____ on _____

RUSSELL JOHN EINARSSON

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Signed at on *May 27th, 2024*



RUSSELL JOHN EINARSSON