Court of King's Bench of Alberta

Citation: Dow Chemical Canada ULC v NOVA Chemicals Corporation, 2024 ABKB 98

Date: 20240221
Docket: 0601 07921
Registry: Calgary

Between:

Dow Chemical Canada ULC and Dow Europe GmbH

Plaintiffs

- and -

NOVA Chemicals Corporation

Defendant

Endorsement
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] This endorsement relates to certain procedural issues arising from what has come to be known by the Court and the parties as the "second remand" hearing.

[2] In the trial of a dispute between the parties involving the co-ownership and operation of an ethane cracker known as "E3" this Court found that performance of a restriction on purchases of ethane by Dow Chemical Canada ULC in the "Pool Area" set out in an operating agreement among the parties was illegal under the Competition Act: 2018 ABQB 482. The operating agreement dated July 11, 1997 was originally entered into by NOVA Chemicals Corporation and Union Carbide Canada Inc, and was assumed by Dow when it merged with Union Carbide in February, 2001.

[3] An appeal from this finding was dismissed, but the issue of the remedial effect of the illegality of the covenant was referred back to this Court.

[4] The Court of Appeal in its decision at 2020 ABCA 320, paras 166-168, directed that:

> ... the matter is referred back to the trial court for further consideration.
>
> E3 is obviously a valuable asset for both parties. Now that Dow has assumed the position of Union Carbide, some aspects of the original arrangement are impractical. Since the parties will want to work together in the future to their mutual advantage, a consensual resolution of the outstanding issues respecting ethane supply would be preferable to one imposed by the Court...
>
> ...[t]he appeal from the dismissal of the counterclaim is dismissed, excepting that the remedial effect of the illegality of the performance of [the] Ethane Pooling covenant is referred back to the trial court.

[5] The parties were unable to resolve the issue consensually.

[6] On November 2, 2023, I directed NOVA counsel to provide Dow counsel with NOVA's position on the second remand question, including what NOVA considered to be the issues to be decided. I directed Dow to respond with the same information. The next appearance was scheduled for November 24, 2023. This direction was made in order to enable the parties and the Court to set a reasonable date for a hearing on the second remand. The procedural issues discussed in this endorsement arose during these appearances and later ones.

[7] Defined terms as used in the trial and appeal reasons have the same meaning when used in this endorsement.

[8] The hearings and briefings that took place between November, 2023 and the end of January, 2024 are set out in some detail as they illustrate that this Court must make certain directions and decisions pursuant to Rules 4.2, 4.7(2) and 4.9 in order to facilitate the ultimate hearing of the second remand issue, and finalize this part of the extensive litigation between the parties with respect to the joint ownership of E3.

[9] The November to January hearings gave rise to a number of issues, not all of which have been resolved in this endorsement. NOVA has asked the Court for a formal ruling on the admissibility of evidence, a *res judicata* issue, the scope of the second remand, the meaning of "prejudice and unfairness" and "whether this idea of an equitable dissolution of the Pool means anything".

[10] Some of those issues and submissions will more properly be dealt with during the second remand hearing, but others must be resolved before the parties are able to take the next steps in the hearing process. Any failure in this endorsement to refer to a submission raised by the parties is not an indication that this Court agrees with or accepts such submission.

II. Pre-hearing Applications

A. Jurisdiction to make pre-hearing directions

[11] On November 2, 2023, I noted that in one of the notices of appeal filed by NOVA during the course of preparation for the first remand (the damages hearing), NOVA had appeared to

object to this Court "unilaterally" taking over the "case management" of the hearing, although no objection had ever been made before me with respect to this issue. I asked NOVA counsel whether this was going to be an issue with respect to the second remand. As NOVA counsel did not recall this as an issue, I asked him to confirm that there would not be an issue with respect to this Court setting a schedule and making directions with respect to the second remand. NOVA counsel replied that, given the history of the matter, "I didn't know that there was any other route."

[12] However, on November 24, 2023, NOVA counsel stated that NOVA had never agreed that this Court would "play a case management role" going forward, referring to Rule 4.15 of the *Alberta Rules of Court*.

[13] In reply to the direct question: "[d]o you object to me dealing with the parties in order to bring this matter to a hearing", NOVA counsel replied that "[w]e object to you acting as case management justice over a proceeding as conceived by, as requested by Dow... we do not object to you ordering that this be heard as a legal issue and hearing it yourself, but if we do go down the path that Dow is now advocating for the first time, we will object." NOVA counsel again referred to the *Alberta Rule of Court*.

[14] NOVA counsel stated that:

> ... I made it absolutely clear today that if we go down the road that Dow is asking for, saying we need more proceedings, more evidence, more submissions, more hearings, fresh evidence, we need you to case manage that, then NOVA objects and is preserving its rights to object to you hearing the trial of that in 2025 or 2026, whenever that happens in Dow's process.

[15] Later, in argument, NOVA counsel said:

> ... But let me be clear about our position on case management substantively. We say that you can hear the legal issue without violation of Rule 4.15. But what Dow is asking for is that you manage the process of what amounts to a new trial with new evidence. A different trial with witnesses, new documents, experts, we say that's not appropriate and was never contemplated by the Court of Appeal. If Dow wants to go down that road, over our objection and the Court orders it over our objection, then that obviously will be, as the Court has acknowledged today, case management.

[16] This issue therefore requires a clear decision before the matter proceeds.

[17] While the term "case management" has been used loosely with respect to this issue, this has never been a true case management as set out in the *Rules of Court*.

[18] Rule 4.2 provides that it is the responsibility of the parties to manage their dispute, and to plan its resolution and requires the parties, when the complexity or the nature of an action requires it, to apply to the Court for direction, or request case management under Rule 4.12.

[19] The second remand is a complex matter and it is clear that the parties cannot agree to a plan to have this remand go forward to a hearing.

[20] Rule 4.7(2) indicates that, on application, the Court may adjust or set dates by which a stage or a step in the action is expected to be complete.

[21] Rule 4.9 provides that if the Court or a party is not satisfied that an action is being managed in accordance with Rule 1.2, the Court may make a procedural or any other appropriate order. Rules 4.10 and 4.11 provide further support for the Court making procedural or any other orders that may aid in the resolution of the proceedings. NOVA suggests that DOW's position on the second remand hearing was raised "for the first time" on November 2, 2023: this is incorrect. It has been clear for months during the damages hearing process that Dow and NOVA have very different views with respect to the scope and purpose of the second remand hearing, and also clear that they could not agree on a reasonable schedule and a list of issues without court assistance.

[22] In a different context, Rule 4.12(1) provides that a request for a case management order must be made in writing to the Chief Justice. The applicant must state the reasons for the request and whether any of the other parties agree. Under Rule 4.13 the Chief Justice may order that an action be subject to case management for a number of listed reasons. There has been no such request, and no such order. Therefore, Rule 4.15, which NOVA suggests prevents this Court from continuing to make procedural orders so as to move this matter to a hearing without being disqualified from the ultimate hearing, has no relevance to the situation.

[23] Of course, NOVA may make such an application, despite the fact that that this is not the preparation stage of a new trial, but the continuation of a trial referred back to this trial court by the Court of Appeal.

[24] I disagree, as I did in the damages hearing, that resolution of these remands amounts to a new trial. These remands are a continuation of the trial on specific issues that arose from the Court of Appeal's decision and its directions.

[25] Until and unless NOVA makes an application for case management under Rule 4.12 and such application is granted, this Court will continue to make directions and hear applications on pre-hearing issues with the goal of facilitating and scheduling the second remand hearing.

B. Hearing issues, Evidence and Scheduling

1.Overview

[26] In order to provide context to the disputes with respect to these matters, it is useful to note what the Court of Appeal said about the second remand: 2020 ABCA 320.

[27] The Court found that the trial remedy in response to the illegality of the covenant not to purchase ethane in the Pool Area, which was to read down the Ethane Pooling Covenants so that they would only apply to acquisitions of ethane for the Joffre site where E3 is located, was an error.

[28] The Court noted at paragraphs 160, 164-168 that:

> Severance should not be done in a way that gives one party a windfall, or imposes an unfair burden on the other: *Transport North American* at para. 46. Severance should be done in a way that is consistent with the original intention of Nova and Union Carbide, not by bootstrapping Dow's current interests. If Union Carbide had remained a party to the Operating and Services Agreement, and had breached the Ethane Pooling covenants, Nova would have had remedial options, including dissolution of the Pool. Dow has entered the joint venture, over the objections of Nova, rendering the Ethane Pooling covenants unenforceable in whole or in part.

> If section 5.15 is simply "blue penciled" out of the agreement, it leaves Nova with all of the obligations, but none of the protections of the covenants. It follows that on the issue of severance the equities favour Nova, and its preferences with respect to the now illegal clause should prevail unless Dow can demonstrate some prejudice or unfairness. If Nova, for example, favours the termination of the Pool as the remedy for the illegality created by Dow's ownership interest in E3, that should be the presumptive remedy.
>
> ...
>
> It is an open question whether the invalidity of the covenants taints all of section 5 (the Ethane Pooling covenants), or only the particular section 5.15. It may be that the appropriate remedy is to sever as invalid the entire Ethane Pooling covenant, and possibly other provisions in the Operating and Services Agreement (such as the covenant to supply Ethane Services). The appropriate remedy in the circumstances was not fully argued on appeal, so the effect of the illegality of the covenants is referred back to the trial court for further consideration. (emphasis added)

[29] It therefore directed at para 168 that:

> d) The appeal from the dismissal of the counterclaim is dismissed, excepting the remedial effect of the illegality of the performance of the Ethane Pooling covenant is referred back to the trial court.

[30] The Court also noted at paragraphs 158-159 when discussing "the Remedy for Illegality" that:

> As a result of Dow's takeover of Union Carbide, and the decision at trial, the parties find themselves in an unusual position. One key component of the Operating and Services Agreement was the formation of an ethane Pool, with an obligation on Nova to supply E3 with sufficient ethane to operate at full capacity. There was a collateral covenant by Union Carbide not to compete in the ethane market, but that covenant is now unenforceable for illegality as a result of Dow's acquisition of Union Carbide.
>
> The trial judge found that at the commencement of this litigation Nova was not in a position to invoke the remedies in Article 9 of the Co-owners Agreement, because Nova was not a "Non-Defaulting Co-owner": reasons at para. 1337. Once the accounts between the parties arising from this litigation are settled, Nova presumably will qualify as a Non-Defaulting Co-owner. There are provisions for termination of the Pool in sections 5.15(c)(iii) and 5.17 of the Operating and Services Agreement. If Dow continues to buy ethane in the Pool Area, what effect does that have on the rights of the parties? (emphasis added)

[31] Several of these comments are key to the scope of the second remand hearing:

a) the appropriate remedy for the situation in which the parties find themselves, being that the covenant by Union Carbide not to compete in the ethane market is now unenforceable, was not fully argued on appeal, and was referred back to the trial court;

b) whether the invalidity of the covenants taints all of article 5 or only section 5.15 is an open question; and

c) the equities on the issue of severance favour NOVA and its preferences with respect to the illegal clause should prevail unless Dow can demonstrate some prejudice or unfairness.

[32] The sections of the operating agreement that this Court found to be illegal, a conclusion confirmed by the Court of Appeal, are as follows:

> 5.1 Ethane Pooling Principles
>
> ...
>
> a) only the Operator shall acquire Ethane from the Pool Area;
>
> ...
>
> 5.15 Termination of Union Carbide's Participation in Pool
>
> In the event Union Carbide or an Affiliate of Union Carbide directly or indirectly acquires Ethane from any source in the Pool Area other than from the Pool except in the circumstances provided for in Section 5.8(c), then the following procedures will apply:
>
> (a) should NOVA consider Union Carbide's Ethane acquisition not to be in the best interest of NOVA as a Pool User, NOVA may provide Union Carbide with written notice of its objection to the Ethane acquisition;
>
> (b) upon receipt of NOVA's notice of objection Union Carbide shall provide NOVA with the full particulars of the acquisition contract and Union Carbide shall have 60 days in which to:
>
> (i) pay NOVA an amount equal to the lesser of ten (10%) of the payments to be made by Union Carbide over the first 12 Months of such contract, or $1,000,000.00; and
>
> (ii) dispose of the contract by any of the following methods:
>
> (A) terminating the contract;
>
> (B) assigning the contact to an unrelated third party for its own use; or
>
> (C) requesting the Operator to accept an assignment of the contract,
>
> (c) should Union Carbide request the Operator to accept an assignment of Union Carbide's Ethane contract, NOVA shall the right to request the Operator to do one of the following:
>
> (i) accept assignment of the contract and include the Ethane volumes in the Pool;
>
> (ii) accept assignment of the contract but not to include the Ethane volumes in the Pool with the total costs

> of Ethane acquisition associated with such contract, including Ethane acquisition, transportation and storage costs being for the account of Union Carbide; or
>
> (iii) dissolve the Pool in accordance with Section 5.17; and
>
> (d) in the event that Union Carbide fails to comply with the terms of this Section 5.15, such failure shall be deemed to constitute a material breach of its obligations and shall avail NOVA of its rights and entitlements under Article 9 of the Plant Co-owners Agreement.

[33] It is also useful to describe the factual and commercial context in which the issues arose, as described in the trial reasons. At the time the operating agreement was entered into by NOVA and Union Carbide there were two purchasers of ethane in the Alberta marketplace: Dow and NOVA. The joint venture entered into by NOVA and Union Carbide maintained that status quo.

[34] The expectation of the contracting parties, NOVA and Union Carbide, was that NOVA would continue to compete with Dow for ethane, as it had in the past. NOVA would be acquiring ethane for three ethane cracking plants on the Joffre site, and Dow would be acquiring ethane for non- E3 or non Joffre purposes, such as for its plant LHC-1.

[35] The operating agreement is one of 11 agreement with respect to the E3 project, all dated July 11, 1997. The operating agreement has three contracting parties, Union Carbide and NOVA as co-owners of the plant and NOVA in its capacity as operator. The operator's duties include conducting the operation of the plant, including the acquisition of ethane. The agreement provides for a "Pool" of contractual rights to purchase ethane from third parties. NOVA received an annual fee for conducting these services.

[36] As noted, the operating agreement provides that only the operator shall acquire ethane for the operation of E3from the "Pool Area", however, Union Carbide was entitled to certain information as set out in section 5.1(e):

> Pool Users shall not be entitled to have access to, receive copies of or assert an interest in any rights, contracts or arrangements obtained or entered into by Operator in providing the Ethane Services, provided however the Operator will provide to Pool Users:
>
> (i) a synopsis of each contract for the acquisition or transportation of Ethane, and of each other contract with respect to Ethane Services (excluding contracts of one Month or less in duration) having a material effect on the Pool, a sample of such a synopsis attached hereto as Schedule "F". A Pool User may, at its option, verify the accuracy of the synopses of the Ethane Services contracts by using the services of a third party auditor at the same time that the year-end audits are being conducted, but the synopsis for individual contracts may be so audited at any time upon 30 days written notice; and

> (ii) with respect to contracts of one Month or less in duration with Affiliates of Operator, a monthly summary identifying the price and volume of each transaction.

[37] Union Carbide was also entitled to participation in a "Feedstock Subcommittee", as follow:

> 5.2 Feedstock Subcommittee
>
> The Management Committee shall establish a feedstock subcommittee as soon as practicable after the execution of this Agreement. The subcommittee shall be composed of equal representation from each Co-owner and representatives need not also be members of the Management Committee. Every three Months (or such other period of time determined by the Management Committee) the feedstock subcommittee shall meet with the Operator. At each meeting of the feedstock subcommittee the Operator will review its strategy for Ethane and Ethane, Shrinkage acquisition including, but not limited to, tactical plans, inventory plans, commitments in respect of Ethane pre-production Fixed Costs, contract portfolio structure and Ethane transportation and storage systems and shall seek the subcommittee's advice, input and consensus regarding such strategy. Notwithstanding the above, the Operator shall not require the consent of Union Carbide, the Management Committee or the feedstock subcommittee prior to entering into any Ethane, Ethane Shrinkage or fuel gas acquisition, transportation or storage arrangement or prior to providing any of the Ethane Services in accordance with the provisions of this Article 5.

[38] The merger of Dow and Union Carbide was publicly announced in August, 1991. NOVA's senior management witnesses testified at trial that NOVA was concerned about NOVA having to share ethane contract information as required by the operating agreement with the only other major purchaser of ethane in Alberta, and its major competitor. Thus, from the time of the announcement of the merger, management of NOVA explicitly directed staff that information with respect to contracts for ethane supply that had been made available to Union Carbide was not to be shared with Dow. NOVA also made submissions to the US Federal Trade Commission and the Canadian Competition Bureau objecting to the merger, and arguing that, as a condition of the merger approval, Dow should be required to divest its interest in E3. This submission was not successful.

[39] Options to resolve this problem, including the possibility of Dow supplying its share of feedstock for E3 and changes to the joint venture agreements were discussed internally by NOVA, but not pursued. A NOVA senior management witness testified that, in the wake of the merger, NOVA came to the view that it could not interact with Dow as it had with Union Carbide. For example, as previously noted, it could not, and did not, provide Dow with the contract synopses that were required by the operating agreement provisions, and it did not provide Dow with any particulars with respect to ethane contracts. This was a deliberate decision that came into effect even before the implementation of the merger. NOVA also terminated the feedstock subcommittee meetings that were required by the operating agreement and that had been held with Union Carbide. The witness testified on cross-examination that these meetings stopped due to competition law concerns shared by both parties.

[40] For the next five years, Dow continued to acquire ethane in the Pool Area without objection from NOVA. In fact, NOVA promoted the use of an ethane streaming agreement to purchase ethane from Dow and purchased spot ethane from Dow on a number of occasions. NOVA continued to ignore provisions of the operating agreement that required that information with respect to NOVA's purchases of ethane for E3 be provided to Dow, without objection from Dow.

[41] It is clear from their conduct that the parties realized that there were competition concerns in enforcing portions of the operating agreement, both with respect to Dow's acquisitions of ethane in the Pool Area and in respect of NOVA's requirements to supply details of ethane contracts entered into for the Pool.

[42] On June 23, 2006, Dow delivered a Notice of Default under the co-owners agreement, setting out a number of alleged breaches by NOVA relating to its failure to optimize production at E3 and misappropriation of Dow's share of ethylene from E3. Dow filed a Statement of Claim on June 24, 2006. Those allegations were unrelated to the ethane pooling covenants.

[43] On July 25, 2006, NOVA issued a Notice of Default alleging that Dow was in breach by acquiring ethane from the Pool Area.

[44] A senior NOVA witness testified that NOVA had not issued a Notice of Default for this alleged breach earlier because its philosophy at the time was to recognize that Dow had already been buying ethane in the Pool Area to support its LHC-1 plant. Further, NOVA and Dow had an ethane streaming agreement at the time that had Dow under the obligation of bringing ethane to the Joffre site, "so we recognized the reality that's associated with Dow acquiring ethane in the Pool Area as soon as Dow acquired Union Carbide."

[45] On cross- examination, this same witness conceded that, at the time of the merger, NOVA knew that Dow would need to continue to obtain ethane in Alberta in order to maintain its ethane and ethylene derivative businesses in Alberta and that it would need to obtain even greater amounts of ethane if it chose to expand those businesses. He agreed that, given the merger, NOVA recognized that the operating agreement provisions that provided that only NOVA could purchase ethane from the Pool Area raised legal issues. The witness acknowledged that NOVA had sought legal advice with respect to the legality and enforceability of section 5.1(a) of the operating agreement. He agreed that NOVA came to the view that it could not conduct itself with Dow as it had with Union Carbide. The witness conceded that it may have been his view at the time of the merger that having a single purchaser of ethane in the Pool Area was anti- competitive, and that he had indicated as much at questioning. He indicated, however, that his current view was that the situation was "not necessarily an anticompetitive situation".

[46] On March 28, 2007, NOVA delivered a Notice to Dow pursuant to section 5.15 of the operating agreement stating that NOVA objected to Dow's acquisition of ethane in the Pool Area from certain suppliers. Other such notices followed.

[47] This is a brief summary of the commercial context in these years, A more detailed description is found in Appendix A of the trial reasons.

[48] In accordance with the Court's direction on November 2, 2023, NOVA described its position on the second remand but did not provide a list of issues. Dow provided its position and a preliminary list of issues that it submitted will have been addressed during the second remand hearings.

[49] NOVA's position as described in its first brief dated November 10, 2023 was as follows:

a) as a result of the illegality of the "Ethane Pooling Covenant" in the operating agreement, the "Pool" should be terminated, and NOVA's obligation to provide Ethane Services should be severed, as of the date of Dow's merger with Union Carbide in February 2001. The brief stated that the Ethane Pool should be wound up and dissolved in accordance with the process contemplated in section 5.17 of the operating agreement;

b) NOVA's covenant to provide Ethane Services should be severed as of the date of the merger between Dow and Union Carbide. NOVA set out a summary of the provisions of the operating agreement that it proposed should also be severed in its brief, including all of Article 5; and

c) the consequences of the dissolution of the Pool and the severance of NOVA's covenant to provide Ethane Services as of the date of the Dow and Union Carbide merger should be that this Court's finding at trial that NOVA was in breach of sections 4.3(b) and 4.4(a) of the operating agreement, which relate to optimizing production from E3, should be vacated, and the Court's award of optimization damages and low conversion damages should be varied, with repayment of these damages to NOVA.

[50] NOVA refers in its brief to an application for the scheduling of the second remand that it says was served on Dow on May 24, 2022. In this application, NOVA asserted that:

a) the remedial effect of the illegality of the performance of the Ethane Pooling covenant, which it defines as the "Pool Question", is a question of law;

b) this Court is *functus officio* with respect to the Court of Appeal's "findings regarding NOVA's counterclaim and the Pool Question, including the presumption of NOVA's remedies"; and

c) the Pool Question is inextricably linked to the Court's determination of Dow's entitlement to damages for all periods subject to the action

[51] The application also asserts that if Sections 5.1(a) and 5.15 of the operating agreement are illegal and/or unenforceable, the result is that all of Article 5 must also be illegal and/or unenforceable. NOVA submits in the application that, if it never had the obligation to provide Ethane Services to the plaintiffs, NOVA cannot be liable for any "alleged" breaches of section 4.3(b), 4.3(c), 7.1 and 7.3.

[52] NOVA's position at the time was that it required no additional evidence other than the Court of Appeal decision for its submissions on the second remand, and that this issue could be argued by the provision of written briefs in one day.

[53] Dow's position in its responding brief of November 17, 2023 was that, in addition to section 5.15, section 5.1(a) must also be declared to be unenforceable or severed. Dow emphasized the Court of Appeal's comment that this Court must attempt to preserve as much of

the original agreement as possible, recognizing that any severance is going to alter the terms of the agreement: para 160.

[54] Dow noted that the purpose of the second remand process was to determine "[t]he appropriate remedy in the circumstances", and that factors relevant to that determination included whether "some prejudice or unfairness" would result from any severance proposal, the need to preserve an intelligible economic transaction, the application of the operating agreement's severability provision and potential further illegality under the *Competition Act*.

[55] Dow submitted that NOVA's proposals for extensive severance gave rise to "at least" the following issues:

a) Did the Court of Appeal order that the Pool be wound up and dissolved in accordance with the process contemplated in section 5.17 of the operating agreement?

b) Should the definition of Ethane Services in section 1.1(x), and any or all additional references in the operating agreement to Ethane Services, be severed or declared to be unenforceable?

c) Should sections of Article 5 beyond sections 5.1 (a) and 5.15 be severed or declared to be enforceable?

d) If other parts of Article 5 other than sections 5.1(a) and 5.15 should be severed or declared unenforceable, what other provisions of the operating agreement, other than the ones specifically noted in NOVA's brief, should be severed or declared unenforceable?

e) When should any findings of severance or declarations of unenforceability be made effective?

f) May this Court's finding at trial that NOVA breached its optimization obligation pursuant to, *inter alia*, sections 4.3(b) and 4.4(a). affirmed by the Court of Appeal, be varied?

g) If so, may the Court's award of optimization and co-production damages and related interest awards be vacated as a result?

h) If the answer is yes, should Dow be ordered to repay any amount paid by NOVA in October 2019, with or without interest?

[56] On November 24, 2023, counsel for NOVA indicated that NOVA did not mean that the Pool should be wound up and dissolved in accordance with the process contemplated in section 5.17 of the operating agreement.

[57] Instead, NOVA's position was that section 5.17 should be severed together with the rest of Article 5, but that "it is instructive" in terms of Dow's position of prejudice "in terms of what may or may not be unfair in how the Pool would be dissolved". NOVA said that when it suggested in its brief that it would dissolve the Pool in accordance with section 5.17, it would be their intention that Dow would be entitled to its feedstock fraction of ethane contracts, that the parties would "negotiate" to divide them up in an equitable manner, and that if they were not able to do that, the issue would go to arbitration.

[58] NOVA also suggested that the optimization claim that was decided at trial "was always subject to the second remand".

[59] NOVA submitted that none of the issues raised by Dow "lead to any new evidence being relevant". NOVA asked that the Court order that the second remand be heard without any more arguments about evidence, without delay, as no new evidence could possibly be relevant.

[60] When this Court noted that the Court of Appeal statement about a remedy being presumptive "unless Dow can demonstrate some prejudice or unfairness" suggested a need for evidence, NOVA counsel disagreed, and submitted that the Court of Appeal had said that the presumed remedy comes from the record before the Court of Appeal, and that the Court never said that there was any need for additional evidence.

[61] NOVA made oral submissions about the Dow list of proposed issues, arguing that they demonstrate no need for fresh evidence.

[62] During these submissions, counsel for NOVA suggested that this Court had "no jurisdiction to find issues beyond the issue remanded by the Court of Appeal" and that Dow's first issue with respect to the method by which the Pool might be dissolved was not within the Court's jurisdiction.

[63] Dow during oral submissions made it clear that it needed to see the contracts that make up the Pool in order to determine whether an equitable division of them could be made, under section 5.17 or otherwise. Dow pointed out that, under the operating agreement, Union Carbide would have been privy to the details of the contracts and would have been a party to a feedstock committee. Therefore, Union Carbide would have had a clear picture of what was in the Pool, what an equitable division of the contracts might look like and how its business might be impacted.

[64] Dow submitted that it needed this information in under to be able to determine any potential prejudice or unfairness, and that this was a matter of fresh evidence. Dow conceded that the Court could not be asked to order something the parties themselves have always recognized would be improper and anticompetitive, and so it was necessary to work out some solution to confidentiality concerns, perhaps similar to the confidentiality provisions that were in place during the first part of the trial.

[65] In response, counsel for NOVA indicated that NOVA would give consideration to whether the Pool contracts were relevant.

[66] At the end of the hearing, I directed NOVA to prepare a redline version of the operating agreement, indicating all of the provisions that NOVA proposed would be severed, and to provide comments on the issues raised by Dow and any other issues it believes would have to be heard at the hearing, and for Dow to prepare its own redline.

[67] This led to a NOVA brief dated December 1, 2023. NOVA again insisted that the Court of Appeal had remanded only one issue, citing the Court of Appeals findings that there was "a clear and direct link between the covenant to provide Ethane Services under section 4.3, and the Ethane Covenants in section 5.15: para 162.

[68] In this brief, NOVA submitted that the Court of Appeal had ruled that the "Ethane Pooling covenants" in the operating argument were illegal as of the date of the Dow-Union Carbide merger, relying for such a proposition on a phase in paragraph 158 of the Court of

Appeal reasons that "[t]here was a collateral covenant by Union Carbide not to compete in the ethane market, but that covenant is now unenforceable for illegality as a result of Dow's acquisition of Union Carbide". NOVA submits that this issue is *res judicata* and not open for re-litigation.

[69] NOVA also submitted that, when considering whether Dow can establish prejudice or unfairness, the "reasonableness of the resulting bargain must be assessed from the perspective of what the parties reasonably intended to agree at the time the contract was made". Thus, NOVA submits, the issue must be determined on the basis of the operating agreement itself and the existing Court record, and that therefore, "there is no legal basis for the introduction of fresh evidence".

[70] However, in its second brief, NOVA acknowledged that the second remand may require the determination of certain sub-issues, being:

a) What provisions of the operating agreement should be severed or declared unenforceable, given that NOVA's preferred remedy is the termination of the Pool?

b) Is there any prejudice to Dow if the Pool is terminated?

c) As of what date does the remedy take effect?

d) What is the impact of the remedy on the calculation of Dow's damages?

[71] With respect to whether the Court of Appeal ordered the Pool be wound up and dissolved in accordance with the process contemplated in section 5.17 of the operating agreement, NOVA submitted that this is not an issue. However, it is clear from the brief and subsequent argument that NOVA takes the position that the process outlined in paragraph 5.17 needed not be followed, that it proposes a method "similar to" the section 5.17 process, the details of which it has not disclosed, which it says is "a commercial issue to be negotiated by the parties".

[72] Dow disagrees and says that it is relevant and material to the issues of prejudice and unfairness that the process of winding up and dissolving the Pool must be disclosed and determined.

[73] NOVA conceded that Dow's issues are similar to NOVA's issues, but disagrees with Dow's "formulation" of the issues.

[74] NOVA also submitted in its second brief that an additional issue is the question of whether Dow's proposal of a severance of only sections 5.1(a) and 5.15 of the operating agreement may be advanced, or whether it is either inconsistent with or an attack on the Court of Appeal's *res judicata* finding.

[75] At a hearing on December 7, 2023, counsel for NOVA again submitted that Dow's list of issues had not demonstrated any need for fresh evidence, and that Dow had not formally applied for leave to adduce fresh evidence. He referred to a proposed schedule received from Dow but asserted that NOVA had still not heard about Dow's theory of prejudice or unfairness within the meaning of the decision of the Court of Appeal. He then indicated that he had not yet received Dow's request for documents, nor details on the nature of expert reports.

[76] Specifically, on December 7, 2023, counsel for NOVA took the surprising position that there was no need for the ethane purchase contacts that made up the Ethane Pool to be disclosed.

However, he then conceded that he may be able to obtain instructions from his client to provide documents on a "without prejudice" basis.

[77] I directed that, after Dow made its documentation request, NOVA would have two weeks to either deliver the requested documents or to challenge the propriety of the request. NOVA did challenge the list of documents that Dow requested, and that issue was heard January 24, 2024, after briefing by both parties.

[78] NOVA continued to submit that "as a matter of law", the issue remanded to this Court must be determined based on the evidence in the existing trial records." In support of this position NOVA noted that the Court of Appeal did not find the evidence insufficient on appeal, and that it did not "permit" or "even suggest" that fresh evidence would be admissible", as part of the second remand.

[79] Dow did not agree that the Court of Appeal made such a determination.

[80] NOVA submitted that Dow's document requests seek production of irrelevant and confidential NOVA business records, is "grossly disproportionate", and raises "significant competition and commercial concerns".

[81] However, NOVA conceded that some limited disclosure of Pool contracts "might be done in some context" to permit the parties to negotiate a resolution of the issues that will arise from the dissolution of the Pool. NOVA suggested the appointment of a receiver to administer Dow's interests in the existing Pool contract until they expire. It also suggested that such a resolution would require the disclosure of existing ethane contracts to a "Dow-appointed 'clean team' to ensure that Dow's interests are protected". NOVA conceded that competition and confidentiality concerns are manageable but submitted that they must be managed in accordance with NOVA's proposal.

[82] However, NOVA continued to submit that the issue of appropriate disclosure and confidentiality provisions should be up to the parties without Court involvement.

[83] Dow made it clear in its final brief that it does not agree with the dissolution of the Pool or the forced division or assignment of third-party agreements. It proposed a much narrower severance, which it submitted is consistent with the law of severance and with Section 24.5 of the operating agreement, which, it submits, communicates the parties' contractual intention to make severance as limited as possible should any provisions of the operating agreement be found to be illegal or enforceable.

[84] Dow submitted that it seeks access to the Pool documentation, not for any improper purpose, but to assess the prejudice of NOVA's severance proposal, which includes dissolution of the Pool and the resulting burden on Dow to provided sufficient ethane to optimize production at E3 on a go-forward basis.

[85] Dow submitted that the issues of competition and confidentiality can be resolved with appropriate safeguards and noted that these issues have been efficiently handled in this litigation before the trial commenced, during the trial, and after the trial reasons were released.

[86] Dow pointed out that under, the express terms of the operating agreement, Dow is entitled to substantial information about the Pool contracts and arrangements, including the current strategy for ethane and ethane shrinkage acquisition, tactical plans, inventory plans, contract portfolio structure and ethane transportation and storage systems.

[87] It submitted that it is entitled to use and rely on that information for purposes of assessing an equitable dissolution of the Pool, and if dissolution of the Pool is the appropriate remedy, to assess whether new agreements and procedures would be necessary for Dow to bring its own ethane to E3. Dow submitted that NOVA's denial of such disclosure is inherently prejudicial and unfair as a matter of process, and that such denial is itself sufficient reason for this Court to find that Pool dissolution is not an available form of severance, apart from other forms of prejudice or unfairness.

[88] Dow acknowledged that this Court cannot be asked to make an order that would raise serious competition concerns among the parties and others. It submitted that what is required is prompt disclosure by NOVA of relevant Pool- related documents to a limited group of approved reviewers. Dow submitted that NOVA's proposal that existing ethane contracts would only be disclosed to a jointly appointed receiver who would manage Dow's feedstock portfolio is unsatisfactory and unfair, as this would not provide Dow with the rights of information it currently has under the operating agreement. The suggested process would not allow Dow the right to make informed decisions in the context of its own business, as the operating agreement provided to Union Carbide.

[89] In its final brief, Dow streamlined its request for disclosure, noting that this was an attempt to eliminate controversy about alleged production burdens. Dow continues to seek the following list of documents:

1. All contracts for ethane acquisition, sale, transportation, storage, fuel gas and third party services arrangements that currently comprise the Pool, including arrangements where NOVA itself may be an owner, together with copies of all records of relevant data (e.g., volume, price, etc.) relating to such contracts in native format (e.g., Excel), including native copies of AEGS sheets, Feedstock Costs Statements, and Combined Ethane Costs and Invoice Spreadsheets of the sort previously produced by NOVA for purposes of the Damages Hearing.
2. Dow clarified that it was only asking for "current" contracts, not expired ones. However, the operating agreement does not require disclosure of the actual contracts, but a synopsis of them on accordance with an appendix attached to the agreement. If NOVA prefers, disclosure may be made in that format, subject to Dows audit rights.
3. Documents describing the current process by which NOVA performs the Ethane Services under the Operating and Service Agreement, including but not limited to:
    a. documents describing the process by which NOVA directs, controls, monitors, administers, manages, or assesses the transportation, delivery, storage, segregation, or purity of ethane from the entry of the ethane onto the AEGS until its delivery to the AEGS delivery point(s) at NOVA's Joffre Site;
    b. documents describing the process by which NOVA directs, controls, monitors, administers, manages, or assesses the

transportation, delivery, storage, segregation, or purity of ethane from the AEGS delivery point(s) at NOVA's Joffre Site to the E3 ethylene production facility at the Joffre Site;

c. documents describing NOVA's decision-making process with respect to delivering ethane from the AEGS delivery point(s) to each of the crackers located at the Joffre Site, both in the normal course of operations and in the event of any planned or unplanned outages at any of the crackers;

d. documents describing the process by which NOVA directs, controls, monitors, administers, manages, or assesses, the acquisition, transportation, delivery, storage, segregation, or purity of fuel gas for use at the E3 ethylene production facility at the Joffre Site;

e. documents describing the process by which NOVA directs, controls, monitors, administers, manages, or assesses, the acquisition, transportation, delivery, storage, segregation, or purity of natural gas to replace Ethane Shrinkage for use at the E3 ethylene production facility at the Joffre Site; and

f. documents describing the process by which NOVA directs, controls, monitors, administers, manages, or assesses, the removal of carbon dioxide from ethane and the transportation, delivery, storage, and any other use or method of disposal of that carbon dioxide.

[90] Dow submits that disclosure under this heading is necessary because of NOVA's proposed termination of its obligation to provide Ethane Services. As this would require Dow to take on these responsibilities for the quantities of ethane needed to optimize production of its half of E3's productive capability, Dow submits that it needs details of the current arrangements in order to determine whether and how it would take on these responsibilities.

[91] However, Dow notes that what is required is only some kind of explanatory document, such as an operation manual, to understand how it would be integrated into plant operations. This concession should alleviate the production burden, although if termination of NOVA's obligations to provide Ethane Services is an appropriate remedy, considerable information would be necessary.

4. All NOVA records regarding opportunities to acquire ethane or to expand the potential supply of ethane in or into Alberta since January 1, 20213, whether pursued or not, including NOVA's consideration and/or analysis.

[92] Dow submits that this category of documents is relevant to NOVA's proposals on severance that would require Dow to deliver at least 50% of E3's future ethane needs.

[93] However, to avoid controversy and delay. Dow seeks only the agreements NOVA has made with respect to the Pool, including agreements regarding the potential or future supply of ethane to E3 beyond the expiration of E3's current pooling arrangements.

[94] Dow no longer seeks disclosure with respect to the fourth category of its disclosure request, other than NOVA's confirmation that no information with respect to the sharing obligation under Section 5.2 of the operating agreement was in fact shared. Dow accepts that NOVA claims privilege with respect to the fifth category of its disclosure request.

[95] As noted previously at the oral hearing on January 24, 2024, NOVA asked the Court for a formal ruling on admissibility of fresh evidence, *res judicata*, the scope of the remand, prejudice and unfairness, and "whether this idea of an equitable dissolution of the Pool means anything".

[96] Some of these issues will more properly be dealt with during the second remand hearing, but others are necessary to be resolved before the parties take the next steps in the hearing process.

[97] NOVA continued to submit at the oral hearing on January 24, 2024 that "there is no jurisdiction left in this Court to order the production of any new records". Counsel for NOVA submitted that this Court could not entertain new submissions from Dow about its entitlement to contract information under Article 5 of the operating agreement because the issue of the dissolution of the Pool is *re judicata*, and the trial record is closed.

[98] NOVA submitted that the jurisdiction of this Court is limited to accepting that the dissolution of the Pool is the appropriate remedy and the extent of severance to accomplish this. It submitted that it is up to the parties to sort out the details of the disclosure including what information this might require. NOVA says that this Court does not have jurisdiction to oversee this.

2. Hearing Issues

[99] In order to progress to a reasonable schedule for the second remand hearing, it is necessary for this Court to confirm a list of issues that must be determined. This list will inform the issue of disclosure. As noted, the parties seem close to agreement, while quibbling over formulation.

[100] The primary issue is, of course, the remedial effect of the illegality of the performance of the Ethane Pooling covenant. This issue is subject to the direction that, on the issue of severance the equities favour NOVA and its preference with respect to the now illegal clause should prevail unless Dow can demonstrate some prejudice or unfairness.

[101] NOVA has expressed its preferences, which include the termination of the Pool, and the severance of its obligations to provide Ethane Services. It has proposed severance of many sections of the operating agreement.

[102] I agree that other issues, or "sub-issues" as NOVA prefers to characterize them, arise from NOVA's preferences. They are:

a. What is the process that NOVA proposes to be followed to wind up and dissolve the Ethane Pool?

[103] NOVA submits that this is a "commercial issue" that should be negotiated by the parties, but the history of this litigation belies the success of any such negotiation. This is an issue that this Court must consider in terms of determining whether it gives rise to any prejudice or unfairness to Dow or third parties.

b. What portions of the operating agreement should be severed or declared unenforceable, given that NOVA's preferred remedy is the dissolution of the Pool and the termination of its obligation to provide Ethane Services, and will any such severance proposed by NOVA give rise to prejudice or unfairness to Dow or third parties?

[104] The parties have characterized this issue in slightly different ways, but this is a condensed version of the issue.

[105] As the Court of Appeal noted, "[it] is an open question whether the invalidity of the covenants taints all of Article 5 (the Ethane Pooling covenants), or only the particular section 5.15". NOVA's submission that Dow's proposal of severance of only sections 5.1(a) and 5.15 is either inconsistent with or an attack on the Court of Appeal's decision may be addressed as part of this issue.

c. When should any findings of severance or declarations of unenforceability be made effective?

[106] NOVA's submissions that the Court of Appeal decided this issue and it is *res judicata* may be addressed within this issue.

d. May this Court's finding at trial that NOVA breached its optimization obligation pursuant to, *inter alia*, sections 4.3(b) and 4.4(a) be varied?

e. If so, may the Court's award of optimization and co-production damages and related interest awards be vacated as a result?

f. If so, should Dow be required to repay any amounts previously paid by NOVA, with or without interest?

[107] Dow has suggested that the parties should continue to work toward an agreed list of issues or sub-issues that could assist the Court at the second remand hearing, and I accept that suggestion. If the parties can agree on a variation or addition to the issues as I have stated them, I would certainly accept such an amendment. However, the parties have now had several opportunities, both in their briefs and in oral argument, to address this question, and there is no need to delay this step in the proceeding further.

[108] The parties appear to agree that all of the issues should be determined together, subject to the Court retaining its authority to frame the scope and sequence of the second remand hearing.

3. Evidence

[109] It is clearly necessary for the Court to make a determination on the relevance of fresh evidence in resolving the second remand issues, and whether the Court of Appeal has , as NOVA submits, directed that the issue remanded to this Court must be determined based on the evidence in the trial records, so that the next steps in the procedure towards the second remand hearing can take place.

[110] I agree with Dow that the Court of Appeal did not make a finding that the determination of the second remand must be based on the trial record. The Court of Appeal directed that NOVA's preferences with respect to the illegality of section 5,15 should prevail "unless Dow can demonstrate some prejudice or unfairness". The Court noted that it is "an open question

whether the invalidity of the covenants taints all of [Article] 5 or only the particular section 5.15. There is no reasonable interpretation of the Court of Appeal's reason that would limit Dow's submissions with respect to prejudice or unfairness to the trial record, particularly since the reasons noted that the appropriate remedy was not argued on appeal. It is a mistake to stretch the Court of Appeal's comments to encompass a direct or implied prohibition on evidence of prejudice or unreasonableness that is not in the trial record.

[111] NOVA relies on the case of ***671122 Ontario Ltd v Sagaz Industries Canada Inc.***, 2001 SCC 59 at paras 20-21, a case that considered, among other issues, whether it was inappropriate to interfere with a trial judge's exercise of discretion to reopen a trial on the basis of fresh evidence. The test in ***Sagaz*** does not apply to the circumstance of the continuation of a trial in accordance with a remand of an issue directed to the trial court by the Court of Appeal. If the Court had intended this limitation it could have stated it clearly.

[112] As noted in ***Canada (Commissioner of Competition) v. Superior Propane Inc***., 2003 FCA 53 at para 10;

> [i]n order to determine whether the Tribunal, in its redetermination decision, failed to follow the directions of the Federal Court of Appeal, it is necessary to consider... what the Court concluded and directed the Tribunal to do.

[113] In order to determine whether NOVA's preferred remedy would result in prejudice or unfairness to Dow, it is necessary that this Court hear evidence of such prejudice or unfairness, evidence that was not led in the trial as there was no necessity for it to be led.

[114] NOVA's preferred remedy involves considerable severance of the operating agreement. Severance requires a full contextual and factual analysis: ***Transport North American Express Inc. v New Solutions***, 2004 SCC 7 at paras 6-7.

[115] NOVA also submits that the issue of prejudice or unfairness concerns the reasonable expectations of Union Carbide at the time of negotiation of the operating agreement. While this may be so, it ignores the inconvenient fact that, at the time of negotiation of the operating agreement, Union Carbide knew that it would be entitled to synopses of the ethane contracts in the Pool, together with the other information set out in section 5.1(e), and disclosed as a result of participation in the feedstock subcommittee as described in Section 5.2.

[116] As Dow notes, if the Pool was to be dissolved, Union Carbide would have had a clear picture of what was in the Pool, what an equitable division of it might look like and how its business might be impacted. For Dow to be in the same position as Union Carbide with respect to reasonable expectations, it would reasonably expect have the same information in the event of the dissolution of the Pool.

[117] It is true that Section 5.17 provides that an equitable division of ethane commitments shall be made in a manner to be mutually agreed by the parties, failing which the matter shall be referred to arbitration, but this step follows Union Carbide's right to make informed choices at the time of dissolution.

[118] The need to ensure a fair and non-prejudicial process for dissolution of the Pool, if that is the appropriate remedy, need not involve this Court in negotiations over the actual division of the ethane commitments, as long as the process of unwinding the Pool does not prejudice Dow nor result in unfairness. It is not possible for this Court to assess if an equitable division of the Pool contracts is feasible without knowing the terms of and process for its implementation.

[119] It is noteworthy that NOVA repeatedly emphasizes a portion of Section 5.17 in its submissions that the Court lacks jurisdiction, but that it proposes that section 5.17 be severed, without a proposal for replacement, other than its would be "instructive" to the eventual process.

[120] NOVA's position that negotiation of an appropriate confidentiality and disclosure order should be up to the parties without Court intervention is disingenuous. If the parties had been able to work these issues out on a mutually agreed-upon basis, they would not before the Court in this second remand. It is clear that the parties have been attempting to resolve the issue without agreement since 2021.

[121] I agree that, without disclosure of relevant documentation relating to ethane commitments, Dow would be prejudiced by NOVA's proposal of Pool dissolution. NOVA's proposal denies Dow its contractual rights to information, and would require Dow to be part of a process without any assurance or ability to determine whether it would be fair or reasonable. While there may certainly be issues of confidentiality and competition to be resolved, those issues do not require the evisceration of Dow's rights.

[122] I disagree that this Court's jurisdiction to entertain submissions from Dow about its entitlement to contract information under Article 5 of the operating agreement is prohibited for reasons of *res judicata*, or that the trial record is closed.

[123] In order to determine whether the dissolution of the Pool and/or the termination of ethane services is an appropriate remedy, I must determine whether Dow is able to establish that this will cause prejudice and unfairness. This involves evidence of the proposed manner of the dissolution and division in principle.

[124] It is difficult to understand NOVA's position with respect to "*res-judicata*". There has not been a final decision with respect to the remedial effect of the illegality of the performance of the Ethane Pooling covenants. That issue has been specifically referred back to this Court, given the unfortunate inability of the parties to resolve the issues consensually. As the Court of Appeal notes, NOVA's preferences with respect to the now illegal clause "should" prevail unless Dow can demonstrate some prejudice or unfairness. NOVA's preference for the termination of the Pool is "presumptive", and subject to the establishment of prejudice or unfairness

[125] A "presumptive" remedy subject to conditions is not final. The trial record is not closed: it was not closed for the purpose of the damages remand and the Court of Appeal did not direct that the second remand was limited to the trial record. While it is open to NOVA to argue at the second remand hearing that Section 5.2 and 5.17 of are "untethered", this was not the Court of Appeal's finding. In fact, the Court was clear that it is an open question whether the invalidity of the covenants taints all of Section 5 or only the particular Section 5.15. The issue of the appropriate remedy is not *res judicata*, particularly as NOVA submits the prejudice or unfairness must be viewed through the lens of what the reasonable expectations of Union Carbide were at the time of formation of the contract.

[126] I find that the disclosure sought by Dow, as amended in its final brief and clarified during the January 24, 2024 hearing, is relevant to the issues that must be decided at the second remand hearing, particularly whether NOVA's proposed dissolution of the Pool and severance of Ethane Services give rise to prejudice or unfairness.

[127] To be clear, this endorsement does not constitute a ruling on either NOVA or Dow's threshold positions with respect to the appropriate remedy arising from the remedial effect of the

illegality of the performance of the Ethane Pooling covenant. It is simply a ruling on disclosure of the information that Dow seeks, which is relevant both to the proposed extent of severance and to the issue of whether NOVA's preferences with respect to severance are prejudicial or unfair. It does not preclude submissions on admissibility of evidence at the hearing proper.

4. Third Parties

[128] At the January 24, 2024 hearing, counsel for Pembrina Pipeline, Wolf NGL Inc, Interpipeline Offgas Limited Partnership and Cochrane Extraction Partnership, all counter parties to contracts with NOVA for the supply, transportation and storage of ethane for E3, appeared and objected to disclosure of their contracts to Dow. Their objection was based on the submission that the contracts contain highly confidential and competitively sensitive information with respect to price, volume, term, and the like, and that the agreements are subject to confidentiality provisions precluding their disclosure to third parties.

[129] I accept that these parties have a serious and substantial commercial interest in whether and, if so, to what extent and in what manner any disclosure may occur. They raise issues of privilege and confidentiality and have asked for the opportunity to address such issues if this Court finds that Dow's disclosure requests are appropriate.

[130] I agree that these parties should be afforded the opportunity to address issues of privilege or bars to disclosure or production, and, without prejudice to these issues, to address appropriate confidentiality protections if no privileges apply. These submissions are to be made at the next appearance. I understand that Dow agrees to disclosure of its briefs to the third parties, and that counsel for NOVA is seeking instructions with respect to the scope of such disclosure.

5. Confidentiality Orders

[131] It is clear that all parties agree that disclosure of this information requires agreement on protecting sensitive commercial information, and that an order should issue, similar to previous orders made during this litigation. I direct that negotiations over what I hope would be a consensual arrangement should continue until the next hearing at the end of February. If there is no agreement on an order, I direct the parties to provide details of their proposals so that the Court is able to resolve any impasse and the disclosure of documentation can begin. A schedule for the hearing of the final second remand hearing will again be a subject for discussion at the next appearance.

Dated at the City of Calgary, Alberta this 21st day of February, 2024.

B.E. Romaine
J.C.K.B.A.

Appearances:

Blair C. Yorke-Slader, K.C
E. Bruce Mellett
Denise Brunsdon
Ciara J. Mackey
Alyssa Marshall
for the Plaintiffs

Steven Leitl, K.C.
Tommy Gelbman
Bryan H. Walker
Fergus I. Schappert
Gunnar Benediktsson
Olivia C. Dixon
Emily McKinnon
for the Defendant

Ryan Phillips
for Interpipeline Offgas Limited Partnership and Cochrane Extraction Partnership

M.R. Lindsay, K.C.
for Pembina Pipeline

D.T. Yoshida
for Wolf NGL Inc.