

Court of King's Bench of Alberta

Citation: Dow Chemical Canada Ulc v NOVA Chemicals Corporation, 2024 ABKB 442

Date: 20240718
Docket: 0601 07921
Registry: Calgary

Between:

Dow Chemical Canada Ulc and Dow Europe Gmbh

Plaintiffs

- and -

NOVA Chemicals Corporation

Defendant

**Endorsement
of the
Honourable Justice B.E. Romaine**

I. Introduction

[1] This is the third endorsement relating to procedural issues arising from what has become known by the Court and the parties as the “Second Remand” hearing. The background and context of this remand are described in 2024 ABKB 98 and in the second endorsement dated May 7, 2024. Since then, Dow has served on NOVA a Statement Regarding the Defendant’s Proposal for Pool Dissolution (the “Dow Statement”) and the reports of two experts that it proposes to call as witnesses at the hearing.

[2] Defined terms as used in the trial and appeal reasons in this litigation have the same meaning when used in this endorsement. When the term “Dow” is used, unless specified otherwise, it refers to both Plaintiffs.

[3] NOVA applies for the following relief in this application:

- (a) production of records of Dow as particularised in the NOVA application;
- (b) a confidentiality agreement ensuring the confidentiality of records produced by Dow;
- (c) the appointment of a Dow corporate representative to be made available for questioning regarding the Second Remand;
- (d) a direction that the Dow experts Ramsey Shehadeh and Jack Broodo be available for pre-trial questioning; and
- (e) adjustment of the current schedule of proceedings leading to the Second Remand hearing to allow the foregoing production and questioning to be completed.

[4] I dismissed NOVA’s application, and these are my reasons.

II. Analysis

A. Applicable Principles relating to Production of Documents and Questioning

[5] As the parties appear to agree, the rules pertaining to disclosure of information in litigation in Alberta are set out in Part 5 of the *Rules of Court*, the purpose of which is set out in Rule 5.1(1). Rule 5.3 sets out the jurisdiction of the Court to modify or waive any right of a party under Part 5 in certain circumstances, which include when it is warranted given “expense, delay, danger or difficulty” in complying with the Rules and when to do so would be “grossly disproportionate to the likely benefit”.

[6] Rules 5.11(1)(a) and 5.1(1) are particularly noteworthy with respect to this application:

5.11(1) On application, the Court may order a record to be produced if the Court is satisfied that

- (a) a relevant and material record under the control of a party has been omitted from an affidavit of records...

...

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

- (a) to significantly help determine one or more of the issues raised in the pleadings...

[7] Given the nature of the Second Remand hearing, there have been neither formal pleadings nor affidavits of records, but the principles set out in these Rules apply to the application.

[8] As noted in *Dow v NOVA*, 2024 ABKB 98, both NOVA and Dow counsel agree that relevance and materiality are based on the issues to be determined at the hearing, and disclosure

and discovery are always tempered by this consideration. This Court agrees with NOVA that the core of document disclosure in the Second Remand hearing process arises from sub-issue 2(b) identified in 2024 ABKB 98:

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?

[9] This Court confirmed that when and if Dow raised any objections to the NOVA severance proposal based on prejudice or unfairness, Dow would be obligated to support such objections with disclosure of relevant documents: May 7, 2024 endorsement.

[10] Dow submits that its allegations of prejudice described in the Dow Statement and the expert reports do not require any further disclosure or production of documents.

[11] NOVA has applied for production of a broad range of documents relating to Dow's current portfolio of ethane contracts and its ethane business in Alberta. In addition to a general demand, it seeks approximately 27 categories of records and documents.

[12] NOVA submits that it has a fundamental right of due process to discovery of Dow regarding all assertions that Dow seeks to prove at the Second Remand hearing. It correctly asserts that Dow has the burden of proof in respect of all assertions of fact that it makes with respect to any allegations of prejudice or unfairness arising from NOVA's severance proposal.

[13] Conversely, NOVA has the burden of proving that the production it seeks in this application is relevant and material to the Second Remand issues.

[14] There is no doubt that NOVA is entitled to present its factual case, including a challenge to assertions of fact made in Dow's Statement or by its experts, but it has failed to establish that it requires production of highly confidential, non-E3 Dow business records in order to do so. Dow's Statement and the expert reports refer to issues of prejudice and unfairness that may arise in the hypothetical world that would exist if NOVA's severance proposal becomes the appropriate remedy to the situation that gave rise to the Second Remand, when the existing ethane Pool is divided, Dow becomes obligated to supply sufficient ethane to E3 to satisfy its share of ethylene output, and a number of provisions of the OSA are severed. Many of the Dow contracts that NOVA seeks to be produced include confidentiality provisions, and some third parties who are counterparties to the contracts have already expressed their concern with disclosure. While some protections can be put in place, as is the case with NOVA's directed production, the issue is whether production and the questioning of a Dow corporate representative is necessary, relevant and material.

[15] A comparison of what NOVA was previously ordered to produce and what it seeks to be produced by Dow on the basis of "reciprocity" does not aid the analysis. As Dow points out, NOVA seeks a broad number of non-E3, non-Pool Dow records in the name of reciprocity.

[16] In 2024 ABKB 98, this Court dealt with the issue, among others, of the relevance of E3 Pool contracts and whether some or all should be produced by NOVA. The list of documents and records sought by Dow is described in paragraphs 89-94 of the decision. I found that, without disclosure of relevant documentation relating to E3's current ethane commitments, Dow would be prejudiced by NOVA's proposal of Pool dissolution, as a refusal of disclosure would

be a denial of its contractual rights to information under the OSA, and would require Dow to be part of a process without any assurance or ability to determine whether it would be fair or reasonable. I found the disclosure sought by Dow to be relevant to the issues that must be decided at the Second Remand, particularly whether NOVA's proposed dissolution of the Pool and severance of ethane services would give rise to prejudice or unfairness.

[17] The test was, as it is now, relevance and materiality in the context of the issues.

[18] As noted by NOVA in a previous application, this Court has recognized its gatekeeper function with respect to the vetting of proposed evidence. A quote from *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 is apposite: "Courts must fulfill their gatekeeper role to ensure that unnecessary, irrelevant, and potentially distracting expert and survey evidence is not allowed to extend and complicate court proceedings." This is particularly apt in the context of litigation that has been ongoing for about 18 years and has given rise to the production of millions of pages of documents.

[19] As was the case with respect to the First Remand, this Court will make directions with the goal of ensuring a fair and appropriate process that uses no more judicial time and court resources than are necessary to address the issues and which attempt to prevent undue delay.

B. Right to Question Dow Corporate Representative

[20] NOVA submits that questioning is a fundamental discovery right, a process aimed at achieving fairness. Rule 5.17(b)(ii) gives a party the right to question the corporate representative of a party adverse in interest about relevant and material records and relevant and material information. As none of the documents requested by NOVA have met the standard of relevance and materiality, is there any other reason to allow additional questioning of a Dow corporate representative at this stage of the continuing, lengthy trial?

[21] The question of whether NOVA is entitled to the questioning it seeks is not determined by the fact that NOVA had full and extensive pre-trial production and discovery rights and that this is an appellate remand on a single issue and related sub-issues, but on whether the requested questioning is relevant and material to the issues of prejudice or unfairness raised by Dow and its experts and whether it would significantly help determine one or more of these issues. NOVA has not established that it would.

[22] NOVA concedes that its request to discover a Dow corporate representative is tied to Dow's Statement and its proposed expert opinion.

[23] Whatever the characterization of the Second Remand hearing, it is clearly not a case of typical pre-trial disclosure but an appellant remand after 18 years of litigation, extensive questioning and documents production during the pre-trial period.

C. Right to Dow Production of Records

[24] NOVA submits that it has a right to discovery of Dow's "new case theories" before they are presented at the hearing. This might be so if the prejudice or unfairness alleged by Dow was based on Dow's internal records, strategies or business records, but Dow has not put such records at issue.

[25] Of course, if Dow has decided to attempt to establish prejudice through expert opinions that do not rely on Dow's previously undisclosed internal business records, Dow will be constrained from admitting such records into evidence at the hearing. Dow, and NOVA, are

represented by senior experienced counsel, and Dow is surely not unaware of the consequences of its strategy.

[26] The following paragraphs analyze NOVA's specific demands for production with reference to NOVA's application, Dow's Statement and the proposed expert reports:

1. Paragraph 1(a) of the NOVA application.

[27] Contrary to NOVA's assertion in this paragraph, the relevant issue is not "the illegality of the performance of the Ethane Pooling Covenants". That issue has been decided and confirmed on appeal. The issues that are relevant are those set out in the Court's endorsement at 2024 ABKB 98.

2. Paragraph 1(a)(ii) of the NOVA application.

[28] NOVA submits that the Dow Statement and its expert reports are "replete" with allegations of prejudice based on the risk of lower volumes of ethane supplied by Dow to E3, increased costs to Dow to replace the Ethane Services (ethane supply transportation and storage) and the receivership structure impacting Dow's ability to efficiently supply, transport and store ethane for E3.

[29] In support of this submission, NOVA cites paragraphs 13 (a), (d) ii, (h), (j) and (k) of Dow's Statement. NOVA submits that the alleged prejudice in these paragraphs "all stem from Dow's ability to supply, transport or store sufficient ethane for E3 and the cost theory". A careful analysis of these statements does not give rise to an issue of Dow's ability to provide sufficient ethane to satisfy its requirements at E3. As Dow has said repeatedly, and reconfirmed in its written and oral submissions during the application, Dow's ability to acquire enough ethane to meet 50 percent or more of E3's requirements on reasonable notice and with appropriate transportation rates will not be raised by Dow as an issue of prejudice at the hearing.

[30] NOVA refers to specific portions of statements in Dow's Statement to support its submission that Dow puts its ability to fill its half of E3 ethane at issue.

- a) the comment in 13(a) of the Dow Statement, which relates to whether "Dow Interests" which are defined in the NOVA proposal as being based on the "Feedstock Fraction", may accurately reflect the ethane services necessary to enable Dow to realize its EPP of an optimized E3. This does not make Dow's current or future non-E3 business interests relevant or material to this concern; but involves the appropriate way to define Dow's interests in the Pool.

- b) NOVA references paragraph 13(d)(ii) of the Dow Statement:

(d)(ii) The Dow Interests managed by the Receiver would be isolated from the rest of Dow's assets in the region, limiting Dow's ability to ensure the regular and stable supply of ethane to E3. This would likely result in (i) shortfalls as the Dow Interests begin to expire shortly after the Pool Termination Date, (ii) non-optimized E3 production, (iii) increased operating costs per ethane barrel, and (iv) contractual breaches or other issues with third-party suppliers based on changes

or upsets in E3's operations and ethane demand;
(*emphasis added*)

NOVA's submission ignores the context of this statement, which is included in a discussion of how the use of a Receiver to manage Dow's interests in the Pool contracts would be prejudicial to Dow. Read in context, it does not assert that Dow would be unable to ensure a sufficient supply of ethane to E3, but that there may be a problem if Dow's ability to do so is complicated by having to go through the intermediary of a Receiver who is constrained both by lack of information and by the information he or she is able to give Dow.

Dow does assert that NOVA's proposed receivership structure will cause prejudice and unfairness to Dow, but this relates to aspects of the proposal, not to Dow's ability to supply its share of ethane to E3. These concerns do not require production of records relating to Dow's current ethane business.

- c) NOVA submits that a comment in Dow's statement at paragraph 13(j) gives rise to the requirement of additional production relating to Dow's costs generally as compared to its costs under the current Project Agreements:

NOVA's proposal would permanently undermine efficiencies achieved and incentives aligned through the Project Agreements, including the security of first load supply to E3, and economies associated with centralized procurement for E3 and management of E3 operations, leading to: (i) higher costs for ethane services, and new costs not contemplated by the OSA for the Receiver and for suitable monitoring, (ii) reduced operational flexibility; and (iii) risk and uncertainty, including the risk of lower volumes of ethane supplied for Dow to E3, and consequential lower yields and lower E3 ethylene production;

NOVA submits that the point of the paragraph is that Dow will pay more for ethane under NOVA's severance proposal. NOVA submits that what Dow is really saying is that dissolving the Pool will create a risk that Dow will be unable to supply enough ethane to E3 and if that happens, E3's production will be lower.

This is not a reasonable interpretation of the paragraph. The phrase "lower volumes of ethane supplied for Dow to E3" does not mean lower volumes of ethane supplied by Dow, but refers to the risk that the NOVA severance proposal may result in NOVA having a lower incentive to optimize production at E3.

The reference to higher costs for ethane services, for example, refers to higher costs than those that are currently the case under the Project Agreements if Dow's interests are managed by a Receiver, not higher costs than Dow incurs for its non-E3 ethane services.

- d) NOVA submits by reference to specific comments in Dow's Statement and in the expert reports that Dow is not only complaining about prejudice arising from

increased prices as a result of the termination of the Pool in relation to E3's requirements but "to the ethane market writ whole." The cited references do not sustain this submission.

- e) NOVA submits that Dow must produce documents regarding its current business portfolio to support its claims of prejudice or unfairness "that would result from a supposed imbalance of knowledge and visibility into the Pool Contracts, supply sources, financial obligations and renewal terms, impairing Dow's ability to make informed ethane acquisition, transportation, and storage decisions".

Dow's assertions of prejudice in this context (and the opinion of its experts) relate to the proposed assignment of existing Pool contracts to a Receiver who would operate those contracts on Dow's behalf, rather than assigning those contracts directly to Dow, and who would be unable to give Dow full disclosure.

- f) NOVA submits that Dow's Statement and its expert reports assert that Dow will be prejudiced or harmed as there will be "less ethane or higher cost ethane accessible to Dow for the purposes of processing at E3". As Dow notes, the few words relied upon in this context are from the Shehadeh Report only, and they are part of Dr. Shehadeh's opinion about NOVA's "ability and incentive to preferentially supply its own ethane, both in terms of quality and volume": Shehadeh Report, para. 61. The harm discussed by Dr. Shehadeh would be at E3, and has nothing to do with Dow's acquisition of the ethane. NOVA makes a similar misleading allegation in paragraph 70 of its brief that "[t]he Broodo report emphasized that managing interests in the Pool and transporting ethane to E3 requires consideration of Dow's 'overall business, operations and initiatives concerning its ethane supply, available transportation, capacity, inventory and storage management'." Mr. Broodo did not put in issue anything about Dow's specific existing arrangements: his opinion in the paragraph cited by NOVA was that "the proposed Receiver structure cannot effectively protect or manage Dow's interests in *Pool contracts* or in transporting Dow's ethane to E3", decisions about which "are not made by *an integrated petrochemical producer like Dow or NOVA* in isolation"; Broodo Report, para. 16.

- g) NOVA seeks records pertaining to Dow's understanding of the existing infrastructure at Joffre with respect to the physical transportation of ethane from the site boundary to E3: Paragraph 1.(a)(iv)(H) of NOVA's application. As Dow notes, what Dow knows about the infrastructure at E3 is what NOVA has chosen to disclose to it as Operator. The same applies to records pertaining to Dow's assessment or understanding of E3's ability to process alternative feedstocks. NOVA thus knows what NOVA as Operator has given to Dow about these two topics.

- h) NOVA submits that, because Dow has raised issues relating to the composition of ethane delivered to E3, and NOVA's ability to acquire ownership interests in infrastructure, Dow must produce:

a) its arrangements with respect to any third-party ethane infrastructure, including contracts under which it transports ethane through AEGS and on other pipelines; and

b) what opportunities Dow may have to harm NOVA by acquiring interest in infrastructure or entering into contracts with other parties in respect of ethane.

As Dow notes, the issue in the Second Remand is about what prejudice or unfairness to Dow might arise if the Court were to accept NOVA's Pool dissolution proposal, not about what harm NOVA's proposal might cause for itself. I agree that Dow's arrangements with pipelines have no bearing on NOVA's ownership interests or NOVA's supply of ethane. Dow's expert reports explore how NOVA could exploit its ownership interests or ethane composition if, as NOVA proposes, it would no longer be in the role of providing all the ethane for E3.

In fact, Mr. Shehadeh recognizes that the severance proposal may provide increased ability and incentive for strategic behaviours by Dow as compared to the current operation of the E3 joint venture, but that is not the issue in the Second Remand.

NOVA's submission that the Dow Statement and the expert reports give rise to the need to see how Dow meets the requirements required by Pembina for the composition of ethane that is transported on AEGS is not relevant or material because Dow is not alleging any inability to provide ethane to E3 under NOVA's proposal.

- i) NOVA submits that it needs to know the cost to Dow of providing the ethane services to itself equivalent to the ethane services that NOVA provides to the Pool. However, the allegation of prejudice that Dow identifies on this issue is that inefficiencies and economics of scale of having NOVA be the buying agent for both Dow and NOVA with respect to E3 ethane would be lost. The primary inefficiency complained about by Dow is that, under the proposal, instead of NOVA acquiring Pool ethane and administering it, there would be the receivership structure, which Dow and its experts submit will raise costs inherently, and create inefficiency since the Receiver is constrained from providing Dow with full information. The complaint is that having NOVA be the buying agent for E3 ethane for both NOVA and Dow had some inherent efficiencies and that, as a result, they were aligned in their common interests. This does not make Dow's current business records relevant or material.

Dow notes that when it served Dr. Shehadeh's report, it did not regard any unproduced records to be relevant and material to the opinions expressed, and none are cited.

- j) NOVA refers to the following parts of Dr. Shehadeh's report in support of its application for Dow records:

1. Para 61- "NOVA's Severance Proposal will frustrate Dow's Ability to Manage the Supply of Ethane and Ethane Services to E3."

In this paragraph, Dr. Shehadeh advises that:

as the Ethane Commitments comprising the Pool expire, NOVA will have the ability and incentive to preferentially supply its own ethane, both in terms

of quality and volume over Dow, including from the ethane in Joffre inventory. This will yield economic harm to Dow in the event of disruptions in supply and will result in less ethane or higher cost ethane accessible to Dow for the purposes of processing at E3, higher operational cost for Dow, and reduced E3 ethylene production for Dow. For example, by bringing E1 and E2 back online in a preferential order relative to E3. This would result in the loss of efficiencies related to common inventory management, thus imposing higher inventory management costs on Dow.

The example Dr. Shehadeh gives is that NOVA could preferentially supply its own solely-owned crackers by sending less ethane to E3, resulting in lower efficiency at E3, or that it could direct lower quality ethane (e.g., higher C02 content) to E3 and higher quality ethane to E1 and E2.

It is apparent that Dr. Shehadeh is referring to prejudice arising from NOVA's management of the Joffre ethane pool, not that that Dow may not be able to source enough ethane to fuel its requirements at E3.

2. NOVA submits that Dr. Shehadeh's opinions on the petrochemical industry in Western Canada found at para 17-21 of his report supports NOVA's demands for documents as follows:

Records related to Dow's assessment of the impact of the following on the Alberta ethane market and/or NOVA's ability to acquire ethane for the Pool: (1) the "continued evolution of natural gas and ethane supply in Western Canada"; (2) the potential construction of new ethane crackers by Dow or by others; (3) changing availability and pricing of alternative feedstocks (e.g., propane); (4) changing exploration and production technologies that affect natural gas production (and the NGL content of natural gas production) in Western Canada; (5) changing government policies such as industry incentives or carbon regulations; and (6) changing demand for and competition for ethylene supply..." NOVA's Application sub paragraph 1(a)(iv) B.

Dr. Shehadeh's opinions in these paragraphs of the report relate to the context of the petrochemical industry in Western Canada and relate how the E3 Project Agreements, including the Pool, facilitate commercial responses to the dynamic conditions he describes. He cites no unproduced Dow documents to support them. If NOVA or its experts disagree with these descriptions and opinions, they may put questions to Dr. Shehadeh on cross examination.

[NOVA submits that to the extent Dow has assessed any of the issues referred to in the context of the Alberta Market, its own ethane portfolio, or with respect to NOVA's ability to acquire ethane for the Pool], those records are properly producible for the purposes of assessing whether any of these issues would, in fact, cause prejudice to Dow were it required to acquire its own ethane for E3, in addition to the significant ethane volumes it already acquires in the province.

Again, Dow does not allege any inability to supply E3 with ethane as a possibility of prejudice arising from the NOVA severance proposal. Dr. Shehadeh's report does not refer to Dow's assessment of the impact of any of the issues raised in his contextual discussion.

As Dow points out, any Dow employee's opinion with respect to these issues would be just that, an opinion and therefore not relevant. Neither does Dow assert NOVA's ability to acquire ethane for the Pool as a possible prejudice to Dow.

3. NOVA submits that, through the Dr. Shehadeh report, Dow has put its ability to acquire sufficient low-cost volumes of ethane to fill E3 at issue by opinions on the efficiencies that are achieved through the Pool relative to having Dow supply its own ethane to E3 and by noting that the Pool is required to align the Operator and the Co-Owners on future ethane crackers constructed in the Province, citing paragraph 56 of Dr. Shehadeh's report.

Paragraph 56 of the Shehadeh report reads as follows:

56. The permanent loss of efficiencies discussed above will cause economic harm to Dow. Specifically, without the economies of scale and the corresponding efficiency gains provided by the E3 joint venture, Dow will face higher operational costs (including feedstock, services, transportation and storage costs), while also facing higher management costs for its feedstock procurement and inventory systems. These costs will include the cost of the Receiver, monitoring costs, risk and uncertainty, and reduced operational flexibility. At the same time, the efficiency losses may also manifest in lower volumes of feedstock supplied for Dow to E3, a lower yield, and lower ethylene production at E3. With a decentralized and unaligned ethane procurement and management process, Dow will need to manage its demand and supply balances in the presence of more ethane supply and demand risk (e.g., disruptions in ethane supply). For example, E3 operates less efficiently at lower levels of capacity utilization and if NOVA were not to nominate its entire share, Dow would be

faced with the option of accepting that lower efficiency or maintaining the option for excess ethane production and inventory (and, thus, storage) to fill E3 with its own Dow Equity Ethane. Upstream, certain ethane extraction assets may operate less efficiently without the Pool demand aligned, for example if they require effective unanimity among their customers to run or run efficiently. Consequently, Dow's E3 operational costs and, in general, its E3 production cost, will increase. The removal of such permanent efficiencies would consequently remove the procompetitive effects arising from the contractual commitments included in the Project.

Dow does not assert that having to acquire more ethane would be prejudicial or unfair. This paragraph refers to the loss of economies of scale and corresponding efficiency gains provided by the E3 joint venture. It does not raise the issue of Dow being able to provide sufficient ethane to supply its E3 requirements.

4. NOVA's comments on Dow's expanded capacity at Fort Saskatchewan and as a result of the Path2Zero project certainly explains why NOVA, as a direct competitor, has an interest in confidential business records with respect to these facilities, but neither Dow nor its experts assert prejudice arising from the demands of Dow's operation of its new and expanded plants. NOVA makes no effort to explain why Dow's development of its Fort Saskatchewan operations would suffer prejudice or unfairness from NOVA's severance proposal, and Dow does not raise this as an allegation of prejudice.

NOVA submits that Mr. Shehadeh's comments that NOVA's proposal will cause a substantial lessening or prevention of competition and therefore economically harm the public gives rise to the requirement of broad disclosure of Dow's business in order to "assess the entirety of the market". The comment must be viewed in the context of Dr. Shehadeh's comments on this issue in the whole set out in paragraphs 62-70 and refer to the implications on the market of NOVA's severance and dissolution proposal in the future hypothetical world where these changes would occur.

- k) NOVA refers to the following parts of the proposed expert report of Jack Broodo in support of its application.

Dow again notes that when it served Mr. Broodo's report on NOVA, it did not regard any unproduced records to be relevant and material to the opinions expressed therein, and none appear to be cited.

1. As with the Shehadeh report, NOVA particularizes the records it believes to be relevant arising from Mr. Broodo's report as follows:

Records of relevant data (e.g., volume, price, etc.) relating to the Ethane Contracts in native format (e.g., Excel), including native copies of ethane supply/demand balances, AOG Inventory Frac Models, invoices, or similar data; explanatory documents, such as operations manuals, which would permit NOVA to understand how Dow currently transports ethane to, through and from AEGS, as well as how Dow has transported and/or delivered ethane to the Joffre Site in the past, whether for use in the E1 Toll, as part of streaming agreements, as a result of short-term or spot sales of ethane to NOVA, or as part of ethane time or location swaps; records related to the volume of ethane Dow's Path2Zero cracker is estimated or expect to consume, including any agreements and related records regarding Dow's future supply (and potential future supply) of ethane to Dow's Path2Zero cracker; records related to Dow's assessment of the impact of its Path2Zero cracker on the Alberta ethane market; records related to Dow's assessment of the impact of its' acquisition of ethane for the Path2Zero cracker on NOVA's ability to acquire ethane for the Pool: NOVA application, paragraph 1(a)(v)(B)-(F).

As Dow notes, most of the demands relate to Dow's acquisition of ethane for LHC-1, for the Path2Zero project and, potentially for E3. NOVA suggests that Mr. Broodo's statement that Dow and NOVA are in direct competition for essentially all the ethane supply in the Alberta market opens the issue of the impacts of LHC-1 and the Path2Zero project on Dow's ability to supply sufficient ethane to E3. It may have, if Dow was asserting prejudice on that basis, but it is not. As Dow does not assert that any prejudice or unfairness would arise from having to acquire enough ethane for its obligations to E3, these records are not relevant.

2. NOVA demands records of and establishing the alleged "real time" nature of Dow's ethane management systems in NOVA application paragraph 1.(a)(v)(G) of its application.

NOVA submits that a significant portion of the prejudice that Dow alleges and that is set out in Mr. Broodo's report relates to the use of a Receiver. NOVA characterizes these comments on the use of a Receiver as resulting in an imbalance of information, loss of Dow's ability to engage its business teams to make decisions regarding the supply, transportation, and storage of ethane, loss of "real time: management, and loss any "economies of scale" that Dow supposedly enjoys, and which supposedly would be at risk if Dow had to purchase more ethane for its own use at E3.

In NOVA's view, this "squarely puts data relevant to Dow's ethane contracts, Dow's 'real time' ethane management systems and any economies of scale Dow benefits from with respect to the Pool in contrast to existing acquisitions and transport arrangement at issue". However, Mr. Broodo's comments relate to how Dow could be prejudiced in a world in which it brought its own ethane to E3 and then handed it over to NOVA to produce as much ethylene as possible for Dow.

Mr. Broodo's opinion is that the Receivership structure proposed by NOVA cannot effectively protect or manage Dow's interests in Pool contracts or in transporting Dow's ethane to E3, commenting that in the ordinary course of business "sophisticated chemical manufacturers like Dow and NOVA have an entire team including commercial managers, schedulers, accountants, lawyers, engineers, and technology specialists, with decades of experience, whose entire job is to manage [ethane] issues in real time".

NOVA refers to general statements Mr. Broodo makes in paragraph 16 and 21 about how "integrated petrochemical producers like Dow or NOVA" make decisions and how ethane feedstock extraction, transportation, storage and supply is generally contracted for in Alberta by Dow and NOVA. These are general statements that have been referred to in evidence previously in this litigation. It is true that Mr. Broodo's experience with these issues included exposure to Dow contracts, many of which have been produced in the first phase of this trial. If NOVA wishes to cross-examine Mr. Broodo on how he came to be able to give these general opinions, it may do so.

As Dow notes, this is a relatively non-contentious general statement with respect to the business of sophisticated chemical manufacturers. If NOVA claims that this is inaccurate, it may cross-examine Mr. Broodo on it.

The other documents and records sought to be produced by Dow in NOVA's application have not passed the test of relevance and materiality for the same reasons as discussed herein. They fail to have a connection to E3, the Pool arrangements, NOVA's proposal to dissolve the Pool and Dow Statement regarding the prejudice and unfairness that arises from the Nova proposal.

NOVA submits that their experts need documentation about Dow's current business, but it does not follow that such experts are entitled to that information unless the records have been shown to be relevant and material.

D. NOVA demands Employment and investment records of Mr. Broodo: NOVA application paragraphs 1(v)(H)(I)(S)

[31] It is clear that NOVA intends to object to Mr. Broodo's qualification as an expert witness on the basis of his long employment with Dow, and possibly a financial interest in the outcome of the litigation. NOVA will be able to test Mr. Broodo's independence on these grounds through cross-examination as to his qualifications when he is offered as an expert witness, and there is no need for Dow to be compelled to release private records of Mr. Broodo in advance. Such a request is unusual and unnecessary, given that Mr. Broodo has been transparent about his previous relationship to Dow.

E. Pre-hearing Questions of Experts

[32] Rule 5.37 provides that, upon agreement or in exceptional circumstances, the Court may direct that an expert be questioned prior to trial.

[33] As noted in *Castle Buildings Centres Group Ltd. v Alberta Drywall + Stucco Supply Inc.*, 2023 ABKB 696 at para 32, the fact that litigation is highly contentious and the amount of damage claimed is significant does not make the situation exceptional. While NOVA is clear that it intends to question the admissibility of Mr. Broodo’s report, that can be properly done at the time the report is tendered for admission at the hearing. Dr. Shehadeh has given expert reports at other times in this litigation, and there has been no application for pre-hearing questioning. If the experts have relied on undisclosed documentation in their reports, that can be elicited in cross examination and will have implications for the credibility of the opinion. While this has been fiercely- contested litigation, there are none of the unusual aspects of the expert reports encountered in *BJM v SLM*, 2012 ABQB 731, for example. There is no persuasive reason to suppose that the questioning of the experts will narrow the issues, focus the hearing or foster resolution between the parties. NOVA submits that pre-trial questioning of the experts would “narrow its questioning of a Dow representative” but I have found no basis for further questioning of a Dow corporate representative.

[34] As noted by Phillips, J in *BJM* at para 27, “[m]y review of the materials provided by the Alberta Law Reform Commissions during the development of the new Rules of Court indicates that this addition [of Rule 5.37] arose out of concern about undue delay and expense associated with permitting unrestricted questioning of experts.

[35] I decline to order pre-hearing questioning of the Dow experts.

F. Miscellaneous

NOVA requests that I address Dow’s allegation that NOVA is attempting to delay the hearing of the Second Remand. I decline to do so in this endorsement. The record speaks for itself.

NOVA also asks that I direct Dow to specify any previously disclosed documents or records that it will submit are relevant to the issues of the Second Remand. That will become apparent in the pre-hearing briefs. While I made such a direction at one point during the First Remand, it was made in the exceptional circumstance of the late disclosure of over a million pages of documents by NOVA just prior to the hearing. At any rate, NOVA did not comply with the direction.

Counsel for NOVA suggests that the schedule for the hearing “will be extended at least to the timeline it takes for the endorsement to come out.” There was no such direction or agreement on an extension.

Heard on the 27th day of June, 2024.

Dated at the City of Calgary, Alberta this 18 day of July, 2024.

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

Appearances:

Blair C. Yorke-Slader, K.C
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Denise Brunsdon
Ciara J. Mackey
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