In the Court of Appeal of Alberta

Citation: IFP Technologies (Canada) Inc v EnCana Midstream and Marketing, 2024 ABCA 384

Date: 20241126
Docket: 2301-0002AC
Registry: Calgary

Between:

IFP Technologies (Canada) Inc.

Appellant
(Cross Respondent)

- and -

EnCana Midstream and Marketing, PanCanadian Resources, EnCana Corporation, EnCana Oil & Gas Developments Ltd., The Wiser Oil Company of Canada and The Wiser Oil Company

Respondents
(Cross Appellants)

The Court:

The Honourable Justice Patricia Rowbotham
The Honourable Justice Thomas W. Wakeling
The Honourable Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Justice C.S. Anderson
Dated the 2nd day of December, 2022
Filed on the 5th day of January, 2024
(2022 ABKB 807, Docket: 0301 03520)

Memorandum of Judgment

The Court:

Overview

[1] The parties to this appeal have been involved in a long-standing contractual dispute that arises out of a 1998 agreement between the appellant, IFP Technologies (Canada) Inc, and PanCanadian Resources, one of the respondents. Following IFP's successful appeal of the original trial decision, the majority of this Court concluded that IFP had a 20% working interest in the petroleum and natural gas rights of a property known as Eyehill Creek and was entitled to an accounting for its proportionate share of the net revenue realized from primary production at Eyehill Creek. The calculation of net revenue realized, as well as a second outstanding issue, were remitted to the Court of King's Bench for determination. This appeal and cross appeal are from that second trial decision.

Background

[2] In October 1998, IFP acquired 20% of PanCanadian's working interest in the petroleum and natural gas rights in Eyehill Creek by way of an Asset Exchange Agreement. At the time, PanCanadian was of the view that primary oil and gas production from Eyehill Creek had finished. PanCanadian and IFP were jointly planning to recover heavy oil from the property, using an enhanced thermal recovery process known as steam assisted gravity drainage (SAGD). The purpose of this process is to recover oil that would otherwise not be recoverable through conventional methods.

[3] Following the execution of the Asset Exchange Agreement, heavy oil prices fell dramatically, making the economics of a SAGD project unattractive. This, combined with an increase in gas prices, led PanCanadian to change its plans. In 2001, PanCanadian entered into an agreement to farm out its remaining 80% working interest in Eyehill Creek to the Wiser Oil Company. Wiser planned to reactivate some existing wells and drill new ones using primary production methods. PanCanadian and Wiser entered into an Abandonment, Reclamation and Option Agreement dated May 18, 2001. Pursuant to the Abandonment, Reclamation and Option Agreement, Wiser could earn PanCanadian's interest by completing a defined abandonment/production program and assuming PanCanadian's significant existing abandonment obligations in Eyehill Creek.

[4] IFP refused to consent to PanCanadian's disposition to Wiser. In 2003, IFP sued PanCanadian alleging it had wrongfully permitted primary production on the Eyehill Creek lands and thereby damaged the thermal development potential of the property. IFP sought damages from PanCanadian for the loss of opportunity and, in the alternative, an accounting of the profits that

Wiser and its successors (collectively with PanCanadian and its successors, the defendants) realized from primary production on the Eyehill Creek lands. PanCanadian took the position that the Asset Exchange Agreement gave IFP only an undivided working interest in production arising from thermal or enhanced recovery methods.

[5] The matter proceeded to trial in 2011, but the trial judge died before rendering judgment. With the consent of the parties, the case was assumed by then Chief Justice Wittman. In a 2014 decision, he found that IFP's working interest was limited to thermal and other enhanced recovery methods and dismissed IFP's claims: *IFP Technologies (Canada) v Encana Midstream and Marketing*, 2014 ABQB 470.

[6] In 2017, a majority of this Court allowed IFP's appeal, holding that IFP had been granted an undivided interest as a tenant in common equal to 20% of PanCanadian's working interest in all forms of production (primary and thermal) in the Eyehill Creek lands: *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 220 (*IFP CA*). The Court of Appeal held that IFP was entitled to an accounting for its proportionate share of the net revenue realized from primary production at Eyehill Creek and remitted two issues back to the Court of King's Bench for determination:

a. calculation of IFP's proportionate share of all net revenue realized from primary production at Eyehill Creek on both existing and new wells, including a determination of the extent, if any, that IFP should be responsible for abandonment costs of existing infrastructure; and

b. the effect of the contractual limitation of liability contained in Article 7.9 of the Asset Exchange Agreement on IFP's claim.

[7] The matter of the costs of the 2011 trial was also remitted to the Court of King's Bench.

[8] The defendants' application for leave to appeal to the Supreme Court of Canada was dismissed in 2018: *Encana Midstream and Marketing v IFP Technologies (Canada) Inc*, 2018 CanLII 28111 (SCC).

[9] In 2022, the second trial proceeded before a new trial judge, who heard witnesses, including four experts, over 13 days. IFP sought just under $21.7 million plus interest from the accounting, for a total of $61.8 million. The defendants' position was that IFP was owed nothing after taking abandonment costs into account.

[10] In a judgment issued in December 2022, the second trial judge directed how IFP's 20% share of the net revenue realized from Eyehill Creek was to be calculated and addressed a number of other issues: *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2022 ABKB 807. Clarification of some outstanding issues followed in an endorsement dated July 5, 2023. For

convenience, we will refer to the second trial judge as the "trial judge" in the remainder of these reasons.

Issues on appeal

[11] IFP's appeal concerns four broad issues arising out of the second trial judgment: (1) the calculation of IFP's share of the net revenue realized; (2) the determination that IFP was responsible for its share of future abandonment obligations and the calculation of the amount IFP was to place in trust; (3) the determination that the damages limitation clause in the Asset Exchange Agreement applies; and (4) the award of interest.

[12] The defendants cross appeal on the following issues: (1) the trial judge's treatment of abandonment costs; (2) the treatment of royalty payments to PanCanadian where IFP had not agreed to the rate; (3) PanCanadian's liability to Wiser under an indemnity granted in the Abandonment, Reclamation and Option Agreement; (4) the defendants' claim for interest; and (5) the costs awarded for the first trial.

[13] IFP's argument on its first issue - the calculation of IFP's share of net revenue realized - focuses on two matters. First, IFP challenges the trial judge's general approach to the evidence, including expert evidence, which IFP says demonstrates error and is contrary to binding authority. Many of these arguments challenge aspects of the trial judge's conclusions on several preliminary issues, which the trial judge addressed at the outset of her judgment to provide a framework for her calculations. We find it convenient to approach IFP's arguments in this category by commencing with a of review of those preliminary issues.

[14] IFP also argues that the trial judge erred in her treatment of specific deductions. We will address all challenges to specific deductions advanced in both the appeal and cross appeal together. We will then deal with the remaining issues.

[15] This judgment will therefore address the various issues and arguments by the parties under the following headings:

1. Preliminary issues determined by the trial judge
2. The trial judge did not fail to follow binding authority
3. Specific deductions challenged on the appeal and cross appeal
4. Treatment of future abandonment costs
5. Interest
6. The limitation of liability clause
7. PanCanadian indemnity
8. 2011 trial costs

Analysis

1. Preliminary Issues Determined by the Trial Judge

[16] As noted above, the trial judge addressed a number of issues at the outset of her judgment to provide a framework for her calculations. Some of her conclusions are challenged by IFP in its argument that the trial judge made errors in her approach to the accounting.

a. Disclosure

[17] The trial judge rejected IFP's submission that the defendants withheld or failed to disclose information and records. The production of Eyehill Creek dates back more than 20 years and there were "approximately 4500 record boxes and 500,000 rows of computer data across various periods and accounting systems". While not all of the records in these boxes were produced, the trial judge accepted that the defendants' accounting expert (Kody Carroll) had provided IFP's accounting expert (Mark Pelzer) with documents he had requested, that Mr Carroll received no further requests for information, and that Mr Carroll received no response to a letter he sent Mr Pelzer advising that the defendants had fulfilled the requirements for information which they had discussed. The trial judge found that "neither the defendants nor Mr Carroll deliberately failed to disclose any information or attempted to frustrate Mr. Pelzer's efforts to prepare his reports and provide his opinion".

b. The JADE

[18] The trial judge's calculation of the net revenue realized from Eyehill Creek between 2001 and 2021 was largely based upon data from the Joint Account Data Extract (JADE). The JADE was "a listing of all transactions made to a cost center or authorization for expenditure for any given period and entered into an accounting system" taken from the records of the various entities responsible for the Eyehill Creek operations between 2001 and 2021. All parties relied on the JADE.

[19] IFP submitted that expenses not included in the JADE or recorded in a document should not be considered in calculating the net revenue realized. The trial judge rejected that proposition; she accepted that the JADE did not reflect all of the reasonable and necessary expenses incurred because the defendants "believed the property was wholly owned" and that "an estimate of those expenses is appropriate in accounting for net revenue realized".

c. Use of Estimates

[20] IFP submitted that an accounting is fundamentally different from an assessment of damages and that the defendants were required to prove (rather than estimate) any expense they sought to deduct. The trial judge rejected IFP's submission that any expenses deducted in calculating the net revenue realized could not be estimated, but rather had to be proven based on

the JADE or written documents. She accepted that "estimates are employed in accounting procedures, where there is reasonable certainty that the expenses were in fact incurred" and that "refusing deductions for expenses where there is reasonable certainty that they were incurred but where precise documentary evidence is not available, would amount to punishment that goes beyond the boundaries articulated by the Supreme Court of Canada [in *Nova Chemicals Corp v Dow Chemical Co*, 2022 SCC 43] for an accounting of profits".

d. Well-by-Well vs Field Accounting

[21] The trial judge rejected IFP's assertion that it was entitled as a tenant in common of the Eyehill Creek operations to have the accounting prepared from the profitable wells only. Rather, she accepted that the accounting should be based upon the entire field because leases would have expired if a plan to develop the field had not been adopted, which would have reduced the parties' working interests. She was satisfied that the defendants were operating on the assumption that Eyehill Creek was wholly owned and there was no evidence to suggest the defendants "undertook the exploration and development of Eyehill Creek in a reckless, indiscriminate or haphazard manner".

[22] As a result, the trial judge did not find it necessary to consider whether individual wells were profitable and instead made her findings "on the net revenue realized from the entire field, by taking the overall gross revenue minus all reasonable and necessary costs and expenses". She noted that approach was in accordance with IFP's position at the first trial and its initial position at the second trial.

e. Expert Accounting Evidence

[23] The expert accounting witnesses called by the parties provided various reports and were examined and cross-examined at some length. The trial judge gave "little, if any, weight" to the evidence of IFP's expert, Mr Pelzer. She characterized the methodology in his reports as inconsistent and described errors identified during his cross-examination. She had concerns about the manner in which he testified as he "did not present as an objective, independent witness", was "at times combative, non-responsive and defensive" during cross-examination and had to be directed by the court to answer a question.

[24] By contrast, the trial judge found both accounting experts called by the defendants (Mr Carroll and Katrina LaRocque) to be "very impressive expert witnesses". She described Mr Carroll's reports as "organized, clear and thorough" and his testimony as "professional, forthright and helpful". Ms LaRocque, who was called because Mr Pelzer and Mr Carroll had given such divergent opinions, provided "some assurance about oil and gas accounting and a 'check' on the other accounting experts" and demonstrated independence from the other experts.

[25] The qualification of experts and the assessment of the probative value of their testimony are evidentiary issues that require deference. An appellate court should interfere with a trial judge's

preference for one expert opinion over another only if the choice is unreasonable or patently wrong: *Grafikon Speedfast Limited v Heidelberg Canada Graphic Equipment Limited*, 2013 ABCA 104 at para 19; *Mouvement Laïque Québécois v Saguenay (City)*, 2015 SCC 16 at para 105. The trial judge's findings on the other preliminary issues summarized above, which governed her general approach to the accounting, are questions of mixed fact and law subject to a deferential standard of review on appeal. Having reviewed her findings and conclusions, as well as the arguments of IFP and the defendants with respect to her approach, we are satisfied that she committed no reviewable error with respect to these matters.

2. The trial judge did not fail to follow binding authority

[26] IFP submits that the trial judge erred in law by deducting certain *estimated* expenses when calculating the net revenue realized from Eyehill Creek, which IFP characterizes as contrary to two binding decisions regarding the proof of deductible expenses in an accounting: *Nova Chemicals Corp v Dow Chemical Co*, 2022 SCC 43 and *FIC Real Estate Fund Ltd v Phoenix Land Ventures Ltd*, 2020 ABCA 325. In our view, neither of these decisions precludes the deduction of estimated expenses in an accounting.

[27] *Nova* was an action by Dow for an accounting of profits resulting from Nova's infringement of Dow's patent for a type of thin strong plastic. The main ingredient in the patented plastic was ethylene, which Nova produced at a cost that was less than the market price of ethylene. One of the issues, which was rejected by the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada, was Nova's submission that it should be permitted to deduct the higher market price of ethylene, rather than the actual costs it incurred to produce the ethylene. The *Nova* decision does not address the propriety of, nor does it preclude, deducting estimated expenses in an accounting where the trial judge is satisfied that "many of the expenses at issue were in fact incurred, notwithstanding that they were not documented."

[28] We recognize that the trial judge made an error when she described the Supreme Court of Canada as allowing the appeal from the Federal Court of Appeal's decision in *Nova*. However, it is apparent that she simply misspoke and did not err in her understanding or application of the *Nova* decision.

[29] *FIC* involved an accounting trial to determine the plaintiff's 20% of the net income from a property. The trial judge appointed an independent accountant to review accounting records produced by the defendants and identify ambiguous and unsupported expenses. The trial judge's disallowance of certain expenses that were not adequately documented was upheld on appeal. The Court of Appeal accepted that the defendant was obliged to prove supportable expenses and disbursals and had not met its evidentiary burden in some instances but rejected the submission that the trial judge grounded his reasoning on a determination that the defendant "engaged in a deliberate course of financial concealment or wrongdoing". Rather, the trial judge simply recognized that a "full accounting from [the defendant] in respect of certain expenses was not available".

[30] IFP submits that the trial judge erred in law when she stated at para 97:

> While I do not disagree with that placement of the burden, the defendants have satisfied me, that there were expenses incurred that are not reflected in the JADE and that an estimate of those expenses is appropriate in accounting for net revenue realized. As in FIC Real Estate, I have found that the defendants have not engaged in financial concealment or wrongdoing. I accept the evidence put before this court by the defendants as to why certain expenses were not recorded. Having heard the evidence of Ms. LaRocque, I am satisfied that reliance on estimates and industry standards does not amount to positing hypothetical expenses. I note that during the 2011 trial, IFP's expert, Mr. Parker, relied on estimates and referred to industry standards in the absence of formal documentation.

[31] The trial judge's approach is not inconsistent with *FIC*. Her decision to accept estimates for certain expenses that she was satisfied with "reasonable certainty" were incurred does not disclose reviewable error.

3. Specific deductions challenged on the appeal and cross appeal

[32] Much of the argument on the appeal and cross appeal relates to various deductions from revenue made by the trial judge when calculating IFP's 20% share of net revenue realized from Eyehill Creek. The following adjustments, made by the trial judge to amounts in the JADE, were challenged by either IFP on the appeal or by the defendants on the cross appeal. Each is addressed individually.

a. Production Engineering

[33] The trial judge accepted Mr Carroll's evidence that there were virtually no charges in the JADE for production engineering and that Eyehill Creek could not have produced revenue without incurring such costs. Mr Carroll testified that the accounting procedures of the Petroleum Accountants Society of Canada (PASC) allow production engineering to be assessed on an as paid actual basis or a percentage assessment basis. He used 2% of base operating costs (excluding overhead and expenses that would not attract production engineering) to calculate the production engineering expenses since May 2001 to be $1,045,834. The trial judge accepted that this calculation should be included in the accounting of IFP's share of net revenue realized.

[34] IFP submits that Mr Carroll was not qualified to give evidence that production engineering would have been required and that the trial judge erred in accepting his evidence. IFP further submits that the trial judge reversed the onus when she stated there was "nothing before [her] to suggest that the parties would not have agreed to those terms had they entered into agreement". It is to be noted that "those terms" are terms that reflect the standards in the industry.

[35] The errors alleged by IFP go to factual findings made by the trial judge based upon the evidence of an expert qualified to provide opinion evidence "calculating net revenue realized from oil and gas assets arising from the production based on standards in the industry". The trial judge's acceptance of Mr Carroll's "calculations that reflect standards in the industry" was reasonable and did not constitute a reversal of the onus. The standard of appellate review for factual findings made by a trial judge, absent an extricable error of law, is palpable and overriding error. The trial judge's acceptance of Mr Carroll's evidence discloses no reviewable error. This ground of appeal is dismissed.

b. Overhead Costs

[36] Overhead costs are the mechanism that allows an operating company to recover indirect administrative costs. The JADE included $3,158,181 in actual overhead costs that had been recorded by the defendants. The parties agreed that the JADE did not sufficiently or consistently reflect overhead costs. Mr Pelzer calculated overhead at $225 per month per producing well for a total of $2,250,225 for overhead costs. Mr Carroll calculated overhead in accordance with PASC Operating Procedures using 10% on operating base costs with some exceptions and 2% on capital, which resulted in an adjustment of $6,414,230 in favour of the defendants.

[37] The trial judge accepted Mr Carroll's methodology. She was satisfied with "reasonable certainty" that such costs were incurred and should be included in an accounting of IFP's share of net revenue realized.

[38] IFP submits on appeal that Mr Carroll relied on two incorrect assumptions in his hypothetical scenario: (i) that IFP did not have a working interest since the inception of the Asset Exchange Agreement; and (ii) that companies "do not typically self-assess overhead on costs centres or AFEs where there are no other working interest owners".

[39] The trial judge's preference for the methodology used by Mr Carroll (including the assumptions made by him) to calculate overhead expenses, rather than that proposed by Mr Pelzer, constitutes a factual finding for which IFP has failed to demonstrate any palpable and overriding error. This ground of appeal is dismissed.

c. Insurance Costs

[40] The JADE contained insurance costs for some years but not others. The trial judge accepted that Mr Carroll's calculation of insurance costs for the missing years should be included in an accounting of IFP's share of net revenue realized. She noted that Mr Pelzer had acknowledged in his evidence that companies never operate oil and gas properties without insurance.

[41] IFP claims that the trial judge erred in allowing an insurance expense for years where there was no insurance expense included in the JADE, and that there was no other evidence adduced of what the defendants were insured for or why IFP should pay a share of those costs.

[42] The trial judge's decision to accept Mr Carroll's methodology to calculate insurance expenses for the missing years was reasonable and discloses no palpable and overriding error. This ground of appeal is dismissed.

d. The Hayter 7-21 Facility

[43] The Hayter 7-21 facility was the processing facility for the Eyehill Creek lands. It was an existing facility acquired by Wiser from PanCanadian pursuant to the Abandonment, Reclamation and Option Agreement. The costs of constructing the Eyehill Creek Hayter 7-21 processing facility were not included in the JADE.

[44] The trial judge accepted that IFP was seeking a benefit from the processing facility, which was necessary for production. As a result, she concluded that IFP had to either "assume responsibility for ownership and costs of the facility or pay third-party costs for processing". If IFP did not participate as an owner, it would have been charged much more expensive third-party processing fees, estimated by Mr Carroll to be roughly $18 million. The trial judge accepted that Mr Carroll's estimate of the initial construction cost of $855,066 should be included in an accounting of IFP's share of net revenue realized. She noted Ms LaRocque's evidence that the costs of the Hayter facility would have been significantly higher than than Mr Carroll's estimate. The trial judge characterized Mr Carroll's estimate as being "conservative" and his methodology "fair and very much to IFP's benefit".

[45] IFP submits on appeal that the trial judge erred in deducting any costs associated with the Hayter 7-21 facility because it was one of the existing production facilities constructed by PanCanadian prior to negotiation of the Asset Exchange Agreement.

[46] The trial judge's conclusion that IFP was seeking the benefit of processing at the Hayter facility and had to either assume responsibility for ownership costs or pay third-party processing costs was a reasonable factual finding. Her inclusion of Mr Carroll's estimate of the construction costs in the calculation discloses no reviewable error.

e. Royalties

[47] At the second trial, IFP objected to the inclusion of royalties paid to PanCanadian in the accounting for its share of net revenue realized.

[48] There were 24 petroleum leases in Eyehill Creek. PanCanadian was the lessor on seven leases, with the remaining leases obtained from the Crown or other third parties. The JADE recorded Wiser's payment of over $10 million for Crown royalties and over $18 million for freehold/gross overriding royalties to third parties, including PanCanadian.

[49] One of the PanCanadian leases had a royalty rate of 20%, while the other six leases provided that the royalty was "to be negotiated". Section 2.10 of the Asset Exchange Agreement

provided that following a written request by IFP, PanCanadian and IFP "shall negotiate the terms of, and cause to be executed and delivered to the other, freehold petroleum and natural gas leases evidencing IFP's interest ... The terms of such leases shall give due consideration to the unique relationship between PCR and IFP." IFP never entered into the leases contemplated in section 2.10.

[50] IFP claimed it was not required by the Asset Exchange Agreement to pay royalties to PanCanadian and that it would be "commercially absurd" for PanCanadian to be able to unilaterally impose a royalty on it. The JADE reflected payment by Wiser to PanCanadian of royalties at a rate of 16.667%, which was the rate contemplated in the Abandonment, Reclamation and Option Agreement.

[51] The trial judge accepted Ms LaRocque's evidence of the distinction between a working interest ownership and a mineral ownership (at para 154):

> Working interests are a lease agreement that grants oil and gas companies the right to explore, drill and produce natural resources from a land. Mineral interest ownership, on the other hand, is a recorded property document outlining the legal owner of natural resources below the surface level. The working interest ownership of a well can be and usually is, different than the mineral ownership of the well… EnCana owns a large percentage of the freehold mineral rights in Canada through its connection with Canadian Pacific Railway. Accordingly, EnCana has two interests in Eyehill Creek: a mineral interest and a working interest.

[52] The trial judge also accepted that there was no evidence that PanCanadian transferred its mineral rights to IFP.

[53] The trial judge agreed that the Asset Exchange Agreement contemplated that PanCanadian and IFP would negotiate a royalty rate for future leases. However, she found that PanCanadian had not met its burden of establishing on a balance of probabilities that PanCanadian and IFP would have negotiated the same royalty rate paid by Wiser, given section 2.10 of the Asset Exchange Agreement and "the unique relationship between [PanCanadian] and IFP" described in that provision. She directed that royalties paid to PanCanadian and its successors be removed from the accounting of IFP's net revenue realized, except for the one lease that specified a royalty rate of 20%.

[54] On their cross appeal, the defendants argue that the trial judge erred in concluding that royalties paid by Wiser to PanCanadian could not be deducted when accounting for the net revenue realized from Eyehill Creek. They claim that the royalties paid by Wiser were an expense incurred to undertake primary production and are properly deductible when calculating the net revenue realized. IFP submits the royalty Wiser agreed to pay PanCanadian was part of the consideration it provided to acquire its interest, which is not part of the net revenue realized.

[55] We agree with the defendants that the royalties paid to PanCanadian were not part of the consideration paid by Wiser to acquire its 80% working interest, but were an expense incurred to acquire the mineral rights associated with those leases. As with the royalties paid to the Crown or other third parties, such royalties were a necessary expense incurred to obtain primary production.

[56] The trial judge recognized that if IFP, rather than Wiser, had obtained the mineral rights associated with the leases from PanCanadian, the Asset Exchange Agreement contemplated that the lease terms (including the royalty rates) would have to be negotiated. The trial judge was not prepared to deduct any amount attributable to royalties paid to PanCanadian because the defendants had not established that PanCanadian and IFP would have negotiated the same royalty rate as was negotiated with Wiser. The trial judge said (at para 164):

> I do not know what terms or rate [PanCanadian] and IFP would have negotiated, particularly "given their unique relationship". I do not know whether Wiser had the same unique relationship as IFP. I heard no evidence on this issue. To accept Mr Carroll's position that [PanCanadian] could impose a royalty rate is contrary to Article 2.10 of the [Asset Exchange Agreement]. To assume that IFP would have negotiated the same rate as Wiser requires speculation on my part. I cannot make that finding.

[57] In our view, the trial judge erred in concluding that she could only include the royalties paid to PanCanadian if she was satisfied that IFP would have negotiated the same rate as Wiser. Whether IFP might have negotiated a different rate is not relevant, as the trial judge was performing an *accounting* to determine IFP's proportionate share of the net revenue realized from Eyehill Creek during the relevant period. The amounts deducted are the actual expenses incurred, or reasonable estimates of expenses incurred with reasonable certainty. The royalties paid to PanCanadian were a necessary expense that was actually incurred and resulted from third party negotiations between Wiser and PanCanadian. There is no suggestion that the royalty rate of 16.667%, which was less than the 20% royalty rate in the one other lease with PanCanadian, was unreasonable.

[58] This ground of the cross appeal is allowed. If the parties are unable to agree on the quantum of royalties paid to PanCanadian that should be included in the accounting of IFP's share of net revenue realized, then that amount shall be determined by the trial judge, or such other judge designated by the Chief Justice or Associate Chief Justice (Calgary) of the Court of King's Bench.

f. Wiser's 2001 Abandonment Costs

[59] One of the issues remitted by this Court for determination at the second trial was "whether and to what extent, if any, IFP should be responsible for abandonment costs of existing infrastructure" (*IFP CA* para 218). This question refers to PanCanadian's existing abandonment obligations, assumed by Wiser to acquire its interest in Eyehill Creek in 2001 pursuant to the

Abandonment, Reclamation and Option Agreement. The abandonment costs were estimated at $7.28 million in 1998, which estimate had increased to $10 million to $15 million by 2001.

[60] The Abandonment, Reclamation and Option Agreement provided that:

i. Wiser was to complete the abandonment program described in the agreement at its sole cost, risk and expense by December 31, 2003, following which PanCanadian would assign its petroleum and natural gas rights and surface rights effective January 1, 2003 to Wiser; and

ii. Wiser would assume PanCanadian's abandonment obligations.

[61] IFP objected to having costs associated with PanCanadian's existing abandonment obligations, assumed by Wiser in 2001, included in the calculation of net revenue realized. IFP argued that Wiser's assumption of responsibility for PanCanadian's existing abandonment obligations was the consideration paid by Wiser to PanCanadian to acquire its working interest, and IFP should not be responsible for a portion of the purchase price paid by Wiser.

[62] The defendants' position was that IFP is responsible for its share of *all* abandonment obligations. IFP was seeking an accounting from Wiser and abandonment costs incurred by Wiser should be deducted in calculating the net revenue realized.

[63] The trial judge recognized that the Asset Exchange Agreement contemplated IFP was to have no abandonment obligations unless or until it opted into primary production (clause 4(c)). However, she found that by seeking an accounting from primary production, IFP was opting in to the existing infrastructure. As a result, she was required to "consider the degree or extent to which IFP was responsible for abandonment costs." She concluded, "I must consider the abandonment costs associated with those wells that were not reactivated. I must also consider the incremental costs of abandonment for those wells that were reactivated." She also noted, however, that neither party presented or argued evidence to that effect before her.

[64] In the absence of such evidence, the trial judge made a number of findings:

a. In 1998, when IFP and PanCanadian entered into the Asset Exchange Agreement, liability for abandonment costs was approximately $7.28 million; by 2001 those estimated costs had increased to $10 to $15 million;

b. Wiser completed work on 147 of the 220 wells on the suspended list by November 2001, reducing PanCanadian's environmental liability by $3.675 million;

c. By April 2002, Wiser had reactivated 42 existing wells;

d. Wiser successfully continued all the leases set for expiry; and

e. "... the Court of Appeal found, at paragraph 44, that Wiser 'completed the abandonment program by the end of 2003', following which PanCanadian assigned its petroleum and natural gas rights and surface rights to Wiser, effective January 1, 2003.

[65] The trial judge accepted that it was unusual for a party such as Wiser to acquire an interest by assuming abandonment obligations and was satisfied that the abandonment costs incurred by Wiser to acquire its interest represented the consideration paid by Wiser. She concluded that IFP should not be responsible for any portion of the consideration paid by Wiser to acquire its interest. She directed that Mr Carroll's estimated $2 million charge against IFP's account for its share of Wiser's estimated 2001 abandonment obligations (20% of $10 million) should not be included in the accounting of IFP's share of net revenue realized.

[66] The defendants cross appeal this conclusion, arguing that the trial judge erred in concluding Wiser's abandonment costs represent the consideration Wiser paid for its interest in Eyehill Creek and that IFP should not be responsible for those costs. We see no reviewable error in the trial judge's conclusion in this regard. The Court of Appeal found that IFP had a "20% interest in *all of the oil and gas leases and other assets held by [PanCanadian]* in Eyehill Creek" (*IFP CA* at para 8, emphasis in original). To the extent that PanCanadian's abandonment obligations predated the production in which IFP had an interest, PanCanadian would not be entitled to deduct those costs if it had retained its interest and developed Eyehill Creek itself. If Wiser had paid $10 million cash to PanCanadian to acquire PanCanadian's interest, permitting Wiser to deduct the consideration it paid to acquire its 80% interest when calculating IFP's 20% share of the net revenue realized would put Wiser in a better position than PanCanadian. That result would be inconsistent with IFP acquiring a 20% interest in the "*assets held by [PanCanadian]"*. It is no different where the consideration paid by Wiser took the form of the assumption of PanCanadian's abandonment obligations.

[67] The trial judge did not commit a palpable and overriding error in concluding that the consideration provided by Wiser to PanCanadian is not an expense relevant to determining IFP's 20% share of the net revenue realized from Eyehill Creek during the relevant period.

[68] This ground of the cross appeal is dismissed.

4. Treatment of Future Abandonment Costs

[69] IFP appeals the trial judge's direction that it pay $3,576,011 into an interest-bearing trust account to cover the estimated net present value of its proportionate share of future abandonment costs.

[70] IFP agreed to the inclusion of abandonment costs, incurred after 2003 and included in the JADE, in the accounting of net revenue realized, but denied responsibility for any future abandonment costs not yet incurred. The trial judge accepted that any abandonment costs incurred after 2003 should be included in the accounting. She rejected IFP's submissions that it had no

regulatory obligation to contribute to future asset retirement obligations (ARO), that there was no evidence that IFP would not pay its ARO if requested to do so, that debts not yet incurred should not be included in an accounting, and that treating the ARO as a liability results in double-counting as those obligations are built into the value of the assets.

[71] With respect to the quantification of future not yet incurred abandonment costs, the trial judge accepted the evidence of the defendants' expert, Phil Johnson, who was qualified to give evidence on future abandonment costs or ARO. His evidence was that future gross ARO associated with Eyehill Creek exceed $22.6 million.

[72] IFP argued that the defendants had not proven how much Wiser spent on its ARO, how much of those costs were attributed to wells abandoned as of 1998, or how much was attributed to wells that were reactivated and for which IFP was incrementally responsible. To address this evidentiary difficulty, the trial judge relied on a statement by the Court of Appeal, at para 44 of *IFP CA*, that Wiser had completed the "abandonment and reclamation program at the end of 2003". The trial judge presumed that, "as of December 31, 2003, Wiser had assumed and addressed the $7.28 million outstanding abandonment obligations" contemplated by PanCanadian and IFP when the Asset Exchange Agreement was executed in 1998. The trial judge found that by "completing the abandonment program" by the end of 2003, "Wiser reset the ARO obligations from Eyehill Creek to nil, so to speak".

[73] The trial judge further found that "Eyehill Creek is shut-in and there is no future productivity". Relying on *Pricewaterhouse Coopers Inc v Perpetual Energy Inc*, 2022 ABCA 111, which she found requires that ARO be fully accounted for, the trial judge concluded that IFP should be responsible for its proportionate share of future ARO that arose during the time frame for which IFP sought an accounting. Rather than include an up-front deduction of future estimated ARO in calculating net revenue realized, the trial judge directed in her endorsement that the present value of IFP's proportionate share of the future abandonment costs ($3,576,011) be paid into an interest-bearing account to be used to pay IFP's proportionate share of abandonment costs. This amount represented the net present value of 20% of the future abandonment costs associated with Eyehill Creek, calculated by Mr Johnson to be $22,659,614.

[74] In our view, the trial judge's finding that IFP should bear its proportionate share of the abandonment costs was appropriate having regard to the principles enunciated in *Pricewaterhouse.* Requiring IFP to post its share of the net present value of the estimated ARO in trust was a reasonable approach, rather than either deducting that amount from the accounting, as had been sought by the defendants, or leaving the defendants to pursue IFP if those obligations were not met.

[75] The key issue, however, is whether the amount directed to be deposited in trust, representing the net present value of IFP's share of the future ARO, was appropriate. The trial judge's calculation was premised on her presumption that Wiser's ARO were reset to "nil" in 2003. Based on that presumption, she adopted Mr Johnson's calculation of the net present value

of his estimate of the future ARO for *all* of the wells and facilities associated with Eyehill Creek. This is a finding of fact that can only be reviewed on appeal if it constitutes palpable and overriding error. IFP says the trial judge erred in assuming that Wiser's "completion of the abandonment program", as contemplated in the Abandonment, Reclamation and Option Agreement, meant that Wiser had "assumed and addressed" PanCanadian's outstanding abandonment obligations.

[76] The Abandonment, Reclamation and Option Agreement distinguishes between:

i. the abandonment obligations that Wiser assumed pursuant to section 7.4 as consideration for acquiring its interest in the lands; and

ii. completion of the abandonment program (defined as the "Program" in section 7.1) to earn its interest.

[77] Section 7.4 of the Abandonment, Reclamation and Option Agreement provided that Wiser assumed all costs, liabilities and expenses related to the wells transferred to Wiser and would indemnify PanCanadian "with respect to any and all costs, liabilities and expenses suffered by [PanCanadian] related to the Abandonment and Reclamation Obligations" related to those wells. The trial judge found these obligations reflected the consideration provided by Wiser to PanCanadian to acquire its interest in Eyehill Creek and determined that IFP should not be responsible for them.

[78] By contrast, the Abandonment, Reclamation and Option Agreement contemplated that Wiser would earn its interest by completing the Program defined in section 7.1, which required the "Suspended Well Count" to be reduced to less than 80 by December 31, 2002 and to zero by December 31, 2003.

[79] IFP submits that the trial judge's presumption that the "ARO had been reset to nil" as at December 31, 2003 was inconsistent with her earlier finding that IFP should not be responsible for the ARO that Wiser assumed from PanCanadian to acquire its interest.

[80] Mr Johnson's estimate of the cost of future ARO of $22.6 million was based on 247 wells, 101 facilities and 194 pipelines. IFP notes that Mr Johnson acknowledged that 183 of the 247 wells and 63 of the 101 facilities predated 1998, when IFP acquired its interest. IFP submits that if the wells drilled and facilities constructed prior to May 2001 were excluded from Mr Johnson's calculation, IFP's 20% share of the undiscounted net total of estimated future ARO would be reduced by $2,514,082 from $3,003,640 to $498,558 for wells, and by $1,137,229 from $1,233,688 to $96,459 for facilities, for an undiscounted total of $568,017, which has a net present value of $468,497. The effect would be to reduce IFP's share of the net present value of future ARO and the amount to be placed in trust from $3,576,011 to $468,497.

[81] We note that Mr Johnson's report contains a chart which shows that 180 wells in the Eyehill Creek field were producing prior to 1998, 23 wells were producing between 1998 and 2001, one

well was producing in 2002, nine wells were producing in 2003, and 13 wells were producing in 2004. Even assuming no overlap, this means that IFP shared in production revenues after 2001 from a maximum of 22 wells but was required to share in the future ARO for 247 wells, the majority of which predate 1998.

[82] In the circumstances, we find that the trial judge's presumption that the ARO had been reset to "nil" at December 31, 2003 constitutes reviewable error.

[83] We recognize that IFP's calculation may not take into account wells drilled prior to 1998 that were reactivated and generated revenue for IFP, or facilities constructed before 1998 that were used to generate revenue for IFP. To the extent that information is available on the existing record, those amounts should be included so that the amount to be placed in trust by IFP reflects its share of the net present value of future ARO for all wells drilled or producing from 2001 and any facilities or pipelines constructed or used from 2001. In the event the parties are unable to agree on that amount, it shall be determined by the trial judge, or such other judge designated by the Chief Justice or Associate Chief Justice (Calgary) of the Court of King's Bench.

5. Interest

a. IFP's Claim for Compound Interest

[84] While IFP only sought interest under the *Judgment Interest Act* in their original and amended Statements of Claim, it sought at trial compound interest at prime plus 2% as provided for in the Canadian Association of Petroleum Landmen (CAPL) operating procedure. The defendants denied that any interest was payable.

[85] The trial judge accepted the evidence of Mr Carroll and Ms LaRocque that interest is rarely charged in the oil and gas industry and rejected Mr Pelzer's opinion that compound interest is consistent with the practice in Alberta. She concluded that IFP was entitled to some interest given the exceptional length of time that had elapsed and awarded interest under the *Judgment Interest Act*.

[86] IFP submits that the trial judge erred in law because she failed to recognize the equitable power to award compound interest. In our view, the trial judge was well aware that she had the ability to award compound interest "where there is evidence that the parties agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest as damages": *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at para 55. She declined to do so because IFP had failed to seek compound interest in its pleadings and, moreover, because she accepted evidence of the defendants' experts that the payment of interest was not the norm in the oil and gas industry and therefore "it cannot be said that the parties here would have agreed or known that compound interest would be payable".

[87] A trial judge's award of interest (in the absence of an express contractual entitlement) is a discretionary decision that will be afforded appellate deference: *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 SCR 581 at para 86; *Bank of America Canada* at para 41. The trial judge's award of interest was reasonable and discloses no reviewable error. This ground of appeal is dismissed.

b. The Defendants' Claim for Interest

[88] The defendants submitted on their cross appeal that interest should be a two-way street; if they are to pay interest on net revenue realized owing to IFP, they should be entitled to interest on IFP's share of expenses that were incurred prior to revenues arising. In her endorsement, the trial judge noted IFP's submission that the defendants had not pursued a counterclaim and that the purpose of the 2022 trial was an accounting of IFP's share of net revenue realized. The trial judge's refusal to award interest to the defendants in the circumstances was reasonable and discloses no reviewable error. This ground of the cross appeal is dismissed.

6. The Limitation of Liability Clause

[89] One of the unresolved issues remitted by this Court to the Court of King's Bench for determination was the effect of the contractual mutual limitation on liability contained in Article 7.9 of the Asset Exchange Agreement:

> In no event shall the liability of PCR to IFP in respect of claims of IFP arising out of or in connection with this Agreement exceed, in the aggregate, the value for the PCR Assets as set out in section 2.7, taking into account any and all increases or decreases to such value that occur by virtue of the terms of this Agreement. In no event shall the liability of IFP to PCR in respect of claims of PCR arising out of or in connection with this Agreement exceed, in the aggregate, the value for the IFP Assets as set out in section 2.7, taking into account any and all increases or decreases to such value that occur by virtue of the terms of this Agreement.

[90] Section 2.7 valued both parties' assets at $16 million.

[91] The trial judge at the first trial found that any damages awarded to IFP would have been limited to $16 million based on Article 7.9. The Court of Appeal, however, noted that the trial judge "did not consider the potential application of this limitation, if any, in the context of IFP's continued ownership of a working interest in the Eyehill Creek Assets. Consequently, whether that Article limits in some way IFP's ownership interests or its ability to require Wiser to account to IFP for IFP's proportionate share of the net proceeds of primary production to date remains an open issue" (*IFP CA* at para 217).

[92] At the second trial, IFP argued that the limitation of liability clause was not applicable, as the expectation was that PanCanadian would not engage in primary production. The trial judge

found that the burden of persuasion "lies on the party seeking to avoid enforcement" of an exclusion clause: *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4. IFP did not meet that burden as it failed to satisfy the trial judge that the Article related only to thermal production, was ambiguous or unconscionable, or that its enforcement would be contrary to public policy.

[93] IFP appeals this finding on several grounds. However, we find that the issue is moot and need not be decided as we are satisfied that the amount IFP is entitled to receive as a result of the second trial decision and this judgment (including interest) is below $16 million.

7. PanCanadian Indemnity

[94] The Court of Appeal's judgment following the first trial contained the following reference to the indemnity provided by PanCanadian to Wiser in the Abandonment, Reclamation and Option Agreement (*IFP CA* at para 43):

> Despite IFP's refusal to consent, PCR and Wiser entered into the formal ARO on May 18, 2001. As the Trial Judge found, under the terms of the ARO, PCR no longer purported to act on IFP's behalf. Since IFP had refused to consent to PCR's disposition to Wiser, PCR agreed in the ARO to indemnify Wiser from any liability of Wiser to IFP. This being so, PCR is responsible for any liability imposed on Wiser, whether to account for the net revenue Wiser has realized from primary production at Eyehill Creek or otherwise.

[95] At the second trial, PanCanadian requested a finding that it has no obligation to IFP under the indemnity agreement between it and Wiser on the bases that: (i) the indemnity was in effect for a period of two years after May 18, 2001 and had expired; and (ii) there was no privity of contract between IFP and PanCanadian. The trial judge found the indemnity issue was not before her as it had not been identified in paragraph 4 of the Court of Appeal's judgment. She also indicated that she agreed with IFP that the issue had been decided by the Court of Appeal. The Judgment Roll states that "the question of [PanCanadian's] liability for any liability of Wiser and its successors was decided by the Court of Appeal and is not before the Court."

[96] PanCanadian in its cross appeal submits that there was "no extant claim" before the trial judge with respect to the indemnity, that IFP has no privity to the indemnity, that No Notice to Co-Defendant or Third Party Claim was filed as between PanCanadian and Wiser, that the Court of Appeal's comments should be viewed as relating only to the two year term stipulated in the indemnity, and that any comments with respect to the enforceability of the indemnity must be regarded as *obiter*.

[97] We agree with the trial judge that PanCanadian's indemnity was not before her and, as a result, it is not before us on this appeal. To the extent that there are issues between any of the

parties regarding the PanCanadian indemnity, such issues will need to be addressed in another forum.

8. 2011 Trial Costs

[98] The Court of Appeal remitted the award of costs for the first trial to the Court of King's Bench for determination. While the second trial judge was not involved in the first trial, she was mindful that the vast majority of that 34-day trial was spent on IFP's unsuccessful claim for loss of opportunity, although IFP did ultimately succeed on its alternative claim for an accounting. The trial judge reviewed Rule 10.33 and authorities discussing the considerations applied when a court is exercising its discretion to award costs. Successful parties are usually entitled to a costs award; substantial success is generally sufficient as it is rare for parties to be successful on all issues: *Mahe v Boulianne*, 2010 ABCA 74 at para 6. While costs are not generally awarded on an issue-by-issue basis, there is discretion to do so in appropriate cases: *Mahe* at para 6; *Wilde v Archean Energy*, 2008 ABCA 132 at para 9; *Zuk v Alberta Dental Association and College*, 2018 ABCA 398 at para 4.

[99] The trial judge awarded the defendants two-thirds of their taxable costs (including expert fees) against IFP and awarded IFP one-third of its taxable costs (including expert fees) against the defendants.

[100] The defendants cross appeal from that finding and submit that the trial judge committed a palpable and overriding error awarding any expert fees to IFP for the first trial. They estimate that the total expert fees at the first trial will likely exceed $2 million, that the vast majority of the expert costs related to the lost opportunity claim on which IFP was not successful, and that IFP's expert evidence regarding its alternative claim occupied only one-half day at the first trial.

[101] A trial judge has broad discretion when awarding costs and her decision will be afforded deference on appeal, absent reviewable error: *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27; *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 42. We are satisfied that the trial judge was not required to do an issue-by-issue assessment with respect to expert fees. Her costs award with respect to the first trial was reasonable and is entitled to deference.

[102] This aspect of the cross appeal is dismissed.

Conclusion

[103] IFP's appeal is allowed solely with respect to determination of the quantum of the present value of its share of the future abandonment costs to be placed in an interest-bearing trust account. If the parties are unable to agree on that amount, it shall be determined by the trial judge, or such other judge designated by the Chief Justice or Associate Chief Justice (Calgary) of the Court of King's Bench. The balance of IFP's appeal is dismissed.

[104] The defendants' cross appeal is allowed solely with respect to the trial judge's failure to deduct royalties paid to PanCanadian when calculating the net revenue realized from Eyehill Creek during the relevant period. If the parties are unable to agree on the amount of royalties paid to PanCanadian, that amount shall be determined by the trial judge, or such other judge designated by the Chief Justice or Associate Chief Justice (Calgary) of the Court of King's Bench. The balance of the defendants' cross appeal is dismissed.

[105] Given the divided success, each of the parties shall bear its own costs of the appeal and cross appeal.

Appeal heard on May 17, 2024

Memorandum filed at Calgary, Alberta
this 26th day of November, 2024

Rowbotham J.A.

Authorized to sign for: Wakeling J.A.

Strekaf J.A.

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