

Court of King's Bench of Alberta

Citation: Dow Chemical Canada ULC v NOVA Chemicals Corporation, 2025 ABKB 467

Date: 20250811
Docket: 0601 07921
Registry: Calgary

Between:

Dow Chemical Canada ULC and Dow Europe GmbH

Plaintiffs

- and -

NOVA Chemicals Corporation

Defendant

**Decision on Costs
of the
Honourable Justice B.E. Romaine**

I. Introduction

[1] In this complex litigation, which commenced with the filing of a statement of claim in 2006 and a final decision of the Court dated July 28, 2025, Dow seeks full indemnity costs, totaling CAD \$81,209,968.31 in solicitor and own client fees for its Canadian legal counsel, CAD \$5,878,623.84 for experts and other disbursements incurred in Canadian dollars, and CAD\$64,784,451.89 for experts and other disbursements incurred in currencies other than Canadian dollars. (as converted on February 28, 2025), subject to further calculation at the end of the proceedings.

[2] The Operating and Services Agreement (“OSA”) between the parties that governs operations at E3, the jointly-owned ethylene manufacturing plant, provides that “Damages” with respect to their claims against NOVA as Operator of E3 include “without limitation legal fees

incurred by a party on a solicitor and his own client basis”. Section 14.1, “Liability of Operator” provides that the Operator “...shall have no liability for Damages incurred or suffered by the Co-owner or either of them...(d)... except when and to the extent that such Damages result or arise from the Gross Negligence or Wilful Misconduct of the Operator”. The major part of Dow’s damages involves the Gross Negligence and Wilful Misconduct of NOVA as Operator. Other awards of damages involve Dow’s claims against NOVA as Co-owner.

II. History of Action

[3] This action has been “uniquely complex and long-lived”: 2024 ABCA 278 at para 2. Literally millions of pages of records were produced, more than 50 individuals were questioned, thousands of interrogatories and undertakings were requested and answered, and there were more than two dozen case management applications and other appearances. The trial, targeted to start in April 2014, finally began in January 2015. As this Court observed in its June 20, 2018 trial decision:

This was a seven-month trial with numerous witnesses and a huge production of documents. Twenty-one counsel from six law firms participated in the trial in various capacities. The evidence primarily involved the period of time from February 2001 until the end of 2012 and included operational data for each of the three ethylene crackers on the Joffre Site during that period. Evidence with respect to the historical context of the joint venture from 1998 until E3 was completed was also presented: 2018 ABQB 482 at para 16 (“Trial Reasons”).

[4] This Court found that NOVA deliberately breached its contractual duties, engaged in conversion, and committed Gross Negligence and Wilful Misconduct, all in a concerted effort to enrich itself and to damage Dow. The Court awarded Dow substantial damages through 2012, and an approximately 5- ½ years of further “top-up” damages to be quantified up to the date of the decision. NOVA’s counterclaim was dismissed.

[5] NOVA appealed. On September 16, 2020, the Court of Appeal affirmed NOVA’s breaches and liability, and affirmed the dismissal of NOVA’s counterclaim: 2020 ABCA 320 (the “2020 COA Decision”). Allowing NOVA to make an argument that had not been advanced at trial, the Court of Appeal directed that Dow’s damages were to be recalculated based on “direct damages resulting from the ethylene shortages”, remanding the recalculation to this Court. The Court of Appeal noted that this Court “was not asked to decide the issue that has formed the basis of the appeal”.

[6] The Court of Appeal allowed the appeal in part:

- a) directing the trial judge to determine direct losses arising from NOVA’s breaches, excluding indirect or consequential damages;
- b) directing the trial judge to determine all issues arising from the recalculation of direct damages, including whether NOVA overpaid damages to which Dow is entitled after damages were recalculated, the quantum of same, the timing of repayment and set-off rights arising (the “first remand”);
- c) giving direction for conversion of allocation damages to Canadian dollars; and

- d) dismissing NOVA's counterclaim, except that the remedial effect of the illegality of the performance of the Ethane Pooling covenant was remitted to the trial judge in accordance with the Court's reasons (the "second remand").

[7] The balance of NOVA's appeal was dismissed.

[8] Pursuant to the first remand a damages hearing was held, both to recalculate the damages awarded and to quantify the top-up damages. The hearing, scheduled for seven weeks, began in November 2021 and concluded with final arguments in November 2023. There were multiple applications, several adjournments, and extensive written and oral submissions on matters of process, discovery, and admissibility of evidence.

[9] Judgment on the first remand was issued on April 7, 2025 :2025 ABKB 217 (the "first remand decision") The Judgment Roll provides that:

1. (a) Dow Europe shall have judgment against the Defendant in the amount of \$1,924,884,477 together with pre-judgment interest in the amount of \$1,566,034,925, for a total of \$3,490,919,403.
(b) Dow Canada shall have judgment against the Defendant in the amount of \$38,255,390 together with pre-judgment interest in the amount of \$31,896,924, for a total of \$70,152,314.
2. Pursuant to paragraph 2 of the Judgment of the Court of Appeal of Alberta, the Defendant shall have credit for the said payments made on October 10, 2019, adjusted to include pre-judgment interest for the period of October 11, 2019 through April 7, 2025, against the judgment in favour of Dow Europe herein and the judgment in favour of Dow Canada herein in the amounts of \$1,855,076,224 and \$55,959,095, respectively, with the result that the outstanding amounts of the said judgments as of the date hereof are \$1,605,843,179 in favour of Dow Europe and \$14,193,219 in favour of Dow Canada.

[10] The second remand flowed from the dismissal of NOVA's counterclaim. The Court of Appeal disagreed with this Court's interpretation of the ethane covenants in the OSA but this Court had also found that performance of certain of the covenants would be illegal as anti-competitive. NOVA disagreed on appeal. The Court of Appeal, however, agreed with this Court, remanding to it the determination of the effect of the illegality. Again, in the second remand process, there were multiple applications, and extensive written and oral submissions on matters of process, discovery, and admissibility of evidence. The hearing, initially scheduled for October 2024, began in November 2024 and concluded with final arguments in February 2025.

[11] In a judgment at 2025 ABKB 452 (the "second remand decision"), this Court decided that:

- a) the remedial effect of the performance of the Ethane Pooling covenant is the severance of sections 5.1 (a) and (e), 5.2, 5.7, 5.8 and 5.15 of the OSA;
- b) Dow has established on a balance of probabilities that NOVA's preferences with respect to the now illegal clause would cause prejudice and unfairness to Dow, so that remedy is no longer presumptive;
- c) the findings with respect to severance are to be effective as of the date of this decision;

- d) answers to the last three sub-issues posed by NOVA are in the negative; and
- e) NOVA's favoured remedy of dissolving the Pool is not a remedy that the Court can grant in the circumstances.

[12] As noted, this action has been resource-intensive, extended and complicated. It has involved more than a dozen complex contracts, years of vigorously contested litigation, a lengthy trial, three appeals, and two extended post-trial remand proceedings. Each side has been represented by multiple law firms, and has called testimony from multiple experts, who produced 36 reports. Hundreds of hours of argument and testimony have been heard, thousands of pages of evidence have been reviewed, and so far, approximately 24 written decisions have been issued.

III. Preliminary Issues

A. No Reservation of Rights

[13] NOVA purports to "reserve its rights to tender further particulars of its costs, subject to the pending interim ruling on costs and the final decision on the pool remand". It also "reserves its rights to make submissions on the costs of the pool remand once the Court issues its reasons and a judgment roll".

[14] These submissions are contrary to this Court's unappealed directions on January 8, 2025 with respect to the process by which costs are to be addressed: 2025 ABKB 9 (the "process endorsement"). The parties at that time agreed to a process and this Court approved it.

[15] By February 28, 2025, Dow would present its costs claim with whatever particulars and details and with whatever supporting materials it considered appropriate. By March 24, 2025 NOVA would present its costs claim with whatever particulars and details and whatever supporting materials it felt appropriate.

[16] This was NOVA's opportunity to indicate if it intended to submit that any of Dow's particulars or materials were insufficient and to provide its own particulars, details and materials. It was also NOVA's opportunity to respond to Dow's position and to argue about the facts and the law. If it presented particulars, detail and materials that were more comprehensive than those of Dow, it could argue that Dow should also be more comprehensive.

[17] By April 7, 2025, Dow would file a reply brief and reply materials. There would then be a hearing.

[18] The Court set a range of dates for the hearing, and stated that it would then hear from the parties on any evidence and arguments that they had presented. The Court would consider and rule on any costs issues at the conclusion of its decision on the second remand.

[19] There was no provision in these directions for "a reservation of rights" to make subsequent submissions, nor was this Court's decision on costs to be an "interim ruling on costs".

[20] NOVA has made certain choices about the materials and details it has presented during the costs hearing process, and is bound by its strategic choices.

B. Involvement of an Assessment Officer

[21] NOVA submits that determination of specific costs and disbursements allowed to either party should be referred to an assessment officer. It also submits that the assessment officer

should be directed to determine costs based on the Court's decision with respect to general principles relating to the terms of the OSA and the law of costs, which it submits includes determinations of reasonableness and its entitlement to costs on the basis of "mixed success".

[22] As this Court noted in the process endorsement, this litigation is unique in both its length and complexity. This Court has received millions of pages of exhibits, and has written more than 19 decisions.

[23] I must agree with Dow that no person is better placed than this Court to address costs of this litigation, including interpreting and applying the OSA, evaluating the work done and exercising discretion where necessary.

[24] While the case of *North American Polypropylene ULC v Williams Canada Propylene ULC*, 2024 ABKB 152, cited by NOVA, is distinguishable in some respects, Neufeld, J's comments at paras 41 and 42 are apposite:

Sophisticated, well-funded litigants expect to expend substantial resources when engaging in high stakes litigation before the Courts or arbitrators. They are quite capable of factoring the costs of doing so into their assessment of litigation risks and rewards as the process unfolds. They are also quite capable of monitoring the costs of outside counsel and the value of advice and advocacy being provided.

In deciding how to determine costs in such cases, the court should be careful not to conflate the need to ensure access to justice as it applies to routine litigation and ordinary litigants, with the needs of industry in commercial dispute resolution by the Courts. What industry requires is judicial dispute resolution that is as responsive, effective, and efficient as those offered by extra-judicial sources. Although bound by the *Rules of Court* and precedent when exercising its discretion over costs, the Court should endeavor to respond to those needs. This includes awarding meaningful costs to successful parties, commensurate with the value of the claims being litigated. (emphasis added)

[25] Referring this matter to an assessment officer would cause delay and excessive use of a Court official's time. It is contrary to the intentions of the parties in the OSA to have costs between a Co-owner and the Operator determined on a solicitor and own client basis.

[26] NOVA submits that diversion to an assessment officer is consistent with the process directed by the Court, but this is a mischaracterization of the decision. NOVA cites a number of cases where a judge referred a calculation or assessment of costs to an assessment officer. This certainly would be within the Court's discretion, but the cited cases are not analogous to this one based on history, length of trial, or contractual provisions.

[27] Dow cites a more appropriate example. In patent litigation before the Federal Court of Appeal between the same parties, the Court awarded a lump sum of damages to Dow on the liability part of the case. There was no contractual basis for costs in that case, so evidence was required to support the lump sum calculation, which represented about 30% of Dow's actual costs. The Court noted as follows:

... I do not agree with NOVA's submission that the evidentiary record before a trial judge asked to award a lump sum must provide a level of detail akin to that which would be required in an assessment conducted by an assessment officer unfamiliar with the proceedings. To my mind, that would defeat the purpose of a

lump sum to save time and costs to the parties that would have otherwise resulted from the assessment process.

...

When a party seeks a lump sum award based on a percentage of actual legal fees above the amounts provided for in the Tariff, as a matter of good practice the party should provide both a Bill of Costs and evidence demonstrating the fees actually incurred. As well, a sufficient description of the services provided in exchange for the fees should be given to establish that it is appropriate that the party be compensated for those services. What is required is sufficient evidence of the nature and extent of the services provided so that a party can make an informed decision whether to settle the fees or contest and so that the Court can be satisfied that the actual fees incurred and the percentage awarded are reasonable in the context of the litigation.

...

... the parties to this litigation are sophisticated corporations which chose to engage in complex, lengthy, contentious litigation. The judge considered that the award of a lump sum award would avoid the parties incurring additional costs and time spent were an assessment undertaken. I see no error of law or palpable and overriding error of fact on the part of the judge...

Further, the record before a trial judge hearing a costs motion is not confined to the motion materials, but includes all of the trial and pre-trial matters over which he or she presided. Here, the judge had an intimate knowledge of the case. The judge was provided with both a Bill of Costs, as well as a summary of Dow's actual solicitor-client fees. The award of 30% of the fees incurred by Dow took into account NOVA's complaints that certain steps ought not to have been part of the costs award, and avoided the need for the parties to undertake the costly exercise of parsing out such steps. The judge was satisfied that the percentage of fees requested as a lump sum were actually incurred and reasonable in the circumstances.: 2017 FCA 25, paras 15, 18, 21- 22.

[28] This is a sensible and proportionate process, consistent with the Rules of Court, which intend matters in dispute to be resolved "in a timely and cost-effective way": Rule 1.2(1). Many of the same considerations exist here: the burden on an assessment officer unfamiliar with the history of the litigation; the fact that this too was lengthy, contentious litigation with numerous interim applications; and allegations of unnecessary steps taken during the trial process.

[29] The law, documented practice in complex cases, common sense, and good practice preclude a referral to an assessment officer in this case.

IV. The Law of Costs

A. General Principles

[30] Costs follow the event and, in general, the successful party receives its costs: Alberta Rules of Court, Alta Reg 124/ 2010, Rule 10.29 (1). The successful party is the one that obtains "substantial success".

[31] As noted in *1384334 Alberta Ltd v Buster's Pizza Donair & Pasta Enterprises Ltd.*, 2020 ABQB 533 at para 7, citing *AE v TE*, 2017 ABQB 674 at paras 4-9:

“Success” does not demand success on each issue. A party is successful if that party has had substantial success in the matter. As Justice Veit wrote in *Mitrovic v Mitrovic*, 2007 ABQB 107 at para 8, “the winner is not only the litigant who has been totally successful on each aspect of the claim, but the litigant who has been substantially successful – the one who has enjoyed the greater success”;

“Success” is not determined only quantitatively. A finding of success may be based on a finding that a party was successful on the most important issue litigated.

Generally, costs are not awarded on an issue-by-issue basis but an assessment of overall success. There is a discretion to award costs on an issue-by-issue [basis]; and

The degree of success is not by itself a decisive or determinative factor. Success must be considered with other factors on the issue of whether costs should be awarded and on the amount of costs.

[32] Substantial success is measured by a case-specific assessment of which issues were the most significant for the parties, which issues took the most time to determine, which issues were the most substantial, and who won on those issues: *Mikkelsen v Truman Development Corporation*, 2016 ABQB 225, varied 2017 ABCA 99 (but not on this point), leave to appeal to SCC refused [2017] SCCA No. 176, paras 28-30; see also *Mahe v Boulianne*, 2010 ABCA 74 at para 6.

B. Solicitor and Own Client Costs

[33] As noted previously, Dow in this case has a contractual right to “solicitor and his own client” costs with respect to its claims against NOVA as Operator of E3. Courts give effect to contractual clauses for the indemnification of legal costs: For example, *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc (IMV Projects Inc)*, 2018 ABCA 304, leave to appeal to SCC refused 2018 [SCCA] no. 492, paras 107-108 ; *Vallieres v Vozniak*, 2014 ABCA 384, para 8-12; *Trinier v Shurnaik*, 2011 ABCA 314, para 35-26; *Collins v Collins*, 2005 ABCA 98, para 15; and *Manufacturers Life Insurance Co. v Toronto Dominion Bank*, 1988 ABCA 351, para 24.

[34] This is not a case where there has been any misconduct by Dow that would prevent enforcement of the contractual expectations and intentions.

[35] Solicitor and own client costs are recognized by Alberta law as providing full indemnity for all legal and associated expenses of the litigation. They are awarded “without deduction for overcaution or excessive (unreasonable) amounts”: *Trinier*, para 11. As noted by the Court of Appeal in *Twinn v Twinn*, indemnification is “complete”.

Solicitor and own client costs allow for a complete indemnification of legal fees and other costs for the successful party. This can include payment for “frills and extras” authorized by the client, but which should not fairly be passed onto a third party. They are distinct from solicitor-client costs, which allow for recovery of

reasonable fees and disbursements, for all steps reasonably necessary within the four corners of the litigation...: 2017 ABCA 419, para 24.

[36] NOVA submits that Dow’s solicitor and own client costs should be made subject to a reasonableness review. Despite NOVA’s submissions otherwise, this is not the law in Alberta. As noted in *Barkwell v McDonald*, 2023 ABCA 87, leave to appeal to SCC refused, [2023] SCCA No. 202, para 56:

The starting point is to recognize the important distinction between solicitor and own client costs, and solicitor and client costs. Solicitor and own client costs are those costs that counsel can charge to the winning party, and that the winning party is required to pay as a matter of contract. Solicitor and client costs represent the costs that a reasonable client might be required to pay for the services rendered...(emphasis added).

[37] The cases upon which NOVA relies to support its contention that a reasonableness review is necessary are distinguishable. NOVA also suggests that section 14.1 of the OSA requires a reasonableness review, but its submissions on this issue rely on a skewed interpretation of that section.

C. Issue-by-Issue Analysis

[38] NOVA submits that costs should be determined separately for the first stage of the trial, which it characterizes as the “Base Trial”, the first remand or what it calls the “Top-Up Trial” and the second remand. It then goes further and submits that the Court should award costs within each phase of the trial on an issue-by-issue or argument-by-argument basis, rather than applying the principle of “substantial success”. Further, it asks the Court to deny costs to Dow and award them to NOVA for individual arguments that it submits that Dow lost.

[39] The Court of Appeal in *Johannson v Haaranem*, 2019 ABCA 197 stated the general rule on this issue at para 4:

Costs on appeal generally follow the ultimate result and will not be apportioned on an issue-by-issue basis, as this court has noted on numerous occasions. See for example, *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 116 at para 12, 87 Alta LR (5th) 108, and *Mahe v Boulianne*, 2010 ABCA 71 at para 6, 21 Alta LR (5-th) 277, where the court stated:

The general rule is that the successful party on appeal is entitled to costs of the appeal. It is rare for any successful party on appeal to be successful on each and every argument that is made. Where several forms of relief are requested on appeal, it is also relatively rare for the successful party to succeed on each item of relief. Further, the parties often make arguments on points that the court does not have to deal with, because of the way the decision unfolds. The general rule contemplates that the party who achieves substantial success on the appeal will receive costs, even if that party is not totally successful, nor successful on every issue or argument. Generally, the costs follow the ultimate result, and costs are not usually apportioned on an issue-by-issue basis, a claim-by-

claim basis or on a head-of-damages basis, although there is a discretion to do that in proper cases...

[40] In *Wilde v Archean Energy Ltd*, 2008 ABCA 132, the Court noted at paras 9-10:

Generally the costs follow the ultimate result and costs are not usually apportioned on an issue-by-issue basis, a claim-by-claim basis or on a head-of-damages basis, although there is a discretion to do so in proper cases... Even though the respondents were eventually unsuccessful on the wrongful dismissal issue, they nevertheless won a substantial award as a result of the trial... They succeeded in increasing the share option valuation and their right to receive it in cash (the issues that consumed the most trial time), even though their award was reduced on appeal. They also won on several collateral issues that were not appealed. The respondents should receive the taxed costs of the trial (including a fee for second counsel), including reasonable disbursements and GST.

Likewise, the appellants were successful on appeal, even though they lost the argument on the finality of the dispute resolution clause. Since we have declined to apportion trial costs, no apportionment on an issue-by-issue basis is appropriate on the appeal either. The appellants should have the taxed costs of the appeal (including a fee for second counsel), as well as reasonable disbursements and GST.

[41] While these comments relate to costs on appeal, they apply equally to trial costs.

[42] In a December 17, 2024 letter to the Court, counsel for NOVA stated that “[t]he Base Trial, Top-Up Trial and Pool Remand are closely linked: thus, costs should be considered as a whole, and not artificially truncated by phases”. The letter also acknowledges this Court’s conclusion that the “Top-Up Trial” and “Pool Remand” hearings constituted a continuation of the “Base Trial” on specific issues that arose from the 2020 COA Decision. NOVA now appears to resile from this position.

[43] In summary, Dow sued NOVA in 2006. The ultimate result was that NOVA was found liable for, among other things, serious and deliberate breaches of contract, Gross Negligence, Wilful Misconduct, conversion, and breach of the duty of good faith. Dow was awarded a record amount of damages. NOVA’s counterclaim was dismissed, and the dismissal of the counterclaim was affirmed on appeal. Dow was substantially successful on both the first and second remand.

[44] However, the 2020 COA decision raised issues with respect to the calculation of damages and the Court of Appeal made certain decisions that led to the two remand hearings. This factor is analyzed later in this decision. There is no reason for this Court to resort to an issue-by-issue basis of determining costs, other than for the unique circumstances that arose from the appeal.

D. Party-and-Party Costs

[45] While the OSA refers to the scale of costs relating to damages awards against NOVA as Operator, it is silent with respect to damages related to claims made by one Co-owner against another.

[46] NOVA submits that this means that Dow is not entitled to any costs relating to this category of damages, which, it points out, includes its counterclaim. This is an incorrect and

commercially unreasonable interpretation of the OSA. If section 14.1 of the OSA released NOVA as a Co-owner from all other liability and all other claims, this Court could not have found NOVA liable for these other claims, and the Court of Appeal would not have affirmed this liability.

[47] Unless a contract clearly states an intention to exclude rights normally arising from it, such an intention should not be inferred: *Ainsworth Lumber Co. Ltd. v KMW Energy Inc.*, 2004 BCCA 415, para 19.

[48] Dow is entitled to costs for its successful claims with respect to this category of damages, based on the Rules of Court and the Court's discretion with respect to an award of costs.

[49] Dow submits that the contracts between the parties and the inter-relatedness of the claims should lead to an entitlement to solicitor and own client costs for the entirety of the litigation.

[50] Dow notes that both the Plant Co-owners Agreement and the Infrastructure Co-owners Agreement define Damages as the OSA does, including "without limitation legal fees incurred by a party on a solicitor and his own client." The definition in the Plant Co-owners Agreement apparently exists as a result of section 5.01 of the agreement, which limits liability of a Co-owner for Damages, which would not apply in the case of the counterclaim, but which implies that other claims between Co-owners under the agreement would include solicitor and own client legal fees. The same scenario appears to exist in the Infrastructure Agreement. However, the counterclaim was based on alleged breaches of the OSA, which does not support this implication.

[51] Given that solicitor and own client costs are rarely awarded and normally justified by express agreement between the parties, this level of costs cannot be justified with respect to claims between Co-owners.

[52] The Alberta Rules of Court give guidance on the relevant factors that the Court should consider: Alberta Rules of Court, Alta Reg 124/ 2010, rules 10.33 (1) and (2). The Court may make a costs award of "any amount that the Court considers to be appropriate in the circumstances including, without limitation, (i) an indemnity to a party for that party's lawyer's charges, or (ii) a lump sum instead of or in addition to assessed costs": r. 10.31 (1)(b).

[53] Rule 10.33 provides that the Court may consider any relevant factor, including:

- a) the result of the action and the degree of success of each party;
- b) the amount claimed and the amount recovered;
- c) the importance of the issues;
- d) the complexity of the action;
- e) the apportionment of liability;
- f) the conduct of a party that tended to shorten the action;
- g) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
- h) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
- i) a contravention of or non-compliance with these rules or an order; and

j) whether a party has engaged in misconduct.

[54] In this case, the appropriate award of costs relating to the Co-owner against Co-owner claim is a lump sum. A manipulation of column 5 would be artificial and unwieldy. A lump sum has the advantage of being an effective and efficient remedy, consistent with the award of costs in the Federal Court litigation between the same parties: 2017 FCA 25. It avoids the parties incurring additional costs and is proportionate and commensurate with the nature of this litigation and the value of the claims.

V. Analysis

A. Dow's Entitlement to Damages

[55] The relevant portions of section 14.1 of the OSA read as follows:

14.1 Liability of Operator

Without limiting any other provisions of this Agreement, including without limitation Section 14.4, the Operator and its Beneficiaries shall have no liability for Damages incurred or suffered by the Co-owners or either of them, no matter how such Damages or the right or claim to such Damages is created or may arise...

d) ...except when and to the extent that such Damages result or arise from the Gross Negligence or Wilful Misconduct of the Operator in which case the Operator shall be liable to and shall indemnify each of the Co-owners to the extent of its Damages. Notwithstanding the foregoing, in no event shall the Operator be liable for (i) Excluded Damages... [emphasis added]

[56] "Damages" are defined as follows:

(u) "Damages" means costs, expenses (including without limitation legal fees incurred by a party on a solicitor and his own client basis), damages (including without limitation damages resulting from injury, death or property damage) losses, liabilities and obligations, including those arising from or in connection with any demand, claim, proceeding, action, judgment, lien, fine, penalty or tax (other than income tax). Damages shall include, without limitation, indirect or consequential damages (including without limitation loss of profits and damages arising from loss of production), incidental damages, exemplary damages, punitive damages and similar damages.

[57] "Excluded Damages" are defined as follows:

(ai) "Excluded Damages" means (i) exclusive of Damages arising from claims by third parties, indirect or consequential damages (including without limitation loss of profits and damages arising from loss of production), incidental damages, exemplary damages, punitive damages and similar damages; and (ii) loss of or damage to the Plant or the Products.

[58] Dow is therefore entitled to costs on the scale of solicitor and his own client basis for damages that flow from this Court's findings of NOVA as Operator's Gross Negligence and Wilful Misconduct. An issue arises from the Court of Appeal's finding that Dow's claim for

damages arising from lost profits relating to polyethylene was a claim for Excluded Damages, which is analyzed herein.

[59] As noted, previously, there need be no review of these costs for reasonableness.

[60] However, if this is incorrect, I find that these costs are reasonable. NOVA submits that, since the liability for costs is contractually based, the factors that are otherwise relevant under Rule 10.33 do not apply. This is true under the law applying to solicitor and his own client costs, but if a reasonableness review were necessary, applying the factors listed under Rule 10.33 leads to the conclusion that these solicitor and own client costs are reasonable in the circumstances.

[61] As noted previously, Dow has been substantially successful except with respect to the original calculation of damages. The Damages awarded are likely a Canadian record for this type of litigation. The issues are of great importance to the parties, relating to their 80-year long commercial relationship, and an asset that is worth billions to them both.

[62] The issues were complex, and the litigation was governed by a Complex Case Litigation Plan. Steps in the litigation included 272 half days of discovery, 89 days of the first phase of trial, and 62 days of further post-hearing and remand hearings. Document discovery in this matter continued before and during all phases of the trial, including production of millions of pages of documents.

[63] There was no apportionment of liability.

[64] Unfortunately, factors (f) through (j) of rule 10.33 require consideration.

[65] Some examples of NOVA's litigation misconduct and efforts at delay up to and during the trial have been noted in previous decisions of this Court.: See first remand decision at para 105 and comments of the Court in 2020 ABQB 441, 2021 ABQB 167 2021, ABQB 595, 2021 ABQB 621, 2021 ABQB 784, 2021 ABQB 845, 2021 ABQB 974, 2022 ABQB 417, 2023 ABKB 156. This conduct includes late production of thousands of plant records on the eve of and during the trial, and NOVA's repeated attempt to re-litigate issues, from the issue of liability to other settled matters of fact, and law, even in the face of clear rulings of the Court of Appeal: 2021 ABCA 153, para 37. In addition, NOVA failed to comply with several procedural orders of the Court, again as detailed in previous decisions.

[66] Ignoring Court rulings that expert evidence comply with the principles accepted at trial, NOVA submitted non-compliant expert reports, and, when those reports were found to be inadmissible, submitted more non-compliant expert reports: first remand decision at paras 99, 2014.

[67] As it did at the first phase of the trial, NOVA again delivered voluminous amounts of collateral records on the eve of the first remand hearing. As the first remand decision describes, in September and October 2021, NOVA produced an additional 1.3 million pages of records and then, contrary to the Court's direction, never identified which of them, if any, on which it intended to rely: first remand decision at paras 86, 95.

[68] Even if the other factors included in Rule 10.33 did not support the reasonableness of Dow's claim for costs, NOVA's pattern of litigation conduct created unnecessary cost and delay that factors into a costs decision.

[69] It is noteworthy that fees paid by Dow to its Canadian counsel represent less than 4% of the damages awarded, exclusive of interest. NOVA has not alleged that Dow's costs are

excessive or disproportionate to the amounts at issue or to the importance of the action to the parties, nor has it disclosed its own costs for comparison.

[70] The fact that the costs claim may be considerable does not make it unreasonable. In the course of this litigation there was nothing to indicate that Dow took any steps that were unreasonable or unnecessary. Even if there were such steps, solicitor and his own client costs are to be awarded “without deduction for overcaution or excessive (unreasonable) amounts: *Trinier* at para 12.

[71] During the first phase of the trial, both parties’ experts calculated Dow’s damages based on lost polyethylene sales. As noted by the Court of Appeal in its 2020 COA Decision, NOVA then “retreated from its position at trial and had “clearly taken a ‘new position’ on the quantification of damages”: paras 65-66. The Court noted that NOVA had “abandoned its argument at trial” with respect to the meaning of the words “indirect or consequential damages (including without limitation loss of profits and damages arising from loss of production)” in the definition of Excluded Damages. The Court of Appeal found that NOVA’s original argument with respect to the meaning of the clause at trial was incorrect, and that it had “conceded that the second version [as found by this Court] is the proper interpretation”: 2020 COA Decision at paras 60-61.

[72] NOVA submits that it is entitled to the costs of defeating the method of calculation of Dow’s damages during the first phase of the trial. While the majority of the Court of Appeal allowed NOVA to advance its new position, and remanded the recalculation of Dow’s damages to this Court, significant trial costs were thrown away and new costs incurred to address a calculation that could have been addressed at trial if NOVA had raised it at that time.

[73] NOVA also submits that, Dow is entitled to its costs, “regarding the proof of its claim for Damages, but not for its attempt to prove its unsuccessful claim for Excluded Damages”. The issue is not as straight-forward as NOVA claims. In *Quan v Cusson*, 2009 SCC 62, the appellants / defendants were allowed to rely on appeal on a defence raised for the first time and therefore the Court ordered a new trial. However, the Court refused to disturb the trial costs award in favour of the plaintiff, commenting:

... While the appellants deserve the opportunity to avail themselves of the new defence, they must also live with the consequences of their own strategic decisions at trial. I would therefore not disturb the costs orders made in the courts below: para 51.

[74] This is what happened here. While *Quan* was a case where the defence did not exist at law until appeal, this is a case where the defence existed, but was not argued by NOVA until appeal. Dow submits that the Court of Appeal decision to allow NOVA to resile from its strategic trial decision should not disentitle Dow to costs.

[75] This is a persuasive argument. However, despite this Court’s rejection of an “issue by issue” approach to assessing costs, the calculation of damages was an issue of great importance, and a considerable amount of trial time was dedicated to it.

[76] For that reason, some adjustment to the solicitor and own client costs for the first phase of the trial is appropriate.

[77] The problem is how to determine the appropriate adjustment. I agree with Dow that it is impractical, and even impossible to discern from individual time entries how much time was spent on different issues.

[78] Because the costs associated with each issue in the first phase of the trial cannot be clearly delineated, the most appropriate approach is a percentage deduction to the solicitor and own client costs claim for the first phase of the trial. This deduction should be modest, as NOVA must live with the consequences of their own strategic decisions at trial. Given that, in view of this Court's direct involvement with the trial, I calculate that the original calculation of damages portion of the trial did not exceed 25% of trial time. Given that NOVA must bear some responsibility for its strategic decision at trial, I find that a fair deduction of Dow's claim for this portion of the trial would be 12.5%. As it is impractical to divide up fees relating to allegations for which Dow is entitled to solicitor and own client fees from other claims, this deduction also fairly compensates for the relatively minor issue of fees that deal with infrastructure claims and ethane purity during the first phase of the trial.

[79] NOVA, however, is not entitled to any costs for the first phase of the trial. Any costs award for the appeal is not, of course, within the jurisdiction of this Court.

B. The First Remand

[80] The first remand was about the calculation of damages arising from this Court's findings of Gross Negligence and Wilful Misconduct. Therefore, Dow is entitled to its costs on a solicitor and own client basis. However, NOVA submits that Dow is not entitled to costs related to the NOx issue, and that NOVA itself is entitled to costs on that issue.

[81] The NOx issue is markedly different from the recalculation of damages issue. NOVA raised its NOx argument belatedly. After initially holding NOVA to the established expert evidence deadlines, the Court relented, ruling that "[i]f Mr. Subramanian's report is found to be admissible, a process to address any prejudice caused to Dow by the unexpected report and its late arrival will be addressed": 2021 ABQB 974, para 25. When the Court subsequently permitted NOVA to call Mr. Subramanian to testify, it specifically reserved the matter of costs: 2023 ABKB 156, para 244.

[82] This Court also noted when it allowed NOVA to belatedly raise a NOx-related adjustment that NOVA expressly relied on the fact that the adjustment would be a minor one: "[a]s conceded by NOVA, this is at most a \$50,000,000 issue". The NOx adjustment appears to affect about 2% of the Dow Total Lost Volume of ethylene. This is a relatively minor issue given the total amount of the damages claim, and it cannot affect Dow's substantial success in the first remand hearing.

[83] There will be no deduction from Dow's costs claimed in the first remand hearing, and NOVA is not entitled to any costs.

C. The Second Remand

[84] The context of the second remand is important to the issue of costs.

[85] NOVA issued a counterclaim against Dow in response to Dow's 2006 statement of claim. This counterclaim alleged that Dow was in breach of the OSA because it acquired ethane in the Pool Area, that Dow had failed to perform the agreement "honestly and in good faith", and that

the Union Carbide / Dow merger was a breach of contract. NOVA sued as a Co-owner and sought a judgment claiming significant damages based on breach of contract, failure to pay and unjust enrichment. NOVA also sought specific performance or a mandatory injunction, and in the alternative declarative relief. Specifically, NOVA sought a declaration that it was entitled to terminate the E3 joint venture and access the remedies contained in section 9.02 of the plant Co-owners Agreement

[86] This Court found, *inter alia*, that the ethane acquisition covenants were unenforceable because they were unreasonable restrictions on competition, and thus performance of the covenants would result in breaches of the Competition Act, RSC 1985, c. 34. The Court also found the scope of the restrictive covenant was overly broad, and therefore unenforceable at common law. NOVA's counterclaim was dismissed.

[87] NOVA appealed on a number of grounds, including "[t]he dismissal of NOVA's counterclaim based on Dow's alleged breach of the ethane acquisition restrictions in the [OSA]". The Court of Appeal disagreed with this Court's finding that the restrictive covenant was unenforceable at common law, but confirmed this Court's findings that any attempt to enforce the Ethane Pooling covenants against Dow would result in a breach of the Competition Act. It found that the counterclaim was properly dismissed. However, this Court's proposed "reading down" of the now illegal covenant reflected reviewable error and the matter was referred back to this Court for further consideration: 2020 COA Decision, para 166.

[88] Specifically, the remedial effect of the illegality of the performance of the Ethane Pooling covenant was referred back to this Court: 2020 COA Decision para 168.

[89] The Court of Appeal also made the following comment at para 165:

The trial judge's proposed "reading down" of the Ethane Pooling covenants is not a reasonable solution. It is an open question whether the invalidity of the covenants taints all of section 5 (the Ethane Pooling covenants), or only the particular section 5.15. It may be that the appropriate remedy is to sever as invalid the entire Ethane Pooling covenant, and possibly other provisions in the Operating and Services Agreement (such as the covenant to supply Ethane Services). The appropriate remedy in the circumstances was not fully argued on appeal, so the effect of the illegality of the covenants is referred back to the trial court for further consideration.

[90] This was the second remand. Dow was the successful party: 2025 ABKB 452. Not only was Dow successful with respect to the issue of severance, but NOVA's claim with respect to repayment of over \$1 billion in damages was dismissed. NOVA submits that Dow's costs of defending the counterclaim during the first phase of the trial are unrecoverable, and that it should be entitled to costs for "to date, the prosecution of its substantially successful counterclaim on severance". The costs of the appeal are a matter for the Court of Appeal, but as the Court said, the appeal of the counterclaim, with its severance elements and claims for relief, was dismissed, and the "appropriate remedy [for the invalidity of the covenants] was not fully argued on appeal" and was referred back to the trial court for further consideration.

[91] It is clear that this issue is between Co-owners, and does not involve NOVA as Operator. Thus, section 14.1 does not apply. As noted previously, Dow is entitled to party-and-party costs of the second remand.

[92] The previous analysis of the factors cited under Rule 10.33 (1) and (2) remains valid with respect to these costs. Given these factors and the history and circumstances of this action, a reasonable award of costs in the second remand is a lump sum equal to 50% of the solicitor-and-own costs claimed by Dow. As noted previously, I find that these costs are reasonable.

D. Claim for Legal Fees

[93] As noted previously, this is not an appropriate case for referral to an assessment officer.

[94] Dow claims legal fees in the amount of \$81,209,968.31. This includes fees paid to five firms, four of which were trial counsel, two of which were counsel both at trial and at the remands, and one firm that acted for primary counsel on a disqualification application.

[95] Dow provides an extensive breakdown of its solicitor and own clients costs, in a format that mirrors the one accepted by the Federal Court and the Federal Court of Appeal in the parties' patent litigation, maintaining privilege over the details. As noted previously, these fees represent less than 4% of the damages awarded.

[96] Dow does not claim counsel fees for appeal proceedings, applications where NOVA was successful and awarded costs, applications in which no costs were awarded and matters relating to other proceedings between the parties. It does not claim costs for US counsel or its in-house counsel.

[97] NOVA objects to Dow's disclosure of legal fees on the basis that it is "an unsubstantiated table showing legal charges without any disclosure as to who did the work, why and at what rate", and that there is no proof that these fees have been paid. The latter criticism is without merit: the fees were presented as accurate by Dow counsel, and there is not even the slightest evidence that they may not have been paid.

[98] I agree with the Federal Court of Appeal that this form of disclosure of fees is appropriate and sufficient for litigation between sophisticated parties in "complex, lengthy, contentious litigation". I am satisfied that the fees were actually incurred, and, by reason of my intimate knowledge of this case as trial judge, are reasonable in the circumstances. This finding relates not only to the solicitor and his own client fees that form part of this award, for which a finding of reasonableness is not required, but also the lump sum party-and-party costs.

[99] As noted previously in *North American Polypropylene* at para 41:

Sophisticated, well-funded litigants expect to expend substantial resources when engaging in high stakes litigation before the Courts or arbitrators. They are quite capable of factoring the costs of doing so into their assessment of litigation risks and rewards as the process unfolds. They are also quite capable of monitoring the cost of outside counsel and the value of advice and advocacy being provided.

[100] It is interesting that Neufeld, J. commented that, in that trial, hard copies of exhibits (primarily email correspondence, slide decks and agreements) and read-ins from questioning occupied ten feet of shelf space.

[101] In this action, hard copies of exhibits occupy a large retiring room in the Courthouse.

[102] As noted by counsel for Dow, from its side, there are over a thousand invoices ranging over almost two decades of litigation, many of them stretching to 10 or 20 pages, itemized time

entries for multiple timekeepers and issues of privilege affecting a substantial number of those time entries. Privilege is particularly sensitive in the present case because these parties are still in business and continue to be in litigation with each other.

[103] There is no need for a multi-year forensic audit of Dow's costs.

[104] It is noteworthy that NOVA, even though it makes claims to be entitled to costs itself, offers no particulars, details or materials of its own for comparison.

[105] NOVA has been represented by an equal number of law firms, other than disqualification counsel, and by counsel of comparable seniority. NOVA's explanation for its lack of disclosure with respect to its legal fees is disingenuous.

[106] NOVA does not in fact allege that Dow's costs are excessive or disproportionate to the amounts at issue or to the importance of the action to the parties. The level of disclosure of legal costs sought by NOVA would only create unreasonable delay in what has already become a lengthy action and would result in further high costs.

E. Disbursements

1. Expert Reports

[107] This case was expert-intensive and highly technical. The parties presented 20 expert reports between them regarding issues of liability, damages and economics during the first phase of the trial, and 16 more expert reports in the period after the first trial decision and to the end of the two remands.

[108] Dow's claim for reimbursement of its experts is indeed large. However, it is not disproportionate to the amounts claimed and the importance of the issues to the parties. I accept that every expert whose fees are claimed by Dow was necessary to prove Dow's case, and to assist the Court in a lengthy and complex trial. This Court found all the experts who testified qualified: in fact, they were highly qualified. This Court repeatedly relied on and accepted the evidence of Dow's experts over those of NOVA. Dow has provided a breakdown of each of its expert fees by invoice.

[109] NOVA has made submissions with respect to two of the experts whose fees are claimed by Dow.

[110] With respect to Mr. Holloway, NOVA submits that since Dow did not call Mr. Holloway as a witness at the first remand hearing, despite him having prepared a report for purposes of that remand, Dow should have no claim for the costs associated with that report, and NOVA should be entitled to an unspecified and unsupported amount of costs "associated with responding to Mr. Holloway's withdrawn report".

[111] Contrary to NOVA's submissions, Dow tendered Mr. Holloway's top-up report to NOVA and the Court, and Dow counsel did not, as alleged by NOVA, state in December 2021 when the first remand was being scheduled that it would not call Mr. Holloway as a witness. Dow counsel in fact said on that occasion:

... if there are any plant equipment changes or constraints on which NOVA is then allowed to proceed, Dow will need an opportunity to rebut whatever that is. And only then, for example, would Mr. Holloway become a relevant witness and

might there be other potential rebuttal evidence. I just want to raise that now and make sure that we're on the same page; we're not going to have some kind of disagreement about it later.

...

... [I]f there are no so-called constraints that pass through the door of relevance and admissibility at the expert evidence stage, then we won't be calling Mr. Holloway. If there are -- and we will only know that when the Court rules, so we can't possibly lead evidence on it now -- then Mr. Holloway may need to address those. Maybe he won't, but maybe he will.

[112] This was an entirely reasonable position for Dow at the time, and there was no objection to it.

[113] As noted by the Court of Appeal in *ENMAX Energy Corporation v Alberta*, 2018 ABCA 291 at para 7:

The reasonableness of a disbursement for an expert witness depends on whether the expenditure was reasonable, measured at the time that it was incurred

[114] The possibility of Dow requiring a rebuttal report to the constraints submissions of NOVA was real at the time.

[115] On March 15, 2023, the Court ruled that NOVA had not proven that any plant changes made to E3 after the 2014 plant turnaround improved its productive capability so Dow would no longer require Mr. Holloway to address that issue. However, the Court allowed NOVA to call Mr. Subramanian to testify about the NOx issue, and it ruled that Dow would be entitled to call rebuttal evidence. In his report, Mr. Holloway had briefly addressed NOx emissions, and available operational methods to control them. On July 26, 2023, at the conclusion of Mr. Subramanian's testimony, NOVA counsel accordingly asked whether Mr. Holloway would be called to testify. Dow counsel asked for an opportunity to review the transcript before responding. Despite vehement objection from NOVA counsel, I allowed Dow counsel a few days to respond. Soon afterwards, Dow counsel advised that Mr. Holloway would not be called to testify.

[116] The reasonable costs of all experts, whether ultimately called to testify or not, are recoverable. Reasonableness is to be assessed at the time the costs were incurred. Dow's decision to incur the costs of a report from Mr. Holloway was reasonable, as was its decision not to call him in the circumstances. Dow is entitled to reimbursement for the full costs of Mr. Holloway's work. NOVA is not entitled to any costs on this issue.

[117] With respect to Mr. Mikulka, it is certainly true that fees paid to him for his reports are very high. NOVA objects to them, characterizing them as extraordinary and unprecedented, and suggesting, without disclosure, that they are more than all of NOVA's expert fees combined.

[118] The work of Mr. Mikulka and his team was key to every part of this trial. His scope of work was enormous. As NOVA counsel in a case management hearing once commented about Mr. Mikulka's model, "[w]hen printed, if you extended it, it would... [be] probably as wide as this courtroom". I accept Dow's descriptions of the reports, which NOVA did not refute. In his January 2014 report, Mr. Mikulka noted his sources for nine categories of damages he was required to calculate. Among others, those sources included Feedstock Cost Statements,

Manufacturing West Reports, the E3 Historian, Production Reports, Net Balance Statements, Net Unit Revenue Files, Gross Cost Files, LP7 Utility Cost Files, Asset Utilization Files, Ethylene Sales, Intercompany Transfer Pricing Policies and Sales, and AOGCL modeling for the many years that made up the damages claim. After the Court of Appeal allowed NOVA to change its position and remanded a new “value of ethylene” calculation, Mr. Mikulka had to prepare a new analysis. That analysis offered three separate methodologies for consideration by the Court, each of which again needed to account for multiple subcomponents and equations.

[119] Mr. Mikulka’s model for the first remand was even larger than the original, with 45 individual sections of data and calculations. The raw data tab alone contained more than 105,000 datapoints, sources and calculations. The damages calculation tab contained another 87,000 datapoints, sources and calculations. According to Dow counsel, Mr. Mikulka and his team had to find or calculate well over a million datapoints. Nothing about these statistics is a surprise: this Court has received, and reviewed all of Mr. Mikulka’s substantial and thorough expert reports in detail.

[120] Mr. Mikulka’s qualifications were not just related to his calculations. He was also an industry expert. NOVA had to call several experts to respond to his reports.

[121] NOVA submits that all of Mr. Mikulka’s work at the first trial should be excluded because of the results of the first appeal. This is an argument that NOVA also made with respect to legal costs, and for the same reasons, this submission cannot succeed here. There was no objection from NOVA about Mr. Mikulka’s reports on the basis that they referred to polyethylene during the first phase of the trial.

[122] As previously noted, the reasonableness of an expert’s report is to be assessed at the time the costs were incurred. At the first phase of the trial, Dow’s decision to retain Mr. Mikulka was reasonable, as was its decision to have him prepare a top-up report in anticipation of the first remand hearing.

[123] NOVA submits that this Court should do a “reasonableness” check on Mr. Mikulka’s expert report. By this, NOVA counsel says that this Court would have to look at the nature of the work done and the charges for that work. This Court is very familiar with the nature of the work done by Mr. Mikulka, and the fees charged, while substantial, are proportionate to the extent and scope of that work, the period of time over which damages accumulated, the enormous task of reviewing millions of records, and the amount of damages claimed and ultimately awarded.

[124] NOVA also submits that this Court would have to determine whether the work done relates to damages caused by Wilful Misconduct and Gross Negligence. This is not necessary. Dow’ claim for disbursements for expert fees is appropriate under both a solicitor and his own client basis and a party-and-party costs basis.

[125] Dow is entitled to reimbursement for Mr. Mikulka’s fees without deduction.

[126] NOVA submits that Dow is not entitled to the fees of Dr. Shehadeh and Mr. Waverman for the first phase of the trial, or the fees of Dr. Shehadeh and Mr. Broodo for the second remand, on the basis of its now rejected argument that Dow has no claim for expert fees in relation to the “severance” issues because they do not constitute Damages as defined in section 14.1 of the OSA.

[127] As noted previously, section 14.1 of the OSA does not restrict Dow's claim for damages against NOVA as Co-owner, nor should the necessary, reasonable and appropriate fees of its experts be disallowed.

[128] Dow is entitled to these disbursements.

2. Discovery Charges

[129] In December 2009, the parties agreed to certain "Protocols for the Electronic Exchange of Records", designed "to facilitate the production and exchange of Records and minimize the management and technology costs related to this litigation". They agreed that, at first instance, "it is the responsibility of each party to bear the costs of producing and exchanging its Records and complying with the Protocols". One of the recitals to the agreement provides that the Protocols "apply to the production and electronic exchange of Records only and to no other aspect of this litigation". As NOVA concedes, the agreement provides that "[S]ubject to any Court orders made in these proceedings, it is the responsibility of each Party to bear the costs of proceedings and exchanging its Records..." This reflects the general principle that the party with the custody of records will initially bear the costs of their production. Dow asks the Court to order the recovery of these costs, routinely awarded as part of costs awards.

[130] NOVA submits that such charges are not recoverable under the OSA as Damages. This is incorrect. There is no reason to deny Dow reimbursement for these charges, and I do so.

3. Travel and Hotels

[131] NOVA submits that these charges should be confirmed by invoices and subject to a reasonableness review.

[132] NOVA does not dispute that Dow was entitled to engage out of province expert counsel in competition law to respond to NOVA's counterclaim, or that their reasonable travel and hotel charges are properly recoverable. In *Trinier* at para 8, a case cited by NOVA, the Court of Appeal confirmed that such costs are recoverable under a covenant for solicitor and own client costs, even for out-of-town counsel from within the province.

[133] I find that, in this case, the travel costs of out-of-province counsel are appropriately claimed and, given the years long length of the proceedings and the important role of competition law counsel, travel and hotel costs as part of both solicitor and own client costs and party-and-party costs are justified and reasonable.

[134] It is noteworthy that Dow does not claim recovery for the legal services, attendance or travel expenses of in-house counsel, although arguably it may be entitled to do so, nor does it claim travel expenses for its fact witnesses, either at trial or questioning.

4. Online Research

[135] Dow claims expenses for online research disbursements. NOVA argues that "back-up" is required, without specifying what kind of back-up, unprotected by litigation or solicitor-client privilege, would be appropriate.

[136] The costs of online research disbursements claimed by Dow are reasonable, given the length and complexity of the trial and its complex nature.

5. Costs between March 11, 2016 and June 30, 2018

[137] Dow seeks to recover legal fees for work done between the conclusion of oral closing submissions in March 2016, and the date of decision in the first part of the trial. NOVA submits that these costs should not be recoverable because “the parties were awaiting a decision; there were no intervening proceedings”.

[138] As Dow points out, it was highly likely during that time that there would be a subsequent “top-up” hearing after the decision on the first phase of the trial. Dow counsel says that it was monitoring losses relating to the period between April 2016 and the date of decision and preparing material for the top-up hearing.

[139] On January 30, 2018, this Court wrote to counsel, advising that, before any broader publication, it would release its reasons for judgment to the parties to ensure that confidential information could be redacted. The parties worked out a process to do that before the actual reasons were issued. Appendix A was released on March 9th. The main decision was released on May 4th. Most of the counterclaim decision was released on June 1st. Appendix C, the analysis of the expert reports for economics and competition, was released on June 18th. Clearly, all through that period, the parties would have been consulting with their clients, considering what was next to follow, like the top-up quantification, attending to redactions according to the instructions of their clients and, all the other work that would normally happen as parties ramped up in earnest for things to come, such as the preparation of a judgment roll and the quantification of the top-up amounts.

[140] In this case, all of this would be no small matter.

[141] There would be monitoring of the law in respect of the many trial issues, as required by professional ethics. The case was not over. There are many reasons why continued work was necessary and appropriate, and Dow is not denied its solicitor-and-own client costs for this period, subject to the modest reduction already noted.

6. Charges for Foreign Counsel

[142] Dow does not claim fees for US counsel nor for Dow’s in-house counsel. NOVA, however, suggests that Dow should have excluded any time spent conferring with US counsel. It also objects to recovery of reimbursement paid to U.K., Australian and New Zealand counsel.

[143] NOVA does not cite any authority for its suggestion that Dow should exclude any time spent conferring with US counsel. There is no principled reason for such an exclusion, particularly since most of such costs are covered under a solicitor-and his own client basis. There is no principled or recognized basis for excluding counsel fees incurred in consulting anyone who is not a Canadian lawyer – parties such as clients, employees, witnesses, and experts. NOVA is not entitled to any exclusion of costs on this basis.

[144] With respect to fees of commonwealth counsel relating to matters of law in their jurisdiction, the law permits recovery of such costs: *Crowe Mackay & Company Ltd. v Ferry*, 2020 ABCA 300, para 14. At any rate, such fees were reasonably and prudently incurred, given the issues in this litigation.

7. Currency Conversion

[145] Several of the disbursements by Dow were incurred and paid in US dollars and other currencies. Dow submits that such amounts be converted to Canadian dollars in the same manner

as its damages award (other than for allocation damages) as of the date of judgment, consistent with the first remand decision: 2025 ABKB 217 at para 522.

[146] The first remand decision sets out the reasons for this currency conversion decision at paragraphs 513 – 522. These paragraphs include reference to the Court of Appeal’s decision with respect to currency conversion at 2020 ABCA 320 at paras 106-109.

[147] NOVA submits that Dow should be entitled to what it actually paid, applying the conversion rate at the time, citing *ENMAX* at para 9, a single sentence in the decision with respect to a costs award that was not based on contract.

[148] There is no principled reason why these disbursements, the amount of which Dow has been deprived from the time they were paid until the present claim for costs, should be treated differently with respect to conversion than damages.

8. Deduction for Inadvertent Repeat Billing

[149] At the costs hearing, Dow reported that, after another check, Dow counsel found one invoice of a service provider that was listed twice. Dow asks that its disbursements claim be reduced by the amount of the billing, \$17,998.06.

VI. Conclusion

[150] Dow is entitled to solicitor and own client costs for the first phase of the trial, subject to a deduction of 12.5%.

[151] Dow is entitled to solicitor and own client costs for the first remand preparation and hearing.

[152] Dow is entitled to a lump sum of costs for the second remand preparation and hearing equal to 50% of its solicitor and own client costs claim.

[153] Dow is entitled to all of its claimed disbursements, subject to a deduction of \$17,998.06 for a duplicated invoice.

[154] NOVA is not entitled to costs.

Dated at the City of Calgary, Alberta this 11th day of August, 2025.

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

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