Court of Queen's Bench of Alberta

Citation: Blaze Energy Ltd v Imperial Oil Resources, 2014 ABQB 326

Date:
Docket: 1401 04421
Registry: Calgary

Between:

Blaze Energy Ltd.

Plaintiff

- and -

Imperial Oil Resources, Whitecap Resources Inc., Keyera Partnership, and Keyera Corp.

Defendants

Reasons for Judgment of the Honourable Madam Justice F. Schutz

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Summary

[1] Imperial Oil Resources ("**IOR**") and Blaze Energy Ltd. ("**Blaze**") were parties (as successors to the original parties) to two separate agreements.

[2] One is an owners' agreement (the "**1960 Lands Agreement**") with respect to oil and gas interests or oil and gas leases located in four specific parcels of land (the "**1960 Lands**"). IOR and Blaze own some of the 1960 Lands on a 50/50 basis. The other land interests under the 1960 Lands Agreement are owned by parties not involved in this action.

[3] The other is a 1988 Construction Ownership and Operation Agreement (the "**1988 CO&O**") regarding the 6-28 West Pembina Gas Plant (the "**Plant**") which was built after 1988. Prior to selling its interest to Whitecap Resources Inc. ("**Whitecap**"), IOR owned 90% of the Plant. Blaze owns 8% of the Plant. The remaining 2% is held among three other parties, none of whom have an interest in the 1960 Lands.

[4] The correct interpretation of some of the wording in these agreements is at the heart of this matter, in particular Blazes' rights of first refusal ("**ROFR**").

[5] IOR's evidence is that it agreed to dispose of and sell $855 million in assets ("**Disposition Offer**") to Whitecap. Disposition Offer assets included IOR's entire interest (90%) in the Plant together with IOR's entire working interest in the "**West Pembina Area**" (as defined in the 1988 CO&O and including, but not limited to, the 1960 Lands).

[6] Whitecap's evidence is that it agreed to dispose of and sell $113 million of the Disposition Offer assets to Keyera Partnership ("**Keyera**"). This sale disposed of 85% of Whitecap's ownership interest in the Plant which was sold to Keyera in conjunction with a portion of the West Pembina Area lands. (Whitecap retained its remaining 5% interest in the Plant.)

[7] In its April 23, 2014 Statement of Claim at para 10 "Blaze claims a ROFR on IOR's sale of the Lands and the *corresponding* interest in the Plant to Whitecap, under the CO&O and the 1960 Operating Agreement." [italics mine]

[8] In its April 23, 2014 Statement of Claim at para 11 "Blaze also claims a ROFR on Whitecap's sale of a portion of the Lands and the *corresponding* interest in the Plant to Keyera under the CO&O and 1960 Operating Agreement." [italics mine]

[9] (Blaze defines in its claim, "Lands" to mean certain petroleum and natural gas reserves, wells, and facilities nearby the Plant located in the West Pembina area of the Province of Alberta.)

[10] Article 1102 of the 1988 CO&O provides for a right of refusal in respect of Plant interests ("**Plant ROFR**").

[11] Article 1101 of the 1988 CO&O provides an exemption to requiring issuance of a Plant ROFR. Article 1101 says: "Any Owner may, without restriction, dispose of an interest in the Plant in conjunction with the disposal of the Owner's corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant...." ("**Gas**" and "**West Pembina Area**" are defined contractual terms.)

[12] IOR, Whitecap and Keyera assert that this in respect of the sales transactions relating to the Disposition Offer assets, these exact dispositions under Article 1101 occurred; therefore, the Article 1101 Plant ROFR exemption applies: IOR and Whitecap, respectively, say they disposed of their interest in the Plant in conjunction with the disposal of their corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant. Keyera supports their respective positions.

[13] On May 2, 2014 Blaze issued an Amended Statement of Claim. At paras 10 and 11 of the Amended Statement of Claim, the word "*corresponding*" is deleted. [italics mine]

[14] On April 29, 2014, Chief Justice Wittmann granted a Consent Order for this expedited trail.

[15] The Consent Order defines "**Assets**" to mean: "The ownership interest in the gas plant under the terms of the Agreement for the Construction, Ownership and Operation of the West Pembina 6-28 Gas Plant and the lands under the Operating Agreement dated June 27, 1960 in which Blaze Energy Ltd. claims a right of first refusal pursuant to the Statement of Claim".

[16] The Consent Order directs an expedited trial to determine the following issues:

(a) Does Blaze have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Imperial Oil Resources and Whitecap Resources Inc.?

(b) Does Blaze have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Whitecap Resources Inc. and Keyera Partnership?

(c) If Blaze Energy Ltd. has rights of first refusal, is it entitled to specific performance?

[17] This expedited trial is expressly limited to these three issues.

[18] The parties were unable to file an Agreed Statement of Facts, as required by para 6(b). The Consent Order stipulates that there shall be no questioning or *viva voce* evidence.

[19] All parties agree that the exhibits for purposes of this expedited trial would be the six affidavits filed, the exhibits attached thereto and the transcripts from cross-examination on some of those affidavits:

(i) David G. Smith, sworn May 12, 2014,

(ii) Gary Lebsack, sworn May 12, 2014,

(iii) Mark Pinsent, sworn May 12, 2014,

(iv) Mark Pinsent, sworn May 22, 2014,

(v) Biago Mele, sworn April 23, 2014,

(vi) Biago Mele, sworn May 16, 2014, and

transcripts from cross-examinations of Lebsack, Smith and Pinsent.

[20] A Confidentiality Order in place does not concern the evidence before me.

[21] At the conclusion of this trial on May 26, 2014 the parties respectfully impressed upon me the urgency of a timely decision and, further, that it would be optimal to have judgment by the end of May 2014, by reason that there are significant collateral matters outstanding in respect of the Plant that concern third parties.

[22] I accede to this respectful request, acknowledging that all infelicities of expression or editing are my own. I am grateful to counsel for their able submissions and thorough briefs, which I have relied upon. I have decided the issues, as set out following.

[23] In answer to issue (a) of the Order of April 29, 2014, I find that Blaze does not have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between IOR and Whitecap.

[24] In answer to issue (b) of the Order of April 29, 2014, I find that Blaze does not have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Whitecap and Keyera.

[25] In answer to issue (c) of the Order of April 29, 2014, I find that even if Blaze has the rights of first refusal it claims, Blaze is not entitled to specific performance.

Cases Provided by Blaze Energy Ltd.:

1. *Canadian Natural Resources Ltd. v Encana Oil & Gas Partnership*, 2008 ABCA 267, [2008] AWLD 4909, 49 BLR (4th) 163
2. *Calcrude Oils Ltd v Langevin Resources*, 2003 ABQB 1051, [2004] AWLD 180. 349 AR353
3. *APEX Corp v Ceco Developments Ltd*, 2005 ABQB 656, [2005] AWLD 3693, 387 AR 211
4. *APEX Corp v Ceco Developments Ltd*, 2008 ABCA 125, [2008] 6 WWR 393, 41 BLR (4th)

5. *Hanen v Cartwright*, 2007 ABQB 184 paras 48-53, [2007] 6 WWR 481, 54 RPR (4th) 66, 71 Alta LR (4) 284
6. *Chase Manhattan Bank of Canada v Sunoma Energy Corp*, 2001ABQB142, [2001] AWLD 288, [2001] AJ No 245 affd 2002 ABCA 286, [2002] AJ No 1550
7. *Bearspaw Petroleum Ltd. v. ConocoPhillips Western Canada Partnership*, 2009 ABQB 202, [2009] 7 WWR 125, 4 Alta LR (5th) 393
8. *GATX Corp. v Hawker Siddeley Canada Inc.*, [1996] OJ No 1492 (Ont. Gen. Div.)
9. *Canadian Natural Resources Ltd. v Encana Oil & Gas Partnership*, 2007 ABQB 460, [2007] AWLD 3176, 33 BLR 163
10. *Georgia Construction Co v Pacific Great Eastern Railway*, [1929] SCR 630, 36 CRC 23, [1929] 4 DLR 161
11. *Canadian Long Island Petroleums Ltd v Irving Wire Products*, [1975] 2 SCR 715, [1974] 6 WWR 385, 3 NR 430
12. *Law of Property Act*, RS.A. 2000, c.L-7, s. 63
13. *Semelhago v Paramadeven*, [1996] 2 SCR 415, 28 OR (rd) 639, 3 RPR (3d)
14. *Colvin v Minhas*, 2009 ABQB 42 at para 43, [2009] 7 WWR 544, [2009] AJ No 74, AM Lutz, J. [Colvin v Minhas], affd 2009 ABCA 404, [201 O] 3 WWR 48
15. *2475813 Nova Scotia Ltd v Lundrigan*, 2003 NSSC 48, 213 NSR (2d) 53 (NSSC)

Cases Provided by Imperial Oil Resources:

1. *Southland Canada Inc v Zarcan Equities Ltd* (1999), 254 AR 59, 1999 CarswellAlta 1034 (QB)
2. *Scurry-Rainbow Oil Ltd v Kasha*, 1996 ABCA 206, 184 AR 177, 1996 CarswellAlta 402
3. *Consolidated Bathurst Export Ltd v Mutual Boiler and Machinery Insurance* (1979), (1980) 1 SCR 888, 1979 CarswellQue 157
4. *Bell v Lever Bros Ltd*, [1931] All ER Rep 1, [1932] AC 161 (UK HL) (Excerpt only)
5. *Catre Industries v Alberta*, 1989 ABCA 243, 99 AR 321, 1989 CarswellAlta 527
6. *Alberta Oil Sands Pipeline Ltd v Canadian Oil Sands Ltd*, 2012 ABQB 524 at para 67, 7 BLR (5th) 142, 2012 CarswellAlta
7. *Chase Manhattan Bank of Canada v Sunoma Energy Corp*, 2001 ABQB 142, 283 AR 260, 2001 CarswellAlta 264
8. *Pierce v Empey*, [1939] SCR 247, 1939 CarswellOnt 97

Cases Provided by Whitecap Oil Resources Inc.:

1. *Two Forty Engineering Ltd. v. Platte River Resources Ltd.*, 1995 CarswellAlta 5 (Q.B.)
2. *Consolidated-Bathurst·Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), 112 D.L.R. (3d) 49

3. *GATX Corp. v. Hawker Siddeley Canada Inc.* 1996CarswellOnt1435 (Ont. Ct. Gen. Div.)
4. *Canadian Long Island Petroleum Ltd. et. Al. v. Irving Industries (Irving Wire Products Division) Ltd. et al.*, [1975] 2 S.C.R. 715
5. *Calcrude Oils Ltd v. Langevin Resources*, 2003 ABQB 1051
6. *Mesa Operating Ltd v. Amoco Canada Resources Ltd*, 1994 CarswelWta 89 (CA)
7. *Southland Canada Inc. v. Zarcan Equities Ltd.*, (1999), CarswellAlta 1034 (QB)
8. *Adesa Auctions of Canada Corp. v. Southern Railway of British Columbia* 2001 BCSC 1421
9. *Saskatchewan Oil & Gas Corp. v. Mobil Oil Canada Ltd*, 1989 CarswellSask 574
10. *Equinox Engineering Ltd. v. Lavalin L.P. Inv.*, 2012 ABCA 204
11. Shorter Oxford English Dictionary, 5th ed, *sub vero*, "correspond"
12. *Sackville-West v Holmesdale (Viscount)* 1870 LR 4 HL 543 at 576, per Lord Cairns
13. *Carson v. Luncheonette Ltd*, 1987 CarswellNfld 98 (S.C.T.D.)
14. *Merritt & District Industrial Co-Operative Society Ltd v. Young*, 1916 CarswellBC 100
15. *NAL GP Ltd v. BP Canada Energy Co.*, 2010 ABQB 626
16. *Captain Developments Ltd v. Nu-West Group Ltd.* (1982), 136 D.L.R. (3d) 502 (Ont. H.C.)
17. *Peterson v. Canadian Imperial Banko/Commerce*, (1992) 105 Sask. R. 113 (C.A.) .
18. *Chase Manhattan Bank of Canada v. Sunoma Energy Corp.*, 2001 ABQB 142
19. *Horizon Resource Management ltd v. Blaze Energy Ltd.*, 2011ABQB658; appeal dismissed, cross-appeal allowed in part 2013 ABCA 139
20. *Power Consolidated (China) Pulp Inc. v British Columbia Resources Investment*, 1989 CarswellBC 1705 (S.C.)
21. *Incanore Resources Ltd v High River Gold Mines Ltd.*, 2008 CarswellOnt 5071 (S.C.)
22. *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.)
23. *Semelhago v. Paramadevan*, [1996] S.C.J. No. 71
24. *Strategy Summit Ltd. v. Remington Development Corp.*, 2009 ABCA 30
25. *Southcott Estate Inc. v. Toronto Catholic District School Board*, 2012 SCC 51

Cases provided by Keyera Partnership and Keyera Corp.:

1. *Alberta Oil Sands Pipeline Ltd. v. Canadian Oil Sands Limited*, 2012 ABQB 524
2. *Southland Canada Inc. v. Zarcan Equities Ltd*, 1999 ABQB 831
3. Undertaking Response of David G. Smith
4. *Imperial Life Assurance Co. of Canada v. Sanderlea Corp.*, [1991] O.J. No. 2705
5. *Chase Manhattan Bank of Canada v. Sunoma Energy Corp.*, 2002 ABCA 286

6. *Bank of America v. Mutual Trust Co.*, [1992] 0.J. No. 2662, 1992 CarswellOnt 4072
7. *Australian Hardwood Property Ltd. v. Commissioner for Railways*, [1961] 1 W.L.R. 425 (P.C.)
8. *Black's Law Dictionary*, 6th ed. at 250
9. D. Dukelow, ed. *Dictionary of Canadian Law*, 3rd ed. at 198

I will now explain why I have decided these matters as I have.

I. The Two Agreements at Issue

[26] IOR and Blaze were parties (as successors to the original parties) to two separate agreements. The June 27, 1960 owners' agreement (the "**1960 Lands Agreement**") is an agreement with respect to oil and gas interests or oil and gas leases in four specified parcels of land (the "**1960 Lands**"). IOR and Blaze own some of the 1960 Lands on a 50/50 basis. The other land interests under the 1960 Lands Agreement are owned by parties not involved in this action. At issue is the wording of some contractual provisions found in this agreement.

[27] Also at issue is the wording of some contractual provisions found in a 1988 Construction Ownership and Operation agreement (the "**1988 CO&O**") regarding the 6-28 West Pembina Gas Plant (the "**Plant**") which was built after 1988. IOR owned 90% of the Plant - prior to selling same to Whitecap - and Blaze owned 8% of the Plant. The remaining 2% is held amongst three other parties, none of whom have an interest in the 1960 Lands.

A. The 1960 Lands Agreement

[28] The 1960 Lands that are subject to the 1960 Lands Agreement are described on page one of the agreement by specific legal description and the owners' oil and gas interests and oil and gas lease interests are affixed as a schedule to the agreement. [Affidavit of Biago Mele sworn April 23, 2014, Exhibit A).

[29] The 1960 Lands are also shown on coloured-coded township and range schematics in the Affidavit of P. Gary Lebsack (hereafter "Lebsack" sworn May 12, 2014, Exhibits D and H.

[30] Clause 18 of the 1960 Lands Agreement [Mele Affidavit sworn April 23, 2014, Exhibit A] grants Blaze a preferential right of purchase (the "**Lands ROFR Notice**") in respect of the 1960 Lands governed by it.

[31] Clause 18 says:

> In the event any part desires to sell all or any part of his or its interests which are subject to this agreement, the other party or parties hereto shall have a preferential right to purchase the same. In such event, the selling party shall promptly communicate to the other party or parties hereto the offer received by him or it from a prospective purchaser ready, willing and able to purchase the same, together with the name and address of such prospective purchaser, and said other party or parties or anyone or more of them shall thereupon have an option for a period of ten (10) days after the receipt of said notice to purchase such interest at and for the offered price and upon the offered terms for the benefit of such remaining parties hereto as may agree to purchase the same. Any interest so

acquired by more than one party hereto shall be shared by the parties purchasing the same in the proportion that the interest of each party so acquiring bears to the total interest of all parties so acquiring. The limitations of this paragraph shall not apply where any party hereto desires to mortgage his or its interest or to dispose of his or its interest by merger, reorganization, consolidation or sale of all his or its assets, or a sale of his or its interest hereunder to an affiliate, subsidiary or parent company.

In event of a sale by Operator of the interests owned by it which are subject hereto, the holders of a majority interest in the premises subject hereto shall be entitled to select a new operator but unless such selection is made the transferee of the Operator shall act as operator hereunder.

[32] The current parties to the 1960 Lands Agreement are Whitecap, Blaze, ARC Resources General Partnership, Penn West Petroleum and Zargon Oil & Gas Partnership.

[33] The 1960 Lands Agreement was executed in June of 1960, predating by almost three decades the construction of the Plant, which occurred after 1988.

B. The 1988 CO&O Agreement

[34] The 1988 CO&O is the agreement respecting the Plant. IOR pointed out that there are owners of the Plant who do not own any of the 1960 Lands. The current parties to the 1988 CO&O are Whitecap, Keyera Partnership, Blaze, Enerplus Partnership, TAQA North and Vermillion Resources.

[35] Article 1102 of the 1988 CO&O also provides a right of first refusal to Plant owners in respect of the sale of an interest in the Plant (**"Plant ROFR Notice"**). [Affidavit of Biago Mele (hereafter "**Mele**") sworn April 23, 2014, Exhibit B.]

[36] Article 1102 says:

1102. SALE OF AN INTEREST IN THE PLANT

If an Owner (the "Selling Owner") wishes to dispose of all or any portion of its interest in the Plant, the Selling Owner shall inform the other Owners in writing of its intention, the interest proposed to be disposed of, the terms and conditions upon which the disposition is to be made, and, if the consideration is not cash, the fair market value of the consideration, and the identity of the person to whom the disposition is made. Each other Owner shall have the option for thirty (30) Days after receipt of the disposal notice to elect to acquire, on the same terms and conditions specified in the disposal notice, a share of the interest to be disposed; but in no event can the other Owners elect to acquire less than the total interest proposed to be disposed. If more than one (1) Owner elects to acquire the interest, then the interest shall be acquired by those Owners in proportion the their respective Plant Participations. Those Owners shall, within thirty (3) Days after their election, pay the consideration for the interest or, when the consideration is other than cash and an Owner cannot supply that type of consideration, the fair market value of it. Unless the option is exercised within the thirty (30) Day period, the Selling Owner shall have the right for a period of one hundred and twenty (120) Days after the giving of the disposal notice to dispose of the interest described in the disposal notice to the person named in it upon the terms and conditions specified in it. If a purchase and sale

agreement is not executed within the one hundred and twenty day (120) Day period, it must be re-offered to the other Owners prior to any subsequent disposition.

[37] Article 1101 of the 1988 CO&O, however, provides an exemption to the foregoing Pland ROFR Notice: under Article 1101 an Owner may, without restriction, dispose of an interest in the Plant in conjunction with the disposal of the Owner's corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant:

1101. DISPOSAL OF AN INTEREST

Any Owner may, without restriction, dispose of an interest in the Plant in conjunction with the disposal of the Owner's corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant. Operator shall immediately revise Exhibit "A" to show the new Owner's Plant Capacity and Plant Participation and supply each Owner with a copy of the revision.

[38] **Gas** is a defined term, found at Article 1, the Definitions section of the 1988 CO&O: "**Gas**" and "means natural gas, together with other hydrocarbon substances, before it has been subjected to any processing except water removal and includes all hydrogen sulphide, carbon dioxide and fluid hydrocarbons not defined as crude oil under the provisions of the Oil and Gas Conservation Act, Chapter O-5 of the revised Statutes of Alberta, 1980, and amendments to it or substitutions for it"[101(i)]. (There is a separate definition for "**Outside Gas**" which is Gas belonging to an Owner and produced from outside the West Pembina Area....).

[39] The "**West Pembina Area**" is also a defined term [101(ee)] and "means the lands in the Province of Alberta outlined by heavy broken black lines on the West Pembina Area map shown in Exhibit "B"".

[40] The borders of the West Pembina Area are also clearly delineated in red outlining on township and range schematics: Lebsack , Exhibits D and H. The schematics also clearly show: (1) the 1960 Lands; (2) the lands sold by IOR to Whitecap; and, (3) the Nisku lands and Nisku wells sold by Whitecap to Keyera. I note that the Plant is not situated within the boundaries of the 1960 Lands but it is situated inside the boundaries of the West Pembina Area, surrounded by IOR lands now sold to Whitecap.

[41] I am satisfied from the evidence of Mr. Lebsack and these schematics that under the 1988 CO&O, the 1960 Lands fall within but form only a small portion of the West Pembina Area lands. Gas is produced to the Plant from West Pembina Area lands, including the 1960 Lands and also from other lands outside the West Pembina Area: see, also Affidavit of Mark Pinsent (hereafter "**Pinsent**" sworn May 12, 2014, paras 11, 12 and Exhibit D (which also shows the 1960 Lands and the Pembina Nisku Units).

[42] I have reviewed the 1988 CO&O and I can locate no reference to the 1960 Lands Agreement or to any rights thereunder. I have reviewed the 1960 Lands Agreement and I can find no reference to any gas processing facility or any mention of future construction or ownership of any such facility.

[43] The 1988 CO&O does not incorporate by reference the 1960 Lands Agreement.

[44] The parties to the two agreements are not the same and were not the same when the 1988 CO&O was executed.

[45] I note, also, that the 1988 CO&O says:

> 301. INTENT
>
> This agreement is intended to cover the construction, ownership and operation of the Plant that has been designed to process the Gas produced from within the West Pembina Area. The Owners will operate and maintain the Plant under the terms and conditions contained in this agreement. This agreement replaces and supersedes all previous agreements and understanding between the parties, whether written or oral, concerning the construction, ownership and operation of the Plant.
>
> ....
>
> 1708. WAIVERS
>
> No waiver by or on behalf of an Owner of any breach of a provision of this agreement shall be binding upon the Owner unless it is expressed in writing and duly executed by the Owner or signed by its fully authorized representative, and that waiver shall not operate as a waiver of any future breach, whether of a like or different character.
>
> ....
>
> 1711. NO IMPLIED COVENANTS
>
> The Owners have expressed herein their entire understanding and agreement concerning the subject matter of this agreement and no implied covenant, condition, term, or reservation shall be read into this agreement relating to or concerning the subject matter, nor shall any oral or written understanding previously entered into modify or compromise any of the terms and conditions in this agreement.

II. Facts

[46] In 2012, Blaze acquired all of the interests of MMCII Energy ULC in the Plant and in some West Pembina Area lands, those lands comprising Blaze's current interest in some of the 1960 Lands - including those 1960 Lands in which IOR and Blaze have a 50/50 ownership - from which gas was produced to the Plant. Blaze acquired these interests in a single transaction. Blaze notified IOR that Blaze was invoking Article 1101, the exemption provision, and would not be issuing IOR a Plant ROFR. [Pinsent, May 12, 2014, Exhibit J.]

[47] In September 2013, IOR initiated a private and confidential bid process for the disposition of a large collection of petroleum and natural gas producing and processing assets (the Disposition Offer assets) located in the Pembina, Boundary Lake and Rocky Mountain House areas of Alberta and British Columbia. The Disposition Offer assets included approximately 1400 wells, in excess of 184,000 gross acres of land, oil and gas production (in 2013) of over 15,000 boe/d and four gas processing facilities. The Disposition Offer assets include, but are not limited to, all IOR's interests in the Plant and all of IOR's lands in the West Pembina Area, including all of the lands from which gas is being produced to the Plant, including the 1960 Lands: Lebsack, paras 6-9

[48] Whitecap placed a bid on all of the Disposition Offer assets and was the highest bidder.

[49] On March 14, 2014, IOR and Whitecap entered into an agreement of purchase and sale of all Disposition Offer assets under which Whitecap purchased and IOR sold all Disposition Offer

assets for the approximate price of $855,130,000.00. Again, the Disposition Offer assets included all of IOR's Plant interests and interests in West Pembina Area lands from which gas is produced to the Plant: Lebsack, para 7

[50] On March 17, 2014, pursuant to Clause 18 of the 1960 Lands Agreement, IOR issued the Lands ROFR Notice to Blaze stating that IOR and Blaze were current parties to the 1960 Lands Agreement, notifying Blaze that IOR has received an offer to purchase its participating interest in all the joint lands - that is the 1960 Lands in which Blaze also had a working interest (the "**ROFR Lands**") - and notifying Blaze that this was an offer that IOR was prepared to accept. IOR copied Whitecap with this Lands ROFR Notice. [See **Appendix "A"** to these Reasons for Judgment, Lebsack, Exhibit E and Mele sworn April 13, 2014, Exhibit C]

[51] IOR calculates that the price of $17,000,000.00 stated in the Lands ROFR Notice is less than 2% of the total consideration for the Disposition Offer assets under the purchase and sale agreement made between IOR and Whitecap.

[52] On March 17, 2014, IOR also notified Blaze and the other working interest owners of the Plant that the sale of IOR's interest in the Plant to Whitecap was exempt from the Article 1102 requirement to provide a Plant ROFR, expressly pursuant to the exemption set out in Article 1101 of the 1988 CO&O [Mele sworn April 23, 2014, Exhibit D; Pinsent sworn May 12, 2014, Exhibit L]. This was as in essence what Blaze had done, in 2012, when it acquired land and Plant assets.

[53] IOR contends that Blaze did not exercise its rights under the IOR Lands ROFR Notice; rather, IOR asserts that Blaze requested information about the Plant [Mele sworn April 23, 2014, Exhibit F], information to which Blaze was not entitled under Article 1101. In particular, Blaze sought the purchase price being ascribed to the Plant and the corresponding working interest percentage Blaze would be entitled to acquire in the Plant if it elected to purchase the Preferential Lands. [emphasis mine] The word "percentage" does not appear in Article 1101.

[54] In a series of communications with Blaze, IOR reiterated that the sale of Disposition Offer assets to Whitecap was being made pursuant to Article 1101 of the 1988 CO&O. [Pinsent sworn May 12, 2014, Exhibit M, N, O, P]

[55] Based upon the evidence before me, I find that IOR did not waive strict compliance with the terms of Clause 18 respecting the IOR Lands ROFR Notice. I find that IOR did expressly state that its sale to Whitecap of Disposition Offer assets fell within Article 1101 of the 1988 CO&O and that the Lands ROFR was "under the land contract as described in Schedule A of the notice".

[56] In cross-examination Mr. Pinsent confirms that the schedule of lands attached were the lands in which IOR and Blaze shared a working interest. [See: point 5, cross-examination summary at page 22 of these Reasons]

[57] The sale by IOR of the Disposition Offer assets to Whitecap, pursuant to the March 14, 2014 purchase and sale agreement, closed on May 1, 2014. [cross-examination Lebsack held May 14, 2014, page 5, lines 17-27]

[58] Mr. Lebsack agreed on cross-examination that one function of the Plant is to produce natural gas and this function still occurs at the Plant.

[59] Another function of the Plant – the injection of gas back into certain wells in the West Pembina Area of part of an enhanced oil recovery process – no longer occurs because the pools have produced the crude oil that was being miscible flooded and is now blown down and producing natural gas. That is, these wells are no longer being miscible flooded, they are simply producing out the hydrocarbon that was injected into the pools, the full composition of which hydrocarbon was not known to Mr. Lebsack but was known by him to include gas.[Lebsack cross-examination held May 14, 2014, page 8, lines 2-27, page 9, lines 1-3]

[60] "**Gas**" under article 1101 means gas together with other hydrocarbon substances: see above, para 38, for the entire definition of "**Gas**". IOR has no remaining interest in the Plant nor in any lands from which gas is being produced to the Plant. This includes the 1960 Lands and the ROFR Lands.

[61] On May 1, 2014, Whitecap also issued Blaze a Lands ROFR Notice under Clause 18 of the 1960 Lands Agreement (the "**Whitecap ROFR Notice**"). This Whitecap ROFR Notice to Blaze did not include a Plant ROFR. [See **Appendix "B"** to these Reasons and Lebsack, para 15, Exhibit G].

[62] Mr. Lebsack confirms that Whitecap did not issue a Plant ROFR Notice to Blaze or any other parties to the 1988 CO&O because Whitecap carefully analyzed the provisions of the 1960 Lands Agreement and the 1988 CO&O and concluded that no Plant ROFR Notice was required.

[63] Whitecap came to that conclusion because Whitecap's sale to Keyera of an 85% interest in the Plant was in conjunction with Whitecap's sale of its corresponding working interest in the lands in the West Pembina Area which produce gas into the Plant. In particular:

(a) the interest that Whitecap was selling to Keyera were the Nisku Natural Gas Reserves (the "**Nisku Reserves**"). The Nisku Reserves are all of the properties in the West Pembina Area that primarily produce gas, which Whitecap had acquired from IOR. Whitecap did not keep any properties in the West Pembina Area which primarily produce gas; and,

(b) the lands in the West Pembina Area that Whitecap was keeping and not selling on to Keyera were comprised of either non-producing lands or properties that primarily produce crude oil. These crude oil properties produce a small amount of gas, which is produced incidentally as a necessary by-product of the retained oil production." [Lebsack, para 17]

[64] On May 9, 2014, Blaze purported to exercise its rights under the Whitecap Lands ROFR Notice and thereupon claimed – if I understand correctly - that since there was now no corresponding interest in the lands being sold to Keyera, Blaze required that Whitecap issue a Plant ROFR Notice for the entire 85% interest in the Plant that Keyera had hitherto offered to purchase. In other words, by exercising its Whitecap Lands ROFR Notice, Blaze took the position that it had taken the Whitecap-Keyera purchase and sale transaction out of the exemption provisions of Article 1101, in consequence requiring the selling party (Whitecap) to revert to the Plant ROFR provisions under Article 1102. [May 9, 2014 letter from Blaze to Whitecap, Lebsack, Exhibit I]

[65] Whitecap maintained that it had no contractual obligation to issue a Plant ROFR merely because Blaze was exercising its option on the Whitecap Lands ROFR Notice. Whitecap countered Blaze's assertion - that there was an immediate triggering of an obligation on the part

of Whitecap to issue a Plant ROFR - by stating that notwithstanding Blaze's exercise of its preferential option under the Whitecap Lands ROFR Notice, this did not entitle Blaze to claim an entitlement to a Plant ROFR under the 1988 CO&O. Whitecap confirmed that it would not be issuing a Plant ROFR in respect to the Plant or any interest in it. [Lebsack, Exhibit J]

[66] Mr. Mele, at para 7 of his April 23, 2014 Affidavit, expresses the opinion that the purchase and sale agreement between IOR and Whitecap provides for the sale of IOR's interest in the Lands "together" with IOR's interest in the Plant and, accordingly, the sale of the Lands must create an entitlement in favour of Blaze for an option on the Plant.

III. Law and Analysis

A. Principles Relating to Interpreting Contracts and Rights of First Refusal

[67] If I correctly understand, Blaze asserts that the wording of Clause 18 of the 1960 Lands Agreement and Article 1102 of the 1988 CO&O agreement must be interpreted so as to somehow give Blaze a contractual entitlement to a Plant ROFR.

[68] With respect, I do not agree: Blaze's position is not correct and it would render meaningless, nugatory the exemption to a Plant ROFR permitted under Article 1101 of the 1988 CO&O.

[69] If find that the IOR-Whitecap transaction and the Whitecap-Keyera transaction fit squarely within the wording of the exemption to requiring a Plant ROFR, as contemplated by Article 1101, upon which provision IOR, Whitecap and Keyera properly relied.

[70] I entirely agree that to find otherwise would be patently unreasonable and could well lead to contractual and commercial chaos in the oil and gas industry: there is no principle of law or equity and there is nothing in these agreements or the conduct of the parties that compels such an untenable result.

[71] A right of first refusal is based in contract. The meaning of a ROFR must be determined by analysis of the contract that created it.

[72] In ***Consolidated-Bathurst Export Ltd. v Mutual Boiler & Machinery Insurance Co*** (1979), 112 DLR (3d) 49, at para 26, the Supreme Court of Canada provided the following guidance when interpreting a right of first refusal:

> ... [T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the [contract was made]. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual

> provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided.

[73] In ***Canadian Long Island Petroleum Ltd et al v Irving Industries (Irving Wire Products Division) Ltd. et al***, [1975] 2 SCR 715, the Supreme Court of Canada describes the substance of the ROFR at para 10:

> This agreement was one which governed the joint operation and development of certain oil properties. Clause 13, which is the important clause under consideration in this case, was a part of that agreement. It was one of the conditions governing the joint ownership of the property. It was designed to protect the desire of each of the joint owners that it should not be forced into a joint ownership with another party against its will.

and

> ... As mentioned previously, the clause is a part of an agreement between joint owners of a property, governing the operation and development of it. In essence it is a negative covenant whereby each party agrees not to substitute a third party as a joint owner with the other, without permitting the other party the opportunity, by meeting the proposed terms of sale, to acquire full ownership. [para 35]

[74] In ***Calcrude Oils Ltd v Langevin Resources***, 2003 ABQB 1051, the Court explains the general purpose of a ROFR:

> ... It is to protect the parties' respective interests by ensuring that if one party decides to dispose of all or a portion of its shares to a third party the other party has the pre-emptive right to acquire those shares first, on the same terms and conditions, including price, as that being offered by the third party. In this way, a party is protected against having an unwanted co-shareholder foisted upon it. [para 55]

[75] In ***Mesa Operating Ltd v Amoco Canada Resources Ltd***, 1994 CarswellAlta 89 (CA) at para 22, the Alberta Court of Appeal says:

> The rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith. As the trial judge said, a party cannot exercise a power granted in a contract in a way that "substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties."

[76] And, at paras 19 and 20:

> In any event, it is not necessary for this case that I go further into this difficult area. This is because this case turns on a rule founded in the agreement of the parties, not in the law. In my view, as a matter of fact, this contract created certain expectations between the parties about its meaning, and about performance standards. If those expectations are reasonable, they should be enforced because that is what the parties had in mind. They are reasonable if they were shared. Of course, those expectations must also, to be reasonable, be consistent with the express terms agreed upon. The contract should be

> performed in accordance with the reasonable expectations created by it. [Emphasis added]
>
> The assessment of those expectations should include regard to the commercial context.

[77] In this case, there are two agreements with two separate and unrelated ROFRs on completely separate and unrelated interests. The 1960 Lands Agreement bestows upon Blaze a preferential ROFR on certain lands and the 1988 CO&O Agreement provides a ROFR – subject to an exemption – on the Plant.

[78] The reasonable expectations of the parties in respect of these agreements, what they had in mind, were shared. If find that Blaze's expectations are not consistent with the express terms agreed upon. Perforce, I find that Blazes' expectations are unreasonable.

[79] I find that it would be unreasonable to extend the Clause 18 Lands ROFR beyond the plain wording of the 1960 Lands Agreement, from which it gains it meaning and having regard to the commercial context in which the parties' agreement was made. I agree with the submissions of IOR, Whitecap and Keyera on this crucial aspect, because:

(a) The 1960 Lands Agreement applies to the 1960 Lands, including the Lands ROFR Notice, and nothing more.

(b) The 1960 Lands are only a small portion of the West Pembina Area lands that process gas through the Plant.

(c) There are other lands outside the West Pembina Area that process gas through the Plant.

(d) The 1960 Agreement was entered into almost 30 years before the Plant was even constructed and its construction was not contemplated or referenced in the 1960 Lands Agreement.

(e) The parties to the 1960 Lands Agreement are not the same as the owners of the Plant or the parties to the 1988 CO&O Agreement.

(f) No reference is made in the 1988 CO&O that modifies the plain wording of Clause 18 and the 1960 Lands Agreement is neither mentioned nor incorporated by reference into the 1988 CO&O.

[80] The intention of the parties at the time of their entry into and execution of the 1960 Lands Agreement simply could not have been to include an interest in the Plant.

[81] I find that it is not a reasonable construction or interpretation to read such an intention into the express words and plain meaning of clause 18. The plain and ordinary meaning of Clause 18 is that the Lands ROFR Notice applies to the 1960 Lands and nothing more. I find that this was the objective intention of the parties.

[82] I agree with the proposition that the contracting parties to the 1960 Lands Agreement were free to determine their rights and to construct a contract to clearly define those rights. I find that the parties did so. The 1960 Lands Agreement was never amended.

[83] Moreover, the parties to the 1988 CO&O entered into that agreement with full knowledge of the provisions of the 1960 Lands Agreement and still made not changes to it. That fact, and

the fact that there was no incorporation of the earlier agreement into the later agreement, assists in understanding the reasonable expectations of the parties, their shared understanding

[84] I agree with defendant counsels' submissions and find that the two agreements are completely independent of one other and language or meaning or expectations from one cannot and will not be imported into the other: the 1960 Lands Agreement relates to the 1960 Lands and the 1988 CO&O relates to the Plant.

B. The Clause 18 "offered price and offered terms" Wording Does Not Give Rise to a Right to an interest in the Plant

[85] Blaze asserts that clause 18 of the 1960 Agreement and, specifically, the words "for the offered price and upon the offered terms" creates a contractual right to an interest in the Plant. I find that this assertion is incorrect.

[86] The lands under the 1960 Agreement were one small part of an $855 million deal between IOR and Whitecap. The IOR-Whitecap purchase and allocation of consideration to some Disposition Offer assets that were subject to discrete ROFRs (including an allocation to IOR's working contract interests in the portion of the 1960 Lands in which Blaze also had a working interest – the ROFR Lands) does not mean what Mr. Mele opines. No specific allocation of consideration to IOR's interest in the Plant was made in the IOR-Whitecap sale agreement and the terms of the purchase and sale agreement did not create an indivisible nexus between the sold lands and the Plant.

[87] By issuing the IOR Lands ROFR Notice, as it was contractually bound to do, IOR was not taking itself out of the protection of Article 1101 because the simple fact remains that IOR disposed of an interest in the Plant in conjunction with the disposal of its corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant. Thus, in my view, fitting squarely within Article 1101.

[88] ***Adesa Auctions of Canada Corp v Southern Railway of British Columbia***, 2001 BCSC 1421, at para 30, the British Columbia Supreme Court held that the holder of a ROFR over one parcel of land did not have the option to purchase a package of lands that included that single parcel. A seller is obliged to offer only the single parcel to the ROFR holder and not the entire package or other parts of it.

[89] Similarly, the court in ***Saskatchewan Oil & Gas Corp v Mobil Oil Canada Ltd***, 1989 CarwellSask 574, at paras 8, 11 and 17, held that the plaintiff only had a ROFR over the joint lands described in the agreement and not over other lands that made up part of a package deal.

[90] This is the essence of Blaze's position:

> In order to have been offered to Blaze on the same terms and conditions as offered to Whitecap, and at the same time to abide by 1101 of the CO&O, a portion of the Plant needed to have been offered to Blaze. [Blaze brief, para 29.]

[91] Principles of contractual interpretation do not support this proposition and I find no basis for giving effect to Blaze's interpretation. Simply put, Blaze had an ROFR over the ROFR Lands the subject of the IOR ROFR Lands Notice and also had a ROFR over the lands subject to the Whitecap ROFR Lands Notice but Blaze did not and does not now have any contractual rights over the other Disposition Offer assets including, but not limited to, the Plant.

[92] There is nothing in the contract language that requires me to consider or read into the contractual language a functional nexus or benefit between owning the producing lands and an interest in the Plant. Even if such nexus or benefit was categorically proven (and I am not persuaded), given that many land owners are not Plant owners and given that many Plant owners are not land owners, I find that such an interpretation is unreasonable and is not consistent with the parties' agreement and the clear contract language expressing same.

[93] Indeed, the Court of Appeal decision in ***Equinox Engineering Ltd v Lavalin L.P. Inv.***, 2012 ABCA 204 is to opposite effect. In ***Equinox***, the Alberta Court of Appeal held that not only does a ROFR not apply to any other interest being sold in a package deal, the ROFR is not triggered on a package deal in every circumstance.

[94] In ***Equinox***, a tenant's lease included a ROFR, which provided that when the landlord received an "offer to lease any floor" the tenant had first right to lease "the said floor on the terms and conditions set out in that offer." The landlord received an offer to lease six floors. The Court of Appeal finds that this did not entitle the tenant to bid on floors of its choice from the offer:

> [13] The interpretation advanced by Equinox effectively requires that the offer be divided into a series of six or possibly eight individual offers, enabling Equinox to choose only one of those offers. But this interpretation is inconsistent with the offer. The offer cannot be divided or severed. The offeror wanted all of the available floors, not every other floor or space which was not contiguous. The offer contains a provision to reduce space on an annual basis by surrendering the top or bottom floor. This offer contemplated a lease of all of the SNC Lavalin space, 50 parking stalls, and roof top signage.
>
> [14] Equinox contends that the interpretation advanced by Lavalin has the effect of eviscerating the right of first refusal and is contrary to the principle that a grantor of a right of first refusal must act reasonably and in good faith in relation to that right and not act in a fashion designed to eviscerate the very right which has been given: *GATX Corp v Hawker Siddeley Canada Inc*, [1996] OJ No 1462 (Gen Div) at para 71, 1 OTC 322. In our view Lavalin's interpretation accords with the plain meaning of the words in the right of first refusal and corresponds with the right which Equinox bargained for: a right of refusal when a single floor became available. The right so interpreted may be narrower than under the interpretation of the chambers judge, but it is not eviscerated and is consistent with the expectations of the parties.

[95] In ***Southland Canada Inc,*** (1999) CarswellAlta 1034, Clark J considers whether an offer to purchase the whole of the property, of which the leased portion was a part, triggered a ROFR in favour of Southland. The ROFR provided a right of first refusal in respect of the "demised premises". Zarcan was selling Block B. Southland occupied and leased part of Block B. The issue was whether Southland's ROFR was only with respect to the leased portion of Block B or encompassed all of Block B, at para 57:

> The wording of the ROFR is clear and unambiguous. In this case the ROFR is a right in respect only of the portion of Block B exclusively occupied and leased by

> Southland. This conclusion is consistent with the commercial context of the lease agreement.

[96] The ROFR referred to "demised premises", which included only the land that was being leased:

> [62] The wording of the ROFR is unambiguous. Although Zarcan initially conducted itself in a manner which could indicate that Southland's ROFR pertained to all of Block B., this course of conduct did not create a ROFR in the whole of Block B. What Southland said in its caveat, and what the parties said and did in 1997 in regards to the ROFR, does not bear on the meaning or operation of the ROFR. The subsequent dealings between the parties did not change the rights and obligations arising under the ROFR.
>
> [64] The consequence of interpreting "demised premises" to mean "shopping centre" or something different than the property leased, would be severe. Landlords reading the Southland lease form would unwittingly be trapped by the misdescription. A landlord leasing to Southland a small portion of a large shopping centre with a "demised premises" ROFR would be unable to give a similar ROFR to any other tenant and would be unable to sell his centre without offering to sell to Southland.

[97] Blaze refers in its brief to ***Canadian Natural Resources Ltd v Encana Oil & Gas Partnership***, 2008 ABCA 267, ***Calcrude Oils Ltd v Langevin Resources***, 2003 ABQB 1051, and ***Hanen v Cartwright***, 2007 ABQB 184 in support of its submissions that "offered terms" includes a Plant interest.

[98] I agree with defendant counsels' submissions: these cases do not offer support for Blaze's contention. And, I find that it would be commercially unreasonable and inconsistent with principles of contractual interpretation and the parties' reasonable expectations were I to find that the phrase "offered terms" in Clause 18 meant that Blaze gets to pick and choose from amongst the variety of Disposition Offer assets sold as part of the IOR-Whitecap transaction, or the Whitecap-Keyera transaction.

[99] I do not view the cases cited by Blaze as standing for, or expanding to embrace, the proposition promoted:

(a) In ***Canadian Natural Resources***, the Court of Appeal considers a ROFR under a pooling agreement. The question was whether the ROFR was triggered at the time a farm-out agreement was signed or at the time well sites had been selected on the pooled lands and earnings were imminent. The timing for the ROFR trigger was important Although the Court of Appeal did not make a finding because the ROFR wording was ambiguous, neither did it suggest that the ROFR holder was entitled to interests other than those specifically included under the pooling agreement.

(b) ***Calcrude*** considers a ROFR that governed all the working interest owners of a natural gas well. The only interest referred to was that well and nothing more.

(c) ***Hanen*** considers whether an option to purchase triggered a ROFR, when that option was made effective 15 days after expiration of the ROFR. The only interest in issue was the lands the ROFR covered, not any other terms under the option to purchase.

[100] Moreover, I find that in the circumstances of this case, to provide Blaze with a 4% percentage interest in the Plant (or any other portion of the Plant) would give it far more than that to which it is entitled under the 1960 Lands Agreement, or for which it had bargained when it acquired its own 2012 (ROFR Lands) interest in the 1960 Lands Agreement. ROFRs are intended to protect the parties' respective interests, as defined by the express wording of the particular ROFR. The 1960 Lands ROFR protects the parties' respective interests in the 1960 Lands and the ROFR appertaining to that agreement, no more and no less.

[101] Blaze contends that under the 1960 Operating Agreement, Blaze also clearly has a ROFR on working interests in lands in the West Pembina Area from which Gas is being produced into the Plant. I find that the 1960 Lands Agreement does not say this. What of the working interests in lands in the West Pembina Area from which Gas is being produced into the Plant that are not and never have been owned by IOR, Whitecap or Keyara? If find that Blaze's contention does not withstand scrutiny.

[102] In summary, I find that there is no juridical basis for giving effect to Blaze's strained interpretations of either the 1960 Lands Agreement contractual wording or the 1980 CO&O contractual wording, or in combination.

[103] I now turn away from contractual interpretation to a more specific discussion of the three issues ordered to be determined in this expedited trial.

C. Issue (a) of the Order of April 29, 2014: "Does Blaze Have the Rights of First Refusal It Claims to Have in Respect of the Assets as set out in the Statement of Claim arising from the Transaction between Imperial Oil Resources and Whitecap Resources Inc.?"

[104] Blaze seeks relief against IOR by claiming an entitlement to a ROFR on 4% of the Plant ownership in conjunction with IOR's sale of Disposition Offer assets. Blaze claims that this 4% Plant interest corresponds to the ROFR Lands because roughly 4% of IOR's total gas produced to the Plant from its interest in West Pembina Area Lands came, on a five year average, from the ROFR Lands.

[105] IOR vehemently disputes that there is any Plant interest that "corresponds to" the 1960 Lands sold to Whitecap, and, further, disputes that 4% would be the measure of that interest in any event.

[106] On March 17, 2014, under Clause 18 of the 1960 Lands Agreement, IOR issued a Lands ROFR Notice to Blaze in respect of IOR's proposed sale of the 1960 Lands to Whitecap.

[107] On March 17, 2014, IOR also notified Blaze, and the other working interest owners of the Plant, that the sale of IOR's interest in the Plant to Whitecap was exempt from any ROFR requirement, pursuant to Clause 1101 of the 1988 CO&O Agreement.

[108] On March 27, 2014, and in response to the IOR Lands ROFR Notice, Blaze claimed that the IOR Lands ROFR Notice was invalid:

> Given that the proposed disposition of Imperial's working interest in the Preferential Lands to Whitecap Resources Inc. is being made in conjunction with a disposition of Imperials [*sic*] corresponding working interest in the West Pembina 6-28 Gas Plant, in order for Blaze to exercise its rights on the same

terms and conditions as offered to Whitecap, Blaze requires additional information relating to the following:

(i) the purchase value being ascribed to the West Pembina 6-28 Gas Plant; and

(ii) the corresponding working interest percentage Blaze would be entitled to acquire in the West Pembina 6-28 Gas Plant if it elects to purchase Imperial's interest in the Preferential Lands.

[Pinsent sworn May 12, 2014, para 28 and Exhibits N and O]

[109] The Blaze email advises that Blaze is entitled to exercise its rights on the same terms and conditions as offered to Whitecap, so that Blaze would be entitled to acquire a corresponding interest in the West Pembina 6-28 Gas Plant if it elected to purchase IOR's interest in the 1960 Lands.

[110] It seems trite to say, but Blaze must seek the claimed ROFR with respect to the Plant either through the 1960 Lands Agreement or the 1988 CO&O Agreement. I agree with IOR's submission that ROFRs do not exist independently of contract. This is made clear in ***Southland Canada Inc*** at paras 56, 58. A ROFR is a contractual right which is deemed to be an interest in land by section 59.1 of *Law of Property Act,* RSA 1980 c. L-8.

[111] The terms of any ROFR are specified by the parties to the contract. I agree with Clark J in the ***Southland*** case that subject to satisfying the basic elements that define a valid right, the parties are free to construct whatever arrangement meets their particular needs: para 58. I also note with approval the reference to Hastings v North Eastern Railway, [1900] AC 260 (UKHL), wherein it is said at page 263:

> No principle has ever been more universally or rigorously insisted upon than that written instruments, if plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself.

[112] While it has been acknowledged, from time to time, that one of the purposes of including ROFRs in joint operating and development agreements is "to prevent a party from being forced into an undesired partnership", that principle does not assist Blaze in these circumstances because I find that the language of the 1960 Lands Agreement and the 1988 CO&O Agreement are clear and the parties have unambiguously specified their rights and obligations.

[113] The relevant part of the 1960 Lands Agreement is Clause 18, recited in full above. I find that the wording is unambiguous and clearly delineates the terms of the Lands ROFR. It creates a ROFR regarding the 1960 Lands only. The wording is clear:

(a) Clause 18 refers to "interests which are subject of this agreement" and specifies the right to purchase only "such interests";

(b) Clause 18 is expressly made "with respect" to the interests of the parties in the 1960 Lands and only those interests;

(c) Clause 18 does not mention or contemplate the future construction of the Plant and does not restrict any disposition of interest in the Plant; and

(d) Clause 18 does not incorporate the concept of interests in other assets "corresponding to" interests in the 1960 Lands.

[114] The 1960 Lands Agreement does not contemplate or mention future construction of the Plant and simply confers no rights to that which was not in the contemplation of the parties, and could not have been.

[115] It bears repeating that the 1960 Lands Agreement is clear and unambiguous in its expression that the ROFR is a right only in respect of the interests which are subject of the 1960 Lands Agreement. Such interests are with respect to the oil and gas interests and oil and gas leases expressly described therein.

[116] I agree that Blaze seeks to avoid the clear and unambiguous Clause 18 Lands ROFR by suggesting that the Lands IOR ROFR gives Blaze the same rights to purchase the Plant "for the offered price and the offered terms". To import a Plant ROFR by pulling this phrase out of Clause 18 and not reading it in the context of Clause 18 and the balance of the 1960 Lands Agreement is not a reasonable contractual interpretation. See preceding section of these Reasons.

[117] Put plainly, the 1960 Lands Agreement has nothing whatsoever to do with rights or interests in the Plant and nothing subsequent to the 1960 Lands Agreement has changed that fact. While I agree that a party seeking to dispose of an interest in the 1960 Lands subject to the Lands ROFR must first offer that interest to the holder of the ROFR upon the same terms as the offer for that interest received from a third party, this obligation does not and cannot extend to a requirement that other or additional assets outside of the 1960 Lands Agreement must be offered as well. Nothing in the language of the two agreements would require such an interpretation and nothing would compel me to find such a construction.

[118] Even if I were to agree with Blaze that there is significant benefit to owning gas-producing lands and having an interest in the Plant, such consideration does not alter my interpretation of Clause 18 or my interpretation of Articles 1101 or 1102.

[119] In any event, Blaze in fact owns an interest in the Plant (an 8% interest), a Plant which is operating under capacity. Blaze can utilize its priority processing rights under the 1988 CO&O to process whatever hydrocarbon interests that it can process through that Plant.

[120] Blaze says that since Whitecap and Keyera have formed a voting block, these defendants can thwart Blaze's rights to priority processing. First, there is no evidence that this has occurred. Second, should it occur, Blaze will no doubt seek legal recourse.

[121] Blaze asserts that the grantor of the ROFR does not have discretion to select which part of the third party offer is to be included in its notice to the ROFR holder. I agree. I do not agree, however, that the grantor of this Lands ROFR has any discretion to add or otherwise seek to re-define what assets are in fact included in the Lands ROFR. IOR was obliged under the 1960 Lands Agreement and the Lands ROFR to offer the subject-matter of the Lands ROFR to Blaze upon the same terms and conditions as received in the offer from the third party offeror.

[122] Blaze took the position that IOR's Lands ROFR Notice was invalid by reason that IOR did not provide information about the offered price for the Plant (or, for that matter, any of the other non-1960 Lands Disposition Offer assets).I disagree. I find that the IOR Lands ROFR Notice is valid on its face, that the failure to include an address for Whitecap was not material nor substantial non-compliance because Whitecap's full name was on the face of the Lands ROFR Notice and, finally, that Blaze was well aware of its contractual obligations to elect to exercise its rights to the ROFR Lands within the time limited, or lose its option rights under the ROFR.

[123] I find that having failed to exercise its rights to ROFR Lands, Blaze has lost its right of first refusal.

[124] The defendants' evidence strongly supports my conclusions and I find that the affidavit evidence was strengthened, not diminished or weakened, by the cross-examination evidence from the questioning of Messrs. Pinsent, Lebsack and Smith on their affidavits, all of which evidence I am entitled to, and have, taken into account.

[125] Mr. Mark Pinsent was cross-examined on the affidavit he swore on May 12, 2014. Mr. Pinsent is the asset enhancement manager for IOR and has been employed by IOR for 33 years.

[126] I have reviewed the entire transcript from the cross-examination of Mr. Pinsent but I note, in particular, the following evidence, most of which I have summarized:

1. Page 7, lines 16-18

   Mr. Pinsent does not have any understanding of the motivations or reasons for constructing the Plant.

2. Page 9, lines 18-24:

   The function of the plant in the West Pembina area is that it processes gas in part for delivery to the market.

3. Page 9, lines 25-27:

   Mr. Pinsent does not know if the plant also processes gas as part of an enhanced oil recovery scheme.

4. Page 10, lines 23-27 and page 11, lines 1-2:

   Mr. Pinsent does not have an understanding that the configuration of the plant and the wells in the West Pembina area is such that it consists of pipelines from each of the wells to the plant to deliver product to the plant for processing, but there are also pipelines from the plant to each of the wells for injection purposes.

5. Page 14, lines 25-27 and page 15, line 1:

   The schedule of lands attached to the March 17, 2014 letter from IOR to Blaze were the lands in which IOR and Blaze shared a working interest. [the Blaze Energy lands in which it shared a working interest with IOR is found at Exhibit "C" of the affidavit of Mr. Pinsent sworn May 12, 2014, delineated by red coloured cross-hatching] This confirms that the Blaze lands in which it shared a working interest with IOR is but a small subset of the West Pembina Area Lands.

6. Page 16, lines 10-12:

   What IOR offered to Blaze with respect to the ROFR was the interest which IOR and Blaze shared in the 1960 Agreement.

7. Page 17, lines 21-27:

   At the time the land ROFR was sent out by IOR to Blaze, Mr. Pinsent did not have any concerns that an interest in the Plant was not being offered to Blaze.

8. Page 19, lines 8-11:

Mr. Pinsent was aware from a weekly update meeting with respect to the project that Blaze was requesting additional information with respect to the Plant and the Lands.

9. Page 19, lines 23-27 and page 20, lines 1-2:

   Exhibit "Q" of the affidavit of Mark Pinsent sworn May 12, 2014 outlines the information Blaze was seeking "(i) the purchase value being ascribed to the West Pembina 6-28 Gas Plant and (ii) the corresponding working interest percentage Blaze would be entitled to acquire in the West Pembina 6-28 Gas Plant if it elects to purchase Imperial's interest in the Preferential Lands."

10. Page 20, lines 15-18:

    As a result of Blaze's March 28, 2014 letter [Exhibit "Q"], no additional information was provided by IOR to Blaze.

11. Page 22, lines 4-9:

    The calculation for the lands valued at $17 million was received from Whitecap.

12. Page 22, lines 12-27:

    IOR did a test for the reasonableness for this number through an IOR engineer who IOR considered to be an evaluator for properties.

13. Page 24, lines 1-12:

    It is a requirement by IOR that a purchaser is required to determine the value associated with each of the properties that are subject to ROFRs. The purchaser comes up with a total purchase price and it is incumbent upon them to break it [*sic*], as they see fit, among the assets.

14. When asked to provide the calculations done by the evaluating engineer, counsel for IOR objected on the basis that what was being asked for did not, in any way, relate to the three issues going to an expedited trial in May at the end of the month. Counsel for IOR does not agree that the issue goes to whether Blaze is entitled to specific performance.

15. On May 6, 2014, counsel for IOR provided to counsel for Blaze the production data requested, on specified terms and conditions including that IOR was making no admission that this data is relevant in this action or that it was appropriate for the purposes of considering an owner's "corresponding working interest in the lands in the West Pembina area" as that phrase is used in the 1988 Plant CO&O: [Exhibit "A" to the affidavit of Biago Mele, sworn May 16, 2014]. [On May 9, 2014, in furtherance of the May 6, 2014 IOR email, Blaze claimed a right of first refusal in respect of a 4% interest in the Plant and took the position that the Lands ROFR Notice of IOR dated March 17, 2014, was invalid for not including this 4% interest in the notice.]

16. Page 26, lines 20-23:

    The data provided in the May 6, 2014 email from IOR is data available in the public domain. [Both counsel for Keyera and counsel for IOR stated on the record that the information provided was not relevant to these court proceedings.]

17. Page 34, lines 7-10:

    Blaze acquired the entire interest of MMCII in the Plant and the West Pembina lands.

18. Page 34, lines 11-17:

    As a result of the bid process and the March 14, 2014 contract with Whitecap, IOR is disposing of its entire interests in all lands in the West Pembina Area and its entire interests in the West Pembina Plant also.

19. Page 36, lines 1-6:

    With reference to the 1988 CO&O "the owner's Plant participation with respect to Blaze Energy, indicates that its interest participation of 8% equates to a capacity of 156,000 cubic metres per day".

20. Page 36, lines 20-24:

    To the extent that IOR does not have any involvement in the Plant any longer, IOR has no involvement in Blaze's access to the Plant.

[127] The undertaking to produce the calculations of relative natural gas production was provided and forms part of the evidence in this expedited trial. The complete answer to undertaking is attached as **Appendix "C"**.

[128] Taking into consideration all of the forgoing, my answer to Issue (a) of the Consent Order of April 29, 2014 is this: Blaze Energy Ltd. does not have the rights to first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Imperial Oil Resources and Whitecap Resources Inc..

D. Issue (b) of the Order of April 29, 2014: "Does Blaze Have the Rights of First Refusal It Claims to Have In Respect of the Assets as Set Out in the Statement of Claim Arising From the Transaction Between Whitecap Resources Inc. and Keyera Partnership?

[129] Immediately following the closing of the IOR transaction, Whitecap closed a sale of some of the Disposition Offer assets to Keyera Partnership, including:

(a) an 85% interest in the Plant, and

(b) Whitecap's corresponding working interest in the lands in the West Pembina Area from which gas is produced into the Plant. [Labsack, para 11]

[130] On May 1, 2014, under clause 18 of the 1960 Agreement, Whitecap issued its Whitecap ROFR Notice to Blaze for Whitecap's proposed sale of some of the 1960 Lands to Keyera Partnership.

[131] On May 9, 2014, Blaze responded to the Whitecap ROFR Notice. Blaze indicated that it intended to acquire the interests in the 1960 Lands being sold to Keyera. Blaze further stated that: "... it is Blaze's view that this ROFR exercise under the Notice will trigger an immediate obligation for Whitecap to issue a ROFR ... under the 1988 CO&O. [Lebsack, para 18 and Exhibit I]

[132] As previously mentioned, Whitecap did not issue a Plant ROFR Notice to Blaze, or any Plant owner, following the sale of an 85% Plant interest to Keyera. It carefully analyzed the provisions of both the 1988 CO&O and the 1960 Agreement and concluded that no Plant ROFR was required. [Lebsack affidavit, para 17]

[133] Both Whitecap and Keyera concluded that clause 1101 of the 1988 CO&O applied because Whitecap was selling an interest in the Plant along with its corresponding interest in the lands in the West Pembina Area from which gas is being produced in to the Plant.

[134] In particular, Whitecap was selling 94.4% of the 90% interest it was acquiring from IOR and retaining 5.6% of that 90%. [Affidavit of David Smith (hereafter "**Smith**") sworn May 12, 2014, para 5, 21; Labsack affidavit, para 17]

[135] Whitecap and Keyera identified the properties that produce gas and considered historical and forecasted production:

(i) The interests Whitecap was selling to Keyera were the Nisku natural gas reserves. Of the lands that Whitecap had purchased from IOR in the West Pembina Area, the Nisku Reserves are all of the properties that primarily produce gas. Whitecap looked at the lands that produced gas to the Plant, and those were the lands that it sold to Keyera. [Lebsack cross-examination May 12, 2014, at p 12/12 – 112/18] It considered historical production as well as forecast production and determined that the corresponding interest was the Nisku Reserves. [Lebsack cross-examination May 12, 2014, at p 18/15 – 19/15]

(ii) The lands in the West Pembina Area that Whitecap was keeping and not selling on to Keyera were comprised of either non-producing lands or properties that primarily produce crude oil. The crude oil properties produce a small amount of gas, which is produced incidentally as a necessary by-product of the retained oil production. [Smith, para 26]

(iii) Keyera used the most current publicly available production data and ascertained that its purchase of an 85% interest in the Plant was in conjunction with Whitecap's corresponding working interest in the lands in the West Pembina Area from which gas is being produced into the Plant. [Pinsent sworn May 12, 2014, Exhibit E]

(iv) The calculation of relative natural gas production was done in March 2014 when Keyera was considering the purchase of assets from whitecap. At that time the most current publicly available production data was from November 2013. Gas production from the Nisku Reserves was calculated to be 96.53% based on that data. By the effective date of the transaction – May 1, 2014 – production from the Nisku Reserves was estimated to be 94.4%. This matched precisely the 94.4% Plant interest Keyera was acquiring.

[136] Blaze asserts that the calculations do not support this split, but rather skew the numbers in Keyera's favour by not including hydrocarbons and condensate as required in the definition of "Gas" in the CO&O and by using largely forecasted future production – whereas David Smith's own evidence referred to current production, Blaze asserts that Clause 1101 requires actual production by using the words "being produced".

[137] I agree with defendant counsels' objection that there is no evidence that the production referred to in Mr. Smith's evidence is based on a calculation of anything other than total gas production into the Plant and I am not persuaded and I find there is no persuasive evidence to support Blaze's contention that these numbers are "skewed".

[138] I find from the evidence that it is clear that Whitecap was disposing of an interest in the Plant in conjunction with the disposal of its corresponding working interest in the lands in the West Pembina Area from which Gas is produced into the Plant.

[139] I find that the 1960 Lands ROFR and the clause 1101 from the CO&O Agreement can be read harmoniously and are devoid of ambiguity.

[140] The Whitecap Lands ROFR Notice relates to a defined corpus of lands, that is, those discrete lands under the 1960 Lands Agreement in which Blaze has a ROFR.

[141] Article 1101 of the CO&O, too, is unambiguous. There is no need for a selling owner to issue a ROFR notice when the selling owner is disposing of its interest in the Plant in conjunction with the disposal of its corresponding working interest in the lands in the West Pembina Area from which Gas is produced into the Plant.

[142] Nothing in Article 1101 requires that said disposition be to the same party. Article 1101 does not say that where an owner disposes of an interest in the Plant in conjunction with the disposal of its corresponding working interest in the lands to which a discrete ROFR attaches, Article 1101 is no longer operative or applicable.

[143] Put another way, the exercise by Blaze of the Whitecap Lands ROFR Notice cannot affect the meaning of clause 1101 such that Blaze can succeed in its argument that since Blaze could take the ROFR lands out of the disposition, then Article 1101 is no longer applicable. To my mind, "disposition" means just that. IOR and Whitecap, respectively, disposed of an interest in the Plant in conjunction with their respective disposals of their corresponding working interest in the lands in the West Pembina Area from which Gas is produced into the Plant. The exercise of the Lands ROFR would certainly divert those discrete lands to Blaze but that is not the same as saying that IOR, or Whitecap, were <u>not</u> then disposing of an interest in the Plant in conjunction with the disposal of the corresponding working interest in the lands ... .

[144] Moreover, "corresponding" does not usually, or properly, mean "identical". The Oxford Dictionary gives various definitions: "to be congruous or in harmony with"; to be "similar or analogous". I agree that "corresponding" in the context of the CO&O Agreement means similar or analogous to. I find that Whitecap was selling 94.4% of the 90% interest in the Plant that it was acquiring from IOR. Whitecap was also selling the gas producing properties in the West Pembina Area – the Nisku Reserves – to Keyera. Production from the Nisku Reserves was estimated to be 94.4% at the time the transaction was to close. As such, Whitecap was selling 94.4% of its interests in the Plant in conjunction with the disposal of its corresponding 94.4% working interest in the lands from which gas is produced into the Plant. That harmonizes with or is congruent or in harmony with the Plant interest being sold.

[145] The word "corresponding" does not import a requirement that a disposing owner sell all of its interest in the Plant nor does the word "corresponding" mean that a disposing owner must sell all of the lands from which gas is produced into the plant.

[146] I agree that if, in the context of this commercial arrangement, the intention of the parties was that Article 1101 was intended by the parties to be other than this construction, the parties would have been at liberty to add different clear and unambiguous language. The clear and unambiguous language presently expressly set out in Article 1101 does not require any such interpretation.

[147] Nor does the interpretation of clause 1101 require that "corresponding working interest", be based solely on current production because I am persuaded that such an interpretation would not comport with industry practice or reality. I accept that current production numbers are not publicly available until months following the production month. Accordingly, parties would never be entitled to avail themselves of Article 1101 because parties would never have current production numbers with which to do so.

[148] With respect, Blaze was not entitled to a Plant ROFR following its exercise on the Whitecap ROFR Lands Notice. It is not reasonable to say that it was the parties' intention that the exercise of a ROFR outside of the actual CO&O Agreement could eviscerate the agreed rights of the parties under Article 1101. Such a construction of Article 1101 would render it completely uncertain and would mean that no selling owner could ever, with any certainty, tell its willing purchaser what would or would not trigger an obligation to issue an ROFR on the Plant. Such a construction would render Article 1101 meaningless and if not meaningless, nugatory.

[149] I reviewed the cross-examination evidence from the questioning of Gary Lebsack that occurred on May 14, 2014. Having reviewed the entire transcript, I note in particular the following, most of which I have summarized:

1. Page 12, lines 12-18

   When asked what work did Whitecap do to determine the corresponding working interest in the Lands and how the Lands were determined whether they were corresponding or not, Mr. Lebsack answered:

   > We looked at lands that produce gas to the Plant and those were the lands we sold to Keyera.

2. At page 15, lines 1-15:

   Whitecap understood that in transferring its 85% of the 90% interest it purchased from IOR in the Plant, that a 94% interest in the lands that produced gas had to accompany the transfer.

3. At page 15, lines 13-15:

   Whitecap excluded land that produced oil "because they are not land that produce gas".

4. Page 18, line 23-25:

   In determining what the corresponding interest in the land was, Whitecap "looked at what lands produced gas to the Plant within the area".

5. Page 18, lines 12-15:

   Whitecap looked at historical production and forecast production into the future.

6. Page 40, 12-27, and page 41, lines 1-21:

   Mr. Lebsack clarifies his understanding, as follows:

   MR . VIPOND: I thought, when we spoke this morning, one of the factors that Whitecap – you understood Whitecap was looking at with respect to ROFR values was forecasted production. Do you recall giving that evidence this morning?

A I'm not sure. How about I clarify, then, that the only way you can determine a net present value on an asset -- I shouldn't say only, but the producing value is to present value the sum of the future cash flows. So the future cash flows are just that, and so we would have to forecast --

Q Right.

A -- to see what the future -- to -- you know, give our estimate of what future cash flows are.

Q Right. And if I understand you, in calculating that future cash flow, Whitecap took into account probable production, correct?

A Well, there's a number of ways that you can evaluate. In sorry. Can you rephrase your question maybe?

Q Sure. And I think probable production is a term you used, instead that it may have been one of the factors that you were looking at in forecasting production. I think that's where we got to -- to now. So now my follow-up question to that is: Was probable production a factor used in the forecasting?

A In the forecasting of the value or in the forecasting --

Q In the forecasting of the assessment of the Keyera ROFR number for Blaze?

A I don't know.

Q In assessing the appropriateness of the $23,600,000 ROFR number that Whitecap received from Keyera, did you or Whitecap forecast any of the production coming from the Cardium zone in the future?

A No. Because we only used the zone that they were purchasing and had the ROFR on, which was the Nisku.

7. As to what accounted for the increase in value in the producing lands – from $17 million to $23.6 million – this is explained by Mr. Lebsack commencing at page 19. Specifically, at page 26, lines 13-20:

   The producing lands were the same and the production from those lands was greater at May 1, 2014 than at November 13, 2013.

8. Further examination ensues between pages 26-31, and at page 31, lines 18-20, the following exchange occurs:

   Q Was the price of the lands over which Blaze had a ROFR interest changed?

   A So I believe that the original document signed was -- had used the Imperial value of $17 million –

Q Okay. Of 17 million.

A -- and was updated for the change in effective date.

Q Okay. So that change resulted in the value being changed from 17 million, for the properties of which Blaze had a ROFR interest, to $23,600,000?

A That's correct.

Q And that change occurred between March 14, 2014, and May 1, 2014?

A It would have, yes

9. And, at page 32, lines 10-18:

   Q What's your understanding of the split between the plant and the natural gas rights?

   A There is no obligation. There's one – one price.

   Q So it's your understanding that there was just one price for the plant and all of the assets?

   A The $113 million was, yes, the price for the entire package that we sold to Keyera. We obviously split out the ROFR lands, as we were obligated to. Outside of that, there's no price allocation to certain assets.

[150] Having reviewed the totality of the evidence on behalf of Whitecap and Keyara, I find no basis upon which I could reasonably conclude on the evidence before me that there has been "loading up" of the land valuation subject to the Whitecap Lands ROFR and nor can I find any reasonable basis to conclude that either Whitecap or Keyera was acting in bad faith in providing the allocated values for the Whitecap Lands ROFR.

[151] If find that the cross-examination evidence of David Smith, a representative of Keyera, strengthened, not diminished or weakened, the affidavit evidence. I am entitled to, and have, taken into account all of the evidence from the cross-examination of Mr. Smith on his May 12, 2014 sworn affidavit. This cross-examination occurred on May 15, 2014. I note the following, most of which I have summarized:

1. Keyera's counsel objected to any cross-examination with respect to the value of the Land ROFR on the basis that it was not relevant as it was not an issue in this law suit.
2. At page 12, lines 19-22:

   The corresponding working interest in the lands were the lands that Keyera acquired as part of the transaction, namely the sale from Whitecap to Keyera.

   At page 13, lines 16-21:

   The lands that Keyera purchased from Whitecap were the lands that were from the Nisku zone, which were primarily gas producing. The lands that Whitecap acquired from IOR, they kept within this area where the Cardium zones, which were primarily crude oil producing.

3. Also at page 13, lines 22-27, the factor that determined corresponding working interest was whether or not the lands were Cardium or Nisku zones.
4. Page 14, lines 21-25:

A portion of what Keyera refers to as "corresponding working interest" has now been elected to be taken up by Blaze through Blaze's right of first refusal on some of the lands.

5. Page 15, lines 18-21:

   Keyera agrees that the lands that was subject to its agreement with Whitecap will be reduced by the lands that Blaze has now elected to exercise its right of first refusal on.

6. Page 16, lines 5-6:

   Keyera does not know the current production would be from these specific lands.

7. Page 16, lines 17-22:

   When asked about his understanding as to how the number for the lands became $23,600,000, counsel objected on the basis of relevance.

8. Page 17, line 3-8:

   A miscible pool is a pool which has been subject to miscible flooding, which is the introduction of additional hydrocarbons intended to enhance the production of crude oil. This is a type of enhanced oil recovery.

9. Page 19, lines 2-22:

   Mr. Smith personally has not had any discussions with Whitecap or IOR as to the purpose of the configuration of the Plant.

10. Page 21, lines 1-4:

    Most companies would have a process for having an AFE (Authorization For Expenditure) procedure but Mr. Smith does not know whether that would have been the case here.

11. Page 22, lines 15-23:

    There were no calculations involved in determining what the corresponding working interest in lands was. There were lots of calculations done in terms of what the reserves were, as part of the negotiations of the purchase and sale agreement between Whitecap and Keyera.

12. Page 23, lines 20-27:

    Keyera did not do a calculation of the proportion of the reserves that were acquired by Keyera of the properties that Whitecap acquired from IOR. Keyera did a calculation of the proportion of the natural gas production from those properties in order to comply with clause 1101 of the 1988 CO&O Agreement.

13. Page 24, lines 7-27, and page 25, lines 1-9, Mr. Smith further explains as follows:

    A That's correct. Your question, I think, at the -- earlier was was there with a calculation of the corresponding working interest in the lands, and there was no calculation involved in determining what the lands were. There was an agreement that we were acquiring the Nisku reserves and Whitecap was keeping the Cardium reserves.

    Q Okay. And through that, then Keyera knew what the proportionate natural gas production was that was being received by Keyera, right?

A Correct.

Q Okay. And what was that proportionate natural gas production?

A With respect to the lands that were subject to the acquisition of the -- from Imperial to -- by Whitecap, the ratio was 85 percent, based on current natural gas production associated with the Nisku reserves that that Keyera subsequently acquired and 5 percent to the Cardium lands that -- I'm sorry. I said reserves. I meant the lands that Keyera was acquired from Whitecap and 5 percent to the Whitecap Cardium lands that they were keeping that they acquired from Imperial.

Q Okay. And this was based upon natural gas production, right?

A That's right.

Q Okay. And does Keyera still have those calculations, sir?

A Yes.

Q Okay. I would ask that you undertake to produce those calculations of relative natural gas production?

[152] The undertaking to produce the calculations of relative natural gas production was provided and forms part of the evidence in this expedited trial. The complete answer to undertaking is attached as **Appendix "C"** to these Reasons.

[153] Taking into consideration all of the foregoing, my answer to issue (b) in the Consent Order of April 29,2014 is this: Blaze does not have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Whitecap Resources Inc. and Keyera Partnership.

[154] (Blaze does have a ROFR in respect of the subject-matter of the Whitecap ROFR Lands Notice.)

E. Issue (c) of the Order of April 29, 2014: "If Blaze has rights of first refusal, is it entitled to specific performance?"

[155] I would be content to end my decision at this juncture but cannot. If I am wrong in my answers to issues (a) and (b), I must explain why I would nevertheless decline to give Blaze relief in the nature of specific performance.

[156] In its Amended Statement of Claim, Blaze seeks the following relief:

(a) a Declaration that IOR's March 17, 2014 Notice is invalid;

(b) specific performance of the CO&O and 1960 Operating Agreement determining the interest in the Plant that corresponds to production from the Lands and transferring to Blaze the Lands and that corresponding interest in the Plant to Blaze or, alternatively the entire interest in the Plant on the same terms as that offered by Whitecap or, alternatively, Keyera;

(c) an interim and permanent injunction enjoining, restraining, and forbidding the May 1, 2014 or any other closing of a sale of the Lands and corresponding interest in the Plant until the Lands and corresponding interest in the Plant has been properly offered to Blaze;

(d) an interim custody and preservation order with respect to the Lands and corresponding interest in the Plant;

(e) the costs of this action on a solicitor and its own client (full indemnity) basis; and

(f) such further and other relief as this Honourable Court finds just and equitable.

[157] At paras 60 of Blaze's brief, Blaze seeks the following relief:

(a) a Declaration that Blaze is entitled to a right of first refusal on Whitecap's proposed sale of an 85% interest in the West Pembina 6-28 Plant to Keyera Partnership and an order for specific performance directing Whitecap to offer that interest to Blaze in accordance with the provisions of the CO&O, including paragraph 1102 thereof;

(b) in the alternative, a Declaration that Imperial Oil Resources has not provided a valid ROFR notice to Blaze under the provisions of the 1960 Operating Agreement and CO&O and an order for specific performance directing Imperial Oil Resources to offer Blaze Energy Ltd. the lands described in its March 17, 2014 notice of disposition together with a 4% interest in the West Pembina 6-28 Plant on the same terms offered by Whitecap or to offer Blaze Energy Ltd. a 90% interest in the Plant on the same terms offered by Whitecap;

(c) the costs of this action on a solicitor and its own client (full indemnity) basis; and

(d) such further and other relief as this Honourable Court finds just and equitable.

[158] From this, it is apparent that Blaze seeks specific performance directing IOR and Whitecap (or Keyera, as the case may be) to offer a Plant ROFR. Blaze insists that this Court enforce a contractual right: that is all that a ROFR is. Yet, Blaze cannot persuade me on the evidence before me that there is unambiguous content or object or subject-matter to the claimed Plant ROFR, even though Blaze resorts to altering the express contractual language by adding the word "percentage" to the end of the phrase "corresponding working interest" and contorts the plain meanings of Clause 18 and Articles 1101 and 1102. This simply will not do. Certainly, none of the other parties agree that there is an unambiguous description attaching to Blaze's sought after remedy.

[159] The remedy of specific performance is equitable. It is long established that specific performance is a discretionary relief, for example: ***Bank of America v Mutual Trust Co***, [1992] OJ No 2662, 1992 CarswellOnt 4072; also see ***Australian Hardwood Property Ltd v Commissioner for Railways***, [1961] 1 WLR 425 (PC) at 432-433.

[160] Elemental principles forming the foundation of this discretionary relief of specific performance include:

1. Specific performance is to be granted only where the party seeking the Court's assistance can show that it is ready, willing and able to perform its side of the bargain.

2. Being ready, willing and able is a substantive and constitutive part of the claim for relief.

[161] Starting with specific performance in the context of the IOR Land ROFR Notice, ***Chase Manhattan Bank*** at paras 40 and 41 makes clear that a holder of ROFR rights must strictly comply with any time periods specified in the ROFR. The holder of the right loses its rights if it fails to elect within that period.

[162] I have already decided that Blaze did not strictly comply and it has lost its rights under the IOR Lands ROFR Notice. I now find that specific performance is not available to revive Blaze's rights.

[163] ***Pierce v Empey***, [1939] SCR 247, 1939 CarswellOnt 97, at para 11, provides clear guidance:

> It is well settled that a plaintiff invoking the aid of the court for the enforcement for the sale of land must show that the terms of the option as to time and otherwise have been strictly complied with. The owner incurs no obligation to sell unless the conditions precedent are fully or as a result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfillment of them. [*Cushing v Knight*, (1912) 46 Can SCR 555; *Hughes v Metropolitan Rly Co*, (1877) 2 App Cas 439; *Bruner v Moore*, [1904] 1 Ch 305]

[164] In ***Chase Manhattan Bank of Canada***, the circumstances are somewhat analogous to those in the case at bar, in that the ROFR holder disputed the validity of the ROFR notice. At para 42 of ***Chase Manhattan Bank of Canada***, commencing at para 40, the Court cites Pierce v Empey for the proposition that once a proper ROFR notice has been given, the ROFR holder must comply strictly with its terms and conditions if it wishes to exercise its right. Furthermore, the owner incurs no obligation to sell to the ROFR holder unless the conditions precedent in the notice are fulfilled or as a result of his conduct the holder of the option is on some equitable ground relieved from the strict fulfillment of them.

[165] As was the case in ***Chase Manhattan Bank of Canada***, in this case clause 18 is clear and on a plain reading, the ROFR holder (Blaze) loses its right if it declines the offer in the notice or if it fails to elect within the ten-day period after the receipt of said notice to purchase such interest.

[166] In ***Chase Manhattan Bank of Canada***, the ROFR sent a letter to the receiver within the notice period stating (in effect) that the notice was invalid. The learned judge finds that the ROFR did not, however, take any other action before the expiry of the notice and explains at para 42:

> ... That expiry operates like a limitation and, at minimum; Best Pacific should have filed a Notice of Motion before that time. The Receiver sold the Hillsdown Assets to Eravista within a period of 60 days following the expiry of the Notice. This Court will not interfere with that sale

[167] Again, I find that Clause 18 of the 1960 Lands Agreement is unambiguous and that Blaze could have complied with the consideration stipulated in the IOR Lands ROFR Notice. Moreover, I find that the merely because Blaze erroneously decided that the IOR ROFR Lands Notice was invalid does not entitle Blaze to equitable relief from the strict fulfillment of the conditions set out in clause 18 because I find that IOR has does nothing wrong.

[168] The determinative wording in Clause 18 is this:

> ... and said other party or parties or any one or more of them shall thereupon have an option for a period of ten (10) days after the receipt of said notice to purchase such interest at and for the offered price and upon the offered terms for the benefit of such remaining parties hereto as may agree to purchase the same.

[169] The IOR Lands ROFR Notice clearly relates to the "interest which are subject to this agreement" and clearly specifies the right to purchase "the same". "Such interest" is expressly made "with respect to" interests of the parties specified in the the1960 Lands Agreement.

[170] The March 17, 2014 IOR Lands ROFR Notice is clear; see **Appendix "A"**.

[171] There is no evidence before me to suggest that IOR waived its strict contractual rights. There is no evidence before me that the IOR Lands ROFR were in any sense "invalid". There is no evidence before me that Blaze exercised its rights as the Lands ROFR holder in respect of the IOR ROFR Notice. The rights Blaze had in respect of the IOR ROFR Notice have been irretrievably lost.

[172] Similarly, the Whitecap Lands ROFR Notice is clear; see **Appendix "B"**.

[173] In respect of the Whitecap Lands ROFR Notice, Blaze has indicated its intention to exercise its rights. That is all that needs to be said, other than to reiterate that Blaze's exercise of its rights under the Whitecap Lands ROFR Notice does not entitle Blaze in equity, contract or otherwise to claim any right to any interest in the Plant that Whitecap acquired by purchase from IOR, or disposed of by sale to Keyera, or retained.

[174] In respect of any claim to a remedy in the nature of specific performance under the provisions of the 1988 CO&O, I find on the evidence presented in this expedited trial that Blaze is in breach of the 1988 CO&O and has been continuously in breach of the 1988 CO&O since shortly after its 2012 acquisition of an interest in the Plant.

[175] While Blaze complained about the sufficiency of the business records provided in support of this contention, Blaze neither refutes this assertion nor did Blaze cross-examine Mr. Smith on his statement, made at para 25 of his affidavit sworn May 12, 2014:

> 25. In the course of the Keyera Transaction we received the business records that Imperial kept relating to ownership and operation of the Plant. The records show that Blaze is in default of payment under the terms of the 1988 CO&O, and has been since July 2012. Attached and marked as Exhibit "C" is Imperial's accounts receivable statement demonstrating the default.

[176] Mr. Smith was examined on his affidavit on May 15, 2014, before Mr. Mele swore his second affidavit on May 16, 2014. Mr. Mele did not take the opportunity to explain why Mr. Smith's evidence is false. Blaze proffered no evidence to contradict Mr. Smith's statement or to contradict the IOR accounts receivable statement upon which he relies.

[177] Citing to the "clean hands" doctrine, Keyera submits that I ought to apply the well-known equitable doctrine that equity will not grant relief to a party, who, as actor, seeks to set judicial machinery in motion and obtain some remedy, if such party in prior conduct has violated conscious or good faith or other equitable principle. I agree.

[178] Therefore, if I am wrong in finding that Blaze is not entitled to any Plant ROFR, I nonetheless find that Blaze is not entitled to the equitable relief of specific performance, in any event, firstly because Blaze has on the evidence before me breached its obligations under the 1988 CO&O and, secondly, because the interest that Blaze seeks to acquire through a presumed exercise of a Plant ROFR is uncertain, incapable of description and is non-specific.

[179] IOR disputes that Blaze's entitlement to a Plant ROFR on 4% of the Plant ownership. There is nothing in the language of the 1988CO&O that imports a "percentage" requirement into

the phrase "corresponding working interest". I can think of no juridical basis upon which I could or ought to import such a criterion into the 1988 CO&O.

[180] In respect of allegations of bad faith concerning valuation of the IOR ROFR Notice lands or the Whitecap ROFR Notice lands, it is clear that Blaze has the evidentiary burden of proving that the other parties have breached their duty of good faith in allocating value. In support of my findings in this regard, I refer to para 34 of the ***Chase Manhattan Bank of Canada*** decision which says:

> In any event, the ROFR holder clearly has the evidentiary burden of proving that the other parties have breached their duty of good faith in allocating value. In Johnson and Stanford, "Rights of First Refusal in Oil and Gas Transactions: A Progressive Analysis" (1999) 37 Alta L Rev (No 2) 316, the authors write (at para. 61):
>
> > From the perspective of the ROFR holder, it will not suffice to simply argue that the allocated price does not in its view represent fair market value. While that may provide an indication that the allocation has been unfairly made or 'loaded up,' that alone will certainly not be conclusive. The ROFR holder will have to demonstrate on the evidence that the allocation principles applied by the purchaser and accepted by the vendor were unreasonable in the circumstances, or in other words that a duty of good faith has been breached.

[181] I am also persuaded by the submissions of IOR, Whitecap and Keyera that value is not an issue in this expedited trial. The issues in this expedited trial were set out in the Consent Order.

[182] Keyera states that the parties expressly agreed that value allocated to the lands of either the Imperial ROFR notice or the Whitecap ROFR notice would be dealt with later, if necessary.

[183] In the result, Whitecap did not include any evidence to address the value issues under either ROFR Notices. [para 106, page 27 Whitecap brief]

[184] In light of these statements by counsel and in light of the wording of the Consent Order of April 29, 2014, I decline to further discuss or make any findings with respect to valuation, other than to say that I agree that Blaze bears the evidentiary burden in this regard and that in the context of the evidence presented in this expedited trial, Blaze has not met the burden cast upon it.

F. Custom or Usage and Matters of Estoppel

[185] Given the findings above, I will not consider these alternate arguments in aid of interpretation of contractual language. I acknowledge that submissions on these points were ably made and disputed but I find that I do not need to revert to them in determining the three issues answered in this expedited trial.

IV. CONCLUSION

[186] I have given my answers to the issues to be determined in this expedited trial. If counsel cannot agree on costs, counsel may provide brief written submissions to me, no later than 30 days from the date hereof.

Heard on the 26th day of May, 2014.
Dated at the City of Calgary, Alberta this 30th day of May, 2014.

F. Schutz
J.C.Q.B.A.

Appearances:

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Appendix "A"

Imperial Oil

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THIS IS EXHIBIT " C "
Referred to in the Affidavit of
Biagio Mele
Sworn before me this 23rd day of
April, 2014
A COMMISSIONER FOR OATHS IN AND FOR THE PROVINCE OF ALBERTA

Katherine Jean Chalowski
Commissioner for Oaths
In and for the Province of Alberta
My Commission expires on November 15, 2014

March 17, 2014

File: 07667.00
(A)

Blaze Energy Ltd.
1010, 900-6th Ave S.W.
Calgary, AB T2P 3K2

Attention: Land Manager

RE: Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal
Operating Agreement dated June 27, 1960
Pembina Area, Alberta
Land Ref: Twp 49 Rge 11 W5M E 33, Sec 34

According to our records, Imperial Oil Resources and Blaze Energy Ltd. are current parties to the Operating Agreement dated June 27, 1960 (the "Agreement") pertaining to lands in the subject area (note that lands jointly held by the parties to this agreement and the parties rights therein may vary)

Pursuant to Clause 18 of the Agreement, Imperial Oil Resources notifies you that it has received an offer to purchase its participating interest in all the joint lands under the Agreement which it is prepared to accept. Blaze Energy Ltd. (the "ROFR Party") has a preferential right to purchase Imperial's interest in the joint lands set out in Schedule "A" attached ("Preferential Lands"). The Preferential Lands comprise petroleum and natural gas rights and related assets.

Whitecap Resources Inc. is the proposed purchaser of our interest. The consideration for the purchase of our interest in the Preferential Lands is SEVENTEEN MILLION DOLLARS ($17,000,000.00) CDN. The effective date of the sale is November 1, 2013 with a proposed closing date of May 1, 2014.

The preceding paragraphs outline the terms of the sale agreement; however, if you wish to review a copy of the executed agreement, you may review it at our offices during regular business hours by contacting the writer at 403-237-4372.

Imperial Oil Resources requests that you waive your right to purchase our interest in the Preferential Lands under the Agreement. Please note that if you are not prepared to waive your right, you are required to elect in writing within 10 days of receipt of this notice, if you wish to acquire the subject interest for the price and on the terms and conditions as set forth in this notice and as reflected in the sale agreement.

Whether you intend to purchase the interest of Imperial Oil Resources or to waive your right of first refusal, Imperial Oil Resources requests that you sign and return one copy of this letter to the attention of the writer as soon as possible.

Yours truly,

IMPERIAL OIL RESOURCES

Heidi Hofbauer
Mineral Negotiator
Asset Enhancement

Company Name:

_____
hereby elects to purchase the interest of Imperial Oil Resources for a purchase price of SEVENTEEN MILLION DOLLARS ($17,000,000.00) CDN and on the same terms and conditions as offered by Whitecap Resources Inc.

Dated this _____ day of _____, 2014.

Per: _____

Name: _____

Title: _____

Company Name:

_____
hereby waives its preferential right to purchase the interest of Imperial Oil Resources and consents to the transfer of the interest to Whitecap Resources Inc.

Dated this _____ day of _____, 2014.

Per: _____

Name: _____

Title: _____

c.c. Whitecap Resources Inc.

07667.00 (A)

This is Schedule "A" to
Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal dated March 17, 2014

PREFERENTIAL LANDS:

LANDS AND PETROLEUM AND NATURAL GAS RIGHTS	ICR INTEREST	ENCUMBRANCES	LEASES, EXPIRY DATE AND EXTENSION	ICR LEASE FILE	ICR CONTRACT FILE
TWP 49 RGE 11 W5M E/2 33 PNG TO TOP CARDIUM	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 119688 LSE DATE: 1960 Aug 02 EFF DATE: 1960 Aug 02 EXP DATE: 1961 Aug 01 MNRL INT: 100.0 EXT CODE: S15	MABD12234 02	07667.00 A
TWP 49 RGE 11 W5M SEC 34 PNG TO TOP CARDIUM	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 119535 LSE DATE: 1960 Apr 28 EFF DATE: 1960 Apr 28 EXP DATE: 1961 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MABD12228 01	07667.00 A
TWP 49 RGE 11 W5M SE 34 PNG BELOW BASE ROCK CREEK TO BASE NISKU (EXCL PNG IN BLUE RIDGE MEMBER)	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 119535 LSE DATE: 1960 Apr 28 EFF DATE: 1960 Apr 28 EXP DATE: 1961 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MABD12234 03	07667.00 E AU0000347 B
TWP 50 RGE 11 W5M SW 3 PNG TO BASE NISKU (EXCL PNG BELOW TOP CARDIUM TO BASE ROCK CREEK)	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 119537 LSE DATE: 1960 Apr 28 EFF DATE: 1960 Apr 28 EXP DATE: 1961 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MABD12231 04	07667.00 G AU0000349 A
TWP 50 RGE 11 W5M S/2 2 PNG FROM BASE UPPER HORSESHOE CANYON TO TOP CARDIUM	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 119537 LSE DATE: 1960 Apr 28 EFF DATE: 1960 Apr 28 EXP DATE: 1961 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MABD12231 05	07667.00 H

07667.00 (A)

This is Schedule "A" to
Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal dated March 17, 2014

PREFERENTIAL LANDS

LANDS AND PETROLEUM AND NATURAL GAS RIGHTS	IOR INTEREST	ENCUMBRANCES	LEASES, EXPIRY DATE AND EXTENSION	IOR LEASE FILE	IOR CONTRACT FILE
TWP 50 RGE 11 W5M SE 3 PNG TO BASE NISKU (EXCL PNG BELOW TOP CARDIUM TO BASE ROCK CREEK)	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 118637 LSE DATE: 1960 Apr 26 EFF DATE: 1960 Apr 26 EXP DATE: 1981 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MAB012231 07	07667.00 G
TWP 50 RGE 11 W5M SE 4 PNG TO TOP CARDIUM	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 119689 LSE DATE: 1960 Aug 02 EFF DATE: 1960 Aug 02 EXP DATE: 1981 Aug 01 MNRL INT: 100.0 EXT CODE: S15	MAB012235 02	07667.00 A
TWP 50 RGE 11 W5M W2 12 PNG FROM BASE ROCK CREEK TO BASE NISKU	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 118638 LSE DATE: 1960 Apr 26 EFF DATE: 1960 Apr 26 EXP DATE: 1981 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MAB012230 01	07667.00 F AU0003481 B

IOR CONTRACT FILES.

07667.00 - Operating Agreement dated June 27, 1960
AU000347 - Pembina Niaku M Unit
AU000345 - Pembina Niaku N Pool Unit No. 1
AU000349 - Pembina Niaku O Pool Unit No. 1

Appendix "B"

WHITECAP RESOURCES INC

May 1, 2014

Blaze Energy Ltd.
1010, 900-6th Avenue SW
Calgary, Alberta
T2P 3K2

Attention: Land Manager

Re: Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal
Operating Agreement dated June 27, 1960
Pembina Area, Alberta
Lands: Twp 49 Rge 11 W5M: SE34 (PNG in Nisku)
Lands: Twp 50 Rge 11 W5M: S3 & W12 (PNG in Nisku)

According to our records, Whitecap Resources Inc. and Blaze Energy Ltd. are current parties to the Operating Agreement dated June 27, 1960 (the "Agreement") pertaining to lands in the subject area (note that lands jointly held by the parties to this agreement and the parties rights therein may vary)

Pursuant to Clause 18 of the Agreement, Whitecap Resources Inc. notifies you that it has received an offer to purchase its participating interest in a portion of the joint lands under the Agreement which it is prepared to accept. Blaze Energy Ltd. has a preferential right to purchase Whitecap's interest in the joint lands set out in Schedule "A" attached ("Preferential Lands")
Keyera Partnership is the proposed purchaser of our interest. Their address is: 600, 144-4th Avenue SW, Calgary, Alberta, T2P 3N4. The offered price for the purchase of our interest in the Preferential Lands is TWENTY THREE MILLION, SIX HUNDRED THOUSAND DOLLARS ($23,600,000.00) CDN. The effective date of the sale is May 1, 2014 with a closing date of May 1, 2014.

The preceding paragraphs outline the relevant terms of the sale agreement as they relate to the Preferential Lands in which Blaze Energy Ltd. has a preferential right. If you wish to review a copy of the executed agreement, you may review it at our offices during regular business hours by contacting the writer at 403-817-2170

Whitecap Resources Inc. requests that you waive your right to purchase our interest in the Preferential Lands under the Agreement. Please note that if you are not prepared to waive your right, you are required to elect in writing within 10 days of receipt of this notice. If you fail to elect within the 10 day period provided for in the Agreement you will lose your preferential right to purchase Whitecap Resources Inc.'s interest in the Preferential Lands

Whether you intend to purchase the interest of Whitecap Resources Inc. in the Preferential Lands or to waive your preferential right, Whitecap Resources Inc. requests that you sign and return one copy of this letter to the attention of the writer.

Yours truly,

WHITECAP RESOURCES INC.

Heather Darrah
Manager, Contracts & Lease Admin

Company Name	Company Name
Hereby elects to purchase the interest of Whitecap Resources Inc. in the Preferential Lands for the offered price of TWENTY THREE MILLION, SIX HUNDRED THOUSAND DOLLARS ($23,600,000.00) CDN and on the terms pursuant to the Agreement as offered by Keyera Partnership.	Hereby waives its preferential right to purchase the interest of Whitecap Resources Inc. in the Preferential Lands
Dated this day of 2014	Dated this day of 2014
Per:	Per:
Name:	Name:
Title:	Title:

cc. Keyera Partnership

07667(A)

This is Schedule "A" to Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal dated May 1, 2014

PREFERENTIAL LANDS:

Lands and PNG Rights	Whitecap Interest	Encumbrances	Leases, Expiry Date and Extension	Whitecap File	Whitecap Contract File
Twp 49 Rge 11 W5M: SE 34 PNG in Nisku	50%	CSS Based on 100% Paid by Whitecap 50%	Crown Lease 118635 Lease Date: Apr 26/60 Effective Date: Apr 26/60 Expiry Date: Apr 25/81 Min Int: 100% Ext Code: Section 15	MAB012228 03	07667.00 E AU000347 B
Twp 50 Rge 11 W5M: SW3 PNG in Nisku	50%	CSS Based on 100% Paid by Whitecap 50%	Crown Lease 118637 Lease Date: Apr 26/60 Effective Date: Apr 26/60 Expiry Date: Apr 25/81 Min Int: 100% Ext Code: Section 15	MAB012231 04	07667.00 G AU00349 A
Twp 50 Rge 11 W5M: SE3 PNG in Nisku	50%	CSS Based on 100% Paid by Whitecap 50%	Crown Lease 118637 Lease Date: Apr 26/60 Effective Date: Apr 26/60 Expiry Date: Apr 25/81 Min Int: 100% Ext Code: Section 15	MAB012231 07	07667.00 G
Twp 50 Rge 11 W5M: W12 PNG in Nisku	50%	CSS Based on 100% Paid by Whitecap 50%	Crown Lease 118638 Lease Date: Apr 26/60 Effective Date: Apr 26/60 Expiry Date: Apr 25/81 Min Int: 100% Ext Code: Section 15	MAB012230 01	07667.00 F

Appendix "C"

Form 11
[Rule 3.31]

COURT FILE NUMBER	[401-0442]
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	BLAZE ENERGY LTD.
DEFENDANTS	IMPERIAL OIL RESOURCES, WHITECAP RESOURCES INC., KEYERA PARTNERSHIP and KEYERA CORP.
DOCUMENT	UNDERTAKING RESPONSE
PARTIES FILING THIS DOCUMENT	KEYERA PARTNERSHIP and KEYERA CORP.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Fasken Martineau DuMoulin LLP Barristers and Solicitors 3400 First Canadian Centre 350 – 7 Avenue S.W. Calgary, Alberta T2P 3N9 **Alex Kotkas/Katie Clayton** Tel: (403) 261-5358/261-5376 Fax: (403) 261-5351 File No.: 287146.00005

UNDERTAKING RESPONSE OF DAVID G. SMITH GIVEN AT THE CROSS EXAMINATION ON MAY 15, 2014

NO.	PG.	UNDERTAKING
1.	22	TO PRODUCE THE CALCULATIONS OF RELATIVE NATURAL GAS PRODUCTIONS (TAKEN UNDER ADVISEMENT) **Response: May 20, 2014** The calculation of relative natural gas production was done in March 2014 when Keyera was considering the purchase of assets from Whitecap. At that time the most current publicly available production data was from November 2013. Nisku gas production was calculated to be 96.53% based on that date (see Schedule "A"). The trend in the data was that Nisku gas production was decreasing while Cardium gas production was increasing. Accordingly an evaluation was done to estimate what the likely Nisku and Cardium gas production would be by the effective date of the transaction, being May 1, 2014. That calculation was not recorded in writing at the time, but an analysis taking into account the factors considered in March is attached at Schedule "B".

SCHEDULE "A"

Imperial Oil Gross Production from Designated Area by Formation
(e3m3/d)

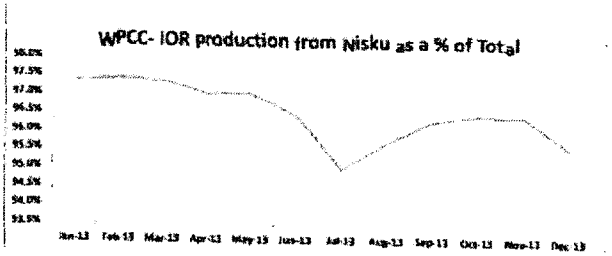
Twp-Rge	Nisku	Cardium	Other	Total
49-10	0.9	0.81		1.7
49-11	1302.0	15.4	0	1317.4
50-10	-	0.78		0.8
50-11	2.4	30		32.4
51-10	-			0.0
51-11	-			0.0
Total	1305.3	47.0	0.0	1352.3
% Nisku/ Cardium	96.53%	3.47%	0.00%	100.00%

1. Designated Area as per Exhibit B of CO&O for West Pembina 6-28 gas plant
2. Production based on November 2013 rpoduction month

	IOR Nisku, mcf/d	IOR Cardium, mcf/d	Total IOR, mcf/d	% Nisku
Jan-13	42,721	1,143	43,864	97.4%
Feb-13	42,846	1,111	43,957	97.5%
Mar-13	42,868	1,136	44,004	97.4%
Apr-13	30,457	912	31,369	97.1%
May-13	42,005	1,258	43,263	97.1%
Jun-13	41,783	1,506	43,289	96.5%
Jul-13	28,595	1,490	30,086	95.0%
Aug-13	29,733	1,308	31,041	95.8%
Sep-13	40,054	1,510	41,563	96.4%
Oct-13	39,224	1,389	40,613	96.6%
Nov-13	41,286	1,480	42,766	96.5%
Dec-13	33,850	1,528	35,378	95.7%

Jan-14	33,118	1,577	34,696	95.5%
Feb-14	32,404	1,629	34,032	95.2%
Mar-14	31,706	1,681	33,387	95.0%
Apr-14	31,025	1,736	32,761	94.7%
May-14	30,340	1,792	32,157	94.4%
Jun-14	29,710	1,850	31,560	94.1%
Jul-14	29,076	1,910	30,986	93.8%
Aug-14	28,457	1,972	30,429	93.5%
Sep-14	27,852	2,036	29,888	93.2%
Oct-14	27,261	2,102	29,363	92.8%
Nov-14	26,684	2,170	28,855	92.5%
Dec-14	26,120	2,240	28,360	92.1%

1. Cardium production growth rate 3.26%/mo post November 2013



Schedule "B"