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AUG 11 2014
CALGARY

Court of Queen's Bench of Alberta

Citation: IFP Technologies (Canada) v Encana Midstream and Marketing, 2014 ABQB 470

Date: 20140805
Docket: 0301 03520
Registry: Calgary

Between:

IFP Technologies (Canada) Inc.

Plaintiff
(Defendant by Counterclaim)

- and -

Encana Midstream and Marketing, PanCanadian Resources, Encana Corporation, Encana Oil & Gas Developments Ltd., Canadian Forest Oil Ltd. and The Wiser Oil Company

Defendants
(Plaintiffs by Counterclaim)

Corrected judgment: A corrigendum was issued on August 11, 2014; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment of the Honourable Chief Justice Neil Wittmann

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I. Introduction

[1] This is a claim for damages arising out of an alleged breach of contract. The Plaintiff, IFP Technologies (Canada) Inc. ("IFP"), claims the Defendant, PanCanadian Resources, breached its contract with IFP when it farmed out its interest in the Eyehill Creek reservoir without IFP's consent. The Plaintiff submits the natural consequence of this disposition was to make it impossible or impracticable for the Plaintiff to realize upon its minority interest. The Plaintiff seeks damages for this lost opportunity.

[2] The Defendants argue there was no breach of contract. They suggest this is a case of a sophisticated business entity inviting the Court to re-write its contract to give it a better deal than the one for which it originally bargained.

[3] The Defendants counterclaim for a declaration that the Plaintiff wrongfully withheld its consent to the farmout and for solicitor and own client costs pursuant to the main agreement between the parties.

[4] Mr. Justice Ron Stevens heard the trial between January 31 and March 14, 2011 and oral argument on June 29 and 30, 2011. Mr. Justice Stevens passed away on Tuesday, May 13, 2014. Rule 13 .1 of the Alberta Rules of Court provides:

> 13 .1 One judge may act in place of or replace another judge if
>
> (a) that other judge dies,
>
> (b) that other judge ceases to be a judge, or
>
> (c) it is inconvenient, improper, inappropriate or impossible for that other judge to act.

[5] Pursuant to Rule 13.1, I took conduct of this matter. I contacted counsel for the parties and they confirmed that this matter could be fairly decided on the record. I agreed to proceed accordingly.

II. The Parties

[6] IFP is a body corporate incorporated under the laws of Quebec and extra-provincially registered in Alberta. IFP is wholly owned by IFP Energies Nouvelles, formerly known as l'Institut Français du Pétrole ("IFP France").

[7] The Defendant Encana Midstream and Marketing was a partnership registered in and carrying on business in Alberta. At the time the causes of action accrued, the partnership was known as PanCanadian Resources ("PCR"). In October 2005, PCR was dissolved and its assets and liabilities were assigned to the partners – Encana Corporation and Encana Heritage Lands. Encana Heritage Lands was dissolved in October 2009 and its assets were wound up into Encana Corporation.

[8] The Defendant Encana Corporation is a body corporate incorporated under the laws of Canada; it is the corporate successor to PanCanadian Petroleum Limited. At the time the causes of action accrued, PanCanadian Petroleum Limited was the managing partner of PCR. Nothing turns on the distinctions among these corporate entities, so I will use the abbreviation "PCR" throughout this judgment to refer to one or both entities. Effective November 2009, Encana Corporation was split into two energy companies, Cenovus Energy Inc. and Encana Corporation.

[9] The Defendant Encana Oil & Gas Developments Ltd. (formerly known as 592284 Alberta Ltd.) is a body corporate incorporated under the laws of Alberta. At the time the causes of action accrued, it was one of PCR's partners.

[10] The Defendant Canadian Forest Oil Ltd. ("Canadian Forest") is a body corporate incorporated under the laws of Alberta; it is a corporate successor to The Wiser Oil Company of Canada. The Defendant The Wiser Oil Company is a body corporate incorporated under the laws of Delaware and extra-provincially registered in Alberta. Throughout these reasons, I will refer to The Wiser Oil Company of Canada and The Wiser Oil Company as "Wiser".

III. Witnesses

[11] The Plaintiff and Defendants called a number of fact and expert witnesses throughout the six-week trial. The Plaintiff's fact witnesses included Eric Delamaide, IFP's general manager in Canada, and Erik Verbraeken, IFP France's legal counsel. Its expert witnesses included Dr. Brad Hayes, David Kisilevsky, Dr. John Carey, Todd White, Richard Baker, Bob Shepherd, Lew Hayes, and Ian Clark. The Plaintiff also read-in the expert evidence of Barry Parker.

[12] The Defendants also called a number of fact witnesses, primarily former and current employees of PCR and Encana, including Simon Gittins, senior reservoir and production engineer at PCR, Greg Sinclair, PCR's senior landman, Wayne Sampson, land manager at PCR after its merger with CS Resources Limited, Mark Montemurro, general manager of the heavy oil

business unit and later general manager of information services for PCR, and Laureen Little, manager of oil sands development at PCR. The Defendants also presented as witnesses former employees of Canadian Forest and Wiser: Craig Seal, manager of engineering and exploitation at Canadian Forest and Robert Pankiw, project leader for heavy oil and shallow gas at Wiser and later a member of Canadian Forest's heavy oil exploitation and operations team. Brent Grocock was called to give evidence regarding oil field samples he had taken. The Defendants' expert witnesses included Dr. Brant Bennion, James O'Byrne, Michael Uland, and Doug Hollies.

[13] I have relied upon the fact witness testimony in setting out the factual background and contractual relationship between IFP and PCR. I will refer to further witness testimony, including expert evidence, in relation to each issue.

IV. Factual Background and Contractual Relationship Between IFP and PCR

A. Factual background

[14] At the start of trial, the parties provided a Statement of Agreed Facts along with more than 500 Agreed Exhibits. In their written argument after trial, the parties further coordinated their factual submissions. I provide the following summary of the facts drawing upon these joint resources as well as witness testimony.

[15] In the late 1980s and early 1990s, CS Resources Limited ("CS Resources") was a pioneer in the exploitation of heavy oil using horizontal wells. During this time, it had a business relationship with IFP France, which had a wide range of technological expertise relating to petroleum research and development.

[16] In February 1988, Société Nationale ELF Aquitaine Production ("SNEAP"), IFP France and CS Resources entered into a Technology Licensing Agreement ("TLA") pursuant to which SNEAP and IFP France granted CS Resources a licence over certain expertise and technical information relating to the drilling, placement and completion of horizontal wells for the enhanced production of oil and gas (the "Technology") in return for a 3% gross overriding royalty on all lands held or acquired by CS Resources on which the Technology was used. CS Resources could terminate the TLA on 60 days written notice.

[17] In April 1990, SNEAP assigned its rights under the TLA to IFP France. In March 1993, IFP France assigned those rights to IFP with CS Resources' consent.

[18] At the same time, IFP France and CS Resources entered into a Cooperation Agreement pursuant to which they agreed to extend their collaboration to other technologies that could be linked to the Technology and that could be applied by CS Resources to its field developments. They agreed any production of oil and gas using such other technologies would be subject to the 3% gross overriding royalty payable to IFP under the TLA.

[19] By 1997, CS Resources was using the Technology and other technologies to produce oil and gas from certain properties and paid IFP the 3% gross overriding royalty pursuant to the above-described agreements. The IFP royalty on CS Resources' property averaged $3,825/month from January to June 1997.

[20] In July 1997, PCR acquired CS Resources. PCR combined the CS Resources properties with its own properties into a single business unit known as the Van Horne business unit. After taking control of CS Resources, PCR expressed its desire to terminate the TLA with IFP and redefine their relationship with the intent to jointly develop and implement new technologies.

[21] One of the heavy oil properties of the Van Horne business unit was located in Township 38, Range 1 W4M, Alberta, one township to the west of the border between Alberta and Saskatchewan, south of the City of Lloydminster. PCR first referred to it as the North Bodo property and later as the Eyehill Creek property ("Eyehill Creek"). Prior to 1997, approximately 222 wells had been drilled on the Eyehill Creek lands. By1998, PCR had shut in the still-producing wells.

[22] In January 1998, the Van Horne business unit, based on simulations and preliminary economics, identified Eyehill Creek as an attractive potential candidate for development using steam-assisted gravity drainage ("SAGD"). SAGD is a type of enhanced oil recovery ("EOR") process. The general objective of EOR methods is to extract a larger portion of the oil located in a reservoir than is possible through conventional or primary wells, which rely solely on the reservoir's natural energy or drive. SAGD is one of several thermal EOR processes designed for heavy oil reservoirs. In a traditional SAGD project, two horizontal wells are drilled one above the other. Steam is injected into the upper well; the steam renders the oil less viscous and the oil flows down towards the lower, producer well.

[23] In April 1998, PCR suggested Eyehill Creek as a property in which IFP might be granted a working interest as part of the consideration for terminating the gross overriding royalty it received under the TLA. Based on the preliminary review of the Eyehill Creek property, PCR's heavy oil team concluded it was the best thermal project candidate.

[24] In August 1998, PCR shared with IFP its preliminary plan for the "Eyehill Creek Thermal Project." The plan was still at an early conceptual phase with many unanswered questions about the project. In this plan, PCR divided the project into two areas: an "undepleted area" it intended to exploit first (south ½ of section 16, north ½ of section 9 and west ½ of section 20) and a "depleted area" to be developed later (north ½ of section 16, southwest ¼ of section 21, southeast ¼ of section 20 and northeast ¼ of section 17). Sections 9, 17 and 21 were PCR Fee Land, while sections 16 and 20 were Crown Land.

[25] The "depleted" area was so named because the reservoir pressures had been altered due to primary production and PCR expected drilling challenges there arising from low reservoir pressure and potential wormhole development (wormholes are long skinny channels running through the reservoir sand). The preliminary plan focused on the undepleted section 9 and large portions of section 16 as the best suited to SAGD drilling operations; however, the depleted sections were a critical part of the project. Mr. Montemurro explained the economics were very modest on an after-tax basis and the reserves in the undepleted sections were insufficient to justify the capital; to be viable the project also required the depleted pool in spite of the incremental drilling risks. There were an estimated 29 million barrels of original oil in place ("OOIP") in the undepleted area and an estimated 32 million barrels OOIP in the depleted area (of which about 3 million barrels had been produced by primary production).

[26] Mr. Gittins explained in testimony that a more detailed technical assessment was needed before bringing any proposals to management. In general, however, PCR believed primary production was finished in the Eyehill Creek area and the field should be considered abandoned if production was limited to primary only.

[27] IFP was interested in Eyehill Creek because of its SAGD potential. Erik Verbraeken, IFP France's Legal Counsel, explained the deal with PCR presented an opportunity to become a more active player in Canadian oil fields and to implement IFP's technologies in real field conditions. IFP had expertise in relation to reservoir studies, but PCR had the operational expertise that IFP lacked and from which it wished to benefit. Mr. Montemurro testified that IFP brought technical expertise to meetings between the parties in relation to reservoir engineering, modelling and simulation work, and geophysical techniques. Around this time, Eric Delamaide, formerly a reservoir engineer with IFP France became IFP's General Manager in Canada. His primary task was to promote cooperation between IFP and PCR; he shared space in PCR's Calgary office.

[28] In May 1998, at PCR and IFP's request, Dobson Resource Management Ltd. ("Dobson") carried out an independent third party reserve and economic evaluation of Eyehill Creek upon which PCR and IFP could rely in their negotiations. Dobson prepared its evaluation assuming PCR planned to extract the oil from the Eyehill Creek lands with the installation of facilities for a SAGD project. Dobson also prepared an economic evaluation of IFP's existing royalty interest and estimated its value to be $5.88 million using the June 1997 price forecast and differentials. By May 1998, the price forecast had worsened and the value of the royalty was significantly reduced.

[29] In July 1998, PCR and IFP executed a Memorandum of Understanding ("MOU") to redefine their relationship following the termination of the TLA. It stated that it was the mutual intent of IFP and PCR to optimize the development of these lands through the implementation of the technology development program including the application of thermal or other enhanced recovery technologies. The MOU proposed to grant IFP "a 20% working interest in Eyehill Creek, whether such development and production is of a primary, assisted or enhanced nature."

[30] On October 26, 1998, PCR and IFP entered into an Asset Exchange Agreement (the "AEA") in which IFP gave up its overriding royalty from the TLA in exchange for working interests in Eyehill Creek and Pelican Lake, and a royalty in one of the formations of Pelican Lake. Appended to and incorporated into the AEA as Schedules were a number of other Agreements including Schedule F Eyehill Creek Joint Operating Agreement ("JOA") and Schedule G Technology Development Agreement ("TDA"). Appended to the JOA as Schedules were Schedule B Operating Procedure (a modified version of the standard operating procedure developed by the Canadian Association of Petroleum Landmen known as the 1990 CAPL Operating Procedure) and Schedule C Assignment Procedure (the 1993 CAPL Assignment Procedure).

[31] The AEA was negotiated principally between Mark Montemurro, PCR's general manager of the heavy oil business unit at that time, and Severin Saden, head of IFP France's legal department and president of IFP Canada, with the assistance of Erik Verbraeken, IFP France's in-house legal counsel and with the further assistance of outside counsel familiar with Alberta oil

and gas agreements. Wayne Sampson, a PCR land manager, was involved in the JOA negotiations. It too was negotiated with the assistance of legal counsel.

[32] For tax purposes it was necessary for the parties to ascribe a value to the assets being exchanged under the AEA. The agreed value was $16 million; IFP internally allocated $14.8 million of this amount to Eyehill Creek.

[33] A key issue in this dispute is the nature of IFP's working interest. While the MOU set out the intention that IFP's 20% working interest would relate to all development and production, whether primary, assisted or enhanced, the JOA purports to limit the parties' working interests to thermal and other enhanced recovery. The JOA relieves IFP of any liability for abandonment obligations related to primary operations. The evidence at trial indicated that it was important to IFP to limit its liability in this regard. I will discuss the relevant contractual clauses and my conclusions in more detail below.

[34] In November 1998, the price forecast for gas had increased, changing the economics of the proposed project. Mr. Gittins explained the cost of gas required for the project would have been more than half the total operating cost. He testified that as the economics of the project worsened, the amount of effort put into it diminished.

[35] On February 10, 1999, Mark Montemurro sent an internal confidential email explaining that low oil prices have created "a serious resource (capital and people) competition" placing heavy oil in direct competition with many of PCR's other opportunities. He explained that senior management's focus would be on the development of Christina Lake rather than other heavy oil channels such as Eyehill Creek. Nonetheless, some development work at Eyehill Creek continued so as to be ready when prices improved. In particular, there was work on regulatory approval, ground water confirmation, royalty negotiation, and discussions with partners, including IFP.

[36] By July 1999, PCR had identified three options for Eyehill Creek: 1) build a new grassroots thermal facility at Eyehill Creek after cleaning up dumps, waste pile sites, unused tankage, pads, etc. not required for such a facility; 2) place PCR's Senlac facility at Eyehill Creek after completing the same cleanup described in option 1 and removing all of the main existing facilities; and 3) divest Eyehill Creek immediately along with all liability, cleanup and reclamation obligations or enter into a partnering/joint venture arrangement with a third party to exploit the field. While PCR engaged in this internal priority setting, IFP had little to no involvement Eyehill Creek.

[37] In February 2000, the Alberta Energy and Utilities Board (the "AEUB") approved PCR's application for a SAGD operation at Christina Lake, a project with an estimated 3 billion barrels of OOIP. Mr. Gittins testified the approval set the wheels in motion to develop Christina Lake and required immediate testing of various SAGD well designs. PCR's Senlac property, already in existence, became the SAGD testing ground for Christina Lake. By August 2000, PCR decided it was no longer interested in the thermal potential at Eyehill Creek.

[38] In April 2000, PCR's lease with respect to petroleum and natural gas rights in the west half of section 20-38-1 W4M (the "West 1/2 of section 20") expired. By letter dated May 25,

2000, Alberta Resource Development notified PCR of the expiry of the lease. The letter advised that the AEUB would be in touch regarding the 29 shut-in wells remaining on the lands.

[39] PCR belatedly applied to continue the lease on the West ½ of section 20. By letter dated July 11, 2000, the Crown rejected PCR's late application for continuation. In June 2000, the AEUB issued 29 notices to PCR, one for each non-producing well, requiring PCR to prove its right to produce from the wells within 30 days, failing which PCR would have to abandon the wells. PCR did not forward these notices to IFP in spite of IFP's ownership of a working interest in the lands. After the lease expiry and subsequent AEUB notices, Mr. Sinclair, PCR's senior landman, was "given the property full time" and told "to get the ship righted."

[40] The West ½ of section 20 was offered for tender at a Crown land sale held in November 2000. PCR tried to repurchase the lease but was outbid by Wiser who offered in excess of $1 million; PCR had bid only $1800. Needless to say, the Crown accepted Wiser's bid. The AEUB granted a variety of extensions to the deadline for commencing work on abandonment of the wells on the West ½ of section 20 until Wiser had time to abandon some wells and commence production on others.

[41] Meanwhile, on August 31, 2000, Alberta Resource Development issued further notices to PCR pursuant to section 18(8) of the *Petroleum and Natural Gas Tenure Regulation*, Alta Reg 263/97 for parts of sections 16, 20, and 28, informing PCR that it had one year from the date of the notices to provide evidence satisfying the Department that the lands in question were capable of producing petroleum or natural gas in paying quantities. Otherwise the rights under the notices would expire and the leases would be amended accordingly. Mr. Sinclair explained the notices required PCR to have one economically producing well per spacing unit within the year.

[42] IFP was not given copies of these notices. Mr. Sinclair suggested in his direct testimony that IFP's working interest had not yet been triggered since there was no thermal development, thus IFP had no liability for the costs associated with bringing primary wells onto production to save the leases. In cross-examination, he admitted that everyone recognized IFP had an interest in the property. Nonetheless, he did not keep IFP informed, explaining that he thought it unnecessary given primary production had to be undertaken:

> ...if we didn't get the lands producing, we were going to have to go out there and abandon and when we abandoned all the wells all the leases would have died and the contracts along with them.

He added that if PCR was abandoning some wells it would abandon everything on the Eyehill Creek lands:

> "If we were out there doing that scale of abandonment we would have abandoned the lands on our fee title as well."

[43] After receipt of the s 18(8) notices, Mr. Sinclair consulted with the technical team. He learned PCR had been experimenting with about three wells per month in an attempt to produce economically, but couldn't find a way to make it work. Laureen Little testified that one well on section 28 was started in May, but was shut in one month later because the value of the flared gas was exceeding the value of the produced oil. Another well in section 28 and several wells in

section 29 were very gassy and fluid levels were unreliable. PCR also produced from seven vertical wells in section 21. These wells were originally drilled pre-1990 and were relatively good wells. Yet, oil prices were about $9/bbl while operating costs were $8/bbl, making primary production a negligibly profitable enterprise.

[44] Mr. Sinclair testified that while it is sometimes possible to obtain a lease continuation with little more than a project proposal, PCR was not in a position to present a thermal project to the Crown at that time. He explained:

> In the case of Eyehill Creek we did not have that passive management support at this point to go forward. For several reasons internally they looked at this facility -- this property as 10,000 barrels a day on average and it was just deemed to be too small to compete for the limited technical resources we had in house and the limited capital we had in house, so to go to the Crown and cobble together a plan to do thermal there when you believed it wasn't going to happen would be unethical in my opinion.

[45] Faced with these abandonment liabilities, leases that were about to expire if production was not planned (including on section 16) and low prices for heavy oil, PCR determined that developing Eyehill Creek no longer fit its business model. Given Wiser's bid for the West ½ of section 20, PCR concluded it might be interested in additional lands in the area. PCR and Wiser began negotiating with respect to Wiser's acquisition of PCR's Eyehill Creek assets in exchange for Wiser's assumption of an abandonment liability estimated to be in the range of $10 to $15 million on the existing conventional wells.

[46] By early 2001, no EOR operations had been undertaken in the Eyehill Creek area. In February 2001, PCR gave IFP informal notice of the pending agreement with Wiser by giving Mr. Delamaide, IFP's general manager in Canada, a copy of the draft letter agreement which Mr. Delamaide showed to Mr. Saden. IFP did not raise any concerns about the proposed deal or complain that it permitted primary production or new wells; nor did IFP suggest that a counteroffer or complaint should be made on its behalf.

[47] In March 2001, PCR and Wiser executed a letter agreement (the "Letter Agreement"), setting out the parties' intentions to give Wiser the right to earn PCR's working interests in Eyehill Creek in exchange for dealing with the 222 pre-existing wells on the lands, by abandoning or reclaiming wells, re-working or placing shut-in wells on production, or converting wells to injector wells. Wiser was also given the opportunity to drill and abandon or produce new wells on the lands. The Letter Agreement stated PCR was acting on behalf of all the working interest owners, including IFP.

[48] If Wiser did not complete the program in accordance with the proposed Abandonment, Reclamation and Option Agreement ("ARO"), it would earn no interest whatsoever in the assets. In the interim, it would act as PCR's operator. Ms. Little testified it was an unusual farmout agreement. Normally in a farmout arrangement the other company drills wells to earn land, but in this case the land would be earned through abandoning the wells.

[49] On April 19, 2001, pursuant to Clause 2401B of the 1990 CAPL Operating Procedure, PCR sent IFP a Right of First Refusal ("ROFR") Notice. On May 4, 2001, Mr. Sinclair, on

behalf of Glenn Booth at Wiser, sent a letter to Mr. Delamaide seeking clarification of IFP's interest. As Mr. Sinclair put it in his testimony: "We wanted to understand that we were on -- singing from the same song sheet as to what their interest was."

[50] The letter highlights the parties' uncertainty about the nature of the interest transferred by the AEA and the JOA, even at this early stage:

> ... Due to the inconsistencies between the Asset Exchange Agreement and the Joint Operating Agreement as to the nature of the interest acquired by IFP pursuant to such agreements, Wiser hereby seeks confirmation from IFP that its interest in the Thermal Lands is limited to petroleum substances produced by means of thermal or enhanced recovery schemes or mechanisms and operations in relation thereto.

[51] Mr. Sinclair, on Wiser's behalf, sought IFP's acknowledgment and agreement regarding its limited interest:

> By executing this letter agreement, IFP acknowledges and agrees that pursuant to the Asset Exchange Agreement and the Joint Operating Agreement it only acquired the right to 20% of PCR's interest in the Lands and operations thereon respecting the exploration of petroleum substances through thermal or enhanced recovery operations or schemes. No thermal or enhanced recovery operations or schemes have been conducted with respect to the Lands from the effective date of the Asset Exchange Agreement and the Joint Operating Agreement to the current date and IFP acknowledges and agrees that the operations to be conducted by Wiser pursuant to the ARO Agreement do not constitute thermal or enhanced recovery operations and IFP has no right to participate in the operations or to receive information or any benefits arising from such operations. ...

[52] On May 9, 2001, Mr. Verbraeken wrote to PCR waiving IFP's ROFR, but refusing to consent to the disposition to Wiser on the basis Wiser had no technical capability or intent to pursue thermal or other enhanced recovery methods. His letter made no mention of Mr. Sinclair's May 4 letter.

[53] On May 18, 2001, in spite of IFP's refusal to consent, PCR and Wiser entered into the formal ARO; PCR notified IFP of the ARO by letter dated July 18, 2001. In the ARO, PCR no longer purported to act on IFP's behalf. In fact, IFP's refusal to consent to the transaction was directly addressed in an indemnity agreement between PCR and Wiser.

[54] Wiser immediately commenced its program to abandon, re-enter and place on production, or convert the suspended wells on the Eyehill Creek lands, including sections 9, 16, 17, 19, 20, 21, 28, 29, and 30. Robert Pankiw was responsible for assessing all the wellbores, abandoning those no longer capable of economic production and reactivating those with potential. By April 2002, Wiser had abandoned 72 non-productive suspended wells. It reactivated 42 existing wells resulting in 650 bbl/day of production and drilled 23 new wells (16 horizontal wells and 7 directional wells) adding a total of approximately 500 bbl/day oil production. Wiser was successful in continuing all the leases set for expiry. Mr. Pankiw testified that he was not asked to keep IFP informed of the steps taken in the Eyehill Creek lands.

[55] Mr. Delamaide and Mr. Booth met in late June 2001 on a without prejudice basis to discuss IFP's refusal of consent, Wiser's operations, etc. Mr. Booth expressed an interest in PCR's previously developed plans for thermal production and asked Mr. Delamaide to forward those to him. Mr. Delamaide could not specifically remember if he had done so, but he stated that he "had no reason not to send it."

[56] Canadian Forest acquired Wiser's interests in November 2004. It has continued to produce petroleum and natural gas from the Eyehill Creek lands. In carrying out operations, Wiser and Canadian Forest have used the surface facilities that were situated on the lands before the ARO was entered into and that Wiser was deemed to have earned under the ARO. None of Wiser's or Canadian Forest's operations has been in the nature of thermal or other enhanced recovery; both companies have produced oil from the Eyehill Creek reservoir using only primary production methods. Craig Seal confirmed that Canadian Forest, like Wiser, did not keep IFP informed of its operations, pending lease expiries, etc. on the understanding that IFP was not a working interest owner in primary operations. IFP's interests were not taken into consideration in making operational decisions.

[57] On June 13, 2002 IFP wrote to PCR seeking to resolve the Eyehill Creek matter. IFP claimed the farmout to Wiser was in breach of contract since IFP had refused consent to the transaction. PCR replied on July 31, 2002 stating it did not see any merit in IFP's claims and took the position IFP had been unreasonable in withholding its consent. In November 2002, IFP and Encana representatives met with little effect. The Statement of Claim was filed on March 4, 2003.

B. Key contractual provisions

[58] This case turns on the interpretation of the complex set of agreements between the parties. At the heart of this case is the nature of the working interest granted to IFP, in particular whether it was limited to thermal and other enhanced recovery only. A key liability issue is whether IFP acted reasonably when it refused to consent to the proposed transaction between PCR and Wiser. Not surprisingly, the parties present very different interpretations of the key provisions. Accordingly, I will set out in the sections below the relevant provisions of the agreements and their schedules and address some of the parties' preliminary contractual arguments. All bold emphasis in quotations from the agreements is mine.

1. Asset Exchange Agreement

[59] The AEA is dated October 26, 1998 and identifies an Adjustment Date of July 1, 1998. The purpose of the AEA was to redefine the relationship between PCR and IFP away from a royalty regime towards working interest ownership and joint operations. The preamble states in part:

> AND WHEREAS following Closing IFP and PCR **shall each own working interests in and to the PCR Lands**, which shall be operated by PCR for and on behalf of PCR and IFP, **all subject to and in accordance with the terms and conditions of the Joint Operating Agreements** described in section 2.9 hereof.

[60] The preamble sets out the parties' intention that PCR would carry out operations for itself and for IFP. It also indicates that the terms and conditions of the JOA inform the understanding and interpretation of the working interests granted in the AEA.

[61] The "Definitions" clause identifies the assets being exchanged. The "PCR Assets" include the "PCR Eyehill Creek Assets", which are defined as follows:

> (t) **"PCR Eyehill Creek Assets" means an undivided interest equal to 20% of the working interest of PCR**, as and at the date hereof and as more particularly described in Exhibit 2 of Schedule "B-4" hereof, in and to:
>
> (i) the **PCR Eyehill Creek Petroleum and Natural Gas Rights**; and
>
> (ii) the **PCR Eyehill Creek Miscellaneous Interests**;

[62] The PCR Eyehill Creek Petroleum and Natural Gas Rights are set out in the List of Lands in Exhibit 2 of Schedule B-4, while the PCR Eyehill Creek Miscellaneous interests are defined as follows:

> (w) **"PCR Eyehill Creek Miscellaneous Interests"** means, subject to any and all limitations and exclusions provided for in this definition, **all property, assets, interests and rights pertaining to the PCR Eyehill Creek Petroleum and Natural Gas Rights**, but only to the extent that such property, assets, interests and rights pertain to the PCR Eyehill Creek Petroleum and Natural Gas Rights, including without limitation any and all of the following:
>
> (i) **contracts and agreements** relating to the PCR Eyehill Creek Petroleum and Natural Gas Rights, including without limitation gas purchase contracts, processing agreements, transportation agreements and agreements for the construction, ownership and operation of facilities;
>
> (ii) **fee simple rights to, and rights to enter upon, use or occupy, the surface of any lands** which are or may be used to gain access to or otherwise use the PCR Eyehill Creek Petroleum and Natural Gas Rights; and
>
> (iii) **all records, books, documents, licences, reports and data** which relate to the PCR Eyehill Creek Petroleum and Natural Gas Rights, including any of the foregoing that pertain to seismic, geological or geophysical matters;

[63] Article 1.5 of the AEA identifies a number of Schedules appended to the AEA, including Schedule B-4 PCR Assets Eyehill Creek Area and Schedule F (JOA). Schedule B-4 includes four exhibits: Exhibit 1 Land Plan, Exhibit 2 List of Lands, Exhibit 3 List of Existing Contracts, and Exhibit 4 Type Log: Base of Mannville Group of Cretaceous Age.

[64] The JOA also attaches several schedules and exhibits: Schedules A1 & A2 Lists of Lands, Schedule B Operating Procedure, Schedule C Assignment Procedure, Exhibit B PASC Accounting Procedure and Exhibit C Type Log: Base of Mannville Group of Cretaceous Age. Exhibit 2 to Schedule B-4 "List of Lands" of the AEA contains the same list of lands as Schedules A1 and A2 "List of Lands" in the JOA.

[65] Article 1.5 incorporates the various schedules into the AEA, but grants the AEA predominance in the event of a conflict between any terms or conditions:

> Such schedules are **incorporated herein by reference as though contained in the body hereof. Wherever any term or condition of such schedules conflicts** or is at variance with any term or condition in the body of this Agreement, **such term or condition in the body of this Agreement shall prevail.**

[66] Thus the JOA, as Schedule F to the AEA, is incorporated by reference and forms part of the AEA.

[67] Article 2.1 identifies the nature of the purchase and sale transaction. It states:

> PCR hereby agrees to sell, assign, transfer, convey and set over to IFP, and **IFP hereby agrees to purchase from PCR, all of the right, title, estate and interest of PCR** (whether absolute or contingent, legal or beneficial) **in and to the PCR Assets, ...all subject to and in accordance with the terms of this Agreement.**

[68] As will be discussed in more detail below, there is uncertainty whether the "right, title, estate and interest" purchased by IFP from PCR was limited to thermal and other enhanced recovery working interests or whether IFP received something more.

[69] Article 2.4 grants IFP a right to obtain title documents from PCR reflecting its interests in the Eyehill Creek Lands:

> **Within a reasonable time following the written request of IFP, PCR shall deliver to IFP copies of the PCR Title Documents** and any other agreements and documents to which the PCR Assets are subject and copies of contracts, agreements, records, books, documents, licences, reports and data comprising PCR Miscellaneous Interests which are now in the possession of PCR or of which it gains possession prior to Closing.

[70] This clause grants IFP the legal right to request title documents from PCR consistent with its ownership position in the Eyehill Creek lands.

[71] Article 2.9(a) provides that PCR and IFP at Closing shall execute Joint Operating Agreements as Schedules; as already mentioned, Schedule F contains the JOA for Eyehill Creek.

[72] Article 2.9(c) was expressly negotiated between the parties and addresses the possibility that IFP will need to call upon external investors to finance its share of expenses for the development of Eyehill Creek:

> (c) **PCR acknowledges that IFP may have to call upon external investors in an effort to secure the funding necessary to allow IFP to contribute its proportionate share of certain costs and expenses to be incurred for the joint account** pursuant to the terms of the joint operating agreements referred to in subclause 2.9(a) hereof. The parties agree, **should IFP be unable to secure from such external investors all or part of the funding required to contribute IFP's proportionate share of the costs and expenses in respect of a given operation,**

> **to negotiate in good faith in an effort to agree on a means by which IFP's failure to secure such funding may be addressed** (which means, for example, may include the carrying by PCR of IFP's proportionate share of such costs and expenses, a proportionate reduction of IFP's working interest in the appropriate portions of the PCR Lands, or the conversion of IFP's working interest in the appropriate portions of the PCR Lands to a net profits interest or some other form of interest).

[73] Articles 2.9(d) provides for the removal of 2.9(c) from the AEA upon execution of the JOA:

> (d) **Upon the execution of the joint operating agreements** referred to in subclause 2.9(a) hereof, **subclause 2.9(c) hereof shall be terminated** and shall be of no further force or effect, and **the relationship of the parties with respect to the PCR Lands shall be governed solely by** the terms and provisions of said **joint operating agreements**.

[74] The Defendants argue article 2.9(d) means the AEA has no further effect once the JOA is executed. They argue that once conveyance has occurred PCR and IFP agreed to have their entire relationship governed by the JOA.

[75] The Plaintiff disputes this characterization. It states article 2.9(c) is a specific provision dealing with the possibility that IFP may have to call upon external investors. The Eyehill Creek JOA includes at Clause 9(c) a provision corresponding to and replacing article 2.9(c) of the AEA. It is identical to article 2.9(c), aside from some additional information at the end of the clause. It is reproduced below in its entirety for comparative purposes:

> 9(c) **PCR acknowledges that IFP may have to call upon external investors in an effort to secure the funding necessary to allow IFP to contribute its proportionate share of certain costs and expenses to be incurred for the joint account** pursuant to the terms of this Agreement. The parties agree, **should IFP be unable to secure from such external investors all or part of the funding required to contribute IFP's proportionate share of the costs and expenses in respect of a given operation, to negotiate in good faith in an effort to agree on a means by which IFP's failure to secure such funding may be addressed** (which means, for example, may include the carrying by PCR of IFP's proportionate share of such costs and expenses, a proportionate reduction of IFP's working interest in the appropriate portions of the Joint Lands, or the conversion of IFP's working interest in the appropriate portions of the Joint Lands to a net profits interest or some other form of interest); **provided, however, that nothing in this subclause shall obligate PCR to agree to any such means in any particular circumstance, and further provided that should the parties fail to reach such agreement, their relationship shall continue to be governed by clauses (a) and/or (b) as applicable, of this Clause 9.**

[76] I do not accept the Defendants' submission that Article 2.9(d) of the AEA results in the termination of the AEA such that the parties' entire relationship is governed solely by the JOA.

Article 2.9(b) clearly states that the execution and delivery of the JOA in no way affects any representations, warranties, covenants or indemnities set out in the AEA:

> (b) Except as provided in subclause 2(d), but otherwise notwithstanding anything to the contrary in this Agreement, **the execution and delivery of such joint operating agreements in no way affects any representations, warranties, covenants or indemnities set out in this Agreement.**

[77] The AEA contains a variety of representations, warranties, covenants and indemnities that are not contained in the JOA. Furthermore, Article 1.5, referenced above, states the schedules form part of the AEA, not replace it.

[78] As the Plaintiff argues, the AEA and JOA were signed contemporaneously; the AEA is not a previous written agreement between the parties to be superseded by the JOA. Also, the AEA contemplates that it will co-exist with the JOA; it expressly provides that its terms shall prevail over any term of the JOA at variance with it. There would have been no need for such a provision if the AEA was being superseded.

[79] Furthermore, the AEA contains provisions that undoubtedly continue to apply after execution of the JOA. For example, article 2.10 of the AEA deals with the negotiation of freehold leases at some future time. I also note the Defendants themselves rely on provisions of the AEA, in spite of arguing it has been replaced by the JOA. In particular, they rely on the limitation of liability in article 7.9 and on article 1.6 providing for solicitor-client costs.

[80] I find article 2.9(d) simply provides that upon execution of the JOA the relationship of the parties with respect to financing the development of Eyehill Creek is no longer governed by article 2.9(c) but by the terms of the JOA itself.

[81] Article 3 of the AEA sets out representations and warranties. In Articles 3.1 and 3.2, IFP and PCR each acknowledge they are purchasing one another's interests and assets on an "as is, where is" basis, without representation and warranty and without reliance on any information provided to or on behalf of IFP by PCR or vice versa or by any third party. The Defendants note there are no representations or warranties with respect to any promise to commence a thermal project or to refrain from primary production.

[82] Articles 4 and 5 relate to Indemnities and Article 6 to Operating Adjustments. Article 7 contains some general provisions, including "Further Assurances" by each party.

[83] Article 7.3 contains an entire agreement clause:

> **The provisions contained in any and all documents and agreements collateral hereto shall at all times be read subject to the provisions of this Agreement and, in the event of conflict, the provisions of this Agreement shall prevail.** No amendments shall be made to this Agreement unless in writing, executed by the Parties. **This Agreement supersedes all other agreements, documents, writings, and verbal understandings among the Parties** relating to the subject matter hereof and **expresses the entire agreement of the Parties** with respect to the subject matter hereof.

[84] This article makes clear the parties intended to have the AEA and attached schedules govern their relationship, without reference to any prior agreement or verbal understandings. The AEA takes precedence over any collateral agreements in the event of conflict. This includes the MOU signed by the parties prior to the AEA that, as discussed above, contained slightly different language on key terms.

[85] Article 7.9 purports to limit liability of either party with respect to claims arising out of or in connection with the AEA to the value of assets set out in Article 2.7, namely $16 million:

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

[86] IFP claims more than $45 million in damages for breach of contract. I must determine whether this clause limits IFP's recovery, if it is successful in its claim. I will discuss this later in these reasons.

2. Joint Operating Agreement and Operating Procedure

[87] The JOA was executed on the same date as the AEA, October 26, 1998, and declares the same effective date of July 1, 1998. The Preamble sets out its purpose:

> WHEREAS, through an Asset Exchange Agreement made effective July 1, 1998, IFP acquired an interest in the Joint Lands,
>
> AND WHEREAS **the parties wish to provide for the exploration, operation, maintenance and development of the Joint Lands** and Title Documents as and from the Effective Date hereof;
>
> NOW THEREFORE THIS AGREEMENT WITNESSETH that, in consideration of the premises, of the mutual covenants herein contained and the benefits to be derived herefrom, the parties agree as follows: ...

[88] Schedule "B" of the JOA contains the Operating Procedure, defined as "the 1990 CAPL Operating Procedure attached to and forming part of this Agreement as Schedule 'B' and includes the Accounting Procedure attached as Exhibit 'B'."

[89] The JOA sets out other relevant definitions. First, it states the definitions contained in Clause 101 of the Operating Procedure apply to the JOA, its recitals and Schedules, unless the context requires otherwise or the term is otherwise defined. The Operating Procedure defines a number of relevant terms at Article 1 Interpretation:

(d) "Agreement" means the agreement to which this Operating Procedure is attached and made a part [in other words, the JOA]

...

(o) "for the joint account" means for the benefit, interest, ownership, risk, cost, expense and obligation of the parties in proportion to their respective working interests.

(p) "joint lands" means **those lands and interests therein which have been made subject hereto by the Agreement, or so much thereof which remains subject hereto** and, except where the context otherwise requires, shall include the petroleum substances within, upon or under those lands and interests, insofar as those lands and interests are subject to the title documents.

(q) "joint operation" means an operation conducted hereunder for the joint account.

(r) "Joint-Operator" means **a party having a working interest in the joint lands**, including the Operator if it has a working interest in the joint lands.

...

(u) "Operator" means **the party appointed by the Joint-Operators to conduct operations hereunder for the joint account**, except as provided in Clause 1004.

...

(ee) "title documents" means the documents of title by virtue of which the parties are entitled to drill for, win, take or remove petroleum substances underlying the joint lands, and all renewals, extensions or continuations thereof or further documents of title issued pursuant thereto.

(ff) "working interest" **means the percentage of undivided interest held by a party in a production facility or the joint lands**, or the respective zones, portions, parcels or parts thereof, **which percentage is as provided in the Agreement or is as modified subsequently pursuant to the provisions hereof.**

[90] The determination of IFP's working interest is at the heart of this claim.

[91] Clauses 4(a) and 4(b) of the JOA set out the structure of the parties' joint operations:

4(a) **All operations** conducted by the parties pursuant to this Agreement shall be **at each party's sole risk and expense** unless the contrary is specifically stated and always **in accordance with Clause 5 hereof.**

(b) All operations conducted by the parties pursuant to this Agreement shall be conducted in a lawful manner and in accordance with good oilfield practice.

[92] Clause 4(c) limits the working interests of the parties to thermal or other enhanced recovery schemes and projects:

> 4(c) It is specifically agreed and understood by the parties **that the working interests of the parties as described in Clause 5 of this Agreement relate exclusively to thermal or other enhanced recovery schemes and projects** which may be applicable in respect of the petroleum substances found within or under the Joint Lands and the Title Documents. Unless specifically agreed to in writing, **IFP will have no interest and will bear no cost and will derive no benefit from the recovery of petroleum substances by primary recovery methods from any of the rights otherwise described as part of the Joint Lands or the Title Documents.**

[93] The Defendants argue this is a very significant clause. They rely on it to argue that IFP's working interest was reduced from the provisions of the AEA which conveyed a percentage of all of PCR's interest in the Title Documents and the Joint Lands to a working interest relating exclusively to thermal or other enhanced recovery schemes. They submit IFP has no interest in any other production from the lands and the JOA applies only to production from thermal or other enhanced recovery methods.

[94] Clause 5, referenced in clause 4(c) above, sets out the parties' "participating interests":

> 5 **Except as otherwise provided in this Agreement**, as and from the Effective Date hereof, the **parties hereto shall bear all royalties, costs, risks and expenses paid or incurred under this Agreement and the Operating Procedure** and shall own the Title Documents, the Joint Lands, the petroleum substances and the operations to be carried out pursuant to this Agreement as follows:
>
> (a) That portion of the Joint Lands described in Schedule "A1":
>
> PCR – an undivided 80% working interest
>
> **IFP – an undivided 20% working interest**
>
> (b) That portion of the Joint Lands described in Schedule "A2":
>
> PCR – as described in Schedule "A2"
>
> IFP – as described in Schedule "A2"
>
> (i) In any event and at all times, unless otherwise specifically agreed in writing, **the working interests of the parties will be in the proportions PCR 80%, IFP 20%;**

[95] Clause 5(c) of the JOA addresses the ownership of existing facilities:

> 5(c) For greater clarity, there exist, in conjunction with the Joint Lands, numerous wells, flowlines, processing facilities and other similar and related

> surface and underground installations which have been or are being used in the primary production of petroleum substances and which are owned, at least partially, by PCR. The parties do not intend that IFP will, pursuant to this Agreement, acquire any interest in such wells, flowlines, facilities or installations. Unless otherwise specifically agreed in writing, the only circumstance in which IFP will come into possession of a proportionate 20% working interest share in any of the aforementioned wells, flowlines, facilities or installations is in the event such wells, flowlines, facilities, or installations are included within the definition of a thermal or other enhanced recovery project. At such time as the parties agree to the inclusion of any such well, flowline, facility or installation in a thermal or other enhanced recovery scheme or project, IFP will forthwith become the owner of a proportionate 20% working interest in any such well, flowline, facility or installation without further consideration paid by IFP to PCR. In such circumstance, IFP will assume its proportionate share of all future costs, liabilities and benefits derived from or associated with its ownership of such well, flowline, facility or installation. Any interest so acquired will become subject to the Operating Procedure without further action by the parties.

[96] The Defendants argue that by virtue of clauses 4 and 5 of the JOA, IFP's working interest (and the only interest for which IFP could direct or control operations pursuant to the Title Documents) was 20% of the right to thermal or other enhanced production from the joint lands. The Defendants submit primary production rights are reserved to PCR and were expressly contemplated to be for PCR's sole benefit. The Defendants argue the combined effect of clauses 4 and 5 is that IFP has no financial or operational rights or responsibilities for either primary operations or abandonment liabilities.

[97] I find that IFP's working interest pursuant to these agreements has always been limited to thermal and other enhanced recovery methods. I find the AEA did not grant broad rights that were subsequently reduced or modified by the JOA, as assumed by both the Plaintiff and the Defendants. The AEA does not define the term working interest. The Preamble to the AEA states, however, that the ownership of working interests is subject to and in accordance with the terms and conditions of the JOA. Furthermore, the JOA is incorporated by reference into the AEA as though it were contained in the body of the AEA. As such, the definition of working interest in the JOA is incorporated by reference into the AEA.

[98] Turning to the JOA, it adopts the definition of working interest set out in the Operating Procedure: "... the percentage of undivided interest held by a party in a production facility on the joint lands, ... which percentage is as provided in the Agreement..." The JOA then provides at Clause 4(c) that the parties' 80% and 20% working interests relate to thermal and enhanced recovery operations only.

[99] The AEA and JOA are contemporaneous documents. Article 1.5 of the AEA incorporates the Schedules and makes them part of the body of the AEA. This is not a case of inconsistency between the terms and conditions of the AEA and the JOA; rather, the AEA lacks a definition that the JOA and Operating Procedure provide. I conclude IFP's working interests under these Agreements is in respect of thermal and other enhanced recovery operations only.

[100] Relying upon these above-described provisions of the JOA, the Defendants further argue that since the ARO with Wiser did not contemplate thermal or other enhanced recovery, neither the ROFR provisions nor the consent requirement was triggered by the ARO. I reject this argument for reasons set forth later in this judgment.

[101] Returning to the JOA, clause 6 provides that PCR will hold IFP's interest in trust:

> PCR has agreed **to hold the participating interest stated in Clause 5**, covering the Joint Lands in Schedule "A1" and Schedule "A2", **in trust, for IFP** subject always to the terms and conditions of the Agreement.

[102] Clause 7 provides in the event of a conflict between the JOA and the Operating Procedure appended to it, the JOA is to prevail:

> Wherever there is a **conflict between this Agreement and the Operating Procedure, the terms and provisions of this Agreement shall prevail.** ...

[103] Clause 107 of the Operating Procedure is similar, granting precedence to the JOA over the Operating Procedure:

> If any provision contained in the Agreement conflicts with a provision herein, **the provision in the Agreement shall prevail** ...

[104] Clause 8 of the JOA appoints PCR as the initial Operator to conduct operations on the Joint Lands for the parties. The Defendants argue that nothing in the JOA or the Operating Procedure prohibits PCR from engaging a contract operator such as Wiser or from transferring operatorship, so long as IFP's rights pursuant to the JOA are respected. Likewise, they argue nothing in the JOA prohibits IFP from assuming the operatorship of the Joint Lands by way of independent operations. The Plaintiff agrees PCR is entitled to engage an Operator, but states that such engagement is subject to its own right of first refusal or consent.

[105] Clause 9 of the JOA sets out the application of the Operating Procedure. It applies to all operations conducted in respect of the exploration, development and maintenance of the Joint Lands for the production of petroleum substances. Subclauses 9(b) and 9(c) modify Article 10 of the Operating Procedure, which relates to Independent Operations.

[106] In the normal course, the Operating Procedure provides at Article 1002 that the parties will consult one another:

> (a) The **parties normally shall consult with respect to decisions to be made for the exploration, development and operation of the joint lands.** Whether or not such consultation has occurred or has been requested, a party may at any time become a proposing party and give to the other parties an operation notice for an operation on or with respect to the joint lands ...

At no time did IFP become a proposing party for thermal or enhanced recovery exploration, development and operation in the joint lands. Subclauses 1002(b) through 1002(e) of the Operating Procedure set out the details of how independent operations are to be conducted, including timelines, penalty clauses, etc.

[107] Clause 9(b) of the JOA acknowledges the potential inapplicability of the Independent Operations provision for secondary or thermal projects and suggests the parties will negotiate in good faith to resolve non-participation or suffer a 400% penalty:

> Notwithstanding the provisions of Article X of the Operating Procedure, **the parties acknowledge and agree that the provisions of such Article X may not be appropriate** to apply to a situation where there is a non-participating party **with respect to a secondary or tertiary recovery project on the Joint Lands.** The parties agree that prior to or upon such situation arising, **they will negotiate in good faith in an effort to agree upon an appropriate means of handling such non-participation, and that failing such agreement the non-participating party shall be subjected to a 400% production penalty** (calculated in accordance with clause 1007 of the Operating Procedure) with respect to all production from all Joint Lands which are exploited by or as a result of the applicable independent operation.

[108] Clause 9(c) of the JOA, as discussed earlier in these reasons, addresses IFP's potential need to call on outside investment to finance a project. In argument, the Defendants placed great emphasis on this clause and on IFP's contractual right to proceed with independent operations. They submit IFP had, at all material times, the right to propose independent operations and failing concurrence by the then Operator, to proceed with those proposed operations on its own at a very significant penalty to PCR or its successors. When combined with the right to enter the lands as a joint owner, IFP had all of the rights it needed to advance a thermal project even if PCR or its successors chose not to do so.

[109] Clause 10 of the JOA deals with the assignment of interests. Clause 10(b) provides that PCR must inform IFP of any intention to dispose of its interest and must include IFP's interests in any such disposition, if possible:

> 10(b) **In the event PCR proposes to sell, assign or otherwise dispose of any of its interest** of PCR in and to the Joint Lands, **PCR shall inform IFP and, if so requested by IFP, shall use all commercially reasonable best efforts to have IFP's interest in and to the Joint Lands included in any disposition** to such third party; provided, however, that nothing in this clause shall obligate PCR to accept anything other than the best offer (in the sole discretion of PCR) for any interest of PCR in and to the Joint Lands.

[110] Article 24 of the Operating Procedure addresses the disposition of interests and grants a right of first refusal prior to a proposed disposition by one party, or alternatively, imposes a consent requirement:

> 2401 RIGHT TO ASSIGN, SELL OR DISPOSE – Other than as required and allowed one party to another elsewhere in this Operating Procedure and subject to Clause 2402 [not applicable here], **a party shall not dispose of any of its working interest,** whether by assignment, sale, trade, lease, sublease, farmout or otherwise, **without first complying with the provision of ALTERNATE B below**...

[111] Alternate B requires the party wishing to make the disposition (the "disposing party") to advise the other party (the "offeree") of its intention. The disposing party must include a description of the working interest to be disposed, the identity of the proposed assignee, the price or other consideration, the proposed effective date, etc. The offeree must respond within a stipulated time period whether it elects to purchase the working interest on the proposed terms. If the working interest is not purchased by the offeree, the disposing party requires the offeree's consent to proceed with the transaction:

> 2401B(e) In the event that the working interest described in the disposition notice is not disposed of to one or more of the offerees pursuant to the preceding Subclause, **the disposition to the proposed assignee shall be subject to the consent of the offerees. Such consent shall not be unreasonably withheld, and it shall be reasonable for an offeree to withhold its consent to the disposition if it reasonably believes that the disposition would be likely to have a material adverse effect on it, its working interest or operations to be conducted** hereunder, including, without limiting the generality of all or any part of the foregoing, a reasonable belief that the proposed assignee does not have the financial capability to meet prospective obligations arising out of this Operating Procedure. ...

[112] Clause 2401B(e) is at the core of this case. The Defendants argue IFP unreasonably withheld its consent to the disposition of PCR's working interest to Wiser. IFP claims its withholding of consent was reasonable. I will address this determinative issue later in these reasons.

[113] Clause 13 of the JOA is the termination provision:

> This Agreement shall terminate on that date which is the later of the date **when no portion of the Joint Lands are owned jointly by any of the parties** ...

[114] The Operating Procedure contains a comparable provision at Article 29, setting out the Term of the Operating Procedure:

> 2901 TO CONTINUE DURING ANY JOINT OWNERSHIP – Subject to Clause 1803, **this Operating Procedure shall terminate when no portion of the joint lands and no production facility is owned jointly by two or more parties** ...

[115] The Defendants argue the termination provision in the Operating Procedure is different from the termination provision contained in the JOA because it provides for termination when no portion of the Joint Lands and no production facility are owned "**jointly by two or more** parties", whereas the JOA provides for termination when no portion of the Joint Lands "are owned **jointly by any** of the parties." The Defendants submit the JOA continues so long as **any** party holds **any** interest in the Joint Lands. As such, they argue the JOA continues to bind the working interests of the parties (and therefore their successors, including Wiser and Canadian Forest) for so long as IFP continues to hold its interest even in the face of a disposition by PCR.

[116] I reject this argument. I understand the JOA to say the same thing as the Operating Procedure; the JOA terminates when "no portion of the Joint Lands are owned **jointly by any** of

the parties." The Operating Procedure is more explicit in saying that no portion of the Joint Lands is owned "**jointly by two** or more parties; "two or more" is the very essence of the meaning of the word jointly. The Operating Procedure, like the JOA, terminates when no portion of the joint lands is jointly owned.

[117] The JOA defines "party" to mean a person "that is bound by the terms of this Agreement". The question is whether Wiser, now Canadian Forest, is bound by the terms of the JOA. IFP admits that someone who properly became novated into the JOA would become a party to the Agreement, but that Wiser, and later Canadian Forest, was not properly novated. The Plaintiff argues that a person to whom one of the parties assigned its interests in the absence of consent and in breach of clause 2401B(e) cannot become a party to the JOA. Consequently, the Plaintiff argues that because its consent was never granted, Wiser did not become a party to the JOA and it is terminated.

[118] The Plaintiff also relies on the CAPL 1993 Assignment Procedure attached as Schedule C to the JOA. It clearly states an assignment becomes effective against a "Third Party" (in this case, IFP) if "all prohibitions, limitations or conditions (such as ... a requirement for prior consent from Third Party) applying to the Assigned Interest have been complied with and satisfied pursuant to the Agreement, or waived by the Third Party..." Only then does the party acquiring the interest become a party to the JOA and the Operating Procedure.

[119] I will address these arguments at the same time I consider whether IFP was reasonable in withholding its consent.

[120] Clause 15 of the JOA includes a number of miscellaneous provisions including a "Supersedes" clause:

> (g) This Agreement supersedes all previous Agreements whether oral or written among the parties hereto as it relates to the Title Documents and the Joint Lands.

[121] In reliance on this clause, the Defendants again argue the JOA replaces the AEA and governs with respect to the nature of the working interest held by IFP in the Joint Lands. My conclusion is as set forth above. The AEA and the JOA are contemporaneous agreements. Neither supersedes the other; rather, the JOA is incorporated by reference into the body of the AEA. The parties' working interests for the purposes of these agreements are limited to thermal and other enhanced recovery only.

[122] Finally, Article 15 of the Operating Procedure describes the legal relationship of the parties as tenants in common:

> 1501 **The rights, duties, obligations and liabilities of the parties hereunder shall be separate and not joint or collective**, nor joint and several, it being the express purpose and intention of the parties that **their interests in the joint lands and in the wells, equipment, production facilities and property thereon held for the joint account shall be held as tenants in common,** subject to the modification of the incidents thereof that are provided in this Operating Procedure. **Nothing contained herein shall be construed as creating a**

> **partnership, joint venture or association of any kind or as imposing upon any party, any partnership duty, obligation or liability to any other party.**

[123] The Defendants argue this is a very important part of the Agreement in that it demonstrates that IFP and PCR were entitled to look to their own interests even if the pursuit of those interests might result in so-called "harm" to the other. Thus, they argue, PCR could pursue primary production without regard to "any partnership duty, obligation or liability" to IFP as long as PCR otherwise had the lawful right to engage in the activity. Likewise, PCR was not obligated to pursue a thermal or other enhanced recovery project and if it did so, IFP was not obligated to participate, just as PCR would not be obligated to participate in a project proposed by IFP. PCR submits the only thing the parties were obliged to do was to live by the terms of the AEA and the JOA.

3. Abandonment Reclamation and Option Agreement ("ARO") between PCR and Wiser

[124] The ARO between PCR and Wiser is also relevant in that it sets out the rights and interests PCR transferred to Wiser. In a letter from PCR to IFP entitled Right of First Refusal Notice, PCR summarized the rights being transferred as 100% of PCR's working interest:

> PanCanadian hereby gives notice pursuant to Clause 2401B of the 1990 CAPL Operating Procedure attached as Schedule B to the Agreement that it has executed a letter agreement dated March 7, 2001 ("Letter Agreement") with The Wiser Oil Company of Canada ("Farmee"), an Extension and Interim Operation Agreement dated March 31, 2001 with the Farmee ("Extension Agreement") and is in the process of finalizing a formal Abandonment, Reclamantion and Option Agreement with the Farmee ("ARO Agreement") which embodies the terms of the Letter Agreement and the Extension Agreement. **The transaction contemplated by the ARO Agreement is the disposition of 100% of PanCanadian's working interest in the Lands and the tangibles and facilities associated therewith** (collectively, the "Interests").

[125] It should be noted PCR sought to protect itself from any legal conclusion that might be drawn from the issuance of this letter:

> This Right of First Refusal Notice **does not constitute any acknowledgment by PanCanadian as to the nature or the applicability of your interest to the transactions** contemplated by the Letter Agreement, the Extension Agreement or ARO agreement.

V. Position of the Parties

[126] IFP claims PCR breached the contract between the parties when it farmed out its interest in Eyehill Creek to Wiser without IFP's consent. IFP seeks damages for the loss of opportunity to pursue thermal and other enhanced recovery at Eyehill Creek.

[127] The Defendants take the position that IFP acted unreasonably in withholding its consent and that PCR had every right to enter into the transaction with Wiser. In the alternative, the

Defendants argue that even if PCR breached its contract with IFP, IFP has suffered no damages. In the further alternative, PCR argues IFP failed to mitigate its damages.

[128] IFP advances an alternative claim against Canadian Forest for an accounting of the profits which Canadian Forest has realized from Eyehill Creek, on the basis the beneficial working interests in the property are held by IFP and Canadian Forest as co-tenants and that there is no contractual relationship between IFP and Canadian Forest.

[129] The Defendants take the position that Canadian Forest is entitled to the benefit of the JOA, pursuant to which IFP agreed it was not entitled to benefit from primary production at Eyehill Creek.

VI. Preliminary Issues

[130] Several issues, both evidentiary and legal, arose in argument after trial. I will address these now because their resolution has an impact on the evidence before the Court and informs the contractual interpretation.

A. Evidentiary issues

1. Exhibits for identification only

[131] The Defendants argue that the Plaintiff relies upon certain documents that were not admitted into evidence at trial as full exhibits, but were marked for identification only. The Defendants submit an exhibit marked for identification is not evidence and cannot be relied upon by the trier of fact for the truth of its contents in rendering a decision, unless and until the proposed evidence has been proven and there has been a ruling on its admissibility. The Defendants submit none of the exhibits marked for identification referenced in the Plaintiff's argument were ruled as admissible evidence at trial. As a result, they submit these exhibits for identification do not form part of the trial evidence and have no probative value.

[132] The Defendants provide no particular examples of exhibits for identification so relied upon by the Plaintiff. Furthermore, the Defendants concede that an exhibit for identification can be put to a witness in direct or cross-examination in responding to questioning.

[133] The Plaintiff submits the Defendants' complaint is without merit. Throughout trial, in having exhibits marked for identification, it was doing no more than acceding to the Defendants' request not to split its case. IFP's experts commented extensively on reports prepared by the Defendants' experts, some of whom the Defendants later elected not to call as witnesses. IFP's experts were also cross-examined with reference to those reports and with reference to other documents prepared by the Defendants' experts. IFP submits it is appropriate for an expert witness to comment on the reports of experts for the opposing party who have not testified. Such evidence is proper and can be considered by the court whether or not the authors of the other reports are called: ***Quantrill v Alcan-Colony Contracting Co Ltd*** (1978), 18 OR (2d) 333 (CA).

[134] I agree with the Plaintiff and find the Defendants' complaints on this ground to be without merit. They did not support their allegations with specific examples, making it very

difficult to ascertain the foundation of their complaint. Further, this Court is well aware of the rules of evidence and will rely only upon those documents properly put into evidence at trial.

2. Adverse inference – Severin Saden

[135] The Defendants ask this Court to draw an adverse inference against the Plaintiff for its failure to call as a witness, Severin Saden, head of IFP France's legal department and president of IFP Canada, since he was one of the key negotiators of the agreements at issue in this case. They argue his evidence was important because he likely has material evidence regarding the negotiation of the agreements and IFP's reasonable expectations. The Defendants submit the evidence of other witnesses suggests Mr. Saden saw IFP as more than a technology company and specifically negotiated for rights that would allow IFP to play an operational role in its projects, including Eyehill Creek. The Defendants argue Mr. Saden, as a citizen of France, is non-compellable by Canadian courts, but is within IFP's exclusive control as its former employee.

[136] IFP disputes the Defendants' claim that Mr. Saden is within its exclusive control. He is no longer employed by IFP, having retired in 2002. In ***Spartan Developments Ltd v Capital City Savings and Credit Union Limited***, 2004 ABCA 12 at para 9, the Court of Appeal affirmed the trial judge's refusal to draw an adverse inference against the defendant for failing to call two former employees "on the basis that there was no property in a witness and either party could have called the two former employees." Like the former employees in ***Spartan Developments***, Mr. Saden was not "uniquely available" to IFP; IFP did not have "exclusive control", or any control for that matter, over Mr. Saden.

[137] Furthermore, IFP has no evidentiary burden in relation to the inference the Defendants seek to draw. There is no evidence for which Mr. Saden's testimony was necessary. In ***Opron Construction Co v Alberta*** (1994), 151 AR 241 at para 768 (QB) Feehan J stated:

> The doctrine of adverse inference is in fact a very narrow one. It arises when someone has an evidentiary burden to establish an issue and does not call evidence in respect of that issue.

[138] IFP does not have any evidentiary burden in relation to the issue raised by the Defendants, i.e. whether Mr. Saden saw IFP as more than a technology company. This is not one of the issues in this lawsuit. IFP submits there is no issue on which Mr. Saden was the only or the best witness to testify. The Court has evidence respecting his role and how he saw IFP. Mr. Verbraeken testified that Mr. Saden was interested in getting involved in the oil and gas business in Canada, but not as an operator. It is not apparent why this is controversial.

[139] As stated by McIntyre J in ***Chapman Management & Consulting Services Ltd v Kernic Equipment Sales Ltd***, 2004 ABQB 870 at para 179: "[a]dverse inferences from failing to call witnesses are essentially matters of common sense." I agree with IFP that common sense indicates there was no reason for IFP to call Mr. Saden, nor is there a reason why this Court should draw the adverse inference the Defendants seek.

B. Legal issue

1. Did the farmout to Wiser trigger IFP's right of first refusal and the consent requirement?

[140] PCR argued for the first time in its written brief that the farm-out to Wiser did not trigger the "disposition of interests" requirement set out in Article 2401B of the Operating Procedure. The Defendants submit that since IFP's working interest is limited by the JOA to thermal or other enhanced recovery and the ARO with Wiser did not contemplate any thermal or other enhanced recovery operations, it did not trigger IFP's right of first refusal, nor did the transaction require IFP's consent.

[141] The Plaintiff rejects the Defendants' interpretation of Article 2401B, arguing it clearly applies to a disposition of working interests by farmout (or otherwise). IFP argues the right of first refusal and consent requirement apply to **any** disposition of **any** working interest, regardless of what the purchaser intends to do with the lands. For clarity, I reproduce the relevant portion of Clause 2401B(e):

> ...**a party** shall not dispose of **any of its working interest**, whether by assignment, sale, trade, lease, sublease, farmout or otherwise, **without first complying** with the provisions of Alternate B below ...

Alternate B then describes the notice procedure and the requirement for consent, which must not be unreasonably withheld.

[142] The JOA also contains an assignment clause stating the Assignment Procedure, attached as Schedule C, shall apply with respect to any assignment of an interest. The Assignment Procedure sets out a similar right of first refusal and consent requirement. The combination of these provisions suggests that **any** disposition of **any** of PCR's working interest triggers the assignment clause.

[143] The key then is to determine whether PCR's ARO with Wiser was a disposition of any of PCR's working interest in Eyehill Creek. The clause requires an assessment of PCR's working interest; the nature of IFP's working interest is irrelevant.

[144] The transaction with Wiser contemplated a disposition of 100% of PCR's working interest in the lands and the tangibles and facilities associated therewith. Clearly, the proposed disposition is a disposition of "any" of PCR's working interest and triggers the right of first refusal and consent requirement.

[145] For all of the above reasons, I find the assignment clause was triggered. IFP waived its right of first refusal. Mr. Delamaide explained IFP had no time in 30 days to find an alternate operations partner or to raise the necessary funds. Furthermore, exercising the right of first refusal would have required IFP to take on the numerous abandonment obligations it had contracted out of at the outset.

[146] Upon waiver of the ROFR, IFP's consent was required for the transaction but IFP did not consent. I must determine whether IFP's consent was unreasonably withheld.

VII. Core Issues

A. Did IFP act unreasonably when it withheld its consent to PCR's proposed disposition to Wiser?

1. Right of first refusal and consent

[147] PCR sent IFP a ROFR Notice on April 19, 2001, giving notice pursuant to Clause 2401B of the 1990 CAPL Operating Procedure that it had executed a letter agreement dated March 7, 2001 with Wiser as Farmee, and an Extension and Interim Operation Agreement dated March 31, 2001, and that it was in the process of finalizing a formal Abandonment, Reclamation and Option Agreement embodying the terms of the Letter Agreement and the Extension Agreement.

[148] The letter summarized the key terms of the agreements. It made clear the transaction contemplated disposition of 100% of PCR's working interest in the lands and associated tangibles and facilities. It required Wiser to deal with all 222 pre-existing wells on the lands by December 31, 2003, by abandoning them, completing them and placing them on production, or converting them to injector wells. In a further letter dated May 4, 2001, Mr. Sinclair clarified that Wiser's operations would be primary in nature.

[149] IFP responded by letter dated May 9, 2011 refusing to consent:

> With respect to your request for consent, we refer to the related clauses of Section 2401B paragraph [e] of the CAPL Operating Procedure, according to which it shall be reasonable for IFP to withhold consent to the disposition, **if the latter would be likely to have a material adverse effect on the working interest of IFP or its operations on the Eyehill Creek lands.**
>
> ...
>
> We understand that Wiser, upon the acquisition of the Eyehill Creek Lands, intends to develop such lands through primary methods of production only and not through thermal or enhanced methods. This is contrary to the understandings reached with PanCanadian at the time of the Asset Exchange Agreement. **Primary development of undeveloped portions of the Eyehill Creek Lands will effectively prevent or severely affect future thermal or enhanced recovery schemes on these lands and will thereby substantially reduce the value of IFP's interest in these lands.**
>
> Therefore, **IFP has determined that the potential sale by PanCanadian to Wiser of the Eyehill Creek Lands will have a material adverse effect on IFP's working interests and operations in such lands**, and is therefore not prepared at this time to consent to the disposal of PanCanadian's interest in Eyehill Creek lands to Wiser. IFP would be prepared to consider giving its consent if satisfactory agreements can be reached to compensate IFP for the subsequent reduced value of its working interests in the Eyehill Creek Lands, either through a purchase agreement of its interests, the granting of a royalty scheme or some other satisfactory arrangement.

[150] The letter makes clear IFP's belief that primary development of Eyehill Creek would harm its interest in future thermal or other enhanced recovery operations, thereby having a material adverse effect on its working interest. IFP submits it was reasonable to withhold consent in the circumstances.

2. General legal principles

[151] The parties identified no cases considering clause 2401B of the CAPL Operating Procedure, although they presented evidence through their respective land experts, Ian Clark and James O'Byrne, of industry custom and practice in the interpretation of the CAPL Operating Procedure. I have placed limited weight on this evidence; it is the role of the courts, not the role of experts, to interpret the parties' agreements.

[152] In general, the parties agreed on the basic legal principles applicable to this issue, relying primarily on case law regarding reasonable withholding of consent in the landlord-tenant context.

[153] The burden of proof is on the party asserting consent was unreasonably withheld: ***Sundance Investment Corporation Ltd v Richfield Properties Limited*** (1983), 41 AR 231 at para 23 (CA).

[154] The party whose consent is required is entitled to base its decision on its own interests alone: ***Community Drug Marts P & S Inc, Estate of v William Schwartz Construction Co Ltd***, 31 AR 466 at para 41, (QB), aff'd [1981] AJ No 537.

[155] Whether a person has acted reasonably in withholding consent depends on all the factual circumstances: ***Exxonmobil Canada Energy v Novagas Canada Ltd***, 2002 ABQB 455 at para 49. The question is not whether a reasonable person might have given consent, but whether a reasonable person could have withheld consent in the circumstances: ***1455202 Ontario Inc v Welbow Holdings Ltd***, [2003] OJ No 1785 at para 9 (ONSC) ("***Welbow***"). In ***Exxonmobil***, Park J reviewed the evidence on an objective basis to determine whether in the circumstances a reasonable person would have refused to consent to the assignment.

[156] A party must not refuse consent where such refusal is calculated to achieve a collateral purpose, or benefit, not contemplated by the original contract: ***Welbow*** at para 9.

[157] Proceeding with an assignment in the face of a reasonable refusal to consent is a clear breach of a negative covenant: ***Exxonmobil*** at para 51.

[158] The court should not defer to the party withholding consent, but must assess the reasons for withholding consent and consider whether a reasonable person in similar circumstances would have made the same decision. The court should consider the purpose of the consent clause and the meaning and benefit it was intended to confer.

[159] Mesbur J explained in ***Zellers Inc v Brad-Jay Investments Ltd***, [2002] OTC 795 at para 26 (Sup Ct):

> In considering whether the landlord's refusal to consent is unreasonable, **the court must first look at the covenant in the context of the lease, and ascertain**

> **the purpose of the covenant in that context.** The court should **look at all the circumstances of the case.** No rigid rules govern the types of reasons that the court may take into account when deciding the question of reasonableness. The test must always **have regard to the contractual matrix**, and the test should **encompass consideration of the surrounding circumstances, the commercial realities and the economic impact of the change of use** on the landlord within the context of a "reasonable person" standard. [Emphasis added, footnotes omitted.]

[160] In discussing a consent clause in a lease in ***Welbow***, Cullity J stated at para 9:

> ... The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the Tenant to assign and that of the Landlord to withhold consent. The Landlord is not entitled to require amendments to the terms of the lease that will provide it with more advantageous terms: ... - but, **as a general rule, it may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion**: ... A refusal will, however, be unreasonable if it was designed to achieve a collateral purpose, or benefit to the Landlord, that was wholly unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease: ... [Emphasis added.]

[161] Cullity J continued:

> The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including **the commercial realities of the marketplace and the economic impact of an assignment** on the Landlord. Decisions in other cases that consent was reasonably, or unreasonably, withheld are not precedents that will dictate the result in the case before the court: ...[Emphasis added.]

[162] Burnyeat J in ***Hayes Forest Services Limited (Re)***, 2009 BCSC 1169 at para 32 identified similar relevant factors:

> ...The determination will be dependent on such factors as the **commercial realities** of the marketplace**, the economic impact** of the assignment**, and the financial position** of the proposed assignee. [Emphasis added.]

[163] In the oil and gas context, Park J commented in ***Exxonmobil*** at para 54 on the purpose of a consent requirement:

> ...The reasons for including a consent requirement in the assignment was **to allow each party the opportunity of reasonably assessing any future contractual partners.** If a proposed assignee did not meet the criteria reasonably required by the other party, the assignment should not proceed. [Emphasis added.]

[164] In ***Exxonmobil***, the plaintiff owned a 56% interest in a gas plant and had delegated the management, operation and control of its interest to the defendant. Further, it had appointed the

defendant as its sole and exclusive agent with respect to its ownership interests. When the defendant sought to sell its entire interest to a third party, the plaintiff refused to consent until it received information regarding the purchaser's financial and operational ability to manage the plant. These facts can be contrasted, however, with the circumstances of IFP and PCR as tenants-in-common of distinct working interests.

[165] In ***Kaiser Francis Oil Co of Canada v Bearspaw Petroleum Ltd***, 1999 ABQB 128 Sullivan J also considered the purpose behind consent clauses. The various contracts between the parties stated an assignment of operatorship could take place only upon satisfaction of certain conditions, including "the consent of the other party 'first had and obtained.'" He suggested the purpose of the clause was to avoid unilateral replacement of an operator or partner at para 76:

> As it happened Kaiser did withhold its consent to the transfer of operatorship by using the restriction for the purpose for which it was originally designed. Such **restrictions on transfer are included deliberately as joint owners** recognize that either one of them could, **if an undesirable transfer took place, be unilaterally stuck in a relationship with an unpleasant and difficult partner.** It is included precisely **to prevent a unilateral replacement** of an operator or an operation partner and Kaiser was within its rights to withhold consent until it was satisfied that Bearspaw was, or was not as it turned out, an acceptable operator to them. [Emphasis added.]

[166] The nature of the exercise before this Court, therefore, involves examining all the circumstances, including the commercial realities of the marketplace, the status quo under the agreements, the economic impact of the assignment and all other relevant factors to determine whether IFP acted reasonably in withholding its consent to the disposition to Wiser.

3. Argument and Analysis

[167] IFP alleged in its pleadings it was reasonable to withhold consent to the proposed disposition to Wiser for the following reasons:

> The effect of the proposed disposition would be the loss or depletion of IFP's working interest in the Lands without any corresponding benefit to IFP;
>
> The intentions of Wiser were to develop the Eyehill Creek Reserves through primary methods only;
>
> Wiser did not have the technology, the expertise or the inclination to carry out PCR's Eyehill Creek Thermal Project, or to develop the Eyehill Creek Reserves through enhanced production; and
>
> The disposition would have a material adverse effect on IFP, on its working interests in Eyehill Creek lands and on secondary production.

[168] Throughout the trial and in argument, IFP expanded on these points arguing it was "readily apparent" the proposed farmout to Wiser would be harmful to IFP in a number of ways, "all of which were borne out by subsequent events."

[169] IFP submits that in considering all the circumstances, this Court should have regard to the commercial context in which the AEA and JOA were negotiated. IFP was interested in Eyehill Creek because of its SAGD potential and PCR's proposed SAGD development plans and entered into the agreements to pursue thermal and other enhanced recovery operations on these lands. By contrast, Wiser intended to conduct primary operations only. Thus, PCR proposed to transfer its interest to a company that, from IFP's perspective, had no experience or interest in thermal operations.

[170] IFP argues it was reasonable in withholding consent because on the simplest level, primary exploitation of the reservoir inevitably results in the "undepleted" area becoming depleted. Any oil produced by Wiser from "SAGD-able" areas would no longer be available to be produced under a SAGD project. I consider this an oversimplification. The evidence makes clear that primary production recovers between 7% - 10% of the OOIP in a reservoir, whereas thermal development achieves 60% or better recovery. The so-called depletion of the oil in the reservoir is a red herring; it is the other related impacts of primary production that cause concern.

[171] Aggressive primary production can be particularly damaging to a reservoir. In February 2000, Mr. Gittins noted in an internal PCR memo his concerns related to primary production in the undepleted area for future SAGD production: "...main concern is that we don't drill any sand production wells in the undepleted pay at the south end."

[172] In a follow-up email he explained that if sand production was required "it could prevent future SAGD development and we could wind up with a 10,000,000 bbl oil reserve write down in the future for the sake of a few hundred bbd/day of production." He also noted that "IFP also have a 20% WI in this area and my understanding is that they are only interested in thermal development." At trial, Mr. Gittins further explained his reasoning:

> Well, it – it leads on from the earlier concern, that it would – if the wells produced sand, it would impact the potential thermal project that we had planned. And – and IFP had an interest in that thermal project.

[173] Prior to the proposed ARO, PCR had provided IFP with information about wormholes and the challenges they presented in drilling horizontal wells. This information was contained in PCR's August 1998 preliminary proposal for Eyehill Creek. In other words, this information was available to IFP at the time it considered PCR's request for consent to the disposition to Wiser.

[174] Furthermore, IFP argued the commencement of a primary operation on the whole reservoir would cause severe practical problems for a minority partner with an interest in initiating a thermal operation. It argues it was not feasible for a SAGD operation to be undertaken in the same location, and at the same time, as a separate primary operation.

[175] IFP also argues that PCR, contrary to the joint intentions and expectations set out in the JOA, did not include anything in the ARO to protect IFP or to ensure Wiser would not harm a future thermal project. IFP submits neither Wiser nor Canadian Forest has ever paid attention to the impact of their operations on the thermal potential of the reservoir.

[176] IFP points to a letter dated May 4, 2001 from Mr. Sinclair sent at the request of Glen Booth, Wiser's Vice President Land, stating Wiser's limited interest in communicating or

working with IFP. The letter was in the form of a proposed letter agreement. It asked IFP to agree to a number of things, one of which was that "IFP has no right to receive information or any benefits arising from" the primary operations that Wiser intended to conduct.

[177] Mr. Delamaide stated in his testimony:

> ...it's really an ugly letter. In there, there are provisions, that say well, we are not going to give you access to any information. So basically they wanted to do whatever they want in the reservoir and they are not going to tell us what they are doing. It says, well, you don't have any working interest in the lands, how can we accept that?

[178] Finally, IFP submits the ARO purported to grant some of IFP's right and interests to Wiser. The initial Letter Agreement purported to be made by PCR on behalf of all working interest owners and entitled Wiser to earn 100% of the interest of all the Owners. IFP argues PCR purported to grant interests which it had previously granted to IFP. The final ARO, however, limited Wiser's interests to those held by PCR, thereby excluding IFP's interests.

[179] IFP submits that after Wiser earned PCR's interests pursuant to the ARO, none of the leases PCR transferred to Wiser contained any acknowledgment of, or reference to, IFP's interest – the very interests PCR had agreed to hold in trust for IFP. IFP argues the land records still do not show IFP's working interest in any of the lands. As such, Wiser and Canadian Forest have considered only their own interests when making decisions regarding surrenders in response to Crown notices. For all of the above reasons, IFP argues it was reasonable in withholding its consent to the ARO with Wiser.

[180] In making its argument, IFP submits it may rely on "any reason, if genuine, for refusal, whether or not earlier told" to the other party: ***Coopers & Lybrand Ltd v William Schwartz Construction Ltd***, [1981] AJ No 537 at para 9. It states the evidence of what subsequently transpired, including the impact of Wiser's eventual operations and whether PCR or Wiser gave any thought to the effect those actions might have on IFP's interests, is relevant in retrospect in judging whether or not IFP's concerns at the time were reasonable. IFP argues it may put forward information that was unavailable at the time but which supports its position; to this end, it has presented evidence it could not have known at the time consent was withheld.

[181] The Defendants submit that much of IFP's evidence in support of its argument that it was reasonable in withholding consent is inadmissible because it was not known to IFP at the time of the proposed disposition to Wiser. They state IFP cannot rely on information that would not have existed at the time it withheld its consent. They insist the reasonableness of the decision to withhold consent must be based on the facts available to IFP at the time consent was withheld.

[182] The Defendants also argue that by the very terms of the Operating Procedure IFP could rely only on information available to it at the time, since Clause 2401B requires consent to be granted or refused in a 30 day time period.

[183] PCR goes so far as to argue that a party can rely only on the reasons given at the time consent was withheld and cannot provide additional reasons, citing ***Welbow*** at para 9:

> In determining the reasonableness of a refusal to consent, **it is the information available to – and the reasons given by – the Landlord at the time of the refusal – and not any additional, or different, facts or reasons provided subsequently** to the court – that is material. .... [Emphasis added.]

[184] I reject this argument, finding the case relied upon in ***Welbow***, namely ***Bromley Park Garden Estates Ltd v Moss***, [1982] 2 All ER 890 (CA) should not be so broadly construed. Slade LJ in ***Bromley Park*** at 902 explained the court is not confined to the reasons expressly put forward at the time of refusal. While the reasons for refusal need not be stated at the time consent is withheld, Slade LJ found those reasons must have influenced the mind at the relevant time – the time when the other party is informed consent is being withheld.

[185] In ***Coopers & Lybrand***, the Court of Appeal held the party withholding consent can rely on any genuine reason, even if not expressed at the time of refusal, thereby suggesting it does not matter if the reason was expressed at the time consent was withheld. On the facts, however, the court found "the evidence shows that the principal reason, the proposed use, was raised from the start." This former statement accords with ***Bromley Park*** in suggesting that while not necessarily expressed, the reasons for refusal must have influenced the mind of the party withholding consent at the relevant time.

[186] I find IFP's references to after-acquired evidence have not introduced any new grounds for withholding consent. Rather, the after-acquired evidence and eventual manner in which Wiser produced the lands support IFP's initial rationale for withholding consent. I accept this evidence only where it does no more than support the belief held by IFP at the material time; that is, where it relates to IFP's stated position at the time consent was withheld.

[187] At trial, the parties presented expert evidence about wormholes and other potential negative effects of primary production upon future thermal production. I will deal with this expert evidence later in these reasons. IFP could not have known the information provided by these experts at the time it withheld its consent to the disposition to Wiser and I will not consider it for these purposes.

[188] The Defendants argue IFP failed to make sufficient inquiries about Wiser and failed to carry out the analysis necessary to support the reasonableness of its decision to refuse consent. They submit the minimal extent of IFP's notes in evidence do not support its claim of having a reasonable belief in the material adverse effects of the disposition. They put forward ***Exxonmobil, Re Hayes*** and ***Hayes Forest Services Ltd v Weyerhauser***, 2007 BCSC 722 as examples where the party withholding consent made detailed inquiries about the proposed transaction and carried out a careful analysis of the proposal to justify their decision.

[189] IFP counters this argument relying upon Mr. Delamaide's evidence:

> ...We had signed on with PanCanadian to do a SAGD project at Eyehill Creek and all of a sudden they decided to sell to a company, Wiser, which is going to do a primary project. This primary project is going to on a practical basis, render impossible any SAGD project on the lands. So we felt that it was obvious for us that we had to refuse our consent.

In later testimony, he stated: "I didn't need all the details to understand that it was bad for us."

[190] The Defendants also argue that IFP's belief it could have benefitted from a SAGD project at the time of its refusal to consent must be realistic from a technological and economic perspective. They submit IFP identified no information, then or now, related to the feasibility of a SAGD project on these lands. In essence, the Defendants submit that IFP's interests could not be materially affected since IFP had no interest in the primary production contemplated by the contract with Wiser. I find this argument denies the acknowledged impact primary operations have on the thermal potential of a reservoir.

[191] Most importantly, however, the Defendants submit the proposed disposition to Wiser must be compared to the status quo to assess the reasonableness of IFP's decision to withhold consent. They point to the annotation to ***Sundance*** by Professors M Litman and B Ziff (24 Alta LR (2d) 1 at 2-4):

> ...Our analysis of the cases suggests that a landlord may withhold his consent to prevent a detriment to the interests granted or reserved by him, but not to optimize the profit potential of the premises. ...the law strikes a balance between the landlord's legitimate interest in protecting himself and the tenant's legitimate interest in alienating his estate and extricating himself from an inconvenient, or perhaps intolerable, situation. **The status quo under the original lease serves as a benchmark against which to determine whether the subletting would be prejudicial to the landlord.** [Emphasis added.]

[192] The Defendants argue that if a party to an agreement will receive as much under the proposed disposition as it would have had under the original agreement then a refusal to consent must be unreasonable. They submit Wiser was doing no more than what PCR was entitled to do; the status quo was unchanged and IFP's justification for withholding consent was plainly untenable and unreasonable.

[193] I find comparison to the status quo to be a very important aspect of the analysis in this case, as is the commercial reality of the marketplace at the time. IFP understood when it entered its agreement with PCR that there were some primary wells drilled on the lands. It knew that these wells eventually would have to go on production or be abandoned. There is no dispute IFP wished to avoid any abandonment liabilities. PCR put some wells back on primary production in the first few years after signing the agreements, without objection from IFP.

[194] The agreements between the parties are unusual in that they create competing working interests. While IFP was granted rights and interests related to thermal and other enhanced recovery only, PCR retained the right to pursue primary production. The agreement neither prohibited PCR from undertaking primary production, nor obliged it to carry out thermal operations.

[195] The parties were not joint venture partners; they held their working interests as tenants-in-common. Expert land-man Ian Clark explained that oil and gas interests are bought and sold routinely, development plans change, companies and their staff change. It is clear from the evidence that PCR's focus shifted between the time it contracted with IFP and the time it entered the ARO with Wiser.

[196] In February 2000, PCR received approval for its SAGD project at Christina Lake, which became its corporate focus. At Eyehill Creek, PCR faced extensive abandonment liabilities along with Crown Notices to Produce. Furthermore, the economics for a SAGD project were poor at the time. As discussed in the factual background, PCR wished to divest itself of its interests in the Eyehill Creek property for a variety of internal reasons.

[197] It is equally clear that IFP was in no position to undertake a SAGD operation on its own. It had neither the operational know-how nor the financial backing to do so. It could not take advantage of the ROFR clause or initiate independent operations.

[198] I can appreciate why IFP believed the disposition to Wiser would be likely to have a material adverse effect on its working interest or future operations. The problem is that such belief must be objectively reasonable. IFP had the unilateral expectation that PCR would initiate a SAGD operation and would refrain from primary production, but the agreements provide no basis for this expectation. Furthermore, in the context of an industry mandating development rather than sitting on rights, an agreement in which each party could make decisions based on its own interests, and tenants-in-common ownership, I find it was unreasonable for IFP to object to the disposition to Wiser on the grounds Wiser would undertake something PCR was entitled to do and in fact was doing. It is not objectively reasonable to withhold consent and prohibit the alienation of PCR's interests on that basis.

4. What is the relevance of the reasonable expectations of the parties?

[199] IFP advances an alternate claim that PCR's action in entering into the ARO with Wiser constituted a breach of contract because it undermined the reasonable expectations of the parties at the time of contracting. IFP argues that a "contract should be performed in accordance with the reasonable expectations created by it": ***Mesa Operating Ltd Partnership v Amoco Canada Resources Ltd*** (1994), 149 AR 187 at para 19 (CA). IFP submits the reasonable expectations created by the agreements herein were to pursue thermal development at Eyehill Creek; it argues primary operations were not within the contemplation of either party. Mr. Delamaide captured IFP's position with the following comment in cross-examination: "We had been discussing about doing a thermal project together, in good faith. I never thought they would pull the rug from underneath our feet."

[200] In ***Mesa***, the dispute related to the interpretation and performance of a contract. The plaintiff argued that the defendant had to exercise its powers granted under the contract in good faith. Kerans JA declined to adjudicate the matter of good faith, noting at para 16 that a general obligation expressed in terms of good faith is not part of contract law in Canada. Instead, he found at para 19 that the contract created certain expectations between the parties about its meaning and about performance standards. Those expectations needed to be enforced because they were reasonable; they were shared by the parties and consistent with the express terms of the contract. The appellate court concluded a contract should be performed in accordance with the reasonable expectations created by it and the assessment of those expectations should include regard to the commercial context.

[201] The principle in ***Mesa*** has been summarized as follows by Nigel Bankes & Alicia Quesnel in "Recent Judicial Developments of Interest to Oil and Gas Lawyers" (2000) 38 Alta L Rev 294, at 357 n 263:

> [A] breach of good faith exists where, without reasonable justification, one party acts in relation to the contract in a manner which substantially nullifies the bargained objective or benefit contracted for, or causes significant harm to the other, contrary to the original purpose and expectation of the parties.

[202] Other cases have considered the concept of reasonable expectations in the performance of a contract. In ***Maritime Life Assurance Co v Regional Capital Properties Corp*** (1996), 190 AR 306 (Master), aff'd 200 AR 317 (QB), Master Funduk considered the plaintiff's reasonable expectations argument. The Master concluded *both* parties must hold the reasonable expectation. In support of this contention, he provided the following example at para 50:

> I expect my salary to be increased by 20%, not cut 5%, but it is unlikely to happen. The point is that the expectation of one party cannot create an obligation on another party. This submission is just a roundabout way of saying that A and B can enter into a contract which imposes an obligation on C because B wants it. No case law goes that far.

[203] He also relied upon ***Mesa*** for the proposition that a general good faith contractual obligation is not part of Alberta law.

[204] In ***National Courier Services Ltd v RHK Hydraulic Cylinder Services Inc***, 2005 ABQB 856, the defendant argued that the plaintiff owed it a contractual duty of good faith. Justice Topolniski found that Alberta law does not recognize a general duty of good faith between contracting parties, although such a duty can arise in contracts where the relationship mandates good faith dealings as in insurance matters and employment dismissals.

[205] Topolniski J stated, at para 29, relying upon *Mesa*, that a duty of good faith also arises where there is significant discretion on the part of one party:

> The issue in *Mesa* was whether liability could exist in the absence of bad motives. The Court of Appeal accepted that a **common law duty to perform a discretionary power in good faith is breached when a party acts in bad faith; that is, when a party acts in a manner that substantially nullifies the contractual objectives or causes significant harm to the other, contrary to the original purposes or expectations of the parties.** [Emphasis added.]

[206] Similarly, in ***Schluessel v Maier***, 2001 BCSC 60, rev'd in part on other grounds 2003 BCCA 405, Harvey J stated at para 129 that a general duty of good faith does not exist in contract law. At para 130, he built upon the "reasonable expectation" principle discussed in ***Mesa***:

> It is however possible to endorse a related and somewhat narrower proposition – namely, that **a party to contract may not act in relation to the contract in such**

> **a way as to nullify the bargained objective or benefit moving to the other party** under the contract. [Emphasis added.]

[207] Harvey J summarized, at para 130, "a party to a contract has a duty not to act in a manner that deprives another party to the contract of the bargained objective or benefit."

[208] A reasonable expectation, therefore, is an expectation held by both parties regarding the performance of obligations under the contract. One party's expectation cannot create an obligation on another party if that expectation is not shared. Reasonable expectations are rarely stated within a contract; rather, the reasonable expectations are an underlying principle of contractual performance in which each party performs in a manner consistent with the objectives, benefits and obligations of the contract.

[209] IFP argues that the doctrine of reasonable expectations applies here to refute some of PCR's claims regarding what it was entitled to do under the JOA, particularly PCR's entitlement to pursue primary development that could harm IFP's interest.

[210] PCR argues it is factually incorrect for IFP to claim it held a reasonable expectation that primary production would not be pursued at Eyehill Creek. PCR's legal counsel expressed PCR's position in a letter to IFP dated July 31, 2002:

> Your letter makes repeated references to the "spirit" of the "1998 Agreements" and the intent or reasonable expectation of the parties to develop the Eyehill Creek Lands using thermal recovery methods. Certainly at the time of entering into the 1998 Agreements, **the parties may have had intended to evaluate the thermal potential of the Eyehill Creek Lands and if they chose to undertake thermal operations,** may have expected to receive a substantial benefit. However, **we fail to see how this perceived intent is to be transformed into a unilateral obligation on the part of PanCanadian to thermally develop the lands regardless of the economics or its analysis of the prospect.** ... [Emphasis added.]

[211] According to ***Mesa***, the alleged reasonable expectations must be consistent with the express terms of the relevant agreements. Thus, assessing whether expectations are reasonable requires an examination of the written agreements. The commercial context can also inform the interpretation of whether expectations are reasonable.

[212] I reject IFP's argument that it had a reasonable expectation that PCR would not pursue primary production at Eyehill Creek. There is nothing in the agreements prohibiting primary production, as conceded by several IFP witnesses. If IFP wanted such a prohibition, it ought to have negotiated it as a term of the agreement. IFP has not identified any specific provision of the contract or industry practice that would indicate its expectations were reasonable. In the absence of express terms or shared expectations regarding primary production, IFP's argument on this ground must fail.

5. What is the effect of IFP's unreasonable withholding of consent?

[213] Since I have concluded that IFP was unreasonable in withholding its consent to the ARO between PCR and Wiser and IFP's reasonable expectations argument fails, I must now decide what flows from these findings.

[214] As discussed above, the majority of the case law related to unreasonable withholding of consent comes from the landlord and tenant context. In those cases, when the court finds a landlord has unreasonably withheld consent to an assignment the effect is to dispense with the consent requirement. In ***Sundance***, Harradence JA stated at para 50 that "[w]here consent is unreasonably withheld the tenant is released from the obligation to obtain it". Although he was writing in dissent, the academic literature supports his approach.

[215] Christopher Bentley, John McNair & Mavis Butkus, *Canadian Law of Landlord and Tenant*, loose leaf (consulted on 11 June, 2014), 6th ed, vol 2 (Toronto: Carswell, 2013) at 15-51 states:

> ...**if the lessor does withhold his consent without good reason**, the lessee, who has asked for the consent and has been refused, **is released from the obligations of the covenant and is at liberty to assign without the lessor's consent**; and the court will declare the lessee's right to do so. [Emphasis added.]

[216] Applying these principles to the facts of this case, IFP, in unreasonably withholding consent, freed PCR from the consent requirement. In other words, PCR was free to proceed with the ARO with Wiser, as it did, in the absence of IFP's consent since such consent was unreasonably withheld.

[217] The next question is whether Wiser was novated into the agreements between PCR and IFP. It is generally not possible for one party to a contract to substitute another person in its place without the consent of the other party to the contract: ***National Trust Co v Mead***, [1990] 2 SCR 410 at 426-427.

[218] The Operating Procedure (as varied by the Assignment Procedure) modifies the law relating to novation so as to make it possible for a purchaser or assignee of one of the parties' interests to be novated into the Operating Procedure without the consent of the other. The Assignment Procedure makes it clear, however, that an assignment of an "Assigned Interest" becomes effective against a "Third Party" (in this case IFP) only if "all prohibitions, limitations or conditions (such as ... a requirement for prior consent from Third Party) applying to the Assigned Interest have been complied with and satisfied pursuant to the Agreement, or waived by Third Party..." If a party fails to respond to a request for consent within the stipulated timeframe, for example, that party is deemed to have consented. The Assignment Procedure is very explicit in stating that this contractual modification of the law of novation does not apply to a purported assignment made in breach of a consent provision.

[219] I have already found that there was no breach of the consent requirement in this case. PCR sought IFP's consent, but such consent was unreasonably withheld. In the circumstances, PCR was entitled to proceed with its disposition to Wiser. IFP admits in its reply brief that upon a disposition of PCR's interest, as long as the disposition was proper, the purchaser would

automatically become novated into the JOA. IFP further admits that someone who properly became novated into the JOA would become a party to it. The JOA would continue to bind IFP as well as the new 80% working interest owner and both parties would remain bound by clause 4(c). Thus, I find that Wiser has been novated into the agreements and the JOA continues to bind Wiser and IFP.

6. Has the opportunity to pursue a thermal or other enhanced recovery project at Eyehill Creek been destroyed or damaged?

[220] If I am wrong in my conclusion that there was no breach of the consent requirement, I must consider whether the breach caused the harm alleged. In other words, I must decide whether PCR's farmout to Wiser and Wiser's subsequent primary development of the Eyehill Creek reservoir (and Canadian Forest's ongoing primary operations) destroyed or damaged IFP's working interest in thermal or other enhanced recovery. IFP bears the burden of proving that it has lost the opportunity to pursue any thermal or other enhanced recovery project at Eyehill Creek, not whether it has lost the opportunity to pursue a specific SAGD project.

[221] IFP argues that the opportunity to pursue thermal development does not exist while Wiser (now Canadian Forest) is in the field because it is not possible to initiate thermal development of the reservoir while primary operations are underway; the two cannot co-exist. More significantly, IFP argues the impacts of primary production on the reservoir have created operational challenges that are difficult to overcome and make any future thermal or other enhanced recovery project uneconomic. IFP also alleges the effect of primary production of the Eyehill Creek reservoir has created insurmountable drilling, completion and production challenges. Finally, IFP argues Wiser has surrendered some of the lands in which IFP held an interest, in particular, Legal Sub-divisions ("LSDs") 2, 4 and 8 of section 16, thereby eliminating IFP's working interest in those lands. Some of these LSDs were in the previously undepleted part of the reservoir and formed part of the area on which IFP's experts proposed their development plan and economic assessment. In sum, IFP argues the primary development of the reservoir has destroyed it for development through thermal and other enhanced recovery methods and no opportunity for this type of development remains.

[222] IFP relies extensively on the expert evidence of Mr. Richard Baker who described the negative impacts on the reservoir resulting from primary production and stated he would no longer recommend the Eyehill Creek reservoir for thermal recovery.

[223] Mr. Baker was qualified as an expert in the following areas:

(1) petroleum reservoir engineering;

(2) the different methods used for the secondary and enhanced recovery of petroleum and the process of screening a reservoir to determine which recovery method or methods would be feasible for that reservoir;

(3) petroleum reservoir simulations, including and in particular SAGD drainage simulations, other thermal simulations and heavy oil primary simulations; and

(4) fluid movement within reservoirs, petroleum reservoir characteristics and the factors which impact reservoir performance.

[224] Mr. Baker presented three primary reports: a report on the EOR potential at Eyehill Creek (the "Screening Report"), a report on the impact of primary production on the EOR potential (the "Impact Report"), and a SAGD simulation report (the "Simulation Report").

[225] In his Screening Report, Mr. Baker explained the differences between primary, secondary, tertiary and enhanced oil recovery mechanisms. Primary recovery typically refers to the first phase of reservoir recovery and involves only the natural energy of the reservoir to drive recovery. Secondary recovery refers to recovery beyond what is supported from existing reservoir energy only and involves the injection of water or gas to provide pressure support to the reservoir. Tertiary recovery typically refers to the third (and in many cases last) phase of recovery. He stated the terms primary, secondary or tertiary refer to a chronologically-based approach to implementing recovery methods, although a tertiary method might be applied first if primary or secondary methods would not allow oil to flow. For example, EOR methods are sometimes referred to as tertiary recovery, but Mr. Baker explained it is common for a heavy oil pool to be placed on secondary recovery or EOR shortly after the time of discovery. EOR is a separate type of recovery process that involves the injection of special materials or fluids (e.g. steam, solvents, surfactants, etc.) to change the reservoir fluid properties by mechanisms such as dissolving, mixing, or heat transfer.

[226] In his Impact Report, Mr. Baker reported that between 2001 and 2009, 1.43 million barrels of oil have been produced from sections 9 and 16 by primary production. Mr. Baker explained that this production has impacted the economics of any EOR project by reducing the recoverable volumes in the reservoir. I reject this concern. The evidence makes clear that primary production recovers between 7% - 10% of the OOIP in a reservoir, whereas thermal development achieves 60% or better recovery. The so-called depletion of the oil in the reservoir is a red herring; it is the other related impacts of primary production that create some potential concern.

[227] Mr. Baker opined in his Impact Report that primary production has decreased the reservoir pressure relative to the initial reservoir pressure, thereby damaging the potential for EOR processes relying on pressure gradients such as SAGD, Cyclic Steam Stimulation ("CSS") and steam flooding. He stated that primary production has caused heterogeneity in pressures and saturations that would cause uncertainty and make it more difficult to plan a thermal project.

[228] Mr. Baker explained that the pressure depletion in sections 9 and 16 has resulted in water influx from the western edge pool, leading to increased water saturations in the reservoir. Increased water saturation increases the amount of heat needed for SAGD and reduces SAGD efficiency (the water acts as a "heat sink" absorbing the energy from the injected steam). He opined that well pairs could be placed higher in the reservoir to avoid contact with the water. Water production would be reduced and the steam chamber could avoid losing heat to the underlying water, but such well placement would reduce the amount of reserves recoverable.

[229] Mr. Baker also noted the appearance of a small primary gas cap in the southern region of section 9. He opined that the reduced reservoir pressures in sections 9 and 16 have led to

increased gas saturations and the possible formation of a secondary gas cap in these sections. Higher gas saturation also negatively affects the efficiency of a SAGD project because, like water, a gas cap can act as a thief zone allowing steam to flow into it and lose heat, resulting in wasted steam energy and higher operating costs. Higher gas saturations in the oil can also reduce the efficiency of SAGD and other enhanced recovery processes.

[230] Mr. Baker also suggested that sand production throughout the reservoir from primary operations likely has created significant wormholes throughout the reservoir. He stated this was the single most important factor in his entire report. Wormholes can hurt thermal production by creating channels that permit the steam to bypass the pay zone. He opined that sand production will cause the reservoir to fracture more easily or create sand control challenges that could lead to equipment failures and unforeseen downtimes in production. Mr. Baker did not prepare a simulation or model to determine whether a thermal project still could proceed at Eyehill Creek.

[231] In sum, Mr. Baker stated at p 38 of his Impact Report that primary production has made the reservoir less predictable:

> Before production begins from a reservoir there is a good degree of predictability in how the reservoir will behave. Heterogeneity will always keep the future behaviour of a reservoir from being known with complete certainty, but the fairly evenly distributed pressure and fluid saturations in a reservoir before production occurs give it higher predictability. ...
>
> As production commences, the behaviour of the reservoir becomes less and less predictable. Local changes in fluid saturations and pressure differentials, and an increasingly uneven distribution of these properties, adds a greater amount of uncertainty to the reservoir. The controllability of the reservoir is significantly reduced, making it harder to plan the optimal development strategy.
>
> I would have strongly recommended SAGD in a field like Eyehill Creek had it been undisturbed. SAGD would have been feasible before primary production occurred. However, due to factors such as the lower oil saturations, higher water and gas saturations, and sand production from primary production, I would no longer recommend the Eyehill Creek pool for thermal recovery (after primary production).

[232] Mr. Baker dismissed the possibility of non-thermal recovery methods in his Screening Report. Mr. Baker's screening was a first level screening that did not model or simulate any particular process. He considered the reservoir characteristics of Eyehill Creek before intervention by Wiser and concluded that the ideal EOR process would have been SAGD, but that other thermal EOR techniques, such as CSS and steam flood would have been feasible. He stated in his testimony that the main reason for rejecting chemical or polymer flooding at Eyehill Creek was the high oil viscosity.

[233] The Defendants refute IFP's arguments on two grounds. First, they submit that the reservoir characteristics described by Mr. Baker existed in the depleted portions of the Eyehill Creek reservoir when IFP first acquired its working interest. PCR's original thermal development proposal was based on the undepleted and depleted sections of the reservoir. At the

time, PCR saw depletion as an economic issue. Depletion from primary production would result in drilling challenges that could be overcome with increased expenditure, but would not create any insurmountable obstacles to SAGD production. The Eyehill Creek Thermal Project prepared by the Van Horne unit in August 1998 stated, "The distinction between depleted and undepleted areas is important because, although it has only a minor effect on the SAGD process, it has a significant effect on our ability to drill the wells." The belief in the ability to drill in the depleted area and overcome any drilling challenges formed part of the foundation of the presentation given to IFP prior to IFP entering into the AEA. The Defendants question why it would have been possible for PCR to overcome the negative effects of primary production in 1998 but is not possible for IFP to do so now.

[234] The Defendants also point to evidence suggesting other EOR operations might succeed in the Eyehill Creek reservoir. Mr. Seal, manager of engineering and exploitation at Canadian Forest, explained in his testimony that Canadian Forest considered the feasibility of implementing a chemical flood in Eyehill Creek and hired a consultant, Surtek Inc. ("Surtek"), to assess the potential for chemical flooding of the reservoir. Surtek concluded that Eyehill Creek "is an excellent polymer or Alkaline-Surfactant-Polymer (ASP) flood candidate. Projected economics are excellent."

[235] Mr. Seal claimed Canadian Forest stopped investigating this option due to IFP's lawsuit. He stated, however, that Canadian Forest would have recognized IFP's interest had it proceeded with this type of EOR development. I acknowledge that the authors of the Surtek report were not before the Court and were not subject to cross-examination; I do not rely on the report for the truth of its contents. I do note, however, that Canadian Forest thought the potential for chemical flooding to be worthy of study and spent at least $500,000 to investigate the possibility.

[236] The Defendants had given notice of their intention to call Dr. Mehran Pooladi-Darvish as an expert in the general areas of hydrocarbon reservoir engineering and modeling. His rebuttal reports to Mr. Baker's three reports were marked as exhibits for identification and were used in cross-examination of Mr. Baker, but Dr. Pooladi-Darvish was not called as a witness at trial and his reports were not tendered into evidence.

[237] In discussing Dr. Pooladi-Darvish's rebuttal report, Mr. Baker admitted in examination in chief that some Canadian companies have had initial success with polymer flooding. He noted, however, that the field process was fairly immature, especially for fields with high oil viscosity and that polymer flooding is very difficult in fields with wormholes. He agreed that selection of the appropriate enhanced recovery process requires experimental valuations and simulation, as well as economic analysis and field pilot projects and particular methods cannot be ruled out conclusively on first screening. When pressed in cross-examination, Mr. Baker did not state that Eyehill Creek could not be developed through EOR methods, only that it would be risky.

[238] IFP submits I must accept Mr. Baker's evidence because the Defendants have not called an expert witness to respond to Mr. Baker. It argues Mr. Baker's opinions respecting reservoir impacts (the disadvantages caused by the creation of wormholes, pressure changes, changes in fluid saturations, controllability, risk of cap rock fracture, etc.) have not been contradicted.

[239] I reject IFP's argument that I must accept Mr. Baker's evidence because he is the only expert on the issue. Mr. Baker was argumentative and evasive in testimony, particularly when addressing inconsistencies in his evidence, and he deflected questions repeatedly with jargon and long, ultimately unhelpful, explanations. There were detailed challenges to his evidence and opinion through which it became evident that Mr. Baker's analysis of the impacts of primary production on the reservoir was more qualitative than quantitative. In relation to one issue, he admitted his answer was "speculation based on my experience." In general throughout his testimony and in his reports, Mr. Baker appeared to rely on his status as an expert, without substantiating his opinion with solid information or coherent explanation. Coupled with his complete lack of candour with respect to his calculation of oil viscosity at high temperatures, discussed in more detail below, I find I am unable to give Mr. Baker's evidence much weight. His reports and testimony were less than compelling.

[240] On the whole, I agree with the Defendants' position that the operational issues identified by Mr. Baker can be overcome. IFP clearly believed this to be the case given its interest in PCR's initial thermal development proposal which included development of the "depleted" areas of the Eyehill Creek reservoir. While these operational issues may create greater challenges for a SAGD development and will affect its cost, I find they have not made a SAGD or EOR project impossible. IFP presented no economic evidence to prove that the increased costs associated with overcoming these operational challenges would render any future thermal or other enhanced recovery project uneconomic and I cannot so find in the absence of such evidence.

[241] IFP also relies on the evidence of Mr. Lew Hayes to argue that primary production has made it impossible to drill the horizontal wells needed for a SAGD development. Mr. Hayes was qualified as an expert in "the areas of drilling, completion and production of oil and gas wells, including industry recommended practices and regulatory requirements for those things in reservoirs that have the potential to become part of a thermal recovery scheme and the planning, operations, and management of heavy oil development projects."

[242] Mr. Hayes explained that industry practice generally is "to preserve pristine conditions in the reservoir to ensure consistent operational parameters in the SAGD process." He stated that drilling, completion and production all affect the reservoir condition and often "these combine to substantially increase the risk to future activities."

[243] Mr. Hayes examined the production impacts and the physical impacts of primary development in sections 9 and 16. Mr. Hayes described the intensive nature of Wiser's and Canadian Forest's primary operations. Since 2001, Wiser and Canadian Forest collectively drilled 28 new wells in sections 9 and 16 and reactivated 15 previously shut-in wells. His maps and charts graphically illustrate the significant volumes of oil, sand, and water produced in sections 9 and 16 since 2000. He stated "[t]hese volumes must be considered substantial and will have changed the reservoir condition."

[244] Mr. Hayes identified similar impacts from primary production mentioned by Mr. Baker such as lowered pressures, wormholes, glory holes (large voids around a primary well with either no sand or less sand than the native reservoir), etc. along with physical impacts related to well and casing design.

[245] Mr. Hayes explained the new wells produce sand along with oil through progressive cavity screw pumps or an aggressive high volume pumping system. Sand production is a means of enhancing recovery; it increases the permeability near the well bore by creating glory holes around the vertical wells and wormholes throughout the reservoir. It also lowers the overall reservoir pressure, as does water production. Sand production results in "increased permeability with no control of where the enhancement will occur in the reservoir – vertically, laterally or a combination of the two."

[246] In 1992, Mr. Hayes, as the drilling and completion manager for CS Resources, oversaw the drilling of a horizontal well (4C2H-21) in section 21 of the Eyehill Creek reservoir, an area with significant previous primary production. In drilling the well, his team encountered the most severe lost circulation problems he has ever seen in his career.

[247] When drilling a well, the pressures from the drill and drilling fluid typically exceed the reservoir pressures of the formation. Since the pressure from the well is higher, the fluids find a way to flow into the reservoir if it is permeable. Lost circulation occurs when there is uncontrollable flow of drilling fluid out of the well bore and into the reservoir. Reservoir conditions contributing to lost circulation include depletion resulting in low reservoir pressure; sand production creating voids, wormholes, and high permeability networks; and high water saturation, which affects the ability of drilling fluids to prevent the losses.

[248] Lost circulation affects drilling in several ways. It may compromise the ability to directionally drill accurately and place the horizontal wells needed for SAGD production. In addition, the materials introduced into the drilling system to correct the lost circulation may have a negative impact on the completion and production processes. Completion involves cementing the vertical portion of the well bore and lining the horizontal well with a slotted liner. Cementing is more difficult in depleted low-pressure reservoirs because, as a heavier substance, the cement used in completing the vertical portion of the well may leak off into the rock the same way as the water or drilling mud.

[249] Mr. Hayes described his experience drilling the 4C2H-21 well in which drilling mud came up through the annulus of offsetting vertical producer wells a full pattern away. This occurred several times. It was apparent the lost circulation involved direct hydraulic communication between the horizontal well and the pre-existing vertical wells; there were "very, very unrestricted channels in the rock and the mud actually flowed from the horizontal well a significant distance over to the vertical well." Mr. Hayes concluded section 21was not an intact formation. He stated the 4C2H-21 well was a technical and financial failure; CS Resources abandoned the well due to sand production and poor production results.

[250] Mr. Hayes likened sections 9 and 16 to section 21, as having the same, potentially major, lost circulation challenges. It was clear throughout Mr. Hayes' examination in chief and cross-examination that the unprecedented difficulties he encountered in section 21 strongly influenced his conclusions as to the likelihood of problems in a SAGD project in sections 9 and 16.

[251] Beyond drilling and lost circulation issues, Mr. Hayes highlighted problems posed by non-thermal cement. The wells drilled by Wiser and Canadian Forest after 2000 used neither thermal cement nor thermal casing. Casing is a piece of pipe put through the zone inside the

drilled hole and cemented into place in the well. The purpose of the cement and casing is to create hydraulic isolation between zones and to provide consistent pressure throughout the well. Non-thermal cement will break down at high temperatures and hydraulic isolation will be lost. He explained that industry recommended practices (IRPs) require the use of thermal cement in any thermally affected areas. Wells with non-thermal casing require abandonment prior to undertaking a thermal project.

[252] Mr. Hayes reviewed the 10 wells drilled before 2000 in sections 9 and 16: four were drilled and abandoned and six were cased, all with non-thermal cement. Likewise, after 2000, none of the wells used thermal cement. He explained the consequence of these choices at p 16 of his report:

> The decision not to use thermal cement may compromise the future potential for a thermal operation, which **would not be possible at all as long as the wells which were completed without thermal cement are being used in operations.** ...non thermal cement when subjected to high temperature will break down and lose the ability to maintain hydraulic isolation.
>
> The decision not to use thermal cement would impact any Board approval for a future thermal project. **An abandonment solution required with respect to the actions required to alleviate the thermal zonal isolation issue would be required.** [Emphasis added.]

[253] He concluded at p 17:

> **...the decision to drill and complete the wells with non thermal cement will compromise the ability to complete a thermal project in the thermal development area.** Approval for a thermal project will not be possible while wells not completed thermally are in operation. After those wells have ceased to operate, there will be an incremental cost to any thermal development project. [Emphasis added.]

[254] In his testimony, Mr. Hayes explained a cemented well is a "pretty permanent thing", limiting the options to make it compatible with a thermal project. To remediate, the non-thermal cement and non-thermal casing must be milled out and replaced with a thermal cement plug, at an estimated cost of $250,000 to $400,000 per well, for a total estimated abandonment liability of $8.75 million to $14 million in sections 9 and 16.

[255] Cross-examination did not shake Mr. Hayes' evidence on this point, nor did the defendants' expert, Mr. Hollies, refute it. There is no doubt the presence of non-thermal cement needs to be addressed prior to undertaking a thermal project at Eyehill Creek and there will be, quite obviously, a cost associated with doing so.

[256] In oral testimony, Mr. Hayes summarized his overall opinion:

> ...I strongly feel that because of the production, because of the well design that has been completed in the area by the companies, Wiser, Canadian Forest, that this project has been – **the ability to do a SAGD project is somewhat**

> **compromised in this area.** I think that it is very important to avoid, as I have talked about, the depleted areas as much as possible, certainly with the experience on the well that I drilled at 4C2H of 21 and that I wouldn't recommend a SAGD project be undertaken here right now because of those impacts. [Emphasis added.]

[257] The Defendants countered with Mr. Doug Hollies, qualified as an expert in "oil and gas well drilling, completion, and production requirements and general practice in these fields, including thermal horizontal oil well drilling."

[258] Mr. Hollies did not refute Mr. Hayes' opinion outright. In general, he agreed with Mr. Hayes' assessment of the challenges of SAGD development in low-pressure reservoirs but he found the challenges and risks presented by primary production to be "incremental" over those inherent in any SAGD drilling operation. He explained that all horizontal well developments have challenges with respect to: 1) directional drilling control (staying in the zone of interest and wellbore straightness); 2) formation damage (impairment of the formation's ability to flow oil or gas); and 3) mechanical issues associated with drilling around a 90 degree bend and for hundreds of meters through loose sand.

[259] Mr. Hollies acknowledged the removal of sand from the Eyehill Creek reservoir will have somewhat destabilized the oil and water bearing sand beds and the resulting instability likely would create challenges with maintaining drilling fluid circulation. He downplayed the severity of these challenges, however, and suggested modern drilling and completion technologies could overcome them.

[260] Mr. Hollies explained how thermally decaying direct emulsion fluids can create an external and internal filter cake in the formation and/or the wellbore to maintain circulation. He also suggested calcium carbonate pills or acid soluble particle injection as a means of mitigating lost circulation. Mr. Hollies highlighted newer drilling technologies, including magnetic ranging systems, to better control drilling direction. Overall, he acknowledged approximately 20% higher drilling costs per well to address the various issues arising from the destabilized sands.

[261] He concluded the executive summary at p 1 of his report by acknowledging the increased costs, but supporting the technical viability of the project overall:

> I see no concerns regarding wellbore placement or formation damage that might have long term corporate impact. **There may be some increased costs from dealing with infrequent lost circulation** and some advanced drilling fluid technology, but there **seems to be relatively little risk in drilling the horizontal wells** necessary to make the Eyehill Creek Field a successful Steam Assisted Gravity Drainage (SAGD) Project. [Emphasis added.]

[262] Mr. Hollies also suggested a modified SAGD operation might be appropriate at Eyehill Creek. In traditional SAGD, the horizontal injector well is placed 5m vertically above the producer well. In modified SAGD, the horizontal well pairs are offset laterally with less vertical depth. He indicated the spacing of modified SAGD well pairs greatly diminishes the risks associated with increased permeability from the previously produced formation.

[263] Mr. Hayes acknowledged in his surrebuttal report that it would be easier to drill such an arrangement than to drill traditional SAGD well pairs. Nonetheless, Mr. Hayes concluded at p 1 that Mr. Hollies "underestimates the magnitude of the problems which can be created by sand production, commonly defined as wormholes, in an environment which has been subjected to primary heavy oil production." He questions whether Mr. Hollies' proposed strategies would have resolved the circulation issues in well 4C2H-21 and whether they would resolve the issues that might arise in sections 9 and 16, given the extensive wormholes likely now present in the reservoir. Mr. Hayes admitted in cross-examination, however, that it cannot be inferred from the failure of the 4C2H-21 well that a modern day SAGD well pair program would also fail. He also conceded that he might not have had enough calcium carbonate to mitigate the lost circulation events he faced. He acknowledged that drilling technology has advanced greatly since that time, presumably improving the chances of successful drilling operations.

[264] I find Mr. Hollies' experience with new technologies is more hands-on and direct than that of Mr. Hayes. I also find Mr. Hayes' experience with the unusually severe lost circulation in well 4C2H-21 has heavily influenced his perspective. I find there is no reason to assume, particularly with the modern technologies now available, that such an unprecedented lost circulation event would recur, in spite of potentially similar reservoir conditions.

[265] I accept Mr. Hayes' evidence that there are now greater technical hurdles to developing sections 9 and 16 as a SAGD project than there were before Wiser and Canadian Forest initiated primary production in 2000. However, I accept Mr. Hollies' evidence that modern technologies and adequate planning can overcome these hurdles. I appreciate that doing so will require additional expenditures for materials to prevent lost circulation, advanced drilling technologies, etc. and I accept Mr. Hayes' evidence regarding the need to plug the non-thermal wells with thermal cement, also at additional cost.

[266] Both Mr. Hayes and Mr. Hollies proffered their opinions on the overall viability of a SAGD operation at Eyehill Creek, but neither is a SAGD expert. Their expertise lies in identifying the drilling challenges likely present in a depleted field and offering solutions on how to overcome them.

[267] After considering Mr. Baker's, Mr. Hayes' and Mr. Hollies' evidence, I am not persuaded that it is no longer possible to pursue thermal or other enhanced recovery operations in the Eyehill Creek reservoir. I find that the improved technologies can overcome the challenges arising from the depletion of the reservoir caused by Wiser's and Canadian Forest's primary operations, although I accept there will be a higher cost in doing so.

[268] IFP has not proven that its working interest has been destroyed by Wiser's and Canadian Forest's primary operations, although I accept that its value may have been reduced. While the benefits of IFP's working interest may be more expensive to realize and there is now less oil in the ground, I was provided with limited evidence as to the increased costs of any future development. There is no way for me to calculate the value of any such potential loss.

[269] The value of any future development has been reduced further by the loss of LSDs 2, 4 and 8 of section 16, but I also have no means to calculate the value of any such potential loss. Furthermore, I note the contradictory nature of IFP's claim on this ground: IFP objects to

Wiser's surrender of these lands, yet it also objects to Wiser's primary production, the most common method of maintaining leases in good standing.

[270] In the event that I am wrong and thermal and other enhanced recovery prospects no longer exist at Eyehill Creek, I will go on to calculate the damages for IFP's loss of opportunity.

VIII. Damages

[271] Although I have found PCR is not liable to IFP for breach of contract, I will undertake a provisional assessment of damages given the length of the trial and the volume of expert evidence presented on that subject.

A. General principles for loss of opportunity damages

[272] The most basic principle of compensatory damages is that the party complaining should be put in the position it would have been in if the wrong had not been done: ***Ticketnet Corp v Air Canada***, (1997), 154 DLR (4th) 271 at para 97 (CA), leave to appeal to SCC refused 161 DLR (4th) viii. The object is to achieve a broadly equitable result: ***Nathu v Imbrook Properties Ltd***, 125 AR 34 at para 25 (CA).

[273] Where a contract is breached so that a party is deprived of an "opportunity" to obtain a benefit that was speculative at the time the contract was entered into, the party has suffered a "loss of chance" or "loss of opportunity." Had the contract been completed, the wronged party may or may not have obtained the benefit sought, but since the party has been deprived of the chance to obtain the benefit, that party may seek damages for the value of the lost opportunity.

[274] If the plaintiff is able to prove that the defendant's conduct prevented the enjoyment of an opportunity – beyond the *de minimus* range – to gain a benefit or avoid a detriment, the plaintiff may be granted relief, discounted to reflect the likelihood of the opportunity being realized. Harvey McGregor, in his text *McGregor on Damages*, 18th ed (UK: Thompson Reuters (Legal) Limited, 2009), quotes at page 345 from ***Davies v Taylor***, [1974] AC 207 (HL) at 213:

> You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent: sometimes virtually nil. But often it is somewhere in between.

[275] While it may be impossible to assess the chance lost with precision, the impossibility of achieving accuracy does not relieve the contract-breaker from paying damages: ***Penvidic Contracting Co v International Nickel Co of Canada***, [1976] 1 SCR 267 at 279-80. In assessing damages, the court must make its best conjecture of what "would have been": ***Argus Machine Co v Stan's Power Tong Service Ltd*** (1988), 93 AR 18 at 21-22 (CA), aff'd 97 AR 314. The amount assessed for the loss of opportunity represents an exercise of judgment based on the particular facts of the case: ***REC Holdings Co v Peat Marwick Thorne***, [1997] BCJ No 1640 at para 121 (SC).

[276] The quantum of damages is a question of fact and the rules relating to damages assessments must be liberally construed and not too rigidly applied: ***Sunshine Exploration Ltd v***

Dolly Varden Mines Ltd (NPL), [1970] SCR 2 at 18. Once the court has calculated the value of the opportunity, it must assess the likelihood that the plaintiff would have obtained the benefit. The basic principle is that the greater the number of contingencies faced by the plaintiff in the chance to obtain the benefit, the lesser will be the quantum of damages awarded.

[277] Thus, assessing damages for a lost opportunity involves the following steps:

(1) deciding whether the claim for lost opportunity is real, as opposed to fanciful;

(2) assessing the value of the opportunity if it had been realized; and

(3) assessing the likelihood the opportunity would have been realized and discounting the damages to reflect the possibility that the opportunity would not have been realized in any event.

[278] IFP bears the burden of establishing, beyond the *de minimus* range, that by entering the ARO with Wiser without IFP's consent, PCR prevented IFP from enjoying the opportunity to benefit from thermal development at Eyehill Creek. IFP must then establish the value of the lost opportunity. Finally, IFP must tender sufficient evidence to prove the likelihood of realizing upon the opportunity. The quantum of damages will be discounted proportionate to the likelihood of realizing upon the opportunity.

[279] Despite my findings above, for purposes of this damages analysis, I must assume IFP was reasonable in withholding consent. I must also assume that PCR's pursuit of a contract with Wiser in the absence of IFP's consent and Wiser's subsequent development of the reservoir has damaged Eyehill Creek for any future thermal or EOR development.

B. Evaluating the Lost Opportunity

1. Did IFP have a real, as opposed to fanciful, opportunity to participate in a thermal or other enhanced recovery project at Eyehill Creek?

[280] The parties' submissions on this issue focussed primarily on the likelihood of a thermal project proceeding at the time of the farmout to Wiser. PCR argued it had no intention of pursuing thermal development at the time because of poor economics and changing corporate priorities. IFP conceded the economics were unfavourable for thermal development but argued this does not mean a thermal project never would have been undertaken or that the Eyehill Creek reservoir no longer had any value as a thermal or EOR project.

[281] These arguments do not speak to the question of whether IFP lost a real versus fanciful opportunity. They relate to the final part of the loss of opportunity damages analysis in which the court must assess the likelihood the opportunity would have been realized and discount the damages to reflect this likelihood.

[282] At this stage of the analysis, it is a threshold inquiry: establishing beyond the *de minimus* range that there was a real (tangible) opportunity. Placing a man on the moon may have been a fanciful opportunity in 1945, but it was a real opportunity in 1969. Similarly, the question here is whether IFP's opportunity to benefit from thermal or EOR development at Eyehill Creek in 2001 was real or fanciful, not whether it was likely in the existing economic environment.

[283] IFP argues that it is clear the reservoir at Eyehill Creek had significant value as a SAGD project. In the AEA, the parties valued the assets transferred at $16 million and IFP allocated $14.8 million to its 20% working interest in Eyehill Creek. IFP submits that PCR's thermal specialist Mr. Gittins described Eyehill Creek as PCR's best SAGD project (technically and economically), even though heavy oil prices were low at the time. PCR's thermal team never changed its views on Eyehill Creek.

[284] At the time of the farmout to Wiser, PCR was carrying Eyehill Creek on its books as a thermal and a primary project. As late as August 2000, PCR recognized, evidenced by Laureen Little's minutes, that "the property appears to have value for thermal operations in section 9" which "needs to be evaluated as a potential thermal project for PCR either now or in the future." The minutes further note that PCR needs "to consider what work (if any) would be required to hold section 9 rights until we are ready to pursue this project." PCR made its decision to farmout to Wiser for strategic reasons having regard to its other projects, its finite human resources and other factors unique to its interests. PCR's decision does not mean thermal development of Eyehill Creek was not a possibility.

[285] Given the *de minimus* threshold at this stage of the damages inquiry, I find IFP has established that it had a real opportunity.

2. What value can be attributed to the loss of opportunity at Eyehill Creek?

[286] The second stage of the analysis is to determine the value of the lost opportunity. As the basis for its damages assessment, IFP has put forward a conceptual model, constructed by its experts, of a SAGD project that could have been carried out at Eyehill Creek if Wiser's and Canadian Forest's primary production operations had not taken place. The model focusses on the previously undepleted areas in sections 9 and 16. IFP did not base its damages model on PCR's 1998 proposed project for the development of the Eyehill Creek field.

[287] The Defendants take issue with IFP's damages model, calling it a fictional development. They argue the quantification of IFP's damages should have been a simple affair: it is the market value of IFP's interest today as compared to what it would have been today if the ARO had not closed. The Defendants suggest that IFP failed to put a valuation report before the Court because the value of the lost opportunity is nil.

[288] I reject this characterization of the damages analysis. IFP's provisional damages are for the loss of opportunity to develop Eyehill Creek as a thermal or other enhanced recovery project and to obtain the financial benefit of such a project. The market value of the lands may reflect, to some extent, the potential held within those lands, but it does not equal the potential profits to be drawn from exploiting the mineral resources within those lands.

[289] They also dispute the reliance placed by IFP's experts on information post-dating 2001, the time of the alleged breach. According to the Defendants, the Plaintiff's reliance on information available in 2009 and 2010 demonstrates "another layer of the fiction of the IFP damages model."

[290] It is clear there are significant flaws in the Plaintiff's damages model resulting from a number of errors introduced by several experts. The Defendants submit the Plaintiff's model

must be rejected entirely, not simply discounted. I will address each expert's evidence and the corresponding critical errors in turn.

Overview of IFP's experts

[291] IFP retained a team of experts to develop its conceptual model for Eyehill Creek. Dr. Brad Hayes was qualified as an expert in the geological interpretation and mapping of petroleum reservoirs. He prepared a detailed geological interpretation of the southern part of the Eyehill Creek reservoir based on well data (cores and well logs), as well as a review of the regional geology, to assist in determining the value of oil reserves potentially recoverable through a SAGD development at Eyehill Creek. The physical cores taken from several of the wells in the Eyehill Creek area were examined by Dr. Hayes. He explained how the various depositional events could be read from the cores.

[292] Dr. Hayes identified two main phases of deposition – the "Lower McLaren" phase of high-quality reservoir sandstone and a later "Upper McLaren" phase of non-reservoir quality rock that had sharply incised the Lower McLaren in places. He described the reservoir as "highly mappable" in that it was "highly continuous" within the Lower McLaren interval; he had a high degree of confidence that the reservoir rocks could be mapped from well to well based on core and log data.

[293] Dr. Hayes directed Mr. David Kisilevsky, who was qualified as an expert in the area of geological interpretation of petroleum reservoirs including quantitative petrophysical analysis, to undertake a quantitative petrophyiscal analysis of the Eyehill Creek reservoir. He did so relying on data from 72 wells in and around the southern part of the reservoir to calculate the physical reservoir characteristics at specific depths including shale volumes, porosity, and water saturation.

[294] Dr. Hayes also directed Dr. John Carey, who was qualified as an expert in the geological interpretation and mapping of petroleum reservoirs including the construction of geocellular models, to create a geocellular model of the southern part of the reservoir based on Dr. Hayes' geological interpretation and Mr. Kisilevsky's petrophysical analysis. Geocellular modelling is a standard industry practice commonly used as the basis for reservoir simulations in which a computer-generated three-dimensional model is built to provide a geological representation of a reservoir in quantitative form.

[295] Once the model was built, Dr. Carey chose, in consultation with other members of IFP's expert team, two small rectangular areas of the model (400m X 1000m) for simulation by Mr. Baker, rescaling the grid cells so they would fit Mr. Baker's simulation software.

[296] Mr. Baker's simulation was designed to estimate the potential oil recovery if SAGD had been implemented in the field before the intervention of Wiser and Canadian Forest. Mr. Baker developed three simulation cases to bracket the range of outcomes. The "Base Case" represented the most likely range of reservoir properties in the heart of the reservoir. The "Thin Case" estimated the response in thinner parts of the reservoir in which the gross pay was less than in the central area. The "Southwest Case" considered an area where an active aquifer underlies the reservoir and there is slightly poorer reservoir quality.

[297] Mr. Bob Shepherd was qualified as an expert in the area of petroleum engineering, including the planning, design and implementation of petroleum development projects and the economic and technical evaluation of such projects using industry-standard methods including discounted cash flow forecasts. Together with IFP's other experts, he worked on the development and valuation of a conceptual project consisting of 29 SAGD well pairs in sections 9 and 16: 7 wells in the Base Case, 14 wells in the Thin Case, and 8 wells in the Southwest Case.

[298] He predicted production of 9,000 barrels of oil and 30,000 barrels of steam per day over an 8-10 year project life to produce approximately 29 million barrels of oil. Mr. Shepherd estimated the present day value of the Eyehill Creek project as a whole. He later adjusted his calculations in a surrebuttal report, taking into consideration criticism from some of the Defendants' experts. His revised figures estimated a present day value of $212.2 to $256.8 million for a project with new facilities and a present day value of $243.2 to $294.3 million for a project using some of the existing facilities at Eyehill Creek. (The ranges come from the difference between calculating present day value using the Consumer Price Index versus the Long Term Bond rate.) IFP's share of these amounts would be proportionate to its working interests.

Geomodel

[299] Dr. Carey's geomodel was attacked for its inclusion of data points he added to his model, which he variously referred to as "pseudo wells," "dummy wells," or "fake wells." In his primary report, he described them as "imaginary zero points", added to "define a sharp, geologically-reasonable eastern valley edge". He gave them zero thickness values to prevent the valley from spreading out unrealistically to the east. Their purpose was to ensure the model conformed to the geological interpretation. They were clearly identified as fake wells in the output data provided to the other experts.

[300] In his testimony, however, Dr. Carey admitted he had forgotten about three other fake wells he had added to the model elsewhere: one to the southwest of the reservoir (in LSD 7 of section 8), one in the south and one in the northeast of section 16. Dr. Carey agreed in cross-examination the effect of his "fake well 7" (the one in LSD 7 of section 8) was to lift the structure of the reservoir, thereby reducing the effect of bottom water. He also acknowledged he had neglected to use an actual well in the same LSD for which Mr. Kisilevsky had provided petrophysical data and that showed the sand to be entirely below the oil/water contact.

[301] Dr. Carey was unable to say what effect his fake well 7 would have on his geomodel. While he thought it probably did not have much effect because it was some distance away from the modelling area, he acknowledged it could have an effect on the well pairs in the southwest area.

[302] The Plaintiff concedes that Dr. Carey erred in using data from his fake well 7 rather than data from an actual well analyzed by Mr. Kisilvesky and that the error undoubtedly resulted in the structure of the model in the southwest area being raised higher than it should have been. The Plaintiff argues, however, that there is no evidence to suggest how the placement of fake well 7, or any of the other fake wells, affected the geomodel. It suggests the Court remove some of the southwest well pairs from the damages model.

[303] The Defendants argue that simply removing the wells affected by Dr. Carey's fake wells is not appropriate. The Plaintiff did not offer any evidence on the effect of removing the improperly included fake wells from the geomodel or on the effect of a changed geomodel on the reservoir simulation model or the resulting development plan and economic analysis. There is no evidence, for example, that a project with a number of wells removed would have the economies of scale to be viable. The Defendants take issue with the Plaintiff's invitation to the Court to accept counsel's estimate of the appropriate discount rather than attempting to quantify the effects with its experts who were well-qualified to do so.

[304] The Defendants rely upon the rebuttal report and testimony of their expert Mr. Michael Uland. Mr. Uland prepared an expert report containing an alternate geomodel, marked as Exhibit "A" for identification during the examination of Dr. Hayes. During their testimony, Dr. Hayes, Mr. Kisilevsky, and Dr. Carey presented rebuttal reports with their comments on Mr. Uland's geomodel and were cross-examined using Mr. Uland's geomodel, yet the Defendants chose not to enter Mr. Uland's geomodel into evidence when he testified. Instead, the Defendants entered only his rebuttal report into evidence.

[305] The Defendants sought to have Mr. Uland qualified as an expert in the general areas of geology, petrophysics, integrated reservoir characterization, and geostatistical modeling. There was vigorous debate as to whether this was a proper description of his expertise. Justice Stevens proceeded to receive his evidence on the following terms:

> ...As far as I'm concerned, he's clearly an expert in modelling, and he's a professional engineer, and he works with a team that does stuff that sounds an awful lot like Mr. Baker. And when I look at the IFP team as a whole, maybe it's what iReservoir [Mr. Uland's employer] does, but I don't know. I'm going to have difficulty making a determination as to what's what until I hear what he has to say. ...
>
> ...
>
> Here's the way we're going to proceed. You know, he strikes me as an expert. He's not a geologist, but he's a model simulator and been doing it for a long time, and he sounds an awful lot, as I said, like Mr. Baker to me or some of these others that have been in front of this Court. But I like Mr. de Waal's suggestion, which is let him give his evidence, and Mr. de Waal can take him apart, if he can, on cross, as it relates to his expertise. But until I hear what he has to say and you get the explanation as to why he says it, I don't know whether it's modelling or geology. He's going to be in more trouble if he says it's because of geology because he's not a geologist.
>
> But it's apparent to me that these people that model reservoirs, if they're professional engineers, know something about geology. They know something about drilling. They seem to become quite conversant in other areas of specialty in order to do their job. So let's proceed, but I would recommend, the two of you, that you extract from Mr. Uland the basis upon which he has these opinions so that I can differentiate between engineering and geology or reservoir engineering

> or modelling or simulation or whatever it is. But I need to know so that I can address the concern that Mr. de Waal has raised.

[306] In preparing his rebuttal report, Mr. Uland reviewed the input data assumptions, and modeling parameters, and modeling workflow choices of IFP's experts. He concluded that most of the geomodel construction decisions were within the acceptable range of industry standards, but several other choices were fatally flawed. Mr. Uland identified four problem areas with IFP's experts' reports. First, he opined that IFP's experts placed a number of SAGD wells in areas where the net oil pay zone was not thick enough to support SAGD. Second, he expressed his opinion that several of the Base Case wells were placed inappropriately in high risk locations, including in marginal muddy sands. Third, he alleged two wells in the Base Case were poorly placed in a carbonate-cemented area of the reservoir that would restrict vertical flow permeability. Finally, he stated there was a "globally serious" issue "that affects the entire IFP model" by including muddy-sand oil volumes in the OOIP estimate for the Base Case.

[307] These four issues with the IFP geomodel are in addition to the unquantified effect of the fake wells. Mr. Uland explained in his testimony that Dr. Carey's three fake wells were "controlling the answer" produced by the geomodel. Essentially, in the three affected areas, the geomodel used to develop IFP's damages analysis reflects arbitrary numbers attached to fake wells created by IFP's experts, not the actual geology of Eyehill Creek.

[308] In sum, the Defendants submit the effect of Mr. Uland's specific critiques of the IFP geomodel are that 13 of the 29 wells in the model should be removed, and that in addition, 24% of the oil recovery claimed by IFP should be risked.

[309] Relying on Mr. Uland's evidence, the Defendants submit the geomodel is plainly unreliable, leaving the Plaintiff without a model upon which to base its reservoir simulation, and in turn, its economic analysis.

[310] The Plaintiff rejects Mr. Uland's criticisms. It submits they are based largely on a misunderstanding as to the minimum reservoir thickness required for SAGD. Mr. Uland is not a SAGD expert and misinterpreted information he received from Mr. Gittins regarding minimum reservoir thicknesses. Furthermore, the Plaintiff argues Mr. Uland is not a geologist and was not qualified to express any opinion on the geology of the area in which the well pairs were placed. For example, it submits his opinion that two wells were placed in an area with vertical flow perm-baffles must be rejected. The Plaintiff notes Dr. Hayes was satisfied that the calcites were not laterally continuous over any significant area; therefore, they would not provide significant impediments to fluid flow. Also, Dr. Carey added that the cemented streaks were found at different elevations in the wells, so that there was no reason to expect that they represented laterally continuous beds.

[311] Dr. Hayes in a surrebuttal report summarized at p 1 the reasons for the Plaintiff's rejection of Mr. Uland's critique:

> Mr. Uland's "issues" are not faults in the PRCL [Petrel Robertson Consulting Ltd. – IFP's experts] geocellular model nor in its use by Carey to lay out a pattern of horizontal development wells. In my opinion, the issues arise from Mr. Uland's misunderstanding of PRCL's geological interpretation, his lack of understanding

> of McLaren reservoir geology (as discussed by Hayes), and his rigid and simplistic assumptions about reservoir net pay cutoffs.

[312] Finally, the Plaintiff submits Mr. Uland's opinion that muddy sands should not have been included in the model is beyond his expertise, as a question of geology. The Plaintiff notes Dr. Hayes and Dr. Carey were satisfied, upon examination of the cores and other well data, that the muddy sand facies are part of the reservoir and should be included in the model, with appropriate adjustments to reflect the fact that muddy sand does not have the same quality as the clean sand. The Plaintiff submits Mr. Uland was not qualified to challenge this and offered no technical analysis to support his statement.

[313] I find Mr. Uland's criticisms go beyond his areas of expertise and I do not accept them. Nonetheless, the fake wells erroneously included in Dr. Carey's geomodel have created a faulty foundation for Mr. Baker's simulation and Mr. Shepherd's development plan and economic analysis.

SAGD simulation

[314] Once IFP's geomodel was complete, Mr. Baker prepared a simulation using a small portion of it. The Defendants argue Mr. Baker's Simulation Report starts from an unreliable foundation, namely Dr. Carey's geomodel, and then introduces its own critical errors.

[315] Mr. Baker imported the geomodel developed by Dr. Hayes and Dr. Carey into CMG STARS – software designed to simulate reservoir performance. He ran simulations of the three scenarios representing different parts of the SAGD development area and concluded that each scenario showed "robust" performance.

[316] Mr. Baker compared the results of his simulation with the reported results of two SAGD projects in the Lloydminster area and with recovery rates quoted in the literature. He found that his simulation results were comparable to actual results experienced in fields with similar reservoir characteristics.

[317] Central to Mr. Baker's simulation was his measure of oil viscosity to predict the rate and volume of heavy oil recovery through a hypothetical SAGD process in the Eyehill Creek reservoir. The Defendants countered with Dr. Bennion, who was qualified as a viscosity expert (more specifically, a chemical, petroleum engineer with specific expertise in the field of steady-state and unsteady-state multiphase flow tests and reservoir fluid sensitivity evaluations, fluid behaviour analysis, including behaviour and testing of oil viscosity; and enhanced oil recovery evaluation). Dr. Bennion provided opinion evidence unequivocally discrediting the heavy oil viscosity values used by Mr. Baker in his simulation. The Plaintiff has conceded in argument, quite properly, that Mr. Baker's viscosity calculations grossly underestimated the likely viscosity of the heavy oil.

[318] Dr. Bennion stated in his report:

> It is not only my expert opinion, but a matter of simple scientific fact, that these oil viscosity values are gross underestimates of the actual in-situ viscosity of

> Eyehill Creek heavy oil at these conditions and that the provided extrapolation is incorrect.

[319] Dr. Bennion provided a number of reasons supporting his conclusions as to the inaccuracy of Mr. Baker's figures. He noted the data referenced in Mr. Baker's Simulation Report indicated typical heavy oil viscosity of about 5 centipoise at 200 degrees Celsius and of about 2 centipoise at 250 degrees Celsius. He questioned why Mr. Baker accepted a calculated viscosity for Eyehill Creek oil of 0.01 centipoise at 250 degrees Celsius when it was so inconsistent his own typical dataset.

[320] Dr. Bennion explained Mr. Baker calculated his figures for the viscosity of heavy oil at high temperatures by extrapolating from a very limited data set at low temperatures using an equation more commonly used to predict the viscosity of conventional oils at low temperatures (the Andrade equation); he stated this equation results in inaccuracies at higher temperatures. He suggested two other equations (the Wolther equation or the Svreck/Mehrota correlation) would have generated more accurate results.

[321] Dr. Bennion opined it should have been immediately obvious when the correlation produced a viscosity of 0.01 centipoise or 0.01 mPa.s (the metric equivalent) at 250 degrees Celsius (a viscosity that exists only with liquid hydrogen) that there was a gross problem with the data set. Dr. Bennion discussed the viscosity of various hydrocarbons and explained that even the lightest hydrocarbon, methane, does not have a viscosity as low as Mr. Baker's calculated viscosity for Eyehill Creek heavy oil. In fact, even liquid water and steam have higher viscosities.

[322] Dr. Bennion stated in his testimony it was immediately obvious to him that the values of heavy oil viscosity predicted by Mr. Baker's correlation were at least 100 times lower than any physical measurement he had ever seen. He wrote, "...this 0.01 mPa.s viscosity is frankly physically impossible and suggests that the pressure-viscosity-temperature (PVT) dataset was formulated without regard for even the most basic principles of high temperature heavy oil properties." He went on to say in his testimony that "anyone who has any knowledge of fluid mechanics, heavy oil operations or multi-phase flow, would immediately know that that is by far out of range."

[323] Dr. Bennion's report referenced the actual viscosity measurements taken by Weatherford Laboratories of the heavy oil at Eyehill Creek. At 200 degrees Celsius it had a value of 4-6 centipoise and at 250 degrees Celsius it had a value of 2-3 centipoise – exactly in line with expectations and all other measured data and in close alignment with the extrapolated viscosity values calculated using more reliable equations.

[324] Dr. Bennion's evidence also addressed a number of explanations Mr. Baker gave in his surrebuttal report to explain his low viscosity figures. Dr. Bennion explained in his testimony that even allowing for all of the factors mentioned by Mr. Baker, his figures were still too low:

> Accounting for experimental error, oxidation, thermal cracking, alterations, et cetera, I believe that if we used, say, 3 centipoise as our baseline, you could conceivably have up to 50 percent variation; so down to 1.5 centipoise, which

> **would still be 150 times higher than the number that he has used.** [Emphasis added.]

[325] Dr. Bennion concluded his report by saying the viscosity error led to overly optimistic recovery rates at p 7:

> This is going to result in grossly optimistic oil recovery rates and recovery factors and significantly inflated net present values for the predicted SAGD operation. Since the oil viscosity is so intrinsically tied to the recovery rates and factors, **my opinion is that all of the simulation results conducted using the EPIC viscosity curve are invalid and should be discarded as extreme over estimations of actual field performance.** [Emphasis added.]

[326] In his testimony, he explained:

> ...So given a constant permeability, if we use a viscosity that is 100 times too low, we are obviously going to grossly overestimate the production rate ...
>
> ...
>
> Based on that particular rule of thumb [the drainage rate in SAGD was approximately proportional to the square root of the fluid viscosity], **it would have a ten times or a tenfold increase in the production rate of the simulated project.** [Emphasis added.]

[327] In spite of its concession regarding Mr. Baker's viscosity figures, the Plaintiff argues he remains the only simulation expert to give evidence and that his simulation can be accepted and a discount applied to account for the viscosity error. IFP submits Mr. Baker was the only expert qualified to express an opinion regarding the effect of using a viscosity value that was too high or too low on the results of a simulation of a heavy oil SAGD project; Dr. Bennion was not qualified to dispute the evidence of Mr. Baker on SAGD simulations.

[328] I reject this contention. While not qualified as a simulation expert, Dr. Bennion is an expert in "fluid behaviour and analysis" and "enhanced oil recovery evaluation," so he is well-qualified to give evidence on the effect a dramatically lower viscosity would have on the oil flow rate. He confirmed the common sense conclusion that the results of a simulation are only as accurate as the inputs used in the first place. He noted in his report that "viscosity of the oil phase is one of the single most important controlling factors in the rate of oil recovery and recovery factor and computation of net present value for any thermal simulation project."

[329] This echoes Mr. Baker's own comment in his Simulation Report that inaccurate inputs into a simulation model lead to inaccurate outputs:

> ...no matter how complex a mathematical model may be and how powerful the numerical method used, the results could still be misleading **if the formation description is inadequate or data on fluid properties inaccurate. Remember that garbage in equals garbage out.** [Emphasis added.]

[330] It is clear that I cannot accept Mr. Baker's viscosity values and the calculations relying upon them.

Mr. Baker as advocate

[331] The Defendants argue the entirety of Mr. Baker's evidence should be given limited, if any, weight in these proceedings not only because of his serious viscosity error but also because he demonstrated bias and lack of independence and advocated for the Plaintiff's position.

[332] Courts have recognized that "[a]n expert witness should strive to be impartial and independent, and should not be an advocate for either party." ***Envirodrive Inc v 836442 Alberta Ltd***, 2005 ABQB 446 at para 135.

[333] One of the key elements of independence is the disclosure by an expert of the facts or assumptions upon which his opinion is based. An expert must strive to ensure no material facts that weaken his opinion are omitted from consideration. While the expert's report itself may strongly advance the position of the expert's client, an expert cannot mislead, either in the report or in court: ***Jacobsen v Sveen***, 2000 ABQB 215 at para 35. Veit J stated at para 32:

> ...all experts who provide evidence in legal proceedings must comply with the basic requirements of such witnesses, **including an obligation to give an honest opinion**...Expert witnesses in civil cases have several duties and responsibilities when they are in court before a judge, and that includes **the duty to give independent and unbiased evidence. They may be advocates for their side and take an adversarial stance, but they cannot mislead the court by giving a less than honest opinion**, or one that would compromise their independence and undermine the court's reliance upon them. [Emphasis added.]

[334] Importantly, "'independence' is not a strict criterion for an expert to be accepted by the court ... [a] lack of independence may influence the weight of the expert opinion": ***Malton v Attia***, 2013 ABQB 642 at para 28. Accordingly, "limitations facing an expert that ... relate (a) to his lack of detachment and (b) lack of independence, must go to the issue of weight assigned to the testimony of that expert": ***1159465 Alberta Ltd v Adwood Manufacturing Ltd***, 2010 ABQB 133 at Schedule 2, para 2.17, aff'd 2011 ABCA 259.

[335] The Defendants submit Mr. Baker's evidence was debunked such that he should be regarded as an advocate for IFP rather than an impartial expert. Even if he is not found to be an advocate, they argue his evidence should be regarded as having very limited probative value. They suggest his simulation runs are demonstrably of no use in connection with the development project prepared by Mr. Shepherd. The inputs are clearly wrong and "garbage in equals garbage out," as Mr. Baker stated.

[336] The Defendants point to a number of elements of Mr. Baker's evidence demonstrating his alleged bias and advocacy; I will address only one. The Defendants suggest Mr. Baker's unrelenting support for the use of the Andrade viscosity equation in his Simulation Report demonstrates the degree to which he was prepared to bolster and support his opinions and defend IFP's case, in the face of overwhelming scientific and expert evidence to the contrary, much of which was referenced in his own report and contemporaneous work.

[337] Furthermore, Mr. Baker continued to defend his low viscosity measurement after he reviewed the Defendants' experts' rebuttal reports. He was provided with two rebuttal reports opining that his viscosity equation produced impossible results with respect to oil viscosity and that his model was flawed as a result. Although one of these reports, Exhibit N for identification, was not entered as a full exhibit, Mr. Baker was examined on portions of it. The examination showed he was familiar with the report, and most significantly, that he had notice of serious problems with his viscosity values before he prepared his surrebuttal report. Yet in his surrebuttal report he stated at p 9:

> I disagree with Fekete's statement that the viscosity at high temperature used in my simulation is too low.

Mr. Baker did not admit any error; instead he took vigorous steps to bolster the initial opinion he had expressed in his Simulation Report.

[338] The Plaintiff argues Mr. Baker was not an advocate and highlights the differences between the cases in which an expert was found to be an advocate and the situation herein:

> Expert became closely identified with his client's case, used "pejorative and judgmental language" and wrote a report that was essentially a brief on behalf of the client: ***McNamara Construction Co v Newfoundland Transshipment Ltd***, 2000 CarswellNfld 402 at paras 6-7 (SC(TD)).
>
> Expert publicized he was the expert for one party and earned a large part of his income from a largely defence-oriented expert witness practice: ***Adwood*** at para 2.16 discussing ***Frazer v Haukioja*** (2008), 58 CCLT (3d) 259 (Ont Sup Ct J)

[339] The Plaintiff argues Mr. Baker did no more than defend his opinion against that of a similarly qualified expert, namely Dr. Pooladi-Darvish. The Plaintiff submits at para 25 in Appendix B to its written argument:

> Dr. Pooladi-Darvish had started the debate about viscosity in his rebuttal report. Witnesses on different sides of a trial often disagree – there is nothing unusual about that. We respectfully submit that Mr. Baker was entitled to defend his opinion on viscosity against the criticisms of Dr. Pooladi-Darvish. The fact that he was eventually shown to have been incorrect does not mean that he was any less qualified than Dr. Pooladi-Darvish to express his opinion and does not make him an advocate for the position of IFP or affect his independence or credibility as an expert.

The qualifications of Dr. Pooladi-Darvish were of the same nature as those of Mr. Baker.

[340] The Plaintiff admits that Mr. Baker, in his surrebuttal report in response to Dr. Pooladi-Darvish's rebuttal report, defended his viscosity inputs on a number of grounds. The Plaintiff argues, however, that defending his opinions, even if some of them were wrong, is completely different from identifying himself with IFP's case or advocating on its behalf. There is no reason for suggesting he intentionally manipulated the viscosity value to improve the simulation results

to favour IFP, as the Defendants have suggested. The Plaintiff submits that if this had been the case, Mr. Baker surely would have found less obvious ways of doing so.

[341] The Plaintiff concedes Mr. Baker was wrong to use the Andrade equation to extrapolate the viscosity of oil at Eyehill Creek from reservoir temperatures to steam temperatures. He was also mistaken in the explanations he provided in his surrebuttal report as to why his conclusions were reasonable. But the Plaintiff notes that Mr. Baker always made it clear that he did not regard himself as an expert on viscosity. He did not attempt to challenge Dr. Bennion on viscosity.

[342] I accept the Defendants' criticisms of Mr. Baker's evidence although I find it unnecessary to go so far as to conclude that he was an advocate or biased. As discussed earlier in these reasons, I found him to be an evasive witness who never directly answered a question. He refused to concede his error, even when it was made readily apparent, and chose to vigorously defend his position instead. I cannot give his evidence any weight.

Economic evaluation

[343] Mr. Shepherd prepared a development plan and economic evaluation of the conceptual Eyehill Creek SAGD project. In his testimony he described the nature of his assignment:

> ...my focus was to determine with the team whether there was a potentially viable project here and to develop a plan for it and develop a valuation for it had it proceeded.

[344] His report set out his assumptions and conclusions regarding the project schedule, water treatment and steam generation systems, water sources, water recycling, cost of each well pair, royalty rates, etc. He created two different capital cost scenarios, one in which everything had to be constructed from the ground up and a second in which the existing facilities at Eyehill Creek were used. Both scenarios delivered a positive return on investment, even when he took a number of possible sensitivities into account.

[345] He relied upon the information from IFP's other experts and assumed it was correct, including the selected well locations and the simulated well injection and production forecasts. He explained in his testimony that he "assumed that the technical team have appropriately modelled the geologic environment."

[346] The Defendants criticize Mr. Shepherd's model for using actual historical oil prices rather than price forecasts. Mr. Shepherd purported to assess the project from the date of the lost opportunity in 2001, but he used actual oil price history from 2002 to 2010 and forecasted prices for beyond 2010. In this way, the Defendants argue he has removed any price risk from the model.

[347] I accept Mr. Shepherd's use of actual prices since they provide the most accurate representation of the lost opportunity. I find the price risk issue relates more to the question of whether and/or when the opportunity would be been realized, not the value of the lost opportunity.

[348] The Defendants also submit Mr. Shepherd's model takes the upside of every variable input. For example, he includes the cost of strat wells (to get more core samples and geologic information) and observation wells (to monitor temperature, pressure and other reservoir characteristics) but assumes good results for them and does not adjust for the contingency that the results of these further investigations by geologists could change the placement of the wells or the recommendation to proceed.

[349] Ultimately, I need not decide on the impact of these concerns. As will be discussed in the section below, I find that the accumulation of errors by IFP's experts, particularly Mr. Baker's low viscosity figure, is such that I cannot accept Mr. Shepherd's valuation of the Plaintiff's conceptual project.

Effect of errors on IFP's damages model as a whole

[350] The Plaintiff concedes that Mr. Shepherd's economic evaluation of IFP's conceptual project has been impaired by two things, the first being Dr. Carey's error in using data from fake well 7 in his geocellular model. IFP argues Dr. Carey believed the error would have only a small effect on IFP's damages model as a whole but he was unable to quantify it. The specific impact on the model is that some of the southwest wells may be less robust in their performance or may not be proper wells at all. There are eight southwest wells, out of a total of 29 project model wells. If half of the southwest wells could not be drilled, they represent 14% of the total wells modelled.

[351] The second problem was Mr. Baker's viscosity error. Mr. Baker testified that his error would not make a significant difference to the predicted well performance and that this conclusion is supported by the favourable comparison between his simulation model and actual well performance results. The Plaintiff submits the error should be viewed as introducing uncertainty rather than as a fatal flaw in the model and argues I must accept Mr. Baker's evidence on this point because the Defendants called no expert to give evidence to the contrary. In recognition of Mr. Baker's and Mr. Carey's errors, the Plaintiff suggests a reduction of "as much as 25%" for the uncertainty caused by the inclusion of Dr. Carey's fake well in the geomodel and Mr. Baker's "excessively low viscosity input." In sum, the Plaintiff submits the appropriate way to approach damages is to base them on Mr. Shepherd's model, using his revised and updated figures and then discounting this figure by 25%. The proposal to reduce the totals by 25% was never put to Mr. Shepherd.

[352] By contrast, the Defendants argue I cannot accept Mr. Shepherd's economic evidence at all since it is premised on the flawed geomodel and flawed simulation model. They take issue at para 306 of their written argument with the Plaintiff's suggestion that a discount factor can be applied:

> ...The suggestion that Mr. Shepherd's project can start with the quantum of damages sought and discount for flawed geological and engineering inputs reveals the Plaintiff's results-driven approach to its damages model. Starting with the end result is not modeling, it is not good science and, it is submitted, it is not a valid foundation upon which to base a damages assessment.

[353] In cross-examination, Mr. Shepherd conceded that errors in the geologic model would impact his economics:

> Q ...if there are problems with the geological model or if there are problems in connection with the modelling process itself, the foundation of your economic runs disappears?
>
> A If you don't believe your models are credible, then your economics aren't.
>
> Q And to get right to the point, the models drive the economics, don't they?
>
> A Yes.

[354] As previously mentioned, Mr. Shepherd assumed the technical team appropriately modeled the geological environment. He also acknowledged in cross-examination that viscosity is an important variable and that it can have a significant impact on the final oil recovery rate and steam injection rate. He did not make any changes to his economic analysis to account for Mr. Baker's viscosity error.

[355] I cannot accept the Plaintiff's suggestion that I simply apply a discount factor to Mr. Shepherd's final numbers to take into account the various errors. I find the propagation and accumulation of the errors described above make the damages model entirely unreliable.

[356] The burden rests on the plaintiff to prove its case. Even if the plaintiff's damages claim is difficult to prove, the plaintiff must discharge its evidentiary burden by establishing sufficient facts to enable the trial judge to determine its loss with reasonable certainty. As stated by Osborne ACJO in ***Robert McAlpine Ltd v Woodbine Place Inc*** (2001), 141 OAC 167 at para 66 (ONCA):

> There must be evidence, accepted by the Trial Judge, from which, ... the Trial Judge can come to an intelligent conclusion on the quantum of damages. ...a **defendant should not have to pay damages based on unproven, speculative assumptions.** [Emphasis added.]

[357] The Plaintiff admits it would have been preferable if the Court had the benefit of a simulation without errors. It submits, however, that mathematical exactness is not required and that courts are often required to make rough estimates or even to "guess" damages: ***Penvidic*** at 279-80.

[358] The Plaintiff argues that even where the court rejects in its entirety the expert evidence on the question of damages, this does not relieve the wrongdoer of having to pay substantial damages. It argues the court must do the best it can nonetheless.

[359] IFP suggests there is ample evidence from which the Court can estimate the value of the lost opportunity. For example, IFP suggests I rely upon an expert report and economic valuation prepared by Dr. Pooladi-Darvish and Mr. Dale Struksnes of Fekete Associates. Although the Defendants used these reports in their cross-examination of Mr. Shepherd, they were never formally entered into evidence and I cannot rely on their contents.

[360] Mr. Shepherd prepared a surrebuttal report in response to these reports that is in evidence and IFP encourages the Court to rely on it. The Plaintiff also points to other evidence of value to be found in the SAGD simulations and economic evaluation done by PCR in 1998 or in the Dobson report commissioned by PCR and IFP. Alternatively, IFP submits the development at PCR's Senlac property also provides useful evidence of value. At the time it was evaluating a SAGD project at Eyehill Creek, PCR frequently compared the Eyehill Creek reservoir to Senlac. The Senlac project ultimately generated substantial net profits and was sold for $110 million in 2009.

[361] It is true that when faced with conflicting expert opinions, the trial judge should endeavor to assess value and fix damages even if the resulting calculation is imprecise. The trial judge is not obliged, however, to assess value and fix damages where the resulting figure would be not more than a guess, unsupported by method, principle or evidence: ***Prothroe v Adams*** (1997), 203 AR 321 at para 358 (QB).

[362] I find that I am faced with this second situation. Given the difficulties with IFP's damages model, discussed in detail above, any figure I select for damages would be a guess, unsupported by method, principle or evidence.

[363] Furthermore, I am unable to accept the Plaintiff's invitation to look elsewhere in the evidence for value. The purpose of the Dobson report, for example, was to prepare an independent third party appraisal of certain oil interests to be used to establish value. It was preliminary nature and the proposed project it considered required further evaluation prior to proceeding.

[364] It is not the court's obligation to calculate potential damages from a random array of evidence when the Plaintiff has otherwise failed to prove its claim. Based on the evidence before me, I am unable to assign a value to the lost opportunity.

3. What is the likelihood IFP would have realized on this opportunity? What other risks need to be considered?

[365] The third part of the analysis for loss of opportunity damages requires the court to consider the likelihood or probability the opportunity would have been realized and apply an appropriate discount reflecting this factor. In ***Argus Machine Co***, Kerans JA explained it as a discount for the likelihood of non-occurrence at 22:

> The task of a court in awarding damages for a risk of future loss is to award the **present value of the apprehended loss in proportion to the risk of occurrence.** Many judges by habit do it the other way around, as did the trial judge here: **they *discount* the present value in proportion to the chance of *nonoccurrence*. It amounts to the same thing in the end. The real issue is to assess fairly the risk of occurrence.** ... [Bold emphasis added; italics in original.]

[366] Satanove J in ***REC Holdings*** characterized it as an exercise in applying negative contingencies at para 121:

> How then does the court assess damages for lost opportunity? Lysyk, J. in *Cuttell v. Bentz*, (1986), 70 B.C.L.R. 85 (B.C.S.C.) said that "the amount to be assessed for the loss of opportunity represents an exercise of judgment based on the particular facts of the case". **Basically, it is an exercise in applying negative contingencies. The court tries to determine what most likely would have happened and then discounts for what possibly,** but not fancifully, **could have happened to prevent the opportunity from reaching fruition.** [Emphasis added.]

[367] Such hypothetical events "need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood": ***Athey v Leonati***, [1996] 3 S.C.R. 458 at para 27. The fact that such calculations are, to some degree, an exercise in conjecture "has not resulted in the courts declining the task": ***Nathu*** at para 15.

[368] The Plaintiff suggests in its argument that the risks associated with the likelihood of realizing upon the opportunity to thermally develop Eyehill Creek may be divided into two categories: (1) the risk or uncertainty related to whether a project would have proceeded and (2) the risk or uncertainty associated with the success of any such project.

[369] IFP argues the risks and uncertainties relevant to whether a SAGD project would have proceeded relate to economics, IFP's minority interest, IFP's need for financing, and the pending lease expiries. The fact that heavy oil and natural gas prices were unfavourable at the time PCR made its decision to farmout to Wiser raises questions about whether the project would have proceeded at all. Given PCR's apparent lack of interest in the project, IFP as 20% working interest holder, would have had to find a majority partner willing to operate a SAGD project. Furthermore, IFP did not have enough cash on hand to finance its share of the capital expenditures associated with a SAGD project, so it would have had to seek funding from its parent company in France or other sources.

[370] The Defendants argue that a SAGD project would not have proceeded at the time. They submit that PCR had clearly decided it was not going to pursue a thermal development at Eyehill Creek. Faced with PCR's decision and Crown leases set to expire by August 31, 2001, unless production was planned or initiated, IFP would have had to spearhead a thermal development of the lands to maintain its opportunity to benefit from its working interest. The Defendants argue it is clear from the evidence that IFP was in no position to initiate a project on its own. Even absent the lease expiry issue, Mr. Delamaide and Mr. Verbraeken testified that IFP was not prepared, and never had been prepared, to become an operator with the result that it would have had to prepare its own thermal development plan for the purposes of seeking an operating partner or marketing its right of independent operations.

[371] The Defendant points to IFP's conduct, or lack thereof, in late 2000 when it first learned PCR would be putting the Eyehill Creek lands up for sale. IFP did not complain to PCR. It did not try to stop or delay the sale. It did not propose a plan to PCR. It did not undertake any internal processes to try and determine next steps, nor did it even inquire of PCR to determine its intentions with respect to the lands. Likewise, in February 2001, before PCR approved the ARO with Wiser, IFP took no action after being given an outline of the proposed agreement. Nor did IFP turn to its French parent for funding or look for a partner in response to the ROFR.

[372] When IFP met with Wiser's Glenn Booth in June 2001 to review its proposed future operations, including its plans for new primary wells on section 9, IFP did not suggest any steps to best protect its working interest (i.e. selection of drilling locations, use of thermal cement). Nor did it seek to enforce its operational rights under the JOA or propose or commence thermal development while Wiser was earning its interest and PCR was still the registered operator.

[373] Furthermore, the Defendants submit that when Canadian Forest took over Wiser's operations, IFP had another opportunity to propose a thermal or other enhanced recovery operation, given Canadian Forest's significant engineering resources, but it still took no action.

[374] The Defendants suggest that the evidence shows that in the face of PCR's decision not to pursue a thermal project IFP would never have taken action. IFP made it clear it had limited tolerance for risk. The evidence establishes that a thermal project is capital intensive for a long duration and requires a substantial up front gamble. IFP did not have the management team in place to advance or manage such a process, and it called no evidence to suggest there were potential partners who were prepared to advance IFP's plans. IFP did not even look for such a partner, although it argues there was not enough time to do so.

[375] IFP refutes the Defendants' arguments saying the fact that it did no work on a SAGD project has no relevance since after Wiser was in possession there was no project to pursue. I find IFP's inaction is relevant to establish that it was unlikely to have proceeded without PCR.

[376] IFP argues that other operators might have been interested in thermal development of these lands, even if PCR was not. It submits the low price environment in 2001 did not condemn this or other projects as having no value; it is conceivable the planning stages could have been undertaken then so as to go forward with the project when the economic environment was more favorable. The Plaintiff states in its brief at para 211: "...it is not appropriate to look at the price environment in 2001 in isolation, as if no project would have been undertaken unless one was started without delay at the very time PanCanadian breached its contract with IFP."

[377] IFP disputes the Defendants' characterization of a limited time frame in which to start a SAGD project and states that a project could have been initiated on the PCR fee lands at any time, without time pressures related to the pending Crown lease expiries. PCR owned fee title to the petroleum in section 9, as well as other odd-numbered sections. The Plaintiff contends a more flexible time frame would have made finding a partner more probable. The evidence suggests, however, that there were very few SAGD projects at the time and PCR was one of the industry leaders, casting doubt on IFP's ability to find a partner. In fact, IFP admits it would have been difficult to find a partner ready to commit full project funds in 2001. Prices increased in 2002, however, and stayed solid thereafter, possibly improving IFP's prospects for finding a partner.

[378] I find the Plaintiff's submissions do not reflect the reality of the oil and gas industry or the Crown's focus on development. Public policy favours development of oil resources, not sitting on those rights. The numerous section 18(8) notices are a testament to this reality. I find it unrealistic to suggest that PCR and IFP could simply sit on their rights and wait for the right price environment.

[379] With respect to funding its share of the project, IFP suggests it is entirely likely its parent company, IFP France, would have stepped in to preserve its interest in Eyehill Creek. Also, IFP notes that while the capital necessary to construct a SAGD project is significant, the amount required before project sanction is modest. IFP argues there is no basis for finding that a lack of funding for IFP's share would have been an impediment to a SAGD project at Eyehill Creek.

[380] IFP acknowledges that the Crown's deadline for a lease extension was August 31, 2001 and that without production numerous portions of section 16 would have been lost to the Crown and posted for sale. IFP's land expert, Mr. Clark, explained the options available to a producer upon receipt of a s 18(8) notice: bring one or more wells on production, apply for continuation based on a technical presentation of a proposed development, or apply for a temporary continuation after drilling at least one well. IFP suggests that it is impossible to know what it would have done in response to the s 18(8) notices because PCR did not comply with its contractual duties or with industry practice in passing them on. IFP submits it may have made a lease extension application or proposed a thermal project at Eyehill Creek to save the Crown leases. I find this is pure speculation. There is nothing in the evidence to suggest that IFP was in a position to take such action. Although PCR did not keep IFP informed as it ought to have done, IFP did not seek out the information. Furthermore, Mr. Clark testified it would have been difficult to get a lease extension from the Crown based on an uneconomic project and without a plan for development.

[381] I also find that PCR would not have proceeded with a thermal development at Eyehill Creek. In the absence of the farmout to Wiser, I find PCR would have undertaken primary operations to preserve its leases. This option was presented to PCR management as the least costly alternative to the Wiser deal. Alternatively, PCR may have let go of the lands entirely. I find IFP was never in a position to realize upon its minority working interest without a committed operator. I conclude that there is no chance a thermal development would have proceeded at Eyehill Creek within a reasonable time of the alleged breach of contract.

[382] The Defendants argue in favour of a discount well in excess of 50% and as high as 100%. They submit the 100% discount would reflect the continued existence of a viable thermal project at Eyehill Creek. I find this is the wrong place for this argument. Loss of opportunity damages are predicated on there being a lost opportunity. In calculating such damages, one cannot suggest that the opportunity hasn't been lost; the loss of opportunity must be presumed. Any discount to damages reflects the "chance of non-occurrence" of the opportunity.

[383] I find, however, that the likelihood of occurrence of a SAGD operation initiated by PCR in the absence of the farmout to Wiser to be zero. As discussed above, PCR would have taken an alternate course of action. I also find that IFP would not have initiated such a development on its own. IFP made no move to take advantage of the purported SAGD opportunity when PCR was still a working interest owner and its approach did not change once Wiser, and later Canadian Forest, were in possession. Even if I had been prepared to award damages for the alleged loss of opportunity, I would have discounted them by 100% to reflect the "chance of non-occurrence". IFP has not established that the purported opportunity would have been realized.

[384] The parties also made submissions related to the likelihood of success of the project including its geological risks, engineering risks, drilling and completion risks, and operational

risks. In general, IFP submits there is no evidentiary basis for suggesting that there was a risk of failure of a SAGD project at Eyehill Creek in the undepleted area before Wiser's arrival that was more significant than the risk of failure of any other SAGD project. On the contrary, they argue this part of the Eyehill Creek reservoir was uniquely positive. Good well control lent a high degree of confidence as to the reservoir qualities and, prior to Wiser's and Canadian Forest's primary production, the modelled part of the reservoir had not been compromised. IFP submits that the risks of the project succeeding have been taken into consideration in the damages model and do not need to be discounted further.

[385] I find it unnecessary to consider the risks associated with development given my conclusion that the opportunity itself would never have been realized.

C. Did IFP fail to mitigate its damages?

[386] Although I have not awarded damages, I will address the parties' mitigation arguments. The principal meaning of mitigation in the law of damages refers to actions the plaintiff might have taken to diminish its losses. A plaintiff must take all reasonable steps to mitigate the loss consequent on the breach and cannot claim any part of the damage due to its own neglect in taking such steps: ***British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Company of London***, [1912] AC 673 (HL) at 689. A plaintiff has an obligation to mitigate even if it is doubtful of the defendant's liability: ***Biranda v Anderson*** (1978), 16 AR 330 at para 14 (Dist Ct). The defendant bears the burden of proving the plaintiff's alleged failure to mitigate.

[387] In ***Costello v Calgary (City)*** (1997), 209 AR 1 at para 42, leave to appeal to SCC refused, [1998] 1 SCR vii, the Alberta Court of Appeal set out the principles governing the duty to mitigate:

> 1. A decision as to whether or not the plaintiff satisfied the duty to mitigate constitutes a legal conclusion. However, the question as to whether or not she acted reasonably in the circumstances is one of fact, not law...
>
> 2. The onus of proof lies on the defendant to establish on a balance of probabilities that the plaintiff failed to take reasonable steps to avoid losses ... However, the courts will not allow the defendant, in discharge of that onus, to be overly critical of the plaintiff. Having committed a wrong, the defendant should not quickly be heard to point out his victim's shortcomings in avoiding resulting losses ... The benefit of doubt, therefore, generally will be given to the plaintiff.
>
> 3. The duty to mitigate does not invariably require action to be taken immediately upon breach. As the plaintiff need merely act reasonably in the circumstances, considerable delay may be permitted in some cases...

4. The plaintiff need not incur great expense or inconvenience in an attempt to stem the flow of losses resulting from the defendant's breach...

5. Nor need the plaintiff incur an unreasonable risk, or embark upon a speculative venture, in an attempt to mitigate her losses...

[388] The Defendants submit IFP had a duty to take steps to mitigate its losses as soon it became clear PCR was proceeding with the ARO with Wiser without IFP's consent. PCR identifies a number of factors as indicative of IFP's failure to mitigate.

[389] PCR repeats its argument that IFP did nothing when it learned in late 2000 of the pending farmout of Eyehill Creek. When presented with the proposed ARO with Wiser in February 2001, IFP did not ask PCR to prevent damages to IFP's own interests nor did it advance its own thermal project. When faced with the ROFR in April 2001, IFP took no action beyond requesting compensation. It did not exercise the ROFR or try to sell its rights. It did not seek funding from its parent or look for a partner to initiate a thermal operation. It also took no action during Wiser's earning period to enforce its operational rights under the JOA. Later, it did not seek an investor or joint venture partner. Upon meeting with Wiser's Glenn Booth in June 2001, IFP did not suggest steps that would preserve its assets.

[390] The Defendants argue IFP could have and should have served an independent operations notice under Article 10 of the Operating Procedure for a SAGD operation. The Plaintiff disputes such an independent operations notice was possible, given its position that Wiser never became party to the JOA or the Operating Procedure. It also argues the practical realities IFP faced in May 2001 after PCR and Wiser entered into the ARO made this idea completely impractical. These practical realities included Wiser's immediate occupation of the field; the absence of information from Wiser and Canadian Forest about their operations, including details about future wells; and, the challenge of finding a majority partner willing to initiate a SAGD project on a field in which a third party was conducting primary operations. IFP argues that it takes time to bring a SAGD project to fruition. Meanwhile, Wiser's and later Canadian Forest's operations were having an ongoing negative physical impact on the reservoir, complicating the process of studying and planning a SAGD operation. Since primary and thermal projects cannot co-exist, Wiser would have had to stop is operations before any SAGD project could be started.

[391] IFP submits, given the practical realities of the situation, it is not tenable to suggest that IFP failed to mitigate its damages by failing to initiate a SAGD project post-ARO.

[392] The Defendants also argue that IFP should have tried to stop Wiser by obtaining an injunction, with limited evidence or argument in support. IFP rightly points out that the court might have concluded that damages would be an adequate remedy.

[393] In February 2014, Justice Stevens invited further submissions from the parties (limited to two pages) in response to a letter from the Defendants about the Supreme Court of Canada's decision in ***Southcott Estates Inc v Toronto Catholic District School Board***, 2012 SCC 51. The main issue in ***Southcott*** was whether the plaintiff, a single-purpose corporation, was excused from mitigating its losses when the Defendant vendor breached the agreement of purchase and sale, particularly when it had promptly brought an action for specific performance. The

Defendants suggest IFP, like the Plaintiff in ***Southcott***, elected only to pursue litigation without any regard to mitigation. I have reviewed the ***Southcott*** decision and the parties' submissions and I find it is not relevant to the disposition of the mitigation issue in this case.

[394] The onus is on the Defendants to prove that IFP failed to take reasonable steps to mitigate its losses. Mitigation requires only that a plaintiff take reasonable steps to avoid loss. I accept IFP's argument that it would have been unreasonable to seek an operating partner and expend the money necessary to initiate a thermal development at Eyehill Creek while Wiser, and later Canadian Forest, were actively developing the field. I reject the Defendants' claim that IFP failed to mitigate its damages.

D. Accounting of profits from Canadian Forest

[395] In the alternative, IFP claims an accounting of profits from Wiser and Canadian Forest. As explained earlier in these reasons, IFP takes the position that the AEA granted IFP an undivided interest equal to 20% of PCR's working interest in Eyehill Creek and that it is only the JOA that limits this working interest to thermal and other enhanced recovery. IFP argues the breach of contract terminated the JOA and Wiser is not and never was a party to it. Consequently, IFP submits it now holds a 20% working interest in the lands without limitation on the type of recovery.

[396] IFP submits that the relationship between two or more holders of working interests in oil or gas is that of "tenants in common of the leases": ***Midcon Oil & Gas Limited v New British Dominion Oil Company***, [1958] SCR 314 at 322, Locke J. They argue that the *Administration of Justice Act*, 1705 (UK), 4 Anne c 16, s 27 (known as the *Statute of Anne*) requires one tenant in common to account to the other tenants in common for their just share of revenues received from the jointly-owned property and that this principle has been applied to persons holding mining interests in joint ownership with others.

[397] IFP relies upon American case law to suggest that the production of petroleum rights by one co-tenant without the consent of the other does not constitute waste; rather, the active co-tenant must account to the non-consenting co-tenant for his proportionate share of the proceeds of production.

[398] IFP presented the evidence of Barry Parker, a production accountant and joint venture auditor retained by IFP. He prepared a report relying upon Wiser's and Canadian Forest's accounting records. His review showed that the primary development of Eyehill Creek reached payout in the latter part of 2004 and that since that time the project has generated total net revenues of $27,823,852. IFP calculates its working interest share as $5,408,911.

[399] The Defendants submit there is no basis for IFP's claim for an accounting from Wiser and Canadian Forest. First, IFP has not lost its interest in Eyehill Creek. A potential thermal or other enhanced recovery project still exists and IFP will receive its 20% interest if and when it proceeds. Second, the Defendants submit Wiser, and subsequently Canadian Forest, have always recognized IFP's rights and have acknowledged that they will abide by the terms of the JOA.

[400] PCR emphasizes the inappropriateness of IFP's claim based on double recovery: on the one hand IFP claims damages based on its alleged lost opportunity to benefit from thermal or

other enhanced recovery operations on the Eyehill Creek lands, while on the other hand it claims a 20% interest in all production, including from primary operations.

[401] The Defendants reject IFP's suggestion that it should have an election as to remedy, stating it is an example of IFP trying to take all the benefits without giving up anything. The Defendants submit that if IFP obtains an accounting it should be coupled with a declaration that any interest it had or claim in thermal or other enhanced recovery at Eyehill Creek is at an end.

[402] As discussed above in Parts VII.A.3. and VII.A.5., I have concluded that IFP was unreasonable in withholding consent and that Wiser was novated into the JOA. I have found that IFP has not lost its interest in Eyehill Creek; IFP will receive the benefit of its 20% working interest in Eyehill Creek if and when a thermal or other enhanced recovery project proceeds.

[403] Furthermore, as I concluded in Part IV.B.2., IFP's working interest is limited to thermal and other enhanced recovery. IFP has no contractual entitlement to a share of the proceeds of primary production.

E. Effect of contractual limitation of liability

[404] The Defendants submit that even if the Court wholly accepted the Plaintiff's claim, IFP is contractually limited to recover a maximum aggregate amount of $16 million pursuant to Article 7.9 of the AEA:

> In no event shall the liability of PCR to IFP in respect of claims of IFP arising out of or in connection with this Agreement exceed, in the aggregate, the value for the PCR Assets as set out in section 2.7 [$16 million], taking into account any and all increases or decreases to such value that occur by virtue of the terms of this Agreement. ...

The Plaintiff made no submissions on this issue.

[405] On its face, a limitation of damages clause is legitimate and enforceable. IFP and PCR are sophisticated business entities who negotiated the AEA with the assistance of legal counsel. There is no indication of unconscionability or oppression at the time the contract was negotiated. There are also no public policy reasons to ignore the limitation clause.

[406] I find that any damages, had they been awarded, would have been limited to a maximum of $16 million. Given the language of the contract, IFP's claim for $45 million in damages was untenable.

IX. Conclusion

[407] The contractual matrix entered into is at odds with the unilateral expectations of IFP. Were it to be granted the remedy asked for, the Court would, of necessity, acknowledge a better set of contracts conferring rights on IFP that IFP did not negotiate in the first instance. IFP cannot attain a remedy which it could not have obtained from PCR. IFP did not bargain for a joint venture, notwithstanding its unilateral expectations in this regard. It provided technology in

exchange for a working interest. IFP's working interest was restricted to EOR. It had no interest in primary production. Yet, primary production was contemplated in the contractual matrix.

[408] In conclusion, I find IFP was unreasonable in withholding its consent to the ARO between PCR and Wiser. Wiser was novated into the JOA and IFP retains its 20% working interest in thermal and other enhanced recovery at Eyehill Creek.

[409] If I am wrong in this conclusion and there was a breach, I find that the opportunity to pursue thermal or other enhanced recovery has not been destroyed; there has been no loss of opportunity.

[410] If I am wrong in this conclusion and IFP did lose an opportunity, I find that IFP has failed to prove the value of its lost opportunity and this Court cannot therefore make a damages award.

X. Counterclaim and Costs

[411] PCR seeks a declaration that IFP wrongfully withheld consent to the ARO between PCR and Wiser. It also seeks solicitor-client costs pursuant to Article 1.6 of the AEA:

> All losses, costs, claims, damages, expenses and liabilities in respect of which a Party has a claim pursuant to this Agreement include without limitation reasonable legal fees and disbursements on a solicitor and client basis.

[412] My conclusions, as set out above, make it clear that IFP was unreasonable in withholding its consent. There is no need for the Defendants to seek a declaration separately by way of counterclaim.

[413] The parties may make further submissions as to costs, if necessary.

Heard on January 24, 25, 31, February 1, 2, 3, 4, 7, 8, 9, 10, 14, 15, 16, 17, 18, 22, 23, 24, 25, 28, March 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, and June 29 & 30, 2011 before the Honourable Mr. Justice R.G. Stevens

Dated at the City of Calgary, Alberta this 30th day of July, 2014.

Neil Wittmann
C.J.C.Q.B.A.

Appearances:

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Corrigendum of the Reasons for Judgment
of
The Honourable Chief Justice Neil Wittman

Appearances: Added names of co-counsel Laurie A. Goldbach and Lawrence D. Ator for Defendants/Plaintiffs by Counterclaim.