In the Court of Appeal of Alberta

Citation: Signalta Resources Limited v Canadian Natural Resources Limited, 2025 ABCA 306

Date: 20250912
Docket: 2301-0069AC;
2401-0079AC
Registry: Calgary

Docket: 2301-0069

Between:

Signalta Resources Limited

Respondent/Cross-Appellant
(Plaintiff)

- and -

Canadian Natural Resources Limited

Appellant/Cross-Respondent
(Defendant)

Docket: 2401-0079AC

Between:

Signalta Resources Limited

Respondent
(Plaintiff)

- and -

Canadian Natural Resources Limited

Appellant
(Defendant)

Corrected judgment: A corrigendum was issued on September 23, 2025; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Justice Dawn Pentelechuk
The Honourable Justice Bernette Ho
The Honourable Justice Joshua B Hawkes

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice E.J. Sidnell
Dated the 24th day of February, 2023
(2023 ABKB 108, Docket: 1001-17217)

Appeal from the Decision by
The Honourable Justice E.J. Sidnell
Dated the 29th day of February, 2024
(2024 ABKB 115, Docket: 1001-17217)

Memorandum of Judgment

The Court:

I. Introduction

[1] This appeal arises from a dispute between a bitumen lessee and a natural gas lessee who each hold interests in the Waseca Formation located approximately 500 metres below the surface near Frog Lake, Alberta. Canadian Natural Resources Limited leases the bitumen.[1] Signalta Resources Limited leases the gas.

[2] As the bitumen lessee, CNRL also has the right to solution gas. Solution gas is hydrocarbon gas that is dissolved in crude oil or crude bitumen before the reservoir is perforated, which becomes gaseous when temperatures and pressures change within the reservoir due to human intervention through extraction activities.

[3] As the natural gas lessee, Signalta has the right to non-solution gas. Non-solution gas is hydrocarbon gas that is in a gaseous state before the reservoir is perforated.

[4] Signalta alleged that a significant volume of its non-solution gas was produced by CNRL when CNRL produced bitumen from the Waseca Formation, because non-solution gas migrated towards the bitumen in the reservoir as a result of CNRL's operations. Signalta claimed over $10 million in damages from CNRL.

[5] CNRL denied producing Signalta's non-solution gas. CNRL maintained that any gas that was produced must have been solution gas that came from, or "exsolved" from, the bitumen because there was an impermeable barrier in the Waseca Formation separating the bitumen from the non-solution gas pools. If the impermeable barrier existed as posited by CNRL, then non-solution gas could not have come into communication with the bitumen and any gas produced was solution gas belonging to CNRL.

[6] A significant amount of technical and expert evidence was called at trial to address the question of whether CNRL produced non-solution gas and if so, in what quantities. Expert evidence was also called to address the quantification of damages.

[7] The trial judge accepted Signalta's technical and expert evidence and found CNRL produced Signalta's non-solution gas. She concluded CNRL was liable to Signalta in trespass,

[1] As noted by the trial judge, there can be distinctions between the terms "heavy oil," and "bitumen," depending on context. It is sufficient for the purposes of this decision to use the general term bitumen.

conversion, and unjust enrichment. CNRL was ordered to pay damages for "negligent trespass": *Signalta Resources Limited v Canadian Natural Resources Limited*, 2023 ABKB 108 [Trial Decision]. The trial judge also awarded costs of the action to Signalta: *Signalta Resources Limited v Canadian Natural Resources Limited*, 2024 ABKB 115 [Costs Decision].

[8] CNRL appeals nearly the entirety of the trial judge's decision on liability, submitting the trial judge made numerous errors. CNRL also appeals the Costs Decision maintaining that the costs awarded to Signalta were excessive and the decision was procedurally flawed.

[9] Signalta cross-appeals the trial judge's assessment of damages, submitting that a higher amount, characterized as harsh damages, should have been awarded given the trial judge's findings of fact. Signalta asserts that none of CNRL's expenses should have been deducted from gross revenue when damages were calculated.

[10] In this decision, after providing background information, we will address CNRL's appeal of the trial judge's liability determination and then Signalta's cross-appeal on damages. We will then address CNRL's appeal of the Costs Decision.

[11] We note that unless it is required to address a particular ground of appeal, we will not review the record and technical evidence in detail, as this information is available in the Trial Decision. In addition, we will use the definitions provided by the trial judge in the glossary appended to the Trial Decision unless context requires otherwise.

II. Background

[12] CNRL and Signalta reached an agreed statement of facts which included the following information:

(a) CNRL was assigned an oil sands lease under an agreement dated August 1, 1998 (the "**OSL**"). This OSL grants CNRL the exclusive right to win, work and recover the oil sands in the Mannville Group in the interval of 1462.00 to 2027.00 feet within and under the lands subject to the OSL.

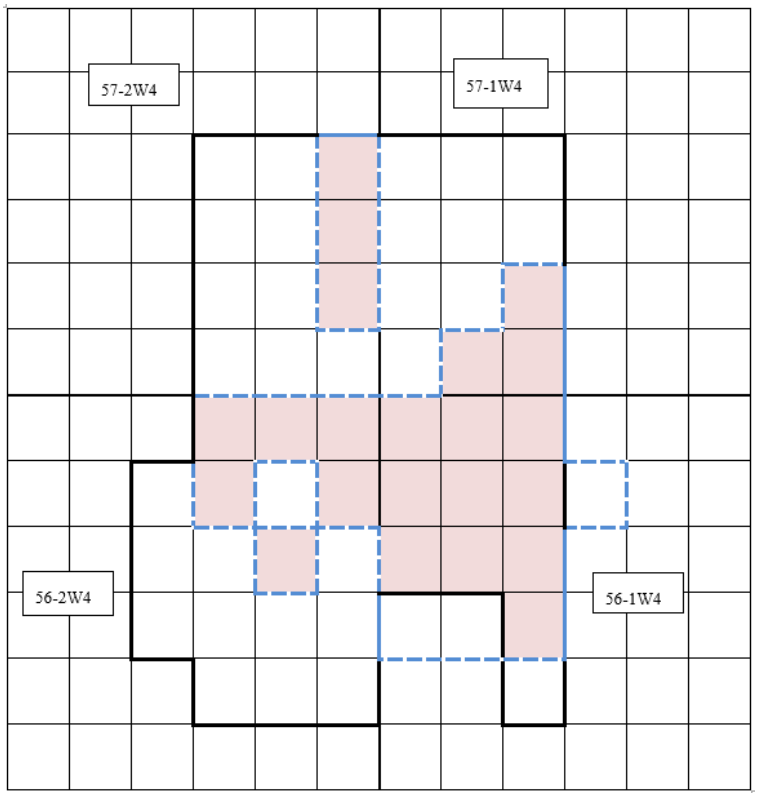
(b) Signalta acquired certain petroleum and natural gas leases (the "**P&NG Leases**") under a purchase and sale agreement with Imperial Oil Resources, dated February 17, 2009, and with an effective date of January 1, 2009 (the "**Purchase and Sale Agreement**")

(c) To the extent that the lands and zones covered by the P&NG Leases overlap with lands covered the OSL, these are Split Title Lands.

(d) Frog Lake falls under the Cold Lake Oil Sands areas in Alberta. The designated zone under the relevant Alberta Energy Regulator Interim Directive[2] ("**ID-99**") is the Mannville Group.

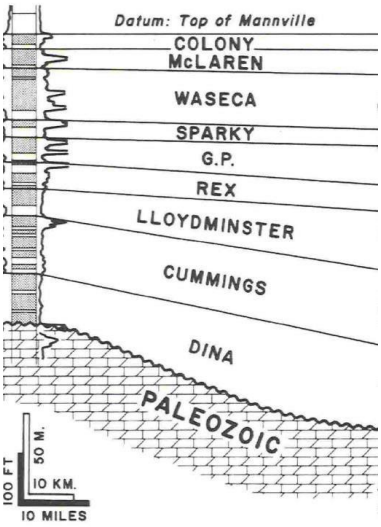
(e) The Waseca zone is a geologic zone within the Mannville Group.

[13] The following figure, excerpted from information included in the Trial Decision, shows CNRL's OSL in the area marked by the solid line and Signalta's P&NG Lease in the area marked by the dashed line (though solid where it overlaps with the OSL boundary). The shaded area represents the Split Title Lands.



[2] Alberta Energy Regulator, *Interim Directive 99-01: Gas/Bitumen Production in Oil Sands Areas – Application, Notification, and Drilling Requirements*, (Calgary: AER, 1999, as amended). As noted by the trial judge, the parties agreed this instrument applied and focused on it, rather than subsequent regulatory enactments that codified aspects of this instrument: Trial Decision at paras 762-763.

[14] The strata of the Mannville Group were depicted in an illustration included in the Trial Decision, originally taken from a report of Dr. Hayes.[3] The illustration includes the Waseca Formation.



[15] The parties agreed that the Waseca Formation was comprised of two informal members, the Upper Waseca and the Lower Waseca, although the exact nature of these formations was disputed. CNRL maintained that the Upper and Lower Waseca were separated by an impermeable shale membrane. Conversely, Signalta's experts opined that no such impermeable membrane existed such that non-solution gas could migrate throughout the Waseca Formation, particularly given CNRL's production and operations.

[16] The trial judge confirmed the Waseca Formation at Frog Lake was regulated as a crude bitumen reservoir, even though it was produced without thermal assistance using the cold heavy oil production with sand method ("**CHOPS**"). The trial judge also confirmed the parties' agreement that ID-99 applied to the lands covered by CNRL's OSL.

[17] Immediately after CNRL obtained the OSL, it did not conserve produced gas; it was either flared or vented without accounting for volumes. Starting in May 2000, CNRL introduced gas conservation measures and started producing gas for its own use and for delivery to market.

[18] After acquiring the P&NG Leases from Imperial Oil a Signalta employee, Mr. Hunt, began making a structural map that included the Waseca zone. By late 2009, Mr. Hunt concluded that CNRL had produced Signalta's non-solution gas from CNRL's wells. In April 2010, Signalta

[3] Primary Report of Dr. Brad J. Hayes dated June 2016, Appellant's Extracts of Key Evidence at 598.

initiated discussions with CNRL regarding its concerns that non-solution gas was being produced. Signalta filed a statement of claim against CNRL on November 19, 2010.

[19] Signalta and Imperial Oil also entered into a Confirmation of Assignment Agreement effective January 28, 2013. The Confirmation of Assignment Agreement was prepared to address CNRL's argument that Signalta did not acquire pre-January 1, 2009 rights from Imperial Oil, and stated, among other things, that the Purchase and Sale Agreement "included all rights of every nature and kind arising from and incidental to [Imperial Oil's] ownership of the Interests in the Split Title Lands".

[20] Signalta's allegation that CNRL produced non-solution gas required the trial judge to first determine whether producible non-solution gas existed in the Waseca Formation in the Split Title Lands before it was disturbed by human intervention. The state of the reservoir prior to human intervention was relevant because the Supreme Court of Canada has ruled that ownership of solution gas and non-solution gas must be determined based on the state of hydrocarbons in the reservoir prior to when pressure and temperature changes were introduced by initial drilling: *Anderson v Amoco Canada Oil and Gas*, 2004 SCC 49 at paras 40-42. If non-solution gas did not exist in the Waseca Formation, any gas produced must have been solution gas belonging to CNRL.

[21] If non-solution gas existed prior to human intervention, the trial judge then had to determine if CNRL produced non-solution gas and if so, in what quantities.

[22] A significant amount of competing technical and expert evidence was adduced at trial to establish the reservoir conditions that existed over 25 years ago, and to address Signalta and CNRL's respective theories of the Waseca Formation as it related to the Split Title Lands. Generally speaking, the technical expert witnesses presented methodologies and conclusions drawn from their analysis and interpretation of collected geologic data.

[23] The trial judge recognized her responsibility to act as a gatekeeper over the expert evidence that was introduced. She reviewed key authorities in the area, including *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9, *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, *R v Bingley*, 2017 SCC 12, this Court's decision in *R v SKM*, 2021 ABCA 246, and various secondary sources to navigate her admissibility determinations.

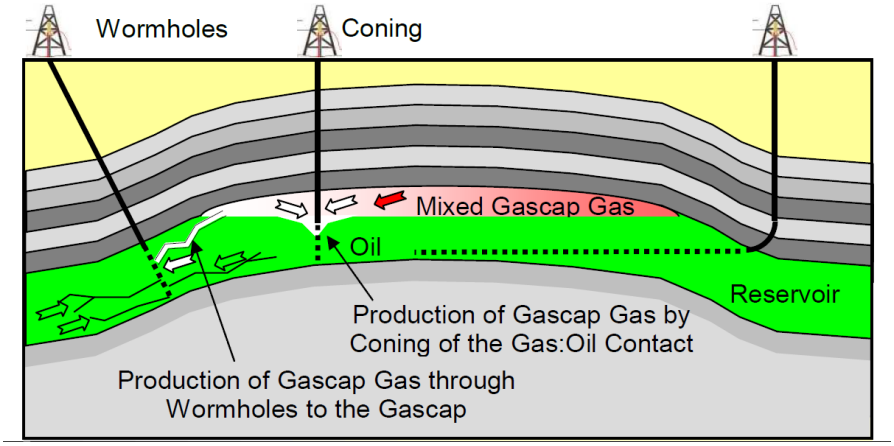
[24] The trial judge conducted a comprehensive and detailed review of the technical and expert evidence. She explained why she accepted or rejected the evidence of each witness, and why she preferred the evidence of some witnesses over others. As she noted, she was forced to deal with late challenges to expert evidence based on weight, assigning zero weight when she found evidence to be inadmissible. After considering the evidence that she determined was admissible and accepted, the trial judge made several key findings, accepting Signalta's position that:

(a) the two gas caps described by Signalta's witnesses at trial, referred to as the Main Gas Cap and the NW Gas Cap, existed and contained non-solution gas, though there was some exsolved gas from surrounding bitumen production in both;

(b) there was no regionally extensive, impermeable barrier between the Upper and Lower Waseca; and

(c) it was possible for CNRL to produce non-solution gas, through perforations made in the Upper Waseca just below the gas-oil contact leading to "coning", and through narrow diameter cavities called wormholes created by CHOPS. The wormhole and coning phenomena are, in part, explained by the following illustration taken from the Trial Decision.

Figure ES.4 Production of Gascap Gas by Oil Wells



[25] Having arrived at those findings, the trial judge then determined that CNRL produced 1,944,851 mcf of non-solution gas from January 1, 2001 to December 31, 2015.

[26] The trial judge next considered Signalta's claim for harsh damages, a form of restitutionary damages available where trespass or conversion occurs in relation to natural resources. In deciding whether to award harsh damages, the trial judge reviewed relevant jurisprudence and CNRL's conduct. She was not satisfied that CNRL's conduct was deliberately unlawful or done in bad faith, so she declined to award "harsh damages". She was nevertheless satisfied that Signalta had proven entitlement to "negligent trespass damages", which coincided with the mid-range case estimated by Signalta's damages expert. CNRL was ordered to pay Signalta damages quantified based on the value of the gross revenue for the non-solution gas, less CNRL's expenses after the gas was extracted, including the royalties paid and the costs of gathering, transporting, and compressing the gas.

[27] Following trial, the parties required the court's assistance to settle the matter of costs. In the Costs Decision, the trial judge held that Signalta was entitled to 45% of its "reasonable and proper costs", plus a doubling of costs after the date it had served a formal offer on CNRL. The trial judge directed that reasonable and proper costs would be determined by an assessment officer. Signalta was also awarded its disbursements, which were not contested by CNRL.

III. Standard of Review

[28] The grounds of appeal attract different standards of review.

[29] Generally, questions of law are reviewable on the correctness standard. Questions of fact, and mixed fact and law are reviewable on the standard of palpable and overriding error, unless there is an extricable question of law: *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 26-36. An error is palpable if it is obvious, and overriding if it is core to the outcome of the case: *Benhaim v St-Germain*, 2016 SCC 48 at para 38.

[30] A decision to accept or reject expert evidence is reviewable on the standard of a palpable and overriding error: *Alberta v ENMAX Energy Corporation*, 2018 ABCA 147 at para 67. It is not the role of an appellate court to second-guess the weight to be assigned to different aspects of the evidence: *Nelson (City) v Mowatt*, 2017 SCC 8 at para 38. An appellate court should not overturn a decision of a lower court to accept the evidence of one expert over another unless it is unreasonable: *Grafikom Speedfast Limited v Heidelberg Canada Graphic Equipment Limited*, 2013 ABCA 104 at para 19; *Stewart Estate v TAQA North Ltd*, 2015 ABCA 357 at para 112 [*Stewart*], leave to appeal to SCC refused 36810 (30 June 2016).

[31] Damages awards are entitled to a high degree of deference. This Court will only intervene if the trial judge applied a wrong principle of law, or the total amount is wholly erroneous: *Herron v Chase Manufacturing Inc*, 2003 ABCA 219 at para 38. Findings of fact, mixed fact and law, and expert evidence related to damages, are subject to the typical standards: *Baker v Poucette*, 2017 ABCA 344 at para 11-12.

[32] Costs awards are discretionary, and this Court will only intervene if there is a misdirection as to the applicable law, a palpable error in the assessment of the facts, or an unreasonable exercise of discretion: *McAllister v Calgary (City)*, 2021 ABCA 25 at para 17-18; *Goldstick Estates (Re)*, 2019 ABCA 508 at para 22.

IV. Liability

[33] CNRL appeals the Trial Decision on numerous grounds related to liability, and submits that the trial judge erred by:

(a) failing to correctly apply the law regarding the admissibility of evidence;

(b) allowing an improper amendment to pleadings during the trial;

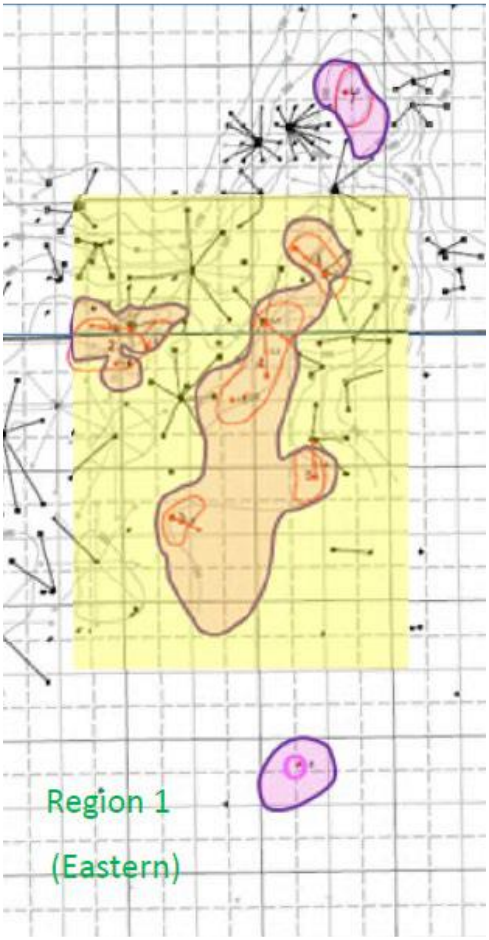
(c) failing to correctly apply the law of trespass to split title oil and gas properties in Alberta; and

(d) failing to correctly apply the law regarding limitations.

A. The Admissibility of Evidence

[34] The primary issue to be determined at trial was whether CNRL produced non-solution gas from the Waseca Formation. CNRL and Signalta advanced competing positions on several underlying issues regarding the state of the reservoir prior to human intervention. One issue required the trial judge to arrive at findings related to the distribution of gas in the Upper Waseca Formation. Signalta's position was that a volumetrically significant amount of non-solution gas was situated in structural highs, whereas CNRL submitted that gas in the Upper Waseca was distributed in isolated and volumetrically small pools, which could not be characterized as non-solution gas prior to field development; rather, they formed because of gas being exsolved from bitumen production. The difference in the parties' position on gas pool distribution is illustrated in the following figure, excerpted from a rebuttal report prepared by Mr. Walker.[4] The two pools marked in purple in the yellow shaded area represent the Main Gas Cap and NW Gas Cap described by Mr. Walker, an expert called by Signalta, as compared to the isolated, smaller red circles generally positioned inside the Main Gas Cap and NW Gas Cap as described by Dr. Hayes, an expert called by CNRL.

[4] Rebuttal Report of Ian M. Walker dated November 2016, Appellant's Extracts of Key Evidence at 670.



[35] The trial judge was also asked to determine whether an impermeable shale membrane existed between the Upper and Lower Waseca zones, that would prevent migration between zones where bitumen was produced and any non-solution gas pools. CNRL argued one existed; Signalta disputed this.

[36] Given the nature of the issues to be determined at trial, the parties called a significant amount of expert evidence. Expert testimony was supported by lengthy, technical written opinions, including rebuttal and surrebuttal. The written reports were provided to the trial judge when the trial commenced. The trial judge faced an onerous task in reviewing and digesting the contents of the reports as each expert testified.

[37] The trial judge recognized that in the proper course, "the admissibility of the experts would be determined after a fulsome *voir dire* on admissibility and before each testifies in chief and the expert reports are entered as evidence in the trial": Trial Decision at para 78. However, except in the case of Mr. Walker, no objections were advanced by either party to the qualifications of the other's proposed expert and the admissibility of their reports in the *voir dire*. For example, CNRL

raised concerns regarding the admissibility of Mr. Collins' evidence for the first time in final argument, and even in Mr. Walker's case, CNRL made it clear during the trial that they were not seeking to have him disqualified as a witness. Similarly, Signalta challenged Dr. Hayes' and Mr. Beliveau's impartiality and qualifications to comment on Mr. Walker's qualifications, following their direct testimony, after they were qualified at the conclusion of their respective *voir dires*. Given the late challenges to the experts, at the end of oral submissions, the trial judge invited counsel to provide additional written submissions clarifying each party's position in relation to the opposing party's experts and to provide submissions on applicable legal principles and considerations.

[38] Late challenges to expert evidence did not absolve the trial judge of ensuring the criteria outlined in *Mohan* and *White Burgess* were met. The trial judge cannot be criticized for addressing concerns about the other party's experts for the first time in the Trial Decision, rather than during the evidentiary portion of the trial. This did not cause any procedural fairness concerns, particularly since both parties advanced late challenges and had an opportunity to provide additional written submissions to assist the trial judge to make her decision. In our view, the trial judge appropriately responded to late concerns raised by the parties, and she retained the discretion to revisit the admissibility of evidence after it was received in the circumstances of this case: *Bruff-Murphy v Gunawardena*¸ 2017 ONCA 502 at paras 66-70; *Ontario (Natural Resources and Forestry) v South Bruce Peninsula (Town)*, 2022 ONCA 315 at para 79.

[39] In any event, neither party challenges the law outlined by the trial judge relating to the qualification or admissibility of the expert evidence. Instead, CNRL asserts that the trial judge committed several errors in her application of the law, which led to the erroneous conclusion that CNRL was liable to Signalta for producing non-solution gas. While we will address each of CNRL's arguments within this ground of appeal related to the admissibility of expert evidence, we observe that many of CNRL's arguments simply invite this Court to reweigh the expert testimony to arrive at different findings, which is not the role of an appellate court.

1. Working files used to produce Mr. Walker's calculation of gas pay

[40] Mr. Walker is a Professional Geologist who was retained as an independent expert witness for Signalta. He provided evidence on a variety of topics including subsurface geologic formations, and the nature and extent of subsurface hydrocarbons. His evidence included a calculation of gas pay.

[41] CNRL submits that Mr. Walker's calculation of gas pay should not have been accepted by the trial judge because it was based on working files that were not included in Signalta's affidavit of records and were not admitted into evidence at trial. In addition, CNRL asserts that Mr. Walker's gas pay calculations were based on gross pay, rather than net pay, which would mean that his assessment of the productive reservoir was overstated. Mr. Walker's incorrect gas pay mapping was then subsequently relied upon by Signalta's other experts as the basis of their work.

[42] We reject CNRL's submission that procedural unfairness resulted because Signalta failed to produce Mr. Walker's working files as part of the discovery process, and therefore CNRL was unable to fully test the basis for Mr. Walker's opinion and cross-examine him. The trial judge noted that Mr. Walker's working files were disclosed to CNRL when the experts' initial reports were exchanged. This was confirmed during the trial. There was no procedural unfairness or prejudice suffered due to Mr. Walker's working files not being admitted into evidence during the trial. CNRL's experts had Mr. Walker's working files, and CNRL could have cross-examined him at trial on the working files, if necessary. Further, the fact the working files were not admitted into evidence is not, in and of itself, a basis to reject Mr. Walker's opinion evidence. Given that his working files were available to CNRL, this argument is one of form over substance.

[43] We also reject CNRL's assertion that there were issues with Mr. Walker's gas pay mapping which required the trial judge to assess and accept the information and calculations contained in Mr. Walker's working files before accepting his evidence. The trial judge stated that Mr. Walker could have been clearer in his initial explanations around the source of his data for his gas pay map in his primary report, but any confusion at trial was eventually clarified. Indeed, the trial judge wrote, "[n]otwithstanding the confusion created by the unclear data source for his gas pay map and other clarity issues I have mentioned already, Mr. Walker's reports were detailed, and, on balance, I find that they expressed his opinion and his reasoning process that led to it": Trial Decision at para 184. She found any lack of clarity in Mr. Walker's opinion arose from his presentation, not from any shortcomings in his analysis.

[44] It is clear from the Trial Decision that the trial judge understood the basis of Mr. Walker's opinion. The trial judge reviewed Mr. Walker's work in detail, as she did with CNRL's experts including Dr. Hayes and Dr. Kubica. Throughout the Trial Decision, the trial judge identified concerns with the evidence of both parties' experts, and discussed why such concerns caused her to reject certain opinions or in other situations, why such concerns were mitigated. The trial judge ultimately accepted Mr. Walker's opinion in several areas, including his interpretation of the data regarding the Waseca Formation, the gas-bearing interval, the thickness of the Upper Waseca gas pay, and his view that both the NW Gas Cap and Main Gas Cap contained non-solution gas. She also accepted Mr. Walker's view that the interval between the Lower and Upper Waseca consists of shales acting as baffles as opposed to an impermeable barrier, and that as a result, it was possible for CNRL to produce non-solution gas from the Upper Waseca through well perforations in both the Upper and Lower Waseca. The trial judge's acceptance of Mr. Walker's evidence is entitled to deference.

2. The trial judge erred in accepting Mr. Walker's evidence in areas outside his expertise

[45] CNRL further asserts that Mr. Walker testified outside the scope of his expertise by offering opinions involving reservoir engineering, petrophysics and chemical engineering. CNRL submits that in accordance with *White Burgess*, any evidence given by Mr. Walker outside his area

of expertise should have been inadmissible or alternatively, given no weight. In support of its position, CNRL points to the fact that its experts in reservoir engineering and petrophysics each provided rebuttal or surrebuttal evidence to Mr. Walker, whose formal education was in the field of geology.

[46] We disagree with CNRL's assertion.

[47] In *Mohan* at page 25, the Supreme Court of Canada made clear that a witness may be qualified as an expert if they "have acquired special or peculiar knowledge through study or experience in respect of matters on which he or she undertakes to testify". Therefore, a proposed expert's qualifications are not necessarily restricted to the scope of their formal education.

[48] The trial judge was satisfied that Mr. Walker was qualified to provide his expert opinion evidence. She wrote at para 174:

> Not only is Mr. Walker a professional geologist, but it was also demonstrated that he has extensive experience in reviewing, analyzing and interpreting well logs, and using all data available to arrive at conclusions about subsurface geological formations, and the existence and nature, size, and extent of subsurface hydrocarbons. In addition, Mr. Walker has considerable experience and specialized knowledge related to drilling and production in the Waseca Formation using CHOPS, some of which experience was in close proximity to Frog Lake. By virtue of his professional training and experience, I am satisfied that Mr. Walker has the expertise, requisite skill, and particular knowledge, required to prove the opinion set out in his reports and the evidence given during his testimony.

[49] This conclusion was available to the trial judge on the record and no appellate intervention is required.

3. The trial judge's consideration of Mr. Collins' model

[50] We address two of CNRL's arguments together as they relate to the trial judge's acceptance of Mr. Collins' opinions, while rejecting those advanced by Mr. Beliveau.

[51] Mr. Collins is a Professional Engineer who was retained as an independent expert witness for Signalta. He provided evidence on a variety of topics including the oil and gas recovery processes, the impact of these processes on subsurface hydrocarbons, and the quantification of hydrocarbons.

[52] Mr. Beliveau is a Professional Engineer who was retained as an independent expert witness for CNRL. He provided evidence on topics including reservoir engineering, methods of heavy oil production, and other matters related to the distinction between solution gas and non-solution gas.

[53] While acknowledging the trial judge correctly stated the law, CNRL submits the trial judge erred in accepting Mr. Collins' model dealing with non-solution gas production because it was without evidentiary foundation or scientific support. According to CNRL, Mr. Collins' model was based on static gas to oil ratios ("**GOR"**), even though both parties acknowledged that GOR change throughout the productive life of an oil well. In addition, Mr. Collins' static GOR numbers were unsupportable, and his model contradicted itself. Conversely, CNRL submits that the trial judge applied uneven scrutiny to Mr. Beliveau's work, even though Mr. Beliveau's work was based on scientific principles and proven theories.

[54] The trial judge specifically found that Mr. Collins' techniques, analysis and interpretation were reliable and based on scientific principles.

[55] The trial judge identified the need to determine if non-solution gas was produced and if so, when and in what volumes. To address these questions, she assessed Mr. Collins' evidence on behalf of Signalta and Mr. Beliveau's evidence on behalf of CNRL. As she did in her review of other expert evidence, the trial judge identified concerns with Mr. Collins' and Mr. Beliveau's evidence and discussed why she accepted or rejected their respective opinions. For example, the trial judge explained why she preferred Mr. Collins' estimate of the initial GOR of the bitumen in the Waseca Formation beneath the Main Gas Cap and NW Gas Cap, as compared to that put forward by Mr. Beliveau which she considered to be unreliable. The trial judge provided extensive reasons as to why she was not persuaded by Mr. Beliveau's opinions, including that his work was premised on the existence of an impermeable mid-Waseca barrier (which she rejected) and that there was a lack of transparency in his calculations.

[56] After reviewing Mr. Collins' evidence in detail, the trial judge also accepted his opinion that non-solution gas could have been produced by CNRL through well perforations in close proximity to gas to oil contacts of the Main and NW Gas Caps via coning, as well as through deeper well perforations through the development of wormholes.

[57] The trial judge ultimately preferred Mr. Collins' evidence regarding the volume and timing of non-solution gas production by CNRL, as compared to Mr. Beliveau's. She reviewed Mr. Collins' analysis of the GOR increasing steadily between the years 2000 to 2007 before a dramatic increase was noted as continuing until October 2010. The trial judge accepted this was consistent with higher bitumen production rates in the vicinity of non-solution gas caps during the period of dramatic increase. In comparison, the trial judge rejected Mr. Beliveau's theory that non-solution gas would have been produced early in the productive life of the reservoir and any late in life bursts were due to the production of solution gas.

[58] In our view, CNRL's complaint regarding the trial judge's acceptance of Mr. Collins' work is fundamentally a request to reweigh the evidence. We do not agree that the trial judge applied different standards to the evidence of different experts. The trial judge was entitled to reject Mr. Beliveau's work, which she found to be based on a twenty-year old version of a petroleum

handbook rather than the newer edition, and to find the publications relied upon by Mr. Beliveau to be poor analogues or comparators for production from the Waseca Formation.

[59] We further reject CNRL's assertion that the trial judge accepted Mr. Collins' work because he was the only expert to rely on Mr. Walker's conclusions, and therefore, provided the only basis upon which to assess damages, regardless of whether it was correct or plausible. While the trial judge acknowledged that Mr. Collins was the only expert to address the issue of CNRL's production of non-solution gas based on Mr. Walker's evidence, the trial judge also "found Mr. Collins' evidence to be based on sound and transparent principles and to be reliable": Trial Decision at para 648.

[60] We conclude there is no basis to interfere with the trial judge's acceptance of Mr. Collins' model and opinions. We also conclude that she did not apply different standards when she considered the expert opinions.

4. The exclusion of portions of Dr. Hayes' evidence and reports

[61] Dr. Hayes is a Professional Geologist who was retained as an independent expert witness for CNRL. He provided evidence on a variety of topics including the creation of a geological study of the Waseca Formation.

[62] CNRL submits that the trial judge erred in excluding significant portions of Dr. Hayes' evidence, relying on statements from *White Burgess* suggesting that it should be rare to exclude an expert opinion for lack of independence or impartiality. Further, the trial judge misunderstood Dr. Hayes' role as a geologist working within an interdisciplinary team of professionals. Finally, her exclusion of evidence resulted in an unbalanced and unfair record.

[63] We conclude there is no merit to CNRL's arguments.

[64] The trial judge identified several concerns with Dr. Hayes' expert opinion including that he considered issues with CNRL's other experts before completing his primary report, adopted a "team approach" in his rebuttal report, expressed opinions on the legality of the scope of Mr. Walker's practice of geology, criticized Mr. Walker's work in an inappropriate manner, and expressed his mandate as providing a geological interpretation of an oil reservoir, despite the litigation being about the production of gas from that reservoir. As a result of these concerns, the trial judge found at paragraph 342 of the Trial Decision that:

> (a) Dr. Hayes' expert opinion in his Primary Report, Surrebuttal Report to Mr. Walker and Mr. Hitchner and related testimony was admissible, except for any portion which related to the admissibility of Mr. Walker as an expert, the intemperate and inflammatory comments about Mr. Walker and Mr. Walker's expert opinion; and the bolstering of evidence of other CNRL experts, which was inadmissible; and

(b) Dr. Hayes' Rebuttal Report to Mr. Walker and any related trial testimony was inadmissible.

[65] Despite her concerns, the trial judge also considered Dr. Hayes' admissible evidence to be helpful. She concluded that her concerns could be addressed in the weight given to Dr. Hayes' evidence.

[66] As for that portion of Dr. Hayes' evidence that was excluded, the trial judge characterized her concerns as "serious". The trial judge concluded the experts called in this trial were not qualified to speak to the legality of Mr. Walker's professional practice, and it was inappropriate for Dr. Hayes to employ language that amounted to a personal attack. She observed that experts are expected to limit the scope of their disagreement to another's opinion evidence. We are not satisfied CNRL has identified an error warranting appellate intervention.

[67] We further observe that while the trial judge excluded portions of Dr. Hayes and Dr. Beliveau's reports, the record demonstrates that the trial judge still had the benefit of a large portion of their opinion evidence because she found it helpful to her resolution of the issues. The Trial Decision shows that the trial judge dealt extensively with Dr. Hayes and Dr. Beliveau's opinions, and she explained what weight she ascribed in her consideration of individual issues. In our view, trial fairness was not compromised by the trial judge's rulings, substantively or procedurally.

5. The opinions of litigant witnesses on disputed facts, already addressed in expert evidence

[68] CNRL called two witnesses, Mr. Zabek and Mr. Lowe, who were employed in management capacities with the company and at times oversaw CNRL's production from the area in question. Mr. Zabek and Mr. Lowe are both Professional Engineers. They were not called by CNRL as independent expert witnesses, but rather as lay witnesses with specialized knowledge and skills. Signalta later argued that their evidence improperly encroached into the area of expert opinion evidence and should not be admitted.

[69] CNRL submits that the trial judge should have admitted Mr. Zabek and Mr. Lowe's opinion evidence based on principles enunciated by this Court in *Kon Construction Ltd v Terranova Developments Ltd*, 2015 ABCA 249. CNRL maintains that because Mr. Zabek and Mr. Lowe personally investigated the basis of Signalta's allegations in their professional capacities as engineers for CNRL, the trial judge erred when she created a novel five-part test and failed to consider their opinions on the matters that were central to the issues at trial.

[70] While we decline to comment on the five-part test enunciated by the trial judge, we nevertheless conclude that appellate intervention is not required.

[71] CNRL submits that the trial judge erred by failing to fully consider Mr. Zabek and Mr. Lowe's evidence because it was admissible under the exception recognized by this Court in *Kon Construction* for litigants or their employees who have expertise and who were actually involved in the events giving rise to litigation. In *Kon Construction*, this Court reasoned that since such witnesses "were often only involved in the underlying events because of their expertise, it makes no sense to hold that they cannot explain why they acted as they did, if they stray into their expertise": *Kon Construction* at para 40.

[72] It is important to understand what the trial judge ruled in relation to Mr. Zabek and Mr. Lowe's evidence.

[73] The trial judge accepted that Mr. Zabek and Mr. Lowe's evidence was "relevant and material, and for the most part, had a probative value that outweighs its prejudicial effect": Trial Decision at para 429. However, she declined to consider portions of their evidence as lay opinion evidence, to the extent it was adduced to prove certain facts that were already addressed by CNRL's independent experts. Specifically, she determined that Mr. Zabek and Mr. Lowe's evidence respecting technical issues such as the geology of the Waseca Formation, the existence of an impermeable mid-Waseca barrier, the development of wormholes, and the formation of gas caps, should not be accepted as opinion evidence that could be relied on for the purpose of deciding the main issues to be determined at trial. Instead, these portions of their evidence could only be considered for context, as illustrative of CNRL's position, or as an explanation for why CNRL acted as it did. In this respect, the trial judge's use of Mr. Zabek and Mr. Lowe's opinion evidence was consistent with *Kon Construction*.

[74] CNRL also relies on the Supreme Court's decision in *Graat v The Queen*, 1982 CanLII 33 (SCC), [1982] 2 SCR 819 and submits the trial judge erred because there is no longer a bar against lay witnesses providing opinion evidence on the ultimate issue. However, *Graat* does not assist CNRL.

[75] In *Graat*, the Supreme Court held that a police officer could provide the opinion that a person he observed was drunk as a compendious statement of observed facts, expressly noting that the opinion was one an ordinary person could form: *Graat* at 839-840. Here, though, the opinions the trial judge excluded were those of professional engineers, drawing inferences about geological formations and hydrocarbons hundreds of feet under the ground, by applying complex scientific principles to an array of geological data. Mr. Zabek and Mr. Lowe's evidence can hardly be described as a compendious statement of observed facts; the circumstances of this case are a far cry from the circumstances that existed in *Graat*.

[76] Read in context, it is clear the trial judge declined to rely on Mr. Zabek and Mr. Lowe's evidence to the extent they used technical and scientific knowledge to provide opinions on the core facts in dispute, for the purpose of proving those facts. There was already ample independent expert evidence on the same subject matter adduced by CNRL. Given this, the trial judge's decision was also consistent with the principle articulated in the *Alberta Rules of Court*, Alta Reg

124/2010 that "[u]nless the Court otherwise permits, no more than one expert is permitted to give opinion evidence on any one subject on behalf of a party": *Rules*, r 8.16. It is difficult to see what value the excluded aspects of Mr. Zabek and Mr. Lowe's evidence could have had, other than improperly bolstering the evidence of CNRL's independent experts, or how the excluded portions of their evidence would have affected the result.

[77] In the circumstances of this case, we are not persuaded that appellate intervention is required in relation to the trial judge's treatment of Mr. Zabek and Mr. Lowe's opinion evidence.

6. The trial judge failed to consider relevant and material evidence

[78] CNRL asserts the trial judge disregarded evidence about the timing of gas production that confirmed the production of solution gas, failed to consider objective production data that confirmed the presence of a mid-Waseca barrier, and did not address gas production from the 2-5 well which Signalta purportedly agreed did not have a non-solution gas cap.

[79] Again, we conclude that CNRL is inviting a reweighing of the evidence. The trial judge addressed the timing of gas production when she considered Mr. Collins' and Mr. Beliveau's evidence. She also expressly rejected CNRL's theory that an impermeable shale barrier existed between the Upper and Lower Waseca zones. Finally, the trial judge accepted Mr. Walker's evidence regarding the GOR of the 2-5 well. The assertion that the trial judge failed to consider the full evidentiary record is without merit.

[80] We conclude that none of the arguments advanced by CNRL regarding the trial judge's consideration of admissibility issues identify a reviewable error. This ground of appeal is dismissed.

B. The Amendment of the Pleadings

[81] CNRL's second ground of appeal concerns Signalta's mid-trial amendment of its pleadings. CNRL submits the trial judge erred in law by allowing Signalta to amend its pleadings so late in the process, and that this prejudiced CNRL.

[82] CNRL called Mr. Jeff Bergeson, a former executive for CNRL who acted as the company's corporate representative during some of the discovery phase of the litigation. While he was giving his direct evidence, Signalta objected first based on principles outlined in *Kon Construction* regarding litigant witnesses with expertise, and then based on relevance since Mr. Bergeson first became involved with CNRL's assets in the Frog Lake area in 2016 after most of the gas had been produced. The trial judge ruled that since he was no longer the corporate representative for CNRL, his evidence was limited to his direct involvement with the subject matter of the litigation. The trial judge also ruled he could not give evidence that amounted to expert opinion on disputed geological facts, because that went beyond his proper role as a witness. Immediately after this ruling was provided, Signalta confirmed that it was prepared to abandon its claim for any gas

produced after December 31, 2015, and the trial judge accepted this concession and clarified the ruling to confirm evidence after this point in time was no longer relevant.

[83] The direct evidence continued, before further objections were raised based on the ruling. Mr. Bergeson was temporarily stood down so these objections could be considered. Before Mr. Bergeson was called back, two witnesses from CNRL testified, including its corporate representative. Mr. Bergeson was recalled, but no further questions were put to him in direct, or in cross-examination. On appeal, CNRL maintains that given the late stage of trial proceedings, it was unable to enter the substance of Mr. Bergeson's evidence through another witness after the amendment.

[84] A party may amend its pleadings after the close of pleadings with the permission of the court: *Rules*, r 3.65. Pleadings can be amended at any time, subject to certain exceptions, including circumstances related to bad faith or serious prejudice. The decision whether to allow an amendment is discretionary: *Foda v Capital Health Region*, 2007 ABCA 207 at paras 9-10; *Eon Energy Ltd v Ferrybank Resources Ltd*, 2018 ABCA 243 at para 18.

[85] Signalta's amendment had the result of limiting its claim for damages to the period of January 1, 2001 to December 31, 2015. Before this Court, CNRL has not clearly articulated what relevant evidence it sought to adduce through Mr. Bergeson but was unable to, other than referring to certain evidence generally regarding damages and capital costs. Nor has CNRL articulated why it could not adduce this evidence through its corporate representative, who was called while Mr. Bergeson was stood down, or through another lay witness called after Mr. Bergeson. Based on the record before us, we do not accept CNRL was prejudiced, and we are not satisfied that Signalta acted in bad faith in amending the time period for its damages claim.

[86] We are not persuaded the trial judge exercised her discretion unreasonably and this ground of appeal is dismissed.

C. The Law of Trespass and Split Title in Alberta

[87] CNRL submits the trial judge erred when she found CNRL liable for producing Signalta's non-solution gas because cases such as *Alberta Energy Co v Goodwell Petroleum Corp*, 2003 ABCA 277 expressly allow CNRL to produce non-solution gas on split title lands. Therefore, CNRL takes issue with the trial judge's interpretation of *Goodwell* when she concluded that CNRL's right to produce gas from the Split Title Lands was limited by CNRL's failure to comply with the applicable statutory and regulatory construct.

[88] CNRL relies upon two cases dealing with split title lands as authority for the proposition that CNRL was permitted to produce non-solution gas in the circumstances of this case. We conclude that neither case assists CNRL, as argued.

[89] In *Goodwell*, the Court considered whether an oil sands lessee had a right to produce initial gas-cap gas (otherwise known as non-solution gas) incidental to bitumen recovery. The Alberta Energy and Utilities Board had held that the oil sands lessee required the consent of the natural gas lessee if it was necessary to produce non-solution gas in order to produce bitumen. If there was no consent, the bitumen well could be shut-in for contravening the terms of the well license, because that license allowed only for the drilling and production of crude bitumen. The Board was otherwise satisfied that the bitumen producer had put in place adequate conservation measures. The Board's concern rested on the interpretation of the oil sands lessee's license and lease.

[90] This Court turned to the seminal decision of *Borys v CPR and Imperial Oil Ltd*, 1952 CanLII 337 (AB CA), [1952] 3 DLR 218 [*Borys* CA], aff'd 1953 CanLII 414 (UK JCPC), [1953] 2 DLR 65, and noted *Borys* stands for two important principles: (i) natural gas rights holders are entitled to non-solution gas, while petroleum rights holders are entitled to solution gas; and (ii) a petroleum rights holder can produce the amount of non-solution gas that is necessary to produce its petroleum, provided "modern methods are adopted and reasonably used and the provisions of the relevant statute and regulations are observed": *Borys* CA at 237; *Goodwell* at para 35; see also *Anderson*. The Court reasoned that it would be inconsistent with these common law principles and the relevant instruments for the Board to require the bitumen rights holder to obtain the consent of the natural gas rights holder, reasoning "that because initial gas-cap production is a known inevitable consequence of bitumen recovery, the right to produce initial gas-cap gas is an implied term and a natural gas lessee cannot stop recovery of bitumen by reason only of the fact that some initial gas-cap gas is incidentally produced": *Goodwell* at para 80. Notably, the Court indicated that the bitumen lessee's ability to produce initial gas-cap gas (or non-solution gas) was subject to any rights the gas-cap gas lessee may have to compensation: *Goodwell* at paras 83-85 and 104.

[91] We conclude that *Goodwell* does not assist CNRL in the manner that it claims. First, as noted by the trial judge, and as expressed in the language employed in this case, production by the bitumen producer of non-solution gas remains subject to the proviso that modern operation methods are used, and relevant statute and regulations are observed. In this case, the trial judge expressly found that CNRL did not observe relevant statutes and regulations. Second, *Goodwell* recognized that a non-solution gas lessee may be entitled to compensation for production of non-solution gas incidental to bitumen extraction. In this context, CNRL's denial of liability to Signalta based on *Goodwell* cannot be sustained.

[92] The second case relied upon by CNRL is *Encana Corporation v ARC Resources Ltd*, 2013 ABQB 352 where an issue arose between a natural gas rights holder and coal owners regarding entitlement to coalbed methane. CNRL submits that the decision in *Encana* supports its right to extract non-solution gas, but CNRL's reliance on *Encana* is misguided. In *Encana*, it was the coal owner's actions in trespass, conversion and unjust enrichment against the natural gas lessee that the court found were bound to fail: *Encana* at para 46. Further, this Court previously affirmed that pursuant to section 10.1(1) of the *Mines and Minerals Act*, RSA 2000, c M-17, "unless there is a specific exclusion, exception or reservation of coalbed methane in the natural gas lease, the natural

gas lessee has the right to recover the coalbed methane": *Encana Corporation v Devon Canada Corporation*, 2012 ABCA 271 at para 16. The chambers judge applied this law to the facts and determined the coal owner had disposed of the natural gas rights. There was no specific exclusion for coalbed methane, so the coal owner had also disposed of the coalbed methane rights, and it had no claim against the natural gas rights holder. This case turned on a statutory provision that does not apply to bitumen, and even if it did, it would not assist CNRL.

[93] In the end, neither case cited by CNRL is helpful to its position. Cases like *Borys* and *Goodwell* provide that CNRL's ability to produce non-solution gas incidental to its production of bitumen has limits, including the need to observe statutory and regulatory requirements. While CNRL takes issue with the trial judge's interpretation of ID-99, the trial judge recognized that ID-99 was an important part of the regulatory framework addressing the relative responsibilities of gas and bitumen producers. Moreover, the trial judge's conclusion that CNRL acted in violation of ID-99 is largely based on her consideration of the evidentiary record and her finding that CNRL produced non-solution gas which required regulatory approval under ID-99. As already noted, her factual findings are entitled to deference and there is no basis for this Court to interfere with her conclusion that CNRL did not comply with regulatory requirements, even though CNRL believed it was complying with regulatory requirements including ID-99.

[94] CNRL's third ground of appeal is dismissed.

D. The *Limitations* Defence

[95] CNRL's fourth ground of appeal relates to the trial judge's consideration of limitations issues. CNRL argued in the alternative that if liability was established, then Signalta's claim should be limited to two-years prior to the filing of Signalta's statement of claim through an application of the *Limitations Act*, RSA 2000, c L-12. CNRL further argued the trial judge erred by admitting Mr. Lane's testimony because his evidence was speculative and "unauthorized". As such, CNRL maintains that the trial judge failed to properly consider Signalta's burden of proof since she could not rely on this testimony, nor could she consider the Confirmation of Assignment Agreement entered between Signalta and Imperial Oil.

[96] Signalta called Mr. Lane as a witness. He was a lawyer working for an Imperial Oil entity under a services agreement at the time that Signalta purchased the P&NG Leases. He could not say whether he was involved in the Signalta-Imperial Oil transaction itself, nor was he authorized to speak on behalf of Imperial Oil. Notably, CNRL did not object to any of Mr. Lane's testimony during the trial and cross-examined him.

[97] CNRL's arguments cannot succeed because the trial judge's findings of fact that determined the limitations issues were available to her on the record.

[98] The trial judge found as a fact that Signalta was not aware CNRL produced non-solution gas from the Split Title Lands until sometime between April and December 2009.

[99] The trial judge then focused on whether Signalta, or Imperial Oil as its predecessor, ought to have known about the production of non-solution gas earlier. In this respect, she found that there was no evidence that Imperial Oil was aware that a significant amount of non-solution gas was being produced by CNRL from the Waseca Formation at Frog Lake, nor was there evidence of a pre-transaction discussion between Imperial Oil and Signalta about the production of non-solution gas. The trial judge accepted Mr. Lane's evidence that Imperial Oil did not monitor neighbouring wells to determine whether drainage by another party was occurring. Importantly, the trial judge also accepted Mr. Lane's testimony that Imperial Oil's ordinary practice was to disclose any defects in assets that Imperial Oil was aware of when selling those assets. From this, the trial judge inferred that Imperial Oil had no knowledge of CNRL's production of non-solution gas because no defects had been disclosed by Imperial Oil as part of the sale transaction with Signalta.

[100] The trial judge also rejected CNRL's argument that Imperial or Signalta could have looked at publicly available information and, with reasonable diligence, discovered the production of non-solution gas at an earlier time; this was illogical given CNRL's continued denial that it was producing non-solution gas and its position that CNRL acted in compliance with ID-99. She concluded that there was no basis on which to find that either Imperial or Signalta ought to have discovered CNRL's production of non-solution gas sooner.

[101] Mr. Lane testified that he was asked to review the Confirmation of Assignment Agreement entered between Imperial Oil and Signalta in 2013 to determine whether it could be signed by Imperial Oil. He concluded that the substance of the agreement was consistent with what was provided for in the Purchase and Sale Agreement, and consistent with Imperial Oil's intention to dispose of all rights and interests in the purchased assets. Regardless of Mr. Lane's testimony on this point, it is clear from the decision that the Confirmation of Assignment Agreement was not central to the trial judge's conclusion that Signalta acquired Imperial Oil's right to advance an action against CNRL. Rather, the trial judge reviewed the terms of the Purchase and Sale Agreement and concluded that the defined term "Miscellaneous Interests" was "inclusive of interests and does not exclude any cause of action against CNRL from the transfer of the P&NG Lease": Trial Decision at para 744. She was clear in her conclusion at paragraph 747 of the Trial Decision:

> As the holder of the P&NG Leases, IOR had a claim against CNRL and, as of January 1, 2009, IOR transferred its interests in the P&NG Leases to SRL. Not only have I found that there were no exclusions to the transfer of the Purchased Assets, but I further find that any cause of action ancillary to IOR's property interest in the P&NG Leases were transferred with that property interest. The claim against CNRL is ancillary to the P&NG Leases and I find it was transferred to SRL under the Purchase and Sale Agreement.

We note that CNRL has not argued that the trial judge misinterpreted or erred in her interpretation of the Purchase and Sale Agreement.

[102] There is no basis for appellate intervention regarding the trial judge's analysis of Mr. Lane's testimony and the limitations issues.

[103] CNRL's appeal of the trial judge's liability finding is dismissed.

V. Damages

[104] Signalta submits that the trial judge erred by setting the necessary level of intent for an award of harsh damages too high, and by conflating harsh damages with punitive damages. Thus, the trial judge erred by not awarding Signalta a higher amount of damages, in the form of disgorgement of gross revenue, given her findings of fact. Instead, the trial judge awarded "negligent trespass damages" to Signalta, which in her view aligned with the middle case presented by Signalta's expert, that calculated damages based on disgorgement of gross revenue less certain expenses associated with royalties, gathering, transportation, and compression (the "adjusted gross revenue" approach).

A. Compensatory vs Restitutionary Damages

[105] Two broad approaches have been used to quantify damages where trespass or conversion in the realm of natural resources has been found.

[106] Compensatory damages are the ordinary measure of damages in tort law and are focused on putting an injured party in the position they would have been in, but-for the tort: *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2007 ABQB 353 at para 100; *Blackwater v Plint*, 2005 SCC 58 at para 74. This approach focuses on the loss to the plaintiff: *Nexxtep Resources Ltd v Talisman Energy Inc*, 2012 ABQB 62 at paras 71 [*Nexxtep* ABQB] aff'd on other grounds *Nexxtep Resources Ltd v Talisman Energy Inc*, 2013 ABCA 40.

[107] Conversely, some courts have applied a restitutionary approach for torts related to natural resources. This approach focuses primarily on the gain wrongfully obtained by the defendant and has been used when there is something in the conduct of the defendant that justifies awarding damages with a view to ensuring the defendant does not retain any benefits of that conduct: *Nexxtep* ABQB at para 72. This restitutionary approach has been endorsed by the Supreme Court of Canada: *Kirkpatrick v McNamee*, 1905 CanLII 19 (SCC), 36 SCR 152 at 156-157; *Lamb v Kincaid*, 1907 CanLII 38 (SCC), 38 SCR 516; *Sohio Petroleum Co et al v Weyburn Security Co Ltd*, 1970 CanLII 137 (SCC), [1971] SCR 81. It has also been endorsed by this Court: *Wasson v The California Standard Company*, 1964 CanLII 642 (AB CA), 47 DLR (2d) 71; *Signalta Resources Limited v Dominion Exploration Canada Ltd*, 2008 ABCA 437 at para 48; *Stewart* at paras 196, 439. The restitutionary approach encompasses a broad range of damages, typically referred to as "mild" at one end, and "harsh" on the other.

[108] In Canadian jurisprudence, the restitutionary approach has been applied in cases involving timber, gold, and oil and gas: *Wasson*; *Lamb*; *Sohio*.

[109] CNRL in its factum submitted that a large portion of oil and gas production in Alberta takes place on split title lands and cautioned in its oral submission against an award of harsh damages. According to CNRL, such a determination would have a broad detrimental effect. In this respect, CNRL submitted that *Stewart* was distinguishable from this case and illustrates that the restitutionary approach to damages in Alberta, and in the oil and gas context, have been restricted to lease disputes.

[110] We do not agree that the restitutionary approach to damages for trespass and conversion in the oil and gas context is limited in application to lease disputes, and more specifically, we do not agree that the restitutionary approach should not be applied in relation to split title hydrocarbon rights. While this Court has recognized that in some circumstances, a bitumen lessee may interfere with the rights of the natural gas lessee to the extent necessary to extract its own resources, it has also stated the compensation should be paid for this interference: *Goodwell* at paras 82-85. The distinct property rights created in split title arrangements are property rights like any other. Fundamentally, the split title scheme and associated regulatory regime exists on the premise that gas and bitumen rights holders will respect one another's interests. Given this, we see no reason to limit the applicability of the restitutionary approach to damages and the harsh rule from application in a split title context.

B. The Mild Rule vs the Harsh Rule

[111] As mentioned, within the restitutionary approach, a court may quantify damages using the "mild rule" or the "harsh rule", as adjusted to fit the circumstances before the court: *Montreal Trust Co v Herc Oil Corp*, 2004 SKCA 116 at para 78-81, leave to appeal to SCC refused, 30596 (21 April 2005). Broadly speaking, whether to use the mild rule or the harsh rule depends on the conduct of the defendant, and perhaps to some degree, the conduct of the plaintiff. These rules are applied flexibly, and the paramount principle is that the damages awarded must be just and equitable to all parties: *Sohio* at 9; *Montreal Trust* at para 101; *Stewart* at paras 196, 439.

[112] Damages awarded under the mild rule have typically been calculated by determining the market value of the resource, with deductions for all the necessary expenses to get that resource to market: *Montreal Trust* at para 80. The original concept underlying this approach was to award damages by estimating the value of the resources *in situ*, based on what the plaintiff might have accepted as payment to allow the defendant to extract them: *Wood v Morewood* (1841), 114 ER 575 at 576, 3 QB 439 (KB); *Kirkpatrick* at 157; *Lamb* at 527. In the past, mild damages have been likened to compensatory damages: *Nexxtep* ABQB at 71-72. This is because the value of the resources gained by a defendant, less expenses, is often close to the value lost by a plaintiff, once the expenses the plaintiff would have had to incur to get the resource into a "saleable" state are considered. Mild damages have been awarded when there was no intent to trespass, the defendant made an innocent mistake, or where the plaintiff was aware of the trespass and allowed it to continue: *Montral Trust* at para 80; *Lamb* at 537-538; *Kirkpatrick* at 156-157. At least in the older

cases, the mild rule was applied presumptively, and the burden was on the plaintiff to establish that the harsh rule should be applied instead: *Lamb* at 522-523 (Davies J dissenting).

[113] Another methodology, called the "royalty approach" has been recognized by some courts as a form of the mild rule. The royalty approach has its origins in *Livingstone v The Rawyards Coal Company* (1880), 5 App Cas 25 (UKHL) and has been awarded when a plaintiff would have been unwilling or unable to extract the resources themselves: *Montreal Trust* at para 80; *Freyburg* at paras 138-142. In these circumstances, courts have quantified damages based on the royalty the plaintiff might have been willing to accept from the defendant or another party.

[114] Damages awarded under the harsh rule have generally been calculated by determining the market value of the resource and then deducting the necessary expenses to get that resource to market, *except* for severance costs: *Montreal Trust* at para 79; *Lamb* at 527. The original concept underlying this approach was to award damages by estimating the value of the resources at the time they were separated from the land (severed), which is the point at which the tort of conversion occurred: *Martin v Porter* (1839), 5 M&W 351, 151 ER 149 (Exch Pl) [*Martin*]. This is why this rule is sometimes called the "severer" rule. However, as discussed further below, the exact deductions vary and sometimes no deductions are allowed at all.

[115] The harsh rule has generally been applied when the plaintiff can establish the trespass was wilful or there was some other kind of misconduct on the part of the defendant that warrants treating the trespass as if it was wilful: *Montreal Trust* at para 79; *Lamb* at 527-529. It is important to recognize that there is a punitive element to the harsh rule as its purpose is, in part, to deter wilful trespass: *Montreal Trust* at paras 79 and 110.

[116] As noted above, while the mild and harsh rules may be stated rather categorically, in practice they have been applied flexibly based on the specific circumstances before the court in each case. This is illustrated by the following cases.

[117] In *Kirkpatrick*, the Supreme Court of Canda applied the mild rule to a gold mining dispute at the beginning of the twentieth century. The defendant removed and processed gold bearing materials from the plaintiff's mining claim. The trial judge found that the trespass was wilful and deliberate, or involved such gross carelessness that it should be treated as wilful. Damages were assessed under the harsh rule. However, the majority of the Supreme Court of Canada found that there was some confusion as to the boundaries of the claims and there was nothing to establish that the defendant acted dishonestly. In describing the defendant's behaviour, the Court stated, "if honest there cannot be that wilful carelessness imputed to the defendants that the law requires before assessing damages on the [harsh] scale which has been adopted": *Kirkpatrick* at 157. The majority held the mild rule applied and the defendant was entitled to deduct the full cost of removing and processing the gold bearing material from the value of the gold: *Kirkpatrick* at 157.

[118] This Court most recently addressed the restitutionary approach in *Stewart* where the mild rule was applied to an oil and gas dispute. In the reasons written by Rowbotham JA, she questioned

whether harsh damages should continue to be used as a measure of damages due to concerns about overcompensation, transparency, and accountability. In Rowbotham JA's view, it would be preferable to use compensatory damages and award punitive damages when warranted to move away from vague or potentially opaque damage awards: *Stewart* at paras 216-223. This view was not endorsed by others on the panel, and Rowbotham JA ultimately formed part of the majority in awarding mild damages to the appellant. We note that there was no request for this Court to reconsider *Stewart,* and the availability of the restitutionary approach to quantify damages in trespass cases involving natural resources.

[119] In *Stewart,* the freehold owners of certain lands entered petroleum and natural gas leases in the 1960s. The wells were shut-in for some time, and then production resumed. There was a dispute about whether at some point, this shut-in caused the leases to terminate according to their terms. At trial, the court found that that the leases had not terminated, but if they had, the mild rule should apply with damages calculated based on the royalty approach: *Stewart Estate v TAQA North Ltd*, 2013 ABQB 691 at para 650-654, 662-666 [*Stewart* ABQB]. In particular, the court noted that a landman had raised a concern with the defendants that the leases might have terminated but found that this was not sufficient to establish the defendants knew or ought to have known the leases terminated: *Stewart* ABQB at para 645.

[120] On appeal, the plaintiffs challenged both liability and damages. The Court allowed the appeal on the question of whether the leases had terminated. The Court also allowed the appeal on damages, holding that the trial judge erred in using the royalty approach to assess mild rule damages. Instead, the majority awarded mild rule damages using the methodology of revenue less production, gathering, and processing costs.

[121] Regarding the level of culpability of the defendants, O'Ferrall JA found the lessees knew or ought to have known that their leases had terminated based on the concerns raised by the landman and continued to produce anyway, but that the mild rule was appropriate in these circumstances: *Stewart* at para 444-447. Rowbotham JA considered the trespass to be innocent based on the evidence and therefore agreed that the mild rule was appropriate: *Stewart* at paras 222-223. McDonald JA found the lessees likely knew or ought to have known about the lease termination but chose to proceed under a clouded title. In dissent on this point, McDonald JA found this conduct to be egregious enough to warrant gross disgorgement under the harsh rule: *Stewart* at paras 316-318. In our view, little can be taken from *Stewart* on when damages are awarded under the mild rule or the harsh rule other than observing that it is a highly fact specific and contextual exercise.

[122] The distinction between mild and harsh damages can also be seen in an older English case, *Trotter v Maclean* (1879), 13 Ch D 574 at 586-588. The defendant extracted coal from his neighbour's land based on a mutual understanding that the work was being performed and that a contract authorizing it was forthcoming. At some point, however, the plaintiff notified the defendant that it may not be possible to enter the contract so the defendant should stop extracting

the coal. The court applied the mild rule to quantify damages for resources extracted until the defendant was told to stop, then applied the harsh rule to quantify damages for resources extracted afterwards: *Trotter* at 583-588. Similarly, in *Sohio*, the methodology of accounting for unlawful production changed once the defendant was notified the plaintiff disputed their right to produce, with service of a writ of summons: *Sohio* at 9.

[123] In *Shewish v Macmillan Bloedel Ltd*, 1990 CanLII 283 (BC CA), 74 DLR (4th) 345, the British Columba Court of Appeal applied the harsh rule when the defendant was careless in relation to the plaintiff's property rights. The defendant clear cut trees from a hectare of the plaintiff's reserve lands. The British Columbia Court of Appeal reviewed the caselaw and concluded that it was appropriate to consider the degree of negligence in terms of culpability and *bona fides* when determining whether to apply the harsh or mild rule in assessing damages: *Shewish* at 11. The court found that the company had deviated from its standard procedures and failed to verify the boundaries it was authorized to log within, although the information was available to it. The court found that "the degree of negligence here has the mark of culpability and want of *bona fides* that must attract the severer rule of damages": *Shewish* at 14. However, the court overturned how the trial judge applied the severer rule, holding that only the actual severing costs of the trees should be excluded from deduction while other deductions were allowed: *Shewish* at 15-16.

[124] While some lower courts in British Columbia have treated *Shewish* as establishing a distinct category of "negligent trespass" damages, in our view it is preferable to view this case as an example where the harsh rule was applied in a flexible manner in circumstances where the court found that the defendant's conduct was sufficiently careless to warrant more than mild rule damages.

[125] In *Wasson*, this Court upheld an application of the harsh rule, without allowing any deductions, and also awarded punitive damages. The plaintiff owned a large parcel of land, which he lived on and used for agricultural purposes. While Mr. Wasson was away, a representative of the defendant visited his home and asked his wife for permission to cut trees and conduct seismic testing. Mrs. Wasson did not grant permission but told the representative to ask her husband and explained how he could be contacted. Rather than seeking him out, the defendant cut the strip of trees without permission. The trial judge applied the harsh rule and quantified damages under separate categories, including: the loss of timber, the costs of restoration, general damages, and punitive damages. This Court unanimously dismissed the appeal, and each justice provided separate reasons.

[126] The trial judge quantified the value of timber based on evidence that a local business would pay $0.12 per post to pick them up onsite, if each tree was cut into 8 posts. No deductions were made to this price to account for processing costs, and the defendant appealed this conclusion. Smith CJA considered the caselaw and reasoned that there was no error, because when a person robs their neighbour in bad faith, it is justifiable to punish that person by excluding any deductions for costs that would have been accounted for if the parties were working by agreement: *Wasson* at

73. Kane JA also upheld the trial judge's conclusion, but on the basis that Mr. Wasson and his family could have performed the processing work themselves at no additional cost, and that there was no error justifying appellate intervention: *Wasson* at 83. MacDonald JA agreed with both Smith CJA and Kane JA, only addressing the importance of awarding punitive damages in the circumstances: *Wasson* at 79-81. This case provides an example of when egregious conduct may warrant the application of the harsh rule of damages, without any deductions, but it does not establish a binding precedent that compelled the trial judge in this case to award harsh damages with no deductions.

[127] When the harsh rule is applied, the measure of damages is not always gross disgorgement of revenue with no deductions. Indeed, cases that have applied the harsh rule confirm that there is no singular approach to the quantification of harsh damages. A few cases have awarded gross disgorgement on principle: *Demars v Chevron Standard Ltd*, 1992 CanLII 4025 (MB CA) at 31-32, 2 WWR 545; *Craig v North Shore Heli Logging Ltd*, 1997 CanLII 2067 (BC SC) at paras 25-26, 52-53, 68-69, 34 BCLR (3d) 330. One case awarded gross disgorgement when the defendant had deliberately obscured the expenses attributable to the plaintiff's minerals while title was being litigated to frustrate the appeal: *Lamb* at 539-541. More frequently, even where wilful and intentional conduct has been established, disgorgement with some deductions is awarded. In *Martin*, the case that established the harsh rule, the trespass was wilful, but only the cost of severing the coal from the earth was excluded from the amount awarded, and not the cost of raising the coal to the mouth of the mine. In *Trotter*, after the defendant received notice from the plaintiff, only severance costs were excluded. In *Shewish*, the trespass was sufficiently careless that that the harsh rule was applied, yet the court only excluded deductions for the cost of severing the timber. In *Wasson*, the trespass was wilful, and no deductions were allowed, but since the value of the timber was based on its price on site, the only real expenses excluded were those associated with cutting the trees and processing the timber into posts. Further, there was evidence that this work could have been performed by the plaintiff's family at no cost.

[128] Given our review of the case law, we do not endorse a separate category of "negligent trespass damages" because the jurisprudence illustrates that the harsh rule of damages is flexible enough to account for varying levels of a defendant's culpability in a variety of circumstances.

[129] Our review of case law leads us to conclude that harsh damages may be awarded anytime a defendant's culpability is found to go beyond an innocent or mistaken trespass, and a trial judge considers there is something in the conduct of the defendant that warrants the application of the harsh rule. Thus, harsh rule damages may be applied when the trespass occurs through carelessness at one end of the spectrum, and through deliberate or wilful conduct at the far end of the spectrum. When the misconduct at issue is carelessness, there is some suggestion that something more than negligence is required, in the sense of a breach of a standard of care. However, the assessment is largely factual and contextual, and we do not consider it helpful to attempt to articulate general principles based on degrees of negligence or nuanced statements respecting culpability or intent.

[130] Ultimately, whether a defendant's conduct justifies the application of the harsh rule should be assessed through a trier's task of determining a "just and equitable" damage award based on the circumstances and evidence in a particular case. This is largely a factual and discretionary exercise. The caselaw provides guidance but may not dictate an outcome in any given circumstance because of the different facts involved in each assessment.

C. Application of the Principles

[131] While the trial judge characterized the basis of the damages awarded as "negligent trespass damages", we note that the trial judge awarded damages using a methodology that closely corresponds to that found in other cases using the harsh rule, being gross revenue, less processing and transportation costs, with no deduction for certain costs related to severance. This is consistent with her finding, following *Shewish*, that CNRL acted with a degree of carelessness and in breach of the regulatory construct, such that damages beyond the mild rule were warranted.

[132] We are satisfied that despite her use of different nomenclature, the substance of the trial judge's analysis found the harsh rule should be applied. She undertook a comprehensive review of existing caselaw applying the restitutionary approach in determining what level of damages to award. If the trial judge erred, it was in thinking that that label "harsh damages" referred only to damages being awarded at the highest level, based on a full disgorgement scenario outlined by Signalta's expert. This did not, though, materially impact her analysis on the quantum of damages to be awarded given the circumstances of the case before her. She remained focused on awarding a just and equitable amount of damages to Signalta. Therefore, we do not accept that the trial judge committed an error in principle by suggesting that a higher level of intent was necessary to apply the harsh rule of damages. Instead, the trial judge effectively found that as CNRL's conduct did not fall at the far end of the spectrum amounting to bad faith or other more egregious wilful misconduct, a damages award at the highest level of gross disgorgement was not warranted. In her view, the amount she awarded was just and equitable. Deference is owed to her decision: *Herron* at para 38; *Baker* at para 11.

[133] Nor do we accept that the trial judge erred by conflating the harsh rule with punitive damages. Punitive damages are awarded in exceptional cases "if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour": *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 94. The objectives of punitive damages are punishment, deterrence, and denunciation: *Whiten* at para 94.

[134] It is apparent that the rationale behind the harsh rule and punitive damages overlap to some degree, and both doctrines may be engaged on a given set of facts: *Martin* at 150; *Lamb* at 525 (Davies J dissenting); *Montreal Trust* at paras 79, 110; *Stewart* at paras 221-222, 318. However, Smith CJA of this Court in *Wasson* made clear that damages awarded under the harsh rule and punitive damages are distinct: *Wasson* at 75-76.

[135] In her reasons, the trial judge noted the relationship between punitive damages and harsh damages and considered Rowbotham JA's analysis in *Stewart*. The trial judge noted that when assessing whether harsh damages are appropriate, in the sense of gross disgorgement, courts have considered whether the wrongdoer "engaged in conduct of a harsh, vindictive, reprehensible, or malicious nature such that it requires the awarding of punitive damages": Trial Decision at para 825(k). She also noted other considerations related to the doctrine of punitive damages. However, these were just some of the considerations, among many, that the trial judge identified as being relevant. The trial judge also pointed to bad faith, wilful carelessness, and fraud as being relevant, none of which are sufficient to warrant punitive damages in their own right. The trial judge did not suggest that satisfying the test for punitive damages was a necessary condition of awarding harsh damages, nor did she apply such a test when considering whether application of the harsh rule was warranted on the facts before her. Rather, the trial judge recognized that courts have tended to restrict awards based on gross disgorgement to circumstances where the defendant's conduct was particularly egregious. This is entirely consistent with the caselaw, and we are not satisfied that there is any reviewable error in this conclusion.

[136] Thus, while we decline to adopt the trial judge's language of "negligent trespass damages", we do not accept that the trial judge committed an error in principle, nor was the award wholly erroneous.

[137] Signalta's cross-appeal is dismissed.

VI. The Costs Decision

[138] The trial judge held that Signalta was entitled to:

(a) 45% of its reasonable and proper costs, from the date litigation was commenced, to the date the formal offer was served on April 12, 2019;

(b) 45% of its reasonable and proper costs, doubled, from April 13, 2019 to the conclusion of the trial and the costs application; and

(c) 100% of its disbursements, in the amount of $1,461,448.08.

[139] CNRL appeals the Costs Decision, advancing five grounds of appeal, asserting that the trial judge erred in law by:

(a) failing to rule on the application before her;

(b) failing to follow binding authority when she made an award based on a percentage of actual legal costs, without evidence of the particulars of those expenses;

(c) awarding Signalta 90% of its actual legal costs, without proper consideration of the principles of proportionality;

(d) finding that Signalta was entitled to double its actual legal costs after the date of the formal offer, even though Signalta was seeking costs on a lump sum or indemnity basis; and

(e) awarding 90% of Signalta's actual legal costs for the costs application to Signalta, despite Signalta conceding a major point of contention to CNRL at the outset of the hearing and neither party providing submissions on this point.

A. Granting Relief not Stated in the Application

[140] CNRL submits the trial judge erred by allowing Signalta to advance a position at the hearing that was different than what Signalta applied for, and that was first articulated at the oral hearing. In our view, CNRL's argument must fail.

[141] Signalta's application stated it was seeking an order for costs of the action based on a percentage of its actual reasonable legal fees, and such further and other relief as the court may deem just. Specifically, Signalta sought 50% of its actual reasonable legal fees, doubled after the date of a formal offer, and 100% of its disbursements. While Signalta sought an award based on its actual costs, it would not disclose some information associated with its invoices because it remained privileged due to the ongoing appeal. Nevertheless, Signalta asserted sufficient evidence was available for the court to proceed.

[142] CNRL disagreed, asserting that the reasonableness of Signalta's actual legal costs had not been adequately proven. Moreover, the amount of costs requested by Signalta was inordinately high in the circumstances. CNRL maintained that costs should be based on Schedule C, relying on caselaw from this Court to that effect: *Kantor v Kantor*, 2023 ABCA 329 at para 14.

[143] At the beginning of the oral hearing to address costs, Signalta submitted it would be appropriate to award a percentage of the reasonable and proper costs as determined by an assessment officer, rather than a percentage of its actual costs.

[144] CNRL noted that this was the first time Signalta proposed referring the matter to an assessment officer. However, CNRL did not seek an adjournment or object to continuing the hearing on the basis of procedural unfairness. Rather, after a discussion with the court, CNRL agreed that it was within the court's discretion to refer the determination of reasonable and proper costs to an assessment officer. The ability to refer a matter to an assessment officer is clearly provided for in the *Rules*: rr 10.31(3)(d); 10.34, 10.41.

[145] The court ultimately permitted Signalta to seek relief that differed from what was expressly sought in its application. However, CNRL was given an opportunity to make submissions and maintained its position that costs should be based on Schedule C. Indeed, many of the issues

considered by the court were the same notwithstanding Signalta's change in position. Ultimately, the trial judge concluded that she could proceed as proposed by Signalta because neither party objected to her determining the percentage to be applied to Signalta's reasonable and proper costs, with the quantum to be finalized after the appeal of the Trial Decision to preserve Signalta's privilege claim: Costs Decision at para 62.

[146] This ground of appeal is dismissed.

B. Awarding a Percentage of Costs Without Particulars

[147] CNRL maintains that it was an error of law for the trial judge to award costs based on a percentage of yet-to-be-determined reasonable and proper costs because Schedule C must be applied if there is inadequate evidence of reasonable costs before the court. We reject this assertion.

[148] Courts have significant discretion in determining appropriate costs awards; there are several tools available in the *Rules*. No one methodology presumptively applies in all circumstances: *McAllister* at paras 25-30. Schedule C is not necessarily the default rule, but it may be appropriate for Schedule C to act as a default in certain circumstances: *McAllister* at paras 54-60; *Barkwell v McDonald*, 2023 ABCA 87 at para 53 [*Barkwell #1*]; *Barkwell v McDonald*, 2023 ABCA 183 at paras 74-80 [*Barkwell #2*], leave to appeal to SCC dismissed, 40742 (2 November 2023). For example, a court may direct a party to pay a percentage of the other party's assessed costs and order an assessment of costs by an assessment officer: *Rules*, rr 10.31(3)(d); 10.34.

[149] The trial judge considered CNRL's evidence regarding Schedule C costs, which CNRL calculated by doubling Column 5 costs, resulting in $566,190.00 in legal fees, plus disbursements. It is clear in the Costs Decision why the trial judge rejected CNRL's position. She found that awarding costs under Schedule C was not appropriate given the complexity of the litigation, its document intensive nature, the amount of expert scientific evidence involved, and the many labour-intensive steps in the litigation that would not have been accounted for in Schedule C. We are not persuaded the trial judge erred in declining to award costs pursuant to Schedule C as requested by CNRL.

C. Proportionality and an Award of Approximately 90% of Actual Costs

[150] CNRL raised several arguments alleging that the trial judge erred in her articulation and application of the principle of proportionality. In substance, CNRL's arguments rely on the proposition that when costs are at issue, the court is required to conduct a proportionality analysis based on the actual dollar value of costs that are payable, and that the trial judge's failure to do so resulted in a disproportionate costs award. In particular, CNRL argues that: (i) the trial judge erred by basing her proportionality assessment on the percentage of costs to be awarded by an assessment officer, rather than to the amount of assessed costs after it was determined; (ii) the trial judge erred by failing to perform the proportionality analysis in relation to the total amount of costs awarded, after the assessed costs were doubled because of Signalta's formal offer; and (iii) the

cost award is disproportionate because the trial judge failed to consider the amount of Signalta's costs in light of the amount of CNRL's costs, and the amount of the judgment.

1. Proportionality based on a percentage of costs yet-to-be-determined

[151] CNRL submits the trial judge failed to properly conduct a proportionality analysis because she awarded a percentage of reasonable and proper costs prior to the assessment being conducted. Therefore, she determined the applicable percentage without all the information she needed.

[152] The *Rules* expressly state that a court may award costs based on "a percentage of assessed costs, or assessed costs up to or from a particular point in an action": *Rules*, r 10.31(3)(d). CNRL conceded this was an option available to the trial judge during the hearing.

[153] Cost awards are intended to partially indemnify the winning party, with a view to establishing a balance between the successful party being indemnified for costs they had to incur to prove their rights, and ensuring the other party is not unduly discouraged from accessing the courts to dispute the claim or being penalized for doing so: *Barkwell #1* at paras 57-58. The paramount question is "whether the quantum represents an amount that the losing party in the litigation should reasonably be expected to pay to the winning party:" *Barkwell #1* at para 59. Answering this question involves an analysis of many factors, including those listed under rules 10.2 and 10.33: *Barkwell #1* at para 59.

[154] Signalta was originally seeking costs based on a percentage of its actual costs and it adduced some evidence to establish what those costs were. The trial judge was aware of the total amount Signalta claimed for its actual costs. In conducting the proportionality analysis, the trial judge stated that "[f]or the purposes of proportionality only, I will assume that the amount claimed by Signalta is what will be found to be reasonable and proper by the Review Officer as it is the maximum amount that may be proven to be reasonable and proper": Costs Decision at para 77. Therefore, the trial judge must have been satisfied the cost award would be proportionate even if 45% of Signalta's *actual costs* represented the amount that CNRL was required to pay after review by an assessment officer. Presumably, she was similarly satisfied that if an assessment officer reduced Signalta's actual costs to arrive at reasonable and proper costs, then 45% of the reduced amount was also proportionate. While this may not be the usual way a cost award is made, we are not satisfied the trial judge committed a reviewable error in the circumstances of this case.

2. Proportionality and formal offers

[155] CNRL submits the trial judge erred because she failed to repeat the proportionality analysis after she considered the impact of Signalta's formal offer of settlement served on April 12, 2019. In our view, CNRL has not established the trial judge committed a reviewable error.

[156] Because Signalta was awarded damages that exceeded the amount outlined in its formal offer, the trial judge awarded Signalta two times its reasonable and proper costs for the period after

the formal offer was served pursuant to rule 4.29. The trial judge found that the doubling effect was to be applied to costs that she had already found to be proportionate, without repeating the proportionality analysis.

[157] The trial judge's conclusion that the proportionality analysis was to be conducted before double costs were applied, and not afterwards, was based on two key reasons. First, the trial judge reasoned that the purpose of rule 4.29 was to encourage parties to settle by agreement as early as practicable by providing clear costs consequences if a party fails to accept a reasonable offer. Second, the trial judge considered the language of the rules in light of this purpose. Rule 4.29(1) states after the date of the offer "the plaintiff is entitled to double the costs to which the plaintiff would otherwise have been entitled under rule 10.31(1)(a)" [emphasis added]. Rule 10.31(1)(a) states the court may order a party to pay "the reasonable and proper costs that a party incurred". The trial judge reasoned that since the plaintiff is entitled to double the reasonable and proper costs it would otherwise have been entitled to after the formal offer, the appropriate methodology was to first determine the reasonable and proper costs and then double that amount for the period after the formal offer without further analysis. She reasoned that to reduce the total amount of costs awarded after applying the doubling effect on proportionality grounds would be inconsistent with the language of rule 4.29.

[158] The trial judge's reasoning regarding the purpose of the rule is consistent with jurisprudence from this Court. This Court has clearly held that the purpose of the formal offer costs rule is to encourage parties to make reasonable settlement offers, "and to subject litigants who reject identifiable and sufficient compromises to predictable, more severe costs consequences": *H2S Solutions Ltd v Tourmaline Oil Corp*, 2020 ABCA 201 at para 27. Formal offers "would become meaningless if courts decline to apply the cost consequences intended to flow from successful offers": *Pillar Resource Services Inc v PrimeWest Energy Inc*, 2017 ABCA 141 at para 15; *Tourmaline* at para 19.

[159] In assessing whether to apply double costs, the court first considers whether the offer constitutes a formal offer that triggers rule 4.29(1), in light of factors such as the timing of the offer, the content of the offer, and whether it was beyond *de minimis*: *Tourmaline* at paras 28-38; *Mostafa Altalibi Professional Corporation v Lorne S. Kamelchuk Professional Corporation*, 2022 ABCA 364 at paras 12-15. If rule 4.29(1) is triggered, the court may then consider whether there are "special circumstances" that justify declining to apply the doubling effect under rule 4.29(4)(e): *Mostafa* at para 16; *Tourmaline* at paras 28, 39. If the court is satisfied that special circumstances exist that warrant invoking rule 4.29(4)(e) and declining to apply double costs, the court may still account for the effect of the formal offer in its overall costs assessment: *Rules*, r 10.33(2)(h).

[160] If rule 4.29 is found to apply, then there is a *prima facie* entitlement to double costs unless the other party can establish that special circumstances exist: *Abt Estate v Ryan*, 2020 ABCA 133 at paras 67-69; *Labbee v General Accident Assurance Company of Canada*, 2000 ABCA 176 at paras 14-15. Applying the double costs rule will not generally constitute a special circumstance,

unless it results in significant over-indemnification: *Mostafa* at para 34. Here, the trial judge found that there were no special circumstances that justified declining to apply rule 4.29(1) pursuant to rule 4.29(4).

[161] We are not persuaded that the trial judge committed a reviewable error in relation to her application of rule 4.29.

3. Weighing of factors in considering proportionality

[162] CNRL also points to numerous factors that the trial judge should have weighed differently in her analysis, such as the difference between its own costs as compared to Signalta's costs, the amount of Signalta's costs as compared to the total amounts in issue, and the amount of Signalta's costs as compared to costs awarded for other complex litigation files.

[163] We are not persuaded that a reweighing of any of these factors is warranted. The trial judge had the information required for her to arrive at her decision on costs and the Costs Decision demonstrates she considered all relevant factors.

D. Double Costs and Rule 10.31(1)(b)

[164] CNRL submits that it was an error for the trial judge to award double costs, because Signalta sought to recover costs under rule 10.31(1)(b). Rule 4.29(4)(a) provides that rule 4.29 does not apply if costs are awarded under rule 10.31(1)(b).

[165] There is no merit to this argument. As explained above, while Signalta originally sought to recover its costs under rule 10.31(1)(b), the trial judge awarded costs under rule 10.31(1)(a). Rule 4.29(4)(a) does not apply.

E. Costs of the Costs Application

[166] CNRL's final ground of appeal is that the trial judge erred in awarding Signalta the reasonable and proper costs associated with its costs application. CNRL argues Signalta was not successful in the costs application, there was no evidence before the trial judge as to what the costs were, costs of the application had not been sought by Signalta, and neither party made submissions relative to the costs application itself.

[167] None of CNRL's arguments have merit.

[168] The successful party in an application is presumptively entitled to the costs of that application, subject to the court's discretion: *Rules,* r 10.29(1). An award of reasonable and proper costs under rule 10.31(1)(a) includes costs incurred in an assessment of costs before the court or an assessment officer, unless the court otherwise orders: *Rules*, r 10.31(2)(b).

[169] Signalta's costs application sought costs of the action. In our view, the action includes proceedings necessary to settle a costs application and it should have been apparent to CNRL that Signalta was also seeking the costs associated with the costs application.

[170] Signalta's costs application required written and oral submissions on costs principles from both parties, and the trial judge simply extended her findings regarding the appropriate principles to apply to the costs of the costs application. We are not satisfied that CNRL was treated unfairly because the trial judge did not seek additional submissions to settle costs of the costs application itself.

[171] This ground of appeal is dismissed.

VII. Conclusion

[172] CNRL's appeal of the Trial Decision and Costs Decision is dismissed.

[173] Although we decline to adopt the nomenclature associated with trial judge's award of "negligent trespass" damages, we conclude that she in effect awarded harsh damages in accordance with the middle case scenario put forward by Signalta's expert. The trial judge was satisfied that this represented a just and equitable cost award in the circumstances of this case, and we decline to interfere with her damages award. Signalta's cross-appeal is also dismissed.

[174] Given the mixed result on appeal, we direct that each party bear their own costs.

Appeal heard on December 5, 2024

Memorandum filed at Calgary, Alberta
this 12th day of September, 2025

Pentelechuk J.A.

Ho J.A.

Hawkes J.A.

Appearances:

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Corrigendum of the Memorandum of Judgment

The word “addition” has been changed to “edition” on page 14, paragraph 58.

The words “(no appearance)” after B.A. Larguinho’s name on the Appearances page have been removed.