

Court of King's Bench of Alberta

Citation: Inter Pipeline Ltd v Teine Energy Ltd, 2026 ABKB 524

Date: 20260720

Docket: 2401 12890; 2401 13291

Registry: Calgary

Between:

Inter Pipeline Ltd.

Applicant

- and -

Teine Energy Ltd.

Respondent

**Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby**

I. Introduction

[1] Teine Energy Ltd (“Teine”) is an oil and gas company that produces, amongst other things, light crude oil from fields in southwestern Saskatchewan. Teine ships its light crude oil on the Mid-Saskatchewan Pipeline System (the “MS Light”) which is owned and operated by

Inter Pipeline Ltd (“IPL”). Teine and IPL engaged in a significant commercial arbitration proceeding over issues concerning IPL’s operation of the MS Light and the charges to Teine for shipping on the MS Light (the “MS Light Arbitration”). Teine won a substantial arbitration award in mid-2024 (the “Award”).

[2] IPL applies to set aside the Award and, in the alternative, for leave to appeal the Award. IPL’s set aside application asserts that Teine’s failure to produce certain records in the MS Light Arbitration rendered that proceeding unfair and there is a reasonable possibility that the unproduced records affected the outcome of the proceeding. IPL seeks leave to appeal the Award on various grounds, including that the Arbitral Tribunal erred in its application of the test for when the limitation period for Teine’s claim started to run.

[3] Teine opposes IPL’s applications. Teine submits that the missing records were inadvertently withheld and that their absence did not affect either the fairness or outcome of the MS Light Arbitration. Teine contends that IPL’s proposed grounds of appeal do not raise questions of law and instead are all attacks on the Arbitral Tribunal’s fact finding.

II. The MS Light Arbitration

[4] Teine produces light sweet crude oil and from fields near Kindersley, Saskatchewan. Teine contracted with IPL to transport its product on the MS Light. The MS Light gathers light sweet crude oil from fields in south-west Saskatchewan and transports it to IPL’s terminal at Kerrobert, Saskatchewan where it is transferred to the Enbridge Main Line. The MS Light operates subject to IPL’s published tariff (“Tariff”).

[5] Teine and IPL are parties to a Pipeline Connection Agreement dated June 24, 2014 (“PCA”). The PCA incorporates the Tariff. The PCA also contains an arbitration clause. Teine commenced the MS Light Arbitration pursuant to a Notice of Request for Arbitration dated May 13, 2022, alleging that IPL breached the PCA and the Tariff in various ways, including by blending products for its own benefit and using an improper method to calculate equalization.

[6] The Arbitral Tribunal was comprised of Gerald W. Ghikas, Adelle Fruman, and C. Kemm Yates. The MS Light Arbitration hearing took place over two weeks in January and February 2024. The Arbitral Tribunal rendered the Award on August 19, 2024. The Award is a comprehensive assessment of the parties’ evidence and argument that runs to 641 paragraphs and 173 pages. The Arbitral Tribunal dismissed all of Teine’s claims other than the equalization claim. The damages and interest awarded in respect of the equalization claim total approximately \$80 million.

[7] A brief explanation of equalization is necessary to put the analysis in these reasons into context. Many producers deliver crude to the MS Light. Each producer delivers crude oil with a different composition. But each producer receives a portion of the blended stream at the end of the MS Light where it is transferred to the Enbridge Main Line. Differences between the physical composition of the crude delivered to the MS Light and crude received from the MS Light has financial consequences that depend on the value of the various components of the crude. Equalization is a financial adjustment that accounts for differences between the quality of crude delivered by a producer and the quality of crude received by the producer from the MS Light. The equalization formula for the MS Light is provided for in the Equalization Procedures Guide (“EPG”) which is an industry standard that is incorporated into the Tariff and PCA.

[8] Equalization pursuant to the EPG is a zero-sum calculation with debits and credits amongst shippers balancing out. At each receipt point the density and sulphur content are ascertained and together they determine the quality differential which is referred to the Source Weighted Average Differential Factor (“Source WADF”). In turn, the Source WADF and volumes for each receipt point determine the Stream WADF which represents the quality of the commingled product on the pipeline. The difference between each Source WADF and the Stream WADF is used to determine the equalization credit or debit that applies to each receipt point.

[9] The Arbitral Tribunal found that IPL did not follow the correct equalization formula. Instead, IPL calculated the difference between Source WADF and what was called a Revised Stream WADF. IPL justified its use of the Revised Stream WADF on the grounds that the MS Light was a single-shipper system. The MS Light was a single-shipper system because, as a formal matter, title to the product was transferred to IPL at each receipt point and transferred back to each producer at the pipeline terminus. The Arbitral Tribunal did not accept that use of the Revised Stream WADF was permitted by the PCA or Tariff and noted that the “difference between the calculated Stream WADF and the Revised [Stream] WADF in this case has not been fully explained.”

[10] Though Teine did not seek leave to appeal the Arbitral Tribunal’s dismissal of its blending claim, it is necessary to briefly describe what is meant by blending as it is intertwined with many of the issues before the Court. IPL was obliged to deliver light crude within certain specifications to Enbridge. IPL took this as an opportunity to put butane and heavy oil on the MS Light when pricing was favourable while ensuring that the addition of those products did not take the overall stream quality outside the required specifications for Enbridge. The Arbitral Tribunal described this practice as “arbitrage.” The Arbitral Tribunal found that that silence in the Teine-IPL contracts on the question of blending meant that it was permitted, not prohibited. Though the Arbitral Tribunal found that blending was allowed, the fact that IPL administered the MS Light as a single-shipper system and engaged in blending for its own account complicated the Arbitral Tribunal’s equalization damages analysis.

III. Procedural Background

[11] I have served as the *de facto* case manager of this matter for the last two years hearing several applications and case conferences. In late 2024, I heard a stay application and confidentiality application together: ***Inter Pipeline Ltd v Teine Energy Ltd***, 2024 ABKB 740 (the “**Confidentiality Application**”). I denied the stay because there was no irreparable harm to IPL because it is a large solvent entity capable of paying the Award and there was no evidence that Teine would have any difficulty repaying IPL if the Award was set aside or the appeal of the Award was successful. A confidentiality order was granted to protect certain information produced in the MS Light Arbitration from being disclosed on the public record, though the scope of the confidentiality order was narrower than IPL had requested.

[12] The application to set aside the Award and application for leave to appeal the Award was scheduled to be heard on November 13 and 14, 2025. IPL made an urgent application in late September 2025 concerning the production of records: ***Inter Pipeline Ltd v Teine Energy Ltd***, 2025 ABKB 545 (the “**KB Production Decision**”). IPL sought production of records from Teine in advance of the pending application to set aside and for leave to appeal. IPL learned in a

different arbitration proceeding involving the same parties (the “MS Heavy Arbitration”) that Teine had failed to produce records that were within the scope of the Arbitral Tribunal’s production orders. The records in issue were forecasts generated by Teine’s pipeline marketing consultant, Boomerang (the “Boomerang Forecasts”). A sample Boomerang Forecast was put before the Court on the application so that the Court could assess whether the non-production of the Boomerang Forecasts could have affected the outcome of the MS Light Arbitration.

[13] The parties agreed that production of records on an application to set aside an arbitration award or leave to appeal an arbitration award is unusual. Neither party approached the issue of non-production as a simple matter of compliance. Instead, both parties proposed higher standards for production of records on an application to set aside an arbitration award and for leave to appeal an arbitration award than in normal litigation. Teine submitted that IPL must meet the test in *Palmer v The Queen*, [1980] 1 SCR 759 at 775 which is that evidence “must be such that if believed it could reasonably, when taken with the other evidence adduced [in the Arbitration], be expected to have affected the result.” Teine emphasized that the Court of Appeal has interpreted the *Palmer* standard as meaning that the evidence must be “practically conclusive”: *Xerex Exploration v Petro-Canada*, 2005 ABCA 224 at paras 116-17. IPL submitted in its written brief that the applicable test is the one articulated by the British Columbia Labour Board in *British Columbia Women’s Hospital and Health Centre Society*, BCLRB No B365/95 (Reconsideration of BCLRB No B318/94), 29 CLRBR (2d) 72 that only requires that the records are material and “may have affected the result of the case.”

[14] I selected the lower standard for production of records posited by IPL and then concluded that IPL had not met this standard. Unlike the Arbitral Tribunal which ordered production of records concerning the MS Light and blending without first seeing them, I had the benefit of the unredacted sample Boomerang Forecast. Critical to my decision not to require production of the Boomerang Forecasts was that, even with the benefit of the unredacted sample Boomerang Forecast, IPL’s affiant did not depose that “the Boomerang Forecasts provided any indication that IPL was not using the contractually agreed equalization formula”: *KB Production Decision* at para 27. This meant that the Boomerang Forecasts could not shed light on the issue to which they were alleged to be relevant — which was when the limitation period started to run.

[15] The Court of Appeal reversed the *KB Production Decision: Inter Pipeline Ltd v Teine Energy Ltd*, 2025 ABCA 375 (the “*Production Appeal*”). The Court of Appeal rejected the positions of both parties and the rationale in the *KB Production Decision*. Instead, the Court of Appeal found that where non-compliance with an Arbitral Tribunal’s production order is shown on an application to set aside or an application for leave to appeal, an order for production must issue without any consideration of the effect the unproduced records would have had on the underlying arbitration proceeding. The Court of Appeal held that the question of what effect the unproduced records might have had on the underlying arbitration is not relevant for a production order but is to be considered only when a party seeks to admit those unproduced records in evidence on a set aside or leave to appeal application.

[16] The *Production Appeal* caused the set aside and leave to appeal applications to be adjourned to permit the production of the Boomerang Forecasts and to afford the parties time to adduce lay and expert evidence concerning the Boomerang Forecasts. A new litigation schedule was set at a case conference, and, given the lack of trust engendered by the non-production of the Boomerang Forecasts, I directed Teine to provide an affidavit detailing its approach to

production of Boomerang records. Time for an application concerning the sufficiency of Teine's production efforts was reserved but IPL did not proceed with the application.

IV. Application to Set Aside the Arbitration Award

a. The Analytical Framework for Set Aside Applications

[17] IPL seeks to set aside the Arbitration Award. An application to set aside an Arbitration Award is concerned with the legitimacy and process of the arbitration. This contrasts with an appeal of an arbitration award which is only permitted on questions of law and, as such, is concerned only with the correctness of the legal conclusions in the Arbitration Award.

[18] The *Arbitration Act*, RSA 2000, c A-43, s 45(1) outlines various grounds on which a court may set aside an arbitration award. IPL relies on grounds 45(1)(f) and (g) which are as follows:

- (f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;
- (g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement;

[19] Grounds s 45(1)(f) and (g) are normally understood to refer to conduct by an arbitrator or arbitration tribunal. But there are no interpretive or logical obstacles that prevent these grounds from applying to conduct of another party to an arbitration proceeding nor were the parties able to direct me to any case law on point. The plain meaning of the words is consistent with application to both arbitrators and parties. There is no practical reason why manifest unfairness or an inability of a party to present its case could not stem from the conduct of a party to an arbitration proceeding. Likewise, it is possible that the conduct of another party to an arbitration may be the cause of a failure to comply with an arbitration agreement. Such an understanding of s 45(1)(f) and (g) is also necessary as a matter of public policy to permit the Court to control behaviour beyond the reach of arbitrators that undermines arbitration proceedings.

[20] The Court of Appeal in *ENMAX Energy Corporation v TransAlta Generation Partnership*, 2022 ABCA 206 at para 25 explained that a court on a set aside application should "give deference to the procedural choices of the arbitration panel." But no deference is required in the present set aside application because the alleged manifest unfairness and non-compliance with the arbitration agreement was not known to the Arbitral Tribunal and, accordingly, was not dealt with by the Arbitral Tribunal. The task in the present case is to determine on a balance of probabilities if Teine's non-production of the Boomerang Forecasts caused IPL to be treated manifestly unfairly, deprived IPL of an opportunity to present its case, or resulted in non-compliance with the arbitration agreement.

b. IPL's Application to Amend its Originating Notice of Application

[21] IPL filed an application on May 19, 2026, seeking leave to amend its Originating Notice of Application to support a different framing of its application to set aside the Arbitration Award. The proposed amendments to the Originating Notice of Application plead the facts concerning the non-production of the Boomerang Forecasts and characterize those facts as a breach of the

arbitration clause of the PCA (the “Arbitration Agreement”). IPL explained in its proposed amended pleading as follows:

IPL further seeks leave to appeal and/or seeks to set aside the Award on the basis that the arbitration clause in the Agreement is a contract in its own right (the “Arbitration Agreement”) which Teine was obligated to perform in good faith. In breach of the Arbitration Agreement and Teine’s duty of good faith performance, Teine failed to comply with the Tribunal’s orders and failed to disclose relevant and material records in its possession. This contributed to the manifest unfairness of the Arbitration process and engages the Court’s jurisdiction to intervene when an arbitration is not conducted in accordance with the Arbitration Agreement.

[22] The IPL application to amend its pleading arrived late in the process which, irrespective of anything else, is not conducive to efficient litigation. But the proposed IPL amendments just crystallize arguments that the parties have been dancing around for the better part of the last year. The substance of the amendments was not a surprise to me as the *de facto* case management justice and there is no way that it could have taken Teine’s experienced counsel by surprise. Put differently, there is no prejudice in these late amendments even though the timing is regrettable. The real question is whether the proposed amendments are barred by *Arbitration Act* s 46.

[23] Teine objects to IPL’s application to amend the Originating Notice of Application on the grounds that it adds a cause of action outside the 30-day time permitted for an application to set aside an arbitration award provided for in *Arbitration Act* s 46. Teine emphasized that the *Arbitration Act* does not allow the time limits for commencing an application to set aside or appeal an arbitration award to be extended: ***Allen v Renouf***, 2019 ABCA 250 at paras 6-7; ***Funk v Funk***, 2018 ABCA 210 at para 43.

[24] IPL advances a creative and novel argument that Teine breached its duty of good faith performance in respect of the Arbitration Agreement and that this breach justifies setting aside the Arbitration Award. IPL relies on the duty of good faith performance articulated in ***Bhasin v Hrynew***, 2014 SCC 71. But because the pleading is breaking new ground mixing elements of contract law into the statutory grounds for setting aside an arbitration award, it is not as clear as it could be in articulating in what sense the breach of contract is asserted and how it is legally significant. This caused Teine to conclude that IPL was asserting a new cause of action.

[25] Pursuant to *Arbitration Act* s 45(1)(f) and (g) an arbitration award may be set aside on the grounds of manifest unfairness or that the procedures in an arbitration agreement were not followed. IPL pleaded these sections in its Originating Notice of Application and provided some particulars to support the pleading. Of course, IPL did not provide any particulars of the non-production of the Boomerang Forecasts because it was unaware of that issue at the time the Originating Notice of Application was filed.

[26] The alleged breach of the Arbitration Agreement may be asserted as an independent cause of action or as a fact that supports a different (non-contract) legal remedy. IPL is not seeking damages, rescission, specific performance or any other conventional remedy for breach of contract. Instead, IPL is seeking to have the Arbitration Award set aside pursuant to *Arbitration Act* s 45. This is clear from the remedy section of the proposed Amended Originating Notice of Application which seeks only remedies pursuant to the *Arbitration Act*. The conspicuous absence of a request for a contractual remedy in the proposed pleading

indicates the breach of the Arbitration Agreement is asserted as a fact that supports the existing pleading for the set aside remedy pursuant to *Arbitration Act* s 45 and not as an independent cause of action. The proposed amendments are, accordingly, not barred by the time limit in *Arbitration Act* s 46.

[27] Even though I have found that IPL's proposed pleading of breach of contract is factual in character and does not add a cause of action, I am nevertheless persuaded that the contractual duty of good faith performance is a relevant consideration. *Arbitration Act* s 6(b) and s 45(1)(g) indicate that an arbitration is to be conducted in accordance with the arbitration agreement and that non-compliance is grounds for setting aside an arbitration award. Compliance with an arbitration agreement in the context of the *Arbitration Act* must be understood to include compliance with the contractual duty of good faith performance.

[28] To address the possibility that Teine might pivot from its objection that IPL advances a new cause of action to assert that IPL failed to plead sufficient particulars, I emphasize that the conduct of this case demonstrates that the ins and outs of the Boomerang Forecast non-production issues are well known to both sides despite particulars not being provided in the original pleading. I would not have been concerned about the fairness of this proceeding if the matters raised in the IPL proposed amendments had been advanced in the context of written argument without the added formality of an amendment to the pleadings.

[29] IPL may file the Amended Originating Notice of Application.

c. The Test for New Evidence on a Set Aside Application

[30] The parties disagree whether the appropriate test for admission of new evidence is the standard test for admission of new evidence on appeal set out in *Palmer* or if it is the lower standard in *BC Women's Hospital*. The *Palmer* test, as noted earlier, has been interpreted as requiring the new evidence to be "practically conclusive" whereas *BC Women's Hospital* only demands that the new evidence may have affected the outcome of the proceeding. The *Production Decision* did not determine which test applies on an application to set aside an arbitration award because the issue before the Court was whether the Boomerang Forecasts should be produced, not whether they should be admitted into evidence. The *Production Appeal* held at para 6 that the time to consider the test for new evidence is when the party seeks to have it admitted into evidence.

[31] Teine submits that IPL admitted before the Court on the *Production Decision* application and before the Court of Appeal on the *Production Appeal* that if the Boomerang Forecasts were produced, then IPL would have to meet the *Palmer* standard to have them admitted into evidence. I agree that IPL's submissions on those occasions can be interpreted as anticipating that the *Palmer* test would apply on any application to admit new evidence in this proceeding. But the statements of counsel made in argument are not the law unless adopted by the Court. So even if the applicability of *Palmer* was conceded by IPL, the Court's job is to determine and apply the correct law. Accordingly, I must decide what is the correct test for new evidence on an application to set aside an arbitration award.

[32] IPL clarified in oral argument that it is only seeking to adduce the new evidence in respect of the set aside application and not in respect of the leave to appeal application. This is an important clarification because it means that the appropriate test for new evidence on a leave to appeal or appeal of an arbitration decision does not need to be determined. There may be

reasons why the test for admission of new evidence for the purpose of a leave to appeal or an appeal of an arbitration award should be different from an application to set aside an arbitration award but that can be left for another case where it is squarely in issue.

[33] IPL submits that the *BC Women's Hospital* test applies to set aside applications. IPL argues that the Court of Appeal's reference to the test for new evidence on appeals being "well settled" in para 6 of the *Production Appeal* should not be understood to mean that the *Palmer* test for new evidence applies to set aside applications. I agree. The Court of Appeal's comments in the *Production Appeal* were not made with the benefit of argument concerning the correct test on an application to set aside an arbitration award and should not be interpreted as having decided that point.

[34] IPL reasons that when an application for new evidence is made in support of an application to set aside an arbitration award based on information unknown to the party and the arbitration tribunal, the high *Palmer* standard is unjust. Justice Karakatsanis, writing for the majority in *Barendregt v Grebliunas*, 2022 SCC 22 at para 30 observed that "*Palmer* does not ... apply to evidence going to the validity of the trial process itself." To support this point, Karakatsanis J cited on *R v Taillefer*, 2003 SCC 70 at paras 76-77 which, in turn, relies on *R v Dixon*, [1998] 1 SCR 244.

[35] *Dixon* established the test to be used on applications for fresh evidence in a criminal case where the Crown is alleged to have undermined the fairness of a trial by failing to disclose relevant records. Justice Cory held at para 34:

This burden is discharged where an accused demonstrates that there is a reasonable possibility the non-disclosure affected *the outcome at trial or the overall fairness of the trial process*. ... [T]he reasonable possibility to be shown under this test must not be entirely speculative. It must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired. [underlining in original; italics added]

[36] The *Dixon* test is more lenient than the *Palmer* standard because there is a constitutional right to disclosure in criminal proceedings. Nevertheless, Karakatsanis J's reference to the idea that *Palmer* does not apply when the validity of the trial process is in question suggests that the *Dixon* approach may apply outside the criminal law context where the concern is with the process, not the substance of a proceeding. The *Dixon* "reasonable possibility" standard is much like that in *BC Women's Hospital* which held at para 49:

[I]f the document that was not produced is material to the case, in the sense that it may have affected the result of the case, then the failure to produce it will result in the denial of a fair hearing. ... [T]he document need not have a strong probability of having a determinative effect on the arbitration award.

[37] The distinctive nature of a set aside application and the reason why evidence was unavailable in the present case justifies departing from the stringent new evidence standard for appeals in *Palmer*. Where, as in the present case, the new evidence was not available at the hearing to the party now seeking to adduce it because the opposing party failed to disclose it, the *Dixon/BC Women's Hospital* standard should apply. Under that standard, the applicant need

only establish a *reasonable possibility* that the new evidence would have affected the outcome. The **Palmer** standard which the Court of Appeal has interpreted in the civil context as requiring the new evidence to be “practically conclusive” is too high a threshold and could lead to injustice.

[38] Additionally, **Dixon** is relevant in the context of a set aside application because it goes beyond **Palmer**’s narrow focus on whether the new evidence would have affected the outcome. Under **Dixon**, new evidence is admissible if there is a reasonable possibility that it would have affected the outcome or the overall fairness of the trial. My view is that **Dixon** describes the appropriate approach to use in the context of a set aside application under the *Arbitration Act*.

[39] The questions that must be asked are: (1) is there a reasonable possibility that the new evidence, if it had been available to the arbitration tribunal, would have affected the outcome of the arbitration? and (2) is there a reasonable possibility that the non-disclosure of records now sought to be admitted as new evidence affected the fairness of the arbitration? An affirmative answer to either question is sufficient to set aside the arbitration.

a. Is There a Reasonable Possibility that the New Evidence Would Have Affected the Arbitral Tribunal’s Decision on the Limitations Issue?

[40] Boomerang is a crude oil marketing company that provided marketing and advisory services to Teine starting November 2016. Each month Boomerang prepared the Boomerang Forecasts and sent them to Teine’s production accountants. The purpose of the Boomerang Forecasts was to enable Teine’s treasury department to prepare monthly cash flow forecasts. The Boomerang Forecasts are forward-looking statements setting out projections. The Boomerang Forecasts must be contrasted with producer statements made by Macquarie Oil Services which provide similar categories information based on actual production (the “Macquarie Producer Statements”). The Macquarie Producer Statements were disclosed and present during the MS Light Arbitration.

[41] Both parties introduced lay and expert evidence to support their view of the significance or insignificance of the Boomerang Forecasts. IPL put forward Don Moe, a consultant with experience in crude oil marketing who was involved in the development of the EPG, as an expert. IPL also relies on the evidence of Jason Ho and Gary McInenly, both IPL employees. Teine offered Darcy Mann as an expert, a consultant with experience in crude oil marketing and a former co-chair of the Industry Equalization Steering Committee. Teine also relied on the evidence of an employee, Jackie Farrow.

[42] Though each party maintained that their expert was better than the other and their evidence should be preferred, neither party challenged the admission of the other party’s expert evidence. Notably, neither party cited the leading cases on expert evidence. For the most part, argument focussed on which expert’s evidence was more compelling. Nevertheless, I find that both experts and their evidence meet the criteria in **White Burgess Langille Inman v Abbott and Haliburton Co**, 2015 SCC 23 at para 19: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert. Even though I have found the expert evidence admissible, as the discussion that follows shows, I find different aspects of each expert’s evidence probative.

[43] IPL adduced lay and expert evidence concerning the significance of the Boomerang Forecasts. IPL’s evidence is notable for what it does not say. None of the IPL witnesses claim

that the Boomerang Forecasts are based on IPL's method of calculating equalization or indicate that Boomerang had any knowledge of IPL's method of calculating equalization. This is consistent with the Arbitral Tribunal's conclusion that IPL's approach to equalization was not discoverable until after record disclosure in the arbitration. It is also consistent with IPL's position before this Court on the Confidentiality Application that information concerning IPL's administration of the MS Light was confidential.

[44] On their own, the Boomerang Forecasts do not provide any insight into whether IPL was abiding by its contractual obligations. Instead, IPL's argument and the evidence of Mr. Moe is that differences between the Boomerang Forecasts and the IPL invoices should have alerted Teine that something was amiss. The recognition of the discrepancy between the Boomerang Forecasts and the IPL invoices should have triggered an investigation which should have focussed on the IPL invoices. Such an investigation would inevitably have led Teine to discover that IPL was not following the EPG and conclude that IPL was in breach of the PCA and Tariff.

[45] Mr. Moe explained in Appendix C to his report how Teine should have determined from the IPL invoices that IPL was not following the EPG. In cross-examination, Mr. Moe explained that "you can determine from [IPL's] billing which – that they're not following the EPG." Mr. Moe was careful to say that even though it is clear from the IPL invoices that IPL was not following the EPG, it is not possible to determine from the IPL invoices how IPL was calculating equalization. He wrote at paragraph 15 of his report that "the IPL Invoices [did not] provide any of the needed information to allow it to be verified, and accordingly this component could not be reconciled or explained using information available to Teine. The absence of this needed information exposed Teine to unquantified and potentially substantial risk."

[46] IPL submits that, had the Boomerang Forecasts been produced during the MS Light Arbitration, IPL would have argued that Teine should have discovered that it had a cause of action against IPL earlier and thus the limitation period would have started to run earlier. IPL's argument is, in essence, that Teine should have identified the discrepancies between the Boomerang Forecasts and the IPL invoices, concluded from the IPL invoices that the EPG was not being followed, and realized that it had an unquantifiable but potentially significant claim against IPL.

[47] Teine makes two arguments in response to IPL. First, Teine submits that the Boomerang Forecasts do not provide any material new information that would have affected the conclusions of the Arbitral Tribunal. Teine points out that it received similar statements containing similar information from another crude marketing service provider in the form of the Macquarie Producer Statements, during the same period, these records include actual and not estimated information. Second, Teine submits that IPL's argument and Mr. Moe's evidence is, in effect, a collateral attack on the Award. Teine contends that the Arbitral Tribunal found that Teine could not have known from the IPL invoices or any other evidence adduced in the MS Light Arbitration that it had a cause of action any earlier than it did. Mr. Moe's evidence repeats arguments that IPL made or could have made in the MS Light Arbitration based on evidence that was available. Ms. Farrow, a Teine employee, illustrated the similarity of the information in the Boomerang Forecasts and the Macquarie Producer Statements in her evidence and Mr. Mann opined that "the Boomerang Forecasts do not provide relevant additional information beyond what is already contained in the Macquarie Producer Statements." Mr. Mann's opinion accords with my assessment of the documents.

[48] Mr. Moe's report did not analyze whether the discrepancies that he identified between the Boomerang Forecasts and the IPL invoices could also be identified between the Macquarie Producer Statements and the IPL invoices. This is noteworthy because Teine adduced evidence of the similarity between the Boomerang Forecasts and the Macquarie Producer Statements in advance of the **Production Decision** which was before Mr. Moe produced his report. Mr. Moe's omission appears to be a product of his instructions from counsel. He testified on cross-examination as follows:

Q Counsel did not ask you to reconcile the Macquarie statements as against the IPL invoices? Just the Boomerang records?

A That's correct.

[49] The inference that I draw from IPL's decision not to undertake the same analysis on the Macquarie Producer Statements as on the Boomerang Forecasts when it knew Teine's position to be that they disclose similar information is that the analysis would have produced similar results. This means that IPL could have had Mr. Moe perform the same analysis during the MS Light Arbitration with the Macquarie Producer Statements. If IPL had done this, it could have made the same arguments in the MS Light Arbitration that it now advances to set aside the Award. Put differently, IPL is now using the Boomerang Forecasts to make an argument that it could have made during the MS Light Arbitration using the Macquarie Producer Statements.

[50] The lynchpin of Mr. Moe's evidence on this application is that Teine could have determined from the IPL invoices that the EPG was not being followed. His evidence contradicts the Arbitral Tribunal's findings. The Arbitral Tribunal held at paras 484 and 510:

[T]he circumstances are that IPL (i) promised to equalize according to the EPG. (ii) implemented equalization using a different methodology, (iii) did not disclose the changed methodology in the monthly statements delivered to Teine, and (iv) refused to provide equalization information to Teine when requested. [emphasis added]

...

We find that Teine did not know, nor could it reasonably have known, before 24 October 2019 that it has suffered any of the injuries for which it now claims. The earliest date by which Teine might reasonably have known that it had a claim is in February 2021. We do not agree with IPL's contention that Teine should have been more diligent and should have made inquiries about IPL's equalization practices sooner than it did. There was nothing in the information provided to Teine that could reasonably have alerted it to the fact that IPL was not fulfilling its promise to conduct equalization in the manner required by the EPG. Indeed, the documents and information provided create the illusion that IPL had complied with the EPG. In addition, even if earlier inquiries had been made, the evidence shows that the relevant information would have been withheld by IPL. [emphasis added]

[51] Even if Mr. Moe is correct that discrepancies between the Boomerang Forecasts and IPL invoices should have led Teine to scrutinize the IPL invoices, the Arbitral Tribunal found that nothing provided by IPL to Teine – including the IPL invoices – could have alerted Teine to the fact that IPL was not following the EPG. Mr. Moe's evidence that IPL's non-use of the EPG can

be discerned from the IPL invoices is something that could have been presented to the Arbitral Tribunal but was not.

[52] A distinction must be drawn between the new evidence sought to be adduced – the Boomerang Forecasts – and the new argument being advanced. There is no reasonable possibility that the new evidence would have affected the Arbitral Tribunal’s decision on the limitations issue because it is like the evidence that was already before the Arbitral Tribunal. The new argument, supported by Mr. Moe’s new expert evidence, might have affected the Arbitral Tribunal’s decision on the limitations issue. But, as explained above, the new argument and Mr. Moe’s new expert evidence could have been put forward during the MS Light Arbitration.

[53] There can be no doubt that if new evidence leads to new arguments, that may be grounds to conclude that the new evidence would have affected an Arbitral Tribunal’s decision. But that is not the case here. The Boomerang Forecasts are not essential to the argument now advanced by IPL. The new argument advanced by IPL could have been made on the evidence before the Arbitral Tribunal. Indeed, it is possible that discrepancies between information in the Macquarie Producer Statements – being actual, not forecasted, information – would have made a more compelling basis for IPL’s argument.

[54] At the MS Light Arbitration, IPL advanced a variety of arguments to the effect that Teine should have known that IPL was not following the EPG. Though IPL did not have the benefit of the Boomerang Forecasts and did not call Mr. Moe as a witness, it argued that Teine could have discerned from the IPL invoices together with other information available to it that IPL was not equalizing pursuant to the EPG. The Arbitral Tribunal rejected these arguments. I am satisfied that there is no reasonable possibility that the Boomerang Forecasts would have affected the Arbitral Tribunal’s decision.

b. Did Non-Production of the Boomerang Records Deprive IPL of a Fair Hearing?

[55] The Court of Appeal in *Enmax* at para 67 explained that the purpose of the fairness ground for setting aside an arbitration award is to “ensure the proceedings are not fundamentally or fatally flawed.” The Court of Appeal summarized the principles applicable to an application to set aside an arbitration award on fairness grounds in *Enmax* at para 66 as follows:

First, parties to an arbitration are entitled to a fair hearing, not a perfect hearing. Second, the overall fairness of the proceedings must be considered, not individual rulings. Third, parties must take advantage of and exercise diligence in pursuing issues and cannot later complain of some perceived unfairness resulting from their failure to do so. Fourth, not every refusal to admit relevant evidence is a breach of natural justice. Fifth, the threshold for setting aside an arbitration award on grounds of unfairness has been described in various ways, but the cases make it clear that something of a significant nature is required, or that the excluded evidence was crucial to the case being presented.

[56] IPL submitted, and I accept, that when assessing whether the non-production of records caused an arbitration to be unfair it is necessary to go beyond the narrow question of whether it was reasonably possible that the non-production of records would have affected the outcome. Fairness is about process as much as substance and that means that it is necessary to ask whether

it is reasonably possible that the production of the records would have led the receiving party in a new direction, changed its theory of the case, or spurred additional records requests that could have materially affected the proceeding. Put differently, is it reasonably possible that the production of the records would have changed the case in a meaningful way?

[57] The principles identified in *Enmax* were framed in the context of non-production of records by reason of a ruling by an arbitral tribunal, but they apply equally to non-production by a party. In the context of non-production by a party, it is necessary to also consider if the non-producing party was acting in good faith. This flows both from the statutory duty to follow the directions of the arbitration tribunal and the contractual duty of good faith performance: J Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 4th ed (Huntington, New York: Juris Publishing, 2022) §6.7.3 at 251.

[58] Teine's conduct must be evaluated in the context of contemporary record production practice and having regard to the request-based record production approach used in commercial arbitration. Teine was ordered by the Arbitral Tribunal to produce records relating to "blending on the MS Light," which would have included the Boomerang Forecasts because they contained information concerning the MS Light and included the keyword "blending." IPL now seeks to use the Boomerang Forecasts to support limitations arguments in respect of Teine's equalization claim, not its blending claim, but the original reason why records are produced does not constrain their use.

[59] Record production in commercial arbitration proceedings typically involves each party producing the records on which they intend to rely and then each party making record requests – called Redfern requests – of the other party. This process contrasts with record production in Alberta court proceedings which places the onus on each party to produce relevant and material records with relevance and materiality being determined by the pleadings. Whether a party in a commercial arbitration receives the records that it needs to make its case depends, in significant part, on its Redfern requests. A party to a commercial arbitration cannot take a passive role and expect to receive sufficient disclosure.

[60] The Boomerang Forecasts fell within the parameters of the Arbitral Tribunal's production order and should have been produced by Teine. Mr. Ho and Mr. McInenly deposed that if IPL had received the Boomerang Forecasts, IPL would have requested the following records from Teine:

- (a) Boomerang's forecasts of anticipated revenue (including in respect of the MS Light pipeline) spanning the entirety of the time period captured by the MS Light Arbitration during which Boomerang contracted with Teine, being January 1, 2017 (i.e., the date that Boomerang first contracted with IPL), through to at least May 1, 2023 (i.e., the date RR#4 was made).
- (b) Teine's reconciliation of Boomerang's forecasts to its actual cash flows.
- (c) Teine's internal correspondence relating to issues identified through the reconciliation process, such as discrepancies between Boomerang's forecasted revenues and Teine's actual net revenues from the MS Light.
- (d) Teine's correspondence with Boomerang relating to issues identified through the reconciliation process, such as discrepancies between Boomerang's forecasted revenues and Teine's actual net revenues from the MS Light.

- (e) Source data provided to Boomerang by Teine for the information reflected in the Boomerang Forecasts.

[61] Ms. Farrow testified in response that Teine did not possess the type of records that Mr. Ho and Mr. McInenly speculate IPL would have sought if the Boomerang Forecasts had been produced. She deposed that “Teine does not undertake a reconciliation process with respect to the Boomerang Forecasts” and, as a result, “there is no internal correspondence of the nature identified by Mr. Ho and Mr. McInenly.” She further explained that the only source data provided by Teine to Boomerang was the density and sulphur content of Teine’s oil which is something that is within IPL’s knowledge. I accept Ms. Farrow’s evidence that the further record requests imagined by Mr. Ho and Mr. McInenly would not have led IPL to any records that could have affected the course or outcome of the MS Light Arbitration.

[62] Counsel for Teine instructed Teine personnel to search for records concerning the MS Light with the word “blending.” Ms. Farrow deposed that Teine performed this search and provided the resulting records, including the Boomerang Forecasts, to its counsel. The responsive records were not uploaded by counsel into the data management software and, accordingly, were not produced to IPL. It is not clear why this occurred or who is to blame for this failure. The failure to upload records led to counsel for Teine representing to IPL that “there were no responsive records to IPL Document Request No. 4. Teine has fully satisfied its production obligations for this request.”

[63] IPL submits that Teine’s explanations for non-production of the Boomerang Forecasts have changed over time and that this is indicative of Teine’s bad faith. IPL stops short of saying that Teine intentionally withheld the Boomerang Forecasts to gain an advantage in the MS Light Arbitration but that is the effect of its submissions.

[64] I am satisfied, based on the explanations for non-production offered by Teine, that the failure to produce the Boomerang Forecasts was inadvertent, not intentional. My conclusion is fortified by the fact that records with similar information – the Macquarie Producer Statements – were disclosed and that there is nothing about the Boomerang Forecasts on their own that was damaging to Teine. No one at the time thought the Boomerang Forecasts were a smoking gun. Teine’s story – that the Boomerang Forecasts fell through the cracks – is the most plausible explanation for non-production. Indeed, Teine’s production of the Boomerang Forecasts in the separate MS Heavy Arbitration when represented by the same counsel is consistent with Teine and its counsel believing that those records had been produced in the MS Light Arbitration.

[65] The Boomerang Forecasts were not “crucial to the case being presented” in the MS Light Arbitration. The Boomerang Forecasts have only become “crucial” in hindsight after IPL hired appellate counsel and a new expert. IPL framed the Boomerang Forecasts as crucial to its new theory of the case on limitations which, as I have explained, is predicated on IPL’s non-compliance with the EPG being discoverable from the IPL invoices. The Arbitral Tribunal found that IPL’s non-compliance with the EPG was not discoverable from anything provided by IPL and it is not the role of the Court on a set aside application to disturb a factual finding unless it is reasonably possible that the withheld records would have affected the factual finding. The Boomerang Forecasts do not change what was in the IPL invoices. Despite the non-production of the Boomerang Forecasts, the MS Light Arbitration was not “fundamentally or fatally flawed.” IPL’s frustration with Teine’s non-production of the Boomerang Forecasts and

motivation to leverage that into a do-over of its case on limitations is understandable but it is not grounds to set aside the Arbitration Award.

V. Application for Leave to Appeal the Arbitration Award

a. The Test for Leave to Appeal

[66] The PCA does not provide for a right of appeal. IPL is, therefore, limited to the right of appeal on questions of law provided by the *Arbitration Act* s 44(2). *Arbitration Act* s 44(2.1) provides that leave to appeal may only be granted where the Court is satisfied that:

- (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
- (b) the determination of the question of law at issue will significantly affect the rights of the parties.

[67] The limitation on the statutory right of appeal of arbitration awards balances the principle of limited court involvement in arbitrations (*Enmax* at para 4; *Schafer v Schafer*, 2023 ABCA 117 at para 45) against the court’s jurisprudential role interpreting and developing private law (*Lesenko v Wild Rose Ready Mix Ltd*, 2024 ABKB 333 at para 49 and *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 at para 86).

[68] Though leave may be granted on questions of law, the court must not wade into questions of law that are inconsequential when viewed in the context of the dispute: *Quanta Canada Holdings II ULC v Bremar Construction Ltd*, 2024 ABKB 317 at paras 16-21. There is no credible suggestion in the present case that the issues raised by IPL are unimportant to the parties or that they would not affect the rights of the parties. The real disagreement between the parties is whether the issues raised by IPL are questions of law. Accordingly, the analysis that follows focuses only on whether the issues raised by IPL are questions of law.

[69] Justice Khullar, as she then was, in *KBR Industrial Canada Co v Air Liquide Global E&C Solutions Canada LP*, 2018 ABQB 257 at para 73 observed that “a stringent threshold is consistent with the deferential approach to the review of arbitral decisions” prescribed by the Supreme Court of Canada in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 and *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32. What follows from this is that a strict approach is required to determine whether an issue raised by a party seeking leave to appeal is a question of law.

[70] Justice Gascon, writing for the majority in *Teal Cedar* at para 43, explained the process for characterizing questions as legal, factual, or mixed law and fact:

[L]egal questions are questions ‘about what the correct legal test is’; factual questions are ‘about what actually took place between the parties’; and mixed questions are questions about ‘whether the facts satisfy the legal tests’ or, in other words, they involve ‘applying a legal standard to a set of facts.’ [citations omitted]

[71] On an application for leave to appeal an arbitration award on a question of law, the court must assess whether the question of law has “arguable merit”: *Sattva*, at paras 72-75; *Alberta Medical Association v Alberta Health Services*, 2019 ABQB 82 at para 14.

b. Limitations

[72] IPL recognizes that the Arbitral Tribunal correctly stated the applicable limitations law but submits that it nevertheless applied the wrong test or erred in how it applied the correct test. The Arbitral Tribunal's statement of the law at para 493 was as follows:

Once the type of injury is identified, the question becomes whether the claimant brought its claims within two years of when it knew or "*ought to have known*" of its alleged injury at the date of each respective breach. To determine if the claimant "*ought to have known*", the test is whether, through the exercise of reasonable diligence, the claimant should have known of the claim that it now alleges. [emphasis in original]

[73] IPL submits that the Arbitral Tribunal's error is found in para 500 where it held:

The evidence shows, however, that Teine did not know and could not reasonably have known, until after this arbitration was commenced and document production had occurred, that equalization was not being performed in the manner required under the EPG.

[74] IPL points out that the question for limitations is not when Teine knew precisely how IPL was equalizing; rather, the correct question pursuant to *Limitations Act*, RSA 2000, c L-12, s 3(1)(a) is when Teine first knew or ought to have known it had suffered an injury at the hands of IPL that warranted bringing a proceeding. What Teine needed to know, according to IPL, was not how IPL was equalizing, just that IPL was not following the EPG. IPL states that the simple fact that IPL was not following the EPG should have been evident from the outset when IPL did not provide Teine with the density and sulphur information for other producers using the MS Light. IPL submits its failure to provide EPG compliant invoicing was sufficient grounds for Teine to commence an action. According to IPL, the limitation period should have started to run when the first deficient IPL invoice was delivered.

[75] The Arbitral Tribunal concluded at para 510 that "[t]he earliest date by which Teine might reasonably have known that it had a claim is in February 2021." What happened in February 2021 that caused the Arbitral Tribunal to peg that as the time when the limitations clock began to run? The Arbitral Tribunal explained at para 129 that in February 2021 "Ms. Farrow noticed that the price Teine was receiving for its light crude upon sale at Kerrobert was lower than she expected it to be." The Arbitral Tribunal noted at para 131 that this caused her to make a "*formal request*" for the back up data for the equalization calculation" on February 12, 2021. On February 18, 2021, IPL told her that the only information that Teine could see was on the invoices and that "*[o]ther data would not be available as MS is a single-shipper pipeline.*" IPL elaborated on this in a further email dated February 26, 2021 stating that:

On a single shipper pipeline, the references to shipper in the tariff and the equalization guidelines would be in relation to the one single shipper on the pipeline. That is why any other shipper at the receipt point or delivery point of the pipeline would not see the details of an equalization statement you see in the guidelines.

[76] The Arbitral Tribunal explained why it concluded that the limitation period commenced running in February 2021 in para 505:

The 26 February 2021 email is the first hint given by IPL that it was only equalizing vis à vis the single Shipper, and that the single Shipper was receiving information that was not being provided to Teine. There was no mention of the critical fact that the single Shipper's equalization was being performed using the Stream WADF as required by the EPG, but that Teine's equalization liability was being determined using a Revised Stream WADF.

[77] IPL's argument for leave to appeal on limitations is a different version of the argument that it advanced on the set aside application. IPL argues that Teine should have known from the IPL invoices that IPL was not following the EPG. The Arbitral Tribunal considered this argument and held as follows at para 510:

We do not agree with IPL's contention that Teine should have been more diligent and should have made inquiries about IPL's equalization practices sooner than it did. There was nothing in the information provided to Teine that could reasonably have alerted it to the fact that IPL was not fulfilling its promise to conduct equalization in the manner required by the EPG. Indeed, the documents and information provided created the illusion that IPL had complied with the EPG. In addition, even if earlier inquiries had been made, the evidence shows that the relevant information would have been withheld by IPL. [emphasis added]

[78] The Arbitral Tribunal found not only that the information provided by IPL to Teine did not disclose that IPL was not complying with the EPG but that the presentation of the information concealed IPL's non-compliance. These are pure factual findings. If this were an appeal of a court decision, IPL could argue that the decision-maker had made a palpable and overriding error. But such arguments cannot be made in the context of an appeal of an arbitration award. A court cannot re-weigh the evidence before an arbitral tribunal and come to a different conclusion on the facts or even return the matter to the arbitral tribunal for redetermination. The *Arbitration Act* s 44 provides for appeals on questions of law, not questions of fact. Leave to appeal is denied on the question of limitations.

c. Interpretation of the EPG

[79] IPL submits that the Arbitral Tribunal erred in its interpretation of the EPG. The interpretation of a contract is a question of mixed fact and law: **Sattva** at para 50. Standard form contracts are an exception to the rule that the interpretation of contracts is a question of mixed fact and law: **Ledcor Construction Ltd v Northbridge Indemnity Insurance Co**, 2016 SCC 37 at para 4. The error in the interpretation of the EPG, according to IPL, is an error of law because the EPG is a standard industry document analogous to a standard form contract. The interpretation of the EPG does not require consideration of the factual matrix and has precedential value that extends beyond the parties to the case: **Ledcor** at para 4. If the Arbitral Tribunal had simply interpreted the EPG, I would agree. But, as will be explained, the Arbitral Tribunal's interpretation of the EPG is part of its damages assessment and inextricably entwined with the facts. As such, the Arbitral Tribunal's interpretation of the EPG is more analogous to the type of contractual interpretation considered in **Sattva** than in **Ledcor**. Therefore, the contract interpretation error asserted by IPL is an error of mixed fact and law. The question, then, is whether a question of law may be extricated from the facts.

[80] IPL does not contest the Arbitral Tribunal's finding that it was obligated to follow the EPG and that it failed to follow the EPG. Indeed, Mr. Moe, IPL's expert for the purpose of

adducing the Boomerang Forecasts, deposed that his “review and analysis of information available to Teine at the time demonstrates IPL was not following the EPG.” The interpretation error that IPL alleges has nothing to do with the Arbitral Tribunal’s finding that IPL breached the PCA by failing to follow the EPG.

[81] IPL’s issue with the Arbitral Tribunal’s interpretation of the EPG concerns the Arbitral Tribunal’s assessment of damages. Once the Arbitral Tribunal concluded that IPL had breached the EPG, its task was to determine what IPL should have done pursuant to the EPG. This was necessary because contract damages are “expectation damages” which are typically measured by difference in value between the contract as it should have been performed and what occurred. The Arbitral Tribunal’s interpretation error, if it was an error, was part of its damages analysis.

[82] There is a fundamental difference between interpreting a standard form contract without any consideration of its factual matrix and interpreting a contract – even a standard form contract – in the context of damages assessment. Damages analysis is different because it requires the construction of a scenario – proper contract performance – that did not happen. Damages analysis typically proceeds on assumptions, often with the aid of expert evidence. Damages analysis is not pure contract interpretation even when a standard form contract is involved because contract damages analysis is, so to speak, an effort to unscramble an egg.

[83] The Alberta Court of Appeal in ***Signalta Resources Limited v Canadian Natural Resources Limited***, 2025 ABCA 306 at para 31 observed that, “[d]amages 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.” This deferential standard recognizes that the process of assessing damages is inherently imperfect because a court often cannot place the parties in the exact position they would have been had the contract been performed. The assessment of contract damages in complex commercial cases is often a fact-driven exercise that turns on competing scenarios constructed by expert witnesses which, in turn, rely on assumptions about what would have occurred if the parties had performed their obligations as promised.

[84] IPL asserts that the Arbitral Tribunal erred in concluding that there could be two WADFs. The so-called “two WADF error” is found in para 469:

IPL had two distinct obligations. First, IPL was contractually committed to Teine to ensure that Teine’s equalization rights and obligations were determined by using the calculated Stream WADF required by the EPG. Second, to the extent that IPL also had a commitment to Enbridge to comply with the EPG, the onus was on IPL to ensure that the WADF it reported to Enbridge “*properly represents the actual stream quality*.” We do not accept that anything precludes IPL from using the Stream WADF to calculate equalization payments due to or from Teine (and any other receipt Shippers with the same contractual rights), while reporting the Revised Stream WADF to Enbridge if that is necessary to meet its obligation under the EPG. Although using different WADFs is not the normal expectation under the EPG, the EPG clearly contemplates that there may be cases where the Stream WADF does not represent actual stream quality. Under the EPG, equalization payments to Shippers are to be determined using the Stream WADF, while a WADF accurately reflecting the commingled stream quality is to be reported to the Downstream Level.

[85] The Arbitral Tribunal’s analysis of the EPG in this passage has two conclusions. First the EPG requires use of a Stream WADF for equalizing amongst producers. Second, the EPG does not preclude the existence and use of a second WADF representing actual stream quality for the purpose of reporting to Enbridge. The Arbitral Tribunal recognized that the “normal expectation” under the EPG is that there is a single WADF. However, on the facts of this case, IPL was treating the MS Light as a single-shipper system and conducting blending activities for its own benefit. This dual use of the MS Light created the possibility that, for the purposes of damages assessment, there could be two WADFs because the Arbitral Tribunal’s damages scenario did not assume away IPL’s blending activities. Indeed, the Arbitral Tribunal could not assume away IPL’s blending activities because it dismissed Teine’s claim that IPL was not allowed to blend butane and heavy oil. The Arbitral Tribunal noted that the EPG contemplates that the Stream WADF used for calculating equalization amongst shippers can be different from the actual stream quality. This is necessarily the case when a pipeline operator is engaging in blending activities for its own account and is still required to equalize in respect of shippers.

[86] The Arbitral Tribunal recognized that absent blending, the WADF used for equalizing amongst shippers and the actual stream quality will be the same thing. The Arbitral Tribunal at para 470 noted IPL’s explanation for the use of the Revised WADF was that MS Light is a single-shipper system and went on to observe that the only thing that made MS Light as a single-shipper system different from MS Light as a multi-shipper system was IPL’s blending practices. Though the Arbitral Tribunal identified blending as the likely reason why IPL used the Revised WADF, it was unable to discern the mathematical basis for the differences between the two WADFs. This underscores that the two WADF issue, even if it has a legal component, is inextricably tied up in the facts.

[87] The *Ledcor* approach to standard form contracts is predicated on there being a question of interpretation that is not entwined with the facts, and that has precedential value. The two WADF problem identified by IPL cannot be separated from its application to the facts and, because of its close connection to the facts, the Arbitral Tribunal’s interpretation of the EPG has little precedential value. To the extent that it has any precedential value in respect of other MS Light users, it is because of the common facts, not the interpretation of the EPG. Outside the context of the MS Light, the Arbitral Tribunal’s decision will have no impact on the interpretation of the EPG in respect of other pipelines.

[88] Whether the “two WADF error” is an error or not, I am satisfied that its legal and factual components that are inextricable from one another. Leave to appeal is denied on the grounds of the alleged error in interpretation of the EPG.

d. Reliance on Renwick Evidence

[89] IPL submits that the Arbitral Tribunal erred in relying on the evidence of IPL’s expert John Renwick that was elicited in response to a hypothetical scenario articulated by the Arbitral Tribunal. IPL submitted that the Arbitral Tribunal erred in law when it:

- i. put a factually unsupported assumption to Mr. Renwick;
- ii. that itself did not call for an expert opinion but rather put to Mr. Renwick a self-fulfilling proposition as to what IPL’s contracts *required it to do* (i.e., one that Mr. Renwick could not reasonably answer in any other fashion); and

- iii. that, in any event, cannot at law supplant the function of interpreting the words of the EPG. [emphasis in original]

[90] The Arbitral Tribunal put a hypothetical situation to Mr. Renwick predicated on the basis that IPL had agreements with all other MS Light shippers except Teine that required blending and equalization using the Revised Stream WADF, while Teine's agreement required equalization according to the EPG (*i.e.*, Stream WADF). In that hypothetical situation, the Arbitral Tribunal wanted to know which WADF IPL would report to Enbridge. Mr. Renwick responded that IPL would report to Enbridge using the Revised Stream WADF because that represented the actual stream quality. The relevant elements of the hypothetical are taken from the transcript below:

AT: If the facts were that IPL had agreements with all of the shippers on the MS light and in all of those agreements except the one with Teine it was agreed that equalization – the blending would take place and equalization would be performed using the revised WADF that we've been talking about, assume that's the agreement with all the shippers except Teine.

...

Blending is authorized. The revised WADF will be used for calculation – calculating equalization and will be reported to Enbridge accordingly. Okay? That's what the agreements with everybody but Teine say. And assume that the agreement with Teine says that equalization will be done according to the EPG, Mr. Murray's way. Okay?

JR: Okay.

AT: Now, in those circumstances, how would you expect equalization to be performed?

...

AT: It's a problematic situation because you have agreements which call for inconsistent things. Am I right?

JR: Yes.

AT: One would expect, though, that in that hypothetical, IPL would do what its contracts require; right?

JR: They are all signed, yes. They're all executed agreements.

AT: So, again, we're just assuming these are the facts.

JR: Yes.

AT: So assume, then, that as – *vis à vis* all the other shippers, equalization is performed using the revised WADF and the credits and debits are – are made accordingly, but for Teine, because the agreement requires it, the equalization credits or debits are performed differently. They're done according to the EPG. Okay? ...

JR: For all the components of the system?

AT: Yes, including any blending that's taking place. Now, in those circumstances, what WADF would you expect IPL to report to Enbridge for the blended stream? Would it be the – the EPG WADF that you used – was used for equalization with Teine or the revised WADF that was used for equalization with everybody else?

JR: Strictly by the concept of making sure that's actual represented quality, it would be the single-shipper methodology, a calculation of the actual stream quality. [Transcript excerpt edited to make minor formatting changes removing stutters and interjections]

[91] After Mr. Renwick gave his final response, the Chair asked the parties, "Is there anything arising out of my questions?" Neither IPL, nor Teine took the opportunity to raise any concerns with the Arbitral Tribunal's line of questions. I emphasize that in a complex commercial arbitration, parties should expect arbitrators to ask questions of experts, including hypothetical questions such as that asked by the Arbitral Tribunal in this instance. To the extent that there is an error in the premise of an arbitrator's question, it is best addressed in the moment or later in argument, not on appeal.

[92] The Arbitral Tribunal's scenario was not predicated on an error nor was it "factually unsupported" because it hypothesized what *would have* happened, not what did happen. The hypothetical scenario posited how IPL would have behaved if it had been required to equalize pursuant to the EPG for Teine but continued with its existing equalization practices with other shippers. This is one of several reasonable "but for" scenarios that could be imagined. This is exactly the type of thing that damages experts in commercial disputes are asked to consider, and it was fair game for the Arbitral Tribunal to articulate its own "but for" scenario and then explore the implications flowing from that scenario with an expert witness.

[93] The Arbitral Tribunal constructed the hypothetical scenario, including the supposed effects of the contracts, and then asked Mr. Renwick what he would expect IPL to do in the scenario. Mr. Renwick's testimony did not concern the content of the contractual obligations; it concerned how he expected IPL to behave in the scenario posited by the Arbitral Tribunal. The Arbitral Tribunal concluded at para 521 that "[i]f IPL had performed its contractual obligation to Teine by using the Stream WADF to calculate Teine's equalization charges, the Revised Stream WADF could have and likely would still have been reported to Enbridge, as Mr. Renwick confirmed." The Arbitral Tribunal could just as easily have drawn this conclusion from the documentary evidence without reference to Mr. Renwick's testimony.

[94] IPL's concern with the Arbitral Tribunal's hypothetical scenario is something that underlies some of its other grounds of appeal. IPL argues, when assessing Teine's expectation damages, the Arbitral Tribunal did not assume that all other producers using the MS Light should have been equalized pursuant to the EPG. The Arbitral Tribunal addressed this point at para 475:

Our finding is that, as between Teine and IPL, the PCA clearly invoked the EPG equalization procedures, and there was a lack of transparency about IPL's actual equalization procedures. Our role is to interpret and apply the contract, not to re-write it to accommodate IPL's or Teine's economic interests. The question whether the same or a similar situation exists as regards [the] other receipt

Shippers is not before us. The answer would in each case depend on the individual contractual arrangements with IPL.

[95] Though there is some logic in IPL's position that the calculation of Teine's damages for IPL's failure to equalize pursuant to the EPG should be calculated on the basis that all producers using the MS Light are equalized pursuant to the EPG, the Arbitral Tribunal's approach in the absence of evidence concerning the contracts of other shippers is also reasonable. The question of how to assess damages in the absence of evidence is in the discretion of the Arbitral Tribunal, not something that a reviewing Court can scrutinize absent an error in principle. I am not persuaded that the Arbitral Tribunal's choice of one of at least two reasonable assumptions available to fill a gap in the evidence constitutes an error of law. Further, I note that the Arbitral Tribunal was familiar with the evidence and how the evidential record came to be because it supervised the pre-hearing record production process. This put the Arbitral Tribunal in a much better position than this Court to make sense of the evidential gaps and determine what assumptions were reasonable to make in the assessment of damages.

[96] The Arbitral Tribunal's reliance on Mr. Renwick's evidence is a factual matter, not a question of law. Leave to appeal on the grounds of the reliance on Mr. Renwick's evidence is denied.

e. Commercially Absurd Outcome

[97] IPL argues that the Arbitral Tribunal erred in rejecting IPL's argument that Teine's expert's methodology was flawed because it failed to consider equalization penalties that Teine would have incurred on the Enbridge system if IPL had reported the Stream WADF to Enbridge instead of the Revised Stream WADF. IPL contends that Mr. Renwick's view that increased equalization credits to Teine would have been "materially offset by the resulting higher equalization penalties it would incur due to equalization on Enbridge" should have been accepted as it was the only evidence on the point. According to IPL, the Arbitral Tribunal's approach resulted in a "significant windfall" to Teine that is "commercially absurd." IPL further submits that the damages awarded to Teine is, in effect, a disgorgement remedy.

[98] Teine submits that the Arbitral Tribunal's finding was sound because IPL's evidence was that it reported the Revised Stream WADF to Enbridge because that was what it was required to do. Moreover, Teine submits that IPL would not change the WADF that it reported to Enbridge because its blending profits and profits obtained from other producers using the MS Light depend on IPL reporting the Revised Stream WADF to Enbridge.

[99] This proposed ground of appeal calls on the Court to reweigh the expert evidence. Perhaps IPL is correct that the Arbitral Tribunal should have accepted Mr. Renwick's evidence that Teine would have been subject to significant equalization penalties on the Enbridge system. But that does not make whose evidence should be preferred a question of law. Weighing lay and expert evidence and choosing which evidence to prefer is quintessential fact-finding. Further, the size of the Award does not make it commercially absurd, nor does it transform it into a disgorgement remedy. IPL argues that the size of the Award is commercially absurd when considered in relation to the fees paid by Teine to IPL over the period in dispute. But that is not the relevant measuring stick. The size of the Award is not commercially absurd when considered relative to the value of the products Teine shipped on the MS Light over the period in dispute. Leave to appeal on the ground that the Arbitral Tribunal failed to accept evidence that Teine

would have been subject to equalization penalties on the Enbridge system if IPL had changed its WADF reporting is denied.

f. Failure to Consider Relevant Evidence

[100] IPL asserts that the Arbitral Tribunal accepted the evidence of Ms. Carey, a Teine expert, despite criticisms of her work by Mr. Renwick. IPL submitted that “[t]he [Arbitral] Tribunal patently did not appreciate the existence of [Mr. Renwick’s] evidence, let alone review, consider, or refer to the actual evidence that was before them.” Evidence of this omission, according to IPL, is found in the Award at para 519 where the Arbitral Tribunal observed that “Mr. Renwick does not address Ms. Carey’s damages calculation of amounts overcharged to Teine or identify any wrong assumption, aside from recommending an offset.” IPL contends that this shows that the Arbitral Tribunal did not consider Mr. Renwick’s evidence or misapprehended Mr. Renwick’s evidence.

[101] Failing to consider evidence can be an error of law: *Tempo Alberta Electrical Contractors Co Ltd v Man-Shield (Alta) Construction Inc*, 2025 ABCA 282 at para 16. Even if I accept that IPL has asserted an error of law, I must still assess whether this ground of appeal has arguable merit. A fair reading of the Award shows that the Arbitral Tribunal was well familiar with Mr. Renwick’s evidence. Paragraphs 519-22 are an evaluation of Ms. Carey’s evidence against Mr. Renwick’s evidence. Teine submits that the Award’s conclusion that Mr. Renwick did not address Ms. Carey’s damages calculation of amounts overcharged to Teine or identify any wrong assumption is a fair assessment because what Mr. Renwick did was provide an alternative approach. This explains the Arbitral Tribunal’s choice of words in para 519.

[102] The Arbitral Tribunal concluded at para 522, “[w]e accept the evidence of Ms. Carey, in preference to that of Mr. Renwick, as to the damages suffered by Teine as [a] result of IPL’s breaches of contract relating to equalization.” I am satisfied from the Award that the Arbitral Tribunal gave Mr. Renwick’s evidence due consideration and that what IPL is, in effect, seeking is an opportunity to reargue how the competing experts’ evidence should be weighed. This ground of appeal does not have arguable merit and, as such, leave to appeal is denied.

VI. Conclusion

[103] The MS Light Arbitration and associated court proceedings between IPL and Teine have been hard fought. The Arbitral Tribunal was comprised of leading arbitrators with expertise in energy industry disputes and the comprehensive Award reflects their deep engagement with the law and evidence. The post-Award court proceedings have focussed on Teine’s failure to produce records which is regrettable but cannot reasonably be understood to have affected either the fairness of the MS Light Arbitration proceeding or its outcome. IPL’s proposed grounds of appeal, in one way or another, all ask the Court to overturn the Arbitral Tribunal’s conclusions on the facts. IPL failed to identify any errors of law that appear to have any arguable merit. If the Arbitral Tribunal made factual errors (something that was beyond the scope of these applications), it must be remembered that the parties could have agreed to the right to appeal factual errors pursuant to *Arbitration Act*, s 44(1) but did not.

[104] IPL’s applications to set aside the Award and for leave to appeal the Award are dismissed. If the parties are unable to agree on costs, they may contact the Court to set a process for the determination of costs.

Heard on the 17 & 18th days of June, 2026.

Dated at the City of Calgary, Alberta this 20th day of July, 2026.

Colin C.J. Feasby
J.C.K.B.A.

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