

Court of King’s Bench of Alberta

Citation: Nova Chemicals Corporation v INEOS Canada Partnership, 2026 ABKB 563

Date: 20260810
Docket: 2401 17169; 2501 07884
Registry: Calgary

Between:

Nova Chemicals Corporation

Applicant

- and -

INEOS Canada Partnership and INEOS Oligomers USA LLC

Respondents

And Between:

2501 07884

Nova Chemicals Corporation

Applicant

- and -

INEOS Canada Partnership and INEOS Oligomers USA LLC

Respondents

**Reasons for Decision
of the
Honourable Justice Allison G. Kuntz**

I. Introduction

[1] Nova Chemicals Corporation (**NOVA**) appeals the decision of an arbitrator (the **Arbitrator**) under the *Arbitration Act*, RSA 2000, c A-43 regarding audit disputes between NOVA and INEOS Canada Partnership (**INEOS**). NOVA submits that the Arbitrator ignored principles of contractual interpretation and principles of law in rejecting certain claims by NOVA and allowing certain claims by INEOS.

[2] For the reasons that follow, NOVA's appeal is dismissed.

II. Background

[3] The matters before the Arbitrator were regarding two manufacturing plants in Joffre, Alberta. The first plant is co-owned by NOVA and Dow Chemical Canada ULC (**Dow**) and manufactures ethylene (the **E3 Plant** or **E3**). The second plant is owned by INEOS and manufactures linear alpha olefins (**LAO** and the **LAO Plant**).

[4] INEOS needs ethylene to make LAO. NOVA provides ethylene to INEOS from the E3 Plant pursuant to a cost formula. The terms of the parties' agreement are in an Amended and Restated Ethylene Sales Agreement dated January 1, 2006 (the **ESA**). The cost formula in the ESA requires INEOS to pay NOVA: (i) a share of INEOS' margin on the sales of LAO from the LAO Plant, and (ii) a share of NOVA's production costs for the ethylene.

[5] The Arbitrator summarized the disputes before him as follows:

[4] NOVA's claims are that from 2012-2018 the INEOS Partnership made material errors and omissions in its accounting to NOVA which had the effect of understating INEOS' revenues and overstating expenses resulting in lesser amounts otherwise payable to NOVA under the [ESA]....

[5] The INEOS Parties counterclaim that NOVA overstated the production costs of ethylene it supplied to the LAO Plant for contract years 2017 through 2020 by understating E3's [nameplate] capacity....

[6] The Arbitrator dismissed certain of NOVA's claims as out of time and allowed INEOS' counterclaim regarding nameplate capacity.

[7] NOVA appeals the Arbitrator's decision on four grounds: "Limitations", "Affiliate Pricing", "Marketing Expenses", and "Nameplate Capacity". Each ground is addressed below.

III. The Standard of Review

[8] Pursuant to the dispute resolution provisions in the ESA, the Arbitrator's Award is final and binding except on questions of law or questions of mixed fact and law.

[9] This appeal mainly concerns contractual interpretation, which is generally a question of mixed fact and law and is reviewable for palpable and overriding error: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 50 [*Sattva*]; *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2021 ABCA 153 at para 39; *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 at para 24. A palpable error is obvious, and an overriding error goes to the core of the outcome. The possibility of another interpretation is insufficient; the appellant must show that its interpretation is the only reasonable one: *Benhaim v St Germaine*, 2016 SCC 48 at para 38.

[10] A question of law may arise from an extricable legal error, such as applying an incorrect principle, failing to consider a required element of a legal test, or failing to consider a relevant factor: *Sattva* at para 53. Such errors are rare in contractual interpretation because the exercise is fact specific and directed at discerning the parties' objective intentions: *Sattva* at paras 54-55. Questions of law are reviewable for correctness: *Esfahani v Samimi*, 2022 ABKB 795 at para 85.

IV. The Arbitrator's Decision

a) Arbitrator's Statement of the Law

[11] The Arbitrator correctly identified the principles of contractual interpretation with reference to the decision of The Honourable Justice Romaine (as she then was) in *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2018 ABQB 482 [*Dow Decision*]. The Arbitrator quoted paragraphs 30 to 40 of the *Dow Decision*, which referenced *Sattva* and *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157, among other decisions.

[12] The principles of contractual interpretation identified by the Arbitrator included:

- (a) that the goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was formed;
- (b) the exercise is to determine what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix;
- (c) evidence of surrounding circumstances is not used to add to, subtract from, vary or contradict a contract, but as an objective interpretive aid to determine the meaning of the words the parties used;
- (d) the factual matrix is used to understand the mutual and objective intentions of the parties as expressed in the words of the contract, and includes objective evidence of the background facts at the time of the execution of the contract;
- (e) evidence of negotiations is not itself admissible as part of the factual matrix, but is relevant insofar as that evidence shows the factual matrix by, for example, helping to explain the genesis and aim of the contract;

- (f) evidence of the parties' subjective intentions is generally inadmissible;
- (g) commercial contracts should be interpreted in accordance with sound commercial principles and good business sense; and
- (h) the words in a contract should be given their ordinary and literal meaning unless a literal meaning would make the provisions to the agreement ineffective, superfluous, or commercially unreasonable.

[13] The Arbitrator also recognised the organizing principle of good faith in relation to contractual performance as established in *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin*]. The Arbitrator described the requirements of the organizing principle as follows:

- (a) that it required a party to "be honest, reasonable, candid and forthright about matters directly connected to the performance of the contract";
- (b) that a wrong is committed when a failure to "speak out" amounts to active dishonesty in a manner directly related to the performance of the contract; and
- (c) if a party has a contractual duty to do something, they have an obligation to do it and to not refuse or evade those duties in a way that harms the interests of the other party.

[14] The parties agree that the Arbitrator identified the correct legal principles governing the interpretation of the ESA. NOVA submits, however, that he failed to apply those principles.

b) Limitations

[15] Pursuant to Article 6 of the ESA, both parties have audit rights so that they can confirm the other's compliance with the ESA. At the Arbitration, NOVA advanced audit claims for contract years 2012 to 2015 and 2017. The Arbitrator dismissed these claims as time-barred finding that the ESA required NOVA to give INEOS formal notice of its audit claims within 30 months of the end of each contract year, and that NOVA had failed to do so.

[16] In reaching his conclusion, the Arbitrator considered the following provisions of the ESA:

- (a) s 6.7(b), which entitles NOVA once in each Contract Year to conduct an audit of the books and records of INEOS for either or both of the previous two (2) Contract Years;
- (b) s 6.7(e), which states "provided that notice with respect to any error in any statement of account rendered pursuant to [the ESA] is made within thirty (30) months following the end of the Contract Year in which such statement of account was rendered..." a correction shall be issued within sixty days;
- (c) s 6.7, which states that "Any dispute with respect to the findings of an audit conducted pursuant to this Section 6.7 shall, if not resolved, be referred for resolution in accordance with Article 11"; and
- (d) s 6.8, which states that "Each Party shall have thirty (30) months after the end of a Contract Year to verify statements of account and to identify to the other Party in writing errors in the statements of account after which time all accounts...for such

Contract Year shall be deemed to be true and correct, except to the extent challenged as aforesaid...”.

[17] The facts relating to the timing of NOVA’s audit claims are as follows.

i. 2012-2014 & 2015-2016 Audits

[18] By letter agreement dated April 28, 2014 (the **Letter Agreement**), the parties agreed to vary the timing under the ESA for the 2012-2014 audits so that the audits would “occur only in the 2015 calendar year and not prior or subsequent thereto.”

[19] NOVA conducted the 2012-2014 audit in Fall 2015 and the 2015-2016 audit in 2017. The auditors issued reports in November 2015 and March 2018, respectively, after which the parties exchanged correspondence and worked to resolve the issues raised.

[20] On June 19, 2018, INEOS wrote to NOVA about the status of both audit periods. INEOS advised that it had corrected the errors identified in the 2015-2016 audit and that it considered the 2012-2014 audit closed, with all accounts deemed true and correct. The parties met in July 2018 to discuss. At the Arbitration, NOVA submitted that it was not clear until that meeting that the parties would be unable to resolve their disputes about these audit periods.

[21] In October 2018, NOVA gave its first formal notice of errors relating to the 2012-2014 and 2015-2016 audits. At the same time, NOVA gave notice of its intention to commence arbitration. NOVA delivered its Notice of Arbitration on November 21, 2019.

[22] NOVA’s October 2018 notice was delivered more than 30 months after the end of the 2012-2015 contract years. Accordingly, the Arbitrator held that NOVA’s claims for these years were out of time.

ii. 2017-2018 Audit

[23] NOVA’s 2017-2018 audit began in the fall of 2019. The auditor issued its report on May 13, 2021, stating that INEOS had not provided the information needed for it to assess compliance with the ESA. On June 15, 2021, NOVA made a final request for information and gave notice that, absent a satisfactory response, it would engage the dispute resolution process. On June 30, 2021, INEOS replied that it had already provided the auditor with adequate information.

[24] On December 7, 2021, NOVA amended its Notice of Arbitration to add audit claims for the 2017-2018 contract years. Because the June 15, 2021, notice was delivered more than 30 months after the end of the 2017 contract year, the Arbitrator held that NOVA’s 2017 claims were out of time.

c) Affiliate Pricing

[25] In exchange for ethylene, INEOS pays NOVA a margin on its sales of LAO produced at the LAO Plant. The ESA defines this payment as the “Margin Distribution Amount” (**Margin Distribution Amount** or **MDA**). The formula for calculating the MDA is set out in the ESA and is, roughly speaking, revenue minus expenses.

[26] The revenue for the purposes of determining the MDA is defined in the ESA as “LAO Revenue.” LAO Revenue is calculated pursuant to a formula set out in Schedule B. The formula is the sum of certain types of revenue from the LAO Plant (e.g., C⁶ and C⁷ Revenue plus C¹⁰ Revenue plus C¹² Revenue...).

[27] Schedule B to the ESA defines the price for each of C⁶, C⁷, etc. The prices vary depending on whether the LAO is being sold to INEOS and its Affiliates for their “own use”, or to a Third Party.

[28] For sales to Third Parties, the price is to be based on the “actual amount invoiced.” For sales to INEOS and its Affiliates for their “own use”, the price is to be based on “Market Prices”, which are “based on a third-party arm’s length sale to a purchaser of similar quantities of such product without collateral considerations.” The ESA requires that revenue from sales be recorded on a monthly basis.

[29] At the Arbitration, NOVA argued that INEOS had breached the ESA by failing to use the “actual amount invoiced” for sales to Third Parties through its Affiliates in Europe and Asia.

[30] INEOS agreed that the ESA required it to use the “actual amount invoiced” when it sold *directly* to Third Parties but disputed that the sales in question were sales to Third Parties. Instead, INEOS argued that they were sales to Affiliates for their “own use” because the Affiliates who received the product did not know at the time of purchase whether they were going to sell the product to a Third Party. Rather, they would co-mingle the product and then decide later on whether to sell it or keep it.

[31] INEOS argued that because the ESA required a monthly accounting of revenue, and not a later accounting for an undetermined future sale, it was appropriate to classify the sales in issue as sales to Affiliates for their “own use”. The Arbitrator agreed.

d) Marketing Expenses

[32] The Margin Distribution Amount is calculated, in part, with reference to: (i) INEOS’ marketing expenses for the sale of LAO from the LAO Plant, and (ii) INEOS’ operating costs for the LAO Plant. INEOS shares its marketing expenses with its global entities (the **Global Marketing Pool**) but is responsible for all the costs of operating the LAO Plant.

[33] Pursuant to the terms of the ESA, marketing expenses are to be allocated to the Global Marketing Pool if they can be “reasonably allocated to LAO for support of ongoing sales.” The ESA provides a broad, non-exhaustive list of expenses that can be allocated by way of example.

[34] At the Arbitration, NOVA argued that INEOS had artificially inflated its expenses at the LAO Plant by not allocating any of the plant’s expenses to the Global Marketing Pool, and by allowing INEOS’ global entities to over allocate to the Global Marketing Pool. Regarding the second argument, the Arbitrator put it this way - “the allegation, not pleaded, is that [INEOS] managers [...] unreasonably exercised those allocations.”

[35] INEOS responded that it could not allocate any expenses from the LAO Plant to the Global Marketing Pool because the LAO Plant did not engage in marketing activities. INEOS otherwise denied over allocation, arguing that its managers were allocating in accordance with the ESA’s reasonableness threshold.

[36] The Arbitrator accepted INEOS’ position, finding there was no evidence that anyone at the LAO Plant was engaged in sales or marketing, and no evidence of unreasonable allocations.

e) Nameplate Capacity

[37] INEOS receives from NOVA at cost, a share of the ethylene that the E3 Plant can produce. The cost is calculated as the volume of ethylene received by the LAO Plant each year, divided by E3's nameplate capacity. The higher the nameplate capacity, the lower the cost.

[38] At the Arbitration, INEOS argued that NOVA understated the nameplate capacity for the E3 Plant for 2017-2020, thereby overcharging INEOS for ethylene. The Arbitrator agreed.

[39] Schedule E to the ESA states:

Ethylene-3 Plant Nameplate Capacity will be that annual production number established in respect of the [E3 Plant] by the following methodology and procedures which calculate the maximum Ethylene capacity achievable from the Plant over the Plant's operating cycle, between Plant turnarounds. Such methodology and procedures will be consistent with the establishment of nameplate capacity at all other ethylene plants at the Joffre Site and may be amended or adjusted with the approval of the Plant owners. A capacity rate trial will be conducted on the Plant by the Plant operator such trial to be of sufficient length and of steady conditions to reliably obtain the following data:

- 1) Ethylene maximum production;
- 2) Maximum furnace capacity;
- 3) Ultimate yield at maximum rate; and
- 4) Conversion of ethane to Ethylene at maximum production rates.

[40] The Arbitrator held that Schedule E required NOVA to test and calculate E3's maximum nameplate capacity on an ongoing basis. NOVA failed to do so. Instead, it continued to use the design capacity of 2.81 BPY, despite knowing E3's actual capacity was materially higher.

[41] The Arbitrator dismissed NOVA's argument that INEOS was bound by INEOS' predecessor's agreement to use 2.81 BPY as the nameplate capacity. He also rejected NOVA's argument that INEOS had somehow acquiesced to 2.81 BPY.

[42] Finally, the Arbitrator rejected NOVA's argument that the ESA required the E3 co-owners, NOVA and Dow, to determine any change to nameplate capacity, and that they had not amended the figure under their own agreement. The Arbitrator rejected that argument because the *Dow Decision* showed Dow had supported an increase since 2003 and that NOVA, not Dow, was the obstacle. He found that NOVA misled INEOS on that point, contrary to its duty of good faith in contractual performance.

V. Grounds of Appeal

[43] NOVA raises the following grounds of appeal:

- (a) the Arbitrator erred in law and mixed fact and law by denying \$6.3 million of NOVA's claims on the basis that the ESA contained a contractual limitation period which prevented NOVA from recovering its audit claims for 2012-2015 and for 2017;

- (b) the Arbitrator erred in law by ignoring a plain reading of the ESA, and instead focussing on operational reasonableness to reject NOVA's claims regarding affiliate pricing;
- (c) the Arbitrator erred in law by ignoring a plain reading of the ESA, and instead allowed INEOS to allocate its marking expenses based on discretion rather than objective metrics; and
- (d) the Arbitrator erred in law by allowing INEOS' claim for \$32 million in damages on account of NOVA having underestimated the nameplate capacity of its ethylene plant.

VI. Analysis & Decision

a) Limitations

[44] The Arbitrator's decision to time bar NOVA's audit claims for 2012-2015 and 2017 under the ESA is a matter of contractual interpretation. It is a question of mixed fact and law and is reviewable on the standard of palpable and overriding error.

i. 30-month notice period

[45] NOVA submits the Arbitrator wrongly treated the 30-month notice period in Article 6 of the ESA as a limitation period for the purposes of dispute resolution under Article 11. NOVA submits that in doing so, the Arbitrator shortened the two-year limitations period under the *Limitations Act*, RSA 2000, c L-12 contrary to law.

[46] The Arbitrator did not treat the 30-month notice period in Article 6 as a limitation period. Rather, he held that it was a contractual notice period, and that it was, therefore, enforceable in accordance with its terms. He did so in accordance with established case law in that regard: *Dilcon Constructors Ltd v ANC Developments Inc*, 2000 ABCA 223 [*Dilcon*] at paras 57-62; *Corpex (1977) Inc v The Queen in the right of Canada*, [1982] 2 SCR 643 at pp 664-666.

[47] The Arbitrator held that NOVA was required to give INEOS notice of any audit disputes within 30 months of the end of a contract year. Because NOVA had failed to do so for 2012-2015 and 2017, the Arbitrator held it could not proceed to arbitration for those years. The Arbitrator did not hold that NOVA was also required to commence dispute resolution under Article 11 within 30 months of the end of those contract years.

[48] NOVA submits that the Arbitrator erred by finding that the 30-month notice period is the cut off for giving formal notice of an error. NOVA argues that so long as: (a) an error is identified within 30 months of the end of a year, and (b) the parties are working to resolve the error, then there is a live issue, and a dispute has not crystallized for the purposes of giving notice under Article 6. NOVA submits that it has two years from the date the parties reach an impasse in their discussions to commence arbitration.

[49] As the Arbitrator held, NOVA's approach ignores the plain language of the ESA. It would effectively import constructive notice into the agreement and create uncertainty about several matters, including: (a) when the audit process was complete, (b) when the parties' obligations under Article 6 had been engaged, and (c) when the accounts are to be deemed true and correct under s 6.8. NOVA's position is contrary to both the wording of the ESA and the case law regarding the enforceability of contractual notice provisions.

[50] The phrase “if not resolved” in s 6.7(g) likewise does not extend the 30-month notice period. Rather, it confirms the next procedural step: if the parties cannot resolve a properly identified audit dispute, they must proceed to arbitration under the ESA’s dispute resolution process.

[51] There is no palpable and overriding error in the Arbitrator’s decision regarding the 30-month notice period and its impact on NOVA’s claims for 2012-2015 and 2017.

[52] NOVA also submits that the Arbitrator erred in finding that NOVA had to give formal notice of an error under s 13.1 of the ESA in order to avoid the deeming provision in s 6.8.

[53] Section 13.1 of the ESA requires all notices given in connection with the agreement to be in writing. Although the wording differs across the relevant provisions, ss 6.7(e) and 6.8 point in the same direction: s 6.7(e) refers to “notice” of an error, and s 6.8 requires errors to be identified “in writing.” Read together, those provisions support the Arbitrator’s conclusion that formal written notice was required.

[54] Further, and as held by the Arbitrator, NOVA’s proposed approach would create uncertainty about whether, when, and by whom the Article 6 audit process had been engaged.

[55] The Arbitrator’s interpretation is consistent with the structured audit process in Article 6, and there is no palpable and overriding error in his conclusion that formal notice was required.

ii. Letter Agreement

[56] NOVA submits that the Arbitrator erred in finding that the Letter Agreement did not extend the 30-month notice period. NOVA argues that because the parties agreed the 2012-2014 audits would occur only in 2015, they must also have agreed to extend the time for identifying errors. Otherwise, NOVA says it would have had no meaningful opportunity to identify or correct errors arising from at least the 2012 audit, rendering s 6.7(e) meaningless. NOVA characterizes the Arbitrator’s failure to give effect to s 6.7(e) as an error of law.

[57] The Arbitrator did not fail to give effect to s 6.7(e). Rather, he read s 6.7(e) within the context of the ESA.

[58] Section 13.3 of the ESA provides that no modification or amendment to the ESA is valid unless it is in writing and duly executed by both parties. The Letter Agreement changed the timing of the 2012-2014 audits under s 6.7(b), but it did not modify or extend the 30-month notice period in s 6.7(e) and s 6.8. Therefore, on a plain and ordinary reading of the ESA, the Letter Agreement could not have extended the 30-month notice period.

[59] Contrary to NOVA’s submission, the Arbitrator did not use subjective-intent evidence to interpret the ESA. At the Arbitration, NOVA relied on an answer from an INEOS witness to a hypothetical question on cross-examination to support its position on the Letter Agreement. The witness agreed that it would be foolish for NOVA to conduct an audit if it could not act on the results.

[60] The Arbitrator considered that evidence in context. The same witness was also asked whether the parties intended the 30-month notice period to be adjusted under the Letter Agreement. The witness did not agree with that proposition. In substance, the witness accepted the hypothetical concern but did not accept that it reflected the parties’ agreement.

[61] I do not read the Arbitrator's reasons as relying on that evidence to interpret the ESA in any material way. The Arbitrator mentioned the evidence and put it in context because NOVA was relying on it. However, his decision was grounded in the wording of the ESA and the Letter Agreement.

[62] In any event, the Letter Agreement did not make compliance with s 6.7(e) impossible. NOVA could have conducted the 2012-2014 audit earlier in 2015 and given formal notice of any errors in the 2012 statements of account by the end of June 2015. Instead, NOVA conducted the audit in November 2015 and did not give formal notice of any errors until October 2018, well after the 30-month notice period had expired for all of the audit years at issue.

[63] There is no palpable and overriding error in the Arbitrator's interpretation or application of the Letter Agreement.

b) Affiliate Pricing

[64] NOVA submits that the Arbitrator made extricable errors of law in his interpretation of the ESA regarding the affiliate pricing issue. NOVA frames the Arbitrator's decision as ignoring the pricing scheme in the ESA for sales to Third Parties and allowing INEOS to implement a lower pricing scheme because it would be inconvenient operationally for them to do otherwise. NOVA's submissions misinterpret the Arbitrator's decision.

[65] The Arbitrator did not ignore the pricing scheme in the ESA for sales to Third Parties, nor did he favour operational concerns over the words of the ESA. The Arbitrator determined that the sales in issue (i.e., sales to affiliates in Europe and Asia) were not sales to Third Parties and therefore the pricing scheme in the ESA for sales to Third Parties did not apply. In doing so, the Arbitrator considered the ESA as a whole and the relevant factual matrix.

[66] The Arbitrator highlighted the following provisions from Schedule B to the ESA:

a) the Point-of-Sale provision:

Point of Sale: A sale to a Third Party, or to an Affiliate of the Partnership for the Affiliate's own use, shall occur, and revenue from such sale shall be treated as revenue hereunder, at such time as the product is dispatched from storage (either at the LAO Plant or at an offsite terminal) and an invoice is generated (to the Third Party or the Affiliate, as the case may be) and recorded in the sales report provided to the Partnership's accounting group in the Month;

b) the Affiliate Sale provision:

Affiliate Sale: A sale to an Affiliate of the Partnership solely for the purpose of inventory transfer, to facilitate current or eventual sales by the affiliate from storage to Third Parties, and not for the Affiliate's own use, shall not be treated as revenue hereunder. Instead, any sale by such Affiliate to a Third Party will be recognized as such at the time of the sale by the Affiliate to the Third Party, in accordance with "Point of Sale" above.

INEOS will maintain a list of all Affiliates of the Partnership which act as agents or resellers in respect of sales to Third Parties

outside North America, for identification of these transactions during audit;

- c) The layering provisions which address comingling of LAO in North America, but not in Asia and Europe; and
- d) The pricing / revenue provisions which speak to, among other things, a monthly accounting.

[67] The Arbitrator considered the commercial context surrounding the Point-of-Sale provisions, which included INEOS' predecessor closing its LAO production facility in Pasadena. Before it was closed, INEOS used the Pasadena plant to supply overseas customers. After it closed, INEOS began using the LAO Plant. As a result, INEOS began shipping more product to its storage and terminal facilities in the US Gulf Coast (**USGC**). INEOS did not recognize revenue from USGC until it was shipped, which delayed margin share recognition for NOVA.

[68] In response to the change in circumstances, and while negotiating the ESA, the parties considered whether revenue should be recognized when product was dispatched from the LAO Plant, or sometime down the road if it was sold to a Third Party. For NOVA, it was a trade off between being paid monthly at Market Price or later in hopes that the LAO could be sold to a Third Party at a higher price.

[69] The Arbitrator held that the commercial context for the parties' negotiation of the Point-of-Sale provisions showed that they had turned their minds to when and how to recognize the value of LAO sales for the purposes of valuing a monthly MDA. The Arbitrator held that the Point-of-Sale provisions were "integral parts of the agreement and not merely illustrative examples for consideration", and that they had to be read "in a way that would provide some timely and commercial certainty."

[70] The Arbitrator accepted INEOS' evidence that it had recorded the sales in issue as sales to Affiliates for their own use, and not Third Party sales, because at the time of sale INEOS did not know whether the product would be sold to a Third Party. The Arbitrator accepted INEOS' evidence that it might not know for months whether the product would be sold to a Third Party, if at all, or at what price. That being the case, the Arbitrator held that INEOS' approach to classifying the sales in issue as sales to Affiliates for their own use so that the revenue could be recorded on a monthly basis was consistent with the Point-of-Sale provisions, and commercially reasonable under the ESA.

[71] The Arbitrator also accepted INEOS' evidence that the Affiliates in Europe and Asia would co-mingle the product. The Arbitrator noted the ESA did not require INEOS to forensically trace product and that the layering provisions in the ESA applied only to sales in North America. Together, the evidence and a plain reading of the ESA supported the Arbitrator's conclusion that it was reasonable for INEOS to classify the sales in issue as sales to Affiliates for their own use. There was no palpable and overriding error in the Arbitrator's decision in that regard.

c) Marketing Expenses

i. *Browne v Dunn*

[72] NOVA submits that the Arbitrator erred in law when he determined that the LAO Plant did not have marketing expenses because in making his decision he discounted key evidence

about INEOS' Market Development Manager through a misapplication of the rule in *Browne v Dunn*.

[73] The evidence at the Arbitration was that during NOVA's audit for 2015-2016 in 2018, it asked INEOS about how marketing activities were performed at the LAO Plant. In response, INEOS' Controller, Mr. Cole, provided NOVA with a job description for Marvin Trimble, Market Development Manager. Despite Mr. Trimble's title, the job description did not include any marketing-related activities. Mr. Cole explained that Mr. Trimble's focus was on safety and the environment, and that marketing for the LAO Plant was out of the US.

[74] In response to a further inquiry from NOVA, Mr. Cole explained that the job description for Mr. Trimble had been created in response to NOVA's inquiry "where none existed previously." Mr. Cole swore a witness statement in the Arbitration, but it did not speak to Mr. Trimble's job description.

[75] At the Arbitration, INEOS tendered a witness statement from another of its executives, Mr. Ratliff. Mr. Ratliff attached the job description for Mr. Trimble to his witness statement. Mr. Ratliff disputed that anything Mr. Trimble did amounted to marketing.

[76] NOVA cross-examined Mr. Ratcliff at the Arbitration. NOVA asked Mr. Ratliff about a 2014 version of Mr. Trimble's job description that INEOS had produced in the Arbitration but had not previously provided to NOVA. The 2014 job description referenced marketing activities at the LAO Plant. Mr. Ratliff agreed that in light of the 2014 job description, Mr. Cole's statement in 2018 that there were no prior versions of the job description was inaccurate.

[77] NOVA cross-examined Mr. Cole at the Arbitration, but not about the job descriptions. At the Arbitration, NOVA argued that the 2014 job description showed that INEOS had fraudulently concealed marketing expenses for the LAO Plant. The Arbitrator disagreed.

[78] At paragraph 151 of his decision, the Arbitrator found there was no direct evidence of marketing at the LAO Plant and wrote that "the allegations concerning the responsibilities of Mr. Trimble and his written job description [did] not change [his] view." This shows that the Arbitrator considered the job descriptions as part of the totality of evidence despite *Browne v Dunn*, and that they did not change his view that there were no marketing expenses at the LAO Plant. This is a finding of fact, and it is not appealable as per the terms of the ESA.

[79] The Arbitrator went on to consider NOVA's allegations of fraud, and the rule in *Browne v Dunn*. The Arbitrator found there was no grounding for fraud and observed that Mr. Cole had not been given the opportunity to respond to the allegations.

[80] Mr. Cole was the subject of the fraud allegation because he provided the 2018 job description to NOVA and was the person who said there was no prior version. As such, and as found by the Arbitrator, NOVA was attacking Mr. Cole's credibility, and he was entitled to respond. I do not see an error in that decision, and it is entitled to deference: *R v Sawatzky*, 2017 ABCA 179, at para 21.

[81] In any event, the job descriptions were not key evidence of marketing activities at the LAO Plant as suggested by NOVA. Rather, the job descriptions only suggested that there might have been marketing activities at the LAO Plant. Without more, NOVA could not make its case. As the Arbitrator held, there was no air of reality to NOVA's claim that INEOS would commit fraud to hide one \$100,000 salary, which would amount to only a \$50,000 credit to NOVA.

[82] There is no error of law, or palpable or overriding error, in the Arbitrator’s assessment of the job descriptions.

ii. The “trust us” approach

[83] NOVA submits that the Arbitrator erred in law when he determined there was no evidence of unreasonable allocations to the Global Marketing Pool by: (a) failing to assess reasonableness and instead endorsing an allocation procedure based on a “trust us” approach contrary to the terms of the ESA, and (b) failing to consider whether any of the disputed expenses fell within the definition of Marketing Expenses in Schedule B.

[84] The Arbitrator did not fail to assess reasonableness or endorse a “trust us” approach. The Arbitrator considered NOVA’s evidence regarding the reasonableness of expenses. He found it lacking. For example, at paragraph 167 of his decision, the Arbitrator writes that NOVA cross-examined INEOS on its marketing expenses, “but did not establish that the allocations were unreasonable.”

[85] The Arbitrator also considered NOVA’s expert report and concluded that it did not resolve threshold issues about INEOS’ expenses. The Arbitrator held that NOVA’s expert did not identify which particular allocations should come out of the Global Marketing Pool or present different scenarios of allocation to assist the Arbitrator.

[86] The Arbitrator considered the approach that INEOS had in place, namely discretion, internal accountability, and managerial review. He also considered that INEOS’ allocations were consistent with proportionate sales and fell below the contractual cap. The fact that the Arbitrator did not criticize INEOS’ approach does not mean that he gave INEOS unlimited discretion to allocate expenses to the Global Marketing Pool without any obligation to justify those allocations as reasonable. Rather, the evidence suggested that INEOS had a system in place and was endeavouring to, and did, take a reasonable approach to allocations.

[87] The Arbitrator also considered NOVA’s audit rights under the ESA, and the fact that NOVA could examine and challenge allocations in that context. The Arbitrator held that NOVA did not have any evidence to support its claim, despite its auditors having the relevant spreadsheet information and access to managers for further interview and discussion.

[88] To the extent NOVA alleged that INEOS was withholding information regarding the allocation of marketing expenses, the Arbitrator held that it was unclear what information was missing. It was also unclear to the Arbitrator whether NOVA had examined all the information provided by INEOS either during the audit or in run up to the Arbitration.

[89] NOVA was the party challenging the expenses. As such, NOVA had to prove that the expenses were unreasonable. INEOS did not have to prove that they were reasonable: See, for example, *Gary Born, International Commercial Arbitration* (Kluwer Law International: 2009), p 1857.

[90] The Arbitrator considered the language of the ESA, and the evidence before him about INEOS’ allocation process. The Arbitrator also considered whether certain expenses had been unreasonably allocated to the Global Marketing Pool but found no evidence of same. There is no palpable or overriding error in the Arbitrator’s conclusion.

d) Nameplate Capacity

i. Mutual Understanding

[91] NOVA submits the Arbitrator erred in law when he found that NOVA breached the ESA by holding the E3 nameplate capacity steady at 2.81BPY, even though actual production had increased. NOVA argues that the Arbitrator erred by ignoring the parties' mutual understanding that the nameplate capacity would remain 2.81 BPY, despite the terms of the ESA.

[92] The Arbitrator did not ignore NOVA's argument regarding a mutual understanding. The Arbitrator considered NOVA's evidence in that regard, including that: (a) INEOS' predecessor accepted a nameplate capacity of 2.81 BPY, (b) NOVA represented to INEOS many times that it could not change the nameplate capacity without co-owner approval, (c) there was some evidence (denied by INEOS) which suggested INEOS believed that NOVA was technically still in compliance with the ESA, (d) INEOS had tried to negotiate changes to the ESA to address the nameplate capacity issue, and (e) INEOS had executed the ESA twice without having successfully renegotiated those terms, meaning INEOS had accepted that NOVA would not update the nameplate capacity under the ESA.

[93] The Arbitrator also considered the key context for NOVA and INEOS' discussions about nameplate capacity. Namely, NOVA had repeatedly suggested to INEOS that Dow was resisting a change to the nameplate capacity for the E3 Plant. The *Dow Decision* showed this to be untrue, and that it was NOVA who was resisting the change. INEOS also led considerable evidence in that regard at the Arbitration. The Arbitrator held that NOVA had misled and misrepresented the situation with Dow to INEOS and had therefore breached its obligation of good faith in contractual performance.

[94] NOVA submits that the Arbitrator erred by considering the *Dow Decision*, and that the parties' motivations for accepting 2.81 BPY as the nameplate capacity for the E3 Plant are irrelevant and served as an unnecessary distraction to the Arbitrator. I disagree.

[95] The duty of honest performance recognized in *Bhasin* precludes a party from knowingly misleading the other party about matters directly connected to contractual performance. Accordingly, NOVA cannot assert a binding shared understanding based on it having misled INEOS into thinking Dow was frustrating an update to the nameplate capacity.

[96] Finally, the Arbitrator considered NOVA's evidence and argument that contrary to having a shared understanding to hold the nameplate capacity at 2.81 BPY, the parties had agreed to stand the matter down until NOVA had resolved the litigation with Dow.

[97] The Arbitrator considered that INEOS was not a party to NOVA's agreement with Dow and that INEOS did not have a window into their discussions. He considered that NOVA had told INEOS that it had discussions with Dow about the nameplate capacity, but that no further discussions were likely until the litigation was resolved. The Arbitrator also considered that INEOS had brought its claim in a timely manner once the litigation was nearing a close.

[98] In light of the evidence led by both parties, the Arbitrator held that the parties had agreed to stand the issue down until the Dow litigation was resolved, not to hold the nameplate capacity at 2.81 BPY. This issue raises a question of mixed fact and law. There are no palpable or overriding error in the Arbitrator's decision.

[99] The Arbitrator rejected NOVA’s argument that INEOS had acquiesced to NOVA’s interpretation of the ESA on the same basis. There are no palpable or overriding error in the Arbitrator’s decision.

[100] NOVA also submits that the Arbitrator’s decision is contrary to the doctrine of estoppel by convention, which demands a shared understanding, reliance, and a detriment: *Ryan v Moore*, 2005 SCC 38, at para 59.

[101] NOVA did not plead or mention the doctrine of estoppel by convention at the Arbitration. Generally, an issue may not be raised on appeal for the first time: *Quan v Cusson*, 2009 SCC 62, at para 36. Regardless, I agree with INEOS that NOVA cannot meet the test for estoppel by convention.

[102] As found by the Arbitrator, there was not a shared understanding that the nameplate capacity would remain at 2.81 BYP. Any reliance on the alleged shared understanding was at NOVA’s own risk given the underlying misrepresentation. As for detriment, the Arbitrator made it clear that the only detriment was to INEOS. At paragraph 272 of his decision, the Arbitrator held: “There is no question that NOVA knew what it was doing and knew this was to its benefit and to the detriment of INEOS.”

ii. Testing for Nameplate Capacity

[103] NOVA submits that the Arbitrator made an error in his interpretation of the ESA by focusing on Schedule E as opposed to the definition of E3 Nameplate Capacity in the ESA. NOVA submits that the Arbitrator failed to appreciate that both the definition of E3 Nameplate Capacity and Schedule E require the E3 Plant co-owners to both determine and approve any amendments or adjustments to the E3 Nameplate Capacity.

[104] The definition of E3 Nameplate Capacity is “the capacity of the Ethylene-3 Plant to produce Ethylene in a year as determined by the Ethylene-3 owners in the manner provided for in Schedule E hereto...” NOVA highlights the phrase “as determined by the Ethylene-3 owners” but not the phrase “in the manner provided for in Schedule E hereto.”

[105] Read as a whole, the definition of E3 Nameplate Capacity provides that the co-owners will determine the yearly capacity for the E3 Plant in accordance with Schedule E of the ESA. Schedule E then details the manner in which INEOS could expect the co-owners to test and determine nameplate capacity for the E3 Plant.

[106] Schedule E also refers to the approval of the plant co-owners, but only in respect of changes to the methodology and procedures that are used to test capacity.

[107] Further, as found by the Arbitrator, NOVA misled INEOS about its ability to get approval from Dow to test and change nameplate capacity. Accordingly, NOVA cannot rely on the pretense of co-owner approval (or lack thereof) to avoid its obligation to test capacity under Schedule E.

[108] The Arbitrator’s interpretation of NOVA’s obligation to test for nameplate capacity is consistent with a plain reading of Schedule E which states, for example, that: (a) the E3 Nameplate Capacity “will be that annual production number” established by the “following methodology and procedures which calculate the maximum Ethylene capacity achievable from the Plant...”, (b) “[s]uch methodology and procedures will be consistent with...”, (c) a “capacity

rate trial will be conducted”, and (d) the “following factors will be developed...and adjusted from time to time to reflect any change in performance...” [emphasis added]

[109] Schedule E speaks to establishing an annual production number and adjusting testing methods from time to time. This is the language of an ongoing obligation, which is what the Arbitrator determined. There is no palpable and overriding error in this interpretation.

[110] Finally, NOVA submits that when INEOS became a party to the ESA it was bound by its predecessor’s agreement that the E3 Nameplate Capacity was 2.81 BPY. NOVA submits that the “Arbitrator curiously held that they were not, with no explanation.” I disagree.

[111] The Arbitrator explained that INEOS was not bound by its predecessor’s agreement because the language regarding nameplate capacity in Schedule E to the ESA was prospective and required ongoing testing. The language in the ESA did not cement a moment in time.

[112] Further, the Arbitrator held that there was no assignment or novation of a past or existing E3 Nameplate Capacity. Accordingly, INEOS was not bound. There is no palpable or overriding error in this decision.

VII. Conclusion

[113] In light of the foregoing, NOVA’s appeal is dismissed in its entirety.

[114] If the parties are unable to agree on costs, they may make written submissions of no more than 5-pages plus a Bill of Costs within 90 days.

Heard on the 13th day of August, 2025.

Dated at the City of Calgary, Alberta this 10th day of August 2026.

Allison G. Kuntz
J.C.K.B.A.

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