The Evolution Of Clause 24.02 Of The CAPL Operating Procedure:
Part 1: Context And Review Of Exceptions
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A key component of the Disposition of Interest Article of the CAPL Operating Procedure is Clause 24.02, which identifies certain transactions to which the requirements of Clause 24.01 do not apply.

This article provides a context for the Clause, the specific exceptions and their evolution over time. The September article will review the assignment to an Affiliate exception in more detail in the context of the Saskatchewan case of Northrock v. ExxonMobil Canada Energy and a sequenced disposition of an asset through an intervening assignment to an Affiliate before the sale of shares of that Affiliate.

The principle at the foundation of Clause 24.02 is that it is not appropriate for the consent not to be unreasonably withheld or right of first refusal requirements included in Clause 24.01 to impede *bona fide* transactions of certain types or scale.

This principle was addressed initially as an exception in the introduction of the Disposition of Interest Article (Clause 2601) of the 1971 version of the Operating Procedure and presented as Clause 2402 or 24.02, as applicable, in the subsequent versions of the document. The specific exceptions have been refined in each version of the document, particularly in the context of industry's experiences with A&D transactions since the late 1980s.

A theme in the changes over time has been to decrease the potential interference with a party's *bona fide* large-scale transactions. As noted below, this is evidenced by the introduction of the 5% net acres (hectares) exception in the 1981 document and the modification to a 10% net hectares exception as of the 2007 document for transactions other than Earning Agreements, as well as the introduction of a 35% net hectares exception for Earning Agreements as of the 2007 document. The inclusion of a ROFR with a negotiated time limited duration as of the 2007 document will also reduce significantly the potential application of a ROFR at the time of future dispositions for parties using the modern documents.

Interrelationship With Clause 24.01

As the most obvious impact of Clause 24.02 is to make certain transactions exempt from the ROFR obligations that would otherwise apply to the applicable joint lands, there is a common assumption that the Clause applies only to transactions to which a ROFR would otherwise apply. That is not correct. The introduction to Clause 2402/24.02 of all versions of the document since the 1974 document states that Clause 2401/24.01 will not apply to any transaction that falls within any of the enumerated exceptions, and the introduction to Clause 2601 of the 1971 has the same effect.

The application of the Clause 2402/24.02 exceptions to both the potential application of a ROFR obligation and a consent not to be unreasonably withheld situation historically met industry's needs appropriately. Larger scale transactions for which the joint lands were a relatively minor component typically would have been for significant consideration. The financial viability of the assignee was unlikely to be an issue in practice for those transactions, such that it was appropriate for those transactions to proceed without impediment.

The dynamic of the industry has changed significantly since late 2014, however. Transactions falling within the scope of the exceptions sometimes involve modest cash consideration in circumstances in which the Disposing Party is transacting with a company of uncertain financial viability, with the primary objective of transferring the Disposing Party's responsibility for abandonment and environmental liabilities to its assignee.

This will often raise concerns about the assignee's financial capacity to perform with respect to the obligations expected to be assumed by it. Parties may wish to modify the final sentence of Clause 24.02 to something such as the following to attempt to mitigate risk in that regard by applying an overarching Alternate 24.01A consent not to be unreasonably withheld test, subject to the qualification that a party should confirm its preferred handling with its own legal advisors:

> "However: (i) a Party will notify the other Parties of any disposition under Paragraph 24.02(b), (c), (d), (e) or (f) in a timely manner, including in that notice the basis for its determination that the applicable Paragraph applies; and (ii) Alternate 24.01A will apply to a disposition to which Paragraph 24.02[(c),?] (d), (e) or (f) applies, unless Paragraph 24.02(b) also applies to that disposition."

Inclusion Of *Bona Fide* Reference In Exceptions

Another significant change introduced as of the 2007 document was the inclusion of a *bona fide* reference in the exceptions. This was done to minimize the risk of form over substance outcomes and to reflect the evolving law with respect to the "duty of good faith".

In this regard, it is important to recall that Courts recognize an implied duty of good faith with respect to a ROFR. The Alberta Court of Appeal judgment in Chase Manhattan Bank v. Sunoma quoted with approval the following passage from an earlier Ontario case (GATX): "…The grantor of a right of first refusal must act reasonably and in good faith in relation to that right, and must not act in a fashion designed to eviscerate the very right which has been given."

Parties would presumably be at risk, for example, if they manipulated allocations or to attempted to fall within the applicable net hectares exception by including in a transaction worthless expiring lands 50 kilometres away.

Assignment By Way Of Security Exception (Paragraph 24.02(a))

This exception has been included to mitigate the potential for the Operating Procedure to interfere with security arrangements entered into by a party. It was expanded significantly as of the 1990 document to be clear that the Clause 2401/24.01 obligations would apply if the security were ultimately enforced by sale or foreclosure.

The 2007/2015 exception is as follows:

> "a *bona fide* assignment or pledge made by way of security for its present or future indebtedness or liabilities (whether contingent, direct or indirect and whether financial or otherwise), its issuance of bonds or debentures or its performance of its obligations as a guarantor under a guarantee, provided that the restrictions on disposition in Clause 24.01 will apply if that security is enforced by sale or foreclosure;"

Assignment To Affiliate Or In Consequence Of Merger Or Amalgamation (Paragraph 24.02(b))

This exception has been included to mitigate the potential for the Operating Procedure to interfere with corporate type transactions being entered into by a party. One would not expect the restrictions on disposition in Clause 2401/24.01 to apply to an assignment to an Affiliate respecting an internal corporate restructuring or for any merger of Company A with Company X, for example.

The exception in the 1981 and 1990 documents also included an assignment of a party's entire interest in the joint lands in return for shares in a corporation or an interest in a partnership. This was removed as of the 2007 document because of the possibility that parties could attempt to defeat a right of first

refusal through such an assignment to an arm's length third party in circumstances in which the net hectares exception would not otherwise apply to the transaction. If the transaction is not part of a much larger transaction to which an exception in Paragraph (c), (d) or (e) applies, the issue is ultimately just the determination of a cash equivalent value. That change does not impact the typical assignment to a partnership comprised only of Affiliates, though.

This exception was also modified as of the 2007 document to provide greater protection if the assigning party were then subject to a Clause 5.05 notice of default. That being said, there may already be protections at law under prior versions of the document if the disposition would negatively impact the ability of the other parties to recover amounts then owing by a Disposing Party.

The 2007/2015 exception is as follows:

> "a *bona fide* disposition to one or more of its Affiliates, or in consequence of its amalgamation with a Party or third party (or another *bona fide* business combination of like effect), other than for any transaction that could limit the remedies available under Clause 5.05 if that assigning Party is then subject to a notice of default thereunder;"

This exception will be reviewed further in the September article in the context of a sequenced transaction involving a specially created Affiliate and the subsequent sale of shares of that Affiliate (Northrock case).

Disposition Of All Or Substantially All P&NG Rights In A Jurisdiction (Paragraph 24.02(c))

This exception addresses the disposition of all or substantially all of a party's P&NG rights in a jurisdiction or of an undivided interest therein (i.e., 20% of its interest across the jurisdiction). The document was modified as of the 1990 version to provide context about the "substantially all" reference by linking it to 90% or more of the net hecatres held by the party in the jurisdiction.

The test for "substantially all" is linked to net hectares, rather than value, because of the factual basis for the calculation using this methodology. This is designed to eliminate what would otherwise be contextual uncertainties and establish a pure quantitative analysis, so that no scrutiny of the qualitative aspect of the property transfer is required. While international agreements generally use a value test, it is important to recall that an international explorer is likely to have a small number of large value JOAs in a jurisdiction, rather than hundreds of individual agreements, as is common in Alberta.

The exception contemplates a disposition of the position in the applicable jurisdiction in a single transaction, not a series of transactions to different assignees (Best Pacific case).

As of the 2007 document, the exception was modified to be clear that: (i) this exception cannot apply if the regional disposition is intended to be made under several transactions to different assignees to reflect the earlier Best Pacific case; (ii) the single transaction requirement can be satisfied by a multi-party assignee in a single transaction, assuming the *bona fide* test in the provision is satisfied; (iii) the transaction can be an Earning Agreement; and (iv) the exception would also apply if there were several different transactions with the same assignee as of the same date.

Parties might consider deleting this exception if working in a jurisdiction in which the joint lands are likely to comprise the vast majority of the parties' interests in that jurisdiction (i.e., provinces or territories other than Alberta, Saskatchewan, B.C. and possibly Manitoba).

The 2007/2015 exception is as follows:

> "a *bona fide* disposition made by it of all, or substantially all, or of an undivided interest in all or substantially all, of its petroleum and natural gas rights in the province, territory or state in which the

Joint Lands are located, if that disposition is: (i) intended to be made under a single transaction (including a *bona fide* arm's length transaction under which that interest may be acquired by two or more assignees or may be earned under an Earning Agreement); or (ii) to the same proposed assignee in different transactions as of the same date, where "substantially all" for the purpose of this Paragraph means 90% or more of the net hectares of working interest petroleum and natural gas rights held by that Party in that province, territory or state;"

Net Hectares Of Joint Lands Relative To Entire Transaction (Paragraphs 24.02(d) and (e))

There was recognition that the 1971 and 1974 documents impeded the ability of parties to complete transactions in which the joint lands represented only a minor component of a large transaction.

As a result, the 1981 document introduced what has been referred to as the "5% rule". This excepted a transaction from the application of Clause 2401 if the net acres/hectares of joint lands represented less than 5% of the total net acres/hectares included in the transaction. This approach offered certainty relative to the alternative of a value test, as noted in the review of Paragraph 24.02(c) above.

To illustrate the application of the 5% exception in the 1981 and 1990 documents, assume that A holds a 20% working interest in a 1,500 ha block (net 300 ha) and that it is selling its interest in 25,000 ha in which it holds an average working interest of 25% (net 6,250 ha), including the working interest in the joint lands. The net hectares of the joint lands being disposed in the transaction would be 4.8% of the total net ha being disposed of (300/6,250), such that the transaction would fall within the exception.

Major changes were made to this exception as of the 2007 document. The 2007 and 2015 documents differentiate between dispositions that are not through Earning Agreements and dispositions that are under an Earning Agreement. The general non-Earning Agreement threshold was changed from a 5% net hectares test to a 10% net hectares test, and a 35% net hectares test was introduced for Earning Agreements to mitigate the potential for a ROFR to apply to a larger regional Earning Agreement. Those changes were intended to reduce significantly the potential application of a ROFR to transactions involving lands in addition to the joint lands.

Additional clarification type modifications were made as of the 2007 document. The date at which the calculation applies is the effective date of the applicable transaction to offer clarity about intervening expiries. The calculation is also based on working interest P&NG rights (versus, for example, non-convertible ORR interests), to reflect the handling in industry acreage reporting processes. Users will want to be aware of those clarifications when applying the methodologies to the net hectares exception included in the 1981 and 1990 documents.

Paragraphs 24.02(d) and (e) of the 2007 and 2015 documents are as follows:

"a *bona fide* disposition by it, other than through an Earning Agreement, in which the net hectares being disposed of by it in the Joint Lands represent, as of its effective date (as defined therein), less than 10% of the total net hectares of working interest petroleum and natural gas rights being disposed of by it and any of its Affiliates therein;"

"a *bona fide* arm's length disposition by it pursuant to an Earning Agreement, in which the net hectares of the Joint Lands that can be earned from it represent, as of its effective date (as defined therein), less than 35% of the total net hectares of working interest petroleum and natural gas rights that can potentially be earned thereunder from the Disposing Party and any of its Affiliates; or"

When doing the 35% calculation under Paragraph 24.02(e), the net hectares to be included in both the numerator and the denominator will include the net hectares that could potentially be earned under the Earning Agreement, notwithstanding that the farmee might not ultimately exercise its option(s) to earn

all of the applicable rights in the joint lands or the other lands.

Users need to understand that each distinct interest set of the joint lands is its own numerator for purposes of these calculations because of the application of the segregation provisions in Clause 1301/13.01. The test in that Clause is binary-there is either a separate notional Operating Procedure/agreement in effect or there is not. A separate ROFR potentially applies to each different interest split. As a consequence, it is not correct to do a calculation for each interest set and then combine the totals from the different blocks to determine if the applicable prescribed 5%, 10% or 35% threshold applies to the sum of the parts. Each piece is actually a self-contained calculation.

It is also the better practice for a party using this exception to include information on its file in sufficient detail that supports the application of the applicable exception in case its use is challenged at some point. There is nothing that precludes another party from requesting information that demonstrates to it that the exception actually applies to a transaction. The burden would be on the party purporting to apply the exception to prove that it applies, not on another party to prove that it does not. A Disposing Party that erroneously determines that this exception applies has a problem, particularly if this is discovered well after the purported application of the exception.

Optional Exception For All Earning Agreements (Paragraph 24.02(f))

This optional exception was introduced as of the 2007 document. It allows parties to exempt all *bona fide* Earning Agreements from the scope of the ROFR obligation. This exemption duplicates the Paragraph 24.02(e) exemption for some Earning Agreements, but is a much more transparent exemption to administer. If this optional Paragraph applies, the conclusion of Clause 24.02 is clear that the consent requirement contemplated in Alternate 24.01A would still apply to the disposition associated with the Earning Agreement, notwithstanding that it would be exempt from a ROFR obligation under Alternate 24.01B.

This optional Paragraph is selected infrequently.

The 2007/2015 optional exception is as follows:

> "the right of another Party or person to earn a Working Interest (or the right to earn a Working Interest) under a *bona fide* arm's length Earning Agreement."

Next Issue And To Learn More

The September article will review the assignment to an Affiliate exception in more detail in the context of the Saskatchewan case of Northrock v. ExxonMobil Canada Energy and a sequenced disposition of an asset through an intervening assignment to an Affiliate before the sale of shares of that Affiliate.

To learn more about the evolution of the entire Disposition of Interest Article of the CAPL Operating Procedure over time, a detailed matrix analyzing the Article is included in the 2015 CAPL Operating Procedure module in the Resource Centre of my website.

(See the Resource Centre tab on my website (MacLeanResourceManagement.com) for a collection of PDFs of articles and presentations on a range of topics, including the CAPL Operating Procedure, the CAPL Farmout & Royalty Procedure and the CAPL Property Transfer Procedure.)

The Evolution Of Clause 24.02 Of The CAPL Operating Procedure:
Part 2: Sequenced Transactions With Affiliates And The Northrock Case
CAPL Negotiator, September, 2021

A key component of the Disposition of Interest Article of the CAPL Operating Procedure is Clause 24.02, which outlines the circumstances in which the requirements of Clause 24.01 do not apply to certain transactions.

The June article provided a context for the Clause, the specific exceptions and their evolution over time. This article reviews the Paragraph 24.02(b) assignment to an Affiliate exception in more detail in the context of the Saskatchewan case of Northrock v. ExxonMobil Canada Energy and a sequenced disposition of an asset through an intervening assignment to an Affiliate before the sale of shares of that Affiliate.

The authors of the document, some legal commentators and many users in the land community have traditionally regarded the Paragraph 24.02(b) assignment to an Affiliate exception (and the other exceptions included in the Clause more generally) as precluding a party from effecting a sequence of planned related transactions using Affiliates in a way that would enable them to avoid compliance with a ROFR obligation by doing indirectly what they could not have done directly if one of the other exceptions did not otherwise apply to an asset disposition. This was based on the belief that inclusion of a ROFR was a major term of the Operating Procedure for which consideration had passed between the parties and that the overarching intention of the parties should be honoured, notwithstanding that a disposing party might choose to transfer a property as an intervening step to a specially created Affiliate for which the shares are to be sold shortly thereafter as a corporate transaction, rather than through an asset sale.

That view is in serious question after the 2017 Saskatchewan Court of Appeal decision in Northrock v. ExxonMobil Canada Energy.

Facts And Decision

In summary, ExxonMobil had created numbered companies in 2005 as wholly owned subsidiaries after it decided to divest of certain assets. It was selling properties for which modest portions (~10%) were subject to ROFRs under a unit agreement and under an agreement that included the 1971 CAPL Operating Procedure. Potential purchasers were invited to make an offer based on the basis of a "busted butterfly" through the acquisition of shares in a subsidiary to which the assets would be transferred or, in the alternative, as an asset sale. The purchaser made the most attractive offer on the basis of the "busted butterfly" transaction structure. In conjunction with the pending sale, ExxonMobil transferred certain interests to the numbered Affiliate companies, with a subsequent sale of shares of the numbered companies to the purchaser about five weeks later without issuing a ROFR notice to Northrock to provide it with the opportunity to acquire the applicable portion of the property.

Northrock objected to the disposition of the interests subject to the ROFRs to an unrelated third party through a sale of the shares in the Affiliate. It based this on the argument that the assignor could not do indirectly what it could not do directly. In essence, Northrock argued that the staged transfers were in fact a single transaction that was ultimately the sale of the interests in a property subject to ROFRs.

The trial decision basically found that:

(i) the ROFRs in question were presented clearly in the agreements and were not triggered by either the disposition to the Affiliate or the subsequent disposition of the shares of the Affiliate. The original parties to those agreements were sophisticated, and could have negotiated a different provision if they had intended such a restriction to apply to this type of situation; and

(ii) the motivation to use a "busted butterfly" for the transaction was determined on the facts to be based on tax considerations, was supported by legal opinions that had been obtained and was not motivated to circumvent ROFRs, such that there was not a violation of a duty of good faith.

The Court of Appeal upheld the trial decision. It did not agree with Northrock's argument that the trial judge had unduly focused on the stated motives for using the "busted butterfly" structure, instead of its design and effect. A key factor in the Court of Appeal's judgment was the standard of review to be applied by the Court of Appeal to a review of "the factual matrix" and questions of "mixed law and fact" and the manner in which the trial judge evaluated and weighed the evidence before him (e.g., whether avoidance of the ROFRs was a motivating factor in the use of the "busted butterfly" structure). Even though ExxonMobil was aware that its choice to use the "busted butterfly" in its transaction was going to result in it not providing Northrock with ROFR notices, this was not itself evidence of a breach of the duty of good faith. The Court of Appeal referred to the leading Supreme Court of Canada case of Bhasin, noting, "…the duty of good faith must not be used to circumvent the plain language of a contract because that would result in *ad hoc* judicial moralism and undermine the principle of certainty in contract."

Potential Impact Of The Case

Accepting for the analysis that follows the factual findings of the courts with respect to the motivation for using the "busted butterfly" structure and the *bona fides* of ExxonMobil and its purchaser in effecting their transaction, there are three important things to recall about this case.

The first is that it is a decision of the Saskatchewan Court of Appeal. While it is certainly a persuasive authority, it is not a decision that is binding on an Alberta court if a similar issue were litigated in Alberta. It is possible for an Alberta court to distinguish the decision if it were to choose to do so based on the facts of the particular case in front of it and its own interpretation of the applicable agreement and case law.

The second is that the case does not stand for the sweeping proposition that a vendor can always avoid a ROFR by doing a sequenced transaction using an Affiliate and then selling shares of the Affiliate. The case turned on the critical finding of fact that the motivation to use the "busted butterfly" transaction was based on tax considerations and that a desire to circumvent the ROFR was not a motivating factor to either ExxonMobil or its purchaser. A vendor that was significantly (or perhaps even somewhat) motivated to structure a disposition using a sale of shares of a specially created Affiliate to attempt to avoid a ROFR could face a significant challenge in trying to bring itself within the scope of the decision. (In this regard, vendors also need to be cognizant of the increased potential for audit risk by the Canada Revenue Agency that could result from a stated motivation to optimize tax outcomes if a ROFR non-compliance issue were litigated in a different circumstance.)

The third is that the ROFR provisions in question were with respect to older style ROFR provisions in a unit agreement and in the 1971 CAPL Operating Procedure. Although the 1981 document introduced the 5% net acres exception in Paragraph 2402(d), the pre-1990 documents did not adequately deal with the complexities inherent in larger transactions for which the joint lands comprised only a portion of the assets included in a transaction to which a ROFR would otherwise apply. In this regard, it is also important to recall that there were relatively few A&D type transactions in the Canadian oil and gas industry until the mid to late-1980s and that "butterfly" and "busted butterfly" transactions only began to be used occasionally in oil and gas transactions from the late 1980s or early 1990s. The net effect is that the authors of those documents and industry reviewers preparing an agreement using those earlier versions of the document did not have the benefit of the lessons learned from modern A&D experiences. The documents were prepared in the context of the totality of their experiences at the relevant time, not

in the context of someone preparing a similar document today with the benefit of intervening learnings from industry's extensive A&D activities over the last 35 years.

The 1990, 2007 and 2015 documents are also fundamentally different from the earlier versions of the document. The modifications to the Disposition of Interest Article in the more modern documents are designed largely to mitigate the potential for a ROFR to impede a party's ability to effect large-scale transactions during the period in which the ROFR remained in effect. However, those modifications also added significant breadth and depth of coverage to the ROFR provisions for the period in which they were to remain in effect, and actually increased significantly the protections provided to the parties receiving a ROFR notice relative to the pre-1990 versions of Alternate B. A review of the Disposition of Interest Article in the more modern documents in its totality could possibly change the "factual matrix" significantly relative to the provisions under consideration in the Northrock case, notwithstanding that the modern documents also do not expressly address the change of control scenario respecting the sale of shares of an Affiliate that was created solely to effect a property disposition in a manner that optimized a vendor's tax outcomes.

Another factor for which it was not apparent if evidence had been provided in the case was industry practice in handling ROFRs when disposing of assets in a sequenced "butterfly" or "busted butterfly" type transaction using an intervening assignment to a specially created Affiliate. It has not been uncommon for vendors using this type of sequenced transaction to have chosen to offer a ROFR to the applicable third parties in comparable circumstances to enable them to acquire the shares of a specially created Affiliate in circumstances in which the ROFR was in effect and the Clause 24.02 net hectares exception would not otherwise apply at the asset level. This is notwithstanding that the applicable ROFR provision did not address a change of control scenario in that situation and that ROFR logistics relating to a sale of shares in an Affiliate are inconvenient relative to an asset transaction. In this regard, it is particularly important to remember that use of a "butterfly" or "busted butterfly" transaction to optimize tax outcomes does not actually in any way: (i) preclude a vendor from choosing to deliver a ROFR notice that provides the recipients the right to acquire the applicable assets on the same terms as the proposed assignee; or (ii) otherwise compromise the vendor's ability to attain the same tax outcomes if it were to issue a ROFR notice. While ROFR compliance on a share transaction for only a portion of the assets owned by such an Affiliate would be inconvenient due to the structure chosen for the transaction if a ROFR were exercised because of the need to create an additional Affiliate for the applicable joint lands, the reality is that a vendor that does not issue a ROFR for a transaction in that circumstance has made a conscious choice not to do so, which is quite different than being unable to do so.

A Potential Modification To Mitigate The Impact Of The Case

Based on the case, parties may wish to modify Paragraph 24.02(b) to something such as the following to attempt to provide clarity on their expectations and to mitigate risk on this point, subject to the qualification that a party should confirm its preferred handling with its own legal advisors:

> a *bona fide* disposition to one or more of its Affiliates, or in consequence of its amalgamation with a Party or third party (or another *bona fide* business combination of like effect), other than for any transaction that could limit the remedies available under Clause 5.05 if that assigning Party is then subject to a notice of default thereunder. Notwithstanding the preceding portion of this Paragraph and for greater clarity, if:
>
> (i) a Disposing Party is effecting a sequenced disposition in which Joint Property is to be assigned to an Affiliate as an intervening step prior to an expected disposition of the shares of that Affiliate to an arm's length third party within [365] days after that assignment to that Affiliate;
>
> (ii) Paragraph 24.02(c) or (d) would not also then apply to that assignment to that Affiliate; and

(iii) Alternate 24.01B is in effect at the time of the expected disposition of the shares of that Affiliate;

the Disposing Party will comply with its obligations under Alternate 24.01B at the time of the intended disposition of the shares of that Affiliate insofar only as relates to the applicable Joint Property, provided that those obligations will not apply if the net hectares of Joint Lands held at that time by that Affiliate represent less than [10%] of the net hectares of working interest petroleum and natural gas rights then held by that Affiliate;

As noted in item (iii), this potential modification is premised on the ROFR still being in effect at the relevant time. The modification would not be applicable in the 2007 and 2015 documents if the transaction is occurring later than the negotiated duration of the ROFR. (Also note that modifications would be required to normalize the presentation for pre-2007 versions of the Operating Procedure.)

The bracketed 365-day period was included to mitigate the potential for a disposing party to avoid ROFR compliance by positioning itself for an eventual disposition by effecting the first step of the disposition process through an assignment to the specially created Affiliate very early in the disposition process once the decision has been made to attempt to dispose of the property. It is quite possible, for example, that the initial assignment to the Affiliate could be done months before a purchaser has even been determined. That period also accommodates the possibility that there could be delays in closing the transaction due to issues during the due diligence process or any requirement to obtain regulatory approvals.

The application of the Paragraph 24.02(c) and (d) exceptions at the time of the assignment to the Affiliate and the 10% net hectares test at the time of the sale of shares in the Affiliate are designed to mitigate the potential for an individual agreement to impede unduly a much larger transaction. The 10% threshold is bracketed to remind parties that they may wish to include a higher net hectares threshold (e.g., 25-30%) for this particular situation.

It is important to remember that many of the potential regional transactions of this type would either be effected after expiry of a ROFR (2007/2015 CAPL) or would fall within the exceptions in Paragraph 24.02(c) or (d) or the applicable net hectares exception at the time of the share sale. Those then subject to the ROFR that would not fall within one of those exceptions will frequently include joint lands that have a low or modest value. In practice, the level of complexity associated with a share transaction in those cases is often such that there would be instances in which a disposing party might choose to approach the other parties in advance to identify the intention to dispose of the shares of an Affiliate using a complex form of agreement and confirm if they would be willing to waive their ROFR rights for that transaction without need to issue a ROFR notice. This reflects the practical fact that the cost of processing a share-based transaction by a receiving party could be quite high relative to the value of the applicable property due to the additional legal and finance resources required to process that form of transaction.

To Learn More About The Disposition Of Interest Article

You can learn more about the evolution of the entire Disposition of Interest Article of the CAPL Operating Procedure over time by looking at the detailed matrix on the Article that is included in the 2015 CAPL Operating Procedure module in the Resource Centre of my website.

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