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The Statutory Liabilities of Joint Operators and Non-Participating Parties

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The Statutory Liabilities of Joint Operators and Non-Participating Parties

by

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Abstract

Oil and gas co-owners in Canada frequently chose to allocate liability contractually, in Joint Operating Agreements such as the 2007 CAPL Operating Procedure. This contractual allocation of liability coexists with the statutory allocation of liability. While these two liability schemes often work together sometimes there may be disparities between the contractual and statutory allocation of liability, especially in circumstances where one co-owner is insolvent.

This thesis focuses on the legal position of joint operators under the 2007 CAPL and on those parties who chose not to participate in an independent operation on the joint lands. This thesis concludes that – in certain circumstances – these parties may be liable for the full costs of environmental clean-up and restoration (i.e. beyond their proportionate working interest share). Whether a joint operator will be exposed to liability depends, in part, on the discretionary authority exercised by the Alberta Energy Regulator.

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Dedicated to my children, Hannah, Andrejs and Aleksie

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CHAPTER ONE: INTRODUCTION

1.1 The Factual Problem

Oil and gas exploration and development operations generally require vast sums of money and involve significant risks. Many industry players manage their risk in upstream operations through contractual arrangements which ultimately lead to joint venture agreements, the most common of which are joint operating agreements ("JOAs").

JOAs typically provide for the management of jointly owned property, amend the common law rights and obligations of co-owners and allocate losses and liabilities between the parties. According to industry expert Peter Roberts, the JOA is "the rock upon which is founded a most complex financial and operational joint venture... [it] provides certainty, and yet accommodates friction and misalignment; it gives stability, yet caters for flexibility; it preserves cohesion, yet manages changes of interest; it must subsist for the long term, yet be capable of coming to an early end".[1]

JOAs typically contain extensive provisions addressing the parties' allocation of losses and liabilities in general, and environmental losses and liabilities in specific.[2] Many parties to JOAs believe that their maximum exposure to environmental liability is equal to their working interest ownership under the JOA. The allocation of costs, profits and liabilities according to

[1] Peter Roberts, *Joint Operating Agreements,* 3rd ed (London: Globe Business Publishing Ltd., 2015) at 7 [Roberts, *JOAs*].

[2] The Canadian Association of Petroleum Landmen 2007 Operating Procedure, *infra* note 13, defines "losses and liabilities" in cl 1.01 to mean "all claims, liabilities, actions, proceedings, demands, losses, costs, expenses, penalties, fines and damages, whether statutory, regulatory, contractual, tortious or otherwise, which may be sustained or incurred by a Party..."

each party's working interest in the joint operation is one of the foundational tenets of many JOAs.[3] Further, many JOAs explicitly provide that each party's liability is separate and not collective.

This contractual allocation of liability can be contrasted with the statutory allocation of environmental liability that is, to a large degree, based on the principle of joint and several liability. The legislative environmental scheme in Alberta has the authority to broadly assign liability, ensuring that, where possible, a private party is identified to engage in environmental clean up and restoration or to pay for the costs thereof.

The two primary environmental statutes which will be analyzed in this thesis are the *Oil and Gas Conservation Act* (the "*OGCA*")[4] and the *Environmental Protection and Enhancement Act* ("*EPEA*")[5]. In conjunction with the *Responsible Energy Development Act* ("*REDA*"),[6] (which mandates the Alberta oil and gas Regulator to provide for the safe, efficient, orderly and environmentally responsible development of energy resources),[7] these Acts authorize the Regulator to assign and allocate liability for clean-up and restoration of the environment among certain statutorily defined persons.

Frequently the statutory and contractual allocation of liability co-exists without concern.[8] Where all parties are solvent and able to comply with their contractual obligations, the statutory allocation of liability between parties and the ability of the Regulator to order

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[3] This general principle is often subject to several well defined exceptions in model JOAs.
[4] *Oil and Gas Conservation Act*, RSA 2000, c O-6 [*OGCA*].
[5] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [*EPEA*].
[6] *Responsible Energy Development Act,* SA 2012, c R-17.3 [*REDA*].
[7] *REDA*, s 2(1)(a).
[8] See, for example, where there is adequate insurance in place to cover the full costs of environmental losses and liabilities. However, the questions of what amounts to and how an operator ensures 'adequate insurance' are considerably complex in their own right and will not be specifically addressed in this thesis.

individual working interest owners to engage in environmental clean-up and restoration is largely irrelevant (as between the parties to a JOA). The JOA will apportion the costs of achieving environmental clean up and restoration between the parties regardless of who is actually statutorily liable.

However, in circumstances where environmental costs or liabilities are so extraordinary, or oil and gas working interest owners are financially distressed, not all parties may have the financial resources to comply with their contractual obligations under the JOA, discharge their environmental liabilities or pay associated costs.[9] In 2015-2016, an unprecedented number of junior and midlevel oil and gas industry players, with little access to capital and high debt levels, struggle to meet their obligations under their JOAs. This includes paying their proportionate working interest share of environmental clean up and restoration.[10]

With these circumstances in mind, it is important for Joint Operators to be aware of and know the full scope of their potential statutory environmental liability (both as non-operators and non-participating parties) which may – in certain circumstances – include the full cost of environmental clean-up and restoration and not just their 'working interest share'.

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[9] The conflict between insolvency and environmental liabilities is not new. See the discussion of the *Redwater* decision, *infra*, note 225 and Josef G A Kruger & RJ Daniel Gilborn, "New and Emerging Issues Arising Out of the Bankruptcy or Insolvency of Energy Companies: The Impact of the Latest Recession" (2010-2011) 48 Alta L Rev 221.

[10] This scenario is not unique to the oil and gas industry. As is noted by in Paul S Davies, *Accessory Liability* (Oregon: Hart Publishing, 2015) at 3:

> Often the reason why a claimant chooses to sue an accessory rather than, or in addition to, a primary wrongdoer, is a fear that it will be impossible to obtain a satisfactory remedy from the primary wrongdoer due to the latter's poor financial situation. This may well be because the primary wrongdoer is insolvent, and therefore unable to satisfy the victim's claim. In such situations, claimants have a natural tendency to look to someone else to provide redress. This regularly prompts claims to be made against accessories who have participated in the primary wrong.

1.2 The Scope of the Legal Question

The question of who can be held legally responsible for the clean-up and restoration of the environment is both complex and uncertain. Jamie Benidickson, in *Environmental Law*, addresses the issue broadly, noting that "[a]mong the most sensitive and controversial matters in the field of remediation is the issue of allocating cleanup costs among past and present property owners, business operations, financial participants, and other potential contributors".[11] In the context of public and private cost recovery frameworks applicable to oil and gas industry infrastructure, the authors of a recent article further observed that "[t]he issues that arise when considering the sharing of Environmental Costs among private industry participants are complex and can lead to significant uncertainty." [12]

One of the primary goals of this thesis is to unravel some of this complexity to achieve greater clarity and certainty for oil and gas working interest owners. Specifically, this thesis will address the statutory responsibility of the parties to the most commonly used JOA in the Western Canadian Sedimentary Basin ("WCSB") - the Canadian Association of Petroleum Landmen 2007 CAPL Operating Procedure (the "2007 CAPL").[13] These parties, known as 'Joint Operators'[14] include non-operating Joint Operators in a 'joint operation' and Joint Operators who have chosen not to participate in an 'independent operation'.

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[11] Jamie Benidickson, *Environmental Law*, 4 ed (Toronto: Irwin Law Inc, 2013) at 238.

[12] Michael A Marion, Michael G Massicotte & Jessica Duhn, "Canada's Aging Oil and Gas Energy Infrastructure: Who Will Pay? Public and Private Cost Recovery Frameworks" (2014) 52 Alta L Rev 331 at 344.

[13] Canadian Association of Petroleum Landmen, "Operating Procedure" (2007), online: CAPL <www.landman.ca/landman_tools/operating_procedure2007.php>. Unlike other model JOAs, the CAPL Operating Procedures are not complete without a 'head agreement' delineating such terms as the effective date, the Operating Procedure elections, the parties and any 'customizations' of the Operating Procedure agreed upon by the parties.

[14] The term 'Joint Operators' will be used in this thesis to indicate the working interest owners under the 2007 CAPL. Note however that the term 'Joint Operator' is not a definition in the 2007 CAPL. Unlike previous versions of the CAPL Operating Procedures, the 2007 CAPL uses the labels of 'Operator' (the party appointed to conduct

This thesis will explore three specific circumstances which generate statutory liability for oil and gas Joint Operators. These include: (i) the spill or release of substances into the environment from an oil and gas well, well site, facility or facility site; (ii) the abandonment of oil and gas wells and facilities; and (iii) the reclamation and remediation of oil and gas well sites and facilities sites.[15] This thesis does not address Joint Operators' voluntary self-compliance in these areas (which likely generates little controversy), but instead focuses on what the Regulator has deemed 'instances of non-compliance'.

Of all of the compliance and enforcement mechanisms available to the Regulator, this thesis is specifically focused on the potential for a Joint Operator to be named under, and compelled to comply with, remedial environmental compliance orders ("ECOs") which are designed to prevent, stop, or mitigate adverse environmental impacts. When the Regulator issues a remedial ECO,[16] a Joint Operator can be compelled to: (i) take positive action (i.e. perform certain acts or discharge certain duties); or (ii) pay for the costs of such action when performed by another party. [17] I will also consider whether the *OGCA* and *EPEA* regulatory

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joint operations) and 'Non-Operator' (a party other than the Operator). Collectively, the 2007 CAPL refers to the Operator and the Non-Operators as the 'Parties'.

[15] Pursuant to section 1(ddd) of the *EPEA*, *supra* note 5, "reclamation" is defined broadly to mean any or all of the following:

(i) the removal of equipment or buildings or other structures or appurtenances;
(ii) the decontamination of buildings or other structures or other appurtenances, or land or water;
(iii) the stabilization, contouring, maintenance, conditioning or reconstruction of the surface of land;
(iv) any other procedure, operation or requirement specified in the regulations.

In N Vlavianos, "Liability for Suspension/Discontinuation, Abandonment and Reclamation in Alberta: An Update" (2001-2002) 39 Alta L Rev 864 at 866 [Vlavianos Article], Professor Vlavianos held that this broad definition of 'reclamation' "describes the entire process from abandoning a well, facility, or pipeline to returning the land to equivalent capability. In other words, it includes activities amounting to abandonment, decontamination and surface land reclamation."

[16] The primary concern in an environmental protection order, one type of remedial ECO, is not "ascribing fault, but rather determining an effective and efficient method of resolving a problem." *Legal Oil and Gas Ltd. v Alberta (Minister of Environment)*, 2000 ABQB 388 (CanLII) at para 28 [*Legal Oil QB*].

[17] The use of ECOs fall within the 'liability rules' category of Alberta's overall statutory environmental liability regime. As noted by William Amos and Ian Miron, there are three common "core elements" of Canadian statutory

schemes address the allocation of these legal obligations between liable parties. In circumstances where more than one Joint Operator may be held liable pursuant to the regulatory regime, I will attempt to determine whether the Regulator has any established practices or policies prescribing who the Regulator will choose to pursue in certain instances. Finally, I will review the case law which addresses what the prospects are for challenging the discretion of the Regulator.[18]

1.3 Methodology & Objectives

It is important to specify upfront that the question asked in this thesis is 'What is *the potential of* Joint Operators to be held responsible for environmental liabilities?' This question addresses the positive law rather than more normative questions. That is, it asks the question in the context of the law as it currently exists. Normative questions of whether the current regulatory regime correctly assigns and apportions liability are left to others.[19] Thus the

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environmental liability regimes which apply to the upstream oil and gas industry in Canada. These elements typically consist of (i) the liability rules; (ii) regulatory offences; and (ii) financial responsibility (assurance) requirements. William Amos & Ian Miron, "Protecting Taxpayers and the Environment Through Reform of Canada's Offshore Liability Regime" (2013) 9 JSDLP 3. Regulatory offences and financial responsibility requirements will not be considered in this thesis although both have the potential to significantly impact a Joint Operator's environmental liability. See, for example, *R v Syncrude Canada Ltd*., 2010 ABPC 229 (CanLII) where Syncrude was charged and convicted of an offence pursuant to section 155 of *EPEA* and section 5.1(1) of the federal *Migratory Birds Convention Act,* 1994, SC 1994, c 22. Syncrude was sentenced to pay $3 million as a result of these convictions.

[18] A Joint Operator's statutory environmental liability extends beyond the limited scope of this thesis. Other environmental statutes can also potentially impose liability on Joint Operators. These include provincial statutes, such as the Alberta *Water Act*, RSA 2000, c W-3 [*Water Act*], and a number of Federal statutes, such as the *Fisheries Act*, RSC 1985, c F-14 and the *Canadian Environmental Protection Act*, SC 1999, c 33. A Joint Operator's liability for environmental clean up and restoration also extends beyond statutory liability. Joint Operators also face liability pursuant to the common law for tort and contract claims asserted by third parties.

[19] As Jamie Benidickson notes, "[t]o identify potential contributors requires important judgments about the principles to be applied to the allocation of cleanup costs". Benidickson, *supra* note 11 at 238. An inquiry into these principles is beyond the scope of this paper, however this question was directly addressed in N. Vlavianos, "Liability for Well Abandonment, Reclamation, Release of Substances and Contaminated Sites in Alberta: Does the Polluter or Beneficiary Pay?" (LLM Thesis, University of Calgary, Faculty of Law, 2000) at 16, 20-36 [Vlavianos Thesis]. For a more recent consideration, see Robert K Omura, "Strategies for cleaning Up Contaminated Sites in Alberta" (2013) Canadian Institute of Resources Law Occasional Paper #41.

purpose of this thesis is not law reform, but to conduct a more detailed doctrinal analysis on the question of a Joint Operator's statutory environmental liability, intending to expose legal practitioners and participants in the oil and gas industry to the realities of present day environmental liability.

In order to answer the legal question posed in this thesis, I have primarily engaged in a doctrinal analysis. I researched relevant primary and secondary material and interpreted and analyzed this material in an organized review. My research encompassed secondary source material available at the University of Calgary law library, online databases (specifically in the legal databases heinonline, ebrary, westlaw, quicklaw, legaltrac, google scholar and the Rocky Mountain Mineral Law Foundation), general internet searches, industry organizations (specifically CAPL, the Association of International Petroleum Negotiators and the Canadian Energy Law Foundation), informal conversations with University professors and I engaged in "following the bibliographic trail".[20]

I also reviewed and noted up relevant legislation, in particular, the applicable sections of the *OGCA* and *EPEA* (both current and repealed), noted up these statutes, and researched and reviewed the applicable case law. Finally, I researched the available publications of the past and current environmental and oil and gas regulators, with particular emphasis on the AER. I reviewed all of the remedial environmental compliance orders ("ECOs") posted on the AER's

[20] This encompassed reviewing the bibliography or footnotes of each source and noting the works cited which were reliable and relevant to my thesis. This generated new sources, with new bibliographies or footnotes to review, and so on. See Wayne C Booth, Gregory G Colomb & Joseph M. Williams, The Craft of Research, 3rd ed (Chicago: University of Chicago Press, 2009) at 80. From this list of materials I was also able to identify frequently cited scholars and determine potential 'experts' or influential researchers in particular subject areas. In order to determine the perspective and reliability of a source, I located the institution(s) the author was affiliated with, determined if the subject matter was within the author's area of expertise, considered the reputation of the institution and reviewed additional publications of the author. Another critical factor was whether the source was peer reviewed before publication.

website under "Compliance Orders"[21] and ran searches of the Compliance Dashboard[22] which also generated additional ECOs. Finally, while it was beyond the scope of my thesis to order all ECOs from the AER Information Centre, I ordered a number of Abandonment Order ECOs[23] to be able to generate some tentative conclusions as to the current practices of the AER Abandonment Orders.

The primary and secondary material generated from my research was organized into the categories and concepts outlined in my thesis table of concepts. I developed screening criteria to filter the material that was beyond the scope of my thesis. I deconstructed my research question into sub-issues which involved the interaction of property and contract law, as modified by Alberta statutory environmental law. Finally, I illuminated areas of controversy and complexity, and analyzed these areas in depth, reaching the conclusions found within this thesis.

With greater certainty and predictability, industry participants will be better able to take positive actions to manage and minimize their risk of environmental liabilities. This includes, but is not limited to, making certain amendments to standard form contracts (where the benefits of doing so outweigh the efficiency benefits of using a model form JOA), such as including provisions for 'collateral support'. Further, although such considerations are beyond the scope of this thesis, working interest owners may decide, given the inherent risks involved in JOAs, to choose a different organizational vehicle affording more protection, such as an

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[21] AER, "Compliance Orders", online: <www.aer.ca/data-and-publications/orders/compliance-orders>.

[22] AER, "Compliance Dashboard: Compliance and Enforcement", online: <www1.aer.ca/compliancedashboard/enforcement.html>. I searched the word 'order' in the "category" category, 'release' and 'spill' in the "keyword" category.

[23] AER, "Abandonment Orders", online: <www.aer.ca/documents/orders/ibo/AbandonmentOrders.pdf>. See Chapter 5 for the list of Abandonment Orders reveiwed.

incorporated joint venture entity. At the very least, it will become apparent after a review of this thesis that oil and gas industry participants should choose their 'partners' wisely (and consider the practical effect of liberal assignment clauses).

1.4 Summary

Chapter One of this thesis explores the precise legal question being addressed in this thesis and establishes its scope. Responsibility for environmental liabilities is a broad issue and can involve many different avenues of liability. Chapter One establishes the focus of this thesis on the potential statutory environmental liability of Joint Operators pursuant to remedial environmental orders issued in accordance with the *OGCA* and *EPEA* regulatory regimes.

Chapter Two provides for a more detailed analysis of working interest owners' rights and obligations as tenants in common. Chapter Two then introduces the 'contractual dimension' of oil and gas ownership, examining the ways in which a standard form JOA amends the co-owners' legal relationship. Chapter Two provides a brief introduction to the 2007 CAPL Operating Procedure which is commonly adopted by Joint Operators engaged in oil and gas activities in the WCSB.

Finally, Chapter Two questions whether it is possible to determine the exact legal relationship of the parties to a JOA. Chapter Two notes that the parties to the 2007 CAPL have attempted to prescribe the legal relationship which exists between the parties, however a court may override the expressed intention of the parties and may deem that a different relationship exists. It is argued that the Operator acts in a number of different legal roles or relationships with the Non-Operators including trustee, agent and independent contractor.

While Chapter Two answers some important fundamental questions about the legal relationship of the parties to a JOA, Chapter Three applies these answers to the *OGCA* regulatory regime. Chapter Three considers whether Non-Operators can potentially be liable to comply with remedial ECOs issued pursuant to the *OGCA* for: (i) the clean-up of spills and releases; (ii) the costs of the clean-up of spills and releases; (iii) the abandonment of oil and gas wells and facilities; and (iv) the payment of abandonment and reclamation costs.

On the whole, the *OGCA* statutory regime appears to be tailored to address the unique contractual arrangements between oil and gas working interest owners. The *OGCA* regime appears to establish limits to a Non-Operator's statutory environmental liability and – at least with respect to abandonment and related reclamation costs – both apportions liability according to a Joint Operator's proportionate working interest share and provides an opportunity for reimbursement in the event a Joint Operator is forced to pay more than its proportionate working interest share.

Chapter Four addresses whether Joint Operators can be held liable to comply with three different types of remedial ECOs pertaining to: (i) the release of substances into the environment, (ii) the reclamation of 'specified land'; and (iii) the clean-up of contaminated sites. *EPEA* grants the Regulator broad authority to issue remedial ECOs to one or more 'person responsible' or 'operator' to assess, clean up, and generally minimize the environmental risks of pollution. In Chapter Four I will show that Non-Operators will likely be considered 'persons responsible' and 'operators', and frequently subject to joint and several liability. Chapter Four pays particular attention to whether Non-Operators have the requisite 'charge, management or control' of oil and gas wells and facilities to be named in an ECO.

Chapters Three and Four suggest when Non-Operators can potentially be held liable to comply with remedial ECOs issued pursuant to the *OGCA* or *EPEA*. However, the fact that a Non-Operator can - potentially - be liable is only part of the answer to the question of whether a Non-Operator will *actually* be targeted by the Regulator over other parties. In Chapter Five, I examine the actual practice of the Regulator with respect to whom the Regulator is likely to pursue or target with respect to environmental clean-up, abandonment and reclamation. Certain trends and patterns are identified in Chapter Five based on the published policies of the Regulator and a review of remedial ECOs which have been posted on the AER website.

Chapter Six introduces the concept of 'independent' or 'exclusive' operations where less than all parties to a JOA participate in an oil and gas operation. Based on the analysis of the *OGCA* and *EPEA* conducted in Chapters Three and Four, Chapter Six challenges the general assumption that a Joint Operator can completely escape liability when it chooses not to participate in an independent operation. In Chapter Six, I argue that 'Non-Participating Parties' do not assign or transfer any property interests during the cost recovery period of an independent (non-title preserving) well operation. Accordingly, Non-Participating Parties continue to be working interest participants and therefore are subject to some of the same statutory environmental liability as Non-Operators in joint operations.

Finally, Chapter Seven integrates my conclusions from Chapters Two through Six, providing a concise summary of the predicted liability of Non-Operators and Non-Participating Parties, within the scope identified in Chapter One.

CHAPTER TWO: WORKING INTEREST OWNERS: THE COMMON LAW RELATIONSHIP AND THE CONTRACTUAL RELATIONSHIP

2.0 Introduction

This thesis examines the application of Alberta's statutory environmental liability regime to the upstream oil and gas industry. Specifically, it considers the application of this regime to oil and gas 'working interest owners' and in particular, those working interest owners who are not the 'operator' of a particular oil or gas well or facility. This Chapter provides overall context to the thesis by describing the rights and liabilities of working interest owners at common law and analyses how working interest owners have chosen to amend their rights and obligations contractually pursuant to a commonly used model agreement. The second half of this Chapter explores the potential legal relationships between working interest owners under the terms of the model industry agreement. The specific legal relationship of working interest owners is important because, as we shall see, the statutory environmental regime in Alberta assigns liability to persons who are acting in a certain legal capacity.

2.1 Working Interest Owners: The Common Law Relationship

2.1.1 What is the Relationship of Working Interest Owners at Common Law?

In Canada, more than one party may hold an undivided beneficial interest in an oil and gas leasehold estate (specifically the rights to drill for and produce, save and market petroleum and natural gas from the lands) and accompanying property. This co-ownership can exist with respect to the land, but also in chattels, oil and gas facilities, funds and other kinds of personal property.[24]

[24] Martin M Olisa, "Legal Problems Arising Out of Co-Ownership of Oil and Gas Leasehold Estate and Facilities" (1970) 8 Alta L Rev 177 at 177.

Professor David Pierce notes that there is both a "property dimension" and a "contractual dimension" to oil and gas ownership.[25] When analysing oil and gas ownership, Professor Pierce recommends to first identify the rights and obligations arising from property law and then determine how these base property rights have been, or need to be, "affirmed, negated, or redefined by the JOA".[26] Professor Pierce's approach appears sound, since the JOA is fundamentally a "transactional response" to provide the necessary coordination and management between co-owners which is often lacking at common law.[27]

Following Professor Pierce's recommendations, this section of the thesis will identify and analyze the property interest of oil and gas working interest co-owners. Of the two forms of co-ownership which currently exist in Canada,[28] co-owners of oil and gas working interests are typically tenants in common rather than joint tenants.[29] In *Hersey v Murphy*,[30] the Chancery Division of the New Brunswick Supreme Court discussed the nature of the property interest held by co-owners of land:

> 10 ...<u>That these parties were and are co-tenants in the property cannot be questioned, as by statute every estate created, granted or devised to two or more</u>

[25] David E Pierce, "Transactional Evolution of Operating Agreements in the Oil and Gas Industry" (2007) Special Institute on Oil and Gas Agreements: Joint Operations, Rocky Mountain Mineral L Foundation at 1-3 [Pierce, "Transactional Evolution"].

[26] *Ibid* at 1-3.

[27] Pierce, "Transactional Evolution", *supra* note 25 at 1-1.

[28] Traditionally in Canada, the common law recognized four types of co-ownership: (i) joint tenancy; (ii) tenancy in common; (iii) tenancy by entireties; and (iv) co-parcenary. As recognized by Professor Ziff, the later two "are (at the very least) functionally extinct in Canada." Bruce Ziff, *Principles of Property Law,* 6th ed (Toronto: Thomson Reuters Canada Limited, 2014) at 337.

[29] According to section 8 of the *Law of Property Act*, RSA 2000, c L-7 [*LPA*], where an interest in land is granted or conveyed to two or more persons, there is a presumption in favour of those persons taking as tenants in common rather than joint tenants unless the opposite intention is sufficiently apparent. In regards to Alberta Crown petroleum and natural gas leases, there is no indication that the Crown is granting a joint tenancy. From a practical perspective, as noted by Professor Ziff: "The tenancy in common has many functions. While a joint tenancy may be ideal for family estate planning, or when trustees are holding title, the right of survivorship is usually seen as inappropriate in a commercial setting or in other arm's length dealings." Ziff, *supra* note 28 at 339-340.

[30] *Hersey v Murphy,* (1920) 48 NBR 65, 1920 CarswellNB 35 at para 10 [*Hersey v Murphy*].

> persons in their own right is a tenancy in common unless expressly declared to be a joint tenancy. Also a conveyance of an undivided interest in property creates a tenancy in common between the grantors and grantee, and when a stranger purchases or acquires from one joint tenant or tenant in common his undivided interest in the common property he becomes a tenant in common with the other tenants. So also the purchaser of an undivided interest in property succeeds to all the rights and obligations of the original owner, and occupies the same position in respect to the property and the other co-tenants as that formerly held by him. He is not entitled to the occupation of any particular part of the property but becomes a tenant in common with the other co-tenants or co-tenant of the whole. [Emphasis added.]

More recently in *IFP Technologies (Canada) Inc. v Encana Midstream and Marketing*,[31] the plaintiff, IFP, submitted that the "relationship between two or more holders of working interests in oil or gas is that of tenants in common of the leases".[32] IFP cited *Midcon Oil & Gas Co. v New British Dominion Oil Co*.[33] for this proposition, likely referring to the majority decision delivered by Locke J who held:

> While the provisions of the agreement are most explicit in defining the duties of the operator, they are not clear as to what they were in regard to the disposing of any oil or gas discovered. The position of the parties, following the discovery of natural gas in quantities, appears to be that of tenants in common of the leases obtained from the Province and of the minerals, including natural gas in and under the lands so leased. There is no fiduciary relationship between tenants in common of real estate as such, a question which must be taken as settled by the judgment of the House of Lords in *Kennedy v. De Trafford et al.* If, therefore, a fiduciary relationship existed between these parties, it resulted either from the terms of the agreement, or from what was done pursuant to its terms. [Emphasis added.][34]

Professor Nigel Bankes agrees that "co-ownership is also the typical foundation for oil and gas operations in [Alberta] and elsewhere since oil and gas companies will typically be

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[31] *IFP Technologies (Canada) v Encana Midstream and Marketing,* 2014 ABQB 470 (CanLII) [*IFP Technologies*].
[32] *Ibid* at para 396.
[33] *Midcon Oil & Gas Limited v New British Dominion Oil Company Limited and Thomas L. Brook,* [1958] SCR 314, 1958 CanLII 42 (SCC).
[34] *Ibid*, at p 322.

tenants in common (working interest owners) of their title documents (the freehold and Crown leases) on which their operations rely".[35]

2.1.2 What are the Rights and Obligations of Tenants in Common?

At common law, Professor Ziff notes that "all co-tenants are inherently entitled to possession of each and every part of the property, no matter the size of their individual shares".[36] Similarly, the Court in *Hersey v Murphy* concluded that when property is held by tenants in common, "each has an equal right with his co-tenants to the entry and possession of the entire estate, and each co-tenant may use and enjoy the common property in a reasonable manner to the extent of his own interest".[37]

However, there are limitations on a co-tenant's common law rights. In a case involving the legal position of co-owners of a mine after the issue of a Crown grant, a British Columbia court held that "[a]ny one of them, or all of them may work the mine ... the only restriction upon [a co-owner] is that he must not appropriate to himself more than his share".[38] A tenant in common may be liable to the other tenants in common for equitable 'waste' which it causes to the common property.[39] According to general principles of the common law, in Alberta, waste occurs when there is an "unreasonable use of the land".[40] What is a 'reasonable use' of the co-owned property will depend upon the nature of the property.

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[35] Nigel Bankes, "Co-Ownership is a Messy Business (Even with an Operating Agreement)" (15 February 2009) online: <ablawg.ca/2009/02/15/co-ownership-is-a-messy-business-even-with-an-operating-agreement/> [Bankes, "Co-Ownership is a Messy Business"]. See also *Luscar Ltd. v Pembina Resources Ltd.,* 1991 CanLII 5974 (AB QB), reversed 1994 ABCA 356 (CanLII)[*Luscar*].

[36] Ziff, *supra* note 28 at 354.

[37] *Hersey v Murphy*, *supra* note 30 at para 11.

[38] *Marino v Sproat et al*, 1 MMC 481, 1901 CarswellBC 10 at para 1, citing *Job v Potton* (1875), LR 20 Eq 84. See also *Dennis v McDonald*, [1981] 1 WLR 810 (Fam D) at 817.

[39] *Statute of Westminster* (1285) 13 Edward 1, c 22.

[40] Ziff, *supra* note 28 at 357.

Several years ago in a paper addressing the legal problems that arise out of co-ownership of oil and gas leasehold estates and facilities in Alberta, author Martin Olisa concluded that the extraction of oil and gas according to an oil and gas lease did not constitute 'waste'.[41] The author noted that a majority of courts in the United States had held that such extraction did not constitute waste and that this finding would likely also apply in Alberta. Olisa's reasoning referenced back to equitable principles: if oil and gas extraction was considered 'waste' and one co-tenant refused to give consent, then the other co-tenant would be deprived of the opportunity for use and enjoyment of the interest he had in the common property.

These arguments continue to be persuasive today.[42] At common law, a co-tenant is likely not required to obtain the consent of other co-tenants when drilling for and removing oil and gas from common property.[43] However, the co-tenant which engages in drilling and

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[41] Olisa, *supra* note 24 at 178-179.

[42] Olisa, *supra* note 24 at 178-179. See also Nigel Bankes, "Pooling Agreements in Canadian Oil and Gas Law" (1994-1995) 33 Alta L Rev 493 at 501-502 [Bankes, "Pooling Agreements"] where Professor Bankes summarizes:

> General property law principles suggest that a tenant in common... is entitled to the use and occupation of the joint property and cannot be restrained from exploring and exploiting the property under the doctrine of waste. (See *Job v Potton* (1875), 20 LR Eq 84; *Hersey v Murphy* (1920), 48 NBR 65 (Ch Div)) Although there are some American states that take a contrary view, the majority view, and the view taken by Canadian commentators who have considered the issue, is that it is not waste to produce, using reasonable methods consistent with good oilfield practice, the oil and gas or minerals that are jointly owned.

[43] The common law rights of one tenant in common to drill for and produce oil and gas have been modified by statute in Alberta. Section 11 of the *OGCA* prohibits any person from commencing to drill a well or undertake any operations preparatory or incidental to the drilling of a well unless a licence has been issued and the person is the licensee. In order to apply for a licence, section 16 of the *OGCA* requires any potential applicant for a well licence to be "a working interest participant... entitled to the right to produce the oil, gas or crude bitumen from the well or to the right to drill or operate the well for the other authorized purpose".
In Bankes, "Pooling Agreements", *supra* note 42 at 501-502, Professor Nigel Bankes analyses the predecessor provision of section 16 of the *OGCA*. The predecessor section was section 11 of the *Oil and Gas Conservation Act*, RSA 1980, c O-5 which read "No person shall apply for a licence (a) for a well for the recovery of oil or gas from a drilling spacing unit, ... unless he is entitled, or is the authorized representative of the person who is entitled, to the right to produce the oil [or] gas ... for the recovery or evaluation of which the well is to be drilled." Professor Bankes noted:

production operations, (the "Producing Co-Tenant") owes a duty to account to the other co-owners (the "Non-Producing Co-Tenants") for their proportionate share.[44] As explained by Martin Olisa, when accounting to the Non-Producing Co-Tenants, the Producing Co-Tenant may claim the necessary exploration and development costs against the Non-Producing Co-Tenant's shares:

> If one of several owners produces oil and gas he must account to his co-tenants for the value of their respective interests in or shares of production. If the producing co-tenant does not oust his co-tenants or otherwise deny them their rights in the common property, he is allowed credit for the reasonable and necessary costs of prospecting and producing such shares. This amounts to his paying to his co-tenants their proportionate shares of the net profits from the operation.[45]

> The first step in construing s. 11 is to ask who "is entitled ... to the right to produce"? The use of the term "entitled" indicates that the answer is to be found not within the *Oil and Gas Conservation Act*, but within the general law of property and the instruments of title on which the applicant relies.

After considering the general property law principles outlining the rights and obligations of a tenant in common (as summarized above in section 2.1.2) and canvassing the relevant decisions of the Energy and Resource Conservation Board (the ERCB was the Regulator tasked with the administration of the *OGCA*), that existed at the time, Professor Bankes concludes at page 505:

> Consequently, we may conclude that while a party may apply to the Board for a licence without the concurrence of other owners whenever it has an undivided interest throughout the DSU, as a matter of policy, a licence should only be granted in such a case if the ownership interests are identical throughout all the tracts making up the DSU.

Professor Bankes continues at pages 505-506:

> Although it may seem surprising that a licence should be granted to one working interest owner (however small her interest) if ownership interests throughout the DSU are the same, the conclusion does make good policy sense and is unlikely, as a matter of practice, to be abused. The protection against abuse lies in the fact that the upfront risk of drilling the exploratory well will be borne by those who elect to go ahead with an operation on the lands. A non-consenting co-owner has no obligation to contribute [*Ruptash and Lumsden v Zawick*, [1956] SCR 347] and yet, at the same time, is entitled to receive its proportionate share of production. The policy sense of the conclusion is simply that it encourages exploration that is consistent with conservation requirements, and yet at the same time denies a veto to the owner of a small undivided interest.

For a more recent decision on what is now section 16 of the *OGCA*, see *Nexxtep Resources Ltd. v Alberta (Energy Resources Conservation Board)*, 2013 ABCA 186 (CanLII), where the Court of Appeal noted at para 15: "Having read Justice Poelman's reasons for judgment, the Board was of the view that Talisman was entitled to produce the 2-16 well. Such entitlement, of course, is a prerequisite of production by virtue of section 16 of the *OGCA*...".

[44] Bankes, "Pooling Agreements", *supra* note 42 at 502.

[45] Olisa, *supra* note 24 at 178-180. The basis of accounting is laid down by the *Statute of Westminster* (1285) 13 Edward 1, c 22 and the *Statute of 4 Anne* (1705) 4 Anne, c 16. *Ibid* at 178. See also *Hersey v Murphy, supra* note 30 at para 12. Note also section 17 of the *LPA*, *supra* note 29, which authorizes the Court to direct an accounting when an order is made terminating the co-ownership of land. Section 17(2) lists a number of factors a court may consider in making its determination including whether a co-owner has made or should be compensated for capital and non-capital expenses in respect of the land.

If the Producing Co-Tenant who is drilling on the common property does not ultimately produce oil and gas, then the Non-Producing Co-Tenants are not liable for their share of drilling costs. Thus there is no sharing of 'risk' for the drilling and production operations. As shall be explored further in Section 2.3 and 2.4 of this thesis, at common law, co-tenants are not partners or agents of each other.[46] Accordingly, the Non-Producing Co-Tenants cannot be bound by the actions of the Producing Co-Tenant unless the Non-Producing Co-Tenants have authorized or ratified the Producing Co-Tenant's actions with respect to the common property.[47] Similarly, the Non-Producing Co-Tenants will not be liable at common law to third parties for the Producing Co-Tenant's tortious actions.

In a recent article on the public and private cost recovery framework of Canada's oil and gas infrastructure, the authors considered the right of a tenant in common to recover costs beyond the scope of drilling and production costs. Authors Marion, Massicotte and Duhn questioned whether a tenant in common - who pays the costs of environmental clean up and restoration - has a claim at common law against the other tenants for their proportionate share of these costs.[48]

The authors noted that each tenant in common is liable, at common law, for "capital expenditures, including repairs and current expenses in proportion with their ownership share, unless the paying of the obligation can otherwise be explained."[49] Accordingly, the authors argued that "co-owners who incur costs on behalf of their fellow joint owners may be able to

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[46] *Kennedy v Trafford*, [1897] AC 180 (HL).
[47] Howard L Boigon, "Liabilities of Nonoperating Oil and Gas Interest Owners" (1983) Rocky Mountain Mineral L Foundation Special 7 at 6.
[48] Marion, Massicotte & Duhn, *supra* note 12.
[49] *Ibid* at 351.

make a claim against these same joint owners".[50] According to Marion, Massicotte and Duhn, the common law principle of bailment may also apply with respect to personal property.[51]

2.2 Joint Operating Agreements

2.2.1 An Introduction to the "Contractual Dimension" of Oil and Gas Ownership

At the introduction to Section 2.1 of this thesis, I referenced Professor Pierce's observation that there are two dimensions to oil and gas ownership. The first was the property law dimension which was explored in the previous section. I will now turn briefly to the second dimension, the contractual dimension, which may affirm, negate or redefine the basic common law property law rights.

As shown in the previous section, the law respecting the rights and obligations of tenants in common at common law is somewhat sparse.[52] This can lead to considerable uncertainty. Accordingly, most oil and gas working interest owners in Canada choose to supplement and amend the common law by entering into a more formal, written, multiparty agreement called a Joint Operating Agreement or JOA.[53] Through the JOA, oil and gas properties held in common can be developed with greater efficiency (for example, talents and properties can be combined), certainty (for example, costs are allocated upfront) and the risks

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[50] *Ibid*.

[51] The authors argue that an owner may recover what they define as 'Environmental Costs' through bailment. The authors argue that:

> where petroleum substances are extracted, they become chattels which can cause environmental problems during storage or transportation. Where a bailee incurs costs related to the storage or conduct of the bailment, the bailee can usually recover costs from the bailor. In the right case, this could include Environmental Costs.

Marion, Massicotte & Duhn, *supra* note 12 at 351-352.

[52] See also Bankes, "Co-ownership is a Messy Business", *supra* note 35: "The CAPL (Canadian Association of Petroleum Operators) standard form operating agreements are designed to supplement the very thin common law default co-ownership rules with detailed provisions as to how the co-owners of an oil and gas property are to get along."

[53] The 2007 CAPL is an 'operating procedure' which is typically attached to a 'head agreement'. Together, the operating procedure and the head agreement constitute a JOA.

associated with exploration and development can be spread between participants over multiple operations.[54]

In addition to seeking greater clarity and efficiency, oil and gas operators also enter into JOAs to directly circumvent certain aspects of the common law pertaining to tenants in common. For example, when disputes arise and negotiations fail between co-tenants, there are limited options for resolution at common law. Termination of the co-ownership relationship can occur: (i) through the release of one owner's interest to the others, (ii) by transfer by all, or (iii) by application to a Canadian court for an order for partition and sale.[55] However, in the case of the oil and gas industry, many participants find these options can be undesirable for economic reasons.[56]

By contracting out of the right to seek partition and sale in a JOA, parties may face a management or decision making deadlock. However, as we shall see, in many model JOAs, the parties have anticipated the possibility of a deadlock and stagnation of the development of the joint lands, by incorporating, among other things, provisions respecting independent or exclusive operations.[57]

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[54] Boigon, *supra* note 47 at 1. JOAs are also entered into for conservation reasons and to meet regulatory requirements (for example, requirements which call for ownership of 100% of a mineral interest in a spacing unit).

[55] *LPA, supra* note 29, s 15(2).

[56] As noted by Professor Ziff, *supra* note 28 at 352, a co-owner has a *prima facie* statutory right to compel partition or sale. With respect to commercial relationships, courts "seem less inclined to forestall one co-owner from bringing these property relationships to an end". As an example, Ziff notes the case of *Greenbanktree Power Corp. v Coinamatic Canada Inc.* (2004) 75 OR (3d) 478 (CA); affirming (2003) 69 OR (3d) 784 (Div Ct) which affirmed (2002) 59 OR (3d) 449 (SCJ) where a sale was ordered upon the application of a co-owner with a very minor interest in the subject property. The order for sale was made despite the fact that the timing of the sale "promised to have catastrophic financial consequences" for the other co-owner. Ziff, *supra* note 28 at 353.

[57] See Chapter 6 of this thesis.

2.2.2 The Significance, Purpose and Philosophy of Joint Operating Agreements

According to Timothy Martin, the JOA is likely the most significant contract used in the upstream oil and gas business. It defines and details the "fundamental and overarching relationship among joint venture parties from the initial exploration to the ultimate production of hydrocarbons".[58] Typically, JOAs are meant to govern the long term and ongoing relationship of the parties and address a number of different contingencies that can develop during the duration of that relationship.[59]

The objectives of many of the model JOAs are similar. For instance, the CAPL Operating Procedures and the AIPN JOAs share the following objectives:

> the need to balance the rights and obligations of operators and non-operators, to balance the needs of the individual participants with those of the participants collectively, to make the negotiation process more effective by providing a widely accepted model form as a starting point for discussions among the participants, and to ensure that the model forms continue to reflect the contemporary needs of industry through a periodic updating process.[60]

Another of the defining objectives of many JOAs is the desire of the participants to contractually allocate the risk and responsibility of the parties. In many JOAs, the parties agree

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[58] Timothy Martin, "Model Contracts: A Survey of the Global Petroleum Industry" (2004) 22 J Energy Nat Resources L 281 at 291.

[59] Brad Grant, "Joint Ventures in the Canadian Energy Industry" (2012-2013) 50 Alta L Rev 373 at 386. See also Pierce, "Transactional Evolution", *supra* note 25 at 1-9 who quotes Eugene Kuntz's observation: "The JOA is a carefully structured instrument designed to govern a great variety of operations over a long period of time."

[60] Michael D Josephson, "How Far Does the CAPL Travel? A Comparative Overview of the CAPL Model From Operating Procedure and the AIPN Model Form International Operating Agreement" (2003-2004) 41 Alta L Rev 1 at 4. See also Andrew Derman who comments on the original AIPN model form JOA:

> [t]he Model Form has two major philosophical underpinnings. First, it does not force parties to accept preordained concepts and consequences. Through the use of options and alternatives, the parties can expediently structure a transaction to fit a variety of situations, including compliance with the underlying host government contract. Second, the Model Form encourages exploration and development, while it neither forces a party to participate in expensive, risky ventures nor prohibits a party from proposing and conducting ventures when the requisite *Operating Committee* passmark vote is not attained.

Andrew B Derman, "Model Form for International Operating Agreements: A Panacea" (1993-1994) 8 Nat Resources & Env't L 40 at 40.

to bear their working interest share of all of the rights, duties, benefits, and obligations. They contractually agree that their liability will not be joint and several. As authors Kangles et al argue:

> a typical joint operating agreement or co-ownership agreement must strive to create a system whereby parties may appropriately share in not only the proceeds of development and operation, but also the risks associated therewith. Failure to do so will result in stifled development of the asset (because no operator will take the risk to operate and develop) or a loss of benefit to non-operating parties (because the operator will require increased compensation in exchange for taking on disproportionate development or operational risk).[61]

However, as author and industry expert Ernest Smith cautions, this sharing of risk between the parties to a JOA is only as strong as its weakest link and a joint venture that "is comprised of weak co-venturers brings little real advantage".[62] Ernest Smith may be referring (at least in one respect), to the fact that while a JOA may contractually allocate each parties' share of losses and liabilities (as between the parties to the JOA), in the event that one or more of these parties is financially unable to share its proportionate burden, the impecunious party's losses and liabilities will fall to the remaining Joint Venturers.

2.2.3 The 2007 CAPL Operating Procedure

As summarized by Timothy Martin and Jay Park, "there has been a growing use of model contracts in the petroleum industry where negotiated cooperative contracts are common and [there is] constant pressure to work efficiently".[63] A number of different model form JOAs[64]

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[61] Nick Kangles et al, "Risk Allocation Provisions in Energy Industry Agreements: Are We Getting it Right?" (2012) 49 Alta L Rev 339 at 363.

[62] Ernest E Smith et al, eds, "International Petroleum Transactions", 2nd ed (Denver: Rocky Mountain Mineral Law Foundation, 2000).

[63] Timothy A Martin & J Jay Park, "Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger" (2010) 3 Journal of World Energy L & Business 1 at 4.

[64] The more commonly used standard form JOAs include the following model form JOAs: the American Association of Petroleum Landmen Form 610 model (AAPL 610), as revised and updated in 1989, online:

have been developed over time which have, as summarized by Michael Josephson, "evolved to reflect the particular industry standards, customs, laws, and regulations in effect in the jurisdictions in which they are most commonly used".[65]

One series of model JOAs - the CAPL Operating Procedures -have been "an integral part of Canada's oil and gas industry for almost 40 years".[66] Canadian oil and gas explorers and developers have traditionally accepted the CAPL Operating Procedures as the standard form JOA for conventional joint operations in the WCSB.[67] The model JOA which will be analyzed in this thesis is the 2007 CAPL.[68] The 2007 CAPL model form operating procedure was the most recent final version of the CAPL Operating Procedure at the time of writing of this thesis.[69]

<www.landman.org/resources/forms-contracts>(the "AAPL JOA"); the Association of International Petroleum Negotiators (AIPN) Model Form, the most recent version for conventional operations was issued in 2012, available at www.aipn.org (the "AIPN JOA"); the Oil and Gas UK Limited model for use on the UK Continental Shelf, issued in 2009, available at www.oilandgas.org.uk (the "OGUK JOA"); and the Australian Mining Petroleum Law Association model form, issued in 2011 for use in Australia, available at www.ampla.org (the "AMPLA JOA"). A number of other models are made available by these organizations for frontier or other context-specific environments.

[65] Josephson, *supra* note 60 at 3. Any agreement adopted by the parties will be determined by the operational, regulatory, economic and political context of the jurisdiction in which the oil and gas resources are located. For example, whether the jurisdiction is mature; whether there is government participation in the exploration and development of the resource; the type of technology required; the nature of the gas or oil 'liberation' (for example, the development program); the permeability, pressure, and depth of the resource (including whether the development is seen as a 'convention' or 'unconventional' resource; the environmental impacts; the location (for example if the resource is located in a remote frontier); the production profile; the legal nature of the rights granted; and the development or sophistication of local oil and gas law.

[66] Craig Spurn, Jana Prete & Melissa Zerebeski, "The 2007 CAPL Operating Procedure" (2008-2009) 46 Alta L Rev 427 at 429-430. The Canadian Association of Petroleum Landmen (CAPL) model form Operating Procedure was first introduced in 1969. Subsequent versions were developed and issued in 1971, 1974, 1981, 1990, and most recently in 2007. *Ibid*.

[67] Josephson, *supra* note 60 at 3. As noted by Josephson, it is "a credit to the drafting committees of the CAPLs that the Canadian model form stands out among all model forms of operating agreements for the clarity of its wording, organization, and approach to concepts. The CAPLs have influenced the evolution of other model forms and are often referred to in American and international commentaries on joint operating agreements." *Ibid*.

[68] 2007 CAPL, *supra* note 13. The 2007 CAPL contains almost six pages of defined terms which have been capitalized in the Operating Procedure. In this thesis, terms which are defined in the 2007 CAPL will not be capitalized unless the context requires it.

[69] A new version of the CAPL Operating Procedure, the 2015 CAPL, was released in November 2015. The primary focus in the 2015 CAPL was to address unconventional operations and other minor adjustments to reflect experiences to date with the 2007 CAPL including intervening legal decisions. CAPL, "2015 Operating Procedure Letter" (November 30, 2015), online: <landman.ca/wp/wp-content/uploads/2015/11/2015-CAPL-Operating-Procedure-cover-letter-Nov.pdf>. There have been many versions of the CAPL Operating Procedure, each

Lately the CAPL Operating Procedures have come under a certain degree of criticism on a number of fronts, and there has been some discussion over whether the CAPL Operating Procedure is still favoured by oil and gas practitioners.[70] However, the WCSB continues to be saturated with CAPL Operating Procedures that have been used in the past. And despite the fact that the AIPN model agreement or other international agreements may be becoming more 'trendy' in the current climate, the CAPL Operating Procedure continues to be the procedure most suitable for conventional operations in the WCSB.[71]

2.2.4 The 2007 CAPL and Contractual Allocation of Liability

The 2007 CAPL provisions which contractually allocate liability are complex and it is not my intention to provide more than a brief overview of them in this thesis.[72] Recall that this thesis primarily questions the *statutory* environmental liability of working interest owners. Further, this thesis considers what affect the insolvency of one of the working interest owners has on the statutory environmental liability of other working interest owners. However, we

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containing "drafting and organizational improvements from the previous one and each has reflected and responded to legal, regulatory, commercial, and operational developments impacting the oil and gas industry in the Western Canadian Sedimentary Basin (WCSB)." Spurn, Prete & Zerebeski, *supra* note 66 at 430.

[70] See for example: Miles Pittman, Jaclyn Hesje & Adam Lamoureux, "Gross Negligence in Canadian Energy Contracts" (2013) 51 Alta L Rev 283 at 307:

> The importance of the AIPN model contracts in the Canadian energy industry has been increasing, due to the prominence of large scale joint ventures for exploitation of upstream shale or other assets, where the CAPL Operating Procedure has proved insufficient. For instance, because the AIPN contract provides for an Operating Committee, and for Work Programs and Budgets, many upstream joint venturers, especially those with international operations or experience, have come to rely on the AIPN model as a useful starting point. Further, the AIPN model is intended as a guide and has significant imbedded flexibility, while the CAPL procedures have been drafted so that they can be used as a code for operations throughout the basin.

[71] Spurn, Prete & Zerebeski, *supra* note 66 at 430.

[72] For a more thorough review of the 2007 CAPL (and the predecessor CAPL Operating Procedures), see Kangles et al, *supra* note 61; Douglas G Mills, Carolyn A Wright & Julie JM Inch, "Exploring the Balance of Power in the Operator/Non-Operator Relationship Under the CAPL Operating Procedure" (2010) 48 Alta L Rev 363; Spurn, Prete & Zerebeski, *supra* note 66; Canadian Association of Petroleum Landmen, 2007 Operating Procedure Annotations (2007) [2007 CAPL Annotations]; and a number of articles prepared by Jim MacLean and published in the Canadian Association of Petroleum Landmen, "The Negotiator".

must remember that when insolvency is not an issue, working interest owners may have a right of contribution pursuant to the relevant JOA – that is, the JOA may re-allocate losses and liabilities suffered by one or more of the parties to the JOA.[73]

Abbreviated, the 2007 CAPL specifically provides that (except as provided in Article 5.00 for financial default), the "[p]arties' rights, obligations and liabilities hereunder will be separate and not joint or collective or joint and several."[74] Indeed one of the foundational principles of the 2007 CAPL is that (subject to certain established exceptions), losses and liabilities incurred in operations under the agreement will be borne by the parties in proportion to their interest in the agreement.[75]

Clause 4.01 of the 2007 CAPL provides that the parties will indemnify and save harmless the Operator against all losses and liabilities in planning or conducting any joint operation.[76] All such losses and liabilities for which the indemnification applies will "be for the Joint Account, and will be borne by the parties (including the Operator) in proportion to their respective Working Interests".[77]

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[73] The contractual provisions found within the 2007 CAPL address the allocation of losses and liabilities as between the parties. Third parties are not bound by this allocation. Where parties to the 2007 CAPL have statutory legal responsibility to another party, the provisions of the 2007 CAPL will not override the statutory allocation of liability. See the Supreme Court decision in *Tercon* where the Supreme Court seems to address the more general jurisdiction of the courts to override contractual obligations. *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, 2010 SCC 4 (CanLII). See also Marion, Massicotte & Duhn, *supra* note 12 at 347. See also the extensive discussion of the British Columbia Court of Appeal in *Niedermeyer v Charlton*, 2014 BCCA 165 (CanLII) where the Court considered *Tercon* and other cases which question the legality of overriding freedom of contract in favour of other fundamental values and public policy.

[74] 2007 CAPL, *supra* note 13, cl 1.05A.

[75] 2007 CAPL, *supra* note 13, cl 3.04, 4.02. See Pittman, Hesje & Lamoureux, *supra* note 70 at 292.

[76] Kangles et al, *supra* note 61 at 365 summarize the liability regime created in the CAPL Operating Procedures as "clearly not entirely-fault-based (in that the operator or service provider is usually provided with some form of indemnity), but neither can it be categorized as the type of knock-for-knock based regime [discussed in the article] since the parties are still exposed to some level of fault based liability."

[77] 2007 CAPL, *supra* note 13, cl 4.01.

There are several exceptions to this broad indemnification. These exceptions include: instances of default,[78] the Operator's gross negligence or wilful misconduct,[79] the Operator's breach of any of its contractual obligations as Operator under the Agreement (except for the Operator's duties under Clause 3.04, Subclause 3.05A or Subclause 3.10A)[80], 'extraordinary damages'[81] and losses and liabilities which relate to a risk against which the Operator is required to carry insurance for the joint account.[82]

In addition to these more general provisions regarding liability and indemnification, the 2007 CAPL also contains express provisions with respect to the parties' liability for the abandonment, remediation and reclamation of wells and facilities.[83] Joint Operators under the 2007 CAPL are responsible for their working interest share of the costs of abandonment,

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[78] Pursuant to Article 5.00 of the 2007 CAPL, *supra* note 13. See also Marion, Massicotte & Duhn, *supra* note 12 at 349: "[t]he effect of the various default provisions is that the liability for Environmental Costs may sometimes be shifted from a defaulting party to the other non-operators."

[79] 2007 CAPL, *supra* note 13, cl 4.02(a). See Pittman, Hesje & Lamoureux, *supra* note 70. The authors conclude at 292 that:

> for those items where the operator is liable only for its own gross negligence (which are the major operator's duties under the 2007 CAPL), the operator's standard of performance has decreased, due to the addition of a new definition of gross negligence. In our view, the *2007 CAPL* sets an extremely high, and potentially impossibly high, bar for the non-operators to clear before they can impose liability on the operator for the operator's gross negligence.

At 306, the authors summarize that "non-operators will be required to show that the operator was reckless, or wantonly indifferent before being held liable for more than its pro rata share of liabilities".

[80] 2007 CAPL, *supra* note 13, cl 4.02(b). The three exceptions to the exception are: clause 3.04 (the Operator's duty to manage all joint property and conduct all joint operations diligently, in a good and workmanlike manner, in compliance with the title documents, the regulations, and good oilfield practice); Subclause 3.05A (the Operator will conduct each Joint Operation in compliance with the Regulations pertaining to health, safety and environment); and Subclause 3.10A (maintenance of title documents).

[81] See Clause 4.04 of the 2007 CAPL, *supra* note 13, and the definition of "extraordinary damages" in c 1.01 of the 2007 CAPL. It is noteworthy that the definition encompasses losses and liabilities that "pertain to loss of well control during drilling or other well operations, including, for this item (ii), associated environmental liabilities". The term 'environmental liabilities' is broadly defined in cl 1.01 of the 2007 CAPL.

[82] 2007 CAPL, *supra* note 13, cl 402(c). It is recognized that the issue of insurance has significant implications on a Joint Operator's potential liability. However, an in-depth consideration of the effect of insurance on a Joint Operator's liability is beyond the scope of this thesis.

[83] See 2007 CAPL, *supra* note 13, Article 12.00. Clause 1.01 of the 2007 CAPL defines "abandonment" broadly to encompass proper plugging and abandonment of a wellbore, the decommissioning or removal of a Production Facility, any required remediation of any associated environmental liabilities, and the reclamation of the applicable surface location and any applicable access roads.

reclamation and remediation of wells and facilities. Further, there are procedures in the 2007 CAPL through which certain parties can be deemed to take over a well and may be deemed to have accepted an assignment for all abandonment obligations and environmental liabilities respecting that well.[84]

Again, it is critical to remember that this allocation of responsibility for abandonment obligations and environmental liabilities is between the parties themselves and does not bind third parties or affect the statutory allocation of statutory liabilities (beyond providing for a contractual right of contribution).

2.3 Modifying the Common Law Relationship

2.3.1 What is the Parties' Expressed Intent According to the 2007 CAPL?

In addition to examining the parties' contractual allocation of liability, it is also important to establish the parties' legal relationship. As we shall see in Chapters 3 and 4, the Alberta statutory environmental regime assigns liability to persons who are acting in a specific legal capacity.

An oil and gas joint venture, formed through the execution of a JOA, is a form of contractual association. The joint venture is created by contract and the terms of the joint venture between the parties will largely be prescribed and limited to those set out in the JOA.[85] As Scott Styles describes:

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[84] See 2007 CAPL, *supra* note 13, Articles 11.00 (surrender of joint lands) and 12.00 (abandonment of joint wells).

[85] Many JOAs contain some form of 'entire agreement clause'. The 2007 CAPL, clause 1.11 provides that except for the title documents or as otherwise provided, "this Agreement supersedes all other oral or written agreements, representations and understandings of the Parties about the matters and property governed hereunder, and expresses all of the terms agreed upon by them with respect thereto." Note however *Direct Energy Marketing Limited v Kalta Energy Corp*., 2003 ABQB 1068 (CanLII) [*Kalta*], where the Court observed at para 34: "Where the CAPL does not specifically provide an answer, the court may resort to general principles of law: *Novalta Resources Ltd. v Ortynsky Exploration Ltd*. (1994), 18 Alta. L.R. (3d) 4 (Alta. Q.B.), at 18".

> The JOA thus functions as the constituent contract of the commercial relations between the parties...[it] will define the proportionate interests of the parties and allocate control mechanisms and rights: all the Joint Operations must be conducted in accord with the terms of the JOA.[86]

Industry expert Peter Roberts notes that petroleum contracts, such as JOAs, are typically drafted and adopted by a distinct, very self-contained industry that is "grounded in general rules of commerce" but also characterized by "unique commercial, technical and behavioural features".[87] Further, Peter Roberts confirms that JOAs typically clearly delineate the parties' intentions and expectations of their legal relationship.[88]

The 2007 CAPL is quite explicit as to the parties' intentions as to their legal relationship. The 2007 CAPL provides that the:

> Parties intend that their interests in the Joint Lands and in all other Joint Property will be held as tenants in common, subject to those modifications expressly provided in this Agreement. Nothing contained in this Agreement creates a partnership or association of any kind, imposes upon any Party any partnership duty, obligation or liability to any other Party or authorizes any Party to act as an agent of any other Party for any purpose except as expressly provided in this Agreement.[89]

In the Annotations to subclause 1.05A of the 2007 CAPL, the drafting committee explains the rationale behind the use of this language:

> One of the major reasons for the inclusion of this type of provision is to attempt to ensure that the business relationship is not legally characterized as a partnership, largely because of the potential adverse tax consequences of that classification. Although other Working Interest owners in a property are commonly referred to as "partners" in the oil and gas industry, this just reflects a traditional choice of terminology, not a description of the legal relationship. A more accurate legal description would be to describe other owners as "co-venturers".[90]

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[86] Scott C Styles, "Joint Operating Agreements" in Greg Gordon et al, eds, *Oil and Gas Law: Current Practice and Emerging Trends,* 2nd ed (Dundee Scotland: Dundee University Press, 2011) at 363.

[87] Roberts, *Petroleum Contracts: English Law and Practice* (Oxford: Oxford University Press, 2013), at v [Roberts, *Petroleum Contracts*].

[88] *Ibid* at 101.

[89] 2007 CAPL, *supra* note 13, cl 1.05A.

[90] 2007 CAPL Annotations, *supra* note 72 at 7.

Further, the 2007 CAPL contains a provision (new to the 2007 CAPL version of the CAPL Operating Procedures), which expressly recognizes that the Joint Operators are competitors:

> Each Party acknowledges that the Parties are engaged in the oil and gas business. Each Party is free to conduct its business in such manner as it, in its sole discretion, sees fit, even if it is (or may be) in competition with potential Joint Operations. Nothing in this Agreement restricts a Party from making elections or decisions in what it perceives to be its own interest, economic or otherwise, subject to: (i) any trust, trust duty or fiduciary relationship imposed at law or in equity; (ii) any duty of good faith (or similar duty) contemplated in Subclause 1.05A; and (iii) the other provisions of this Agreement, including any specific obligations not to exercise discretion unreasonably.[91]

The express declaration that the JOA does not create a partnership is common in model JOAs from other common law jurisdictions. For example, the American Association of Petroleum Landmen's Model (AAPL) Form 610-1989 JOA contains a similar provision in Article VII.A:

> It is not the intention of the parties to create, nor shall this agreement be construed as creating, a mining or other partnership, joint venture, agency relationship or association, or to render the parties liable as partners, co-ventures, or principals.

The Association of International Petroleum Negotiators 2012 model form JOA for conventional operations similarly provides in clause 14.1:

> It is not the intention of the Parties to create, nor shall this Agreement be deemed or construed to create, a mining or other partnership, joint venture or association or (except as explicitly provided in this Agreement) a trust.

[91] 2007 CAPL, *supra* note 13, cl 1.05B.

2.3.2 Deliberate Relationships Versus Remedial Relationships

Despite the express attempt of the parties to a 2007 CAPL to outline the parameters of their legal relationship (i.e. their "deliberate relationship"),[92] in a dispute between the parties themselves, or between one or more of the parties and a third party, a court may find that a different relationship actually exists between the parties. This court-imposed relationship is what Professor David Pierce calls a "remedial relationship".[93] For example, the parties may profess that the operator under the 2007 CAPL is only an arm's length contractor of the Non-Operators and not an agency relationship. However, it is open for a court to hold otherwise when examining the terms of the JOA as a whole and the commercial reality of the parties' relationship – especially when asked to do so by a third party.

Where it is determined that the parties are in fact engaging in operations as a partnership, a joint venture or pursuant to some other legally recognized relationship, this will trigger the application of specific legal principles, rights and obligations under statute and at common law which may alter the express language of the JOA significantly.[94] An example (which is especially significant to this thesis) occurs in statutory environmental legislation where one party's role as an 'agent' or 'principal' may be a deciding factor in whether such a party is responsible for environmental liabilities.

A number of authors have argued that courts in the USA are likely to deem parties to a JOA to be in an alternate legal relationship than the one identified by the parties. In a

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[92] As defined by David Pierce, "deliberate relationships" are those the parties clearly intend to create through the express and implied terms of the JOA. Pierce, "Transactional Evolution", *supra* note 25 at 18.

[93] As defined by David Pierce, "remedial relationships" are those the parties probably did not consciously intend to create, but they are being used by a litigant, or the courts, to pursue desired outcome. Pierce, "Transactional Evolution", *supra* note 25 at 18.

[94] Olisa *supra* note 24 at 183-184 where the author concluded that a partnership could be established by law, contrary to the express intentions of the parties.

somewhat dated article on the liabilities of non-operating oil and gas owners, Howard Boigon concludes that:

> operations pursuant to a joint operating agreement are likely to give rise to partnership or joint venture liability because of the cooperation inherent in the enterprise... [this] could frequently result in direct non-operator regulatory liability... cosmetic modifications of agreement are likely to have little effect.[95]

More recently Pharo et al noted that many courts faced with the interpretation and application of a JOA have "worked hard in certain circumstances to find relief for an aggrieved party". In an article on the statutory and common law liability of the parties to the model form JOA in the United States, Pharo et al concluded that:

> ... there are dangers out there for both the Operator and Non-Operators alike, both with regard to third parties and with regard to one another...the articles and jurisprudence suggest... the courts may choose to abandon the express statements of the parties themselves and impose heightened duties and responsibilities." [96]

One of the ways in which courts in the United States have found relief for a sympathetic plaintiff has been through the application of a mining partnership, agency, co-tenancy, trustee or fiduciary relationship to the JOA situation. However, Pharo et al caution that this may only occur in specific circumstances:

> Where either third parties or Non-Operators have been cheated, hoodwinked, consciously lied to, or stolen from, there is generally going to be a remedy. Where the aggrieved party has suffered as a result of a consequence of an everyday mistake, even those with significant financial consequences, the courts are generally unlikely to provide assistance. [97]

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[95] Boigon, *supra* note 47 at 34. See also *ibid*, 34-36.

[96] Milam Randolph Pharo et al, "Liabilities of the Parties to a Model Form Joint Operating Agreement: Who is Responsible for What?" (2008) Rocky Mountain Mineral L Foundation 5 at 15.

[97] *Ibid*.

Citing English case law, Peter Roberts notes that most JOAs explicitly provide that the JOA relationship does not constitute a partnership, however such a declaration can easily be overridden by the substance of the relationship itself:

> ... it is the substance of the relationship that the JOA creates, rather than the form of the JOA and the simple denial that a partnership exists, which must be considered. In *Weiner v Harris* it was judicially noted that "It is not in the least conclusive that the partners have used a term or language intended to indicate that the transaction is not that which in law it is".[98]

A recent Alberta Law Review article examines the relationship of the Operator and the Joint Operators in the CAPL Operating Procedures primarily to consider whether the parties to the CAPL Operating Procedures are subject to fiduciary duties and the duty of good faith.[99] Similarly to this thesis, the authors noted that "while parties to a CAPL Procedure may believe they have restricted their obligations by the terms of the contract (thereby precluding liability for causes of action other than breach of that contract), this may not always be the case".[100] The authors argue that despite the parties' intentions, additional liability outside the terms of the contract exist, specifically with respect to the common law principles of negligence, fiduciary duties and the duty of good faith.[101]

2.3.3 Classifying the Legal Relationship of the Parties: the Joint Venture Question

While there are many in the industry that would characterize the business arrangement of the parties to a 2007 CAPL as a 'joint venture', there is some question as to whether the

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[98] Roberts, *JOAs*, *supra* note 1 at 303.
[99] Mills, Wright & Inch, *supra* note 72.
[100] *Ibid* at 366.
[101] *Ibid* at 366. However, the authors conceded that the parties express intentions "should reduce the risk of the court imposing an ad hoc fiduciary relationship" on the parties, particularly in light of recent Supreme Court of Canada jurisprudence on fiduciary duties. Mills, Wright & Inch, *supra* note 72 at 369.

parties can be in a 'joint venture' relationship if a joint venture does not exist as a legal category in Canadian law.

According to *The Law of Partnerships & Corporations*, in Canada, a 'Joint Venture' "is neither a distinct form of business organization nor a relationship that has any precise legal meaning", but a term used loosely "to refer to a wide variety of legal arrangements in which two or more parties combine their resources for some limited purpose, for a limited time, or both".[102]

According to VanDuzer, there are three types of joint ventures which can be adopted. These include: (i) a corporation in which each business is a shareholder; (ii) a partnership, in which each business is a partner; or (iii) by the parties together, with the parties' respective rights and obligations governed only by a contract. [103] It is the third type of joint venture that is considered in this thesis.

A similar concept applies under English law where the term 'joint venture' is argued to essentially be "a commercial rather than a legal definition ... not always clearly elucidated".[104] But while the term "joint venture" in English law is without a settled common law meaning, it has been argued that the term is "apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership: such as a company, a trust, an agency or joint ownership".[105]

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[102] J. Anthony VanDuzer, *The Law of Partnerships & Corporations*, 3rd ed (Toronto: Irwin Law, 2009) at 20.
[103] *Ibid* at 76-77.
[104] Roberts, *Petroleum Contracts*, *supra* note 87 at 84.
[105] *Ibid at n 2*, citing *United Dominions Corporation Ltd. v Brian Pty Ltd* (1985) 60 ALR 741, per Mason Brennan J. (HC Aust).

In Canada, this uncertainty over the status of joint ventures was the subject of an Alberta Law Reform Institute Memorandum[106] and Final Report.[107] The ALRI Final Report summarized that "joint ventures by business entities have become increasingly common and increasingly important to the economic life of Canada" and, specifically in the energy industry, have provided "efficiencies in the development of oil and gas properties".[108]

However, the ALRI Final Report concluded that the "legal landscape" in which the joint venture operates, has "not developed to accommodate it".[109] In particular, the ALRI Final Report found that the joint venture was "at risk of being categorized for legal purposes as a partnership and thus subject to the *Partnership Act*[110] and the common law of partnerships.

The ALRI Report was heavily criticized by University of Saskatchewan law professor Robert Flannigan in an article, "Joint Venture Theurgy" for "predicat[ing] its analysis on a number of assumptions that are not justified".[111] Professor Flannigan challenged the ALRI Final Report's assumption that a distinct flexible form of joint venture already exists in some clear sense.[112] Speaking strictly with respect to oil and gas joint ventures in Alberta, it is

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[106] Alberta Law Reform Institute, *Joint Ventures*, *Consultation Memorandum 14* (Edmonton: Alberta Law Reform Institute, 2011).

[107] Alberta Law Reform Institute, *Joint Ventures*, *Final Report* (Edmonton: Alberta Law Reform Institute, 2012)[ALRI Final Report].

[108] *Ibid* at v.

[109] *Ibid*.

[110] *Partnership Act*, RSA 2000, c P-3 [*Partnership Act*].

[111] Robert Flannigan, "Joint Venture Theurgy" (2013) 54 Can Bus L J 368 at 372 [Flannigan, *Joint Venture Theurgy*]. Professor Flannigan has previously written on the subject of Joint Ventures and their legal status in Robert Flannigan, "The Legal Status of the Joint Venture" (2008-2009) 46 Alta L Rev 713 and Robert Flannigan, "The Joint Venture Fable" 50 American J Legal History 200. The later article focused primarily on the law of the United States, while the former article reviewed Joint Ventures in the jurisdictions of the United States, England, Australia and Canada.

[112] One of the more critical areas of divergence between the ALRI Final Report and Professor Flannigan's scholarship centers around the question of whether the status of partnership is imposed by statute and whether the parties can contract out of that status. The ALRI Final Report specifically addresses section 22(1) of the *Partnership Act* which provides that "[t]he mutual rights and duties of partners whether ascertained by agreement or defined by this Act may be varied by the consent of the partners." The ALRI Final Report concludes that this

questionable whether Professor Flannigan's concern is warranted. In a recent Alberta Law Review article, practitioner Brad Grant holds that "[j]oint ventures have also been present for a long time in the development of some of Canada's most significant oil and gas resources" and provides numerous examples of such ventures.[113]

It is beyond the scope of this thesis to determine whether the relationship of the parties to an oil and gas JOA meets the formal requirements of a partnership, as defined in the *Partnership Act* or as determined by common law. However, the weight of authority in Canada and abroad suggests that oil and gas joint ventures are not formal partnerships.[114]

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section is insufficient to provide relief for a joint venture seeking to avoid the "grip of partnership law". ALRI Final Report, *supra* note 107 at para 28.

Professor Flannigan argues that the ALRI Final Report's conclusion that parties cannot contract out of a partnership status is incorrect. He argues:

> The Institute here fails to comprehend the relevant jurisprudence. Contracting out is indeed possible. The law of partnership is a *default* regulation (with both "private" and "public" functions) that parties may modify in its application to them. The authorities establish only that parties to a contract cannot vary the application of partnership law with respect to *third parties* who do not otherwise contractually accept the variation. [Emphasis in original.]

Flannagan, *supra* note 111 at 376.

Professor Flannagan emphasizes that partnership law "surrenders to mutual contractual autonomy" and except where "unaddressed third-party interests are engaged, partners have free rein to structure their relations in any way they see fit." Flannagan, *supra* note 111 at 376-377.

Part of the underlying basis for Professor Flannagan's objections appear to stem from broader theological principles. Professor Flannagan disagrees with the notion that an undertaking carried on in common with a view to profit can be free of public regulation. Professor Flannagan notes that "choice of 'business structure' necessarily involves choosing amongst different default regimes of regulating interaction with third parties." Flannagan, *supra* note 111 at 380. Professor Flannagan reminds us that "[n]o legal form, including contract, is free of public regulation". *Ibid*.

[113] See Grant, *supra* note 59 at 375-376 and 398-401. Brad Grant includes three specific types of 'joint ventures' in his definition: joint ventures that are corporations, partnerships (including limited partnerships), and contractual joint ventures. *Ibid* at 378. It is the later type of joint venture which is of concern in the ALRI Final Report, as the former two categories fall, by definition, within a clearly identified legal entity, namely corporations and partnerships respectively.

[114] See Roberts, *JOAs*, *supra* note 1 at 301-306 and Styles, *supra* note 86 at 368-374. In the United States, in the specific context of oil and gas JOAs, a specific legal relationship arises when "two or more persons own or acquire a mineral interest or a right to work it, and actually engage in the joint operating of the enterprise". Boigon, *supra* note 47 at 2. This relationship is a type of Joint Venture - a "mining partnership" - and is most often "imposed by law, independent of-and often antagonistic to- express contractual declarations". *Boigon, supra* note 47 at 2. See also the recent case of *CCS Corp v Secure Energy Services Inc.* 2016 ABQB 582 where the question of whether a contractual joint venture could be distinguished from a partnership was considered by the Alberta Court of Queen's Bench. The Court noted that it was important to distinguish whether the issues involved the relationship

For example, Peter Roberts, in a text on Joint Operating Agreements, acknowledges that "a joint venture, such as that represented by the terms of a JOA could have the appearance of being a relationship that fulfils the legal definition of a partnership".[115] Notwithstanding this, according to Peter Roberts, the "view of most commentators is that the JOA is not, in substance, a partnership between the parties".[116] Rather, Peter Roberts describes the relationship between the parties to the JOA as follows:

> the JOA represents a platform for the collation of several separate persons that are all interested in carrying on a business for profit, where that platform will imply some commonality of interests between those persons. Each party has the objective of making a profit for the enterprise that the JOA represents, but that is not the same as saying that there is a joint profit motive between all of the parties together.[117]

As Peter Roberts notes, the particular wording of the JOA and the actual management of the joint lands engaged in by the parties will ultimately determine the issue.[118]

Finally, Peter Roberts questions the usefulness of engaging in the debate over whether an oil and gas joint venture is a partnership. He argues that (at least with the law in the United Kingdom), perhaps "there might be little real distinction between a partnership and a JOA in light of the various consequences, and the effort that is put into distinguishing the JOA from a partnership could have little practical purpose".[119] I would tend to agree with Peter Roberts, subject to one qualification that is directly relevant to this Chapter. That is, the differences between how partnership law and the law of co-ownership treat agency relationships.

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and duties owed between the parties to the venture versus "outsiders to it" (para 67), but the Court ultimately declined to make a determination. On the facts before it, the Court held that the defendant applicants – either as partners or participants in the joint venture – could be jointly liable for liabilities incurred and the Court refused to grant summary judgment on the issue.

115 Roberts, *JOAs*, *supra* note 1 at 301-302.

116 *Ibid* at 306.

117 *Ibid.*

118 *Ibid*. See also Styles, *supra* note 86 at 368-374.

119 Roberts, *JOAs, supra* note 1 at 303.

At common law, one co-owner is not the agent, real or implied, of the other co-owners. One co-owner does not posses the default power to bind another co-owner. In a partnership, it is a basic principle that each partner is an agent of the partnership and able to bind the partnership when acting in the usual course of business.[120] In many ways, as shall be explored in greater detail below, JOAs attempt to impose limitations on the agency of the parties which is more characteristic of mere co-ownership rather than a partnership.[121] Only the Operator has the authority to bind the parties – the extent to which the Operator is able to do so is the subject of the next section in this thesis, section 2.4.[122]

Before leaving the subject of partnership, one further issue is worthy of note – that of joint and several liability. For tenants in common, the starting point is that there is no joint and several liability. One tenant in common is not liable to third parties for the actions or inactions of the other tenants in common. The parties to the 2007 CAPL have attempted to amend this aspect of tenancy in common. The parties to the 2007 CAPL agree to be liable for their proportionate share of losses and liabilities incurred by the Operator or other parties (subject to certain exceptions). This apportioned liability is characteristic of nearly all JOAs but it is clearly not an acceptance of joint and several liability.[123]

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[120] See the *Partnership Act*, *supra* note 110, ss 6-7. The only time a third party will not be able to rely on the ability of a partner to bind the partnership (in the usual course of business), is if the partner in question does not have actual authority and the third party has notice of this. See also VanDuzer, *supra* note 102 at 54-55.

[121] Boigon, *supra* note 47 at 6.

[122] This restricted agency could be used as evidence that a JOA is not a partnership. For in many ways, this aspect of partnership law –that each partner is the principal and agent of the other partners - is one of the defining characteristics of partnership law. However, this argument could be countered with the argument that partnerships are also free to establish parameters around a partners' right to bind the partnership and give notice of these restrictions or parameters to third parties.

[123] Roberts, *JOAs*, *supra* note 1 at 185-188. See, for example, the AIPN JOA which provides in clause 14.1: "The rights, duties, obligations, and liabilities of the Parties under this Agreement shall be individual, not joint or collective." As summarized above in Section 2.2.4 of this thesis, the parties to a 2007 CAPL have gone to considerable length, through the use of detailed indemnity and liability provisions to achieve the result that the

However the internal ordering of liabilities between the parties will not affect the liability of Joint Operators to third parties.[124] In this way, the liability of the Joint Operators in a 2007 CAPL can be compared to the liability of partners in a partnership. According to the *Partnership Act* and the supporting body of common law pertaining to partnerships, in general, "all partners are liable for all liabilities of the partnership".[125] This includes: liability in contract; liability for torts and other wrongful acts or omissions of agents or employees, including breaches of fiduciary duties; and potentially even liability for the fraudulent acts of partners.[126]

As we shall see in Chapters 3 and 4 of this thesis, joint and several liability is established in most, but not all, instances of statutory environmental liability which will be addressed in this thesis. Thus in this way, the liability for third party claims against Joint Operators is similar to that of partners in a partnership.[127]

2.4 Is the Operator an Agent for the Joint Operators?

Pursuant to the terms of most model JOAs, the individual parties adopt different 'roles' or engage in different capacities, the most significant of which are the roles of Operator and Non-Operator.[128] The question of whether the Operator acts as a legal 'agent' for the Non-Operators is one which is acutely germane to the issues under consideration in this thesis. The

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parties will only be liable for their proportionate share of losses and liabilities (subject to the circumstances noted in Section 2..2.4).

[124] Roberts, *Petroleum Contracts*, *supra* note 87 at 107-108.

[125] VanDuzer, *supra* note 102 at 54.

[126] *Ibid* at 55.

[127] It is noteworthy that the drafters of the ALRI Final Report were prepared to specifically legislate the liability of non-partnership joint venturers to achieve greater certainty and clarity. The ALRI Final Report proposed that joint venturers were to be jointly and severally liable for (a) the debts and obligations to third parties (unless a contract with persons outside the joint venture provided otherwise); and (b) wrongs done to third parties, by or under the order of joint venturers. See the ALRI Final Report, *supra* note 107 at para 82.

[128] The relationship of 'participating parties' and 'non-participating parties' will be considered in Chapter 6.

establishment of an agency relationship has many consequences.[129] In Alberta, environmental statutory liability can specifically extend to those in an agent / principal relationship. As we shall see, in the context of the 2007 CAPL, the Operator may be engaged as an agent of the parties in the exercise of its rights and in the performance of its obligations under the JOA. At times, the Operator may also act as the trustee of the Non-Operators, especially with regards to property acquired for the Joint Account or the proceeds of the sale of petroleum products. In other circumstances, the Operator may be the mere 'independent contractor' of the Non-Operators.

2.4.1 An Introduction to Agency and Trust Relationships in Canada

Fridman defines agency as follows:

> Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.[130]

This definition has been widely quoted and applied by Canadian courts. For Eileene Gillese, "[a]n agency relationship arises when one person, called an agent, has express or implied authority to act on behalf of another person, called the principal".[131] Gillese distinguishes between agency and trust relationships on a number of grounds. First, while agency relationships are personal, as between principal and agent, trust relationships are

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[129] For example, a determination of whether the parties are in an agency relationship will affect the ability of third parties to enforce a contract against the Operator directly and against the Joint Operators (as principals, whether disclosed or undisclosed), the ability of the parties to enforce the contract directly against the third party and the status of the operator as a fiduciary. As such, agency creates liability for the Joint Operators for the actions of the Operator – perhaps beyond which the Joint Operators intended. Roberts, *JOAs*, *supra* note 1 at 90. Styles, *supra* note 86 at 382.

[130] GHL Fridman, *Canadian Agency Law*, 2nd ed (Markham, Ontario: LexisNexis Canada Inc., 2012) at 3-4. It should be added to Fridman's definition that agents can also create liability for their principals beyond contracts with third parties, such as under tort and criminal law. See Cameron Harvey & Darcy MacPherson, *Agency Law Primer*, 4th ed (Toronto: Carswell, 2009) at 2.

[131] Eileene E Gillese, *The Law of Trusts,* 3rd ed (Toronto: Irwin Law, 2014) at 13.

proprietary in nature. Second, trustees must have title to the trust property while agents typically do not have title to property. Third, agency arises by agreement between the parties and an agent acts on behalf of, and is subject to the control of, the principal. In contrast, there may be no agreement between the trustee and the beneficiaries and a trustee is not subject to direction or control by the beneficiaries (beyond the obligation to manage the trust property consistent with trust duties).[132]

This final element - control - is emphasized by Fridman who provides that "[w]hether someone is an agent or a trustee depends on the degree of control that is exercised over the person whose status is in question. The more control there is the more likely is it that this person will be an agent, not a trustee."[133]

Recent case law has also emphasized the importance of the factor of 'control' in determining agency and trust relationships. In *Stewart Estate v TAQA North Ltd*,[134] (addressed in greater detail in Section 4.3.1 of this thesis), Justice Rowbotham of the Court of Appeal considered the plaintiff's argument that a working interest owner could be the agent of the gross overriding royalty owner in the facts of the case before the Court.

The contract in question in this case incorporated a CAPL model contract (the 1997 Farmout and Royalty Procedure) which provides that the relationship between the working interest owner and the royalty owner is an agency relationship and further, that the working interest owner would be a "trustee" for the royalty owner. At trial, the Court was not prepared

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[132] *Ibid*. See also Fridman, *supra* note 130 at 15-18.
[133] Fridman, *supra* note 130 at 18.
[134] *Stewart Estate v TAQA North Ltd,* 2015 ABCA 357 (CanLII), leave to appeal denied [2016] SCCA No 17 [*Stewart Estate*].

to concede that the mere assertion of an agency relationship or trust relationship was enough to establish either relationship.

Justice Rowbotham noted that there was nothing to suggest that the royalty owner exerted any control over the working interest owner. The working interest owner only disposed of the produced substances from the well and paid the royalty. She recognized that "it is not always easy to draw the line between trust and agency"[135] and deferred to the trial judge's analysis of the facts, holding that the trial judge did not err in finding that the royalty owner had no liability for the actions of the working interest owner.

Further complicating the distinction between trust and agency relationships, Canadian courts have held that a trustee may also be an agent of the beneficiary in certain circumstances.[136] Whether the trustee is also an agent of the beneficiary largely depends on the fundamental question of whether the beneficiary exercises control over the trustee.[137] In addition, agent and trustee are not the only legal 'roles' that a person, such as an Operator, may embrace (or by implication be deemed to have embraced) with respect to the same undertaking. A person, such as an Operator, may also act as both an independent contractor and an agent in the course of the same project.[138]

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[135] *Stewart Estate, supra* note 134 at para 259 per Justice Rowbotham. See also *Stewart Estate, supra* note 134 at para 257 where Justice Rowbotham noted: "When there are two possible constructions of a legal relationship (agency or trust), the predominant relationship must be determined in order to assess the extent of the principal/beneficiary's liability for the agent/trustee's actions. Assuming no extricable legal error, this is a question of fact: *Trident Holdings Ltd v Danand Investments Ltd* (1988), 1988 CanLII 194 (ON CA), 64 OR (2d) 65, 49 DLR (4th) 1 (CA)."

[136] See Fridman, *supra* note 130 at 18: "... someone can be an agent and a trustee at the same time, and in the capacity of agent can enter into contracts on behalf of the beneficiaries of the trust". See also *Italtractor ITM SpA v 425528 Alberta Ltd*., 1993 CanLII 7131 (ABQB) [*Italtractor*] and *Trident Holdings Ltd. v Danand Investments Ltd.*, 1988 CanLII 194 (ONCE).

[137] *Italtractor*, *supra* note 136 at para 24.

[138] *B.C.(Hydro & Power Authority) v R*, 1996 CanLII 1783 (BC SC) at 11-12 [*BC Hydro*].

This subsection has provided a brief overview of differences between trust relationships and agency relationships and with this context in mind, I will now turn to examine the terms of the 2007 CAPL which purport to address the relationship between the Operator and the Non-Operators which will enhance our discussion of the Joint Operator's statutory environmental liability in Chapters 3 and 4.[139] As is appropriate when dealing with a commercial contractual relationship, the starting point for the discussion must be an analysis of the express intentions of the parties as reflected in their contract.

2.4.2 Express Intentions

Peter Roberts argues that "[t]he JOA should be particularly careful to address whether the operator will act as the agent of the parties in the exercise of its rights and in the performance of its obligations under the JOA, and what the impact of such an agency representation would be".[140] Roberts provides a summary of the express renouncement or express recognition of an agency relationship in some of the more common industry JOAs which have been adopted worldwide:

> The AIPN JOA makes no express reference to the operator's acting as agent, but it does expressly disclaim the existence of any agency relationship except where the JOA expressly provides to the contrary. [AIPN JOA, subclause 14.1] .... The OGUK JOA makes an express reference to the operator's agency status in respect of the operator's acting for the parties in dealings with third-party contractors. [OGUK JOA, subclause 6.5.8] In

[139] As we shall see, Canadian courts have spoken with relative frequency on the subject of whether the Operator – Non-Operator relationship established in a CAPL Operating Procedure invokes fiduciary duties. Both agency and trust relationships impose fiduciary duties on the trustee or agent, however, the converse is not true: the existence of a fiduciary duty does not necessarily import an agency or trust relationship. Regrettably, Canadian courts have not been as informative on the specific question of whether the Operator acts as 'agent' for the Non-Operators.

[140] Roberts, *JOAs*, *supra* note 1 at 90. In PW O'Regan & TW Taylor, "Joint Ventures and Operating Agreements" (1984) 14 Victoria U Wellington L Rev 85, at 90, the authors (writing from the perspective of New Zealand joint ventures), note that it "is common for a provision to be included in petroleum joint venture agreements specifically providing that the operator enters into... contracts as agent for the parties".

> the AMPLA JOA, the operator is expressly appointed as the agent of the parties for the purposes of the JOA. [AMPLA JOA, subclause 6.1.] [141]

With respect to the 2007 CAPL, Roberts notes that it is "somewhat opaque" on whether the operator is the agent of the parties.[142] As noted above, the 2007 CAPL specifically provides that:

> Nothing contained in this Agreement creates a partnership or association of any kind, imposes upon any Party any partnership duty, obligation or liability to any other Party or authorizes any Party to act as an agent of any other Party for any purpose except as expressly provided in this Agreement.[143] [Emphasis added.]

Further, clause 3.03 provides that the Operator is "an independent contractor in activities hereunder" and the Operator "will supply or cause to be supplied all material, labour and services reasonably necessary for Joint Operations".[144]

While contractual provisions expressly identifying or denying a particular legal relationship are, according to the Supreme Court of Canada, "important to note",[145] they are not determinative.[146] Indeed, Fridman argues that the terminology of 'agent' or 'contractor' or other term describing the parties' relationship is largely irrelevant to the determination of such relationship.[147] In the context of the interpretation of JOAs, clearly the express declaration that

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[141] Roberts, *JOAs*, *supra* note 1 at 90.

[142] *Ibid*.

[143] 2007 CAPL, *supra* note 13, cl 1.05A.

[144] This language is similar to the AAPL 1989 Model JOA which defines the operator's role as an "independent contractor" rather than an "agent". See William W Pugh, Harold J Flanagan & Jana Grauberger, "Don't Get Stuck With the Check When It's Not Your Dinner: Indemnity and Insurance Issues Under Joint Operating Agreements" (2008) Rocky Mountain Mineral L Foundation 6.

[145] *Midcon Oil & Gas Limited v New British Dominion Oil Company Limited and Thomas L Brook,* [1958] SCR 314, 1958 CanLII 42 (SCC) at 323-324, per Locke, J, who held, with respect to a unitization agreement, "[i]t is also of importance to note, as declared by para 20 [of the unitization agreement] that the parties in terms provided that the relationship existing between them in carrying out the terms of the agreement was neither partnership nor that of principal and agent".

[146] *Canadian Delhi Oil Ltd. v Alminex Ltd.* 62 WWR 513, 1967 CarswellAlta 73(Alta Sup Crt, App Div) at para 47-49, appeal dismissed [1968] SCR 775, 1968 CanLII 117 (SCC).

[147] Fridman, *supra* note 130 at 5-6.

the Operator is an independent contractor must be assessed against the terms of the entire JOA which provide the extent of the Operator's actual control over operations (and by implication, the degree of control of Non-Operators) and the conduct of the particular parties to the agreement.[148]

Arguably, as shall be explored in greater detail in the subsequent sections of this Chapter, the Operator has many roles when performing its obligations under the 2007 CAPL: it may be operating as trustee, agent and independent contractor simultaneously or at different times as it engages in different activities, fulfills different obligations and exercises its different rights.

2.4.3 The Fluid Nature of the Operator's Role

The capacity of the Operator to act in a number of different legal roles or relationships with the Non-Operators has been alluded to in a number of judgments in Alberta which have attempted to delineate the nature of the legal relationship between the Operator and the Non-Operators.[149] Most frequently, this analysis has centred around the question of whether the

[148] The parties' respective rights of control under the 2007 CAPL are analyzed in Section 4.3. Peter Roberts notes the following rights the Operator typically enjoys under a model JOA: staffing rights, the awarding of contracts (subject to prescribed limitations), litigation management, representation before the State, and the Operator's right to reimbursement. Roberts, *JOAs*, *supra* note 1 at 86-88.

[149] Alberta courts have considered whether a fiduciary relationship exists between the parties to an oil and gas JOA in a variety of different factual circumstances. In the context of Alberta oil and gas operations, this includes: *Great Northern Petroleums & Mines Ltd. v Merland Explorations Canada Northwest Land Limited*, 1984 ABCA 187 (CanLII); *Bank of Nova Scotia v Société générale* (Canada), 1988 CanLII 166 (AB CA)[*Société générale*]; *Mesa Operating Limited Partnership v Amoco Canada Resources Ltd*., 1994 ABCA 94 (CanLII); *Erehwon Exploration Ltd. v Northstar Energy Corp*. 1993 CanLII 7238 [*Erehwon]*; *Prairie Pacific Energy Corp. v Scurry-Rainbow Oil Ltd.*, 1994 CanLII 9132 (AB QB); *Luscar, supra* note 35; *Canada Southern Petroleum Ltd. v Amoco Canada Petroleum Co.,* 2001 ABQB 803*; Powermax Energy Inc. v Argonauts Group Ltd.,* 2003 ABQB 71 (CanLII); *Husky Oil Operations Limited v. Gulf Canada Resources Limited,* 2008 ABQB 390 (CanLII); *Adeco Exploration Company Ltd. v Hunt Oil Company of Canada, Inc.*, 2008 ABCA 214 (CanLII); and *Bernum Petroleum Ltd v Birch Lake Energy Inc*, 2014 ABQB 652 (CanLII) at para 105 [*Bernum*].

Operator is acting in a fiduciary relationship with the Non-Operators.[150] A comprehensive review of these cases and a directed analysis of the fiduciary question is beyond the scope of this Chapter which is concerned with whether the Operator acts as agent for the Non-Operators.[151] However, from their analysis of whether a fiduciary relationship exists between an Operator and Non-Operators, Alberta courts have also provided some guidance as to the nature of the relationship between the Operator and Non-Operators more generally.

For example, the basic issue before the Alberta Court of Appeal in *Bank of Nova Scotia v Société générale*[152] was the nature of the relationship between the Operator of certain oil and gas properties and several Non-Operators who were party to a 1981 CAPL Operating Procedure. The Court held that the parties' intention that the Operator act for the benefit of the Non-Operators "pervades the entire agreement". The Court held at para 6:

> [u]nder the terms of the agreement, Sorrel was constituted the operator of the oil and gas properties by the non-operators. Sorrel was given wide powers to act for them in the control and management of the exploration, development and operation of the

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[150] This was observed by the Court in *Husky Oil Operations Limited v Gulf Canada Resources Limited*, 2008 ABQB 390 (CanLII) [*Husky Oil*] where the Court noted that the test for a fiduciary relationship established in *Hodgkinson v Simms*, [1994] 3 SCR 377, 1994 CanLII 70 (SCC) at 408 had been applied by Alberta courts to many fact situations involving oil and gas joint ventures. See also DA MacWiliam, "Fiduciary Relationships in Oil and Gas Joint Ventures" (1970) 8 Alta L Rev 233; Mills, Wright & Inch, *supra* note 72; Don Greenfield & Jay Todesco, "Fundamental Aspects of Oil and Gas Law Revisited" (2004-2005) 42 Alta L Rev 75 at 82-90; and Nigel Bankes, "The legal implications of failing to continue a Crown oil and gas lease: the duty of the operator to its joint operators and to the holder of a royalty interest" (16 June 2008), online: <ablawg.ca/wp-content/uploads/2009/09/blog_nb_adeco_abca_june2008.pdf>. For more recent commentary on fiduciary relationship in general (that is, outside of the oil and gas context), see Paul Finn, "Contract and the Fiduciary Principle" (1989) 12 UNSWLJ 76 and Ciara J Toole, "Fiduciary Law and the Constructive Trust: Perfecting the Fiduciary Undertaking", (2011-2012) 49 Alta L Rev 655 at 656.

[151] For international commentary, see also Styles, *supra* note 86 at 386 where the author comments that Canadian courts appear "especially welcoming" of a fiduciary relationship between the parties to a JOA. The question of fiduciary relationships in the context of the oil and gas industry has continued to perplex the oil and gas industry and legal commentators internationally. See also Roberts, *JOAs*, *supra* note 1, Appendix H at 333; Bryan Clark, "Fiduciary Relationships Under the Joint Operating Agreement" (June 1999) Bus L Rev 150; Pierce, "Transactional Evolution", *supra* note 25 at 4; and Richard James, "Kansas Oil and Gas Law: Defining the Duty Between Participants in a Joint Operating Agreement: Amoco Production Co. v. Wilson, 976 P.2D 941 (KAN. 1999)" 1999-2000 39.

[152] *Société générale, supra* note 149.

> joint lands for the joint account. The term "joint account" is often referred to in the agreement and is expressly defined as embodying the concept of being for the benefit of the non-operators. In brief, the agreement reflects confidence of the non-operators in Sorrel as operator and expressly provides that Sorrel keep them informed, account to them and in general act for their benefit.[153]

The Court in *Erehwon Exploration*[154] considered the decision in *Société générale*, finding that in such a case (i.e. when the Operator is selling the Non-Operator's gas for the Non-Operator's account), the Operator was acting as the Non-Operator's agent and the agency relationship was a "classic case of fiduciary duties".[155] However the Court in *Erehwon* cautioned that this holding did not necessarily mean that the Operator was a fiduciary of the Non-Operator in all circumstances.[156]

The Operator's role as 'agent' is dependent on the circumstances in which the Operator is acting, the specific duty or responsibility involved and the particular conduct the Operator is engaging in. Fortunately it is not necessary for the precise nature of the legal relationship between the Operator and the Non-Operators to be identified in every situation. For the purposes of this thesis, we are primarily concerned with the Operator's relationship to the Non-Operators in the specified circumstances outlined in the next section.

2.4.4 The Operator – Non-Operator Relationship in Certain Circumstances

As we shall see in Chapter 4 of this thesis, in Alberta, legislatively defined 'persons responsible' can be held responsible for environmental liabilities. Such persons include owners of contaminating substances, owners of land, persons in control of contaminating substances

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153 *Ibid* at para 6.
154 *Erehwon, supra* note 149.
155 *Ibid* at para 141.
156 See also *Luscar, supra* note 35, where Conrad JA writing for the majority, at para 56, held that "although there may be fiduciary aspects of the duties of an operator, not every duty is fiduciary".

and agents and beneficiaries of these parties.[157] The party licensed or registered with the Regulator (and, at times, the agent or beneficiary of the licensee), can also be held liable under the Alberta statutory environmental regime. As a result, it is appropriate to narrow our analysis to ask whether the Operator is engaged as agent for the Non-Operators in the following areas: as agent for the Non-Operators in dealings with the Regulator; in the acquisition of personal and real property for the joint account; and when actively engaged in specified 'operations' for the joint account.

(a) The Operator as 'Agent' for the Non-Operators in Dealings with the Regulator

Even if the Operator is not found to be an agent of the Non-Operators elsewhere, there are some circumstances in which the Operator is required to be the agent of the Non-Operators. The 2007 CAPL recognizes this in subclause 309 which provides:

> The Operator will acquire, maintain and manage for the joint account all necessary surface rights and all licences, approvals or other rights of similar nature required under the regulations for joint operations.

The reference to the regulations likely applies to section 29 of the *Mines and Minerals Act*[158] which provides that where an oil or gas licence or lease is held by two or more persons as lessees, the lessees much designate one of their number (or any other person) as their representative for the purposes of the Act. Further, in section 29(3), the Act provides:

> (3) The lessee or lessees of an agreement are bound by the acts and omissions of their designated representative with respect to all matters arising under the agreement, or under this Act in relation to the agreement, while the designation is in effect.

The *OGCA* does not contain a similar explicit reference to a 'designated representative'. As we shall see further in Chapter 3, the *OGCA* assigns liability to operators and the licensee on

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[157] *EPEA*, *supra* note 5 at ss 1(tt) and 107(1)(c) . See Chapter 4 for a detailed discussion of 'persons responsible'.
[158] *Mines and Minerals Act*, RSA 2000, c M-17 [*MMA*].

record. There is no explicit reference to a licensee under the *OGCA* being an agent or representative of other parties. However, the *OGCA* regulatory regime does recognize that there may be (and often are) parties other than the licensee with an ownership interest in a particular well or facility.[159]

(b) Acquiring Property for the Joint Account

In the 2007 CAPL, once joint property is acquired by the Operator for the joint account, the parties are entitled to an undivided interest in that property according to their respective participating interests. The Annotations to Clause 1.05A provide:

> Although the Operator may contract for the leasing or acquisition of Joint Property in its own name, the rights acquired by the Operator for the Joint Account become Joint Property. The Non-Operators own their respective Working Interest shares of acquired Joint Property as tenants in common. [160]

Often the question of the relationship of the parties arises when an oil and gas operator becomes insolvent and creditors are attempting to cease assets.[161] In the United States it has been held that a joint operator's interest in 'joint property' of the venture is not subject to levy

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[159] Pursuant to the section 11 of the *OGCA*, no person is permitted to commence to drill a well, continue drilling operations or production operations unless (a) a licence has been issued and is in full force and effect, and (b) the person is the licensee. Section 2.010(1) of the *Oil and Gas Conservation Rules*, Alta Reg 151/1971 [*OGCR*] provides that an application for a licence shall be made in the prescribed form and include the documentation required by Directive 056. Schedule 4.1 of Directive 056, Working Interest Participants – Wells, section 7.14.2, provides that an applicant for a well licence must provide the working interest participant information when the applicant is not the 100 per cent interest participant in the proposed well. See AER, Directive 056: Energy Development Applications and Schedules (Calgary: AER, 2011).

[160] 2007 CAPL Annotations, *supra* note 72 at 7. Although a case primarily concerned with set-off, in *SemCanada Crude Company (Re),* 2009 ABQB 397 (CanLII), it was re-affirmed that monies intended for the joint accounts were held expressly in trust on behalf of all co-owners. Justice Romaine referred to the judgment of the Alberta Court of Appeal in *Société générale*, *supra* note 149 and *Brookfield Bridge Lending Fund Inc. v Karl Oil and Gas Ltd*., 2009 ABCA 99 (CanLII). See Kruger & Gilborn, *supra* note 9 at 234-235. Harking back to Section 2.3 of this Chapter, it is noted that the trust provisions found within the 2007 CAPL and other JOAs (and the fact that the money is held in trust for all co-owners), is inconsistent with partnership law. In a partnership, the 'partnership property' is not held in trust for the partners.

[161] VanDuzer, *supra* note 102. Similarly, this is often the time in which the question of whether the parties are in a partnership or joint venture relationship arises.

and sale in order to pay the debts of another Joint Operator.[162] The same principle appears to apply in Alberta. In *Direct Energy Marketing Ltd. v Kalta Energy Corp*.,[163] Kalta Energy Corporation ("Kalta") was a party to, and was operator of several oil and gas wells pursuant to several CAPL Operating Procedures (the "CAPLs").[164] Kalta entered into an agreement to purchase several separators from Ultrafab (the "Sales Transaction"). The separators were completed and delivered to several different well locations however Kalta did not pay Ultrafab for the separators. Kalta then attempted to transform the sale of the separators to rental agreements (the "ERPAs").

At trial, the Court found that property in the separators had passed to Kalta and its working interest partners prior to the attempt to transform the sale of the separators to rental agreements. In reaching this conclusion, the Court of Queen's Bench questioned whether the Operator Kalta had obtained "proper and full authority"[165] for the purchase of the separators.

The Court concluded that Kalta (as Operator), either had authority for the purchase pursuant to the terms of the 1974 CAPL (i.e. the working interest owners had signed and returned the required AFEs), or it had been granted authority under common law principles (i.e. the Non-Operators had ratified Kalta's actions *ex post facto* by their conduct - paying the cash calls - or by their implied acquiescence in accepting joint venture billing).[166]

Once the working interest participants had acquired their interest in the separators, specific consent was once again required from the Non-Operators to cancel the Sales

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[162] Boigon, *supra* note 47 at 16-17.
[163] *Direct Energy Marketing Limited v Kalta Energy Corp*., 2003 ABQB 1068 (CanLII); aff'd 2006 ABCA 40 (CanLII) [Kalta].
[164] One of the CAPLs was purported to be the 1974 CAPL Operating Procedure, but it is uncertain which other versions were used by the parties.
[165] *Kalta*, *supra* note 163 at para 34.
[166] *Ibid*.

Transaction and enter into the ERPAs. Since the Operator did not acquire this consent, the ERPAs were "void for mistake".[167] Consequently, Ultrafab did not have priority over the separators when Kalta was petitioned into bankruptcy.

In reaching its decision, the Court of Queen's Bench held that McKeary, Ultrafab's manager and owner, "knew that Kalta was probably acting for other working interest partners, even if that fact was not discussed and the other partners not named."[168] It is interesting to note that Ultrafab was deemed to know not only that Kalta, as Operator, was acting for other working interest owners, but also the extent of this authority. In the case, Ultrafab argued that it was entitled to rely on the apparent or ostensible authority of Kalta as operator to make whatever arrangements it deemed necessary in the ordinary course of its business operations. The Court of Queen's Bench held that the ERPA transaction was out of the ordinary course for both Kalta and Ultrafab. At para 42 the Court held:

> Kalta made no clear representation that it had the necessary authority to enter into the transaction, which was suggested and documented by Mr. McKeary of Ultrafab. Mr. McKeary is familiar with the oil and gas business. He was aware that the renegotiation of a sale transaction into a lease in a situation where Kalta's financial difficulties were apparent was unusual and even questionable. This was not a case where an innocent third party was deceived in a normal course transaction by the ostensible authority of an agent.[169]

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[167] *Ibid* at para 43.

[168] Kalta, *supra* note 163 at para 34.

[169] While the principles of agency enable the Operator to enter into contracts with third parties, once property is acquired for the Joint Account, the interests of the Non-Operators may also be held in trust. Peter Roberts has noted that "[t]he Operator might also hold certain property in trust as the trustee on behalf of the parties as the beneficiaries of that trust." See Roberts, *JOAs*, *supra* note 1 at 335.

An interesting question (regrettably beyond the scope of this thesis) is whether there is an industry practice "reasonably certain and so notorious and so generally acquiesced"[170] that an Operator enters into its contracts for the joint account as 'agent' of the Non-Operators.[171]

(c) The Role of the Operator When Engaged in Operations

Harmful substances released into the environment and the contamination of lands will likely arise from so called 'field oriented activities' rather than tasks of an administrative or managerial nature or 'back office' activities. The 2007 CAPL defines these types of activities as "Operations":

> "Operation" means any drilling, Deepening, Sidetracking, Completion, Recompletion, Equipping, Reworking, Abandonment or other activity provided for or conducted hereunder, including: (i) the recovery of Petroleum Substances from wells; (ii) the construction, installation, modification, expansion or operation of any Production Facility; and (iii) the conduct of any geological, geophysical, environmental, biophysical or engineering program or study respecting the Joint Lands and any other lands within the scope of that approved program or study."[172]

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[170] See *Georgia Construction Co. v Pacific Great Eastern Railway Co*., [1929] SCR 630, 1929 CanLII 30 (SCC) at 633, per Duff J.

[171] For a summary discussion of when implied terms (from custom or usage) will be read into a contract, see John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 777-779. See also *Sun Sudan Oil Co. v Methanex Corp*., 1992 CanLII 6194 (AB QB).

[172] The definition of "operation" was clarified in the 2015 CAPL. The 2015 CAPL provides that any operation must relate primarily to the exploration, development or exploitation of the Joint Lands (rather than tasks that are primarily administrative or managerial in nature). A rationale for the change was provided in a document which tabulates the 2015 updates against the 2007 CAPL:

> As a sweeping statement, industry has always regarded Operations as work type activities, rather than "back office" activities. Added because of the possibility that a court could regard activities of only a purely administrative nature as an Operation because the activity benefited the Joint Account... (See, for example, *Adeco v Hunt*) Jim MacLean, "2015 Updates to 2007 CAPL Operating Procedure" (24 November 2015), online: <landman.ca/resources/forms-store/2015-capl-operating-procedure/>.

Such 'operations', when conducted by the Operator on behalf of all Non-Operators, are defined as 'joint operations' in the 2007 CAPL and are defined to mean "an Operation authorized and conducted hereunder *for the Joint Account*". (Emphasis added.)[173]

Clause 3.01A of the 2007 CAPL, "Control and Management of Joint Operations", requires the Operator to consult with the parties periodically and keep them informed in a timely manner about Joint Operations. Further, Clause 3.01A provides:

> Subject to this Agreement, the Parties delegate to the Operator, on their behalf, management of the exploration, development and operation of the Joint Lands and management of the other Joint Property. However, the Operator does not have any obligation to initiate or optimize the exploration and development of the Joint Lands, except insofar as this Agreement includes specific obligations to the contrary. [Emphasis added.]

The language in the provisions of the 2007 CAPL provided above, *'for the joint account'* and *'delegate... on their behalf'* suggests that the Operator is acting on behalf of the Non-Operators – that the Non-Operators are being represented by the Operator.

According to Fridman, this 'representation' of the principal by the agent is one of the two "chief features" that delineates an agency relationship.[174] Recall in *Société générale*, the Court held that the parties' intention that the Operator act for the benefit of the Non-Operators pervaded the entire 1981 CAPL Operating Procedure. The Court specifically noted that under the 1981 CAPL Operating Procedure, the term 'joint account' was expressly defined as "embodying the concept of being for the benefit of the non-operators".[175]

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[173] "Joint Account" means the sharing of benefits, risks, costs, expenses and obligations by the Parties in proportion to their respective Working Interests at the relevant time. 2007 CAPL, clause 1.01.

[174] Fridman, *supra* note 130 at 15.

[175] *Société générale, supra* note 149 at para 6.

Canadian courts have generally accepted that the Operator is acting on behalf of the Non-Operators when it conducts operations for the joint account. For example, in *Talisman Energy Inc. v Questerre Energy Corp*,[176] Talisman, as Operator, sought summary judgment (relying on the terms of cl. 505(b)(iv) of the CAPL 1990) for Questerre's participating interest share (25%) of the costs of drilling and completing a well. The main issue in the case was the application of the set off provisions, however, Master Prowse noted that the *drilling work* done by Talisman, as operator, "*was done on its behalf and on behalf of Questerre as a 25% participant*".[177] (Emphasis added.)

This suggests that Master Prowse may have accepted that the Operator was representing Questerre in conducting operations for the joint account – provided the established terms of this representation were met (i.e. the AFE provisions in the 2007 CAPL).[178] Could it also be argued that the Master accepted – without explicitly acknowledging – that the Operator was acting as Questerre's agent?

According to Fridman, the second "chief feature" to delineate an agency relationship is the power of the agent to affect the legal position of the principal.[179] In the preceding section of this thesis, it was demonstrated that the Operator has the power to affect the Non-Operator's legal position through the acquisition of property – provided the terms of the 2007

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[176] *Talisman Energy Inc v Questerre Energy Corporation*, 2015 ABQB 775 *(CanLII)* [*Questerre].*

[177] *Ibid* at para 16-17. However Talisman was not entitled to summary judgment for the over one million dollar costs in completion work for which there was no signed AFE.

[178] Although Talisman was successful in obtaining summary judgment for Questerre's 25% of the drilling costs (i.e. up to casing point election), Master Prowse concluded that there was a dispute as to liability for completion costs which would require a trial.

[179] Fridman, *supra* note 130 at 15.

CAPL are adhered to.[180] It is arguable that the Operator can, in certain circumstances, affect the legal position of the Non-Operators (vis-a-vis third parties) in other ways.[181]

Clause 3.03A provides that the Operator is "an independent contractor in activities hereunder. It will supply or cause to be supplied all material, labour and services reasonably necessary for Joint Operations."[182] Further, clause 3.03A provides that the Operator's status as an independent contractor does not alter the liability and indemnification provisions found elsewhere in the agreement. As the 2007 CAPL Annotations acknowledge, typically an 'independent contractor' would assume full legal responsibility for its own negligence. However Article 4.0 of the 2007 CAPL largely absolves the Operator of legal responsibility for its own negligence in most circumstances.

Since the 2007 CAPL expressly alters the legal responsibility which would have been afforded an 'independent contractor' at common law, clause 3.03A was likely included for other reasons – perhaps as an attempt to establish that the Operator is not acting as 'agent' of the parties when entering into contracts on behalf of Joint Operations.[183]

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[180] However, it must be emphasized that the Operator does not act for the Non-Operators in every circumstance. For example, the 2007 CAPL does not empower the Operator to dispose of a Non-Operator's working interest in the documents of title that pertain to the joint lands.

[181] The parties have contractually specified the legal liability of the parties themselves through the use of liability and indemnity provisions.

[182] This language is similar to the AAPL 1989 Model JOA which defines the operator's role as an "independent contractor" rather than an "agent". See Pugh, Flanagan & Grauberger, *supra* note 144 at 2.

[183] When considering a similar provision in the 1984 CAPL, section 1501, the Alberta Court of Appeal in *Société générale, supra* note 149 at para 12, held that "this section defines the relationship of all participants in the venture inter se; it does not override the fiduciary obligation imposed on the operator when one considers the whole of the agreement... The fact that the properties were held by the parties holding a participating interest in the properties on the terms specified in s. 1501 does not obviate the operator's duties."

One of the more common 'model' contracts entered into by an Operator in the WCSB is the CAPP CAODC Master Well Service Contract.[184] This contract does not use agency language, however the contract does distinguish between the 'Operator' (who is a party to the contract) and the 'Operator Group' (who are not parties to the contract).[185] The Operator Group is granted certain benefits under the contract in the form of indemnities and the Contractor is entitled to register a lien or liens against the interests of the Operator Group.

It may be the case that the Operator does not act as agent when entering into contracts for services. However, as noted above, simply stating that the Operator is an independent contractor does not mean that the Operator will actually be held to be an independent contractor by Canadian courts. Indeed there is a complex and extensive body of case law dedicated to the question of whether an independent contractor is actually an independent contractor at law.[186] Independent contractors have often been differentiated from employees and, less frequently, from agents.[187]

An independent contractor typically agrees to generate a specified product or result. Subject to the terms of agreement between the independent contractor and the person retaining the independent contractor, an independent contractor is usually free to determine

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[184] Canadian Association of Oilwell Drilling Contractors and the Canadian Association of Petroleum Producers, "Master Daywork and Master Well Services Contract" (November 2003), CAPP Publication number 2003-0018, online: <www.capp.ca/publications-and-statistics/publications/149146> [the "Master Daywork Contract"].

[185] "Operator's Group" is defined in the Master Daywork Contract to mean "Operator, its co-interest owners, joint venturers, partners, co-lessors, its and their Affiliates and the shareholders, officers, directors, employees, agents, consultants, servants, and invitees of each of them".

[186] See Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008) at 16.

[187] See *671122 Ontario Ltd. v Sagaz Industries Canada Inc*., [2001] 2 SCR 983, 2001 SCC 59 (CanLII) where the Court asked whether the party in question was engaged as a person on his own account or on behalf of another. See also *Badger Daylighting Kindersley Ltd v Badger Daylighting Inc*, 2015 ABQB 55 (CanLII)[*Badger Daylighting*]; *BC Hydro, supra* note 138; *Thorne Riddell Inc. v Rolfe*, 1982 CanLII 1219 (AB QB); and *S K Management Inc. v The Queen*, 2003 TCC 103 (CanLII).

the method of performance of the work or services performed.[188] That is, the person retaining the independent contractor does not control the actions of an independent contractor beyond the requirements of the initial contract for services. Conversely, an agent continues to be subject to the principal's instructions and is not completely independent of the principal's control.[189] Additionally, an independent contractor is not empowered to bind the person who has retained them unless expressly (or ostensibly) authorized to do so by the employer.[190]

In other jurisdictions, Operators engaged under JOAs have typically been held to be 'agents' of the Joint Operators for contracting purposes. In the United States, it has been held that in an unincorporated joint venture, an operator typically enters into contracts with third parties as agent of the parties and the parties will be contractually liable as disclosed principals.[191]

As reasoned by Peter Roberts, despite the express provisions of many model JOAs denying an agency relationship between the parties, "[t]he commercial reality is that under the JOA the operator will act as the agent of the parties - for example, in negotiating and executing contracts with third parties".[192] This conclusion was echoed in an article by Scott Styles (which predominantly considers JOAs in the United Kingdom), where the author argues that:

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[188] Fridman, *supra* note 130 at 22. An independent contractor is significantly more independent of the employer's control or interference than a mere employee. According to Fridman, *supra* note 130 at 22, an "employee, is one who, by agreement, whether gratuitously or for reward, gives his service to another, previously called a master. An independent contractor is one who, by agreement, usually for reward, provides services for another, an employer." See also *Badger Daylighting*, *supra* note 187.

[189] See Section 4.3.2 of this thesis for an analysis of the degree of 'control' a Non-Operator has over the Operator.

[190] Fridman, *supra* note 130 at 23.

[191] Smith, *supra* note 62 at 92.

[192] Roberts, *JOAs*, *supra* note 1 at 91.

> the relationship between the operator and non-operators is inevitably in the form of agency. When contracting on behalf of the joint venture the operator will, by definition, be acting *qua* agent for the group of principals who are the members of the JOA.[193]

Whether this is the case in the context of the 2007 CAPL will likely depend on the specific fact scenario put before Canadian courts.

2.5 Summary

In this Chapter we saw that the common law relationship between working interest owners – that is, between two or more holders of working interests in oil or gas in Alberta – is usually that of tenants in common. As such, working interest owners have certain rights and obligations. Each has an equal right to enter and possess the entire estate, and can drill for and remove oil and gas from the common property without the other co-owner's consent (subject to statutory requirements). However producing co-tenants owe a duty to account to their co-owners. They may claim necessary exploration and development costs against the non-producing co-tenant's share. Finally, working interest owners are not automatic agents of each other, nor is their liability joint and several.

All of these rights and obligations may be affirmed, negated or redefined by contract. However, they are important to identify because they are the 'default rules' which will be applied where the contract between the co-owners does not address the issue.

The most commonly used model contracts between working interest owners in the WCSB are the CAPL Operating Procedures, the most recent of which (at the time of writing this thesis) was the 2007 CAPL. The 2007 CAPL explicitly provides that the parties are tenants in

[193] Styles, *supra* note 86 at 382.

common, unless otherwise specified. However this 'deliberate relationship' established by the parties may be overridden by a 'remedial relationship' imposed by a court.

While the parties to an oil and gas joint operating agreement, such as the 2007 CAPL, are often referred to colloquially as 'partners', the relationship that exists between them has often been described as a 'joint venture'. However, as noted, there is the potential in Canada and abroad for a significant degree of uncertainty over the status of joint ventures and their connection or correlation to legally recognized partnerships. Although there is no separate law applicable to 'joint ventures' *per se*, there is a vast body of common law which applies to unincorporated commercial ventures whose relationship is both created and regulated by contract. Thus the common law of co-ownership, contracts and agency will be strong influences on any determination of the parties' legal relationship.

The relationship between the Operator and the Non-Operators was also explored in this Chapter. I argued that the Operator has many roles when performing its obligations under the 2007 CAPL. The Operator may act as trustee, agent and independent contractor as it engages in different activities, fulfills different obligations and exercises its different rights pursuant to the terms of the 2007 CAPL.

The capacity of the Operator to act in a number of different legal roles or relationships with the Non-Operators has been alluded to in a number of judgments in Alberta which have attempted to delineate the nature of the legal relationship between the Operator and the Non-Operators. However, with the exception of establishing that, at times, the Operator may owe the Non-Operators a fiduciary duty, the Courts have not conclusively determined in what circumstances the Operator will act as agent for the Non-Operators.

The parties to a 2007 CAPL have expressly provided that nothing in the 2007 CAPL "authorizes any party to act as agent for any purpose except as expressly provided" therein. Furthermore, the parties have stated explicitly that the Operator is an independent contractor. Yet we noted that explicit renunciation of a legal relationship must be assessed against the balance of the language the parties have used in the JOA and the way in which the parties have conducted themselves.

A number of international commentators have argued that despite the express provisions of many model JOAs denying an agency relationship between the parties, 'the commercial reality' is that under many JOAs the operator acts as the agent of the parties - for example, in negotiating and executing contracts with third parties.

When the terms of the 2007 CAPL are reviewed in the context of agency law, there is a strong case that, in certain circumstances, the Operator acts as agent for the Non-Operators. Specifically, the Operator acts as agent for the Non-Operators when engaged in dealings with Alberta Energy; in the acquisition of personal and real property for the joint account; and when actively engaged in operations for the joint account. In each of these circumstances it is suggested that the Operator both represents the Non-Operators and, at times, has the power to affect the legal position of the Non-Operators.

CHAPTER THREE: The *Oil and Gas Conservation Act*: What is the Statutory Environmental Liability of Joint Operators?

3.1 Introduction

The *OGCA* is the primary Act which regulates oil and gas wells and facilities in Alberta.[194] One of the established purposes of the *OGCA* is to "control pollution above, at or below the surface in the drilling of wells and operations for the production of oil and gas and in other operations over which the Regulator has jurisdiction".[195] The Regulator accomplishes this, in part, by issuing remedial ECOs, pursuant to the *OGCA*, for the clean up of escaped substances and the abandonment of oil and gas wells and facilities.[196] The *OGCA* establishes the liability of certain persons to comply with such orders and pay associated costs. In this Chapter I will consider whether non-operating working interest owners (Non-Operators), under the 2007 CAPL, can be held liable to comply with clean up orders and abandonment orders or pay the costs associated with compliance of these orders.

As we shall see, a Non-Operator's liability is determined by the type of remedial ECO issued: a Section 104 Clean-Up Order, a Section 104 Clean-Up Cost Recovery Order, a Section

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[194] *OGCA, supra* note 4. See also the *Oil Sands Conservation Act*, RSA 2000, c O-7 [*OSCA*] and the *Pipeline Act*, RSA 2000, c P-15 [*Pipeline Act*]. Both the *OSCA* and the *Pipeline Act* address liability in a similar manner as the *OGCA*. For example, see section 36(1) of the *Pipeline Act*, where the Regulator may direct a pipeline operator or licensee to take any steps necessary to contain and cleanup an escaped substance. However, there are notable differences between the Acts. For example, pursuant to the *Pipeline Act*, the Regulator is not required to allocate costs. The entire amount is borne by the licensee. As we shall see *infra*, this is not the case with the *OGCA*.

[195] *OGCA*, *supra* note 4, s 4(f).

[196] These are not the only options available to the Regulator for 'pollution control' and environmental non-compliance under the *OGCA*. The AER has the statutory authority to engage in various enforcement and compliance actions. See, for example, *OGCA*, s 7 (broad authority to make any just and reasonable orders); *OGCA*, s 106 (actions against principals); and *OGCA*, s 110 (fines for enumerated offences). See also: AER, "Integrated Compliance Assurance Framework" (Calgary: AER, 2016)[ICAF] and AER, Manual 013: Compliance and Enforcement Program (Calgary: Alberta Energy Regulator, 2016)[Manual 013].

27 Abandonment Order or a Section 30 A&R Cost Recovery Order.[197] This Chapter specifically addresses the question of Non-Operator liability under the *OGCA* regulatory regime. As such, it should be read in conjunction with Chapter 4, which addresses potential liability under the *EPEA* regulatory regime, and Chapter 5 which examines the actual policy and practice of the Regulator when issuing environmental administrative orders.

3.2 Liability for Releases of Escaped Substances and Abandonment of Oil and Gas Wells and Facilities

3.2.1 Section 104 Clean-Up Orders and Section 104 Clean-Up Cost Recovery Orders

In the event of an "escaped substance" (for example oil, crude bitumen, or water) from a well or facility, the *OGCA* authorizes the Regulator to order the licensee, approval holder or operator of a well or facility from which the escaped substance appears to have escaped, to take steps to contain and clean up the escaped substance (a "Section 104 Clean-Up Order").[198] This could include something as extreme and sudden as a well blow out or a smaller event, such as a small leak that occurs over time.[199] The Regulator may also direct such persons to do anything else necessary to ensure the safety of the public and the environment.[200] Operations

[197] See also the Regulator's general powers under section 100(1) of the *OGCA* which are not specifically addressed in this thesis. This section grants the Regulator the discretion to do whatever it considers necessary to address a failure to comply with an order, direction or requirement of the Regulator in regards to the control, completion or operation of a well or facility. The Regulator may determine the costs of or incidental to this remedial work and allocate these costs among any or all of the licensee, approval holder and working interest participants. *OGCA*, *supra* note 4, s 100(2).

[198] *OGCA*, *supra* note 4, s 104. A Section 104 Clean-Up Order is issued where it appears to the Regulator that the escaped substance might not otherwise be contained and cleaned up forthwith. *Ibid*. It is not certain whether the Regulator has the discretion to name one or all of these parties in a Section 104 Clean-Up Order. To date, section 104 has not been formally challenged before a regulatory board or court.

[199] Although rare (when considering the number of wells which have been drilled in the Western Canadian Sedimentary Basin), blowouts have occurred in Alberta. For example, see the historically famous blow outs at Pelican Landing on the Athabasca River; the Royalite No. 4 sour gas blowout in Turner Valley; the Atlantic No. 3 blow out (Leduc) which required six months to cap; and the Lodgepole natural gas blowout near Drayton Valley.

[200] *OGCA*, *supra* note 4, s 104(1)(b).

undertaken to contain and clean up spills or releases of escaped substances pursuant to a Section 104 Clean-Up Order are referred to herein as "Clean-up Operations".[201]

A licensee, approval holder or operator who has conducted Clean-Up Operations (or the Regulator on its own behalf) may request the Regulator to determine the costs and expenses of Clean-Up Operations. Once the costs and expenses of Clean-Up Operations have been determined, the Regulator must "direct by whom and to what extent they are to be paid" in a Section 104 Clean-Up Cost Recovery Order.[202]

Although this language appears to grant the Regulator quite a broad discretion to allocate the costs of Clean-Up Operations, it is arguable that there must be some rational connection between the substance which has 'escaped' (and must be cleaned up) and the persons named in a Section 104 Clean-Up Cost Recovery Order.

3.2.2 Section 27 Abandonment Orders and Section 30 A&R Cost Recovery Orders

The Regulator may order a licensee or approval holder to abandon a well or facility,[203] at the Regulator's discretion, or as required by the regulations or rules (a "Section 27

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[201] *OGCA*, *supra* note 4, s 104(1)(a). Section 104 of the *OGCA* had not been judicially considered at the time of writing of this thesis. Arguably this is due to the Regulator's use of a multi-tiered compliance framework in response to breaches of this provision. See Manual 013, *supra* note 196. Documentation identifying specific instances where the AER has used this compliance framework were not readily available to the public until recently. On September 23, 2015 the AER issued Bulletin 2015-28, Posting of Participation and Procedural Decisions. In this Bulletin, the AER announced that "effective immediately" the AER intended to post on its website participation or standing decisions and substantive procedural decisions made by both hearing panels and other AER decision-makers. This includes compliance orders issued pursuant to s 104 of the *OGCA*. See Nigel Bankes, "The Alberta Energy Regulator Announces that It will Publish a Broader Range of Decisions" (29 September 2015), ABlawg.ca, online: <ablawg.ca/2015/09/29/the-alberta-energy-Regulator-announces-that-it-will-publish-a-broader-range-of-decisions/>. To date, none of these orders has been formally appealed pursuant to the ERCA or *REDA*. However, initial compliance orders will be examined in greater detail in Chapter 5 of this thesis.

[202] *OGCA*, *supra* note 4, s 104(3). Where owed to the Regulator, these costs and expenses constitute a debt payable to the Regulator. *OGCA*, *supra* note 4, s 100(3), 104(4).

[203] Section 32 of the *OGCA* widens the scope of suspension and abandonment obligations to include associated equipment and non licensed facilities that are located on the site or used in connection with the operation, suspension or abandonment of the well or facility, unless such equipment or facilities are exempted from the application of the provision by the regulations or rules.

Abandonment Order").[204] The Regulator also has the discretion to direct a working interest participant ("WIP") that is not the licensee or approval holder to abandon a well or facility.[205]

Section 29 of the *OGCA* provides that abandonment of a well or facility does not relieve the licensee, approval holder or WIP "from responsibility for the control or further abandonment of the well or facility or from the responsibility for the costs of doing that work".

It is important to identify the distinction between the Regulator's statutory jurisdiction over abandonment operations[206] versus reclamation activities[207]. While the *OGCA* grants the Regulator the authority to order the *abandonment* of oil and gas wells and facilities, it is *EPEA* which grants the Regulator the authority to order the *conservation and reclamation* of "specified land" which is defined to include oil and gas wells and facilities.[208] However, as we will see below, section 30 of the *OGCA* grants the Regulator authority over reclamation *costs*.[209]

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[204] *OGCA*, *supra* note 4, s 27(1). The AER also has express authority to order that a well or facility be suspended or abandoned where it is necessary to protect the public or the environment. *Ibid*, s 27(3). Section 3.012 of the *OGCR*, *supra* note 159, provides other triggers for abandonment. Section 3.013(1) of the *OGCR* requires that "abandonment operations" be conducted in accordance with AER, "Directive 020: Well Abandonment" (Calgary: AER, 2016)[Directive 020]. Directive 020 specifies the mandatory requirements which must be met by the "responsible duty holder as specified in legislation (e.g., licensee, operator, company, applicant, approval holder, or permit holder)".

[205] *OGCA*, *supra* note 4, s 27(2)(a). A WIP may also choose to abandon a well or facility with the consent of the Regulator. See *OGCA*, *supra* note 4, s 27(2)(b). Similarly to Section 104 Clean-Up Orders, arguably the Regulator has the discretion to name one or all of a license, approval holder or WIP(s) in a Section 27 Abandonment Order. This discretion has not been formally challenged in front of a regulatory board or court.

[206] The *OGCA*, *supra* note 4, at section 1(1)(a) defines "abandonment" as: "subject to section 68(a), means the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules and includes any measures required to ensure that the well or facility is left in a permanently safe and secure condition".

[207] *EPEA*, *supra* note 5, at section 1(ddd) defines "reclamation" to mean "any or all of the following: (i) the removal of equipment or buildings or other structures or appurtenances; (ii) the decontamination of buildings or other structures or other appurtenances, or land or water; (iii) the stabilization, contouring, maintenance, conditioning or reconstruction of the surface of land; (iv) any other procedure, operation or requirement specified in the regulations".

[208] See *EPEA*, *supra* note 5, Part 6.

[209] Section 4(b) of the *OGCA* provides that the purpose of the *OGCA* is to, *inter alia*, "secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, constructing, completing, reworking, testing, operating, maintenance, repair, suspension and abandonment of wells and facilities and in operations for the production of oil and gas or the storage or disposal of substances". Reclamation activities are not specifically mentioned.

Where a licensee, approval holder, WIP or agent has conducted an abandonment or reclamation, that person may apply to the Regulator to determine the abandonment costs and reclamation costs.[210] The Regulator must then allocate those costs to each WIP "in accordance with its proportionate share in the well or facility and shall prescribe a time for payment" (a "Section 30 A&R Cost Recovery Order").[211]

Section 30 of the *OGCA* refers to each WIP's "proportionate share" in the well or facility but does not define what is meant by 'proportionate share'. When read in the context of the *OGCA* definition of WIP (i.e. a person who owns a beneficial or legal undivided interest in a well or facility under agreements that pertain to the ownership of that well or facility), arguably, a WIP's "proportionate share" is their beneficial or legal undivided working interest share in the well or facility (a WIP's "Proportionate Share").

A WIP that fails to pay its share of costs within the period of time prescribed by the Regulator must pay, unless the Regulator directs otherwise, a penalty equal to 25% of its share of the costs.[212] Abandonment costs and reclamation costs constitute a debt payable to the licensee, approval holder, WIP, agent or the Regulator, as the case may be.[213]

While Section 27 Abandonment Orders and Section 30 A&R Cost Recovery Orders are related, the Regulator has been careful in the past to distinguish between the two types of orders. In *Dalhousie Oil Co., Re*,[214] the Energy Resources Conservation Board (ERCB)

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[210] *OGCA*, *supra* note 4, s 30. An application may be made to the Regulator to allocate the costs of suspension, abandonment or reclamation pursuant to 3.071 of the *OGCR*. The Regulator may also determine these costs based on the Regulator's own motion if the well or facility was abandoned by the Regulator or its agent.

[211] *OGCA*, *supra* note 4, ss 30(1), 30(2). In comparison, the Regulator cannot direct a WIP other than the licensee to abandon a pipeline pursuant to the *Pipeline Act*.

[212] *OGCA*, *supra* note 4, s 30(3).

[213] *OGCA*, *supra* note 4, ss 30(4), 30(5).

[214] *Dalhousie Oil Co., Re*, ERCB Decision 2010-19 (ERCB) [*Dalhousie*].

distinguished Dalhousie Oil Company Limited's arguments regarding responsibility for abandonment separate from the payment of abandonment costs:

> The Board considers Dalhousie's arguments regarding responsibility for *abandonment* to be largely irrelevant to the issue at hand, which is liability for payment of abandonment *costs* following abandonment by the ERCB. The issue of which party was responsible for abandonment of the well is moot, since the ERCB found it necessary to abandon the well when Dalhousie failed to do so when directed. The issue now is which party is liable for the costs.[215]

Accordingly, should a WIP wish to contest an abandonment order, it must do so in a timely fashion as provided for in *REDA* and not wait until the Regulator has already abandoned the well or facility and issued a Section 30 A&R Cost Recovery Order.

3.2.3 Reimbursement by the Orphan Well Fund

As we have seen, any or all WIPs can be issued a Section 27 Abandonment Order and held liable to carry out abandonment operations under the *OGCA*. Depending on to whom the order is issued, and which WIPs comply with the order, some WIPs may end up paying more than their Proportionate Share of abandonment and reclamation costs. However, this inequity is mitigated by section 30 of the *OGCA* which provides that the Regulator must (upon application) allocate the costs of abandonment and reclamation to each WIP in accordance with its Proportionate Share in the well or facility (by way of a Section 30 A&R Cost Recovery Order).

Where one or more WIPs is insolvent or defunct, a Section 30 A&R Cost Recovery Order may not – without more - provide relief to a WIP who has incurred more than its share in carrying out abandonment and reclamation operations pursuant to a Section 27 Abandonment

[215] *Ibid*, para 13. See also *Prince Resource Corporation, Review of Abandonment Costs Order No. ACO 2001-06*, AEUB Decision 2003-029 [*Prince#2 EUB*].

Order. However, the *OGCA* regulatory regime has anticipated this potential for inequity. Pursuant to the *OGCA*, where one or more of the WIPs is a "defaulting WIP",[216] the other WIPs may be entitled to apply for reimbursement by the orphan fund.

According to section 70(1) of the *OGCA*, the purposes of the orphan fund is to pay for a defaulting WIP's share of abandonment and related reclamation costs in respect of orphan wells, facilities, facility sites and well sites.[217] The *OGCA* does not clearly specify whether a Joint Operator who has paid more than their Proportionate Share is entitled to reimbursement as a right, however, a number of Joint Operators have received reimbursement in recent years. (According to the Orphan Well Association ("OWA"), in 2015-2016 the OWA paid out $2,743,000 in working interest claims. This was a 380% increase compared to $571,000 in the previous year.[218])

There are a number of preconditions. First, abandonment operations must be complete to apply for abandonment cost reimbursement.[219] With respect to an application for reclamation costs, a reclamation certificate must have been issued for the well or facility site.[220]

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[216] The Regulator has the discretion to deem a WIP to be a 'defaulting WIP' where the WIP: (i) has an obligation under the Act to contribute toward abandonment costs or related reclamation costs and has not contributed to those costs, and (ii) in the opinion of the Regulator, does not exist, cannot be located or does not have the financial means to contribute to those costs. See *OGCA*, *supra* note 4, ss 68(c), 70(2)(b).

[217] Note that pursuant to s 68(h) of the *OGCA*, a "well site" does not include any part of a well site that has been designated as a contaminated site under s 125 of *EPEA*.

[218] Orphan Well Association, "Orphan Well Association 2015-2016 Annual Report" (June, 2016), online: <www.orphanwell.ca/OWA%202015-16%20Ann%20Rpt%20Final.pdf> [OWA, "2016 Annual Report"].

[219] Abandonment is considered completed when the well abandonment is completed as per AER Directive 020 and the AER Digital Data Submission (DDS) system is updated to indicate both zonal and surface abandonments. OWA, "2016 Annual Report", at 53. *OGCR*, *supra* note 159, s 16.541(1)(f)(i).

[220] *OGCR*, *supra* note 159, s 16.541(1)(f)(ii).

The Regulator must also designate the well or facility (or an associated site) to be an orphan before reimbursement from the orphan fund can be made.[221]

3.3 Who is Liable to Comply With Environmental Orders Under the *OGCA*

As shown above, the Regulator can require *licensees, approval holders* and *operators* to undertake Clean-Up Operations pursuant to a Section 104 Clean-Up Order. The Regulator has the discretion to determine whether these same parties and others related to the escaped substance may be liable to pay the costs and expenses of Clean-Up Operations in a Section 104 Clean-Up Cost Recovery Order. In contrast, the Regulator can issue a Section 27 Abandonment Order to *licensees, approval holders* and *WIPs*. *WIPs* are then liable to pay their Proportionate Share of abandonment and reclamation costs in a Section 30 A&R Cost Recovery Order.

Regrettably, there has been limited interpretation of the definitions of these categories of persons by Alberta boards and courts.[222] Despite the limited case law, in the next Section of this thesis I will explore the definitions of each of these categories of persons, in an effort to better answer the question of whether a Non-Operator falls within the definition of any of these categories and consequently could be liable under one of the four types of *OGCA* environmental orders considered above.

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[221] *OGCA*, *supra* note 4, s 70(2)(b)(iii). Section 16.541(1) of the *OGCR* requires an application under section 70(1) of the Act for payment from the orphan fund of a defaulting WIP's share. The applicant must provide, inter alia, (i) a complete list, totalling 100 per cent of the working interest, of the working interest participants in the well or facility at the time the costs were incurred; and (ii) a summary of the steps taken to collect the costs from the defaulting working interest participant. *OGCR*, *supra* note 159, ss 16.51(1)(c), 16.51(e).

[222] Intentionally left blank.

3.3.1 The Registered Interest: Licensees and Approval Holders

The registered owner of a well or facility – the licensee or approval holder – can be determined through a review of the Regulator's records. Well licensees have been recorded by the Regulator pursuant to legislation that both includes and predates the *OGCA*, and recently the Regulator has required the identification of all WIPs when processing applications and transfers.[223] "Licensee" is defined in the *OGCA* to mean "the holder of a licence according to the records of the Regulator and includes a trustee or receiver-manager of property of a licensee".[224] The inclusion of trustees and receivers was first introduced in 2000 in the *OGCA*.[225]

The new category of "approval holder" in the *OGCA* was introduced in 2000. It is defined in the *OGCA* to mean "the holder of an approval granted pursuant to this Act, any predecessor of this Act or a regulation or rules under any of them".[226]

In the case of the 2007 CAPL, it is generally the Operator who is the licensee or approval holder on record with the Regulator. Clause 308 of the 2007 CAPL provides that the Operator will acquire, maintain and manage all necessary surface rights and all licences, approvals or

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[223] According to the AER website, WIP information is only required by the AER during four stages in the life of a well (that is, when the well is licensed, transferred, suspended, and abandoned). The AER database will not be updated outside of these four stages, however the licensee of record may submit updated WIP information to be kept on file. It is unknown whether this information has any official status. AER, "Abandonment and Reclamation – Frequently Asked Questions – Enforcement", online: <www.aer.ca/abandonment-and-reclamation/liability-management/frequently-asked-questions>.

[224] *OGCA*, *supra* note 4, s 1(1)(cc). Under section 31.1 of the *OGCA*, the Regulator may deem a transferor of a large facility to be a licensee where a large facility was transferred within two years and certain other conditions are met, largely amounting to the financial incapacity of the transferee to comply with suspension, abandonment and reclamation costs.

[225] Vlavianos Article, *supra* note 15 at 868. It was noted by the Court in *Grant Thornton Ltd. v Alberta Energy Regulator*, 2016 ABQB 278 CanLII at para 121 [*Redwater*] that after *PanAmericana de Bienes y Servicios v Northern Badger Oil & Gas Limited*, 1991 ABCA 181 (CanLII) was decided, the *OGCA* was amended in 1994 and again in 2000 to include "trustee or receiver-manager of property of a licensee". The Court of Appeal noted: "Under the provincial legislation, the Trustee is the licensee by definition." [Emphasis added by Court.]

[226] *OGCA*, *supra* note 4, s 1(1)(e).

other rights of similar nature required under the Regulations for Joint Operations. Thus it is likely that the Non-Operators will not be liable as a licensee or an approval holder, unless a joint operation's change of operatorship notices with the Regulator are not up to date.

There are very few cases which have considered the *OGCA* definitions of 'licencee' or 'approval holder' which do not involve the (repealed) section 20.1 of the *1980 Oil and Gas Conservation Act*.[227] One instance of a dispute involving a licensee challenging an order to abandon several oil and gas wells pursuant to the *1980 OGCA* is a series of cases in the twenty year saga of Sarg Oils (the "Sarg Oils Saga").[228]

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[227] *Oil and Gas Conservation Act,* RSA 1980, cO-5 [*1980 OGCA*]. The cases involving section 20.1 of the *1980 OGCA* (listed, *infra*, in this footnote) tend to focus on whether particular directors, officers and shareholders of a corporation were in actual control of the corporation and therefore could be personally liable for well abandonment costs. For a review of these cases, see Vlavianos Article, *supra* note 15 and Danielle Brezina & Bradley Gilmour, "Protecting and Supporting the Orphan Fund: Recent Legislative and EUB Policy Amendments Designed to Address Unfunded Liabilities of Oil and Gas Facilities in Alberta" (2003-2004) 41 Alta L Rev 29 at 32-33. The provisions on personal liability in the *1980 OGCA* were found to be an "ineffective enforcement mechanism" that was "difficult to administer" and were ultimately omitted from the current *OGCA*. Amos & Miron, supra note 17 at 875-876.
(The Section 20.1 cases include: *South Alberta Energy Corp., Greg Justice, 693040 Alberta Ltd., and Marc Dame: Review of Abandonment Costs Order No ACO 98-1* (2000-51)[Justice EUB]; leave to appeal granted, 2000 ABCA 267 (CanLII) [Justice CA]. See also *Legal Oil & Gas Ltd., Charles W Forester and Tartan Energy Inc. Review of Abandonment Order No. AD 98-10* (13 February 2001) AEUB Decision 2001-11 *[Legal Oil EUB 2001]; Prince Resource Corp & Richard Yu Review of Abandonment Costs Order*, AEUB Decision 2002-5 *[Prince#1 EUB]*, leave to appeal denied, 2003 ABCA 243 [*Prince CA*].)
As an alternative to the provisions on personal liability in the *1980 OGCA*, legislators included section 106 in the current *OGCA* which is believed to be more efficient than the former section 20.1. Brezina & Gilmour, *supra* note 227 at 39. See the discussion, *infra*, note 505.

[228] Not including the numerous surface rights cases involving Sarg Oils and some of the earlier Board decisions, there are three distinct lines of cases involved in the Sarg Oils Saga. The first relate to the Sarg Abandonment Cost Order and include: *Alberta (Energy Resources Conservation Board) v Sarg Oils Ltd*., 1998 ABQB 804 CanLII [*Sarg CRO-1*]; *Alberta (Energy Resources Conservation Board) v Sarg Oils Ltd.*, 2002 ABCA 174 CanLII [*Sarg CRO-2*]; leave to appeal denied [2002] SCCA No. 371. The second line of cases relate to Alberta Environment's Environmental Protection Orders and include: *Sarg Oils Ltd. v Alberta (Director, Land Reclamation Division, Alberta Environmental Protection*), AEAB Decision No 94-011, 1996 CarswellAlta 1086 (5 December 1996) [*Sarg EPO-1*]; *Sarg Oils Ltd. v Environmental Appeal Board*, 2005 ABQB 553 (CanLII) [*Sarg EPO-2*]; reversed 2007 ABCA 215 (CanLII)[*Sarg EPO-3*]. Finally, there is a distinct line of cases regarding a separate set of Sarg wells, the "Southern Alberta Wells and Facilities". These cases include: *Sarg Oils Ltd. v Alberta (Energy & Utilities Board)*, 2008 ABCA 198 (CanLII) [*Sarg SA-1*]; *Sarg Oils Ltd. v Alberta (Energy & Utilities Board),* 2011 ABCA 56 (CanLII) [*Sarg SA-2*]; *Sarg Oils Ltd., Re*, 2011 ABERCB 32 [*Sarg SA-3*].

In 1985, Sarg Oils Ltd. ("Sarg") purchased sixteen oil wells which were nearing the end of their productive lives (the "Camrose Wells"). The Camrose Wells had been operated by at least ten separate resource companies prior to Sarg. After engaging in operations on six of the wells, Sarg sold its interest in the Camrose Wells to Sundial Oil and Gas Ltd. ("Sundial") in 1988. The ERCB confirmed that Sundial had the capacity to accept the transfer of the well licenses. The assignment of the petroleum and natural gas rights was completed and registered with Alberta Energy, the transfer of the surface leases and the pipeline leases was registered, but there was a delay in registering the well licence transfers. The ERCB was holding up the transfer from Sarg to Sundial because of a proposed subsequent transfer of the well licences from Sundial to 3D Enterprises ("3D"). 3D did not meet the requirements of the *OGCA* to accept a transfer. By the spring of 1989, all equipment on the well sites had been removed by Sundial but the Camrose Wells were not formally abandoned.

In October of 1991, since Sarg was still the licensee of record, the ERCB ordered Sarg to abandon the Camrose Wells pursuant to section 7 of the *1980 OGCA* (the "Sarg Abandonment Order").[229] When Sarg failed to abandon the wells as ordered, the ERCB had the work done and issued an enforcement cost order to Sarg pursuant to section 95 of the *1980 OGCA* for repayment of the costs in the amount of $226,000.00 (the "Sarg Abandonment Cost Order").[230]

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[229] Section 7 of the *1980 OGCA, supra* note 227 provided that the Lieutenant Governor in Council may make any just and reasonable orders and directions the Board considers necessary to effect the purposes of the Act that are not otherwise specifically authorized by the Act. Sections 20.1-20.7 of the *1980 OGCA* which specifically addressed the suspension and abandonment of wells and facilities did come into effect until 1994.

[230] Section 95 of the *1980 OGCA* provided for the Regulator's general authority in regards to enforcement of orders. (Section 20.5 of the *1980 OGCA* which specifically addressed the allocation of abandonment costs did not come into effect until 1994.) Section 95(4) provided: "[t]he costs and expenses of and incidental to proceedings taken by the Board under this section are in the discretion of the Board and the Board may direct by whom and to what extent they are to be paid". Section 95(4) of the *1980 OGCA* was renumbered as section 105(4) in the current *OGCA*.

The Sarg Abandonment Order and Sarg Abandonment Cost Order led to one distinct line of cases involving Sarg, the "Sarg Abandonment Cost Order" cases.[231]

In *Sarg CRO-1*, counsel for the ERCB argued that because Sarg was the last licensee on record for the Camrose Wells, Sarg was properly named in the Sarg Abandonment Cost Order. Since section 18 of the *1980 OGCA* (now section 24 of the *OGCA*) provided that "[a] license shall not be transferred without the consent in writing of the Board", the sale of the Camrose Wells from Sarg to Sundial did not affect the status of Sarg as licensee until such time as the ERCB approved the well licence transfer.[232]

Sarg countered the Board's argument, maintaining that the ERCB was under both a common law and a statutory duty of fairness to Sarg and that the process by which Sarg was left as licensee of record in relation to the wells was unfair.[233] The Court of Queen's Bench agreed, holding that:

> The ERCB failed to discharge its duty of fairness to Sarg when it refused to transfer the well license applications from Sarg to Sundial. The delay involved in the process and the fundamental policy changes without notice to the industry were manifestly unfair to Sarg. The ERCB should not be permitted to recover a debt from Sarg that was a direct result of these unfair practices.[234]

A subsequent appeal by the ERCB to the Court of Appeal was allowed. The Court of Appeal concluded that Sarg had engaged in an impermissible collateral attack on the Sarg Abandonment Order. Specifically:

> the key issue in this case is not whether the Board acted fairly in ordering Sarg to abandon the wells, but whether Sarg made its argument about the Board's alleged unfairness in the appropriate place, at the appropriate time. The legislative scheme

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[231] See *supra*, note 228.
[232] *Sarg CRO-1*, *supra* note 228 at para 105.
[233] *Ibid* at paras 147-176.
[234] *Ibid* at para 221.

> gave Sarg a number of ways to make the arguments it wished to make. Following any of those avenues would have maintained the integrity of the administrative system and honoured the legislature's intent about the proper forum for making the decision about abandoning the wells and paying for the associated costs.[235]

The Court of Appeal's holding is clear – when disputing environmental enforcement orders, ensure that you do so in the appropriate forum at the appropriate time as prescribed by the relevant statute. This segment of the Sarg Oils Saga also provides a cautionary tale to vendors to ensure that *OGCA* well and facility licensee transfers are completed. Although the legislation has changed since the series of cases in the Sarg Oils Saga noted above– this segment of the Sarg Oils Saga shows that where a *licensee* has legal obligations under the *OGCA* to engage in abandonment or Clean-Up Operations, questions of beneficial ownership are irrelevant.

3.3.2 Working Interest Participants

As shown above, WIPs may be required to comply with a Section 27 Abandonment Order and will be required to pay for their Proportionate Share of abandonment and reclamation costs in a Section 30 A&R Cost Recovery Order. They may also be named in a Section 104 Clean-Up Cost Recovery Order.

The *OGCA* defines "working interest participant" ("WIP") to mean "a person who owns a beneficial or legal undivided interest in a well or facility under agreements that pertain to the ownership of that well or facility".[236] Beneficial ownership of oil and gas assets in Canada is not regulated or recorded by a Regulator to any significant degree and a review of industry documentation (on file with industry owners), is required in many cases to determine beneficial

[235] *Sarg CRO-2, supra* note 228 at para 25.
[236] *OGCA*, *supra* note 4, s 1(1)(fff).

ownership.[237] As one commentator has noted, the ownership of assets can be unclear and complex, especially where there is "a long history of fractured or transferred ownership interests".[238] This long history occurs in part due to the nature of the industry - conventional oil and gas operations typically occur over a period of decades with abandonment occurring only in the final stages.[239] Further:

> [t]racking ownership can be complicated by lost records, poor record-keeping, changing operators and operator practices, insolvency of working interest participants or co-owners, and even the long standing perpetuation of mistakes in the administration of the assets.[240]

Arguably, it is these complexities in determining the beneficial interest in a particular well or facility, and the not the definition of WIP in the *OGCA,* which leads to the greatest uncertainty. One problem arises because the *OGCA* is concerned with *well* and *facility* licensees, not the lessees or licensees of the underlying mineral rights. Historically, it was often the working interest ownership of the mines and minerals which was considered to be the more critical interest to properly document. Purchase and sales, asset swaps, valuation of companies – these all revolve around the mines and mineral assets. Minimal attention was paid to the ownership or licensing of a particular well or facility, particularly if that well or facility was not producing or operating. This is no longer the case for most industry participants because abandonment and reclamation costs have increased and industry participants and the

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[237] Brezina & Gilmour, *supra* note 227 at 33. But see the discussion *supra* note 223.

[238] Marion, Massicotte & Duhn, *supra* note 12 at 346.

[239] A number of other characteristics of the upstream oil and gas industry exasperate these difficulties. These include: the common practice of the industry to maintain a diverse portfolio of part interests, engaging in joint ventures with other companies pursuant to JOAs; the significant numbers of companies engaged in oil as gas exploration (although this number has been reduced in recent years); the number of agreements which can govern the relationship between oil and gas parties; and the introduction by the Alberta Crown of deep rights reversion and shallow rights reversion.

[240] Marion, Massicotte & Duhn, *supra* note 12 at 346.

public are increasingly aware of these liabilities. However, the documentation surrounding the transfer of well and facility licences can be fragmented in some cases.[241]

There are very few reported decisions where an administrative body or court has been asked to consider the definition of WIP in either the *1980 OGCA* or the current *OGCA*.[242] The *OGCA* definition of WIP was considered in *Dalhousie Oil.*[243] In this case, the Alberta ERCB was asked to review a Section 30 A&R Cost Recovery Order which had been issued following the issuance of several Section 27 Abandonment Orders in 2005 and 2006 to Dalhousie Oil Company Limited ("Dalhousie") in respect of a well that had not produced since 1922 (the "4-18 Well"). When Dalhousie failed to comply, the Board carried out re-abandonment operations in 2006.[244] Dalhousie failed to pay the ERCB's subsequent invoice within the prescribed time and was fined the statutorily mandated penalty of 25% of the abandonment costs.[245]

Dalhousie did not dispute that it was the licensee of the well in question, but argued that it was not a WIP as defined in the *OGCA*. Dalhouise argued that the 4-18 Well had been sold to Signalta who had purchased Dalhousie's interest in Turner Valley Unit No 7 ("TVU No 7").[246] However, the Board rejected Dalhousie's arguments.[247] The Board held that Dalhousie

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[241] The 2007 CAPL also has grown in complexity and length as an attempt to properly administer and document increasingly complex divisions of the Joint Lands such as where well ownership of a particular well is different than the working interest owner in the joint lands.

[242] With respect to the *1980 OGCA*, see *Justice EUB, supra* note 227 and *Legal Oil EUB 2001, supra* note 227.

[243] *Dalhousie*, *supra* note 214.

[244] *Ibid* at paras 10-12.

[245] Dalhousie's total liability amounted to approximately 0.5 million dollars.

[246] Dalhousie argued that it no longer had an interest in the 4-18 Well because (i) the well was included in the Rundle Pool which was subject to compulsory unitization by Order (TVU No 7) under the *Turner Valley Unit Operations Act*, RSA 2000, c T-9 ("*TVUO Act*") and (ii) Dalhousie had sold its interest in TVU No 7 to Signalta.

[247] The Board determined the 4-18 Well was not a part of TVU No. 7 because units are not determined solely by reference to geographic boundaries but must also penetrate or be in communication with the specified unit producing reservoir (in this case the Rundle Group). The well had never penetrated the Rundle group, but rather produced oil from nearly 660 m above the shallowest gas/oil contact of the Rundle. See Dalhousie, *supra* note 214 at paras 27-33.

did not sell the 4-18 Well to Signalta in 2006 when Signalta purchased Dalhousie's interest in TVU No 7 because the 4-18 Well had never been included in the unit.[248]

The Board held that based on the evidence before it, Dalhousie had "100 per cent ownership in the well, and as such [was] the well's sole WIP".[249] The Board held that Dalhousie was properly named in the Section 30 A&R Cost Recovery Order as the "party responsible" for payment of the costs, the penalty and any GST associated with abandonment of the 4-18 Well.[250]

As noted by Professor Bankes of the University of Calgary:

> the decision emphasizes that, at least in some cases, liability for a well may be different from the rights and responsibilities associated with a working interest position in a set of leases or other title documents...This confirms that a vendor seeking to dispose of its entire interest in an area should be careful to ensure that all wells within the area are carefully identified and listed in a schedule of assets and liabilities to be transferred (assuming that that is the shared intention of the parties) to the purchaser.[251]

In addition to Professor Bankes' warning, vendors and assignors must also ensure that the purchase and sale or other transaction is not one which leaves them vulnerable to being considered a 'deemed WIP' in future years. Pursuant to section 31 of the *OGCA*, the Regulator can deem a 'former' WIP to continue to be a WIP for the purposes of a Section 27 Abandonment Order and a Section 30 A&R Cost Recovery Order. A former WIP can only be deemed to be a WIP where the transaction occurred after a well or facility ceased to meet an economic limit test or throughput rate as prescribed in the regulations.[252] Under these

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[248] Dalhousie, *supra* note 214 at para 33-37.
[249] *Ibid* at para 23.
[250] *Ibid* at para 1.
[251] Nigel Bankes, "A century of liability for an abandoned well" (10 June 2010), ABlawg (blog), online: <ablawg.ca/wp-content/uploads/2010/06/blog_nb_dalhousie_june2010.pdf >.
[252] It does not appear that the regulations have been amended to include an economic limit test or throughput rate at the time of this thesis. Such tests would likely be dependent on the fluctuating price of natural gas and oil.

circumstances, if the successor WIP fails to pay its Proportionate Share of abandonment or reclamation costs and the successor WIP is a person other than the licensee of the well or facility, then the former WIP will be held liable for these costs.[253]

The ability of the Regulator to deem a former WIP to be a WIP (and thus subject to abandonment and reclamation costs) allows the Regulator to circumvent the "blatant dumping of liabilities".[254] However, as noted by Brezina and Gilmour, it is unclear whether liability is limited to the next successor or whether it could extend through multiple transactions and successor WIPs.[255]

Although there has been little interpretation of the *OGCA* definition of 'WIP', it is arguable that when all of the relevant definitions in the 2007 CAPL are read together, Non-Operators fall within this definition. Pursuant to the 2007 CAPL, "Non-Operator" means "a Party other than the Operator". A "Party" means "a corporation, partnership, individual, body politic, trust or other legal person that holds a Working Interest and is bound by the terms of this Agreement". A "Working Interest" means "the percentage of undivided beneficial interest

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In today's economic oil and gas climate, if the deemed WIP provisions and associated tests were implemented in the regulations, it is likely that a many wells would be deemed 'uneconomic'.

[253] *OGCA*, *supra* note 4 at s 31.

[254] Brezina & Gilmour, *supra* note 227 at 33.

[255] *Ibid* at 34. Although the focus of this thesis does not involve an analysis of the potential *contractual* liability of former owners, it has been noted that former owners may also be contractually responsible for "environmental costs" depending on the transfer documentation executed by the parties. The 2007 CAPL adopts (in clause 24.04) the 1993 CAPL Assignment Procedure. This procedure enables an assignment that may only result in a partial novation. Specifically, it has been argued that:

> Under the Assignment Procedure, the assignor expressly remains liable for obligations and liabilities which arose or accrued prior to the transfer date. Further, the assignee is only entitled to the benefits and bound by all obligations related to the assigned interest on or after the transfer date. Neither the other parties to the contract nor the assignee release the assignor from any obligation or liability which had arisen or accrued prior to the transfer date.... As a result of the effect of the Assignment Procedure, other parties to the contract, including current working interest owners, could possibly attempt to recover Environmental Costs from former owners.

See Marion, Massicotte & Duhn, *supra* note 12 at 354-355. See also Pugh, Flanagan & Grauberger, *supra* note 144 at 24-25.

held by a Party... in the Joint Lands ... a Production Facility ... or other Joint Property...".[256] "Joint Property" means "the Joint Lands, together with all other tangible and intangible property held for the Joint Account at the relevant time, including funds, wells, Production Facilities and other equipment and materials". The 2007 CAPL is an agreement that pertains to the ownership of wells and facilities drilled or acquired for the 'joint account' and the definitions in the 2007 CAPL, when read together, provide that the Non-Operators, as parties to the 2007 CAPL , hold an undivided beneficial interest in these wells and facilities.

Accordingly, a Non-Operator will likely be considered a "WIP" under the *OGCA* and subject to Section 27 Abandonment Orders and Section 30 A&R Cost Recovery Orders. Non-Operating WIPs may find some comfort in the fact that they will only be named in a Section 30 A&R Cost Recovery Order for their Proportionate Share of costs.

3.3.3 Operators

The Regulator can require 'operators' to undertake Clean-Up Operations pursuant to a Section 104 Clean-Up Order. The Regulator also has the discretion to determine whether Operators may be liable to pay the costs and expenses of Clean-Up Operations in a Section 104 Clean-Up Cost Recovery Order. Pursuant to the *OGCA*, an 'operator', with respect to a well or facility, means a "person who (i) has control of or undertakes the day to day operations and activities at a well or facility, or (ii) keeps records and submits production reports for a well or facility to the Regulator whether or not that person is also the licensee or approval holder in respect of the well or facility".[257]

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[256] These definitions are all found in subclauses 1.01 of the CAPL 2007, *supra* note 13. Issues of ownership are analysed more specifically in Chapter 4 of this thesis.

[257] *OGCA*, *supra* note 4, s 1(1)(k).

The definition of 'operator' in the *OGCA* can be contrasted with the extremely broad definition of 'operator' in *EPEA* (considered in Chapter 4), and the definition of 'Operator' in the 2007 CAPL (i.e. the "party appointed to conduct Joint Operations, subject to clause 10.04 and independent operations").[258] Clause 3.00 of the 2007 CAPL provides the function and duties of the Operator which include the control and management of joint operations. There can be little argument that the Operator in the 2007 CAPL conducts the day to day joint operations and activities at a joint well or facility. Further, the Operator under the 2007 CAPL is required to submit all reports for joint operations and the production of petroleum substances as required by the regulations.[259]

In the ordinary course of operations, it is likely that there is congruence between the *OGCA* definition of 'operator' and the CAPL 2007 definition of 'Operator'. Given the relatively narrow definition of 'operator' in the *OGCA*, it is unlikely that Non-Operators will incur statutory environmental liability through the *OGCA* category of 'operator'.

This conclusion is further supported by section 11 of the *OGCA* which provides that "no person shall commence to drill a well or undertake any operations preparatory or incidental to the well or continue any drilling operations, any producing operations or any injecting operations" unless that person is the licensee of the well and the licence is in full force and effect.[260] As a result, there should be few cases where the *de facto* operator (the party engaged in well or facility operations) is not also the operator *de jure* (the licensee recorded in the records of the Regulator). However, there have been a few cases where an operator *de jure*

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[258] 2007 CAPL, *supra* note 13, cl 1.01. 'Independent Operations' are discussed in Chapter 6 of this thesis.
[259] 2007 CAPL, *supra* note 13, cl 3.12.
[260] Section 12 of the *OGCA* provides essentially the same restrictions with regards to facilities.

has argued that since it was not the *de facto* operator, it should not be liable.[261] Generally these cases have not met with success. One of these cases is explored further in Chapter 5 of this thesis.[262]

3.3.4 Summary of Joint Operator Liability to Comply with Environmental Orders Under the *OGCA*

I have summarized my conclusions in Table 1: Statutory Environmental Liability of Non-Operators Under the *OGCA*. As with any discussion of the potential liability of a party, each case will be determined by the specific facts of the case in question, and the chart below represents only a guideline.

[table on following page]

[261] See, for example, *Legal Oil & Gas Ltd v Alberta (Surface Rights Board)*, 2001 ABCA 160 (CanLII) where Legal Oil and Gas ("Legal"), a well licensee (under the *1980 OGCA*), argued that it was not an 'operator' for the purposes of section 39(1) of the *SRA*. The Court of Appeal acknowledged the argument of the Respondent landowner that Legal was an 'operator' because it retained a well licence and, as provided by section 11 of the *1980 OGCA* (quoted in the text directly preceding this note), only the licensee could undertake 'operations'. (The party undertaking operations is usually defined as the 'operator' both in the *SRA* and the *OGCA*.) While the Court of Appeal declined to make a decision and dismissed the appeal, it "tend[ed] to agree with the submissions of counsel for the respondent that Legal, alone, as the holder of the well licence, has the right to undertake any operations on this site" (para 14).

[262] See Section 5.2 and *Coral Exploration Corporation v Apache Canada Ltd*., 2012 ABSRB 63 [*Coral Exploration*].

Table 1: Statutory Environmental Liability of Non-Operators Under the *OGCA*

Act	Environmental Compliance Order	Description	To whom may the Order be issued to?	Potential for liability	Apportion-ment of costs?
				Joint Operators	
OGCA, s 104(1)	Section 104 Clean-Up Order	Regulator may direct the person(s) named in the order to: (i) take steps the Regulator considers necessary to contain and clean up the escaped substance and to prevent further escapes, and (ii) to do anything else the Regulator considers necessary to ensure the safety of the public and the environment.	Licensees, Approval Holders, Operators	x	No
OGCA, s 104(3)	Section 104 Clean-Up Cost Recovery Order	Regulator shall determine the costs and expenses of the Clean-Up operations and direct by whom and to what extent they are to be paid.	At Regulator's Discretion	✓	Yes
OGCA, s 27	Section 27 Abandonment Order	Abandon a well or facility in accordance with the regulations or rules.	Licensees, Approval Holders, WIPs, Deemed WIPs	✓	No
OGCA, s 30	Section 30 A&R Cost Recovery Order	Regulator to determine the abandonment costs and reclamation costs and allocate those costs to each WIP	WIPs, Deemed WIPs	✓	Yes - in accordance with each WIPs Proportionate Share in the well or facility

3.4 Conclusion

This Chapter analyzed the potential for a Non-Operator under the 2007 CAPL to be liable pursuant to four types of remedial ECOs issued pursuant to the *OGCA*. I concluded that a Non-Operator arguably does not fall within the *OGCA* defined categories of 'licensee', 'approval holder' or 'operator' and therefore the Regulator could not issue a Non-Operator the first type of remedial ECO, a Section 104 Clean-Up Order, in the event a substance escaped into the environment. However, once Clean-Up Operations are complete, the Regulator may issue the

second type of remedial ECO, a Section 104 Clean-Up Cost Recovery Order, directing by whom and to what extent the costs and expenses of Clean-Up Operations are to be paid. There are no prescribed categories of persons to whom Section 104 Clean-Up Cost Recovery Orders may be issued. I argued that based on a Non-Operator's connection, as a working interest owner, to a well or facility which released the escaped substance, it was possible for Non-Operators to have liability for Section 104 Clean-Up Cost Recovery Orders.

I also concluded that Non-Operators would fall within the *OGCA* definition of WIP (or deemed WIP). Non-Operators are persons who own a beneficial undivided interest in the wells and facilities of a joint operation. There may be some uncertainty as to who may be a WIP for a particular well or facility. Beneficial interests are largely determined by examining ownership and conveyancing documentation on file with industry owners. Although the Regulator now requires parties to identify working interests in some circumstances, such ownership is considerably more complex and uncertain than determining the registered licence or approval holder. Ultimately, however, the Regulator or the courts will make a determination as to whether a party is a WIP in relation to that well or facility.

Based on my conclusions that Non-Operators would fall within the *OGCA* definition of WIP (or deemed WIP), then Non-Operators could be named in the third type of remedial ECO, a Section 27 Abandonment Order, which can be issued to licensees, approval holders and WIPs. Although no case has challenged the Regulator to date, it is arguable that the Regulator has discretion to name some or all licensees, approval holders and WIPs in a Section 27 Abandonment Order. The reason the Regulator has not been challenged over this discretion (and likely won't be challenged), is that once abandonment operations are complete, and a

determination of the costs of abandonment and reclamation is made by the Regulator, the Regulator must allocate these costs to each WIP in accordance with its Proportionate Share in the well or facility. The Regulator's allocation of costs among the WIPs is the fourth type of remedial ECO, a Section 30 A&R Cost Recovery Order. A Section 30 A&R Cost Recovery Order essentially requires those WIPs who did not pay their Proportionate Share of abandonment and reclamation costs to reimburse those WIPs who funded these operations.

The Legislature appears to have anticipated the situation where one or more WIPs in a Section 30 A&R Cost Recovery Order do not exist, cannot be located or do not have the financial means to contribute to their Proportionate Share of the costs of abandonment and reclamation. According to the procedure provided for in the OGCR, a WIP who conducts an abandonment and reclamation operation (or anyone who conducts abandonment operations) and who pays more than their Proportionate Share, may apply to be reimbursed for a "defaulting WIP's" Proportionate Share of abandonment and related reclamation costs from the orphan fund.

On the whole, the *OGCA* regulatory regime appears to be tailored to meet the specific business environment of the oil and gas industry and its unique contractual arrangements between working interest owners. The *OGCA* regulatory regime appears to establish limits to a Non-Operator's statutory environmental liability – at least with respect to the apportionment and potential reimbursement of abandonment and reclamation costs. However, this 'comfort' afforded to Non-Operators does not extend to the other statutory environmental regime applicable to oil and gas operations. On the contrary, it can be argued that Non-Operators are

exposed to greater liability pursuant to the *EPEA* regulatory regime. The *EPEA* regulatory regime is explored next, in Chapter 4.

CHAPTER FOUR: The *Environmental Protection and Enhancement Act*: What is the Statutory Environmental Liability of Joint Operators?

4.0 Introduction

This chapter examines the potential liability of Joint Operators to comply with one specific type of remedial ECO - environmental protection orders ("EPOs") – which are issued pursuant to the *Environmental Protection and Enhancement Act ("EPEA").*[263] This Chapter will consider three *EPEA* EPOs: two EPOs issued pursuant to Part 5 of *EPEA*, 'Release of Substances', and one EPO issued pursuant to Part 6 of *EPEA*, 'Conservation and Reclamation'. These EPOs may be issued to broadly defined 'persons responsible' and 'operators' – terms which include a broad range of parties.

When the definitions of 'persons responsible' and 'operator' are applied to the parties to a 2007 CAPL, arguably both the 'Operator' and 'Non-Operators' could be considered 'persons responsible' or 'operators' and thus potentially liable under an *EPEA* EPO. Chapter 4 explores how Non-Operators arguably fall within the definitions of 'persons responsible' as owners of substances and owners of contaminated sites, successors, 'principals' (in an agency relationship), and those with charge, management or control of joint operations. The definition of 'operator' in Part 6 of *EPEA* will also be reviewed and compared with the definition of 'Operator' in the 2007 CAPL. Chapter 4 shows how Operators and Non-Operators may be named (either individually or collectively) in all three *EPEA* EPOs and required to comply with the Regulator's directives.

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[263] *EPEA*, *supra* note 5. *EPEA* replaced the *Environmental Protection and Enhancement Act*, SA 1992, c E-13.3 [*1992 EPEA*] which was proclaimed into force in 1993. Unless otherwise indicated, the provisions in the *1992 EPEA* and the current *EPEA* were substantively unchanged. The other major environmental statute in Alberta is the *Water Act*, *supra* note 17. Under the *Water Act*, the Director may issue water management orders directing that a person report, maintain, stop, prevent and restore or reclaim the land. See the *Water Act* at s 99. The *Water Act* will not be considered in this thesis.

Chapter 4 also identifies the areas where the Regulator has been granted considerable discretion under *EPEA* and considers the prospects for challenging the Regulator when it uses its discretion to issue EPOs to potentially liable parties. To date, courts have resisted the temptation to second guess the Regulator – provided the Regulator issues EPOs to *EPEA* defined 'persons responsible' or 'operators'. A discussion of the Regulator's practices and policies for pursuing certain parties when issuing EPOs will wait until Chapter 5.

4.1 *EPEA*, Part 5: Environmental Protection Orders

The 'Regulator'[264] may issue an EPO to a 'person responsible' for a substance where, in the Regulator's opinion: (i) a release of a substance into the environment may occur, is occurring or has occurred; and (ii) the release may cause, is causing or has caused an adverse effect (a "Section 113 Release EPO").[265] A Section 113 Release EPO may direct a person to take any measures that the Regulator considers necessary including an enumerated list of activities in section 113(4). (Section 114 provides for emergency EPOs.)

Section 113 Release EPOs are authorized by Division 1 of Part 5 of *EPEA*. Division 2 of Part 5 of *EPEA* provides a comprehensive scheme for dealing with 'contaminated sites'. Where the Regulator has designated a contaminated site,[266] the Regulator may issue an EPO to a 'person responsible' for the contaminated site, to take any measures that the Regulator

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[264] Although the precise language of *EPEA* refers to the "Director's" jurisdiction, on March 29, 2014, under *REDA, supra* note 6, this jurisdiction (in respect of energy resource activities) was transferred to the Alberta Energy Regulator, or the "Regulator" which term shall be used herein, unless the context requires otherwise.

[265] *EPEA*, *supra* note 5, s 113. Special considerations apply where the release of the substance into the environment is or was expressly authorized by an approval, code of practice or registration or the regulations. See *EPEA*, s 113(2).

[266] *EPEA*, *supra* note 5, s 125(1). This section provides: "Where the Regulator is of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment, the Regulator may designate an area of the environment as a contaminated site".

considers necessary to restore or secure the contaminated site and the environment affected by the contaminated site (a "Contaminated Site EPO").[267]

Significant differences exist between the two types of EPOs. The Environmental Appeals Board ("EAB") has previously distinguished between what are now Section 113 Release EPOs (which are issued pursuant to section 113) and Contaminated Site EPOs (which are issued pursuant to section 129):[268]

> 38 Sections 113 and 129 are both found in Part 5 of *EPEA*, entitled "Release of Substances." Both sections give the Director broad authority to issue an EPO requiring a person responsible for pollution to assess, clean up, and generally minimize the environmental risks of pollution. ... Although both sections relate to the issuance of an EPO, the texts and contexts of section 113 and 129 differ in several fundamental respects. As outlined below, sections 113 and section 129 set out different processes for the Director to issue an EPO, different criteria which must be met before the Director can issue an EPO, and different 'persons responsible' who may be subject to an EPO.
>
> ...
>
> 48 Further, while section 129 EPOs are predicated on more rigorous procedural steps and substantive facts that [sic] section 113 EPOs, the Director has certain powers under the section 129 process that are lacking in section 113...

For the purposes of this thesis, the key differences between the two types of EPOs are: (i) who may be named in the respective EPOs (which is addressed below in Section 4.2); (ii) that there is a list of factors (prescribed in section 129(2) of *EPEA*), that the Regulator must consider when naming a 'person responsible' in a Contaminated Site EPO;[269] and (iii) that a

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[267] *EPEA*, *supra* note 5, s 129.

[268] *Imperial Oil Ltd. v Alberta (Director, Enforcement & Monitoring, Bow Region, Regional Services, Alberta Environment)*, [2002] AEAB Decision No 48 at paras 38, 48 [*Imperial EAB*]; application for judicial review allowed in part, *Imperial Oil Ltd. v Alberta (Minister of Environment),* 2003 ABQB 388 [*Imperial QB*]. Note that the Board provides references to both the applicable sections in the *1992 EPEA* and the current *EPEA*. The references to the *1992 EPEA* have been removed for ease of reading.

[269] These factors include, for example, when the substance became present in, on or under the site; whether the person knew or ought reasonably to have known that the substance was present in, on or under the site;

Contaminated Site EPO *may* contain provisions for the apportionment of the costs of carrying out the EPO.[270] There is no provision for the apportionment of liability for Section 113 Release EPOs. For Section 113 Release EPOs (and Contaminated Site EPOs that do not contain provisions for the apportionment of liability), section 240 of the *EPEA* applies. It provides:

> 240(1) Where an environmental protection order is directed to more than one person, all persons named in the order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs of doing so, including any costs incurred by the Director under section 245(2).

The Regulator does not have authority under *EPEA* to issue cost recovery orders similar to those found in the *OGCA*.[271]

4.2 *EPEA*, Part 5: Who is Liable to Comply With Environmental Protection Orders?

4.2.1 Two Related Definitions of 'Person Responsible' Under *EPEA*

The previous section introduced the two types of EPOs which can be issued under Part 5 of *EPEA*: Section 113 Release EPOs and Contaminated Site EPOs. Both of these EPOs are issued to 'persons responsible', however, 'person responsible' is defined differently depending on whether the EPO is a Section 113 Release EPO or a Contaminated Site EPO.

With respect to Section 113 Release EPOs, section 1(tt) of *EPEA* provides that a 'person responsible', when used with reference to a substance or a thing containing a substance, means:

(i) the owner and a previous owner of the substance or thing,

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whether the person took all reasonable care to prevent the presence of the substance in, on or under the site; whether a person dealing with the substance followed accepted industry standards and practice in effect at the time; and what steps the person took to deal with the site on becoming aware of the presence of the substance in, on or under the site.

[270] *EPEA*, *supra* note 5, s 129(4).

[271] Where the Regulator is required to carry out the terms of an order, the costs incurred by the Director are recoverable by the Government: (i) in an action in debt against the person to whom the EPO was directed; or (ii) as a charge against the land to pay the Minister upon the purchase of the sale of the land. *EPEA*, ss 245, 248.

(ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,
(iii) any successor, assignee, executor, administrator, receiver, receiver‑manager or trustee of a person referred to in subclause (i) or (ii), and
(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii), ... [272]

With respect to Contaminated Site EPOs, section 107(1)(c) of *EPEA* provides that in Part 5, 'person responsible for the contaminated site', means:

(i) a person responsible for the substance that is in, on or under the contaminated site,
(ii) any other person who the Director considers caused or contributed to the release of the substance into the environment,
(iii) the owner of the contaminated site,
(iv) any previous owner of the contaminated site who was the owner at any time when the substance was in, on or under the contaminated site,
(v) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in any of subclauses (ii) to (iv), and
(vi) a person who acts as the principal or agent of a person referred to in any of subclauses (ii) to (v) ... [273]

The two definitions of 'person responsible' were compared in *Imperial Oil Ltd. v Alberta*.[274] In *Imperial*, the Director issued what we now call a Section 113 Release EPO to an oil company and its real estate subsidiary requiring them to take appropriate steps to assess the extent of pollution with respect to certain lands in a subdivision in Calgary and to clean it up. In

[272] A number of subsections of the definition of 'person responsible' in s 1(tt) are not relevant to this thesis and have been specifically excluded from the definition, including, in specified circumstances, municipalities, persons conducting tests or investigations, and the Minister responsible for the *Unclaimed Personal Property and Vested Property Act*.

[273] A number of subsections of the definition of 'person responsible' in s 107(1)(c) are not relevant to this thesis and have been specifically excluded from the definition, including, in specified circumstances, municipalities and persons conducting tests or investigations.

[274] *Imperial, supra* note 268. At the time the EPOs were issued, the *1992 EPEA, supra* note 263, was in force and effect. In between the time when the appeal to the EAB was filed and the Imperial matter was heard before the EAB, the statutes of Alberta were revised and consolidated. As the provisions in question were not – for the purposes of this thesis - substantially changed, for ease of reference, the current *EPEA* provisions will be used. In *Imperial*, the EAB used referenced the *1992 EPEA* while the Court of Queen's Bench referenced both the *1992 EPEA* and the current *EPEA*.

its decision the EAB surmised that the relevant definition of 'person responsible' for the purposes of what is now a Section 113 Release EPO focuses on the person who caused or contributed to the pollution and implements the 'polluter pays' principle advocated in section 2 of *EPEA*. By contrast, the relevant definition of 'person responsible' for a Contaminated Site EPO "reaches beyond the person who caused or contributed to the pollution and attaches responsibility to any person who owns or owned the contaminated land, regardless of whether they contributed to the presence of the contaminants in the land."[275] The Court of Queen's Bench essentially agreed, summarizing that "the definition of 'person responsible for the contaminated site' casts a much wider net than the definition of 'person responsible for the substance'".[276]

In *McColl Frontenac Inc.*[277] the EAB also engaged in a complex discussion of the differences between the two definitions. In *McColl*, the appellant oil company McColl was successor to several companies that owned a site on which a gas station had operated for approximately 25 years. The gas station ceased operation in 1979 and the property was leased to an equipment rental company, A Ltd., who subsequently purchased the property "as it stands" from McColl's predecessor. The Director issued what is now a Section 113 Release EPO to McColl and McColl appealed the order to the EAB.

The Board first considered the definition of 'person responsible' in what is now section 1(tt) of *EPEA* (relevant to Section 113 Release EPOs), holding that the definition was

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[275] *Imperial EAB*, *supra* note 268 at para 47.
[276] *Imperial QB*, *supra* note 268, at para 46.
[277] *McColl-Frontenac Inc., Re*, [2001] AEAB Decision No 68 [*McColl EAB], McColl-Frontenac Inc. v. Alberta (Minister of Environment)*, 2003 ABQB 303 (CanLII)[*McColl QB].* The *Imperial* and *McColl* cases were heard within the same relative time frames. The *Imperial EAB* decision was released after the *McColl EAB* decision but before the *McColl QB* decision. I have chosen to review *Imperial* first as the *Imperial EAB* and Queen's Bench judgments appear more thorough.

"inapplicable to current and past owners, *by virtue of their ownership alone*".[278] The Board emphasized that the Legislature defined 'person responsible' - with respect to substances released into the environment - in relation to the pollution, not the overall property where the pollution is located. Specifically, the Board summarized that what is now section 1(tt) of *EPEA* defines 'person responsible' for a substance to include the owner and a previous owner of the substance and " . . . every person who ... has had charge, management or control of the substance...".[279]

In comparison, the EAB in *McColl* held that 'person responsible for a contaminated site' (in what is now s 107(1)(c) of *EPEA*) consisted of persons responsible for the substance causing the contamination (i.e. the categories of 'persons responsible' in what is now section 1(tt) for the purposes of a Section 113 Release EPO) as well as the contaminated site owner and any prior site owner who owned the site when the pollution occurred.[280]

4.2.2 The Trend Towards a Broad Interpretation of 'Persons Responsible'

Before I turn to examine the individual categories of 'persons responsible', I note that, in general, Canadian courts have tended to broadly interpret the statutory provisions assigning liability for environmental clean-up in order to capture as many potentially responsible parties

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[278] *McColl EAB*, *supra* note 277 at para 108 (emphasis added by author). However, the Board cautioned against misapplying its remarks regarding the section 1(tt) definition of 'person responsible' and the liability of owners. At n 102, the EAB in *McColl* emphasized:

> The Board stresses this qualifying phrase [italicized in the quote above], because site owners may qualify as 'persons responsible' for reasons other than their mere ownership, for example, if a property owner conducts activities on the property that discharges pollution. Even if an owner leases the property to another party who releases pollution, the owner may also be considered to have had "ownership" or "charge, management, and control" of the pollution. In addition, a person who purchases a polluted site and takes affirmative action that exacerbates the polluted condition might also be considered a 'person responsible' under section 102 [s 113 of *EPEA*]. These examples are consistent with the Board's decision in *Legal Oil,* that the current well site lessee was a 'person responsible' because he assumed responsibility for the pollution under the well-site lease.

[279] *Ibid* at para 107.

[280] *Ibid*.

as possible.[281] In *Pétrolière Impériale* the Supreme Court of Canada confirmed that the 'polluter-pay' principle has been firmly entrenched in environmental law in Canada and is found in almost all federal and provincial environmental legislation including section 113(1) of *EPEA*.[282]

Recent jurisprudence out of Ontario has interpreted the Ontario statutory provisions addressing 'who' may be liable for environmental clean-up as broadly as possible, stretching the 'polluter-pays' principle to include past and present property owners, business operators, financial participants, and other potential contributors.[283] One commentator notes that the allocation of liability to take action against pollution includes a range of potentially responsible parties, including so-called 'innocent' parties. Jamie Benidickson argues that:

> Pursuant to the various statutory schemes [in Canada], it is possible that directions may be issued to people to remedy pollution that originated prior to the passage of the legislation authorizing the orders or directed at those who were not directly responsible for the environmental damage to which they may be required to respond.[284] [Emphasis added.]

Dianne Saxe concludes that "[w]hen a choice must be made between doing nothing, paying from the public purse, or imposing the costs on the innocent, Regulators are increasingly turning to picking the pockets of the innocent".[285]

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[281] Indeed, it has been argued that "expansive approaches" to these definitions and subcategories have the "potential to extend environmental liability to institutions and individuals whose original connection with contaminated properties was financial in nature rather than operational". Benidickson, *supra* note 11 at 241.

[282] *Imperial Oil Ltd. v Quebec (Minister of the Environment),* [2003] 2 SCR 624, 2003 SCC 58 at para 23 (CanLII) [*Pétrolière Impériale]*. See also Jerry V DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" (2007) 17 J Envtl L & Prac 159 at 181.

[283] Benidickson, *supra* note 11 at 241. See also the Ontario jurisprudence, *infra*, note 337.

[284] Benidickson, *supra* note 11 at 151 citing *British Columbia Hydro and Power Authority v British Columbia (Environmental Appeal Board)*, [2005] 1 SCR 3, 2005 SCC 1 (CanLII). With respect to this debate, see JD Coop & J Fairfax, "Fairness Principle Overturned by Environmental Review Tribunal – the Pendulum Swings Yet Again" in SD Berger, ed, *Key Developments in Environmental Law* (Canada Law Book, 2010).

[285] Dianne Saxe, "Who Pays When Polluters Can't" (23 June 2013) online: < envirolaw.com/pays-polluters/>. See also, Gabrielle Kramer, "Liability Developments II: Other Persons in Care and Control: *McQuiston v Ontario*

This trend towards broadly interpreting those statutory provisions which assign liability for environmental clean-up should be kept in mind in this thesis as we interpret the specific categories of 'persons responsible' and 'operator' in *EPEA* and determine whether Non-Operators fall within these definitions.

4.3 Application to the 2007 CAPL

4.3.1 *EPEA*, Part 5: The Specific 'Categories' of Person Responsible

The Operator under the 2007 CAPL who conducts a joint operation which contaminates a site or releases a substance into the environment is the most obvious party for the Regulator to name in either a Section 113 Release EPO or a Contaminated Site EPO. The Operator will likely fall within both definitions of 'person responsible' summarized above. If an Operator is named in one of these EPOs, the 2007 CAPL permits the Operator to apportion the costs of complying with the EPO to the Joint Operators in proportion to their working interests.[286]

However, as will be explored more fully in Section 4.5, the Regulator has the discretion to name multiple parties as 'persons responsible' or chose not to name certain parties (such as the Operator) in an EPO. This may occur where the Operator is bankrupt, or unable to pay its debts and liabilities, or is otherwise unavailable to be named in an EPO.

As Section 4.3 will show, Non-Operators also arguably fall within several of the categories of both definitions of 'person responsible' in *EPEA* and therefore, Non-Operators can be named as 'persons responsible' in Section 113 Release EPOs and Contaminated Site EPOs. Accordingly, Non-Operators may be jointly and severally liable for the costs of complying with

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(Environment and Climate Change), 2015 CanLII 28335" (9 October 2015) online: <canliiconnects.org/en/commentaries/38856>. Gabrielle Kramer argues that Ontario EPOs are being issued to "parties named with absolutely no expectation of environmental liability".

[286] Subject to the exceptions reviewed in Section 2.2.4.

these EPOs (subject to a right of contribution pursuant to the 2007 CAPL – which in turn is subject to the other Joint Operators' solvency).[287]

4.3.1 (a) The Owner of the Substance or Thing Containing a Substance – s 1(tt)(i) of *EPEA*

Section 113 Release EPOs may be issued to 'persons responsible' for a substance or thing containing a substance as defined in section 1(tt) of *EPEA*. This definition includes 'the owner and a previous owner of the substance or thing containing a substance'.[288] A Joint Operator in the 2007 CAPL will likely be determined to be an 'owner of the substance or thing containing a substance' pursuant to section 1(tt)(i) of *EPEA* because a Joint Operator owns an undivided working interest in the joint property of the joint operation.

Under the 2007 CAPL, each Joint Operator has a 'working interest' (that is, a percentage of undivided beneficial interest) in: (i) the joint lands, (ii) production facilities, and (iii) other joint property.[289] 'Joint property' means the joint lands, together with all other tangible and intangible property held for the joint account at the relevant time, including funds, wells, production facilities and other equipment and materials.[290]

If the substance which escapes into the environment is not a petroleum substance but is either a substance used in operations (that is owned by the Joint Operators and not a sub-contractor) or a by-product thereof (such as drilling fluids, fuel, lubricants, fracturing fluid, or

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[287] Given the restricted length of a masters level thesis, not all of the categories of 'persons responsible' are covered in equal depth. However, I attempted to provide a comprehensive analysis of those categories most relevant to the issue of Non-Operator liability.

[288] *EPEA*, *supra* note 5, s 1(tt)(i). Pursuant to s 107(1)(a), which is provided to aid in interpretation and application in Part 5 of *EPEA*, "owner of a substance" means the owner of the substance immediately before or during the release of the substance.

[289] 2007 CAPL, *supra* note 13, cl 1.01, definition of 'Working Interest'.

[290] 2007 CAPL, *supra* note 13, cl 1.01, definition of 'Joint Property'.

facility waste), this will amount to tangible personal property held for the joint account and each Joint Operator will be a percentage owner of that substance.

If the escaped substance is petroleum, natural gas or another mineral or substance for which the Joint Operators have the right to explore, develop or produce, the issue becomes slightly more complex. But ultimately the answer is the same. Joint Operators hold a percentage undivided beneficial interest in the 'joint lands' - those lands, formations and petroleum substances that have been made subject to the JOA.[291] 'Petroleum substances' is defined in the 2007 CAPL to mean the "petroleum, natural gas ... and every other mineral or substance for which the title documents grant the right to explore, develop or produce".[292] Joint Operators therefore 'own' the petroleum substances, subject to the terms of the title documents.

The exact point at which the Joint Operators assume ownership of the petroleum substances is less certain. A number of commentators have remarked on the lack of certainty in the development of Canadian oil and gas ownership theories.[293] Michael Laffin, in a recent

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[291] 2007 CAPL, *supra* note 13, cl 1.01, definition of 'Joint Lands'.

[292] 2007 CAPL, *supra* note 13, cl 1.01, definitions of 'Petroleum Substances'. See also *ibid*, cl 1.01 definition of 'Title Documents'. The title documents typically include petroleum and natural gas licences or leases and other contractual agreements through which the Joint Operators hold their working interest in the joint lands.

[293] See Michael J Laffin, "Legal Considerations in the Development of Coalbed Methane" (2001-2002) 39 Alta L Rev 127 at 140. Laffin summarizes the conclusions of AR Lucas & CD Hunt, *Oil and Gas Law in Canada* (Toronto: Carswell, 1990), at 5, 7. Canadian courts have not yet clearly settled on an overarching theory of ownership of oil and gas. The Privy Council was prepared to assume that oil and gas in situ was the property of the fee simple owner even though it had not been reduced to possession. Such ownership was subject to defeasance if the substances moved elsewhere before the fee simple owner reduced them to possession. See *Borys v Canadian Pacific Railway* (1953), 7 WWR (NS) 546 (PC) recent years, the question of oil and gas ownership theory was brought before the courts in the context of split title lands and the ownership of coalbed methane. See *Encana Corporation v ARC Resources Ltd*., 2011 ABQB 431 (CanLII); *Encana Corporation v ARC Resources Ltd*., 2013 ABQB 352 (CanLII); and *Anderson v Amoco Canada Oil and Gas,* [2004] 3 SCR 3, 2004 SCC 49 (CanLII) [*Anderson*]. It was noted by the Supreme Court of Canada in *Anderson* at para 35 that:

> The traditional categories of property law may not easily match the realities of oil and gas ownership, a problem this Court acknowledged in *Bank of Montreal v. Dynex Petroleum Ltd*., [2002] 1 SCR 146, 2002

article considering the ownership of coalbed methane, acknowledges this uncertainty and hypothesizes that "what may be inferred from the Canadian cases is a theory that resembles qualified ownership of oil and gas in place subject to the rule of capture". [294]

Elucidating on the nature of the Lessee's interest in a Crown oil and gas lease (as opposed to the fee simple interest of the Lessor), Professor Nigel Bankes concludes:

> [t[he words of grant in the province's standard form petroleum and natural [gas] licences and leases grant a set of rights which perfectly match the elements of a profit: i.e. the right to go on to somebody else's property and win, work and remove a valuable resource. The Crown owns the corporeal estate (i.e. the oil and gas in place) and the lessee has an incorporeal right in relation to the oil and gas in place. Once severed from the ground, title to the oil and gas in place passes to the lessee as personal property. [295]

Applying these theories on the nature of the ownership of petroleum substances to the legal interest held by a Joint Operator, a Joint Operator will likely not 'own' the petroleum substances until they are 'severed from the ground' or reduced to possession.[296]

In the instance of a well blow out, the Joint Operators may not be 'owners' of the petroleum substances, as the petroleum substances have not been reduced to their possession. However, such a determination does not mean that Joint Operators could escape liability for a

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SCC 7 (SCC). The traditional categories of property law are not to be indiscriminately applied; similarly a new view of global ownership theory for oil and gas must be subject to the same caution.

The Supreme Court of Canada in *Anderson* did not see the need to determine an "overarching ownership theory" in the appeal before it.

[294] Laffin, *supra* note 293 at 140. According to Laffin, qualified ownership ("the right of the land owner or his lessee to acquire absolute title by production - often classified as a *profit à prendre*") can be contrasted with two other theories of oil and gas ownership: the theory of absolute ownership and the theory of non-ownership (natural gas should be considered for ownership purposes the same as *ferae naturae*). *Ibid.*

[295] Nigel Bankes, "Whoever Heard of Such a Thing? A Crown Oil and Gas Lease an Intangible Form of Personal Property" (1 March, 2013), ABlawg, online: <ablawg.ca/wp-content/uploads/2013/03/Blog_NB_Kasten_Shamrock_March2013.pdf>.

[296] The exact determination will depend (and be contingent upon) the underlying lease. See also the recent case of *Bussey Seed Farms Ltd. v DBC Contractors Ltd* 2016 ABQB 577 where Master Prowwse provides a concise review of the case law which establishes that where an interest in land in the nature of a *profit à prendre* is conferred, "ownership in the subject-matter is transferred to the grantee at the moment the subject-matter is severed from the soil" (para 7). In *Bussey Seed* and the reviewed cases, the subject-matter of the profit was gravel, but the same principles can be applied to an oil and gas profit.

well blow out. Recall that this Chapter only addresses Joint Operator liability to comply with certain *EPEA* EPOs.[297] Further, even if Joint Operators are not captured by the sub-category of 'owner' in the section 1(tt)(i) *EPEA* definition of 'person responsible', they likely will be caught by other categories of 'person responsible' in section 1(tt) of *EPEA*, as explored below.

Also recall that – at least in respect of Section 113 Release EPOs – the category of 'owners' in section 1(tt) of *EPEA* may arguably be insufficient (on its own) to generate liability. Although *EPEA* provides that a person need only fall within one of the categories listed in the definition of 'person responsible', the EAB in *McColl* concluded that the Regulator should not issue a Section 113 Release EPO to a party by virtue of ownership alone.[298] As noted earlier, the EAB in *McColl* emphasized the importance of whether the 'owner' also caused or contributed to the pollution.[299]

As we shall see in Section 4.3.2.2, the issue may be moot as arguably, Non-Operators also fall within the definition of 'persons responsible' in section 1(tt)(ii) of *EPEA* which establishes that every person who has or has had the care, management or control of a substance (or thing containing a substance) are also 'persons responsible'.

4.3.1 (b) The Owner of the Contaminated Site – s 107(1) of *EPEA*

Where the land in question has been designated as a 'contaminated site', it is also likely that a Joint Operator in a 2007 CAPL will be determined to be a 'person responsible' pursuant to section 107(1) of *EPEA* and thus may be subject to a Contaminated Site EPO. We know from

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[297] A joint operator may also be liable pursuant to the common law and other statutory environmental provisions.

[298] Although, once ownership is established, there may be a lower threshold to meet to fall within the definition of 'charge management or control'. For example, in *McColl EAB*, *supra* note 277, the Board speculated (in *obiter*) that if an owner leased a property to another person who released pollution, the owner may well be considered to have had both 'ownership' and 'charge, management or control' of the pollution.

[299] *Imperial EAB*, *supra* note 268 at para 47 and *McColl EAB*, *supra* note 277 at para 108.

the jurisprudence that the definition of 'person responsible for the contaminated site' subsumes the definition of 'person responsible' for the substance. Therefore if Joint Operators are liable as 'persons responsible' for the substance, they will also be 'persons responsible for the contaminated site'.[300]

For the sake of analysis, let us assume that a Joint Operator would not be considered a 'person responsible' for the substance. Does a Joint Operator fall within the definition of a 'person responsible for a contaminated site'? The definition of 'person responsible' in section 107(1)(c) of *EPEA* refers to the ownership of 'land' - the contaminated site - not the pollutant. 'Owner', with regard to land, is defined as:

(i) the registered owner of the land,
(ii) a purchaser of the land whose interest as a purchaser is shown on the certificate of title to that land, or
(iii) a tenant or other person who is in lawful possession or occupation of the land.[301]

The registered owner of the land in which a Joint Operator has a working interest would include the Crown or the fee simple freehold landowner. Crown petroleum and natural gas leasehold interests are registered with Alberta Energy,[302] however it is unlikely that this type of 'registration' is captured by the definition of 'owner' in section 1(ss)(i) of *EPEA*.

It is considerably more likely that a Joint Operator will fall within the definition of 'owner' (in regards to land) in section 1(ss)(iii) of *EPEA*. The definition of 'land' in the *Land Titles Act* ("*LTA*")[303] is defined to include oil and gas leases. If the *LTA* is read *in pari materia*[304]

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[300] *McColl EAB*, *supra* note 277 at para 107.
[301] *EPEA*, *supra* note 5, s 1(ss).
[302] With respect to freehold land, petroleum and natural gas leases are not 'registered' however they can be the subject of a caveat on title.
[303] *Land Titles Act*, RSA 2000, c L-4, s 1(m)[*LTA*].
[304] Two Acts are 'in pari materia' when the two statutes relate to the same person or thing, or to the same class of persons or things or have a common purpose. The Court in *Hayes v Mayhood et al*., [1959] SCR 568, 1959 CanLII

with the section 1(ss)(iii) definition of 'owner' of land in *EPEA*, it is likely that that a mines and minerals leaseholder will fall within this definition. Even if the two statutes cannot be read *in pari materia*, it is arguable that the definition of land in *EPEA* may be interpreted to encompass a petroleum and natural gas lease. Recall that Canadian courts have consistently interpreted the categories of 'responsible person' quite broadly in accordance with the public interest of having polluted land 'cleaned up'.[305]

Further, petroleum and natural gas leases have been held to amount to interest in land in a number of separate contexts.[306] Recently, in the case of *Stewart Estate v TAQA North Ltd,*[307] Justice O'Ferrall affirmed that mines and minerals are interests in land. [308] Justice O'Ferrall held that the "[t]he debate over whether there can be a trespass to mines and minerals should be put to bed." He quoted GHL Fridman who reasoned that "[t]he expression 'land', at least for the purposes of the law of trespass, not only includes the surface, i.e., the topsoil, but may extend to cover the earth below and air above the surface". [309]

Although it was the Lessor's possessory interest in a petroleum and natural gas lease that was at issue in *Stewart Estate*,[310] the case is relevant to this discussion because the Court

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72 (SCC), affirming (1958) 24 WWR 332 at 575-577, affirming (1958) 24 WWR 332, held that the definition of "land" in the *LTA* is not to be considered *in pari materia* with all other legislation in which land is mentioned without regard to the purposes for which such other legislation is passed. It is beyond the capacity of this thesis to engage in a lengthy comparison of the purposes of the *LTA* and the contaminated sites division of *EPEA*. However, it is important to recognize that the possibility of the statutes being read *in pari materia* exists.

[305] See the discussion *supra* in Subsection 4.2.2 of this Chapter.

[306] See, for example, *Bank of Montreal v Enchant Resources Ltd.,* 1999 ABCA 363 (CanLII), affirmed [2002] 1 SCR 146, 2002 SCC 7 (CanLII).

[307] *Stewart Estate*, *supra* note 134.

[308] *Stewart Estate*, *supra* note 134, per Justice O'Ferrall at n 6.

[309] *Ibid*, citing GHL Fridman, *The Law of Torts in Canada*, 2nd ed, (Toronto: Thomson Canada Limited, 2002) at 43.

[310] The appeal in *Stewart Estate* centered on the interpretation of five freehold petroleum and natural gas leases and whether they had continued in force after their primary term once production had been suspended. The trial judge had found that "an energy company that extracts resources from land owned by another without a valid

of Appeal was required to speak to both the characterization of petroleum and natural gas leases and the parties' possessory interest therein.[311] Justice O'Ferrall concluded that "[s]ubject to the rule of capture, minerals can also be wrongfully converted when a party without authority reduces them to possession by severing them from the subterrain".[312] Accordingly, Justice O'Ferrall held that, in the case before the Court, both a trespass and a wrongful conversion had occurred.

Madam Justice Rowbotham first noted that when considering the nature of an oil and gas lease (which is not a traditional lease because it grants a *profit à prendre to minerals in situ below the surface), "*traditional notions of occupation and possession are not an exact fit".[313] Second, she noted that the party in possession of land may sue someone trespassing on that land: "When the owner of land has granted a lease and the lessee tenant has taken possession of the land, the tenant has exclusive possession and can sue for trespass". She concluded that this basic principle was applicable to oil and gas leases and could be applied to the lessor's reversionary interest in the land.[314]

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lease violates a property right of a person" but the trial judge did not provide a definitive characterization of the applicable cause of action in the case. *Stewart Estate*, *supra* note 134 at para 163.

[311] There are three separate judgments in the nearly 100 page decision of the Court of Appeal, however, as summarized by Professor Nigel Bankes, "all three members of the panel concluded that the lessees' actions fitted the elements of the causes of action in both trespass and in conversion." Nigel Bankes, "Court of Appeal Assesses Damages for Production on a Dead Oil and Gas Lease: An Important but Ultimately Disappointing Decision", ABlawg, (3 December 2015), online: < ablawg.ca/wp-content/uploads/2015/12/Blog_NB_Court-of-Appeal-assesses-damages-for-production-on-a-dead-oil-and-gas-lease_Dec2015.pdf>.

[312] *Stewart Estate*, *supra* note 134 at n 6.

[313] *Ibid* at para 162.

[314] *Ibid* at para 165. In the case before her, Madam Justice Rowbotham was concerned with trespass to the Lessor's reversionary interest, not trespass to the Lessee's interest. She concluded that when the interest granted is a *profit à prendre*, (i.e., the lessee's right to go on the land for the limited purpose of severing the minerals and making them its own), such an interest was particularly suitable to a claim for trespass of a reversionary interest. As she explained, this was because the holder of the profit does not own the minerals in situ. They form part of the fee. What the holder of the profit owns are mineral claims and the right to exploit them through the process of severance. When the right to go on the land and sever the minerals has terminated but severance nevertheless

Although the fragmented nature of the *Stewart Estate* decision lessens its precedential value, the judgment of Madam Justice Rowbotham arguably supports the suggestion that a petroleum and natural gas lessee's interest in land is possessory. By extension, a petroleum and natural gas lessee could be defined as "a tenant or other person who is in lawful possession or occupation of the land" as per the section 1(ss)(iii) of 'owner' in *EPEA*. Accordingly, a Joint Operator (who is an oil and gas lessee) may fall within the definition of 'owner', with regards to land, and thus may be a 'person responsible' for a contaminated site. As a 'person responsible' for a contaminated site, a Joint Operator is a person to whom the Regulator can issue a Contaminated Site EPO.

4.3.1 (c) Successors, Assignees and Former Owners

'Successors and assignees' of persons referred to in many of the other categories of 'person responsible' are also defined as 'persons responsible' in their own right. Accordingly, the Regulator has the discretion to issue successors and assignees a Section 113 Release EPO or a Contaminated Site EPO, as applicable.[315]

As explored in Chapter 3, it is customary in the oil and gas industry for Joint Operators to assign and transfer their ownership interests, stipulating by contract that either the assignor or the assignee will be responsible for environmental liabilities.[316] However, this contractual

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continues, the reversioner has been deprived of its fee interest, which constitutes the trespass of the reversion. *Stewart Estate*, *supra* note 134 at paras 166-168.

[315] See the definitions of 'person responsible' in sections 1(tt)(iii) and 107(1)(c)(v) for a complete description of the category of successors and assignees.

[316] See the discussion *supra* note 256.

assignment of environmental liabilities does not supersede the statutory allocation of liability or affect the liability of successors and assignees to comply with EPOs.[317]

In *McColl*,[318] the Board disagreed with McColl's argument that the assumption of responsibility for liability for pollution had been voluntarily accepted by the subsequent purchaser of the land through contract. At para 106 the Board held:

> 106 ...The Board disagrees with McColl that Texaco's contractual relationship with Al's Rentals should absolve McColl of liability under the Order. The liability created by section 102 [now section 113] is to the public and is determined, not by private contract principles, but by *EPEA*. McColl is clearly a person responsible based on its relationship to the site before it was sold to Al's Rentals. The Board finds nothing in section 102 or related provisions of *EPEA* that allow a person responsible for pollution to unilaterally end that legal status through private contractual arrangements.

In *Legal Oil*[319] the Director of Alberta Environment issued the equivalent of what is now a Section 113 Release EPO to Legal Oil who was an assignee of the Lessee's interest under a petroleum and natural gas lease.[320] The lease granted the Lessee "the right of entering upon, using and occupying the lands or so much thereof and to such an extent as may be necessary or convenient". It also required the Lessee to indemnify the landowner for any loss, injury, damage or obligation to compensate for loss or damages.[321]

At the Board level, the EAB held that the former Lessee, Sinclair Canada Oil Company ("Sinclair"), had assigned its entire interest under the lease to Legal Oil's predecessor and therefore Legal Oil had accepted Sinclair's obligations under the lease. The EAB concluded that

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[317] Although the contractual assignment of environmental liabilities may enable a Joint Operator to succeed in a contractual claim for reimbursement of the costs associated with complying with an environmental EPO – provided the contractually responsible party is solvent.

[318] *McColl EAB*, *supra* note 277.

[319] *Legal Oil QB, supra* note 16.

[320] By the time the EPO was issued, Sinclair Canada Oil Company no longer existed. *Legal v Director, Land Reclamation Division, Alberta Environmental Protection* [1999] AEABD No 22 [*Legal Oil EAB 1999*].

[321] *Legal Oil QB*, *supra* note 16 at paras 39- 40.

"[t]hrough this inheritance, Legal Oil became the "owner" of the released substances; Legal Oil had "management and control" over those substances; and Legal Oil was a "successor" and "assignee" of Sinclair, which itself was an "owner" of, and had "management and control" over, those substances.[322]

Commenting on *Legal Oil*, Robert Omura argues that "it would appear that a subsequent party who assumes a predecessor's obligations without reservation in the contract can be liable for the whole of its predecessor's share of the damages".[323] Further, Robert Omura argues that the definition of 'successor' should not equate with 'successor in title'. Instead, he suggests a number of purposive meanings including: (i) those who voluntarily assume responsibility by contract or agreement; (ii) those successors with an 'identity of personality'; or (iii) circumstances where there is a 'continuity of enterprise'. Additionally, 'successor' could be defined in order to prevent fraudulent transactions.[324]

This analysis suggests that both current Joint Operators and Joint Operators that have previously disposed of their working interest may fall within the definitions of 'person responsible' in *EPEA*.[325]

4.3.1 (d) Principals and Agents

Finally, both definitions of 'person responsible' in *EPEA* also include a person who acts as the principal or agent of a person referred to in several of the other categories of 'persons responsible'.[326] In Section 2.4 of this thesis, I argued that in certain circumstances, the

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322 *Legal Oil EAB 1999*, *supra* note 320 at para 16.
323 Omura, *supra* note 19 at 86-87.
324 *Ibid* at 87.
325 See *EPEA*, *supra* note 5, ss 1(tt)(iv), 107(1)(c)(vi).
326 *EPEA*, *supra* note 5, ss 1(tt)(iv), 107(1)(c)(vi).

relationship between the Operator and the Non-Operators is that of principal – agent. [327] These circumstances include when the Operator: engages with the Regulator; acquires personal or real property for the joint account; and, in some instances, when the Operator conducts operations on the joint lands. Accordingly, an Operator's liability as a 'person responsible' will likely extend to Non-Operators as a result of their agency relationship.

Although not a case involving upstream oil and gas operations, in *Imperial* the EAB considered the liability of two distinct parties to a Joint Venture Agreement.[328] Devon Estates Limited ("Devon")(a wholly owned subsidiary of Imperial), and Nu-West Developments ("Nu-West") entered into a joint venture to develop the Lynnview Ridge lands in Calgary into a residential subdivision, with Nu-West providing the development expertise, and Devon providing the lands. Pursuant to the Joint Venture Agreement between the companies, Nu-West was designated the operator, and each party had an equal interest in the joint account. Nu-West was required to continuously communicate with Devon so that Devon could participate in the joint planning and other decisions making.[329]

Even though Devon was not the operator of the joint venture, the EAB concluded that Devon met the definition of 'person responsible' under section 1(tt) of *EPEA*[330] and was named in what is now a Section 113 Release EPO, because, *inter alia*, Devon was aware of the presence

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[327] A different definition of 'principals' was analysed in Omura, *supra* note 19 at 90-91 with respect to principals of a corporation and issues of piercing the corporate veil. On this issue, see also s 253 of *EPEA*, *supra* note 5, regarding vicarious liability.

[328] *Imperial EAB*, *supra* note 268.

[329] *Ibid* at para 69.

[330] At the time the EPO was issued, Nu-West no longer existed and therefore was not pursued by the Director in connection with the pollution. *Ibid* at para 199.

of hydrocarbons at the subdivision lands, it was the owner of the subdivision lands and it was jointly engaged in the development of the subdivision lands.[331] At para 68, the Board held:

> The Board finds that the fact that Devon Estates was not the operational partner of the land development joint venture between it and Nu-West, does not absolve it of responsibility for the development of the land and the associated charge, management or control of the Substances. The Board is satisfied that through meetings with Nu-West and the receipt of information from Nu-West, Devon Estates was sufficiently aware of the ongoing development activities and was in a position to prevent activities on the Subdivision Lands of which it did not approve. Devon Estates was at least the principal of others who were directed to manage the Substances during development. [Emphasis added.] [332]

The Board expressly refers to Devon as a 'principal of others' who were directed to manage operations. This may be a reference to the definition of 'person responsible' in section 1(tt)(iv) of *EPEA*. The EAB's reasons also appear to suggest that Devon may also have had the 'charge, management or control' of operations in its own right (i.e. Devon may have met the criteria in section 1 tt(ii) of *EPEA*). This category of 'person responsible' is examined in Section 4.3.2 of this Chapter.

4.3.2 Do Non-Operators Have 'Charge, Management or Control' of Joint Operations?

The issue of whether a Non-Operator has 'charge, management or control' of joint operations – and 'control' in particular – pervades almost every Chapter of this thesis. In Chapter 2, 'control' is a factor in determining whether an agency relationship arises between the Operator and Non-Operator. In Chapter 3, the amount of 'control' a Non-Operator has over joint operations influences whether a Joint Operator will fall within the *OGCA* definition of

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[331] *Imperial EAB*, *supra* note 268 at para 68.

[332] In the application for judicial review of the EAB's ruling, the Court of Queen's Bench treated 'Imperial' and 'Devon' as the same entity. There was no further mention of Devon's liability - distinct from Imperial's. Ultimately, the Alberta Environment Director and Imperial entered into a Remediation Agreement in 2005 and as a result, the Director of Alberta Environment withdrew the EPOs that had been issued against Imperial and Devon. Imperial and Devon abandoned the appeals they had filed against those orders. See *Imperial QB*, *supra* note 268 and *Imperial Oil Ltd. v Calgary (City)*, 2014 ABCA 231 at para 5.

'operator'. In Chapter 4, 'control' comprises part of one of the categories of 'person responsible' in section 1(tt) of *EPEA*.[333] Accordingly, we now turn to a more detailed analysis of whether a Joint Operator – in particular a non-operating Joint Operator – has 'charge, management or control' of joint operations and by extension a potential polluting substance (or thing containing a substance) - pursuant to the provisions of the 2007 CAPL.

4.3.2.1 The Definition of Control

The definition of 'control' is context specific. For example, in the corporate law context, the Supreme Court of Canada has held that the word 'control' is a term of art, not directed to control of the physical assets of an underlying company but to control of the company itself; i.e. *de facto* control.[334]

In practice, those having the right of control or actual control could include such legal persons as tenants, landlords, parents, subsidiaries and/or amalgamated companies, agents, officers, directors and employees. A full consideration of the issue of what constitutes sufficient control to make a person liable ('control liability') is beyond the scope of this thesis.[335] In the context of statutory environmental liability, whether a person has a sufficient degree of 'control' of an operation to attract liability appears to differ depending on the provincial environmental legislative scheme in question.[336]

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[333] Arguably it also applies to the definition of 'person responsible' in section 107(1)(c) as the definition of 'person responsible' in section 1(tt)(ii) of *EPEA* is subsumed by the definition of 'person responsible' in section 107(1)(c)(i) of *EPEA*.

[334] See *Atco Ltd. v Calgary Power Ltd*., [1982] 2 SCR 557, 1982 CanLII 208 (SCC), per Wilson J (in dissent) at p 561.

[335] See however the seminal case of *R v Sault Ste. Marie,* [1978] 2 SCR 1299, 1978 CanLII 11 (SCC) and subsequent jurisprudence. See also Christopher Donald, "Limited Partnerships and the "Control" Liability of Limited Partners" (2007) 44 Can Bus L J 398 and Omura, *supra* note 19 at 92-94.

[336] For example, see the meanings of 'management' and 'control' in an environmental context in jurisdictions such as Ontario where there is a substantial volume of jurisprudence broadly interpreting the potential persons who

In Alberta, there is limited jurisprudence on this issue. Although the Board did not provide detailed reasoning in *Legal Oil*,[337] Legal Oil argued that it was not a 'person responsible' with respect to the polluted 'off-site' areas of an oil and gas lease because Legal had no control or legal relation to the off-site pollution.[338] The EAB disagreed, holding that the lease in question applied to the 'off-site' areas and therefore Legal Oil had the requisite 'management and control' over the released substances to be named as a 'person responsible' in what is now a Section 113 Release EPO. The Board held that once it was established that Legal Oil was the Lessee and that the lease encompassed the 'off site' areas, Legal assumed management and control of the released substances.[339]

While not an oil and gas case or a case involving an EPO, in *R v Edmonton City,*[340] the Court engaged in a detailed analysis of when a person will have sufficient 'control' of a pollutant sufficient to attract liability under *EPEA*. In *Edmonton City,* the city leased a stadium to a local organizing committee (LOC) for the purpose of the LOC's hosting a world championship. The LOC decided to leave the stadium lights lit 24 hours per day. On three occasions insulating oil (containing PCBs) from ruptured capacitators from the lights fell onto

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could be named in an EPO pursuant to the *Environmental Protection Act*, RSO 1990, c E-19. See, for example, *724597 Ontario Ltd., Re*, 1994 CarswellOnt 333 (ONEAB); the "Kawartha Decisions" (*Kawartha Lakes (City) v Ontario (Director, Ministry of the Environment)*, [2010] OERTD No 32 (Ont Environmental Review Trib), *Kawartha Lakes (City) v Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2708 (Ont Div Ct), and *Kawartha Lakes (City) v Ontario (Director, Ministry of the Environment)*, 2013 ONCA 310 (CanLII)); *Currie v Ontario (Director, Ministry of the Environment)*, [2011] OERTD No 10-051, 2011 CarswellOnt 5580 (Ont Environmental Review Trib); and *Rocha v Ontario (Director, Ministry of the Environment and Climate Change)*, [2010] OERTD Nos 14-016 & 14-043, 2015 CarswellOnt 11189 (Ont Environmental Review Trib). For a discusion of the "broad definitions of the parties" subject to environmental enforcement in the United States, see Boigon, supra note 47 at 29.

[337] *Legal Oil EAB 1999, supra* note 320. *Legal Oil EAB 1999* was discussed *supra*, in Section 4.3.1(c).

[338] *Ibid* at para 13-16.

[339] *Ibid* at para 15-16. See also the EAB's analysis of a number of third party's alleged 'charge, management or control' in *Imperial EAB*, *supra* note 268 at paras 191-245.

[340] *R v Edmonton (City of),* 2006 ABPC 56 (CanLII) [*Edmonton City*].

spectators. The city was charged with several offences under the *1992 EPEA* including section 99(2) of the *1992 EPEA* which provided that:

> [t]he person having control of a substance that is released into the environment that has caused, is causing or may cause an adverse effect shall, immediately on becoming aware of the release, report it... [Emphasis added] [confirmed]

The Court held that the City (the Lessor) had the requisite 'control' of the pollutant, however the City was acquitted on other grounds.

The Court adopted a very broad interpretation of when a person will 'have control' pursuant to the *1992 EPEA*. The Court held:

> [603] In my view the phrase "charge, management or control" as it may relate to the pollutant, has a very broad ordinary meaning as well as a purposive meaning. The phrase is not restricted to immediate, it may be long term. It is not confined to physical, but extends to legal. It is not limited as to the time or location where the polluting activity takes place, but may include when and where the pollution consequence occurs. It is not restrained to the temporary or the usual, the perpetrator or the victim; it includes all. This is all consistent with the Legislature creating a wider class or category of possible reporters of environmental pollution.
> ...
>
> [605] ... It only makes sense that there may, in the circumstances of any particular case, be more than one person, even several persons, in control of the substance. That interpretation is also consistent with the legislative history of section 99.[341]

In the Court's view mere ownership of the facility and the equipment which was the source of the pollutant was insufficient to establish control. However, the Court concluded that two other factors made the defendant city a person 'in control' of the polluting substance in the case before it. At paras 610-611 the Court noted:

> [610] ... The first is that it was the Stadium itself onto which the pollutant fell which was not only owned by the defendant, but to whom possession was expected to revert in a matter of only a few weeks. While the defendant may not have had control over the Stadium and therefore the pollutant at the time of release, the pollutant came to be

[341] *Edmonton City*, *supra* note 340 at paras 603 - 605.

> under the defendant's control because the pollutant came to rest on the defendant's property and the defendant was aware of that fact. If the pollutant had similarly landed on a neighbouring land, to the knowledge of the owner or occupier of that land, that owner or occupier too would be a person who had control of the pollutant.
>
> [611] Moreover, the defendant acquired a degree of charge, management or control over the released pollutant in its capacity as maintenance provider of the Stadium lighting during the Games, upon the defendant taking possession of the ruptured capacitors and commencing an investigation as to the nature and characteristics of the pollutant by having it tested.

The Court in *Edmonton City* considered the Newfoundland case of *R v Abitibi Consolidated Inc.*[342] which involved an alleged contravention of the *Fisheries Act* by depositing a deleterious substance, namely silt, into a lake which was frequented by fish. The Court reviewed the construction contract between Abitibi and its contractor, McNamara, and concluded that the defendant had sufficient control in relation to the activity. LeBlanc, J. at paras 32 and 33 said:

> [32] ....I am unable to conclude that the accused [Abitibi] cannot be charged in this case because it is somehow contractually shielded.
>
> [33] Perhaps ironically, the fact that the accused took such an active role as a partnership in monitoring environmental concerns related to construction is what has contributed in a major way to my conclusion on this issue. The accused were clearly acting as though they were concerned with the issues related to sediment control and, indeed, brought their concerns, at times, to the attention of the contractor who generally acted upon them. <u>This is not a case where the owners had no involvement in the activity itself or no monitoring role</u>. Yes the contractor was responsible for directing and controlling the construction activity, but, also in my view, <u>the accused, as owners, had the ability to monitor and influence the contract in the prevention of such deposit. By being able to audit and monitor the extent of the sediment control problem, by acting to ensure that their concerns related to the necessary control measures were made known to the contractor and by the response of that contractor, the accused in this case played a sufficiently active role to have some potential responsibility for the actions of McNamara in the area of environmental compliance</u>. Clearly, as the evidence

[342] *R. v Abitibi Consolidated Inc*. (2000), 190 Nfld & PEIR 326, 576 APR 326 (Nfld Prov Ct) [*Abitibi*].

indicates, the contractors were very responsive to the concerns and advice of the partnership representatives. [Emphasis added in *Edmonton City*][343]

Another case reviewed by the Court in *Edmonton City* was the Yukon Territory case of *R v Placer Developments Ltd*.,[344] where the trial judge analysed the contract between a project owner and its tenant contractor finding that Placer, as owner of the property, could have imposed on its tenant contractor the responsibility to exercise care in using and storing fuel. Further, the contract provided that Placer had general supervision and direction of the work and had the authority to stop or delay the start of the work whenever it might be necessary to ensure the proper execution of the contract. Another factor noted by the Court in *R v Placer* was that Placer was required to possess sufficient expertise to recognize the potential risk to the environment posed by a fuel system in northern mining camps.[345]

These cases seem to suggest that project owners can have the requisite 'control' of their contractors in certain circumstances. As shall be seen in the next section, by extension, Joint Operators, as working interest owners, may also have the requisite 'control' of the Operator, depending on the factual situation.[346]

4.3.2.2 Application to the 2007 CAPL: How Much Control Does a Non- Operator Have Over a Joint Operation?

In general, joint venturers can contract along a wide spectrum of involvement in the management and operation of a joint venture. According to one commentator, this can range from:

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[343] *Abitibi, supra* note 342 at paras 32-33, as cited in *Edmonton City*, *supra* note 340 at paras 560-566.
[344] *R v Placer Developments Ltd.* (1983), 13 CELR 42 (YT Terr Ct)[*R v Placer*].
[345] *R v Placer, supra* note 344, as cited by the Court in *Edmonton City*, *supra* note 340 at paras 580-583.
[346] The following section analyzes a Non-Operator's potential for 'control' of a joint operation based on the provisions of the 2007 CAPL which impose limits on the Operator's freedom, not as a result of the nature of the legal relationship between Operator and Non-Operator (which was examined in Chapter 2 of this thesis).

> joint venturers taking a passive approach to their investment with very limited involvement in management and operations, other joint venturers wanting unanimity over any decision of any significance, and still other joint venturers wanting control over certain critical issues like capital expenditures or technology and expertise, but little involvement in operational matters like operating budgets and drilling programs.[347]

Joint Operators in a 2007 CAPL arguably fall somewhere in the middle of this spectrum.

Pursuant to the 2007 CAPL, the Operator generally has the right and duty to control and manage joint operations on behalf of the parties.[348] The parties delegate to the Operator, on their behalf, management of the exploration, development and operation of the joint lands and management of the other joint property.[349]

Clearly the 'Operator', as defined under the 2007 CAPL, has the 'charge, management or control' over operations and any substances which may be released into the environment.[350] However, the case law clearly establishes that there may be more than one 'person responsible' and specifically, more than one person with 'care, management or control' of an activity, substance or thing. *Edmonton City* confirmed that there can be more than one person in a given situation with the requisite control of a polluting substance.[351]

Therefore, the more pertinent question is whether Non-Operators, as defined by the 2007 CAPL, *also* have sufficient 'control' over joint operations and released substances to fall within the definitions of 'person responsible' in *EPEA*. On the subject of Joint Operator control, the 2007 CAPL Annotations compare the role of the Operator in the 2007 CAPL with the role of the Operator in JOAs which also provide for an 'Operating Committee' (frequently used in

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[347] Grant, *supra* note 59 at 387-388.
[348] See 2007 CAPL, *supra* note 13, cls 3.01A, 5.02, & 5.06.
[349] 2007 CAPL, *supra* note 13, cl 3.01A.
[350] Subject to the involvement of subcontractors.
[351] See also section 1(tt)(ii) of *EPEA* which provides that a 'person responsible', when used with reference to a substance or a thing containing a substance, means: "*every person* who has or has had charge, management or control of the substance or thing...". Emphasis added.

international operations). Where a JOA provides for an Operating Committee, Non-Operators generally participate in the supervision and direction of joint operations more directly through various voting and approval mechanisms.[352]

Scott Styles also suggests that the Operating Committee is an important factor which can significantly impact the role of the Non-Operator in a JOA:

> The role of the non-operators in the joint venture is one of non-operating, non-working, interest owners or, to put it more simply, the role is that of an investor. But non-operators are *active* investors, in that they have an active say in the managing of the project through the Joint Operating Committee. [353]

The 2007 CAPL Annotations argue that, in light of the fact that the 2007 CAPL does not provide for an Operating Committee, "the role of the Non-Operators in setting exploration strategy might seem minimal under the conventional CAPL Operating Procedure".[354] However the use of an Operating Committee is just one of the ways in which Non-Operators can maintain control over joint operations. Peter Roberts argues that "[t]he non-operating parties will wish to secure a fair measure of control over the operator's conduct of the joint operations, in order to ensure that such conduct is exercised in a prudent manner." Roberts suggests this could be achieved through a package of provisions relating, for example, to: Non-Operator consensus at the time of setting the work programme and budget; the securing of AFEs; control

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[352] Michael Josephson summarizes the potential power of an Operating Committee, noting that the Operating Committee can be provided with broad authority over the authorization and supervision of joint operations, effectively providing Non-Operators with considerable power. However, Michael Josephson cautions that this may not be the case with all Operating Committees. Josephson argues: "[i]t has been observed that whether the operating committee actually acts as an active and influential body in the style of a corporate board of directors or whether it merely serves as a "rubber stamp" for the operator will depend upon the dynamics of the group". Josephson, *supra* note 60 at 12-13.

[353] Styles, *supra* note 86 at 387. Styles argues further that: "...the day-to-day control of joint operations rests with the operator. In practice this reduces the position of the non-operators to one major duty and one major right. The major duty is to pay *pro rata* for all expenditure authorised by the Opcom and to contribute *pro rata* towards any liabilities incurred by the joint operations. The non-operators' major right is to uplift *pro rata* their share of any production arising out of the joint operations. *Ibid* at 389-390.

[354] 2007 CAPL Annotations, *supra* note 72 at 12.

of the award of contracts for joint operations; and a voting mechanism at the Operating Committee.[355] It is noteworthy that the 2007 CAPL contains two of the four mechanisms outlined by Roberts: the use of AFEs[356] and controls on the award of contracts.[357]

The 2007 CAPL also imposes certain duties, parameters and protective mechanisms on the Joint Operators' delegation of authority to the Operator. These include: the Operator's duties in clause 3.04; the specific duty of the Operator to consult with the Joint Operators in clause 3.01; the Joint Operators' rights to information, inspection and audit; and the rights of the Joint Operators to challenge and replace the Operator in clauses 2.02 and 2.03.

Each of these limitations on the Operator's authority will be reviewed to determine whether, in each instance, the limit also provides Non-Operators with a degree of 'control' over operations. This 'control', in turn, will be explored within the context of the jurisprudence summarized above regarding 'control' of a polluting substance.[358]

Clause 3.04 of the 2007 CAPL attempts to establish certain parameters around the Operator's conduct of joint operations. It provides that:

> [t]he Operator will manage all Joint Property and conduct all Joint Operations diligently, in a good and workmanlike manner, in compliance with the Title Documents and the Regulations and in accordance with good oilfield practice, including prudent reservoir management and conversation principles. Insofar as the Operator hires contractors hereunder, it will supervise them as is reasonable.

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[355] Roberts, *JOAs*, *supra* note 1 at 286. See also Kangles, et al, *supra* note 61 at 363: "The operator's authority is typically restricted by various means including capping the operator's ability to expend funds from the joint account without approval and the institution of an approval process or, in more complex agreements, requiring approval from a management or operating committee in order to proceed with certain activities, operations, or initiatives."

[356] 2007 CAPL, *supra* note 13, cl 3.01.

[357] 2007 CAPL, *supra* note 13, cl 3.03B.

[358] A recent example of the correlation between non-operator control and liability occurred in the aftermath of the Macondo Deepwater Horizon oil spill where the non-operating parties argued that they had minimal involvement in joint operations in an attempt to avoid liability. Roberts, *JOAs*, *supra* note 1 at 286-287, 290. (BP was operator of the Deepwater Horizon platform and the well was jointly owned by BP (65%), Anadarko (25%) and MOEX (10%).)

The Operator is also specifically required to conduct each joint operation in compliance with the regulations pertaining to health, safety and environment with the goals of, *inter alia*, avoiding adverse and unintended impacts on the environment.[359]

However clause 3.04 and subclause 3.05A must be read with a certain degree of caution. While subclause 3.04 establishes the Operator's duty, a breach of the Operator's obligations in subclause 3.04 will not result in any form of liability (whether tort, contract or otherwise) of the Operator to the Joint Operators. (Certain exceptions apply including conduct which constitutes gross negligence or wilful misconduct).[360] As one commentator has questioned, "[g]iven the exculpation of any liability of Operator for any breach of this provision that does not constitute Gross Negligence or Wilful Misconduct, the effect of this provision [clause 3.04] is somewhat limited".[361] Correspondingly, if the Operator's duty is so weakened, does this provide the Non-Operators with any degree of meaningful control over joint operations?[362]

The Operator also has a duty to consult with the Joint Operators periodically about the joint operations and keep the Joint Operators informed in a timely manner.[363] Along with this duty, the Joint Operators also retain rights of inspection and auditing.[364] Arguably, Joint

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[359] 2007 CAPL, *supra* note 13, at cl 3.05.

[360] See Section 2.2.4 for a more detailed discussion of the exceptions which apply.

[361] Spurn, Prete & Zerebeski, *supra* note 66, at 441.

[362] Peter Roberts also recognizes that JOAs typically exclude any liability on the operator's part for failure to act (excluding gross negligence and wilful misconduct). Roberts speculates that "...because the JOA has no real remedy to cure the operator's default, the JOA seeks to focus on prevention rather than cure". Roberts, *JOAs*, *supra* note 1 at 290.

[363] 2007 CAPL, *supra* note 13, cl 3.01A.

[364] The Operator is specifically required to "promptly advise each Non-Operator of any HSE incident that it reasonably determines significant". 2007 CAPL, *supra* note 13, cl 3.05B. The Operator is also required to cause HSE audits to be conducted for the Joint Account and provide copies to the Joint Operators upon request. A Non-

Operators have the requisite knowledge (or the legal means to acquire the requisite knowledge) about polluting events once they have occurred. Recall that 'knowledge' (which is not limited to the time or location where the polluting activity takes place) was one of the important factors in the *Edmonton City* and *Imperial* decisions. Further, as was shown in the two cases reviewed in *Edmonton City*, owners with the ability to audit, monitor and influence a contractor (and who took an active role in doing so) were held to have sufficient 'control' of operations to be held statutorily liable for a polluting event.

Perhaps more significant than rights of inspection and auditing, the 2007 CAPL also grants approval rights to Joint Operators. While an Operator may make expenditures for the joint account that it considers "necessary and prudent", the Operator is required to obtain an Authorization for Expenditure (AFE) when expenditures are predicted to exceed a certain threshold.[365] In the 2007 CAPL, this threshold is $50,000.[366] The execution of an AFE by a Joint Operator generally constitutes that party's approval and consent to all expenditures necessary to conduct the operations described in the AFE.[367]

Where the AFE process provided for in the 2007 CAPL is properly followed, Joint Operators arguably have 'legal' control, if not 'physical' control over joint operations, which the Court in *Edmonton City* held would be sufficient to establish the degree of control required by

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Operator may also conduct an HSE audit at its own cost. 2007 CAPL, *supra* note 13, cl 3.05. Joint Operators also have more general rights to information, audit and inspection pursuant to clauses 3.07, 3.08 and Article 7.

[365] There are two logical exceptions to this requirement involving: (i) emergency situations, and (ii) circumstances where an expenditure is required by the regulations and a failure to make the expenditure could result in the Operator suffering material adverse formal consequences. 2007 CAPL, *supra* note 13, cl 3.01B.

[366] 2007 CAPL, *supra* note 13, cl 3.01B. The threshold is lower in previous versions of the CAPL Operating Procedure.

[367] AFEs are required to have sufficient detail to enable a party to understand an operation's nature, scope, sequence and schedule. 2007 CAPL, *supra* note 13, cl 1.01. As noted by the Court in *Renaissance Resources Ltd v Metalore Resources Ltd* (1984), 1984 CanLII 1160 (AB QB) at para 44 (with respect to a 1974 CAPL Operating Procedure), "[t]he AFE is a written manifestation of consent to *participate* in an undertaking."

EPEA. The Joint Operators are not simply 'owners' with no legal right to interfere with the Operator's management of operations. However, where an AFE substantially misdescribes an operation, Joint Operators can argue that they did not give 'consent' to the operation conducted and did not have 'control' over the actual operation conducted. [368] As a consequence, the Non-Operators may be able to establish that they did not have 'control' over a subsequently polluting event.

The 2007 CAPL also provides Non-Operators with the right to challenge or replace the Operator in certain circumstances. This may also grant Non-Operators a level of 'control' over joint operations. Clause 2.02 of the 2007 CAPL authorizes both the 'immediate' and a 'delayed' replacement of the Operator – depending on the circumstances.[369] Clause 2.02 specifically purports to remove an Operator's right to seek relief at law, or in equity, or under the regulations to prevent its replacement in accordance with the Subclause.

Is the Joint Operators' right to remove an Operator an indicia of 'control' of the Operator by Non-Operators? The Court in *Norcen Energy*[370] would likely reject this idea. The Court in *Norcen* was of the view that the position of Operator is held as a 'right' that should not be taken away summarily. A more current position, reflected in the precise language of the 2007 CAPL, is that the Operator is merely providing a service.[371]

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[368] A Joint Operator may argue that an AFE did not reasonably describe the operation, contains misrepresentations, or was negligently prepared. See *Solara Exploration Ltd v Richmount Petroleum Ltd*., 2008 ABQB 596 (CanLII)[*Solara*].

[369] For example, where the Operator is in default under the regulations, the Non-Operators may attempt to immediately remove the Operator. A 'default under the regulations' could include environmental regulations, a breach of which could lead to the cancellation of title documents. The Operator is allowed a period to rectify the default.

[370] *Norcen Energy Resources Ltd v Oakwood Petroleums Ltd* (1988) , 1988 CanLII 3560 (AB QB) [*Norcen*].

[371] Jim MacLean, "The CAPL Operating Procedure: A 500 Foot Perspective – Patterns and Predictability" August, 2007 [on file with author][MacLean, "500 Foot"].

Another consideration is the practical likelihood of the successful replacement of the Operator. If the Joint Operators' right to remove the Operator provides the Joint Operators with some 'control' over Joint Operations, arguably this potential avenue of Non-Operator 'control' will only materialize if the mechanism established in the 2007 CAPL is effective in practice**.** It has been argued that in certain circumstances the replacement of Operator provisions (in previous versions of the CAPL Operating Procedure) have been difficult to effect in practice. For example, Professor Bankes notes:

> And all the precedents suggest that it would certainly be difficult for a minority owner to bring about a change of operatorship against an operator and majority owner who resists, even where the operator is in persistent default under the terms of the agreement but particularly in the case of an insolvency: *Norcen Energy Resources Ltd v. Oakwood Petroleums Ltd* (1988), 63 Alta. L.R. (2d) 361 (QB), *Mutual Oil and Gas Ltd v. DSWK Holdings Ltd* (unreported judgement of Justice Kenny, January 5, 1996, rev'd on appeal [1996] AJ 582), and *Rimoil Corporation v. Hexagon Gas Ltd*, unreported May 5, 1989 (Alta. QB)... [372]

The challenge provisions provided in cl 2.03 of the 2007 CAPL have proved equally difficult to use in practice.[373]

At the same time, it is important to note that the replacement and challenge provisions of the 2007 CAPL have not been judicially considered yet and have undergone significant amendments intended to address some of the difficulties presented by the earlier versions of the CAPL Operating Procedure.

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[372] Nigel Bankes, "Co-ownership is a messy business (even with an operating agreement)" (15 February 15 2009) Ablawg, online: <ablawg.ca/wp-content/uploads/2009/10/blog_nb_sanjuan_abqb_feb2009.pdf>.
On the issue of the practical effectiveness of the removal of operator provisions, see also *Tri-Star Resources Ltd. v JC International Petroleum Ltd*., 1986 CanLII 1767 (AB QB); *Signalta Resources Ltd v Land Petroleum International Inc*, 2007 ABQB 290 (CanLII); and *BG International Limited v Canadian Superior Energy* (11 February 2009), Calgary 0901-02012 (Alta QB), 2009 ABCA 73 (CanLII). For a consideration of a more recent case involving the 2007 CAPL, see also Nigel Bankes, "Change of Operator: *Norcen v Oakwood* of no Application in the Case of a Bankruptcy" (7 July 2016) Ablawg, online: < ablawg.ca/wp-content/uploads/2016/07/Blog_NB_Operator_Bankruptcy.pdf>.

[373] See, for example, *Diaz Resources Ltd v Penn West Petroleum Ltd*, 2010 ABQB 153 (CanLII) and Nigel Bankes, "Challenge Notices Under the Terms of the 1990 CAPL Operating Procedure" (25 March 2010) Ablawg, online: <ablawg.ca/2010/03/25/challenge-notices-under-the-terms-of-the-1990-capl-operating-procedure/>.

I have identified several areas where the 2007 CAPL appears to grant Non-Operators the potential to control joint operations, specifically: the Operator's duties to Non-Operators; the Joint Operators' rights to information, inspection and audit; the AFE approval mechanism; control of the award of contracts for joint operations; and the rights of the Joint Operators' to challenge and replace the Operator. Further, this Section attempted to identify certain issues which have arisen with respect to the practical application of these duties, rights and mechanisms. This includes instances where the provisions of previous versions of the CAPL Operating Procedures have been challenging to implement in practice, such as the challenge of operator provisions. It also includes circumstances where the provisions of the previous versions of the CAPL Operating Procedures have not been followed by the parties, such as the issuance of AFEs which inaccurately describe the Joint Operations which actually take place. I would argue that any potential avenue of Non-Operator 'control' only materializes if the mechanism established in the 2007 CAPL is effective in practice and if the provisions are actually followed by the parties.

When reviewed as a whole, is this bundle of rights sufficient to establish that a Non-Operator has 'charge, management or control' over Joint Operations? Or, as more broadly considered in *Edmonton City*, does this bundle of rights amount to "control over the act of pollution, control over the polluting act, or control over the activity that causes the pollution, whether directly or indirectly"?[374]

Obviously, the answer depends greatly on the circumstances of the polluting event. While Joint Operators appear to have a significant degree of control over high level decisions

[374] Omura, *supra* note 19 at 89 citing *Edmonton City*, *supra* note 340.

and management of operations, Joint Operators do not have either knowledge of, or control over, the day to day decisions that take place in an oil and gas operation. However, in *Edmonton City*, the Court held that 'charge, management or control' was not restricted to "immediate, it may be long term". Therefore, while Non-Operators may not have the immediate physical control of the physical location where the polluting event takes place, they arguably have the legal control over the overall activity and the means to become informed after the fact.

Non-Operators arguably have sufficient 'control' over joint operations to fall within the considerably low threshold for 'control' over a pollutant established in cases such as *Edmonton City*. Recall from previous Sections that legislators have been attempting to widen the pool of potential parties which may be responsible for environmental clean-up operations. Accordingly this low threshold for 'control' over a pollutant is likely to be repeated in subsequent cases.

4.4 *EPEA*, Part 6: Section 140 Reclamation EPOs

An 'operator' is required to conserve and reclaim "specified land"[375] and obtain a reclamation certificate pursuant to Part 6 of *EPEA*.[376] Before a reclamation certificate is issued, (or at any time where an operator is not required to obtain a reclamation certificate),[377] the

[375] "Specified land" means specified land within the meaning of the regulations on or in respect of which an 'activity' is or has been carried on. 'Activities' are listed in the *EPEA*, Schedule of Activities. *EPEA*, *supra* note 5, s 1(a)"activity", 134(f) "specified land". This includes (in section 3 of the *EPEA* Schedule of Activities), the "drilling, construction, operation or reclamation of a well other than a water well." Other oil and gas related facilities are listed in the *EPEA* Schedule of Activities as well.

[376] Section 137 of *EPEA* provides the operator's statutory duty to conserve and reclaim specified land.

[377] Where a reclamation certificate has been issued and an inspector is of the opinion that further work is necessary to conserve and reclaim the specified land, an EPO can be issued pursuant to section 142 of *EPEA*. However, the 'work' must relate to "matters that were not apparent at the time the reclamation certificate was issued". This type of EPO may be issued to: (i) the person to whom the reclamation certificate was issued; (ii) a successor, assignee, executor, administrator, receiver, receiver‑manager or trustee of a person referred to in subclause (i); or (iii) a person who acts as principal or agent of a person referred to in subclause (i) or (ii).

Regulator may issue an EPO to an 'operator' directing the performance of work (or the suspension of work) if it is necessary in order to conserve and reclaim specified land (a "Section 140 Reclamation EPO").[378] The Regulator may also issue an EPO to an 'operator' who is or was carrying on an activity that caused or allowed a substance to escape from the specified land or caused an adverse effect *in a location other than the specified land*.[379]

A Section 140 Reclamation EPOs may be issued to an 'operator', defined in Part 6 of *EPEA* as:

> (i) an approval or registration holder who carries on or has carried on an activity on or in respect of specified land pursuant to an approval or registration,
> (ii) any person who carries on or has carried on an activity on or in respect of specified land other than pursuant to an approval or registration,
> (iii) the holder of a licence, approval or permit issued by the Alberta Energy Regulator or the Alberta Utilities Commission for purposes related to the carrying on of an activity on or in respect of specified land,
> (iv) a working interest participant in
> (A) a well,
> (B) a mine,
> (C) a coal processing plant,
> (D) an oil sands processing plant, or
> (E) a plant or facility that is subject to the Large Facility Liability Management Program administered by the Alberta Energy Regulator
> on, in or under specified land,
> (v) the holder of a surface lease for purposes related to the carrying on of an activity on or in respect of specified land,
> (vi) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in any of subclauses (i) to (v), and
> (vii) a person who acts as principal or agent of a person referred to in any of subclauses (i) to (vi). [Emphasis added.][380]

While the 'Operator', as determined by the 2007 CAPL, is the most logical party to fall within the definition of 'operator' in Part 6 of *EPEA*, a number of parties may also fall within this

[378] *EPEA*, *supra* note 5, s 140. The Regulator may issue an emergency EPO to an 'operator' to suspend work where, in the Regulator's opinion, an immediate and significant adverse effect may occur, is occurring or has occurred on specified land. *EPEA, supra* note 5, s 143.
[379] *EPEA*, *supra* note 5, s 141.
[380] *EPEA*, *supra* note 5 at s 134(b).

broad definition. There has been little judicial consideration of the *EPEA* definition of 'operator' (possibly due to the comprehensiveness of the definition itself). Further, *EPEA* does not provide guidance as to which potential 'operator' might take precedence over others or whether multiple operators can be named with respect to a particular oil and gas well or facility.

In Chapter 3 I argued that a Non-Operator (under the 2007 CAPL) is a WIP, as defined by the *OGCA*. The *EPEA* defines WIP as "a person who owns or controls all or part of a beneficial or legal undivided interest in an activity described in clause [134](b)(iv) under an agreement that pertains to the ownership of that activity."[381] Professor Vlavianos argues that the *EPEA* definition of WIP is broader than the definition of WIP under the *OGCA*.[382] Thus it is likely that a Non-Operator meets the criteria in both definitions. Therefore, a Non-Operator is likely an 'operator', according to Part 6 of *EPEA* and may be liable to conserve and reclaim specified land pursuant to a Section 140 Reclamation EPO.

4.5 The Regulator's Discretion

Earlier in this Chapter I alluded to the Regulator's discretion to issue EPOs – in particular Section 113 Release EPOs and Contaminated Site EPOs – to one or several parties. The Regulator's discretion to issue EPOs goes beyond simply determining the number of parties named in an EPO. In two cases (brought before the EAB and the Court of Queen's Bench), the persons named in an *EPEA* EPO challenged the Regulator's discretion to issue the EPO, claiming that: (i) the EPO was issued under the incorrect section of *EPEA* or the *1992 EPEA*; (ii) the

[381] *EPEA*, *supra* note 5 at s 134(j).
[382] Vlavianos Article, *supra* note 15 at 883.

issuance of what is now a Section 113 Release EPO, instead of a Contaminated Site EPO may expose the alleged 'person responsible' to disadvantages; and (iii) the Regulator should be required to issue an EPO to all potential 'persons responsible'.

On the whole, these arguments have not met with success.

(i) Did the Regulator Issue the Wrong Type of EPO Under *EPEA* and Was the Person Named in the EPO 'Disadvantaged' as a Result?

The question of whether the correct type of EPO had been issued was the subject of a judicial review of an EAB decision in *Imperial*.[383] Imperial argued that it was disadvantaged because a Section 113 Release EPO had been issued instead of a Contaminated Site EPO. Imperial argued that certain factors in section 129(2) which applied only to Contaminated Site EPOs introduced a "consideration of the overall fairness of requiring each person to bear all or part of the costs of the clean up of the site."[384] Imperial was referring to the eight factors prescribed in section 129(2) of *EPEA* that the Regulator was required to take into consideration when deciding to issue an EPO to a particular person under that section. As noted by the Court of Queen's Bench, these included: "when the substance became present, the circumstances and knowledge of the substance when a person obtained ownership (in the case of a previous owner), the care taken by the person responsible, and the industry standards at the time."[385] Imperial argued that because it has been issued a Section 113 Release EPO – where these factors (and the opportunity for apportionment) did not apply - Imperial lost the possibility of sharing the costs of the cleanup, and was thus disadvantaged.[386]

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383 *Imperial QB, supra* note 268.
384 *Ibid* at para 46.
385 *Ibid* at para 45.
386 *Ibid* at para 46.

The Court disagreed.[387] The Court held that section 129(2) of *EPEA* which exclusively pertained to Contaminated Site EPOs did not *require* the Regulator to apportion costs between 'persons responsible'; the power to apportion costs was discretionary. The Court determined that joint and several liability applied if a Section 113 Release EPO was issued or if a Contaminated Site EPO was used and the Regulator did *not* use its discretion to apportion the costs of cleanup among 'persons responsible'. The Court concluded that that the decision of the Director to issue what is now a Section 113 Release EPO was not patently unreasonable.

The issue of whether the Regulator had issued the correct *EPEA* EPO was also the subject of a judicial review in *McColl Frontenac Inc.*[388] In *McColl*, the Court noted several appropriate reasons for the Director to issue what is now a Section 113 Release EPO including that there was a lower threshold of 'adverse effect' under Division 1 EPOs (Section 113 Release EPOs). This alone, in the Court's opinion, was sufficient grounds to conclude that the Director had the discretion to proceed under Division 1 of Part 5 (i.e. issue a Section 113 Release EPO).[389] The Court also noted the EAB's observation that there was no legislative criteria for determining which type of EPO to issue.[390] Finally, there was some suggestion that the Board had favoured the use of Contaminated Site EPOs, however, the Court disagreed. At para 87 the Court concluded:

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[387] As noted by the Board in *Imperial EAB*, *supra* note 268 at para 214, the more appropriate place to address the apportionment of liability between the parties was through the civil law process. The Board noted what is now section 217 of *EPEA* which provides that: "... nothing in this Act shall be construed so as to repeal, remove or reduce any remedy available to any person at common law or under any Act of Parliament or of a provincial legislature". EPOs may be issued to any person responsible without prejudice to the ability of any other party to take civil action.

[388] *McColl EAB*, *supra* note 277.

[389] *McColl QB*, *supra* note 277 at para 82.

[390] *Ibid* at para 86.

> [87] ... The EAB was not unsympathetic to McColl Frontenac's point, but it was also aware of timeliness issues and the higher "significant adverse effect" standard. It noted that there are some policy reasons for proceeding under s. 114 [now s 129], but it also noted there were legitimate policy reasons for using s. 102 [now s 113]. It most certainly did not find that the EPO should have been issued under s. 114 [now s 129]. Its point was to suggest that Alberta Environment review its policies, keeping its comments in mind.

The Court concluded that the EAB had not made a patently unreasonable error when it concluded that it was within the Director's discretion to issue what is now a Section 113 Release EPO.

(ii) Is the Regulator Required to Issue EPOs to All 'Persons Responsible'?

The second issue involving the Regulator's discretion questions whether the Regulator is required to name all 'persons responsible' in either a Section 113 Release EPO or a Contaminated Site EPO.

In *McColl*, the EAB concluded:

> [95] While section 102 [section 113 of *EPEA*] allows the Director to name more than one person responsible, the Board does not read that section as requiring the Director to name all persons who fall within that category. Rather, the *EPEA* Director allows the wide discretion in deciding which persons responsible to name in a section 102 order [a Section 113 Release EPO]. [391]

McColl had argued that both Highway Realities, who had owned the property in question for twenty-four years and Al's Rental's, the current owner of the property, should have been added as 'persons responsible' in the EPO. The Board disagreed. Even assuming Highway Realities was a 'person responsible', the Board saw no practical purpose in adding them to the order because the company no longer existed.[392] With respect to Al's Rentals, the

[391] *McColl EAB*, *supra* note 277 at para 95.

[392] *Ibid* at para 98. The Appellant McColl had argued that since the government assumed responsibility for orphan sites at officially designated contaminated sites, the Director should not exclude a 'person responsible' based on its

Board held there was little evidence linking the company to the sub-surface pollution. However, the Board did recommend that if further investigation revealed that Al's Rentals did cause pollution, then McColl could request that the Director add Al's Rentals to the EPO on that basis.[393]

The question of whether the Regulator should have issued a Section 113 Release EPO to all potential 'persons responsible' was also appealed to the EAB in *Imperial*. Before the EAB, Imperial contended that it was not the only party that fit the description of 'person responsible' for pollution and clean up under the Act.[394] Imperial claimed that the city, the city's housing corporation (a joint venture partner of the oil company's real estate subsidiary) and several contractors that had contracted with the joint venture partner to work on the development of the lands also should also be named as 'persons responsible' in the EPO. [395] The EAB rejected that contention.

The Board noted that there was nothing in Section 113 of *EPEA* that required the Regulator to name all potential persons responsible in an EPO. Furthermore, efficiency arguments might militate against the Director attempting to name all persons responsible.[396] More specifically, the Board referred to its earlier decision in *Legal Oil* where the Board noted "that the task of attempting to apportion the costs of cleanup would introduce chaos into the timely and responsive cleanup of oil well sites...".[397]

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inability to pay. The Board rejected this, noting that what is now a Section 113 Release EPO is issued pursuant to Division 1 of Part 5 and thus is distinguishable from Contaminated Site EPOs (issued pursuant to Division 2 of Part 5) where the government assumes responsibility for orphan sites.

393 *McColl EAB*, *supra* note 277 at para 105.

394 *Imperial EAB*, *supra* note 268 at para 191.

395 *Ibid* at paras 191-192.

396 *Ibid* at para 193.

397 *Ibid*. The case referred to by the Board as '*Legal O*il' is the EAB decision of *Legal Oil EAB 1999, supra* note 320.

However, the Board also noted that the Director must "balance efficiency and fairness in reaching his decision to issue an EPO."[398] Later in its decision, the Board held that:

> 197 ....administrative fairness obliges the Director to also name other clearly responsible parties in an EPO so that the cleanup burden might be shared. If two parties caused or contributed to the presence of substances at a site, it would be unfair if responsibility for cleanup was attached to one party while the other party remained free of obligation....
>
> 198 In determining whether the Director exercised his discretion unreasonably by deciding not to name the other parties referred to above as persons responsible, the Board will consider whether the parties meet the definition of a person responsible and whether in the interests of fairness the party should have been named in the Order.[399]

In the case before it, the EAB determined that the Director did not exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the order. The order was confirmed.

The EAB referred to this issue recently in *1370996 Alberta Ltd. v Director, South Saskatchewan Region*.[400] The Director issued a Section 113 Release EPO following the release of a substance from a ruptured storage tank and the alleged migration of the substance to the Little Bow River. The applicant company argued (as part of its application for a stay) that there was a serious issue to be decided in that the "Director refused to consider other 'persons responsible' for the substance" as defined in section 1(tt) of *EPEA*.[401]

The Applicant attempted to distinguish the *McColl EAB*[402] decision on the grounds that the alleged additional person responsible (South Country Coop) in *1370996 Alberta* was an ongoing active business and there was evidence to show that the Coop was an owner of the

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[398] *Imperial EAB*, *supra* note 268 at para 197.
[399] *Ibid* at paras 197 – 198.
[400] *1370996 Alberta Ltd. v Director, South Saskatchewan Region, Alberta Environment and Parks*, AEAB 15-020 (EAB) [*1370996 Alberta*].
[401] *Ibid* at para 17.
[402] *McColl EAB*, *supra* note 277.

tank which had ruptured and caused the release. The Applicant argued that the Director's failure to issue the EPO to the Coop would result in the Applicant incurring the cost of complying with the EPO and the cost of litigation with the Coop in order to recover the expenses it incurred to comply with the EPO.[403]

The Director argued that any arguments regarding 'persons responsible' were more properly the subject of an appeal and were not relevant to a stay application. The Board appeared to agree, holding that the costs incurred to comply with the EPO and any future litigation were not "irreparable harm" within the meaning of the common law test for a stay.[404]

4.6 Conclusion

This Chapter focused on the two types of EPOs that the Regulator has the discretion to issue under Part 5 of *EPEA*: Section 113 Release EPOs (issued pursuant to Division 1 of Part 5) and Contaminated Site EPOs (issued pursuant to Division 2 of Part 5)("Part 5 EPOs"). Part 5 EPOs can require a Joint Operator to assess, clean up and generally minimize the environmental risks of pollution. With one exception, all parties who are named in a Section 113 Release EPO or Contaminated Site EPO are jointly and severally liable for carrying out the terms of the EPO and paying for the costs of complying with the EPO. The exception is for Contaminated Site EPOs where the Regulator exercises its discretion to allocate the costs of clean up between 'persons responsible'.

The Regulator has the discretion to issue a Part 5 EPO to a Joint Operator (under the 2007 CAPL) where the Joint Operator falls within one of two related definitions of 'person

[403] *1370996 Alberta*, *supra* note 400 at para 72.
[404] *Ibid* at para 89.

responsible'. The *Operator* (under the 2007 CAPL) will most likely fall within both definitions of 'person responsible'. However, as we have seen, the Regulator has the discretion to name multiple parties if they fall within the relevant definition of 'person responsible'.

Non-Operators are also likely to fall within a number of categories of 'persons responsible' including owners, former owners, assignees, principals (in an agency relationship) and (depending on the facts) those with 'care, management or control' of a polluting substance. In the event that the Regulator issues an EPO to one or more Joint Operators under a 2007 CAPL, each Joint Operator will be jointly and severally liable to comply with the EPO.[405] A Joint Operator may have a contractual claim against other Joint Operators for their proportionate working interest share of the costs of compliance with the EPO, however, such a claim will only be realizable where the parties have the financial capability to pay for their share.

This Chapter also briefly reviewed Section 140 Reclamation EPOs which are issued to 'operators' pursuant to Part 6 of *EPEA*. Given the broad definition of 'operator' in *EPEA*, Non-Operators are also likely to fall within the definition of 'operator' and will be liable to comply with Section 140 Reclamation EPOs to conserve and reclaim specified land pursuant to Part 6 of *EPEA*.

Both the EAB and the Alberta Court of Queen's Bench have consistently held that the Regulator has discretion to issue either a Section 113 Release EPO or a Contaminated Site EPO, subject to the broad legislative criteria and specific definitions of 'person responsible' in *EPEA*. Further, the Regulator has the discretion to name one or more 'persons responsible' in an EPO, subject to balancing the need for efficiency and fairness.

[405] As noted *supra*, there is an exception to joint and several liability in the case of Contaminated Site EPOs where the Regulator has chosen to allocate the costs of compliance for the EPO.

'Table 1' summarized my conclusions regarding the potential liability of Joint Operators under the *OGCA*. It has been supplemented with my conclusions regarding the potential liability of Joint Operators under *EPEA* and is found at the end of this Section as 'Table 2'. When compared with a Joint Operator's more limited liability under the *OGCA*, the potential for liability under *EPEA* seems particularly formidable. When the two regimes are reviewed together, there appears to be a large number of options available to the Regulator to address environmental clean-up related to oil and gas activities. What is equally apparent is that the environmental regulatory schemes (with the exception of abandonment and reclamation costs under the *OGCA*) do not appear to adopt the same philosophy of proportionate liability as the 2007 CAPL.

Given the various options available to the Regulator, the logical question becomes, what is the policy and practice of the Regulator when determining liability among oil and gas participants for environmental non-compliance? Will the Regulator pursue one category of potentially liable persons over another? Does the Regulator favour one legislative regime over another? For example, in the event of a well blow out, will the Regulator consider the blow out to be a 'substance release' as provided for in *EPEA* or the *OGCA*? Alternatively, will the Regulator designate the site as 'contaminated'? Or will the Regulator opt to engage the reclamation provisions of Part 6 of *EPEA* to reclaim the well site?

Neither the *OGCA* nor *EPEA* provide much guidance as to how the provisions of the Acts will coexist under one regulator. In the following Chapter, I attempt to identify any policies or practices of the Regulator which may provide some answers to these questions.

Table 2: Statutory Environmental Liability of Non-Operators

Act	Environmental Compliance Order	Description	To whom may the Order be issued to?	Potential for liability Joint Operators	Apportion-ment of costs?
OGCA, s 104(1)	Section 104 Clean-Up Order	Regulator may direct the person(s) named in the order to: (i) take steps the Regulator considers necessary to contain and clean up the escaped substance and to prevent further escapes, and (ii) to do anything else the Regulator considers necessary to ensure the safety of the public and the environment.	Licensees, Approval Holders, Operators	x	No
OGCA, s 104(3)	Section 104 Clean-Up Cost Recovery Order	Regulator shall determine the costs and expenses of the Clean-Up operations and direct by whom and to what extent they are to be paid.	At Regulator's Discretion	✓	Yes
OGCA, s 27	Section 27 Abandonment Order	Abandon a well or facility in accordance with the regulations or rules.	Licensees, Approval Holders, WIPs, Deemed WIPs	✓	No
OGCA, s 30	Section 30 A&R Cost Recovery Order	Regulator to determine the abandonment costs and reclamation costs and allocate those costs to each WIP in accordance with its proportionate share in the well or facility	WIPs, Deemed WIPs	✓	Yes
EPEA, s 113	Section 113 Release EPO	An EPO may order the person to whom it is directed to take any measures that the Director considers necessary.	Responsible Person s 1(tt)	✓	No
EPEA, s 129	Contaminated Site EPO	An EPO may require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site.	Responsible Person s 107(1)	✓	At Regulator's Discretion
EPEA, s 140	Section 140 Reclamation EPO	An inspector may issue an EPO directing the performance of any work or the suspension of any work if in the inspector's opinion the performance or suspension of the work is necessary in order to conserve and reclaim specified land.	Operator s 134(b)	✓	No

CHAPTER FIVE: The Policies and Practices of the Regulator

5.1 Introduction

In Chapters 3 and 4 of this thesis, I concluded that Non-Operators, under the 2007 CAPL could be named by the Regulator for different categories of remedial ECOs issued under the *OGCA* and *EPEA*. Specifically, in Chapter 3, I demonstrated that a Non-Operator under the 2007 CAPL may be liable pursuant to the *OGCA*, to: (i) pay for the clean-up of spills and releases of escaped substances; (ii) engage in abandonment operations; and (iii) pay for its share of the costs of abandonment and reclamation. In Chapter 4, I established that there is a strong likelihood that both Operators and Non-Operators will be legally obligated to comply with EPOs issued pursuant to two parts of *EPEA*: Part 5 (which includes Division 1, release of substances and Division 2, contaminated sites), and Part 6 (conservation and reclamation).

However, the fact that a Non-Operator can - potentially - be liable is only part of the answer to the question of whether or not a Non-Operator will actually be targeted by the Regulator as well as other parties, such as the Operator. This Chapter examines the actual practice of the Regulator in pursuing potential parties pursuant to the *OGCA* and *EPEA*. A definite conclusion to the question of whether Non-Operators will be pursued by the Regulator remains elusive - the practices and policies of the Regulator are always evolving. We cannot predict with certainty that if a substance is released or escapes from an oil and gas well or facility or if an oil and gas well or facility requires abandonment, then the Regulator will take a specified action against a specified person. However, we can identify certain trends and patterns based on the published policies of the Regulator and by looking at the Regulator's previous responses in similar factual circumstances.

In this Chapter, I will begin by reviewing a LLM Masters thesis which asked similar questions in the context of oil and gas operations generally (rather than in connection with the potential liability of certain parties to a JOA). This thesis was defended in 2000 and significant economic, legislative and Regulatory changes have occurred since this time. After a brief summary of these changes, I will review recently published policies of Alberta Environment and Parks ("AEP") and the Alberta Energy Regulator (the "AER") (and their recent predecessors where appropriate). Finally, I will conclude with an analysis of the AER's remedial ECOs which have been made publicly available on the AER website. These orders provide insight into the actual practice of the AER in cases where unauthorized substances have been released into the environment and where the Regulator has ordered the abandonment and reclamation of oil and gas wells and facilities.

5.2 Previous Policies and Practices of Alberta Environment and the Energy Regulator

5.2.1 Conclusions from Professor Vlavianos' LLM Thesis (2000)

As part of a University of Calgary LLM Masters thesis defended in 2000,[406] Professor Vlavianos reviewed the legislative scheme governing liability for: well abandonment, well site reclamation, the release of substances into the environment and contaminated sites in Alberta.[407] Substantial regulatory and other changes have occurred since this time, however Professor Vlavianos' thesis is an appropriate starting point to begin my analysis in this Chapter. Professor Vlavianos concluded that the Alberta legislative regimes then in place pointed to "a number of different categories of persons" who could be held liable for both carrying out

[406] Vlavianos Thesis, *supra* note 19. Professor Vlavianos also published a subsequent article, see Vlavianos Article, *supra* note 15.

[407] Professor Vlavianos' thesis was completed in 2000 and her article was published in 2001-2002.

environmental clean-up operations and covering the costs of these operations.[408] Professor Vlavianos examined the actual practice of Alberta Environment and the Alberta Energy and Utilities Board (the "EUB"), the oil and gas Regulator at that time. She examined Environmental Appeal Board decisions, reviewed a key policy document,[409] and engaged in informal conversations with the EUB. Professor Vlavianos concluded that the actual practice of Alberta Environment and the EUB in pursuing particular categories of potentially liable parties differed significantly depending on the specific operation or event at issue: an abandonment, a reclamation, a substance release, or a contaminated site.[410]

With respect to the circumstance of well abandonment (conducted pursuant to the *1980 OGCA*),[411] Professor Vlavianos concluded that the EUB has "essentially followed the *OGCA* legislative and Regulatory scheme" to determine liability. Specifically, Professor Vlavianos noted that:

> [I]t is the current licensee who is primarily responsible for carrying out the abandonment with the working interest participants also potentially responsible if the EUB orders them to do so. Whether or not the working interest participants actually participate in the clean-up, however, the legislation is clear that they will share the costs of the abandonment. Thus, in effect, only two categories of persons are liable for well abandonment in Alberta: the current licensee and the current working interest participants.[412] [Emphasis added.]

By contrast, Professor Vlavianos determined that the actual practice of Alberta Environment, when operating under the jurisdiction of *EPEA*, "has differed significantly in regard to liability for reclamation and substance releases at oil and gas well sites and related

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[408] Vlavianos Thesis, *supra* note 19, at 69.
[409] Alberta Environmental Protection, "Conservation and Reclamation Info Letter 98-1: Compliance and Enforcement Approach for Conservation and Reclamation of Oil and Gas Activities" (Feb, 1998) online: <extranet.gov.ab.ca/env/infocentre/info/library/6874.pdf>[IL-98-1].
[410] Vlavianos Thesis, *supra* note 19, at 69.
[411] *1980 OGCA, supra* note 227.
[412] Vlavianos Thesis, *supra* note 19 at 69.

facilities".[413] Professor Vlavianos concluded that as a matter of policy, the "last licensee on record with the EUB will generally be held liable for the costs of conserving and reclaiming a wellsite under Part 5 of *EPEA* [now Part 6 of *EPEA*]" (the "Last Licensee on Record Policy").[414] Professor Vlavianos' conclusions in this regard are based, in part, on her review of IL 98-1 which Professor Vlavianos summarizes in her thesis:

> [T]he Information Letter states that in cases where no approval has been issued under *EPEA* (for e.g., in the case of an oil and gas well), the current EUB licensee will be the first to be considered the operator for conservation and reclamation compliance and enforcement purposes. This is so because: (a) industry standard practice is to hold the licensee responsible; (b) EUB standard practice is to hold the licensee responsible; and (c) operators can be tracked through existing EUB records rather than requiring AENV to develop a separate records system.[415]

Professor Vlavianos also provided a summary of a number of early Environmental Appeal Board decisions in the Sarg Oils Saga[416] and a decision of the Alberta Court of Queen's Bench in *Gammon Resources*.[417] In some of the earlier Sarg Oils decisions reviewed by Professor Vlavianos, the last licensee on record argued that other parties who fell within the definition of 'operator' in section 119(b) of the *1992 EPEA* (now 134(b) of *EPEA*) should also have been held liable for reclamation. However, the EAB disagreed, concluding that Alberta Environment's practice of holding the last licensee on record with the EUB liable for the

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413 *Ibid*.
414 *Ibid*, at 69-70.
415 *Ibid*, at 71.
416 See *supra* note 228. Professor Vlavianos reviewed the following Sarg Oils Saga cases: *Sarg Oils Ltd. v Alberta (Department of Environmental Protection)* [1995] AEABD No 4; *Sarg v Alberta (Environmental Appeal Board)*(1996) 185 AR 118 (QB); *Sarg v Alberta (Department of Environmental Protection)*[1996] AEABD No 15; *Energy Resources Conservation Board v Sarg*, 1998 ABQB 804, reversed 2002 ABCA 174. See also Section 3.3, *supra* and Section 5.2.2, *infra*.
417 *Gammon Resources Ltd. v Alberta (Department of Environmental Protection)* [1996] AEABD No 13 [*Gammon Resources*].

reclamation of a wellsite was not unlawful. The EAB came to a similar conclusion in the *Gammon Resources* case.[418]

Professor Vlavianos also concluded that Alberta Environment had adopted the same practice of holding the last licensee on record with the EUB liable in circumstances of released substances under what is now Division 1 of Part 5, *EPEA*.[419] Although there was no specific policy document in place outlining this policy with respect to the release of substances, Professor Vlavianos established that the practice had been noted in two decisions of the EAB and, "generally-speaking, has been approved of by that Board".[420]

With respect to contaminated sites, Professor Vlavianos concluded that Alberta Environment had not adopted a practice of fixing liability on one party. Rather, for contaminated sites, Alberta Environment "started with the premise that a whole host of parties are potentially liable and then this position may be narrowed down based on the facts of the particular case".[421] At the time of Professor Vlavianos' thesis, Alberta Environment's practice in regards to contaminated site liability was set out in the *Guideline for the Designation of Contaminated Sites Under EPEA (GDCS)*.[422] Professor Vlavianos noted that, according to the GDCS, Alberta Environment only considered a contaminated site designation "as a last resort

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[418] *Gammon Resources, supra* note 417. See Vlavianos Thesis, *supra* note 19 at 77-81.

[419] Vlavianos Thesis, *supra* note 19 at 81-88.

[420] *Ibid* at 82, 88. See *Legal Oil & Gas Ltd. v Alberta (Department of Environmental Protection*), [1997] AEABD No 38 (Env App Bd)[*Legal Oil EAB 1997*]; *Legal v Alberta (Department of Environmental Protection)* 1997 AEABD No 38 (EAB); *Legal Oil EAB 1999*, *supra* note 320; and *Legal Oil QB, supra* note 16 (application for judicial review of *Legal Oil EAB 1999* dismissed). Professor Vlavianos also referenced conversations with staff at Alberta Environment who indicated that Alberta Environment would likely take the same position with respect to liability for substance releases at oil and gas wells and facilities.

[421] Vlavianos Thesis, *supra* note 19 at 89.

[422] *Ibid*. Alberta Environment, "Guideline for the Designation of Contaminated Sites Under EPEA, (Edmonton: Alberta Environment, April 2000)[GDCS].

where no other appropriate tools are available to deal with the particular problem".[423] The use of the contaminated site provisions in what is now Division 2 of Part 5, *EPEA* "as a last resort" was only briefly discussed in Professor Vlavianos' thesis.[424] However, as we shall see, in subsequent years, Alberta Environment (and its predecessors) and the oil and gas Regulator have continued to use these provisions 'as a last resort' – indeed they have not been used at all in recent years in the context of oil and gas wells and facilities.

5.2.2 Post-2000 Decisions: A Continuation of the 'Last Licensee on Record' Policy?

Some of the cases (or related cases) Professor Vlavianos summarized in her thesis continued past the defence date of her thesis. For example, in *Legal Oil & Gas,*[425] the EUB was asked to determine who was liable to pay for abandonment costs (licensees or WIPs or both) under the *1980 OGCA.*[426] In this case, the EUB held that a "bare licensee" (holding a zero percent working interest) and the 100 percent WIP to be jointly and severally liable for abandonment costs where the EUB had carried out the abandonment.[427] This case was decided based on the application of the *1980 OGCA*. Accordingly, Alberta Environment's Last Licensee on Record Policy was not mentioned.

The Last Licensee on Record Policy was cited in the more recent decisions in the 'Sarg Oils Saga'. The initial facts in the Sarg Oils case were reviewed in Section 3.3 along with the line

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[423] Vlavianos Thesis, *supra* note 19 at 89.
[424] See sections 108-118 inclusive of Division 4, Part 2 of 1992 *EPEA*.
[425] *Legal Oil EUB 2001*, *supra* note 227.
[426] *1980 OGCA*, *supra* note 227, s 20, 92. In *Legal Oil EUB 2001*, the Board was faced with a unique set of circumstances which are unlikely to arise again. At issue before the Board was whether section 92 of the *1980 OGCA* or the newly enacted section 20.3 of the *1980 OGCA* should govern liability for cost abandonment. The Board noted that the "new abandonment provisions [we]re significantly different from their predecessors" in terms of who could be liable for costs of abandonment. *Legal Oil EUB 2001*, *supra* note 227 at 3.4.
[427] Brezina & Gilmour, *supra* note 227 at 32.

of cases referred to herein as the Sarg Abandonment Cost Order cases. Recall from Chapter 3 that Sarg had failed to abandon the Camrose Wells and had been issued the Sarg Abandonment Cost Order pursuant to section 95 of the *1980 OGCA*. At the same time, Alberta Environment concluded that the well sites had been inadequately reclaimed pursuant to *EPEA* and issued sixteen EPOs pursuant to section 125 of the *1992 EPEA* (loosely equivalent to Section 140 Reclamation EPOs under *EPEA*) to Sarg and Mankov to undertake the necessary site cleanup (the "Sarg Reclamation EPOs").[428]

In the judicial review of the EAB decision upholding the Sarg Reclamation EPOs,[429] Sarg and Mankov argued that while they may technically fall within the definition of 'operator' for some of the wells, they did not fall within that definition for all of the wells (as they had conducted no activities thereon).[430] Sarg and Mankov argued that a number of flare pits and salt water pits associated with the battery sites had only been used by predecessor operators. Furthermore, Sarg and Mankov argued that Sundial was more truly the 'operator' of the well sites.[431] Therefore, Sarg and Mankov concluded that it was an improper exercise of the Board's discretion to target Sarg and Mankov with all of the reclamation costs.[432]

Despite the fact that Sundial last owned the petroleum and natural gas rights in relation to the wells, Sundial was never targeted as a potential party in terms of the reclamation of the

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[428] When the EPOs were issued, separate Regulators were involved in "abandonment" and "reclamation".

[429] See *Sarg EPO#1, supra* note 228. The reason for the significant passage of time between the application for judicial review of the EAB decision and the judicial review (in 2005) was because the judicial review was adjourned pending resolution of the outstanding "Sarg Abandonment Cost Order" litigation.

[430] *Sarg EPO#2*, *supra* note 228.

[431] The definition of 'operator' referenced by the EAB decision under review in *Sarg EPO#2* was provided in s 119(b) of (what was then) Part 5 of *EPEA* 1992 – before the Act was amended in 1996 to include WIPs. See *Sarg EPO#1*, *supra* note 228 at para 58. It is substantially different than the equivalent Part 6 definition of 'operator' in what is now s 134(b) of Part 6 of *EPEA*.

[432] *Sarg EPO#2*, *supra* note 228 at paras 17-18.

Camrose Wells. Witnesses from Alberta Environmental Protection testified that the government "would seek redress only from the licensed party, as shown on the EUB records, and any issues that arose between vendor and purchaser would be sorted out between those parties in other forms of legal action".[433] Specifically, witnesses from Alberta Environmental Protection testified that:

> ... although the definition of operator means any person who carries on or has carried on an activity on or in respect of specified land the position adopted by their department was that they would deal only with the licensed individual unless that person was merely a shell or was in bankruptcy.[434]

Representatives of industry also testified that the targeting of the licensee as the responsible party was accepted by industry. One of the reasons for this approach was that "the licensee is the person who has the Regulatory responsibility for compliance with all regulations of the Conservation Board...".[435]

The Court of Queen's Bench noted that Sarg and Mankov did "everything in their power to divest themselves of all interests in the... well sites" and had every expectation that approval would be granted in the usual course of the ERCB's business.[436] After a further finding that "[o]ne is left with a sense of bewilderment as to how the EAB's decision can accord with any sense of equity", [437] the Court concluded that the Board breached the rules of natural justice "by failing to make adequate inquiries in relation to the Applicants' designation as licensees, in

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[433] *Ibid* at para 21.
[434] *Ibid* at para 22.
[435] *Ibid* at para 23.
[436] The Court further found that Sarg and Mankov "appeared to have been kept in the dark about any impediments to their proposed transfer of interests." *Sarg EPO#2*, *supra* note 228 at para 38.
[437] *Sarg EPO#2, supra* note 228 at para 40.

circumstances were [sic] there was clearly an issue to be investigated having regard to the potential consequences".[438] The decision of the EAB was quashed.

The EAB and Minister of Environment appealed. The Alberta Court of Appeal noted the Board's conclusion that Sarg Oils and Mankov were 'operators' under section 119 of the *1992 EPEA* because Sarg and Mankov had engaged in specified activities on the sites (even though in six of the sites this only amounted to cutting weeds). The Court of Appeal also noted that the Board had accepted that there was evidence of a well accepted industry practice that the last well licensee on record with the Regulator was responsible for reclamation and reclamation costs. If liability were to be assigned among a series of operators over several decades of operations, the Court noted the Board's argument that this could cause "chaos in the industry, logjams, and extensive litigation".[439] The Court of Appeal further noted that the Board concluded that it was the responsibility of the parties to ensure that transfers were registered, having regard to the legal duties that flow from ownership. Finally, the Court acknowledged the Board's conclusion that holding the respondents responsible for reclamation of the sites was consistent with the objective of *EPEA* to protect the environment. For all of these reasons, the Court of Appeal determined that the Board's decision had not been patently unreasonable, restored the EAB's decision and thus the original order.[440]

The Last Licensee on Record Policy has also been applied by the Surface Rights Board in the context of determining who is an 'operator' under the *Surface Rights Act*.[441] In *Coral*

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[438] *Ibid* at para 42.
[439] *Sarg EPO#3, supra* note 228 at 8.
[440] The Supreme Court of Canada decision in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII) explicitly abolished the `patently unreasonable, standard of review. However, applying the `reasonableness standard` of review would likely result in the same holding.
[441] *Surface Rights Act*, RSA 2000, c S-24 [*SRA*].

Exploration v Apache Canada,[442] the Surface Rights Board was asked to determine who was liable for payment of compensation to a landowner, the *de facto* operator, or the operator *de jure* (that is, the licensee recorded in the records of the Regulator). In this case, Apache sold the well and assigned the surface lease to Coral Exploration Corp. ("Coral") pursuant to a Wellbore Conveyance and Indemnification Agreement dated July 27, 2009. Coral paid the annual surface rental compensation from 2009 to 2011. However the well licence remained in Apache's name.

The *SRA* defines 'operator', with respect to the operator's obligations, as an "operator who is obligated to pay compensation under a surface lease to a lessor, or who is obligated to pay compensation under a compensation order to a respondent".[443] As Coral was the lessee pursuant to the Surface Lease, Coral would arguably fall within this definition of 'operator'. 'Operator' is also defined in section 1(h) of the *SRA*: "'operator' means (i) the person or unincorporated group of persons having the right to a mineral or the right to work it, or the agent of such a person or group of persons...".[444] Since Coral held all of the registered and beneficial interest in the mineral rights in question, Coral would arguably be the 'operator' under this definition as well.

However, it appears that the Surface Rights Board was not satisfied with the application of the two definitions of 'operator' under the *SRA*. The Board also noted the definition of 'operator' under the *Energy Resources Conservation Act*[445] which provides:

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[442] *Coral Exploration, supra* note 262.
[443] *Ibid,* referencing s 27(1)(b) of the *SRA*.
[444] *Coral Exploration*, *supra* note 262, referencing s 1(h) of the *SRA*.
[445] *Energy Resources Conservation Act*, RSA 2000, c E-10, s 27.2(1)(d) [repealed].

> 'operator' means in relation to any facility, oil sands project, coal project or well, (i) the person who is the actual operator of the facility, oil sands project, coal project or well, or (ii) the person who holds an approval license or permit issued by the Board or to whom or in respect of whom an order is granted by the Board. [Emphasis added by author.][446]

The Surface Rights Board noted that:

> 22 The Panel notes that the right to operate a well is consistently associated with the possession of a valid approval or well licence issued from the ERCB. The operator is identified as the holder of the well licence. This is consistent with the practice of the Board in determining who the operator is by identifying the holder of the well licence... Therefore, the Panel concludes that the possession of the well licence is fundamental to its determination on the issue of responsibility for paying the annual compensation and finds that Apache is the operator in this case.[447]

While *Coral Exploration* involved a determination of who was 'operator' and subject to a legal obligation to a third party in the oil and gas context, it is a decision of a different regulatory body, interpreting legislation other than its home statute and therefore little weight (if any) can be assigned to the case for the purposes of determining the practice of the AER in targeting Non-Operators for statutory environmental obligations. Notwithstanding this, *Coral Exploration* is worthy of mention given the Surface Rights Board's explicit reference to the practice of determining who is the Operator by identifying who is the holder of the well licence.[448]

5.3 Changes to the Regulatory Regime, the Economic Climate and the Resulting Impact on the Oil and Gas Industry

A number of significant changes have occurred since Professor Vlavianos defended her thesis in 2000, including legislative, regulatory, and economic changes. First, the legislative

[446] *Coral Exploration, supra* note 262 at 7.1.2.
[447] *Ibid*.
[448] Although it is unclear whether the Surface Rights Board's reference to "the practice of the Board" is referring to the AEUB's practice or its own practice.

scheme for abandonment and reclamation of oil and gas wells and facilities was amended in 2000 pursuant to the *Energy Statutes Amendment Act ("ESAA 2000")*.[449]

The 'new' *OGCA* gave the EUB the authority to determine reclamation costs that had been incurred in respect of an oil or gas well or facility and to allocate these costs. Prior to this, the jurisdiction of the EUB and Alberta Environment was split depending on whether the issue was abandonment or reclamation.[450] The amendments also clarified that the Regulator could order a single WIP to carry out the abandonment of a well or facility pursuant to what we now would call a Section 27 Abandonment Order. However, as noted by Danielle Brezina and Bradley Gilmour, the new *OGCA* did not provide any guidance as to when a WIP would be chosen to conduct abandonment operations instead of or in conjunction with the well or facility licence or approval holder. The new *OGCA* further clarified that once abandonment and reclamation costs were determined, the Regulator was required to allocate them among the WIPs in accordance with their Proportionate Share in the well or facility (pursuant to what we now call a Section 30 A&R Cost Recovery Order).[451]

Under the 'new' *OGCA*, the definition of 'licensee' was both broadened and narrowed. Section 20.1 of the *1980 OGCA* – which was the subject of the majority of the earlier case law in Professor Vlavianos' thesis - was repealed. Section 20.1 had provided that – for the purposes of well abandonment liability – the definitions of licensee and WIP included persons with actual control of a corporation. The new *OGCA* also provided for the deeming of 'former licensees' to

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[449] *Energy Statutes Amendment Act,* SA 2000, c 12 [*ESAA 2000*]. These changes were considered in Vlavianos Article, *supra* note 15.

[450] Alberta Environment had exclusive jurisdiction over remediation and reclamation of oil and gas wells and facilities, while the EUB was responsible for suspension and abandonment. Brezina & Gilmour, *supra* note 227 at 31.

[451] Brezina & Gilmour, *supra* note 227 at 36.

be licensees in certain circumstances, as well as trustees and approval holders. As a result of these changes, the influence of much of the case law which considered the *1980 OGCA* was notably reduced.

Perhaps most significantly, in 2014, a new energy Regulator in Alberta was created. The AER replaced the ERCB, which had succeeded the EUB as the primary oil and gas Regulator in the province. The AER also assumed the regulatory role previously provided by AESRD (formerly Alberta Environment) with respect to upstream oil and gas operations. Specifically, on March 29, 2014, pursuant to the provisions of *REDA* and its associated regulations,[452] certain regulatory responsibilities under (*inter alia*) *EPEA* that pertained to energy resource activities were transferred to the AER.

Regulatory change also occurred on a smaller scale to a long standing regulatory program which directly addresses abandonment of oil and gas wells. On August 1, 2015, the AER executed the final phase of changes to the Licensee Liability Rating Program (the "LLR Program").[453] The AER revised the LLR Program to address concerns that the previous LLR program "significantly underestimated abandonment and reclamation liabilities of licensees".[454] Some commentators argued that as a consequence, junior to midsized operators

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[452] *REDA*, *supra* note 6. See also AER, "Bulletin 2014-08: AER Implementation Phase 3" (11 March 2014) online: <www.aer.ca/documents/bulletins/AER-Bulletin-2014-08.pdf>.

[453] See AER, "Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process" (17 February 2016) online: < www.aer.ca/documents/directives/Directive006.pdf> and AER, "Directive 011: Licensee Liability Rating (LLR) Program: Updated Industry Parameters and Liability Costs" (31 March 2015) online: <www.aer.ca/documents/directives/Directive011_March2015.pdf>. Pursuant to these two documents, a licensee can calculate the actual amount of financial security owing by a licensee to the AER. The amount owing is based on a ratio of the licensee's assets to its liabilities.

[454] The 2015 LLR Program required that a licensee provide the AER with a security deposit where the licensee had a Liability Management Rating ("LMR") below 1.0. This occurs where the licensee's deemed liabilities in the program exceed its deemed assets in the program (plus any previously provided security deposits). Energy Resources Conservation Board, "Licensee Liability Rating (LLR) Program Changes and Implementation Plan" (Calgary, March 12, 2013), online: < www.aer.ca/documents/bulletins/Bulletin-2013-09.pdf>.

faced dramatically increased security deposits which could restrict their ability to continue to engage in industry operations.[455]

These changes to the AER's LLR Program came at a time when the industry was burdened by a number of economic challenges.[456] For a long time, junior to midsized operators have struggled with limited access to capital. As a result, many juniors have run their debt levels up to the maximum limit of credit. Added to this burden is the relatively low price of crude oil, which has resulted in dramatically smaller cash flows and reduced asset values.[457]

The combination of all of these factors may lead to an unprecedented number of bankruptcies in the oil and gas sector.[458] According to Haynes and Boone's "Oil Patch Bankruptcy Monitor", as of September 7, 2016, 102 North American oil and gas producers have filed for bankruptcy since the beginning of 2015. These bankruptcies (which include both United States and Canadian companies) involve approximately $67.8 billion in cumulative

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[455] Dan Healing, "Spyglass Receivership Raises Well Abandonment Liability Questions" *Calgary Herald* (27 November 2015) online: <www.pressreader.com/canada/calgary-herald/20151127/281998966373759>; Tracy Johnson, "Alberta Sees Huge Spike in Abandoned Oil and Gas Wells" CBC News (15 April 2015), online: <www.cbc.ca/news/canada/calgary/alberta-sees-huge-spike-in-abandoned-oil-and-gas-wells-1.3032434; Stephen Ewart, "Oilpatch Bankruptcies Add to Backlog of Orphan Well Reclamations" *Calgary Herald* (18 April 2015), online: <calgaryherald.com/business/energy/ewart-oilpatch-bankruptcies-add-to-backlog-of-orphan-well-reclamations>.

[456] As will be shown below, the 2015 LLR Program was again changed in 2016 as a result of the *Redwater* decision, *supra* note 225.

[457] The economic challenges faced by the industry were compounded by the fact that the industry had not fully recovered from the global recession that commenced in 2008 in which "[c]ommodity prices slumped, demand for products produced by the energy industry shrank, funding for projects evaporated, and expense budgets were slashed." Kruger & Gilborn, *supra* note 9 at 221. In 2008, it was "pervasive low gas prices" which made it "extremely difficult to sell distressed gas assets". *Ibid* at 222. This significant drop in commodity prices combined with the "general lack of available financing severely inhibited purchases of distressed assets. Finding interim financing to keep insolvent companies afloat during restructuring became a significant challenge." *Ibid*. Kruger and Gilborn were referring to the 2008 global recession, however their words are equally applicable to the 2014-2015 drop in oil prices and resulting industry slow-down.

[458] Rakteem Katakey & Luca Casiraghi, "Energy industry bankruptcies could rise as $550B of oilpatch debt comes due" (27 August 27 2015) *The Calgary Herald*, online: <calgaryherald.com/business/energy/energy-industry-bankruptcies-could-rise-as-550b-of-oilpatch-debt-comes-due>.; Kelsey Butler, "Bankruptcy becomes a way of life for oil and gas companies" (30 October 2015) online: The Deal <www.thedeal.com/content/restructuring/bankruptcy-becomes-a-way-of-life-for-oil-and-gas-companies.php#ixzz3rgBLpnZp>.

secured and unsecured debts. Haynes and Boone predict that "[d]espite the modest recovery in energy prices, all indications suggest many more producer bankruptcy filings will occur during 2016".[459]

Of critical interest to this thesis, is whether the upsurge in oil and gas bankruptcies will increase the financial burden of more solvent Joint Operators to address environmental clean-up operations and finance the abandonment, reclamation and remediation of oil and gas wells and facilities. As I have attempted to show in this thesis, when a Joint Operator becomes insolvent, the *EPEA* regime authorizes extending liability to the remaining Joint Operators (or others) to find a solvent payor to bear the costs of environmental clean up and reclamation. Regulators may look to those connected to the polluting substance, the polluting activity, or those who are in some way connected to the contaminated land.[460]

In Alberta, it has been argued that the recent decision of *Redwater Energy*[461] and consequent regulatory response by the AER may exacerbate the difficulties faced by industry participants to do business.[462] Redwater Energy Corp. ("Redwater") was a publicly listed junior

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[459] Haynes and Boone, "Oil Patch Bankruptcy Monitor", (9 September 2016), online: haynesboone.com.

[460] Omura, *supra* note 19 at 82.

[461] *Redwater*, *supra* note 225.

[462] The potential clash between environmental law and insolvency law has a long legal history. Prior to the *Redwater* decision, whether EPOs and other regulatory orders constituted financial liabilities and should be considered 'claims' within the meaning of federal bankruptcy legislation (see the *Companies Creditors' Arrangement Act,* RSC 1985, c C-36 and the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3) was unsettled in Canada. In *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 [*AbitibiBowater*], the Court established a three-part test to determine whether an environmental order could be considered a claim and subject to the insolvency process. To be considered a claim, the Court required the following: (i) a debt, liability, or other obligation to a creditor; (ii) the obligation was incurred prior to the time limit for inclusion in the insolvency process; and (iii) it was possible to attach a monetary value to the debt. *AbitibiBowater* at para 3. A further requirement specifically applicable to environmental orders was added by the majority in *AbitibiBowater* – namely that there needed to be sufficient indications that the regulatory body would ultimately be forced to perform the work.
For additional commentary on this issue, see Luc Béliveau & Guillaume-Pierre Michaud, "Insolvency and Environmental Law following the AbitibiBowater Case: Still a Murky Intersection" (2012) Insolvency Institute of Canada Articles 2 (Westlaw); Sean F Dunphy, Guy P Martel & Joseph Reynaud, "Unstoppable Force Meets

oil and gas producer in Alberta. On May 12, 2015, it was ordered into receivership. After conducting an assessment of Redwater's assets, the Receiver notified the AER that it would only be taking possession of 20 wells, facilities and associated pipelines (out of approximately 91 wells). In response, the AER issued Section 27 Abandonment Orders in respect of the licensed assets renounced by the Receiver. Further, the AER filed an application with the Court of Queen's Bench to compel the receiver to comply with the Section 27 Abandonment Orders and to fulfill all statutory obligations of Redwater in relation to abandonment, reclamation and remediation of the renounced licensed assets.

Professor Nigel Bankes summarizes the Court of Queen's Bench's holding in the *Redwater* case:

> In a much anticipated decision Chief Justice Neil Wittmann has concluded that there is an operational conflict between the abandonment and reclamation provisions of the province's *Oil and Gas Conservation Act*, RSA 2000, c O-6 (*OGCA*) and *Pipeline Act*, RSA 2000, c P-15 and the federal *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*). Thus, a trustee in bankruptcy is free to pick and choose from amongst the assets in the estate of the bankrupt by disclaiming unproductive oil and gas assets even where (and especially so) those assets are subject to abandonment orders from Alberta's oil and gas energy Regulator, the Alberta Energy Regulator (AER).[463]

Even before the AER's published its regulatory response to the *Redwater* decision, commentators were speculating on the *Redwater* decision's "far-reaching" implications. According to one online legal commentary, the *Redwater* decision:

Immovable Object: The Supposed Clash Between Environmental Law and Insolvency Law after AbitibiBowater" (2012) Insolvency Institute of Canada Articles 3 (Westlaw); and Houlden & Morawetz On-Line Newsletter, *Insolv L Nws* 2015-49 (Westlaw). For cases considering the *AbitibiBowater* case, see *Nortel Networks Corp. (Re)* 2013 ONCA 599 (CanLII); leave to appeal dismissed and *Northstar Aerospace Inc. (Re),* 2013 ONCA 600 (CanLII). See also the recent Supreme Court companion appeals in *Alberta (Attorney General) v Moloney* [2015] 3 SCR 327, 2015 SCC 51 (CanLII) and *407 ETR Concession Co. v Canada (Superintendent of Bankruptcy)* [2015] 3 SCR 397, 2015 SCC 52 (CanLII) where the Court applied the federal paramountcy doctrine.

[463] Nigel Bankes, "The Power of a Trustee in Bankruptcy to Disclaim Unproductive Oil and Gas Properties and the Implications for the AER's Liability Management Program" (17 June 2016), online: <ablawg.ca/wp-content/uploads/2016/06/Blog_NB_*Redwater*_June2016-1.pdf>.

> ...could result in a dramatic increase in the number of wells renounced by Trustees and determined to be "orphaned" by the AER, which will undoubtedly increase pressure on industry to fund the completion of work to abandon, reclaim and remediate such wells, and on the boards of directors who serve companies in the industry... Individual companies already fund not only the costs to abandon, reclaim and remediate their own wells, but through the collection of a levy by the OWA, also fund such costs for orphan wells where there is no legally responsible or financially able party to deal with such obligations.... the added cost associated with higher levies could have severe economic implications for some companies in the current environment...[464]

The AER agreed with the speculations of numerous law firms, media outlets and industry groups that the *Redwater* decision was likely going to result in "significant impacts to stakeholders, including industry and landowners".[465] The AER and the OWA have appealed the *Redwater* decision but, as an interim measure, the AER has released Bulletin 2016-16 detailing the AER's immediate response. The interim regulatory measures outlined in Bulletin 2016-16 include treating all applications for licenses as non-routine and requiring all transferees of wells and facilities to demonstrate that they have a liability management ratio (LMR) of 2.0 or higher immediately following the transfer. [466]

Bulletin 2016-16 appears to have generated its own share of commentary by the above noted groups.[467] It is beyond the scope of this thesis to analyze either the merits of the *Redwater* decision or the AER's response, however, it is arguable that these events will further

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[464] Janice Buckingham, et al, "Implications of the Redwater Decision – Where Does the Buck Stop", (19 May 2016) online: <www.osler.com/en/resources/regulations/2016/implications-of-the-Redwater-decision-where-does>. See also James Mahony, "Redwater Ruling Could See Orphan Well Count Soar: Lawyers", Daily Oil Bulletin (20 May 2016).

[465] AER, "Bulletin 2016-16: Licensee Eligibility – Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision" (20 June 2016) online: < aer.ca/documents/bulletins/Bulletin-2016-16.pdf>[Bulletin 2016-16].

[466] *Ibid*.

[467] In response to the published concerns of stakeholders, the AER released "Bulletin 2016-21: Revision and Clarification on Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision" (8 July 2016) online: <www.aer.ca/documents/bulletins/Bulletin-2016-21.pdf> which reiterated the terms of Bulletin 2016-16 but opened a potential avenue of 'grandfathering' transactions in progress. Licensees with transactions in progress were "encouraged to contact the AER to arrange a review of their specific circumstances".

challenge both insolvent companies and those seeking to escape insolvency through oil and gas mergers and acquisitions and other transactions.[468]

5.4 The Current Policies and Practices of the Alberta Government and the AER

5.4.1 Alberta Environment and Parks and AER Policy Documents

As noted above, with the enactment and coming into force of *REDA* in 2014, the jurisdiction of the ERCB and the jurisdiction of AESRD (with respect to energy resource activities) were combined under the authority of the newly formed AER.[469] The AER was granted broad operational jurisdiction under the "energy resource enactments"[470] and the "specified enactments",[471] which include *EPEA*. When *REDA* was first enacted, the relationship between the primary department or ministry of the Alberta government charged with the protection of the environment (now Alberta Environment and Parks)("AEP") and the AER was unclear. However, both agencies have recently released several publications which attempt to delineate their roles and responsibilities.

For the purpose of this thesis, it can be summarized that the government of Alberta, through AEP, retains the responsibility to establish and set standards, criteria and guidelines in accordance with *EPEA* and its regulations while the AER ensures that these standards, criteria and guidelines are achieved with respect to energy resource activities.

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[468] Alan W Tambosso, "Collateral Damage Caused by the Alberta Energy Regulator's Response to the Redwater Decision", Sayer Energy Advisors (29 June 2016), online: <www.dailyoilbulletin.com.

[469] Pursuant to s 1(1)(i) of *REDA, supra* note 6, "energy resource activity" means (i) an activity that may only be carried out under an approval issued under an energy resource enactment, or (ii) an activity described in the regulations that is directly linked or incidental to the carrying out of an activity referred to in subclause (i).

[470] *REDA, supra* note 6, s 1(1)(j). The "energy resource enactments" include the *OGCA*, *supra* note 4; the *OSCA, supra* note 194; the *Pipeline Act, supra* note 194; the *Coal Conservation Act*, RSA 2000, c C-17; the *Gas Resources Preservation Act*, RSA 2000, c G-4; and the *TVUO Act, supra* note 246.

[471] *REDA*, s 1(1)(s).

The specific question addressed in this section of Chapter 5 is whether there is evidence, in the publications of either AEP or the AER, that suggests that the Regulator has established a policy or practice of pursuing or naming a particular party when issuing remedial ECOs pursuant to the *OGCA* or *EPEA*, similar to the policies and practices of the regulators at the time of Professor Vlavianos' thesis.

A number of publications detailing both the AEP's and the AER's policies and intended practices have recently been released in the area of oil and gas related 'contaminated sites'. AESRD (now AEP) released the *Contaminated Sites Policy Framework* ("CSP") in 2014.[472] The CSP purports to provide "policy guidance for the management of contaminated sites in Alberta... [providing] overall policy links to site assessment guidance... and the options for management of contaminated sites."[473] Further, it applies when "developing and assessing options for management of contaminated lands in Alberta."[474] Despite the repeated references to "contaminated lands", the CSP does *not* discuss the formal 'designation' of contaminated sites or reference the contaminated site provisions of Division 2 of Part 5, *EPEA*. Rather, the CSP specifies:

> The [CSP] informs on Director Requirements under Part 5, Substance Release in the Environmental Protection and Enhancement Act (*EPEA*)... as it relates to Sections 111, Manner of Reporting, and 112, Duty to take Remedial Measures. [Emphasis added.]

[472] Alberta Environment and Sustainable Resource Development, *Contaminated Sites Policy Framework,* (Edmonton: AESRD, 2014)[CSP]. The CSP expressly provides to supersede the AENV, "Draft Policy for Management of Risks at Contaminated Sites in Alberta (AENV, 1999). See CSP at 1.
[473] *Ibid*.
[474] *Ibid*.

The AEP has also released additional policy and procedure guidelines which reference the terms 'contaminated lands' and 'contaminated sites', but these documents also do not refer to the formal 'contaminated sites' provisions of *EPEA*.[475]

The CSP addresses the "role of the proponent", which term is expressly stated to include any person responsible, owner, or operator as defined in *EPEA*.[476] As such, the CSP offers little in the way of guidance on the question of whether a particular 'person responsible' will be pursued under the substance release provisions in Division 1 of Part 5, *EPEA*.

The AER appears to be following the AEP's lead with respect to 'contaminated sites'. The CSP provides that, for upstream oil and gas and coal activities, the AER will operationalize the AEP's policies for contaminated site assessment and reclamation.[477] On the AER website, reference to the clean-up of contaminated sites is found within the "Reclamation and Remediation" division (of the website) which includes liability management and the suspension and abandonment of wells and related facilities. On the AER's website, 'decontamination' is equivalent to 'remediation'.[478]

Recently, the AER released Specified Enactment Direction 002 ("SED-002") which is in effect as of June 21, 2016.[479] According to SED-002, the "AER is responsible for ensuring that land used for energy resource activities is reclaimed in an environmentally sound manner" as

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[475] See, for example, the AEP, "Draft Alberta Risk Management Plan Guide" (Edmonton: Alberta Environment and Parks, 2016), online: aep.alberta.ca/about-us/public-engagement/documents/Draft-AlbertaRiskManagementPlan-Jun2016.pdf> [2016 Draft RMP Guide].

[476] CSP, *supra* note 472, at 7.

[477] CSP, *supra* note 472 at 4.

[478] AER, "Reclamation and Remediation", online: <www.aer.ca/abandonment-and-reclamation/reclamation-remediation>.

[479] A 'specified enactment direction' is a regulatory document covering energy activities that sets out industry requirements or provides guidance related to the specified enactments. SED-002 replaces and supersedes the Government of Alberta "2010 Reclamation Criteria for Wellsites and Associated Facilities: Application Guidelines". AER, "Specified Enactment Direction 002: Application Submission Requirements and Guidance for Reclamation Certificates for Well Sites and Associated Facilities" (Calgary: AER, 2016) at 1 [SED 002].

directed by Part 6 of *EPEA* and the *Conservation and Reclamation Regulation*.[480] SED-002 provides the requirements of energy-related reclamation certificate applications. SED-002 does not provide significant guidance as to whether the AER has adopted a practice or policy with respect to who may be liable pursuant to Part 6 of *EPEA*.

The draft document on the designation of contaminated sites reviewed in the Vlavianos Thesis was published by Alberta Environment in 2000 and remains listed as a publication on the Alberta Environment and Parks information site.[481] However, only five contaminated sites have been designated since 1993, the most recent designation occurring in 1996.[482] According to the Environmental Law Centre in 2004,

> Alberta Environment has made the substance release order its tool of choice in management of contaminated land. However, *EPEA* does not include clear criteria to guide the choice of regulatory tools, which creates uncertainty. Given this uncertainty, the matter of choice of tools has been litigated in Alberta a number of times.[483]

It appears (although it is not explicitly stated in current publications of either the Alberta government or the AER), that the formal contaminated site provisions in Division 2 of Part 5 of *EPEA* are not being utilized by the relevant government or regulatory authorities.[484]

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[480] SED-002's corresponding AEP standards, criteria and guidelines for conservation and reclamation of specified land are divided into separate documents by land use: cultivated lands, forested lands, native grasslands or peatlands. These can be found in the following documents: ESRD, "2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Lands", (Edmonton: ESRD, 2013), ESRD, "2010 Reclamation Criteria for Forested Lands and Native Grasslands" (Edmonton: ESRD, 2013); and AEP, "Reclamation Criteria for Wellsites and Associated Facilities for Peatlands" (Edmonton: AEP, 2015). Other requirements apply for complex or difficult sites.

[481] Alberta Environment, online: <environment.gov.ab.ca/info/posting.asp?assetid=7263&categoryid=4>. See Alberta Environment, "Guideline for the Designation of Contaminated Sites Under *EPEA*, (Edmonton: Alberta Environment, April 2000).

[482] Omura, *supra* note 19 at 14 at n71.

[483] Environmental Law Centre, "A Review of Regulatory Approaches to Contaminated Site Management" (Edmonton: Alberta Environment, 2004) at 1. The cases noted by the Environmental Law Centre are: *Legal Oil QB, supra* note 16; *McColl QB*, *supra* note 277; and *Imperial QB*, *supra* note 268.

[484] See sections 123-133 inclusive of Division 2 of Part 5 of *EPEA*. Section 125 authorizes the Director, in his discretion, to designate an area of the environment as a contaminated site and section 129 enables the Director to issue a Contaminated Site EPO.

The AER's website provides that in some areas, the AER will rely on the policies developed by former Regulators.[485] One of these policies might be the "Orphan Well Compliance Process" which Alberta Environment issued in 2010 (the "OWCP").[486] Despite its name, the process addresses how Alberta Environment assigns liability for reclamation and remediation of both wells and facilities designated as 'orphans' and wells and facilities where there is still a licensee or some other party connected to the well or facility.

Most of the references in the OWCP are to *EPEA*, although it is the *OGCA* regime which officially designates wells and facilities as 'orphans'. The OWCP explicitly provides that the responsibility for reclamation and remediation is typically to "be fulfilled by the licensee on record in the ERCB system" (that is, the well or facility licensee).[487] According to the OWCP, where a site does not have an official 'orphan' designation, the oil and gas well licensee or facility licensee will be "the first to be considered the operator for reclamation compliance and enforcement issues".[488] Further, the OWCP provides that Alberta Environment will only look to a successor, receiver trustee or working interest participant where the ERCB licensee is defunct.[489]

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[485] The AER's website provides that the "AER will rely on the regulations, policy and guidance already developed by the provincial department of Environment and Sustainable Resource Development (ESRD) for *EPEA* and the *Water Act*". AER, "Q & A: Environmental Protection and Enhancement Act", online: <www.aer.ca/applications-and-notices/application-process/qa-*EPEA*>.

[486] Alberta Environment, "Orphan Well Compliance Process" (Edmonton: Alberta Environment, 2010)[OWCP]. The OWCP clearly specifies the instances in which Alberta Environment (now the AER) will engage the provisions and processes specified in *EPEA* versus those found in the *OGCA* with respect to the abandonment and reclamation of oil and gas wells. There does not appear to be a similar document in place with respect to the issuance of EPOs for spills and releases.

[487] *Ibid* at 1.

[488] *Ibid* at 2. Three reasons are listed for this practice: (i) industry standard practice was to hold the licensee responsible; (ii) ERCB standard practice was to hold the licensee responsible; and (iii) operators could be tracked through the responsible Regulator's records.

[489] OWCP, *supra* note 486.

The AER's website does not reference the OWCP and it is unknown whether the AER has adopted the OWCP.

5.4.2 A New Compliance Framework and Enforcement Orders

On February 12, 2016, the AER released a new Integrated Compliance Assurance Framework ("ICAF")[490] and replaced Directive 019: 'Compliance Assurance' with Manual 013: Compliance and Enforcement Program.[491] As noted on the AER website, the ICAF:

> integrates the compliance assurance systems of each of the AER's predecessor organizations into a single approach. It combines the most effective parts of the Energy Resources Conservation Board's and Alberta Environmental and Sustainable Resource Development's (now Alberta Environment and Parks) compliance assurance programs.[492]

According to the ICAF, the AER recognizes that an integrated approach is necessary to avoid inconsistent responses from AER staff and uncertainty for stakeholders in industry, the public and government. Additionally, an objective of Manual 013 is to "ensure fairness and consistency in the assessment of and response to non-compliance".[493]

As I noted briefly in the introduction to this thesis, from the Regulator's perspective, remedial ECOs are only issued in the event of environmental 'non-compliance' which is defined in the ICAF to mean "failure by a regulated party to meet regulatory requirements".[494] The ICAF outlines the AER's strategic approach to ensuring compliance, provides guiding principles and

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[490] AER, *Integrated Compliance Assurance Framework* (Calgary: Alberta Energy Regulator, 2016)[ICAF].
[491] Manual 013, *supra* note 196.
[492] AER, "Frequently Asked Questions: Integrated Compliance Assurance Framework" (2016), online: <www.aer.ca/documents/enforcement/IntegratedComplianceAssuranceFramework_FAQ_20160212.pdf> [AER, "FAQ: ICAF".
[493] Manual 013, *supra* note 196 at 10. See also AER, FAQ: ICAF, *supra* note 492.
[494] ICAF, *supra* note 490 at Appendix 1. "Regulatory Requirements" are defined as "any restriction, duty, or obligation imposed upon a regulated party or other person by legislation (including regulations, rules, codes, guidelines, and policy documents), approval (including licences, permits, authorizations, leases, etc.), order, direction, declaration, or other document issued by the AER or the Government of Alberta and under the jurisdiction of the AER".

"generally describes the AER's vision for compliance".[495] Manual 013 provides more direction on how the initiatives and strategies in the ICAF will be implemented and outlines the availability of different compliance and enforcement tools. According to Manual 013:

> The AER has a variety of compliance and enforcement tools available under its energy resource and specified enactments to compel compliance and to correct and deter future noncompliance. The AER tries to use the most appropriate tool. The AER has processes in place to ensure that each noncompliance meets legal standards and procedural fairness before proceeding with any compliance or enforcement response.[496]

The AER's compliance and enforcement tools include: notices of noncompliance, warnings, orders, administrative sanctions, fees, administrative penalties, prosecution, and declaration of named individuals.[497]

Specifically with respect to "orders", Manual 013 notes that:

> [b]y requiring regulated parties to address noncompliance issues or take proactive measures, orders are effective for: ensuring that no regulated party benefits from not complying, deterring noncompliance for other regulated parties, and responding quickly to prevent or stop actual or potential impact on the environment, public safety, or orderly development.[498]

However Manual 013 does not distinguish (or make reference to) any specific types of orders, such as the remedial ECOs discussed in this thesis. Regrettably, neither the ICAF nor Manual 013 provide guidance with respect to which parties the Regulator will name in a remedial ECO or which regime – the *OGCA* or *EPEA* regime – the Regulator will utilize in certain circumstances, such as the escape of a substance from an oil and gas well or facility.

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[495] ICAF, *supra* note 490 at 1.
[496] Manual 013, *supra* note 196 at 7.1.
[497] AER, "Compliance Assurance Program", online :< www.aer.ca/compliance-and-enforcement/compliance-assurance>.
[498] Manual 013, *supra* note 196 at 7.4.

On April 8, 2016, the AER released Bulletin 2016-10 which arguably provides more direction on these issues than the ICAF.[499] The stated purpose of Bulletin 2016-10 is to "remind licensees and their directors and officers of their statutory responsibilities when ceasing operations because of insolvency or for any other reason". Bulletin 2016-10 provides that "[r]egardless of the reason for ceasing operations, licensees remain responsible for ensuring compliance with all Alberta Energy Regulator (AER) requirements", including, *inter alia*, completing abandonment and reclamation of all sites. Further, Bulletin 2016-10 notes that "[t]he decision to cease operations may trigger obligations for working interest participants, including the obligation to pay their proportionate share of suspension, abandonment, and reclamation costs".[500]

In addition to the ICAF and Bulletin 2016-10, I have also reviewed specific instances where the AER has addressed environmental non-compliance. The focus of this thesis is on remedial ECOs, however, as noted earlier, compliance orders can be both remedial and punitive in nature. As noted by the AER website:

> Remedial orders are designed to prevent, stop, or mitigate adverse environmental impacts or unacceptable risks to public safety or responsible resource development. Alternatively, punitive orders are designed to penalize those who are found to be noncompliant with AER rules and requirements.[501]

The AER has recently posted some remedial ECOs to their website, potentially allowing for some tentative conclusions to be drawn with respect to the AER's practices when issuing

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[499] AER, "Bulletin 2016-10: Obligations of Licensees When in Insolvency or When Otherwise Ceasing Operations" (8 April 8 2016) online: < www.aer.ca/documents/bulletins/Bulletin-2016-10.pdf>[Bulletin 2016-10].

[500] *Ibid.*

[501] AER, "Compliance Orders", online: <www.aer.ca/data-and-publications/orders/compliance-orders>.

these types of remedial orders.[502] The bulk of these orders are simply listed on the AER's Compliance Dashboard,[503] without the individual orders being made available on the AER website. These orders include abandonment orders, closure orders and miscellaneous orders.[504] The AER's Compliance Dashboard also includes 'Named Individual Orders'[505] and 'Liability Management Orders'.[506]

In Chapter 3, I determined that Non-Operators, as 'WIPs', could be named (and therefore were exposed to liability), in Section 27 Abandonment Orders issued under the *OGCA*. The AER's website provides some guidance as to the Regulator's practices in respect of a WIP's abandonment liability, providing that:

> any working interest participants in properties which are ordered abandoned are named as parties responsible for ensuring the abandonment of the properties in which they have a working interest by the deadline provided in the Abandonment Order.[507]

Further, the AER website provides:

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[502] The AER also publishes 'decisions' on the website, however, as of June 15, 2016, none of these decisions directly address environmental remedial orders. *REDA* permits the filing of a request for a regulatory appeal by an eligible person in regards to an appealable decision as set out in s 38 of *REDA*. This can include the review or appeal of a remedial order such as an EPO.

[503] AER, "Compliance Dashboard: Compliance and Enforcement", online: <www1.aer.ca/compliancedashboard/enforcement.html>.

[504] Miscellaneous orders appear to be used primarily for financial non-compliance (e.g. failure to pay security deposits (in accordance with the Licensee Management Rating Program), orphan fund levies, or administrative fees). Miscellaneous orders also appear to be issued against the licensee pursuant to the *OGCA* and not with respect to a specific location, well or facility.

[505] These orders are issued pursuant to section 106 of the *OGCA*. Pursuant to section 106, where the Regulator considers it in the public interest to do so, the Regulator may make a declaration naming one or more directors, officers, agents or other persons who, in the Regulator's discretion, were directly or indirectly in control of a recalcitrant licensee, approval holder or working interest participant. In making such a declaration, the Regulator may take a number of actions including: suspend any operations of a licensee or approval holder; refuse to consider an application for an identification code, licence or approval from the person; or require additional abandonment and reclamation deposits. As of June 15, 2016, there were ten Named Individuals listed on the AER website. The more recent section 106 Declarations can be found under the 'Decisions' section of the AER website, online: <www.aer.ca/applications-and-notices/decisions>.

[506] There are no example LMOs available on the website however, according to the Compliance Dashboard, these orders are issued pursuant to *EPEA* for "failure to obtain Reclamation Certificates" and are referred to under the heading of 'Environmental Protection Orders EPO LM 2015-XXX'.

[507] AER, "Abandonment and Reclamation – Frequently Asked Questions – Enforcement", online: <www.aer.ca/abandonment-and-reclamation/liability-management/frequently-asked-questions>.

> WIPs are expected to comply with any Order in which they are named as responsible parties. Failure to do so may result in the imposition of the Global REFER status against the WIP. If the AER undertakes the abandonment of the properties captured in an Abandonment Order because a WIP fails to comply with the Abandonment Order, the WIP will be pursued for the costs of the abandonment incurred by the Board in accordance with its proportionate share in the abandoned properties.[508]

A review of some of the recently issued Section 27 Abandonment Orders suggests that the AER is indeed issuing these orders to the licensee and all related WIPs.[509] The Orders I reviewed provided that both the Licensee and the WIPs must (before a specified date), abandon the wells and facilities "for which they are identified as being associated". Further, in letters from the AER to the licensees and WIPs, the AER reminds the licensee and WIPs that the *EPEA* requires the licensee and the WIPs "to reclaim these sites and obtain a reclamation certificate". The AER requests written confirmation from the WIPs that they understand their obligations and "advise when they will commence the remediation and reclamation work".[510]

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[508] *Ibid*. The AER website provides that 'Global Refer Status 'is an "enforcement status that results in all of the licensee's applications being processed as nonroutine, all of the licensee's applications and decisions being brought before the Board for disposition, and possible additional terms or conditions on business associate codes, licences, or approvals". *Ibid*.

[509] These Abandonment Orders are not posted on the website, but copies can be ordered from the Regulator for a fee. I reviewed AER, Abandonment Order AD 2016-12, issued to Camino Industries Inc. and Repsol Oil & Gas Canada Inc. (22 April 2016) (ordered from AER Information Centre and on file with author); AER, Abandonment Order AD 2016-12A, issued to Camino Industries Inc. and Pengrowth Energy Corporation (25 May 2016) (ordered from AER Information Centre and on file with author); AER, Abandonment Order AD 2016-15, issued to Elmdale Resources Ltd. (6 June 2016) (ordered from AER Information Centre and on file with author); AER, Abandonment Order AD 2016-16, issued to Grizzly Holdings Inc., et al (17 June 2016)(ordered from AER Information Centre and on file with author); AER, Abandonment Order AD 2016-20A, issued to Tuscany Energy Ltd, et al (28 September 2016) (ordered from AER Information Centre and on file with author); AER, Abandonment Order AD 2016-21, issued to Lexin Resources Ltd. and Prospex Resources Ltd. (4 August 2016) (ordered from AER Information Centre and on file with author); AER, Abandonment Order AD 2016-22, issued to Lexin Resources Ltd., et al (10 August 2016) (ordered from AER Information Centre and on file with author); AER, Abandonment Order AD 2016-28A, issued to 410577 Alberta Limited, et al (28 September 2016) (ordered from AER Information Centre and on file with author); and AER, Abandonment Order AD 2016-29A, issued to BRW Petroleum Corp. (31 August 2016) (ordered from AER Information Centre and on file with author) (collectively, the "Reviewed Section 27 Abandonment Orders").

[510] See for example, AER, Letter to Grizzly Holdings Inc., Lochaird Energy Corp. and Symphony Energy Corp., dated June 17, 2016, Re: Abandonment Order No AD 2016-16 (ordered from AER Information Centre, on file with the author); AER, Letter to Camino Industries Inc. and Repsol Oil & Gas Canada Inc., dated April 22, 2016, Re: Close/Abandonment Order No AD 2016-12 (ordered from AER Information Centre, on file with the author); AER,

As of October 10, 2016, there were 42 abandonment orders issued in 2016 and 94 issued in 2015.[511]

As of June 15, 2016, the AER's website provided copies of fifteen ECOs, including two Enforcement Orders, eleven *EPEA* EPOs, and two *OGCA* environmental orders (the "Fifteen ECOs").[512] From a review of the Fifteen ECOs, a few observations can be made. First, the AER appears to have issued the vast majority of these ECOs pursuant to the provisions of *EPEA*. The two Enforcement Orders were issued pursuant to section 210 of *EPEA*. Section 210 of *EPEA* permits the Director to issue 'Enforcement Orders' where, in the Director's opinion, a person has contravened *EPEA*.[513]

Letter to Camino Industries Inc. and Pengrowth Energy Corporation, dated May 25, 2016, Re: Closure/Abandonment Order No AD 2016-12A (ordered from AER Information Centre, on file with the author); AER, Letter to 410577 Alberta Limited, et al, dated September 28, 2016, Re: Abandonment Order No AD 2016-28A (ordered from AER Information Centre, on file with the author); AER, Letter to BRW Petroleum Corp. dated August 31, 2016, Re: Abandonment Order No AD 2016-29A (ordered from AER Information Centre, on file with the author); AER, Letter to Lexin Resources Ltd., et al dated August 10, 2016, Re: Closure/Abandonment Order No AD 2016-22 (ordered from AER Information Centre, on file with the author); AER, Letter to Lexin Resources Ltd. and Prospex Resources Ltd. dated August 4, 2016, Re: Closure/Abandonment Order No 2016-21 (ordered from AER Information Centre, on file with the author); and AER, Letter to Tuscany Energy Ltd, et al dated September 28, 2016, Re: Amended Closure/Abandonment Order No AD 2016-20A (collectively, the "Reviewed Section 27 Abandonment Letters").

[511] AER, "AER Abandonment Orders", online: <www.aer.ca/documents/orders/ibo/AbandonmentOrders.pdf>.

[512] AER, "Compliance Orders", online: <www.aer.ca/data-and-publications/orders/compliance-orders>. *EPEA* specifically uses the term 'EPO', while similar types of orders issued pursuant to the *OGCA* are referred to more generally as 'Environmental Orders'.

[513] The first enforcement order was issued in respect of a section 109(2) *EPEA* release. The second enforcement order was issued in respect of a section 227(e) *EPEA* breach (i.e. operating contrary to an approval). See AER, Enforcement Order (*EPEA*)EO-2014/02-UAR (14 March 2014) issued to Coal Valley Resources, as amended by Enforcement Order Amendment 1 – EO-2014/02-UAR (21 March 2014), Enforcement Order Amendment 2 – EO-2014/02-UAR (26 March 2014), Enforcement Order Amendment 3 – EO-2014/02-UAR (19 June 2014), online: <aep.alberta.ca/about-us/compliance-assurance-program/compliance-enforcement/documents/CoalValley-EnforcementOrder-EO-2014-02.pdf> and Alberta Environment and Sustainable Resource Development, Enforcement Order (*EPEA*)EO-2013/05-NR issued to Canadian Natural Resources Limited (21 October 2013) Re: Cold Lake Weapons Range, online: <aep.alberta.ca/about-us/compliance-assurance-program/compliance-enforcement/documents/CanadianNaturalResources-EO-2013-05.pdf>.

Of the Fifteen ECOs, three were Section 140 Reclamation EPOs.[514] These EPOs ordered the operators to perform specific work in order to conserve and reclaim the 'specified land' at the well or facility sites and ordered the operators to apply for a reclamation certificate before a specified future date.[515] One of these EPOs had initially been issued to Stampede Oils, as the Operator, but AESRD (the Regulator at the time) was informed that Locke Stock & Barrel Company Ltd. ("LS&B") had acquired ownership from the Receiver for Stampede Oils and now owned the well sites in question. Accordingly, the EPO was amended and issued to LS&B as the 'operator' within the meaning of section 134(b) of *EPEA*.

Of the Fifteen ECOs, eight were Section 113 Release EPOs.[516] In most of these cases, additional sections of *EPEA* or the *Pipeline Act* were also referenced. For example, in a recent

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[514] Alberta Environment and Sustainable Resource Development, Section 140 (*EPEA*) EPO No EPO-2014-03-SSR issued to Locke Stock & Barrel Company Ltd. (27 March 2014), online: <aep.alberta.ca/about-us/compliance-assurance-program/compliance-enforcement/documents/LockeStockBarrel-EPO-2014-03.pdf>; AER, Section 140 and 241 (*EPEA*) EPO issued to NEP Canada ULC (19 November 2015), online: <www.aer.ca/documents/orders/EPO-NEP_20151119.pdf>; and AER, Section 140 and 241(*EPEA*) EPO issued to Gear Energy Ltd. (25 September 2015), online: <www.aer.ca/documents/orders/EPO-GearEnergyLtd_20150928.pdf> (collectively, the three orders are the "Reviewed Section 140 Reclamation EPOs").

[515] The AER's Compliance Dashboard also lists a large number of orders under the category of "EPO" for "failure to obtain a reclamation certificate". These orders are not available on the website, but are simply listed by reference number.

[516] The eight Section 113 Release EPOs I reviewed are: (i) AER, Section 113 (EPEA) EPO (and s 29 Pipeline Act order) issued to ConocoPhillips Canada Operations Ltd. (14 June 2016), online: <www.aer.ca/documents/orders/EPO-ConocoPhillips_20160614.pdf>; (ii) AER, Section 113 and 241 EPO (EPEA) and Section 27 Abandonment Order (OGCA) issued to Shoreline Energy Corp. et al (12 April 2016), online: <www.aer.ca/documents/orders/EPO-ShorelineEnergyCorp_20160412.pdf>; (iii) AER, Section 113 and 241 EPO (EPEA) issued to Bradley Oil & Gas Inc. et al (18 September 2015), online: <www.aer.ca/documents/orders/EPO-BradleyOilGasInc-20150918.pdf>; (iv) AER, Section 113 and 241 EPO (EPEA) (and s 156 EPEA order) issued to Syncrude Canada Ltd. (11 August 2015), online: <www.aer.ca/documents/orders/EPO-SyncrudeCanadaLtd-20150811.pdf>; (v) AER, Section 113 EPO (and s 22 OGCA, s 210 EPEA and s 59.1 Public Lands Act order) issued to Apache Canada Ltd. (26 June 2015), online: <www1.aer.ca/compliancedashboard/enforcement/201506-17_Order_Apache%20Canada_2013-004_RW.pdf>; (vi) AER, Section 113, 241 & 210 EPO (EPEA) (and s 29(1)(b) Pipeline Act order and s 59.1 Public Lands Act order) issued to Sabanero Energy Corp. (22 December 2015), online: <www.aer.ca/documents/orders/EPO-Sabanero_20151222.pdf>; (vii) Alberta Environment and Sustainable Resource Development, Section 113 & 114 EPO (EPEA) - EPO-2013-33/NR issued to Canadian Natural Resources Limited (24 September 2013) Re: Cold Lake Weapons Range, online: <aep.alberta.ca/about-us/compliance-assurance-program/compliance-enforcement/documents/CanadianNaturalResources-EPO-2013-33.pdf>; and (viii) Alberta Environment and Sustainable Resource Development, Section 113 EPO (EPEA) – EPO-2013/34-CR issued to

EPO issued to ConocoPhillips Canada Operations Ltd. on June 14, 2016, Conoco was the pipeline licensee and a "person responsible" for substances as defined in section 1(tt) of *EPEA*. The EPO was issued pursuant to section 113 of *EPEA* and section 29(1)(b) of the *Pipeline Act*. Only two of the Fifteen ECOs were Section 104 Clean-Up Orders, issued pursuant to the *OGCA*.[517] Both orders were issued with respect to 'releases' or 'escapes' of substances at facilities.

The second general observation I can make in respect of the Fifteen ECOs is that only three of the ECOs directly or implicitly address the liability of more than one Joint Operator. On September 18, 2015, a Section 113 Release EPO (the "Bradley EPO") was issued to: (i) Bradley Oil and Gas Inc. ("Bradley"), the holder of *OGCA* well licence number W 0338273 (the "Well"), and facility licence number F 35213 (the "Facility") located at 9-05-115-6-W6M; (ii) Hardie & Kelly Inc (who was appointed receiver and manager of the property and assets of Bradley pursuant to section 243(1) of the *BIA* (the "Receiver"); and (iii) three other WIPs in the Well. The three other WIPs in the Well, and their respective registered working interests, are: 1434706 Alberta Ltd. (3.00%), 1046884 Alberta Inc. (3.25%), and 1506928 Alberta Ltd. (18.00%)(collectively, the "WIPs").[518]

Coal Valley Resources Inc. and Sherritt International Corporation (19 November 2013) Re Obed Mountain Mine, online: <aep.alberta.ca/about-us/compliance-assurance-program/compliance-enforcement/documents/CoalValley-SherrittInternational-EPO-2013-34.pdf>, as amended by Environmental Protection Order Amendment 1, EPO-2013/34-CR (28 November 2014), Environmental Protection Order Amendment 2, EPO-2013/34-CR (30 June 2015).

[517] See AER, Section 104 Order (*OGCA*) issued to Bonavista Energy Corporation (29 October 2015), online: <www.aer.ca/documents/orders/BonavistaOGCAs104.pdf> (the "Bonavista Order") and AER, Section 104 Order (*OGCA*) issued to Nexen Energy ULC (13 May 2016), online: <www1.aer.ca/compliancedashboard/enforcement/201605-01_Order_Nexen%20Energy%20ULC_2016-05-13.pdf>. When the Bonavista Order was issued, Bonavista was the current licensee of a gas plant facility licence. The Order references a sulfolane 'escape' from Bonavista's facility "or from an unidentified source associated with" Bonavista's facility. There is some evidence that Suncor was the plant operator when the contamination was first detected in 2008.

[518] AER, Section 113 and 241 EPO (*EPEA*) issued to Bradley Oil & Gas Inc. et al (18 September 2015), online: <www.aer.ca/documents/orders/EPO-BradleyOilGasInc-20150918.pdf>.

The Bradley EPO references the definition of 'licensee' in the *OGCA* (as including a receiver-manager of a licensee) and the definition of a 'working interest participant' in section 1(1)(fff) of the *OGCA*. The EPO further provides that oil emulsion had been released onto the wellsite and that the AER had previously issued a notice of non-compliance against Bradley under section 8.050(1)(2) of the *OGCR* for unaddressed releases.

The Bradley EPO was issued pursuant to section 113 (release of substances) and section 241 (general requirements of EPOs) of *EPEA*. The EPO also provides that each of Bradley, the Receiver and the WIPs are 'persons responsible' for the released substance, as defined in section 1(tt) of *EPEA*. Although the references to both the *OGCA* and *EPEA* adds a certain level of complexity, it appears that Bradley and each of the WIPs are being ordered, pursuant to section 113 of *EPEA*, to engage in clean-up operations. According to the analysis conducted in this thesis, this would suggest that Bradley and each of the WIPs or 'Joint Operators'[519] will be liable, jointly and severally, to comply with the Section 113 Release EPO.[520]

On September 18, 2015, a Section 27 Abandonment Order (Amended Closure/Abandonment Order 2015-88A) was also issued to Bradley, the Receiver and the WIPs in respect of the abandonment of the Well (the "Bradley Abandonment Order").[521] The Bradley Abandonment Order provides that "as licensee and/or working interest participant in License No. W0338273, you are responsible and liable for the abandonment of the W0338273 Site".

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[519] It is not known whether the parties have entered into a JOA, although in Alberta, industry practice would quite strongly suggest that this is the case. If the parties have entered into a JOA, it is also arguable that the JOA was a CAPL Operating Procedure, although which version of the CAPL is indeterminable.

[520] Recall that section 240(1) of *EPEA* provides that "[w]here an environmental protection order is directed to more than one person, all persons named in the order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs of doing so".

[521] AER, Abandonment Order AD 2015-88A issued to Bradley Oil & Gas Inc. et al (18 September 2015), online: <www.aer.ca/documents/orders/EPO-BradleyOilGasInc-20150918.pdf>.

Further, the Bradley Abandonment Order provides that "[o]nce the W0338273 Site has been abandoned, section 137 of *EPEA* requires Bradley and the WIPs to reclaim this site and to obtain a reclamation certificate". The analysis conducted in this thesis suggests that each of Bradley and the WIPs are liable to engage in abandonment operations and reclamation operations. The party who conducts the abandonment can apply for the apportionment of any abandonment and related reclamation costs between the WIPs in accordance with the WIPs' 'Proportionate Shares' (i.e. their working interest percentages in the Well) pursuant to a Section 30 A&R Cost Recovery Order.

The second order which addresses the liability of Joint Operators was issued on April 12, 2016 to Shoreline Energy Corporation ("Shoreline") and High Mark Energy Corp., Dark Warrior Resources Ltd., Progress Energy Canada Ltd., Iteration Energy/Chinook Energy Inc., and Lexin Resources Ltd. (collectively, the "WIPs")(the "Shoreline Order"). This order appears to be a combined *EPEA* Section 113 Release EPO (to engage in clean-up operations required by the release of a substance into the environment) and an *OGCA* Section 27 Abandonment Order.

Shoreline was the licensee for two wells which were involved in a substance release (the "Wells") – specifically, the escape of natural gas from the surface casing of the Wells.[522] Shoreline had made a voluntary assignment into bankruptcy on December 23, 2015. On March 15, 2016 the Trustee of Shoreline executed a 'Notice of Renunciation' in accordance with section 20(1) of the BIA to quit claim and renounce Shoreline's interests in the well, facility and pipeline licenses held by Shoreline.

[522] This is commonly referred to as a 'surface casing vent flow' and is common in older oil and gas wells where the cement behind the casing was not pumped all the way to surface. Where shallow gas zones were left without cement keeping them sealed behind the surface casing, a surface casing vent flow would result.

According to the Shoreline Order, Shoreline, as a licensee, is a 'person responsible' as defined in section 1(tt) of *EPEA*. The WIPs are identified in the Shoreline Order as 'working interest participants' of the Wells as defined in section 1(1)(fff) of the *OGCA*. The WIPs, as beneficial or legal owners of an interest in the Wells, are also identified as 'persons responsible' as defined in section 1(tt) of *EPEA*.[523] Finally, the Shoreline Order states that the director is of the opinion that it is necessary to abandon the Wells to protect the environment and Shoreline and the WIPs are therefore ordered to engage in clean-up operations and abandon the Wells.

Similarly to the conclusions made above in respect of the Bradley EPO and Bradley Abandonment Order, based on the analysis conducted in this thesis, it would appear that Shoreline and the WIPs are jointly and severally liable to conduct clean-up operations in respect of the escaped substance and abandon the Wells. Any of the WIPs who conduct the abandonment operations can then apply to the Regulator for a Section 30 A&R Cost Recovery Order apportioning the costs of abandonment and reclamation between the WIPs in accordance with their Proportionate Share in the Wells. We know that Shoreline is bankrupt and will likely be unable to pay for its Proportionate Share according to a Section 30 A&R Cost Recovery Order. Therefore, in order to be reimbursed for Shoreline's Proportionate Share, the WIPs who undertake abandonment operations will: (i) need to apply to the Regulator to have Shoreline declared a 'defaulting WIP'; and (ii) undergo the application process outlined in

[523] AER, Section 113 and 241 EPO (*EPEA*) and Section 27 Abandonment Order (*OGCA*) issued to Shoreline Energy Corp. et al (12 April 2016), online: <www.aer.ca/documents/orders/EPO-ShorelineEnergyCorp_20160412.pdf>.

section 70(1) of the *OGCA* and section 16.541 of the OGCR to be reimbursed for Shoreline's Proportionate Share of abandonment and related reclamation costs from the orphan fund.[524]

The only other order worthy of specific consideration is a Section 113 Release EPO issued to Coal Valley Resources Inc. ("CVRI") and Sherritt International Corporation ("Sherritt") in respect of a mining facility (the "Coal Valley EPO").[525] According to the EPO, there was a release of mine wastewater into the environment. CVRI and Sherritt are each named as a 'person responsible' for the substances, as defined in section 1(tt) of *EPEA*, as the owners of the mining facility, the persons responsible for operations at the mining facility, and/or as the holder of the approval for the mining facility. The EPO is of interest because it names a party other than the licensee of record as a 'person responsible'. Since *EPEA* is the only legislation referenced, it is likely that CVRI and Sherritt will be jointly and severally liable.

5.5 Conclusions

In her 2000 LLM thesis, Professor Vlavianos concluded that Alberta Environment had adopted and applied a policy of holding the last licensee on record with the EUB liable (i.e. the "Last Licensee on Record Policy") for the costs of both: (i) conserving and reclaiming a wellsite under what is now Part 6 of *EPEA*; and (ii) the clean-up of released substances under what is now Division 2 of Part 5, *EPEA.*

[524] The parties who are subject to the Shoreline Order are subject to a 1981 CAPL Operating Procedure. Prior to Shoreline's bankruptcy and renunciation of operatorship and its interests in the Wells, Shoreline held a 53.958% working interest. (Document on file with author.)

[525] See Alberta Environment and Sustainable Resource Development, Section 113 EPO (*EPEA*) – EPO-2013/34-CR issued to Coal Valley Resources Inc. and Sherritt International Corporation (19 November 2013) Re Obed Mountain Mine, online: <aep.alberta.ca/about-us/compliance-assurance-program/compliance-enforcement/documents/CoalValley-SherrittInternational-EPO-2013-34.pdf>, as amended by Environmental Protection Order Amendment 1, EPO-2013/34-CR (28 November 2014), Environmental Protection Order Amendment 2, EPO-2013/34-CR (30 June 2015).

Further, Professor Vlavianos concluded that Alberta Environment had not adopted a practice of fixing liability on one party with respect to the application of the contaminated sites provisions of what is now Division 2 of Part 5, *EPEA*. Instead, Alberta Environment started with the premise that a 'whole host of parties' were potentially liable, and then narrowed down this list based on the facts of the particular case.

Significant legal, regulatory and economic changes have occurred since Professor Vlavianos defended her thesis and the Regulator has responded to these changes with new environmental liability management criteria, guidelines and operational standards. The coming into force of *REDA*, the creation of the AER with jurisdiction under both the *OGCA* and *EPEA* (as it pertains to energy resource activities), and an industry wide recession (involving an unprecedented number of bankruptcies in the oil and gas sector) are likely the most significant changes in terms of the issues considered in this thesis.

In particular, the increased number of industry participants either bankrupt or otherwise unable to pay their working interest share of liabilities has prompted regulators to amend some of their practices to accommodate the potential bankruptcy of the licensee of oil and gas facilities and name other 'responsible persons', 'operators' and 'WIPs' in remedial ECOs.

Contaminated Sites

Although the Regulator has not published any policies which expressly provide that the Regulator is unlikely to utilize the formal contaminated site provisions in Division 2 of Part 5, *EPEA*, it appears that this is indeed the case. The AEP's *Contaminated Sites Policy Framework* purports to provide policy guidance for the management of 'contaminated sites' in Alberta,

however it refers to Division 1 of Part 5, *EPEA* (substance releases) and omits any reference to the formal contaminated site provisions in Division 2 of Part 5.

The AER appears to have followed the AEP's lead in addressing the clean-up of contaminated sites by equating the 'decontamination' of oil and gas wells and facilities with the reclamation and remediation of these sites – pursuant to Division 1 of Part 5, *EPEA* or Part 6 of *EPEA*. Further, it is notable that none of the published remedial ECOs on the AER website have been issued pursuant to the formal contaminated site provisions of Division 2 of Part 5, *EPEA*.

Recall that in her thesis, Professor Vlavianos noted that Alberta Environment had indicated that the formal designation of contaminated sites would be a 'last resort' option. The rare use of these provisions in practice since 2000 and AEP's direct association of 'contaminated lands' with the substance release and reclamation of lands provisions of *EPEA* seems a natural continuation of this policy. Unfortunately, for our goals of greater clarity and certainty, the same cannot be said of the Last Licensee on Record Policy that Professor Vlavianos identified (as the next section will show).

<u>The Last Licensee on Record Policy and Section 140 Reclamation EPOs</u>

Based on a review of all of the available policy documents, guidance materials and other material published by the AER and AEP, in conjunction with an analyses of those remedial ECOs published on the AER website, I cannot conclude that the Regulator continues to use the Last Licensee on Record Policy – at least, not as consistently as it once did. The strongest evidence that this policy continues to be applied is Alberta Environment's OWCP document issued in 2010. In the OWCP, Alberta Environment explicitly provides that the oil and gas well or facility licensee will be the first to be considered the 'operator' for reclamation compliance and

enforcement issues. Further, the OWCP provides that Alberta Environment will only look to a successor, receiver trustee or WIP where there the ERCB licensee is defunct.

However, the OWCP was issued prior to the implementation of *REDA* and the creation of the AER and is not mentioned on the AER website. Accordingly, I question what weight can be assigned to this document. The three Reviewed Section 140 Reclamation EPOs were issued to the *licensees* of the well sites or facility sites named in the orders, however these EPOs also note that the licensees in question are '*operators*' as defined in section 134(b) of *EPEA*. The AER's published document directed towards compliance with Part 6 of *EPEA* and the *Conservation and Reclamation Regulation* is SED-002. This document does not address the issue of which party or parties the Regulator will pursue in the event of non-compliance with Part 6 of *EPEA*. Finally, in the Reviewed Section 27 Abandonment Letters (which accompanied the Reviewed Section 27 Abandonment Orders), WIPs are reminded of their 'duty' to engage in reclamation activities following the completion of abandonment operations.

<u>Section 27 Abandonment Orders</u>

With respect to Section 27 Abandonment Orders, the Regulator appears to be issuing these orders to the applicable licensee, receiver-trustee (if applicable) and WIPs, ordering all parties to abandon the wells 'for which they are identified as being associated' before a certain date. It appears that the Regulator is pursuing as many parties as is justifiable under the *OGCA* to engage in abandonment operations. The AER website provides that a "WIP will be pursued for the costs of abandonment incurred by the Board in accordance with its proportionate share" and while there is no evidence of any Section 30 A&R Cost Recovery Orders on the AER

website, according to the Orphan Well Association, in 2015-2016, the OWA reimbursed WIPs (or other parties) $2,743,000 for abandonment and related reclamation costs.

Section 104 Clean-Up Orders (*OGCA*) and Section 113 Release EPOs (*EPEA*)

At the start of this Chapter I asked how the Regulator was going to exercise its discretion and integrate the substance release and escape provisions of the *OGCA* and *EPEA*. In the area of substance releases and escapes, most of the published policy documentation only refers to *EPEA*. With respect to the escape or release of substances into the environment, the ESRD's *Contaminated Sites Policy Framework* specifically purports to apply. However, the CSP only generally refers to the "role of the proponent", which term is expressly stated to include any person responsible, owner, or operator as defined in *EPEA*. The Regulator has offered little in the way of guidance as to whether a particular 'person responsible' will be pursued under the substance release provisions in Division 1 of Part 5, *EPEA*.

Further, we know that out of the Fifteen ECOs provided on the AER website, ten were issued by the AER in response to substance releases, eight of those were Section 113 Release EPOs (*EPEA*) and two of those were Section 104 Clean-Up Orders (*OGCA*). The two Section 104 Clean-Up Orders were each issued to a single party, the licensee. This is not surprising if we recall from Chapter 3 that Section 104 Clean-Up Orders may only be issued to the licensee, an approval holder and a relatively narrow definition of 'operator' (when compared to the *EPEA* definition of 'operator').

Of the eight Section 113 Release EPOs, three were issued to multiple parties as 'persons responsible' pursuant to section 1(tt) of *EPEA*. In two of these circumstances, the order was issued to all known WIPs. Yet in these two orders, the licensee was bankrupt. (The third order

was issued to two joint owners of a facility). What of the other five Section 113 Release EPOs? They were all issued to one party - the licensee. Was this because the well or facility in question was owned 100% by the licensee or were there other potential 'persons responsible' who could have been named, but the Regulator exercised its discretion to name only the licensee? (i.e. were these five Section 113 Release EPOs simply issued to the last licensee on record with the Regulator?) There is simply not enough information to establish that the Regulator has adopted any practices which would assist us in predicting which potentially liable parties the Regulator will pursue in the event of substance releases.

Although this Chapter reviewed a significant amount of material regarding the Regulator's policies and practices on 'environmental liability management', this area continues to remain ambiguous and uncertain. However, we can identify the following tentative conclusions: (1) The Regulator is unlikely to utilize the formal contaminated site provisions in Division 2 of Part 5, *EPEA*. (2) The Regulator will likely name the licensee and all WIPs in a Section 27 Abandonment Order and pursue all WIPs, as defined in the *OGCA*, to conduct and pay for the costs of abandonment operations. (3) In the event a licensee is bankrupt, all WIPs will likely be named by the Regulator, on a joint and several basis, in a Section 113 Release EPO and ordered to conduct clean-up operations. (4) There may continue to be circumstances where the Regulator will first look to the last licensee on record with the Regulator before turning to other related parties. For example, this may be the case with respect to the reclamation and conservation of specified land pursuant to Part 6 of *EPEA*. However, in the event the licensee is bankrupt or defunct, the Regulator will pursue other parties, including WIPs.

None of these tentative conclusions offer Non-Operators any degree of certainty or clarity with respect to their likelihood to be pursued by the Regulator for environmental non-compliance. However, these conclusions will be integrated with a summary of my conclusions from the remainder of the thesis in Chapter 7, and hopefully will add some insight to the overall thesis question.

CHAPTER SIX: INDEPENDENT OPERATIONS

6.0 Introduction

Chapter 6 introduces the concept or mechanism of 'independent operations' where less than all of the parties to the 2007 CAPL proceed with an operation on the joint lands. The Chapter beings with a brief overview of the processes and primary objectives of independent operations and introduces the two primary groups of parties in independent operations - 'Participating Parties' (those parties who choose to participate in an independent operation) and 'Non-Participating Parties' (those parties who elect not to participate in an independent operation).

In Chapter 6, I continue to ask whether the parties to the 2007 CAPL can be named in remedial ECOs issued pursuant to the *OGCA* and *EPEA*. However, instead of focusing on 'Non-Operators' in a joint operation, I focus on 'Non-Participating Parties' in an independent operation. Chapter 6 utilizes and builds on much of the analysis of previous chapters as many of the underlying legal concepts, provisions of the 2007 CAPL and 'facts' (such as joint ownership of mineral interest) remain the same. For example, the 'Participating Parties' group (if there is more than one Participating Party) is comprised of Non-Operators and Operators whose liability has already been established in earlier Chapters. Further, the concepts of agency, ownership and possession continue to play a pivotal role in independent operations.

Independent operations also add an additional level of complexity and Chapter 6 addresses some particularly contentious issues, such as whether there is a transfer of any of the Non-Participating Parties' property interests in an independent operation and what effect the Non-Participating Parties' right to 'buy-back' into the independent operation (i.e. participate at

a future date) has on the parties' ownership interests and ultimate liabilities. Once these questions have been addressed, then Chapter 6 explores the Non-Participating Parties' potential liability, first under the *OGCA* and then under *EPEA*.

6.1 An Overview of Independent Operations

The 2007 CAPL's "paramount policy objective" is to "encourage the joint evaluation of the Joint Lands".[526] However, the current reality of both the domestic and the international oil and gas industry is one in which the parties of JOAs are often competitors outside of the 'joint lands' and in some instances the parties cannot come to a unanimous agreement on the management and operation of the joint lands.[527] If there is no mechanism for resolution of the parties' differences, this can lead to a complete failure of the joint venture and possibly the forfeiture of the mineral interest to which the joint lands relate.

Given these significant risks, many JOAs have adopted a mechanism through which some of the parties may proceed with an operation on the joint lands 'independently'. The mechanism adopted in the 2007 CAPL to address the potential for 'deadlock' in decision making is found in Article 10 of the 2007 CAPL, 'Independent Operations'. 'Independent operations' loosely equate to 'exclusive operations' outside of Canada.[528] As noted by Spurn, Prete and

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[526] 2007 CAPL Annotations, *supra* note 72 at 28.

[527] There are various reasons why the parties may be unable to agree on joint operations. The parties may have different technical views of a particular prospect or different investment strategies, internal budget thresholds, or thresholds for risk. See also *Mesa Operating Limited Partnership v Amoco Canada Resources Ltd*., 1994 ABCA 94 (CanLII) at para 48.

[528] 'Exclusive operations' is a term generally used outside of Canada. Exclusive operations are typically broken down into two types of operations which allow for the non-participation of one or more members: sole risk operations and non-consent clauses. As described by Scott Styles:

> [t]he difference between the two types of clause is essentially between the amount of support a proposal has obtained at the JOC. A *sole risk* project is one which has failed to obtain the pass mark in the Opcom, but which the defeated member(s) nevertheless wish to go ahead. A *non-consent* project, by contrast, is

Zerebeski, "[a]rticle 10.00 is a critical component of the [2007 CAPL] Procedure and ensures that the Joint Lands are not sterilized from development merely because not all Parties agree upon a proposed Operation or the manner in which it will be carried out."[529]

The Court of Queen's Bench has summarized the independent operations provisions or 'clause' (as the case may be) in an earlier version of the CAPL Operating Procedure:

> The effect of that clause is that if one of the parties to the operating agreement was desirous of drilling a well and the other party was not, the first party could drill the well at its own cost and expense and, if production resulted from such operation, the other party had the right, upon payment of certain amounts, to become a part owner of the well after the first party had recovered the full costs of drilling, etc. plus a certain percentage thereof from production from the well.[530]

Recall from Chapter 2, Section 2.2 of this thesis, that the second fundamental principle of many JOAs, including the 2007 CAPL, is to balance the rights and needs of the individual parties with those of the collective.[531] The independent operations Article of the 2007 CAPL attempts to achieve this balance through two major components. The first is the process

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one which succeeds in obtaining the pass mark in the Operating Committee, but where the outvoted minority nevertheless elect not to participate in the proposed project. Styles, supra note 86 at 390. Similarly to 'independent operations' conducted pursuant to the 2007 CAPL, sole risk operations and non-consent operations involve a portion of working interest owners who wish to proceed with the operation and a portion who do not.

[529] Independent operations are undertaken as a matter of course in Canada. By contrast (and referring to 'exclusive operations' outside of Canada), some commentators suggest that exclusive operation provisions in JOAs are rarely utilized in practice. For example, Peter Roberts suggests that "[t]he reality is that exclusive operations provisions in a JOA are more usually used to apply some leverage in the negotiation of proposals at the Operating Committee than in actual application." Roberts, *JOAs*, *supra* note 1 at 73. See also Eduardo G Pereira, *Joint Operating Agreements: Mitigating Operational and Contractual Risks in Exclusive Operations* (London: Globe Business Publishing Ltd., 2013) at 14 who argues that the challenges or complexities involved in exclusive operations are the "main reason why exclusive operations are commonly used as a threat rather than a matter of reality".

[530] See *Monashee Petroleums Ltd. v Pan Cana Resources Ltd*., 1986 CanLII 1894 (AB QB), with respect to a non-CAPL Operating Procedure at para 7.

[531] According to Jim MacLean, "[w]hile a Party will generally be permitted to pursue a path of self-interest in management of its WI in the joint property, the Operating Procedure includes some controls to restrict what an individual Party can do... Examples of controls on a Party's ability to do whatever it wants are with respect to the handling of information, encumbering its WI, dispositions of interest and the ability to conduct operations independently." MacLean, "500 Foot", supra note 371.

'infrastructure' or 'mechanisms' which must be complied with in order for an independent operation to be proposed and conducted. This includes such matters as the contents of an operation notice, restrictions on the types of operations which may be proposed as independent operations, how the participating interests in the independent operation will be allocated, the independent operation's commencement date and provisions addressing the manner in which the operation is to be conducted and administered.[532] The second component in an independent operation, designed to ensure that the rights and needs of the individual parties are balanced with those of the collective, are the provisions that outline the consequences of non-participation and the allocation of rewards associated with participation.[533]

Finally, although the parties' contractual allocation of liability is beyond the scope of this thesis, it should be noted that the parties have adopted a separate risk allocation regime for

[532] Jim MacLean", "Independent Operations – Part I" (October 2007), The Negotiator at 6 [MacLean, "Independent Operations – Part I"]. JOAs will generally contain a number of limitations regarding when an independent operation may be proposed. However, two fundamental restrictions are usually found in most JOAs which permit independent or exclusive operations. These include: (i) that independent operations cannot interfere with present or proposed joint operations, and (ii) independent operations may only be pursued upon proper disclosure to all Joint Operators (that is, all parties must be presented with the opportunity to participate in an operation on the joint lands). This second limitation usually requires that parties proposing an independent operation satisfy the requirements of a detailed notice procedure.

[533] *Ibid*. One of the more famous cases which exemplifies the general philosophy of why independent operation provisions are included in most standard JOAs is the 'Goldie case'. (*Greymouth Petroleum Acquisition Company Limited and Southern Petroleum (Ohanga) Limited v Ngatoro Energy Limited* (High Court, Wellington Registry) CP162/02 13 May 2003 – Wild J. as cited in A Caddie, "Sole Risk Provisions in Petroleum Exploration Joint Ventures" (2004) New Zealand Petroleum Conference Proceedings 7-10 March 2004 at 4). The *Goldie* case involved a 'sole risk operation' conducted in New Zealand. In the case, a minority party under a Joint Venture Operating Agreement ("JVOA")(holding a bare 5.0% of the working interest in the joint lands) was able to test its minority viewpoint as to the technical chances of success in relation to a particular prospect – and succeed. Ironically, the subsequent litigation in the Goldie case may have overshadowed the fact that the Goldie sole risk operation ultimately resulted in immediate commercial production of oil and gas. See *Caddie, supra* note 533 and Brigid McArthur, "Goldie Oil Row: Dynamics of a Sole Risk Operation" (2003) 22 Australian Resources & Energy L J 485 at 489.

independent operations.[534]

Clause 10.18 of the 2007 CAPL provides, in summary, that the Participating Parties will be liable to and, in addition, indemnify and hold harmless each Non-Participating Party for its losses and liabilities (defined in the 2007 CAPL) which arise as a result of the planning or conducting of an independent operation. This broad indemnity is subject to the handling of extraordinary damages prescribed by Clause 4.04. Clause 4.04 is the same clause on extraordinary damages that applies to the indemnification of the Operator for joint operations which excludes (in certain circumstances) 'environmental liabilities' from the indemnity. [535]

6.1.1 'Buy-Back' of Participation Rights

Most independent operations provisions also have some form of mechanism for the parties who initially chose not to participate in an independent operation (the "Non-Participating Parties") to "buy-back their right to participate ("Buy-Back Rights") from those parties who chose to participate in the independent operation (the "Participating Parties") in the independent operation. (This is not the case in the 2007 CAPL with respect to title preserving wells). Typically, the Non-Participating Parties will pay the Participating Parties all of the costs which they would have contributed if the operation had been a joint operation plus a

[534] On the subject of the comprehensiveness of the Non-Participating Parties' (or Non-Consenting Parties') indemnity, see Christopher Penman, "Sole Risk Operations in Petroleum Joint Ventures" (1993) 12 AMPLA Bull 100 at 106; Marion, Massicotte & Duhn, *supra* note 12 at 349; Pereira, *supra* note 529 at 48; and Roberts, *JOAs, supra* note 1 at 75.

[535] In contrast, the AIPN JOA provides that the 'Consenting Parties' (equivalent to the 2007 CAPL's Participating Parties):

> shall indemnify the Non-Consenting Parties from any damages, losses, costs (including reasonable legal costs and attorneys' fees), and liabilities incurred incident to such Exclusive Operation (including Consequential Loss and Environmental Loss). Emphasis added. AIPN JOA, *supra* note 64, at Article 7.3.A.

'penalty' or 'premium' (the "Buy-Back Premium").[536] Buy-Back Rights ensure that the consequences (or risks) of not participating in the independent operation are not disproportionately high. The Buy-Back Premium recognizes that the Participating Parties take a risk in proposing and conducting the independent operation.

The Buy-Back Premium will differ depending on whether the well is an exploratory well, a development well or a validating well (i.e. a title preserving well). According to Eduardo Pereira, such penalties in international JOAs can vary from 100% to 2000% of the original costs of the operation.[537] In Canada, the parties negotiate the percentage at the time the 2007 CAPL is executed, but the numbers for drilling operations in the WCSB typically include between 200% (for development wells) and 500% (for exploratory wells). Where a Non-Participating Party elects to 'buy-back' their right to participate in an independent operation, it "will acquire its Working Interest share therein" and the "Parties then participating therein will hold that well for their account, and the Parties will adjust accounts accordingly".[538]

In the 2007 CAPL, "title preserving wells" are treated separately. As noted above, Non-Participating Parties have no Buy-Back Rights for title preserving wells. In brief, a Title Preserving Well, as the name implies, is a well that is drilled, completed, recompleted or placed on production and the *failure* to conduct such operation would result in the reversion of any

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[536] Solicitor Christopher Penman notes that the 'production penalty' is the "preferred method in Australia of rewarding the risk-taking parties". Other forms of penalties include cash penalties (less favoured by participants for tax reasons and because they typically contemplate an up-front payment rather than be satisfied by the extraction of petroleum from the relevant reservoir) and acreage penalties (whereby the Non-Participating Party looses or relinquishes part of the joint venture tenement area in favour of the Participating Parties). The complications of administering acreage penalties often make them the least attractive option. Christopher Penman, *supra* note 534 at 108.

[537] Pereira, *supra* note 529 at 40. At the AIPN Model Contracts Conference, it was suggested that there was no international practice suggesting "appropriate premiums". Jay Park & Jeff Scobie, "AIPN International Operating Agreement 2012: Reaction and Results So Far" presentation delivered at AIPN Model Contracts Conference in Banff Canada, 28 June 2016 [unpublished].

[538] 2007 CAPL, *supra* note 13, subclause 10.07D.

joint lands to the grantor of the applicable title documents.[539] Where the operation in question is a Title Preserving Well, a Non-Participating Party (subject to some qualifications) will forfeit to the Participating Parties a portion of its working interest.[540]

6.2 The Relationship of the Parties in an Independent Operation

As we saw in Chapter 4, the legal relationship between the parties has a direct impact on the statutory environmental liability of the parties under *EPEA*. Specifically, if the Participating Parties act as the legal agent of the Non-Participating Parties, then the Non-Participating Parties may fall within the definitions of 'person responsible' in *EPEA* and be subject to Section 113 Release EPOs and Contaminated Site EPOs. However, in order to answer the question of whether the Non-Participating Parties and the Participating Parties are in an agency relationship, we must first determine the nature of the parties' interests during the cost recovery period of an independent operation. Specifically, we must determine whether ownership of any of the property interests of the Non-Participating Parties passes to the Participating Parties.

6.2.1 The Non-Participating Parties' Property Interests During Cost Recovery

In Section 2.4 of this thesis, I argued that, in certain circumstances, the Operator acts in the capacity of 'agent' of the Non-Operators. In this section I will consider whether the

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[539] Title Preserving Wells (and Subsequent Title Preserving Wells) are defined in Subclause 10.10A of the 2007 CAPL. When determining whether a particular well is a Title Preserving Well, previous courts in Alberta (reviewing previous versions of the CAPL Operating Procedures), have considered both the intention of the proposing party at the time the independent well was drilled and the surrounding context. See *APL Oil & Gas Ltd. v Amoco Canada Resources Ltd*., 1993 CanLII 7245 (QB) and *Amethyst Petroleum Ltd. v Primrose Drilling Ventures* Ltd., 2006 ABQB 595 (CanLII), dismissed in part, 2007 ABCA 355 (CanLII).

[540] 2007 CAPL, clause 10.10A and 10.10B.

Operator of an independent operation may, in some circumstances, act as agent for the Non-Participating Parties. At first glance, it might appear unreasonable to suggest that the Operator of an independent operation acts as an agent of the Non-Participating Parties; it is an *independent* operation after all. The Non-Participating Parties have chosen not to participate in the operation, the Non-Participating Parties are not involved in the management of the operation and the Participating Parties have indemnified the Non-Participating Parties for their losses and liabilities.

However, the Non-Participating Parties have the right to elect to participate in the independent operation at a later date and there is no transfer of ownership during the cost recovery period of an independent well operation.[541] Accordingly, I conclude that the Operator of an independent operation may act as agent of the Non-Participating Parties during the cost recovery period. The "Cost Recovery Period" occurs when one or more parties have elected not to participate in an independent operation, and 'payout' has not occurred.[542] 'Payout' occurs when the gross proceeds from the sale of production equals the total of the costs specified in Subclause 10.07A plus a multiple of such costs (i.e. the 'Buy Back Premium') ("Payout").[543]

Section 2.1 of this thesis establishes that, at common law, oil and gas working interest owners typically hold an undivided beneficial interest as tenants in common. Further, Section

[541] Recall that the cost recovery provisions in subclause 10.07 involve wells that are not considered "title preserving wells".

[542] Subclause 10.07 of the 2007 CAPL, *supra* note 13, addresses the cost recovery period. Specifically, it applies where an independent well has been drilled and there has been production. See also subclause 10.09 of the 2007 CAPL which directly addresses the situation of a non-producing independent well.

[543] This includes, in general, 100% of the lessor's royalty; 100% of any overriding royalties, freehold mineral taxes, or other encumbrances borne for the Joint Account; 100% of the Operating Costs; 100% of the Facility Fees; 200% of Equipping Costs; and a multiple of the *bona fide* Drilling Costs and Completion Costs. See 2007 CAPL, Clause 10.07A for a complete description of the applicable costs and exceptions.

2.1 outlines some of the rights and obligations of tenants in common and establishes that such rights and obligations can be modified by express agreement. With respect to joint operations, Joint Operators delegate the management of operations to an Operator. However, Joint Operators do not transfer or assign their ownership interest in the joint lands or other joint property. That is, while some of the rights and obligations of tenants in common are expressly modified by the terms of the JOA, each working interest owner continues to hold an undivided beneficial interest in the joint lands and joint property.

Article 10 of the 2007 CAPL does not expressly amend this 'status quo' in the circumstances of a non-title preserving well in the cost recovery period. That is, the provisions of Article 10 do not expressly transfer a Non-Participating Party's ownership interests in the underlying mineral rights to explore and produce from the joint lands (i.e. the profit à prendre); the personal property interest in the production from an independent well; or (iii) the real property rights in the independent well itself. Without any express provisions where the Non-Participating Parties either expressly transfer or surrender their ownership interests, then there can be no change in the parties' ownership interests in the Cost Recovery Period.

Subclause 10.07A of the 2007 CAPL provides:

> The Participating Parties will <u>retain possession</u> of an Independent Well Completed or Recompleted for the production of Petroleum Substances from one or more formations of the Joint Lands under the associated Operation Notice and all production from those formations through that well (including any such formation in which they subsequently Complete or Recomplete that well)...[544] [Emphasis added.]

The phrase "retain possession" in subclause 10.07A of the 2007 CAPL does not appear to expressly modify the underlying property rights of the Non-Participating Parties or the

[544] Subclause 10.07 is subject to Clause 10.06 for wells that have been used for lands other than the joint lands, Clause 10.08 for operations on an existing well on the joint lands and Clause 10.10 for wells that preserve title.

Participating Parties. The Participating Parties are not granted an exclusive right to the independent well or production, and the Non-Participating Parties and the Participating Parties remain tenants in common with undivided possession of the whole.

As we shall see below, other provisions in the 2007 CAPL *do* expressly modify the parties' property rights through express language, such as 'forfeiture'. However, in subclause 10.07A, there does not appear to be any change in ownership. Instead, the Non-Participating Parties appear to be contractually agreeing not to exercise their property rights until a certain time and upon the occurrence of certain events. Instead of a transfer in ownership, I would argue that the Participating Parties may have a present possessory interest in the independent well and any production therefrom with a contractual right to reduce the petroleum substances to possession and market them for the Participating Party's own account.

This conclusion is partially supported in older literature and relevant case law.[545] Robert Desbarats and Donald MacDiarmid argue that the precise legal characterization of independent operations 'penalties' are "not clear". Desbarats and MacDiarmid's work examines the 1990 CAPL Operating Procedure which also provides that the Participating Parties are entitled to "retain possession" of two different forms of property: the independent well and all

[545] In addition to the subsequent discussion, see the analysis of Christopher Penman, in an Australian journal, *supra* note 534 at 107. Penman concludes that "the form of penalty or premium associated with sole risk or non-consent activity *should not be such as to change the legal or equitable ownership of joint venture property*." [Emphasis added.] Penman cites the legislative provisions that restrict the free alienability of such interests as one reason for his conclusion. (Alberta legislation generally does not provide this same restriction on alienability.) Penman also raises the question of whether production penalties should be construed as contractual rights and obligations only (and therefore will not pass automatically to successors and assigns) or whether they become part of the proprietary rights attaching to the joint venture interests. *Ibid*.

production therefrom.[546] Desbarats and MacDiarmid argue that if there is no transfer of an ownership interest, then:

> ... the non-participating parties will continue to own their interest in the well and the production during the penalty period and, at the end of the penalty period, possession will be returned to them.[547]

However, Desbarats and MacDiarmid are dissatisfied with this conclusion as it is applied to *production* from the independent well:

> While this approach might make some sense insofar as the well is concerned, it leads to an absurd conclusion insofar as the production is concerned. The obvious commercial purpose of the penalty is to permit the participating parties to own the production during the penalty period with the further right to sell the production for their own account.[548]

The authors argue that in order to avoid a judgment that is absurd (in terms of the sale of production) and still recognize the specific language used (i.e. 'retain possession'), the 'better view' is that the Participating Parties are entitled to possession of the well and ownership of production.[549]

In addition to their consideration of the parties' ownership interests in the independent well and the petroleum substances produced from the well, Desbarats and MacDiarmid also consider a third form of property interest which is involved in independent operations - the

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[546] Subclause 10.07 of the CAPL 2007 also refers to two distinct property interests which the Participating Parties are entitled to retain possession of: (i) "an Independent Well Completed or Recompleted for the production of Petroleum Substances from one or more formations of the Joint Lands under the associated Operation Notice"; and (ii) "all production from those formations through that well (including any such formation in which they subsequently Complete or Recomplete that well)".

[547] Robert P Desbarats & Donald G MacDiarmid, "Independent Operations: Article X of the CAPL Operating Procedure" (1996) 34 Alta L Rev 602 at 616.

[548] *Ibid*.

[549] *Ibid*. The authors also suggest that subclause 1007(b)(ii) of the 1990 CAPL which refers to "those participating parties receiving the assignment of the production attributable to..." is evidence that suggests that ownership of the production taken during the penalty period is to be transferred to the Participating Parties and not merely possession. *Ibid* at 617. However, in subclause 10.07F(b) of the 2007 CAPL (which is arguably the equivalent clause to 1007(b)(ii) of the 1990 CAPL), the language was modified to remove reference to any 'assignment'.

underlying mineral rights to explore and produce from the joint lands.[550] Desbarats and MacDiarmid consider whether the independent operation provisions potentially transfer an interest in the Non-Participating Parties' rights to drill for and produce petroleum substances (as granted by the title documents). Desbarats and MacDiarmid note the potential "unforeseen consequences" which arise if an independent operation 'penalty' results in an assignment and transfer of the petroleum and natural gas rights by the Non-Participating Parties to the Participating Parties. For example, the authors question whether such a transfer may trigger a right of first refusal.[551]

The separate treatment of each distinct property interest which is involved in an independent well operation is critical to a proper understanding of the 2007 CAPL independent operation provisions, and will be returned to throughout this chapter. The decision of the Alberta Court of Appeal in *Mesa Operating Ltd. Partnership v Amoco Canada Resources Ltd.*[552] directly speaks to the status of the parties' interests in the *production revenue* generated from an independent well in an independent operation conducted pursuant to earlier versions of the CAPL Operating Procedure and some non-CAPL agreements. Yet the Court's analysis in *Mesa* is difficult to reconcile with the express language used in the CAPL Operating Procedures quoted by the Court and the fundamental nature of the property rights possessed by tenants in

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[550] Additional property interests which are involved in an independent well operation are considered *infra*, in Section 6.4.1 of this thesis.

[551] See Desbarats & MacDiarmid, *supra* note 547 at 617-618 for additional consequences. Subclause 10.07 of the 2007 CAPL does not expressly address this third category of property. Arguably, this is because the drafters of the 2007 CAPL recognize that the Participating Parties do not need an assignment of these property rights to drill and produce from an independent well. In Section 2.1 of this thesis, it is established that (at common law) one co-tenant can explore for and produce petroleum on the jointly held lands without consent of the other co-owners. See *supra* note 43 which describes the statutory requirements for co-owners to produce petroleum substances. Arguably, the provisions of the 2007 CAPL grant the Participating Parties entitlement to the right to produce petroleum substances as required by the *OGCA*.

[552] *Mesa*, *supra* note 527.

common. In a cross-appeal, Mesa, the holder of an overriding gross royalty in several properties in which Amoco held a working interest (but was not the operator), argued that the royalty was payable by Amoco on all the earnings of an independent well Amoco had elected not to participate in. Amoco argued that the royalty was suspended while it was in the "penalty period" – that is, until the operator recovered all development costs plus a penalty.

In order to address Amoco's claim, the Court of Appeal ruled on the legal status of the production revenue during the penalty period as between the Participating Parties and Amoco. The Court also spoke to the status of the Non-Participating Party's working interest in general. The Court held that the operating agreements before the Court did not provide that revenue during the penalty period was 'received for' Amoco.[553] At paras 48-49, the Court held:

> 48 The non-consent clause, in turn, can be seen as a sort of rental of the working interest accompanied by a right of first refusal. It is common in the oil and gas industry, as are shared working interests, and this permits each player to establish its own development plans and budgets. The benefit to working interests and royalty-holders alike is to encourage more investment generally in the industry, much more than the amount planned by or within the means of the firm with which the royalty-holder has its agreement.
>
> 49 From this perspective, it is not surprising to see that the model agreement of the Canadian Association of Petroleum Landmen, used for some of the operating agreements under review, refers to the non-participating interest as though ownership has changed hands, albeit temporarily. Clause 1008 provides that "... the participating parties shall be entitled to retain possession of the well and to all production therefrom." The other agreements contain similar terms. Some deem an alteration in ownership by reference to an assignment. The effect is the same. During the penalty period, the interest of Amoco is deemed to cease, and the interest is held by those who participate. I see nothing suspicious in this. [Emphasis added.]

[553] Specifically the Court questioned whether, under the operating procedures before it, the production revenues during the penalty period were in any realistic sense received *for* Amoco even though they were admittedly not received *by* Amoco. *Mesa*, *supra* note 527 at para 44.

As noted by Desbarats and MacDiarmid, the Court of Appeal's reference to the right of first refusal is "peculiar to say the least".[554] As is the conclusion of the Court of Appeal that previous versions of the CAPL Operating Procedure refer to the non-participating interest as though ownership has temporarily changed hands. Yet perhaps the other agreements under review by the Court contained language that was more conducive to an assignment. The 2007 CAPL does not appear to contain such assignment language.

The *Mesa* case is not the only Canadian court to have specifically considered Article X or Article 10 of the CAPL Operating Procedures, although it is the only case where the Alberta Court of Appeal has spoken so directly on the nature of the Non-Participating Party's property interests during an independent well operation.[555] In two cases (subsequent to *Mesa),* Canadian courts have alluded to distinctions between contractual rights of participation and the alteration of property rights through forfeiture. In *Robert Lemmons & Associates Ltd. v Gannon Bros. Energy Ltd.,*[556] a dispute over the ownership of a particular well arose between two parties to an unspecified CAPL Operating Procedure. The Operator of the well claimed that the Non-Operator had given up his interest by not participating in a completion operation. The Saskatchewan Court of Queen's Bench summarized the independent operations provisions of the CAPL Operating Procedure before it:

> 33 ... It should be underscored firstly, however, that the CAPL agreement contemplates the situation where only one partner chooses to complete the well. If a producing well

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554 Desbarats & MacDiarmid, *supra* note 547 at 617.

555 In addition to the cases specifically mentioned herein, see: *Nexen Inc. v Fort Energy Corp.,* 2007 ABQB 385 (CanLII)[*Nexen*]; *James H. Meek Trust v San Juan Resources Inc*., 2005 ABQB 9 (CanLII), reversed (on other grounds), 2005 ABCA 448 (CanLII); *Solara, supra* note 368; *APL, supra* note 539; and *Monashee, supra* note 530 at para 7 (with respect to a non-CAPL Operating Procedure).

556 *Robert Lemmons & Associates Ltd. v Gannon Bros. Energy Ltd.,* 1995 CanLII 6089, 1995 CarswellSask 231 (SK QB); varied, 1996 CanLII 5073 (SK CA) [*Lemmons*, cited to Westlaw].

> materializes, the partner assuming all the risk of completion costs, is rewarded by a heavy penalty payable ultimately by the non-completing partner out of well proceeds.[557]

The Court noted that the CAPL agreement was standard in the industry and that both parties were familiar with the concept of independent operations.[558] Further the Court differentiated between "not participating" in the completion of the well and "surrendering" an interest. The Court of Queen's Bench concluded that the Non-Operator did not abandon or forfeit its interest in the well, but instead, through a breach of contract, did not participate in the casing point election and was subject to the penalty provisions in the CAPL agreement.[559] (The Court's reference to a 'breach of contract' would not be applicable to a similar set of circumstances under the 2007 CAPL, but the distinction between 'not participating' and 'forfeiture' is relevant.)

In *Amethyst Petroleums Ltd. v Primrose Drilling Ventures Ltd.,*[560] the 1990 CAPL Operating Procedure was considered by the Alberta courts. The central issue in dispute was whether a second well drilled by the sole Participating Party (Primrose) was a 'title preserving well' and whether (because Amethyst had failed to participate in the drilling of the well), all of Amethyst's rights, title and interest in section 8-26-20-W4M, including the well, were forfeited. The Court held that, according to Article 1007 of the 1990 CAPL Operating Procedure, "where a party elects not to participate in the drilling of a well, it can retain its interest in the well after paying certain costs and penalties".[561] The Court of Queen's Bench concluded that the well was not a title preserving well and the plaintiffs were therefore entitled to "retain their interest" in

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557 *Ibid* at para 33.
558 *Ibid* at para 41.
559 *Ibid* at para 42.
560 *Amethyst, supra* note 539.
561 *Amethyst CA, supra* note 539 at para 7.

the section subject to payment of all costs and penalties that might be associated with the drilling of the well.[562]

Jim MacLean, CAPL committee member and CAPL expert, strongly objects to the conclusion that ownership is transferred from the Non-Participating Parties to the Participating Parties in an independent operation. MacLean explains that the drafters of the 2007 CAPL specifically considered their choice of language in drafting the independent operations provisions of the 2007 CAPL, intentionally replacing references to 'production penalties' with 'cost recovery' references. The rationale for this change was to provide a "more transparent description of the real relationship between the participating parties and a non-participating party in circumstances in which there is no forfeiture of the working interest."[563] Users of the 2007 CAPL are urged by MacLean to think of the relationship between the Participating Parties and the Non-Participating Parties as a "non-recourse financing arrangement with respect to a particular investment opportunity".[564] Jim MacLean explains:

> [a]s counterintuitive as it may initially seem, the Non-Participating Party is actually participating in the Independent Operation. It does not participate, of course, through direct cost participation for its Working Interest share of costs. Instead, it participates indirectly, by covering its share of costs through a financing arrangement with the Participating Parties whereby they fund the Non-Participating Party's Working Interest share of costs. That financing arrangement sees the Participating Parties retaining the Non-Participating Party's share of the applicable well and the production therefrom until the prescribed cost recovery is attained.[565]

This viewpoint is somewhat similar to Peter Roberts' description of 'buy-back rights' in somewhat different circumstances. Roberts notes:

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[562] *Amethyst QB*, *supra* note 539 at para 70.
[563] Jim MacLean, "2007 CAPL Operating Procedure: How Well Do You Really Understand Clause 1007 Production Penalties?" (October 2013), The Negotiator at 18 [MacLean, "Production Penalties"].
[564] *Ibid* at 18.
[565] *Ibid*.

> In essence, the buy-back right is similar to the non-participating party having a repayable carried interest with an uplift (see 4.6), in that the non-participating parties are relieved of the costs of participation, but can later become participants upon repaying the forgone costs, with a premium.[566]

Roberts defines an "uplift" (in section 4.6 of his book), as compensation to the carrying parties "for the value of the funding that they have provided".[567] Roberts is speaking in the context of a carried interest exercised by a state entity who is granted a participation right under the concession to protect the state entity from the risks which would ordinarily be associated with participation. However, Roberts acknowledges that a carried interest could also be held by a private entity, for example in accordance with the terms of a farm-out agreement or with respect to an exclusive operation.[568]

In support of the conclusion that there is no change in ownership, but only a contractual agreement not to exercise certain property rights, it is useful to compare the specific language used in the cost recovery provisions of subclause 10.07 with other provisions in Article 10 of the 2007 CAPL.[569] For example, subclause 10.07 can be compared with subclause 10.10 which addresses the consequences of a failure to participate in an independent operation that involves the *preservation of title*. Abbreviated, subclause 10.10B provides that:

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[566] Roberts, *JOAs*, *supra* note 1 at 79.
[567] *Ibid* at 54.
[568] *Ibid*.
[569] While a comparison of the language used in certain provisions of the 2007 CAPL is useful, any conclusions drawn from these comparisons must be viewed with caution. The language adopted in Article 10 of the 2007 CAPL is not always consistent. See, for example, subclause 10.07D of the 2007 CAPL which provides that "[t]he Operator [of joint operations] will operate that well if it is an owner of that well, provided that the applicable Parties will appoint another Operator under Clause 2.06, *mutatis mutandis*, if the Operator has not accepted participation in that well or it declines the opportunity to become Operator at the time it acquires participation under this Subclause." (Emphasis added.) The reference to 'if it is an owner of the well' is peculiar, to say the least, and contrary to the argument in this thesis that Non-Participating Parties retain ownership rights in the independent well.

> ... Notwithstanding Clauses 9.03, 10.07 and 10.08, a Non-Participating Party for a Title Preserving Well will forfeit to the Participating Parties therein 100% of its Working Interest in:
>
> (a) that well and its Spacing Unit...; and
> (b) the balance of the Preserved Lands[570] at the date they otherwise would have reverted under the applicable Title Document(s)... [Emphasis added.]

The 1990 CAPL also provides that the Non-Participating Parties will 'forfeit' a specified interest in similar circumstances. (Previous versions of the CAPL Operating Procedure require the Non-Participating Party to 'assign' its interest to the Participating Parties.)[571] The use of the word 'forfeit' suggests that the Non-Participating Parties must alter or give up their property rights. Desbarats and MacDiarmid agree, arguing that:

> [t]he specific use of those words in the title preservation provisions and not in the penalty provisions suggest that the words in the penalty provisions may not transfer ownership in anything and probably do not transfer ownership of an interest in the joint lands.[572]

In addition to the forfeiture of title provisions in the 2007 CAPL, the provisions of the 2007 CAPL which enable the Non-Participating Parties to elect to participate in an independent operation (upon notification of cost recovery) also appear to distinguish between 'participation' rights and 'forfeiture'.[573] Subclause 10.07C provides that the Operator of an independent well will notify the Non-Participating Parties of cost recovery and each Non-Participating Party will notify the Operator if it "accepts participation in that well and the production from that well

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[570] Subclause 10.10A of the 2007 CAPL defines "Preserved Lands" to mean "any areal and stratigraphic rights included in the Joint Lands that would have reverted to the grantor of the applicable Title Document(s) if there were no Title Preserving Well, subject to any designation of Preserved Lands under Subclause 3.10D".

[571] Desbarats & MacDiarmid, *supra* note 547 at 621, speculate that the change in language from an 'assignment' to 'forfeiture' was made so that the transfer of the interest occurred immediately, "rather than only upon the non-participating party executing an assignment".

[572] *Ibid* at 616.

[573] The right of the Non-Participating Parties to elect whether to participate in the independent well election after cost recovery was not introduced until the 1981 CAPL Operating Procedure. The 2007 CAPL Annotations, *supra* note 72 at 35, speculate that there may be circumstances where a Non-Participating Party may chose not to participate, even after cost recovery, where the potential abandonment costs or accrued environmental liabilities are greater than the projected value of production from the independent well.

from the associated formations of the Joint Lands in which it is Completed or Recompleted". Failure to elect is deemed an election to accept participation.

According to subclause 10.07E of the 2007 CAPL, a Non-Participating Party that does not accept participation in an independent well after cost recovery:

> ... will forfeit to the Participating Parties its right of participation therein and its right to Petroleum Substances produced from its Spacing Unit, insofar only as that Spacing Unit related to production through the wellbore from the formations of the Joint Lands in which that well is then Completed or Recompleted. Except as provided in the preceding sentence for produced Petroleum Substances, that Non-Participating Party does not forfeit its Working Interest in the Joint Lands comprising that Spacing Unit or its right to recover Petroleum Substances from that formation in a different location in that Spacing Unit through the use, in whole or in part, of a different wellbore."[574] [Emphasis added.]

Once again, express language of a transfer in ownership is used.

In this Section I conclude that Non-Participating Parties continue to own – with respect to a non-title preserving well - their working interest share in the independent well, the production from the independent well and the mineral rights to explore for and produce petroleum substances from the joint lands. Conversely, the Participating Parties are granted a present possessory interest in the independent well and the production from the independent well. These preliminary conclusions are necessary in order to answer the questions that follow in this Chapter.

6.2.2 Do the Participating Parties Act as Agents of the Non-Participating Parties?

The two requirements for an agency relationship were established in Section 2.4 of this thesis. Based on these two requirements, we must specifically ask: (i) Do the Non-Participating Parties intend to be represented by the Operator of the independent well operation, and (ii) have the Non-Participating Parties granted the Operator of the independent well operation the

[574] 2007 CAPL, *supra* note 13, subclause 10.07E.

right to alter their legal interests? The answer will depend upon the specific factual situation. Perhaps the Non-Participating Parties would agree that the Operator of the independent well operation may represent their interests before Alberta Energy, specifically with respect to continuation of the title documents. Further, the Non-Participating Parties likely intend to enable the Operator of the independent well operation to dispose of production from the independent well. If the Non-Participating Parties are merely granting temporary possession of production from the independent well, then this does not – without more – enable the Operator of the independent well operation to sell the production to third parties. It is arguable that an agency relationship must arise wherein the Non-Participating Parties endow the Participating Parties with the legal authority to transfer title of the produced petroleum substances to third parties.

However, the Non-Participating Parties may not be so eager to accept responsibility for contracts entered into by the Operator of the independent well operation. For example, if the Operator of the independent well operation engages in a contract with a third party for the purchase of drilling fluids or mud, it is unlikely that the Non-Participating Parties would agree that the Operator acts as their agent in purchasing the mud. In such circumstances, the Non-Participating Parties would argue that they only ratify the acts of the Operator of the independent operation upon their election to participate following cost recovery.

The previous two sections of this Chapter attempted to illuminate the ownership of specific property interests of the parties to an independent well operation and provides context with respect to the legal relationship of the Non-Participating Parties and the Participating Parties. I argue that this analysis is required to adequately determine what legal obligations

Non-Participating Parties may have - specifically with respect to statutory environmental liability - when Participating Parties propose and engage in an independent well operation under the 2007 CAPL. For example, if the Participating Parties have drilled a dry hole and do not have the capital or are otherwise unavailable to properly abandon the independent well, can the Non-Participating Parties be held statutorily liable for abandonment and reclamation? Alternatively, if an independent well is drilled and there is a well blow out during the cost recovery period, can the Regulator issue an environmental clean up order to the Non-Participating Parties?[575]

Sections 6.3 and 6.4 consider the answers to these questions.

6.3 What is the Statutory Environmental Liability of Non-Participating Parties Under the *OGCA*?

Chapter 3 analyzes the potential for *Non-Operators* of joint operations under the 2007 CAPL to be liable pursuant to two specific areas of the *OGCA* regulatory regime: (i) liability for the clean-up of escaped substances that require containment; and (ii) liability to conduct abandonment operations and pay for abandonment and reclamation costs. In this section of my thesis, I use my analysis from Chapter 3 to answer whether *Non-Participating Parties* under the 2007 CAPL are liable in these same two areas of the *OGCA* regulatory regime.

[575] The Regulator would likely issue an *OGCA* order or *EPEA* EPO to the Participating Parties in these circumstances, however, in this Section, I question whether it is *possible* for the Regulator (pursuant to the *OGCA* or *EPEA*) to issue an order to the Non-Participating Parties. It is probable (as is explored in Chapter 5), that the Regulator would not do so unless the Participating Parties were unable to comply with the order.

6.3.1 Liability for Spills & Releases of Escaped Substances Under the *OGCA*

In Chapter 3, I determined that the legal obligation to comply with a Section 104 Clean-Up Order and conduct Clean-up Operations in the event of an escaped substance that requires containment and clean-up, rests squarely on the licensee, approval holder and operator of the breached well or facility. In Chapter 3, I also conclude that a Non-Operator of joint operations under the 2007 CAPL likely does not fall within any of these statutorily defined categories of persons. The same arguments which apply to Non-Operators of joint operations under the 2007 CAPL will also apply to *non-operating* Participating Parties in an independent operation.[576] Accordingly, since *non-operating Participating Parties* are unlikely to be liable to conduct Clean-Up Operations in the event of an escaped substance from an independent well, it is unreasonable to suggest that *Non-Participating Parties* in an independent well operation will be liable.

Recall from Chapter 3 that the 'Operator' under the 2007 CAPL will likely be the licensee, approval holder and 'operator' as defined in the *OGCA*. This includes the 'Operator' of a joint operation and the 'Operator' of an independent operation. It is very unlikely that a Non-Participating Party would ever become the Operator of an independent well operation under the 2007 CAPL.[577]

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[576] In an independent operation there can be three distinct types of parties: Participating Parties who are also the Operator of the independent operation, Participating Parties who are Non-Operators (and arguably equivalent to Non-Operators of a joint operation) and Non-Participating Parties.

[577] Subclause 10.04 of the 2007 CAPL provides the parties with two alternative methods of determining who will be the Operator of an independent well operation. Subclause 10.04A, alternate (a) provides that the Proposing Party will be the Operator of an independent operation unless the Proposing Party is in default or would otherwise be disqualified from being Operator. (The 1990 CAPL provision is similar to that proposed in alternate 10.04A(a) of the 2007 CAPL.) Alternatively, the parties may choose to elect subclause 10.04A(b) which offers the Operator (of joint operations) the right to conduct the independent operation if the Operator is a Participating Party.

In order for the Operator of joint operations to become the Operator of an independent operation - in which it is not participating - the Participating Parties would (at a minimum) need to agree, pursuant to Article 2 of the 2007 CAPL and the Non-Participating Party would also need to consent.[578] Given the risks involved, there are likely few circumstances (if any) in which a Non-Participating Party will be Operator of the independent operation.[579] Accordingly, Non-Participating Parties of an independent operation will rarely fall within the statutory definitions of licensee, approval holder or 'operator' in the *OGCA*. Therefore, according to the *OGCA*, a Non-Participating Party will likely not be liable to *conduct* Clean-Up Operations pursuant to a Section 104 Clean-Up Order.

As summarized in Chapter 3, once Clean-up Operations have been undertaken, the Regulator may "direct by whom and to what extent the costs of Clean-up Operation are payable" in a Section 104 Clean-Up Cost Recovery Order. While this language appears to grant the Regulator quite a broad discretion, in Chapter 3, I argued that there must be some rational connection between the substance which has 'escaped' and the persons who are directed to pay for Clean-Up Operations. I argued in Chapter 3 that there is likely a sufficient connection

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[578] But see *Nexen Inc. v Fort Energy Corp*, 2007 ABQB 385 (CanLII) on the applicability of Article 2 to independent operations. The *Nexen* case involved an unusual set of factual circumstances and ultimately the court declined to make a ruling on the relationship between Articles II and X, however the Operator (for joint operations) argued that Article II only applied with respect to the resignation or replacement of an Operator for the reasons set out in Article II – which did not include by way of service of an independent operations notice. The Operator of the independent operation disputed this narrow interpretation.

[579] There may be a greater chance of a Non-Participating Party becoming Operator of an exclusive operation in international JOAs. Peter Roberts notes that the operator of joint operations may still act as the operator of an exclusive operation even where the operator is a non-consent party or elects not to participate in a sole-risk exclusive operation. Roberts notes that, in this circumstance:

> [t]he Operator will still act as the operator (although not as a participant) in respect of the resultant exclusive operation and will be entitled to charge the expenses incurred in doing so to the separate account of the participating parties.

Alternatively, Roberts suggests that the Participating Parties elect an operator among themselves, however, he cautions that "[b]ecause of the potential for problems with having two operators in respect of different parts of the JOA, the continuing involvement of the original operator is generally to be preferred." Roberts, *JOAs, supra* note 1 at 76-77.

between Non-Operators, who own a beneficial working interest in the joint operation's wells and facilities, and substances which escape from these properties.

Arguably, there is also a 'rational connection' between Non-Participating Parties and substances which escape or are released from an independent well operation. However, this connection is substantially less than that of Non-Operator's of a joint well operation. Two factors support these conclusions. First, Non-Participating Parties continue to be working interest participants ("WIPs")(as defined in the *OGCA*) with respect to an independent well.[580] Recall that the *OGCA* defines "working interest participant" to mean "a person who owns a beneficial or legal undivided interest in a well or facility under agreements that pertain to the ownership of that well or facility".[581] In Section 6.2, I argue that ownership does not change hands in the case of an independent operation involving a non-title preserving well.

The second factor somewhat negates the first. Specifically, as is explored below in Section 6.4.2, Non-Participating Parties do not have the same care, management or control of an independent operation than Non-Operators have of joint operations. In the event of a judicial review of an order in which the Regulator names a Non-Participating Party in a Section 104 Clean-Up Cost Recovery Order (involving an escape of a substance from an independent well that the Non-Participating Party was not participating in),[582] a court would likely take the Non-Participating Party's lack of control into consideration. A judicial review in these

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[580] In comparison, in section 6.4.1, *infra*, I argue that Non-Participating Parties do not have a *participating interest* in independent operations. There is a significant difference between the definition of 'working interest participant' in the *OGCA* and the CAPL 2007 definition of 'working interest'. Further, Article 10 of the CAPL 2007 refers to the Participating Party's 'participating interests' although this term is not defined.

[581] *OGCA*, *supra* note 4, s 1(1)(fff).

[582] See also Chapter 5 of this thesis which summarizes the policy and practice of the Regulator in circumstances where the Regulator has the discretion to choose among multiple parties who may potentially be liable for conducting Clean-Up Operations and paying the costs of such operations.

circumstances would also likely take into consideration the Non-Participating Party's Buy-Back Rights (if any) into consideration.

6.3.2 Liability for Abandonment: Licensees, Approval Holders and Working Interest Participants

The argument that Non-Participating Parties remain WIPs with respect to independent operations on non-title preserving wells also has repercussions for a Non-Participating Party's liability for abandonment under the *OGCA*.[583] Similarly to Non-Operators of joint operations, if Non-Participating Parties fall within the *OGCA* definition of 'WIP' (or deemed WIP) in the *OGCA*, the Regulator has the discretion to name them in an Section 27 Abandonment Order and hold them responsible to engage in and complete well or facility abandonment operations. Once these operations are completed, the *OGCA* requires the Regulator to allocate the costs of abandonment and reclamation operations to each WIP in accordance with its Proportionate Share in the well or facility through a Section 30 A&R Cost Recovery Order. As WIPs, Non-Participating Parties can thus also be named in a Section 30 A&R Cost Recovery Order.[584]

If Non-Participating Parties are named in any of the four *OGCA* administrative environmental orders reviewed in this section and incur 'losses and liabilities' as defined in the 2007 CAPL, they may make a claim under the 2007 CAPL under the Article 10 indemnity provisions or clause 10.09 provisions which deal with abandonment liabilities.[585] A

[583] In Chapter 3, I also note that the Regulator now requires parties to identify working interests in some circumstances. I question whether, as a matter of practice, Non-Participating Parties are listed as working interest participants in documentation submitted to the Regulator. Although such evidence is not conclusive of whether a Non-Participating Party will be considered a working interest participant by the Regulator or the courts, it may be a factor to consider.

[584] As I note below, despite the potential for Non-Participating Parties to be named in a Section 27 Abandonment Order or a Section 30 A&R Cost Recovery Order, the Regulator does not do so in practice.

[585] In clause 10.09 of the 2007 CAPL, the Participating Parties of an independent operation contractually agree to abandon an independent well in a timely manner if the well is not capable of production (or if a well is capable of

consideration of the likelihood of success in these claims is beyond the scope of this thesis which is concerned with the potential for statutory liability in the first instance. The second caveat is more practical in nature, in regards to how – specifically – the Regulator could actually impose an order on the Non-Participating Parties and will be discussed further in Section 6.5.

6.4 Liability of Non-Participating Parties under *EPEA*

6.4.1 Non-Participating Parties and the Definitions of 'Person Responsible' in *EPEA*: Focus on Ownership

In Chapter 4 of this thesis I concluded that there was a strong likelihood that both Operators and Non-Operators in a joint operation could be named in and subject to comply with 3 different types of *EPEA* EPOs: Section 113 Release EPOs, issued pursuant to Division 1 of Part 5 of *EPEA*; Contaminated Site EPOs, issued pursuant to Division 2 of Part 5 of *EPEA*; and Section 140 Reclamation EPOs, issued pursuant to Part 6 of *EPEA*. Recall that Part 5 EPOs can require the 'persons responsible' to assess, clean up and generally minimize the environmental risks of pollution and Part 6 EPOs can require the 'operator' to conserve and reclaim 'specified land'.

In Chapter 4 we saw that Operators were the most likely parties to be named in a *EPEA* EPO, however, the Regulator has the discretion to name one or more parties (who become

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production, but the Participating Parties decide to abandon the well before the prescribed cost recovery). Subclause 10.09C further provides:

> A Non-Participating Party will not assume any responsibility for the costs or risks of an Abandonment under this Clause (including subsequent surface restoration costs) and does not acquire any rights in a well Abandoned hereunder, except insofar as Clause 9.04 or Subclause 10.08E prescribe any allocation of Abandonment costs between the Parties that participated in the drilling of the well and the Parties that participated in additional Operations on that well.

According to the 2007 CAPL, the Non-Participating Parties do not acquire any rights in an "abandoned well", however, as I argue above, Non-Participating Parties continue to own an interest in the independent well – before abandonment. Taking into account the fact that arguably, the Non-Participating Parties are WIPs as defined in the *OGCA*, there is potential for Non-Participating Parties to be liable to conduct abandonment operations and pay their proportionate working interest share of abandonment costs.

jointly and severally liable)[586] and has the discretion to chose between 'persons responsible' subject to the broad legislative criteria. For example, if the Operator is bankrupt, dissolved or otherwise unable to pay for the costs of complying with an EPO, the Regulator has the discretion to name other parties - such as Non-Operators.

This Section asks whether the Regulator has the discretion to name Non-Participating Parties in an *EPEA* EPO. More specifically, do Non-Participating Parties fall within either definition of 'person responsible', in *EPEA* or within the definition of 'operator' in Part 5 of *EPEA*? Rather than adopt a category-by-category approach (which I used in Chapter 4), this Section will focus on whether Non-Participating Parties would fall within these definitions by virtue of their ownership in the independent well (section 107(1)(a) of *EPEA*) or their ownership in substances either produced from or acquired for the independent well (section 1(tt)(i) of *EPEA*). Then, in Section 6.4.2, I will examine whether the Non-Participating Parties have the requisite care, management or control of independent operations to fall within the definition of 'person responsible' in section 1(tt)(ii) of *EPEA*.

Earlier in this section I concluded that a Non-Participating Party would likely fall within the definition of WIP in the *OGCA*. In Section 4.4 of this thesis I noted that the *EPEA* definition of WIP is broader than the definition of WIP under the *OGCA*. Thus it is likely that a Non-Participating Party is an 'operator', according to Part 6 of *EPEA* and may be liable to conserve and reclaim specified land pursuant to a Section 140 Reclamation EPO.

In Section 4.3.1 of this thesis I concluded that a Non-Operator in a joint operation will likely fall within the definition of 'owner', with regards to land designated as a contaminated

[586] With the exception of Contaminated Site EPOs where the Regulator may allocate liability after consideration of eight factors listed in the *EPEA*.

site. Thus a Non-Operator can be named in a Contaminated Site EPO as a 'person responsible' for a contaminated site pursuant to section 107(1)(c) of *EPEA*. Further, in Section 4.3.1, I concluded that a Non-Operator could be named in a Section 113 Release EPO as a 'person responsible' for a substance (or thing containing a substance) escaped or released into the environment pursuant to section 1(tt)(i) of *EPEA*.

In Section 6.2 of this Chapter I argued that there is no transfer of a Non-Participating Parties' ownership interests when Participating Parties engage in independent well operations (which do not involve title preservation). Specifically, Non-Participating Parties continue to own: their interest in the well, production from the well, and the right to produce petroleum substances from the well during the 'cost recovery' period. Based on this conclusion, Non-Participating Parties will continue to fall within the various definitions of 'owner' in *EPEA* as these definitions relate to the independent well (as the thing containing the escaped substance) and the escape or release of petroleum substances into the environment. Thus, Non-Participating Parties could be issued a Contaminated Site EPO or a Section 113 Release EPO – provided the substance released is petroleum.

However, it is arguable that Non-Participating Parties do not fall within the definition of 'persons responsible' with respect to ownership of substances released into the environment that are *not* petroleum substances. While I argue that the Non-Participating Parties retain their ownership interest in several property interests associated with the independent well, Non-Participating Parties are still non-participants in the independent well operation. As I discussed above (in the context of the parties' potential agency relationship), Non-Participating Parties

arguably do not have a working interest in property which is acquired for the exclusive use of the independent operation.

Article 10 is complex and arguably enigmatic at times. Admittedly, not all provisions of Article 10 support the conclusions made in this Chapter.[587] However, there is some support for my argument that Non-Participating Parties do not have any rights or obligations in property acquired for the exclusive use of an independent well. Subclause 10.02C of the 2007 CAPL enables a Participating Party to participate to the extent of its working interest plus an increase (by its proportionate share) of:

> (i) the unassumed percentage of participation for the independent operation; and
> (ii) any then remaining participating interest on a *pro rata* basis until the Participating Parties have fully assumed the participating interests...

This suggests that Non-Participating Parties lose their working interest share in their right to participate (i.e. their right to have a participating interest) in the independent operation (until cost recovery). This includes any rights (and obligations) pertaining to certain property

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[587] For example, see subclauses 10.07D and 10.07E of the 2007 CAPL. Subclause 10.07D somewhat cryptically provides that upon cost recovery:

> A Non-Participating Party that accepts participation in an Independent Well under Subclause 10.07C will acquire its Working Interest share therein, effective as of full recovery of the proceeds prescribed by Subclause 10.07A.

Arguably, the entire sentence must be read together. That is, the Non-Participating Party will *acquire its working interest share in participation* in the independent well. (If the subclause is interpreted to mean the Non-Participating Party will acquire its working interest share in the independent well itself, this conflicts with subclause 10.07A and my conclusions that the Non-Participating Party retains its ownership in the independent well.)

Subclause 10.07E is also somewhat puzzling. It provides that if a Non-Participating Party does not elect to accept participation in the independent well, the Non-Participating Party will:

> forfeit to the Participating Parties its right of participation therein and its right to Petroleum Substances produced from its Spacing Unit, insofar only as that Spacing Unit relates to production through that wellbore from the formations of the Joint Lands in which that well is then Completed or Recompleted. Except as provided in the preceding sentence for produced Petroleum Substances, that Non-Participating Party does not forfeit its Working Interest in the Joint Lands comprising that Spacing Unit or its right to recover Petroleum Substances from that formation in a different location in that Spacing Unit through the use, in whole or in part, of a different wellbore. [Emphasis added.]

Arguably, under this clause, Non-Participating Parties do not forfeit their ownership interest in the independent well, but only the right to participation in the independent well and their right to petroleum substances therefrom.

acquired for the independent operation. The Participating Parties, through their right and obligation to participate, acquire a participating interest in any property that is realized exclusively for the independent operation. (The total *participating interest* of the Participating Parties must equal 100%.) In an independent well operation there can be a number of different kinds of property. In addition to the three forms of property discussed above, there are other types of property which can be acquired or obtained for the exclusive use of a particular independent operation. This can include: (i) the surface rights and other contractual rights, permits, and authorizations; (ii) the surface equipment and associated materials (largely personal property, except to the extent that the equipment might be considered a "fixture" and part of an interest in land); and (iii) the proceeds of the sale of produced oil or gas (personal property). Arguably, Non-Participating Parties do not maintain or acquire an interest in any of these three types of property rights (until cost recovery) as they do not have a *participating* interest in the independent operation.[588]

Accordingly, if some of the tangible personal property which pertains exclusively to an independent operation escapes or is released into the environment, the Regulator cannot issue a Section 113 Release EPO to the Non-Participating Parties as 'owners' of the substance.

[588] Further, as is explored in Section 6.1 and 6.2, the relationship of the Non-Participating Parties to the Operator of an independent operation is not the same as the relationship between the Operator and the Non-Operators of a joint operation. Arguably, in limited circumstances, the Operator of an independent operation may act as an agent of the Non-Participating Parties, however these circumstances are limited to the Non-Participating Parties' interest in the independent well, the production therefrom, and the Non-Participating Parties' mineral rights. See Section 6.2.3. Admittedly, the argument that Non-Participating Parties do not obtain an ownership interest in certain personal and real property acquired for the independent operation is subject to a number of challenges – for example, when does this collection of personal and real property evolve into the distinct entity which we call the 'independent well' – which I have argued the Non-Participating Parties do have an ownership interest in?

6.4.2 Do Non-Participating Parties Have 'Charge, Management or Control' of Independent Operations?

Section 1(tt) of *EPEA* provides that a 'person responsible', when used with reference to a substance or a thing containing a substance, means...

> (ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing, [Emphasis added.]

In Chapter 4, I concluded that it is likely that both Operators and Non-Operators have sufficient control over joint operations to fall within this category of 'person responsible'.

Earlier in this Chapter, I argued that the Participating Parties have a present possessory interest in the independent well and any production therefrom with a contractual right to reduce the petroleum substances to possession and potentially market them for the Participating Party's own account. According to Professor Ziff, 'possession' or the right of possession, is separate from ownership or title *per se*. Ziff notes, somewhat cryptically, that "possession is a flexible and chameleon-like concept, as well as a vital ingredient in the analysis and determination of property rights."[589] According to Ziff, at the core of 'possession' are two components: "*animus possidendi* (an intention to possess) and *factum* (physical control, sometimes also referred to as *corpus*)".[590]

The legal concepts of possession and control are arguably linked, although they are not synonymous. However, for the purposes of this section, I argue that all of the *Participating Parties* have control over the independent operation. In support of this conclusion is my argument in Chapter 4 that both Operators and Non-Operators likely have sufficient 'control' of

[589] Ziff, *supra* note 28 at 133-134.
[590] *Ibid.*

a Joint Operation to fall within the category of 'person responsible' in section 1(tt)(ii) of *EPEA*. After all, the Participating Parties are made up of an 'Operator' and 'Non-Operators' for the independent operation.

However, the Participating Parties' possession is not exclusive (see Section 6.2 above), and there can be a number of parties with 'control' of an oil and gas operation (see Section 4.3.2 above). Accordingly, the specific issue in this Section is whether Non-Participating Parties also have sufficient 'control' of an independent well operation to fall within the category of 'person responsible' in section 1(tt)(ii) of *EPEA*.

In *Edmonton City*,[591] the Court was asked whether an owner (the City), which had leased a stadium to another party, could still be in 'control' of a pollutant released during the other party's possession. In holding that the City was a person in control of a polluting substance, the Court noted, *inter alia*, that the property onto which the pollutant fell was to revert – and in fact did revert - back to the City:

> 610 However, there are two factors which made the defendant a person in control of the polluting substance in the instant case. The first is that it was the Stadium itself onto which the pollutant fell which was not only owned by the defendant, but to whom possession was expected to revert in a matter of only a few weeks. While the defendant may not have had control over the Stadium and therefore the pollutant at the time of release, the pollutant came to be under the defendant's control because the pollutant came to rest on the defendant's property and the defendant was aware of that fact. If the pollutant had similarly landed on a neighbouring land, to the knowledge of the owner or occupier of that land, that owner or occupier too would be a person who had control of the pollutant.
>
> 611 Moreover, the defendant acquired a degree of charge, management or control over the released pollutant in its capacity as maintenance provider of the Stadium lighting during the Games, upon the defendant taking possession of the ruptured

[591] *Edmonton City*, *supra* note 340.

> capacitors and commencing an investigation as to the nature and characteristics of the pollutant by having it tested.[592]

Similar to the facts in *Edmonton City*, the Non-Participating Parties continue to own an interest in the independent well. Further, upon cost recovery, the Non-Participating Parties have an election to accept participation in the independent well. However, this election is not an automatic reversion as was the case in *Edmonton City*. Further, as is argued below, the *Edmonton City* case can be distinguished because the Non-Participating Parties do not act as 'maintenance provider' (or similar capacity) as was the case of the owner in *Edmonton City*.

The most significant factor involved in determining whether the Non-Participating Parties have the requisite 'control' over an independent well operation is whether (outside of Article 10), the remaining provisions of the 2007 CAPL apply as between Non-Participating Parties and Participating Parties during an independent operation.

Article 7.12A of the AIPN JOA provides:

> Each Exclusive Operation shall be carried out by the Consenting Parties acting as the Operating Committee, subject to the provisions of this Agreement applied *mutatis mutandis* to such Exclusive Operation and subject to the terms and conditions of the Contract. [Emphasis added.]

Does this mean that all of the provisions of the 2012 AIPN apply, *mutatis mutandis* to the exclusive operation? Peter Roberts notes that JOAs usually provide that the terms of the JOA will apply to any exclusive operation (with the implication of necessary changes).[593] The 2007 CAPL Clause which corresponds to Article 7.12A of the 2012 AIPN, is more narrow than its AIPN counterpart. Clause 10.16 of the 2007 CAPL provides:

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[592] *Edmonton City*, *supra* note 340 at paras 610-611.
[593] Roberts, *JOAs*, *supra* note 1 at 74.

> Subject to this Article, the provisions of this Operating Procedure will apply, *mutatis mutandis*, to an Independent Operation as if it otherwise were a Joint Operation of the Participating Parties. [Emphasis added.]

There is no dispute that the provisions of the Operating Procedure apply to independent operations between the *Participating Parties*, however, Clause 10.16 does not refer to the *Non-Participating Parties*. Clause 10.16 does not appear to be of any assistance when determining whether the remainder of the 2007 CAPL is applicable to an independent operation, as between the Non-Participating Parties and the Participating Parties. However, a detailed consideration of this issue is beyond the scope of this Article. For our purposes, it will be presumed that the provisions of the 2007 CAPL may apply, *mutatis mutandis* to an independent operation.[594]

Article 10 of the 2007 CAPL provides that: an "Independent Operation means an Operation proposed to be conducted under this Article". [595] An independent operation is not a 'joint operation' which is an Operation "authorized and conducted hereunder for the Joint Account".[596] This suggests that those provisions in the 2007 CAPL which specifically pertain to 'joint operations' do not, automatically, apply to the relationship between the Non-Participating Parties and the Participating Parties. (They do, however, apply as between the Participating Parties.) This makes logical sense as Article 10 is basically a contractual agreement between the Non-Participating Parties and the Participating Parties through which, *inter alia,* the Non-Participating Parties loose certain rights and obligations provided for in the 2007 CAPL,

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[594] The phrase "*mutatis mutandis*" has been considered by many Alberta courts, most frequently in the context of statutory interpretation. In *International Land Corp. v Parkview Properties Ltd*., Hetherington JA noted the definition of the phrase in Black's Law Dictionary as: "[w]ith the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like". *International Land Corp. v Parkview Properties Ltd.*, 1986 ABCA 210 (CanLII) at paras 5-6.

[595] 2007 CAPL, *supra* note 13, cl 1.01.

[596] 2007 CAPL, *supra* note 13, cl 1.01.

but only as those rights and obligations pertain to the specific independent operation in question. This is a natural consequence of having elected not to participate in the operation.

It could be argued that most of the rights and obligations which the Non-Participating Parties relinquish should pertain to rights of 'control' of the independent operation.[597] In Chapter 4 I describe the following rights of 'control' which Non-Operators enjoy in a joint operation: the Operator's duties to the Non-Operators, the Joint Operators' rights to information, inspection and audit, the AFE approval mechanism, and the rights of the Joint Operators' to appoint and replace the Operator. It is unlikely that Non-Participating Parties have a right to: (i) approve an AFE (or be notified of a supplemental AFE) pursuant to subclause 3.01B; or (ii) replace the Operator of an independent operation pursuant to clause 2.02. Further, there is some question as to whether the Operator of an independent well operation owes the Non-Participating Parties a duty to conduct the independent operation diligently, in a good and workmanlike manner, pursuant to Clause 3.04.[598]

Do Non-Participating Parties in a cost recovery position of an independent well operation have inspection, audit and information rights similar to Non-Operators in a joint operation? Article 10 addresses these rights – to a limited degree. Clause 10.15 requires the

[597] The answer to whether some of the other Articles of the 2007 CAPL apply to an independent operation, as between the Participating Parties and the Non-Participating Parties, is more ambiguous. However it is unnecessary for the purposes of this thesis to identify all of the Articles of the 2007 CAPL which apply between the Non-Participating Parties and the Participating Parties. In this section of the thesis I am only concerned with those provisions of the 2007 CAPL which grant Non-Operators rights of 'control'.

[598] Whether the Operator owes Non-Participating Parties contractual duties as provided for in the 2007 CAPL may depend on the particular duty at issue. Because Non-Participating Parties continue to maintain their ownership interest in non-title preserving independent wells during the cost recovery period, it can be argued that the Operator owes Non-Participating Parties certain duties with respect to these wells. For example, the Operator may owe Non-Participating Parties the duty to conduct operations in compliance with the regulations pertaining to health, safety and the environment, as required by Clause 3.05 of the 2007 CAPL. The Operator may also continue to owe the Non-Participating Parties a common law duty to conduct operations which do not generate 'waste' or irrevocably damage the common property. It is unlikely that the Non-Participating Parties would contract out of such protection.

Operator of an independent operation (which is subject to a cost recovery) to maintain accounting records and periodically provide written statements of account to the Non-Participating Parties. Clause 10.15 specifically provides that a Non-Participating Party may conduct an audit of the cost recovery account, however, clause 10.19 provides that the Non-Participating Parties are not entitled to access the independent well site or any information therefrom, including the information prescribed by Article 7.00 and Clause 10.15, until the Non-Participating Party becomes a Participating Party or on a prescribed date (such as 150 days following the drilling of a new well).

Notwithstanding these limited information, audit and inspection rights, I conclude that the Non-Participating Parties have contracted out of most of the 'control rights' they may have over an independent well operation, whether these rights are found at common law or in the 2007 CAPL.[599] Accordingly, the Non-Participating Parties would likely not fall within the section 1(tt)(ii) category of 'person responsible' – that is, they arguably do not have 'care, management or control' of the independent operation.

6.5 Conclusion

The mechanism of independent operations in Article 10 of the 2007 CAPL involves the interaction of a number of distinct property interests and a complex commercial contractual agreement which attempts to modify the common law which relates to those interests. In this Chapter, I added an additional level of complexity by questioning the impact of certain aspects of Alberta's statutory environmental regime on the liability of the Non-Participating Parties. As

[599] If the Non-Participating Parties were to have a significant degree of control over the independent operation, such control would arguably be a double edged sword: the more control over the asset or operation the Non-Participating Parties have, the more liability they may incur.

I summarized in Section 6.1 of this Chapter, the provisions in Article 10 of the 2007 CAPL which allocate liability between the Non-Participating Parties and Participating Parties, *inter se*, are relatively unambiguous. However, the parties' express allocation of losses and liabilities is subordinate to any potential statutory environmental liability the parties may face. While Non-Participating Parties may have a contractual right to recover certain losses from the Participating Parties, this does not protect the Non-Participating Parties from incurring statutory environmental liability in the first instance.

In order to better understand the relationship between the Non-Participating Parties and the Participating Parties in the 2007 CAPL, I also tried to shed some light on the prickly issue of whether there is a change in ownership of the parties' underlying property rights during an independent well operation. Initially, I considered three specific property interests: (i) the personal property interest in the production from an independent well; (ii) the real property rights in the independent well itself; and (iii) the interest in the *profit à prendre* (i.e. the right to explore for and produce petroleum substances).

I argued that the 2007 CAPL did not contain specific language which transferred or assigned any of the Non-Participating Parties' ownership interest in any of these property rights during the Cost Recovery Period of non-Title Preserving Wells. Accordingly, I concluded that the *Non-Participating Parties* continue to own their respective working interests in these property rights and the *Participating Parties* have a present possessory interest in the independent well and any production therefrom together with a contractual right to reduce the petroleum substances to possession and potentially market them for the Participating Parties' own account.

A number of factors support this conclusion. First, Non-Participating Parties, as working interest owners, are tenants in common with the right to undivided possession of the whole. While tenants in common may alter their property rights through contract, subclause 10.07A (which addresses the parties' respective rights during the Cost Recovery Period) does not expressly alter the parties' ownership interests. The specific language used in subclause 10.07A can be contrasted with other provisions of Article 10.00 which specifically provide that the Non-Participating Parties will forfeit a specified interest in the joint lands. 'Forfeiture' expressly occurs with respect to Title Preserving Wells and where a Non-Participating Party elects – after cost recovery – not to accept participation in an independent well.

Second, the *Lemmons* and *Amythest* cases appear to acknowledge a distinction between a transfer of ownership and a contractual right of participation in the context of independent operations conducted pursuant to CAPL Operating Procedures. Third, there is support in the relevant literature for the conclusion that ownership does not change hands – even temporarily. Desbarats and MacDiarmid argue that Non-Participating Parties retain ownership in the independent well and their petroleum and natural gas rights (although they hold a different opinion with respect to ownership of produced petroleum). Further, CAPL committee member and principal drafter, Jim MacLean suggests that there is no change in ownership in an independent operation and Non-Participating Parties actually participate in independent operations. Finally, Peter Roberts suggests that independent or exclusive operations can be conducted as carried interest operations with an 'uplift' (i.e. with no change in ownership).

When these conclusions are applied to my analysis of the statutory environmental regimes in the *OGCA* (reviewed in Chapter 3) and *EPEA* (reviewed in Chapter 4), I conclude that

there is potential for Non-Participating Parties to face statutory environmental liability with respect to an independent well operation in the Cost Recovery Position. (Specifically, Non-Participating Parties can – potentially – be named in several different remedial ECOs issued pursuant to the *OGCA* and *EPEA*.

But as with Non-Operators in a joint operation, there is little likelihood that Non-Participating Parties in an independent operation will be named in a Section 104 Clean-Up Order and liable to conduct Clean-Up Operations. There is also little likelihood that Non-Participating Parties in an independent operation have sufficient connection to an independent well to be ordered to pay for the costs of Clean-Up Operations in a Section 104 Clean-Up Cost Recovery Order. Unlike Non-Operators in a joint operation, Non-Participating Parties in an independent operation do not possess a significant degree of 'control' over an independent operation.

The one factor which does connect Non-Participating Parties with an independent well operation is my conclusion that Non-Participating Parties may fall within the definition of 'working interest participant' in the *OGCA*. However, this factor alone is arguably insufficient for Non-Participating Parties to be ordered to pay for their share of clean-up costs pursuant to a Section 104 Clean-Up Cost Recovery Order.

My conclusion that Non-Participating Parties may fall within the *OGCA* definition of WIP likely has different repercussions regarding whether the Regulator could name Non-Participating Parties in a Section 27 Abandonment Order. In Chapter 5 we saw that that the Regulator appeared to be adopting a practice of issuing Section 27 Abandonment Orders to all WIPs of a well or facility. Accordingly, a Non-Participating Party could be named in a Section 27

Abandonment Order. Applying section 30 of the *OGCA* to the situation of independent operations, if a Non-Participating Party is a WIP, the Regulator must allocate abandonment and reclamation costs to the Non-Participating Party in accordance with its Proportionate Share in the independent well.[600]

The primary problem with this conclusion is that it would be very difficult to implement in practice. It is industry practice in AER well licence applications to name only the Participating Parties as WIPs – according to their 'participating interests'. The Non-Participating Parties' working interest ownership in the well is purely beneficial in nature – they have no registered interest.

The Regulator is not likely to inquire as to whether an abandoned well is an independent well in the Cost Recovery Period. The question posed at the beginning of this thesis was whether it was possible for Non-Participating Parties to be named in remedial ECOs and incur statutory environmental liability. In the case of Section 27 Abandonment Orders and Section 30 A&R Cost Recovery Orders, the answer to this question would be 'yes' - there is potential for liability. However, a more complete answer would also take into account the reality that this potential is not likely to be realized unless industry and Regulator practices change.

In Section 6.4 of this Chapter, I also determined that Non-Participating Parties likely fall within a limited number of categories of 'persons responsible', as defined in *EPEA*. Non-Participating Parties will likely fall into the category of 'owners' of a substance (or thing containing a substance) based on their continued ownership in the well and their ownership of

[600] Recall that 'Proportionate Share' is not defined in the *OGCA* and I approximated a definition of 'Proportionate Share by combing the language of Section 30 and the definition of WIP together to read: 'a WIP's "proportionate share" is their beneficial or legal undivided working interest share in the well or facility'. This definition arguably enables the Regulator to determine proportionate ownership by reference to a WIP's beneficial or registered interest.

petroleum substances produced from the well. However, Non-Participating Parties arguably do not fall within as many categories of 'person responsible' as Operators or Non- Operators of joint operations. Non-Participating Parties will likely not be considered 'owners' of substances released into the environment if that substance is not a petroleum substance. Non-Participating Parties likely do not acquire an interest in any personal property that is acquired for the exclusive use of the independent well operation (until cost recovery). Further, Non-Participating Parties likely do not have sufficient charge, management or control of an independent operation to fall within the section 1(tt)(ii) *EPEA* category of 'person responsible'.

Non-Participating Parties may be issued a Contaminated Site EPO (to remediate contaminated land, pursuant to the contaminated site provisions of Division 2, Part 5 of *EPEA*), as a 'person responsible' in section 107(1)(c) of *EPEA*. Non-Participating Parties would likely fall within the category of 'owners' of land, for similar reasons as Non-Operators, as was discussed in Chapter 4. However, given the practice of the Regulator established in Chapter 5, it is unlikely that the Regulator will issue a Contaminated Site EPO but would instead issue a Section 113 Release EPO.

Finally, as was shown in Chapter 4, Non-Operators, as 'working interest participants' will likely fall within the definition of 'operator' in Part 6 of *EPEA* and may be ordered, pursuant to a Section 140 Reclamation EPO, to remediate and reclaim 'specified land'. However, in Chapter 5 we found that it was arguable that the Regulator continued to pursue the last license on record with respect to Section 140 Reclamation EPOs. Therefore, unless the Operator and licensee were insolvent or defunct, a Non-Participating Party would not likely be pursued in these circumstances.

The Table which was introduced in Chapter 3 (outlining a Non-Operator's liability under the *OGCA*) and expanded in Chapter 4 (with a Non-Operator's potential for liability under the *EPEA*), is provided below, incorporating a Non-Participating Party's potential for liability under both these statutes. However, as indicated in the Table, a distinction is made between a Non-Participating Party's *potential* for liability and the ability for the Regulator to actually pursue Non-Participating Parties, given current licensing practices followed both by industry and the Regulator. Specifically, I refer to the lack of information as to actual ownership interests (versus participating interests) of non-title preserving independent wells in the Cost Recovery Period.

[table on following page]

Table 3: Statutory Environmental Liability of Non-Operators and Non-Participating Parties

Act	Environmental Compliance Order	Description	To whom may the Order be issued?	Potential for liability		Apportion-ment of costs?
				Joint Operators	Non-Participating Parties	
OGCA, s 104(1)	Section 104 Clean-Up Order	Regulator may direct the person(s) named in the order to: (i) take steps the Regulator considers necessary to contain and clean up the escaped substance and to prevent further escapes, and (ii) to do anything else the Regulator considers necessary to ensure the safety of the public and the environment.	Licensees, Approval Holders, Operators	x	x	No
OGCA, s 104(3)	Section 104 Clean-Up Cost Recovery Order	Regulator shall determine the costs and expenses of the Clean-Up operations and direct by whom and to what extent they are to be paid.	At Regulator's Discretion	✓	x	Yes
OGCA, s 27	Section 27 Abandonment Order	Abandon a well or facility in accordance with the regulations or rules.	Licensees, Approval Holders, WIPs, Deemed WIPs	✓	✓**	No
OGCA, s 30	Section 30 A&R Cost Recovery Order	Regulator to determine the abandonment costs and reclamation costs and allocate those costs to each WIP in accordance with its Proportionate Share in the well or facility	WIPs, Deemed WIPs	✓	✓**	Yes
EPEA, s 113	Section 113 Release EPO	An EPO may order the person to whom it is directed to take any measures that the Director considers necessary.	Responsible Person s 1(tt)	✓	Unlikely	No
EPEA, s 129	Contaminated Site EPO	An EPO may require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site.	Responsible Person s 107(1)	✓	✓**	At Regulator's Discretion
EPEA, s 140	Section 140 Reclamation EPO	An inspector may issue an EPO directing the performance of any work or the suspension of any work if in the inspector's opinion the performance or suspension of the work is necessary in order to conserve and reclaim specified land.	Operator s 134(b)	✓	✓**	No

****** These parties have the potential to be liable under the legislation, however give the current practice of the Regulator and industry regarding disclosure on well and facility license applications, it is unlikely that they could be pursued by the Regulator at this time

Chapter Seven: Conclusions

As was recently noted by the Alberta Court of Queen's Bench, "[t]he oil and gas industry is a high risk, speculative business, particularly for junior participants who often operate on precarious financial foundations,... many things can go wrong ...". [601] Those parties engaged in exploration and development in the oil and gas industry attempt to protect themselves, and their interests, through contractual agreements which, among other things, attempt to spread this risk amongst each other and amongst a number of industry ventures.

Joint Operating Agreements, such as the 2007 CAPL, involve the interaction of a number of distinct property interests and complex commercial terms which attempt to modify the common law which relate to those interests. The provisions of the 2007 CAPL which allocate liability between the Joint Operators, *inter se*, are somewhat convoluted. However, subject to certain noted exceptions, the 2007 CAPL steadfastly holds to the principle that Joint Operators will be liable for their proportionate working interest share of losses and liabilities of the joint venture.

Notwithstanding this, the parties' express allocation of losses and liabilities is subordinate to any statutory environmental liability the parties may face. While some parties may have a contractual right to recover certain losses from other parties, this does not protect those parties from incurring statutory environmental liability in the first instance. In the current economic climate, where oil and gas bankruptcies are on the rise, capital is limited and credit limits have been maximized, contractual rights of contribution may not offer parties any real relief from paying more than their proportionate working interest share when they have

[601] *Bernum, supra* note 149 at para 46.

been ordered to engage in environmental clean-up and restoration. Further, where an Operator, under a 2007 CAPL, is known to be insolvent or bankrupt, this circumstance appears to trigger a certain regulatory response – that is, the Regulator is likely to order all Joint Operators to address instances of environmental non-compliance, such as a release into the environment, on a joint and several basis.

The Alberta statutory environmental scheme for the issuance of remedial ECOs significantly diverges from the parties' contractual allocation of liability. As we have seen, a Non-Operator's liability is based on what type of remedial ECO is issued and the specific section of the *OGCA* or *EPEA* applicable to that order. Although the Regulator intends to integrate the compliance assurance systems and adopt the most effective practices of each of these legislative regimes into a single approach to avoid inconsistency and uncertainty, the Regulator's policies and practices in this area are still evolving.

7.1 *OGCA* Remedial ECOs: Abandonment of Oil and Gas Wells and Facilities

Under the *OGCA*, the Regulator has the discretion to name any or all licensees, approval holders and WIPs in a Section 27 Abandonment Order and compel the named parties to abandon a well or facility. If a Section 27 Abandonment Order is issued to more than one party, then each party is jointly and severally liable to comply with the order. In Chapter 3, I argued that Non-Operators would fall within the *OGCA* definition of WIP (or deemed WIP). In Chapter 6, I argued that Non-Participating Parties would also fall within the *OGCA* definition of WIP (or

deemed WIP). Both these groups are persons who own a beneficial undivided interest in the wells and facilities of a joint (or independent) operation, as the case may be.[602]

The Regulator appears to be relatively consistent in its practice when issuing Section 27 Abandonment Orders. Based on a review of the AER's website, associated documents and some of the Section 27 Abandonment Orders themselves, it appears that the Regulator is issuing these orders to the applicable licensee, receiver-trustee (if applicable) and WIPs, ordering all parties to abandon the wells and facilities 'for which they are identified as being associated' before a certain date. It appears that the Regulator is pursuing as many parties as is justifiable under the *OGCA* to engage in abandonment operations.

From the perspective of Non-Operators, this joint and several liability to comply with a Section 27 Abandonment Order may seem overly harsh – especially by those Non-Operators who hold only a small percentage working interest in the well or facility. However, the *OGCA* effectively tempers any perceived unfairness which may arise through the combined effect of two provisions of the *OGCA*. Section 30 of the *OGCA* provides that once abandonment operations are complete, and a determination of the costs of abandonment is made by the Regulator, the Regulator must allocate abandonment costs to each WIP in accordance with its Proportionate Share in the well or facility (in what I have defined as a Section 30 A&R Cost Recovery Order). Further, the statutory allocation by the Regulator of abandonment costs is supported in practice by section 70 of the *OGCA*. Section 70 provides that the purpose of the orphan fund is to pay for, *inter alia*, a defaulting WIP's share of abandonment costs. While the

[602] As noted in Chapter 6, despite the potential for Non-Participating Parties to be named in a Section 27 Abandonment Order, in practice, the Regulator would have difficulty determining the Non-Participating Parties in an independent non-title preserving well operation in the Cost Recovery Period. It is the practice of industry to name only the Participating Parties on well licensing applications.

OGCA does not appear to provide that a Non-Operator is entitled – as of right - to reimbursement, the *OGCR* provides a procedure through which Non-Operators can apply for abandonment cost reimbursement – but only where there is a 'defaulting WIP'. A number of Joint Operators in recent years have successfully met all of the prescribed requirements and obtained reimbursement.

The combined effect of sections 30 and 70 of the *OGCA* and the 'comfort' afforded to Non-Operators with respect to Section 27 Abandonment Orders is relatively straightforward. However, the impact of the combined effect of sections 30 and 70 of the *OGCA* on 'reclamation costs' is less certain. Section 30 of the *OGCA* provides that the Regulator must allocate abandonment costs *and reclamation costs* to each WIP in accordance with its proportionate share in the well or facility. Reclamation costs are also included in the section 70 provisions on reimbursement. However, section 30(2) is unclear as to whether 'abandonment operations' and 'abandonment costs' are actually a condition for a Section 30 A&R Cost Recovery Order. Stand alone reclamation operations may not qualify. Recall that 'reclamation operations' are addressed in *EPEA* and it is unlikely that the statutory apportionment of costs in sections 30 and 70 of the *OGCA* applies with respect to operations conducted pursuant to Section 140 Reclamation EPOs and Section 113 Release EPOs, both issued pursuant to *EPEA*.

7.2 *OGCA* Remedial ECOs: Clean-Up of Escaped Substances

In Chapters 3 and 6, I argued that Non-Operators and Non-Participating Parties likely did not fall within the *OGCA* defined categories of 'licensee', 'approval holder' or 'operator' and therefore the Regulator could not name them in a Section 104 Clean-Up Order, in the event an escaped substance that requires containment and clean-up. However, once Clean-Up

Operations are complete, the Regulator may issue a Section 104 Clean-Up Cost Recovery Order, which directs "by whom and to what extent [Clean-Up Operations] are to be paid". There are no prescribed categories of persons to whom Section 104 Clean-Up Cost Recovery Orders must be issued. I argued that based on a Non-Operator's connection, as a working interest owner, to a well or facility which released the escaped substance, it is likely that a Non-Operator could be named in a Section 104 Clean-Up Cost Recovery Order and compelled to pay the costs of Clean-Up Operations, as allocated by the Regulator.

By comparison, although Non-Participating Parties are working interest owners, there is arguably less of a connection between them and the substance or well or facility which released the escaped substance. For example, Non-Participating Parties arguably will not have the 'charge, management or control' of independent operations which generated the escaped substance.

Finally, I note that, unlike Section 30 A&R Cost Recovery Orders, Section 104 Clean-Up Cost Recovery Orders are discretionary, and I found no evidence that the Regulator had ever apportioned the costs of Clean-Up Operations following a Section 104 Clean-Up Order.

7.3 *EPEA* Remedial ECOs: Part 5 EPOs

Under Part 5 of *EPEA*, the Regulator has authority to issue two different types of orders: Section 113 Release EPOs (issued pursuant to Division 1 of Part 5 of *EPEA*) and Contaminated Site EPOs (issued pursuant to Division 2 of Part 5 of *EPEA*)(collectively, "Part 5 EPOs"). Part 5 EPOs can require a Joint Operator to assess, clean up and generally minimize the environmental risks of pollution. A Joint Operator's liability to comply with a Part 5 EPO is largely determined through an analysis of whether the Joint Operator falls within the relevant definition of 'person

responsible' in section 1(tt) or section 107(1)(c) of *EPEA* respectively. The *Operator* under the 2007 CAPL will clearly fall within both definitions of 'person responsible'. However, as we saw in Chapter 4, the Regulator has the discretion to name multiple parties if they fall within the relevant definition of 'person responsible'. Non-Operators arguably also fall within a number of the categories of both definitions of 'person responsible' in *EPEA*. Non-Participating Parties also fall within some of the categories of 'person responsible' – although far less than Non-Operators.

All Joint Operators who are named in a Part 5 EPO are jointly and severally liable for carrying out the terms of the EPO and for paying the costs of complying with the EPO (with the exception of Contaminated Site EPOs where the Regulator has the discretion to allocate costs).

Both the EAB and the Alberta Court of Queen's Bench have consistently held that the Regulator has discretion to issue either a Section 113 Release EPO or a Contaminated Site EPO, subject to the broad legislative criteria and specific definitions of 'person responsible' in *EPEA*.

7.3.1 *EPEA* Remedial ECOs: Contaminated Site EPOs

Although the Regulator has not published any policies which expressly provide that the Regulator is choosing not to utilize the formal contaminated site provisions in Part 5, Division 2 of *EPEA* (ss 123-133), it appears that this is indeed the case. AEP and the AER have both indicated that 'contaminated sites' will be addressed pursuant to Part 5, Division 1 of *EPEA* (substance releases) or Part 6 of *EPEA* (reclamation of specified land). Further, it is notable that none of the published environmental orders on the AER website have been issued pursuant to the formal contaminated site provisions of Part 5, Division 2 of *EPEA*.

One of the impacts of the Regulator's choice to forgo the contaminated sites provisions in favour of the other provisions of *EPEA* is relevant to Joint Operators. The only statutory mechanism for allocating the responsibility for environmental clean-up and restoration (under *EPEA*) is found in the contaminated sites provisions of *EPEA*. If named in one of the other remedial ECOs under *EPEA*, a Joint Operator may be solely liable for all of the clean up and reclamation costs, subject, of course, to its potential right of contribution in the 2007 CAPL.

7.3.2 *EPEA* Remedial ECOs: Section 113 Release EPOs

As noted above, both Non-Operators and Non-Participating Parties arguably fall within the section 1(tt) definition of 'person responsible' and can be named in a Section 113 Release EPO. As I argued in Chapter 4, Non-Operators are likely to fall within a number of categories of 'persons responsible' including owners, former owners, assignees, principals (in an agency relationship) and (depending on the facts) those with 'care, management or control' of a polluting substance. In comparison, I argued in Chapter 6, that Non-Participating Parties likely do not have the care, management or control of a polluting substance that has escaped from an independent operation. Further, it is unlikely that Non-Participating Parties and Participating Parties are in an agency relationship in the Cost Recovery Period of a non-title preserving independent well, except perhaps with respect to produced petroleum substances. However, Non-Participating Parties do fall within the category of 'owners' of an escaped substance – if that substance is petroleum – and 'owners' of a thing containing an escaped substance – the independent well. Thus Non-Participating Parties could be named in a Section 113 Release EPO, subject to the EAB's obiter comments in McColl that it would be inappropriate to issue what is now a Section 113 Release EPOs to a party "by virtue of their ownership alone".

7.3.3 *EPEA* Remedial ECOs: Section 140 Reclamation EPOs

Non-Operators may also be liable pursuant to Part 6 of *EPEA*, Conservation and Reclamation of Land. In Chapter 4 we saw that Non-Operators, as 'working interest participants' will likely fall within the definition of 'operator' in Part 6 of *EPEA* and may be ordered, pursuant to a Section 140 Reclamation EPO, to remediate and reclaim 'specified land'. I argued in Chapter 6 that Non-Participating Parties are also 'working interest participants', therefore they too could be issued a Section 140 Reclamation EPO.[603]

In Chapter 5 we saw that the Regulator may be continuing to pursue the last licensee on record with respect to Section 140 Reclamation EPOs. This would be in a Non-Operator's favour, for, as mentioned above, it is unlikely that a Non-Operator is the licensee on record with the Regulator. It is also unlikely that a Non-Participating Party would be the licensee on file with the Regulator with respect to an independent operation.

7.4 Substances Release ECOs: The *OGCA* Versus the *EPEA*

In the event of a substance release or escape from a well or facility into the environment, the Regulator has discretion to issue a Section 104 Clean-Up Order pursuant to the *OGCA* or a Section 113 Release EPO pursuant to *EPEA*. Certain legislative criteria apply which may distinguish which of these two types of orders may apply in a particular factual circumstance.[604] The criteria I am most concerned with in this thesis determine to whom the order may be issued.

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[603] Again, this is subject to the Regulator's practical difficulty in determining who are the Non-Participating Parties in an independent non-title preserving well operation in the Cost Recovery Period.

[604] The Regulator may issue a Section 104 Clean-Up Order "if a substance has escaped or appears to have escaped from a well, facility or pipeline ... and it appears to the Regulator that the escaped substance may not otherwise be contained and cleaned up forthwith" whereas the Regulator can only issue a Section113 Release EPO where "a

In the area of substance releases and escapes, most of the published policy documentation only refers to *EPEA*. However, the Regulator has offered little in the way of guidance as to whether a particular 'person responsible' will be pursued under the substance release provisions in Part 5, Division 1 of *EPEA* or whether a licensee, approval holder or operator will be pursued under the *OGCA*.

We know that out of the Fifteen ECOs which I reviewed, ten were issued by the AER in response to substance releases, and the majority of those were issued pursuant to *EPEA*. This is not surprising since Section 104 Clean-Up Orders may only be issued to the licensee, an approval holder or a relatively narrow definition of 'operator' (when compared to the *EPEA* definition of 'operator'). It is also notable that two of the Section 113 Release EPOs were issued to all WIPs of the well or facility in circumstances where the Operator and licensee was bankrupt. Finally, even though the AER has not expressly adopted the Last Licensee on Record Policy, it may still apply in cases where the Operator is not defunct or insolvent. Many of the EPOs reviewed were issued solely to the licensee, however we do no know if this was pursuant to policy or due to other circumstance.

The apparent practice of the Regulator to hold the last licensee on record responsible for environmental liabilities may benefit Joint Operators in some circumstances. Despite their potential to be named as 'persons responsible' and subject to liability, it is often the Operator who is the licensee of wells and facilities.

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release of a substance into the environment may occur, is occurring or has occurred, and the release may cause, is causing or has caused *an adverse effect*".

7.5 Going Forward

Significant legal, regulatory and economic changes have occurred in the past decade and the Regulator has responded to these changes with new environmental liability management criteria, guidelines and operational standards. The coming into force of *REDA*, the creation of the AER with jurisdiction under both the *OGCA* and *EPEA* (as it pertains to energy resource activities), and an industry wide recession (involving an unprecedented number of bankruptcies in the oil and gas sector) are likely the most significant changes in terms of the issues considered in this thesis.

In particular, the increased number of industry participants either bankrupt or otherwise unable to pay their working interest share of liabilities has prompted regulators to amend some of their practices to accommodate the potential bankruptcy of the licensee of oil and gas facilities and name other 'responsible persons', 'operators' and 'WIPs' in remedial ECOs.

As we have seen in this thesis, Joint Operators may potentially be subject to a variety of remedial ECOs that the Regulator may issue in a number of circumstances. Further, Joint Operators may find themselves solely responsible for complying with these remedial ECOs and paying the costs associated with compliance – especially where the Regulator issues remedial ECOs under *EPEA*. Can Joint Operators protect themselves from statutory environmental liability? This natural follow up question is beyond the scope of this thesis to address in depth, however, it is suggested that Joint Operators should consider such options as requesting performance assurances from other joint venturers in the form of parental guarantees or irrevocable letters of credit or setting up abandonment and environmental liability trust funds.

Given the nature of the Canadian oil and gas industry and many industry participants' lack of access to capital, this may not be feasible. Further, working interest owners may consider, given the inherent risks involved in JOAs, to choose a different organizational vehicle affording more protection, such as an incorporated joint venture entity. Again, however, other factors come into play, such as tax considerations, which must be weighed against the perceived benefit of such ventures.

At the very least, it has become apparent in this thesis that oil and gas industry participants should choose their 'partners' wisely, as in the words of the Regulator, the actions of working interest participants "may trigger obligations" – to put it mildly - for their fellow Joint Operators.

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