**Right of First Refusal Quick Reference Guide**

***(from the CAPLA Contracts Education and Development Committee)***

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# INTRODUCTION

Rights of first refusal and other preferential rights (collectively, "**ROFRs**") are some of the most challenging and important provisions contained in commercial agreements.[[1]](#footnote-1) The following pages comprise a collection of reference materials for land administration professions to use in dealing with ROFRs, especially in the various iterations of the Canadian Association of Petroleum Landmen ("**CAPL**") Operating Procedures.

As always, the Committee recommends that CAPLA members use the latest 2015 form of CAPL Operating Procedure (the "**2015 CAPL**"). With respect to ROFRs, the 2015 CAPL contains several exemptions that are quite logical from a commercial perspective and may assist in future dispositions. This is certainly the most practical tool for new agreements, but companies can even consider updating older agreements through amendment in cases where parties are aligned.

When considering new agreements, question whether a ROFR is necessary, given the restrictions on dispositions, increased administrative costs, and the impacts on marketability that come along with these provisions. Be sure to discuss internally about the business objectives that any new ROFR is trying to achieve. Careful analysis on the value of the asset, long-term plans and other factors can assist in making the most prudent decision.

Finally, please keep in mind that this guide should act merely as a quick reference and is no way definitive on all of the challenging aspects that ROFRs can present, especially in cases where the ROFR is custom and not from the CAPL forms. We also are aware that different companies often have different policies as to how teams deal with ROFRs. Ultimately, we recommend that less experienced members learn their company's policies well and work closely with more senior colleagues on ROFR issues, to manage the processes effectively while minimizing risks.

Please let us know if there is anything missing from this guide that you would find useful, as the Committee is always looking to improve our materials and make them useful for members!

- The CAPLA Contracts Education and Development Committee

# ROFR FLOW CHART – SELLER

|  |
| --- |
| REVIEW OF LAND FILES |
|  |
| CONTRACT FILES |  | LEASE FILES |
|  |
| DETERMINE WHETHER ROFR’S OR CONSENTS ARE REQUIRED |  | VERIFY LAND INFORMATION FOR SCHEDULE “A” AND ROFR’S |
|  |
| IF A ROFR EXISTS AND IS TRIGGERED |
|  |
| IDENTIFY THE CAPL EDITION AND CLAUSE OR NON-CAPL CLAUSE |
|  |
| CHECK FOR REPLY PERIOD DAYS / ROFR EXPIRY |
|  |
| CHECK IF ANY EXEMPTIONS APPLY |
|  |
| OBTAIN ROFR VALUES FROM PURCHASER |
|  |
| VENDOR CONFIRMS ACCEPTANCE OF ROFR VALUE WITH TEAM OR OTHERWISE CHALLENGES VALUATION, LEADING TO DISPUTE RESOLUTION OR COURT ACTION[[2]](#footnote-2) |
|  |
| DRAFT ROFR LETTERS AND PROVIDE TO PURCHASER |
|  |
| ISSUE ROFR NOTICES OR CONSENT LETTERS |

# ROFR REVIEW GUIDE – RECIPIENT CHECKLIST

**ROFR NOTICE RECEIVED**

**\_\_\_\_\_** Date Received: **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**
The date stamp on the ROFR Notice may not be the date received – calculate response period from the date of the letter.

**\_\_\_\_\_** If Assignment is exempt from ROFR confirm exemption. See ROFR Exemption Guide below.

**DUE DILIGENCE**

**\_\_\_\_\_** Confirm Parties (include any silent parties, review Agreement of silent party for details) and Interests in your Land Database to the Schedule attached to the ROFR Notice and ensure your records align with the lands, rights and interests being divested.

**\_\_\_\_\_** Confirm the ROFR applies under the Agreement (i.e., ROFR exemption).

**\_\_\_\_\_** Confirm CAPL Year and ROFR Response Period.

**CONSIDERATION**

**\_\_\_\_\_** Tangibles, intangibles and miscellaneous: **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**If there are tangibles confirm with your Landman or Vendor what those are if they are not already identified on the Schedule.

**\_\_\_\_\_** Scan ROFR Notice and send to Landman, Land Manager, Geology, Engineering and Environmental Departments and any silent partners for their review and election to either waive or exercise ROFR: Indicate response date (ensure response date is a few days prior to the deadline).

**DECISION MADE TO**

**WAIVE**

**\_\_\_\_\_** Send signed Waiver of ROFR Notice back to originating company.

**\_\_\_\_\_** Update Land Database with comments using the Amendment Type "WAIVER OF RIGHT OF FIRST REFUSAL". Outline a brief description of the ROFR Notice.

**\_\_\_\_\_** Attach a copy of the approval email to the ROFR Notice and send for filing.

**\_\_\_\_\_** Provide a copy to silent partners if applicable.

**EXERCISE**

**\_\_\_\_\_** Regardless of Operatorship – Internal review – Health, Safety and Environment and Field Site Assessment to ensure analysis of all potential known and unknown liabilities.

**\_\_\_\_\_** Initial review of Agreement to be used at Vendor's offices by Senior Contracts Landman (i.e., Farmout; P&S; Asset Exchange; Conveyance, etc.) and if any issues, a second review completed by Legal Department.

**\_\_\_\_\_** Other internal reviews by Finance, Joint Interest, Marketing.

**\_\_\_\_\_** Send ROFR back to vendor with appropriate signature (fax, scan or email executed ROFR to Vendor as a backup method).

**\_\_\_\_\_** Proceed with acquisition.

**\_\_\_\_\_** Advise silent partners, if applicable.

# NOTICE OF ASSIGNMENT AND ROFR EXEMPTION GUIDELINES

**Upon receipt of an NOA Letter, REVIEW the Agreement to check if there is a ROFR**

**Note\* If not identified on the Elections Sheet, READ the CAPL Agreement as the # of days may be modified from the standard agreement, including inside the document.**

**NON-CAPL Agreement –** Need to review the Agreement in its entirety to check for a ROFR and carefully note the relevant terms. It is often recommended to get legal teams involved for these agreements to assist in interpretation.

**CAPL Agreement –** Review the exemptions to confirm whether any apply. Always confer and confirm with all relevant internal teams as to whether the relevant exception applies. The following is a brief summary of the exceptions to Clause 2401 B that applies to each version of the CAPL Operating Procedure (1974, 1981, 1990, 2007, 2015).

| **Description of Exemption** | **1974** | **1981** | **1990** | **2007** | **2015** |
| --- | --- | --- | --- | --- | --- |
| Calendar days to decide whether to exercise a ROFR or be deemed to have waived the right.  | 20 | 20 | 30 | 30 | 30 |
| Calendar days to close a sale before ROFR Notices must be reissued. | 60 | 60 | 150 | 150 | 150 |
| Assignment made by way of security for assignor's indebtness. A good faith requirement was added in CAPL 2007 and 2015. | YES | YES | YES | YES | YES |
| Assignment made by way of security for assignor's future indebtness or liabilities, the issuance of bonds or debentures of a corporation, or the performance of the obligations of assignor as a guarantor under a guarantee, provided that upon enforcement of security by sale or foreclosure, ROFR applies. | NO | NO | YES | YES | YES |
| Assignment sale or disposition made by a party of its entire participating interest in joint lands to a corporation in return for shares or to a partnership in return for a partnership interest. | NO | YES | YES | YES | YES |
| Assignment sale or disposition of all or substantially all or of an undivided interest in all or substantially all of its PNG rights in the province, state or territory where joint lands are situated. The term "substantially all" was clarified as being 90% or more of net hectares being disposed of by it (CAPL 1990 and onward). A good faith requirement was also added in CAPL 2007 and 2015. | YES | YES | YES | YES | YES |
| Assignment, sale or disposition by a party in which net acres being assigned, sold or disposed of in lands subject to ROFR represent less than 5% of total net acres being assigned, sold or disposed of pursuant to a transaction. | NO | YES | YES | YES10% | YES10% |
| A good faith disposition, other than through an earning agreement, in which net hectares being disposed of is less than 10% of total net hectares being disposed. | NO | NO | NO | YES | YES |
| A good faith arm's length disposition under an earning agreement in which net hectares that can be earned represent at its effective date, less than 35% of total net hectares that can potentially be earned thereunder from a disposing party and its affiliates. | NO | NO | NO | YES | YES |
| Optional Paragraph – The right of another person to earn a working interest under a good faith arm's length earning agreement. | NO | NO | NO | YES | YES |

# The Effect of the Segregation Protocol on ROFR's

Pursuant to the CAPL / CAPLA Segregation Protocol, if an Agreement contains a ROFR and the Agreement has been subject to segregation by virtue of a partial assignment of contract lands or a party assigns a portion of their working interest then those agreements effectively act as two separate agreements and therefore **TWO SEPARATE ROFR** notices need to be prepared for each portion of the agreement.

For more information please see: [THE SEGREGATION PROTOCOL – 5 SIMPLE RULES located at this link](http://caplacanada.org/wp-content/uploads/2015/02/Segregation-Article_-5-SIMPLE-RULES_edited.doc)[[3]](#footnote-3) or the [Segregation Protocol itself, located at this link](http://caplacanada.org/wp-content/uploads/2015/02/segregationprotocolfinal.pdf).[[4]](#footnote-4)

# RIGHT OF FIRST REFUSAL NOTICE

DATE **VIA COURIER**

Company Name

Address

City, Province, Postal Code

Attention: Land Department

**NOTICE OF DISPOSITION OF INTEREST
Request for Waiver of Preferential Rights to Purchase**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Agreement dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the "Master Agreement")**

Twp **\_\_\_\_\_** Rge **\_\_\_\_\_** W**\_\_**M Sec **\_\_\_\_\_
\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Area, Province

Our File: **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**VENDOR** wishes and intends to dispose to **PURCHASER** the interests as described on the attached Schedule "A" (the "**Interests**"), together with other interests. Our records indicate the Interests are subject to the Master Agreement which contains preferential purchase provisions (the "**Right of First Refusal**") in your favour. The terms and conditions of the disposition are detailed in a binding sale agreement (the "**Sale Agreement**"), a copy of which will be made available for your review in our office during normal business hours upon request. The bona fide estimate of **PURCHASER** of the value in cash of such consideration, the effective date for adjustment purposes and the scheduled closing date are described on the attached Schedule "A".

**VENDOR** requests you waive the Right of First Refusal within the applicable **ROFR DAYS** day period (the "Notice Period") to allow the disposition of the Interests to proceed to **PURCHASER**.

These Interests are subject to the terms under the above referenced Master Agreement. Clause 2401/24.01 B of the **Year** CAPL Operating Procedure attached to the Master Agreement, contains Right of First Refusal provisions. This Right of First Refusal Clause provides for a **#** day period, the ("**Notice Period**") to exercise Rights of First Refusal.

Should you exercise your Right of First Refusal, you will be obligated to enter into an agreement that incorporates terms substantially the same as the terms of the Sale Agreement with only such minimal changes as are necessary to reflect the Interests. Failure to respond to this disposition notice within the Notice Period will be deemed to be an election to waive the Right of First Refusal.

Please provide your waiver or notice of acceptance by signing the duplicate copy of this disposition notice in the space provided below and returning one copy of this notice to the address above, within the Notice Period. Failure to respond during the Notice period will be deemed to be an election to waive your Right of First Refusal under the terms of the Master Agreement. A waiver or deemed waiver of the Right of First Refusal will also be deemed to be your company providing any applicable consent to the sale of the Interests under the Master Agreement.

If more than one company elects to exercise its Right of First Refusal, then the electing companies will have the right to acquire the subject Interests in the proportions that their respective participating interests bear one to the other.

**VENDOR NAME**

NAME

TITLE

Encl.

|  |  |
| --- | --- |
| **WAIVER – RIGHT OF FIRST REFUSAL**The undersigned elects to **WAIVE** the Right of First Refusal and consents to the dispositionCompany: Per: Title: Date:  | **EXERCISE – RIGHT OF FIRST REFUSAL**The undersigned elects to **EXERCISE** the Right of First Refusal.Company: Per: Title: Date:  |

Schedule "A"[[5]](#footnote-5)

**ATTACHED TO AND FORMING PART OF A
NOTICE OF DISPOSITION
DATED \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
BETWEEN COMPANY "A" AND COMPANY "B"**

**AGREEMENT:**

**EFFECTIVE DATE:**

**PROPOSED CLOSING DATE:**

**CONSIDERATION:**

**NOTICE PERIOD:**

**INTERESTS:**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **File #** | **Title Documents** | **Legal Description** | **Interests** | **Encumbrances** |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |

**Third Parties:**

# ROFR EXEMPTION – COVER LETTER

**VIA COURIER**

**COMPANY**

**Address**

**City, Province, PC**

**DATE**

|  |  |  |
| --- | --- | --- |
| **COMPANY****Address****City, Province, PC** | **COMPANY****Address****City, Province, PC** | **COMPANY****Address****City, Province, PC** |

Attention: Land Department

**NOTICE OF DISPOSITION**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Agreement dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the "Master Agreement")**

Twp **\_\_\_\_\_** Rge **\_\_\_\_\_** W**\_\_**M Sec **\_\_\_\_\_
\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Area, Province

Our File: **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

Effective as of **DATE**, **SELLER**, by virtue of a **Transfer Agreement**, transferred and conveyed its entire interest in the above Agreement to **PURCHASER**. According to our records, your company is a current party to the Master Agreement, which contains a preferential right of purchase ("**ROFR**") in your company's favour.

The relevant lands governed by the Master Agreement are **exempt** from the underlying ROFR provisions pursuant to clause **CLAUSE** **[of the YEAR CAPL Operating Procedure attached to the Master Agreement OR of the Master Agreement]**.

Therefore, the enclosed notice of assignment is provided for your review and further handling.[[6]](#footnote-6) This will result in a Binding date of **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**.

**[Please be advised that the enclosed notice of assignment has been prepared in accordance with the provisions of the Segregation Protocol [Version: CAPLA 2011], and as such, names only those Current Third Parties which have an interest in the lands to which the Notice of Assignment pertains.][[7]](#footnote-7)**

If you have any questions or concerns, please contact the undersigned.

Yours truly,

**SELLER**

Name

Title

Phone # Fax #

Email address

cc: Company Two Address, City, Province, PC

1. For recent academic guidance on ROFRs, please see a paper published in 2017 at the Alberta Law Review, [found at this link](https://www.albertalawreview.com/index.php/ALR/article/view/1247). (https://www.albertalawreview.com/index.php/ALR/article/view/1247) [↑](#footnote-ref-1)
2. Valuation issues are one of the most common disputes that arise in ROFR scenarios. Please ensure that all relevant internal teams are included in the analysis. [↑](#footnote-ref-2)
3. <http://caplacanada.org/wp-content/uploads/2015/02/Segregation-Article_-5-SIMPLE-RULES_edited.doc> [↑](#footnote-ref-3)
4. <http://caplacanada.org/wp-content/uploads/2015/02/segregationprotocolfinal.pdf> [↑](#footnote-ref-4)
5. While potentially helpful from an administrative clarity perspective, parties do not always choose to include all of this information in this schedule. However, caution is advised, as ROFR notices that omit material information can be deemed to be invalid. This schedule attempts to provide all material terms in accordance with CAPL requirements. Additionally, some parties have also moved towards providing a redacted version of the entire sale agreement as part of the ROFR notice, which would defeat any argument that the ROFR holder did not receive all material terms. [↑](#footnote-ref-5)
6. This paragraph should be revised if a notice of assignment is not being provided. [↑](#footnote-ref-6)
7. Include this paragraph if applicable. [↑](#footnote-ref-7)