2021 ABAER 003

Alberta Energy Regulator

Regulatory Appeals of the Decision to Issue Declarations Naming Darren O'Brien and Jeffrey Young Pursuant to Section 106 of the *Oil and Gas Conservation Act*

Regulatory Appeals 1928568 and 1928569

February 3, 2021

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February 3, 2021

Published by
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Decision

[1] Having carefully considered all of the evidence, the Alberta Energy Regulator (AER) revokes the declarations under section 106(1) of the *Oil and Gas Conservation Act* (*OGCA*) naming Darren O'Brien and Jeffrey Young (collectively, the requesters), former directors of Trident Exploration (Alberta) Corp. (Trident Alberta) and Trident Exploration (WX) Corp. (Trident WX) (collectively, Trident).

[2] In reaching this decision, the AER considered all relevant materials properly before it, including the evidence and argument provided by each party. Accordingly, references to specific portions of the evidence in this decision are intended to assist the reader in understanding the AER's reasoning on a particular matter and do not mean that the AER did not consider all relevant portions of the evidence.

Background and History

[3] The requesters served as directors of Trident from September 6, 2016 to April 30, 2019. Mr. O'Brien also served as Trident's president from January to April 30, 2019. Trident Alberta and Trident WX are wholly owned by Trident Exploration Corp. (Trident Exploration).

[4] Trident Alberta and Trident WX held well, pipeline, and facilities licences issued by the AER. According to the requesters, Trident produced mainly shallow, dry natural gas from coalbeds and had ownership interest in 4700 wells and ownership of 29 gas plants. The requesters stated that, in February 2019, 2700 of Trident's wells were still producing, 22 of its gas plants were in operation, and Trident's production was 85 million cubic feet of oil equivalent per day.

[5] The requesters are partners at Origami Capital Partners, LLC. The requesters submitted that Origami is a private equity investment manager that manages $1 billion (US) in assets and invests in sectors that are challenged and in need of capital investment, such as Alberta's oil and gas industry.

[6] The requesters stated that in 2015, Trident was overburdened with debt and had a weak balance sheet. In 2016, Trident Exploration was recapitalized through a plan of arrangement under the *Canada Business Corporations Act* (*CBCA*). The requesters submitted that Origami led the *CBCA* process and

reduced Trident's debt from $270 million to $60 million for Trident to exit the *CBCA* process. As a result of the plan of arrangement, Trident Exploration was controlled by Origami.

[7] The requesters said that they were appointed directors of Trident following the recapitalization of Trident Exploration because of their involvement with Origami. They stated that by the end of 2016, Origami had invested over $60 million in Trident with the goal to improve operations. The requesters submitted that ATB Financial was Trident's primary lender and that ATB financing was needed for Trident's working capital.

[8] Mr. O'Brien stated that the natural gas price collapse in Canada in 2017 resulted in a liquidity crisis for Trident. In late 2018, Origami invested an additional $5 million in Trident. Mr. O'Brien further stated that Origami had not recovered its capital investments in Trident.

[9] The requesters stated that in January 2019, Trident engaged Veracity Energy Services Ltd. (Veracity) to assist Trident with capital preservation and cost reductions. On January 31, 2019, Trident Exploration's directors terminated its chief executive officer. The requesters submitted that Trident subsequently engaged Veracity to provide interim staffing for the roles of chief financial officer and chief operating officer, and to provide technical support and field services. At the same time, Mr. O'Brien assumed the role of chief executive officer. The requesters stated that on February 15, 2019, they notified the AER that they were the only remaining directors of Trident and that Mr. O'Brien was appointed an officer of Trident.

[10] The requesters submitted that, on February 25, 2019, independent auditors determined that Trident was effectively insolvent. At this time, Trident initiated discussions with its lenders, insolvency professionals, and the AER to explore solutions that might lead to refinancing or an orderly insolvency process. These discussions continued, without resolution, until late April 2019.

[11] The requesters submitted that these discussions were affected by the Supreme Court of Canada's decision in *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 (Redwater). Redwater was issued on January 31, 2019, and involved the AER and ATB Financial as opposing litigants. The requesters maintained that Redwater's impact was to make environmental and end-of-life obligations senior to any other obligations during insolvencies, resulting in lenders to the energy sector becoming much more cautious. The requesters stated that in the wake of Redwater, they asked the AER for guidance on the AER's priorities in situations where operators are in financial distress.

[12] On April 29, 2019, the AER's Compliance and Liability Management Branch (Compliance and Liability Management) issued an order (the order) to Trident, restricting its eligibility for AER licences and requiring it to submit an updated Schedule 1 pursuant to *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* by June 1, 2019. The order further required that, by June 14, 2019, Trident either apply to transfer its well, facility, and pipeline licences to a person, or

persons, eligible to hold AER licences; post a security deposit of $245 714 822.00 for the total deemed liabilities of Trident Alberta and $13 294 700.50 for the total deemed liabilities of Trident WX; or submit a compliance plan to the AER for approval. Finally, the order required that, by June 14, 2019, Trident update the working interest participant records associated with its licences and confirm that all fluids had been removed from its inactive sites.

[13] No evidence was presented in this proceeding demonstrating that before April 29, 2019, Trident's operations caused any risk to the safety of the public, or the environment, or that Trident squandered any resources.

[14] On April 30, 2019, Trident shut in what it perceived to be its highest-risk sites, ceased operations, terminated its staff, and Mr. O'Brien and Mr. Young resigned as Trident's only directors.

[15] On May 2, 2019, the Orphan Well Association filed an application with the Alberta Court of Queen's Bench to appoint a receiver for Trident. On May 3, 2019, the court heard the application, and by order appointed PricewaterhouseCoopers Inc. as receiver (the receivership order).

[16] The receiver's first report, filed with the court on October 1, 2019, indicated that on April 30, 2019, Trident's contractors and field staff shut in all of Trident's facilities, most of their compressor stations, and approximately 700 wells. After April 30, 2019, about 1700 wells continued to flow and accumulate pressure in Trident's pipeline system. The receiver also indicated that following its appointment on May 3, 2019, its primary concerns were to shut in the remaining producing wells and to generate funds for the shut-in work and the receivership. To that end, the receiver retained Veracity to provide production technical advice, shut-in coordination, and field operational support.

[17] On June 24, 2019, Compliance and Liability Management served the requesters with a notice of intent to issue declarations naming the requesters under section 106 of the *OGCA*. The requesters filed written submissions on July 24, 2019, to show cause why the declarations should not be made.

[18] Compliance and Liability Management issued the declarations on October 9, 2019, imposing various restrictions on the requesters' future activities regulated under the *OGCA* and the *Pipeline Act*. The declarations and reasons for the decision were signed by Mr. Robert Wadsworth, who was then Vice President of the AER's Closure and Liability Branch (now Compliance and Liability Management).

[19] Compliance and Liability Management stated that Trident's cessation of operations occurred without an orderly transition for the care and custody of the assets, leaving wells, facilities, and pipelines in an unsecured state. It further maintained that by ceasing operations and failing to comply with the order, the requesters exposed the Province of Alberta to end-of-life liabilities of about $259 million. According to Compliance and Liability Management, these were aggravating factors it considered in issuing the declarations.

Requests for Regulatory Appeal

[20] The requesters filed requests for regulatory appeal of the declarations on November 8, 2019, under Part 2, Division 3, of the *Responsible Energy Development Act* (*REDA*) and Part 3 of the *Alberta Energy Regulator Rules of Practice (Rules of Practice).*

[21] The AER granted the requests for regulatory appeal on May 4, 2020, and set the matters down for hearing. The notice of hearing was issued on June 17, 2020. On June 17, 2020, and July 6, 2020, Compliance and Liability Management and the requesters, respectively, confirmed their full participation in the hearing. A late request to participate was received from Canadian Natural Resources Limited on July 16, 2020, and was denied on July 30, 2020. The AER issued the notice of scheduling of hearing on October 9, 2020.

[22] A prehearing meeting was held electronically on September 3, 2020, before hearing commissioners P. Meysami (presiding), C. Chiasson, and T. Stock (the panel), and the prehearing decision was issued on September 11, 2020.

[23] The following issues for the hearing were identified in the prehearing decision. The issues were proposed by the requesters and were not opposed by Compliance and Liability Management:

1) Whether the AER erred in holding Messrs. O'Brien and Young liable under section 106 of the OGCA as persons in direct or indirect control over Trident at the time Trident failed to comply with the order or pay the invoice?
2) Whether the AER erred in concluding that Messrs. O'Brien and Young's conduct made compliance with the order or payment of the invoice impossible?
3) Whether the AER erred in concluding that it was in the public interest for the declarations to be issued?
4) Whether Messrs. O'Brien and Young had a reasonable apprehension of bias with respect to Mr. Wadsworth as decision maker on behalf of the AER, and the decision is tainted by procedural unfairness?

[24] The AER held a public electronic hearing for this proceeding before the panel. The panel heard the evidence from November 2 to 4, 2020, and the closing arguments on November 10, 2020. Hearing participants are listed in a0.

Regulatory Framework

Responsible Energy Development Act

[25] The AER's mandate under *REDA* is to provide for the efficient, safe, orderly, and environmentally responsible development of energy resources in Alberta.

[26] Under section 38(1) of *REDA*, an eligible person may request a regulatory appeal of an appealable decision. The requesters are eligible persons under section 36(b)(ii) of *REDA*, and the declarations are appealable decisions under section 36(a)(iv) of *REDA*.

[27] The hearing commissioners constituting this hearing panel are independent decision makers authorized under section 12 of *REDA* to carry out hearings of regulatory appeals and make decisions in the name of and on behalf of the AER. Pursuant to section 41(2) of *REDA*, the panel must determine whether to confirm, vary, suspend, or revoke Compliance and Liability Management's decision to issue the declarations.

Oil and Gas Conservation Act

[28] In determining whether to confirm, vary, suspend, or revoke the declarations, we must consider section 106 in the context of the following purposes of the *OGCA* as listed in section 4 of the act at the time the declarations were issued:

> (b) to 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;
>
> (c) to provide for the economic, orderly, and efficient development in the public interest of the oil and gas resources of Alberta;
>
> (f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Regulator has jurisdiction.

[29] Section 106 states:

> (1) Where a licensee, approval holder or working interest participant
>
> (a) contravenes or fails to comply with an order of the Regulator, or
>
> (b) has an outstanding debt to the Regulator, or to the Regulator to the account of the orphan fund, in respect of suspension, abandonment or reclamation costs,
>
> and where the Regulator considers it in the public interest to do so, the Regulator may make a declaration setting out the nature of the contravention, failure to comply or debt and naming one or more directors, officers, agents, or other persons who, in the Regulator's opinion, were directly or indirectly in control of the licensee, approval holder or working interest participant at the time of the contravention, failure to comply or failure to pay.
>
> (2) The Regulator may not make a declaration under subsection (1) unless it first gives written notice of its intention to do so to the affected directors, officers, agents or other persons and gives them at least 10 days to show cause as to why the declaration should not be made.
>
> (3) Where the Regulator makes a declaration under subsection (1), the Regulator may, subject to any terms and conditions it considers appropriate,

> (a) suspend any operations of a licensee or approval holder under this Act or a licensee under the *Pipeline Act*,
>
> (b) refuse to consider an application for an identification code, licence or approval from an applicant under this Act or the *Pipeline Act*,
>
> (c) refuse to consider an application to transfer a licence or approval under this Act or a licence under the *Pipeline Act*,
>
> (d) require the submission of abandonment and reclamation deposits in an amount determined by the Regulator prior to granting any licence, approval or transfer to an applicant, transferor or transferee under this Act, or
>
> (e) require the submission of abandonment and reclamation deposits in an amount determined by the Regulator for any wells or facilities of any licensee or approval holder,
>
> where the person named in the declaration is the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e) or is a director, officer, agent or other person who, in the Regulator's opinion, is directly or indirectly in control of the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e).
>
> (4) This section applies in respect of a contravention, failure to comply or debt whether the contravention, failure to comply or debt arose before or after the coming into force of this section.

Submissions and Arguments

[30] The parties took differing positions on how we should interpret section 106. The requesters argued for a strict interpretation. They referred us to legal authorities supporting strict interpretation of legislation in instances where individuals' rights are affected and argued that the requesters' right to participate in the oil and gas industry in Alberta is affected by the declarations.

[31] Compliance and Liability Management responded that holding oil and gas licences in Alberta is a privilege, not a right, citing *Directive 067*. It also stated that the AER issues declarations sparingly to deal with "the worst of the worst behaviour" and that section 106 effectively seeks banishment from the industry of individuals named in a declaration.

[32] Compliance and Liability Management argued for a more liberal interpretation of section 106, taking into consideration the spirit and intent of the entire section as well as that of the *OGCA* and *REDA*. It suggested that because section 106(3) gives the AER broad discretion when imposing terms and conditions within a declaration, section 106(1), which establishes the substantive requirements for issuing a declaration, should be liberally interpreted. It argued that section 106 must be given a liberal interpretation that is not limited to contraventions of a specific AER order or the actual timing when noncompliance occurred. Further, once noncompliance by a licensee is established under section 106(1), the decision maker only needs to determine whether it is in the public interest to issue declarations naming the licensee's principals.

[33] Compliance and Liability Management also referred us to *Tran v Canada (Public Safety and Emergency Preparedness*), 2017 SCC 50, as authority for the proposition that legislative interpretation should not produce absurd consequences, including rendering aspects of legislation pointless. It argued that strict interpretation would render section 106 pointless. Compliance and Liability Management argued that strict interpretation would allow directors and officers to avoid regulatory responsibilities by resigning from a licensee in financial distress; in effect "that would open the floodgates in Alberta, allowing any director or officer or licensee to walk away and just pass the costs of [*sic*] associated with end-of-life obligations on to the public and the other industry players who actually follow the rules and comply with regulatory requirements."

[34] The requesters responded that Compliance and Liability Management's submissions suggest we ignore the wording in section 106(1). They argued that a declaration is issued under section 106(3) only after the express terms of section 106(1) are fulfilled. The requesters submitted that section 106(3) does not invest the AER with wide-ranging discretion. They suggested that section 106(3) enumerates a list of actions the AER may take in respect of a licensee, approval holder, applicant, transferor, or transferee controlled by a person named in a declaration. They argued that the AER has discretion to qualify a declaration by way of terms and conditions, but this discretion does not extend to discretion to issue declarations in circumstances not contemplated by the plain language of section 106(1). The requesters also argued that neither Compliance and Liability Management, as the original decision maker, nor this panel can amend the *OGCA* to achieve the interpretation of section 106 sought by Compliance and Liability Management.

Analysis and Findings

[35] The legal authorities cited by both parties provide that we should look to the wording of the relevant provisions while being mindful of the meaning and intent of the relevant legislation.

[36] Section 106(1) sets out the substantive elements that must be met to issue a declaration, section 106(2) establishes the process the AER must provide before issuing a declaration, and section 106(3) sets out the actions the AER may take with respect to any entity regulated by the AER that is, in the AER's opinion, directly or indirectly controlled by the person named in a declaration.

[37] Section 106(1) is clear and specific in setting out the elements that must be met to issue a declaration. It requires evidence that an individual named in a declaration was "directly or indirectly in control of the licensee…at the time of the contravention, or failure to comply" with an order. We cannot ignore parts of section 106(1) to fulfil broader purposes as urged by Compliance and Liability Management. Therefore, in this decision we must determine whether the requesters had direct or indirect control of Trident at the time Trident failed to comply with the order.

[38] Furthermore, the parts of section 106 are to be applied sequentially. We agree with the requesters' submissions that section 106(1) must be satisfied before section 106(3) is engaged, and that the broad nature of section 106(3) does not expand or modify the ordinary meaning of section 106(1).

[39] The purpose of section 106 of the *OGCA* is to ensure compliance and to prevent further noncompliance by any licensee controlled by a named person. A person named in a declaration, and any licensee or approval holder controlled by that person, may be subject to limitations on their participation in the oil and gas industry in Alberta. The parties agreed that section 106 declarations can have significant effects on individuals and their activities. We find that such impact favours applying section 106 in accordance with its ordinary meaning, as argued by the requesters.

Standard of Review

Submissions and Arguments

[40] The parties made submissions and arguments about the nature of the regulatory appeals, particularly whether we should give deference to Compliance and Liability Management's interpretation of section 106 of the *OGCA*, which it applied in issuing the declarations. Deference refers to the standard of review to be applied by an appellate body in reviewing an administrative decision.

[41] Both parties characterized this proceeding as a *de novo* (new) hearing, referring us to the AER's previous decision in *Pure Environmental Re*, 2020 ABAER 004 (Pure).

[42] Compliance and Liability Management submitted that relevant case law requires an appellate body to give deference to an administrative tribunal when that tribunal has interpreted its home statute, or a statute closely related to its function, and argued that we should give deference to Compliance and Liability Management's interpretation of section 106 of the *OGCA*. Compliance and Liability Management further submitted that the *de novo* nature of a regulatory appeal did not prevent us from giving it deference in this proceeding.

[43] Relying on Pure, the requesters argued that we should not apply a standard of review but rather decide this proceeding afresh based on the record before us. Furthermore, the requesters submitted that the authorities cited by Compliance and Liability Management in support of its deference standard argument were inapplicable to this proceeding.

Analysis and Findings

[44] Regulatory appeals of AER decisions are governed by Part 2, Division 3, of *REDA* and Part 3 of the *Rules of Practice*. Hearing panels deciding regulatory appeals may confirm, vary, suspend, or revoke appealable decisions. Section 31.1 of the *Rules of Practice* enables hearing panels to allow new information to be submitted in regulatory appeals if that information is relevant and material to the appealable decision and was not available to the original decision maker at the time the decision was

made. However, these provisions do not automatically cast all AER regulatory appeals as *de novo* proceedings.

[45] Section 36(a) of *REDA* defines a wide range of regulatory decisions as appealable decisions. Examples of appealable decisions include the AER's issuance of reclamation certificates, environmental protection orders, water protection orders, coal mine permits, oil sands approvals, well and pipeline licences, and declarations issued under section 106 of the *OGCA*. We recognize the extensive scope of AER decisions that may be appealed and the reality that no two regulatory appeals will have the same circumstances. In some regulatory appeals, such as in Pure, the panel has new information before it in addition to what was before the original decision maker. Pure held that an AER regulatory appeal hearing is a hybrid *de novo* hearing wherein a panel has before it the record of the original AER decision maker and any relevant and material new information filed by the parties that was not before that original decision maker.

[46] As part of this proceeding's record, Compliance and Liability Management filed the information it relied on to issue the declarations. The requesters provided evidence that was not before Compliance and Liability Management at the time the declarations were issued. In reaching our decision, we have considered the entire record in this proceeding and relied on both the decision maker's record, as well as the relevant and material new information before us. As such, we find this is a hybrid *de novo* proceeding, because its record differs significantly from that relied on by Compliance and Liability Management when it issued the declarations. As in Pure, we find it unnecessary to apply a standard of review in this proceeding due to this difference in records.

[47] We also find that we are not required to apply deference to Compliance and Liability Management's interpretation of section 106 of the *OGCA*. The cases it cited are not applicable to an AER regulatory appeal as they involved appellate or judicial review by the courts of administrative tribunal decisions. An AER hearing panel is an administrative tribunal, not a court. Moreover, pursuant to section 12(3) of *REDA*, the panel makes its decision as the AER. Accordingly, the *OGCA* is this panel's home statute as much as it is Compliance and Liability Management's home statute, and we need not defer to Compliance and Liability Management's interpretation of section 106.

Issues of the Hearing

[48] Having found that this is a hybrid *de novo* proceeding and this panel does not need to apply a standard of review, we have decided to consider whether the requirements for a section 106 declaration are met in these circumstances.

[49] A valid section 106 declaration must meet the substantive requirements in subsection (1) as follows:

- A licensee, approval holder, or working interest participant has contravened or failed to comply with an order of the AER, or has an outstanding debt to the AER, or to the AER to the account of the orphan fund, in respect of suspension, abandonment, or reclamation costs.
- The person to be named was, in the AER's opinion, in direct or indirect control of the licensee, approval holder, or working interest participant at the time of the contravention, failure to comply, or failure to pay.
- The AER considers it in the public interest to issue the declaration.

[50] In this proceeding, the following facts were not contested by the parties and were established to our satisfaction:

- Trident did not comply with an order of the AER.
- The requesters were directors of Trident from September 6, 2016, to April 30, 2019. Mr. O'Brien also served as Trident's president from January to April 30, 2019.

[51] The section 106 requirements that remained at issue were

- whether the requesters were in direct or indirect control of Trident at the time Trident failed to comply with the order, and
- whether the declarations were in the public interest.

[52] Also at issue during the hearing was the matter of whether the requesters had a reasonable apprehension of bias regarding the Compliance and Liability Management decision maker, Mr. Robert Wadsworth, who signed the declarations.

[53] As noted previously, we identified hearing issues in the prehearing decision. The issues evolved over the course of the submission process and the hearing. To decide these regulatory appeals, we need to address the following issues, discussed in three sections: control of the licensee, time of failure to comply with the order, and other issues, including public interest and reasonable apprehension of bias.

Control of the Licensee

Submissions and Arguments

[54] The requesters submitted that section 106 of the *OGCA* authorizes the AER to issue declarations against individuals in control of a licensee at the time the licensee contravenes or fails to comply with the order.

[55] The requesters resigned as directors and officers of Trident on April 30, 2019, one day after Compliance and Liability Management issued the order to Trident. The parties disagreed about the effect of the resignations, which is relevant to the question of whether the requesters had direct or indirect control of Trident at the time Trident failed to comply with the order.

[56] The requesters submitted that upon their resignations, they ceased to hold office in Trident. The requesters cited section 108 of both the Alberta *Business Corporations Act* and the *CBCA*, which deal with the effective date of a director's resignation and provide that a director ceases to hold office when the director resigns. Compliance and Liability Management did not dispute the effect or applicability of those sections.

[57] The requesters cited the decision in *Netupsky v R.*, 2003 Carswell Nat 46 (TCC), which held that a director has the right to resign to avoid potential liabilities.

[58] The requesters' resignations were registered with Alberta Corporate Registry on May 3, 2019, pursuant to the Alberta *Business Corporations Act*, by the requesters' legal counsel. Proofs of filing were provided that showed

- no active directors for Trident Alberta, of which Trident Exploration held 100 per cent of its shares, and
- no active directors for Trident WX, of which Trident Exploration held 100 per cent of its shares.

[59] The requesters argued that Trident was placed under the direct control of the receiver on May 3, 2019, pursuant to the receivership order, paragraph 3 of which empowered the receiver to "take possession of and exercise control over" Trident's assets and to "manage, operate and carry on the business" of Trident. Both Mr. O'Brien and Mr. Young testified that they had no control or input concerning Trident's assets after April 30, 2019. Therefore, the requesters submitted that they were not in direct or indirect control of Trident on June 1, 2019, or June 14, 2019, when it failed to comply with the order.

[60] Compliance and Liability Management submitted that the requesters were in direct control of Trident immediately before the order was issued. Mr. Gosselin, who was the AER's Director of Licensee Management at the time the declarations were issued, testified that the requesters had indirect control of Trident's well and facility licenses after resigning on April 30, 2019, and that the "point of control is not important." Mr. Gosselin relied on the statement at page 7 of the reasons for the declarations that a licensee's notification to the AER that it intended to "cease operations and take no further responsibility for its licensed properties does not absolve the licensee of its ongoing obligations."

[61] Compliance and Liability Management argued that when the requesters resigned, Trident became incapable of complying with the order because it lacked any management, employees, agents, or directors

and was left with no one to direct it. There was "no one at the helm." Compliance and Liability Management argued that this constituted an immediate breach of the order.

[62] Compliance and Liability Management characterized the requesters' resignations and the termination of Trident's operations as acts of bad faith, frustrating the process and the intent of the order. Mr. Gosselin testified that in his view the requesters were "gaming the system" and trying to exploit "a loophole in the legislation." Compliance and Liability Management contended this would bring the regulatory process into disrepute.

[63] Alternatively, Compliance and Liability Management submitted that notwithstanding the appointment of a receiver on May 3, 2019, the requesters remained in indirect control of Trident at the time of the contravention of the order on June 1, 2019, and June 14, 2019. This argument relied on the receivership being a direct consequence of the requesters' actions or omissions from February to April 30, 2019. Compliance and Liability Management stated that the AER, as a responsible and prudent regulator protecting the public, was compelled to facilitate the appointment of the receiver because Trident left potentially dangerous wells and facilities operating when the requesters "walked away." Compliance and Liability Management argued that the requesters should not be able to avoid responsibility when it was their own actions that resulted in the receiver being appointed.

Analysis and Findings

[64] Section 106 requires evidence that a party named in a declaration was "directly or indirectly in control of the licensee…at the time of the contravention, or failure to comply" with an order.

[65] We find, in accordance with section 108 of the Alberta *Business Corporations Act*, that the requesters resigned as directors and officers of Trident effective April 30, 2019, after which time they had no direct control of Trident. Further, the requesters did not have indirect control of Trident after their authority was terminated on May 3, 2019, by appointment of the receiver with authority to take possession and exercise control of Trident's assets and to manage, operate, and carry on Trident's business. We were not persuaded by the evidence provided by Compliance and Liability Management and find that the requesters did not have indirect control of Trident.

[66] However, these findings do not address the argument of Compliance and Liability Management, that contravention of the order occurred when Trident ceased operations on April 30, 2019, as stated in its letter dated October 9, 2019, providing reasons for the declarations:

> As a direct result of the actions of [the Requesters]…in directing the ceasing of operations by Trident, directing the termination of its employees and resigning as directors of Trident, Trident contravened… the Order. As at April 30, 2019, when such steps were taken by [the Requesters], it became impossible for Trident to fulfill the terms of the Order and therefore the Order was frustrated or anticipatorily contravened.

[67] Therefore, we must decide when Trident failed to comply with the order.

Time of Failure to Comply with the Order

Submissions and Arguments

[68] Compliance and Liability Management argued that when the requesters resigned, Trident became incapable of complying with the order because it lacked any management, employees, agents, or directors. Compliance and Liability Management described Trident as an empty vessel with "no one at the helm" and no way to steward its assets.

[69] Compliance and Liability Management characterized the requesters' resignations as the only remaining directors of Trident, and the termination of Trident's operations, as acts which justified a presumption of an immediate noncompliance with the order.

[70] The requesters argued that contravention of the order could not have occurred before the lapse of the first deadline for compliance on June 1, 2019. In support of their argument, the requesters relied on *R v Sakellis* (1970), 2 CCC 377 (Ont CA) (*Sakellis*); *R v Henning*, [1988] 4 CTC 2692 (TCC) (*Henning*); and *Dame Re*, 2011 ABERCB 37 (*Dame*).

[71] The requesters submitted that in *Sakellis*, the Ontario Court of Appeal held that a failure to remit a sum of money to the Receiver General for Canada under the *Income Tax Act* occurs only after lapse of the period set for payment. The requesters further argued that in *Henning,* the Tax Court of Canada found that a director who ceases to hold office before the date when a tax payment must be made cannot be held liable if the payment is not made, as the payment default only arises after the date it is due. The requesters also submitted that according to *Henning*, "as soon as a director resigns, he no longer has any power to prevent the corporation's failure to remit," or, by extension, to comply with an order. Finally, the requesters submitted that in *Dame,* the Alberta Energy Resources Conservation Board (ERCB), the AER's predecessor, found that contravention of an ERCB order occurs when a licensee fails to comply by the date set in the order.

[72] The requesters argued that their resignation and Trident's cessation of operations did not cause noncompliance with the order. The requesters submitted that they reasonably expected the AER to appoint a receiver to operate Trident's wells and facilities.

[73] The requesters also submitted that on the dates by which the order required Trident's compliance, a receiver had control of Trident pursuant to the receivership order. Section 95 of the Alberta *Business Corporations Act* terminated the directors' authority until discharge of the receiver. Therefore, Trident's compliance, or noncompliance, with the order was not the responsibility of the requesters.

[74] Compliance and Liability Management submitted that appointment of the receiver did not absolve the requesters of responsibility for their resignations which caused Trident to be unable to comply with the order. The resignations compelled the AER, as a responsible and prudent regulator, to work with the Orphan Well Association to have the receiver appointed because Trident left potentially dangerous wells

and facilities operating when the requesters "walked away." Compliance and Liability Management argued that the requesters' resignations were an unacceptable response to the order.

Analysis and Findings

[75] There was no dispute that Trident had not complied with the order when the requesters resigned as Trident's directors and Trident ceased operations on April 30, 2019. The parties also agreed that the order required Trident to fulfil certain obligations by June 1, 2019, and other obligations by June 14, 2019.

[76] Compliance and Liability Management provided no legal authority to support its argument that because a corporation without directors has no capacity to act, contravention occurred when Trident ceased operations on April 30, 2019.

[77] After the requesters resigned on April 30, 2019, and until the receiver's appointment on May 3, 2019, Trident was in limbo and unable to legally operate. However, the requesters' resignations did not trigger an immediate presumption of contravention of the order. Compliance and Liability Management's argument to this point was inconsistent with the case law cited to us by the requesters.

[78] We note that the legislature chose to link control of the licensee to the time of contravention or noncompliance as a necessary element of section 106(1) of the *OGCA*. Had the legislature intended otherwise, it could have used language to that effect.

[79] We find that Trident's failure to comply with the order did not occur until June 2, 2019, once the first deadline for compliance lapsed, at which time the requesters were not in direct or indirect control of Trident.

Other Issues

[80] The initial hearing issues we identified at the prehearing included whether it was in the public interest to issue the declarations and whether the requesters had a reasonable apprehension of bias regarding Mr. Wadsworth as the decision maker who signed the declarations on behalf of the AER.

[81] Given that we have found that the requesters were not in control of Trident at the time it failed to comply with the order, the requirements under section 106(1) of the *OGCA* are not met. Therefore, we do not need to consider whether the declarations were in the public interest or whether the requesters had a reasonable apprehension of bias with respect to Mr. Wadsworth.

Conclusion

[82] Pursuant to section 106(1) of the *OGCA*, the following requirements must be satisfied to support the issuance of the declarations naming the requestors:

- Did Trident contravene, or fail to comply, with an AER order?
- If there was a contravention or failure to comply with an AER order, were the named persons in direct or indirect control of Trident at the time of the contravention or failure to comply?
- Is issuing a declaration, or declarations, in the public interest?

[83] Each element of section 106(1) must be met to issue a declaration. Failure to satisfy any element means the legal requirements have not been met and a declaration cannot be issued.

[84] In our view, Compliance and Liability Management did not err in concluding that Trident failed to comply with an order of the AER. However, Compliance and Liability Management failed to establish that the requesters were in direct or indirect control of Trident at the time of noncompliance. Given that we have found that the requesters were not in control of Trident at the time it failed to comply with the order, the requirements under section 106(1) cannot be met. Therefore, we do not need to consider whether the declarations were in the public interest or whether the requesters had a reasonable apprehension of bias with respect to Mr. Wadsworth as decision maker on behalf of the AER.

[85] We find that the section 106(1) criteria for declarations have not been met in this case. Therefore, we revoke the decision to issue the declarations naming the requesters.

Dated in Calgary, Alberta, on February 3, 2021.

Alberta Energy Regulator

Parand Meysami, P.Eng., M.Sc.
Presiding Hearing Commissioner

C.L.F. Chiasson, LL.B.
Hearing Commissioner

Tracey Stock, P.Eng., J.D., M.B.A., Ph.D.
Hearing Commissioner

Appendix 1 Hearing Participants

Principals and Representatives	Witnesses
D. O'Brien and J. Young	D. O'Brien
H. A. Gorman, Q.C.	J. Young
A. Harvie	
K. Bourassa (Counsel for A. Corbett)	A. Corbett
K. Meyer (Counsel for P. Darby)	P. Darby
T. Myers (Counsel for P. Darby)	G. Gwartney
	D. Helkaa
AER Compliance and Liability Management	T. Gosselin
C. Ross	L. Olsen
K. Dumanovski	B. Reilly
AER Staff	
A. Hall, AER Counsel	
F. De Luca, AER Counsel	
W. Handayani	
E. McKellar	
A. Shukalkina	
T. Turner	
T. Wheaton	