

COURT OF APPEAL FILE NUMBER 1901-0255AC
TRIAL COURT FILE NUMBER 1801-10960
COURT COURT OF APPEAL OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF/APPELLANT PRICEWATERHOUSECOOPERS INC., LIT in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
DEFENDANTS/RESPONDENTS PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE
APPLICANTS (NOT A PARTY) CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., AND TORXEN ENERGY LTD.
DOCUMENT **MEMORANDUM OF CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., AND TORXEN ENERGY LTD.**
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I. INTRODUCTION

1. Canadian Natural Resources Limited (“Canadian Natural”), Cenovus Energy Inc. (“Cenovus”), and Torxen Energy Ltd. (“Torex”, collectively the “Applicants”) all seek intervenor status in Court of Appeal File Number 1901-0255AC (the “Appeal”) with the right to participate in the Appeal specifically as it pertains to the Trustee’s appeal of the Honourable Mr. Justice D.B. Nixon’s finding that Asset Retirement Obligations (“ARO”) are not a liability, as addressed in part at paragraphs 94 to 120 and paragraphs 139 to 144 of the Appellant’s Factum, and all matters incidental thereto.

2. The Applicants should be granted intervenor status because they will be directly and significantly impacted by the outcome of the Appeal as it pertains to Justice Nixon’s findings on ARO, and will offer extensive expertise and unique perspectives to assist this Honourable Court.

II. FACTS

3. The Applicants rely upon the statement of facts in the Appellant’s Factum as needed. Terms not otherwise defined shall have the same meaning as set out in the Statement of Claim and the Factum of the Appellants.

4. On August 2, 2018, the Trustee filed a Statement of Claim seeking to set aside the Transactions related to the Goodyear Assets on several grounds including, *inter alia*, the claim that the Asset Transaction constituted a transfer at undervalue in violation of Section 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “BIA”, and the “BIA Claim”).

5. On February 25, 2020, the Respondents, Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp. filed applications to strike or summarily dismiss the BIA Claim (the “BIA Application”) arguing, among other arguments, that the Trustee was unable to prove that the Asset Transaction is a transfer for undervalue under Section 96 of the BIA .

6. On July 24, 2020, the Applicants were granted intervenor status with respect to the BIA Application along with the Orphan Well Association (the “OWA”). The issue of whether ARO is a liability is a significant consideration in the BIA Application, which was heard by Justice Nixon on October 1 and 2, 2020. Additional written submissions were submitted by all parties by

October 21, 2020, and Justice Nixon is not expected to issue his decision in the *BIA* Application prior to the hearing of the Appeal currently scheduled for December 10, 2020.

III. APPLICABLE LAW

7. The Court has the discretion to grant intervenor status under Rule 14.58(1) of the *Alberta Rules of Court*, Alta Reg 124/2010, which states that “a single appeal judge may grant status to a person to intervene in an appeal, subject to any terms and conditions and with the rights and privileges specified by the judge”¹.

8. In determining an intervenor application, a two-step approach is used. The Court first considers the subject matter of the proceeding and then determines the proposed intervenor’s interest in that subject matter².

9. Further, the Court of Appeal in *Pedersen v Alberta*, 2008 ABCA 192, established that the following questions are relevant in determining whether to grant intervenor status³:

- a) Will the intervenor be directly affected by the outcome of this matter?
- b) Is the presence of the intervenor necessary for the court to properly decide the matter?
- c) Might the intervenor’s interest in the proceedings not be fully protected by the parties?
- d) Will the intervenor’s submissions be useful and different or bring particular expertise to the subject matter before the court?
- e) Will the intervention delay the proceedings?
- f) Will there possibly be prejudice to the parties if the intervention is granted?
- g) Will intervention widen the *lis* between the parties?
- h) Will the intervention transform the court into a political arena?

¹ *Alberta Rules of Court*, Alta Reg 124/2010, r 14.58

² *Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320, at para 5

³ *Pedersen v Alberta*, 2008 ABCA 192, at para 3

IV. LEGAL ARGUMENT/APPLICATION OF THE LAW

A. The Applicants Will be Directly and Significantly Affected by this Appeal

10. If Justice Nixon's findings that ARO are not a liability is upheld in this Appeal, that decision will bind Justice Nixon in his determination of the *BIA* Application that has been heard, but not yet decided upon. If Justice Nixon's finding regarding ARO are upheld and the relevant ARO pertaining to the Asset Transaction is not accounted for in determining whether the Asset Transaction was a transfer for undervalue under Section 96 of the *BIA*, that will likely result in the *BIA* Claim being summarily dismissed and allow the Asset Transaction to persist. Should the Asset Transaction persist, it is a near certainty that the Trustee will disclaim the Goodyear Assets causing the OWA to become responsible for the associated ARO, and resulting in a direct financial impact on all contributors to the OWA's annual orphan levy (the "Levy").⁴ The specific burden that will be borne by the Applicants is approximately \$42,000,000.00 to Canadian Natural, \$6,000,000.00 to Cenovus, and \$6,500,000.00 to Torxen.⁵

11. In *Reference Re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 SCR 335, the Supreme Court of Canada found that a proposed intervenor may have a sufficient interest in the outcome of an appeal when a legal issue to be determined in that appeal will be binding on other pending litigation to which the proposed intervenor is a party⁶. While the Applicants are not technically a party in the *BIA* Application, they were granted intervenor status and permitted to make written and oral submissions pertaining to the *BIA* Claim. The impact of this Appeal on the *BIA* Application that the Applicants were allowed to intervene in should be considered in determining whether the Applicants should be granted leave to intervene in the Appeal.

12. In addition to the financial impact on the Applicants arising from a significantly increased OWA Levy, if Justice Nixon's finding is upheld and the Asset Transaction is allowed to endure, the Applicants will face the risk of other industry members being compelled to

⁴ Affidavit of Ron Laing sworn October 29, 2020 ("Laing Affidavit") at para 17; Affidavit of Antonio Jackson sworn October 29, 2020 ("Jackson Affidavit") at para 9; Affidavit of John K. Brannan sworn October 29, 2020 ("Brannan Affidavit") at para 8

⁵ Laing Affidavit at paras 18 and 19; Jackson Affidavit at paras 10 and 11; Brannan Affidavit at paras 9, 10, and 11

⁶ *Reference Re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 SCR 335 at para 11

implement similar strategies incentivizing asset restructuring and insolvency to avoid ARO.⁷ If that were to occur, the authority of Alberta's regulatory regime and the purpose of the OWA would effectively be nullified, along with an undermining of the "polluter pays" principal, to the detriment of the environment, industry members, and the general public.

13. Furthermore, contributors to the Levy, such as the Applicants, will be unfairly and disproportionately financially impacted and burdened by such avoidance of ARO, potentially leading to a financial tipping point and further operational instability during an already challenging economy resulting from declining markets and the COVID-19 pandemic.

14. For the reasons set out above, the Applicants will be directly and significantly impacted by the decision of this Honourable Court as it pertains to Justice Nixon's findings on ARO.

B. The Applicants Should be Granted Intervenor Status to Protect Interests Not Fully Protected by the Parties, to Provide Unique Expertise, and to Assist the Court

15. The Applicants' perspectives are necessary in order for the Court to properly consider the private industry interests of Alberta's oil and gas sector, as well as the associated public interest in ensuring industry members are guided by appropriate economic and environmental considerations.

16. Neither the existing parties to the Appeal nor the other potential intervenors are in a position to speak to or represent the private industry interests of Alberta's oil and gas sector or the associated public interest before the Court. As such, the Applicants' interests will not be fully protected by the existing parties or the other potential intervenors to the Appeal.

17. As a diversified cohort of industry members, the Applicants are well situated to represent a sample of the oil and gas industry, lending their unique perspective to assist the Court in recognizing the practical effects of the legal issues to be decided on energy production in Alberta, as well as the business and operational considerations of industry members.

18. If granted intervenor status, the Applicants will be in a position to provide the Court with useful and unique submissions on industry's incorporation of ARO in valuing an asset

⁷Laing Affidavit at para 22; Jackson Affidavit at para 9; Brannan Affidavit at para 8

particularly for the purposes of negotiating a purchase or sale, and industry's treatment of ARO as a liability on its financial statements and in its reporting to investors.⁸

19. For the reasons set out above, the Applicants' presence as intervenors is necessary for the Court to properly decide the matter, the Applicants' interests in the Appeal will not be fully protected by the current parties to the Appeal or the potential intervenors to the Appeal, and the Applicants' submissions will be useful and bring a particular and unique expertise to the consideration of the Appeal.

C. The Intervention Will not Unduly Delay the Proceedings, Cause any Significant Prejudice, Widen the *Lis* or Turn the Court into a Political Arena

20. The expected timeline for proceeding with the Applicants' requested intervention will not cause undue delay, as the Applicants will restrict their intervention in the Appeal to the narrow issue already before the Court – namely, whether Justice Nixon erred in his findings regarding ARO. These Applicants do not intend to take a position on the other matters in the Appeal and will submit their factum within two business days from the hearing of this Application.


V. RELIEF SOUGHT

21. The Applicants request an Order, pursuant to Rule 14.58(1) of the *Alberta Rules of Court*, Alta Reg 124/2010, granting the Applicants leave to intervene in the Appeal, specifically as it pertains to Justice Nixon's finding regarding ARO and all matters incidental thereto, on such terms as this Honourable Court deems just; an Order, pursuant to Rule 14.58(1), prohibiting costs, either in favour of, or against the Applicants, with respect to any other party or intervenor in the Appeal; and such further relief as this Honourable Court may deem just or necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of October, 2020.

PARLEE MCLAWS LLP

PER:


G. Scott Watson / Charles W. Ang
Solicitors for the Applicants

⁸ Laing Affidavit at para 29; Jackson Affidavit at para 19; Brannan Affidavit at para 13

LIST OF AUTHORITIES

TAB	
1	<p><i>Alberta Rules of Court</i>, Alta Reg 124/2010 https://www.canlii.org/en/ab/laws/regu/alta-reg-124-2010/#sec14.58subsec1</p>
2	<p><i>Papaschase Indian Band v Canada (Attorney General)</i>, 2005 ABCA 320 https://www.canlii.org/en/ab/abca/doc/2005/2005abca320/2005abca320.html?autocompleteStr=papas&autocompletePos=4</p>
3	<p><i>Pedersen v Alberta</i>, 2008 ABCA 192 https://www.canlii.org/en/ab/abca/doc/2008/2008abca192/2008abca192.html?autocompleteStr=pedersen&autocompletePos=1</p>
4	<p><i>Reference Re Workers' Compensation Act 1983 (Nfld.)</i>, [1989] 2 SCR 335 https://www.canlii.org/en/ca/scc/doc/1989/1989canlii23/1989canlii23.html?autocompleteStr=reference%20re%20workers%27&autocompletePos=3</p>