COURT OF APPEAL OF ALBERTA

Registrar's stamp

REGISTRAR FILED 25 Nov 2020 JN Court of Appeal of Alberta

COURT OF APPEAL FILE NUMBER:	2001-0255AC
TRIAL COURT FILE NUMBER:	1801-10960
REGISTRY OFFICE:	CALGARY
PLAINTIFF/RESPONDENT:	PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP.
STATUS ON APPEAL:	APPELLANT
DEFENDANTS	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE
STATUS ON APPEAL:	RESPONDENTS
INTERVENORS:	ORPHAN WELL ASSOCIATION, CANADIAN NATURAL RESOURCES LIMITED *et al*
STATUS ON APPEAL:	INTERVENOR
DOCUMENT:	**JOINT FACTUM OF THE RESPONDENTS** ***RE: ORPHAN WELL ASSOCIATION INTERVENOR FACTUM***

Appeal from the Judgment of
The Honourable Mr. Justice D.B. Nixon
Dated the 13th day of January, 2020
Filed the 18th day of February, 2020

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

Norton Rose Fulbright Canada LLP
3700, 400 Third Avenue SW
Calgary, Alberta T2P 4H2

Lawyers: Steven H. Leitl, QC | Gunnar Benediktsson
Phone: (403) 267-8140 | (403) 267-8256
Fax: (403) 264-5973
Email: steven.leitl@nortonrosefulbright.com
File No.: 1001040549
Counsel for the Respondent, Susan Riddell Rose

CONTACT INFORMATION FOR ALL OTHER PARTIES:

Burnet, Duckworth & Palmer LLP
8th Avenue Place, East Tower
2400, 525 8th Ave. SW,
Calgary, Alberta T2P 1G1
Lawyers: D. J. McDonald, Q.C. | Paul G. Chiswell
Phone: (403) 260-5724 | (403) 260-0201
Fax: (403) 260-0332
Email: djm@bdplaw.com | pchiswell@bdplaw.com
File No.: 59140-43

Counsel for the Respondents, Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp.

DE WAAL LAW
Suite 1010, 505 – 3rd Street SW
Calgary, Alberta T2P 3E6
Lawyers: Rinus de Waal | Luke Rasmussen
Phone: (403) 266-0013
Fax: (403) 266-2632
Email: rdewaal@dewaallaw.com
File No. 283.001

Counsel for the Respondent, PricewaterhouseCoopers Inc., LIT, in its capacity as Trustee in bankruptcy of Sequoia Resources Corp.

BENNETT JONES LLP
4500, 855-2nd St. SW
Calgary, AB T2P 4K7

Lawyers: Ken Lenz, QC/Andrea Stempien/Ashley Bowron
Phone: 403 298 3317
Email: lenzk@bennettjones.com

Counsel for Orphan Well Association (Intervenor)

PARLEE MCLAWS LLP
3300 TD Canada Trust Tower
421-7 Ave SW
Calgary, AB T2P 4K9

Lawyers: G. Scott Watson/Charles W. Ang
Phone: 403 294 7038

Counsel for Canadian Natural Resources Ltd. et al (Intervenors)

TABLE OF CONTENTS

INTRODUCTION

1. This is the joint Factum of the Respondents Perpetual Energy Inc. (**PEI**), Perpetual Operating Trust (**POT**), Perpetual Operating Corp. (**POC** and, collectively, **Perpetual**) and Susan Riddell Rose (**Rose**) in response to the Factum of the intervenor Orphan Well Association (**OWA**) filed November 18, 2020 (the **OWA Factum**).

2. A joint Factum in response to the Factum of the Industry Intervenors is being filed contemporaneously.

PART 1 – FACTS

3. The Respondents' submissions regarding the facts are set out in their facta filed on September 25, 2020 in response to the Trustee's appeal.[1]

PART 2 – GROUNDS OF APPEAL / INTERVENTION

4. The OWA was granted leave to address the Trustee's grounds of appeal regarding the Oppression Claim, Director Claim, the Release and the Public Policy Claim.[2]

5. Ultimately, the OWA limited its submission to the singular contention that the Chambers Judge "erred in law in finding, on the basis of the SCC's decision in *Redwater*, that ARO should not be considered in the Oppression Remedy or Director Liability contexts."[3]

6. The Chambers Judge made no such finding.

PART 3 – STANDARD OF REVIEW

7. Perpetual and Rose agree that the standard of review applicable to an extricable issue of law is correctness. However, the relevance of the Chambers Judge's consideration of ARO in this case was to his determination that the Trustee was not a "proper person" to be a complainant under the Oppression Claim, a decision that is "in the discretion of the Court."[4] Discretionary decisions

---

[1] Capitalized terms in this Factum are as defined in the Factum of the Respondent Susan Riddell Rose dated September 25, 2020 (**Rose Factum**).
[2] Order granted November 13, 2020. Conversely, the OWA was not granted leave to, and does not, address the Trustee's other challenges of the Chambers Judge's rulings, as argued in the Factum of the Appellant dated May 29, 2020 (**PWC Factum**), including that: (a) Rose was not the 'controlling mind' of PEOC (paras 57-63); (b) PEOC was a special-purpose wholly-owned subsidiary of PEI (paras 65-70); (c) the decision to enter the Aggregate Transaction (including the Asset Transaction) was that of PEI (paras 71-6); (d) Rose's decision-making as a director of PEOC was subject to the business judgment rule (paras 77-82); and (e) Rose properly exercised her business judgment as a director of PEOC (paras 83-93).
[3] Factum of the Orphan Well Association, Intervenor dated November 18, 2020 (**OWA Factum**) at para 11.
[4] *Business Corporations Act (Alberta),* RSA 2000, c. B-9 [the **ABCA**] at s. 239(b)(iv) [**Table of Authorities (TOA), Tab 2**]..

of that nature are entitled to significant deference on appeal.[5] Absent an error in principle or a significant error, such decisions are "beyond the scope of appellate review."[6]

PART 4 – ARGUMENT

(i) The Trustee's Pleading of ARO

8. The Chambers Judge carefully considered the nature of abandonment and reclamation obligations (**ARO**) in the context of the specific allegations made in the Trustee's Statement of Claim.[7] The OWA Factum does not address the Trustee's allegations. Instead, it makes general policy-based arguments[8] and refers to a hypothetical scenario.[9]

9. The Oppression Claim and Director Claim concern only the Asset Transaction.[10] Under the Asset Transaction, the beneficial interests in the Goodyear Assets were combined with the legal interests in PEOC, which continued to hold the well licences. As such, the Asset Transaction had no effect on the ARO associated with the Goodyear Assets.[11] Moreover, neither PEI nor POC were parties to the Asset Transaction. None of the general policy concerns raised by the OWA were engaged by the Asset Transaction.

10. The Trustee did not allege in the Oppression Claim or the Director Claim that there was any "improper dealing with ARO"[12], whatever that might mean. The Trustee did not base the Oppression Claim or the Director Claim on alleged violations of "regulatory obligations". The Trustee separately pleaded the Public Policy Claim, on which the OWA makes no comment.

11. The OWA expresses concern that the "regulatory obligations" reflected by ARO may be relevant to oppression or director duty claims "in the proper case"[13], "whether or not ARO is a claim, liability or otherwise."[14] However, in this case the Trustee pleaded the Oppression Claim

---

[5] *Québec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at para 52, [2017] 1 SCR 478. That includes where the Court exercises its discretion [**TOA, Tab 6**].
[6] *Olympia & York Developments Ltd. (Trustee of) v Olympia & York Realty Corp.*, 2003 CarswellOnt 5210, at para 43, [2003] OJ No. 5242 [**TOA, Tab 7**].
[7] For instance, see Appeal Record of appeal 2001-0174, Part 2 [Written Reasons for Judgement of D.B. Nixon, J., dated 2020-01-13 (the **Reasons**) at paras 166 - 173] at 133-4.
[8] OWA Factum at para 16.
[9] OWA Factum at para 30.
[10] Appeal Record of appeal 2001-0174, Part 2 [Reasons at paras 119 and 180] at 125 and 135. Despite the Statement of Claim's reference to "Transactions", the Trustee and Trustee counsel confirmed to the Court that the claims concern only the Asset Transaction.
[11] Factum of the Respondent Susan Riddell Rose dated September 25, 2020 at paras 10-11, 20, 78 and 144.
[12] OWA Factum at para 18.
[13] OWA Factum at paras 13, 18, 30, 32 and 34.
[14] OWA Factum at para 18 (emphasis in original).

and the Director Claim expressly on the basis that ARO was a PEOC liability owed to the AER. The Oppression Claim and the Director Claim were founded on the allegation that as a result of the Asset Transaction, PEOC became liable to the AER in respect of the ARO associated with PEOC's assets; that the AER became a creditor of PEOC at the time.[15]

12. By design, the theory of the AER as a PEOC creditor is central to both the Oppression Claim and the Director Claim.[16] The Trustee would not have putative standing as a complainant to sue for oppression other than by portraying the AER as a creditor of the estate.[17]

13. In the Oppression Claim, the Trustee pleaded that by causing PEOC to enter into the Asset Transaction, Rose had exercised her powers as a director of PEOC, and that PEI and POC had carried on their business and affairs, "in a manner that was oppressive, unfairly prejudicial to or unfairly disregarded the **interests of the creditors** of PEOC, including its contingent creditors."[18] The AER was alleged to be a creditor in relation to the ARO associated with the Goodyear Assets. In the Director Claim, the Trustee pleaded that Rose breached her duties to PEOC by causing PEOC to enter the Asset Transaction when she knew that the Goodyear Assets were "high liability assets."[19]

14. The Trustee pleaded both the Oppression Claim and the Director Claim on the theory that the AER was a creditor of PEOC at the time of the Asset Transaction. As addressed below, the subsequent decision of the Supreme Court of Canada in *Redwater* would negate that theory by holding that the AER is not a creditor in respect of ARO.

---

[15] Appeal Record, Volume 1 [Statement of Claim, filed August 2, 2018 (**SOC**) at paras 5, 16.3.1 and 20] at P003, P005 and P007.
[16] Also see, for instance, PWC Factum at paras 143-4.
[17] Notably, the Chambers Judge reviewed the law respecting the circumstances in which a trustee in bankruptcy *may* qualify as a "proper person" to be a complainant for the purposes of s. 239(b)(iv) of the ABCA; he concluded that such standing is possible where "the common interests of all of the creditors at the time of bankruptcy" are at stake, but not where the trustee is acting in the interests of a particular creditor: Appeal Record of appeal 2001-0174, Part 2 [Reasons at paras 134-7] at 128. There is no authority for the proposition (implicitly advanced by the OWA) that a trustee in bankruptcy may pursue an oppression remedy on behalf of a party which is *neither* a creditor *nor* a shareholder, notwithstanding the existence of other statutory remedies, and the fact that party has not even tried to assert complainant status for itself. Such a proposition is contrary to the narrow view courts have taken on who may claim these remedies in the first place, which generally limits even creditor claims to situations where the complainant is "analogous to a minority shareholder": *Royal Trust Corp of Canada v Hordo* (1993), 10 BLR (2d) 86 (Ont Ct J (Gen Div)) at para 14, [1993] OJ No 1560 [Book of Additional Authorities of Susan Riddell Rose dated September 25, 2020 at 010]. Moreover, The Trustee would not have authority under s. 30 of the BIA to sue to enforce regulatory obligations, as that would not concern the estate of the bankrupt.
[18] Appeal Record, Volume 1 [Statement of Claim, filed August 2, 2018 (**SOC**) at para 19] at P007.
[19] Appeal Record, Volume 1 [SOC at para 16] at P005; Appeal Record of appeal 2001-0174, Part 2 [Reasons at para 212] at 140.

(ii) Alberta's Regulation of the Oil and Gas Industry and *Redwater*

15. Alberta has a "comprehensive cradle-to-grave licensing regime" which is aimed at addressing future costs associated with ARO.[20] The government of Alberta made a deliberate policy choice in affixing liability to the ultimate owner of a well; and not to prior owners. Unlike in some other regulatory regimes[21], the government chose not to pass legislation that provides for director liability in relation to ARO. Indeed, under Alberta's regulatory regime, the OWA is solely responsible for the abandonment and reclamation of orphan wells - oil and gas assets and their sites left vacant but not properly abandoned and reclaimed by defunct companies.[22] The regulatory regime does not give the OWA power to recover its costs from directors of the defunct companies.

16. In *Redwater*, like the decision under appeal, the Court emphasized that it is not the role of the courts to make public policy:

> During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being offloaded onto the public. What Alberta has chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities ... The Licensee Liability Rating Program essentially requires licensees to apply the value derived from oil and gas assets during the productive portions of the life cycle of the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those life cycles.
>
> Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the "development, conservation and management of non-renewable natural resources . . . in the province" (Constitution Act, 1867, ss. 92(13) and 92A(1)(c)). Alberta has devised a complex regulatory apparatus to address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid. Its solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings.[23]

---

[20] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 at para 1, [2019] 1 SCR 150 [***Redwater***] **[TOA, Tab 1]**.
[21] For example, the *Business Corporations Act (Alberta),* RSA 2000, c. B-9, at s 119 [**TOA, Tab 2**], expressly provides for joint and several liability for six months' unpaid wages. Directors are also personally liable to CRA in certain circumstances for unpaid source deductions in respect of payroll: *Income Tax Act*, RSC 1985 (5th Supp) at s 227.1(1) [**TOA, Tab 3**].
[22] *Redwater* at para 22 [**TOA, Tab 1**].
[23] *Redwater* at paras 29-30 (italics in original; underscoring added) [**TOA, Tab 1**].

17. *Redwater* specifically concerned the "untidy intersection" of Alberta's regulatory regime and Canada's bankruptcy regime[24]; and more particularly, whether AER enforcement powers and orders are claims provable in bankruptcy, and thus subject to compromise. The Supreme Court said no. As conceded in the OWA Factum, the Court found that "the AER is not a creditor with respect to ARO."[25] That was so even though – unlike in this case – in *Redwater* the AER had issued and was seeking to enforce an abandonment order.

(iii) Director Duties and Oppression

18. The fiduciary duty is a duty of loyalty to the corporation.[26] In considering what is in the best interests of the corporation, directors may, depending upon the corporation's circumstances, look to the interests of shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule.[27] Neither the Trustee nor the OWA challenge that in authorizing the Asset Transaction Rose and the Purchasers considered the ARO associated with the Goodyear Assets and how the transfer of ARO would impact the best interests of PEOC and it's stakeholders, as shown in evidence and the Chambers Judge's finding of fact respectively.[28]

19. The oppression remedy "focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors." It is available to a wide but finite range of stakeholders - security holders, directors, officers and, on a discretionary basis, creditors or "proper persons".[29] It is, however, not infinite; the oppression remedy is generally not available to parties who have other remedies available; [30] it follows, for that reason, that it is not open to regulators to use as a substitute for statutory remedies provided by the legislature. The oppression remedy is for stakeholders of the corporation, not government agencies.

---

[24] *Redwater* at paras 31, 64 and 73 [**TOA, Tab 1**].
[25] OWA Factum at paras 14 and 35; Rose Factum at paras 30-7.
[26] *BCE Inc. v 1976 Debentureholders,* 2008 SCC 69 at paras 36-7, [2008] SCR 560 [***BCE***] [**TOA, Tab 4**].
[27] *BCE* at paras 39 and 40 [**TOA**, **Tab 4**].
[28] Appellants Extracts of Key Evidence (**AEKE**), Volume 2 (Affidavit of Susan Riddell Rose) at A0236-7, para 39; AEKE, Volume 6 (Transcript of Cross Examination of Susan Riddell Rose, with Exhibits) at A0148-9, 38/27 – 39/10; Appeal Record of appeal 2001-0174, Part 2 [Reasons at paras 323] at 155-6.
[29] *BCE* at para 45 [**TOA, Tab 4**]; Appeal Record of appeal 2001-0174, Part 2 [Reasons at paras 117 and 127-37] at 125 and 127-8.
[30] For a discussion of that principle, see *1043325 Ontario Ltd. v CSA Building Sciences Western Ltd.*, 2016 BCCA 258 at para 53, [2017] 1 WWR 247.

20. Creditors will not be granted standing as complainants to sue for oppression simply on the basis of an unpaid debt. Creditors must plead and prove the breach of a reasonable expectation that they would be treated like a minority shareholder who has a legitimate interest in the management of the corporation.[31] That is not the case pleaded by the Trustee.

21. There is no remedy for oppression unless the complainant proves that it had reasonable expectations that were breached with consequent harm. Moreover, it bears emphasis that directors owe their duty to the corporation, not to stakeholders, such that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.[32] The complainant must identify the expectations that he or she claims have been violated by the conduct at issue, establish that the expectations were reasonably held, and establish breach and compensable harm. Yet, in this case, as noted by the Chambers Judge, the Statement of Claim is silent as to reasonable expectations.

22. In summary, the Trustee's claim was not founded on the regulatory obligations of concern to the OWA; nor could the Trustee's claim have been so founded.

(iv) The Decision of the Chambers Judge

23. The OWA does not argue that the Chambers Judge erred at law in striking the Oppression Claim. The OWA concedes that an oppression claim must plead the existence and breach of reasonable expectations (in this case, of the AER as alleged creditor of PEOC)[33], whereas the Statement of Claim makes no such allegations.[34] Nor does the OWA argue that the Chambers Judge erred at law in striking and summarily dismissing the Director Claim, which in large part turned upon the unchallenged evidence regarding the exercise of Rose's business judgment.

24. The Chambers Judge was clearly mindful of the potential overlap of the legal regime regulating director conduct (in this case, the ABCA) and the legal regime regulating the abandonment and reclamation of wells. Rightly so, he did not turn the Court into a policy-maker by importing the former into the latter.[35]

---

[31] Rose Factum at paras 69-71; Appeal Record of appeal 2001-0174, Part 2 [Reasons at para 131] at 127-8.
[32] *BCE* at para 66 [**TOA**, **Tab 4**].
[33] OWA Factum at para 31.
[34] Appeal Record of appeal 2001-0174, Part 2 [Reasons at para 180] at 135; Rose Factum at paras 70-1.
[35] Appeal Record of appeal 2001-0174, Part 2 [Reasons at paras 112, 120-5] at 124 and 126.

25. The Chambers Judge did not interpret *Redwater* to mean that ARO are a "nothing" in all statutory contexts[36], or that "ARO should not be considered" in all oppression and director duty claims.[37] On the contrary, he considered the Trustee's specific allegation that the AER was a PEOC creditor against the ruling in *Redwater* that the AER is not a creditor in respect of ARO.[38]

26. Similarly, the Chambers Judge did not make a blanket ruling that "a trustee in bankruptcy cannot qualify as a complainant under section 239."[39] On the contrary, he considered the jurisprudence which addresses when a trustee in bankruptcy may so qualify.[40] In this specific case, the Trustee did not qualify because it was alleging an individual creditor-based claim - not a claim for the estate collectively – and the AER was not a creditor.[41]

PART 5 – CONCLUSION

27. The Chambers Judge did not make the categorical findings of law asserted by the OWA. He did not "erase ARO from consideration" in oppression or director duty claims.[42] He properly considered the implications of *Redwater* in relation to the specific allegations made by the Trustee.

28. In the proper case, a corporation's or a director's consideration of regulatory obligations associated with a well might be relevant to an oppression claim or a director duty claim. However, there is no such claim in this case. The OWA has no basis to ask this Court for pronouncements of law on the basis of hypothetical scenarios.

29. If the OWA sees social merit in expanding well reclamation obligations to non-owners – a policy expressly rejected by the Government of Alberta to date[43] - it should lobby government for regulatory reform.

---

[36] OWA Factum at para 25.
[37] OWA Factum at paras 11, 15, 16 and 20.
[38] OWA Factum at paras 28 and 35.
[39] OWA Factum at para 28.
[40] Appeal Record of appeal 2001-0174, Part 2 [Reasons at paras 134-7 and 193-4] at 128 and 137.
[41] Appeal Record of appeal 2001-0174, Part 2 [Reasons at paras 204-211] at 139-140.
[42] OWA Factum at para 15.
[43] Appeal Record of appeal 2001-0174, Part 2 [Reasons at paras 120-5] at 126.

Counsel estimates the length of argument will not exceed 15 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF NOVEMBER, 2020

Norton Rose Fulbright Canada LLP

Steven Leitl, QC

Steven H. Leitl QC | Gunnar Benediktsson
Counsel for Susan Riddell Rose

Burnet, Duckworth & Palmer LLP

Dan McDonald, QC

D.J. McDonald, QC | Paul Chiswell
Counsel for Perpetual

Table of Authorities