SCC Court File Number 39597

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM *THE COURT OF APPEAL OF ALBERTA*)

BETWEEN:

SUSAN RIDDELL ROSE

APPLICANT
(Respondent)

AND:

PRICEWATERHOUSECOOPERS INC., LIT in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity

RESPONDENT
(Appellant)

RESPONSE

OF PRICEWATERHOUSECOOPERS INC., LIT in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity

(Rule 27 of the *Rules of the Supreme Court of Canada*)

De Waal Law
1460, 530-8th Avenue SW
Calgary, AB T2P 3S8

Rinus de Waal
Tel: 403-266-0013
Fax: 403-266-2632
Email: rdewaal@dewaallaw.com

Luke Rasmussen
Tel: 403-266-0014
Fax: 403-266-2632
Email: lrasmussen@dewaallaw.com

Counsel for the Respondent

Osler, Hoskin & Harcourt LLP
Suite 1900
340 Albert Street
Ottawa, ON K1R 7Y6

Geoffrey Langen
Tel: 613-787-1015
Email: glangen@osler.com

Ottawa Agent for Counsel for the Respondent

Norton Rose Fulbright Canada LLP
3700, 400 3rd Ave SW
Calgary, AB T2P 4H2

Steven H. Leitl, Q.C.
Tel: 403 267 8140
Fax: 403 264 5973
Email: steven.leitl@nortonrosefulbright.com

Gunnar Benediktsson
Tel: 403-267-8256
Fax: 403-264-5973
Email: gunnar.benediktsson@nortonrosefulbright.com

Counsel for the Applicant Susan Riddell Rose

Supreme Advocacy LLP
40 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Tel: 613-695-8855
Fax: 613-696-8580
Email: emeehan@supremeadvocacy.ca / mfmajor@supremeadvocacy.ca

Ottawa Agent for the Applicant Susan Riddell Rose

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IN THE SUPREME COURT OF CANADA
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APPLICANT
(Respondent)

AND:

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(Appellant)

MEMORANDUM OF ARGUMENT

OF PRICEWATERHOUSECOOPERS INC., LIT in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity, RESPONDENT

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De Waal Law
1460, 530-8th Avenue SW
Calgary, AB T2P 3S8

Rinus de Waal
Tel: 403-266-0013
Fax: 403-266-2632
Email: rdewaal@dewaallaw.com

Luke Rasmussen
Tel: 403-266-0014
Fax: 403-266-2632
Email: lrasmussen@dewaallaw.com

Counsel for the Respondent

Osler, Hoskin & Harcourt LLP
Suite 1900
340 Albert Street
Ottawa, ON K1R 7Y6

Geoffrey Langen
Tel: 613-787-1015
Email: glangen@osler.com

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Norton Rose Fulbright Canada LLP
3700, 400 3rd Ave SW
Calgary, AB T2P 4H2

Steven H. Leitl, Q.C.
Tel: 403 267 8140
Fax: 403 264 5973
Email: steven.leitl@nortonrosefulbright.com

Gunnar Benediktsson
Tel: 403-267-8256
Fax: 403-264-5973
Email: gunnar.benediktsson@nortonrosefulbright.com

Counsel for the Applicant Susan Riddell Rose

Supreme Advocacy LLP
40 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Tel: 613-695-8855
Fax: 613-696-8580
Email: emeehan@supremeadvocacy.ca / mfmajor@supremeadvocacy.ca

Ottawa Agent for the Applicant Susan Riddell Rose

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PART I – OVERVIEW AND FACTS

Overview

1. The decision of the Alberta Court of Appeal (the "**ABCA**") in this case (the "**ABCA Decision**") does not raise any issues which, by reason of their public importance, ought to be decided by the Supreme Court. It does not confer any new authority on trustees in bankruptcy, and there is nothing "remarkable" or "troubling" about the ABCA Decision. Although the factual circumstances of this case are unique, the legal principles applied by the ABCA are all well-established.

2. The submissions on behalf of Susan Riddell Rose ("**Ms. Rose**" or the "**Applicant**") do not accurately reflect the nature of the claims of PricewaterhouseCoopers Inc., LIT, in its capacity as the trustee in bankruptcy of Sequoia Resources Corp. (the "**Trustee**") or the nature of the ABCA Decision.

Concise Statement of Facts

3. Perpetual Energy Inc. ("**PEI**") was the sole shareholder of Perpetual Energy Operating Corp. ("**PEOC**"), which changed its name to Sequoia Resources Corp. ("**Sequoia**") after the transactions discussed below. PEOC was the trustee for Perpetual Operating Trust ("**POT**") and held the licences for the wells and related facilities of POT. The Applicant was an officer, director and shareholder of PEI and the sole director of PEOC.

4. In 2016, PEI decided to dispose of a large number of specifically identified POT assets (the "**Goodyear Assets**") with associated asset retirement obligations ("**ARO**") of $100 million or more, for nominal consideration. It did so through a series of transactions.[1] The Goodyear Assets were sold to PEOC (the "**Asset Transaction**"), PEOC was replaced as trustee for POT, which retained the selected remaining assets (the "**KeepCo Assets**") and the shares of PEOC were then sold by PEI to an arm's length purchaser ("**198Co**"), again for nominal consideration (the "**Share Transaction**").

5. The Asset Transaction was specifically designed to benefit PEI, as PEOC's sole shareholder. It separated and disposed of the Goodyear Assets with associated obligations of more than $100 million to PEOC for nominal consideration, while retaining the selected positive value

[1] *Pricewaterhousecoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 16, at paras. 6, 11 and 89 [**Appeal Decision**]

KeepCo Assets. The Asset Transaction harmed PEOC and its stakeholders in the same measure as it benefited PEI. PEOC assumed liability for the obligations associated with the Goodyear Assets, without the benefit of the KeepCo Assets and with no ability to meet those obligations.

6. The Asset Transaction was also specifically structured to avoid regulatory oversight.

7. The Trustee claims that Ms. Rose abdicated her responsibility as the sole director of PEOC. Instead of acting in PEOC's best interests, she caused PEOC to enter into a transaction with a related party, POT, in which POT transferred a significant number of negative value assets to PEOC for nominal consideration.

PART II – QUESTION IN ISSUE

8. In an effort to present the Appeal Decision as "remarkable" and "troubling", Ms. Rose presents the question in issue in a way that does not accurately reflect the Trustee's claims or the Appeal Decision:

> *When, if ever, [does] a trustee in bankruptcy [have] the legal authority to sue a former director of a bankrupt corporation for breach of fiduciary duty or oppression, not on the basis of the interests of the corporation or its stakeholders, but rather on the basis of future obligations, not yet due, but inherent to the assets and owed by the corporation to the public: an oil and gas producer's ARO.*[2]

9. The Trustee's claims relate only to the interests of PEOC and its stakeholders in voiding a related-party transaction in which PEOC gave vastly more consideration than it received. The ARO formed a fundamental part of the value of the Goodyear Assets transferred from POT to PEOC *at the time of the transfer* and must be considered in determining the financial effect of the Asset Transaction for PEOC and its stakeholders.

10. The ARO are not "future obligations", as Ms. Rose repeatedly asserts. As this Court held in *Redwater* and as the ABCA confirmed in this case, the ARO were present obligations *at the time* of the Asset Transaction and served to depress the value of the Goodyear Assets transferred to PEOC.[3]

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[2] Rose Memorandum of Argument, at para. 35.
[3] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5, at para. 157 [***Redwater***]; Appeal Decision, at paras. 95-96.

11. The ABCA Decision does not "effectively make directors of bankrupt corporations guarantors of future regulatory obligations."[4] The ABCA Decision did not determine the merits of the Trustee's claims; the ABCA simply determined that the Trustee's claims could not be struck or dismissed summarily.[5]

12. The ABCA did not "embrace new visions";[6] it merely applied well-established corporate law principles in confirming that the sole director of a corporation *could be* liable where she or he abdicates her or his responsibilities and causes the corporation to enter into a transaction that harms the corporation for the benefit of its shareholder.[7]

PART III – ARGUMENT

13. While the factual context may be novel, the ABCA Decision simply applied well-established legal principles in determining that the Trustee's claims could not be struck or dismissed summarily.

    13.1. As the sole director or PEOC, Ms. Rose was required to act in the best interests *of PEOC* and not simply to do the bidding of its sole shareholder, PEI.[8]

    13.2. Ms. Rose's duty to act in the best interests of PEOC included a duty to treat stakeholders affected by the Asset Transaction "in a fair manner, commensurate with [PEOC's] duties as a responsible corporate citizen."[9]

    13.3. PEOC's creditors at the time of the Asset Transaction had a reasonable expectation that their interests would not be "compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself".[10]

    13.4. A trustee in bankruptcy can be entitled to pursue an oppression claim as the representative of the bankrupt's creditors, where the oppression remedy sought

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[4] Rose Memorandum of Argument, at para. 2.
[5] Appeal Decision, at paras. 82, 97, 111, 144, 152, 159, 166, 175 and 227.
[6] Rose Memorandum of Argument, at para. 2.
[7] Appeal Decision, at paras. 153-159; *Chevron Corp. v Yaiguaje*, 2015 SCC 42, at para. 95 [***Yaiguaje***]; *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69, at paras. 66 and 82 [***BCE***]
[8] Appeal Decision, at paras. 155-156; *Yaiguaje*, *supra*, at para. 95; *BCE*, *supra*, at paras. 66 and 82; *Yaiguaje v Chevron Corporation*, 2018 ONCA 472, at paras. 60-62 [***Chevron***]
[9] Appeal Decision, at para. 156; *BCE*, *supra*, at para. 82.
[10] Appeal Decision, at para. 129; *JSM (Ontario) Ltd. v Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, at para. 66 [***JSM***]; *BCE*, *supra*, at paras. 82 and 93.

would benefit the creditors generally.[11]

14. Based on these established principles and the evidence that the Asset Transaction benefited PEI at the expense of PEOC and all of its other stakeholders, including its creditors,[12] the ABCA found that the Trustee's claims against Ms. Rose could not be struck or summarily dismissed.[13]

15. The submission on behalf of Ms. Rose that the ABCA Decision "profoundly alters the authority and role of trustees in bankruptcy, and significantly expands corporate directors' exposure to personal liability"[14] is based on a series of flawed premises inconsistent with the Trustee's claims against Ms. Rose and the ABCA Decision.

16. The Trustee does not claim against Ms. Rose on the basis of regulatory obligations owed to the public.[15]

    16.1. The primary relief sought by the Trustee is an Order declaring the Asset Transaction void and directing that the Goodyear Assets be returned to POT.[16] The vehement opposition to the claim speaks to the Defendants' own assessment of the value of the consideration given and received by PEOC in the Asset Transaction.

    16.2. The alternative relief sought by the Trustee is judgment for the difference between the consideration given and received by PEOC, to undo the financial effect of the Asset Transaction.[17]

17. The Trustee does not claim against Ms. Rose "on the basis of the subsequent bankruptcy of Sequoia and its consequent inability to fund the anticipated ARO associated with its energy asset portfolio."[18]

    17.1. The implication that ARO were future obligations and did not arise until "after

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[11] Appeal Decision, at para. 131, 139 and 144; *Olympia & York Developments Ltd. (Trustee of) v Olympia & York Developments Ltd.*, [2003] O.J. No. 5242, at paras. 44-45 **[*Olympia & York*]**; *BDO Canada Limited v Dorais*, 2015 ABCA 137, at paras. 11-17 [***Dorais***]; *Ernst & Young Inc. v Essar Global Fund Limited*, 2017 ONCA 1014, at para. 115 [***Essar Global***]
[12] Appeal Decision, at paras. 3-12.
[13] Appeal Decision, at paras. 156-157.
[14] Rose Memorandum of Argument, at para. 3.
[15] Rose Memorandum of Argument, at para. 1.
[16] Trustee's Statement of Claim, Relief Sought, at para. 1; Appeal Decision, at para. 28.
[17] Trustee's Statement of Claim, Relief Sought, at para. 2.
[18] Rose Memorandum of Argument, at para. 3.

bankruptcy" is a recurring theme in Ms. Rose's submissions. As this Court held in *Redwater*, and as Ms. Rose argued before the ABCA, the ARO associated with the Goodyear Assets formed a fundamental part of their value *at the time* of the Asset Transaction.[19] This Court held in *Redwater* that ARO are a present obligation from the time a well is drilled.[20] The ABCA Decision confirmed that.[21]

17.2. The Trustee's claims do not relate to any "subsequent bankruptcy" or "consequent inability" of PEOC to fund its ARO. The Trustee says that the Asset Transaction rendered PEOC personally liable for obligations it was unable to pay immediately following the Asset Transaction.[22]

18. Another recurring theme in Ms. Rose's submissions is that the Asset Transaction was "perfectly lawful", so that the ABCA was required to embrace "new visions of the laws pertaining to bankruptcy, director duties and the oppression remedy" in order not to uphold the summary dismissal of the Trustee's claims.[23]

18.1. Ms. Rose's own affidavit included email correspondence confirming that the Asset Transaction and the Share Transaction were deliberately structured to circumvent the more stringent license transfer requirements introduced by the Alberta Energy Regulator in the summer of 2016.[24]

18.2. The ABCA declined to strike the statutory illegality claim, because it could not determine that it was permissible for "an oil and gas company to structure its affairs so as to avoid regulatory scrutiny, in a manner that is analogous to income tax law."[25]

18.3. Accordingly, it remains to be determined if the Asset Transaction was "perfectly lawful", as Ms. Rose maintains.

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[19] *Redwater*, *supra* note 3, at para. 157; Appeal Decision, at para. 96.
[20] *Redwater*, *supra* note 3, at para. 157.
[21] Appeal Decision, at paras. 86, 88 and 96.
[22] Appeal Decision, at paras. 11, 15, 88 and 89.
[23] Rose Memorandum of Argument, at paras. 3, 66.
[24] August 2016 Emails between Kailas Group and Perpetual Energy Inc., October 19, 2018 Affidavit of S. Rose, Exhibit "P".
[25] Appeal Decision, at para. 147.

A. The Trustee's Oppression Claim

19. The arguments presented by Ms. Rose are discussed below.

1. A trustee in bankruptcy is not limited to pursuing creditor claims "against the estate"[26]

20. It is submitted on behalf of Ms. Rose that:

> A trustee in bankruptcy represents the bankrupt estate, and all of its creditors, but only in respect of the creditors' claims *against the estate*.[27]

21. This submission is not correct. It relies on this Court's 1975 decision in *Mercure* for the proposition that a trustee may only advance creditor claims "against the estate."[28]

22. The issue in *Mercure* was whether the trustee incurred liability to a creditor for failing to maintain and replace insurance on certain property in the estate.[29] The Court was not required to consider the scope of the trustee's authority to advance claims as the representative of the estate's creditors. The words relied on by Ms. Rose, "to the extent that [the trustee] can even act on [the creditors'] behalf against the debtor" should be understood in this context and in light of the following subsequent passage:

> Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to intepret it using an overly narrow, legalistic approach is to misinterpret it.[30]

23. *Mercure* has not been cited as authority for the proposition that a trustee may only advance creditors' claims "against the estate".[31] There is ample authority confirming that the narrow interpretation advocated on behalf of Ms. Rose should be rejected.[32]

24. Section 30 of the *BIA* confers broad authority on a trustee in bankruptcy to pursue litigation.[33] There is no suggestion that a trustee in bankruptcy may only pursue creditors'

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[26] Rose Memorandum of Argument, at paras. 38 and 41.
[27] Rose Memorandum of Argument, at para. 38
[28] Rose Memorandum of Argument, at para. 38.
[29] *A. Marquette & Fils Inc. v Mercure*, [1977] 1 S.C.R. 547, at para. 1 **[*Mercure*]**
[30] *Ibid*, at para. 16.
[31] Rose Memorandum of Argument, at para. 38
[32] *Olympia & York*, *supra* note 11, at paras. 1, 2, 46 and 47; *Dorais*, *supra* note 11, at paras. 11-17; *Essar Global*, *supra* note 11, at para. 63.
[33] *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, s. 30 [***BIA***]

claims "against the estate". Section 30(1)(d) provides that the trustee may, "with the permission of the inspectors":

> bring, institute or defend any action or other legal proceeding *relating to the property of the bankrupt*. [Emphasis added.][34]

25. In *Dorais*, relied on by Ms. Rose, the ABCA confirmed that the trustee in bankruptcy was entitled to pursue fraudulent preference claims on behalf of certain creditors because a declaration that certain transfers were void would benefit all the creditors.[35] The holding in *Dorais* is inconsistent with the interpretation of s. 30(1)(d) advocated by Ms. Rose, that a trustee can only advance creditors' claims "against the debtor". The fraudulent preference claims the trustee was permitted to pursue in *Dorais* related to transfers involving the debtor that benefited related parties at the debtor's expense.[36]

26. In *Olympia & York*, another authority relied on by Ms. Rose, the Ontario Court of Appeal rejected the proposition that a trustee cannot advance an oppression claim on behalf of the debtor's creditors in respect of a transaction to which the debtor was a party.[37] As in *Dorais*, the claim the trustee was entitled to pursue on behalf of the creditors was not a claim "against the debtor". Like the transfers from the debtor company at issue in *Dorais*, the transaction at issue in *Olympia & York* benefitted parties related to the debtor at the expense of the debtor and its creditors.[38]

27. *Olympia & York* was cited with approval by the Ontario Court of Appeal in *Essar Global*, which concerned the standing of a *Companies' Creditors Arrangement Act* monitor to advance an oppression claim.[39] The Court in *Essar Global* emphasized the degree of overlap between an oppression claim, brought on behalf of a debtor corporation's stakeholders, and derivative claim, brought on behalf of the debtor corporation itself.[40] The Court noted "the need for flexibility in the availability of the oppression remedy" and pointed out that a transaction could harm both the corporation and the interests of its creditors.[41] The

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[34] *BIA*, s. 30(1)(d).
[35] *Dorais*, *supra note 11*, at paras. 11-17.
[36] *Ibid*, at para. 11.
[37] *Olympia & York*, *supra* note 11, at paras. 44-45.
[38] *Ibid*, at para. 46; Dorais, *supra* note 11, at para. 11.
[39] *Essar Global*, *supra* note 11, at para. 115.
[40] *Ibid*, at para. 128-146.
[41] *Ibid*, at paras. 133 and 144.

transactions at issue in *Dorais* and *Olympia & York* are examples of transactions involving the debtor corporation that harm the interests of both the debtor and its creditors.

28. The submission on behalf of Ms. Rose is also incorrect in assuming that a creditor oppression claim is not a claim against the debtor. In the absence of the intervening bankruptcy, the oppression claim would properly be brought be brought against PEOC, now known as Sequoia, its affiliates, and its sole director.

29. The proposition advocated by Ms. Rose, that a trustee can only advance creditor claims "against the debtor", is inconsistent with the Ontario Court of Appeal's reasoning in *Essar Global*. A trustee can advance a creditor oppression claim where "the same wrongful conduct" that causes harm to the corporation also harms the interests of a group of creditors.[42]

30. The oppression claim at issue in *Essar Global* was not directed "against the debtor". Instead, as in *Dorais* and *Olympia & York*,[43] it was directed at parties related to the debtor corporation that benefited from the impugned transactions at the expense of the debtor and its creditors.[44]

2. If the Trustee's oppression claim is successful, all of Sequoia's creditors will benefit

31. Ms. Rose submits that the oppression claim is not a collective claim properly advanced by the Trustee on behalf of Sequoia's creditors and that, although the oppression remedy sought by the Trustee would benefit other stakeholders of Sequoia, it will not benefit its creditors:

> After all, if the Trustee recovers damages equal to the value of Sequoia's ARO, *the performance of the ARO will rank in priority to any creditor claims as a public duty of the company binding on its trustee*..[45]
>
> [...]
>
> The Trustee has no legal right to use third party creditors' rights of action as a means of converting Sequoia's allegedly unfunded ARO into a judgment against its former director (Ms.

[42] *Ibid*, at paras. 133 and 144.
[43] *Dorais*, *supra*, at para. 11; *Olympia & York*, *supra*, at para. 46.
[44] *Essar Global*, *supra* note 11, at paras. 155-156.
[45] Rose Memorandum of Argument, at para. 40.

> Rose) and shareholder (PEI), particularly *when that judgment cannot benefit a creditor* and relates to an obligation that can only become current at some remote time in the future.[46]
>
> [...]
>
> [A]ny recovery of damages by the Trustee on behalf of the Sequoia estate, *is not available to creditors*, but instead must be used to fund Sequoia's ARO deficit in accordance with *Redwater*.[47]

32. Ms. Rose's submissions start with a correct premise, based on *Redwater*, that any judgment obtained by the Trustee as an oppression remedy should be used to address the ARO associated with the Goodyear Assets. However, the reasoning then relies on two flawed assumptions in proceeding to the conclusion that such a judgment "cannot benefit a creditor", meaning that the Trustee's oppression claim is not properly brought on behalf of Sequoia's creditors.

33. The first flawed assumption is that the Trustee's oppression claim seeks "damages equal to the value of Sequoia's ARO". The primary relief sought by the Trustee is an Order setting aside the Asset Transaction, which would benefit all of Sequoia's creditors, as in *Dorais*.[48] The alternative relief sought by the Trustee is judgment for the difference between the value of the consideration given and received by Sequoia in the Asset Transaction,[49] to reverse the financial effect of the Asset Transaction. The judgment sought is not limited to ARO, but also includes the amount of the municipal taxes Sequoia became liable for but has been unable to pay as a result of the Asset Transaction.

34. The second, related flaw in Ms. Rose's reasoning is that any judgment obtained by the Trustee on its oppression claim would only enable the performance of the ARO and would therefore not benefit Sequoia's creditors. Not all the Goodyear Assets are net negative value assets.[50] A judgment reversing the financial effect of the Asset Transaction would address the ARO associated with the Goodyear Assets and allow these positive value assets to be

[46] Rose Memorandum of Argument, at para. 45.
[47] Rose Memorandum of Argument, at para. 46.
[48] Statement of Claim, Relief Sought, at para. 1.
[49] Statement of Claim, Relief Sought, at para. 2.
[50] Appeal Decision, at paras. 11 and 88.

sold, with the proceeds benefiting Sequoia's creditor in accordance with the priority scheme under the *BIA*.

35. Although the Trustee's oppression claim is only properly brought on behalf of the creditors who were owed money at the time of the Asset Transaction,[51] Ms. Rose submissions confirm that a judgment granted as an oppression remedy would need to reverse the financial effect of the Asset Transaction in order to provide meaningful relief to Sequoia's creditors. A judgment in the amount of the municipal taxes owing at the time of the Asset Transaction, for example, would not be sufficient to address the ARO and would not permit any distribution to Sequoia's creditors.

3. The Trustee's oppression claim seeks redress for conduct that was unfairly prejudicial to Sequoia's creditors at the time of the Asset Transaction

36. Ms. Rose argues that the Trustee's oppression claim seeks to pursue the "public's interest (or the interests of non-creditors like the AER and OWA) in the funding of Sequoia's ARO."[52] The flawed premises underlying this conclusion have already been discussed:

36.1. The oppression remedy sought by the Trustee is an Order setting aside the Asset Transaction, reversing the transfer of the negative value Goodyear Assets, for the benefit of all of Sequoia's stakeholders, including its creditors.

36.2. The alternative remedy sought by the Trustee is a judgment that would have the financial effect of reversing the Asset Transaction, by requiring the Defendants to repay the financial benefit they obtained at the expense of Sequoia. This would also benefit all of Sequoia's stakeholders, including its creditors.

37. In addition to mischaracterizing the oppression relief sought by the Trustee, Ms. Rose's submission that the Asset Transaction could not have been oppressive to Sequoia's creditors relies on an incorrect description of the Asset Transaction:

> Nevertheless, the ABCA Decision allows the Trustee's claim to proceed, on the theory that an *arm's length corporate transaction* which includes the *disposition of producing assets* could somehow affect the reasonable expectations of a *creditor* in respect of a *public duty to perform ARO*.[53]

[51] Appeal Decision, at paras. 140-141.
[52] Rose Memorandum of Argument, at para. 47.
[53] Rose Memorandum of Argument, at para. 48.

38. The Asset Transaction was not an "arm's length" transaction.

    38.1. The Asset Transaction was entered into between POT and Sequoia when both entities were controlled by PEI.[54]

    38.2. Ms. Rose, a director of PEI and the sole director of Sequoia, executed the purchase and sale agreement on behalf of both entities.[55]

    38.3. The nominal consideration to be received by Sequoia in the Asset Transaction was pre-determined internally by PEI.[56]

39. The Asset Transaction did not merely transfer "producing assets" to Sequoia.

    39.1. Although the Asset Transaction also *included* some producing assets, the bulk of the Goodyear Assets were non-producing wells that had already been shut-in or abandoned,[57] so that the net financial effect of the transfer of all these wells was negative for Sequoia, in an amount of more than $200 million.[58]

    39.2. The oppression claim relates to the transfer of these negative value wells to Sequoia in the Asset Transaction.[59]

40. The creditors' reasonable expectation allegedly breached by the Asset Transaction is not "in respect of a public duty to perform ARO".[60] Rather, as pointed out by the ABCA in this case and by the Ontario Court of Appeal in *Essar Global*, it is the reasonable expectation of any corporate creditor that their interests would not be "compromised by internal corporate manoeuvres against which the creditor cannot protect itself".[61] In *BCE*, this Court identified "changing corporate structure to drastically alter debt ratios" as an example of "unfair prejudice" potentially justifying an oppression remedy.[62]

41. The Asset Transaction was oppressive to Sequoia's creditors because it left Sequoia only with the negative value Goodyear Assets and with no ability to pay the liabilities associated

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[54] Appeal Decision, at paras. 99, 101 and 104.
[55] October 18, 2018 Affidavit of S. Rose, at para. 52.
[56] Appeal Decision, at paras. 101 and 104.
[57] Appeal Decision, at para. 88.
[58] August 2, 2018 Affidavit of P. Darby, at para. 40-44; Appeal Decision, at paras. 11 and 13.
[59] Appeal Decision, at paras. 140-141.
[60] Rose Memorandum of Argument, at para. 48.
[61] Appeal Decision, at para. 129; *JSM*, *supra* note 8, at para. 66; *Essar Global*, *supra* note 11, at para. 144**.**
[62] *BCE*, *supra* note 7, at para. 93.

with them. The loss to Sequoia and its stakeholders was the Defendants' gain: PEI was able to rid itself of most of its corporate liabilities.[63] It reported to the market the disposition of obligations with a present value of over $100 million, for nominal consideration.[64]

4. The Trustee does not seek to "offload" regulatory obligations onto Ms. Rose

42. Ms. Rose submits that the Trustee seeks to "circumvent this regulatory regime by attempting to offload the bankrupt's regulatory duties onto person who could never be personally liable under the regulatory regime in that manner"[65] and that the Trustee's oppression claim does "not belong to the estate and cannot benefit any creditor at all".[66]

43. The submission that the Trustee seeks to make Ms. Rose "personally liable for ARO" builds on the same flawed premises discussed above:

43.1. that the relief sought by the Trustee is a judgment in the amount of the ARO associated with the Goodyear Assets; and

43.2. that the only beneficiaries of such a judgment would be the AER, the OWA and the public, not Sequoia's creditors.

44. The Trustee seeks to undo the significantly negative effects of the Asset Transaction on the Sequoia estate, by setting aside the Asset Transaction as void and returning the Goodyear Assets to the Defendants, or by obtaining a judgment that would reverse the financial effect of the Asset Transaction. Both remedies would benefit the estate and all the stakeholders of Sequoia, including those who were creditors at the time of Asset Transaction and remain unpaid.

45. The submission on behalf of Ms. Rose also rests on a misstatement of this Court's reasons in *Redwater*: that the obligations of a licensee under the regulatory regime are public duties "binding on the licensee *after bankruptcy*".[67] The implication is that the ARO only became obligations "after bankruptcy" and the Trustee now seeks to "offload" them onto the Defendants.

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[63] Appeal Decision, at paras. 6 and 11.
[64] August 2, 2018 Affidavit of P. Darby, at paras. 42-43; Appeal Decision, at para. 6.
[65] Rose Memorandum of Argument, at para. 54.
[66] Rose Memorandum of Argument, at para. 55.
[67] Rose Memorandum of Argument, at para. 54.

46. As this Court found in *Redwater*, and as the ABCA confirmed in this case, the ARO are a present obligation from the time a well is drilled.[68] The regulatory obligations associated with the Goodyear Assets were present obligations at the time of the Asset Transaction, when the Defendants offloaded the negative value Goodyear Assets onto Sequoia, a related party with no other assets.[69]

47. At the time of the Asset Transaction, the Defendants assessed the present value of the obligations "disposed" of to Sequoia for $10.00 at more than $100 million.[70] If the Goodyear Assets cannot be returned to the Defendants, the Trustee seeks an oppression remedy reversing the financial effect of the Asset Transaction, by requiring the Defendants to repay the benefit they obtained at the expense of Sequoia and its stakeholders, including its creditors. This does not mean that the Trustee is seeking to "offload" regulatory obligations on onto a former director.

B. The Trustee's Claim that Ms. Rose Breached Her Duties as PEOC's Sole Director

1. The Trustee does not allege that Ms. Rose "owed a prevailing fiduciary duty in respect of the environment, or a corporation's future public duties"[71]

48. Ms. Rose submits that:

> The ABCA Decision, by overturning the summary dismissal of the Trustee's claim against Ms. Rose, recognized a fiduciary duty not to the company's *future creditors*, but in respect of the company's *future insolvency or inability to fund ARO*.[72] [Emphasis added.]

49. The submission that ARO are "future public duties" is based on misstatement of this Court's reasons in *Redwater*: that ARO are "binding on the licensee *after bankruptcy*"[73] and that ARO are "future obligations".[74]

50. As this Court held in *Redwater* and as the ABCA confirmed in this case, ARO are present obligations binding on the licensee from the time a well is drilled.[75] They are not "future" public duties, they are simply public duties.[76]

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[68] *Redwater*, *supra* note 3, at para. 157; Appeal Decision, at paras. 86 and 88.
[69] Statement of Defence, at para. 44(c); Appeal Decision, at paras. 11 and 96.
[70] August 2, 2018 Affidavit of P. Darby, at paras. 20, 42 and 43.
[71] Rose Memorandum of Argument, at para. 56.
[72] Rose Memorandum of Argument, at para. 56.
[73] Rose Memorandum of Argument, at para. 54.
[74] Rose Memorandum of Argument, at para. 58.
[75] *Redwater*, *supra* note 3, at para. 157; Appeal Decision, at paras. 87-88.
[76] Appeal Decision, at paras. 87-89.

51. The ARO were present obligations at the time Ms. Rose caused Sequoia to enter into the Asset Transaction,[77] by executing the agreement on behalf of both parties and executing the resolution approving the Asset Transaction as Sequoia's sole director.[78]

52. The Trustee's claims against Ms. Rose does not relate to any "future public duties". The Trustee seeks to reverse the *immediate* financial effect of the Asset Transaction, which rendered Sequoia unable to pay the obligations transferred to it and yielded a corresponding financial benefit to PEI, which PEI and Ms. Rose promptly reported to the market and the media.[79]

2. The Asset Transaction harmed the interests of Sequoia and all of its stakeholders other than PEI

53. Ms. Rose submits that she was required to balance various competing interests in assessing whether the Asset Transaction was in the best interest of Sequoia.[80]

54. Ms. Rose submits that the interests of 198Co, the prospective purchaser of PEI's shares in Sequoia, "were rightly taken into account by Ms. Rose in determining how best to serve [Sequoia's] own interests."[81] However, as Ms. Rose correctly points out, a director's fiduciary duty in a change of control situation is directly adverse to the interests of a prospective purchaser: it is to "maximize the return *from the corporation's purchaser*".[82] If a director in a change of control situation was also required, or even permitted, to consider the interests of a prospective purchaser, they would truly be placed in an "impossible" position because of this conflicting interest.

55. Although Ms. Rose presents the Asset Transaction as a complex exercise in balancing "competing stakeholder interests",[83] the effect of the Asset Transaction on PEOC's various stakeholders is remarkably simple and set out in the evidence.

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[77] Appeal Decision, at para. 89.
[78] October 18, 2018 Affidavit of S. Rose, at para. 52; Appeal Decision, at para. 155-156.
[79] Appeal Decision, at para. 89; August 2, 2018 Affidavit of P. Darby, at paras. 42-43 and Exhibits O and P.
[80] Rose Memorandum of Argument, at para. 65.
[81] Rose Memorandum of Argument, at para. 60.
[82] Rose Memorandum of Argument, at para. 64.
[83] Rose Memorandum of Argument, at para. 65.

56. PEI, PEOC's sole shareholder, benefited significantly from the Asset Transaction, as it allowed over $100 million in obligations, representing over 70% of PEI's corporate liabilities at the time, to be "disposed" of for nominal consideration.[84]

57. PEOC and all of its other stakeholders suffered in direct proportion to the benefit obtained by PEI:

    57.1. PEOC was left with the net negative value Goodyear Assets and no ability to satisfy the obligations associated with them.

    57.2. PEOC's creditors were harmed because PEI and Ms. Rose caused PEOC to assume the obligations associated with the Goodyear Assets without receiving fair market value consideration sufficient to offset those obligations, leaving PEOC unable to pay its creditors.

    57.3. The AER, the OWA and the public were harmed because the Asset Transaction and Share Transaction were deliberately structured so that PEI and POT could sever the negative value Goodyear Assets from the net positive value KeepCo Assets without a license transfer, which would have been reviewable by the AER.[85] In a typical transfer situation, a shell company like 198Co could not have received the Goodyear Assets without paying a substantial security deposit for ARO.[86]

58. In allowing the Trustee's appeal from the dismissal of its breach of director's duty claims against Ms. Rose, the ABCA noted the inherent contradiction in Ms. Rose's position: she asserted that she both considered PEOC's best interests and at the same time, that she simply acted on instructions from its sole shareholder, PEI.[87]

59. The same contradiction is evident in Ms. Rose's submissions before this Court. Ms. Rose asserts that she weighed the "competing interests of stakeholders" in determining how "best to serve PEOC's own interests."[88] At the same, Ms. Rose asserts that PEOC was a "single-purpose, wholly owned subsidiary of PEI".[89]

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[84] Appeal Decision, at paras. 11 and 89; August 2, 2018 Affidavit of P. Darby, at paras. 42-43.
[85] Appeal Decision, at para. 9.
[86] *Redwater*, *supra* note 3, at para. 18-19.
[87] Appeal Decision, at paras. 156-157.
[88] Rose Memorandum of Argument, at paras. 60-61.
[89] Rose Memorandum of Argument, at para. 60.

60. As Ms. Rose acknowledged in her affidavit, she determined that the Asset Transaction and Share Transaction were in the best interest *of PEI*. Ms. Rose viewed, and continues to view, PEOC as merely a "single purpose" extension of PEI, one which PEI was entitled to use as it pleased for its own benefit. This is view is contrary to the fundamental principle, noted by the ABCA, that "each corporation is a separate legal person."[90]

61. Although Ms. Rose submits that the ABCA's decision "upends" the law regarding a director's fiduciary duty and transforms it "into a duty owed prevailingly to the environment or the public", it is completely consistent with what Ms. Rose acknowledges to be result in *BCE*:

> In *BCE,* this Court rejected the proposition that directors of takeover targets must recognize shareholders' interests as prevailing over the interests of other stakeholders, such as creditors and the environment. (The *Revlon* line of cases from Delaware was specifically rejected).[91]

62. The ABCA found that, as PEOC's sole director, Ms. Rose was not permitted simply to defer to the interests of PEOC's sole shareholder, PEI, and approve a transaction that benefited PEI at the expense of PEOC and all of its stakeholders, including its creditors, the AER and the public.[92]

63. These findings do not represent a "transformation of the law, going far beyond what was contemplated in *BCE*".[93] As this Court stated in *BCE*:

> The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation *comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly*. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not limited to, *the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen*.[94] [Emphasis added.]

64. Further, in *Yaiguaje*, this Court cited *BCE* as re-affirming the "fundamental principle of corporate separateness": a parent corporation and its subsidiary are separate legal entities.[95]

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[90] Appeal Decision, at para. 155; *Yaiguaje*, *supra*, at para. 95; *Chevron*, *supra*, at paras. 60-62.
[91] Rose Memorandum of Argument, at para. 63.
[92] Appeal Decision, at paras. 155-157.
[93] Rose Memorandum of Argument, at para. 65.
[94] *BCE*, *supra* note 7, at para. 82.
[95] *Yaiguaje*, *supra* note 7, at para. 95.

A parent corporation owns only its shares in the subsidiary; the subsidiary corporation itself is not the property of the parent corporation to do with as the parent pleases.[96]

65. The Asset Transaction benefited PEI at the expense of PEOC and all of its other stakeholders. The ABCA merely determined, in accordance with *BCE*, that the breach of fiduciary duty issue could not be determined summarily in favour of Ms. Rose.[97]

3. The Trustee does not seek to "offload" the "ARO burden" onto Ms. Rose

66. As she does in relation to the Trustee's oppression claim, Ms. Rose seeks to present the Trustee's breach of fiduciary duty claim as an attempt to:

> [C]ircumvent the prevailing regulatory regime by offloading the ARO burden onto the bankrupt's released former directors [sic], who owed no such regulatory duty in the context of a transaction that was perfectly lawful in any event.[98]

67. The complaints about the Trustee's alleged attempt to "offload the ARO burden" onto her have an ironic quality. The basis for the Trustee's claims against Ms. Rose is that she abdicated her responsibility as PEOC's sole director and assisted POT and PEI in offloading the negative value Goodyear Assets onto PEOC for nominal consideration.[99]

68. Contrary to Ms. Rose's submission, the ARO did not become an obligation "after bankruptcy".[100] They were a present obligation that formed a fundamental part of the value of the Goodyear Assets *at the time they were transferred* from POT to PEOC in the Asset Transaction. Ms. Rose used her position as PEOC's sole director to assist POT and PEOC in offloading the Goodyear Assets onto PEOC, yielding an immediate financial benefit to which PEI itself assigned a present value of over $100 million.[101]

69. The Trustee does not seek to offload anything onto Ms. Rose or the other Defendants. It merely seeks to reverse the transfer of the Goodyear Assets from POT to PEOC or, alternatively, to reverse the financial effects of the transfer, by requiring the Defendants to repay the financial benefit they obtained at PEOC's expense.

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[96] *Chevron*, *supra* note 8, at paras. 60-62.
[97] Appeal Decision, at para. 159.
[98] Rose Memorandum of Argument, at para. 66.
[99] Appeal Decision, at paras. 6, 11 and 89.
[100] Rose Memorandum of Argument, at para. 54.
[101] Appeal Decision, at paras. 6, 11 and 89.

70. The lawfulness of the Asset Transaction has not been established. As noted by the ABCA, a "central issue in the litigation is whether an oil and gas company can arrange its affairs so as to avoid regulatory scrutiny".[102]

4. Ms. Rose's submission that she owed no duty in relation to PEOC's regulatory obligations

71. Ms. Rose submits that, in the context of the Asset Transaction, she owed no duty in relation to PEOC's regulatory obligations.[103]

72. As this Court explained in *BCE*, a director's fiduciary duty to the corporation is not a duty to maximize the interests of its shareholders by any means necessary. The duty to act in the best interest of the corporation comprehends a duty "to treat individual stakeholders affected by corporate actions equitably and fairly", consistent with "the corporation's duties as a responsible corporate citizen."[104]

73. A director contemplating a transaction that would benefit a corporation's shareholders but leave the corporation unable to comply with its regulatory obligations, does owe a duty in relation to those regulatory obligations. It is a duty to act in the best interests of the corporation, by ensuring that the corporation's ability to satisfy its regulatory obligations is not sacrificed for the benefit of the corporation's shareholder.

74. In any event, the Defendants were well aware of their regulatory obligations in respect of the Asset Transaction. Contrary to the submission that the Asset Transaction was "perfectly lawful", the Defendants were prepared to transfer the Goodyear Assets directly to 198Co but instead, deliberately adopted the Asset Transaction and Share Transaction structure to circumvent the new and more stringent license transfer requirements introduced by the AER in June 2016, shortly before the Asset Transaction took place.[105] In the words of a PEI employee in August 2016 "this changed from an asset deal to a corporate deal to accommodate the new LMR restrictions placed recently by AER."[106]

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[102] Appeal Decision, at para. 147.
[103] Rose Memorandum of Argument, at para. 66.
[104] *BCE Inc., Re*, supra note 7, at para. 82.
[105] *Redwater*, *supra* note 3, at para. 19; August 2016 Emails between Kailas Group and Perpetual Energy Inc., October 19, 2018 Affidavit of S. Rose, Exhibit "P".
[106] August 11, 2016 Email from J. Lambden to H. Wang, October 19, 2018 Affidavit of S. Rose, Exhibit "P".

PART IV – COSTS

75. If the application for leave to appeal is dismissed, the Trustee should be awarded costs of the application.

76. If the application is granted, the Trustee submits that costs should be costs in the appeal.

PART V – ORDER SOUGHT

77. The Trustee seeks an Order dismissing Ms. Rose's application for leave to appeal, with costs.

Calgary, Alberta
May 13, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per: _____

Rinus de Waal/Luke Rasmussen
Counsel for the Respondent,
PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

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