

COURT FILE NUMBER 1801-10960

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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

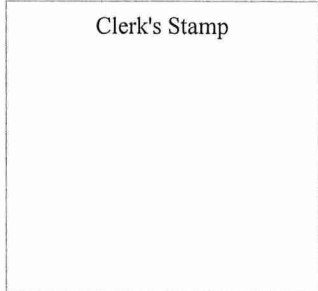
DEFENDANTS PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, and PERPETUAL OPERATING CORP.

INTERVENORS ORPHAN WELL ASSOCIATION, CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., and TORXEN ENERGY LTD.

DOCUMENT **ADDITIONAL WRITTEN SUBMISSIONS OF CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., AND TORXEN ENERGY LTD.**

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ADDITIONAL WRITTEN SUBMISSIONS OF THE INTERVENORS, 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. (“Torxen”, collectively with Canadian Natural and Cenovus, the “Industry Intervenors”) are intervenors in the within Action and submit this brief to address this Honourable Court’s request for further submissions on:

- a) the commentary in the 22nd Edition of *Bennett on Bankruptcy* (“*Bennett on Bankruptcy*”) addressing the balance sheet test for insolvency¹;
- b) the treatment of deferred income taxes on the industry members’ financial statements (i.e. whether same are treated as a liability, obligation, or provision); and
- c) whether or not PEOC assumed the Asset Retirement Obligations (the “ARO”) associated with the Goodyear Assets as a result of the Asset Transaction.

II. ARGUMENT AND SUBMISSIONS

A. Commentary in *Bennett on Bankruptcy*

2. The commentary provided in *Bennett on Bankruptcy* pertains to a consideration of what obligations must be considered in determining whether or not a person has insufficient assets, if liquidated, to pay their debts.

3. Specifically, the commentary considers the *Enterprise Capital* and *Re Stelco* cases² and their guidance on when future obligations should or should not be considered as a debt of a person for the purposes of completing the balance sheet test set out in the definition of “insolvent person” in the *Bankruptcy and Insolvency Act*³.

¹ Frank Bennett, *Bennett on Bankruptcy*, 22nd Ed (Toronto, ON, LexisNexis Canada Inc. 2020) (“*Bennett*”) at pgs 48 and 49 [Perpetual Energy Defendants’ Brief filed October 9, 2020 (“Perpetual Brief”), Tab 1]

² *Ibid*

³ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at the definition of “insolvent person” [Written Submissions of the Industry Intervenors filed September 25, 2020, Tab 1]

4. However, the Industry Intervenors submit that the relevant consideration of ARO in the balance sheet test is not in the second component of the test as an obligation or debt, but rather as a critical and fundamental component of the first part of the test, namely the determination of the fair market value of the person's aggregate property.

5. In the matter at hand, a determination of the fair market value of PEOC's aggregate property post-Asset Transaction, including the Goodyear Assets, must account for the significant corresponding ARO, which would serve to substantially depress the value of those assets.

B. Deferred Income Tax are Treated as a Liability

6. Contrary to the submissions of the Perpetual Defendants, deferred income tax, similar to ARO, is treated as a liability on the financial statements of Canadian Natural and Cenovus; however, there are several key differences between the two liabilities.

7. Deferred income tax arises as a result of the difference between the carrying amount of an asset or liability and the appropriate tax base⁴. Over time, the deferred income tax associated with a particular asset lessens as the difference between the carrying amount of the asset and the appropriate tax base diminishes, and the deferred income tax associated with a particular asset can eventually be completely eliminated as the temporary tax difference is eliminated.

8. In contrast, ARO arise, not as a result of differences in accounting calculations, but rather as a direct result of the physical development of an oil and gas site, which triggers the obligation to abandon, suspend, reclaim, and remediate that site at the end of its life. Further, ARO relate to tangible expenditures that will inevitably need to be incurred in returning an oil and gas site back, as close as reasonably possible, to its original state. Lastly, ARO will not begin to lessen over time with the possibility of completely disappearing like deferred income tax, until the certain and unavoidable expenses associated with the abandonment, suspension, reclamation, and remediation of that oil and gas site are actually incurred⁵.

⁴ IAS Standard 12, at para. 11 [Perpetual Brief, Tab 2]

⁵ Affidavit of Ron Laing filed August 12, 2020 at para. 20; Affidavit of John K. Brannan filed August 12, 2020 at para. 6; and Affidavit of Antonio Jackson filed August 17, 2020 at para. 6

9. In any event, ARO is treated as a liability by the Industry Intervenors, and is a fundamental component in assessing the fair market value of an asset. As such, ARO must be considered in evaluating the fair market value of a person's aggregate property for the purposes of determining insolvency.

C. PEOC Assumed the ARO Associated with the Goodyear Assets as a Result of the Asset Transaction

10. The Industry Intervenors note that they have not had the opportunity to review the Trust Indenture dated June 28, 2002 between the Settlor and PEOC, being the Original Indenture, referenced in the documents comprising Exhibit "A" to the Affidavit of Sheena Criece filed October 6, 2020 (the "Criece Affidavit"). However, the Industry Intervenors provide the following submissions based on the information made available to them in the Criece Affidavit.

11. The First Amended and Restated Trust Indenture dated August 1, 2002 (the "First Amended Indenture") clearly sets out that the income of POT was to be distributed by PEOC to POT's beneficiaries on an annual basis, and the obligations of POT were to be settled, paid, and satisfied by PEOC out of the assets or property of POT⁶. Neither the income nor the obligations of POT were to be of personal benefit to or the personal responsibility of PEOC; rather, PEOC was responsible for managing POT's assets and liabilities on behalf of and for the benefit of POT's beneficiaries⁷.

12. Prior to the Purchase and Sale Agreement dated October 1, 2016 (the "PSA"), PEOC maintained the legal interest in the Goodyear Assets, importantly, not in its personal capacity, but in its capacity as Trustee for POT. Similarly, any responsibility for the ARO associated with the Goodyear Assets that PEOC had, prior to the execution of the PSA, was in its capacity as Trustee for POT and not in its personal capacity.

13. In accordance with the First Amended Indenture, any costs, expenses, or expenditures made with regard to the Goodyear Assets, prior to the execution of the PSA, would have been

⁶ Exhibit "A" to the Affidavit of Shana Criece filed October 6, 2020: First Amended and Restated Trust Indenture dated August 1, 2002 (the "First Amended Indenture") at Sections 2.3 and 4.2(t)

⁷ *Ibid* at Section 4.3

obligations of POT and were to be settled, paid, and satisfied by PEOC out of the assets or property of POT⁸.

14. As set out in the PSA, POT agreed to sell, assign, transfer, convey, and set over to PEOC all of the right, title, and interest of POT in the Goodyear Assets⁹.

15. While the Perpetual Defendants have repeatedly submitted that the PSA “only combined” the beneficial interests of the Goodyear Assets with the legal interests already held by PEOC, it is clear, by its existence, that the PSA was a necessary step in order for PEOC to obtain full ownership of the interests in the Goodyear Assets in its personal capacity. What actually occurred was not simply the combination of the legal and beneficial ownership interests in the Goodyear Assets, but rather the transfer from POT to PEOC of its beneficial interest in the Goodyear Assets and the transfer from POT to PEOC of the legal interest in the Goodyear Assets, such that PEOC would, following the Asset Transaction, legally and beneficially own the Goodyear Assets in its personal capacity and not solely in its capacity as Trustee and for the benefit of POT.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of October, 2020.

PARLEE MCLAWS LLP

PER: 

G. Scott Watson / Charles W. Ang
Solicitor for the Industry Intervenors

⁸ First Amended Indenture at Section 4.2(t)

⁹ Exhibit “D” to the Affidavit of Paul Darby filed on August 2, 2018: Purchase and Sale Agreement between Perpetual Operating Trust as Vendor and Perpetual Energy Operating Corp. as Purchaser dated October 1, 2016 at Section 2.01