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JUDICIAL CENTRE
OF CALGARY

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, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE

DOCUMENT

APPLICATION

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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NOTICE TO THE RESPONDENTS: PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. and SUSAN RIDDELL ROSE

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard as shown below:

Date: August 30, 2018
Time: 4:00 p.m. – Commercial List
Where: Calgary Courts Centre, 601 - 5 Street SW, Calgary, Alberta
Before Whom: The Honourable Mr. Justice P.R. Jeffrey

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

The Applicant PricewaterhouseCoopers Inc. (the “**Trustee**”), in its capacity as the trustee in bankruptcy of Sequoia Resources Corp., previously known as Perpetual Energy Operating Corp. (“**Sequoia**” or “**PEOC**”), seeks Order:

1. setting aside the October 1, 2016 transaction entered into between PEOC and Perpetual Operating Trust (the “**Asset Transaction**”) and declaring the Asset Transaction void as against the Trustee;
2. *alternatively*, granting judgment against the Respondents, Perpetual Energy Inc. (“**PEI**”), Perpetual Operating Trust (“**POT**”), Perpetual Operating Corp. (“**POC**”) and Susan Riddell Rose (“**Rose**”), jointly and severally, for the difference between the consideration received by PEOC in the Asset Transaction and the value of the consideration given by PEOC in the Asset Transaction, in the amount of not less than \$217,570,800;
3. awarding costs of the application against the Respondents on a full-indemnity basis; and
4. granting further and/or alternative relief.

Grounds for making this application:

1. In or about the summer or fall of 2016, PEOC and the Respondents entered into a series of transactions, including the Asset Transaction (the “**Transactions**”), with the intent to benefit the Respondents to the prejudice of PEOC, by transferring a large number of shallow gas wells and related assets with significant associated liabilities (the “**Goodyear Assets**”) from POT to PEOC and then severing the corporate relationship between PEOC and the Respondents.

Transfer at Undervalue

2. The Asset Transaction:
 - 2.1. was a disposition of property for which the consideration received by PEOC was conspicuously less than the fair market value of the consideration given by PEOC in the Asset Transaction, including its assumption of the liabilities associated with the Goodyear Assets and therefore constituted a transfer at undervalue within the meaning of sections 2 and 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the “**BIA**”);
 - 2.2. was entered into between PEOC and POT in circumstances where:
 - 2.2.1. PEOC was the trustee for POT;

- 2.2.2. PEI controlled PEOC and POT;
 - 2.2.3. PEOC and the Respondents were not dealing at arm's length with each other within the meaning of the BIA; and
 - 2.2.4. PEI, POC and Rose benefitted from and were privy to the Asset Transaction within the meaning of s. 96 of the BIA;
 - 2.3. occurred in October 2016, less than 5 years before Sequoia filed its Notice of Intention to Make a Proposal and assigned itself into bankruptcy in March 2018; and
 - 2.4. was entered into by PEOC while it was insolvent or rendered PEOC insolvent.
3. Pursuant to s. 96 of the BIA:
 - 3.1. the Asset Transaction is void as against the Trustee; or
 - 3.2. the Trustee is entitled to judgment against the Respondents, jointly and severally, for the difference between the value of the consideration received by PEOC in the Asset Transaction and the value of the consideration given by PEOC in the Asset Transaction.

Breach of Director's Duties

4. At all material times until her resignation as sole director of PEOC following the closing of the Transactions, Rose:
 - 4.1. owed fiduciary duties to PEOC, including a duty to act honestly and in good faith with a view to the best interests of PEOC, in accordance with s. 122(1)(a) of the Alberta *Business Corporations Act*, RSA 2000 c B-9 (the "ABCA");
 - 4.2. owed PEOC a duty of care, including to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, in accordance with s. 122(1)(b) of the ABCA; and
 - 4.3. was required to comply with the provisions of the ABCA, including s. 120.
5. Rose breached her duties to PEOC, *inter alia*, by:
 - 5.1. failing to act honestly and in good faith with a view to the best interests of PEOC;
 - 5.2. failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;
 - 5.3. causing PEOC to enter into the Asset Transaction in circumstances where:

- 5.3.1. Rose and the other Respondents had determined that the Goodyear Assets to be purchased by PEOC were high liability assets that should be disposed of by, and for the benefit of, the Respondents;
 - 5.3.2. Rose was aware that PEOC was unable to meet the obligations associated with the Goodyear Assets;
 - 5.3.3. Rose was aware that PEOC was insolvent, or would be rendered insolvent by the Asset Transaction; and
 - 5.3.4. Rose would benefit personally from the Asset Transaction, including as a beneficial shareholder of PEI; and
- 5.4. failing to disclose to PEOC, *inter alia*, that:
 - 5.4.1. the Transactions were not fair or reasonable to PEOC and were not in PEOC's best interests; and that
 - 5.4.2. Rose, as a beneficial shareholder and director of PEI, had a material interest in PEI, POT and POC, which benefited from the Transactions at the expense of PEOC.
6. As a result of the breaches by Rose of her duties as a director of PEOC, the Asset Transaction should be set aside and declared void, including pursuant to s. 120 of the *ABCA*.

Oppression

7. The Trustee is a proper complainant with the meaning of Part 19 of the *ABCA*, including s. 239 and 242.
8. By causing PEOC to enter into the Transactions, including the Asset Transaction, Rose exercised her powers as a director of PEOC and PEI and POC carried on or conducted their business in a manner that was oppressive, unfairly prejudicial to or that unfairly disregarded the interests of creditors of PEOC, including its contingent creditors.
9. As a result of the Transactions generally, and the Asset Transaction in particular:
 - 9.1. if PEOC was not already insolvent at the time of the Transactions, it was rendered insolvent by the Transactions;
 - 9.2. PEOC was liable for, but unable to pay, the municipal property taxes with respect to the Goodyear Assets pursuant to the *Municipal Government Act*; and
 - 9.3. PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets;

all for the benefit of the PEI, POC and Rose personally.

Public Policy, Statutory Illegality and Equitable Grounds

10. The Asset Transaction is void and should be set aside, on the basis of public policy, statutory illegality and equitable grounds.

Material or evidence to be relied on:

11. The Affidavit of Paul J. Darby, sworn on August 2, 2018; and
12. Such further evidence as counsel for the Trustee may advise and the Court may allow.

Applicable rules:

13. Rules 6.3, 6.11, 7.3, 10.29, 10.31 and 10.33 of the *Alberta Rules of Court*, AR 124/2010.

Applicable legislation:

14. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, including ss. 2 and 96
15. *Business Corporations Act*, RSA 2000, c. B-9, including ss. 120, 239 and 242.

How the application is proposed to be heard or considered:

16. It is proposed that the Application be heard on the Commercial List.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.