

**COURT OF APPEAL OF ALBERTA**

**FORM AP-3**  
[RULE 14.53]



COURT OF APPEAL FILE NUMBER: 1901-0255AC

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., and not in its personal  
capacity

STATUS ON APPEAL: APPELLANT  
STATUS ON APPLICATION: RESPONDENT

DEFENDANTS/RESPONDENTS: PERPETUAL ENERGY INC., PERPETUAL  
OPERATING TRUST, PERPETUAL  
OPERATING CORP., and SUSAN RIDDELL  
ROSE

STATUS ON APPEAL: RESPONDENTS  
STATUS ON APPLICATION: RESPONDENTS

APPLICANT: ORPHAN WELL ASSOCIATION

STATUS ON APPEAL: PROPOSED INTERVENOR  
STATUS ON APPLICATION: APPLICANT

DOCUMENT: **APPLICATION OF THE PROPOSED  
INTERVENOR, THE ORPHAN WELL  
ASSOCIATION, FOR LEAVE TO  
INTERVENE**

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And

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**NOTICE TO RESPONDENTS:**

PRICEWATERHOUSECOOPERS INC, LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP., and not in its personal capacity, the Respondents; and PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, AND PERPETUAL OPERATING CORP., the Appellants; and SUSAN RIDDELL ROSE, the Appellant

**WARNING**

If you do not come to Court on the date and time shown below either in person or by your lawyer, the Court may give the applicant what it wants in your absence. You will be bound by any order that the Court makes. If you intend to rely on other evidence or a memorandum in support of your position when the application is heard or considered, you must file and serve those documents in compliance with the Rules. (Rule 14.41 and 14.43)

**NOTICE TO RESPONDENT(S):**

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

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

Date: November 12, 2020  
Time: 9:30 a.m.  
Where: Court of Appeal of Alberta, 27th Floor,  
450 1st St SW, Calgary Alberta  
Before: Single Judge of the Court (Rule 14.37)

**Nature of Application and Relief Sought:**

1. The Orphan Well Association ("**OWA**") seeks an Order pursuant to Rule 14.58(1) of the Alberta *Rules of Court* granting leave to intervene in Court of Appeal File Nos. 1901-0262AC and 1901-0255AC (collectively, these "**Appeals**") with the right to participate in all proceedings related to the following distinct legal issue:
  - (a) the status of abandonment and reclamation obligations ("**ARO**") following the Supreme Court of Canada decision in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 ("**Redwater**") and in particular whether they should be taken into account pursuant to Section 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**").

2. Pursuant to Rule 14.58(1) of the *Rules of Court*, an Order prohibiting costs, either in favour of or against the OWA.
3. Such further and other relief incidental to the above as requested and as this Honourable Court deems appropriate.

**Grounds for making this application:**

4. Terms not hereinafter defined shall have the same meaning as set out in the decisions of the Honourable Justice D.B. Nixon at *PricewaterhouseCoopers Inc v. Perpetual Energy Inc.*, 2020 ABQB 6.

*Background*

5. The OWA abandons and reclaims wells, facilities, and pipelines that do not have a solvent and responsible owner to protect people and the environment.
6. The OWA has a limited budget and is focused on maximizing its available funding. This requires risk-assessing and prioritizing the inventory of orphaned and abandoned wells, facilities, and pipelines to ensure public safety and environmental protection. The OWA is primarily funded by the Orphan Fund Levy (the "**Levy**"), rather than Albertans, which is paid by energy companies across Alberta. The Levy payable by any individual company is determined in part on the total abandonment and reclamation liabilities of all wells, facilities, and pipelines across Alberta.

*Concerns with the Transactions*

7. Upon learning of the details of the Aggregate Transaction, the OWA became concerned, for, *inter alia*, the following reasons:
  - (a) the Aggregate Transaction has the effect of shedding from Perpetual the abandonment and reclamation obligations associated with the Goodyear Assets;
  - (b) the Aggregate Transaction did not receive the usual regulatory scrutiny because it took place as a share transaction, rather than an asset transaction;

- (c) the effect of the Asset Transaction in combination with the Aggregate Transaction was to create a significant liability that Sequoia Resources Corp., a company with limited assets, had no ability to pay, ultimately leaving the Goodyear assets to be abandoned and reclaimed by the OWA; and
  - (d) allowing the Asset Transaction to stand will create an undesirable precedent by sanctioning the selling of assets, at undervalue, permitting companies to avoid abandonment and reclamation obligations.
- 8. At present, the cost to abandon and remediate the Goodyear Assets is estimated by the Trustee to be approximately \$200,000,000. It is likely that the entire cost associated with the abandonment and reclamation of the Goodyear Assets will be paid by the OWA, which in turn is funded by the Levy paid by energy companies. It is virtually certain that the OWA will face significant harm if the Asset Transaction is not declared void as sought in the Statement of Claim.
- 9. The OWA's perspective is necessary to this Action in order for this Court to properly consider the interests of the OWA as the entity that will probably be responsible for the abandonment and reclamation obligations associated with the Goodyear Assets, as well as that of the energy industry more broadly and that of the public.
- 10. The OWA proposes to assist the Court in this Action by providing submissions in the following areas:
  - (a) The interaction between section 96 of the *BIA* and the regulatory obligations with regard to Supreme Court of Canada's decision in *Redwater*, and specifically that the existence of a regulatory obligation, compliance with which would render a company insolvent, can be considered an obligation for the purposes of the *BIA* provisions regarding transactions at undervalue;
  - (b) In particular, the OWA is concerned with respect to Justice Nixon's characterization of ARO as "not a liability" which it is submitted is the wrong question for the purposes of the analysis. The fact that ARO is not a liability for the purposes of determining a provable claim should not be determinative of whether it is an obligation due or accruing due for the purposes of section 96;

- (c) The impact of transactions made for the purposes of avoiding abandonment and reclamation obligations on the OWA and industry; and
  - (d) Such further and other submissions in respect of matters incidental to the above, as counsel may advise and this Honourable Court may permit.
11. The OWA proposes to file its factum to intervene no later than November 15, 2020, such factum being limited to ten pages.
12. Granting the OWA leave to intervene in the Action will not:
- (a) unduly delay the proceedings;
  - (b) cause prejudice to either of the parties; or
  - (c) widen the *lis* between the parties.

**Material or evidence to be relied on:**

13. Affidavit of Lars De Pauw, sworn on October 29, 2020; and
14. Such further and other material as counsel may advise and this Honourable Court may allow.

**Applicable Acts, regulations and rules:**

15. This Application is made pursuant to Rule 14.58 of the *Alberta Rules of Court* and the jurisdiction of this Honourable Court to control its own process.
16. Such further and other material, legislation, and rules as counsel may advise and this Honourable Court may allow.

**DATED** at the City of Calgary in the Province of Alberta, this 30<sup>th</sup> day of October, 2020.

Estimated time of argument: 15 minutes

**ORPHAN WELL ASSOCIATION**

Per: 

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Kenneth T. Lenz, QC / Andrea Stempien  
Bennett Jones LLP  
Solicitors for the Orphan Well Association

To: The Clerk of the Court

And To: Solicitors for the Respondents

And To: Solicitors for the Appellants