COURT OF APPEAL OF ALBERTA

REGISTRAR'S STAMP

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
DEFENDANTS/RESPONDENTS:	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., AND SUSAN RIDDELL ROSE
STATUS ON APPEAL:	RESPONDENTS
INTERVENOR:	ORPHAN WELL ASSOCIATION
STATUS ON APPEAL:	INTERVENOR
DOCUMENT:	**FACTUM OF ORPHAN WELL ASSOCIATION, INTERVENOR**

Appeal from the Order of The Honourable Justice D.B. Nixon
Dated the 15th day of August, 2019, Filed the 18th day of February, 2020

FACTUM OF THE INTERVENOR

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INTRODUCTION[1]

1. The Orphan Well Association (the "**OWA**") intervenes in this matter exclusively on the question of the characterization of asset retirement obligations ("**ARO**"), particularly in light of the Supreme Court of Canada's decision in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [*Redwater*].[2]

2. The Court below appears to read *Redwater* as meaning that since ARO do not amount to provable claims, they do not have value and therefore should not figure in the context of important statutory rights and obligations. Ultimately, the Chambers Judge appears to come to the conclusion that ARO need not be considered by directors and officers in the discharge of their statutory and fiduciary duties, and that it is not something the Court should consider with respect to the oppression remedy. The OWA respectfully submits that these conclusions are errors in law, because they undermine these important statutory duties and remedies.

PART I: FACTS

A. Procedural History

3. The Plaintiff is the trustee in bankruptcy (the "**Trustee**") of the estate of Sequoia Resources Corp. ("**Sequoia**"), formerly known as Perpetual Energy Operating Corp ("**PEOC**").

4. On August 2, 2018, the Trustee commenced an action against Perpetual Energy Inc. ("**Perpetual**"), Perpetual Operating Trust ("**POT**"), and Perpetual Operating Corp. ("**POC**") (collectively, the "**Perpetual Defendants**") and Ms. Susan Riddell Rose ("**Rose**"). The Trustee filed the Statement of Claim seeking to set aside a sale and transfer of assets by POT to PEOC (the "**Asset Transaction**") related to the Goodyear Assets, on several grounds including, *inter alia*, the claim that the Transactions constituted a transfer at undervalue in violation of section 96 of the *BIA*.

[1] Terms not hereinafter defined shall have the same meaning as set out in the decisions of the Justice Nixon at *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABQB 6 [Reasons] [**Tab 1**].
[2] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 [*Redwater*] [**Tab 2**].

5. In response, the Defendants filed two essentially similar Applications to strike the claims, or alternatively summary judgment. These Applications raised issues with respect to five claims: the *BIA* Claim, the Oppression Claim, the Public Policy Claim, the Release Issue, and the Director Claim.[3]

6. These Applications were heard by Justice Nixon and his decision was reported on January 13, 2020.[4] That decision is the subject of this Appeal.

7. On February 25, 2020, after reviewing the reasons in the decision before the Court today, the Perpetual Defendants applied to strike or alternatively, for summary judgment of the claim on the basis that the Trustee had not proven that the transfer of ARO made Sequoia insolvent (the "**BIA Summary Judgment Application**").

8. On July 24, 2020, the OWA was granted intervener status on related issues with respect to the BIA Summary Judgment Application. The BIA Summary Judgment Application was heard by Justice Nixon on October 1, and 2, 2020 and his decision is currently under reserve.

B. The Role of the OWA

9. The OWA abandons and reclaims wells, facilities, and pipelines that do not have a solvent and responsible owner to fulfill these obligations. These "orphan wells" are located throughout the Province, usually on Crown or private land. Without abandonment and remediation, the orphan wells encroach on surface owners' property rights and can present a significant concern to health and safety.

10. 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

[3] Reasons, *supra* note 1 at para 5 [**Tab 1**].
[4] Reasons, *supra* note 1 [**Tab 1**].

primarily funded by the Orphan Fund Levy (the "**Levy**"), rather than Albertans, which is primarily paid by energy companies across Alberta.[5]

PART II: GROUNDS OF APPEAL

11. 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.

PART III: STANDARD OF REVIEW

12. The legal status of ARO and its proper characterization, for the purposes of a variety of statutes, is a question of law.[6] As a result, the standard of review with respect to this question is correctness.[7]

PART IV: ARGUMENT

A. The Chambers Judge overstated the effect of the SCC's decision in *Redwater*

13. Fundamentally, the ratio of the SCC's decision in *Redwater* is that Courts should not lightly turn regulatory obligations into provable claims, which can then be compromised and discharged, because to do so undermines the constitutionally guaranteed right of the Provinces to regulate the energy industry.

14. The SCC in *Redwater* states that ARO is not a provable claim in bankruptcy.[8] The Court also finds that the AER is not a creditor with respect to ARO.[9] However, the Court also states that ARO are obligations and endorses the statement of former Chief Justice Laycraft in *Northern Badger* that they are inchoate liabilities.[10]

15. The learned Chambers Judge relied upon the SCC's finding that ARO is not a provable claim in bankruptcy to extrapolate that ARO should not be considered under these

[5] Affidavit of Lars de Pauw sworn October 29, 2020, filed in this appeal with leave from Justice Rowbotham.
[6] Similar questions were assessed by the Alberta Court of Appeal in *Orphan Well Association v Grant Thornton Ltd.*, 2017 ABCA 124 at para 10 [**Tab 4**].
[7] *Housen v Nikolaisen*, 2002 SCC 33 at para 8 [**Tab 5**].
[8] *Redwater, supra* note 2 at para 159 [**Tab 2**].
[9] *Redwater, supra* note 2 at para 135 [**Tab 2**].
[10] *Redwater, supra* note 2 at para 135 [**Tab 2**]; *Panamericana De Bienes Y Servicios (Receiver of) v Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181 [*Northern Badger*] [**Tab 6**].

other statutory regimes – in particular, in his assessment of the Oppression Claim and the Director's Liability Claim. We respectfully submit that these conclusions do not logically follow from the SCC's decision and should not be permitted to stand on appeal. To allow these conclusions to stand would effectively erase ARO from consideration in these important statutory contexts, and does not give due regard to the important objectives these obligations and rights are intended to address.

16. Regulatory obligations must be considered by directors and officers in the discharge of their duties. To find otherwise would significantly undermine the object and purpose of these remedial statutes, and affect a broad variety of persons who rely on companies, and their directors and officers, to appropriately consider their interests, including the OWA and industry members.

1. The Chambers Judge's Decision on the Oppression Remedy

17. Paragraphs 138 to 173 and 218 to 232 of the Reasons discuss the nature of ARO in light of *Redwater* and the relevance of ARO to the Oppression Claim. The Chambers Judge concludes at paragraphs 237-241 that he can strike the Oppression Claim partly on the application of the *Hordo* factors to the pleading to determine whether the Trustee is a proper person to make such a claim, but primarily on the basis that the claim does not constitute a liability because of *Redwater*. His reasons for this decision include:

> …the impact of the *Redwater* decision is to nullify the Oppression Claim. I exercise my discretion in this manner because, on the authority of *Redwater*, the very foundation underlying the Oppression Claim, the ARO, is not a liability. Instead, it is a future burden that has not crystalized into a liability.[11]

18. We respectfully submit that it cannot be the case that the SCC's decision in *Redwater* nullified the foundation of the Oppression Claim. Improperly dealing with ARO is something directors should be responsible for, and in the proper case, should amount to oppressive conduct, *whether or not ARO is a claim, liability or otherwise*. Reliance on the idea that ARO is not a debt or a liability as a basis to exclude ARO from consideration in assessing oppression remedies is a misinterpretation of the SCC's decision in *Redwater*.

[11] Reasons, *supra* note 1 at para 239 [**Tab 1**].

2. The Chambers Judge's Decision on the Director's Duties

19. The Chambers Judge refers back to his analysis regarding ARO in relation to the Oppression Claim while dismissing the Director Claim. Ultimately he makes a very similar finding that *Redwater* nullifies the Director Claim:

> I have already indicated that the Director Claim embodies no reasonable cause of action when the Trustee SOC is read as a whole in the context of what fiduciary duty and duty of care mean: see paragraph 285 of this decision, above. This is fatal to the Director Claim. I make this comment because *Redwater* held that ARO is not a liability, which nullifies the Trustee's arguments considering fiduciary duty and duty of care.[12]

20. Given the significant negative effects that ARO can have on a company and its stakeholders, it is in error to find that ARO is not a factor to be taken into account by directors and officers in exercising their fiduciary and statutory duties.

B. ARO is an Obligation

21. ARO are obligations that have value and, at minimum, carry a cost to fulfill. They affect a large variety of actors and as such, must be taken into account in a variety of contexts, including when assessing directors' liability and duties.

22. The obligations at issue – end-of-life ARO – are important to a broad range of stakeholders. Those interests warrant consideration. In *Redwater*, the SCC held that end-of-life ARO are "public duties" owed to fellow citizens and are enforced "in furtherance of the public good."[13] This public duty was similarly described by former Chief Justice Laycraft in *Northern Badger*:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life ... But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. **The duty is owed as a public duty by all the citizens of the community to their fellow citizens.** When the citizen subject to the order complies, the result is not the recovery of

[12] Reasons, *supra* note 1 at para 341 [**Tab 1**].
[13] *Redwater, supra* note 2 at paras 130 and 135 [**Tab 2**].

> money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law.[14] [Emphasis added]

23. It is significant that both the oil and gas industry and the accounting industry recognize the financial importance of ARO. Perpetual itself characterizes the transaction which is the subject of this appeal in its financial statements as the assumption by Sequoia of $128 million of decommissioning obligations, for nominal consideration.[15]

24. The importance of ARO is also exemplified in the bankruptcy context. Since excessive ARO can render a corporation insolvent, the decision to take on ARO must be a decision that warrants consideration in assessing whether a director or officer is fulfilling his or her duties.

25. The problem with the analysis in the Chambers Judge's decision is that by extrapolating from the SCC's decision in *Redwater*, he effectively rendered ARO a nothing in all other statutory contexts. This directly contradicts the experience of both landowners and members of the oil and gas industry. ARO also affects the shareholders and creditors of the company, and the public at large. ARO is a very real obligation that can render companies insolvent, can preclude bank lending, is disclosed in financial reports, and is assessed by the AER. The suggestion that directors need not take ARO into consideration is untenable.

C. ARO should be considered in assessing Oppression Claims and Directors' Duties

1. ARO should be considered in Oppression Claims

26. In assessing an oppression claim, the question is whether the party qualifies as a "complainant" under section 242 of the Alberta *Business Corporations Act*, RSA 2000, c B-9 ("***ABCA***"). A complainant is defined in section 239 as follows:

> (b) "complainant" means
>
> (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

[14] *Northern Badger*, *supra* note 10 at para 33 [**Tab 6**].
[15] Affidavit of Paul Darby, filed on September 23, 2020, at paras 11-14.

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
(iii) a creditor
(A) in respect of an application under section 240, or
(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),
or
(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

[Emphasis added]

27. In assessing whether the Trustee is a "complainant" that is entitled to bring an oppression claim under section 242 of the *ABCA*, the Chambers Judge focused on subsection 238(b)(iii)(B). Specifically, whether the Trustee is a creditor. However, a broader power exists under subsection 238(b)(iv). A complainant can include any other person who the Court decides is a proper person to make an application.

28. It does not follow from the SCC's conclusion that ARO is not a provable claim, that a trustee in bankruptcy cannot qualify as a complainant under section 239. Like directors, trustees in bankruptcy are required to consider the interests of all stakeholders: "While a primary function is to maximize proper recovery for the estate, trustees must maintain a dispassionate approach that is ever mindful of the interests of all stakeholders."[16] ARO unquestionably affects the financial ability of a company to operate. These obligations must be fulfilled, and they cost money to complete.

29. There is no logical reason why only provable claims in bankruptcy should be considered in determining whether a party qualifies as a "proper person". A trustee may well be a proper person if, as alleged here, the assumption of ARO was the event that effectively rendered the company insolvent.

30. Consider a hypothetical case not unlike the present. A small but moderately profitable exploration company acquires a modest income stream for a year, and along with that income stream an enormous number of non-productive defunct wells. The wells carry with them regulatory obligations that will cost hundreds of millions to rectify. When the

[16] *Transtrue Vehicle Safety Inc. v Werenka*, 2015 ABQB 197, at para 22 [**Tab 7**]; see also *Albert Gelman Inc. v 1529439 Ontario Limited*, 2020 ONSC 5531 at para 117 [**Tab 8**].

income stream runs out, it is highly likely the company will be unable to continue as a going concern. The ARO will make it impossible, or unprofitable, to continue, whether or not those obligations are provable claims. Add the additional fact that the transaction is completed between related companies with the same directors. It would be surprising if the shareholders of the acquiring company could not say their directors acted contrary to their statutory and fiduciary duties and in the appropriate case, oppressively.

31. The analysis put forward by the learned Chambers Judge fails to adequately take into account the purpose of the oppression remedy. The SCC held in *BCE Inc v 1976 Debentureholders*, 2008 SCC 69[17] that the oppression remedy is remedial and is focused on "the harm to the legal and equitable interest of stakeholders affected by oppressive acts of a corporation or its directors."[18] The remedy "gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair"[19]; and when presented with an oppression claim, the court must decide if the claimant had a reasonable expectation and if that expectation was violated by conduct which is "oppressive", "unfairly prejudicial", or that "unfairly disregards" the claimant's interest.[20]

32. While the oppression claim against Ms. Riddell-Rose may fail for other reasons, it is the submission of the OWA that ARO must be a factor capable of grounding such a claim in the appropriate circumstances. Apart from the effect it has on many stakeholders, it can have a direct and material effect on a company and its shareholders. These obligations are important and must be appropriately considered by those charged with the control and operations of corporations.

2. ARO should be considered in assessing Directors' Duties

33. The two leading cases on directors' obligations and duties are *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68,[21] and *BCE*. *Peoples* and *BCE* altered the foundation of fiduciary duties in rejecting the shareholder primacy view and embracing a more pluralistic view. The SCC held in *BCE,* citing *Peoples*:

[17] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 [*BCE*] [**Tab 9**].
[18] *BCE, supra* note 17 at para 45 [**Tab 9**].
[19] *BCE, supra* note 17 at para 58 [**Tab 9**].
[20] *BCE, supra* note 17 at para 68 [**Tab 9**].
[21] *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68 [*Peoples*] [**Tab 10**].

> In determining whether they are acting with a view to the best interest of the corporation, it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interest of shareholders, employees, suppliers, creditors, consumers, governments and the environment.[22]

34. In any given instance, the board must have regard to "all relevant considerations", including "the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible or corporate citizen."[23] While directors also owe a higher duty, namely a fiduciary duty, to the corporation, the directors in discharging their normal statutory duty of care must also consider those persons and things affected by the corporations' activities, including land owners. More directly, directors must consider the impact that assumed regulatory obligations will have on the company, its shareholders, the ability to borrow, the ability to transact in the current regulatory environment and so on. The idea that directors would not have an obligation to consider ARO, in light of all these possible effects, is improper.

35. Furthermore, while ARO does not amount to a provable claim, it is clear that it has a value that affects a corporation's operations. ARO is disclosed as a liability in financial disclosure, by public companies like Perpetual and the Industry Intervenors, and its value is certified by directors to be fair and appropriate. ARO is critical to lenders in determining the value of collateral, and whether that collateral has any value at all. ARO is valued by the AER in determining whether to permit certain transactions, and determining the rate at which the obligations must be fulfilled. Finally, ARO is valued by the OWA, who must complete the obligations when no other solvent responsible party remains.

D. Conclusion

36. The finding by the SCC that ARO is not a provable claim in bankruptcy does not lead to the conclusion that ARO need not be considered by directors when making decisions on behalf of the company, nor considered by courts when assessing directors' actions. To find otherwise is to erase a significant obligation from legal consideration by those who arguably need to pay the closest heed to these requirements. With respect, the Supreme Court of Canada did not intend such an extreme outcome in considering the facts in *Redwater*. A

[22] *BCE, supra* note 17 at paras 39-40 [**Tab 9**].
[23] *BCE, supra* note 17 at para 82 [**Tab 9**].

corporation's stakeholders should continue to be protected by requiring the due consideration of ARO by directors and officers.

PART V: RELIEF SOUGHT

37. The OWA respectfully requests that this Honourable Court clarify or correct the reasons of the Chambers Judge in light of the submissions in this Factum.

38. The OWA takes no position on the ultimate issue, whether Rose should be found personally responsible for the matters set out in the Statement of Claim.

39. The OWA requests that this Honourable Court not award costs in favour or against the OWA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Estimated Time for Argument: 20 minutes

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