COURT FILE NUMBER	1801-10960
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	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	**JOINT SUBMISSIONS OF THE DEFENDANTS** ***Re: Letter of the Hon. Mr. Justice B. Nixon dated May 23, 2019***

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1 The Perpetual Defendants and Rose make these joint submissions in response to the letter of the Hon. Mr. Justice D.B. Nixon dated May 23, 2019. That letter enquired as to whether the parties wish to make further submissions regarding:

(a) the decision of the Supreme Court of Canada in *Orphan Well Association v. Grant Thornton Ltd.* (***Redwater***)[1]; and

(b) the decision of the Court of Appeal of Alberta in *Weir-Jones Technical Services Incorporated v. Purolater Courier Inc.* (***Weir-Jones***).[2]

2 Capitalized terms are as defined in the Defendants' briefs filed November 1, 2018.

II. *REDWATER*

A. Positions of the Parties

3 A foundation of the Trustee's claim is the assertion that PEOC's end-of-life asset retirement obligations (**ARO**) resulted in the AER being a creditor[3]:

(a) the BIA claim is premised on the assertion that ARO is an independent liability owed to the AER;

(b) the Trustee seeks standing as a complainant to sue for oppression in relation to AER's reasonable expectations as a contingent ARO creditor of PEOC as at the date of the Transaction; and

(c) the Trustee alleges that Sequoia, as the successor of PEOC, has a claim against Rose, as a PEOC director, on the basis that the ARO was a liability of PEOC at the time of the Transaction.

4 In its Brief, the Trustee placed considerable reliance on the decision of the majority of the Court of Appeal of Alberta in *Redwater*:

- "In *Redwater*, our Court of Appeal confirmed an insolvent entity's regulatory obligations to the AER were provable claims [...]"[4];
- "Based on the Court of Appeal's findings in *Redwater*, there is ample evidence to support the existence of a provable claim by the AER prior to the Asset Transaction"[5];
- "the Court of Appeal in *Redwater* confirmed that regulatory obligations are provable claims under the *BIA*"[6]; and,

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[1] 2019 SCC 5.
[2] 2019 ABCA 49.
[3] See, for example, Rose Brief filed November 1, 2018, para. 82.
[4] Trustee's Brief, para 120.
[5] Trustee's Brief, para 122.

- "per *Redwater*, the AER had a significant provable claim at the time of the Asset Transaction."[7]

5 At the hearing, the Trustee doubled-down on its position that the AER has a provable contingent claim arising from the ARO.[8] The Trustee submitted: "All we have to prove is – all we have to show is that with respect to the ARO claims, those were claims provable in bankruptcy. And that's what the Court held in the *Redwater* decision."[9]

6 The Defendants submitted that, on the basis of the test in *Abitibi*, the AER was not a creditor of PEOC at the time of the Transaction, or of Sequoia at the time of its bankruptcy.[10] In relation to *Redwater*, the Defendants submitted that their position would be doubly strong if the Supreme Court of Canada adopted the dissenting decision of Martin J.A. (as she then was) because that would confirm that the AER does not become a creditor as a result of the enforcement of its powers.

B. *Redwater* holds that the AER is not a creditor

7 The Supreme Court of Canada adopted the reasoning of Martin J.A. and held that the AER has no status as a creditor in relation to a licensee's ARO.[11] Further, even if it could be said that the AER was a creditor, there was not sufficient certainty that the AER would ever perform any remediation work and have a claim for reimbursement.[12] Accordingly, under the *Abitibi* test, the AER did not have a claim provable in bankruptcy.

8 The Court summarized its conclusions as follows:

> 121. In this Court, the [AER] supported by various intervenors, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the "creditor" step of the *Abitibi* test has been interpreted too broadly ... and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the "monetary value" step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the "sufficient certainty" step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater's regulatory obligations were "intrinsically financial". Under *Abitibi*, the sufficient certainty analysis should have focused on whether the [AER] would ultimately perform the environmental work and assert a monetary claim for reimbursement.
>
> 122. In my view, both concerns raised by the [AER] have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the [AER] acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is,

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[6] Trustee's Brief, para 127.
[7] Trustee's Brief, para 130.
[8] Transcript of Proceedings, November 8, 2018, p 78 ll 39-41; p 79 ll 1-40; p 85 ll 29-32.
[9] Transcript of Proceedings, November 8, 2018, p 79 ll 6-9.
[10] Rose Brief filed November 1, 2018, paras. 82-90.
[11] paras. 115-137.
[12] paras. 138-154.

> therefore, not a creditor of Redwater. It is the public, not the [AER] or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. ... [Emphasis added.]

9 The Court made it clear that whether the AER has a *contingent* claim provable in bankruptcy is relevant only to the sufficient certainty test, which presupposes that the AER is a creditor.[13] That is, the "creditor" test cannot be bypassed on the basis of a contingency. It must be established that, as a matter of law, enforcement by the regulator results in the regulator attaining the status of creditor.

10 In this case, the Trustee relies entirely on the argument that the AER had a *contingent claim* against PEOC at the time of the transaction, and has a *contingent claim* provable in the bankruptcy of Sequoia. The position is not sustainable given the holding in *Redwater*. Under the *Abitibi* test, the test is binary: the regulator is either a creditor or not a creditor. *Redwater* holds that the AER is not a creditor.

C. Insufficient certainty under the *Abitibi* test

11 Assuming for the sake of argument that the AER was a creditor, the Supreme Court in *Redwater* found that it was "not sufficiently certain that the [AER] will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process."[14] Further:

> 145. The [AER] is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the [AER] was that the [AER] very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy. ...[15]

12 On the evidence in this matter, no steps have been taken to abandon any Sequoia wells and there are no plans to do so. Rather, the Trustee is attempting to sell Sequoia wells.

13 Accordingly:

(a) at the time of the Transaction, the AER was not a creditor of PEOC; and

(b) at the time of Sequoia's bankruptcy, the AER had no provable claim in bankruptcy.

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[13] paras. 130, 138-9.
[14] para. 142.
[15] Nor could the OWA advance a claim for reimbursement: para. 153.

D. ARO is a component of value, not a liability

14 Originally, the Trustee alleged that the ARO associated with PEOC's wells represented a PEOC liability. At the hearing, the Trustee conceded that it is *not* a liability.[16]

15 In *Redwater*, the Supreme Court held that, rather than being a form of liability, the "end-of-life obligations form a fundamental part of the *value* of the licensed assets, the same as if the associated costs had been paid up front."[17]

16 This finding supports the Defendants' position that the ARO associated with PEOC's assets was taken into account by the arm's length parties to the Transaction.[18] It also further undermines the Trustee's claim that the Transaction was a transfer at undervalue or that PEOC/Sequoia was insolvent at the time of the Transaction or rendered insolvent by it.

E. *Redwater* is dispositive of the Trustee's claims in relation to the AER

17 The decision in *Redwater* thus nullifies causes of action pleaded by the Trustee insofar as they are premised on the AER being a creditor of PEOC or Sequoia.

(i) There are no claims provable in bankruptcy regarding the AER

18 The Trustee submitted: "The three-part test from [*Abitibi*] is set out at paragraph 120 of the Trustee's brief. The Trustee agrees that [if] a regulator cannot satisfy those three requirements, it will not have a provable claim."[19]

19 As a result of *Redwater*, the AER had no provable claim against PEOC at the time of the Transaction, and has no provable claim in the bankruptcy of Sequoia.

(ii) There is no basis for an oppression claim in relation to the AER

20 *Redwater* holds that the AER was not a creditor or contingent creditor of PEOC at the time of the Transaction, and that there was no certainty that the AER would undertake the abandonment of any particular PEOC wells. Thus, the AER has no claim as a creditor in the bankruptcy of Sequoia.

21 The Trustee argued that creditor oppression claims do not turn on findings that the claims are provable in bankruptcy.[20] That is technically correct, but oppression cases require that the claimant must be an actual or contingent creditor at the time of the Transaction, and even then the Court has discretion whether to grant standing.[21]

22 The Trustee's argument ignores the fact that the AER was not a creditor or contingent creditor of PEOC at the time of the Transaction. As confirmed by *Redwater*, as a matter

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[16] November 8 hearing transcript, p. 80, l. 10-38.
[17] para. 157.
[18] See, for instance, Rose Brief filed November 1, 2018, para. 9 (Sequoia business plan and story).
[19] Trustee's Response to prior questions of the Court, pp. 11 (regarding question 21).
[20] Trustee's Response to prior questions of the Court, pp. 10-11 (regarding question 21) and p. 26 (question 44).
[21] The complainant must then prove the violation of reasonable expectations held in the capacity as creditor. In this case, the Trustee adduced no such evidence.

of law, the AER is not a creditor in respect of a licensee's ARO. There is no other basis on which the AER could have been a creditor of PEOC at the time of the Transaction.

23 Moreover, *Redwater* fortifies Rose's position that she did not personally benefit from the Transaction as alleged by the Trustee. The Trustee argued that a benefit can be calculated on the basis that the ARO was a liability[22], but *Redwater* makes it clear that the ARO is not a liability; rather, it is a component of the value of the asset.

24 Accordingly, a key premise of the oppression claim against Rose is extinguished by *Redwater.*

(iii) As a director of PEOC, Rose owed no duties to PEOC in relation to the ARO as a liability

25 The premise of the Trustee's claim is that, as a director of PEOC, Rose failed to consider the implications of PEOC's ARO as a liability of PEOC.[23]

26 *Redwater* holds that the ARO was not a liability. On the contrary, it is an embedded component of value.

27 The entire premise of the Trustee's claim against Rose in this regard is extinguished by *Redwater.*

III. *WEIR-JONES*

28 The test for summary dismissal was addressed at paragraphs 21 to 27 of the Perpetual Defendants' Brief. Reference was made to the conflicting Court of Appeal authorities supporting the balance of probabilities test and the higher unassailable test. The test was also addressed at paragraphs 29 to 31 of the Trustee's Brief, with reference only to the balance of probabilities test. The Trustee did not challenge that this is an appropriate case for summary judgment.

29 The Court in *Weir-Jones* resolved the rift in the jurisprudence and concluded: "The threshold burden on the moving party with respect to the factual basis of a summary judgment application is therefore proof on a balance of probabilities".[24] This means the burden on applicants for summary judgment is the lower of the two possible standards extant when these applications were argued.

30 Importantly, not only does the lower of the two standards apply, but there appears not to be any difference between the parties on the principles for summary dismissal; rather the differences arise in the parties' analysis of the legal consequences arising from the facts.

31 The statements of the Court of Appeal in *Weir-Jones*, relying on *Hryniak v Maudlin*[25], provide overwhelming support for the proposition that the Defendants' application is

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[22] Trustee's Response to question 48.
[23] See, for instance, Statement of Claim, para. 16.3.
[24] *Weir-Jones*, para 31.
[25] 2014 SCC 7.

suitable for summary determination. It is difficult to isolate a single statement or paragraph and reliance is placed on the entire reasons of Justice Slatter for the majority. Certain passages are particularly helpful (emphasis added in quotes below):

Paragraph 15:

> In *Hryniak v. Mauldin* the Supreme Court of Canada called for a "shift in culture" with respect to the resolution of litigation. Reliance on "the conventional trial no longer reflects the modern reality and needs to be re-adjusted" in favour of more proportionate, timely and affordable procedures. Summary judgment procedures should increasingly be used, and the previous presumption of referring all matters to trial should end...

Paragraph 21:

> *Hryniak v. Mauldin* at para. 49 sets out a three part test for when summary judgment is an appropriate procedure:
>
> > 49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result....

Paragraph 25:

> ... It comes down to whether summary disposition is possible, considering the record, the evidence, the facts, and the law that must be applied to them. If the record allows the judge to make the necessary findings of fact and apply the law, then the summary procedure should be used unless there is a substantive reason to conclude that summary disposition would not "achieve a just result". ...

Paragraph 28:

> There was a time when there were numerous standards of proof used in civil law. The uncertainty and complications created were eliminated by the decision in *C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.) at para. 40, [2008] 3 S.C.R. 41 (S.C.C.) which held that there is only one standard of proof in civil law: proof on a balance of probabilities. That standard was confirmed in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 (S.C.C.) at paras. 35-7, [2016] 2 S.C.R. 720 (S.C.C.). Specifically, "obvious", "unassailable" and "very high likelihood" are no longer recognized standards of proof in Alberta civil proceedings.

Paragraph 48:

> There is no policy reason to cling to the old, strict rules for summary judgment. This can only serve to undermine the shift in culture called for by *Hryniak v. Mauldin*. Summary judgment should be used when it is the proportionate, more expeditious and less expensive procedure. It frequently will be. Its usefulness should not be undermined by attaching conclusory and exaggerated criteria like "obvious" or "high likelihood" to it.

32 In summary, not only did the Court of Appeal in *Weir-Jones* resolve the differences regarding the burden of proof, but it re-affirmed and explained *Hryniak*, all of which is entirely supportive of the Defendants' positions on their summary dismissal applications in this case. The record in this case allows the Court to make the necessary findings of fact and apply the law. Here, summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result.

June 4, 2019

RESPECTFULLY SUBMITTED.

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