

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 2101-0021AC

TRIAL COURT FILE NUMBER: 1801-10960

REGISTRY OFFICE: CALGARY

PLAINTIFF/APPELLANT: 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 (NOT A PARTY): ORPHAN WELL ASSOCIATION

STATUS ON APPEAL: PROPOSED INTERVENOR
STATUS ON APPLICATION: APPLICANT

DOCUMENT: **MEMORANDUM OF ARGUMENT OF ORPHAN WELL ASSOCIATION, THE PROPOSED INTERVENOR**

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I. INTRODUCTION¹

1. The Applicant, the Orphan Well Association ("**OWA**"), seeks an Order from this Court pursuant to Rule 14.58(1) of the *Alberta Rules of Court*² granting it leave to intervene in the within Appeal, with the right to participate in all proceedings related to the status of abandonment and reclamation obligations ("**ARO**") in light of the Supreme Court of Canada decision in *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 ("**Redwater**")³ and this Court's decision in *PricewaterhouseCoopers Inc v Perpetual Energy* ("**Perpetual #1**").⁴

2. The OWA submits that it is directly affected by this issue and will offer submissions to this Court which are useful and different given its role as the party ultimately responsible for abandoning and reclaiming orphaned oil and gas assets in Alberta.

3. The OWA has had the benefit of reading the Application and Memorandum of Argument of Canadian Natural Resources Limited, Cenovus Energy Inc., and Torxen Energy Ltd. (collectively, the "**Industry Intervenors**"). The OWA adopts and restates the submissions of the Industry Intervenors in addition to the submissions that follow.

II. FACTUAL BACKGROUND

4. 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**").

5. 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 *Bankruptcy and Insolvency Act*⁵ (the "**BIA Claim**").

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.*, 2021 ABQB 2 [Reasons] [Tab 1].

² *Alberta Rules of Court*, Alta Reg 124/2010 [Rules] [Tab 2].

³ *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 [Redwater] [Tab 3].

⁴ *PricewaterhouseCoopers Inc v Perpetual Energy Inc.*, 2021 ABCA 16 [First Appeal] [Tab 4].

⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s 96 [BIA] [Tab 5].

6. On August 2, 2018, the Defendants filed applications to strike or summarily dismiss the Trustee's Statement of Claim (the "**First Summary Dismissal**"). The First Summary Dismissal was reported on January 13, 2020.⁶ Both the Defendants and the Trustee appealed the First Summary Dismissal to this Court (the "**First Appeal**"). The OWA and the Industry Intervenors were granted Intervenor status in the First Appeal on November 13, 2020.

7. The First Appeal was heard on December 10, 2020, with reasons, which substantially overruled the First Summary Dismissal, being issued on January 25, 2021 (the "**First Appeal Decision**").⁷

8. On February 25, 2020, the Perpetual Defendants filed applications to strike or summarily dismiss the *BIA* Claim (the "**Second Summary Dismissal**"). On July 24, 2020, the OWA and the Industry Intervenors were granted intervenor status with respect to the Second Summary Dismissal. In respect of the Second Summary Dismissal, the OWA made written and oral submissions related to the *BIA* Claim and filed Affidavit evidence which the Court found to be informative.⁸

9. The Second Summary Dismissal, which is the subject of the within appeal, was heard by Nixon, J., on October 1 and 2, 2020 and the Reasons were issued on January 14, 2021. The Reasons held that ARO were estimates that (i) had yet to be fully constituted, (ii) were not exigible, and (iii) were absent existing creditors, and should therefore “not be included in the determination of the solvency of an entity”⁹.

III. ARGUMENT

10. Granting intervenor status is discretionary, though the Alberta Court of Appeal has held that whether, as here, a proposed intervenor was granted intervenor status in the Court below is a relevant consideration in determining whether intervenor status is appropriate on appeal.¹⁰

11. In determining whether to grant leave to intervene, the Court must first consider the subject matter of the proceeding, and then determine the proposed intervenor's interest in the

⁶ *PricewaterhouseCoopers Inc v Perpetual Energy Inc.*, 2020 ABQB 6 [Tab 6].

⁷ *First Appeal*, *supra* note 4 [Tab 4].

⁸ *Reasons* at para 195 [Tab 1].

⁹ *Ibid* at para 155.

¹⁰ *Suncor Energy Inc. v Unifor Local 707A*, 2016 ABCA 265 at paras.15-20 [*Suncor*] [Tab 7]; *PT v Alberta*, 2018 ABCA 312 at para 4 [*PT*] [Tab 8].

subject matter¹¹ by considering (a) whether the intervenor will be directly and significantly affected by the outcome of the matter before the Court; and (b) whether the intervenor has some expertise or fresh perspective to assist the court in resolving the matter.¹²

12. This Court has also held that the following additional considerations are relevant in circumstances where a proposed intervenor has been granted intervenor status in the Court below: the role taken by the intervenors in the court below; whether the submissions of the intervenors were necessary or helpful in informing the decision being reviewed; whether the issues on appeal are the same as in the court below, or whether the issues as framed on appeal could continue to impact the applicants' interests; and whether the particular perspective of the applicants can continue to inform the discussion as now framed on appeal.¹³

A. The Subject Matter of the Proceeding

13. As to the Action as a whole, the Trustee seeks, among other things, an order setting aside the Asset Transaction and declaring the Asset Transaction void against the Trustee based on four approaches.¹⁴ The OWA seeks leave to intervene on the *BIA* Claim and on points of law that deal with the status of abandonment and reclamation obligations in relation to issues raised by the Perpetual Defendants, consistent with the OWA's intervention in the First Appeal and the Second Summary Dismissal.

14. The Second Summary Dismissal sought to strike or dismiss the *BIA* Claim based on argument that because regulatory obligations are not provable claims under the *BIA*, they cannot factor in to the determination of PEOC's insolvency, notwithstanding that shedding these obligations was financially motivated.

B. The OWA's Interest in the Subject Matter of the Proceeding

15. This Appeal is another step in resolving the appropriate characterization of ARO, the same issue that arose in the First Appeal and the Second Summary Dismissal. This issue continues to directly affect and remain significant to the OWA, both with respect to the ARO in the instant case and the treatment of ARO generally.

¹¹ *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238 at para 8 [Tab 9].

¹² *Ibid.*

¹³ *Suncor*, *supra* note 10 at paras. 15-20 [Tab 7]; *PT v Alberta*, *supra* note 10 at para. 4 [Tab 8].

¹⁴ Statement of Claim at Remedy Sought, para 1.

16. 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, causing it significant financial harm.

17. If the Court finds that abandonment and reclamation obligations, compliance with which could render an entity insolvent, are not a factor to be considered in an application under section 96 of the *BIA*, it will likely result in more orphaned and abandoned oil and gas assets in Alberta, which will become the responsibility of the OWA. This will influence the OWA and its ability to carry out its mandate, as well as potentially the solvency of other producers.¹⁵

18. The Court of Appeal has held that an organization may be "specifically affected" by a decision that would have a "significant effect on its ability to achieve its mandate."¹⁶ If the Transactions are allowed to stand without review as transfers at under value, this sends a message to producers that they need not be responsible for their own abandonment and reclamation obligations, leaving the OWA, and by extension, other producers, to pay abandonment and reclamation costs. Further, if transactions of this nature become routine, it could threaten the solvency of other producers, potentially leaving the cost of closure to be borne by Albertans. This could significantly impact the OWA's mandate.

19. In addition, a narrow characterization of section 96 of the *BIA* will significantly undermine its purpose, which is to prevent and rectify situations where on the eve of insolvency companies structure their affairs to prefer one creditor over another. It is not a requirement of section 96 that a transaction include a "claim" or "liability." Whether these obligations are "claims" within the context of the *BIA* is of no moment if they are obligations that have a direct and foreseeable financial impact on those who hold them. That is why they are reflected in balance sheets. A transfer of regulatory obligations on the eve of insolvency will equally prefer some creditors over others. Any other interpretation undermines the purpose of the section and overlooks the reality of the situation.

20. The issues raised in this appeal are the same as those raised in the Second Summary Dismissal and nearly identical to those raised in the First Appeal, which substantially overturned

¹⁵ Affidavit of Lars De Pauw, filed October 30, 2020 at para 12.

¹⁶ *Wilcox v Her Majesty the Queen in Right of Alberta*, 2019 ABCA 385 at para 14 [TAB 10].

the First Summary Dismissal, including the Chambers Judge's articulation of the impact of ARO on an entity's solvency. Consistent decisions in this regard are critical to the OWA being able to administer its mandate.

21. The OWA's presence is necessary to the Appeal as the OWA will bring a useful and different perspective that is not put forward by the parties. When assessing whether a party brings particular expertise to the issues to be determined, regard must be had to the existing participants in the action.¹⁷ The interests of the Trustee are different than those of the OWA. The Trustee's interest is to maximize the value of the estate in the bankruptcy. The OWA's interest is to decrease the number and frequency of abandoned and orphaned oil and gas assets, and ultimately the financial obligations on the OWA and industry.

22. The parties will not be prejudiced by granting the OWA leave to intervene. The OWA is prepared to expeditiously proceed with this application and intervenor Factum. There will be no delay associated with granting this Application.

23. Finally, the proposed intervention by the OWA will not widen the *lis* between the parties. The proposed submissions of the OWA relate only to issues already before the Court. Further, the Court has the power to control the scope of the intervention by the OWA so that it does not widen the *lis* between the parties.¹⁸

IV. CONCLUSION

24. For the reasons set out above, the OWA respectfully asks the Court to grant it leave to intervene in this Appeal on terms that the Court considers just, in respect of the submissions in the Notice of Application filed on May 24, 2021.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on this 24th day of May, 2021.

BENNETT JONES LLP

Per:

Ken Lenz, Q.C. / Andrea Stempien
Counsel for the Proposed Intervenor, the
Orphan Well Association

¹⁷ Reference re Impact Assessment Act, 2020 ABCA 94 at para 13 [TAB 11].

¹⁸ Ecojustice Canada Society v Alberta, 2020 ABQB 364 at para 72 [TAB 12].

TABLE OF AUTHORITIES

1. *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, [2021 ABQB 2](#).
2. *Alberta Rules of Court*, [Alta Reg 124/2010](#).
3. *Orphan Well Association v Grant Thornton Ltd.*, [2019 SCC 5](#).
4. *PricewaterhouseCoopers Inc v Perpetual Energy Inc.*, [2021 ABCA 16](#).
5. *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#).
6. *PricewaterhouseCoopers Inc v Perpetual Energy Inc.*, [2020 ABQB 6](#).
7. *Suncor Energy Inc. v Unifor Local 707A*, [2016 ABCA 265](#).
8. *PT v Alberta*, [2018 ABCA 312](#).
9. *Orphan Well Association v Grant Thornton Limited*, [2016 ABCA 238](#).
10. *Wilcox v Her Majesty the Queen in Right of Alberta*, [2019 ABCA 385](#).
11. *Reference re Impact Assessment Act*, [2020 ABCA 94](#).
12. *Ecojustice Canada Society v Alberta*, [2020 ABQB 364](#).