

COURT OF APPEAL OF ALBERTA



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/APPLICANTS PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE

STATUS ON APPEAL RESPONDENTS
STATUS ON APPLICATION RESPONDENTS

APPLICANTS ORPHAN WELL ASSOCIATION, CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., and TORXEN ENERGY LTD.

STATUS ON APPEAL PROPOSED INTERVENORS
STATUS ON APPLICATIONS APPLICANTS

DOCUMENT MEMORANDUM OF ARGUMENT OF PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, and PERPETUAL OPERATING CORP. (the Perpetual Respondents)

RE: APPLICATIONS FOR LEAVE TO INTERVENE

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: Counsel for Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp.:

Burnet, Duckworth & Palmer LLP
2400, 525 - 8 Avenue SW
Calgary, Alberta T2P 1G1
Lawyers: D.J. McDonald, QC/Paul G. Chiswell/Michael S. Deyholos
Phone: (403) 260-5724 / 0201 / 0156
Fax: (403) 260-0332
Email: djm@bdplaw.com/pgc@bdplaw.com/mdeyholos@bdplaw.com
File No. 59140-43

CONTACT
INFORMATION OF ALL
OTHER PARTIES:

Counsel for PriceWaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity:

De Waal Law
1010, 505 – 3rd Street SW
Calgary, AB T2P 3E6
Lawyers: Rinus de Waal / Luke Rasmussen
Phone: (403) 266-0013 / 0014
Fax: (403) 266-2632
Email: rdewaal@dewaallaw.com / lrasmussen@dewaallaw.com

Counsel for Susan Riddell Rose:

Norton Rose Fulbright Canada LLP
3700, 400 Third Ave SW
Calgary, Alberta T2P 4H2
Lawyers: Steven H. Leidl, QC / Gunnar Benediktsson
Phone: (403) 267-8140 / 8256
Fax: (403) 264-5973
Email: steven.leidl@nortonrosefulbright.com /
gunnar.benediktsson@nortonrosefulbright.com

Counsel for Orphan Well Association:

Bennett Jones LLP
4500 Bankers Hall East, 855-2nd Street SW
Calgary, Alberta T2P 4K7
Lawyers: Kenneth T. Lenz, QC / Andrea Stempien
Phone: 403-298-3317 / 3148
Fax: 403-265-7219
Email: lenzk@bennettjones.com / stempiana@bennettjones.com

Counsel for Canadian Natural Resources Limited, Cenovus Energy Ltd. and Torxen Energy Ltd.:

Parlee McLaws LLP
330, 421 – 7th Avenue SW
Calgary, Alberta T2P 4K9
Lawyers: G. Scott Watson / Charles W. Ang
Phone: (403) 294-7038 / 3457
Fax: (403) 767-8875
Email: swatson@parlee.com / cang@parlee.com

TABLE OF CONTENTS

I. INTRODUCTION	1
II. BACKGROUND.....	1
A. The Action and Decision under Appeal	1
B. The <i>BIA</i> Summary Dismissal Application.....	2
C. The OWA's Application to Intervene in this Court	2
III. ARGUMENT	3
A. The Perpetual Appeal	3
B. The Trustee Appeal	4
IV. RELIEF SOUGHT	5

I. INTRODUCTION ¹

1. The Orphan Well Association (**OWA**) seeks leave to intervene in Appeal Nos. 1901-0255AC (the **Trustee Appeal**) and 1901-0262AC (the **Perpetual Appeal**; together, the **Appeals**). Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd. (the **Industry Applicants**) seek leave to intervene only in the Trustee Appeal.

2. This Memorandum primarily addresses the OWA's application for leave to intervene in the Perpetual Appeal. The Perpetual Respondents adopt the submissions made on behalf of Ms. Rose in the Trustee Appeal, subject to additional submissions below.

3. The issue the OWA seeks to address—"whether [ARO] should be taken into account pursuant to Section 96 of the [BIA]"—is not an issue in the Perpetual Appeal or the Trustee Appeal. That issue is an issue in a different application in the underlying Queen's Bench action. A decision on that application is under reserve.

II. BACKGROUND

A. The Action and Decision under Appeal

4. On August 2, 2018, the Trustee sued the Perpetual Respondents and Ms. Rose. The Statement of Claim seeks to set aside a sale of assets pursuant to the Asset Transaction, claiming it was a transfer at undervalue contrary to s. 96 of the *BIA*, and makes three other claims: the Oppression Claim, Director Claim and Public Policy Claim.

5. On August 27, 2018, the Perpetual Respondents and Ms. Rose applied to strike or summarily dismiss the Statement of Claim. The OWA did not seek to intervene in those applications, which were heard in late 2019. In written reasons issued January 13, 2020, Justice Nixon dismissed the application to strike or summarily dismiss the *BIA* Claim and granted the applications to strike or dismiss all other claims. The Perpetual Respondents appealed the decision regarding the *BIA* Claim. The Trustee appealed all the others.

¹ This Memorandum of Argument uses the abbreviations and defined terms in the reasons for judgment of the Honourable Justice D.B. Nixon dated January 13, 2020 (the **Reasons**). The Reasons had not been issued when the Appeal Record was prepared, and are attached as Appendix A to the Factum of the Appellants filed May 29, 2020 in the Perpetual Appeal (**Perpetual Appellants' Factum**). The Order of the Honourable Justice D.B. Nixon filed on February 18, 2020 is attached as Exhibit B to the Perpetual Appellants' Factum.

6. The application to strike or summarily dismiss the *BIA* Claim, and the Perpetual Appeal, address only a discrete threshold issue that is one of the essential elements the Trustee must prove—"were the parties dealing at arm's-length with each other within the meaning of the *BIA*" (the ***BIA* Arm's Length Issue**). Other essential elements of s. 96—was there a transfer of undervalue and was PEOC insolvent or rendered insolvent by the transfer—were not addressed on the application and are not issues on appeal. The applications for leave to intervene in the Appeals fail to mention this essential background.

B. The *BIA* Summary Dismissal Application

7. On February 25, 2020, the Perpetual Respondents filed the *BIA* Summary Dismissal Application to strike or summarily dismiss the *BIA* Claim, raising two different threshold issues: "was PEOC insolvent at the time of the transfer or rendered insolvent by it within the meaning of the *BIA*?" and "was there a transfer at undervalue within the meaning of the *BIA*?"²

8. The OWA and Industry Applications were granted intervenor status in that application, which was heard on October 1 and 2, 2020. Justice Nixon reserved. One of the key questions Justice Nixon is considering is how, if at all, ARO should be considered in a s. 96 analysis. The OWA obtained intervenor status to make submissions on the "*interaction between section 96 of the BIA and the regulatory obligations with regard to the 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 a liability and render a person insolvent for the purposes of the BIA.*"³ The OWA filed several briefs and made oral submissions on this and other related issues, arguing that ARO is an obligation due or accruing due and can render a person insolvent for the purposes of s. 96 even if that obligation is not considered a liability or a claim.

C. The OWA's Application to Intervene in this Court

9. The OWA now seeks leave to intervene in the Perpetual Appeal addressing the *BIA* Arm's Length Issue, before Justice Nixon has decided the *BIA* Summary Dismissal Application. The

² Application of the Perpetual Energy Defendants filed February 25, 2020 at para 1 [**Supplemental Materials filed November 5, 2020 (Supplemental Materials), Tab 1**].

³ Application by the OWA filed July 10, 2020 at para 10(a) [**Supplemental Materials, Tab 2**]; Transcript of Proceeding before the Honourable Justice D.B. Nixon dated July 24, 2020 at 14/10-15 [**Supplemental Materials, Tab 4**].

OWA seeks to make submissions on the same issues it argued before Justice Nixon and Justice Nixon is now considering.⁴ Specifically, the OWA proposes to make submissions on the "*interaction between section 96 of the BIA and the regulatory obligations with regard to [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*".⁵

10. The OWA does not seek to make submissions on whether the Asset Transaction was at arm's length, whether the Trustee had standing to bring the Oppression Claim or whether the Public Policy Claim was properly struck (the Director Claim and the Release Issue do not involve the Perpetual Respondents).

III. ARGUMENT

A. The Perpetual Appeal

11. The OWA seeks to intervene in the wrong appeal. If there is an appeal from the decision that Justice Nixon will render in the *BIA* Summary Dismissal Application, the OWA may reasonably apply for leave to intervene.

12. The OWA claims an interest in the subject matter of the "proceeding", but incorrectly describes the "proceeding" as the underlying Court of Queen's Bench action when seeking to intervene in the Perpetual Appeal.⁶ The subject matter of the Perpetual Appeal is whether the parties to the Asset Transaction were dealing at arm's length within the meaning of the *BIA*. The OWA has nothing to add to that inquiry; it does not even purport to do so. This is not surprising—it is inconceivable that the OWA would have any interest in whether parties to a private transaction were acting at arm's length, or that the OWA could offer any special expertise or fresh perspective on that subject.

13. Instead, the OWA seeks to make submissions in this Court now on ARO and how it should be considered in determining whether a person was insolvent or whether a transfer was at

⁴ See for example: Application of the OWA for Leave to Intervene filed and served on October 30, 2020 (**OWA Application**) at paras 1, 10.

⁵ OWA Application at para 10(a).

⁶ Memorandum of Argument of the OWA filed October 30, 2020 at paras 11-14; *Wilcox v Her Majesty the Queen in right of Alberta*, 2019 ABCA 385 (*Wilcox*) at para 11 [**Tab 1**].

undervalue for the purposes of s. 96 of the *BIA*. Those issues have nothing to do with the Perpetual Appeal. The Appellants' Factum in the Perpetual Appeal does not even mention ARO. The Respondent's Factum mentions it just six times, but only in the Statement of Facts. Neither party addresses ARO in their arguments, for the simple reason that is not an issue in the Perpetual Appeal.

14. The Court should not grant leave to entertain arguments on issues that are not before it. An intervener must take the case as he finds it. An appeal is not the venue for arguments which were not pursued in the court below or which cannot be addressed on the evidentiary record in the court below.⁷

15. The issues that the OWA wants to argue have already been argued by the parties and the intervenors in the *BIA* Summary Dismissal Application and are on reserve. If leave were to be granted in this Court now, Justice Nixon and this Court will be considering the same issues at the same time. This Court should not pre-empt Justice Nixon's findings on the *BIA* Summary Dismissal Application in an appeal that addresses a different subject. After Justice Nixon makes a decision on the *BIA* Summary Dismissal Application, and if the unsuccessful party appeals, the Court of Appeal will have the benefit of his reasons. The OWA may seek leave to intervene in that appeal.

16. In short, the OWA does not meet the test for intervenor status.⁸ It does not have an interest in the subject matter of the Perpetual Appeal. It does not have, nor does it claim to have, a special expertise or fresh perspective on the issue before this Court. Its proposed submissions are unnecessary and irrelevant. The Perpetual Respondents would be prejudiced by its intervention and would be required to consider on appeal an issue that was not addressed in their Factum. The OWA's intervention would not only widen the *lis* but create a new *lis* that does not exist in this appeal.

B. The Trustee Appeal

17. The Perpetual Respondents are respondents only in respect of the Oppression Claim and the Public Policy Claim in the Trustee Appeal. The Perpetual Respondents agree with and adopt

⁷ *Stewart Estate v 1088294 Alberta Ltd*, 2014 ABCA 222 at para 10 [Tab 2].

⁸ *Wilcox* at paras 10-13 [Tab 1].

Ms. Rose's submissions with respect to the Oppression Claim.

18. The Industry Applicants' purported interest in the Trustee Appeal is precedential. Their objective is to reverse the Chambers Judge's finding that ARO is not a "liability" for the purposes of the Oppression Claim because this *might* create a precedent for his s. 96 analysis in the *BIA* Summary Dismissal Application. Jurisprudential concerns are not a sufficient reason for intervention.⁹ The Industry Applicants rely on *Reference Re Workers Compensation Act*, but acknowledge that it is distinguishable as they are not "parties" to the *BIA* Summary Dismissal Application and ignore the Supreme Court's statement that such an interest is a "tenuous basis upon which to base an application for intervention".¹⁰

19. The Public Policy Claim has nothing to do with ARO or the *BIA*. It is about Justice Nixon's conclusion that the illegality, public policy and equitable rescission claims in the Statement of Claim do not disclose causes of action. Neither the OWA nor the Industry Applicants claim to have any interest, expertise or fresh perspective with respect to, or propose to make submissions on, the Public Policy Claim.

IV. RELIEF SOUGHT

20. The Perpetual Respondents seek an order dismissing the applications with costs.

RESPECTFULLY SUBMITTED THIS 6th DAY OF NOVEMBER, 2020.

BURNET, DUCKWORTH & PALMER LLP

Per:



D.J. McDonald, Q.C., Paul G. Chiswell &
Michael S. Deyholos
Counsel for the Perpetual Respondents

⁹ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 349 at para 29 [Tab 3].

¹⁰ Memorandum of the Industry Applicants dated October 30, 2020 at para 11; *Reference Re Workers Compensation Act 1983 (Nfld)*, [1989] 2 SCR 335 at para 11 [Tab 4]. The Supreme Court granted intervenor status on this basis only because the Attorney General (the intervenor's counterparty in the other pending litigation) had an automatic right to intervene, so there would be an "aura of unfairness" in denying intervention to its counterparty.

Table of Authorities

1. *Wilcox v Her Majesty the Queen in right of Alberta*, 2019 ABCA 385
2. *Stewart Estate v 1088294 Alberta Ltd*, 2014 ABCA 222
3. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 349
4. *Reference Re Workers Compensation Act 1983 (Nfld)*, [1989] 2 SCR 335