

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

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## I. INTRODUCTION<sup>1</sup>

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*<sup>2</sup> 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**")<sup>3</sup> 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**").<sup>4</sup>

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.

## II. FACTUAL BACKGROUND

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*.

5. In response, the Defendants filed two separate Statements of Defence and two essentially similar Applications. These Applications raised five claims: the *BIA* Claim, the Oppression Claim, the Public Policy Claim, the Release Issue, and the Director Claim.<sup>5</sup>

<sup>1</sup> 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].

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

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

<sup>4</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s 96 [BIA] [Tab 4].

<sup>5</sup> Reasons, *supra* note 1 at para 5 [Tab 1]

These Applications were heard by Justice Nixon and his decision was reported on January 13, 2020.<sup>6</sup> That decision is the subject of this Appeal.

6. On February 25, 2020, the Perpetual Defendants applied to strike or alternatively, for summary judgment of the claim (the "**BIA Summary Judgment Application**").

7. 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.

### III. ARGUMENT

8. Granting intervenor status is discretionary, though the Alberta Court of Appeal has commented that "a court must be reluctant to decline assistance from an organization whose members are the major participants in a business or sector that will be directly affected by the Court's decision and would be in a position to address the implications of different potential solutions."<sup>7</sup>

9. In determining whether to grant leave to intervene, the starting point of the Court's analysis is a two-part test: the Court must first consider the subject matter of the proceeding, and then determine the proposed intervenor's interest in the subject matter.<sup>8</sup>

10. In determining whether a proposed intervenor has an interest in the subject matter of the subject matter of a proceeding, the Court should consider (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.<sup>9</sup> Together with the above, the Alberta Court of Appeal has also established several relevant factors for the Court to consider in determining whether to grant intervenor status in *Redwater*.<sup>10</sup>

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<sup>6</sup> Reasons, *supra* note 1 [Tab 1].

<sup>7</sup> *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2017 ABCA 280 at para 11 [Tab 5]; *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340 at para 10 [Edmonton] [Tab 6].

<sup>8</sup> *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238 at para 8 [Redwater] [Tab 7]; see also *Ecojustice Canada Society v Alberta*, 2020 ABQB 364 at para 42 [Ecojustice] [Tab 8].

<sup>9</sup> *Ecojustice*, *ibid* [TAB 8].

<sup>10</sup> *Orphan Well*, *supra* note 8 at para 10 [TAB 7].

### **A. The Subject Matter of the Proceeding**

11. 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.<sup>11</sup> Alternatively, the Trustee seeks judgment against the Defendants for the difference between the value received by PEOC and the value of the consideration given by PEOC under the Asset Transaction. As noted above, the Trustee's claim is grounded in four approaches. 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.

12. The Perpetual Defendants' *BIA* Summary Judgment Application seeks to strike the *BIA* Claim pursuant to rule 3.68 of the *Rules* based on an argument that because regulatory obligations are not strictly claims under the *BIA*, they cannot factor in to the determination of PEOC's insolvency, notwithstanding that, shedding these obligations was financially motivated and by the Defendant, Ms. Riddell Rose's, own admission, significantly improved Perpetual's balance sheet.

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

13. OWA is directly and significantly affected by the issues in this case and can offer a unique perspective and special expertise that will be helpful to this Court. 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.

14. 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

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<sup>11</sup> Statement of Claim, at Remedy Sought, para 1.

OWA and its ability to carry out its mandate, as well as potentially the solvency of other producers.<sup>12</sup>

15. 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."<sup>13</sup> If the Transactions are allowed to stand without review and oversight by this Court, it threatens the integrity of the regulatory system by sending 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.<sup>14</sup> This could significantly impact the OWA's mandate.

16. 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.

17. Justice Nixon in the reasons for the decision of the case under appeal comments extensively on the issue on which the OWA seeks to intervene.<sup>15</sup> While these comments are largely in the context of the oppression remedy and director liability claims, reference is made to section 96 of the *BIA* and they are central to that claim. Fundamentally, the OWA maintains that just because ARO does not amount to a provable claim, it does not follow that it should receive no consideration by the Court, particularly with respect to transfers at undervalue.

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<sup>12</sup> Affidavit of Lars De Pauw, filed October 30, 2020 at para 12.

<sup>13</sup> *Wilcox v Her Majesty the Queen in Right of Alberta*, 2019 ABCA 385, at para 14 [TAB 9].

<sup>14</sup> *Ibid*, at para 14.

<sup>15</sup> See Reasons, *supra* note 1 at paras 138-180, 217-232, 356-363 and 368 [Tab 1].

18. The OWA's presence is necessary to the Appeal as the OWA will bring a useful and different perspective that is not protected by the parties to the Appeal. 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.<sup>16</sup> 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. A sustainable abandonment and reclamation regime is necessary to landowners as well, who are the immediate victims of the activity being addressed in this litigation.

19. The parties here will not be prejudiced by granting the OWA leave to intervene. The OWA is prepared to proceed with this application as expeditiously as possible and is prepared to file its factum to intervene no later than November 15, 2020. The OWA does not expect that its submissions at that application will impact the length of time required to hear the Appeal. There will be no delay associated with granting this Application.

20. Finally, the proposed intervention by the OWA will not widen the *lis* between the parties. There has been no suggestion that this is the case and, in any event, 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.<sup>17</sup>

#### IV. CONCLUSION

21. 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 October 30, 2020.

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<sup>16</sup> *Reference re Impact Assessment Act*, 2020 ABCA 94 at para 13 [TAB 10].

<sup>17</sup> *Ecojustice*, *supra* note 8, at para 72 [TAB 8].



ALL OF WHICH IS RESPECTFULLY SUBMITTED on this 30th day of October, 2020.

BENNETT JONES LLP

*Ken Lenz*

Per:

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Ken Lenz, Q.C. / Andrea Stempien / Ashley  
Bowron  
Counsel for the Proposed Intervenor, the  
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**TABLE OF AUTHORITIES**

1. [PricewaterhouseCoopers Inc v Perpetual Energy Inc.](#), 2020 ABQB 6.
2. [Alberta Rules of Court](#), Alta Reg 124/2010.
3. [Orphan Well Association v Grant Thornton Ltd.](#), 2019 SCC 5.
4. [Bankruptcy and Insolvency Act](#), RSC 1985, c B-3.
5. [Canadian Centre for Bio-Ethical Reform v Grande Prairie \(City\)](#), 2017 ABCA 280.
6. [Edmonton \(City\) v Edmonton \(Subdivision and Development Appeal Board\)](#), 2014 ABCA 340.
7. [Orphan Well Association v Grant Thornton Limited](#), 2016 ABCA 238.
8. [Ecojustice Canada Society v Alberta](#), 2020 ABQB 364.
9. [Wilcox v Her Majesty the Queen in Right of Alberta](#), 2019 ABCA 385.
10. [Reference re Impact Assessment Act](#), 2020 ABCA 94.