Registrar's Stamp


**COURT OF APPEAL OF ALBERTA**

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| 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 |
| INTERVENORS: | ORPHAN WELL ASSOCIATION, CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., and TORXEN ENERGY LTD. |
| DOCUMENT: | **JOINT FACTUM OF THE RESPONDENTS**<br><br>**RE: INTERVENOR FACTUM OF CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., and TORXEN ENERGY LTD.** |

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

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## PART 1 - FACTS [1]

### A. Introduction

1. This Joint Factum of the Perpetual Respondents and Rose responds to the Factum of Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd. (collectively, the **Industry Intervenors**) filed November 18, 2020 (the **Industry Intervenor Factum**). A separate Joint Factum responds to the Factum of the Orphan Well Association (the **OWA**).[2]

2. The Industry Intervenors argue that the Chambers Judge mischaracterized ARO as not being a liability. They seem to claim that ARO is a liability *because* it is an inherent part of the value of licensed assets that depresses the value of those assets. In making this argument, the Industry Intervenors misunderstand the Reasons.

3. A key issue before the Chambers Judge and on this appeal is whether the ARO associated with the Goodyear Assets was a *liability of PEOC owed to a creditor* at the time of the Asset Transaction, such that the Trustee had standing as a "complainant" or "proper person" to sue for oppression. To make that determination, the Chambers Judge considered whether the AER was a creditor of PEOC and whether the ARO are properly characterized as a "liability" as alleged by the Trustee. He carefully considered *Redwater*—including the proposition that ARO is an inherent part of the value of a licensed asset—and concluded that the ARO was not a liability and the AER was not a creditor. As a result, he declined to exercise his discretion to find that the Trustee was a "proper person" to commence the Oppression Claim. Similarly, he found no merit to the Director Claim insofar as it was premised on the ARO being a liability.[3] The Industry Intervenors have not identified any error in his analysis.

4. The facts are set out in the Reasons and summarized in the Respondent Factum of Rose and in the Respondent Factum of the Perpetual Respondents, each filed September 25, 2020.

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[1] The abbreviations and defined terms in the reasons for judgment of the Honourable Justice D.B. Nixon dated January 13, 2020 (the **Reasons**) are used in this factum. 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 Appeal Number 1901-0262AC (**Perpetual Appellants' Factum**). The Order of the Honourable Justice D.B. Nixon filed on February 18, 2020 is attached as Appendix B to that factum.

[2] The submissions and arguments in the Joint Reply to the OWA Intervenor Factum, to the extent they are relevant to the arguments of the Industry Intervenors, are adopted by reference and not repeated.

[3] Reasons at para 369 [**Perpetual Appellants' Factum, Tab A**].

Additional facts and procedural background relevant to the Industry Intervenors' submissions are set out below.

## B. The Action and Decision under Appeal

5. The Trustee SOC 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, the Director Claim and the Public Policy Claim. On August 27, 2018, the Perpetual Respondents and Rose applied to strike or summarily dismiss the Trustee SOC, raising five discrete threshold issues:

(a) Was the Asset Transaction an arm's length transfer for the purposes of s. 96(1) of the *BIA*?

(b) Is the Trustee a "complainant" that is entitled to bring an oppression claim under s. 242 of the Alberta *Business Corporations Act*?

(c) Should the claim for relief on grounds of public policy, statutory illegality, and equitable rescission be struck?

(d) Is the Release a complete bar to the claims against Rose?

(e) Did Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction?[4]

6. The Chambers Judge dismissed the applications to strike or 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 in Appeal No. 1901-0262AC (the **Perpetual Appeal**). The Trustee appealed all the others in this Appeal, on the specific grounds set out in its factum.

7. The application to strike or summarily dismiss the *BIA* Claim (the subject of the Perpetual Appeal, not this Appeal), addressed 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*". Other essential elements of s. 96—was there a transfer of undervalue and

[4] Reasons at para 5 [**Perpetual Appellants' Factum, Tab A**].

was PEOC insolvent or rendered insolvent by the transfer—were not raised on the application and are not issues on appeal, but are issues in the *BIA* Summary Dismissal Application below.

### C. The *BIA* Summary Dismissal Application

8. On February 25, 2020, the Perpetual Respondents applied to strike or summarily dismiss the *BIA* Claim (the ***BIA* Summary Dismissal Application**) on two *different* threshold issues: whether the Asset Transaction was a transfer at undervalue within the meaning of the *BIA*, and whether PEOC was insolvent at the time of the Asset Transaction or rendered insolvent by it.

9. The OWA and the Industry Intervenors intervened in the *BIA* Summary Dismissal Application. One of the central issues in the *BIA* Summary Dismissal Application is how, if at all, the ARO associated with the Goodyear Assets at the time of the Asset Transaction should be considered under s. 96 of the *BIA*, specifically in relation to the transfer at undervalue and solvency issues raised in that application. The Chambers Judge's decision on the *BIA* Summary Dismissal Application is on reserve. It is not part of the Trustee's appeal.

## PART 2 - GROUNDS OF APPEAL

10. The Industry Intervenors were granted leave to intervene in this Appeal to make submissions addressing the Trustee's grounds of appeal, specifically the Oppression Claim, the Director Claim, the Release Issue, and the Public Policy Claim.[5]

## PART 3 - STANDARD OF REVIEW

11. The Industry Intervenors argue that the Chambers Judge misinterpreted *Redwater* and therefore the standard of review is correctness. But a standard of review must be tied to a ground of appeal.

12. The Chambers Judge considered whether the ARO associated with the Goodyear Assets was a liability of PEOC at the time of the Asset Transaction in the context of determining whether the Trustee was a "complainant" within the meaning of s. 239 of the *Business Corporations Act*. He decided not to exercise his discretion to find that the Trustee was a "proper person" to be

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[5] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 417 at para 31 [**Tab 1**]. The Reasons for Decision of the Honourable Justice Rowbotham granting intervenor status were issued on November 20, 2020, and have not yet been published online.

accorded standing as a complainant for three reasons: the Trustee SOC did not include the necessary particulars, the Trustee framed the oppression too narrowly (in respect of two creditors rather than all creditors), and the foundation underlying the Oppression Claim, ARO, is not a liability.[6] The Chambers Judge's exercise of discretion under s. 239(b)(iv) of the *ABCA* is entitled to deference.[7]

## PART 4 - ARGUMENT

### A. The Chambers Judge properly interpreted and applied *Redwater*

13. The Industry Intervenors argue that the Chambers Judge should have recognized the ARO associated with the Goodyear Assets as a liability because ARO is "an inherent part of the value of the licensed assets".[8] Their central argument, based on *Redwater*, is summarized at paragraph 24 of their factum:

> In order to properly determine whether or not the ARO associated with the Goodyear Assets were a liability in the context of the Appellant's claims, the Industry Intervenors submit that the analysis of that ARO should have included consideration of how that ARO impacted and depressed the fair market value of the Goodyear Assets at the time of the Asset Transaction, which Justice Nixon failed to do.[9]

14. In substance, the Industry Intervenors argue that since ARO depresses the fair market value of a licensed asset, ARO is properly characterized as a liability. This is backwards. The Chambers Judge found that the ARO associated with the Goodyear Assets was not a liability for several reasons, including *because* ARO is a component of value:

> [166] In *Redwater*, the Supreme Court of Canada addressed the ARO liability allegation from a different viewpoint. Rather than being a form of liability, the Supreme Court held that 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": *Redwater* at para 157. In making this determination, the Supreme Court of Canada relied on *Daishowa-Marubeni International Ltd v Canada*, 2013 SCC 29 [***Daishowa***] at para 29.

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[6] Reasons at paras 237-239 [**Perpetual Appellants' Factum, Tab A**].

[7] Whether a person is a "proper person" to be granted standing in an oppression claim is "in the discretion of the Court": *Business Corporations Act*, RSA 2000, c B-9, s. 239. "In a case involving an exercise of discretion, an appellate court must show great deference and must be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner": *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 SCC 26 at para 52 [**Tab 2**].

[8] See for example: Industry Intervenor Factum at paras 9-10, 27.

[9] Industry Intervenors Factum at para 24.

> [167] While courts should be cautious in relying too heavily on *Daishowa* because it approached the issue from an income tax perspective, it does touch on the very issue that was being argued in *Redwater*. In *Daishowa*, the Supreme Court found that statutory reforestation obligations of persons that held forest tenures in Alberta were a future cost. That Court went on to comment that **such future costs were embedded in the forest tenure, which serves to depress the tenure's value at the time of sale**: *Daishowa* at para 31.
>
> [168] While **those regulatory parameters depressed the value of the assets**, the Supreme Court of Canada in *Daishowa* held that **those "…reforestation obligations were not a distinct existing debt**": *Daishowa* at para 35. **That is, those future obligations did not equate to a current monetary claim**.
>
> …
>
> [229] I also note that in *Daishowa* the Supreme Court found that statutory reforestation obligations were a future cost. That Court went on to comment that **such future costs were embedded in the forest tenure, which serves to depress the tenure's value at the time of sale**: *Daishowa* at para 31. The Supreme Court of Canada further stated that those "...reforestation obligations were not a distinct existing debt": *Daishowa* at para 35. That is, **those future obligations did not equate to a current monetary claim. Based on what is stated in the Trustee SOC, I find that the same result applies to the ARO associated with the Goodyear Assets at the time of the Asset Transaction**.[10]

15. The Chambers Judge's consideration of ARO and *Redwater* arose primarily in the context of the Oppression Claim, in which the Chambers Judge needed to determine whether the Trustee was a proper "complainant", or a "proper person" with standing to bring an oppression claim.[11] As the Chambers Judge put it, where a person does not qualify or has not been granted standing as a complainant, "the quest for an oppression remedy in respect of that person ends, full stop."[12]

16. The Oppression Claim alleges that the Asset Transaction was "oppressive, unfairly prejudicial to or unfairly disregarded *the interests of the creditors* of PEOC",[13] and that as a result of the Asset Transaction, PEOC "became *liable* for, but unable to pay, the ARO".[14] Similarly, the Director Claim alleges that Rose caused PEOC to enter into the Asset Transaction knowing that the Goodyear Assets were "high liability assets" and, in doing so, breached a fiduciary duty and duty of care owed to PEOC.[15]

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[10] Reasons at paras 166-168, 229 (emphasis added) [**Perpetual Appellants' Factum, Tab A**].
[11] Reasons at para 134 [**Perpetual Appellants' Factum, Tab A**].
[12] Reasons at para 133 [**Perpetual Appellants' Factum, Tab A**].
[13] Trustee SOC at para 19 (emphasis added) [**Appeal Record, Vol. 1, P006**].
[14] Trustee SOC at para 20.3 (emphasis added) [**Appeal Record, Vol. 1, P007**].
[15] Trustee SOC at para 16.3.1 [**Appeal Record, Vol. 1, P005**].

17. Underlying each of these claims is the contention that the ARO was a separate, current liability of PEOC owed to the AER at the time of the Asset Transaction, and that these "liabilities" exceeded the "value" of the Goodyear Assets.[16]

18. Given the Trustee SOC, the Chambers Judge necessarily had to consider whether:

(a) the ARO associated with the Goodyear Assets was a liability of PEOC at the time of the Asset Transaction, as opposed to an *inherent part* of the value of the assets; and

(b) the AER—being the only "creditor" posited by the Trustee in respect of the ARO—was a creditor of PEOC at the time of the Asset Transaction.

19. The Chambers Judge concluded, following *Redwater, Northern Badger* and *Abitibi*, that:

(a) the AER is not a creditor in respect of future contingent claims in respect of ARO, which are "inchoate" liabilities that amount to a "future obligation" that has not yet "crystallized into a liability";[17]

(b) the AER has no status as a creditor in relation to the ARO of a licensee;[18]

(c) ARO is a component of value in that an asset's "end-of-life obligations form a fundamental part of the value of the licensed assets";[19]

(d) there is no amount referable to an existing obligation, nor a contractual framework establishing an existing and accumulating obligation, in respect of the ARO associated with the Goodyear Assets;[20]

(e) to the extent there is ARO associated with the Goodyear Assets, it is a "notional and contingent obligation";[21] and

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[16] Trustee SOC at para 14 [**Appeal Record, Vol. 1, P005**].
[17] Reasons at paras 147 and 239 [**Perpetual Appellants' Factum, Tab A**].
[18] Reasons at para 151 [**Perpetual Appellants' Factum, Tab A**].
[19] Reasons at paras 152 (heading (iii)) and 166 [**Perpetual Appellants' Factum, Tab A**].
[20] Reasons at para 171 [**Perpetual Appellants' Factum, Tab A**].
[21] Reasons at para 172 [**Perpetual Appellants' Factum, Tab A**].

(f) as no Abandonment Notices existed on the date of the Asset Transaction, the ARO of Sequoia was one further step removed from being a liability than the assets that were considered in *Redwater*.[22]

20. It is in this context that the Court determined that ARO is not a liability. The Chambers Judge did *not* conclude (as the Industry Intervenors imply) that ARO is not inherent to the value of an asset. To the contrary, the Chambers Judge found that ARO *is* a fundamental part of the value of the licensed assets,[23] but does not constitute a separate liability because, in the case of PEOC, ARO had not crystallized into a current obligation. This nullified the foundation of both the Oppression Claim and the Director Claim, which presumed that the ARO is a liability owed to the AER at the time of the Asset Transaction.

21. Remarkably, the Industry Intervenors argue that the Chambers Judge's "findings on the creditor status of the AER, as well as his finding that ARO are not claims provable in bankruptcy, ought to have been *irrelevant considerations*".[24] These two related issues were clearly relevant.

22. The Oppression Claim was based on an allegation that the Asset Transaction was oppressive to the creditors of PEOC because it made PEOC "liable for, but unable to pay, the ARO".[25] Accordingly, the Court had to determine whether PEOC had any creditors in respect of the ARO at the time of the Asset Transaction. The only ARO "creditor" posited by the Trustee was the AER. The Chambers Judge found that the ARO associated with the Goodyear Assets was not a debt, it was not owed to the AER, and therefore the AER was not a creditor.

23. The Chambers Judge further held that "[a]bsent a creditor, there cannot be a liability" because "they are linked inextricably".[26] The Industry Intervenors concede that the AER was not a creditor of PEOC at the time of the Asset Transaction. As stated in their factum: "[t]he Supreme Court of Canada distinguished ARO as a public duty or obligation 'owed not to a creditor, but rather, to fellow citizens',"[27] "the Supreme Court of Canada found that the [AER]… should

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[22] Reasons at para 173 [**Perpetual Appellants' Factum, Tab A**].
[23] Reasons at para 166 [**Perpetual Appellants' Factum, Tab A**].
[24] Industry Intervenor Factum at para 27 (emphasis added).
[25] Trustee SOC at paras 19-20 [**Appeal Record, Vol. 1, P006-P007**].
[26] Reasons at para 361 [**Perpetual Appellants' Factum, Tab A**].
[27] Industry Intervenor Factum at para 13.

typically [not] be mistaken as a creditor,"[28] "[w]hile ARO have a financial element, they are not always owed to a creditor,"[29] and "[a]lthough ARO have a financial element, they are not always a debt owed to a creditor".[30] The OWA was more concise: "The SCC in *Redwater* states… that the AER is not a creditor with respect to ARO,"[31] and "ARO is not a debt or a liability".[32] Similarly, the Trustee's counsel acknowledged in argument:

> THE COURT: I think you're agreeing with me. We don't have a party that we can say the amount is -- an amount is owed to.
>
> MR. DE WAAL: I agree, My Lord.[33]

24. Whether the AER had a claim provable in bankruptcy in relation to the ARO was also relevant to the issues before the Chambers Judge. In fact, the Trustee rested its case on this analysis in oral argument (at the time relying on the Court on Appeal's decision in *Redwater*, as the Supreme Court had not yet issued its decision):

> THE COURT: So you're saying an ARO is liability?
>
> MR. DE WAAL: Not a liability in the sense -- it's not a present liability. Again, that's something Mr. Leitl kept saying, where's the current liability? We're not saying that. **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**…
>
> …
>
> THE COURT: So who's the creditor?
>
> MR. DE WAAL: The AER will have a claim provable in bankruptcy. [34]

25. The Chambers Judge was right to consider whether the AER had a claim provable in bankruptcy because the *Abitibi* test asks useful questions: is there a debt, liability or obligation owed to a creditor, and is it possible to attach a monetary value to the debt, liability or obligation?[35]

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[28] Industry Intervenor Factum at para 13.
[29] Industry Intervenor Factum at para 15.
[30] Industry Intervenor Factum at para 27.
[31] Factum of the OWA filed November 18, 2020 (**OWA Factum**) at para 14.
[32] OWA Factum at para 18.
[33] Transcript of Proceedings before the Honourable Justice D.B. Nixon dated December 17, 2018 at 113/16-19 [**Appeal Record, Vol. 3, 264**].
[34] Transcript of Proceedings before the Honourable Justice D.B. Nixon dated November 8, 2020 at 79/3-40 (emphasis added) [**Appeal Record, Vol. 2, 081**].
[35] Reasons at para 138 [**Perpetual Appellants' Factum, Tab A**].

These questions are clearly relevant to the AER's creditor status and whether the ARO associated with the Goodyear Assets was a liability of PEOC at the time of the Asset Transaction. Using the *Abitibi* test as a framework, the Chambers Judge concluded that the AER had no status as a creditor in relation to the ARO, and that even if it did, its claim would be too remote and speculative to justify reimbursement.[36] This finding is fatal to the Trustee's Oppression Claim.

26. The Industry Intervenors concede that ARO is "owed, not to a creditor, but, rather, to fellow citizens, and therefore outside the scope of 'provable claims'".[37] A public duty owed to all citizens is not a creditor claim and provides no basis for the Oppression Claim or the Director Claim. The Trustee cannot, and does not purport to, sue for oppression on behalf of the public at large. Nor can it sue a director, whose duties are principally owed to the corporation, for unarticulated breaches of a duty owed by the *licensee* to citizens generally.

27. The Chambers Judge understood this issue when he held that the oppression remedy is not the vehicle to pursue environmental protection and reclamation, which are properly "advanced by an appropriate regulatory framework that is developed in conjunction with the stakeholders".[38] It is not the function of the Court to fix legislative or regulatory regimes.[39]

### B. The value of the Goodyear Assets is not an issue in this Appeal

28. The Industry Intervenors obscure the issues in the Trustee's Appeal through vague references to the "Appellant's claims".[40] They argue that these claims require a "determination of the proper valuation of the Goodyear Assets at the time of the Asset Transaction".[41] They then argue how the Court should determine the value of the Goodyear Assets: "value is not and should not be restricted only to the consideration of liabilities constituting claims provable in bankruptcy,

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[36] Reasons at para 151 [**Perpetual Appellants' Factum, Tab A**].
[37] Industry Intervenor Factum at paras 13, 27.
[38] Reasons at paras 124-125 [**Perpetual Appellants' Factum, Tab A**].
[39] Reasons at paras 125, 188 [**Perpetual Appellants' Factum, Tab A**]. As the AER's CEO Jim Ellis acknowledged in the AER's Public Statement on August 8, 2018, "it is our responsibility to identify and address any gaps in our requirements": Affidavit of Mark Schweitzer sworn October 3, 2018, Exhibit C [**Extracts of Key Evidence, Vol. 2, A0226**].
[40] Industry Intervenor Factum at paras 22, 24, 25, 31.
[41] Industry Intervenor Factum at para 22.

but rather should include all factors inherent and fundamental to an asset's value as well as the consideration exchanged during an impugned transaction."[42]

29. This argument shows a fundamental misunderstanding of the issues before the Chambers Judge and the Reasons, and attempts to address issues relevant solely to the *BIA* Summary Dismissal Application. Whether ARO is a liability and the value of the Goodyear Assets are separate issues. Only the former was before the Chambers Judge (in the context of the Oppression Claim and Director Claim) and is part of the Trustee's Appeal.

30. The Chambers Judge did not conclude that ARO had no impact on the value of the Goodyear Assets. He acknowledged that ARO affects value.[43] But he did not determine the value of the Goodyear Assets for the simple reason that the issue was not before him.

31. The value of the Goodyear Assets is relevant to other elements of s. 96 raised in the *BIA* Summary Dismissal Application. The Chambers Judge's decision on that application is under reserve. This Court should not pre-decide the issue of value of the Goodyear Assets without the benefit of the Chambers Judge's reasons and the full record from the *BIA* Summary Dismissal Application.

## PART 5 - RELIEF SOUGHT

32. The Industry Intervenors are not entitled to any relief. The Chambers Judge did not err in finding that ARO is not a liability.

Respectfully submitted November 25, 2020.

**Estimated time required for the oral argument: 15 minutes**

**BURNET, DUCKWORTH & PALMER LLP**

Per: _____

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

**NORTON ROSE FULBRIGHT CANADA LLP**

Per: Steven Leitl, QC

Steven H. Leitl, Q.C. / Gunnar Benediktsson
Counsel for Susan Riddell Rose

[42] Industry Intervenor Factum at para 22.
[43] Reasons at paras 166-168, 229 [**Perpetual Appellants' Factum, Tab A**].

## TABLE OF AUTHORITIES

# TAB 1

# In the Court of Appeal of Alberta

**Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABCA 417**

**Date:** 20201120
**Docket:** 1901-0255-AC
**Registry:** Calgary

**Between:**

**PricewaterhouseCoopers Inc., LIT in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity**

Respondent
(Appellant)

- and -

**Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp., and Susan Riddell Rose**

Respondents
(Respondents)

and -

**Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd.**

Interveners
(not a party to this appeal)

and -

**Orphan Well Association**

Intervener
(not a party to this appeal)

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**Reasons for Decision of**
**The Honourable Madam Justice Patricia Rowbotham**

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Applications for Leave to Intervene

**Reasons for Decision of**
**The Honourable Madam Justice Patricia Rowbotham**

## A. Introduction

[1] These are two applications to intervene in an appeal scheduled for hearing on December 10, 2020. Although three related appeals will be heard that day, the proposed interveners clarified that they seek leave to intervene only in Appeal 1901-0255-AC ("the Trustee appeal").

[2] The two proposed interveners are the Orphan Well Association and a joint application by Canadian Natural Resources Limited ("CNRL"), Cenovus Energy Inc. ("Cenovus") and Torxen Energy Ltd. ("Torxen"), collectively ("the Industry Interveners").

[3] Following the hearing, I granted the applications with reasons to follow. These are the reasons.

## B. Background

[4] PricewaterhouseCoopers Inc., LIT is the trustee in bankruptcy of the estate of Sequoia Resources Corp., formerly Perpetual Energy Operating Corp. The Trustee commenced an action against Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. (collectively "the Perpetual Respondents"), and Ms Susan Riddell Rose. The Statement of Claim sought an order declaring a sale and transfer of assets by Perpetual Operating Trust to Perpetual Energy Operating Company (the Asset Transaction) void as against the Trustee. Among the assets are the Goodyear Assets which have associated abandonment and reclamation obligations.

[5] The Trustee advanced four claims: (1) an oppression claim under s. 242 of the Alberta *Business Corporations Act*, RSA 2000, c B-9 ("the Oppression Claim"); (2) a claim based upon public policy, statutory illegality and equitable rescission ("the Public Policy Claim"); (3) a breach by Ms Rose of her duties as sole director of Perpetual Energy Operating Corp. during the Asset Transaction ("the Director's Liability Claim"); and (4) a claim under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 that the transfer was undervalue ( "the *BIA* Claim").

[6] The Perpetual Respondents and Ms Rose applied to strike these claims or to have them summarily dismissed. As will be discussed further below, the application to strike the *BIA* Claim was based upon a threshold issue under s. 96 of the *BIA*: whether the transactions were at arm's length.

[7] The chambers judge struck the Oppression, Public Policy and Director's Liability claims. He found a release executed by Ms Rose to be a complete bar to the claims against her. With respect to the *BIA* Claim, the chambers judge did not strike or summarily dismiss the claim, commenting that the issue of whether the Perpetual Respondents and Ms Rose were dealing at

arm's length within the meaning of the *BIA* involved a mixture of fact, deeming rules and rebuttable presumptions which were worthy of consideration by a court: *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6.

### *1. The Trustee Appeal*

[8] The Trustee appealed the dismissal of the Oppression, Public Policy and Director's Liability claims, as well as the decision regarding the release. The Perpetual Respondents appealed the decision regarding the *BIA* Claim.

[9] The application to strike or summarily dismiss the *BIA* Claim (and the Perpetual appeal) addresses only the discrete threshold issue of whether the parties were dealing at arm's length within the meaning of the *BIA*. Other essential elements of the *BIA* Claim – whether there was a transfer undervalue and whether Perpetual Energy Operating Corp. was insolvent or rendered insolvent by the transfer – were not addressed on the application and are not issues on appeal.

### *2. The BIA Summary Dismissal Application*

[10] On February 25, 2020 the Perpetual Respondents brought an application to strike or summarily dismiss the *BIA* Claim on two different threshold issues: whether Perpetual Energy Operating Corp. was insolvent at the time of the transfer or rendered insolvent by it within the meaning of the *BIA*, and whether there was a transfer at undervalue within the meaning of the *BIA*.

[11] The Orphan Well Association and the Industry applicants were granted intervener status in that application. One of the issues in that application is how, if at all, abandonment and reclamation obligations should be considered in the analysis under s. 96 of the *BIA*. The chambers judge's decision on the *BIA* Summary Dismissal Application is on reserve.

[12] Both proceedings involve the same parties and were heard by the same chambers judge. An issue to differing extents in both proceedings is the interpretation of the Supreme Court's decision in *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 (*Redwater*). The respondents take the position that the application to intervene should not be granted in the Trustee appeal, and that the appropriate venue for these interventions would be in a potential appeal of the *BIA* Summary Dismissal Application.

## C. The Test for Intervention in this Court

[13] A two-step approach is used to determine an intervener application. The court first considers the subject matter of the proceeding and then determines the proposed intervener's interest in that subject matter: *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238 at para 8; *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2005 ABCA 320 at para 5.

[14] In determining the proposed intervener's interest in the subject matter, the court considers whether the proposed intervener would be specifically affected by the decision facing the court or has some special expertise or insight to bring to bear on the issues facing the court: *Orphan Well Association* at para 8; *Papaschase* at para 2; *Doe v Canada*, 2000 ABCA 217 at para 10, citing *Ahyasou v Alberta (Minister of Environmental Protection)*, 1998 ABQB 875 at para 4; *AC and JF v Alberta*, 2020 ABCA 309 at para 9.

**D. The Proposed Interveners**

[15] The Orphan Well Association is a primarily industry-funded association, reflecting a collaboration among the Alberta Government and provincial oil and gas producers. The association works toward the common goal of protecting public safety and managing environmental risks of oil and gas properties that do not have a solvent party that can comply with the regulatory abandonment and reclamation obligations of assets at the end of their use. The mandate of the Orphan Well Association is to safely abandon and reclaim those assets. It is funded through an industry levy, which in 2019 was $60,000,000.

[16] The Industry Interveners are a sample of those who pay the levy. CNRL holds the most licenses from the Alberta Energy Regulator ("the Regulator") for wells located in Alberta and is accordingly the largest contributor to the levy, more than quadruple the next largest licensee. Cenovus holds several licenses and is a significant contributor to the levy. Torxen is an exploration and production company and maintains the second most licenses for wells in Alberta. Its small size relative to CNRL and Cenovus results in it bearing a greater percentage of the impact in relation to the levy.

**E. Analysis**

***Subject Matter of the Trustee Appeal and the Interest of the Interveners in the Subject Matter***

[17] The heart of the respondents' position is that the proposed interveners do not have an interest in the appeal sufficient to warrant their intervention. They submit that the interventions are more appropriately warranted in the *BIA* Summary Dismissal Application where the proposed interveners have already been granted status to intervene and in all likelihood would be granted that status in an appeal of that decision. Counsel for the Perpetual Respondents emphasized that this court does not have the proper record in this appeal and that the relevant record will be in an appeal of the *BIA* Summary Dismissal Application.

[18] Ms Rose supports the position of the Perpetual Respondents and further maintains that the proposed interveners have no connection to the personal claims made against her and in particular the issue of the release.

[19] In terms of the subject matter of the Trustee Appeal, the issue that is important to the proposed interveners is the chambers judge's interpretation of *Redwater* and his conclusion that, for the purposes of striking the Trustee's claims, abandonment and reclamation obligations are not a liability. The proposed interveners contend that they should be permitted to intervene to make submissions to assist the court with respect to the proper interpretation of *Redwater*.

[20] Turning to the second requirement of the test, an examination of the chambers judge's reasons for striking the Oppression Claim is sufficient to demonstrate that the proposed interveners do have an interest in the subject matter of the appeal.

[21] The key allegations in the Statement of Claim are that:

1. The Trustee is a proper complainant within the meaning of Part 19 of the *ABCA*;

2. Ms Rose exercised her powers as a director, and Perpetual Energy Inc. and Perpetual Operating Corp. conducted their business in a manner that was oppressive, unfairly prejudicial to or unfairly disregarded the interest of the creditors of Perpetual Energy Operating Corp.;

3. As a result of the Asset Transaction (1) if Perpetual Energy Operation Corp. was not insolvent, it was rendered insolvent; (2) Perpetual Energy Operating Corp. was liable for but unable to pay property taxes with respect to the Goodyear Assets; and (3) Perpetual Energy Operating Corp. became liable for but unable to pay the abandonment and reclamation obligations associated with the Goodyear Assets; all for the benefit of Ms Rose and the Perpetual Respondents.

[22] The chambers judge concluded that the Trustee did not get past the first requirement: it was not a proper complainant within the meaning of Part 19 of the *ABCA*. He considered this first by asking whether the Statement of Claim alleged sufficient particulars to satisfy what are known as the *Hordo* factors which provide guidance for determining which creditors should be granted standing for the purposes of an oppression remedy: *Royal Trust Corp of Canada v Hordo* (1993), 10 BLR (2d) 86, [1993] OJ No 1560 (Ont Ct J (Gen Div)). He determined that the Statement of Claim did not plead sufficient particulars to enable him to address the *Hordo* factors.

[23] The chambers judge then asked whether he should exercise his discretion to find the Trustee a proper person to be accorded standing as a complainant. He declined to do so as the class of creditors on behalf of whom the Trustee purported to claim was too narrow: rather than a collective focus on all creditors, the claim was only for municipal taxes and abandonment and reclamation obligations.

[24] Finally, the chambers judge considered what he described as the *Redwater* factor. He concluded at para 239:

> Third, I will not exercise my discretion to find that the Trustee is a "proper person" to be accorded standing as a "complainant" because 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 crystallized into a liability.

[25] The *Redwater* factor was discussed at length in the chambers judge's reasons. The ruling on the Oppression Claim turned on the chambers judge's interpretation of *Redwater* as standing for the proposition that the Regulator is not a creditor and that the abandonment and reclamation obligations are not a liability. The *Redwater* factor also played an integral part of the chambers judge's analysis of the release and of the Director's Liability Claim. In addition to forming a significant part of the subject matter of the Trustee Appeal, the central role of the chambers judge's interpretation of *Redwater* in his decision also captures the proposed interveners' interest in that subject matter.

[26] As the material in support of the applications reveals, the proposed interveners are concerned with, and directly affected by the abandonment and reclamation of assets in Alberta. I do not view this as a situation where they have a mere jurisprudential concern. I am satisfied that the proposed interveners have a sufficient interest in the subject matter of the appeal to warrant intervening.

[27] In addition, both interveners have expertise and insight to bring to the court, which is not specifically aligned with the perspective of the Trustee.

[28] The interests of the Trustee are different than those of the Orphan Well Association. The Trustee's interest is to maximize the value of the estate in the bankruptcy. The association's interest is to decrease the number and frequency of abandoned and orphaned oil and gas assets, and ultimately the financial obligations to the association, the industry and landowners.

[29] The parties to the appeal are not in a position to speak to or represent the private industry interests of the oil and gas sector in Alberta. The Industry Interveners, as a diversified cohort of the industry, are able to lend their expertise and can provide submissions on how the industry incorporates abandonment and reclamation obligations in valuing an asset for the purposes of negotiating purchase or sale and the industry's treatment on its financial statements and reporting to investors.

[30] Accordingly, both proposed interveners satisfy the requirements to intervene in the Trustee Appeal. While a potential appeal of the *BIA* Summary Dismissal Application may be the better opportunity for intervention, the inclusion of the Orphan Well Association and Industry perspectives in the more immediate Trustee Appeal will assist the court in reaching a timely and fully-considered decision on the issues related to *Redwater* in this appeal.

**F. Conclusion**

[31] The applications to intervene are granted. I repeat the directions I gave to the parties on November 12, 2020:

1. Leave to intervene in Appeal No. 1901-0255-AC is granted;
2. The interveners' submissions are to be addressed to the grounds of appeal in Appeal No. 1901-0255-AC only; specifically, the Oppression, Release, Public Policy and Director's Liability Claims;
3. The interveners will file a factum to a maximum of 10 pages no later than Wednesday, November 18, 2020. If the interveners choose to file a record consisting of the affidavits in support of these applications, the record will be filed at the same time as the factum;
4. If the respondents wish to file a reply factum, they shall do so no later than Wednesday, November 25, 2020. The factum will be a maximum of 10 pages;
5. The interveners may apply to the panel for directions regarding time for submissions at the hearing of the appeal;
6. Subject to item 7, Rule 14.58(1) with respect to costs applies; and
7. With respect to the costs of the application by the Orphan Well Association, the Perpetual Respondents are granted costs of the application pursuant to Schedule C, Column 5 of the Rules of Court.

Applications heard on November 12, 2020

Reasons filed at Calgary, Alberta
this 20th day of November, 2020

Rowbotham J.A.

REGISTRAR
FILED
20 Nov 2020
KH
Court of Appeal of Alberta

**Appearances:**

R. de Waal
for the Respondent PricewaterhouseCoopers Inc., LIT in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

D.J. McDonald Q.C./P.G. Chiswell
for the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp.

S.H. Leitl Q.C./G. Benediktsson
for the Respondent Susan Riddell Rose

G.S. Watson/C. Ang/K. Gramlich
for the Applicants Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd.

K.T. Lenz Q.C./A. Bowron
for the Applicant Orphan Well Association