

COURT FILE NUMBER	1801-10960
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	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
APPLICANT (Not a Party)	ORPHAN WELL ASSOCIATION
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BENNETT JONES LLP Barristers and Solicitors 4500 Bankers Hall East, 855-2 nd Street SW Calgary, Alberta T2P 4K7 Attention: Kenneth T. Lenz, Q.C. / Andrea Stempien Telephone No.: 403-298-3317 / 3148 Fax No.: 403-265-7219 Client File No.: 56977.17

BRIEF OF THE ORPHAN WELL ASSOCIATION IN SUPPORT OF THE APPLICATION FOR LEAVE TO INTERVENE BEFORE THE HONOURABLE JUSTICE D.B. NIXON

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL BACKGROUND.....	1
A. Procedural History	1
B. The OWA.....	3
III. ARGUMENT.....	4
A. The Subject Matter of the Proceeding	5
B. The OWA's Interest in the Subject Matter of the Proceeding.....	6
IV. CONCLUSION.....	10
V. TABLE OF AUTHORITIES	11

I. INTRODUCTION

1. The Applicant, the Orphan Well Association ("**OWA**"), seeks an Order from this Court granting it leave to intervene in the within Action, in respect of the *BIA* Claim and matters related to the impact of the Supreme Court of Canada's decision in *Redwater*¹ on the legal aspects of this case (the "**Novel Issues**").

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

II. FACTUAL BACKGROUND³

A. Procedural History

3. In early 2016, Perpetual Energy Inc. ("**Perpetual**") decided to sell several gas wells as well as certain other properties in Alberta, known as the Goodyear Assets.⁴ The Plaintiff, PriceWaterhouseCoopers Inc. (the "**Trustee**"), estimated the abandonment and reclamation obligations of the Goodyear Assets to be \$229 million at the time of the Transactions.⁵ The Defendant, Ms. Riddell Rose, the sole director, and CEO of Perpetual Energy Operating Corp ("**PEOC**") at the time of the Transactions, stated in media interviews that the purpose of disposing of the Goodyear Assets was to reduce the liabilities of Perpetual.

4. The sale of the Goodyear Assets was facilitated by a series of transactions (the "**Transactions**"), which began with Perpetual Operating Trust ("**POT**") selling its beneficial interest in the Goodyear Assets to PEOC, an entity wholly owned by Perpetual, by an asset purchase agreement, dated October 1, 2016 (the "**Asset Transaction**").⁶ The Asset Purchase Agreement provided that the Goodyear Assets would be sold for \$10.00.⁷ The final step in the

¹ *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 [*Redwater*] [TAB 1].

² Affidavit of Lars De Pauw, filed June 30, 2020, at para 3 [De Pauw Affidavit].

³ Terms not hereinafter defined shall have the same meaning as ascribed to them in the Statement of Claim.

⁴ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABQB 6 at paras 7-9 [*Perpetual Summary Judgment Decision*] [TAB 2].

⁵ Affidavit of Paul J. Darby, filed August 2, 2018, at para 40 [August 2018 Darby Affidavit].

⁶ *Perpetual Summary Judgment Decision*, *supra* note 4, at para 17 [TAB 2].

⁷ August 2018 Darby Affidavit, at Exhibit D (Asset Purchase Agreement, at section 2.03).

Transactions was PEOC changing its name to Sequoia Resources Corp ("**Sequoia**").⁸ The Transactions concluded on October 16, 2016.⁹

5. On March 23, 2018, Sequoia made an assignment into bankruptcy and the Trustee was appointed. The Trustee asserted that as part of its investigation into the financial circumstances of Sequoia, the Trustee considered the terms and circumstances of various transactions before the bankruptcy, including the Transactions.¹⁰ On August 2, 2018, the Trustee filed the Statement of Claim here seeking to set aside the Transactions related to the Goodyear Assets, grounded on four approaches:

- (a) the Transactions were an alleged transfer at undervalue, which the Trustee asserted violated section 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*") (the "**BIA Claim**");
- (b) the alleged application of the oppression provisions of the *Alberta Business Corporations Act*, RSA 2000, c B-9 (the "**Oppression Claim**");
- (c) the transactions were an alleged violation of public policy, statutory illegality, and equitable grounds (the "**Public Policy Claim**"); and
- (d) an alleged breach by the Defendant, Ms. Riddell Rose, of her duties as the sole director of PEOC at the time of the Asset Transaction (the "**Director Claim**").

6. In August 2019, the Oppression Claim, the Public Policy Claim, and the Director Claim were struck under rule 3.68 of the *Alberta Rules of Court*.¹¹ The Trustee has appealed this Order to the Alberta Court of Appeal. In the same application, the Court declined to dismiss or strike the *BIA* Claim.

7. On February 25, 2020, the Defendants, Perpetual, POT, and PEOC (collectively, the "**Perpetual Defendants**") applied to strike or alternatively, for summary judgment of the *BIA* Claim (the "**BIA Summary Judgment Application**"). This application was originally scheduled to be heard on June 22-24, 2020, but was adjourned as a result of the COVID-19

⁸ *Perpetual Summary Judgment Decision*, *supra* note 4 at para 17 [TAB 2].

⁹ *Ibid*, at para 18.

¹⁰ August 2018 Darby Affidavit, at para 10.

¹¹ *Alberta Rules of Court*, Alta Reg 124/2010, r 3.68 [Rules] [TAB 3].

pandemic. The *BIA* Summary Judgment Application has been rescheduled to July 28-30, 2020, at the request of the Perpetual Defendants, over the opposition of the Plaintiffs.

8. The *BIA* Summary Judgment Application seeks a determination of two issues:
 - (a) was PEOC insolvent at the time of the transfer or rendered insolvent by it within the meaning of the *BIA*?
 - (b) was there a transfer at undervalue within the meaning of the *BIA*?¹²

9. The *BIA* Summary Judgment Application, if granted, would be dispositive of this Action, subject to any appeals.

B. The OWA

10. The OWA is a mainly industry-funded association, reflecting a collaboration among the Alberta Government, provincial regulators, and oil and gas producers to work toward the common goal of protecting public safety and managing environmental risks of oil and gas properties that do not have a legally or financially (i.e., solvent) responsible party that can comply with regulatory obligations to abandon and reclaim assets at the end of their life cycle.¹³

11. The OWA is primarily funded through the Orphan Fund Levy (the "**Levy**") issued yearly to energy companies across Alberta by the Alberta Energy Regulator (the "**AER**").¹⁴ The AER transfers the funds generated by the Levy to the OWA's operating budget.¹⁵ The Levy is used to pay for project closure costs, including suspension, abandonment, remediation, and reclamation, if an energy company cannot meet its obligations to responsibly perform these regulatory obligations.¹⁶ The Levy ensures that Albertans need not bear the cost of abandoning and reclaiming orphan oil and gas wells, pipelines, and production facilities.¹⁷

12. The OWA first learned about the Transactions in early March 2018, well after they occurred, after Sequoia had filed a Notice of Intention to Make a Proposal pursuant to the *BIA*.¹⁸

¹² Application by the Perpetual Defendants, filed February 25, 2020.

¹³ De Pauw Affidavit, at para 3.

¹⁴ *Ibid.*, at para 6.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at para 7.

¹⁷ *Ibid.*, at paras 6 & 7.

¹⁸ *Ibid.*, at para 10.

Upon learning the details of the Transactions, the OWA became concerned because it appeared as though the Transactions were concluded for the express purpose of avoiding municipal taxes, and abandonment and reclamation obligations associated with the Goodyear Assets, and the Transactions appeared to have been carefully engineered to avoid the requirement of approval from the AER. The effect of the Transactions was to move significant regulatory obligations to Sequoia, a company with limited assets that has no ability to perform the obligations. This created a high likelihood that the Goodyear Assets would be required to be abandoned and reclaimed by the OWA.¹⁹

13. It is estimated by the Trustee that the cost to abandon and reclaim the Goodyear Assets is \$229,000,000.²⁰ If the Transactions are not declared void, most of the cost associated with the abandonment and reclamation of the Goodyear Assets will be borne by the OWA and ultimately other members of industry.²¹

III. ARGUMENT

14. The Court may grant intervenor status to any person "subject to any terms and conditions and with the rights and privileges specified by the Court."²² 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 major participants in a business or other 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."²³

15. 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.²⁴

16. 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

¹⁹ *Ibid*, at para 11.

²⁰ *Ibid*, at para 12; August 2018 Darby Affidavit, at para 40.

²¹ *Ibid*, at para 12.

²² *Rules*, r 2.10 [TAB 3].

²³ *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2017 ABCA 280 at para 11 [TAB 4]; *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340 at para 10 [Edmonton][TAB 5].

²⁴ *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238 at para 8 [Orphan Well] [TAB 6]; see also *Ecojustice Canada Society v Alberta*, 2020 ABQB 364 at para 42, Horner, J [Ecojustice] [TAB 7].

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.²⁵ 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:

- (a) Will the intervenor be directly affected by the outcome of the matter?
- (b) Is the presence of the intervenor necessary for the court to properly decide the matter?
- (c) Might the intervenor's interest in the proceedings not be fully protected by the parties?
- (d) Will the intervenor's submissions be useful and different or bring particular expertise to the subject matter before the court?
- (e) Will the intervention delay the proceedings?
- (f) Will there possibly be prejudice to the parties if the intervention is granted?
- (g) Will the intervention widen the *lis* between the parties?
- (h) Will the intervention transform the court into a political arena?²⁶

A. The Subject Matter of the Proceeding

17. In considering the nature of the proceeding, it is important to consider the *BIA* Summary Judgment Application that is pending as well as the nature of the Action as a whole.

18. 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.²⁷ 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

²⁵ *Ecojustice*, supra note 24 [TAB 7].

²⁶ *Orphan Well*, supra note 24 at para 10 [TAB 6].

²⁷ Statement of Claim, at Remedy Sought, para 1.

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.

19. 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

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

21. 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.²⁸

22. 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."²⁹ 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.³⁰ This could significantly impact the OWA's mandate.

²⁸ De Pauw Affidavit, at para 14.

²⁹ *Wilcox v Her Majesty the Queen in Right of Alberta*, 2019 ABCA 385, at para 14 [TAB 8].

³⁰ *Ibid*, at para 14.

23. 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.

24. If the Transactions are not declared void, under section 96 of the *BIA*, the majority of the estimated \$229,000,000 cost to abandon and reclaim the Goodyear Assets will be borne by the OWA, and ultimately other industry participants.³¹ This outcome will have a direct and significant effect on the OWA by increasing the Levy in future years and increasing the number of assets being abandoned and reclaimed by the OWA.³² This potential liability to the OWA is significant.

25. The OWA's presence is necessary to the Action as the OWA will bring a useful and different perspective that is not protected by the parties to the Action. In its Notice of Application, the OWA provides, with specificity, its proposed submissions:

- (a) The interaction between section 96 of the *BIA* and the regulatory obligations with regard to 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*.
- (b) The determination of whether parties' are non-arm's length, in the context of section 96 of the *BIA*, in circumstances, of multiple, sequential transactions, with a stated purpose to avoid abandonment, reclamation, and other obligations.

³¹ De Pauw Affidavit, at para 12.

³² *Ibid*, at para 12.

- (c) The effect of transactions made to avoid abandonment and reclamation obligations on the OWA and industry; such transactions threaten 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.³³

26. 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.³⁴ 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. All of these 4 items are part of the larger public interest in this case.

27. In *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, the Court of Appeal allowed the Urban Development Institute, an organization whose members are developers, to intervene in a matter concerning a condition attached to a subdivision permit where it was alleged that its outcome would "affect the funding model of future light rail transit expansion through undeveloped land in Edmonton."³⁵ In arriving at its decision, the Court noted that the Urban Development Institute will be able to offer special insight and perspective which will assist the Court in its deliberations as a result of its membership and their commercial interests:

The developer members of the Institute will be directly and significantly affected by the outcome of this appeal. Their commercial interests are at stake. What portion of the infrastructure costs associated with the LRT corridor are to be borne by developers affects the profitability of their businesses.

Its members are major players in the development business in Edmonton. They are ideally situated to assist the Court appreciate the consequences of any potential outcome. The Court benefits from the participation of an organization whose members have special expertise in the subject matter of an appeal.³⁶

³³ Notice of Application, filed July 10, 2020, at para 16.

³⁴ *Reference re Impact Assessment Act*, 2020 ABCA 94 at para 13 [TAB 9].

³⁵ *Edmonton*, *supra* note 24, at para 1 [TAB 5].

³⁶ *Ibid*, at para 14.

28. Similarly, the OWA is funded by oil and gas producers.³⁷ Both the OWA and the industry participants who fund it will be directly and significantly affected by the outcome of this Action. If it becomes routine practice to allow transactions in the nature of those at issue in this Action, the Levy is likely to increase, which increases the overall burden on producers, which impacts their profitability and solvency.³⁸ At least as significant is the impact on landowners and the environment, if the decision results in delays to restore the environment to its original condition. The OWA is uniquely situated to assist the Court to appreciate the consequences of any potential outcome, particularly with regard to the Novel Issues.

29. The parties here will not be prejudiced by granting the OWA leave to intervene. Though the Perpetual Defendants have stated an intent to oppose this application, its main reason appears to be that it is important to Perpetual to shift this potential obligation off their balance sheet. Whether Perpetual can, by this transaction, shift \$229 million of obligations to the OWA and other members of industry is the very issue. The obligation to restore the land to its original condition does not go away. In any event, a decision involving hundreds of millions of dollars in obligations and a significant precedent need not be rushed without proper participation and scrutiny by those affected. A delay of 2 – 3 months, if necessary, is practically inconsequential when looking at a case this significant.

30. The OWA is prepared to proceed with this application as expeditiously as possible and is prepared to make submissions at the *BIA* Summary Judgment Application, currently scheduled for July 28-30, 2020. The OWA does not expect that its submissions at that application will impact the length of time required to hear the *BIA* Summary Judgment Application. There will be no delay associated with granting this application.

31. 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.³⁹ Similarly, there is no suggestion that the OWA's presence will transform the court into

³⁷ De Pauw Affidavit, at para 6.

³⁸ *Ibid*, at para 14.

³⁹ *Ecojustice*, *supra* note 24, at para 72 [TAB 7].


a political arena, and, in any event, the OWA intends to confine its submissions to the legal issues before the Court only.

IV. CONCLUSION

32. For the reasons set out above, the OWA respectfully asks the Court to grant it leave to intervene in this Action on terms that the Court considers just, in respect of the submissions in the Notice of Application filed on July 10, 2020.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2020

BENNETT JONES LLP



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

V. TABLE OF AUTHORITIES

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