COURT FILENUMBER	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, and PERPETUAL OPERATING CORP.
APPLICANTS (NOT A PARTY)	CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., AND TORXEN ENERGY LTD.
DOCUMENT	**REPLY BRIEF OF CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., AND TORXEN ENERGY LTD.**

Clerk's Stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No.: 22-921

REPLY BRIEF OF THE APPLICANTS, CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., AND TORXEN ENERGY LTD.

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CLERK OF THE COURT
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TABLE OF CONTENTS

I. INTRODUCTION

1. Canadian Natural Resources Limited ("Canadian Natural"), Cenovus Energy Inc. ("Cenovus"), and Torxen Energy Ltd. ("Torxen", collectively with Canadian Natural and Cenovus, the "Applicants") have applied to seek intervenor status in Court of Queen's Bench Action No. 1801-10960 (the "Action") with the right to participate in all matters concerning Section 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*"), the Application for Security for Costs, and all matters incidental thereto.

2. This Reply Brief is filed in reply to the Responding Brief of Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp. (the "Perpetual Defendants"), and a Responding Brief of Susan Riddell Rose ("Rose", who is also referred to collectively with the Perpetual Defendants as the "Responders").

II. FACTS

3. The Applicants rely on and adopt the statement of facts and evidence as set out in their Brief served and filed on July 15, 2020 (the "Applicants' Original Brief").

III. LEGAL ARGUMENT

4. The Applicants rely on and adopt the legal arguments and authorities set out in the Applicants' Original Brief.

5. The Applicants also reply as follows to arguments made in the Responding Briefs of the Responders.

A. Susan Riddell Rose is No Longer a Party and Has No Standing to Speak to this Application

6. A Responding Brief was served on behalf of Susan Riddell Rose, notwithstanding the fact that she is no longer a party to this Action, and therefore has no standing to speak to the within Application.

7. In the January 13, 2020 Summary Judgment decision of Justice Nixon, the Court dismissed all claims against Rose, who was removed as a party of the Action effective immediately.[1] Although this decision is pending appeal, there is no stay of the decision unless an application is made before the deciding judge or a single judge of the Court of Appeal, which has not occurred to the Applicants' knowledge.[2]

8. Rose also clearly states that the proceedings against her are at an end.[3] However, she argues that the Application of the Orphan Wells Association speaks to "all proceedings" (which is irrelevant to the Applicants' Application) and suggests that she has an interest in the Intervenor Applications on the basis that the Applicants are seeking to expand the *lis* of the *BIA* Claim or "may affect Rose's position in the Trustee's pending appeal".

9. No further specifics were given as to how the within Application would, in any way, affect Rose's legal position in the pending appeal. To the contrary, the relief sought by the Applicants are strictly confined to the Action that remains against the Perpetual Defendants, specifically the forthcoming Applications to Strike the *BIA* Claim and to seek Security for Costs. As previously discussed, the Applicants are not seeking to expand the *lis* of the *BIA* Claim[4], but Rose was never a direct respondent to the *BIA* Claim in any event.

10. No substantive argument has been put forward to explain why Rose should have any standing as a non-party to speak to the within Application. As such, the Applicants respectfully submit that this Court decline to consider or give any weight to Rose's submissions.

11. Alternatively, should this Court be inclined to consider the submissions made on behalf of Rose notwithstanding her lack of standing, the Applicants' replies to said submissions are incorporated below.

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1 *PriceWaterhouseCoopers Inc. v Perpetual Energy Inc. et al*, 2020 ABQB 6 at paras. 330 and 380; *Stoney Tribal Council v Canadian Pacific Railway*, 2017 ABCA 432 at para. 112.

2 *Alberta Rules of Court*, Alta. Reg.124/2010, s.14.48; *Easy Loan Corp. v Base Mortgage & Investments Ltd.*, 2016 ABCA 163 at footnote #19.

3 Brief of Susan Riddell Rose, served on July 17, 2020 [the "Rose Brief"], at para. 5.

4 Applicants' Original Brief at para. 39.

B. The Responders' Distinction between the Asset Transaction and the "Aggregate Transactions" is Immaterial to the Significant Impact Expected by the Applicants and their Ability to Provide a Unique and Useful Perspective

(1) *There is a Real and Probable Risk of Significant Consequences to the Applicants from the Determination of the Perpetual Defendants' Applications*

12. The Responders argue that the Applicants and other parties seeking intervenor status are mistakenly seeking to challenge or set aside the "Aggregate Transaction", while only the Asset Transaction is being sought to be set aside in the Trustee's *BIA* Claim.[5] They further argue that the Applicants have no interest in the determination of the *BIA* Claim as their stated concerns are only with the Aggregate Transaction, which do not intersect with the *BIA* Claim.[6]

13. First, it is patently incorrect to suggest that the Applicants will not be affected by this Court's finding on the *BIA* Claim and whether the Asset Transaction should be set aside. The Asset Transaction was the instrument that transferred assets with significant Asset Retirement Obligations ("ARO") and an estimated net liability of at least $223,241,000.00 from Perpetual Operating Trust to Perpetual Energy Operating Company, later Sequoia Resources Corp. ("Sequoia"), for $10.00, which Sequoia was unable to pay.[7] This liability directly correlates to the expected impact of more than $200 Million in abandonment and reclamation costs that will burden all OWA Levy contributors, of which the Applicants expect to bear approximately $54.5 Million.[8] There are significant stakes facing the Applicants in the Court's determination of whether the Asset Transaction should be set aside pursuant to Section 96 of the *BIA* – they do not seek intervenor status simply out of curiosity or intellectual interest.

14. Second, the Responders argue that the interests of the Applicants are speculative as they presume that the Goodyear Assets subject to the Asset Transaction will not be sold in the course of Sequoia's bankruptcy and are not presently designated by the AER as orphans.[9] While the Goodyear Assets have yet to be designated as "orphan wells" by the AER and the Applicants

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[5] Brief of the Perpetual Defendants served July 17, 2020 [The "Perpetual Brief"] at para. 37; Rose Brief at para. 64.
[6] Perpetual Brief at para. 43, 44, and 49; Rose Brief at paras. 73 to 74.
[7] Affidavit of Paul J. Darby filed August 2, 2018 ["Darby Affidavit"] at paras. 21, 31, and 44.
[8] Applicants' Original Brief at paragraph.33.
[9] Perpetual Brief at para. 48; Rose Brief at para. 63.

agree that the same will likely not occur until the conclusion of the Sequoia bankruptcy[10], it is not realistic to suggest that the designation will not ultimately occur. It is clear that Sequoia is a bankrupt corporation incapable of satisfying the related ARO.[11] The Responders argue that the Trustee has not tried to sell the Goodyear Assets yet, but the Applicants submit this this ignores the likelihood that there will be a limited, if not non-existent, market for the purchase of oil and gas assets with significant, accompanying ARO. The Applicants are also unaware of this Court disapproving the Trustee's decision to refrain from marketing the Goodyear Assets or any parties contesting the same in Sequoia's bankruptcy proceedings.

15. In any event, there is no evidence before this Court to find that there is any reasonable prospect of the Goodyear Assets being sold to a third party purchaser during the course of Sequoia's bankruptcy. To the contrary, the most likely fate of those Assets is that they will follow their current, expected path - to be designated as orphans upon the completion of the bankruptcy.

(2) *The Applicants' Perspective on Industry Standards and the Consequences of the Asset Transaction will be Unique and Useful to this Court*

16. The Responders argue that the Applicants will not have any unique or helpful perspective to provide this Court with respect to the Application to Strike the *BIA* Claim, claiming that the Applicants' arguments and concerns only pertain to the Aggregate Transaction and are irrelevant to the application of Section 96 of the *BIA* to the Asset Transaction.[12]

17. The Applicants agree that the Trustee has sought to set aside the Asset Transaction, and not the Share Transaction or the Retained Interests Agreement.[13] However, the Applicants respectfully submit that it would be a disservice to this Court to review the Asset Transaction in a vacuum, outside the context of its role in the larger Aggregate Transaction, its consistency or inconsistency with applicable industry standards, and the expected, real-world consequences to Alberta's oil and gas industry and the public in general if the Asset Transaction is maintained.

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[10] Rose Brief at para. 36.
[11] Darby Affidavit at paras. 31 and 47
[12] Perpetual Brief at paras 58, 60 and 65; Rose Brief at para. 74.
[13] Darby Affidavit at paras. 22 and 25.

18. Section 96 of the *BIA,* together with Section 95, provides the Trustee with a framework for addressing transactions that diminish the value of the insolvent party's estate, with the key objectives of achieving fairness and predictability. Holden and Morawetz spoke to the same as follows:

> Sections 95 and 96 create a complete framework for challenging transactions that may diminish the value of the insolvent debtor's estate, reducing the amount of money available for distribution to the creditors.
>
> .... A transfer at undervalue is disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received is conspicuously less than the fair market value of the consideration given by the debtor. The framework is aimed at ensuring fairness and predictability when dealing with these types of transactions in the insolvency system.[14]

19. Similarly, the Ontario Superior Court of Justice in ***Tucker v. Aero Inventory (UK) Ltd.***, while speaking particularly to Section 95 of the *BIA*, spoke to the importance of an "...appropriate review mechanism in place to challenge transactions that are not consistent with ordinary course activities and have had the effect of unfairly transferring value to a third party during the review period".[15]

20. The transfer of net liability caused by the Asset Transaction was the clear linchpin and instigator of the series of transactions undertaken by Sequoia, as spoken to in the Trustee's Statement of Claim and Affidavit[16], which the Applicants expect to prove in evidence to be a significant and material departure from the industry's ordinary standards.[17] The Applicants continue to submit that their submissions on these issues will be useful and different from that of the Trustee, who is not qualified to speak to such matters.[18]

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[14] LW Holden, GB Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009) F§201 at pg 610.
[15] *Tucker v. Aero Inventory (UK) Ltd.* 2011 ONSC 4223 at para 163.
[16] Statement of Claim at paras. 4 to 14; Darby Affidavit at paras. 20 to 29.
[17] Applicants' Original Brief at para. 33.
[18] Applicants' Original Brief at para. 28.

21. The Perpetual Defendants also argue that the within Application is distinguishable from this Court's decision in *Ecojustice Canada Society v Alberta*, 2020 ABQB 364, in which oil and gas industry participants were allowed to intervene on an application for judicial review where the issue of public interest was recognized by the Court. The Perpetual Defendants argue that public interest is not at issue in the case at hand.[19]

22. The Applicants strongly disagree with the position that issues of public interest or policy should be absent from this Court's consideration of the *BIA* Claim. The Applicants also take exception to the Perpetual Defendants' suggestion that the impact of the Court's decision on the Applicants is irrelevant.[20]

23. As this Court previously commented upon in the within Action, public policy considerations can be relevant to a Court's consideration on whether a particular contract should be enforced.[21] The Applicants submit that this Court's consideration of the *BIA* Claim is analogous to the same, as the Court will be determining whether the Asset Transaction remains in force or should be declared void. The Applicants expect to provide evidence on the consequences of the Asset Transaction to the Applicants, the oil and gas industry, and the public, which the Trustee will be unable to properly speak to.

24. Finally, the Responders have argued that the Applicants' submissions on the consequences of the Asset Transaction are tantamount to an attempt to reiterate or revive the Trustee's Public Policy Claim that was pled in its Statement of Claim, later dismissed, or an attempt to turn the courtroom into a political arena.[22] However, the Applicants would clearly not be seeking to raise an independent cause of action akin to the Trustee's Public Policy Claim, and its submissions will be restricted to the Court's determination of the *BIA* Claim.

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[19] Perpetual Brief at para. 62.
[20] Perpetaul Brief at para. 49.
[21] *PriceWaterhouseCoopers Inc. v Perpetual Energy Inc. et al*, 2020 ABQB 6 at para. 266.
[22] Perpetual Brief at para. 38 and 69 to 70; Rose at para. 73.

C. There is No Undue Delay in the Bringing of this Application

25. The Responders argue that the relevant time period in considering a delay in the bringing of the within Application started at the commencement of this Action.[23]

26. The Applicants deny that the commencement of the Action is the relevant starting point to consider, and rely upon their prior submissions that the appropriate time period started, at earliest, upon the filing and scheduling of the Perpetual Defendants' Applications to Strike the *BIA* Claim and to Seek Security for Costs. They continue to submit that there was no undue delay in bringing the within Application.[24]

27. The Perpetual Defendants cite several decisions in their Reply Brief in support of an argument that the within Application should be dismissed based upon a perceived delay in bringing the Application.[25] While the Applicants deny the existence of any undue delay, they also find that the Perpetual Defendants' authorities are, at the very least, not determinative of the case at hand. In those authorities, the presiding justices first found that the applying intervenors were unsuitable for failing to offer different and useful perspectives to the Court or unable to speak to the matters at issue, and only after those findings were concerns with delay addressed.[26] None of those authorities included a finding that an application for intervenor status ought to have been dismissed solely based on issues with delay in bringing the application.

28. Further, the Applicants also state that this Court's orders in response to the COVID-19 Pandemic, concluding with Chief Justice Moreau's "Master Order #4 - Relating to Court's Response to the COVID-19 Virus" pronounced May 14, 2020, effectively precluded the hearing of any non-urgent and non-emergency civil matters for the period of March 16, 2020 until June 26, 2020.[27] As previously stated, the Applicants understand that the Perpetual Defendants' Applications to Strike the *BIA* Claim and for Security for Costs were adjourned without a return

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[23] The Rose Brief, at para 65; The Perpetual Brief at para 97.
[24] The Applicants' Original Brief, at paras 36-38.
[25] The Perpetual Brief at para 98-99 and 102.
[26] *ViiV Healthcare ULC v Teva Canada Ltd*, 2015 CAF 33 at paras 5-6; *Prophet River First Nation v Canada (Attorney General)*, 2016 CAF 120 at paras 13-14 and 18; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 CAF 34 at paras 17-18 and 30
[27] Master Order #4, pronounced May 14, 2020 https://albertacourts.ca/docs/default-source/qb/covid/master-order-4---covid-19-final.pdf?sfvrsn=cbd39e80_4 ;
Amended Master Order #3, pronounced April 21, 2020, https://albertacourts.ca/docs/default-source/qb/covid/amended-master-order-3---covid19.pdf?sfvrsn=e7029d80_6

date until they were rescheduled at or around the end of June 2020. As such, it is unlikely that any urgent or emergency circumstances existed that would have allowed the Applicants to apply for intervenor status during the aforementioned suspension of civil matters.

D. The Terms and Conditions of the Intervention

29. The Perpetual Defendants seek that this Court impose a number of strict conditions upon any party who is granted intervenor status in this Action.[28] While the Applicants have already acknowledged the Court's discretion to control the scope of their proposed intervention and expressed their willingness to adhere to any expedited timelines that the Court may order as a condition of being granted intervenor status[29], they will not agree to the excessively stringent conditions sought by the Perpetual Defendants.

30. The most concerning condition sought by the Perpetual Defendants is to restrict any intervenor to the "evidentiary record as is", which is understood to be a prohibition of filing any new evidence in the Action. Should the Applicants receive the Court's permission to participate as an intervenor, they vigorously oppose any argument made to prevent the Applicants from filing further evidence. Such a prohibition would defeat the very purpose of the Applicants, and the other proposed intervenors, serving as intervenors who would provide this Court with their unique and useful perspectives on the matters at issue through sworn evidence. Similarly, the Applicants submit that it is premature to impose any restrictions on the length of the Applicants' written or oral submissions at this time, until the Applicants are able to file the evidence they will rely upon in speaking to the Perpetual Defendants' Applications.

IV. RELIEF SOUGHT

31. Canadian Natural, Cenovus, and Torxen continue to request the following relief:

a) an Order, pursuant to Rule 2.10 of the *Alberta Rules of Court*, Alta Reg 124/2010, granting Canadian Natural, Cenovus, and Torxen leave to intervene in the Action with the right to participate in the *BIA* Application and the Application for

[28] Perpetual Brief at para. 109.
[29] Applicants' Original Brief at paras. 35 and 38.

Security for Costs and all matters incidental thereto on such terms as this Honourable Court deems just;

b) an Order, pursuant to Rule 2.10 of the *Alberta Rules of Court*, Alta Reg 124/2010, prohibiting costs, either in favour of, or against the Applicants, with respect to any other party or intervenor in the *BIA* Application or the Application for Security for Costs;

c) should this Court grant the Applicants leave to intervene on Friday July 24, 2020 or thereabouts, a further Order adjourning the *BIA* Application and/or the Application for Security for Costs currently scheduled for July 28, 2020 to July 30, 2020; and

d) such further or other relief as this Honourable Court may deem just or necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of July, 2020.

PARLEE MCLAWS LLP

PER: _____

G. Scott Watson
Solicitor for the Applicants,
Canadian Natural Resources Limited, Cenovus Energy Inc., and Torxen Energy Ltd.

LIST OF AUTHORITIES

TAB

1. *Stoney Tribal Council v. Canadian Pacific Railway.* 2017 ABCA 432, 2017 CarswellAlta 2729.

2. *Alberta Rules of Court*. Alta. Reg. 124/2010, s. 14.48.

3. *Easy Loan Corp. v. Base Mortgage & Investments Ltd.* 2016 ABCA 163, 2016 CarswellAlta 990.

4. LW Holden , GB Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009) F§201 at pg 610.

5. *Tucker v. Aero Inventory (UK) Ltd.* 2011 ONSC 4223, [2011] O.J. No. 3816.

6. *ViiV Healthcare ULC v Teva Canada Ltd*, 2015 CAF 33, 2015 FCA 33.

7. *Prophet River First Nation v Canada (Attorney General)*, 2016 CAF 120, 2016 FCA 120.

8. *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 CAF 34, 2015 FCA 34.

9. Master Order #4, pronounced May 14, 2020, retrieved from the internet on July 20, 2020: https://albertacourts.ca/docs/default-source/qb/covid/master-order-4---covid-19-final.pdf?sfvrsn=cbd39e80_4.

10. Amended Master Order #3, pronounced April 21, 2020, retrieved from the internet on July 20, 2020: https://www.albertacourts.ca/docs/default-source/qb/covid/master-order-3---covid-19---final.pdf?sfvrsn=c4c68280_8.