

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 1901-0255AC
 TRIAL COURT FILE NUMBER: 1801-10960
 REGISTRY OFFICE: CALGARY
 APPLICANTS: Orphan Well Association
 Canadian Natural Resources Ltd.
 Cenovus Energy Inc.
 Torxen Energy Ltd.

Registrar's Stamp

STATUS ON APPEAL: NON-PARTIES
 STATUS ON APPLICATION: APPLICANTS

APPELLANT: PRICEWATERHOUSECOOPERS
 INC., LIT, in its capacity as
 TRUSTEE IN BANKRUPTCY
 OF SEQUOIA RESOURCES
 CORP.

STATUS ON APPEAL APPELLANT

STATUS ON APPLICATION n/a

RESPONDENTS: PERPETUAL ENERGY INC.,
 PERPETUAL OPERATING
 TRUST, PERPETUAL
 OPERATING CORP., SUSAN
 RIDDELL ROSE

STATUS ON APPEAL: RESPONDENTS
 STATUS ON APPLICATION: RESPONDENTS

DOCUMENT: **MEMORANDUM OF ARGUMENT OF SUSAN RIDDELL ROSE**
Applications to Intervene Returnable November 12, 2020 at 9:30 a.m.

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Introduction

1. This memorandum is respectfully submitted on behalf of the Respondent Susan Riddell Rose (**Rose**) in response to the applications of the Orphan Well Association (the **OWA** and **OWA Application**), and by Canadian Natural Resources Limited *et al* (the **Industry Applicants** and **Industry Application**) for leave to intervene in this appeal no. 1901-0255AC (the **Trustee Appeal**).

2. The Trustee Appeal is made by PricewaterhouseCoopers Inc. as trustee in bankruptcy of Sequoia Resources Corp. (the **Trustee**) from an Order (the **Order**) summarily dismissing and/or striking various claims made against Rose and against Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp. (collectively, **Perpetual**).¹

3. Rose submits that neither the OWA nor the Industry Applicants should be granted leave to intervene in the Trustee Appeal at all, and particularly in relation to the Trustee's claims *against Rose personally*; specifically, the Oppression Claim, Director Claim and the Public Policy Claim.²

The Trustee's Claim against Rose

4. In an extraordinary claim made by a trustee in bankruptcy against an individual³, the Trustee sought approximately \$225 million in monetary relief against Rose. In the end, every claim against Rose was *dismissed summarily* on the basis of the Release; the Director Claim was *dismissed summarily* on its merits *and struck*; and the Oppression Claim and Public Policy Claim were *struck* as pleading no cause of action. In a subsequent decision on costs, the Court found the Trustee's conduct to have been *egregious*.⁴

5. The Trustee filed its appeal in August 2019. The hearing date of December 10, 2020 was set long ago. The Trustee filed its Factum in May, and Rose filed her Factum in September. It is obviously very important to Rose that the Trustee's appeal be heard on the scheduled date.

¹ Appeal Record of appeal 2001-0174AC [Order of D.B. Nixon, J. filed 2020-02-18] at 165 (the **Order**).

² Capitalized terms are as defined in the Factum of the Respondent Susan Riddell Rose dated September 24, 2020 in appeal 1903-0255AC (**Rose Factum**). The Oppression Claim and the Public Policy Claim were made against Perpetual as well.

³ Rose Factum at para 42.

⁴ Appeal Record of appeal 2001-0174AC [Written Reasons for Judgement of D.B. Nixon, J., filed 2020-09-24 at para 202] at 97.

Ongoing proceedings before Justice Nixon

6. In the proceeding below, well after the Order had been granted, the OWA and Industry Applicants were granted leave to intervene in *Perpetual's* second *application* to summarily dismiss the Primary BIA Claim (which the OWA calls the BIA Claim). Rose is not a party to the Primary BIA Claim so she was not involved.⁵

7. The Primary BIA Claim remains extant. Justice Nixon is seized with it. His decision on *Perpetual's* application for summary judgment is under reserve. If the Trustee and the applicants prevail, the Primary BIA Claim will continue before Justice Nixon. If *Perpetual* prevails, the Primary BIA Claim will be at an end. Given the history of this matter, the unsuccessful party will likely appeal.

The Trustee's Appeal

8. The Court may grant leave to intervene only in relation to specific issues raised by the Trustee Appeal.⁶ The issues raised by the appeal are defined by the Order and the grounds of appeal set out in the Trustee's Factum.

9. The operative components of the Order⁷ that are subject to the Trustee Appeal state:

...

2. The Plaintiff's claims pursuant to s. 242 of the *Alberta Business Corporations Act*⁸ are struck as against all Defendants pursuant to Rule 3.68.
3. The Plaintiff's claims on the grounds of public policy, statutory illegality and equitable rescission⁹ are struck as against all Defendants pursuant to Rule 3.68.
4. The Plaintiff's claims against [Rose] for breach of fiduciary duty and breach of duty of care¹⁰ are dismissed pursuant to Rule 7.3 and struck pursuant to Rule 3.68.

⁵ Rose was party to the Alternative BIA Claim, which was dismissed on the basis of the Release.

⁶ *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238 at para 8, [2016] AJ No 790 (QL) (*Redwater*) [Tab 3 of OWA Memorandum]; *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2005 ABCA 320 at para 5, 143 ACWS (3d) 211 (*Papaschase*) [Tab 2 of Industry Applicant's Memorandum of Argument].

⁷ Appeal Record of appeal 2001-0174AC [Order of D.B. Nixon, J. filed 2020-02-18 at ss 2-5] at 166.

⁸ Oppression Claim.

⁹ Public Policy Claim.

¹⁰ Director Claim.

5. The application of Rose to dismiss all of the Plaintiff's claims against [Rose] on the basis of the [Release] is granted pursuant to Rule 7.3.

10. The grounds of appeal in the Trustee's Factum assert that Justice Nixon erred in ruling that:
- a. the Release was a bar to all claims against Rose (paragraph 5 of the Order);
 - b. Rose was not the 'directing mind' of PEOC (a finding in support of paragraph 4 of the Order);
 - c. the business judgment rule applied in relation to the conduct of Rose as a director (a finding in support of paragraph 4 of the Order);
 - d. the Director Claim should be dismissed (paragraph 4 of the Order);
 - e. the Oppression Claim should be struck (paragraph 2 of the Order);
 - f. the Public Policy Claim should be struck (paragraph 3 of the Order).¹¹

11. Neither the OWA nor the Industry Applicants seek to intervene in relation to the first three grounds of appeal or the Public Policy Claim. The fourth (Director Claim) and fifth (Oppression Claim) grounds of appeal are addressed below.

OWA Application

12. The OWA Application seeks leave to make submissions on whether ARO "should be taken into account pursuant to section 96 of the [BIA]".¹² The OWA seeks to intervene only in the Primary BIA Claim.¹³

13. Notably, the Primary BIA Claim is *not* the subject of the Trustee's appeal; the components of the Order under appeal were *not* made under the BIA; and *none* of the grounds raised in the Trustee's Factum concern the Primary BIA Claim. Again, the Primary BIA Claim remains extant before the Court below.

¹¹ Factum of the Appellant dated May 29, 2020 in appeal 1901-0255AC at para 17 (**Trustee's Factum**).

¹² Memorandum of Argument of Orphan Well Association filed October 30, 2020 at paras 1 and 11 (**OWA Memorandum**) [emphasis added]; OWA Memorandum ("The OWA seeks leave to intervene on the BIA Claim ..." at paras 14 and 15).

¹³ OWA Memorandum at paras 5 and 11.

14. Accordingly, there is no basis to grant the OWA leave to intervene in the Trustee's Appeal.

Industry Application

15. As a general proposition, Rose submits that the Court should be reticent to allow the intervention of Perpetual competitors who seek to advance "private industry interests"¹⁴ in relation to *in personam* claims against Rose, and especially where allegedly aggrieved parties (such as the AER) could have sued directly. Intervention is supposed to assist the Court; not advance private financial interests of non-parties.

16. The Industry Applicants' Memorandum of Argument states that they seek to make "submissions on industry's incorporation of ARO in valuing an asset particularly for the purposes of negotiating a purchase or sale, and industry's treatment of ARO as a liability on its financial statements and in its reporting to investors."¹⁵ How ARO affects industry participants' views of asset values, how they record ARO in their financial statements, and what they disclose to their particular investors are entirely irrelevant to the Trustee Appeal. The Trustee did not raise these points.

17. The Industry Applicants' Memorandum of Argument also states that they seek to intervene in the Trustee Appeal "*specifically* as it pertains to ... Justice D.B. Nixon's finding that [ARO is] not a liability, *as addressed* in part at paragraphs 94 to 120 and paragraphs 139 to 144 of the [Trustee's] Factum."¹⁶

18. While those paragraph numbers are specifically identified, the Industry Applicants' Memorandum of Argument says nothing more about them, and rather proceeds to speak only about s. 96 of the BIA.¹⁷ Again, there is no BIA issue raised by the Trustee Appeal.

19. Paragraphs 94-110 of the Trustee's Factum concern the Director Claim: whether Rose breached duties owed to PEOC under the ABCA by causing PEOC to enter into the Asset Transaction where, it is alleged, the subject assets were "high liability assets" because of the associated ARO.¹⁸ The *only* issue raised regarding ARO is whether the decision of the Supreme Court of Canada in *Redwater* means that the ARO was a current PEOC liability for the purpose of the Director Claim.

¹⁴ Memorandum of Canadian Natural Resources Limited, Cenovus Energy Inc., and Torxen Energy filed October 30, 2020 at para 16 [emphasis added] (**Industry Applicants' Memorandum of Argument**).

¹⁵ Industry Applicant's Memorandum of Argument at para 18.

¹⁶ Industry Applicant's Memorandum of Argument at para 1 [emphasis added].

¹⁷ See Industry Applicant's Memorandum of Argument at paras 10 and 11.

¹⁸ The Trustee's allegations in this regard are summarized in the Rose Factum at paras 74 and 138.

The Trustee's Factum makes extensive submissions in that regard, and this Court is entirely capable of understanding and applying the *Redwater* decision. Indeed, decisions of the Supreme Court are supposed to clarify the law for application by other courts, not invite jurisprudential lobbying efforts by private industry interests.¹⁹

20. Paragraphs 111-113 of the Trustee's Factum concern the estimation of ARO associated with the subject assets in the context of the Director Claim. At most, the Trustee's argument again raises the meaning of the *Redwater* decision. The Industry Applicants have nothing to add beyond another set of lawyers.

21. Paragraphs 114-120 of the Trustee's Factum concern an attempt to resile from a *concession by Trustee's counsel* that ARO is not a liability, and an estoppel argument about the defendants' pleadings. The Trustee's argument raises no substantive issue regarding ARO.

22. Paragraphs 139-144 of the Trustee's Factum concern whether the AER was a contingent creditor of PEOC for the purposes of the Oppression Claim.²⁰ The Oppression Claim was struck on the basis that it did not disclose a reasonable cause of action; specifically, that the Trustee does not have standing as a complainant under the ABCA; the Trustee does not have standing under s. 30 of the BIA to make individual creditor claims; and that the AER was not a creditor of PEOC at the time of the Asset Transaction for the purposes of an oppression claim under the ABCA. The Trustee Appeal is based on the striking of pleadings. At most, the Trustee's arguments raise the same question about the interpretation of *Redwater*.

Conclusion

23. Neither the OWA nor the Industry Applicants have established an entitlement to intervene in the Trustee Appeal. Rose submits that they should be dismissed with costs.

RESPECTFULLY SUBMITTED ON NOVEMBER 6, 2020

NORTON ROSE FULBRIGHT CANADA LLP

Per: *Steven H. Leidl*

Steven H. Leidl, QC / Gunnar Benediktsson

¹⁹ *Stewart Estate (Re)*, 2014 ABCA 222 at para 9, 577 AR 57 [Book of Authorities (BOA), Tab 1]; *Papaschase* at para 2 [Tab 2 of Industry Applicant's Memorandum of Argument]; *R. v Newborn*, 2018 ABCA 256 at para 4 [2018] AWLD 2864 [BOA, Tab 2]; *Apotex Inc. v Eli Lilly Canada Inc.*, 2001 FCA 108 at para 9, [2001] FCJ No 613 (QL) [BOA Tab 3].

²⁰ The Trustee's specific allegations are quoted in the Rose Factum at para 59.

Table of Authorities

Tab #	Style of Cause (Hyper-Linked)	Citation
1.	<i>Stewart Estate (Re)</i>	2014 ABCA 222
2.	<i>R v Newborn</i>	2018 ABCA 256
3.	<i>Apotex Inc. v Eli Lilly Canada Inc.</i>	2001 FCA 108