
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)**

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

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 Intervenors”).

[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 intervenor's interest in the subject matter, the court considers whether the proposed intervenor 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 Intervenors, 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.



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. Leidl 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