

COURT OF APPEAL OF ALBERTA

FORM AP-3
[RULE 14.53]



COURT OF APPEAL FILE NUMBER: 2101 – 0021AC

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
STATUS ON APPLICATION: RESPONDENT

DEFENDANTS/RESPONDENTS: PERPETUAL ENERGY INC., PERPETUAL
OPERATING TRUST, and PERPETUAL
OPERATING CORP.,

STATUS ON APPEAL: RESPONDENTS
STATUS ON APPLICATION: RESPONDENTS

APPLICANT: ORPHAN WELL ASSOCIATION

STATUS ON APPEAL: PROPOSED INTERVENOR
STATUS ON APPLICATION: APPLICANT

DOCUMENT: **APPLICATION OF THE PROPOSED
INTERVENOR, THE ORPHAN WELL
ASSOCIATION, FOR LEAVE TO
INTERVENE**

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And

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NOTICE TO RESPONDENTS:

PRICEWATERHOUSECOOPERS INC, LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP., and not in its personal capacity, the Appellant; and PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, AND PERPETUAL OPERATING CORP., the Respondents.

WARNING

If you do not come to Court on the date and time shown below either in person or by your lawyer, the Court may give the applicant what it wants in your absence. You will be bound by any order that the Court makes. If you intend to rely on other evidence or a memorandum in support of your position when the application is heard or considered, you must file and serve those documents in compliance with the Rules. (Rule 14.41 and 14.43)

NOTICE TO RESPONDENT(S):

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: June 10, 2021
Time: 9:30 a.m.
Where: Court of Appeal of Alberta, 27th Floor,
450 1st St SW, Calgary Alberta
Before: Single Judge of the Court (Rule 14.37)

Nature of Application and Relief Sought:

1. The Orphan Well Association ("**OWA**") seeks an Order pursuant to Rule 14.58(1) of the Alberta *Rules of Court* granting leave to intervene in Court of Appeal File No. 2101-

0021AC (the "**Appeal**") with the right to participate in all proceedings related to the following distinct legal issue:

- (a) The interaction between section 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, C b-3 (the "**BIA**") and regulatory obligations with regard to the Supreme Court of Canada's decision in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 ("**Redwater**") and in particular, whether regulatory obligations are an obligation that can render a person insolvent pursuant to section 96 of the BIA, based on the treatment of regulatory obligations by the OWA.
2. Pursuant to Rule 14.58(1) of the *Rules of Court*, an Order prohibiting costs, either in favour of or against the OWA.
3. Such further and other relief incidental to the above as requested and as this Honourable Court deems appropriate.

Grounds for making this application:

4. Terms not hereinafter defined shall have the same meaning as set out in the decisions of the Honourable Justice D.B. Nixon at *PricewaterhouseCoopers Inc v. Perpetual Energy Inc.*, 2021 ABQB 2.

Asset Retirement Obligations & Solvency

5. The OWA abandons and reclaims wells, facilities, and pipelines that do not have a solvent and responsible owner to protect people and the environment.
6. The OWA has a limited budget and is focused on maximizing its available funding. This requires risk-assessing and prioritizing the inventory of orphaned and abandoned wells, facilities, and pipelines to ensure public safety and environmental protection. The OWA is primarily funded by the Orphan Fund Levy (the "**Levy**"), which is paid by energy companies across Alberta, rather than Albertans. The Levy payable by individual companies and is determined in part with regard to the total abandonment and reclamation liabilities of all wells, facilities, and pipelines across Alberta. In short, abandonment and reclamation obligations are always taken into account in calculating the Levy and the overall sustainability of the program.

7. Upon learning of the details of the Aggregate Transaction, but more specifically, the embedded Asset Transaction, the OWA became concerned, for, *inter alia*, the following reasons:
 - (a) the Asset Transaction had the effect of shedding from Perpetual and POT, the significant abandonment and reclamation obligations ("**ARO**") associated with the Goodyear Assets, which potentially rendered the purchaser, Perpetual Operating Corp insolvent;
 - (b) the Aggregate Transaction did not receive the usual regulatory scrutiny because it took place as a share transaction, rather than an asset transaction; and
 - (c) the effect of the Asset Transaction in combination with the Aggregate Transaction was to create a significant liability that Sequoia Resources Corp., a company with limited assets, had no ability to pay, ultimately leaving the Goodyear assets to be abandoned and reclaimed by the OWA.
8. At present, the cost to abandon and remediate the Goodyear Assets is estimated by the Trustee to be approximately \$200,000,000. It is likely that the entire cost associated with the abandonment and reclamation of the Goodyear Assets will be paid by the OWA, which in turn is funded by the Levy paid by energy companies. It is virtually certain that the OWA will face significant harm if the Asset Transaction is not declared void as sought in the Statement of Claim.
9. The OWA was granted leave and did intervene in the application being appealed. Furthermore, the OWA intervened in the Court of Appeal hearing on December 10, 2020 (the "**First Appeal**") reasons for which were delivered January 25, 2021 (the "**First Appeal Decision**").
10. The First Appeal Decision substantially overruled Justice Nixon's characterization of ARO in relation to the causes of action at issue in that appeal.
11. This appeal concerns a second application where many of the same issues, and the same characterization of ARO, is relevant. The decision appealed was from January 14, 2021,

11 days prior to the First Appeal Decision, so Justice Nixon did not have the benefit of this Honourable Court's reasons in that case.

12. The characterization of ARO is fundamental to the OWA's purpose and mandate. The OWA submits that this appeal should be allowed, largely based on the findings in the First Appeal Decision.
13. The OWA's perspective is necessary to this Action in order for this Court to properly consider the interests of the OWA as the entity that will probably be responsible for the abandonment and reclamation obligations associated with the Goodyear Assets, as well as that of the entity that considers whether oil and gas properties have responsible owners to complete end-of-life obligations.
14. The OWA proposes to assist the Court in this Action by providing submissions in the following areas:
 - (a) The interaction between section 96 of the BIA and regulatory obligations with regard to the Supreme Court of Canada's decision in *Redwater* and in particular, whether regulatory obligations are an obligation that can render a person insolvent pursuant to section 96 of the BIA, based on the treatment of regulatory obligations by the OWA.
 - (b) In particular, the OWA is concerned with respect to Justice Nixon's characterization of ARO as "not an actual liability," which it is submitted is the wrong question for the purposes of the applicability of section 96 of the BIA. Rather, ARO need only be the broader "obligation" to trigger section 96 of the BIA.
 - (c) The impact of transactions made for the purposes of avoiding abandonment and reclamation obligations on the OWA and industry; and
 - (d) Such further and other submissions in respect of matters incidental to the above, as counsel may advise and this Honourable Court may permit.
15. Granting the OWA leave to intervene in the Action will not:

- (a) unduly delay the proceedings;
- (b) cause prejudice to either of the parties; or
- (c) widen the *lis* between the parties.

Material or evidence to be relied on:

- 16. The written reasons of judgment of the Chambers Justice dated January 14, 2021, PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABQB 2;
- 17. The written reasons of judgment of the Alberta Court of Appeal dated January 25, 2021: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 16;
- 18. The pleadings and materials filed in the Court of Queen's Bench of Alberta Action No. 1801-10860, as set out in the Appellant's Record;
- 19. The pleadings and materials filed in the Alberta Court of Appeal Action No. 1901-0255AC, as set out in the Appellant's Record;
- 20. Affidavit of Donna Kathler, affixing the Affidavit of Lars de Pauw, sworn on June 30, 2020 in support of the initial interest by the OWA, redacted in accordance with the Order of Justice Nixon dated September 11, 2020; and
- 21. Such further and other material as counsel may advise and this Honourable Court may allow.

Applicable Acts, regulations and rules:

- 22. The inherent jurisdiction of this Honourable Court to control its own process;
- 23. Rules 14.28, 14.37, 14.40, and 14.58 of the Alberta Rules of Court; Bankruptcy and Insolvency Act, RSC 1985, c B-3; and

24. Such further and other material, legislation, and rules as counsel may advise and this Honourable Court may allow.

DATED at the City of Calgary in the Province of Alberta, this 25th day of May, 2021.

Estimated time of argument: 15 minutes

ORPHAN WELL ASSOCIATION

Per: Ken Lenz
Kenneth T. Lenz, QC / Andrea Stempien
Bennett Jones LLP
Solicitors for the Orphan Well Association

To: The Clerk of the Court
And To: Solicitors for the Respondents
And To: Solicitors for the Appellants