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TO

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER	1901-0255AC
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
DEFENDANTS/APPLICANTS	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE
STATUS ON APPEAL	RESPONDENTS
INTERVENORS	CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., and TORXEN ENERGY LTD.
INTEREVENOR	THE ORPHAN WELL ASSOCIATION
DOCUMENT	**FACTUM OF THE INDUSTRY INTERVENORS**

Appeal from the Judgment of
The Honourable Mr. Justice D.B. Nixon
Dated the 15th day of August, 2019
Filed the 18th day of February, 2020

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INTRODUCTION

1. Canadian Natural Resources Limited ("Canadian Natural"), Cenovus Energy Inc. ("Cenovus"), and Torxen Energy Ltd. ("Torxen", collectively with Canadian Natural and Cenovus, the "Industry Intervenors") are intervenors in Court of Appeal File Number 1901-0255AC (the "Appeal") and submit this factum to offer their extensive expertise and unique perspectives to assist this Honourable Court solely as it pertains to the Appellant, PricewaterhouseCoopers Inc.'s (the "Appellant's") appeal of the Honourable Mister Justice D. B. Nixon's ("Justice Nixon's") finding that Asset Retirement Obligations ("ARO") are not a liability.

2. The Industry Intervenors do not take a position on the other matters in the Appeal.

PART I – FACTS

3. The Industry Intervenors rely upon the statement of facts in the Factum of the Appellant.

4. Terms not otherwise defined shall have the same meaning as set out in the Statement of Claim and the Factum of the Appellant.

PART II – GROUNDS FOR APPEAL

5. N/A

PART III – STANDARD OF REVIEW

6. Where the issue involves a question of law, including the proper interpretation of a binding authority from the Supreme Court of Canada, the applicable standard of review is correctness.

7. Justice Nixon's misinterpretation of *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, ("*Redwater*") and consequent mischaracterization of the ARO as not a liability involves a question of law, and therefore the appropriate standard of review is correctness.

PART IV – ARGUMENT

A. Issue

8. The Industry Intervenors focus their submissions on the issue of whether or not Justice Nixon erred in his characterization of ARO not being a liability.

9. More specifically, the Industry Intervenors will focus their submissions on how Justice Nixon misinterpreted the law and/or interpreted the law too broadly, resulting in the mischaracterization of ARO as not being a liability. The stark contrast of Justice Nixon's finding to the industry practice of ARO being treated as a liability, inherent to the value of an asset is further explained in the Affidavits of Ron Laing (the "Laing Affidavit"), Antonio Jackson (the "Jackson Affidavit"), and John K. Brannan (the "Brannan Affidavit"), filed on October 30, 2020, and located in the Industry Intervenor's Record (the "IIR") at Tabs "1", "2", and "3", respectively.

B. Applicable Law

10. In *Redwater*, the Supreme Court of Canada found that "end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front", and that "these regulatory conditions depress the value of the licensed assets"[1].

11. The Supreme Court of Canada was insistent that a licence holder could not benefit during the "productive period" of a licenced asset, then avoid the "associated liabilities"[2]. The Supreme Court of Canada aptly explained that the "Licensee Liability Rating Program essentially requires licensees to apply the value derived from oil and gas assets during the productive portions of the life cycle of the assets to the ***inevitable*** cost of abandoning those assets and reclaiming their sites at the end of those life cycles"[3] **[*emphasis added*]**.

12. The Supreme Court of Canada further found that the regulatory regime in Alberta is "a licensing regime which makes such costs an inherent part of the value of licensed assets", and

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[1] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 ("*Redwater*"), at paras. 157 and 158 **[Appellant's Authorities, Tab 24]**
[2] *Redwater*, at para. 157 **[Appellant's Authorities, Tab 24]**
[3] *Redwater*, at para. 29**[Appellant's Authorities, Tab 24]**

"has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law"[4].

13. The Supreme Court of Canada distinguished ARO as a public duty or obligation "owed, not to a creditor, but, rather, to fellow citizens, and therefore outside the scope of 'provable claims'"[5]. Further, the Supreme Court of Canada found that the Alberta Energy Regulator ("AER") is an enforcer of this public duty, and should typically neither be mistaken as a creditor, nor a provider of abandonment and reclamation services[6].

14. In considering whether or not ARO are a claim provable in bankruptcy, the Supreme Court of Canada acknowledged that the second part of the *Abitibi* test was met in *Redwater*, namely that ARO were a debt, liability, or obligation that was incurred before the debtor became bankrupt[7]. That is, while the Supreme Court of Canada ultimately distinguished ARO, given the circumstances applicable in *Redwater*, from a claim provable in bankruptcy, the Court still recognized ARO as a debt, liability, or obligation, for the purposes of considering the value of an asset[8].

15. The Supreme Court of Canada clarified that regulatory requirements like ARO require licence holders to "do something"[9]. While ARO have a financial element, they are not always debts owed to a creditor, or claims provable in bankruptcy, but rather they are "licensing requirements" that predate bankruptcy, "apply to all licensees regardless of solvency", and "depress the value of the licensed asset"[10].

C. The Industry Intervenors Unanimously consider ARO to be a Fundamental Component of an Asset's Value

[4] *Redwater*, at para. 29**[Appellant's Authorities, Tab 24]**
[5] *Redwater*, at paras. 131 and 134-135**[Appellant's Authorities, Tab 24]**
[6] *Redwater*, at paras. 135 and 145**[Appellant's Authorities, Tab 24]**
[7] *Redwater*, at paras. 119 and 120**[Appellant's Authorities, Tab 24]**
[8] *Redwater*, at para. 29 **[Appellant's Authorities, Tab 24]**
[9] *Redwater*, at para. 139 **[Appellant's Authorities, Tab 24]**
[10] *Redwater*, at para. 158 **[Appellant's Authorities, Tab 24]**

16. In accordance with the above principles set out in *Redwater*, the Industry Intervenors unanimously made the following conclusions about ARO, as stated in their respective Affidavits filed October 30, 2020[11]:

16.1 ARO are an inherent part of the value of a licensed asset under the regulatory regime in Alberta;

16.2 all licences that are transferred are subject to the ARO that will inevitably arise, and these end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front; and

16.3 ARO serve to depress the value of licensed assets.

17. In Alberta, the transfer of licenses for oil and gas properties such as wells, facilities, and pipelines is subject to review and approval by the AER through its Licensee Liability Rating Program (the "LLR Program"). Under the LLR Program, a licensee seeking to acquire a license from another licensee must submit a license transfer application to the AER, which triggers an AER Liability Management Rating ("LMR") Assessment ("LMR Assessment"), on a post-license transfer basis for the buyer and the seller[12]. The LMR Assessment considers a licensee's capacity to take responsibility for and manage it suspension, abandonment, remediation, and reclamation liabilities by comparing a licensee's deemed assets in the LLR Program, Large Facility Management Program, and Oilfield Waste Liability Program (collectively, the "Programs") to its deemed liabilities in those Programs[13].

18. In accordance with AER Directive 006, if the AER determines that a proposed transferee's or transferor's post-transfer deemed liabilities will exceed its post-transfer deemed assets under the Programs, this will negatively impact its LMR rating. If a licensee's LMR rating falls below the AER threshold applicable at that time, then the licensee would be required to

[11] *Redwater*, at paras. 29, 157, and 158, Affidavit of Ron Laing filed October 30, 2020 ("Laing Affidavit"), at paras. 26, and 30 to 35 **[Industry Intervenor's Record ("IIR"), TAB "1" at pgs. 11 - 13]**, Affidavit of Antonio Jackson filed October 30, 2020 ("Jackson Affidavit"), at paras 22 to 24 **[IIR, TAB "2" at pgs. 29 and 30]**, and Affidavit of John K. Brannan filed October 30, 2020 ("Brannan Affidavit"), at paras. 16 to 18 **[IIR, TAB "3"at pgs. 46 and 47]**.

[12] AER Directive 006, effective date February 17, 2016 ("Directive 006"), at pgs. 10 and 12 [**Appellant's Authorities, Tab 34]**

[13] Directive 006 at pg. 4 [**Appellant's Authorities, Tab 34]**

provide a security deposit to the AER to bring its LMR rating above the set threshold after consideration of the security deposit plus the licensee's post-transfer deemed assets compared to its post-transfer deemed liabilities, or otherwise establish that it is capable of meetings its asset's life cycle obligations in order for the proposed license transfer to receive AER approval[14].

19. The purpose of the LLR Program is to minimize the risk of the licensee's suspension, abandonment, remediation, and reclamation obligations ultimately being borne by the Orphan Well Association, and indirectly, through the Orphan Fund Levy, by all industry participants[15].

20. The LLR Program, related LMR Assessment, and the AER's consideration of end of life obligations associated with oil and gas assets in determining a licensee's deemed liabilities were and continue to be safeguards followed industry-wide to ensure the long-term viability of the oil and gas industry in Alberta and to ensure that oil and gas assets are owned, operated and transferred in a responsible way that protects the environment and Albertans.

21. The regulatory regime in Alberta highlights the importance of ARO in determining the value of an asset. However, ARO is not a statutory fiction or a liability created solely as a result of statute or an AER directive. All three Industry Intervenors confirm that ARO is a liability that depresses the value of the corresponding asset for the purposes of negotiating the purchase or sale of a licensed asset[16]. Similarly, ARO is reported as a liability on all of the Industry Intervenors' balance sheets and in their reporting to investors and stakeholders[17]. It is well known in industry that ARO will inevitably be addressed and must be paid for as part of operating in the oil and gas industry and acting as an environmentally responsible industry member.

22. Further, the Appellant's claims do not require the ARO attributable to the Goodyear Assets to be established as a claim provable in bankruptcy. Instead, the Appellant's claims require, *inter alia*, determination of the proper valuation of the Goodyear Assets at the time of the Asset Transaction, which is separate and distinct from the issues considered in *Redwater*. The

[14] Directive 006 at pgs. 4 and 12 [**Appellant's Authorities, Tab 34]**
[15] Directive 006 at pg. 2 [**Appellant's Authorities, Tab 34]**
[16] Laing Affidavit, at paras. 26, and 30 to 35 **[IIR, TAB "1" at pgs. 11 - 13]**, Jackson Affidavit, at paras. 22 to 24 **[IIR, TAB "2" at pgs. 29 and 30]**, and Brannan Affidavit, at paras. 16 to 18 **[IIR, TAB "3" at pgs. 46 and 47]**
[17] Laing Affidavit, at paras. 37 and 38 **[IIR, TAB "1" at pgs. 13 and 14]**, Jackson Affidavit, at paras. 27 and 28 **[IIR, TAB "2" at pg. 30]**, and Brannan Affidavit, at paras. 21 and 22 **[IIR, TAB "3" at pg. 47]**

Industry Intervenors submit that determination of value is not and should not be restricted only to the consideration of liabilities constituting claims provable in bankruptcy, but rather should include all factors inherent and fundamental to an asset's value as well as the consideration exchanged during an impugned transaction.

23. The Perpetual Operating Trust ("POT") and Perpetual Energy Operating Corp. ("PEOC") problematically chose not to incorporate the ARO, a fundamental and inherent part of the value of the Goodyear Assets, in completing the Asset Transaction by assigning the ARO no value. Specifically, the October 1, 2016 Purchase and Sale Agreement (the "PSA") whereby POT agreed to sell and PEOC agreed to purchase, *inter alia*, the Goodyear Assets, expressly states that "the Parties agree to attribute no value to the assumption of the Abandonment and Reclamation Obligations and the Environmental Liabilities"[18], as those terms are defined in Section 1.01 of the PSA, that were associated with the Assets sold under the PSA[19].

24. In order to properly determine whether or not the ARO associated with the Goodyear Assets were a liability in the context of the Appellant's claims, the Industry Intervenors submit that the analysis of that ARO should have included consideration of how that ARO impacted and depressed the fair market value of the Goodyear Assets at the time of the Asset Transaction, which Justice Nixon failed to do.

D. Justice Nixon erred by concluding that ARO were not a liability because ARO were not a claim provable in insolvency

25. In deciding whether or not ARO were a liability to be considered in the context of the Appellant's claims, Justice Nixon erroneously focused his attention on the issue of whether ARO should be considered a claim provable in bankruptcy, rather than the issue at hand – considering whether ARO is "an inherent part of the value of licensed assets"[20] which serves to depress the value of that licensed asset. His focus on ARO as claims provable in bankruptcy was repeatedly

[18] Purchase and Sale Agreement (the "PSA"), at Subsection 2.06(e) **[Extracts of Key Evidence of the Appellant/Respondent PricewaterhouseCoopers Inc., LIT, p. A0064]**
[19] PSA at Subsection 1.01(a); definition of "Abandonment and Reclamation Obligations" **[Extracts of Key Evidence of the Appellant/Respondent PricewaterhouseCoopers Inc., LIT, p. A0052-A0053]**
[20] *Redwater*, at para. 158 **[Appellant's Authorities, Tab 24]**

evident throughout his reasons for judgment, including his inapt application of the *Abitibi* test[21]. The *Abitibi* test is a tripartite test used to determine if an environmental obligation imposed by a regulator will be a claim provable in insolvency; however, it is not intended to be used in assessing the impact of an environmental obligation on the value of an impugned asset prior to insolvency[22].

26. Similarly, Justice Nixon found that the ARO associated with the Goodyear Assets that are subject in this Appeal were not a liability, comparing them to the assets considered in *Redwater*[23]. Justice Nixon reasoned that because the AER had issued abandonment notices for the *Redwater* assets, but had not yet done so for the Goodyear Assets, the ARO associated with the Goodyear Assets were even farther removed from being characterized as a liability than those in *Redwater*[24]. However, this reasoning is only applicable to assessing ARO as a claim provable in insolvency, which the Industry Intervenors again submit was an incorrect analysis adopted by Justice Nixon. Justice Nixon's reasoning failed to recognize ARO as a liability insofar as ARO are a licensing requirement that pre-date bankruptcy and applies to all licensees regardless of solvency[25].

27. Justice Nixon also made several findings to establish that the AER is *not* a creditor in his reasons[26]. While this characterization of the AER was important in the *Redwater* context, the same cannot be said in the instant circumstances. Although ARO have a financial element, they are not always a debt owed to a creditor, but rather are always an inevitable obligation to *do something*[27]. ARO are a public duty owed to fellow citizens and consequently typically beyond the scope of provable claims[28]. Justice Nixon's findings on the creditor status of the AER, as well as his finding that ARO are not claims provable in bankruptcy, ought to have been irrelevant considerations in the case at hand. The Industry Intervenors submit that Justice Nixon should have instead recognized the ARO in question as a liability that was "an inherent part of

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[21] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6 ("Reasons for Judgment"), as attached as Appendix A to the Factum of the Appellants filed May 29, 2020 in Appeal Number 1901-0262AC ("Perpetual Appellants' Factum"), at para. 138 **[Perpetual Appellants' Factum, Tab A]**
[22] *Redwater* at para. 37 **[Appellant's Authorities, Tab 24]**
[23] Reasons for Judgment, at para. 173 **[Perpetual Appellants' Factum, Tab A]**
[24] Reasons for Judgment, at para. 173 **[Perpetual Appellants' Factum, Tab A]**
[25] *Redwater* at para. 158 **[Appellant's Authorities, Tab 24]**
[26] Reasons for Judgment, at paras. 141-143 **[Perpetual Appellants' Factum, Tab A]**
[27] *Redwater* at para. 139 **[Appellant's Authorities, Tab 24]**
[28] *Redwater* at paras. 124 and 134-135 **[Appellant's Authorities, Tab 24]**

the value of licensed assets"[29], which served to depress the value of the Goodyear Assets in the course of the Asset Transaction.

28. Finally, Justice Nixon found that the ARO associated with the Goodyear Assets were a "notional and contingent obligation", and such future obligations could not equate to a current monetary claim[30]. Again, this assessment of ARO as a future, notional, or contingent obligation fails to recognize ARO, as they were classified by the Supreme Court of Canada in *Redwater*, as inevitable end-of-life obligations, similar to an up-front cost, and inherent or fundamental to the value of the licensed asset[31].

29. As discussed above, ARO are a duty, liability, or obligation that form a fundamental part of the value of an asset, and once the benefit of an oil and gas asset has been received during its productive life cycle period, a licensee cannot then avoid the associated liabilities[32]. As such, consideration of the fair valuation of the aggregate of PEOC's property following the Asset Transaction must also include the ARO associated with PEOC's assets, including the Goodyear Assets.

30. The Appellant has estimated the expense associated with the Goodyear Asset's ARO as being over $200 million dollars, and same must be considered in assessing the fair valuation of PEOC's aggregate property post Asset Transaction.

31. To that end, the Industry Intervenors submit that the failure to properly consider ARO in the assessment of the Goodyear Assets' value, as well as the failure to recognize the consequent effect on PEOC's value following the Asset Transaction, resulted in Justice Nixon's improper analysis of the issues before him and caused him to err in finding that ARO were not a liability for the purposes of assessing the Appellant's claims.

PART V – RELIEF SOUGHT

32. Canadian Natural, Cenovus, and Torxen request an Order declaring that Justice Nixon erred in his findings that ARO are not a liability.

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[29] *Redwater* at para. 29 **[Appellant's Authorities, Tab 24]**
[30] Reasons for Judgment, at paras. 172 and 229 **[Perpetual Appellants' Factum, Tab A]**
[31] *Redwater* at paras. 29, and 157-158 **[Appellant's Authorities, Tab 24]**
[32] *Redwater*, at para. 157 **[Appellant's Authorities, Tab 24]**

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of November, 2020.

Estimate of time required for oral argument: 15 to 30 minutes.

PARLEE MCLAWS LLP

PER: 

G. Scott Watson / Charles W. Ang
Solicitors for the Industry Intervenors, Canadian Natural Resources Ltd., Cenovus Energy Inc., and Torxen Energy Ltd.