SCC Court File number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM *THE COURT OF APPEAL OF ALBERTA*)

B E T W E E N:

SUSAN RIDDELL ROSE

APPLICANT
(Respondent)

A N D:

PRICEWATERHOUSECOOPERS INC., LIT in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
(SUSAN RIDDELL ROSE, APPLICANT)
(Pursuant to section 40 of the *Supreme Court Act*, RSC 1985, c S-26, and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I. OVERVIEW AND FACTS

(1) Overview

1. The proposed appeal by Susan Riddell Rose (**Ms. Rose**) raises the issue of when, if ever, a trustee in bankruptcy has legal authority to sue a former director of a bankrupt corporation for breach of fiduciary duty or oppression, not on the basis of the interests of the corporation or its stakeholders, but rather on the basis of regulatory obligations owed by the corporation to the public – in this instance, an oil and gas producer's abandonment and reclamation obligations (**ARO**) prescribed pursuant to the Alberta *Responsible Energy Development Act* and related regulations.

2. The decision of the Alberta Court of Appeal[1] (**ABCA** and the **ABCA Decision**) has bestowed on trustees in bankruptcy a new authority to act as enforcers of provincial regulatory obligations owed by bankrupt corporations, and to make directors the financial guarantors of such obligations. This is a remarkable and troubling departure from: (i) the authority conferred upon trustees by the *Bankruptcy and Insolvency Act*[2] (the **BIA**); (ii) jurisprudence regarding the interests of a bankrupt estate; (iii) the law regarding the duties of directors to the corporation; and (iv) the law regarding the test for oppression. The ABCA Decision is fundamentally flawed at law; it will distort the administration of bankruptcies, and unjustifiably expose corporate directors to an entirely new area of personal liability.

3. The Trustee alleged personal liability on the part of Ms. Rose *qua* former director of PEOC-Sequoia[3] on the basis of the subsequent bankruptcy of Sequoia and its consequent inability to fund the anticipated ARO associated with its energy asset portfolio.[4] The trial court

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[1] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 [**Appeal Decision**].

[2] RSC 1985, c B-3.

[3] As is set out further herein, Ms. Rose was the sole director of Perpetual Energy Operating Corp. (**PEOC**) at the time of an impugned transfer between PEOC and Perpetual Operating Trust (**POT**). Following a sale of the shares of PEOC to an arm's length third party, and Ms. Rose's resignation, PEOC changed its name to Sequoia Resource Corp. (**Sequoia**).

[4] Appeal Decision at para 13(a)-(d). The Trustee alleged, among other things, that Ms. Rose's conduct with respect to the Asset Transaction (as separate from the Aggregate Transaction of

rightly struck the claims as being manifestly unsupported by the law: the regulatory duty in question was Sequoia's, not that of Ms. Rose, and the impugned transaction which formed the basis for Ms. Rose's alleged liability was perfectly lawful. In contrast, on the basis of new visions of the laws pertaining to bankruptcy, director duties and the oppression remedy, the ABCA sanctioned the Trustee's claims.

4. The ABCA Decision raises issues of public and national importance; for all common law jurisdictions, it profoundly alters the authority and role of trustees in bankruptcy, and significantly expands corporate directors' exposure to personal liability. In the case of a bankrupt oil and gas company, the trustee in bankruptcy may now sue the directors of the bankrupt corporation based on the corporation's own regulatory defaults, even if the regulatory regime does not provide for personal director liability, the bankruptcy occurred long after the director's departure, and was caused by unforeseeable changes in business conditions and the response of new directors and management to external factors. The trustee may even do so while pursuing claims in oppression that never belonged to the bankrupt, and do not belong to its estate.

5. This case accordingly concerns the scope of authority of a trustee in bankruptcy in respect of the bankrupt's public and regulatory obligations, and thus sits at the intersection of *Redwater*[5] (the public duty to satisfy ARO), *BCE*[6] (oppression and directors' duties in the context of corporate transactions) and *Wilson*[7] (the limits of personal liability of directors, particularly in oppression). The ABCA itself acknowledged this case raises "novel issues respecting corporate law, bankruptcy law, oil and gas regulation, contracts, and procedure."[8]

(2) Facts

6. The defendants Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp. (**Perpetual**) have separately applied for leave to appeal the ABCA Decision. Ms. Rose supports and agrees with Perpetual's application, and adopts the statement of facts and

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which it was part) acted oppressively within the meaning of the Alberta *Business Corporations Act*, RSA 2000, c B-9 [the **BCA**], and breached her fiduciary duties to the company.

[5] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [***Redwater***].
[6] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 [***BCE***].
[7] *Wilson v Alharayeri*, 2017 SCC 39 [***Wilson***].
[8] *PricewaterhouseCoopers Inc v Perpetual Energy Inc,* 2021 ABCA 92 at para 7.

defined terms from the Memorandum of Argument filed by Perpetual on even date herewith (the **Perpetual Memorandum**).

7. Additional incremental facts are set out below.

(A) The provincial regulatory regime

8. The nature of the energy regulatory regime devised by the government of Alberta is aptly summarized in *Redwater*.[9] For the purposes of this application, it is sufficient to note ARO is an obligation of the licensee – in this case PEOC-Sequoia. Enforcement of ARO and related obligations is the sole jurisdiction of the AER. The regime specifically contemplates the risk of a licensee's bankruptcy, including through the program administered by the Orphan Well Association (**OWA**). The regime makes no provision for personal liability of directors in relation to unsatisfied ARO.[10]

9. The BIA does not confer on trustees in bankruptcy any authority to take proceedings to enforce the bankrupt's public obligations against others. The director duty provisions of the Alberta *Business Corporations Act* (**BCA**) do not provide for director liability in relation to such obligations.

(B) Sequoia's bankruptcy

10. After closing the Aggregate Transaction, PEOC changed its name to Sequoia (under 198 Alberta's control) and implemented its own business plan pursuant to which it, among other things, acquired additional assets, took steps to increase production, and executed, on an accelerated basis, the abandonment and reclamation of some of its shut-in assets.[11] At first, Sequoia flourished; an unforeseen collapse in the Alberta natural gas market negatively impacted

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[9] For the purposes of this appeal, the regulatory regime governing ARO is still materially the same as what was considered by this Court in *Redwater*.

[10] The AER may seek limited remedies against directors and officers if a licensee's ARO goes unsatisfied, including as the result of a licensee's receivership or bankruptcy. These remedies are prescribed under s. 106 of the *Oil and Gas Conservation Act*, RSA 2000 c. O-6 [the **OGCA**], which does not contemplate directors' personal liability for ARO.

[11] Affidavit of Mark Schweitzer filed October 4, 2018 [**Schweitzer Affidavit**] at para 24 & Exhibit "A".

the industry and eventually rendered Sequoia unable to operate.[12] Sequoia initially sought to restructure its affairs through Notice of Intention proceedings under the BIA; however, it ultimately assigned itself into bankruptcy on March 23, 2018 (nearly 18 months after the closing of the Aggregate Transaction and Ms. Rose's resignation as a director of PEOC).

(C) The Trustee's claim

11. On August 2, 2018, the Trustee filed a Statement of Claim against PEI, Perpetual Operating Corp. and Perpetual Operating Trust and Ms. Rose. Relief was claimed against Ms. Rose on behalf of PEOC, including based on alleged breaches of fiduciary duty and oppression.[13] Damages were claimed in excess of $220 million, largely comprised of an estimate of Sequoia's unfunded ARO for the Goodyear Assets at the time of its bankruptcy.

12. Ms. Rose defended and filed a combined striking and summary dismissal application.[14]

(D) The Chambers Judge's Decision

13. Ms. Rose adopts the summary of the Chambers Judge's decision in the Perpetual Memorandum, and adds the following in relation to the regulatory regime, and the Trustee's oppression and directors' duties claims.

14. The Chambers Judge concluded, correctly, that the Trustee's claims would in effect hold a prior licensee liable for ARO, contrary to the Legislature's express intentions: "The position now advanced by the Trustee is what was advanced by the ERCB, and rejected by the legislature, that the prior licensee should be liable for abandoned wells."[15]

15. The Chambers Judge properly noted that oppression actions are *not* a "means by which commercial agreements, legislative regimes or regulatory frameworks are effectively rewritten by a Court to accord with an assessment of a third-party as to what is just and equitable, especially on an *ex post facto* basis."[16]

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[12] Schweitzer Affidavit at para 24, Exhibit "A" & Exhibit "B" (Trustee's Preliminary Report Dated April 11, 2018).
[13] Statement of Claim of PricewaterhouseCoopers Inc., LIT, in its capacity as trustee in bankruptcy of Sequoia Resources Corp at paras 15, 16 & 19 [**Trustee SOC**].
[14] Appeal Decision at para 13.
[15] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6 at paras 123, 125 [**QB Reasons**] [emphasis added].
[16] QB Reasons at para 188.

16. The Chambers Judge recognized that a creditor may have status as a "complainant"[17] to sue the corporation or its directors for oppression, but only if the creditor is a "proper person"[18] who has an interest in the corporation's management, akin to a minority shareholder.[19] An oppression action is not an appropriate means of enforcing a debt,[20] which is why creditors do not have automatic "complainant" status to sue in oppression.[21]

17. Citing relevant authorities, the Chambers Judge reasoned that a trustee in bankruptcy may pursue a claim *on behalf of the bankrupt estate* (to recover what is owed to the bankrupt debtor) but it "may not pursue the claims of individual creditors."[22] That result flowed from the collective nature of the bankruptcy regime: "It must be a collective pursuit, and not a selective pursuit."[23]

18. The Chambers Judge held that the AER is not a "creditor" in relation to a licensee's ARO, per *Redwater*.[24] ARO is an "inchoate" future obligation that "ha[s] not crystalized into a liability."[25] ARO "form a fundamental part of" the value of the assets to which they relate.[26]

19. The Chambers Judge concluded that the Trustee's oppression claim was framed to focus only on the interests of the AER and municipalities, not creditors generally;[27] indeed, ARO was the "substantive focus" of the claim and it could be inferred from the Statement of Claim that "the only significant liability of PEOC is the ARO associated with the Goodyear Assets."[28] The Trustee's oppression claim was not "collective" in nature.[29] The Chambers Judge therefore

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[17] QB Reasons at para 127.
[18] QB Reasons at para 128.
[19] QB Reasons at paras 131 &191.
[20] QB Reasons at para 190, citing *Royal Trust Corp of Canada v Hordo* (1993), 10 BLR (2d) 86 (Ont Ct J (Gen Div)) at para 14.
[21] QB Reasons at paras 134, 136, 184 & 193.
[22] QB Reasons at para 137, quoting from *BDO Canada Limited v Dorais*, 2015 ABCA 137 at para 8.
[23] QB Reasons at paras 204 & 207.
[24] QB Reasons at paras 143 & 151.
[25] QB Reasons at paras 147 & 148, citing *Panamericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181 at para 32, leave to appeal to SCC refused 22655 (16 January 1992) [***Northern Badger***].
[26] QB Reasons at para 166, citing *Redwater, supra* note 5 at para 157.
[27] QB Reasons at para 210.
[28] QB Reasons at paras 212 & 231.
[29] QB Reasons at para 210.

declined to recognize the Trustee as a "proper person" who should be granted standing as a "complainant" to pursue the creditor-based oppression claim.[30]

20. Neither the AER nor any creditor had a contingent claim against PEOC for ARO at the time of the alleged oppressive conduct,[31] including because the public is the beneficiary of the duty to satisfy ARO, there was insufficient certainty that the AER would ultimately perform the related environmental work, and the Trustee's theorized contingent claim for ARO was "too speculative" and incapable of valuation (just as was held in *Redwater*).[32]

21. The Trustee's oppression claim was accordingly struck for failing to disclose a cause of action.[33] In addition, the Chambers Judge summarily dismissed the claims against Ms. Rose; as against Ms. Rose, there were no genuine issues for trial. [34]

(E) The Appeal Decision

22. Ms. Rose adopts the summary of the ABCA Decision in the Perpetual Memorandum, adding the following.

23. The ABCA agreed with the Chambers Judge that ARO is inherent in every well from the moment it is drilled;[35] however, it disagreed with the Chambers Judge's characterization of ARO as a contingent liability. The ABCA reasoned that ARO is only contingent while the well is producing in the sense that it is unknown when production will cease, not in the sense that ARO may (or may not) ever come into existence.[36] The ABCA perceived that ARO crystallizes when a well is shut-in[37] and ceases being "contingent" at that point.[38] Once a well is shut-in, "the owner[39] of the well is under a public duty to shut in the well and reclaim the surface."[40]

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[30] QB Reasons at paras 210-211.
[31] QB Reasons at para 218.
[32] QB Reasons at paras 221-224.
[33] QB Reasons at paras 232 & 241.
[34] QB Reasons at paras 327, 328, 364 & 370-372.
[35] Appeal Decision at para 86.
[36] Appeal Decision at paras 86 & 87.

[37] In truth, there is no regulatory obligation to abandon and reclaim shut-in wells. Shut-in wells may be returned to production. Abandonment and reclamation may also be deferred indefinitely unless there is a pressing environmental concern, the AER orders otherwise, or the licensee makes an insolvency filing. This is evident from the fact that PEOC was not ordered by the AER

24. The ABCA reasoned that "*Redwater* does not stand for the proposition that [ARO] are not a liability or obligation of the bankrupt corporation" because obligations that are not provable claims in bankruptcy must still be complied with. [41] ARO was accordingly accepted as "depress[ing] the tenure's value at the time of sale."[42]

25. The KeepCo Assets and Retained Interests were recognized by the ABCA as not carrying immediate ARO because they were still producing at the time of the impugned transaction. In contrast, the Goodyear Assets were "mature" (already including 910 shut-in and 727 abandoned wells) and their ARO was "more immediate" and no longer contingent.[43] The extent to which the value of the Goodyear Assets was depressed by ARO was identified as a triable issue. Accordingly, none of the Trustee's claims could be struck out or summarily dismissed based on *Redwater.*[44]

26. The Trustee was recognized as an appropriate "complainant" in oppression based on the allegation that PEOC-Sequoia had reorganized its affairs in a way that rendered it unable to pay its debts.[45]

27. The ABCA recognized that, under s. 242(2) of the BCA, an oppression action must be directed at the interests of a security holder, creditor, director or officer, as distinct from the environment or the public.[46] However, the Trustee's oppression claim was accepted by the ABCA as focussed on the prejudice allegedly caused to the legitimate interest of creditors "in preventing management from conducting the business of the corporation [in] a way that prevents

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to abandon and reclaim any of its shut-in wells prior to the Asset Transaction, or at any time prior to Sequoia's bankruptcy.

[38] Appeal Decision at para 87(c).
[39] Under the regulatory regime, the licensee (not the "owner") is responsible for ARO.
[40] Appeal Decision at para 87(c).
[41] Appeal Decision at paras 94, 95 & 138.
[42] Appeal Decision at para 96, citing *Redwater, supra* note 5 at para 157.
[43] Appeal Decision at para 88.
[44] Appeal Decision at para 97.
[45] Appeal Decision at paras 124 & 126.
[46] Appeal Decision at para 121.

it from satisfying its obligations."[47] The oppression claim was therefore accepted as sufficiently directed toward an interest of creditors.

28. Curiously, the ABCA concluded that the Trustee's oppression claim was rightfully brought by the Trustee, on behalf of Sequoia's estate (even though Sequoia was a *party* to the allegedly oppressive transaction) rather than by the creditors who were allegedly oppressed.[48] The ABCA reasoned that the necessity of having a "complainant" pursue collective interests in oppression is "not generally a barrier to a trustee in bankruptcy" because a trustee in bankruptcy by definition "represent[s] all of the creditors of the bankrupt."[49]

29. The ABCA accepted the conceptual underpinning of the Trustee's oppression claim. Although there is no "creditor" with a claim for ARO,[50] per *Redwater*, ARO may ground an oppression action on behalf of creditors indirectly if it is "manage[d] … in a manner that is unfairly prejudicial to the interests of creditors"[51] – and such an oppression claim may nonetheless be pursued by the Trustee on behalf of all creditors of the estate.[52]

30. The interplay between the regulatory regime and the Trustee's oppression claim was seen by the ABCA as a "complex issue" that could only be resolved with a proper evidentiary record.[53] In particular, the ABCA declined to see the oppression claim as a disguised attempt by the Trustee to advance a regulatory claim (not contemplated in the regulatory regime) against Perpetual and Ms. Rose as PEOC's sole director at the time.

31. The ABCA was satisfied that the Chambers Judge had erred by striking the Trustee's oppression claim.[54]

32. The ABCA held that Ms. Rose owed duties to PEOC as PEOC's sole director and "directing mind",[55] and that such duties were not necessarily aligned with the interests of PEOC's then parent corporation and sole shareholder, PEI. The ABCA went so far as to hold that

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[47] Appeal Decision at paras 126 & 129.
[48] Appeal Decision at paras 127 & 128.
[49] Appeal Decision at para 131.
[50] Appeal Decision at para 139.
[51] Appeal Decision at paras 131 & 141.
[52] Appeal Decision at para 140.
[53] Appeal Decision at paras 142 & 143.
[54] Appeal Decision at para 144.
[55] Appeal Decision at para 155.

Ms. Rose abdicated her duty to the extent she caused PEOC to enter the Asset Transaction at the "bidding" of PEI, reasoning that Ms. Rose's duty was to resign and be replaced by a new director rather than to act in furtherance of PEI's interests;[56] the ABCA did not explain how any replacement director was to have navigated this situation. Further, the Trustee's breach of duty claim against Ms. Rose was not nullified by *Redwater*.[57]

33. The ABCA concluded that, "on the face of it", the Trustee's breach of duty claim against Ms. Rose was not appropriate to strike out or summarily dismiss.[58]

34. In the result, the ABCA confirmed the Trustee's right to advance a $220 million claim, including against Ms. Rose personally, based on PEOC's theorized acquisition of an ARO-based "net deficit" through the Asset Transaction, and the subsequent inability of Sequoia to perform its public duties and regulatory obligations.[59]

PART II. QUESTION IN ISSUE

35. The proposed appeal raises the issue of when, if ever, a trustee in bankruptcy has legal authority to sue a former director of a bankrupt corporation for breach of fiduciary duty or oppression, not on the basis of the interests of the corporation or its stakeholders, but rather on the basis of future obligations, not yet due, but inherent to the assets and owed by the corporation to the public: an oil and gas producer's ARO. The ABCA Decision has bestowed such authority on trustees in bankruptcy, effectively making directors of bankrupt corporations guarantors of future regulatory obligations. That newfound, quasi-regulatory authority now permits a trustee in bankruptcy *de facto* status as a complainant in oppression, *and* the ability to allege, *ex post facto,* a breach of a director's fiduciary duties to the company on the basis of remote and speculative interests of future stakeholders of the company's environmental and future regulatory obligations.

PART III. ARGUMENT

36. Ms. Rose respectfully submits that as creatures of statute, trustees in bankruptcy have no authority to sue in order to enforce, directly or indirectly, the public duties owed by bankrupt

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[56] Appeal Decision at paras 156, 157.
[57] Appeal Decision at para 158.
[58] Appeal Decision at para 159.
[59] Court of Appeal Judgment Roll dated January 25, 2021.

corporations against the bankrupt's current or former directors. Moreover, neither the fiduciary duty owed by directors to the corporation, nor any possible director duty in relation to the reasonable expectations of the corporation's shareholders or creditors, can result in personal director liability flowing from the corporation's inability to meet such public duties.

(1) When can a trustee in bankruptcy claim status as a complainant in oppression to pursue third party claims against a bankrupt's former director?

37. The issue of when a trustee in bankruptcy may be a complainant in oppression is central to this proposed appeal. In the instant case, the Trustee purports to advance a claim in oppression on the basis that the Asset Transaction (a single required and negotiated step in a larger commercial arm's length deal) was "oppressive" because it allegedly left Sequoia unable to fund its ARO nearly a year and a half later.[60] In that regard, the Trustee sues on behalf of the bankrupt (Sequoia), but its claims are truly based on rights of action that (if they exist at all) were never part of the Sequoia bankrupt estate and are not the Trustee's to pursue.

38. A trustee in bankruptcy is a creature of statute.[61] A trustee in bankruptcy represents the bankrupt estate, and *all* of its creditors, but only in respect of the creditors' claims *against the estate*.[62] The trustee may litigate the *estate's* claims against others; all of the property of the debtor (including any rights of action) vests in the trustee upon bankruptcy.[63] The trustee can then pursue the bankrupt's rights of action for the benefit of the estate and *all* of its creditors, who will share in the proceeds in accordance with their own legal rights against the estate.

39. A Trustee may, in rare cases, be recognized as a complainant in oppression: the aim, in such cases, is to protect the Trustee's ability to take *collective* action on behalf of the estate's creditors, not to permit the Trustee to pursue rights of action that creditors should rightly pursue themselves.[64] The Trustee's mandate is not normally understood to include the pursuit of creditors' personal rights of action against third parties for the benefit of the estate.[65]

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[60] Trustee SOC at para 20.
[61] *BDO Canada Limited v Dorais*, 2015 ABCA 137 at para 8.
[62] *A Marquette & Fils Inc v Mercure*, 1975 CarswellQue 51 (SCC) at para 9 [***A Marquette & Fils***].
[63] BIA, *supra* note 2, s 71.
[64] A Trustee in bankruptcy is "neither automatically barred from being a complainant nor automatically entitled to that status" (*PricewaterhouseCoopers Inc, v Olympia & York Realty*

40. The ABCA Decision in effect overturns this longstanding principle, suggesting not only that the Trustee may pursue and enforce the personal rights of individual creditors, but that it may obtain complainant status under the guise of representing the estate and its creditors, while in fact pursuing a remedy that will benefit neither. After all, if the Trustee recovers damages equal to the value of Sequoia's ARO, the performance of that ARO will rank in priority to any creditor claims as a public duty of the company binding on its trustee. In effect, the Trustee will have appropriated the claims of Sequoia's allegedly oppressed *creditors*, and used the proceeds to benefit stakeholders that have never been recognized as complainants in oppression: the regulator, the public interest in performance of ARO, or the Orphan Well Association.

41. This finding of the ABCA is in error, and contrary to jurisprudence from across Canada, (including this Court) which has found the Trustee's role to be representing *the estate*, and the creditors only collectively, and only "to the extent that [the Trustee] can even act on [creditors'] behalf against the debtor."[66] That finding is entirely consistent with authorities that require a trustee, in order to obtain complainant status, to be pursuing an interest of the estate's creditors in a *collective* sense.[67]

42. The effect of the ABCA Decision is to overturn this law and invent a new role for the trustee as the representative of *individual* creditor interests,[68] *and* to expand recognized creditor interests to include regulatory compliance by the bankrupt corporation, including in respect of regulatory obligations that were not current as at the time of the impugned transaction.

Corp, 68 OR (3d) 544, [2003] OJ No 5242 at para 45). It is for "the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant" (*ibid,* emphasis added). In this case, the judge at first instance determined the Trustee is not a proper person as its aim is not the collective interest of the estate and its creditors.

[65] *Toyota Canada Inc v Imperial Richmond Holdings Ltd* (1997) 202 AR 274 (Alta QB) at para 20 [***Toyota Canada***].

[66] *A Marquette & Fils*, *supra* note 62 at para 9.

[67] See eg *Toyota Canada, supra* note 65*; Principal Group (Trustee of) v Principal Savings & Trust Co*, [1990] AJ No 907, 111 AR 81 (Alta QB), aff'd 1990 (Alta CA), leave to appeal to SCC refused, 22324 (13 June 1991).

[68] This Aspect of the Appeal Decision is addressed in further depth in the Perpetual Memorandum.

43. The following passage from the ABCA Decision is illustrative:

> The case management judge concluded that an oppression claim by a creditor should be "collective" in the sense that it should be for the benefit of all of the creditors. A single creditor should not use the oppression remedy to collect its own debt. That, however, would not generally be a barrier to a trustee in bankruptcy seeking complainant status, because trustees in bankruptcy, by definition, represent all of the creditors of the bankrupt. The aggregate claims in a bankruptcy always consist of a number of individual claims. The case management judge's objection was that the Trustee in Bankruptcy focused his arguments on the two main obligations of Perpetual/Sequoia: the Abandonment and Reclamation Obligations and unpaid municipal taxes. As set out in the next section of these reasons, the Abandonment and Reclamation Obligations cannot support "creditor" status for the purposes of an oppression action, but they are still relevant to whether a claim of oppression exists and is properly brought by creditors of the estate through its representative the Trustee in Bankruptcy.[69]

44. In short, the ABCA Decision transforms the legal *requirement* that trustees act collectively in bringing claims in oppression into a legal doctrine that *deems* a trustee to be doing so, even when the trustee patently is not. Furthermore, the ABCA Decision holds, in effect, that even if a creditor *cannot* pursue a claim in oppression (because oppression is not a mechanism to enforce a debt), the Trustee can *nevertheless* do so on the creditor's behalf because "trustees in bankruptcy, by definition, represent all of the creditors of the bankrupt."[70] This *de facto* complainant status can then (or so it seems), be used by the Trustee to recover a judgment that is measured by reference to a regulatory obligation that was not current or due at the time of the transaction, has never been actionable by either Sequoia's creditors *or* the estate, and is not a claim in the bankruptcy: the estate's ARO.

45. This creates intractable conceptual difficulties, not addressed in the ABCA Decision. If the structuring of PEOC's affairs by Ms. Rose and others was unfairly prejudicial *to creditors*, that would give rise to a right of action against Ms. Rose *by those creditors*; not a right of action by PEOC (a party to the allegedly oppressive transfer), and certainly not a right of action by PEOC's trustee in bankruptcy. The Trustee has no legal right to use *third party creditors' rights of action* as a means of converting Sequoia's allegedly unfunded ARO into a judgment against its former director (Ms. Rose) and shareholder (PEI), particularly when that judgment cannot

[69] Appeal Decision at para 131 [emphasis added].
[70] Appeal Decision at para 131.

benefit a creditor and relates to an obligation that can only become current at some remote time in the future.

46. Put another way: if certain Sequoia creditors believed the actions of Perpetual and Ms. Rose were oppressive, or unfairly prejudicial to them, they had personal rights of action in oppression and should have commenced their own actions. There was no impediment. The Trustee cannot do it for their benefit, for an obvious reason: any recovery of damages by the Trustee on behalf of the Sequoia estate, is not available to creditors, but instead must be used to fund Sequoia's ARO deficit in accordance with *Redwater*.

47. In this case, the Trustee's claim is stated to be made "on behalf of" certain creditors of Sequoia; however, the Trustee's claim is clearly not seeking redress for conduct that was unfairly prejudicial to those creditors. Rather, the Trustee's conspicuous objective is to allege oppression in the shoes of Sequoia, while actually pursuing the public's interest (or the interests of non-creditors like the AER and OWA) in the funding of Sequoia's ARO.[71] The ABCA Decision suggests such a claim would not be permitted to proceed in oppression, stating, correctly, that:

> Although "any other person", even if not a creditor, could theoretically prove it was "a proper person", the oppression action itself must still be directed at the interests of the four groups identified in s. 242(2): a security holder, **creditor**, director or officer. **Neither "the environment" nor "the public" is listed.**[72]

48. Nevertheless, the ABCA Decision allows the Trustee's claim to proceed, on the theory that an arm's length corporate transaction which includes the disposition of producing assets could somehow affect the reasonable expectations of a *creditor* in respect of the public duty to perform ARO. This finding is novel: the ABCA in effect suggests that a trustee in bankruptcy, standing in the shoes of the bankrupt company, may advance an oppression action on behalf of "creditors" where by definition the alleged oppressive conduct did not relate to creditor interests but to some inchoate duty in respect of public or regulatory burdens on the bankrupt company and its trustee. In this case, the Trustee's stated objective is to recover the value of Sequoia's ARO into the estate.[73] If accomplished, this result would bring about no recovery to creditors at all, whose claims against Sequoia are in every case subject to Sequoia's public duty to perform

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[71]For instance, see Trustee SOC at paras 20.2, 20.3, & 24, and Affidavit of Paul Darby filed August 2, 2018 at paras 51, 56, & 57.
[72] ABCA Decision at para 121 [emphasis added].
[73] Trustee SOC at 8, para 2.

the ARO. It was on this novel basis that the ABCA Decision granted complainant status to the Trustee, on the supposition that creditors could somehow benefit, when they cannot and will not.[74]

49. The only possible beneficiaries of such a claim are the very stakeholders the ABCA Decision suggested are *not* able to obtain status as oppression complainants—the public at large, the AER, the OWA (or its industry funders) or perhaps, the environment itself. This places the ABCA Decision in conflict with existing law regarding who may bring actions in oppression. An oppression action must be brought by a proper person to act as a complainant, and as the ABCA correctly noted, must "be directed at the interests of the four groups identified in s. 242(2): a security holder, creditor, director or officer.[75] An action in oppression may therefore not be used to further the interests of the environment or the public, and certainly not the AER, because (as the ABCA recognized) the environment, the public and the AER are not "creditors" in respect of ARO.[76] These stakeholders may have *other* legal remedies – most notably, in the regulatory regime – but the law does not permit them status as oppression complainants.

50. In this case, Ms. Rose faces the significant risk of reputational damage and ruinous financial consequences, all in service of the Trustee's unprincipled attempt to expand the law governing oppression to encompass the Trustee's self-anointed, quasi-regulatory role in which it attempts to turn a bankrupt company's former directors into guarantors of the bankrupt's public obligations, even if those directors bear no moral or legal fault for the bankrupt's failure and even after those directors have resigned and been released.

(2) Can the Trustee use corporate law theories to attempt to render a company's prior directors personally responsible for ARO?

51. In effect, the ABCA Decision held that the AER may qualify as a complainant, and that the Trustee is a convenient vehicle of regulatory enforcement. Both propositions are wrong at law.

52. The Legislature of Alberta has enacted a comprehensive suite of statutes, not only enabling the AER, but also governing all aspects of energy (including oil and gas) production. Those statutes, the regulations promulgated thereunder and the AER's policies and directives, in

[74] ABCA Decision at paras 140, 141 & 144.
[75] ABCA Decision at para 121.
[76] ABCA Decision at para 139.

combination, establish a complete and comprehensive regulatory regime.[77] The Asset Transaction complied with all relevant regulations, and no one has alleged otherwise.

53. The regime does not contemplate the enforcement of ARO by trustees in bankruptcy. The regime makes no provision for personal liability of directors in relation to unsatisfied ARO.[78] The regime does not envision the trustee circumventing the limitations on director liability by visiting the unpaid future obligations of a bankrupt producer upon its former directors.

54. This Court has confirmed that the obligations of a licensee under that regime are not claims of a creditor but public duties binding on the licensee after bankruptcy and upon its trustee.[79] What the Trustee seeks to do, in an exotic legal approach now endorsed by the ABCA, is circumvent this regulatory regime by attempting to offload the bankrupt's regulatory duties onto persons who could never be personally liable under the regulatory regime in that manner. The Chambers Judge was right to view this as an attempt to "impose a form of predecessor liability for ARO that was rejected by the Legislature in structuring the regulatory regime.[80]

55. The ABCA Decision speculated that there might be some "interplay" between the Trustee's claim and the relevant regulatory regime, and that this could create "complex issues" that could only be resolved with a proper evidentiary record.[81] What these "complex" issues are, or what evidence could possibly clarify this pure question of law, the ABCA did not clarify. Fundamentally, the ABCA Decision proposes a novel principle under which a Trustee can bring claims in oppression on behalf of the estate's creditors, including where the claims do not belong to the estate and cannot benefit any creditor at all, in an effort to attach personal liability for ARO to a bankrupt company's former directors, in a manner specifically rejected by Alberta's

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[77] Both the Chambers Judge, and this Court in *Redwater*, stressed that this regulatory regime was chosen by the Legislature. QB Reasons at paras 123 and 125. See also *Redwater, supra* note 5 at paras 29 and 30.

[78] The AER may seek limited remedies against directors and officers if a licensee's ARO goes unsatisfied, including as the result of a licensee's receivership or bankruptcy. These remedies are prescribed by the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (the **OGCA**), including s. 106. Director personal liability is not contemplated.

[79] *Redwater, supra* note 5 at paras 135 and 159-160.

[80] QB Decision at para 125.

[81] Appeal Decision at para 142.

Legislature. This is a novel and troubling evolution of our corporate law; clarification from this Court is needed.

(3) Does a director owe a prevailing fiduciary duty in respect of the environment, or a corporation's future public duties?

56. A director owes a statutory fiduciary duty ("act honestly and in good faith with a view to the best interests of the corporation") and a duty of care ("exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances") under s. 122(1) of the BCA.[82] These duties are owed only to the corporation.[83] They are not owed to creditors or regulators. The ABCA Decision, by overturning the summary dismissal of the Trustee's claim against Ms. Rose, recognized a fiduciary duty not only to the company's future creditors, but in respect of the company's future insolvency or inability to fund ARO. Indeed, the ABCA suggests this interest is so dominant, its conflict with shareholders interests so intractable, that a director in Ms. Rose's position has no option other than to resign.[84]

57. The ABCA reached this conclusion in the face of a record showing that Ms. Rose considered the interest of all stakeholders and a factual finding indicating she did so consistently with her business judgment.[85] In doing so, the ABCA Decision threatens to radically alter the scope of director's fiduciary duties, particularly in change of control transactions, such that a director in that situation can no longer discharge his or her duty by considering the company's known stakeholders in the transaction, or by reliance on the business judgment rule.

58. Part of the Trustee's claim is based on the allegation that Ms. Rose owed a duty to PEOC (which she has never denied) in respect of the Asset Transaction, which she breached by having PEOC enter that transfer (a condition precedent to a larger commercial deal) to further the

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[82] BCA, *supra* note , s 122(1).

[83] *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at paras. 45-6 & 53 [***Peoples***]. Note that while in some circumstances a trustee in bankruptcy may act on behalf of other corporate stakeholders under the *oppression* remedy, the same is not true with respect to an alleged breach of fiduciary duty. In any such action, the Trustee must stand in the shoes of the bankrupt, and cannot advance a claim on behalf of any other stakeholder.

[84] Appeal Decision at para 157.

[85] QB Reasons at para 323. See also Affidavit of Susan Riddell Rose filed October 19, 2018 at para 80 [**Rose Affidavit**].

interests of PEOC's current and future shareholders, and not PEOC's own interests. Neither the Trustee, nor the ABCA, have clarified what PEOC's supposedly divergent interests in the Asset Transaction actually were, but the Trustee's claim makes clear that the interest was in respect of future obligations to perform ARO.

59. The Trustee's claim is truly predicated on the existence of a stakeholder interest in ensuring the past, present and *future* discharge of regulatory obligations, which directors must recognize as prevailing over all other stakeholder interests in deciding how to give effect to their fiduciary duties. The ABCA Decision endorses this theory, and puts directors of corporate takeover targets in an impossible position as a result.

60. In this respect, the ABCA Decision is contrary to existing law. PEOC was a single-purpose, wholly owned subsidiary of PEI;[86] its interests and those of PEI were never out of alignment. At minimum, PEI and 198Co were stakeholders of PEOC with legitimate interests that were rightly taken into account by Ms. Rose in determining how best to serve PEOC's own interests.[87]

61. The best interests of a corporation are evaluated by directors with regard for the interests of all stakeholders, as was recognized by this Court in *Peoples* and *BCE*.[88] The business judgment rule prevents the second-guessing of directors' decisions, particularly with the benefit of hindsight, so long as reasonable decision making processes were used. Directors are meant to balance the competing interests of stakeholders in furtherance of their corporations' best interests.[89] In any given case, and in this case particularly, the competing interests that directors must balance may include (without limitation) those of a parent corporation and a prospective purchaser.[90]

62. While this Court has recognized "the environment" as a form of stakeholder interest that may inform directors' decisions,[91] it has not come close to suggesting that directors may be held personally liable for breaching their fiduciary duties to the corporation (in whose shoes the

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[86] Rose Affidavit at para 12.
[87] *Ibid* at para 80.
[88] *Peoples, supra* note 83 at para 42; *BCE, supra* note 6 at paras 37, 38 & 40.
[89] *BCE, ibid* at para 40.
[90] QB Reasons at para 323.
[91] *Peoples, supra* note 83 at para 42; *BCE, supra* note 6 at paras 39 & 40.

Trustee stands) on the basis of the *corporation's* failure to satisfy environmental regulations, and certainly not for failing to ensure the *future* satisfaction of environmental regulatory obligations--notwithstanding very recent new case law (consistent with the decision of the Chambers Judge) holding that no ARO is owing by a licensee until the AER issues an Abandonment Order.[92] Such a conclusion would vastly expand potential director liability in the energy sector, far beyond the limits of most insurance policy limits.

63. In *BCE*, this Court rejected the proposition that directors of takeover targets must recognize shareholders' interests as prevailing over the interests of other stakeholders, such as creditors and the environment.[93] (The *Revlon* line of cases from Delaware was specifically rejected.)[94] While this Court affirmed that directors must always act in the corporation's best interests, commentators have called for clarity about how a target corporation's interests are best served by directors in this context.[95]

64. Maximizing the return from the corporation's purchaser is accepted in the context of a change of control transaction as advancing a target corporation's best interests. As stated in *Canadian Business Corporations Law*:

> When a board of directors decides to undertake the process of selling the corporation it directs, the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise. There is no single path that a board must follow in order to maximize stockholder value, but directors must follow a path of reasonableness which leads toward that end. Moreover, the board has the burden of proving that it acted reasonably. It has a duty to seek the highest value reasonably available for the company's

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[92] *Manitok Energy Inc (Re)*, 2021 ABQB 227 at para 42. No AER Abandonment Orders were outstanding at the time of the Asset Transaction..

[93] *BCE, ibid* at para 86.

[94] *Ibid* at paras 86-88.

[95] Edward J Waitzer and Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439 at 460, 462 & 463; Sarah P Bradley, "BCE Inc v 1976 Debenture-holders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2010) 41:2 Ottawa L Rev 325 at 330, 331, 338, 343 & 344; Patrick Lupa, "The BCE Blunder: An Argument in Favour of Shareholder Wealth Maximization in the Change of Control Context" (2011) 20 Dal J Leg Stud 1 at 16-20; Carol Liao, "The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise" (2013) 9:1 JSDLP 53 at 70-73; David L Johnston, Kathleen Doyle Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (Markham: LexisNexis Canada, 2014) at 18.68, 18.69, 18.85; Li-Wen Lin, "The 'Good Corporate Citizen' Beyond BCE" (2021) 58:3 Alta Law Rev 551 at 523, 565 & 566.

> shareholders regardless of where that value comes from. These are simply applications of the duty of loyalty and the general requirement that the directors of a corporation must act in the best interests of the corporation.[96]

65. The ABCA Decision upends this law by converting a director's fiduciary duty from a duty owed to the corporation and informed by the interests of all stakeholders into a duty owed prevailingly to the environment or the public. The ABCA Decision incorrectly applies *Redwater* (which had nothing to do with directors' duties) to justify a transformation of the law in this area, going far beyond what was contemplated in *BCE*. Ms. Rose was fully entitled to balance competing stakeholder interests, and her fiduciary duty did not require her to recognize the interests of the environment and the public as prevailing over the interests of PEI and the Kailas Group.

66. Even if the environment and the public were prevailing interests, only the AER (not the Trustee in Sequoia's shoes) would have standing to complain. *Redwater* stood for the proposition that ARO are a public obligation of a *licensee*, which survives its bankruptcy and is binding upon a trustee. It did not authorize that same trustee to circumvent the prevailing regulatory regime by offloading the ARO burden onto the bankrupt's released former directors, who owed no such regulatory duty in the context of a transaction that was perfectly lawful in any event.

PART IV. COSTS

67. Ms. Rose respectfully suggests the costs of this application be in the cause.

PART V. ORDER SOUGHT

68. Ms. Rose respectfully requests an order granting leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of March , 2021.

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[96] KP McGuinness, *Canadian Business Corporations Law*, 3rd ed (Markham: LexisNexis Canada, 2017) at 14.131 [emphasis added], citing *In re Answers Corp Shareholders Litigation*, CA No 6170-VCN (Del Ct Ch 2012).

PART VI. TABLE OF AUTHORITIES

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