

# RESULTS OF SUMMARY DISMISSAL IN PwC CLAIM AGAINST PERPETUAL OVER SEQUOIA TRANSACTION

21 August 2019

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## Background:

On August 15, 2019 Justice D. Blair Nixon gave oral reasons in response to an application for summary dismissal of the claim by PricewaterhouseCoopers Inc. ("**PwC**"), the bankruptcy trustee for Sequoia Resources Corp. ("**Sequoia**"), against Perpetual Energy Inc. and its CEO, Susan Riddell Rose. You can read our prior reporting on the statements of claim and defence made in this proceeding on our website:

- [PwC Claim against perpetual over Sequoia transaction](#)
- [Update response in PwC claim against perpetual over Sequoia transaction](#)

Given the recent release of the Redwater decision, the importance of managing environmental liabilities in accordance with the requirements of the Alberta Energy Regulator ("**AER**") and the context of the Bankruptcy and Insolvency Act ("**BIA**") has become a key issue for companies operating in the oil and gas industry.

PwC's pleadings alleged that the October 2016 transaction was a deliberate transfer of distressed assets intended to escape abandonment obligations, and requested that the Court either unwind the asset sale or award significant damages.

## Decision:

The claims for the proceeding were divided into five primary issues as follows:

1. Was the transaction completed at arm's length in accordance with the BIA?

2. Is the trustee entitled to relief on the ground of oppression?
3. Is the trustee entitled to relief on public policy grounds?
4. Does the release signed by the parties bar all claims against Ms. Rose?
5. Did Ms. Rose breach her fiduciary duties?

## Arm's length

In applying the test for summary dismissal, Justice Nixon found insufficient evidence to strike PwC's claim that the parties were not dealing at arm's length within the meaning of the BIA. He continued by stating that the relevant analysis pertains to the relationship between the parties, not merely the value of the transaction. This includes an assessment of the legal teams involved in the transaction, the conduct of the negotiations, and the potential for influence. On this basis, the test for summary dismissal was not met and the claim can proceed.

## Oppression

Justice Nixon struck this claim on the basis that PwC was not an appropriate complainant under section 239(b)(iv) of the Alberta Business Corporations Act ("**ABCA**") to be entitled to relief on the ground of oppression. To access this remedy, the relationship between the parties must be such that PwC's position would be analogous to that of a shareholder.

## Public Policy

While the public policy claim had the potential to significantly impact industry participants, Justice Nixon ruled that there was no legal basis on which to advance this claim, noting several deficiencies in the submissions. First, he stated that equitable rescission is only relevant to disputes between parties to an agreement, and is not a cause of action on its own as submitted by PwC. As the requisite contractual relationship does not exist in this case, the remedy is not applicable. Second, in order to advance a claim on the basis of public policy grounds, the impugned subject matter must be injurious to the state or justice system, encourage immorality, be harmful to marriage, restrict trade, or be harmful to protected liberties. PwC failed to provide any particulars to advance this position and the claim was struck.

## Claims against Ms. Rose

With regards to the fourth and fifth claims, Justice Nixon gave multiple reasons to strike these claims. First, he upheld the mutual release agreement, noting that a decision rendering a standard business practice as null and void would change the nature of director liability and create significant uncertainty for commercial parties. In order to bring the validity of the release into question, Justice Nixon stated that PwC would have to establish that it was invalid, as the product of fraud, criminal activity, or deceit. However, these particulars were not included in the pleadings, and there was no evidence to establish their applicability to the current dispute. Even if the release had been invalid, Justice Nixon concluded that Ms. Rose pursued her responsibilities with diligence and professionalism and as such, there was no basis to conclude that she was in breach of her fiduciary duties.

## Conclusion

Although the case will proceed in a significantly limited manner and remains highly fact dependent, it nonetheless provides a level of guidance for industry participants in respect of transactions involving environmental liabilities. Most importantly, it provides some judicial insight into whether new public policy arguments (such as those dealt with in the *Tronox Inc et al. v. Kerr McGee Corp et al.* decision mentioned in our initial update) will be readily imported into Canada.

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