

COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

COURT OF APPEAL FILE NUMBER: ²⁰⁰¹ ~~101~~-0174AC

TRIAL COURT FILE NUMBER: 1801-10960

REGISTRY OFFICE: CALGARY

OTHER PARTY: PRICEWATERHOUSECOOPERS
INC, in its personal capacity

STATUS ON APPEAL: APPELLANT
STATUS ON APPLICATION: APPLICANT

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

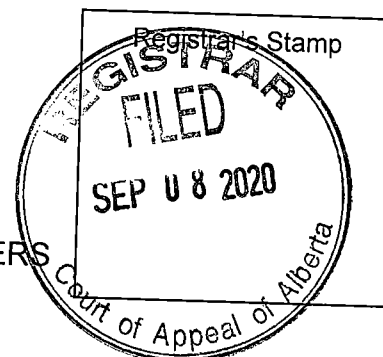
STATUS ON APPEAL: APPELLANT
STATUS ON APPLICATION: RESPONDENT

DEFENDANT/APPLICANTS: PERPETUAL ENERGY INC., PERPETUAL
OPERATING TRUST, PERPETUAL
OPERATING CORP. and SUSAN RIDDELL
ROSE

STATUS ON APPEAL: RESPONDENTS
STATUS ON APPLICATION: RESPONDENTS

DOCUMENT: APPLICATION FOR PERMISSION TO
APPEAL AND OTHER RELIEF OF
PRICEWATERHOUSECOOPERS INC., IN ITS
PERSONAL CAPACITY

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: Osler, Hoskin & Harcourt LLP
Suite 2500, 450 - 1 Street SW
Calgary, AB T2P 5H1
Colin Feasby, QC / Marc Wasserman
Phone: 403 260 7067 / 416 862 4908
Fax: 403 260 7024
cfeasby@osler.com / mwasserman@osler.com



and

**CONTACT INFORMATION OF ALL
OTHER PARTIES:**

Counsel for the Respondent,
Susan Riddell Rose
Norton Rose Fulbright Canada LLP
3700, 400 Third Avenue SW
Calgary, AB T2P 4H2
Steven H. Leidl, QC / Gunnar Benediktsson
Phone: 403 267 8140
Fax: 403 264 5873
steven.leidl@nortonrosefulbright.com /
gunnar.benediktsson@nortonrosefulbright.com

Counsel for the Respondents,
Perpetual Energy Inc., Perpetual Operating
Trust and Perpetual Operating Corp.
Burnet, Duckworth & Palmer LLP
8th Avenue Place, East Tower
2400, 525 – 8th Avenue SW
Calgary, AB T2P 1G1
D.J. McDonald, QC / Paul G. Chiswell
Phone: 403 260 5724 / 403 260 0201
Fax: 403 260 0332

Counsel for the Respondent,
Pricewaterhousecoopers Inc., LIT, in its
capacity as Trustee in Bankruptcy of Sequoia
Resources Corp. and not in its personal
capacity
De Waal Law
1010, 505 - 3rd Street SW
Calgary, AB T2P 3E6
Rinus de Waal / Luke Rasmussen
Phone: 403 266 0012 / 403 266 0014
Fax: 403 266 2632

NOTICE TO RESPONDENT(S):

PERPETUAL ENERGY INC., PERPETUAL
OPERATING TRUST, PERPETUAL
OPERATING CORP., SUSAN RIDDELL ROSE
and PRICEWATERHOUSECOOPERS INC.,
LIT, IN ITS CAPACITY AS TRUSTEE IN
BANKRUPTCY OF SEQUOIA RESOURCES
CORP. AND NOT IN ITS PERSONAL
CAPACITY

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: September ~~28~~²⁹, 2020, or such other date as directed by this Honourable Court to allow for written submissions regarding the Honourable Justice D.B. Nixon's transcribed oral reasons or written reasons for the order that the Applicant seeks permission to appeal

Time: 9:30 am or at another time as this Honourable Court directs

Where: By videoconference or audio telephone, as this Honourable Court directs

Before: x single judge of the court (Rule 14.37)
panel of the court (Rule 14.38)

Nature of Application and Relief Sought:

1. As a named "Other Party", PricewaterhouseCoopers Inc., in its personal capacity ("PWC"), has a right to appeal the Order of the Honourable Justice D.B. Nixon (the "Chambers Judge") dated August 26, 2020, directing that PWC pay to the Respondent, Susan Riddell Rose ("Rose"), 85% of the \$683,431.00 solicitor-client costs amount set out in Rose's draft Bill of Costs (the "Costs Order"). As such, PWC has filed a Civil Notice of Appeal concurrently with the filing of this Application.
2. In the alternative, PWC seeks an Order granting it permission to appeal the Costs Order.

3. Further, and in any event, PWC seeks an Order:
 - (a) Consolidating this appeal with the Trustee's appeal in Court file No. 1901-0255-AC (the "**Dismissal Order Appeal**");
 - (b) Fast tracking this appeal or truncating the deadlines in the *Rules of Court* such that this appeal may be heard concurrently with the Dismissal Order Appeal or as shortly thereafter as directed by this Honourable Court;
 - (c) In the alternative to (2), (3)(a) and (3)(b), adding PWC as an Appellant to the Dismissal Order Appeal; and, in any event,
 - (d) Granting PWC permission to file a Factum of no more than 20 pages and make oral submissions of no more than 30 minutes regarding grounds to appeal the Costs Order;
4. Granting the costs of this Application; and
5. Granting such further and other relief as PWC may seek and this Honourable Court deems just.

Grounds for making this application:

6. On August 2, 2018, Pricewaterhousecoopers Inc., LIT, in its capacity as the trustee in bankruptcy (the "**Trustee**") of Sequoia Resources Corp. ("**Sequoia**") and not in its personal capacity filed a Statement of Claim seeking relief against the Respondents Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose ("**Rose**").
7. In the Statement of Claim, the Trustee seeks an order declaring a particular sale of assets void against the Trustee or, alternatively, damages for an amount not less than \$217,570,800 based on various statutory, common law and equitable breaches.
8. On August 15, 2019, the Chambers Judge issued an order (the "**Dismissal Order**") striking and dismissing certain claims brought by the Trustee, including all claims against Rose personally.

9. The Trustee has appealed the Dismissal Order to this Honourable Court. The Dismissal Order Appeal is scheduled to be heard in December 2020.
10. On August 26, 2020, the Chambers Judge issued the Costs Order, awarding costs to Rose for the proceeding that led to the Dismissal Order. The Chambers Judge provided brief oral reasons for the Costs Order with detailed written reasons to follow. Counsel has requested the transcript of oral reasons but has not yet received them.
11. As a named "Other Party", PWC has a right to appeal the Costs Order, and it would be just and convenient to consolidate that appeal with the Dismissal Order Appeal given the common questions of fact and law, including the fact that the proceedings arise out of the same transaction and litigation. PWC seeks permission to file a Factum of no more than 20 pages and make oral submissions of no more than 30 minutes regarding grounds to appeal the Costs Order.
12. In the alternative, if necessary, PWC as an "Other Party" seeks permission to appeal on the following bases:
 - (a) The Costs Order directs PWC to pay significant costs to Rose in its personal capacity for dismissal of an action brought in its capacity as Trustee;
 - (b) PWC is directly affected by the Costs Order and should be permitted to appeal the Costs Order in its personal capacity;
 - (c) It would be procedurally unfair to PWC to affirm or adjudicate the Costs Order against it without providing PWC with the opportunity to make submissions;
 - (d) The Appellant to the Dismissal Order Appeal is the Trustee acting on behalf of the Sequoia estate, not PWC; therefore, PWC's interests can only be fully represented through independent party status and its own legal counsel; and
 - (e) To avoid delay to the Dismissal Order Appeal, PWC is prepared to proceed on a fast track filing schedule and/or truncate the deadlines for procedural steps under the *Rules of Court* such that this appeal may be heard

concurrently with the Dismissal Order Appeal or as shortly thereafter as directed by this Honourable Court.

13. The related substantive decision (the Dismissal Order) is already under appeal. Therefore, this proposed appeal is not an appeal of "costs only". Alternatively, if necessary, PWC seeks leave to appeal on "costs only", on the following bases:
 - (a) PWC has a good, arguable case to warrant permission to appeal. If granted permission to appeal, PWC intends to argue, among other grounds of appeal, that in issuing the Costs Order, the Chambers Judge committed reviewable errors of law, fact, mixed fact and law, and discretion, including errors of law by: (i) failing to address the duties of trustees to maximize the value of the bankrupt estate by pursuing litigation on behalf of the estate; (ii) imposing legal duties on trustees such as a duty to investigate and provide procedural fairness to potential Defendants that have no basis in law; and (iii) ordering costs against PWC on bases unsupportable by the facts or the law.
 - (b) These issues are important to the parties to this appeal and the general legal and insolvency communities. The issues will transcend the parties and influence the development of the law regarding trustee duties and obligations and the potential for personal liability of the trustee if those duties are unfulfilled.
 - (c) The appeal will have practical utility as it will impact whether, and the extent to which, PWC is liable to pay Rose's costs in its personal capacity.
 - (d) To avoid delay to the Dismissal Order Appeal, PWC is prepared to proceed on a fast track filing schedule and/or truncate the deadlines for procedural steps under the *Rules of Court* such that this appeal may be heard concurrently with the Dismissal Order Appeal or as shortly thereafter as directed by this Honourable Court.
14. In the further alternative, PWC seeks leave to appeal under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. , 1985, c. B-3, on all of the foregoing bases.

15. In the further alternative, PWC seeks permission to be added as an Appellant to the Dismissal Order Appeal, with limited rights to file written argument not exceeding 20 pages and oral argument to not exceed 30 minutes. PWC seeks this order on the following bases:
 - (a) PWC has legal obligations under the Costs Order;
 - (b) For the foregoing reasons, it would be just and convenient to add PWC as an Appellant; and
 - (c) PWC's interest will only be adequately protected if it were granted party status; the Trustee represents the Sequoia estate, not PWC in its personal capacity.
16. This Application has been filed without an accompanying Affidavit and Memorandum of Argument to preserve the time limitation to file for permission to appeal while the parties await the transcribed oral reasons and/or written reasons for the Costs Order.

Material or evidence to be relied on:

1. The pleadings relevant to the Dismissal Order, the Costs Order and the Dismissal Order Appeal;
2. One or more Affidavits, to be filed no later than 10 days prior to the hearing of this Application or on such other date as directed by this Honourable Court;
3. Memorandum of Argument, to be filed no later than 10 days prior to the hearing of this Application or on such other date as directed by this Honourable Court;
4. Written reasons for the Dismissal Order, indexed as 2020 ABQB 6;
5. Transcribed oral reasons for the Costs Order;
6. Written reasons for the Costs Order; and
7. Such further and other materials as PWC may advise and this Honourable Court may permit.

Applicable Acts, regulations and rules:

1. Rules 3.72, 3.74, 14.2, 14.4, 14.5, 14.7, 14.13, 14.14, 14.37, 14.40, 14.44, 14.53, 14.56, 14.57, 14.73 and 14.88;
2. *Alberta Rules of Court*, Alta Reg 124/2010;
3. *Judicature Act*, RSA 2000, c J-2, s. 3;
4. *Bankruptcy and Insolvency Act*, R.S.C. , 1985, c. B-3, 183 and 193(e); and
5. Such further and other Acts, regulations and rules as counsel for PWC may advise and this Honourable Court may permit.

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NOTICE OF APPLICATI \$50.00
FILE #: 2010174AC

TOTAL \$50.00
American Express \$50.00
Item count: 1
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