



COURT FILE NUMBER 1801-10960

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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

DEFENDANTS PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE

DOCUMENT **APPLICATION FOR SECURITY FOR COSTS**

PARTIES FILING THIS DOCUMENT PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. (the **Perpetual Defendants**)

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT Burnet, Duckworth & Palmer LLP
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File No.: 59140-43

NOTICE TO PLAINTIFF:

This application is made against you. You are the respondent.

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

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

DATE	<u>June 22-24, 2020</u>
TIME	<u>10:00 am</u>
WHERE	<u>Calgary Courts Centre 605 5 Street SW Calgary, AB T2P 5P7</u>
BEFORE WHOM	<u>The Honourable Justice D.B. Nixon</u>

Go to the end of this document to see what else you can do and when you must do it.

Nature of Application and Relief Sought:

1. The Perpetual Defendants seek an Order:
 - (a) directing PricewaterhouseCoopers Inc. (**PwC**), in its capacity as trustee in bankruptcy of Sequoia Resources Corp. (the **Trustee**), to pay to the Clerk of the Court of Queen's Bench of Alberta security for costs of the Trustee's Action (the **Security**), in the amount of \$2,000,000 reflecting the Perpetual Defendants' anticipated solicitor-client (full indemnity) costs;
 - (b) in the alternative, directing the Trustee to post Security in the amount of \$1,048,900 reflecting five times Schedule C, Column 5 of the *Alberta Rules of Court*;
 - (c) directing the Security be held by the Clerk until further order of this Honourable Court as security for any costs award in favour of the Perpetual Defendants in this Action;
 - (d) directing the Security take one of the following forms:
 - (i) cash;
 - (ii) a bond or letter of credit or similar instrument securing payment of the Security on terms acceptable to the Perpetual Defendants or this Honourable Court;
 - (iii) a written undertaking from the Trustee in its personal capacity to pay any and all costs of this Action when due and owing to the Perpetual Defendants; or
 - (iv) a written undertaking or guarantee of the payment of costs to the Perpetual Defendants from another party and on such terms as may be acceptable to the Perpetual Defendants or this Honourable Court;
 - (e) directing that if the Security is not posted within 30 days of the date of this Honourable Court's order, this Action is dismissed without further order;

- (f) directing PwC in its personal capacity, or alternatively PwC in its capacity as Trustee, to pay to the Perpetual Defendants the costs of this application on a full indemnity basis or on such scale as this Honourable Court determines to be just; and
 - (g) granting such other relief that this Honourable Court determines just.
2. The abbreviations and defined terms in the Perpetual Defendants' Statement of Defence are used in this application.

Grounds for making this application:

3. In 2016, Perpetual agreed to sell assets to an unrelated third party, 198, effected by the sale of shares of a subsidiary, PEOC (the **Aggregate Transaction**).
4. The Aggregate Transaction was effected through various steps. One of those steps was combining the beneficial interest in the Goodyear Assets in the subsidiary trustee, PEOC, which already held the legal interest to those same assets (the **Asset Transaction**). The shares of PEOC were then sold to 198.
5. 198 then renamed PEOC, Sequoia, and operated the company for 17 months. Sequoia then assigned itself into bankruptcy.
6. Almost two years after the Aggregate Transaction, the Trustee sued the Perpetual Defendants, alleging, among other things, that the Asset Transaction constituted a transfer at undervalue within the meaning of s. 96 of the *Bankruptcy and Insolvency Act* (the **BIA**), amounted to oppression under the *Business Corporations Act* (Alberta), and was contrary to public policy, statutory illegality and equitable grounds.
7. On August 27, 2018, the Perpetual Defendants applied to summarily dismiss or strike all of the Trustee's claims. On August 15, 2019, the Honourable Justice D.B. Nixon issued oral reasons for judgment, and on January 13, 2020 issued written reasons for judgment, dismissing or striking all of the claims except for the claim under the *BIA*.
8. The Perpetual Defendants have asked the Trustee to agree to be personally liable for any costs that may be owing to the Perpetual Defendants in respect of the Action.

9. The Trustee has not agreed to pay costs to the Perpetual Defendants for the struck claims nor to bear any personal responsibility for those costs or any costs resulting from its Action.
10. Unless the Trustee agrees to be personally liable for the Perpetual Defendants' costs, it is unlikely that the Perpetual Defendants will be able to collect a costs award from the bankrupt estate in this matter. The secured claims against the bankrupt estate exceed the value of any remaining funds in the estate and would rank in priority to a preferred unsecured claim for payment of costs.
11. There is little merit to the Trustee's Action. The only outstanding claim in this Action is the claim under the *BIA*. There is little merit to the following three elements of the Trustee's claim:
 - (a) **Arm's length:** the Trustee narrowly avoided a summary dismissal application on this issue.
 - (b) **Transfer at undervalue:** The Trustee's allegation that the value provided by Sequoia under the Asset Transaction included over \$218 million in assumed ARO liabilities is premised on the flawed assumption that ARO associated with the Goodyear Assets constitutes a liability and is bound to fail.
 - (c) **Insolvency:** The Trustee's allegations that Sequoia was insolvent at the time of the Asset Transaction or rendered insolvent by it are based on the assumption that the ARO associated with the Goodyear Assets is a liability and that Sequoia was unable to pay the ARO associated with the Goodyear Assets. These allegations are wrong, incapable of proof and bound to fail.
12. The Trustee's ability to pursue its Action will not be unduly prejudiced by an order to post security for costs. In contrast, if the Trustee does not post security for costs, the Perpetual Defendants will be prejudiced if they are successful in this Action and the bankrupt estate has insufficient exigible funds to pay the Perpetual Defendants' costs.

Material or evidence to be relied on:

13. The Affidavit of Mark Schweitzer, to be filed.

14. The pleadings and proceedings herein, including the materials filed in the Action so far, including:
 - (a) the Statement of Claim filed August 2, 2018;
 - (b) the Statement of Defence filed August 27, 2018;
 - (c) the Affidavit of Paul J. Darby sworn and filed August 2, 2018;
 - (d) the Affidavit of Mark Schweitzer sworn and filed October 4, 2018;
 - (e) the Affidavit of Susan Riddell Rose sworn and filed October 19, 2018;
 - (f) the Transcript of questioning of Paul J. Darby held on October 22, 2018;
 - (g) the Transcript of questioning of Mark Schweitzer held on October 26, 2018;
 - (h) the Transcript of questioning of Susan Riddell Rose held on October 26, 2018; and
 - (i) the Reasons for Judgment of Justice D.B. Nixon cited as 2020 ABQB 6.

15. The pleadings and proceedings in Court of Appeal of Alberta Appeal No. 1901-0255AC arising from the Trustee's appeal of the order of Justice D.B. Nixon granted August 15, 2019, including:
 - (a) The Application of the Perpetual Defendants for security for costs filed September 24, 2019;
 - (b) The Affidavit of Susan Riddell Rose sworn and filed September 23, 2019;
 - (c) The Affidavit of Paul J. Darby sworn October 18, 2019 and filed October 21, 2019;
 - (d) The Transcript of questioning of Paul J. Darby held on November 5, 2019 and the undertaking responses of Paul J. Darby;
 - (e) The Reasons for Decision of Justice B.L. Veldhuis cited as 2020 ABCA 36; and
 - (f) The Order granted by Justice B.L. Veldhuis filed on February 12, 2020.

16. Such other materials as counsel advises and this Honourable Court admits.

Applicable Acts, regulations and rules

17. *Alberta Rules of Court*, Alta. Reg. 124/2010, Rules 4.22 and 4.23.
18. *Business Corporations Act*, RSA 2000, c. B-9, s. 254.
19. Such other Acts and regulations as counsel may advise.

How the application is proposed to be heard or considered:

20. Orally.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant(s).