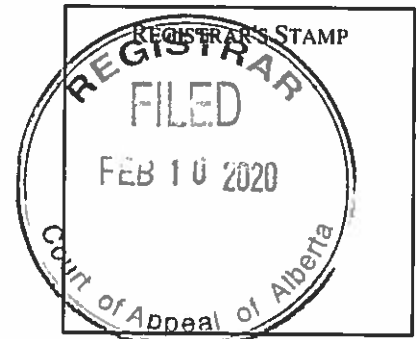


COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBERS: 1901-0255AC

TRIAL COURT FILE NUMBER: 1801-10960

REGISTRY OFFICE: CALGARY

APPLICANT: 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

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

STATUS ON APPEAL: RESPONDENTS

DOCUMENT: APPLICATION OF PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP.

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: DE WAAL LAW
1010, 505 – 3rd Street SW
Calgary, AB T2P 3E6

Attention: Rinus de Waal/Luke Rasmussen
Telephone: 403266 0013
Facsimile: 403 266 2632
Email: rdewaal@dewaallaw.com

CONTACT INFORMATION FOR ALL OTHER PARTIES: Burnet, Duckworth & Palmer LLP
8th Avenue Place, East Tower
2400, 525-8th Ave SW T2P 1G1
Attention: D.J. McDonald, Q.C./Paul Chiswell
Telephone: 403 260 5724/403 260 0201
Facsimile: 403 260 0332

Norton Rose Fulbright Canada LLP
3700, 400 3rd Ave SW
Calgary, AB T2P 4H2
Attention: S. Leitl/G. Benediktsson
Telephone: 403 267 8140
Facsimile: 403 264 5973

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 RESPONDENTS:

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: _____, 2020~~ *In writing only*
Time: 9:30 a.m.
Where: TransCanada Pipelines, 2600, 450 1st Street SW, Calgary, Alberta
Before: The Presiding Justice in Chambers

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

Nature of the Application and Relief Sought:

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp., (the “Trustee”) respectfully seeks an Order:

1. setting aside or varying its January 29, 2020 Order, pursuant to Rule 9.13, *alternatively* Rule 9.15(4);
2. changing or modifying the Reasons for Decision reported as *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.* at 2020 ABCA 36;
3. *alternatively*, granting the Trustee permission to appeal the Order and the Decision, pursuant to Rule 14.5;
4. directing that costs of the Application be costs in the Appeal; and
5. granting such other relief as counsel for the Trustee may advise and the Court may permit.

Grounds for making this application:

1. On January 29, 2020, the Court issued Reasons for Decision (the “Reasons”) and ordered the Trustee to post security for costs in favour of the Respondents to the Trustee’s Appeal (the “Security for Costs Order”).

Rules 9.13 and 9.15

2. Rule 9.13 provides that, at any time before a judgment or order is entered, the Court may:
 - (a) vary the judgment or order, or
 - (b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.
3. Rule 9.15(4) provides that the Court may set aside, vary or discharge an interlocutory order:
 - (a) because information arose or was discovered after the order was made,
 - (b) with the agreement of every other party, or
 - (c) on other grounds that the Court considers just.
4. The Security for Costs Order and the Reasons are based on plain and manifest errors of law, including a failure to consider relevant evidence.
5. The Court erred in law in finding that the Respondents had provided sufficient evidence to shift the burden of proof onto the Trustee.
6. The statements from the Respondents' affidavit cited by the Court were not evidence. They were statements of belief by the Respondents' witness, based in part on her own interpretation of the Supreme Court of Canada's decision in *Redwater*.
7. Proceeding on the basis that the evidentiary burden had shifted to the Trustee, the Court concluded that the Trustee could not show that the Estate would be able to pay any costs award in favour of the Respondents and "was intentionally preventing the discovery of relevant and material financial information of the estate for the purpose of these applications."
8. In granting the Security for Costs Order and issuing the Reasons, the Court erred in law in failing to consider relevant evidence:
 - 8.1. Prior to the cross-examination of its representative, the Trustee had provided detailed financial information regarding the Estate (the "**Confidential Estate Information**") to the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp. (the "**Perpetual Respondents**"), in their capacity as creditors and in accordance with s. 26(3) of the *Bankruptcy and Insolvency Act* (the "**BIA**").
 - 8.2. The Trustee disclosed the Confidential Estate Information to the Perpetual Respondents on the express condition that, *unless the Court directed otherwise*, this information would not be published generally and would only be used by the Perpetual Respondents in accordance with the *BIA*, as creditors, to consider the Trustee's administration of the Estate.

- 8.3. The Perpetual Respondents took no issue with this condition and reviewed the Confidential Estate Information on that basis.
 - 8.4. Instead of complying with this condition, including by seeking an Order permitting the Trustee to disclose the Confidential Estate Information publicly notwithstanding s. 26(3) of the *BIA*, the Perpetual Respondents sought to introduce the Confidential Estate Information into a public cross-examination in a manner directly inconsistent with s. 26(3) and the disclosure conditions they had implicitly accepted.
 - 8.5. In order to provide additional financial information regarding the Estate without offending s. 26(3), the Trustee's representative offered to go through each secured claim file with the Perpetual Respondents.
 - 8.6. Instead of accepting that offer, the Perpetual Respondents requested an undertaking that the Trustee publicly disclose, as part of the cross-examination record, "all the claims files for the estate for all the secured creditors". The requested undertaking was inconsistent with s. 26(3) of the *BIA* and the disclosure conditions accepted by the Perpetual Respondents.
9. The Court also erred in law in making findings inconsistent with the evidence before the Court:
- 9.1. The Court found that the Trustee's representative made no efforts to apprise himself of the Estate's financial situation prior to or during questioning and did not know the balance of funds in the Estate even though the Trustee's representative had testified that the bank balance at the date of his questioning was approximately \$2.5 million.
 - 9.2. The Court criticized the Trustee's representative for refusing publicly to disclose the books and records of the Estate:
 - 9.2.1. even though the Trustee's representative provided a detailed explanation of the position of the Trustee with respect to the Confidential Estate Information in response to the undertakings requested by the Respondents; and
 - 9.2.2. even though the Court expressly declined to find that the Trustee was necessarily required to provide full disclosure of the financial status of the Estate to a court.
 - 9.3. The Court made no mention of the stated intention of the Respondents to seek costs against the Trustee personally and the financial ability of the Trustee personally to pay any costs which may be ordered.
10. The Court also erred in law in failing to address the arguments raised by the Trustee in its Memorandum of Argument that:

- 10.1. a security for costs Order was unnecessary because the Respondents intended to seek costs from the Trustee personally and there was no suggestion that the Trustee personally had insufficient assets to satisfy a costs award; and that
 - 10.2. as the Respondents had allegedly caused the Estate's financial condition, they were not entitled to rely on the effects of their own conduct in seeking security for costs.
11. As the Reasons and the Security for Costs Order are the products of objectively demonstrable errors of law, they should be set aside, varied or modified to avert an injustice.

Application for Leave to Appeal

12. Rule 14.5 provides that an Order of single appeal judge can be appealed with permission of the single appeal judge who made the Order.
13. Rule 14.38 permits a single appeal judge to refer an application for leave to another appeal judge or to a panel of the Court of Appeal.
14. An application for permission to appeal a decision of a single appeal judge should be granted where the applicant can demonstrate one or more or all of the following:
 - 14.1. a question of general importance;
 - 14.2. a possible error of law;
 - 14.3. an unreasonable exercise of discretion; or
 - 14.4. a misapprehension of important facts.
15. The Security for Costs Decision raises questions of general importance, likely to affect the ability of trustees in bankruptcy across Canada to pursue claims under the *BIA*.
16. Unless it is modified or set aside, the Security for Costs Decision means that a trustee in bankruptcy faced with a security for costs application will have the onus to show that the value of the assets in the bankruptcy estate exceeds all secured and unsecured claims that will eventually be allowed, as well as a potential cost award in favour of the applicant seeking security for costs:
 - 16.1. on the basis only of a statement by an applicant that he or she *believes* that the Estate will be unable to pay costs;
 - 16.2. when, in the circumstances or because of the information and resources available, it may be practically impossible for the trustee to consider and determine the merit and value of every secured and unsecured claim in the estate and to determine the value of every asset in the estate; and
 - 16.3. by making full public disclosure of detailed confidential information regarding the financial affairs of the estate, including assets, liabilities and claims by creditors through cross-examination by parties who may or may not be entitled to such

information under the *BIA* and by presenting such evidence to the Court if the applicants choose not to do so, in breach of the confidentiality obligations imposed on trustees by the *BIA*.

17. In addition to these serious questions of general importance, the Reasons and Security for Costs Order reflect errors of law, as discussed above.
18. If the Reasons and Security for Costs Order are not set aside, varied or modified, permission to appeal should be granted.

Material or evidence to be relied on:

19. The October 18, 2019 Affidavit of Paul Darby.
20. The transcript of Paul Darby's cross-examination November 6, 2019 and the Trustee's answers to undertakings.
21. Such other material as counsel for the Applicant may advise and the Court may allow.

Applicable rules:

22. Rules 6.3; 9.13, 9.15, 9.16, 10.29; 10.31; 10.33, 14.5 and 14.37 of the *Alberta Rules of Court*.