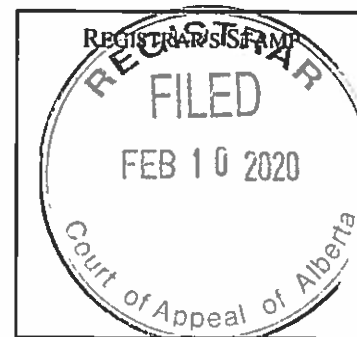


**COURT OF APPEAL OF ALBERTA**



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

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## Introduction

1. PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. (the “Trustee”) seeks an Order:
  - 1.1. setting aside or varying the January 29, 2020 Order requiring the Trustee to post security for costs in favour of the Respondents to the Trustee’s appeal, Perpetual Energy Inc., Perpetual Operating Corp., Perpetual Operating Trust (the “Perpetual Respondents”) and Ms. Susan Riddell Rose (the “Security for Costs Order”);
  - 1.2. changing or modifying the Reasons for Decision reported as *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.* at 2020 ABCA 36 (the “Reasons”),
  - 1.3. *alternatively*, granting permission to appeal the Security for Costs Order and Reasons.

## The Test for Setting Aside or Varying an Order

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.<sup>1</sup>
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.<sup>2</sup>

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<sup>1</sup> *Alberta Rules of Court*, AR 124/2010, s. 9.13 [Trustee’s Authorities, Tab 1]

<sup>2</sup> *Alberta Rules of Court*, AR 124/2010, s. 9.15(4) [Trustee’s Authorities, Tab 1]

4. In *Lewis Estates*, the Court cited with approval the following description of the power conferred under Rule 9.13:

In light of the explicit authority contained in Rule 9.13 and the purpose of the Rules of Court as contained in Rule 1.2, Shelley J. decided that a judge may investigate whether error exists in a judgment and, when an error is identified, consider whether the defect warrants correction. She identified the benefits of such judicial intervention as including the avoidance of an otherwise unnecessary and costly appeal; and, where an appeal is nonetheless pursued, the benefit of the appeal court having a more fully developed trial consideration of the facts and law. The circumstances in which the later [sic] benefit might arise, she said, include where an issue had not been fully apprehended during preparation of the judgment.<sup>3</sup>

5. The Court found that Rule 9.13 “represents a considerable expansion of judicial discretion from that contained in the predecessor Rule 339,”<sup>4</sup> observing that Rule 9.13 “expands the scope for correcting errors in judgments”.<sup>5</sup>
6. In *Luebke*, *Lewis Estates* was cited with approval for the proposition that Rule 9.13 should be used to vary a decision “where there is a plain and manifest error”.<sup>6</sup>

#### **The Reasons and Security for Costs Order Reflect Plain and Manifest Errors of Law**

7. The Court erred in law in finding that the Respondents had provided sufficient evidence to shift the burden of proof onto the Trustee.<sup>7</sup>

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<sup>3</sup> *Lewis Estates Communities Inc v Brownlee LLP*, 2013 ABQB 731 (*Lewis Estates*) [Trustee’s Authorities, Tab 2]

<sup>4</sup> *Ibid*, at para. 20 [Trustee’s Authorities, Tab 2]

<sup>5</sup> *Ibid*, at para. 28 [Trustee’s Authorities, Tab 2]

<sup>6</sup> *Luebke v Manluk Industries*, 2017 ABQB 243, at para. 9 [Trustee’s Authorities, 3]

<sup>7</sup> Reasons, at paras. 18, 22-23.

8. The statements from the Respondents' affidavit cited by the Court were *not evidence*.<sup>8</sup> 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*.<sup>9</sup>
9. 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 a cost award in favour of the Respondents<sup>10</sup> and that the Trustee "was intentionally preventing the discovery of relevant and material financial information of the estate for the purpose of these applications."<sup>11</sup>
10. In granting the Security for Costs Order and issuing the Reasons, the Court erred in law in failing to consider relevant evidence:<sup>12</sup>
  - 10.1. Prior to the cross-examination of its representative, the Trustee had provided detailed financial information regarding the Estate (the "**Confidential Estate Information**") to the Perpetual Respondents, in their capacity as creditors and in accordance with s. 26(3) of the *Bankruptcy and Insolvency Act* (the "**BIA**").<sup>13</sup>
  - 10.2. The Trustee disclosed the Confidential Estate Information to the Perpetual Respondents on the express condition that, *unless the Court directed otherwise*, this

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<sup>8</sup> Reasons, at para. 22, citing September 23, 2019 affidavit of S. Rose, at para. 27.

<sup>9</sup> *North American Polypropylene ULC v Williams Canada Polypropylene ULC*, 2018 ABQB 281 (*North American Polypropylene*), at para 7 [Trustee's Authorities, Tab 4]; *Renfrew Insurance Ltd v Donald*, 2012 ABQB 228, at para 38 [Trustee's Authorities, Tab 5]; *Banff Transportation and Tours Inc v Buchan*, 2002 ABQB 423, at para 35 [Trustee's Authorities, Tab 6]

<sup>10</sup> Reasons, at para. 32

<sup>11</sup> Reasons, at para. 25.

<sup>12</sup> *364021 Alberta Inc. v Burnet, Duckworth & Palmer*, 2005 ABCA 257 (*Burnet*) [Trustee's Authorities, Tab 13]

<sup>13</sup> *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, s. 26(3) [Trustee's Authorities, Tab 7]; Undertaking Responses of Paul J. Darby, Response to Undertaking No.1.

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.<sup>14</sup>

10.3. The Perpetual Respondents took no issue with this condition and reviewed the Confidential Estate Information on that basis.<sup>15</sup>

10.4. 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.<sup>16</sup>

10.5. In an attempt 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.<sup>17</sup>

10.6. 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".<sup>18</sup> The requested undertaking was inconsistent with s. 26(3) of the *BIA*, Rules 40 and 41 of the *Bankruptcy and*

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<sup>14</sup> Undertaking Responses of Paul J. Darby, Response to Undertaking No.1.

<sup>15</sup> Undertaking Responses of Paul J. Darby, Response to Undertaking No.1.

<sup>16</sup> Transcript of Cross-Examination of P. Darby, Exhibit 3 and at p. 12, lines 4-16, p. 66 and lines 17-23.

<sup>17</sup> Transcript of Cross-Examination of P. Darby, p. 62, lines 7-27, p. 63, p. 64, lines 1-25.

<sup>18</sup> Transcript of Cross-Examination of P. Darby, p. 65, lines 2-8.

*Insolvency General Rules* and the disclosure conditions implicitly accepted by the Perpetual Respondents.<sup>19</sup>

11. The Court also erred in law in making findings against the Trustee inconsistent with the evidence before the Court:<sup>20</sup>

11.1. 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<sup>21</sup> even though the Trustee's representative had testified that the bank balance at the date of his questioning was approximately \$2.5 million.<sup>22</sup>

11.2. The Court criticized the Trustee's representative for refusing to publicly disclose the books and records of the Estate:

11.2.1. 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,<sup>23</sup> and

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<sup>19</sup> Transcript of Cross-Examination of P. Darby, Exhibit 3 and at p. 12, lines 4-16, p. 66 and lines 17-23

<sup>20</sup> *Coyle v. O'Keefe*, 2019 ABCA 442, at para. 23 [Trustee's Authorities, Tab 8]

<sup>21</sup> Reasons, at para. 32.

<sup>22</sup> Transcript of Cross-Examination of P. Darby, at p. 19, lines 10-18.

<sup>23</sup> Undertaking Responses of Paul J. Darby, Response to Undertaking No.1, Exhibit 3, p. 12, lines 4-16, p. 66 and lines 17-23.

11.2.2. 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.<sup>24</sup>

12. The Court also erred in law in failing to address the arguments raised by the Trustee in its Memorandum of Argument<sup>25</sup> that:

12.1. a security for costs Order was unnecessary as 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;<sup>26</sup> and that

12.2. as the Respondents had allegedly contributed to the Estate's financial condition, they were not entitled to rely on the effects of their own conduct in seeking security for costs.<sup>27</sup>

13. As the Reasons and the Security for Costs Order are the products of plain and manifest errors of law, they should be set aside, varied or modified to avert an injustice.<sup>28</sup>

### **The Test for Permission to Appeal**

14. An application for permission to appeal a decision of a single appeal judge should be granted if the applicant can establish a question of general importance, a possible error of law, an unreasonable exercise of discretion or a misapprehension of important facts.<sup>29</sup>

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<sup>24</sup> Reasons, at para. 56.

<sup>25</sup> *Andersen v Colvin*, 2019 ABCA 469, at para. 35 [Trustee's Authorities, Tab 9]

<sup>26</sup> Trustee's Memorandum of Argument, at paras. 4-7.

<sup>27</sup> Trustee's Memorandum of Argument, at paras. 20-26.

<sup>28</sup> *Lewis Estates, supra*, at para. 33 [Trustee's Authorities, Tab 2]

<sup>29</sup> *Settlement Lenders Inc. v. Blicharz*, 2016 ABCA 109, at para. 1 [Trustee's Authorities, Tab 10]

15. In *JE v Alberta (Workers' Compensation Board)*, Veldhuis JA held that an application for leave to appeal required the exercise of discretion in a “judicial manner and in accordance with the principles of fundamental justice.”<sup>30</sup>

### **The Decision Raises Serious Questions of General Importance**

16. The Reasons raise serious questions of general importance, likely to affect the ability of trustees in bankruptcy across Canada to pursue claims under the *BIA*.
17. The Court focused the inquiry on the financial situation of the bankrupt estate<sup>31</sup> holding that:

in the context of bankruptcy proceedings, common sense suggests that a court must consider that assets in the estate will be subject to a hierarchy of claims and may or may not end up being exigible assets.<sup>32</sup>
18. This approach requires a trustee in bankruptcy to consider and determine the merit and value of every secured and unsecured claim in the estate and to determine the value of all the assets in the estate, regardless of the information available to the trustee and the funds in the estate available to the fund the trustee’s activities.
19. This approach would also require a trustee in bankruptcy to make full public disclosure of specific evidence regarding the financial affairs of the estate, including assets, liabilities and claims by creditors, presumably subject to cross-examination by parties who may or may not be creditors, which would be inconsistent with the confidentiality obligations imposed on trustees by the *BIA*.
20. The Reasons accordingly raise the following serious questions of general importance:

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<sup>30</sup> *JE v Alberta (Workers' Compensation Board)*, 2016 ABCA 243, at para 2 [Trustee’s Authorities, Tab 11]

<sup>31</sup> Reasons, at para. 21.

<sup>32</sup> Reasons, at para. 31.



20.1. Is a trustee required to value all of the assets in the estate and determine the merits and value of all the claims in the estate, regardless of the facts and the funding available in the particular circumstances of each case, simply to respond to a security for costs application?

20.2. Does an application for security for costs require a trustee in bankruptcy to make full public disclosure of the financial and other affairs of the estate, including the details of all claims submitted, regardless of the confidentiality obligations imposed on trustees by the *BIA* and the Bankruptcy Rules?<sup>33</sup>

In contrast with the time and effort demanded of a trustee in bankruptcy, the approach to security for costs set out in the Reasons also allows the applicant to shift the burden of proof onto the trustee simply by expressing a *belief* that the estate will be unable to pay a potential costs award.

21. The Reasons confirmed that an applicant for an order for security for costs has the initial burden of establishing, on a balance of probabilities, that it is just and equitable to order security for costs or that the respondent will be unable to pay its costs. The Court then found that a statement of belief regarding three respects was sufficient to discharge this onus and to establish the required facts on a balance of probabilities.

22. By allowing the Respondents to discharge their onus merely by stating a belief, the Reasons effectively placed the initial burden of proof onto the Trustee. However, as discussed above, a non-expert witness' legal opinion, on the interpretation of case law, for example, is not

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<sup>33</sup> *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, ss. 13.5 and 26(3); *Bankruptcy and Insolvency General Rules*, CRC c 368, s 40 [Trustee's Authorities, Tab 12]

evidence.<sup>34</sup> A “bald statement of belief” that a respondent is unlikely to be able to pay a costs award has “no evidentiary value” in a security for costs application.<sup>35</sup>

23. This aspect of the Reasons raises the following serious questions of general importance:

23.1. Is a statement of belief sufficient to establish anything on a balance of probabilities in this context?

23.2. Does the onus in an application for security for costs shift onto the respondent if the applicant simply states a belief that a cost order will not be enforceable against exigible assets?

#### **Errors of Law**

24. The errors of law reflected in the Reasons and Security for Costs Order are discussed above.

25. If the Court declines to set aside, vary or modify the Reasons and Security for Costs Order, these errors of law support the granting of permission to appeal under Rule 14.5.

#### **Questions of Law**

26. The Trustee requests permission to appeal the Reasons on the following questions of law:

26.1. Should the Trustee be required to post security for costs on the basis that, because the Estate is in bankruptcy, it is unlikely to be able to pay an adverse cost award?

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<sup>34</sup> *Renfrew Insurance, supra*, at para 38 [Trustee’s Authorities, Tab 5]; *Banff Transportation, supra*, at para 35 [Trustee’s Authorities, Tab 5]

<sup>35</sup> *North American Polypropylene, supra*, at para 7 [Trustee’s Authorities, Tab 4]

- 26.2. Was the Trustee required to determine the validity and amounts of all claims and the values of all assets in the bankrupt Estate in response to the application for security for costs?
- 26.3. Was the Trustee obliged to make full public disclosure of the financial and other affairs of the Estate, including claims submitted?
- 26.4. Was the statement of belief of Ms. Rose sufficient to meet the applicants' onus to establish facts on a balance of probabilities and to shift the onus to the Trustee?

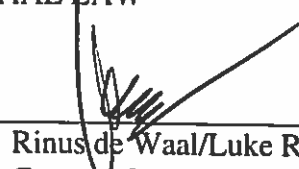
Calgary, Alberta  
February 10, 2020

Estimated Time for  
Argument: 15 minutes

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per:

  
\_\_\_\_\_  
Rinus de Waal/Luke Rasmussen  
Counsel for the Trustee (Appellant/Applicant)

## TABLE OF AUTHORITIES

1. *Alberta Rules of Court*, AR 124/2010, ss. 9.13, 9.15(4), 14.5 and 14.37
2. *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 731
3. *Luebke v. Manluk Industries*, 2017 ABQB 243
4. *North American Polypropylene ULC v Williams Canada Polypropylene ULC*, 2018 ABQB 281
5. *Renfrew Insurance Ltd v Donald*, 2012 ABQB 228
6. *Banff Transportation and Tours Inc v Buchan*, 2002 ABQB 423
7. *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, ss. 13.5 and 26(3)
8. *Coyle v. O'Keefe*, 2019 ABCA 442
9. *Andersen v Colvin*, 2019 ABCA 469
10. *Settlement Lenders Inc. v. Blicharz*, 2016 ABCA 109
11. *JE v Alberta (Workers' Compensation Board)*, 2016 ABCA 243
12. *Bankruptcy and Insolvency General Rules*, CRC c 368, s 40
13. *364021 Alberta Inc. v. Burnet, Duckworth & Palmer*, 2005 ABCA 257