

May 1, 2020

By e-mail Laurie.Baptiste@albertacourts.ca

Court of Appeal of Alberta
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Our reference
1001040549

Your reference

PricewaterhouseCoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others Appeal No. 1901-0255AC

This letter is respectfully submitted on behalf of the Respondent Susan Riddell Rose (**Rose**) in support of her request for solicitor-client, or otherwise enhanced, costs as against PricewaterhouseCoopers Inc. personally, or alternatively as against the Plaintiff trustee in bankruptcy (the **Trustee**), in connection with the Order of the Honourable Madam Justice B. Veldhuis granted (the **Security for Costs Order**).

In accordance with your direction, these submissions are tendered to the panel (not yet convened) that will hear various applications made by the Trustee and by Mr. Paul Darby (**Darby**) concerning the Security for Costs Order. We would be grateful if you arrange to have these submissions forwarded accordingly. (We will be sending copies of the cited authorities as soon as possible.)

These proceedings arise from an appeal by the Trustee from the Order of Justice Nixon granted August 15, 2019 and filed February 18, 2020 pursuant to which the Trustee's extraordinary claims against Rose, in which the Trustee sought approximately \$220 million in damages, interest and full indemnity costs, were: (i) struck because the Trustee does not have standing to sue; (ii) struck as disclosing no reasonable cause of action; (iii) summarily dismissed; and (iv) declared barred by virtue of a written release in favour of Rose.¹

Rose applied for security for costs of the appeal and swore an affidavit in support. The Trustee did not cross-examine. Darby swore a short affidavit in response in which he curiously argued that the Trustee had succeeded against Rose and would seek costs against Rose. Darby stated that in any event the funds then in the bankrupt estate exceeded Rose's cost estimates. He did *not* state that the estate would be able to pay a costs award in favour of Rose. It cannot.

¹ The order of Justice Nixon, as well as his oral reasons for judgement on an application to settle the terms of that order, are attached hereto as **Tab 1**. Justice Nixon has yet to rule on costs. Rose is filing an application seeking full indemnity costs against PricewaterhouseCoopers Inc. personally which is scheduled to be heard on June 22, 2020.

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Darby's cross-examination was remarkable. Darby had not looked at the estate's books and records to prepare his evidence.² The Trustee took the position that Perpetual Energy Inc. (**Perpetual**), as a creditor, could see certain estate records but that Rose, the CEO of Perpetual, *and a litigant in this action in her personal capacity*, could not.³ Darby refused to answer how he had reached the conclusions in his affidavit regarding financial position of the estate.⁴ Darby refused to look at the bank statements of the estate that were on the table in front of him.⁵ The Trustee refused to disclose the estate's anticipated expenses⁶ or receipts.⁷ The Trustee refused to disclose what fees it had been paid from the estate.⁸ The Trustee refused to answer whether the Trustee has any intention to pay a cost award.⁹ Darby could only *guess* how much money was in the estate's bank account,¹⁰ and called that a "useless question".¹¹ He had no idea whether any of the estate funds had been segregated for other obligations.¹² He had no idea whether the estate had any uncollected receivables¹³; what expenses the estate might incur for abandonment and reclamation¹⁴; how much cash the estate would have in one month or what expenses the estate might incur in the future¹⁵; how many secured creditors there are or the total of their claims.¹⁶ These are but examples.

Justice Veldhuis was rightly unimpressed. Justice Veldhuis found, among other things, that in responding to the applications for security for costs, the Trustee "purposefully hindered meaningful cross-examination"¹⁷; intentionally prevented the discovery of relevant and material information¹⁸; and was unnecessarily obstructive.¹⁹

Justice Veldhuis granted Rose's application for security for costs. In the circumstances of this appeal and of that application, Rose submits that the panel should exercise its discretion to award solicitor-client, or otherwise enhanced, costs of the application. In short, the Trustee, an officer of the Court, should not have opposed the application; and, in any event, the Trustee engaged in unnecessary and inappropriate conduct in doing so.

² Cross-examination of Paul Darby dated Nov., 6 2019 [**Darby cross-exam. Nov. 6/19**]: 35/14/16.

³ Darby cross-exam. Nov. 6/19: 10/12-13; 11/5-11/ 12/17-20; 16/3-21; 17/10-13; 17/25-27. Reasons for Judgment of Justice Veldhuis (security for costs), **PricewaterhouseCoopers Inc v Perpetual Energy Inc**, 2020 ABCA 36 [**Reasons**] at para 26.

⁴ Darby cross-exam. Nov. 6/19: 15/2-10.

⁵ Darby cross-exam. Nov. 6/19: 20/4-6.

⁶ Darby cross-exam. Nov. 6/19: 28/23-29/23.

⁷ Darby cross-exam. Nov. 6/19: 38/20-39/5; 43/8-12.

⁸ Darby cross-exam. Nov. 6/19: 46/11-13; 48/5-11; 103/1-5.

⁹ Darby cross-exam. Nov. 6/19: 58/7-11.

¹⁰ Darby cross-exam. Nov. 6/19: 19/1-5; 32/18-26; 33/11-13.

¹¹ Darby cross-exam. Nov. 6/19: 22/12-18.

¹² Darby cross-exam. Nov. 6/19: 24/8-12; 27/9-15.

¹³ Darby cross-exam. Nov. 6/19: 37/21-23.

¹⁴ Darby cross-exam. Nov. 6/19: 51/16-18.

¹⁵ Darby cross-exam. Nov. 6/19: 56/5-10.

¹⁶ Darby cross-exam. Nov. 6/19: 56/21-57/8; 57/15-19; 70/23/ 71/6-8.

¹⁷ *Reasons*, para. 24.

¹⁸ *Ibid.*, para. 25.

¹⁹ *Ibid.*, para. 29.

This Court has the jurisdiction to award costs on any scale.²⁰ In considering the quantum and manner of costs to be paid, the Court may consider, among other factors: “(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action . . . (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake.”²¹

Solicitor-client costs may be awarded to indemnify a party for their reasonable costs of the litigation where the opposite party’s conduct was reprehensible, scandalous or outrageous.²² Examples include: (i) where justice can only be done by indemnification; (ii) where there was no serious issue of fact or law which required the proceedings; and/or (iii) where a party delays or protracts the litigation.²³

Absent such conduct, the Court may award costs on an enhanced, or partial indemnity, basis.²⁴ Courts can achieve this by way of a multiplier, or by use of lump sums based on a fraction of solicitor-client costs.²⁵ This Court has held that the application of a multiplier may be appropriate where the length and complexity of a proceeding and the quantum merits it.²⁶ In some cases, up to 75% indemnity for solicitor-client costs may be appropriate.²⁷

In conjunction with this letter, Rose is swearing and filing an affidavit in support of her request for enhanced costs which (among other things) attaches a bill of costs showing her solicitor-client costs relating to the proceeding before this Court (redacted for privilege).

Finally, on the point of the award of costs being made against PricewaterhouseCoopers Inc. personally:

- a. The Court has clear jurisdiction to award costs against PricewaterhouseCoopers Inc. personally where, as the Trustee, it elected to sue in civil proceedings and the bankrupt estate had insufficient unsecured assets to satisfy an adverse costs award.²⁸
- b. The Trustee elected to make extraordinary civil claims against Rose, and is not entitled to any presumption as to personal liability for costs under s. 197 of the *BIA*.
- c. The Trustee’s claims were struck, dismissed and barred.
- d. The Trustee appeals nonetheless.
- e. An award of costs against the bankrupt estate will be worthless.

²⁰ Alberta *Rules of Court*, Alta Reg 124/2010, Rule 14.88(3). Notably, the issue of Rose’s costs arising from the decision below has not been determined, but Rose has sought full indemnity costs from that Court too.

²¹ *Ibid.*, R. 10.33(2)(a) & (d).

²² *Estate of Montgomery*, 2019 ABQB 833 [*Montgomery*] at para 16.

²³ *Ibid.* at para 16.

²⁴ For instance, in *Athabasca Minerals Inc. v Syncrude Canada Ltd.*, 2018 ABQB 551, Jones J. awarded costs of a dismissed application on the basis of 45% the successful party’s actual costs. He stated that had he not done that, he would have used a multiplier of Column 5 and accounted for inflation.

²⁵ *Weatherford Canada Partnership v Addie*, 2018 ABQB 571, aff’d 2019 ABCA 92 at paras 54-57.

²⁶ *Stewart Estate v TAQA North Ltd.*, 2016 ABCA 144 at para 24.

²⁷ *Estate of Montgomery*, *supra*, at para 79.

²⁸ *Bankruptcy and Insolvency Act (Canada)*, RSC 1985 c. B-3, s. 197(2). Costs have been awarded against trustees in bankruptcy personally in a number of appropriate circumstances, including where there is misconduct in the litigation, and where the assets in the estate are insufficient to pay a costs award: See *Asian Concepts Franchising Corporation (Re)*, 2018 BCSC 1464 at para 17, citing *Commonwealth Investors Syndicate Ltd., Re* (1986), 38 ACWS (2d) 184 (BCSC), 1986 CarswellBC 490 (WL Can) at para 5, and *British Columbia (Civil Forfeiture Act Director) v. Nguyen*, 2009 BCSC 827 [*Nguyen*] at para 48, citing *Vancouver Trade Mart v. Creative Prosperity Capital Corp.* (1998), 84 ACWS (3d) 23 (BCSC), 1998 CarswellBC 2528 (WL Can); *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 771 at paras 21-15.

Yours truly,
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