In the Court of Appeal of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABCA 36

Date: 20200129
Docket: 1901-0255-AC
Registry: Calgary

Between:

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its Personal Capacity

Respondent
(Plaintiff)

- and -

Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose

Applicants
(Defendants)

Reasons for Decision of
The Honourable Madam Justice Barbara Lea Veldhuis

Applications to Post Security for Costs

Reasons for Decision of
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Background

[1] Two applicants, Susan Riddell Rose and a group of companies collectively referred to as Perpetual, seek orders requiring the respondent, PricewaterhouseCoopers Inc. in its capacity as trustee for the bankrupt estate of Sequoia Resources Corp. (Sequoia), to post security for costs for the respondent's appeal either pursuant to rule 14.67(1) of the *Alberta Rules of Court*, AR 124/2010, or s. 254 of the Alberta *Business Corporation Act*, RSA 2000, c B-9 [*ABCA*].

[2] Sequoia was previously named Perpetual Energy Operating Corp. (PEOC), and was a wholly owned subsidiary of one of the companies. Perpetual created PEOC to hold natural gas assets in trust for the benefit of Perpetual. Ms. Rose was the sole director of PEOC. In early 2016, Perpetual decided to sell some of the natural gas wells held in trust by PEOC (referred to as the Goodyear Assets) to a third-party.

[3] To affect the sale, the parties were required to engage in a series of transactions and other steps which occurred in conjunction with each other in October 2016. Among other things, beneficial and legal title to the Goodyear Assets was consolidated in PEOC and all the shares of PEOC were sold to the third-party.

[4] PEOC was renamed as Sequoia. Sequoia operated for approximately 17 months before it assigned itself into bankruptcy in March 2018.

[5] Following bankruptcy, the respondent sued the applicants and brought an application seeking to set aside one of the transactions. Alternatively, the respondent sought damages against the applicants personally in the minimum amount of $217,570,800. The grounds for the application include allegations that the transaction constituted a transfer at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] or was void on the basis of public policy, statutory illegality or equitable rescission. The respondent also alleged that the applicants engaged in oppressive conduct and that Ms. Rose breached her duty of care and fiduciary duties to PEOC in directing PEOC to enter into the series of transactions.

[6] The applicants filed applications to stay the respondent's application and to dismiss the respondent's claims. After some interlocutory steps, the dismissal and stay applications proceeded to hearing in November 2018, with additional submissions made later. On August 15, 2019, the chambers judge gave oral reasons, with written reasons to follow. The written reasons were released several weeks after these applications were heard: 2020 ABQB 6. The parties did not seek to make further submissions with respect to these applications.

[7] In the written reasons, the chambers judge struck the respondent's oppression claim on two grounds. First, the respondent was not a "proper person" that would accord it standing as a "complainant" entitled to make this claim under the *ABCA*. Second, given the impact of *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 the respondent has no cause of action in respect of oppression because the Supreme Court of Canada has nullified the claim. The chambers judge also struck the respondent's public policy claim for disclosing no reasonable cause of action. The chambers judge struck and summarily dismissed the allegations that Ms. Rose breached her fiduciary duty and duty of care. In any event, the chambers judge found that Ms. Rose's release would act as a complete bar to the claims against her. The respondent appeals the chamber judge's decisions on these claims. The applicants seek security for costs for this appeal.

[8] The chambers judge found the evidence did not permit him to summarily dismiss or strike the claim that the impugned transaction was a transfer at undervalue pursuant to s. 96 of the *BIA*. The applicants have cross-appealed this finding. No security for costs application has been brought for this cross-appeal.

Section 243(3) of the *ABCA*

[9] In its factum, the respondent states that s. 243(3) of the *ABCA* is a complete bar to the relief requested in these applications since the respondent has alleged oppression. Section 243(3) states:

> 243 (3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

[10] While there is little case law on this section, *Broadway v Robson*, 2018 ABQB 463 at para. 12 suggests that to receive the benefit of this section, a party must establish an arguable case that they are a complainant. Here, the chambers judge has found the respondent is not a complainant, although this finding is subject to appeal.

[11] As further set out below, I am unable to say that this ground of appeal lacks merit. As a result, I decline to find that this provision has no application to a security for costs application on appeal.

[12] Assuming the respondent is a complainant, the next step is to examine the claim to determine whether it, or part of it is a non-oppression claim clothed as one of oppression: *Mudrick Capital Management v Wright*, 2018 ABQB 194 at para 18.

[13] There are a variety of claims made against the applicants, some together, some that would apply only individually (like the breach of fiduciary duty claim against Ms. Rose). I cannot say that the "core" of the claim is one of oppression such that the entire application is barred. Instead, I follow the practice of finding that a proportion of the claim constitutes "oppression" and reduce the quantum posted by that amount. In these circumstances, I find that 20% of the claim constitutes oppression.

Tests for Security for Costs

[14] Pursuant to rule 14.67(1) of the *Rules*, a single appeal judge may order a party to provide security for costs under rule 4.22 if it is just and reasonable to do so, considering the following:

(a) whether it is likely that the applicant for an order will be able to enforce an order or judgment against assets in Alberta;

(b) the ability of the respondent to pay the costs award;

(c) the merits of action;

(d) whether an order to give security for costs would unduly prejudice the respondent's ability to continue the action; and

(e) any other matter the court considers appropriate.

[15] Security for costs is a discretionary order involving the balancing of the right to the economic security of one party with the other party's right to legal process: *Arcuri v Adamson*, 2006 ABCA 360 at para 6. A party's right to access the legal process does not mean they can advance an appeal without the fear of costs consequences: *Aski Construction Ltd v Markos*, 2017 ABCA 341 at para 11. The applicant bears the onus of proving these factors weigh in their favour: *Aski* at para 8.

[16] Alternatively, pursuant to s. 254 of the *ABCA*, security for costs may be sought against a corporation:

> In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

[17] The parties argue this Court can grant security for costs against a corporation under either test citing *North American Polypropylene ULC v Williams Canada Propylene ULC*, 2018 ABQB 281. Other decisions have held that s. 254 of the *ABCA* is the only applicable test: *Amex Electrical Ltd v 726934 Alberta Ltd*, 2014 ABQB 66 at para 58. I decline to comment on which is the correct approach. That matter is best left for a panel on another day. In the circumstances of this case, I have considered the parties' arguments under each approach.

[18] Under either test, the applicants bear 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. If the applicants satisfy this onus, the evidentiary burden shifts to the

respondent to satisfy the court that the court should not exercise its discretion to grant security for costs: *Mudrick Capital Management v Wright*, 2018 ABQB 648 at para 8 [*Mudrick #2*].

Analysis

[19] I have reviewed the extensive records provided by the parties including filed affidavits, transcripts of the cross-examinations of the individual (PD) acting on behalf of the respondent, and the oral and written reasons for decision of the chambers judge. I am satisfied that the applicants have met their burden under both tests.

The Ability of the Respondent to Pay the Costs Award

[20] The test for security for costs under the *Rules* asks whether it is unlikely the respondent will be able to pay an adverse costs award. Section 254 of the *ABCA* provides a more stringent financial assessment and considers whether the corporation will be unable to pay costs: *Xpress Lube & Car Wash Ltd v Gill*, 2011 ABQB 457 at para 16.

[21] Before these applications were brought, the applicants requested the respondent to confirm that it would be personally liable for a costs award, or that it would post commercially reasonable security for the appeal. The respondent has failed to do so. Since the respondent will not post security, this requirement focuses on the financial situation of the bankrupt estate of Sequoia.

[22] The applicants submit, relying on a preliminary report of the estate prepared by the respondent in April 2018, that no funds will remain in the bankrupt estate to pay an adverse costs award after the claims of secured creditors are paid. The applicants provided an affidavit swearing that:

> (i) at the time of the filing of the Trustee's claim, there were insufficient assets in the Sequoia estate to satisfy any cost claim made in favour of the [applicants];
>
> (ii) currently, there are even fewer or no exigible assets in the Sequoia estate; and
>
> (iii) an order of costs in favour of the [applicants] against the estate of Sequoia will accordingly not be enforceable against any exigible assets in Alberta.
>
> Affidavit of Susan Riddell Rose, Sworn September 23, 2019 at para 27.

[23] It remained open to the respondent to provide meaningful rebuttal evidence. Rather, PD, acting for the respondent, filed an affidavit merely stating that:

> [T]here are sufficient funds available in the Estate to pay a costs award in favour of the Defendants, even in the amount estimated by Ms. Rose. The Trustee's Preliminary Report does not reflect the current financial position of the Estate for a

number of reasons, including the receipt of funds from the collection of accounts receivable and the sale of assets.

Affidavit of PD, sworn on October 18, 2019 at para 4.2.

[24] The applicants attempted to cross-examine PD on this point. During the hearing, the applicants argued excerpts, which were provided to the Court, to demonstrate that while PD was aware of his duty of candour as an officer of the court, he purposefully hindered meaningful cross-examination. For example, the following exchange related to the value of the claims of secured creditors:

Q Do you know the amount of claims made by the secured creditors in the estate?

A No. Not off the top of my head, no.

Q Do you agree with me it's in the millions?

A Yes.

Q My number is closer to 10 million, but is that approximately correct?

A I can't comment without looking at it.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 57/1-8.

[25] While this response in and of itself may not be objectionable, when it is paired with numerous other instances of non-responses and refusals to provide relevant and material financial information about the estate or to reference financial documents put before him, as further discussed below, the only conclusion I am left to draw is that the respondent was intentionally preventing the discovery of relevant and material financial information of the estate for the purpose of these applications.

[26] While Perpetual was permitted to examine records of the estate, the respondent objected to any financial records being marked as exhibits while Ms. Rose was present during questioning (notwithstanding that she is a party to this litigation). The respondent justified its position on the basis that Ms. Rose, acting personally, was not permitted to view the records of the estate. The applicants pointed to the conundrum created by this position:

Q So the position is that Perpetual can see the records, but the chief executive of Perpetual [Ms. Rose] may not; is that right?

A [counsel for the respondent]: Not in her personal capacity, Mr. Leitl.

Q How does she separate then?

A [counsel for the respondent] I don't know.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 11/5-11.

[27] PD even refused to review recent financial statements of the estate during the questioning which would have informed him about the estate's financial affairs:

Q You don't want to look at the bank statements right in front of you?

A No.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 20/4-6.

[28] As it was clear that the cross-examination of PD was producing no information, the applicants requested that the respondent make the accounts and financial records of the estate available for use in these applications. The applicants also requested undertakings that the respondent produce the most recent costs estimate for Sequoia's estate, the books and records of the estate, cash flow projections for the estate, and the respondent's position on the secured creditors' claims in the estate and their dollar amounts. The respondent refused these requests.

[29] Upon further questioning, PD had limited awareness of the estate's current financial position and appeared to be unnecessarily obstructive:

Q ...what is the bank balance for the estate?

A As of?

Q As of today.

A I don't know.

...

Q Okay. Let me go to one of my questions which is how much money is in the operating account for the estate?

A I already answered that question. I don't know the exact number today. I manage over a hundred bank accounts. Expect me to memorize every account would be – it's a useless question.

Q I'm not expecting you to memorize it. I've got the numbers right in front of you. You're welcome to look at it.

A Today's number? I don't think you have today's number right in front of you.

Q [D]o you want to look at the records you've got in front of you to get a close approximation?

A I gave you a good approximation.

...

Q Do you know what the initial receipt of funds was approximately in March of 2018?

A No.

Q Do you know what the receipt of funds has been in the estate from March of 2018 to today?

A From memory, no.

Q Do you know what the collection of accounts receivable for the estate has been?

A From memory, no.

...

Q And, sir, do you know how much the estate of Sequoia has made from the sale of assets?

A From memory, no.

...

Q Did you look at the books and records of the estate before attending today?

A No.

...

Q When was the last time you looked at the claims register for the estate?

A I don't recall.

Q Was it within the last couple of weeks?

A No.

...

Q Did you review the claims register before you swore your affidavit?

A No.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 19/1-5; 22/12-26; 32/18-26; 33/11-13; 35/14-16; 57/15-19; 71/6-8.

[30] Upon further examination PD admitted that it was highly unlikely that costs could be paid:

Q So unless you win the suit against [the applicants]...the unsecured creditors get [nothing] right?

...

A There's a high probability that the unsecured creditors get nothing.

...

Q So you've got assets of marginal value that you don't intend to sell or try to sell. You've got expensive lawsuits. You've got secured claims that may or may not be allowed, and you've got a very remote prospect of unsecured creditors being paid anything unless you win on all your lawsuits; right?

A Yes.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 111/3-6, 9-10, 22-27; 112/1.

[31] During the hearing, counsel for the respondent defended PD's behavior on the basis that the test for security for costs asks whether there are assets available to satisfy a costs award at the moment of assessment and ignores whether this will be the case going forward. I have not been provided with any authority that the ability to pay requirement looks at assets in isolation from liabilities or ignores whether these assets will be available on the date costs are awarded. 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.

[32] In conclusion, the applicants provided financial statements that were not current but suggested that unsecured creditors (which would include their costs award) would not be paid from the estate. The respondent did not seriously challenge this assertion. PD was examined on his affidavit filed in opposition to these security for costs applications that directly put in issue the ability of the estate to pay the large costs award. He was unaware of the value of the claims of secured creditors, did not know the balance of funds in the estate, nor did he have general knowledge of the current financial status of the estate. It was open to PD to apprise himself of this information before swearing his affidavit, before attending questioning or during questioning. He chose not to do so. Based on the records before me, I am satisfied the respondent will be unlikely and unable to pay costs.

Enforcing an Order or Judgment Against Assets in Alberta

[33] In oral argument, the respondent suggested 2500 wells will remain in the estate, subject to the appeal, that may be used to satisfy an adverse costs award. The respondent has given no indication as to their value or any liabilities associated with these assets. This does not allow this Court to make any meaningful assessment about whether they can be used to pay costs. In Alberta's current economic climate "2500 wells", with nothing more, may well be equivalent to a $3 bill.

The Merits of the Appeal

[34] At the time of oral argument, the chamber judge's written decision was not available for the respondent to formalize its grounds of appeal. While written reasons are now available, an in-depth assessment of the merits of the appeal is best left to a panel with the benefit of the parties' written argument.

[35] For these applications, an assessment of whether there is a serious question to be tried and the appeal is not frivolous is sufficient consideration of the merits: see *RDX Technologies Corporation v Appel, 2019 ABCA 338* at para 37.

[36] The respondent has suggested various grounds of appeal which may be reviewed on a correctness standard. At this stage, I cannot say that the appeal lacks merit.

Undue Prejudice

[37] Given PD's lack of cooperation, it is unclear whether an order requiring the estate to post security for costs will prevent the respondent from bringing this appeal. It is expected that a trustee, as an officer of the court, will act consistently with his duty of candour and disclose any prejudice, or lack thereof, that would result from such an order.

[38] It appears the respondent takes the position that it is in the best interest of the estate to pursue the appeal and it is willing to use the estate's available funds to finance the appeal. There is no evidence before this Court to suggest that an order for security for costs will hinder the respondent from pursuing its appeal.

Result

[39] The applicants have satisfied me that both tests for security for costs have been met.

Quantum of the Security for Costs Order

[40] The applicants seek security for costs on a solicitor-client basis. Alternatively, the applicants request security for costs based on five times the amount at Column 5, Schedule C of the *Rules*.

[41] Solicitor-client costs are reserved for exceptional circumstances where a party's litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: *Twinn v Twinn*, 2017 ABCA 419 at para 25. They are only awarded in rare circumstances: *Lotoski v Lotoski*, 2019 ABCA 262 at para 3.

[42] The unique circumstances of these applications make it difficult to assess whether solicitor-client costs are likely to be awarded. Costs on appeal are generally awarded on the same level as the scale awarded at trial: *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 254 at para 7. The chambers judge did not address costs in the oral or written decisions.

[43] Security for enhanced costs may be awarded at a multiple of Schedule C in the *Rules* if it is likely that enhanced costs will be awarded: *Mudrick #2* at paras 43-48. The following factors support the likelihood of enhanced costs in these applications: the respondent claims amounts greatly exceeding Column 5 of Schedule C in the *Rules*, resulting in the applicants being especially vigilant in their defense: *Stewart Estate v TAQA North Ltd*, 2016 ABCA 144 at para 26; and the conduct of the respondent falls short of what is expected of a responsible litigant: *Lotoski* at para 7.

[44] The applicants provided a sworn affidavit that each applicant will incur solicitor-client costs in the amount of $400,000 as a result of the respondent's appeal. The applicants support the request for $400,000 on the basis that it represents 75% of the costs incurred in the proceedings below, the respondent's intent to seek leave to file a 50-page factum, and that the appeal record will include a large amount of evidence.

[45] Costs incurred in the proceedings below are likely to be materially different than the costs of the appeal. The proceedings below required numerous applications, affidavits, briefs and supplemental written arguments as well as numerous court attendances. Costs in the proceedings

below also included costs for the entire action, while these applications for security for costs are related to the respondent's appeal and would not include the costs of the applicants' appeal.

[46] The applicants have not provided a draft bill of costs in support of the alternative quantum requested (five times Column C), although based on my review of Column C, the fees alone under this alternative calculation could be as high as $98,000 for all steps taken in the appeal.

[47] The fixing of quantum is a discretionary decision. There are no specific rules. A court must decide quantum on a case-by-case basis: *Beacon Hill Service (2000) Ltd v Esso Petroleum Canada*, 2000 ABCA 326 at para 10.

[48] While I am not satisfied that security for costs should be ordered in the amount of $400,000 for each party in this appeal, given the factors addressed above, $150,000 is an appropriate amount for each of the applicants. These amounts must then be reduced by 20% to take into account the prohibition against security for costs in oppression claims.

[49] Therefore:

(a) In its appeal against Ms. Rose, the respondent shall post $120,000 with this Court for security for costs within 30 days of the date of this decision, failing which the appeal in their action against Ms. Rose will be deemed abandoned and struck.

(b) In its appeal against Perpetual, the respondent shall post $120,000 with this Court for security for costs within 30 days of the date of this decision, failing which the appeal in their action against Perpetual will be deemed abandoned and struck.

Comments on the Trustee's behaviour

[50] A trustee of a bankrupt estate serves as an officer of the court to facilitate the goals of the *BIA*, namely, to provide for the orderly liquidation of a bankrupt's estate: LW Holden, GB Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada,* 4th ed (Toronto: Thomson Reuters Canada, 2009) (loose-leaf updated 2015, release 9) ch 1 at 2. As an officer of the court, the trustee should promote the effective operation of the judicial system. The trustee has a duty of candour and must act impartially as codified by the *Bankruptcy and Insolvency General Rules*, CRC, c 368, s 39:

> Trustees shall be *honest and impartial* and shall provide to interested parties *full and accurate information* as required by the Act with respect to the professional engagements of the trustees. [emphasis added]

[51] When a trustee brings a claim to set aside an impugned transaction, it is expected that the trustee will not assume an adversarial role and will present relevant facts to the court in an impartial manner: *Canada (Attorney General) v Norris Estate*, 1996 ABCA 357 at para 24.

[52] In previous questioning it was apparent that PD was aware of his obligation to act impartially:

> Q You're aware of your role as a trustee to be an officer of the court?
>
> A Yes.
>
> Q And you understand that you're supposed to be neutral and impartial? Yes?
>
> A Yes.
>
> Q Would you include answering my questions to be part of that?
>
> A Yes.
>
> Transcript of Questioning on Affidavit of PD sworn August 2, 2018, held on October 22, 2018 at 74/11-19.

[53] As expressed above, I question whether PD has fulfilled his obligations to act impartially and with candour in these applications. I am troubled by the adversarial approach taken by PD and his failure to provide meaningful responses upon cross-examination. He made no efforts to apprise himself of the estate's financial situation prior to or during questioning though this information was clearly relevant to assertions he had made in an affidavit.

[54] I am further troubled by statements made in PD's affidavit which appear to suggest the applicants were responsible for the difficulty in determining whether future costs could be paid. PD asserted that the applicants had "made no request to inspect the books, records and documents relating to the administration of the Estate or to request a report from the Trustee regarding the condition of the Estate or the moneys on hand". Subsequent cross-examination revealed this to be a hollow statement as PD had no intention of allowing one of the applicants to review relevant material:

> Q So when you swore this affidavit, were you prepared to allow Ms. Rose to inspect the records?
>
> A No.
>
> Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 108/11-13.

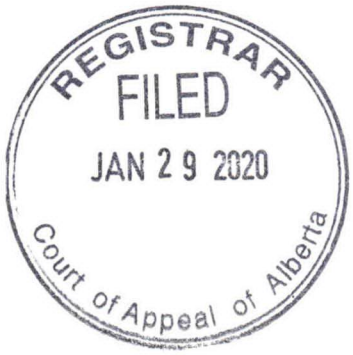
[55] It is unclear why PD would provide an affidavit to this Court that suggests the applicants failed to take steps that PD, acting for the respondent, would prevent them from taking. It is not clear to me how this assertion can be seen to be within the confines of PD's duty of candour.

[56] My concerns should not be read to suggest the respondent should refrain from exercising its right to appeal the chamber judge's decision, nor that the respondent is necessarily required to provide full disclosure of the financial status of the estate to a court: *North American Polypropylene* at paras 27-30. I merely question whether the adversarial nature in which PD has chosen to proceed on behalf of the respondent is in harmony with the underlying goals of the *BIA*, his role as an impartial trustee and his duty of candour.

[57] These applications are granted as set out above.

Applications heard on November 21, 2019

Reasons filed at Calgary, Alberta
this 29th day of January, 2020



Veldhuis J.A.

Appearances:

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G. Benediktsson/S.H. Leitl
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