

In the Court of Appeal of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 92

Date: 20210315

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**

Appellant
(Plaintiff)

- and -

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

Respondents
(Defendants)

- and -

Orphan Well Association

Intervenor

- and -

Canadian Natural Resources Limited

Intervenor

- and -

Cenovus Energy Inc.

Intervenor

- and -

Torxen Energy Ltd.

Intervenor

The Court:

**The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter**

Memorandum of Judgment Regarding Costs

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The Court:

[1] The parties have applied for directions on the costs consequences, and the form of judgment, arising from the decision reported as *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16.

Form of Judgment

[2] The formal judgment only records the result of the appeal, and should not replicate or summarize the reasons for decision, or contain details about subordinate findings or rulings: *McAllister v Calgary (City)*, 2019 ABCA 285 at para. 6, 90 Alta LR (6th) 213; *Thompson Brothers (Construction) Ltd. v Alberta (Workers' Compensation Board Appeals Commission)*, 2012 ABCA 150 at para. 2, 522 AR 184. Further, appeals are from the formal order of the trial court, not from the trial court's reasons, and it is often appropriate for the appeal judgment to refer to the specific paragraphs of the trial order.

[3] The formal judgment in appeal number 1901-0255AC should read:

1. The appeal is allowed, paragraphs 2, 3, 4, and 5 of the order of the Court of Queen's Bench pronounced on August 15, 2019 are set aside, and the action is returned to the trial court.
2. The appellant Trustee in Bankruptcy is granted status as a complainant under Part 19 of the Alberta *Business Corporations Act* to pursue a claim under s. 242(2) of that *Act* as it may be advised.
3. The appellant Trustee in Bankruptcy, if so advised, is granted permission in accordance with R. 3.65 of the Alberta *Rules of Court* to circulate a proposed amended statement of claim to clarify the claims being advanced. Any disputes about the nature and form of the proposed amendments are referred back to the trial court.

The panel notes that the reach of the Resignation & Mutual Release with respect to all the claims against the respondent Rose depends, in part, on the resolution by the trial court of the interpretive issue identified at paras. 167-171 of the panel's reasons.

[4] The panel perceives that the parties have agreed on the form of judgments in appeals number 1901-0262AC and 2001-0174AC.

Costs

[5] The Trustee in Bankruptcy was the substantially, although not completely successful party in appeal number 1901-0255AC, and is entitled to costs. That the unsuccessful parties may have made “incorrect statements on key legal and factual issues” is necessarily implied in them being unsuccessful, and does not usually have any further impact on the entitlement to costs.

[6] While it is possible to defer the costs of interlocutory applications until the end of the litigation, the presumption is that those costs are paid once the application is completed: R. 10.29(1). The parties brought competing applications for summary judgment and summary dismissal, essentially agreeing that this was a proportionate and efficient way of resolving some key issues underlying this litigation. Many of those issues were, in fact, resolved or narrowed. It is not appropriate for the costs consequences of these complex proceedings to be in the cause, and costs are payable forthwith.

[7] These appeals were complex, raising a number of important and some novel issues respecting corporate law, bankruptcy law, oil and gas regulation, contracts, and procedure. The amounts involved are substantial. Rule 14.88 cannot be relied on, because the trial costs have apparently not been set. In any event, it is appropriate that costs of appeal 1901-0255AC be awarded on five times Column 5 of Schedule C, plus reasonable disbursements and GST. Appeal 1901-0262AC was, in some respects, a form of cross-appeal, although it did raise some discrete issues. The Trustee in Bankruptcy is entitled only to an additional fee for filing a factum in appeal 1901-0262AC, at three times item 19(1) of Column 5 of Schedule C.

[8] Both parties argue that the costs award should reflect litigation misconduct by the other. Much of what is relied on occurred in the trial court, not on the appeal. The parties are entitled to plead and argue claims in the alternative. Obviously, swearing affidavits in the alternative is an entirely different matter: *URS Federal Support Services Inc v Kiani*, 2015 ONSC 7906 at para. 20; *Philly Foods Corp v Michetti*, [1986] AJ No 1336 at para. 9. This litigation has been very aggressively pursued by both sides, and both sides have adopted positions or taken steps that would draw the attention of an objective observer. That has contributed to the complexity of the litigation, which is one justification for an award of costs on a multiple of Schedule C, but not for any further adjustment.

[9] The costs relating to the application for security for costs were reserved for the panel: *Sequoia Resources Corp (Trustee of) v Perpetual Energy Inc.*, 2020 ABCA 254 at para. 23, refusing permission to appeal from 2020 ABCA 36, 75 CBR (6th) 179. The Trustee in Bankruptcy unsuccessfully opposed that application, which could have been avoided if the Trustee in Bankruptcy had acknowledged that it was primarily liable for costs of litigation commenced on behalf of the bankrupt estate: 2021 ABCA 16 at para. 189. The respondents are entitled to costs of those applications, assessed on Column 3 of Schedule C, plus reasonable disbursements and GST.

[10] All the awards of costs for and against the same parties may be set off against each other: R. 10.31(4).

Appeal 2101-0021AC

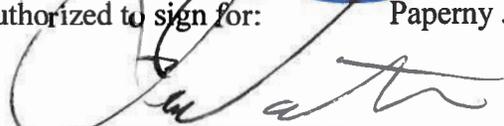
[11] When appeal 2101-0021AC is perfected, it should be scheduled for oral argument in the usual way. While the Chief Justice can, in appropriate cases, assign particular appeals to particular panels, that is not the normal practice. Except in exceptional circumstances, appeals are set down in time slots on the court calendar selected by counsel, without regard to or knowledge of the identity of the panel that has been assigned. The random assignment of judges to appeals is an important component of curial impartiality. This panel accordingly rejects the invitation to seize itself of appeal 2101-0021AC.

Written submissions February 22, March 5, 8, 10, 2021

Memorandum filed at Calgary, Alberta
this 15th day of March, 2021



Authorized to sign for: Paperny J.A.



Watson J.A.



Slatter J.A.

Appearances:

R. de Waal

for the Appellant/Cross-Respondent PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

D.J. McDonald, Q.C.

for the Respondents/Cross-Appellants Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp.

S.H. Leidl

for the Respondent/Cross-Appellant Susan Riddell Rose