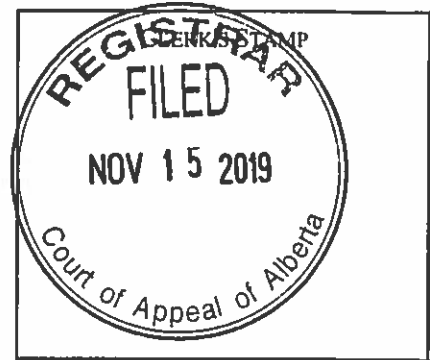


COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBERS: 1901-0255AC
1901-0262AC
1901-0275AC

TRIAL COURT FILE NUMBER: 1801-10960

REGISTRY OFFICE: CALGARY

PLAINTIFF/RESPONDENT: 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/RESPONDENT

DEFENDANTS/APPLICANTS: PERPETUAL ENERGY INC., PERPETUAL
OPERATING TRUST, PERPETUAL
OPERATING CORP. and SUSAN RIDDELL
ROSE

STATUS ON APPEAL: RESPONDENTS/APPELLANTS

DOCUMENT: MEMORANDUM OF ARGUMENT ON
BEHALF OF THE TRUSTEE

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Introduction

1. The Defendants Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. (the “**Perpetual Defendants**”) and the Defendant Susan Riddell Rose (“**Ms. Rose**”) have each applied for an Order directing the Trustee to provide security for their costs in the Trustee’s appeal, no. 1901-0255 (the “**Trustee’s Appeal**”). It does not appear that the Defendants seek security for costs against the Trustee for their own appeals, nos. 1901-0262 and 0275 which are proceeding jointly with the Trustee’s Appeal.
2. The Trustee’s Memorandum of Argument is filed in response to the Memorandum of Argument filed by the Perpetual Defendants and the Memorandum of Argument filed by Ms. Rose.

Argument

A. **This Court should decline to exercise its discretion in favour of the Defendants**

3. The factors relevant to the exercise of the Court’s discretion are discussed below.

1. Whether it is likely that the Defendants will be able to enforce a costs award

4. In his September 6, 2019 letter, counsel for Ms. Rose stated that:

I emphasize that Rose and the Perpetual defendants will seek costs against PWC personally. [...]

Rose will seek costs on the same basis at the conclusion of your client’s appeal, which we fully expect to be dismissed.¹

5. The Defendants’ application materials do not refer expressly to their intention to seek costs of the Appeals against the Trustee personally² and address only an alternative scenario, in which costs are awarded against the Estate of Sequoia Resources Corp. (the “**Estate**”).

¹ September 6, 2019 Letter from S. Leidl to R. de Waal, p.2, Affidavit of S. Rose, sworn on September 23, 2019, Exhibit I.

² Affidavit of S. Rose, sworn on September 23, 2019, at para. 35.

However, they have not resiled from the position stated in the above letter and intend to seek costs against the Trustee personally if their applications are dismissed.³

6. There is no suggestion that the Trustee would be unable to pay any costs awarded against it personally. As the Defendants actually intend to seek costs against the Trustee personally, not the Estate, and the Trustee could pay those costs if awarded, the Defendants are not entitled to security for costs.
7. In arguing that they are entitled to security for costs based on the alternative scenario discussed above, the Defendants assert that the Estate would be unable pay a costs award.
8. Contrary to her position in the proceedings below, including the position accepted by the Chambers Judge, Ms. Rose now argues that the asset retirement obligations (the “ARO”) associated with the assets in the Estate are “associated liabilities”⁴, that these liabilities exceed the value of the assets in the Estate and that there is therefore insufficient funds in the Estate to pay costs.⁵
9. The Trustee agrees with Ms. Rose’s characterization of the ARO associated with the assets in the Estate as “associated liabilities”, consistent with the decision of the Supreme Court of Canada in *Redwater*.⁶
10. However, *Redwater* does not stand for the proposition that *all the ARO* associated with *all the assets* in the Estate must be satisfied before *any* distributions can be made. As noted by the majority in *Redwater*:

³ Memorandum of Argument of S. Rose, at para. 11.

⁴ Memorandum of Argument of S. Rose, at para. 3.

⁵ Affidavit of S. Rose, sworn on September 23, 2019, at para. 27; Memorandum of Argument of the Perpetual Defendants, at para. 11, citing the Affidavit of S. Rose, at para. 27 and 33.

⁶ *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 (*Redwater*), at para. 157 [Trustee’s Authorities, Tab 2]

Further, it is important to note that Redwater's *only substantial assets were affected by an environmental condition or damage*. Accordingly, the Abandonment Orders and LMR requirements *did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage*. In other words, recognizing the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the BIA – rather it facilitates them.⁷

11. The uncontradicted evidence of Mr. Darby, on behalf of the Trustee, is that the funds currently in the Estate easily exceed Ms. Rose's estimate of the Defendants' anticipated legal fees.⁸ In cross-examination, Mr. Darby confirmed that the funds in the Estate's bank accounts significantly exceeded the amount of the Defendants' anticipated legal fees.⁹
12. Accordingly, even in an alternative scenario in which the Defendants sought costs against the Estate, they have not established that it is unlikely to be able to satisfy a costs award.

2. The Trustee's Appeal has Merit

13. It is respectfully submitted that there is a reasonable prospect that a number of findings by the Chambers Judge may be overturned on appeal, including his findings that:
 - 13.1. he was "not aware of anything" that would prohibit a transaction to artificially boost an entity's LLR rating with the intention of avoiding regulatory intervention from the AER;¹⁰
 - 13.2. the Trustee's allegation that it was a proper "complainant" to seek oppression relief "goes well beyond what the law currently provides for" such that the oppression claim could be struck for failing to disclose a reasonable cause of action;¹¹

⁷ *Ibid*, at para. 159 [Trustee's Authorities, Tab 2]

⁸ Affidavit of Paul Darby, at para. 4.

⁹ Transcript of Cross-Examination of Paul Darby, at p. 19, lines 10-18.

¹⁰ Oral Reasons, p. 9, lines 6-9 [AR, p. F11]

¹¹ Oral Reasons, p. 8, lines 1-3 [AR, p. F10]

- 13.3. although Ms. Rose was the sole director of Sequoia Resources Corp., then known as Perpetual Energy Operating Corp. (“PEOC”), she was not its “directing mind”;¹²
- 13.4. Ms. Rose was entitled to rely on a release from liability for breaches of her statutory duties to PEOC notwithstanding s. 122(3) of the *BCA*;¹³
- 13.5. the recent decision in *Redwater* stands for the proposition that the ARO associated with oil and gas assets are “not a liability”;¹⁴ and
- 13.6. as the ARO associated with the assets transferred to PEOC were “not a liability”, Ms. Rose “owed no duties to PEOC in relation to ARO as a liability” and the Trustee’s claims that she breached her statutory fiduciary duty and duty of care to PEOC could be dismissed summarily.¹⁵
14. Various aspects of the Chambers Judge’s decision are reviewable on a correctness standard, including:
- 14.1. the decision to strike certain claims for failing to disclose a cause of action;¹⁶
- 14.2. the consideration of evidence in striking the Trustee’s oppression claim for failing to disclose of action, contrary to Rule 3.68(3);¹⁷
- 14.3. the finding that the sole director of a corporation was not its directing mind, an extricable error law;¹⁸

¹² Oral Reasons, p. 11, lines 24-26 [AR, p. F13]

¹³ Oral Reasons, p. 12, lines 10-26 [AR, p. F14]

¹⁴ Oral Reasons, p. 13, lines 18-20 [AR, p. F15]

¹⁵ Oral Reasons, p. 13, lines 6-23 [AR, p. F15]

¹⁶ *Grenon v. Canada Revenue Agency*, 2017 ABCA 96, at para. 4 [Trustee’s Authorities, Tab 3]

¹⁷ *HOOPP Realty Inc. v. The Guarantee Company of North America*, 2015 ABCA 336, at paras. 10 and 14 [Trustee’s Authorities, Tab 4]

¹⁸ *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 33-34 [Trustee’s Authorities, Tab 5]

14.4. the Chambers Judge’s interpretation of the *BCA*, including his interpretation of s. 122(3) to permit Ms. Rose to rely on a release from liability for breaches of her statutory director’s duties;¹⁹ and

14.5. The Chambers Judge’s interpretation of *Redwater*, as standing for the proposition that ARO are “not a liability”, which raises questions of precedent and *stare decisis* that are “matters of law”.²⁰

15. In determining the security for costs issue, the Court should not consider the merits of the Trustee’s Appeal in detail.²¹ However, the Trustee’s Appeal has merit and, as discussed above, a correctness standard applies to key grounds of appeal.

3. Any other matter the Court considers appropriate

16. In determining whether to require an appellant to provide security for costs, the Court is entitled to consider “any other matter” it considers appropriate under s. 4.22(e), which is form of “catchall” provision.²² There are a number of factors making a security for costs order against the Trustee inappropriate:

16.1. The results in the Court below were mixed. The Trustee was successful on the main claim, while the Defendants were successful on the other claims;

16.2. The Trustee, the Perpetual Defendants and Ms. Rose have each filed a notice of appeal, and these three appeals will proceed and be heard together;

¹⁹ *Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd.*, 2011 ABCA 107, at para. 10 [Trustee’s Authorities, Tab 6]

²⁰ *Mammoet 13220-33 Street NE Limited v. Edmonton (City)*, 2014 ABCA 229, at para. 15 [Trustee’s Authorities, Tab 16]

²¹ *Geophysical Service Incorporated v. Encana*, 2016 ABQB 49, at para. 44(a); *Bechir v. Gowling Lafleur Henderson*, 2017 ABQB 667, at para. 6 [Trustee’s Authorities, Tab 7, 8]

²² *Access Mortgage Corporation (2004) Limited v. Arres Capital Inc.*, 2017 ABCA 373 (*Access Mortgage*), at para. 11 [Perpetual Authorities, Tab 3]

- 16.3. No order for costs has been made, or even sought, in the Court below. There is no basis for the Defendants' assumption that the Trustee will be liable for costs; and
- 16.4. There is no basis for the proposition that costs awarded against the Trustee, in the Court below or on appeal, would be solicitor-client costs rather than taxable costs
17. There are two further factors weighing against an Order requiring the Trustee to provide security for costs: (i) the importance of the issues raised by the Trustee's Appeal; and (ii) the Defendants' role in contributing to the Estate's present financial circumstances.
18. In *Amex Electrical*, the Court noted that the likelihood that a security for costs application would be dismissed escalates if:
- The resolution of the issue presented by the respondent's action is important to the community. The growth of the law will be impaired by an order that may bring the action to an end before a final adjudication.²³²⁴
19. As in *Amex*, the importance of the Trustee's appeal to the community, including the preservation of established principles of corporate law, is a factor that weighs in favour of dismissing the Defendants' application.
20. In their *Civil Procedure Handbook*, Stevenson & Côté note that:

Security is discretionary. The Court can look at all the circumstances, and refuse to order security *if it would be unjust*. For example, the plaintiff may have a strong case, have no way of raising security, and *appear to have been impoverished by the very wrong sued for*.²⁵ [Emphasis added.]

²³ *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, 2014 ABQB 66 (*Amex Electrical*), at paras. 74(h) and 75(h) [Trustee's Authorities, Tab 9]

²⁴ *Ibid.*, at para. 75(h) [Trustee's Authorities, Tab 3]

²⁵ Alberta Civil Procedure Handbook, 2018, Stevenson & Côté, pp. 4-21 and 4-22.

21. In *Sirron Systems Inc. v. Insyght Systems Inc.*,²⁶ the Court cited a number of authorities for the proposition that it would be unjust to require the plaintiff to post security for costs where its impecuniosity was the result of the defendants' alleged conduct.²⁷
22. Alberta authorities confirm that the defendants' alleged role in impoverishing the plaintiff is a "significant circumstance" the Court should consider in determining whether it would be "just and reasonable" to require a plaintiff to provide security for their costs.²⁸
23. In support of its claim against the Defendants that the transfer of assets to PEOC was a transfer at undervalue within the meaning of s. 96 of the *BIA*, the Trustee provided uncontradicted evidence that the liabilities associated with the assets transferred to PEOC, primarily the ARO, exceeded the value of the assets by at least \$217,570,800.²⁹
24. Although the Defendants had denied the Trustee's claims, including by denying that the ARO were liabilities associated with assets transferred to PEOC, they now state that:
 - 24.1. the ARO are, in fact, "associated liabilities";³⁰ and
 - 24.2. because the associated ARO liabilities significantly exceeded the value of PEOC's assets, there "were insufficient assets" in the Estate to satisfy a costs award when the Trustee commenced its claim against the Defendants;³¹
 - 24.3. the ARO are so significant that, even if the Trustee is successful, any gains from the litigation "will clearly be offset" by the ARO.³²

²⁶ *Sirron Systems Inc. v. Insyght Systems Inc.*, 2018 ONSC 2019 (*Sirron*) [Trustee's Authorities, Tab 10]

²⁷ *Ibid*, at paras. 39-41 [Trustee's Authorities, Tab 10]

²⁸ *Spectrum Centre for Physical Therapy & Athletic Rehabilitation Ltd. v. Filipenko*, 2011 ABQB 340 (*Filipenko*), at paras. 27-31 [Trustee's Authorities, Tab 11]; *1007374 Alberta Ltd. v. Ruggieri*, 2013 ABQB 420 (*Ruggieri*), at para. 64 [Trustee's Authorities, Tab 12]

²⁹ Affidavit of P. Darby, at paras. 40 and 44.

³⁰ Memorandum of Argument of S. Rose, at para. 3.

³¹ Affidavit of S. Rose, sworn September 23, 2019, at para. 27(d).

25. It is unjust to award security for costs where the plaintiff's impoverishment was "caused by the very acts of which the plaintiff complains in this action."³³ Here, the injustice would be particularly egregious because the Defendants *seek to rely* on the devastating financial effects of their own conduct in seeking security for costs against the Trustee.
26. Accordingly, even if the Trustee or the Estate were incapable of satisfying a costs award, it would not be "just and reasonable" for the Court to exercise its discretion in the Defendants' favour.³⁴

B. Section 243(3)

27. Section 243(3) of the *BCA* provides that "a complainant is not required to give security for costs in any application made or action brought" under Part 19, including s. 242.³⁵
28. Section 243(3) is not dealt with by the Perpetual Defendants. Ms. Rose simply submits that it is of no assistance to the Trustee.³⁶ She provides no authority for the proposition that the prohibition on security for costs provided for in s. 243(3) does not apply to an appeal in an "action brought" under Part 19.
29. The oppression remedy is remedial legislation and should be given "a liberal interpretation in favour of the complainant".³⁷ Accordingly, s. 243(3) should be construed broadly to include appeals in an "action brought" under Part 19. A narrow interpretation is both unsupported by authority and inconsistent with the remedial purpose reflected in s. 243(3).

³² Memorandum of Argument of S. Rose, at para. 3;

³³ *Ibid*, at para. 41, citing *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705 (Ont. H.C.) [Trustee's Authorities, Tab 13]

³⁴ Alberta Rules of Court, AR 124/2010, s. 4.22.

³⁵ *Business Corporations Act*, RSA 2000, c. B-9, s. 243(3) [Trustee's Authorities, Tab 1]

³⁶ Memorandum of Argument of Ms. Rose, paras. 16-17.

³⁷ *HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.*, 1999 ABQB 406, at para. 26, citing *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*, 60 Alta. L.R. (2d) 122, at 150 [Trustee's Authorities, Tab 14]; *Vaasjo v. Jurina*, 2016 ABQB 78 (*Vaasjo*), at para. 40 [Rose's Authorities, Tab 19]

30. Contrary to the submission by Ms. Rose, a party is *not* required to “establish” that it is a complainant in order to benefit from the protection afforded by s. 243(3). In *Broadway*, the Court found that it was “not practical to get into a detailed analysis” the issue at the preliminary stage and held that “the threshold test should be that the respondent/plaintiff produce evidence that supports an arguable case that they are a ‘complainant’”.³⁸
31. There was ample evidence before the Chambers Judge to support an “arguable case” that the Trustee was a proper “complainant” entitled to the protection of s. 243(3). Ms. Rose’s own affidavit in the proceedings below confirmed that the Perpetual Defendants had significant municipal tax liabilities at the time of the allegedly oppressive transactions, and that these amounts were never paid.³⁹ The Chambers Judge considered this evidence and found that he was not satisfied that the Trustee’s oppression claims could be summarily dismissed.⁴⁰ Although he proceeded incorrectly to strike the claims,⁴¹ his refusal to dismiss the claims supports the conclusion that the Trustee had advanced at least an “arguable case” for oppression relief.
32. Ms. Rose also submits that a party cannot benefit from the protection of s. 243(3) if oppression is “one *basis* of liability arising from a series of transactions”.⁴² In *Vaasjo*, the respondent, like the Trustee, had also pleaded other causes of action, including breach of

³⁸ *Broadway v. Robson*, 2018 ABQB 463, at paras. 11-12 [**Rose’s Authorities, Tab 18**]

³⁹ Affidavit of Susan Riddell Rose, sworn October 19, 2018, at paras. 68-71 and Exhibit Z; Trustee’s Brief, at paras. 109-116.

⁴⁰ Oral Reasons, at p. 7, lines 34-41 [**AR, p. F9**]

⁴¹ *HOOPP Realty Inc. v. The Guarantee Company of North America*, 2015 ABCA 336, at para. 14 [**Trustee’s Authorities, Tab 4**]

⁴² Ms. Rose’s Written Submissions, footnote, 28.

fiduciary duty.⁴³ The Court held that s. 243(3) was nonetheless a “complete answer” to the defendants’ security for costs application.⁴⁴

33. Effect must be given to s. 243(3), as part of the remedial provisions in Part 19 of the *BCA*. If, as Ms. Rose contends, the Trustee’s oppression claims cannot be “extricated” from its other claims, then s. 243(3) is a “complete answer” to the Defendants’ applications.
34. Finally, the suggestion by Ms. Rose that the Trustee’s oppression claim would not benefit the Estate was dealt with at length by the Trustee in its written submissions before the Chambers Judge.⁴⁵ Any oppression relief would benefit all the creditors of SRC.⁴⁶
35. The Trustee submits that the Defendants’ Applications should be dismissed, with costs.

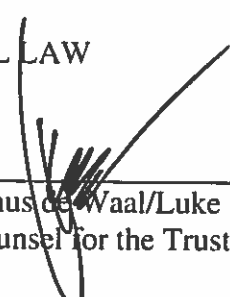
Calgary, Alberta
November 15, 2019

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/Respondent)

⁴³ *Vaasjo, supra*, at paras. 12, 17 and 51.

⁴⁴ *Ibid*, at para. 59.

⁴⁵ Trustee’s Written Submissions, at paras. 132-138.

⁴⁶ *BDO Canada Limited v. Dorais*, 2015 ABCA 137, at paras. 12-13 [Trustee’s Authorities, Tab 15]

TABLE OF AUTHORITIES

1. *Business Corporations Act*, RSA 2000, c. B-9, s. 243(3).
2. *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5
3. *Grenon v. Canada Revenue Agency*, 2017 ABCA 96
4. *HOOPP Realty Inc. v. The Guarantee Company of North America*, 2015 ABCA 336
5. *Housen v. Nikolaisen*, 2002 SCC 33
6. *Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd.*, 2011 ABCA 107
7. *Geophysical Service Incorporated v. Encana*, 2016 ABQB 49
8. *Bechir v. Gowling Lafleur Henderson*, 2017 ABQB 667
9. *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, 2014 ABQB 66
10. *Sirron Systems Inc. v. Insyght Systems Inc.*, 2018 ONSC 1928
11. *Spectrum Centre for Physical Therapy & Athletic Rehabilitation Ltd. v. Filipenko*, 2011 ABQB 340
12. *1007374 Alberta Ltd. v. Ruggieri*, 2013 ABQB 420
13. *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705 (Ont. H.C.)
14. *HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.*, 1999 ABQB 406
15. *BDO Canada Limited v. Dorais*, 2015 ABCA 137
16. *Mammoet 13220-33 Street NE Limited v. Edmonton (City)*, 2014 ABCA 229