

**COURT OF APPEAL OF ALBERTA**

COURT OF APPEAL FILE NUMBER: 1901-0255AC  
TRIAL COURT FILE NUMBER: 1801-10960  
REGISTRY OFFICE: CALGARY  
APPLICANT: PAUL DARBY  
STATUS ON APPEAL: NON-PARTY  
STATUS ON APPLICATION: APPLICANT  
APPELLANT: PRICEWATERHOUSECOOPERS  
INC., LIT, in its capacity as  
TRUSTEE IN BANKRUPTCY  
OF SEQUOIA RESOURCES  
CORP.  
STATUS ON APPEAL APPELLANT  
STATUS ON APPLICATION n/a  
RESPONDENTS: PERPETUAL ENERGY INC.,  
PERPETUAL OPERATING  
TRUST, PERPETUAL  
OPERATING CORP., and  
SUSAN RIDDELL ROSE  
STATUS ON APPEAL: RESPONDENTS  
STATUS ON APPLICATION: RESPONDENTS



DOCUMENT: **MEMORANDUM OF ARGUMENT OF SUSAN RIDDELL ROSE:  
APPLICATION BY PAUL DARBY (PERSONALLY) TO INTERVENE  
IN TRUSTEE APPLICATION FOR LEAVE TO APPEAL**

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS DOCUMENT:

**Norton Rose Fulbright Canada LLP**  
3700, 400 Third Avenue SW  
Calgary, Alberta T2P 4H2

Lawyers: Steven H. Leidl, QC | Gunnar Benediktsson  
Phone: (403) 267-8140 | (403) 267-8256  
Facsimile: (403) 264-5973  
Email: steven.leidl@nortonrosefulbright.com |  
gunnar.benediktsson@nortonrosefulbright.com  
File No.: 1001040549  
Counsel for Susan Riddell Rose

CONTACT INFORMATION  
FOR ALL OTHER PARTIES:

**Burnet, Duckworth & Palmer LLP**

8<sup>th</sup> Avenue Place, East Tower  
2400, 525 8<sup>th</sup> Ave. SW,  
Calgary, Alberta T2P 1G1

Lawyers: D.J. McDonald, QC | Paul G. Chiswell  
Phone: (403) 260-5724 | (403) 260-0201  
Facsimile: (403) 260-0332  
Email: [djm@bdplaw.com](mailto:djm@bdplaw.com) | [pchiswell@bdplaw.com](mailto:pchiswell@bdplaw.com)  
File No.: 59140-43

Counsel for Perpetual Energy Inc., Perpetual Operating Trust,  
and Perpetual Operating Corp.

**DE WAAL LAW**

Suite 1010, 505 – 3<sup>rd</sup> Street SW  
Calgary, Alberta T2P 3E6

Lawyers: Rinus de Waal | Luke Rasmussen  
Phone: (403) 266-0013  
Fax: (403) 266-2632  
Email: [rdewaal@dewaallaw.com](mailto:rdewaal@dewaallaw.com)  
File No. 283.001

Counsel for PricewaterhouseCoopers Inc., LIT, in its capacity as  
Trustee in Bankruptcy of Sequoia Resources Corp.

**Borden Ladner Gervais LLP**

Centennial Place East Tower  
1900, 520 – 3<sup>rd</sup> Avenue SW  
Calgary, Alberta T2P 0R3

Lawyers: Josef G.A. Kruger, QC  
Phone: (403) 232-9563  
Email: [JKruger@blg.com](mailto:JKruger@blg.com)

Counsel for Paul Darby

## Introduction

1. This memorandum is respectfully submitted on behalf of the Respondent Susan Riddell Rose (**Rose**) in response to the application of the non-party Paul Darby (**Darby**) filed February 26, 2020 (the **Darby Application**). The Darby Application concerns the *reasons* of Veldhuis J.A. dated January 29, 2020 (the **Reasons**)<sup>1</sup> for granting the Respondents' applications for security for costs. Darby seeks "leave to intervene ... for the purpose of having the Reasons set aside, or alternatively corrected, changed or modified."<sup>2</sup> The hypothesis is the Reasons may affect Darby's reputation.

2. This Memorandum should be read in conjunction with Rose's Memoranda of Argument filed February 18 and 19, 2020, which respond to the applications of the Appellant trustee in bankruptcy (the **Trustee**) for leave to appeal the Order of Veldhuis J.A.

## Context

3. Rose asks that her response be considered in light of the history of this proceeding. Rose *qua* President of Perpetual Energy Inc. (**PEI**) was cooperative in connection with the Trustee's pre-suit investigation of PEI and its affiliates. Darby did not tell her the Trustee had already resolved to sue her personally for \$220 million on the basis of extraordinary<sup>3</sup> and baseless<sup>4</sup> allegations of oppression, breach of fiduciary duty, breach of duty of care, and a peculiar theory of breach of public policy<sup>5</sup> - in the face of a pre-existing written release of Rose that released her from any such possible claims.<sup>6</sup> The Trustee not only sued Rose personally with no prior notice but filed an application for summary judgment returnable in less than one month. In the course of the proceeding, the Trustee, under Darby's direction, would submit to the Court that Rose had acted *dishonestly* and in *bad faith*; "*deliberately abandoned her role* as PEOC sole director"; "*pushed around*" a PEI subsidiary; was "*disloyal*"; exercised "*no reasonable degree of prudence or diligence*"; *disregarded* PEOC creditors who could not protect themselves; "*exercised no business judgment*"; did not even "*consider that she had a duty of care*"; gave effect to an improper "*internal*

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<sup>1</sup> Darby Memorandum of Argument filed Feb. 26/20, paras. 1-2; Darby cross-examination May 26/20, 16/26-17/1 [**Book of Authorities and Evidence, Tab 1**].

<sup>2</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 2.

<sup>3</sup> Darby cross-examination Oct. 22/18, 67/24-68/2 [**Book of Authorities and Evidence, Tab 2**]; Darby cross-examination Nov. 6/19, 82/16-19 [**Book of Authorities and Evidence, Tab 3**].

<sup>4</sup> Nixon J. Order granted Aug. 15/19, filed Feb. 18/20 [**Book of Authorities and Evidence, Tab 4**].

<sup>5</sup> Darby cross-examination Oct. 22/18, 15/2-19/17; 24/20-27/7; 30/5-35/4; 62/25-63/16; 68/13-75/5 [**Book of Authorities and Evidence, Tab 2**]. Affidavit of Susan Riddell Rose filed Oct. 19/18, paras. 59-63 [**Book of Authorities and Evidence, Tab 5**]; Ex. X [**Book of Authorities and Evidence, Tab 6**]; Ex. Y [**Book of Authorities and Evidence, Tab 7**].

<sup>6</sup> Darby cross-examination Oct. 22/18, 68/10-12; 82/7-83/22 [**Book of Authorities and Evidence, Tab 2**].

corporate maneuver”; *exploited breaches of fiduciary duty* (trust) for an “*immediate financial advantage*” to herself; and even engaged in quasi *criminal* conduct.<sup>7</sup>

4. Rose applied to strike and summarily dismiss all of the Trustee’s claims. After several days of hearings and a period of reserve, Justice D.B. Nixon granted Rose’s application by oral reasons with written reasons to follow. The Trustee appealed.

5. Rose applied for security for costs of the appeal, pointing to the Trustee’s own report showing that a costs award against the bankrupt estate would be worthless.<sup>8</sup> The Trustee opposed, tendering a short affidavit sworn by Darby in which he incredibly swore, among other things, that the Trustee had been substantially *successful* against Rose, and would seek costs *against her*.<sup>9</sup>

6. The written reasons of Justice Nixon (the **QB Reasons**) were released while the decision of Veldhuis J.A. was under reserve. The QB Reasons were clear that Nixon J. had struck and/or dismissed all claims against Rose. The Trustee, however, took the position that the QB Reasons did not mean what they said. This required a further hearing to settle the form of Order at which the Court made it doubly clear the claims against Rose had been entirely struck and/or dismissed.<sup>10</sup>

### **Application for Security for Costs**

7. The Trustee opposed the application as it saw fit. The Trustee chose not to cross-examine Rose<sup>11</sup> but to tender a short affidavit sworn by Darby.<sup>12</sup> Darby was cross-examined without any of the complaints now made by him. Having had the Memoranda of Argument of Rose and the other parties for 53 days, the Trustee filed a Memorandum of Argument which articulated the Trustee’s position.<sup>13</sup> Trustee counsel and Darby attended the hearing before Veldhuis J.A.<sup>14</sup>

8. The Reasons were issued on January 29, 2020.

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<sup>7</sup> Statement of Claim, para. 16.1; Hearing transcript Nov. 8/18, 74/4-19; 81/41–82/13 [**Book of Authorities and Evidence, Tab 8**]; December 17, 2018 Trustee’s Response to Requests from, and Questions for, the Parties, Answer to Question Nos. 38, 39, 44c, 44e, 44f, 49, 50 [**Book of Authorities and Evidence, Tab 9**]; Hearing transcript Dec. 17/18, 48/29-49/3; 86/13-87/5 [**Book of Authorities and Evidence, Tab 10**].

<sup>8</sup> Reasons, para. 30. Darby cross-examination May 26/20, 61/10-24 [**Book of Authorities and Evidence, Tab 1**].

<sup>9</sup> Affidavit of Paul Darby sworn Oct. 18/19 (the **Darby Affidavit**), paras. 2.1-2.2 [**Book of Authorities and Evidence, Tab 11**]; Darby cross-examination Nov. 6/19, 89/21-24; 93/12-25; 97/16-19; 102/9-13 [**Book of Authorities and Evidence, Tab 3**].

<sup>10</sup> Hearing transcript Feb. 14/20, 15/32-39 [**Book of Authorities and Evidence, Tab 12**]; Briefs of Susan Riddell Rose filed Feb. 4, Feb. 10/20 (without attachments) [**Book of Authorities and Evidence, Tabs 13 and 14**]. In July 2020, Justice Nixon will hear an application by Rose for costs on a full indemnity basis and an order that the Trustee pay the costs personally.

<sup>11</sup> Darby cross-examination Nov. 6/19, 87/22-23 [**Book of Authorities and Evidence, Tab 3**].

<sup>12</sup> Darby Affidavit [**Book of Authorities and Evidence, Tab 11**].

<sup>13</sup> Trustee Memorandum of Argument filed Nov. 15/19 [**Book of Authorities and Evidence, Tab 15**].

<sup>14</sup> Hearing transcript Nov. 21/19 [**Book of Authorities and Evidence, Tab 16**].

## Trustee Applications

9. The Trustee's application for leave to appeal was filed on February 10, 2020. The application does not seek to introduce new evidence. On February 14, 2020, the Trustee filed a further application requesting the first application be heard by a panel. That application is now moot.

## Darby Application

10. The Darby Memorandum of Argument makes extraordinary assertions that Darby is a *victim* of "Veldhuis J.A.'s *abuse of power*"<sup>15</sup>, *complete oblivious[ness]*<sup>16</sup>, *misapprehensions* and *overstatements*<sup>17</sup>, and "*shocking and fundamentally unfair*" statements.<sup>18</sup>

11. The Darby affidavit expresses Darby's personal apprehension about the possible impact of the Reasons on his reputation.<sup>19</sup> On cross-examination, even this speculative evidence fell away; Darby has suffered no personal impact from the issuance of the Reasons.<sup>20</sup>

12. Indeed, though the foundation of the Darby application is concern about the impact of the Court's statements on his personal reputation, Darby now takes the position that the personal impact of the litigation on the parties is irrelevant:

MR. LEITL: Mr. Darby, you have sworn an affidavit in which you attempt to set out your personal objections to the considered and reserved reasons of a respected member of our Court of Appeal --

MR. KRUGER: Well, that's your opinion.

MR. LEITL: -- and the reason you state in your affidavit, if I can finish my question, is the impact on your reputation, and I'm simply asking you, as a matter of fact, which we all know and you can simply agree now and I can move on, is that neither you or the trustee have ever uttered a word of concern about the impact of the law suit on my client's reputation. That's true isn't it?

MR. KRUGER: Objection. That is inherent in every law suit that somebody is going to be prejudiced in litigation. Every defendant is in that situation --

MR. LEITL: Thank you.

MR. KRUGER: -- and there's not duty to -- don't apologize to a defendant that you are suing the defendant even if it is Ms. Rose.<sup>21</sup>

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<sup>15</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 7.

<sup>16</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 13.

<sup>17</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 14.

<sup>18</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 16.

<sup>19</sup> Darby cross-examination May 26/20, 10/5-7; 26/8-20; 27/2-15 [Book of Authorities and Evidence, Tab 1].

<sup>20</sup> Darby cross-examination May 26/20, 26/8-20; 27/2-15 [Book of Authorities and Evidence, Tab 1].

## Answers to Darby Arguments

*Darby has not addressed or met the test for leave to intervene*

13. Darby does not address the test for leave to intervene established by this Court. The test requires consideration of whether: (a) the intervener is directly affected by the appeal; (b) the presence of the intervener is *necessary* to determine the appeal; (c) the intervener's interests are protected by the positions of the parties; (d) the intervener's submission will be useful and different, or bring particular expertise on an issue under appeal; (e) the intervention will cause delay; (f) the intervention will cause prejudice to a party; (g) the intervention will widen the *lis* between the parties; and (h) the intervention will transform the Court into a political arena.<sup>22</sup>

14. These factors all militate against Darby being granted leave to address apprehensions about his reputation. The Trustee's appeal concerns the Order of Veldhuis J.A.; Darby is not directly affected by the outcome.<sup>23</sup> Darby's personal presence and submissions are not necessary to determine the appeal, as is evident from the Trustee's appeal materials. Darby's intervention has widened and will further widen the *lis* between the parties. In short, Darby's personal position has nothing to do with whether the Court should have ordered the Trustee to post security for costs.

15. Darby argues that court officers are regularly granted leave to intervene in an appeal where their integrity is "at risk".<sup>24</sup> In this case, the court officer, the Trustee, is already addressing that alleged risk. Further, the decisions cited by Darby do not support his position.<sup>25</sup> Indeed, in *R. v. P(B)*<sup>26</sup>, the Court denied leave, expressing concern that "[p]ermitting other participants to have a

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<sup>21</sup> Darby cross-examination May 26/20, 42/21-43/14 [Book of Authorities and Evidence, Tab 1].

<sup>22</sup> *Orphan Well Association v. Grant Thornton Ltd.*, 2016 ABCA 238 at para. 10 [Book of Authorities and Evidence, Tab 17].

<sup>23</sup> On cross-examination, Darby conceded the obvious point that he has no personal interest in whether the Trustee pays security for costs, which was the *only* issue decided by Veldhuis J.A.: Darby cross-examination May 26/20, 17/1-10 [Book of Authorities and Evidence, Tab 1].

<sup>24</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 5.

<sup>25</sup> *SMTCL* (Paul J. Darby List of Authorities filed Feb. 26/20, Tab 5) concerned a lawyer's motion for leave with the respondent's consent where the sole ground of appeal was founded on alleged negligence of the lawyer. *Butty* (Paul J. Darby List of Authorities filed Feb. 26/20, Tab 6) concerned a lawyer's motion to intervene regarding extensive criticism by the trial judge. The Court stated that "leave to intervene in a private law suit is rarely granted" but granted leave on the basis that the lawyer's interests would not be represented by the parties on appeal. The Court limited the lawyer to the record and gave him 15 minutes to speak. *W. (D). v. White*, 2003 CarswellOnt 5199, [2003] O.J. No. 5222 (O.N.C.A.) (Paul J. Darby List of Authorities filed Feb. 26/20, Tab 7) was a dismissal of a motion to quash an appeal based on allegations of incompetence of counsel. Counsel had not been given notice, so the court directed that they be given notice and an opportunity to make submissions about the allegations if they wished. *Bearden v. Lee*, 2005 CarswellOnt 1831, [2005] O.J. No. 1834 (Paul J. Darby List of Authorities filed Feb. 26/20, Tab 8) concerned an expert witnesses' motion to intervene in a motion made by the defendants which alleged that the expert had fraudulently testified about his qualifications. *R. v. West*, 2009 NSCA 63 (Paul J. Darby List of Authorities filed Feb. 26/20, Tab 9) concerned a lawyer's motion to intervene in a criminal appeal where the appeal was premised on alleged negligence by the lawyer. *JP v. British Columbia (Children and Family Development)*, 2015 BCCA 481 (Paul J. Darby List of Authorities filed Feb. 26/20, Tab 12) concerned an appeal following a 140 day trial where the trial judge had made severe findings regarding the conduct of a non-party which, among other things, put the safety of the non-party's family at risk. *Peel (Regional Municipality) v. Greater Toronto Airports Authority*, 1999 CarswellOnt 1602, [1999] O.J. No. 1921 (Paul J. Darby List of Authorities filed Feb. 26/20, Tab 13) concerned a claim that turned on allegations of dishonesty on the part of the applicant which, if proven, would disqualify him from sitting on a board. It was found that denial of leave would amount to a denial of natural justice. The applicant was limited to the record.

<sup>26</sup> Darby Memorandum of Argument filed Feb. 26/20, Tab 10.

role beyond that of a witness can distort” due process. *United Pacific*<sup>27</sup> concerned a lawyer’s motion to excise one paragraph from the Court’s reasons on the basis that it cast aspersions on his character. The Court dismissed the application, stating:

It is not always possible for the court to avoid findings that might affect the reputation of non-parties. In some circumstances, it may be appropriate to afford non-parties limited status to make argument and even to present evidence as interveners. Even this degree of participation by non-parties may prove problematic. For the most part, the reputations of non-parties must be protected by judicial restraint rather than by affording them rights to control the process.

16. These decisions are consistent with the proposition that non-parties are rarely granted leave to intervene to address personal interests that are not the subject of the litigation.<sup>28</sup> Concerns over reputation “do not give rise to a right of appeal.”<sup>29</sup>

*Jurisdiction to change reasons*

17. Darby asserts that he has “rights under Rule 9.13(b)” that were “irreparably prejudiced.”<sup>30</sup> A non-party has no *right* in a proceeding unless the Court allows intervention. Where the Court has jurisdiction, it is discretionary and should be exercised with caution.<sup>31</sup> Indeed, it is doubtful whether such discretion permits a Court to vary (or grant leave to appeal) with respect to reasons alone: this Court has stated that “[o]nly the formal disposition of a court can properly be the subject of appellate review.”<sup>32</sup> No appeal lies from mere reasons for judgment.<sup>33</sup>

*The Trustee qua litigant refused to answer proper questions*

18. Darby asserts that Veldhuis J.A. found that he intentionally contravened his duties as a trustee in bankruptcy.<sup>34</sup> On the contrary, Veldhuis J.A. simply recited argument made by counsel and found that the Trustee *qua* civil litigant was obstructive during cross-examination. Veldhuis J.A. rightly considered the Trustee’s status as an officer of the Court relevant in that regard.

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<sup>27</sup> Darby Memorandum of Argument filed Feb. 26/20, Tab 11.

<sup>28</sup> *1874000 Nova Scotia Ltd. v. Barrow*, 1996 NSCA 216 at paras. 50-54 [**Book of Authorities and Evidence, Tab 18**]; *Brunning v Canada (Attorney General)*, 2018 ONCA 1009 [**Brunning**] at paras. 21-24 [**Book of Authorities and Evidence, Tab 19**].

<sup>29</sup> *Brunning* at para 22 [**Book of Authorities and Evidence, Tab 19**].

<sup>30</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 7.

<sup>31</sup> *Simpson v. Rondeau*, 2015 ABCA 283 at para. 6 [**Book of Authorities and Evidence, Tab 20**]; *CZ v. RB*, 2019 ABCA 445 at paras. 26-27 [**Book of Authorities and Evidence, Tab 21**]. Rule 9.13 states: “At any time before a judgment or order is entered, the Court may ... 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.” In this case the order was entered by the consent of the parties and without prejudice to Darby’s position.

<sup>32</sup> *Elizabeth Metis Settlement v. Metis Settlements General Council*, 2004 ABCA 39 at para 1 [**Book of Authorities and Evidence, Tab 22**].

<sup>33</sup> *Brunning* at para 23 [**Book of Authorities and Evidence, Tab 19**].

<sup>34</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 1 (citing paras. 24, 25, 52 of the Reasons).

19. Many decisions, not cited by Darby, have confirmed that a trustee in bankruptcy, as an officer of the court, is held to a high standard *as a litigant*.<sup>35</sup> As stated by this Court:

The Trustee in this case adopted an adversarial and hostile role in this application. Instead of presenting to the court, as it was his duty to do as an officer of the court, all the relevant facts which were within his knowledge as Trustee, he presented a bare bones skeletal case just sufficient to invoke the presumption in s. 95(2)<sup>36</sup> without disclosing to the court those facts in his material to which I have already alluded which might, in the mind of the chambers judge, weigh against presumption. This is conduct by a Trustee as an officer of the court which must not be tolerated or condoned. A judge is entitled to expect that all relevant and pertinent information on any application placed before him by officers of the court will be specifically drawn to his attention even if it is also in the written material. ... [Emphasis added.]<sup>37</sup>

20. Many other decisions, not cited by Darby, have also confirmed that a trustee in bankruptcy owes a duty of impartiality, of even-handedness, and of impartiality *even when acting as a litigant*.<sup>38</sup> This is particularly true when a creditor is seeking the disclosure of information from a trustee.<sup>39</sup> A trustee's duty of impartiality is "absolute", and never changes.<sup>40</sup>

21. Darby, in contrast, acted on the misconception that a trustee in bankruptcy "*cannot be impartial* in litigation" and, as noted by Veldhuis J.A., resisted the disclosure of relevant and material information as part of the Trustee's litigation strategy.<sup>41</sup>

*The propriety of the Trustee's litigation conduct was before the Court*

22. Darby asserts that Veldhuis J.A.'s findings regarding the conduct of the Trustee were "unprompted". On the contrary, the propriety of the conduct of the Trustee was clearly in issue at Darby's cross-examination, and was squarely before the Court at the time of the hearing.<sup>42</sup> For

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<sup>35</sup> See *Norris, Re*, 1996 ABCA 357 at paras. 22-24 (*Norris*) [**Book of Authorities and Evidence, Tab 23**]; *Berube v. Wingrowich*, 1999 ABQB 547 at paras. 23-25 [**Book of Authorities and Evidence, Tab 24**]; *Tomassetti, Re*, 1999 CanLII 14515 (M.B.Q.B.) at para. 9 [**Book of Authorities and Evidence, Tab 25**]; *Kultgen, Re*, 2001 ABQB 189 at paras. 6, 11, 12 [**Book of Authorities and Evidence, Tab 26**]; *Werbeniuk, Re*, 2005 MBQB 156 at paras. 35-38 [**Book of Authorities and Evidence, Tab 27**]; *Petrick (Re)*, 2017 BCSC 1780 at paras. 32-34, 37 [**Book of Authorities and Evidence, Tab 28**].

<sup>36</sup> Presumption of a preference where transfer has effect of giving a preference.

<sup>37</sup> *Norris* at para. 24 [**Book of Authorities and Evidence, Tab 23**]; Reasons, para. 51.

<sup>38</sup> *Beetown Honey Products Inc., Re*, [2003] O.T.C. 866, (2003) 125 A.C.W.S. (3d) 805 (Ont. S.C.J.) at paras. 21-23 [**Book of Authorities and Evidence, Tab 29**]; *Maxer (2006) Ltd. v. Taylor*, 2015 MBQB 5 at paras. 28, 30 [**Book of Authorities and Evidence, Tab 30**].

<sup>39</sup> *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONSC 2616 at paras. 18-19, 21-22, 30-31, 33-34 (*Impact*) [**Book of Authorities and Evidence, Tab 31**].

<sup>40</sup> *Impact* at para. 33 [**Book of Authorities and Evidence, Tab 31**].

<sup>41</sup> Darby cross-examination May 26/20, 65/15-25; 69/3-12 [**Book of Authorities and Evidence, Tab 1**]; Reasons, para. 25.

<sup>42</sup> Hearing transcript Nov. 21/19, 3/35-4/3 [**Book of Authorities and Evidence, Tab 16**]; Darby cross-examination May 26/20, 19/14-18 [**Book of Authorities and Evidence, Tab 1**].



example, counsel for PEI submitted that the Trustee had gone “to extraordinary lengths to ensure there would be no meaningful cross-examination”, and gave several illustrations.<sup>43</sup>

23. There were many illustrations from which to choose. For instance, Darby had not looked at the estate’s records before attending for cross-examination.<sup>44</sup> He could only *guess* how much money was in the estate’s bank account,<sup>45</sup> and called that a “useless question”.<sup>46</sup> Darby refused to explain his bald conclusions regarding the financial position of the estate.<sup>47</sup> He refused to look at the bank statements that were on the table in front of him.<sup>48</sup> The Trustee refused to disclose the estate’s anticipated expenses<sup>49</sup> or receipts.<sup>50</sup> The Trustee refused to disclose its fees.<sup>51</sup> It refused to answer whether the Trustee has any intention to pay a cost award.<sup>52</sup> Darby had no idea whether any of the estate funds had been segregated for other obligations.<sup>53</sup> He had no idea whether the estate had any uncollected receivables<sup>54</sup>; what expenses the estate might incur for abandonment and reclamation<sup>55</sup>; or how many secured creditors there are, or the total of their claims.<sup>56</sup>

24. Darby took a similarly adversarial posture during his cross-examination of May 26, 2020. For example, when asked to confirm that he had done his best to give fulsome and honest evidence in his affidavit, he declined to answer, taking the position that there was no agreed definition of “best.”<sup>57</sup> While he argues in his affidavit that the Defendants had acted with undue “aggression”, he refused to answer any questions about the Trustee’s litigation tactics.<sup>58</sup> While he swore that at the time of his original cross-examination he was concerned about possible prejudice to the Trustee’s litigation position, on cross-examination he would not say what kind of prejudice that might be; that he would have think about it and answer at some other time.<sup>59</sup> While he insisted that records of the bankrupt estate must not be shared with Rose because they were confidential, he refused to answer how he could use the very same records in his personal application to advance his personal

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<sup>43</sup> Hearing transcript Nov. 21/19, 10/5-14/2 [Book of Authorities and Evidence, Tab 16]; Darby cross-examination May 26/20, 24/15-25/26 [Book of Authorities and Evidence, Tab 1].

<sup>44</sup> Darby cross-examination Nov. 6/19, 35/14-16 [Book of Authorities and Evidence, Tab 3].

<sup>45</sup> Darby cross-examination Nov. 6/19, 19/1-16; 32/18-26; 33/11-13 [Book of Authorities and Evidence, Tab 3].

<sup>46</sup> Darby cross-examination Nov. 6/19, 22/12-18 [Book of Authorities and Evidence, Tab 3].

<sup>47</sup> Darby cross-examination Nov. 6/19, 15/2-13 [Book of Authorities and Evidence, Tab 3].

<sup>48</sup> Darby cross-examination Nov. 6/19, 20/4-6 [Book of Authorities and Evidence, Tab 3].

<sup>49</sup> Darby cross-examination Nov. 6/19, 28/23-29/23 [Book of Authorities and Evidence, Tab 3].

<sup>50</sup> Darby cross-examination Nov. 6/19, 38/20-39/21; 43/8-12 [Book of Authorities and Evidence, Tab 3].

<sup>51</sup> Darby cross-examination Nov. 6/19, 46/11-13; 48/4-11; 102/26-103/1-5 [Book of Authorities and Evidence, Tab 3].

<sup>52</sup> Darby cross-examination Nov. 6/19, 58/7-11 [Book of Authorities and Evidence, Tab 3].

<sup>53</sup> Darby cross-examination Nov. 6/19, 24/8-12; 27/9-15 [Book of Authorities and Evidence, Tab 3].

<sup>54</sup> Darby cross-examination Nov. 6/19, 37/21-23 [Book of Authorities and Evidence, Tab 3].

<sup>55</sup> Darby cross-examination Nov. 6/19, 51/16-18 [Book of Authorities and Evidence, Tab 3].

<sup>56</sup> Darby cross-examination Nov. 6/19, 56/25-57/8; 57/15-19; 70/23-71/8 [Book of Authorities and Evidence, Tab 3].

<sup>57</sup> Darby cross-examination May 26/20, 11/27-12/5; 13/25-15-7; 44/2-11; 54/23-27; 55/3-9 [Book of Authorities and Evidence, Tab 1].

<sup>58</sup> Darby cross-examination May 26/20, 41/25-42/12 [Book of Authorities and Evidence, Tab 1].

<sup>59</sup> Darby cross-examination May 26/20, 68/7-69/2 [Book of Authorities and Evidence, Tab 1].

interests.<sup>60</sup> He refused to concede the obvious proposition that it was open to him to inform himself of relevant information from the Trustee's own records before he was cross-examined.<sup>61</sup>

25. Darby argues that he was not "provided with an opportunity to introduce the significant body of evidence which responds to and contextualizes" *his own* cross-examination evidence.<sup>62</sup> Rather, Darby had every opportunity to tender whatever evidence he saw fit.<sup>63</sup> Darby answered (or refused to answer) questions on cross-examination as he saw fit. He never mentioned a concern about any "dilemma" affecting his ability to answer honestly, as he now asserts in his affidavit.<sup>64</sup> In any event, Darby confirmed that any such dilemma did not affect his ability to answer questions truthfully, and did not limit his ability to put whatever records before the Court he saw fit.<sup>65</sup>

26. The Trustee's counsel did not seek to re-examine Darby or otherwise to tender reply evidence. Moreover, an affiant who is cross-examined may not seek to tender a new affidavit to try to explain away admissions.<sup>66</sup>

27. Notably, the pending Trustee application for leave to appeal does not seek to tender new evidence. Instead, Darby curiously seeks to tender confidential estate records only to advance his personal interests, despite that the Trustee (under the direction of Darby) objected to the very same records being tendered to Justice Veldhuis at the time of the applications for security for costs.<sup>67</sup>

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<sup>60</sup> Darby cross-examination May 26/20, 101/21-27 [**Book of Authorities and Evidence, Tab 1**].

<sup>61</sup> Darby cross-examination May 26/20, 112/26-113/4 [**Book of Authorities and Evidence, Tab 1**].

<sup>62</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 11.

<sup>63</sup> Reasons, paras. 23, 32.

<sup>64</sup> Affidavit of Paul Darby sworn Feb. 10/20, paras. 16, 32. In contrast, when he was cross-examined on that affidavit, he said he had no such dilemma. Curiously, his counsel asserted the opposite: Darby cross-examination May 26/20, 7/17-20; 8/16-21 [**Book of Authorities and Evidence, Tab 1**]. Only after counsel intervened did Darby change his evidence: Darby cross-examination May 26/20, 9/5-12 [**Book of Authorities and Evidence, Tab 1**]. Ultimately, he agreed that any such dilemma should not impair his ability to answer truthfully: Darby cross-examination May 26/20, 9/22-24; 30/14-20; 48/24-53/4; 62/26-63/12; 64/4-24 [**Book of Authorities and Evidence, Tab 1**].

<sup>65</sup> Darby cross-examination May 26/20, 9/22-25; 10/17-23; 11/1-13 [**Book of Authorities and Evidence, Tab 1**].

<sup>66</sup> Among the limitations on rebuttal evidence is the general rule that evidence relating to matters arising from a party's cross-examination are inadmissible in reply: John Sopinka, Sidney Lederman, and Alan Bryant, *The Law of Evidence in Canada*, 4th ed (Toronto: Butterworths & Company, 2014) at p. 1191 [**Book of Authorities and Evidence, Tab 32**]. It follows, *a fortiori*, that it is improper to adduce belated affidavit evidence to explain a witness' admissions arising during *his own* cross-examination. Once cross-examination is completed, only a single and *limited* opportunity to explain or contextualize admissions given under oath remains: *re-examination*, an opportunity that the Trustee's counsel *chose* not to exercise. Of course, re-examination is strictly limited to matters arising during cross-examination: a witness is "not ordinarily permitted to supplement" its evidence in chief by introducing new facts: *Driscoll v. Morgan*, 2007 NLCA 39 at para. 20, citing *R. v. Evans*, [1993] 2 S.C.R. 629 (S.C.C.) [**Book of Authorities and Evidence, Tab 33**]. Still less can a witness tender a further affidavit, *months* later, in a belated effort to explain away his own sworn evidence. Darby cross-examination May 26/20, 56/23-57/7 [**Book of Authorities and Evidence, Tab 1**].

<sup>67</sup> Darby cross-examination May 26/20, 10/5-7; 10/17-23; 11/1-13; 81/2-25; 86/9-25; 99/1-12; 101/21-27 [**Book of Authorities and Evidence, Tab 1**].

*The Trustee's refusals to disclose relevant evidence were not "decisions" regarding the bankrupt estate*

28. Darby argues that as an officer of the Court, a bankruptcy trustee's decisions are presumed to be right until they are shown to be wrong on appeal.<sup>68</sup> However, the Trustee application already seeks to defend the Trustee's conduct. Further, Darby's refusals to answer questions on cross-examination were not decisions of the Trustee in relation to the administration of the bankrupt estate.

29. The decisions cited by Darby do not support his argument. The 1933 Ontario decision in *Mindens*<sup>69</sup> concerned a trustee's disallowance of claims. *Mindens* has not been cited in any judicial decision over the last 87 years. *YBM*<sup>70</sup> concerned an application to remove a receiver on the grounds of conflict of interest. The Master's decision in *Mother of God*<sup>71</sup> concerned a motion to recuse the Master. The Court stated: "... judicial officers must be and must also be seen to be disinterested in the outcome and open to persuasion by evidence ...".

*Complaints about filing are moot*

30. Darby argues Veldhuis J.A. abused her power by denying leave to file his prior application<sup>72</sup>, and (for this reason alone) that the Reasons should be entirely "set aside".<sup>73</sup> The issue is now moot: Veldhuis J.A. subsequently granted leave to have that determined by a panel.

## **Conclusion**

31. Rose and the Perpetual Defendants applied for security for costs based on the best evidence available to them. The Trustee, *qua* civil litigant, chose to pursue an adversarial and highly technical strategy in response. Darby was clearly partial to the Trustee's strategy and improperly obstructive in his cross-examination. This was all clear to Justice Veldhuis, whose Order was entirely reasonable based on the evidence tendered by the parties. The Reasons set out nothing more than fair comment about the evidence and the conduct of the litigants. The Trustee was able to post the security without any impact on its appeal. Darby's professional life is unchanged.

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<sup>68</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 4.

<sup>69</sup> Darby Memorandum of Argument filed Feb. 26/20, Tab 1.

<sup>70</sup> Darby Memorandum of Argument filed Feb. 26/20, Tab 2.

<sup>71</sup> Darby Memorandum of Argument filed Feb. 26/20, Tab 3.

<sup>72</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 7.

<sup>73</sup> Darby Memorandum of Argument filed Feb. 26/20, para. 9.

32. Rose respectfully submits that there are no grounds on which to grant Darby leave to intervene to challenge the Reasons. If leave is granted, there are no grounds to edit the Reasons.

RESPECTFULLY SUBMITTED ON JUNE 5, 2020

**NORTON ROSE FULBRIGHT CANADA LLP**

Per: *Steven H. Leidl*

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**Steven H. Leidl, QC / Gunnar Benediktsson**  
Counsel for the Respondent, Susan Riddell Rose