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COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1901-0255AC
TRIAL COURT FILE NUMBER:	1801-10960
REGISTRY OFFICE:	CALGARY
APPLICANT:	PAUL J. DARBY
STATUS ON APPEAL:	Proposed Intervenor
STATUS ON APPLICATION:	Applicant
RESPONDENTS:	SUSAN RIDDELL ROSE, PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
STATUS ON APPLICATION:	Respondents
DOCUMENT:	**MEMORANDUM OF ARGUMENT OF PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST AND PERPETUAL OPERATING CORP.** (the **Perpetual Respondents**) **IN RESPONSE TO THE APPLICATION OF PAUL J. DARBY, PROPOSED INTERVENOR**

Registrar's Stamp

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FILED
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TP
Court of Appeal of Alberta

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I. INTRODUCTION

1. Paul J. Darby (**Mr. Darby**) seeks to change the Reasons for Decision of the Honourable Justice B.L. Veldhuis dated January 29, 2020 (the **Reasons**) pursuant to Rule 9.13 or to intervene in the leave to appeal application by PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (the **Trustee**) for the same purpose.

2. This Memorandum should be read with the Memoranda of the Perpetual Respondents filed February 18 and 19, 2020 (the **February 18 Memorandum** and **February 19 Memorandum** respectively) filed in response to the Trustee's applications. Reading the materials on all applications together, it is apparent that the application for leave to appeal is simply a vehicle to provide Mr. Darby with a proceeding to seek to remove or change those parts of the Reasons that addressed his conduct.

3. The Perpetual Respondents adopt the submissions in the Memorandum filed on behalf of the Respondent Susan Riddell Rose (**Ms. Rose**) in response to Mr. Darby's application.

4. Mr. Darby's application should be dismissed for the same reasons set out in the February 18 Memorandum (which are not repeated) and for additional reasons arising from his lack of standing:

(a) Rule 9.13 does not permit "second kicks at the can", particularly by non-parties; and

(b) there are no arguable grounds for leave to appeal, and no reason to permit Mr. Darby to intervene in the appeal.

5. The relief Mr. Darby seeks relating to the initial refusals to accept his application and for an order directing his application to be heard by a Panel are moot.

II. THE SINGLE ISSUE AND ANSWER

6. Mr. Darby raises many complaints about the findings critical of his conduct in the Reasons. It is submitted an initial and dispositive issue should be addressed first:

> Should a witness whose conduct is addressed in a judge's reasons have an opportunity for a new hearing to seek to explain that conduct and have the comments removed or changed?

7. It is submitted that the answer is no. Judges must be free to comment on the conduct of witnesses who appear before them. If a witness's conduct warrants comment or even strong criticism, a judge is not required to hold another hearing at the instance of the witness to consider the witness's explanation. Nor should the comments be subject to appellate review solely for that purpose.

8. This should apply to ordinary witnesses, expert witnesses, and witnesses who are officers of the Court. Indeed, officers of the Court more than other witnesses should be held to a higher standard of conduct, and should be expected to know that if their conduct falls short it may be criticized.

9. The record shows that Justice Veldhuis's comments about Mr. Darby's conduct were entirely warranted. They were measured, objective and firmly based on the evidence.

III. OTHER ARGUMENTS

A. Procedural Issues

1. A witness is not entitled to apply to have reasons changed

10. The message that Justice Veldhuis sent to counsel for Mr. Darby through the Case Management Officer's February 5, 2020 letter[1] was correct. Only a party may make an application pursuant to Rule 9.13(b). That is a correct interpretation of Justice Brown's (as he then was) decision in *Lewis Estates Communities Inc. v Brownlee LLP*.[2]

11. *Aubin v Petrone*[3] is distinguishable and in any event does not stand for the proposition that a non-party has standing to apply under Rule 9.13. In that case, the plaintiff in a divorce case successfully brought an injunction application against Quantiam Technologies Inc, a non-party

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[1] Affidavit if Paul James Darby, sworn February 10, 2020, filed February 26, 2020, Exhibit P.
[2] *Lewis Estates Communities Inc. v Brownlee LLP*, 2013 ABQB 731 (Memorandum of Argument of Paul J. Darby, filed February 26, 2020 (**Darby Memorandum**), Tab 14).
[3] *Aubin v Petrone*, 2018 ABQB 259 (Darby Memorandum, Tab 15).

(85% of the shares of Quantiam formed the majority of the matrimonial assets). Quantiam's application under Rule 9.13 to vary the reasons for granting the injunction was dismissed.

12. Paragraphs 14-17 of the February 19 Memorandum also addresses this issue. See in particular *R v P.(B.)*[4] and *United Pacific Capital Ltd v. Piché*.[5]

2. A witness is not entitled to intervene in an appeal to have reasons changed

13. The security for costs application is over, unless this Court grants permission to appeal. Mr. Darby does not even claim to have anything to contribute to the question of whether permission should be granted. The only reason he is seeking to intervene, and it is submitted the only reason the Trustee is seeking permission to appeal, is to address Mr. Darby's personal concerns. That is not a basis for granting permission to appeal.

14. It should first be determined if leave to appeal should be granted. If not, the security for costs application is over. There is then nothing for Mr. Darby to intervene in.

15. If leave to appeal is granted, then the Court should consider whether, as Mr. Darby claims, he has some higher entitlement than other classes of witnesses to intervene because he is an officer of the Court. It is submitted that is patently wrong, and that for this purpose he is in no better or worse position than any other witness seeking to intervene for the same reason.

16. Mr. Darby had an opportunity to explain or justify his conduct when he filed his affidavit and was questioned by opposing counsel. His explanation under oath would then have been in the transcript read by Justice Veldhuis. He had another opportunity through the Trustee's counsel, whom Mr. Darby instructs, on the hearing of the application for security for costs. If neither he nor counsel took advantage of those opportunities, he should not now get his "second kick at the can".

17. Nor should Mr. Darby be surprised. The Respondents' counsel's frustration during the questioning was obvious. The issue was front and centre at the hearing of the application.

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[4] *R v P.(B.)*, 2010 ABQB 204 (February 19 Memorandum, Tab 13).
[5] *United Pacific Capital Ltd. v. Piché*, 2005 BCSC 1018 (February 19 Memorandum, Tab 10).

B. Responses to Mr. Darby's Complaints

18. Mr. Darby's overall complaint is "The Reasons Should be Set Aside Because they are Factually Unfounded and Legally Erroneous". He has several arguments that purport to support that complaint, which are described below with references to the paragraphs in the Mr. Darby's Brief. None of these arguments have merit.

1. The context argument (para. 11)

19. Mr. Darby states there appears to be no real dispute about several matters that are disputed:

(i) *"no party requested any such Findings be made"*: The Respondents sought security for costs, not any particular reasons. But their submissions made their concerns about Mr. Darby's conduct perfectly clear. Counsel provided Justice Veldhuis with the entire transcript of the cross-examination and then tendered excerpts with the explanation: "And in my submission, [Mr. Darby] went to extraordinary lengths to ensure there would be no meaningful cross-examination on his statement [in his affidavit]". The Trustee's counsel did not respond to that submission. Justice Veldhuis had every reason to scrutinize the transcript and draw her own conclusions.

(ii) *"Veldhuis J. A. provided no notice to the parties that she was considering making the Findings…"*: Notice is not required.

(iii) *"No party made any submissions regarding the legal or factual basis for the Findings"*: The Trustee's counsel had a full opportunity to make whatever legal or factual submissions he wished about Mr. Darby's conduct, including how he had answered or why he refused to answer questions on cross-examination. Counsel make decisions about how to argue a case, and about what arguments to make and what to leave out.

(iv) *"the sole evidentiary basis for the findings was Veldhuis J.A.'s independent and unilateral review of Mr. Darby's cross-examination transcripts"*: The affidavit and the transcript were the evidence the Respondents put before her and argued extensively in support of their application. Justice Veldhuis carefully considered them. Judges are

expected to make "independent and unilateral" decisions based on the evidence before them. Mr. Darby had an opportunity to introduce evidence. He did so by filing an affidavit and answering questions when cross-examined on that affidavit.

2. The confidentiality obligation argument (paras. 12-13)

20. Mr. Darby boldly states that his "conduct during his cross-examination was not only fully justified, but was in fact legally required…" (para. 12) and relies on the confidentiality obligations in the *Bankruptcy and Insolvency General Rules* to justify that conduct. With respect, Mr. Darby appears to have learned nothing from this experience.

21. The Trustee made the same argument. It is addressed in paragraphs 19-26 of the February 18 Memorandum.

22. Mr. Darby now seeks to rely on a Confidential Affidavit to support his own claim. Yet on cross-examination he used confidentiality as a basis for refusing to answer proper questions.

3. The conflict argument (paras. 14-15)

23. Mr. Darby appears to argue that the Reasons create a precedent that the duties of a trustee in bankruptcy prevent a trustee from relying on an argument that an applicant has not met their onus on an application.

24. This argument is perplexing. Of course, like any respondent to any application, the Trustee could have decided not to file an affidavit in response to the application for security for costs and argued that the Respondents had not met their onus. Mr. Darby chose to file an affidavit. He was cross-examined. That is the way it works for all witnesses, including bankruptcy trustees.

4. The "intentional" or "purposeful" breach argument (para. 16)

25. The evidence and the Reasons speak for themselves. The argument that neither Mr. Darby nor the Trustee were given an opportunity to provide evidence or submissions on this issue is patently wrong. They had every opportunity. They now want a second opportunity

because their strategy in opposing the application for security for costs, not responding to proper questions, and not making submissions on this issue did not work out as they planned.

5. The issues of general importance argument (para. 17)

26. There are no issues of general importance on this application. The issues are only of importance to Mr. Darby.

IV. CONCLUSION

27. It is respectfully submitted that Mr. Darby's application should be dismissed. The Perpetual Respondents seek costs against Mr. Darby for the same reasons and on the same basis as they seek costs in the February 18 Memorandum.

June 8, 2020

RESPECTFULLY SUBMITTED.

BURNET, DUCKWORTH & PALMER LLP

Per: _____

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