Court of Queen's Bench of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2022 ABQB 592

Date:
Docket: 1801 10960
Registry: Calgary

Between:

PricewaterhouseCoopers Inc, LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp

Applicant

- and -

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

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice D.B. Nixon

I. Introduction

[1] This costs decision pertains to several applications brought in an action (the "Action") by PricewaterhouseCoopers Inc, LIT, (the "Trustee") in its capacity as the Trustee in Bankruptcy of the estate of Sequoia Resources Corp ("Sequoia").

[2] Sequoia formerly operated under the name Perpetual Energy Operating Corp ("PEOC"). The defendants in the Action are Perpetual Energy Inc, Perpetual Operating Trust, and PEOC (collectively, the "Perpetual Defendants"), along with Ms. Susan Riddell Rose, who was the sole director of PEOC (collectively, the "Defendants").

[3] Ms. Rose and the Perpetual Defendants each filed an application for summary dismissal and an application for a stay of the Action (collectively, the "First Applications"). These were heard in August 2019. Ms. Rose and the Perpetual Defendants subsequently brought another application for summary dismissal (the "Second Application"). The Second Application focused on a single claim in the Trustee's statement of claim and was heard in January 2020.

A. The First Applications

[4] The issues addressed in the First Applications were summarized in both my written decision thereon and the Court of Appeal's decision on the appeal: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2020 ABQB 6 ("***First ABQB Decision***") and ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 ("***First ABCA Decision***"), respectively.

[5] The Court of Appeal overturned my costs decision for the First Applications and chose to refer the matter back to me rather than awarding costs at both levels of court: ***Pricewaterhouse Coopers Inc v Perpetual Energy Inc***, 2021 ABCA 92 ("***ABCA Costs Decision***"). Therefore, I must use my discretion to evaluate the substantial winner on appeal, the status of the Trustee's claims, and whether any conduct by either party ought to impact the ultimate costs award.

B. The Second Application

[6] The Second Application dealt exclusively with the Trustee's *BIA* Claim (defined below) against the Perpetual Defendants and focused on whether: (i) PEOC was insolvent at the time of the Asset Transaction or rendered insolvent by it within the meaning of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"); or (ii) there was a transfer at undervalue within the meaning of the *BIA*. I summarily dismissed the Trustee's *BIA* Claim against the Perpetual Defendants in a written decision issued on January 14, 2021: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABQB 2 ("***Second ABQB Decision***").

II. Issues

[7] The issues with respect to costs are as follows:

a. Are the Defendants entitled to costs against the Trustee in respect of the First Applications?

b. Are the Perpetual Defendants entitled to costs against the Trustee in respect of the Second Application?

c. Are the Perpetual Defendants entitled to costs against the Orphan Well Association ("OWA")?

d. Are the Perpetual Defendants entitled to costs against the Industry Intervenors?

e. Where possible, should the various cost components be set off against one another?

III. Background

[8] The Action is a challenge to the transfer of several assets from Perpetual Operating Trust to PEOC (the "Asset Transaction").

[9] Perpetual Operating Trust was created to hold natural gas assets in trust for the benefit of PEOC. In early 2016, Perpetual Energy Inc arranged to sell some of these assets to a third-party buyer ("198Co"). The Asset Transaction was one step in this broader transaction. This involved consolidating beneficial and legal title to the assets in PEOC. All PEOC shares subsequently were sold to 198Co, and PEOC was renamed Sequoia.

[10] Sequoia assigned itself into bankruptcy approximately 17 months later, in March 2018, and appointed the Trustee.

[11] The Trustee filed a statement of claim on August 2, 2018, seeking $217,570,800 in damages, along with an application to set aside the Asset Transaction. The Trustee's claims with respect to the Asset Transaction are as follows:

a. The Asset Transaction was a transfer at undervalue under section 96 of the *BIA* (the "BIA Claim") or was void on the basis of public policy, statutory illegality, or equitable rescission (the "Public Policy Claim");

b. The Asset Transaction engaged the oppression provisions of the Alberta *Business Corporations Act* (the "Oppression Claim"); and

c. Ms. Rose breached her duty of care and fiduciary duties as the sole director of PEOC at the time of the Asset Transaction by directing PEOC to enter into the transactions (the "Director's Breach Claim").

[12] The First Applications were to summarily dismiss the above claims or strike the Trustee's pleadings. I gave my oral reasons in August 2019 and written reasons in January 2020. I granted the Defendants' applications to strike the Trustee's Public Policy Claim for failure to disclose a reasonable cause of action and summarily dismissed both the Oppression Claim and the Director's Breach Claim.

[13] However, I declined to summarily dismiss or stay the BIA Claim. The Perpetual Defendants' argument focused on its assertion that the parties were dealing at arm's-length within the meaning of the *BIA*. I found that *viva voce* evidence was necessary for determination of this issue.

[14] The Court of Appeal overturned my summary dismissal of the Oppression Claim and the Director's Breach Claim and my striking of the Public Policy Claim, but upheld my findings regarding the BIA Claim.

[15] Consequently, the Perpetual Defendants brought the Second Application so that I could assess the merits of the BIA Claim with reference to the following questions:

a. Was PEOC insolvent at the time of the Asset Transaction or rendered insolvent by it within the meaning of the *BIA*?

b. Was there a transfer at undervalue within the meaning of the *BIA*?

[16] In the ***Second ABQB Decision***, I found that PEOC was neither insolvent at the time of the Asset Transaction nor rendered insolvent by it. This meant that I did not need to address the question of undervalue in order to summarily dismiss the BIA Claim.

[17] The Court of Appeal issued its decision on the appeal of the ***Second ABQB Decision*** in March 2022: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2022 ABCA 111 ("***ABCA Second Decision***"). The Court of Appeal allowed the appeal and directed the BIA Claim to proceed to trial. Since this Court has neither received an application nor heard argument concerning the costs on the ***ABCA Second Decision***, I will make no comment thereon.

IV. Threshold Questions

A. Should Costs be awarded in the cause?

[18] *Rule* 10.29 of the Alberta *Rules of Court*, Alta Reg 124/2010 (the "*Rules*") is the general rule regarding costs awards:

> 10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to
> (a) the Court's general discretion under *rule* 10.31,
> (b) the assessment officer's discretion under *rule* 10.41,
> (c) particular rules governing who is to pay costs in particular circumstances,
> (d) an enactment governing who is to pay costs in particular circumstances, and
> (e) subrule (2).

[19] The *Rules* reinforce the Court's wide discretion in awarding reasonable and proper costs: see ***Stewart Estate v TAQA North Ltd***, 2016 ABCA 144 at para 17. Costs typically are awarded in a "pay as you go" manner, but *Rule* 10.31 allows the Court to depart from this standard and order "costs in the cause" instead.

[20] The Defendants argue that costs should be awarded in the cause. The Court of Appeal rejected this in respect of costs of the appeal, stating in ***ABCA Costs Decision*** at para 6:

> 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...It is not appropriate for the costs consequences of these complex proceedings to be in the cause, and costs are payable forthwith.

[21] I see no reason to depart from this conclusion with respect to costs of the First Applications. In my view, the Defendants have not sufficiently demonstrated why it is necessary for me to diverge from the default position that costs be payable forthwith. The pay-as-you-go principle is consistent with the policy underlying *Rule* 10.29(1): ***Enviro Trace Ltd v Sheichuk***, 2015 ABQB 28 at para 9. In choosing to hear the Second Application, I agreed with the Perpetual Defendants that it was a useful measure to make the Action more expedient. Nonetheless, costs are a necessary consequence of the decision to initiate legal proceedings and ordinarily will be payable forthwith: ***Athabasca Minerals Inc v Syncrude Canada Ltd***, 2018 ABQB 551 at paras 75, 78.

B. What is "substantially successful"?

[22] *Rules* 10.29 and 10.31 apply where a party is "substantially successful in a proceeding": ***Hotchkiss v Budding Gardens Inc***, 2021 ABQB 333 at para 25 and 26.

[23] Both parties claim to have been "substantially successful" on the First Applications. The Defendants assert that the Court of Appeal narrowed the Oppression Claim. The Trustee points out that the Court of Appeal restored its pleadings and granted it "complainant" status to pursue its claims "if it so elects": ***ABCA First Decision*** at para 227.

[24] The Court of Appeal deemed the Trustee "substantially successful" on appeal in its order from the ***ABCA First Decision***: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021

ABCA 92 at para 5 ("***ABCA Costs Order***"). However, the question of costs for the original hearing of the First Applications and the Second Application requires further analysis.

[25] The Court of Appeal has stated that "[s]uccess is generally determined globally having regard to the outcome of the appeal, although the degree of success and the issues on which success was achieved can be considered as well": ***Abt Estate v Cold Lake Industrial Park GP Ltd***, 2019 ABCA 145 at para 2. Therefore, "the winner is not only the litigant who has been totally successful on each aspect of the claim, but the litigant who has been substantially successful – the one who has *enjoyed the greater success*": ***AE v TE***, 2017 ABQB 674 at para 6 (emphasis added), citing ***Mitrovic v Mitrovic***, 2007 ABQB 107 at para 8; see also ***DBF v BF***, 2016 ABQB 708 at para 16, varied at 2017 ABCA 272.

[26] These authorities demonstrate that, while the Court of Appeal found the Trustee to be the "substantially successful" party on appeal, it does not necessarily follow that the Trustee is entitled to costs for the original hearing of the First Applications. Determination of the "substantially successful" party requires consideration of the impact of the Court of Appeal's conclusions. Moreover, the Second Application requires an independent analysis.

C. Does the Trustee's Public Policy Claim establish a cause of action?

[27] I found that the Public Policy Claim did not disclose a reasonable cause of action against the Perpetual Defendants and Ms. Rose. The Trustee appealed this finding and the Court of Appeal agreed that the Trustee's pleadings on its Public Policy Claim did not demonstrate a cause of action: ***ABCA First Decision*** at para 146. However, the Court of Appeal rejected my decision to strike this portion of the Trustee's pleadings. Notwithstanding that the Trustee did not ask to amend its pleading during the First Applications, the Court of Appeal held that the correct solution was to provide leave to the Trustee to amend its pleadings. Therefore, the Trustee was successful with respect to its Public Policy Claim in the sense that the Court of Appeal preserved its right to litigate this claim.

[28] The Court of Appeal went on to comment on how the Trustee's pleadings should be amended: ***ABCA First Decision*** at paras 146 and 149. Specifically, the Trustee was "granted leave to amend any portions of the statement of claim that would benefit from clarification": ***ABCA First Decision*** at para 227. In doing so, in my view, the Court of Appeal directed case management judges to exercise caution when asked to strike pleadings under *Rule* 3.68 and to adopt an interventionist stance when pleadings appear deficient.

[29] While I take the Court of Appeal's concerns about pleadings seriously, a comment on these concerns is warranted.

[30] A party's pleadings must disclose "clearly and precisely the real issues which are in dispute": Jack I H Jacob & Iain S Goldrein, *Pleadings: Principles and Practice* (London: Sweet & Maxwell, 1990) at 2 ("*Pleadings*"); see also ***Al-Ghamdi v Alberta***, 2017 ABQB 684 at paras 111, 113-114. A statement of claim must show a viable legal and enforceable claim against the defendant. This does not mean that the claim must be outlined "in any formal legal shape…[but] there must be an inner connection, a legal nexus, between the facts relied on and the relief or remedy claimed": *Pleadings* at 71.

[31] In other words, while a statement of claim need not explicitly state the cause of action it outlines, it must contain an "aggregate of facts which the law will recognize as giving the plaintiff a substantive right to make the claim against the defendant for the relief or remedy which he is seeking": *Pleadings* at 76; see also ***Barclay v Kodiak Heating & Air Conditioning Ltd***, 2019 ABQB 850 at paras 28-29. These requirements are not just for convenience – they fulfill the principle of natural justice that a party must know the case against it: ***Waguan v Canada***, 2002 ABCA 110 at para 85. These requirements are further reflected in *Rule* 1.2(3), which states that parties themselves must "identify...the real issues in dispute...".

[32] In the course of these proceedings, the Defendants asked me to order the Trustee to amend its pleading. I declined. As a referee in the litigation, it is not my place to direct the Trustee what to say in its pleading. The Trustee elected not to amend its pleadings and, based on the information before me, has yet to do so. In my view, courts should not interfere with parties' litigation choices, which may be made for strategic or practical reasons. Courts are expected to fulfill an adjudicative role, not to advocate for one side or another. In ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42 at paras 22-24, Justice McLachlin noted that a claimant must "clearly plead the facts upon which it relies in making its claim…[t]he claimant chooses what facts to plead, with a view to the cause of action it is asserting."

[33] It is not up to this Court to supplement or correct or redraft the pleadings: ***Al-Ghamdi*** at para 113 (aff'd on this point, 2020 ABCA 81 at paras 14-19). Plaintiffs must plead the basic elements of a cause of action, the absence of which amounts to a "radical defect": ***Deep v Ontario***, 2004 CanLII 14527 (ON SC) at para 34. At minimum, the "essence of the action" must be ascertainable: ***Korte v Deloitte, Haskins & Sells***, 1993 ABCA 78 at para 6. In my view, the crux of these authorities is that courts are to take the parties' pleadings as they find them, particularly when dealing with sophisticated parties.

[34] The Court of Appeal held that the Trustee's Public Policy Claim must be amended to include particulars regarding the "scope and enforceability of the public interest" that the Trustee attempted to engage: ***ABCA First Decision*** at para 148. In my view, it would be unjust to call the Trustee substantially successful on this issue when it did not fulfil its obligation with respect to its Statement of Claim. Rather, the Trustee's "success" was simply the preservation of a claim that was improperly developed at first instance, has not yet been amended in accordance with the leave given by the Court of Appeal, and may never materialize, depending on the Trustee's decision.

[35] Accordingly, the Public Policy Claim remains a *potential* claim, the viability of which is contingent on the Trustee amending its statement of claim in the manner recommended by the Court of Appeal. Whether the Trustee intends to do so remains uncertain, at least as at the date that the parties to this action provided their cost submissions to this Court. Moreover, while this portion of the Court of Appeal decision favours the Trustee's position, it was ultimately a directive to both this Court and the Trustee with respect to deficiencies in the pleadings and was premised on its view of how courts are to address gaps in pleadings.

D. Has the Oppression Claim been reduced to $1,560,809?

1. Assorted Success

[36] The Court of Appeal granted the Trustee "complainant" status to pursue the Oppression Claim, "if it so elects": ***ABCA First Decision*** at para 227. In doing so, the Court of Appeal criticized how creditors must demonstrate that their position equates to that of a minority shareholder to qualify as a "proper person" for the purpose of bringing an oppression action: ***ABCA First Decision*** at para 120. The Court of Appeal held that since "creditor" is a distinct category in section 242 of the Alberta *Business Corporations Act*, the need for a creditor to "qualify" becomes redundant: ***ABCA First Decision*** at para 130.

[37] With respect, this separation of the "proper person" test from the listing of "creditor" in section 242 misinterprets the purpose of the "proper person" analysis. Rather, section 242 of the Alberta *Business Corporations Act* lists "creditor" to make clear that an oppression action *may* be available to a creditor, but this requires a creditor to obtain standing at the court's discretion, unlike minority shareholders who have standing as of right.[1]

[38] In essence, section 242 of the Alberta *Business Corporations Act* enables creditors to bring an oppression action, but this inherently involves analysis of whether creditors, "by virtue of their relationship to, or dealings with, the company, have an interest that is not dissimilar to that of a shareholder": Jassmine Girgis, citing ***N'Quatua Logging Co Ltd v Thevarge et al***, 2006 BCSC 1122 at para 19.

[39] My comments aside, the Court of Appeal authorized the Trustee to pursue the Oppression Claim on behalf of Sequoia's creditors. However, the quantum of damages that Sequoia owes to its creditors remains contested. This question also bears on the determination of which party was "substantially successful".

[40] The Defendants argue that, as a result of the Court of Appeal's conclusions, the Oppression Claim has been confined to $1,560,809, being Sequoia's outstanding municipal property taxes. The Trustee argues that the value of the Oppression Claim was unchanged by the Court of Appeal and continues to be in excess of $200 million, which reflects the net deficit caused by the Asset Transaction, since Sequoia's assets contained unrealized Abandonment and Reclamation Obligations ("ARO").

[41] In my view, the Defendants are correct. The Court of Appeal limited the Trustee's Oppression Claim by concluding that there is no creditor associated with Sequoia's ARO: ***ABCA First Decision*** at para 141. This is further supported by the Court of Appeal's statement that the Oppression Claim may be brought only "on behalf of all other creditors who were owed money at the time of the alleged oppressive conduct and remained unpaid on the date of [Sequoia's] bankruptcy": ***ABCA First Decision*** at para 140. The Court of Appeal did not make a finding the amount of the Oppression Claim, but the only creditors who fit these criteria are the municipalities to whom taxes are owed: ***ABCA First Decision*** at para 133; ***First ABQB Decision*** at para 334. This determination is supported by the Court of Appeal's statement that the Trustee's Oppression Claim is "narrower than... anticipated": ***ABCA First Decision*** at para 144.

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[1] Professor Jassmine Girgis, "Must Creditors be "Analogous to Minority Shareholders" to Obtain Standing for Oppression?" (February 17, 2021), online ["**Jassmine Girgis**"]: ABlawg, http://ablawg.ca/wp-content/uploads/2021/02/Blog_JG_Perpetual_Energy.pdf.

[42] I recognize that the Court of Appeal left open the possibility of an oppression claim being made with respect to how "the directors and officers of a corporation might manage those Abandonment and Reclamation Obligations in a manner that is unfairly prejudicial to the interests of creditors": ***ABCA First Decision*** at para 141. However, this concern does not align with the claim actually available to the Trustee, which is the amount owed to the municipalities: ***First ABQB Decision*** at paras 118, 334-335.

[43] As such, the only "success" here is that the Trustee received the "complainant" status it argued for. In my view, the narrowing of the Oppression Claim amounts to much more of a win for the Defendants.

2. Was the Oppression Claim "inconsistently argued" by the Perpetual Defendants and Ms. Rose?

[44] The Trustee argued that the Perpetual Defendants and Ms. Rose, in their applications for leave to the Supreme Court of Canada, "advance[d] inconsistent interpretations of the same Court of Appeal decision" with respect to the value of the Oppression Claim. The Trustee asserts that this amounts to improper conduct that warrants enhanced costs. I disagree.

[45] First, generally this is not improper conduct. Parties are entitled to structure arguments in any manner they see fit. That is the nature of advocacy, and the obligation of counsel is to strive to do the best for their client.

[46] It is part and parcel of an adversarial legal system to see arguments by counsel that are drafted to be compelling and, quite frankly, self-interested. Courts are commonly presented with two differing views of the "truth" rooted in the perspectives of opposing parties. The hearing court is then tasked with determining which of these "truths" is correct in law. Absent the use of outright lies, such tactics are accepted by – if not inherent in – our litigation process.

[47] Second, this is not improper conduct applicable to a costs decision. A determination of costs involves analyzing which party was substantially successful before the Court and whether any party engaged in conduct during the litigation that should bear on its costs award.

[48] I was unable to find a case that stands for the principle that the content of a party's appeal application to the Supreme Court of Canada may constitute improper conduct for the purpose of *Rule* 10.33 and the Trustee cited no such authority. In my view, this would be "post-hearing" evidence, which is generally inadmissible: Williams A. Stevenson & Jean A. Côté, *Alberta Civil Procedure Handbook*, vol 1 (Edmonton, Alberta: Juriliber, 2022) at 10-55; see also ***Anderson v Amoco Canada Oil and Gas***, 2002 ABCA 162 at para 61, aff'd 2004 SCC 49.

[49] Justice Erb in ***1022049 Alberta Ltd. v Medicine Hat (City)***, 2006 ABQB 208 held at para 15 and 16, citing ***Anderson*** at para 61, that courts should not consider post-hearing evidence "unless there is clear connection between that evidence and the proceedings". This is because such evidence was not properly put before the judge at trial.

[50] My role on this costs application is to evaluate my decisions and those of the Court of Appeal, along with the parties' litigation conduct. Analyzing a party's application to the Supreme Court of Canada is not only unnecessary but generally inappropriate.

[51] Third, having reviewed the two submissions, I do not see the inconsistency alleged by the Trustee. The Perpetual Defendants and Ms. Rose state in their costs briefs that the claim against them was reduced by the Court of Appeal as a reflection of Sequoia's *actual* outstanding

creditors. In contrast, the concerns they raise in their application to the Supreme Court of Canada relate to the *legal principle* established by the Court of Appeal where, *on the right set of facts*, a trustee could integrate a bankrupt corporation's AROs in an oppression claim with respect to how that bankrupt corporation structured its management of its obligations and how such management negatively impacted the corporation's creditors: ***ABCA First Decision*** at paras 131, 140-141. These are two distinct arguments, rather than an inconsistency.

[52] In summary, the Defendants' applications to the Supreme Court of Canada take issue with how the Court of Appeal's comments may disturb settled bankruptcy law principles. In my view, these arguments do not interfere with the Defendants' costs submissions, do not amount to improper conduct and do not warrant enhanced costs.

E. What is the scope of the Release?

[53] In her capacity as the sole director of PEOC, Ms. Rose signed a Resignation & Mutual Release with 198Co upon completion of the Asset Transaction (the "Release"). Ms. Rose says that the Release insulates her from liability with respect to the Trustee's allegations of breach of her duties as director.

[54] The Release was discussed at length in ***First ABQB Decision*** at paras 287-295 and in ***ABCA First Decision*** at paras 160-175. The Court of Appeal disagreed with my conclusions that the Supreme Court's decision in ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 nullified the Trustee's claims with respect to the Release and that the Release, on its face, was a complete defence to claims against Ms. Rose. The Court of Appeal held that the available record was not sufficient to support these conclusions, but that "most of Ms. Rose's potential liability to Perpetual/Sequoia was released": ***ABCA First Decision*** at para 175.

[55] The Court of Appeal pointed out that neither the Trustee's pleadings nor the present record demonstrated a direct benefit received from the Asset Transaction. Therefore, they declined to address the Alternative BIA Claim (and whether the Release could encompass it): ***ABCA First Decision*** at para 115. Moreover, the Court of Appeal held that the release was wide enough to cover past claims against Ms. Rose: ***ABCA First Decision*** at para 173. However, the Alternative BIA Claim and the interpretation, scope, and legal effect of the Release was referred back to the trial court: ***ABCA First Decision*** at para 227.

[56] The Court of Appeal agreed with my conclusion that the Release was not contrary to section 122(3) of the Alberta *Business Corporations Act*. They noted that, despite the Trustee's suggestions otherwise, "there is no basis to completely invalidate the Resignation & Mutual Release": ***ABCA First Decision*** at para 164.

[57] The Court of Appeal concluded that the issue of whether environmental obligations owed to the public could be covered by the Release could not be resolved on the existing record: ***ABCA First Decision*** at para 165.

[58] The Court of Appeal's Order concerning this aspect of the First Applications states:

> The panel notes that the reach of the Resignation & Mutual Release with respect to <u>all</u> 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: ***ABCA Costs Decision*** at para 3. [emphasis in original].

[59] Given the above, the Trustee's "success" concerning the Release is that the issue remains live. However, the Court of Appeal rejected many of the Trustee's assertions. Therefore, I characterize the Release issue as a "draw" at this stage of the litigation, notwithstanding the Court of Appeal's comment that most of Ms. Rose's potential liability to PEOC was released: ***ABCA First Decision*** at para 175. There is too much uncertainty at this junction to determine otherwise.

F. What other aspects of the litigation have been significantly narrowed?

[60] As noted above, I held at the First Applications that the BIA Claim could not be struck or summarily dismissed, and the Court of Appeal upheld my decision. On the Second Application, I summarily dismissed the BIA Claim (and, by extension, the Alternative BIA Claim): ***Second ABQB Decision*** at para 269. While the Trustee appealed my decision, the litigation has been narrowed by elimination of the BIA Claim. The costs concerning that appeal can be dealt with in a separate application.

V. Analysis

[61] Having addressed several threshold questions, I must now apply *Rules* 10.29, 10.31, and 10.33 to both the First Applications and the Second Application.

A. Principles in awarding costs

[62] *Rule* 10.29 entitles a successful party to a "costs award against the unsuccessful party" who must pay the costs "forthwith". Costs are highly discretionary: ***Abt Estate*** at para 26. This discretion is broad, but "must be exercised judicially and in accordance with established principles": ***Pharand Ski Corp. v Alberta*** (1991), 81 Alta LR (2d) 304 (QB) at 398. This promotes rational and consistent costs awards: ***Alberta Treasury Branches v 1401057 Alberta Ltd (Katch 22)***, 2013 ABQB 748 at para 29.

B. Which parties were substantially successful in respect of the First Applications?

[63] *Rule* 10.33(1) outlines the following general considerations the Court may use to ensure that costs awards are made rationally and consistently:

> (a) the result of the action and the degree of success of each party;
> (b) the amount claimed, and the amount recovered;
> (c) the importance of the issues;
> (d) the complexity of the action;
> (e) the apportionment of liability;
> (f) the conduct of a party that tended to shorten the action; and
> (g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

[64] The parties agree that costs for the First Applications should be five times Column 5 of Schedule C of the *Rules*. However, they disagree on which party is entitled to these costs.

[65] As discussed above in the "threshold questions", the Trustee was successful on its appeal of the First Applications. The Trustee was awarded costs for the appeal proceedings and my costs award for the First Applications was overturned. However, since the costs issue was

referred back to me, I take it that, rather than simply copying the Court of Appeal's costs award, I am obligated to consider the practical implications of the Court of Appeal's conclusions and how they should influence the award of costs on the First Applications.

[66] In light of my above analysis of the "threshold questions", I find that the Perpetual Defendants and Ms. Rose were substantially successful on the First Applications. The Trustee was successful at the Court of Appeal only to a limited extent, given that the Court of Appeal reduced the value of the Oppression Claim and permitted the Trustee to revise the Public Policy claim. The Director's Breach Claim requires further analysis of the Release, which the Court of Appeal noted covered most of the claims against Ms. Rose.

C. Are the Defendants entitled to Costs Against the Trustee on the First Applications?

[67] *Rule* 10.33(2) sets out additional considerations that may be relevant to costs:

> In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:
>
> (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
> (b) a party's denial of or refusal to admit anything that should have been admitted;
> (c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;
> (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
> (e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;
> (f) a contravention of or non-compliance with these rules or an order;
> (g) whether a party has engaged in misconduct;
> […]

[68] In my view, the only factor that may be relevant is (f) because Ms. Rose did not comply with my order requiring the parties to provide costs submissions by July 7, 2021. Her submissions were filed on July 14, 2021.

[69] Ms. Rose's brief states that she "adopts and repeats the submissions and arguments set out in the brief of law of the Perpetual Defendants." Nevertheless, while Ms. Rose and the Perpetual Defendants may agree on certain issues, they are separate parties in this litigation, both obligated to abide by court orders, including court-imposed deadlines.

D. Which parties were substantially successful in respect of the Second Application?

[70] As noted above, the Second Application focused on whether PEOC was insolvent at the time of the Asset Transaction or rendered insolvent by it or whether there was a transfer at undervalue. The Trustee opposed the Second Application, arguing that it was an abuse of process, given the outcome of the First Applications. For purposes of this costs application and based on the record as at the time the costs submissions were filed, I disagreed because the

Second Application addressed different threshold issues; the First Application focused solely on whether the transfer was at "arm's length": ***Second ABQB Decision*** at para 271.

[71] I concluded that PEOC was not insolvent at the time of the Asset Transaction or rendered insolvent by it: ***Second ABQB Decision*** at paras 180, 206, 249, 255, and 271-276. Consequently, I did not need to evaluate whether there was a transfer at undervalue: ***Second ABQB Decision*** at paras 62-64. Based on this decision, the Trustee was unsuccessful.

E. Is a Multiplier Warranted?

[72] The Trustee asserts that the "complex" and "novel" issues raised in the First Applications support enhanced costs in its favour. The Court of Appeal applied a five times multiplier in ***ABCA Costs Decision*** at para 7.

[73] The Defendants make the same argument in their own favour and further submit that the $217 million initial value of the Trustee's claim warrants this multiplier, since the costs incurred to defend the claim are reflective of this amount.

[74] Application of a multiplier may be warranted where the trial is long and complex and the quantum of damages claimed is significantly greater than $1.5 million: ***Stewart Estate v TAOA North Ltd***, 2016 ABCA 144 at para 24, citing ***Nexxtep Resources Ltd v Talisman Energy Inc***, 2012 ABQB 708 at para 24.

[75] The Court of Appeal has outlined three circumstances in which a multiplier of the tariffs in Column 5 may be applied: ***Stewart Estate*** at para 25. First, when the complexity of the action warrants it. Second, when the amount in dispute significantly exceeds $1.5 million. Third, when the conduct of one of the parties warrants a multiplier. However, this is "highly dependent on the facts and circumstances of each case": ***Stewart Estate*** at para 26.

[76] There is no doubt that the issues raised in this case are complex and involved novel issues. That said, this is not a trial. As the ***ABCA First Decision*** confirms, this is simply a summary application, and the matter needs to go to trial.

[77] In my view, a summary application that "front loads" heavy legal costs on a party at the outset of litigation poses a risk to the many litigants who do not have deep pockets. I find as a matter of policy that it would be inappropriate to award a significant multiplier in these circumstances. Further, in this case I am not convinced that the Trustee's argument about the "value of the litigation" is helpful because I have concluded that the value of the Oppression claim has been narrowed significantly.

[78] As a result, I award the Defendants costs on Column 5 without a multiplier.

G. Are the Perpetual Defendants entitled to Costs Against the Trustee on the Second Application?

[79] The Trustee concedes that the Perpetual Defendants succeeded on the Second Application. The issues are the quantum of costs to be awarded against the Trustee and whether costs should be awarded against the OWA and the Industry Intervenors as well.

[80] The Perpetual Defendants argue that the appropriate scale of costs on the Second Application is the same as for the First Applications, namely five times Column 5. The Trustee argues that the appropriate scale is Column 5 costs without a multiplier.

[81] The Trustee further submits that the award against it should be reduced because it did not oppose the Second Application or seek to cross-examine Mr. Schweitzer on his affidavit, which had the effect of expediting the application. By contrast, the Trustee argues that the Perpetual Defendants took various steps that lengthened proceedings, such as opposing the involvement of intervenors.

[82] Given my above analysis, I award the Perpetual Defendants costs against the Trustee based on Column 5 without a multiplier.

H. Are the Perpetual Defendants entitled to Costs against the OWA?

[83] The Perpetual Defendants seek costs against the OWA, arguing that its submissions were of limited assistance, as evidenced by how little I referenced them in my decision and by my conclusion that those submissions did not advance the Trustee's argument.

[84] The OWA submits that there is a general rule that a party who intervenes in the public interest is neither entitled to nor liable for costs: ***B(R) v Children's Aid Society of Metropolitan Toronto***, [1995] 1 SCR 315 at para 175. However, the Perpetual Defendants assert that the OWA has an interest in the litigation that may negate the public interest exception: ***Ritter v Hoag***, 2003 ABQB 401 at para 4.

[85] I agree that the OWA has an interest in the outcome of the litigation, but I do not accept that its interest is beyond the public good. The very essence of the OWA is to deal with orphan wells in a fashion that is beneficial to the larger community.

[86] Even if the objectives of the OWA went beyond the public good, I am of the view that it would be appropriate for me to deviate from the general rule in this case. The Court in ***Canadian Union of Postal Workers v Her Majesty in Right of Canada***, 2017 ONSC 6503 at para 31 listed six factors that should be considered in this regard. Applying those factors, I find as follows:

a. **Factor One** – What was the nature and extent of the OWA's interest in the issues that were before the Court and in the outcome of the proceeding?

   Answer – The OWA is directly affected by the issues raised in the Action. It offered a perspective to this Court that was useful given its position as the party ultimately responsible for abandoning and reclaiming orphaned oil and gas assets in Alberta.

   I recognize that it is in the interest of the OWA to decrease the number and frequency of abandoned and orphaned oil and gas assets and, therefore, its financial obligations. I find, however, that a sustainable abandonment and reclamation regime is necessary for a number of stakeholders within the larger community and that this is reflective of the public good.

b. **Factor Two** – What was the nature and extent of the OWA's involvement in the proceeding?

   Answer – The OWA's involvement served to better inform the Court of the implications of the Perpetual Defendants' position in the Action.

c. **Factor Three** – What are the OWA's resources?

Answer – The OWA is funded by oil and gas producers by way of an annual levy. Both the OWA and the industry participants who fund it would be directly affected by the outcome of this Action.

If it becomes routine practice to allow transactions in the nature of those at issue in this Action, the levy is likely to increase, which increases the overall burden on producers, impacting their profitability and solvency. At least as significant is the impact on landowners and the environment, if the decision results in delays in restoring the environment to its original condition. The OWA is uniquely situated to assist the Court to appreciate the consequences of any potential outcome, particularly with regard to the novel issues.

d. **Factor Four** – Was the OWA successful on the merits?

Answer – While the OWA was not successful in its arguments before me, that is only one element of the analysis. Given the nature and role of the OWA, I view this factor as neutral in these circumstances.

e. **Factor Five** – Did one of the parties anticipate or provoke the OWA's involvement?

Answer – While the Perpetual Defendants argued that the OWA was acting as an advocate for the Trustee, there was no evidence of that. The argument advanced by the Perpetual Defendants does not make it evidence.

f. **Factor Six** – Did the terms of the order granting leave to intervene address the possibility of a cost award?

Answer – The Order, filed on July 31, 2020, granting intervenor status to the OWA did not address a costs award. Consequently, I view this factor as neutral.

[87] Taking into account all of the foregoing, I find that the OWA intervened in the public interest and that costs should not be awarded against it.

I. Are the Perpetual Defendants entitled to Costs against the Industry Intervenors?

[88] The Perpetual Defendants submit that the Industry Intervenors were pursuing commercial interests and should not be entitled to rely on the public interest exception to awarding costs.

[89] There is no doubt that the Industry Intervenors have an interest in the outcome of this litigation. To the extent ARO is not funded by entities that are failing financially, the businesses represented by the Industry Intervenors are exposed to that financial burden. That notwithstanding, I am not persuaded that their interest is beyond the public good. The nature of

their interest ties directly into the operations and responsibility of the OWA, which is to deal with orphan wells in a fashion that is beneficial to the public.

[90] Even if the Industry Intervenors are motivated by their own financial benefit, it may be appropriate for me to deviate from the general rule in this case. I turn again to the six factors enumerated in ***Canadian Union of Postal Workers*** at para 31 and find as follows:

a. **Factor One** – What was the nature and extent of the Industry Intervenors' interest in the issues that were before the Court and in the outcome of the proceeding?

   Answer – The Industry Intervenors have an interest in the outcome of the litigation because the entities they represent are exposed to the financial risk of higher levies from the OWA in the future. Further, they offered this Court a useful perspective given their knowledge concerning abandoning and reclaiming orphaned oil and gas assets in Alberta.

b. **Factor Two** – What was the nature and extent of the Industry Intervenors' involvement in the proceeding?

   Answer – The Industry Intervenors' involvement served to better inform the Court of the implications flowing from the Perpetual Defendants' position in the Action.

c. **Factor Three** – What are the Industry Intervenors' resources?

   Answer – The Industry Intervenors have their own resources. That said, if it becomes routine practice to allow transactions in the nature of those at issue in this Action, the Industry Intervenors will be subject to an increase in the OWA levy, increasing the burden on all upstream producers in the industry and impacting their profitability and solvency. As mentioned above, there also will be an impact on landowners and the environment, if the decision results in delays in restoring the environment to its original condition. Similar to the OWA, the Industry Intervenors are uniquely situated to assist the Court to appreciate the consequences of any potential outcome, particularly with regard to the novel issues.

d. **Factor Four** – Were the Industry Intervenors successful on the merits?

   Answer – As with the OWA, the Industry Intervenors were not successful in their arguments, but that is only one element of the analysis. Given the contribution of Industry Intervenors to this judicial process, I view this factor as neutral in these circumstances.

e. **Factor Five** – Did one of the parties anticipate or provoke the Industry Intervenors involvement?

Answer – While the Perpetual Defendants suggested that the Industry Intervenors were acting as advocates for the Trustee, there was no evidence of that.

f. **Factor Six** – Did the terms of the order granting leave to intervene address the possibility of a cost award?

Answer – The Order filed on July 31, 2020, granting intervenor status to the Industry Intervenors did not address a costs award. Consequently, I view this factor as neutral.

[91] Taking into account all of the foregoing, I find that costs should not be awarded against the Industry Intervenors because they provided this Court with useful evidence based on their knowledge concerning abandoning and reclaiming orphaned oil and gas assets in Alberta. I make this determination notwithstanding that I did not find in favour of the Industry Intervenors and do so because of the broader policy perspectives that underlie this case.

J. Where possible, should the various Cost components be set off against each other?

[92] *Rule* 10.31(4) provides that:

> The Court may adjust the amount payable by way of deduction or set-off if the party that is liable to pay a costs award is entitled to receive an amount under a costs award

[93] In ***Colborne Capital Corp v 542775 Alberta Ltd***, 1999 ABCA 361 at para 29, the Court of Appeal directed that a costs award in favour of one party could be set off against costs awarded in favour of the other party. In its costs reasons in this case, the Court of Appeal referred to *Rule* 10.31(4) and directed that "all the awards of costs for and against the same parties may be set off against each other": ***ABCA Costs Decision*** at para 10.

[94] Consistent with *Rule* 10.31(4), the costs awarded against the Trustee may be set off against the costs awarded in favour of the Trustee.

VI. Conclusions

[95] Based on the facts and analysis, my conclusions on the above questions are as follows:

a. For the reasons outlined above, I find the Perpetual Defendants and Ms. Rose were the substantially successful parties on the First Applications. As a result, the Defendants are entitled to costs against the Trustee in respect of the First Applications on Column 5 without a multiplier.

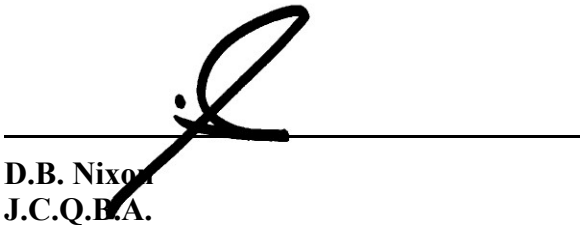
b. For purposes of this application, the Perpetual Defendants are entitled to Costs Against the Trustee in respect of the Second Application on Column 5 without a multiplier.

c. The Perpetual Defendants are not entitled to Costs against the OWA.

d. The Perpetual Defendants are not entitled to Costs against the Industry Intervenors.

e. The various Cost components should be set off against each other.

Submissions received as of the 23rd day of July 2021.
Dated at the City of Calgary, Alberta this 31st day of August 2022.



D.B. Nixon
J.C.Q.B.A.

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