

COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

COURT OF APPEAL FILE NUMBER: 1901-0255AC

TRIAL COURT FILE NUMBER: 1801-10960

REGISTRY OFFICE: Calgary

APPLICANT: Paul J. Darby

STATUS ON APPEAL: Intervener

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 Trustee in Bankruptcy of Sequoia Resources Corp., not in its personal capacity

STATUS ON APPLICATION: Respondents

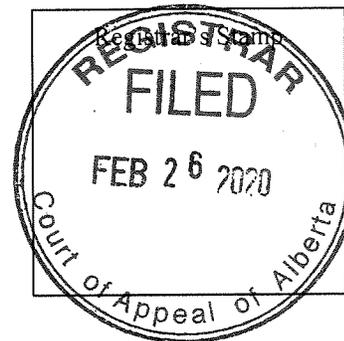
DOCUMENT: **APPLICATION OF PAUL J. DARBY,
INTERVENER**

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NOTICE TO RESPONDENTS:

Susan Riddell Rose, Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp., and PricewaterhouseCoopers Inc., LIT, in its capacity as Trustee in Bankruptcy of Sequoia Resources Corp., not in its personal capacity

WARNING

If you do not come to Court on the date and time shown below either in person or by your lawyer, the Court may give the applicant what it wants in your absence. You will be bound by any order that the Court makes. If you intend to rely on other evidence or a memorandum in support of your position when the application is heard or considered, you must file and serve those documents in compliance with the Rules. (Rule 14.41 and 14.43)

NOTICE TO RESPONDENTS:

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: June 18, 2020
Time: 9:30 a.m. or as soon thereafter as counsel may be heard
Where: Court of Appeal of Alberta, Calgary
Before: A Panel of the Court of Appeal

Nature of Application and Relief Sought:

1. An Order by a panel of the Court of Appeal (the “**Panel**”) to reconsider the decision issued on February 5, 2020 by Honourable Madam Justice Barbara L. Veldhuis (the “**Feb 5 Decision**”) refusing Paul James Darby (“**Mr. Darby**”) permission to file an application as an intervener (the “**Rule 9.13 Application**”) to correct, modify or change Reasons for Decision by Veldhuis J.A. dated January 29, 2020 (the “**Reasons**”) by correcting or striking findings in the Reasons regarding Mr. Darby’s professional reputation, honesty, integrity and professional ability (the “**Findings**”);
2. An Order by the Panel to reconsider the decision issued on February 11, 2020 (the “**Feb 11 Decision**”) by Veldhuis J.A. directing the Clerk of this Court to refuse to accept for filing an application by Mr. Darby to file an application for reconsideration by a Panel of the Feb 5 Decision and related relief (the “**Reconsideration Application**”);
3. Further, or in the alternative, an Order that a Panel, pursuant to Rule 14.38(1), hears this application by Mr. Darby for leave to appeal (the “**Leave to Appeal Application**”) against the Feb 5 Decision and against the Feb 11 Decision;
4. An Order by the Panel setting aside the Feb 5 Decision and the Feb. 11 Decision;
5. An Order by the Panel permitting Mr. Darby to intervene in this Appeal for the purpose of participating in the Application for Security Costs filed by Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp. (the “**Perpetual Parties**”) on September 24, 2019, and in the Application for Security Costs filed by Susan Riddell Rose (“**Rose**”) on September 23, 2019 (collectively, the “**Security Applications**”), including (a) the application for leave to appeal by PricewaterhouseCoopers Inc. in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. (the “**Trustee**”) against the Order to Post Security for Costs filed on February 12, 2020 (the “**Order to Post Security for Costs**”), and (b) any appeal against the Order to Post Security for Costs, should leave to appeal be granted;
6. An Order by the Panel correcting, striking, changing, or modifying the Reasons in order to correct or strike the Findings;
7. An Order sealing the Confidential Affidavit of Paul James Darby, sworn on February 10, 2020; and
8. Such further and other relief as this Court deems just.

Grounds for making this application:

Reconsideration Application

9. The Feb 5 Decision arose in response to a letter from Mr. Darby's counsel requesting confirmation from the Case Management Officer regarding the correct procedure for filing the Rule 9.13 Application (the "**Procedural Directions Letter**"). The Procedural Directions Letter simply sought procedural clarity, and did not seek permission to file the Rule 9.13 Application. Indeed, there was no requirement to obtain the Court's permission prior to filing the Rule 9.13 Application.
10. The Feb 5 Decision refusing permission to file the Rule 9.13 Application arises from a misapprehension of the law governing Rule 9.13 and governing the status of prospective interveners. Further, the Feb 5 Decision constitutes a denial of procedural fairness and natural justice. Reconsideration of the Decision by a Panel is the only way of ensuring that the Rule 9.13 Application is determined in a judicial manner that accords with the principles of fundamental fairness and natural justice.
11. The Feb 11 Decision arose from Mr. Darby's attempt to file the Reconsideration Application on Feb. 11, 2020. The Clerk of this Court was directed by Veldhuis J.A. not to accept filing of the Reconsideration Application. Mr. Darby requested reasons for the Feb 11 Decision, but none have been forthcoming to date.

Leave to Appeal Application

12. The Feb 5 Decision was issued without giving Mr. Darby the opportunity to have the Rule 9.13 Application filed, and without allowing Mr. Darby an opportunity to file affidavits or a Memorandum of Law.
13. The Feb 11 Decision was issued without giving Mr. Darby the opportunity to have the Reconsideration Application filed, and without allowing Mr. Darby an opportunity to file affidavits or a Memorandum of Law.
14. The Feb 5 Decision and the Feb 11 Decision were issued without giving Mr. Darby any hearing.
15. The Feb 5 Decision is wrong in law.
16. In respect of both the Feb 5 Decision and the Feb 11 Decision, Veldhuis J.A. did not exercise her discretion in a judicial manner, nor in accordance with the principles of fundamental justice.
17. The Leave to Appeal Application involves serious questions of general importance. Those questions are not frivolous, have a reasonable chance of success, and involve matter of policy, principle and/or law that might have precedential value.

18. The Panel has the discretion pursuant to Rule 14.38 (1) to hear this application at first instance.

Application to Intervene

19. Mr. Darby is directly, specially and significantly affected by the outcome of the Security Applications, and specifically by the Findings in the Reasons. As a result of the Findings, Mr. Darby's integrity and his professional and personal reputation are at stake in the Security Applications, impacting his career and his livelihood.
20. Mr. Darby's intervention in the Security Applications in his personal capacity is necessary so that he may address the Court's concerns with respect to his conduct, which he previously had no opportunity to address. This Honourable Court cannot properly or fairly decide the Security Applications without hearing Mr. Darby's response to the Findings, which are unique to him personally. Mr. Darby's interests in the proceedings are distinct from the other parties to the Security Applications and cannot be fully protected by these parties.
21. Mr. Darby's experience and insights are relevant and material to the Findings and need to be considered by the Court. Mr. Darby will provide particular evidence as to the practical, professional, and policy dilemmas that licenced insolvency trustees face as officers of the Court when their professional and ethical duties require them to take an active role in contested, adversarial proceedings.
22. Permitting Mr. Darby to intervene will not unduly delay the Security Applications and will not prejudice the parties to the Security Applications, nor will it widen the *lis* between the parties. Mr. Darby's application to intervene is specifically focussed on the Findings and their effect on him personally, and is not focussed on, or otherwise affecting the substantive legal dispute between the parties.

Application to Change or Modify the Reasons

23. The grounds for modifying or changing the Reasons to strike or correct the Findings are:
 - a. the Findings are based on a misapprehension of the evidence, the relevant legal principles, and the parties' positions related thereto;
 - b. the Findings were made despite Mr. Darby's reputation and integrity not being an issue that was ever raised by any of the parties, or by the Court, such that none of Mr. Darby, nor any of the other parties, ever had the opportunity to make any submissions or enter any evidence in relation to the Findings; and
 - c. the Findings amount to a miscarriage of justice causing grave prejudice, such that it is just and equitable to modify the Reasons.

Sealing Order

24. The Confidential Affidavit of Paul James Darby, sworn on February 10, 2020, contains confidential information respecting the Estate.
25. A sealing order is necessary to prevent the confidential information from being disclosed and jeopardizing the ability of the Trustee to administer the bankrupt estate for the benefits of the creditors.
26. The sealing order is the least restrictive means possible to prevent disclosure.
27. Such further and other basis as Counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

28. Affidavit of Paul James Darby sworn on February 10, 2020.
29. Confidential Affidavit of Paul James Darby sworn on February 10, 2020.
30. Affidavit of Paul James Darby sworn February 13, 2020 and filed on February 14, 2020.
31. Such other materials as counsel advises and this Honourable Court admits.

Applicable Acts, regulations and rules:

32. *Alberta Rules of Court*, AR 124/2010, Part 6, Division IV, and in particular, Rule 6.28 to 6.32; Rule 9.13; Part 14, Division 4 and Division 5; Rules 14.1, 14.2, 14.5 and 14.73.
33. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 13-38, 135, 136, and 187 and 197.
34. *Bankruptcy and Insolvency General Rules*, CRC c. 368, and in particular Rules 34-40.
35. *Judicature Act*, R.S.A. 2000, c. J-2.
36. Such other Acts, regulations or rules as counsel may advise.