

COURT OF APPEAL OF ALBERTA

Form 49
[Rule 13.19]

COURT OF APPEAL FILE NUMBER: 1901-0255AC
TRIAL COURT FILE NUMBER: 1801-10960
REGISTRY OFFICE: CALGARY
APPLICANTS: PERPETUAL ENERGY INC.,
PERPETUAL OPERATING CORP.,
PERPETUAL OPERATING TRUST
and SUSAN RIDDELL ROSE



STATUS ON APPEAL: RESPONDENTS
RESPONDENT: PRICEWATERHOUSECOOPERS
INC., LIT, in its capacity as the
TRUSTEE IN BANKRUPTCY OF
SEQUOIA RESOURCES CORP.
and not in its personal capacity

STATUS ON APPEAL: APPELLANT
DOCUMENT: AFFIDAVIT

ADDRESS FOR SERVICE AND
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AFFIDAVIT OF SUSAN RIDDELL ROSE

Sworn September 23, 2019

I, Susan Riddell Rose, of the City of Calgary, of the Province of Alberta, SWEAR AND SAY THAT:

Introduction

1. I am the President, Chief Executive Officer and a director of the Respondents Perpetual Energy Inc. and Perpetual Operating Corp., which is the trustee of Perpetual Operating Trust (collectively, **Perpetual**). I am also personally a Respondent in this appeal. I am authorized to swear this Affidavit on behalf of Perpetual.

2. As such, I have personal information regarding the matters set out in this Affidavit, except where I state that my information is from another source, in which case I believe that information to be true.

3. I swear this Affidavit in support of applications by me and Perpetual for security for costs of the within Appeal.

The Appellant

4. On March 23, 2018, the Appellant, PriceWaterhouseCoopers Inc. (**PwC**) was appointed as the trustee in bankruptcy (the **Trustee**) of Sequoia Resources Corp. (**Sequoia**).

The Trustee's Claims

5. On August 2, 2018, the Trustee filed the Statement of Claim in the proceeding below (Court of Queen's Bench no. 1801-10960) together with an application returnable August 30, 2018 (the **Trustee's Application**) and an affidavit sworn by Paul Darby, a PwC partner (the **Darby Affidavit**). The materials were served on Friday, August 3, 2018. Copies of the Statement of Claim and the Trustee's Application are attached as Exhibits 'A' and 'B'.

6. The Trustee's Application sought, among other things, judgment against me personally, without a trial, in an amount "not less than \$217,570,800.00".

7. The Trustee's claims comprised the following:

(a) a claim against all Defendants pursuant to s. 96(1)(b)(ii) of the *Bankruptcy and Insolvency Act* regarding an arm's length transaction completed approximately 18 months prior to the Trustee's appointment;

(b) a claim against me, Perpetual Energy Inc. and Perpetual Operating Corp. alleging oppression of the interests of two particular alleged creditors of Sequoia pursuant to ss. 239 and 242 of the Alberta *Business Corporations Act* (the **Oppression Claim**);

(c) a claim against me personally alleging that, as a director, I had breached my fiduciary duty and duty of care owed to the corporate predecessor of Sequoia (the **Director Claim**); and

(d) a claim against all Respondents alleging liability on "grounds of public policy", "statutory illegality" and "equity" in relation to the legislation governing the Alberta Energy Regulator (the **Public Policy Claim**).

8. On August 27, 2018, the Defendants filed Statements of Defence. Copies are attached as Exhibits 'C' and 'D'.

9. On the same day, the Defendants filed applications to stay the Trustee's Application (the **Stay Applications**) and applications to summarily dismiss the Trustee's claims (the **Dismissal Applications**). On September 21, and November 14, 2018, I filed amendments to my Dismissal Application, and on October 19, 2018 the Defendants filed further Amended Dismissal Applications. Copies of the ultimate Dismissal Applications are attached as Exhibits 'E' and 'F'.

10. On August 30, 2018, the parties appeared before Justice Jeffrey. The Trustee's position was that the Trustee's Application should be finally determined following a one-day hearing to be held in three months. The Defendants submitted that the Stay Applications and the Dismissal Applications should be determined first. Justice Jeffrey directed the parties to consult with Justice Horner regarding the appointment of a Calgary Commercial List justice to hear all applications, and that the Stay Applications be heard before the Trustee's Application.

11. On September 18, 2018, Justice Horner directed that the Stay Applications be heard by Justice Blair Nixon on November 8, 2018. Subsequently, the Trustee took the position that the Dismissal Applications should be heard at the same time. The Defendants concurred.

12. On October 3, 2018, Mark Schweitzer, Vice-President of Finance and Chief Financial Officer of Perpetual, swore an affidavit in support of the Stay Applications.

13. On October 19, 2018, I swore an affidavit in support of the Dismissal Applications.

14. On October 22, 2018, counsel for the Defendants cross-examined on the Darby Affidavit.

15. On October 26, 2018, counsel for the Trustee cross-examined me on my affidavit and Mr Schweitzer on his affidavit.

16. The parties submitted Briefs to Justice Nixon in advance of the November 8, 2018 hearing of the Stay Applications and Dismissal Applications.

17. On November 8 and 9, 2018, the parties appeared before Justice Nixon and made submissions.

18. In December 2018, Justice Nixon issued a series of written questions to counsel for the parties. On December 17, 2018, counsel re-attended before Nixon J., providing written answers and oral submissions.

19. On May 23, 2019, Justice Nixon sent counsel a letter asking for additional submissions on recent decisions of the Supreme Court of Canada and this Honourable Court. On June 4, 2019, the Defendants filed joint written submissions. On June 11, 2019, the Trustee filed a written response. On June 14, 2019, the Defendants filed a written reply.

Decision of the Court

20. On July 16, 2019, Justice Nixon's office wrote to counsel to advise that His Lordship would give an oral decision on August 15, 2019.

21. On August 15, 2019, Nixon J. gave oral reasons for the decision of the Court and advised that he would be issuing a "lengthy judgment" subsequently. A copy of the transcript of the oral reasons is attached as Exhibit 'G'.

22. Justice Nixon held, among other things, that:

(a) the Trustee is not entitled to status as a complainant for the purposes of the Oppression Claim (page 7, lines 23-5);

(b) there is no evidence of any oppression of any creditor interests (page 7, lines 27-38);

(c) the Oppression Claim should be struck as failing to disclose a reasonable cause of action (page 7, line 40 – page 8, line 3);

(d) the Public Policy Claim should be struck as failing to disclose a reasonable cause of action (page 10, lines 2-3);

(e) all of the Trustee's claims against me personally are barred by virtue of a written release in my favour (the **Release**) (page 10, line 5 – page 13, line 4):

(f) further with respect to the Release:

As I understand the Trustee's argument, it seeks monetary damages from Ms. Rose, apparently on the theory that she caused Perpetual Energy to require 198Co to agree to the Release. I find on the balance of probabilities that this allegation is without merit. I make this finding primarily because there is no evidence that Ms. Rose caused Perpetual Energy to do anything. Indeed, the evidence is to the contrary. [page 11, lines 5-9]

(g) further with respect to the Release:

If the Trustee's position is that section 122(3) of the ABCA precludes a corporation from entering into a mutual release with a former director, that would be exceptional. I make that comment for at least four reasons. First, the use of a release by business people in transactions is common practice. If I accept the position advanced by the Trustee, it will displace decades of business convention. I am not prepared to go down that path in the circumstances of this case. Second, the implication inherent in the position of the Trustee is that directors can never be released in transactions that involve an acquisition of control. If that was the law, directors would be exposed to liability for an indeterminate amount of time. Third, there are books written on the use of releases. In my review of that literature and indeed the case law, I find nothing that would support the proposition that's been advanced by the Trustee. Further, there is a need for finality. But for releases, a director may never achieve finality. That is an important element of the law in a number of circumstances. [page 12, lines 15-26]

(h) regarding my conduct:

Based on the evidence before me, I also find that Ms. Rose took her responsibilities as a director and officer of PEOC seriously, considered the best interests of PEOC, its stakeholders, and then exercised her business judgment to the best of her ability. ... [page 11, lines 28-30]

23. As of the date of this Affidavit, Justice Nixon has not issued his written reasons.

Trustee Appeal

24. On August 23, 2019, the Trustee filed a Civil Notice of Appeal which appeals the whole of the decision of Justice Nixon. A copy of the Notice of Appeal is attached as Exhibit 'H'.

Request for Security for Costs

25. On September 6, 2019, my counsel sent a letter to counsel for the Trustee which asked the Trustee to consent to an order providing security for my costs related to the Trustee's appeal. The letter confirmed that Perpetual is making the same request. A copy of the letter is attached as Exhibit 'I'.

26. The letter concluded:

Rose and the Perpetual defendants request that, by no later than September 11, 2019, PwC either confirm that it is personally liable for all costs as noted above, or that it will arrange to post commercially reasonable security for Rose's costs of the Appeal. In the case of a negative response or no response, Rose will file an application for security for costs without further notice.

27. With respect to certain points made in that letter:

(a) Attached as Exhibit 'J' is a copy of the Trustee's Preliminary Report dated April 11, 2018.

(b) A review of the Trustee's website regarding the Sequoia bankruptcy shows that the Trustee has not subsequently reported on the financial affairs of the estate of Sequoia, including on the costs and disbursements of the Trustee. On the other hand, the Trustee has likely incurred considerable expenses, including the legal costs of advancing this litigation.

(c) According to the disclosure by the Trustee, and based on my understanding of the effects of the Supreme Court of Canada's decision in *Redwater*—namely that the obligation of an insolvent company to perform asset retirement obligations is binding on a trustee in bankruptcy and must in practice be performed prior to payment of either secured or unsecured creditors, it appears that the unsecured creditors of Sequoia stand to recover little or nothing.

(d) Based on the foregoing, I believe that:

(i) at the time of the filing of the Trustee's claim, there were insufficient assets in the Sequoia estate to satisfy any cost claim made in favour of the Respondents;

(ii) currently, there are even fewer or no exigible assets in the Sequoia estate; and

(iii) an order of costs in favour of the Respondents against the estate of Sequoia will accordingly not be enforceable against any exigible assets in Alberta.

(e) As of September 8, 2019, my counsel have invoiced me \$510,585, and have anticipated unbilled but incurred expenses of approximately \$22,386, progress totalling approximately \$532,971 in respect of the Trustee's Application, the successful Dismissal Applications and the matters on appeal; and

(f) As of the date of this Affidavit, the Perpetual defendants' counsel have invoiced them \$708,148.70, and have work-in-progress of approximately \$99,912, for a total of approximately \$808,060.70, in respect of the Trustee's Application, the successful Dismissal Applications and the matters on appeal, in addition to the amounts incurred by me personally.

28. The Trustee's response to my counsel's letter is attached hereto as Exhibit 'K'.

29. Attached as Exhibit 'L' is a copy of a letter dated September 12, 2019 sent by counsel for the Trustee to this Court which made representations regarding the estate of Sequoia. Attached as Exhibit 'M' and 'N' are copies of letters sent by my counsel and Perpetual counsel in reply.

30. On October 22, 2018, Mr. Paul Darby of PwC was cross-examined on matters relating to his affidavit filed in support of the Trustee's Application. The transcript of Mr. Darby's examination is attached hereto as Exhibit 'O'.

31. Among other things, Mr. Darby was asked questions relating to how the Trustee is proposing to fund this litigation against me and Perpetual. Mr. Darby's sworn evidence was that the inspectors of Sequoia had been presented with estimated cash flow statements that projected certain legal costs be paid by the Sequoia estate, though he could not recall the projected monthly amounts. Mr. Darby went on to give this evidence:

Q. You can't recall ballpark what you estimated for the cost of the lawsuit?

A. No, because we did it on a monthly cash-flow basis, not on a single line item.

Q. Can you recall the monthly amounts?

A. No.

Q. Will you agree, based on what you've seen today, this lawsuit is going to cost in the millions of dollars, the trustee?

A. I can't estimate the – I don't know.

(Transcript of examination of Paul Darby, p. 87:1-10)

32. Mr. Darby went on to swear, under oath, that the trustee had made no arrangements with any other party to finance or fund the litigation:

MR. LEITL: So your answer is you don't know what [this litigation] is going to cost?

A. No. I don't know. I expect it to be expensive.

Q. And has the trustee made arrangements with any third parties for any backup financing?

A. No.

(Transcript of examination of Paul Darby, p. 87:19-24)

33. Based on the foregoing, I believe that the Trustee must be exhausting all cash available from the Sequoia estate to finance this litigation. I base this on the obvious fact that litigation costs are expensive, the current dispute is complex, and the Trustee has for at least 18 months been paying three sets of professional fees from the Sequoia estate: its own fees, those of Torys (its counsel with respect to the bankruptcy in general) and those of its counsel in this dispute. Considering these facts, and the available resources of Sequoia on the date of its bankruptcy, I believe that an order for costs against the estate of Sequoia will have no value.

34. I believe that I will incur solicitor-client costs of the Appeal in the range of \$400,000 or more, and that the Perpetual Respondents will also incur solicitor-client costs of the Appeal in the range of \$400,000 or more, for a total of \$800,000 in additional legal fees. In this regard, I have considered the following:

(a) This figure represents approximately 75% of the solicitor-client costs I have personally incurred in the proceeding below, and less than one third of the costs incurred by me and by Perpetual;

(b) The Trustee's appeal states that it is appealing the *whole* of the decision of Justice Nixon, despite the fact that Justice Nixon expressly found, among other things, that all claims against me are barred by the Release and that many of the claims disclose no reasonable cause of action;

(c) Because of the breadth of the Trustee's appeal, I expect that the Appeal Record will have to include all or substantially all of the evidence that was before Justice Nixon and all arguments made before Justin Nixon will have to be repeated;

(d) Counsel for the Trustee has advised that they will seek leave to file a Factum of 50 pages, which I understand is exceptionally long; and


(e) The Trustee seeks against me personally, as well as the other Defendants, damages of approximately \$220 million.

35. In the proceeding before Justice Nixon, the Defendants responded to the Trustee's Application promptly. Within three and a half months of service of the Trustee's Application, the Defendants cross-examined on the Darby Affidavit, filed responding evidence, filed lengthy written submissions and made oral submissions. The result was the striking or dismissal of all claims against me. The Defendants will be seeking a further hearing before Justice Nixon to request full indemnity costs against the Trustee personally; however, that will not be possible until Justice Nixon releases his written reasons.

36. According to PwC's website (www.pwc.com/gx/en/about/global-annual-revenue-2018.html), its global revenue in 2018 was US \$41.3 billion.

37. In all the circumstances, I believe that it would be just and fair that the Trustee be required to post reasonable security, such as a commercially reasonable letter of credit, for the solicitor-client costs of the Defendants.

SWORN BEFORE ME at the City of Calgary,)
in the Province of Alberta this 23 day of)
September, 2019.)


_____)
A Commissioner for Oaths in and for the)
Province of Alberta)


_____)
Susan Riddell Rose

Daniel Stephen Mills
Student-At-Law