

**COURT OF APPEAL OF ALBERTA**

**Form AP-3**  
[Rules 14.53]

COURT OF APPEAL FILE NUMBER: 1901-0255AC

TRIAL COURT FILE NUMBER: 1801-10960

REGISTRY OFFICE: CALGARY

DEFENDANTS: PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST and PERPETUAL OPERATING CORP.

STATUS ON APPEAL: RESPONDENTS

STATUS ON APPLICATION: APPLICANTS

PLAINTIFF: 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

STATUS ON APPLICATION: RESPONDENT

OTHER PARTY (DEFENDANT/RESPONDENT ON APPEAL) SUSAN RIDDELL ROSE

DOCUMENT: **APPLICATION FOR SECURITY FOR COSTS**

**BY PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST and PERPETUAL OPERATING CORP.**

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**NOTICE TO RESPONDENT:** PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity

**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: ~~October 31, 2019~~ TO BE DETERMINED  
Time: 9:30 AM  
Where: Court of Appeal of Alberta  
2600, 450 - 1st St. S.W.  
Calgary, AB T2P 5H1  
Before: Single appeal judge (Rules 14.37, 14.67)

**WARNING**

If you do not come to Court 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 want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence or prepare a memorandum in response to the application, you must file and serve those documents in compliance with the Rules. (Rule 14.41 and 14.43)

### **Nature of Application and Relief Sought:**

1. The Respondents in this Appeal, Perpetual Energy Inc, Perpetual Operating Trust and Perpetual Operating Corp. (together, **Perpetual**), seek an Order:
  - (a) directing PricewaterhouseCoopers Inc., LIT. (the **Trustee**), in its capacity as trustee in bankruptcy of Sequoia Resources Corp. (**Sequoia**), to pay to the clerk of the Court of Appeal of Alberta security for costs of the Trustee's appeal (the **Security**), in the amount of \$400,000 or in the alternative, calculated on the basis of five times Schedule C, Column 5 of the *Alberta Rules of Court*;
  - (b) directing the Security be held by the Clerk until further order of this Honourable Court as security for any costs award in favour of Perpetual in this Appeal;
  - (c) directing the Security take one of the following forms:
    - (i) cash;
    - (ii) a bond or letter of credit or similar instrument securing payment of the Security on terms acceptable to Perpetual or this Honourable Court;
    - (iii) a written undertaking from the Trustee in its personal capacity to pay any and all costs of this Action and this Appeal when due and owing to Perpetual; or
    - (iv) a written undertaking or guarantee of the payment of costs to Perpetual from another party and on such terms as may be acceptable to Perpetual or this Honourable Court; and
  - (d) directing that if the Security is not posted within 30 days of the date of this Honourable Court's order, this Appeal is deemed to be abandoned by the Trustee and will be struck;
  - (e) granting Perpetual costs of this application; and
  - (f) granting such other relief that this Honourable Court determines just.

### **Grounds for making this application:**

2. Perpetual relies on the application for security for costs filed by the other Respondent in this Appeal, Susan Riddell Rose.
3. In 2016, Perpetual Energy Inc. agreed to sell assets to an unrelated third party (the **Purchaser**), effected by the sale of shares of a subsidiary (the **Aggregate Transaction**).

4. The Aggregate Transaction was effected through various steps. One of those steps was combining the beneficial interest in the assets in the subsidiary trustee, which already held the legal interest to those same assets (the **Asset Transaction**). The shares of the subsidiary trustee were then sold to the Purchaser.
5. The Purchaser then renamed the purchased company Sequoia and operated the company for 17 months. Sequoia then assigned itself into bankruptcy.
6. Almost two years after the Aggregate Transaction, the Trustee sued Perpetual, alleging, among other things, that the Asset Transaction constituted a transfer at undervalue within the meaning of s. 96 of the *Bankruptcy and Insolvency Act* (the **BIA**), amounted to oppression under the *Business Corporations Act* (Alberta), and was contrary to public policy, statutory illegality and equitable grounds.
7. Perpetual applied to summarily dismiss or strike all of the Trustee's claims. On August 15, 2019, the Honourable Justice Nixon issued oral reasons for judgment dismissing or striking all of the claims except for the claim under the **BIA**. Justice Nixon stated he intends to issue written reasons. The Parties are waiting for the written reasons to prepare the form of order.
8. The Trustee has appealed the decision of the Honourable Justice D.B. Nixon.
9. Perpetual has asked the Trustee to agree to be personally liable for any costs that may be owing to Perpetual in respect of the Action or the Appeal.
10. The Trustee has not agreed to pay costs to Perpetual for the struck claims nor to bear any personal responsibility for those costs or any costs resulting from its appeal.
11. Unless the Trustee agrees to be personally liable for Perpetual's costs, it is unlikely that Perpetual will be able to collect a costs award from Sequoia's bankrupt estate in this matter. The secured claims against Sequoia exceed the value of any remaining funds in Sequoia's estate and would rank in priority to a preferred unsecured claim for payment of costs.
12. There is little merit to the Trustee's appeal:
  - (a) In striking the claim for oppression, Justice Nixon held that the Trustee did not qualify as a complainant under the *Business Corporations Act*. That discretionary decision is entitled to significant deference.
  - (b) In striking the Trustee's claims that the Aggregate Transaction is void for being contrary to public policy, or on the basis of statutory illegality and equitable grounds, Justice Nixon found the claims were hopeless.

13. The Trustee's ability to pursue its appeal will not be unduly prejudiced by an order to post security for costs.

**Material or evidence to be relied on:**

14. The Affidavit of Susan Riddell Rose, filed.
15. The Appeal Record, filed.
16. Such other materials as counsel advises and this Honourable Court admits.

**Applicable Acts, regulations and rules**

17. *Alberta Rules of Court*, Alta. Reg. 124/2010, Rules 4.22, 14.37, 14.67.
18. *Business Corporations Act*, RSA 2000, c. B-9, s. 254.
19. Such other Acts and regulations as counsel may advise.