In the Court of Appeal of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABCA 254

Date: 20200629
Docket: 1901-0255-AC
Registry: Calgary

Between:

PricewatershouseCoopers Inc, LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp and not in its personal capacity

Applicant
(Respondents on Cross-Application)
(Appellant)

- and -

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

Respondents
(Applicants on Cross-Application)
(Respondents)

Paul J. Darby

Intervener
(Applicant)

- and -

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

Respondents

Memorandum of Judgment
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Michelle Crighton
The Honourable Madam Justice Ritu Khullar

Application by Trustee, PricewaterhouseCoopers Inc for Permission to Appeal
Application by Mr. Darby for Permission to Intervene in the Permission to Appeal
Application by Mr. Darby for Permission to Intervene in the Security for Costs Application
Application by Mr. Darby to seal a Confidential Affidavit and a Confidential Transcript
Application by the Respondents', Perpetual Energy Inc, Perpetual Operating Trust, Perpetual Operating Corp and Susan Riddell Rose for Costs
Application by Mr. Darby for Permission to Intervene in the Substantive Appeal

Memorandum of Judgment

The Court:

[1] There are a number of applications before the Panel arising from the January 29, 2020 decision of the chambers judge ordering PricewaterhouseCoopers, the trustee of the bankrupt estate, to post security for costs for the benefit of the respondents: 2020 ABCA 36. The applications were referred to a Panel of this Court by the chambers judge exercising her discretion pursuant to r 14.37(2)(f) of the *Alberta Rules of Court*, AR 124/2010. In light of that referral, any application that relates to the chamber judge's refusal to refer matters to a Panel for determination is moot and we will not consider it further.

[2] What remains are the following applications:

a) The trustee's application to set aside or vary the January 29, 2020 order, to change or modify the reasons or in the alternative for permission to appeal the security for costs order including the reasons;

b) Mr. Darby's application to intervene in the permission application, in the appeal in the event permission is granted, and as clarified during oral argument, in the appeal proper. In addition, he seeks permission to seal his affidavit against public access and permission to rely on it in support of his application to intervene; and

c) The respondents' application for solicitor/client costs and in the alternative for enhanced costs against the trustee personally for their successful application for security for costs before the chambers judge.

[3] We pause to note that, as part of his application for a sealing order, Mr. Darby seeks to refer to his "Confidential Affidavit" sworn February 10, 2020 which provides "confidential, private and commercially sensitive details and records relating to the Estate and its stakeholders", and, in addition, to the related transcript of the questioning of him on that affidavit which occurred on May 26, 2020. Neither have been filed nor are they evidence at this point. The respondents do not object to the proposed sealing order or to the filing of the confidential information, but they oppose the balance of the trustee's and Mr. Darby's applications. The trustee's permission to appeal application does not rely on the Confidential Affidavit, but rather on a different affidavit from Mr. Darby dated October 18, 2019, the cross-examination of him on that affidavit on November 6, 2019 and related answers to undertaking. The trustee, of course, also relies on Mr. Darby's affidavit dated February 13, 2020 filed in support of its permission application, which does not include or refer to the confidential information.

[4] During oral argument, the panel dismissed each of Mr. Darby's applications and the trustee's application for permission to appeal with reasons to follow. As a result, the sealing

application became moot. It was agreed that copies of the material for which a sealing order was sought that had been provided to the Panel, but not filed, would be destroyed. The panel reserved on the issue of costs. We begin with our reasons for dismissing the trustee's application for permission to appeal followed by our reasons for dismissing Mr. Darby's applications. We conclude with our decision on costs.

[5] The trustee, in its filed application, seeks an order setting aside the chambers judge's January 29, 2020 decision, an order striking or varying the reasons, and in the alternative, permission to appeal that decision. We see no merit in the first two remedies. Aside from jurisdictional defects, both are actually thinly disguised appeals of her decision which requires permission to appeal. At best, they are premature and accordingly beyond the reach of this panel. At worst, the relief sought trenches on judicial independence to the extent it seeks to strike out or restate the chambers judge's reasoning process because it offends a witness who participated in the litigation process.

[6] With respect to the alternative application for permission to appeal a decision of a single appeal judge under r 14.5(1)(a), the applicant must establish there is: (a) a question of general importance; (b) a possible error of law; (c) an unreasonable exercise of discretion; or (d) a misapprehension of important facts: ***Settlement Lenders Inc v Blicharz***, 2016 ABCA 109 at para 1, leave to appeal denied, [2016] SCCA No 275 (QL). In our view the trustee has failed to do so.

[7] The trustee commenced an action against the respondents on behalf of the bankrupt estate. That action was largely dismissed and the applicant trustee appealed that decision. The respondents applied for, and were granted, security for costs of that appeal based on the chambers judge's assessment of the evidence before her.

[8] While the applicant casts the arguments as questions of general importance, they are simply complaints about how the chambers judge resolved the gaps in the evidentiary record that was before her. She applied the correct test and concluded that she was not satisfied the bankrupt estate on whose behalf the action was advanced would be able to satisfy any cost award that might flow from a dismissal of the applicant's appeal.

[9] We reject the trustee's argument that the chambers judge's decision will require trustees in bankruptcy to breach confidentiality obligations or to respond in any particular way when called upon to respond to an application for security for costs. The trustee was not obliged to file a responding affidavit if it considered the respondents had not met the test but, having done so, the respondents were entitled to examine Mr. Darby on the affidavit he filed. The chambers judge reviewed the entirety of the record before her and merely identified what she found to have been inadequacies in the response and in Mr. Darby's comportment in that context. Absent any meaningfully responsive evidence from the trustee on the question to be determined, the chambers judge concluded that security was warranted. She was required to balance evidence of exigible assets available to pay a cost award against the merits of the underlying appeal and the prejudice any order to post security for costs would cause relative to the ability to continue that action. We

see no error in her approach and no basis upon which this Court would grant permission to appeal that decision.

[10] With respect to Mr. Darby's multiple applications, we observe firstly that it is unusual to apply for permission to intervene at the permission stage. Rather, such applications are typically, though not always, made in extant appeals or after permission to appeal has been granted and for obvious reasons. An intervenor is required to provide a broader or different perspective than that provided by the parties to the dispute that will assist the court to decide the issues on appeal. Mr. Darby concedes his interest is purely personal, and given that the trustee seeks the same relief that Mr. Darby seeks, we see no justification for allowing Mr. Darby to advance his personal interests in a matter for which permission has not yet been granted. The application to intervene in the trustee's application for permission to appeal the security for costs order is therefore dismissed.

[11] Given our decision to dismiss the trustee's application for permission to appeal, it is unnecessary for this panel to consider Mr. Darby's application to intervene in a non-existent appeal. However, because he also sought permission to intervene in the main appeal, our reasons for dismissing that application follow.

[12] We note that Mr. Darby's application to intervene contains no suggestion he can or even may contribute to this court's understanding of the legal issues at play in the application, or in the issues in the merits of the appeal. Mr. Darby swore an affidavit for use in the proceedings, but he was not a party to the application the respondents filed. He inserted himself into the process for admittedly personal reasons to "correct" language he considers to have been unfair and therefore detrimental to his reputation, and that was the sole purpose behind his applications.

[13] Mr. Darby argues that an officer of the court whose integrity is at risk as a result of findings made by a lower court is "typically" granted leave to intervene to be able to defend his reputation. We disagree.

[14] First, many of the cases provided in support of the proposition simply do not apply to the facts of this case of challenging comments in a judge's reasons.

[15] For instance, some deal with an appeal where the grounds are ineffective or negligent trial counsel, and the counsel is permitted leave to intervene in an application for fresh evidence or in the appeal proper: ***SMTCL Canada Inc v MasterTech Inc***, 2017 ONCA 291 at para 4, [2017] OJ No 1740 (QL); ***R v West*** 2009 NSCA 63, [2009] NSJ No 253 (QL); ***W(D) v W(D)***, [2003] OJ No. 5222 (CA) at para 4, 128 ACWS (3d) 426. That approach has not been followed thus far in this province: ***R v BP***, 2010 ABQB 204 at para 15, [2010] AJ No 352 (QL).

[16] Two cases are closer to this fact situation. In ***Butty v Butty*** (2009), 98 OR (3d) 713 (CA), a trial judge severely criticized the conduct of one of the lawyers in his reasons. The matter was appealed though ineffective counsel was not a ground of appeal. A single judge of the Ontario Court of Appeal permitted the lawyer to intervene in the appeal to protect his integrity, and there

was no indication that the lawyer's interests would be addressed by either party in the appeal. We are not persuaded by the reasons or the approach.

[17] A different approach is seen in ***United Pacific Capital Ltd v Piché*** 2005 BCSC 1018, [2005] BCJ No 1522 (QL). A lawyer who was not a party or counsel applied to the trial judge to excise a paragraph of the trial reasons which, the lawyer argued, impugned his reputation. The trial judge dismissed the application, observing at para 8 that, "[f]or the most part, the reputations of non-parties must be protected by judicial restraint rather than by affording them rights to control the process".

[18] Ultimately the determination about whether a non-party is permitted to intervene for the purpose articulated by Mr. Darby should be considered within the context of well-established legal principles.

[19] First, an appeal is from an order, not reasons: ***Elizabeth Metis Settlement v Metis Settlement***, 2004 ABCA 39 at para 1, [2004] AJ No 99 (QL); ***Fontaine v Canada (Attorney General)***, 2018 ONCA 1009 at para 23, [2018] OJ No 6477 (QL).

[20] Second, on an application to intervene, the test in Alberta is found in ***Grant Thornton Ltd v Alberta Energy Regulator***, 2016 ABCA 238 at paras 7-13, [2016] AJ no 790 (QL). The factors to be considered are whether the intervenor: (1) is directly affected; (2) is necessary to properly decide the matter; (3) has interests in the proceedings that will not be fully protected; (4) can contribute useful and different submission expertise; (5) will not unduly delay the proceedings; (6) will suffer any possible prejudice; (7) will widen the dispute between the parties; (8) will transform the court into a political arena. Ultimately these factors assist in determining whether an applicant will be affected by the outcome of the appeal, *and* whether they can offer any expertise or fresh perspective on the subject matter that will be helpful in resolving the appeal.

[21] The application of this test to these facts demonstrates the futility of Mr. Darby's position. While he has an interest in his reputation, there is no intersection between Mr. Darby's reputation and the legal issues in the substantive appeal. His intervention is not necessary to assist the court to decide the issues; he has no different perspective or expertise to offer this court. He cannot even say that his personal interest in his reputation will not be fully protected, given that the trustee (which is Mr. Darby wearing his professional hat) supported his applications and is the appellant in the substantive appeal.

[22] In an exceptional case, the court might allow an intervention by a non-party in an appeal to protect his or her reputation, assuming the test for intervention can be met. But this case is not one of them.

[23] Finally, on the issues of costs the parties agree the panel assigned to hear the substantive appeal will be in the best position to determine the costs for the security for costs application and for the application for permission to appeal that decision. We agree.

[24] Mr. Darby concedes that since his involvement is at an end, costs are payable by him to the respondents. The parties requested the opportunity to consider their respective positions regarding costs after having an opportunity to review the panel's reasons for dismissing Mr. Darby's applications. In the event the parties are unable to resolve the issue of costs and the respondents wish to apply for costs on a solicitor client or other enhanced basis, they are to do so within 5 days of this decision being issued in a letter no longer than 5 pages. Mr. Darby will have 5 days after the respondents' submissions are filed to respond in a letter also limited to 5 pages.

Appeal heard on June 18, 2020

Memorandum filed at Calgary, Alberta
this 29th day of June, 2020

REGISTRAR
FILED
29 Jun 2020
KH
Court of Appeal of Alberta

Wakeling J.A.

Crighton J.A.

Khullar J.A

Appearances:

R. de Waal/L. Rasmussen
for the Appellant

D.J. McDonald, QC/ P.G. Chiswell
for the Respondents, Perpetual Energy Inc, Perpetual Operating Trust, Perpetual Operating Corp

S.H.L Leitl/G. Benediktsson
for the Respondent, Susan Riddell Rose

J.G.A. Kruger, QC
for the Intervenor