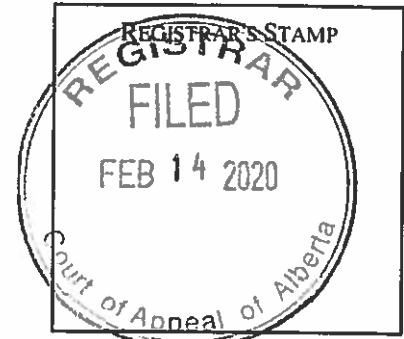


COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBERS: 1901-0255AC

TRIAL COURT FILE NUMBER: 1801-10960

REGISTRY OFFICE: CALGARY

APPLICANT: 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

RESPONDENTS: PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. and SUSAN RIDDELL ROSE

STATUS ON APPEAL: RESPONDENTS

DOCUMENT: MEMORANDUM OF ARGUMENT OF PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP.

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Introduction

1. PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. (the “Trustee”) seeks an Order directing that the Trustee’s Application filed on February 10, 2020 (the “Trustee’s Application”) is referred to a panel of the Court of Appeal pursuant to Rule 14.37(2)(f).

A Single Appeal Judge may Refer an Application to a Panel

2. Rule 14.37(2)(f) of the *Alberta Rules of Court* (the “Rules”) provides that “a single appeal judge may refer any application to a panel of the Court of Appeal.”¹
3. A single appeal judge has broad discretion to refer an application to a panel:
 - 3.1. In *R v Canto*, Veldhuis J.A., as a single appeal judge, found that an application to extend the time to file a notice of appeal² was an “appropriate” application to refer to a panel pursuant to Rule 14.37(2)(f) in light of several recent decisions from the Court of Appeal considering similar extension applications.³
 - 3.2. In *Goodswimmer v. Canada (Attorney General)*, a single appeal judge referred a stay application to a panel of the Court of Appeal pursuant to Rule 14.37(2)(f) on the basis that a decision by a panel would provide greater certainty:

Some greater certainty may be helpful to all the parties involved and accordingly, pursuant to r 14.37(2)(f), this matter is referred to a panel of the Court of Appeal as scheduled on April 5, 2017.⁴

¹ *Alberta Rules of Court*, AR 124/2010, s. 14.37(2)(f) [Trustee’s Authorities, Tab 1]

² *R v Canto*, 2015 ABCA 151 [Trustee’s Authorities, Tab 2]

³ *Ibid*, at para. 5 [Trustee’s Authorities, Tab 2]

⁴ *Goodswimmer v. Canada (Attorney General)*, 2017 ABCA 64, at para. 5 [Trustee’s Authorities, Tab 3]

- 3.3. In *Clark v Pezzente*, a single appeal judge referred to a panel of the Court of Appeal an application for permission to appeal a decision in which the judge had criticized the applicant and declared him a vexatious litigant.⁵

Referral of the Trustee's Application to a Panel would be Appropriate

General Considerations

4. Rule 505(6), the predecessor to Rule 14.5(2), required the single judge who had made the decision to also decide the application for permission to appeal.⁶
5. The new Rule 14.5(2) provides that permission to appeal a decision of a single judge "must be sought from" the single appeal judge who made the decision,⁷ but the Rule no longer requires a single appeal judge to decide an application for permission to appeal from the judge's own decision.⁸
6. This change, away from requiring that single appeal judges hear applications for leave to appeal their own decisions, is consistent with a long line of authority noting the heightened potential for a reasonable apprehension of bias in those circumstances.

- 6.1. In *Prefontaine*, decided under the previous, mandatory version of Rule 14.5(2), Berger J.A. noted that:

⁵ *Clark v Pezzente*, 2018 ABCA 76 (*Clark*), at para. 7-10 [Trustee's Authorities, Tab 4]

⁶ Rule 505(6) of the 1968 version of the Rules provided that no judgment or order of a single appeal justice could be appealed "except by leave of the justice giving the judgment or making the order". See: *Prefontaine v. Minister of National Revenue*, 2001 ABCA 299 (*Prefontaine*), at paras. 2 and 6 [Trustee's Authorities, Tab 5]

⁷ *Alberta Rules of Court*, ss. 14.5(1) and (2) [Trustee's Authorities, Tab 1]

⁸ *Prefontaine*, at para. 6 [Trustee's Authorities, Tab 5]; *Alberta Rules of Court*, AR 124/2010, s. 14.5(2) [Trustee's Authorities, Tab 1]

Notwithstanding the presumption of neutrality and the significant of the oath of office taken by judges, a reasonable person properly informed would apprehend bias on the part of a judge called upon to decide whether his judgment should be appealed.⁹

In support of this conclusion in principle, Berger J.A. referred to s. 10 of the *Court of Appeal Act* (the predecessor to current s. 11), which provided that “no judge” who “determined the matter being reheard” can “sit as one of the judges hearing the matter”.¹⁰

6.2. In *Oommen*, Berger J.A. considered an application for permission to appeal a decision of another single appeal judge.¹¹ His Lordship noted that the single appeal judge whose decision was at issue may have had regard to the *Prefontaine* decision and s. 11 of the *Court of Appeal Act* in declining to decide the application for permission to appeal.¹²

6.3. Similarly, in *Blicharz*, Berger J.A. found that “to the extent that” a letter received from the applicant constituted an application for leave to appeal a previous Order of His Lordship, the application would be heard by another single appeal judge.¹³

⁹ *Prefontaine*, *supra*, at para. 7 [Trustee’s Authorities, Tab 5]

¹⁰ *Ibid*, citing *Court of Appeal Act*, RSA 1980, c C-28, s. 10; *Court of Appeal Act*, RSA 2000, c C-30, s. 11 [Trustee’s Authorities, Tab 6]

¹¹ *Oomen v. Alberta (Law Enforcement Review Board)*, 2011 ABCA 141, at para 1 [Trustee’s Authorities, Tab 7]

¹² *Ibid*, at para. 5 [Trustee’s Authorities, Tab 7]

¹³ *DL Pollock Professional Corporation v Blicharz*, 2018 ABCA 283, at para. 5 [Trustee’s Authorities, Tab 8]

Specific Considerations

7. In *Yukon Francophone School Board*, the Supreme Court of Canada cited with approval the following test for determining whether there is a reasonable apprehension of bias:

...what would an informed person, viewing the matter realistically and practically – and having thought through the matter – conclude. *Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.*¹⁴ [Emphasis added.]

8. Having regard to this test and the circumstances of this case, an informed person, viewing the matter realistically and practically, would think that Veldhuis J.A., consciously or unconsciously, is less likely than not to decide the Trustee's Application fairly:

8.1. Veldhuis J.A. has strongly criticized the behaviour of the Trustee's representative, Mr. Darby, including for what Her Ladyship found to have been his failure to act in accordance with his duty of impartiality and candour as an officer of the Court, without giving him notice or an opportunity to address those questions.

8.2. Veldhuis J.A. intervened in communications between counsel for Mr. Darby and the Case Management Officer relating to a scheduling issue before an application had been filed, then refused to allow Mr. Darby to even file an application to challenge the findings against him, without giving Mr. Darby notice that such an Order was being contemplated and without giving Mr. Darby an opportunity to address those issues.

¹⁴ *Yukon Francophone School Board Education Area No 23 v Yukon Territory (Attorney General)*, 2015 SCC 25, at para 20 [Trustee's Authorities, Tab 9]

- 8.3. Veldhuis J.A. intervened again when counsel for Mr. Darby attempted to file an application to challenge Her Ladyship’s refusal to allow the filing of his first application and again refused to even allow an application to be filed – again without notice to Mr. Darby, without hearing from Mr. Darby or his counsel and without providing written reasons for Her Ladyship’s decision.
9. Having regard to the general considerations presented by asking any judge to determine whether an appeal from his or her own decision can proceed and having regard to the specific considerations discussed above, an informed person would think it “more likely than not” that Veldhuis J.A., “whether consciously or unconsciously, would not decide fairly.”¹⁵
10. As noted by Abella J. in concluding that a reasonable apprehension of bias had been established in *Yukon Francophone School Board*:¹⁶

The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process. [Emphasis in original.]¹⁷

11. Accordingly, the Trustee’s Application should be referred to a panel of the Court of Appeal, pursuant to Rule 14.37(2)(f).

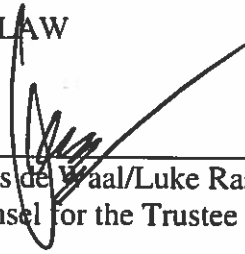
Calgary, Alberta
February 13, 2020

Estimated Time for
Argument: 15 minutes

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per:



Rinus de Waal/Luke Rasmussen
Counsel for the Trustee (Appellant/Applicant)

¹⁵ *Ibid* [Trustee’s Authorities, Tab 9]

¹⁶ *Ibid*, at paras. 38 [Trustee’s Authorities, Tab 9]

¹⁷ *Ibid*, at para. 22 [Trustee’s Authorities, Tab 9]

TABLE OF AUTHORITIES

1. *Alberta Rules of Court*, AR 124/2010, ss. 14.5 and 14.37
2. *R v Canto*, 2015 ABCA 151
3. *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 64
4. *Clark v Pezzente*, 2018 ABCA 76
5. *Prefontaine v. Minister of National Revenue*, 2001 ABCA 299
6. *Court of Appeal Act*, RSA 2000, c C-30, s. 11
7. *Oomen v. Alberta (Law Enforcement Review Board)*, 2011 ABCA 141
8. *DL Pollock Professional Corporation v Blicharz*, 2018 ABCA 283
9. *Yukon Francophone School Board Education Area No 23 v Yukon Territory (Attorney General)*, 2015 SCC 25