

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

STATUS ON APPEAL: RESPONDENTS/APPELLANTS

DOCUMENT: AFFIDAVIT

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AFFIDAVIT OF PAUL J. DARBY
SWORN ON FEBRUARY 13, 2020

I, Paul J. Darby, of Calgary, Alberta, SWEAR AND SAY THAT:


1. I am a Senior Vice President with PricewaterhouseCoopers Inc., LIT, the Trustee in Bankruptcy for Sequoia Resources Corp. (the "Trustee"). I have personal knowledge of

the facts and matters in this affidavit except where the context indicates otherwise. Where I have stated something on the basis of information, the source of the information, unless I have indicated otherwise, is my personal counsel in this matter, Josef Kruger, Q.C. and his associate Garrett Finegan of Borden Ladner Gervais LLP and I believe their information to be true.

2. On January 29, 2020, Veldhuis J.A. issued Reasons for Decision (the “**Reasons**”), directing the Trustee to post security for costs (the “**Security for Costs Order**”). I am informed by the Trustee’s counsel that, attached as **Exhibit 1**, is a letter from the Court of Appeal enclosing a copy of the Reasons.
3. On February 4, 2020, my personal counsel sent a letter to the Case Management Officer of the Court of Appeal (the “**CMO**”). I am informed **Exhibit 2** is a copy of that letter.
4. On February 5, 2020, the CMO and my personal counsel exchanged email.
 - 4.1. I am informed that the documents at **Exhibit 3** are copies of the email, with attachments, including copies of my application for an Order, allowing me to intervene in the security for costs proceedings (the “**Intervener Application**”).
 - 4.2. I am also informed that copies of additional emails exchanged between the CMO and my personal counsel on February 5, with a letter attachment received by my counsel from the CMO (the “**February 5 Letter**”), are attached as **Exhibit 4**. I am informed that the February 5 letter advised my counsel that Veldhuis J.A. had refused permission to file the Intervener Application (the “**February 5 Decision**”).
5. On February 10, 2020, the Trustee filed an application seeking an Order, setting aside or varying the Security for Costs Order or, alternatively, granting the Trustee permission to appeal the Security for Costs Order, among other things (the “**Trustee’s Application**”). I am informed by the Trustee’s counsel that filed copies of the Trustee’s Application and Memorandum of Argument are attached as **Exhibits 5 and 6**.
6. On February 11, 2020, my personal counsel sent a letter to the CMO (the “**February 11 Letter**”).
 - 6.1. I am informed that **Exhibit 7** is a copy of the February 11 Letter, which enclosed the application and memorandum of argument, attached as **Exhibits 8 and 9**. The application seeks an Order reconsidering Veldhuis J.A.’s February 5 Decision or granting me leave to appeal (the “**Reconsideration Application**”), to be heard by a panel of the Court of Appeal.
 - 6.2. I am informed that, as set out in the February 11 Letter, Veldhuis J.A. again refused even to allow the Reconsideration Application to be filed.

I swear this affidavit in support of the application of the Trustee for an Order referring the Trustee's Application to a panel of the Court of Appeal for a hearing.

SWORN BEFORE ME at Calgary)
Alberta, this 12th day of February, 2020)



Luke Rasmussen)
A Commissioner for Oaths in and for the)
Province of Alberta)



PAUL J. DARBY)

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January 28, 2020

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Re: ***Pricewaterhousecoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others***
Appeal No. 1901-0255AC

This is to advise that the reserved judgment in the above-named case will be released the morning of January 29, 2020. On that day, between 9:30 a.m. and 10:00 a.m., a copy of the judgment will be sent to you as set out above.

That same day, the judgment will also be sent to the Canadian Legal Information Institute (CanLII) at 10:00 a.m. for publishing to its website, which may occur that same day. Any concerns with on-line judgments should be raised directly with CanLII.

If you have any concerns about the judgment being sent to you as set out above, please contact our office as soon as possible to make alternate delivery arrangements.

Thank you,

for: 
I. Moore
Deputy Registrar
Court of Appeal - Calgary
/jn

This is Exhibit " 1 " referred to in the
Affidavit of
Paul J. Darcy
Sworn before me this *13th* day
of *February* A.D. 20 *20*
A Notary Public / A Commissioner for Oaths
In and for the Province of Alberta
LUKE RASMUSSEN
Barrister & Solicitor

Date: JAN 29 2020

As indicated above, attached is the judgment which was released today.

Thank you.

In the Court of Appeal of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABCA 36

**Date: 20200129
Docket: 1901-0255-AC
Registry: Calgary**

Between:

**PricewaterhouseCoopers Inc, LIT, in its capacity as the
Trustee in Bankruptcy of Sequoia Resources Corp.
and not in its Personal Capacity**

**Respondent
(Plaintiff)**

- and -

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

**Applicants
(Defendants)**

**Reasons for Decision of
The Honourable Madam Justice Barbara Lea Veldhuis**

Applications to Post Security for Costs

**Reasons for Decision of
The Honourable Madam Justice Barbara Lea Veldhuis**

Background

[1] Two applicants, Susan Riddell Rose and a group of companies collectively referred to as Perpetual, seek orders requiring the respondent, PricewaterhouseCoopers Inc. in its capacity as trustee for the bankrupt estate of Sequoia Resources Corp. (Sequoia), to post security for costs for the respondent's appeal either pursuant to rule 14.67(1) of the *Alberta Rules of Court*, AR 124/2010, or s. 254 of the *Alberta Business Corporation Act*, RSA 2000, c B-9 [ABCA].

[2] Sequoia was previously named Perpetual Energy Operating Corp. (PEOC), and was a wholly owned subsidiary of one of the companies. Perpetual created PEOC to hold natural gas assets in trust for the benefit of Perpetual. Ms. Rose was the sole director of PEOC. In early 2016, Perpetual decided to sell some of the natural gas wells held in trust by PEOC (referred to as the Goodyear Assets) to a third-party.

[3] To affect the sale, the parties were required to engage in a series of transactions and other steps which occurred in conjunction with each other in October 2016. Among other things, beneficial and legal title to the Goodyear Assets was consolidated in PEOC and all the shares of PEOC were sold to the third-party.

[4] PEOC was renamed as Sequoia. Sequoia operated for approximately 17 months before it assigned itself into bankruptcy in March 2018.

[5] Following bankruptcy, the respondent sued the applicants and brought an application seeking to set aside one of the transactions. Alternatively, the respondent sought damages against the applicants personally in the minimum amount of \$217,570,800. The grounds for the application include allegations that the transaction constituted a transfer at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA] or was void on the basis of public policy, statutory illegality or equitable rescission. The respondent also alleged that the applicants engaged in oppressive conduct and that Ms. Rose breached her duty of care and fiduciary duties to PEOC in directing PEOC to enter into the series of transactions.

[6] The applicants filed applications to stay the respondent's application and to dismiss the respondent's claims. After some interlocutory steps, the dismissal and stay applications proceeded to hearing in November 2018, with additional submissions made later. On August 15, 2019, the chambers judge gave oral reasons, with written reasons to follow. The written reasons were released several weeks after these applications were heard: 2020 ABQB 6. The parties did not seek to make further submissions with respect to these applications.

[7] In the written reasons, the chambers judge struck the respondent's oppression claim on two grounds. First, the respondent was not a "proper person" that would accord it standing as a "complainant" entitled to make this claim under the *ABCA*. Second, given the impact of *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 the respondent has no cause of action in respect of oppression because the Supreme Court of Canada has nullified the claim. The chambers judge also struck the respondent's public policy claim for disclosing no reasonable cause of action. The chambers judge struck and summarily dismissed the allegations that Ms. Rose breached her fiduciary duty and duty of care. In any event, the chambers judge found that Ms. Rose's release would act as a complete bar to the claims against her. The respondent appeals the chamber judge's decisions on these claims. The applicants seek security for costs for this appeal.

[8] The chambers judge found the evidence did not permit him to summarily dismiss or strike the claim that the impugned transaction was a transfer at undervalue pursuant to s. 96 of the *BIA*. The applicants have cross-appealed this finding. No security for costs application has been brought for this cross-appeal.

Section 243(3) of the *ABCA*

[9] In its factum, the respondent states that s. 243(3) of the *ABCA* is a complete bar to the relief requested in these applications since the respondent has alleged oppression. Section 243(3) states:

243 (3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

[10] While there is little case law on this section, *Broadway v Robson*, 2018 ABQB 463 at para. 12 suggests that to receive the benefit of this section, a party must establish an arguable case that they are a complainant. Here, the chambers judge has found the respondent is not a complainant, although this finding is subject to appeal.

[11] As further set out below, I am unable to say that this ground of appeal lacks merit. As a result, I decline to find that this provision has no application to a security for costs application on appeal.

[12] Assuming the respondent is a complainant, the next step is to examine the claim to determine whether it, or part of it is a non-oppression claim clothed as one of oppression: *Mudrick Capital Management v Wright*, 2018 ABQB 194 at para 18.

[13] There are a variety of claims made against the applicants, some together, some that would apply only individually (like the breach of fiduciary duty claim against Ms. Rose). I cannot say that the "core" of the claim is one of oppression such that the entire application is barred. Instead, I follow the practice of finding that a proportion of the claim constitutes "oppression" and reduce the quantum posted by that amount. In these circumstances, I find that 20% of the claim constitutes oppression.

Tests for Security for Costs

[14] Pursuant to rule 14.67(1) of the *Rules*, a single appeal judge may order a party to provide security for costs under rule 4.22 if it is just and reasonable to do so, considering the following:

- (a) whether it is likely that the applicant for an order will be able to enforce an order or judgment against assets in Alberta;
- (b) the ability of the respondent to pay the costs award;
- (c) the merits of action;
- (d) whether an order to give security for costs would unduly prejudice the respondent's ability to continue the action; and
- (e) any other matter the court considers appropriate.

[15] Security for costs is a discretionary order involving the balancing of the right to the economic security of one party with the other party's right to legal process: *Arcuri v Adamson*, 2006 ABCA 360 at para 6. A party's right to access the legal process does not mean they can advance an appeal without the fear of costs consequences: *Aski Construction Ltd v Markos*, 2017 ABCA 341 at para 11. The applicant bears the onus of proving these factors weigh in their favour: *Aski* at para 8.

[16] Alternatively, pursuant to s. 254 of the *ABCA*, security for costs may be sought against a corporation:

In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

[17] The parties argue this Court can grant security for costs against a corporation under either test citing *North American Polypropylene ULC v Williams Canada Propylene ULC*, 2018 ABQB 281. Other decisions have held that s. 254 of the *ABCA* is the only applicable test: *Amex Electrical Ltd v 726934 Alberta Ltd*, 2014 ABQB 66 at para 58. I decline to comment on which is the correct approach. That matter is best left for a panel on another day. In the circumstances of this case, I have considered the parties' arguments under each approach.

[18] Under either test, the applicants bear the initial burden of establishing, on a balance of probabilities, that it is just and equitable to order security for costs or that the respondent will be unable to pay its costs. If the applicants satisfy this onus, the evidentiary burden shifts to the

respondent to satisfy the court that the court should not exercise its discretion to grant security for costs: *Mudrick Capital Management v Wright*, 2018 ABQB 648 at para 8 [*Mudrick #2*].

Analysis

[19] I have reviewed the extensive records provided by the parties including filed affidavits, transcripts of the cross-examinations of the individual (PD) acting on behalf of the respondent, and the oral and written reasons for decision of the chambers judge. I am satisfied that the applicants have met their burden under both tests.

The Ability of the Respondent to Pay the Costs Award

[20] The test for security for costs under the *Rules* asks whether it is unlikely the respondent will be able to pay an adverse costs award. Section 254 of the *ABCA* provides a more stringent financial assessment and considers whether the corporation will be unable to pay costs: *Xpress Lube & Car Wash Ltd v Gill*, 2011 ABQB 457 at para 16.

[21] Before these applications were brought, the applicants requested the respondent to confirm that it would be personally liable for a costs award, or that it would post commercially reasonable security for the appeal. The respondent has failed to do so. Since the respondent will not post security, this requirement focuses on the financial situation of the bankrupt estate of Sequoia.

[22] The applicants submit, relying on a preliminary report of the estate prepared by the respondent in April 2018, that no funds will remain in the bankrupt estate to pay an adverse costs award after the claims of secured creditors are paid. The applicants provided an affidavit swearing 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 [applicants];

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

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

Affidavit of Susan Riddell Rose, Sworn September 23, 2019 at para 27.

[23] It remained open to the respondent to provide meaningful rebuttal evidence. Rather, PD, acting for the respondent, filed an affidavit merely stating that:

[T]here are sufficient funds available in the Estate to pay a costs award in favour of the Defendants, even in the amount estimated by Ms. Rose. The Trustee's Preliminary Report does not reflect the current financial position of the Estate for a

number of reasons, including the receipt of funds from the collection of accounts receivable and the sale of assets.

Affidavit of PD, sworn on October 18, 2019 at para 4.2.

[24] The applicants attempted to cross-examine PD on this point. During the hearing, the applicants argued excerpts, which were provided to the Court, to demonstrate that while PD was aware of his duty of candour as an officer of the court, he purposefully hindered meaningful cross-examination. For example, the following exchange related to the value of the claims of secured creditors:

Q Do you know the amount of claims made by the secured creditors in the estate?

A No. Not off the top of my head, no.

Q Do you agree with me it's in the millions?

A Yes.

Q My number is closer to 10 million, but is that approximately correct?

A I can't comment without looking at it.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 57/1-8.

[25] While this response in and of itself may not be objectionable, when it is paired with numerous other instances of non-responses and refusals to provide relevant and material financial information about the estate or to reference financial documents put before him, as further discussed below, the only conclusion I am left to draw is that the respondent was intentionally preventing the discovery of relevant and material financial information of the estate for the purpose of these applications.

[26] While Perpetual was permitted to examine records of the estate, the respondent objected to any financial records being marked as exhibits while Ms. Rose was present during questioning (notwithstanding that she is a party to this litigation). The respondent justified its position on the basis that Ms. Rose, acting personally, was not permitted to view the records of the estate. The applicants pointed to the conundrum created by this position:

Q So the position is that Perpetual can see the records, but the chief executive of Perpetual [Ms. Rose] may not; is that right?

A [counsel for the respondent]: Not in her personal capacity, Mr. Leidl.

Q How does she separate then?

A [counsel for the respondent] I don't know.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 11/5-11.

[27] PD even refused to review recent financial statements of the estate during the questioning which would have informed him about the estate's financial affairs:

Q You don't want to look at the bank statements right in front of you?

A No.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 20/4-6.

[28] As it was clear that the cross-examination of PD was producing no information, the applicants requested that the respondent make the accounts and financial records of the estate available for use in these applications. The applicants also requested undertakings that the respondent produce the most recent costs estimate for Sequoia's estate, the books and records of the estate, cash flow projections for the estate, and the respondent's position on the secured creditors' claims in the estate and their dollar amounts. The respondent refused these requests.

[29] Upon further questioning, PD had limited awareness of the estate's current financial position and appeared to be unnecessarily obstructive:

Q ...what is the bank balance for the estate?

A As of?

Q As of today.

A I don't know.

...

Q Okay. Let me go to one of my questions which is how much money is in the operating account for the estate?

A I already answered that question. I don't know the exact number today. I manage over a hundred bank accounts. Expect me to memorize every account would be – it's a useless question.

Q I'm not expecting you to memorize it. I've got the numbers right in front of you. You're welcome to look at it.

A Today's number? I don't think you have today's number right in front of you.

Q [D]o you want to look at the records you've got in front of you to get a close approximation?

A I gave you a good approximation.

...

Q Do you know what the initial receipt of funds was approximately in March of 2018?

A No.

Q Do you know what the receipt of funds has been in the estate from March of 2018 to today?

A From memory, no.

Q Do you know what the collection of accounts receivable for the estate has been?

A From memory, no.

...

Q And, sir, do you know how much the estate of Sequoia has made from the sale of assets?

A From memory, no.

...

Q Did you look at the books and records of the estate before attending today?

A No.

...

Q When was the last time you looked at the claims register for the estate?

A I don't recall.

Q Was it within the last couple of weeks?

A No.

...

Q Did you review the claims register before you swore your affidavit?

A No.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 19/1-5; 22/12-26; 32/18-26; 33/11-13; 35/14-16; 57/15-19; 71/6-8.

[30] Upon further examination PD admitted that it was highly unlikely that costs could be paid:

Q So unless you win the suit against [the applicants]...the unsecured creditors get [nothing] right?

...

A There's a high probability that the unsecured creditors get nothing.

...

Q So you've got assets of marginal value that you don't intend to sell or try to sell. You've got expensive lawsuits. You've got secured claims that may or may not be allowed, and you've got a very remote prospect of unsecured creditors being paid anything unless you win on all your lawsuits; right?

A Yes.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 111/3-6, 9-10, 22-27; 112/1.

[31] During the hearing, counsel for the respondent defended PD's behavior on the basis that the test for security for costs asks whether there are assets available to satisfy a costs award at the moment of assessment and ignores whether this will be the case going forward. I have not been provided with any authority that the ability to pay requirement looks at assets in isolation from liabilities or ignores whether these assets will be available on the date costs are awarded. In the context of bankruptcy proceedings, common sense suggests that a court must consider that assets

in the estate will be subject to a hierarchy of claims and may or may not end up being exigible assets.

[32] In conclusion, the applicants provided financial statements that were not current but suggested that unsecured creditors (which would include their costs award) would not be paid from the estate. The respondent did not seriously challenge this assertion. PD was examined on his affidavit filed in opposition to these security for costs applications that directly put in issue the ability of the estate to pay the large costs award. He was unaware of the value of the claims of secured creditors, did not know the balance of funds in the estate, nor did he have general knowledge of the current financial status of the estate. It was open to PD to apprise himself of this information before swearing his affidavit, before attending questioning or during questioning. He chose not to do so. Based on the records before me, I am satisfied the respondent will be unlikely and unable to pay costs.

Enforcing an Order or Judgment Against Assets in Alberta

[33] In oral argument, the respondent suggested 2500 wells will remain in the estate, subject to the appeal, that may be used to satisfy an adverse costs award. The respondent has given no indication as to their value or any liabilities associated with these assets. This does not allow this Court to make any meaningful assessment about whether they can be used to pay costs. In Alberta's current economic climate "2500 wells", with nothing more, may well be equivalent to a \$3 bill.

The Merits of the Appeal

[34] At the time of oral argument, the chamber judge's written decision was not available for the respondent to formalize its grounds of appeal. While written reasons are now available, an in-depth assessment of the merits of the appeal is best left to a panel with the benefit of the parties' written argument.

[35] For these applications, an assessment of whether there is a serious question to be tried and the appeal is not frivolous is sufficient consideration of the merits: see *RDX Technologies Corporation v Appel*, 2019 ABCA 338 at para 37.

[36] The respondent has suggested various grounds of appeal which may be reviewed on a correctness standard. At this stage, I cannot say that the appeal lacks merit.

Undue Prejudice

[37] Given PD's lack of cooperation, it is unclear whether an order requiring the estate to post security for costs will prevent the respondent from bringing this appeal. It is expected that a trustee, as an officer of the court, will act consistently with his duty of candour and disclose any prejudice, or lack thereof, that would result from such an order.

[38] It appears the respondent takes the position that it is in the best interest of the estate to pursue the appeal and it is willing to use the estate's available funds to finance the appeal. There is no evidence before this Court to suggest that an order for security for costs will hinder the respondent from pursuing its appeal.

Result

[39] The applicants have satisfied me that both tests for security for costs have been met.

Quantum of the Security for Costs Order

[40] The applicants seek security for costs on a solicitor-client basis. Alternatively, the applicants request security for costs based on five times the amount at Column 5, Schedule C of the *Rules*.

[41] Solicitor-client costs are reserved for exceptional circumstances where a party's litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: *Twinn v Twinn*, 2017 ABCA 419 at para 25. They are only awarded in rare circumstances: *Lotoski v Lotoski*, 2019 ABCA 262 at para 3.

[42] The unique circumstances of these applications make it difficult to assess whether solicitor-client costs are likely to be awarded. Costs on appeal are generally awarded on the same level as the scale awarded at trial: *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 254 at para 7. The chambers judge did not address costs in the oral or written decisions.

[43] Security for enhanced costs may be awarded at a multiple of Schedule C in the *Rules* if it is likely that enhanced costs will be awarded: *Mudrick #2* at paras 43-48. The following factors support the likelihood of enhanced costs in these applications: the respondent claims amounts greatly exceeding Column 5 of Schedule C in the *Rules*, resulting in the applicants being especially vigilant in their defense: *Stewart Estate v TAQA North Ltd*, 2016 ABCA 144 at para 26; and the conduct of the respondent falls short of what is expected of a responsible litigant: *Lotoski* at para 7.

[44] The applicants provided a sworn affidavit that each applicant will incur solicitor-client costs in the amount of \$400,000 as a result of the respondent's appeal. The applicants support the request for \$400,000 on the basis that it represents 75% of the costs incurred in the proceedings below, the respondent's intent to seek leave to file a 50-page factum, and that the appeal record will include a large amount of evidence.

[45] Costs incurred in the proceedings below are likely to be materially different than the costs of the appeal. The proceedings below required numerous applications, affidavits, briefs and supplemental written arguments as well as numerous court attendances. Costs in the proceedings

below also included costs for the entire action, while these applications for security for costs are related to the respondent's appeal and would not include the costs of the applicants' appeal.

[46] The applicants have not provided a draft bill of costs in support of the alternative quantum requested (five times Column C), although based on my review of Column C, the fees alone under this alternative calculation could be as high as \$98,000 for all steps taken in the appeal.

[47] The fixing of quantum is a discretionary decision. There are no specific rules. A court must decide quantum on a case-by-case basis: *Beacon Hill Service (2000) Ltd v Esso Petroleum Canada*, 2000 ABCA 326 at para 10.

[48] While I am not satisfied that security for costs should be ordered in the amount of \$400,000 for each party in this appeal, given the factors addressed above, \$150,000 is an appropriate amount for each of the applicants. These amounts must then be reduced by 20% to take into account the prohibition against security for costs in oppression claims.

[49] Therefore:

- (a) In its appeal against Ms. Rose, the respondent shall post \$120,000 with this Court for security for costs within 30 days of the date of this decision, failing which the appeal in their action against Ms. Rose will be deemed abandoned and struck.
- (b) In its appeal against Perpetual, the respondent shall post \$120,000 with this Court for security for costs within 30 days of the date of this decision, failing which the appeal in their action against Perpetual will be deemed abandoned and struck.

Comments on the Trustee's behaviour

[50] A trustee of a bankrupt estate serves as an officer of the court to facilitate the goals of the *BIA*, namely, to provide for the orderly liquidation of a bankrupt's estate: LW Holden, GB Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009) (loose-leaf updated 2015, release 9) ch 1 at 2. As an officer of the court, the trustee should promote the effective operation of the judicial system. The trustee has a duty of candour and must act impartially as codified by the *Bankruptcy and Insolvency General Rules*, CRC, c 368, s 39:

Trustees shall be *honest and impartial* and shall provide to interested parties *full and accurate information* as required by the Act with respect to the professional engagements of the trustees. [emphasis added]

[51] When a trustee brings a claim to set aside an impugned transaction, it is expected that the trustee will not assume an adversarial role and will present relevant facts to the court in an impartial manner: *Canada (Attorney General) v Norris Estate*, 1996 ABCA 357 at para 24.

[52] In previous questioning it was apparent that PD was aware of his obligation to act impartially:

Q You're aware of your role as a trustee to be an officer of the court?

A Yes.

Q And you understand that you're supposed to be neutral and impartial? Yes?

A Yes.

Q Would you include answering my questions to be part of that?

A Yes.

Transcript of Questioning on Affidavit of PD sworn August 2, 2018, held on October 22, 2018 at 74/11-19.

[53] As expressed above, I question whether PD has fulfilled his obligations to act impartially and with candour in these applications. I am troubled by the adversarial approach taken by PD and his failure to provide meaningful responses upon cross-examination. He made no efforts to apprise himself of the estate's financial situation prior to or during questioning though this information was clearly relevant to assertions he had made in an affidavit.

[54] I am further troubled by statements made in PD's affidavit which appear to suggest the applicants were responsible for the difficulty in determining whether future costs could be paid. PD asserted that the applicants had "made no request to inspect the books, records and documents relating to the administration of the Estate or to request a report from the Trustee regarding the condition of the Estate or the moneys on hand". Subsequent cross-examination revealed this to be a hollow statement as PD had no intention of allowing one of the applicants to review relevant material:

Q So when you swore this affidavit, were you prepared to allow Ms. Rose to inspect the records?

A No.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 108/11-13.

[55] It is unclear why PD would provide an affidavit to this Court that suggests the applicants failed to take steps that PD, acting for the respondent, would prevent them from taking. It is not clear to me how this assertion can be seen to be within the confines of PD's duty of candour.

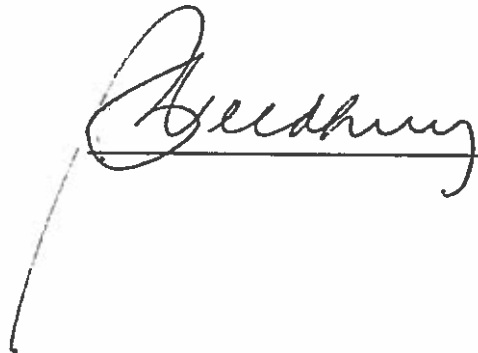
[56] My concerns should not be read to suggest the respondent should refrain from exercising its right to appeal the chamber judge's decision, nor that the respondent is necessarily required to provide full disclosure of the financial status of the estate to a court: *North American Polypropylene* at paras 27-30. I merely question whether the adversarial nature in which PD has chosen to proceed on behalf of the respondent is in harmony with the underlying goals of the *BIA*, his role as an impartial trustee and his duty of candour.

[57] These applications are granted as set out above.

Applications heard on November 21, 2019

Reasons filed at Calgary, Alberta
this 29th day of January, 2020




Veldhuis J.A.

Appearances:

R. de Waal/L. Rasmussen
for the Respondent

D.J. McDonald, Q.C./P.G. Chiswell
for the Applicants Perpetual Energy Inc., Perpetual Operating Trust and
Perpetual Operating Corp.

G. Benediktsson/S.H. Leidl
for the Applicant, Susan Riddell Rose

This is Exhibit " 2 " referred to in the
Affidavit of

Paul J. Durby
Sworn before me this 13th day
of February, A.D. 2020

A Notary Public, A Commissioner for Oaths
In and for the Province of Alberta

LUKE RASMUSSEN
Barrister & Solicitor

From: Kim, Stella <SKim@blg.com>
Sent: February 4, 2020 3:54 PM
To: laurie.baptiste@albertacourts.ca
Cc: Kruger, Josef G. A. <JKruger@blg.com>; Gurofsky, Robyn <RGurofsky@blg.com>; Finegan, Garrett <GFinegan@blg.com>; Rinus de Waal <rdewaal@dewaallaw.com>; steven.leitl@nortonrosefulbright.com; gunnar.benediktsson@nortonrosefulbright.com; djm@bdplaw.com; pchiswell@bdplaw.com
Subject: PricewaterhouseCoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others (Appeal No. 1901-0255AC)

Hi Ms. Baptiste,

Please find attached correspondence sent on behalf of Josef Kruger, Q.C. with respect to the above noted matter.

Should you have any questions or concerns, please contact Mr. Kruger.

Regards,
Stella

Stella Kim
Practice Assistant - Commercial Litigation
T 403.232.9442 | F 403.266.1395 | SKim@blg.com
Centennial Place, East Tower, 1900, 520 – 3rd Ave. SW, Calgary, AB, Canada T2P 0R3

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Josef G.A. Kruger, Q.C
T 403.232.9563
F 403.266.1395
ofinegan@blg.com

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Calgary, AB, Canada T2P 0R3
T 403.232.9500
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File No. 089229-000174

February 4, 2020

Delivered by Email: laurie.baptiste@albertacourts.ca

**Court of Appeal of Alberta
Registrar's Office
2600, 450 – 1st Street SW
Calgary, Alberta T2P 5H1**

Attention: Laurie Baptiste, Case Management Officer

Dear Ms. Baptiste:

**Re: *PricewaterhouseCoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others*
Appeal No. 1901-0255AC (the "Appeal"): Application to Change or Modify Reasons**

We act for Paul James Darby, a licensed insolvency trustee, in his personal capacity. Mr. Darby is a Senior Vice President of PricewaterhouseCoopers Inc. ("**PwC Inc.**"). PwC Inc., in its capacity as the bankruptcy trustee of Sequoia Resources Corp., is one of the parties involved in the Appeal. We are not counsel for any of the parties involved in the Appeal. Instead we have been retained by Mr. Darby in his personal capacity to intervene in the Security Application (as defined below). On January 29, 2020, pursuant to an application for security for costs (the "**Security Application**") the Honourable Madama Justice Barbara Lea Veldhuis released Reasons for Decision (the "**Reasons**") in which Veldhuis J.A. made findings about Mr. Darby's professional reputation, honesty, integrity and professional ability (the "**Findings**"). The Findings were made without prior notice or warning by Veldhuis J.A. Mr. Darby has instructed us to bring an urgent application for the Reasons to be corrected, changed or modified (the "**Reasons Application**").

We write to request confirmation and directions as to the appropriate procedure for Mr. Darby to make the Reasons Application.

The Reasons arose from an application to a single appeal judge pursuant to Rule 14.67 of the Alberta *Rules of Court* (the "**Rules**"), and no Order has been entered yet in the Security Application. It is our understanding that Part 14 of the Rules does not deal with applications to correct, change or modify the reasons of a single appeal judge in the circumstances of this case, and accordingly,

pursuant to Rule 14.2(1), Rule 9.13(b) (with any appropriate modifications) applies to the Reasons Application.

Accordingly, it is our intention to bring the Darby Application pursuant to Rules 9.13(b) and 14.37(2)(e), supported by affidavit evidence and a Memorandum of Argument. It is our understanding that the Darby Application should properly be heard the Honourable Madame Justice Barbara Lea Veldhuis. We respectfully request confirmation that the foregoing is the appropriate procedure, or alternatively, if it is not, we respectfully request direction as to the appropriate procedure to bring an application of this type.

Please do not hesitate to contact the writer if you have any questions with respect to the foregoing.

Yours truly,

BORDEN LADNER GERVAIS LLP


Josef G.A. Kruger, Q.C.

cc: ~~Rinus de Waal/Luke Rasmussen~~
~~De Waal Law~~

Steven H. Leitt/Gunnar Benediktsson
Norton Rose Fulbright Canada LLP

Daniel J. McDonald, Q.C./ Paul G. Chiswell
Burnet, Duckworth & Palmer LLP

This is Exhibit " 3 " referred to in the
Affidavit of
Paul J. Darby
Sworn before me this 13th day
of February A.D. 20 20
A Notary Public, Commissioner for Oaths
in and for the Province of Alberta

LUKE RASMUSSEN
Barrister & Solicitor

From: Kruger, Josef G. A. <JKruger@blg.com>

Sent: February 5, 2020 12:34 PM

To: Laurie Baptiste <Laurie.Baptiste@albertacourts.ca>

Cc: Dan McDonald <djm@bdplaw.com>; Paul Chiswell(pchiswell@bdplaw.com) <pchiswell@bdplaw.com>; Finegan, Garrett <GFinegan@blg.com>; Gurofsky, Robyn <RGurofsky@blg.com>; Rinus de Waal <rdewaal@dewaallaw.com>; Gunnar Benediktsson <gunnar.benediktsson@nortonrosefulbright.com>; steven.leitl@nortonrosefulbright.com

Subject: RE: PricewaterhouseCoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others (Appeal No. 1901-0255AC):
Application by Paul Darby

Importance: High

URGENT

Dear Ms. Baptiste,

Further to your email below, we respectfully seek permission to file and serve Mr. Paul Darby's Application today or tomorrow. There is extreme prejudice to Mr. Darby if his Application cannot be filed, served and be heard as one of urgency. Because of the damaging and serious nature of the findings made against Mr. Darby in the Reasons, and because of his standing in the professional insolvency community, Justice Veldhuis' findings impugning his reputation and integrity are being discussed all over Canada, especially among the professional insolvency community and the legal community. Perpetual has also immediately sought to capitalize on those findings, as appears from a letter from Perpetual's counsel dated February 3, 2019 attached hereto, and Ms. Rose's counsel yesterday provided a copy of the Reasons to Justice Nixon in a QB application. In this morning's Insolvency Insider it published the following article:

<https://insolvencyinsider.ca/pricewaterhousecoopers-inc-v-perpetual-energy-inc-2020-abca-36/>

The Insolvency Insider is an internet publication widely distributed to professionals practising in insolvency throughout Canada. Its readership includes insolvency trustees, lawyers, academics and Justices.

Tomorrow the Annual Review of Insolvency Law (ARIL) commences in Vancouver. The ARIL conference is the preeminent insolvency conference in Canada, widely attended by Canadian and foreign insolvency practitioners, Justices, and academics. See:

<https://cairp.ca/cgi/page.cgi/ARIL.html>

https://cairp.ca/Library/ARIL/1909392_ARIL_Conference_Brochure-010_BC_edits.pdf

Mr. Darby is a speaker at the ARIL conference, as is apparent from the link above containing the program.

We understand that Justice Veldhuis is very busy, and we apologize for this intrusion on her schedule, but as far as Mr. Darby is concerned this is a case of "*justice delayed, is justice denied.*" We respectfully submit that justice and fairness requires that he at least be allowed to file his Application immediately so that his version of events may also become public. We attach hereto a draft of the Application which Mr. Darby intends filing. We suggest that he be given permission to file it immediately together with the supporting affidavit evidence and Memorandum of Argument, and that the date for the hearing in the Application be a provisional date such that the Application can be scheduled for a hearing on a subsequent date suitable to Justice Veldhuis.

Your assistance is greatly appreciated

Josef Kruger



Josef G. A. Kruger, Q.C.

Partner

T 403.232.9563 | JKruger@blg.com

Centennial Place, East Tower, 1900, 520 – 3rd Ave. SW, Calgary, AB, Canada T2P 0R3

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From: Laurie Baptiste <Laurie.Baptiste@albertacourts.ca>

Sent: February 5, 2020 11:21 AM

To: Kim, Stella <SKim@blg.com>

Cc: Dan McDonald <djm@bdplaw.com>; Paul Chiswell(pchiswell@bdplaw.com) <pchiswell@bdplaw.com>; Finegan, Garrett <GFinegan@blg.com>; Kruger, Josef G. A. <JKruger@blg.com>; Gurofsky, Robyn <RGurofsky@blg.com>; Rinus de Waal <rdewaal@dewaallaw.com>; Gunnar Benediktsson <gunnar.benediktsson@nortonrosefulbright.com>; steven.leitl@nortonrosefulbright.com

Subject: Re: PricewaterhouseCoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others (Appeal No. 1901-0255AC)

Good morning to all,

I write to just advise that I have referred this request to Justice Veldhuis to consider. She has a full week of sittings next week but she will respond to this as soon as she is able.

Please note that Mr. Kruger advised earlier today that BLG had a server crash so I would appreciate very much if someone can make sure that he has received this message.

Thank you,

Laurie Baptiste, B.A., J.D.

Case Management Officer
Alberta Court of Appeal, Calgary

>>> Laurie Baptiste 2020-02-04 05:57 PM >>>
Good afternoon,

I have received your letter and will get back to you shortly, probably tomorrow morning, on the appropriate procedure for this matter.

Best regards,

Laurie Baptiste, B.A., J.D.
Case Management Officer
Alberta Court of Appeal, Calgary

>>> "Kim, Stella" <SKim@blg.com> 2020-02-04 03:54 PM >>>
Hi Ms. Baptiste,

Please find attached correspondence sent on behalf of Josef Kruger, Q.C. with respect to the above noted matter.

Should you have any questions or concerns, please contact Mr. Kruger.

Regards,
Stella

Stella Kim
Practice Assistant - Commercial Litigation
T 403.232.9442 | F 403.266.1395 | SKim@blg.com
Centennial Place, East Tower, 1900, 520 – 3rd Ave. SW, Calgary, AB, Canada T2P 0R3

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COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

COURT OF APPEAL FILE NUMBER: 1901-0225AC

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**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: **Josef G.A. Kruger, Q.C.**
Borden Ladner Gervais LLP
1900, 520 3rd Ave. S.W.
Calgary, AB T2P 0R3
Telephone: (403) 232-9563
Facsimile: (403) 266-1395
Email: jkruger@blg.com
File No. 089229-000174

CONTACT INFORMATION OF ALL OTHER PARTIES: **Burnet, Duckworth & Palmer LLP**
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Tel: (403) 260-5724
Tel: (403) 260-0201
Fax: (403) 260-0332
Email: djm@bdplaw.com
pchiswell@bdplaw.com
File Number: 59140-43
Counsel for Perpetual Energy Inc., Perpetual Operation Trust, Perpetual Operating Corp.

Registrar's Stamp

Norton Rose Fulbright Canada LLP
3700, 400 Third Avenue SW
Calgary, Alberta T2P 4H2
Phone: 403-267-8140
Fax: 403-264-5973
Attention: Steven H. Leidl
Email: steven.leidl@nortonrosefulbright.com
File No.: 1001040549
Counsel for Susan Riddell Rose

De Waal Law
Rinus de Waal / Luke Rasmussen
Tel: (403) 266-0013
Fax: (403) 266-2632
Email: rdewaal@dewaallaw.com
File Number: 283.001
Counsel for PricewaterhouseCoopers Inc., LIT, in its
capacity as Trustee in Bankruptcy of Sequoia Resources
Corp., not in its personal capacity.

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:
Time: 9:30 a.m. or as soon thereafter as counsel may be heard
Where: Court of Appeal of Alberta, Calgary
Before: Honourable Madame Justice Barbara L. Veldhuis

Nature of Application and Relief Sought:

1. An Order permitting Paul James Darby to intervene 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”).
2. An Order correcting, striking, changing, or modifying the Reasons for Decision issued on January 29, 2020 by Honourable Madame Justice Barbara L. Veldhuis in respect of the Security Applications (the “Reasons”) in order to correct or strike findings in the Reasons regarding Mr. Darby’s professional reputation, honesty, integrity and professional ability (the “Findings”).
3. An Order sealing the Confidential Affidavit of Paul James Darby, sworn on February 5, 2020.
4. Such further and other relief as this Court deems just.

Grounds for making this application:

Application to Intervene

5. 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.
6. 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.
7. 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.
8. 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

9. The grounds for modifying or changing the Reasons to strike or correct the Findings are:
 - a. no order has been entered in respect of the Reasons;
 - b. the Findings are based on a misapprehension of the evidence, the relevant legal principles, and the parties' positions related thereto;
 - c. 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
 - d. the Findings amount to a miscarriage of justice causing grave prejudice, such that it is just and equitable to modify the Reasons.

Sealing Order

10. The Confidential Affidavit of Paul James Darby, sworn on February 5, 2020, contains confidential information respecting the Estate.
11. 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.
12. The sealing order is the least restrictive means possible to prevent disclosure.
13. Such further and other basis as Counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

14. Affidavit of Paul James Darby filed on February 5, 2020.
15. Confidential Affidavit of Paul James Darby filed on February 5, 2020.
16. The Affidavits and written submissions filed in the Security Applications.
17. The Appeal Record, filed.
18. Such other materials as counsel advises and this Honourable Court admits.

Applicable Acts, regulations and rules:

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

Via Email

February 3, 2020

Rinus de Waal/Luke Rasmussen
De Waal Law
1010, 505 - 3 Street SW
Calgary, AB T2P 3E6

Steven H. Leitzl/Gunnar Benediktsson
Norton Rose Fulbright Canada LLP
3700, 400 - 3 Avenue SW
Calgary, AB T2P 4H2

PricewaterhouseCoopers Inc., LIT v. Perpetual Energy Inc., et al
Action No. 1901-0262AC

I am enclosing a proposed Order to Post Security for Costs. If acceptable, please endorse your approval as to form and content and return it to me.

I am in receipt of Mr. Kruger's January 31, 2020 letter advising that he is counsel for PwC and Mr. Darby. As requested, by a copy of this letter I am sending him the proposed Order. However, the Order does not seek his approval and we will enter it as soon as it is approved by Mr. de Waal and Mr. Leitzl.

The Reasons for Decision do not reference costs. Pursuant to Rule 14.88, the successful party is entitled to costs and unless otherwise ordered, the scale of costs in an appeal shall be the same as the scale of the order appealed from. In the circumstances, we will be applying for full indemnity costs of the application against PwC personally. We will contact the Court to determine when and what procedure we should follow to make that request. Among other authorities, we will be relying on *Re Asian Concepts Franchising Corporation*, 2018 BCSC 1464, *Farm Mutual Financial Services Inc.*, 2010 ONSC 2184, and Rules 10.31 and 10.33(2). In our view, the circumstances of this case, and these applications particularly, justify such an award of full indemnity costs.

On September 6, 2019, Mr. Leitzl (on behalf of Ms. Rose and the Perpetual Defendants) wrote to Mr. de Waal seeking the Trustee's consent to an order that it is personally liable for costs or to post security for the costs of Ms. Rose and the Perpetual Defendants. Mr. de Waal's letter dated September 11, 2019 did not address the substance of Mr. Leitzl's letter. Instead, it stated, without explanation: "There is no basis for the Trustee to provide security for the Defendants' costs." That necessitated the expense of the applications, as noted by Justice Veldhuis at paragraph 21 of her decision.

As you know, Justice Veldhuis has already commented negatively on the Trustee's conduct in responding to the security for costs applications, including assuming an adversarial role, acting in a partial manner, and failing to disclose full and accurate information, all contrary to its obligations under the *Bankruptcy and Insolvency Act*. Specifically:

- At paragraph 25: "While this response in and of itself may not be objectionable, when it is paired with numerous other **instances of non-responses and refusals to provide relevant and material financial information** about the estate or to reference financial documents put before him, as further discussed below, **the only conclusion I am left to draw is that the respondent was intentionally preventing the**

discovery of relevant and material financial information of the estate for the purpose of these applications."

- At paragraph 26: "the respondent objected to any financial records being marked as exhibits while Ms. Rose was present during questioning (notwithstanding that she is a party to this litigation)."
- At paragraph 31: "During the hearing, counsel for the respondent defended PD's behavior..."
- At paragraph 32: "PD [...] was unaware of the value of the claims of secured creditors, did not know the balance of funds in the estate, nor did he have general knowledge of the current financial status of the estate. It was open to PD to apprise himself of this information before swearing his affidavit, before attending questioning or during questioning. He chose not to do so."
- At paragraph 37: "Given PD's lack of cooperation..."
- At paragraph 53: "As expressed above, **I question whether PD has fulfilled his obligations to act impartially and with candour in these applications. I am troubled by the adversarial approach taken by PD** and his failure to provide meaningful responses upon cross-examination. He made no efforts to apprise himself of the estate's financial situation prior to or during questioning though this information was clearly relevant to assertions he had made in an affidavit."
- At paragraph 54: "**I am further troubled by statements made in PD's affidavit** which appear to suggest the applicants were responsible for the difficulty in determining whether future costs could be paid. PD asserted that the applicants had "made no request to inspect the books, records and documents relating to the administration of the Estate or to request a report from the Trustee regarding the condition of the Estate or the moneys on hand". **Subsequent cross-examination revealed this to be a hollow statement as PD had no intention of allowing one of the applicants to review relevant material**
- At paragraph 55: "It is unclear why PD would provide an affidavit to this Court that suggests the applicants failed to take steps that PD, acting for the respondent, would prevent them from taking. It is **not clear to me how this assertion can be seen to be within the confines of PD's duty of candour.**"
- At paragraph 56: "I merely question whether **the adversarial nature in which PD has chosen to proceed on behalf of the respondent is in harmony with the underlying goals of the BIA, his role as an impartial trustee and his duty of candour.**"

We look forward to receiving your prompt approval of the form of Order.

Yours truly,

BURNET, DUCKWORTH & PALMER LLP



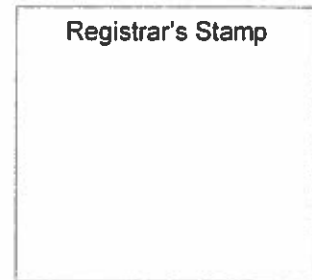
Daniel J. McDonald, Q.C.

DJM/lm
Encl.

- c. **Josef G.A. Kruger, Q.C./Robin Gurofsky, Borden Ladner Gervais LLP** By Email (JKruger@blg.com/RGurofsky@blg.com)
Paul G. Chiswell, Burnet, Duckworth & Palmer LLP By Email (pgc@bdplaw.com)

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 1901-0255AC
TRIAL COURT FILE NUMBER: 1801-10960
REGISTRY OFFICE: CALGARY
APPLICANT: SUSAN RIDDELL ROSE
STATUS ON APPEAL: RESPONDENT
STATUS ON APPLICATION: APPLICANT



APPLICANTS: PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, and PERPETUAL OPERATING CORP.
STATUS ON APPEAL: RESPONDENTS
STATUS ON APPLICATION: APPLICANTS

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
STATUS ON APPLICATION: RESPONDENT

DOCUMENT: **ORDER TO POST SECURITY FOR COSTS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Burnet, Duckworth & Palmer LLP
8th Avenue Place, East Tower
2400, 525 – 8th Avenue SW
Calgary, Alberta T2P 1G1

Lawyers: D.J. McDonald, Q.C./Paul G. Chiswell
Phone: (403) 260-5724/(403) 260-0201
Fax: (403) 260-0332
Email: djm@bdplaw.com/pgc@bdplaw.com
File No.: 59140-43

Counsel for Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp.

DATE ON WHICH ORDER WAS PRONOUNCED: January 29, 2020
LOCATION OF HEARING: Calgary, Alberta
NAME OF JUSTICE WHO GRANTED THIS ORDER: Madam Justice B.L. Veldhuis

ON THE APPLICATION OF Susan Riddell Rose (Rose) and the Application of Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp. (together, Perpetual), for an Order requiring PricewaterhouseCoopers Inc. in its capacity as trustee in bankruptcy of Sequoia Resources Corp. (the Trustee) to post security for costs in the Trustee's within Appeal; AND UPON HAVING READ the Affidavit of Rose sworn September 23, 2019, the Affidavit of Paul Darby sworn October 18, 2019, the Transcript of the Cross-Examination of Paul Darby dated November 6, 2019, and the Undertaking Responses of Paul Darby; AND UPON the written and oral submissions from counsel for Rose, Perpetual, and the Trustee; AND UPON PROVIDING reasons with citation 2020 ABCA 36;

IT IS ORDERED THAT:

1. In the Trustee's Appeal against Rose, the Trustee shall post \$120,000 with the Clerk of the Court of Appeal of Alberta for security for Rose's costs of the Trustee's Appeal within 30 days of January 29, 2020, being the date of the decision in these applications, failing which the Trustee's Appeal in their action against Rose will be deemed abandoned and struck.
2. In the Trustee's Appeal against Perpetual, the Trustee shall post \$120,000 with the Clerk of the Court of Appeal of Alberta for security for Perpetual's costs of the Trustee's Appeal within 30 days of January 29, 2020, being the date of the decision in these applications, failing which the Trustee's Appeal in their action against Perpetual will be deemed abandoned and struck.

Justice of the Court of Appeal of Alberta

APPROVED AS TO FORM AND CONTENT THIS _____ DAY OF FEBRUARY, 2020

Burnet, Duckworth & Palmer LLP

Norton Rose Fulbright Canada LLP

Per: _____

D.J. McDonald, Q.C./Paul G. Chiswell
 Counsel for Perpetual Energy Inc.,
 Perpetual Operating Trust, and
 Perpetual Operating Corp.

Per: _____

Steven H. Leidl/Gunnar Benediktsson
 Counsel for Susan Riddell Rose

De Waal Law

Per:

Rinus de Waal/Luke Rasmussen
Counsel for PriceWaterhouseCoopers
Inc., LIT, in its capacity as the Trustee
in Bankruptcy of Sequoia Resources
Corp. and not in its personal capacity

Luke Rasmussen

From: Rinus de Waal
Sent: Wednesday, February 05, 2020 3:02 PM
To: Luke Rasmussen
Subject: FW: PricewaterhouseCoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others (Appeal No. 1901-0255AC): Application by Paul Darby
Attachments: 01(C)-1901-0255AC.pdf

From: Laurie Baptiste <Laurie.Baptiste@albertacourts.ca>
Sent: February 5, 2020 2:53 PM
To: Josef G.A.Kruger <JKruger@blg.com>
Cc: Dan McDonald <djm@bdplaw.com>; Paul Chiswell(pchiswell@bdplaw.com) <pchiswell@bdplaw.com>; Finegan Garrett <GFinegan@blg.com>; RGurofsky@blg.com; Rinus de Waal <rdewaal@dewaallaw.com>; Gunnar Benediktsson <gunnar.benediktsson@nortonrosefulbright.com>; steven.leitl@nortonrosefulbright.com
Subject: RE: PricewaterhouseCoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others (Appeal No. 1901-0255AC): Application by Paul Darby

It's my pleasure to assist.

Please see the attached.

Best regards,

Laurie Baptiste, B.A., J.D.
Case Management Officer
Alberta Court of Appeal, Calgary

This is Exhibit "4" referred to in the
Affidavit of
Paul J. Darby
Sworn before me this *17th* day
of *February*, A.D. 20*20*
A Notary Public / Commissioner for Oaths
in and for the Province of Alberta

LUKE RASMUSSEN
Barrister & Solicitor

>>> "Kruger, Josef G. A." <JKruger@blg.com> 2020-02-05 01:20 PM >>>
Thank you very much for your prompt attention and response Ms. Baptiste.

BLG Josef G. A. Kruger, Q.C.
Partner
T 403.232.9563 | JKruger@blg.com
Borden Ladner Gervais Centennial Place, East Tower, 1900, 520 – 3rd Ave. SW, Calgary, AB, Canada T2P 0R3

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Borden Ladner Gervais LLP
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From: Laurie Baptiste <Laurie.Baptiste@albertacourts.ca>

Sent: February 5, 2020 1:19 PM

To: Kruger, Josef G. A. <JKruger@blg.com>

Cc: Dan McDonald <djm@bdplaw.com>; Paul Chiswell(pchiswell@bdplaw.com) <pchiswell@bdplaw.com>; Finegan, Garrett <GFinegan@blg.com>; Gurofsky, Robyn <RGurofsky@blg.com>; Rinus de Waal <rdewaal@dewaallaw.com>; Gunnar Benediktsson <gunnar.benediktsson@nortonrosefulbright.com>; steven.leitl@nortonrosefulbright.com

Subject: RE: PricewaterhouseCoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others (Appeal No. 1901-0255AC): Application by Paul Darby

Dear Mr. Kruger,

I have sent this to Justice Veldhuis to consider and I will get back to you with her response as soon as I am able.

Best regards,

Laurie Baptiste, B.A., J.D.

Case Management Officer

Alberta Court of Appeal, Calgary

>>> "Kruger, Josef G. A." <JKruger@blg.com> 2020-02-05 12:33 PM >>>

URGENT

Dear Ms. Baptiste,

Further to your email below, we respectfully seek permission to file and serve Mr. Paul Darby's Application today or tomorrow. There is extreme prejudice to Mr. Darby if his Application cannot be filed, served and be heard as one of urgency. Because of the damaging and serious nature of the findings made against Mr. Darby in the Reasons, and because of his standing in the professional insolvency community, Justice Veldhuis' findings impugning his reputation and integrity are being discussed all over Canada, especially among the professional insolvency community and the legal community. Perpetual has also immediately sought to capitalize on those findings, as appears from a letter from Perpetual's counsel dated February 3, 2019 attached hereto, and Ms. Rose's counsel yesterday provided a copy of the Reasons to Justice Nixon in a QB application. In this morning's Insolvency Insider it published the following article:

<https://insolvencyinsider.ca/pricewaterhousecoopers-inc-v-perpetual-energy-inc-2020-abca-36/>

The Insolvency Insider is an internet publication widely distributed to professionals practising in insolvency throughout Canada. Its readership includes insolvency trustees, lawyers, academics and Justices.

Tomorrow the Annual Review of Insolvency Law (ARIL) commences in Vancouver. The ARIL conference is the preeminent insolvency conference in Canada, widely attended by Canadian and foreign insolvency practitioners, Justices, and academics. See:

<https://cairp.ca/cgi/page.cgi/ARIL.html>

https://cairp.ca/Library/ARIL/1909392_ARIL_Conference_Brochure-010_BC_edits.pdf

Mr. Darby is a speaker at the ARIL conference, as is apparent from the link above containing the program.

Registrar's Office
26th Floor
450 – 1st ST SW
Calgary AB T2P 5H1

TEL: (403) 297-2206
FAX: (403) 297-5294



COURT OF APPEAL OF ALBERTA

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Case Management Officer: L. Baptiste
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Case Management Officer: B J. McDevitt
Email: bobbi.mcdevitt@albertacourts.ca
<https://albertacourts.ca>

February 5, 2020

J.G.A. Kruger, QC
Borden Ladner Gervais LLP
Email: JKruger@blg.com

Re: Pricewaterhousecoopers Inc., LIT (A) v. Perpetual Energy Inc. (R) and others
Appeal No. 1901-0255AC

Justice Veldhuis asked me to send the following message:

Thank you for your correspondence respecting this matter.

A decision has been made and the matter is concluded.

Permission to file the application is not granted pursuant to R 9.13(b) as existing authority provides that only a party may make such an application. See, e.g.: *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 731, per Brown J (as he then was) at paras 20-24.

Best regards,

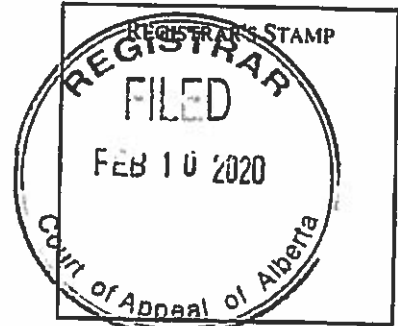
Laurie Baptiste, B.A., J.D.
Case Management Officer
Court of Appeal - Calgary
/lb

cc: R. de Waal and L. Rasmussen
De Waal Law
Email: rdewaal@dewaallaw.com
Email: lrasmussen@dewaallaw.com

D.J. McDonald, QC and P.G. Chiswell
Burnet, Duckworth & Palmer LLP
Email: djm@bdplaw.com
Email: pchiswell@bdplaw.com

S.H. Leidl and G. Benediktsson
Norton Rose Fulbright Canada LLP
Email: steven.leidl@nortonrosefulbright.com
Email: gunnar.benediktsson@nortonrosefulbright.com

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

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: DE WAAL LAW
1010, 505 - 3rd Street SW
Calgary, AB T2P 3E6

Attention: Rinus de Waal/Luke Rasmussen
Telephone: 403266 0013
Facsimile: 403 266 2632
Email: rdewaal@dewaallaw.com

CONTACT INFORMATION FOR ALL OTHER PARTIES: Burnet, Duckworth & Palmer LLP
8th Avenue Place, East Tower
2400, 525-8th Ave SW T2P 1G1

Attention: D.J. McDonald, Q.C./Paul Chiswell
Telephone: 403 260 5724/403 260 0201
Facsimile: 403 260 0332

Norton Rose Fulbright Canada LLP
3700, 400 3rd Ave SW
Calgary, AB T2P 4H2

Attention: S. Leitl/G. Benediktsson
Telephone: 403 267 8140
Facsimile: 403 264 5973

This is Exhibit "S" referred to in the

Affidavit of
Paul J. Daryl
Sworn before me this *5* day
of *February*, A.D. 20*20*

.....
A Notary Public, A Commissioner for Oaths
In and for the Province of Alberta

LUKE RASMUSSEN
Barrister & Solicitor

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: _____, 2020~~ *In writing only*
Time: 9:30 a.m.
Where: TransCanada Pipelines, 2600, 450 1st Street SW, Calgary, Alberta
Before: The Presiding Justice in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Nature of the Application and Relief Sought:

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp., (the "Trustee") respectfully seeks an Order:

1. setting aside or varying its January 29, 2020 Order, pursuant to Rule 9.13, *alternatively* Rule 9.15(4);
2. changing or modifying the Reasons for Decision reported as *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.* at 2020 ABCA 36;
3. *alternatively*, granting the Trustee permission to appeal the Order and the Decision, pursuant to Rule 14.5;
4. directing that costs of the Application be costs in the Appeal; and
5. granting such other relief as counsel for the Trustee may advise and the Court may permit.

Grounds for making this application:

1. On January 29, 2020, the Court issued Reasons for Decision (the "Reasons") and ordered the Trustee to post security for costs in favour of the Respondents to the Trustee's Appeal (the "Security for Costs Order").

Rules 9.13 and 9.15

2. Rule 9.13 provides that, at any time before a judgment or order is entered, the Court may:
 - (a) vary the judgment or order, or
 - (b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.
3. Rule 9.15(4) provides that the Court may set aside, vary or discharge an interlocutory order:
 - (a) because information arose or was discovered after the order was made,
 - (b) with the agreement of every other party, or
 - (c) on other grounds that the Court considers just.
4. The Security for Costs Order and the Reasons are based on plain and manifest errors of law, including a failure to consider relevant evidence.
5. The Court erred in law in finding that the Respondents had provided sufficient evidence to shift the burden of proof onto the Trustee.
6. The statements from the Respondents' affidavit cited by the Court were not evidence. They were statements of belief by the Respondents' witness, based in part on her own interpretation of the Supreme Court of Canada's decision in *Redwater*.
7. Proceeding on the basis that the evidentiary burden had shifted to the Trustee, the Court concluded that the Trustee could not show that the Estate would be able to pay any costs award in favour of the Respondents and "was intentionally preventing the discovery of relevant and material financial information of the estate for the purpose of these applications."
8. In granting the Security for Costs Order and issuing the Reasons, the Court erred in law in failing to consider relevant evidence:
 - 8.1. Prior to the cross-examination of its representative, the Trustee had provided detailed financial information regarding the Estate (the "**Confidential Estate Information**") to the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp. (the "**Perpetual Respondents**"), in their capacity as creditors and in accordance with s. 26(3) of the *Bankruptcy and Insolvency Act* (the "**BIA**").
 - 8.2. The Trustee disclosed the Confidential Estate Information to the Perpetual Respondents on the express condition that, *unless the Court directed otherwise*, this information would not be published generally and would only be used by the Perpetual Respondents in accordance with the *BIA*, as creditors, to consider the Trustee's administration of the Estate.

- 8.3. The Perpetual Respondents took no issue with this condition and reviewed the Confidential Estate Information on that basis.
 - 8.4. Instead of complying with this condition, including by seeking an Order permitting the Trustee to disclose the Confidential Estate Information publicly notwithstanding s. 26(3) of the *BIA*, the Perpetual Respondents sought to introduce the Confidential Estate Information into a public cross-examination in a manner directly inconsistent with s. 26(3) and the disclosure conditions they had implicitly accepted.
 - 8.5. In order to provide additional financial information regarding the Estate without offending s. 26(3), the Trustee's representative offered to go through each secured claim file with the Perpetual Respondents.
 - 8.6. Instead of accepting that offer, the Perpetual Respondents requested an undertaking that the Trustee publicly disclose, as part of the cross-examination record, "all the claims files for the estate for all the secured creditors". The requested undertaking was inconsistent with s. 26(3) of the *BIA* and the disclosure conditions accepted by the Perpetual Respondents.
9. The Court also erred in law in making findings inconsistent with the evidence before the Court:
- 9.1. The Court found that the Trustee's representative made no efforts to apprise himself of the Estate's financial situation prior to or during questioning and did not know the balance of funds in the Estate even though the Trustee's representative had testified that the bank balance at the date of his questioning was approximately \$2.5 million.
 - 9.2. The Court criticized the Trustee's representative for refusing publicly to disclose the books and records of the Estate:
 - 9.2.1. even though the Trustee's representative provided a detailed explanation of the position of the Trustee with respect to the Confidential Estate Information in response to the undertakings requested by the Respondents; and
 - 9.2.2. even though the Court expressly declined to find that the Trustee was necessarily required to provide full disclosure of the financial status of the Estate to a court.
 - 9.3. The Court made no mention of the stated intention of the Respondents to seek costs against the Trustee personally and the financial ability of the Trustee personally to pay any costs which may be ordered.
10. The Court also erred in law in failing to address the arguments raised by the Trustee in its Memorandum of Argument that:

- 10.1. a security for costs Order was unnecessary because the Respondents intended to seek costs from the Trustee personally and there was no suggestion that the Trustee personally had insufficient assets to satisfy a costs award; and that
 - 10.2. as the Respondents had allegedly caused the Estate's financial condition, they were not entitled to rely on the effects of their own conduct in seeking security for costs.
11. As the Reasons and the Security for Costs Order are the products of objectively demonstrable errors of law, they should be set aside, varied or modified to avert an injustice.

Application for Leave to Appeal

12. Rule 14.5 provides that an Order of single appeal judge can be appealed with permission of the single appeal judge who made the Order.
13. Rule 14.38 permits a single appeal judge to refer an application for leave to another appeal judge or to a panel of the Court of Appeal.
14. An application for permission to appeal a decision of a single appeal judge should be granted where the applicant can demonstrate one or more or all of the following:
 - 14.1. a question of general importance;
 - 14.2. a possible error of law;
 - 14.3. an unreasonable exercise of discretion; or
 - 14.4. a misapprehension of important facts.
15. The Security for Costs Decision raises questions of general importance, likely to affect the ability of trustees in bankruptcy across Canada to pursue claims under the *BIA*.
16. Unless it is modified or set aside, the Security for Costs Decision means that a trustee in bankruptcy faced with a security for costs application will have the onus to show that the value of the assets in the bankruptcy estate exceeds all secured and unsecured claims that will eventually be allowed, as well as a potential cost award in favour of the applicant seeking security for costs:
 - 16.1. on the basis only of a statement by an applicant that he or she *believes* that the Estate will be unable to pay costs;
 - 16.2. when, in the circumstances or because of the information and resources available, it may be practically impossible for the trustee to consider and determine the merit and value of every secured and unsecured claim in the estate and to determine the value of every asset in the estate; and
 - 16.3. by making full public disclosure of detailed confidential information regarding the financial affairs of the estate, including assets, liabilities and claims by creditors through cross-examination by parties who may or may not be entitled to such

information under the *BIA* and by presenting such evidence to the Court if the applicants choose not to do so, in breach of the confidentiality obligations imposed on trustees by the *BIA*.

17. In addition to these serious questions of general importance, the Reasons and Security for Costs Order reflect errors of law, as discussed above.
18. If the Reasons and Security for Costs Order are not set aside, varied or modified, permission to appeal should be granted.

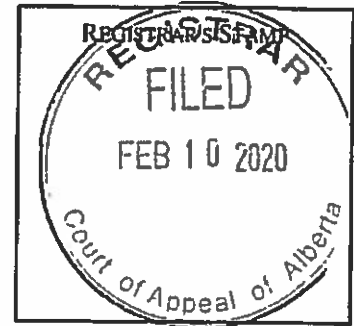
Material or evidence to be relied on:

19. The October 18, 2019 Affidavit of Paul Darby.
20. The transcript of Paul Darby's cross-examination November 6, 2019 and the Trustee's answers to undertakings.
21. Such other material as counsel for the Applicant may advise and the Court may allow.

Applicable rules:

22. Rules 6.3; 9.13, 9.15, 9.16, 10.29; 10.31; 10.33, 14.5 and 14.37 of the *Alberta Rules of Court*.

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.

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

DE WAAL LAW
1010, 505 – 3rd Street SW
Calgary, AB T2P 3E6

Attention: Rinus de Waal/Luke Rasmussen
Telephone: 403266 0013
Facsimile: 403 266 2632
Email: rdewaal@dewaallaw.com

CONTACT INFORMATION FOR ALL OTHER PARTIES:

Burnet, Duckworth & Palmer LLP
8th Avenue Place, East Tower
2400, 525-8th Ave SW T2P 1G1

Attention: D.J. McDonald, Q.C./Paul Chiswell
Telephone: 403 260 5724/403 260 0201
Facsimile: 403 260 0332

Norton Rose Fulbright Canada LLP
3700, 400 3rd Ave SW
Calgary, AB T2P 4H2

Attention: S. Leitl/G. Benediktsson
Telephone: 403 267 8140
Facsimile: 403 264 5973

This is Exhibit " 6 " referred to in the

Affidavit of
Paul J. Dargatzis
Sworn before me this *13th* day
of *February* A.D. 20 *20*

A Notary Public & Commissioner for Oaths
in and for the Province of Alberta

LUKE RASMUSSEN
Barrister & Solicitor

Introduction

1. PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. (the “Trustee”) seeks an Order:
 - 1.1. setting aside or varying the January 29, 2020 Order requiring the Trustee to post security for costs in favour of the Respondents to the Trustee’s appeal, Perpetual Energy Inc., Perpetual Operating Corp., Perpetual Operating Trust (the “Perpetual Respondents”) and Ms. Susan Riddell Rose (the “Security for Costs Order”);
 - 1.2. changing or modifying the Reasons for Decision reported as *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.* at 2020 ABCA 36 (the “Reasons”),
 - 1.3. *alternatively*, granting permission to appeal the Security for Costs Order and Reasons.

The Test for Setting Aside or Varying an Order

2. Rule 9.13 provides that, at any time before a judgment or order is entered, the Court may:
 - (a) vary the judgment or order, or
 - (b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.¹
3. Rule 9.15(4) provides that the Court may set aside, vary or discharge an interlocutory order:
 - (a) because information arose or was discovered after the order was made,
 - (b) with the agreement of every other party, or
 - (c) on other grounds that the Court considers just.²

¹ *Alberta Rules of Court*, AR 124/2010, s. 9.13 [Trustee’s Authorities, Tab 1]

² *Alberta Rules of Court*, AR 124/2010, s. 9.15(4) [Trustee’s Authorities, Tab 1]

4. In *Lewis Estates*, the Court cited with approval the following description of the power conferred under Rule 9.13:

In light of the explicit authority contained in Rule 9.13 and the purpose of the Rules of Court as contained in Rule 1.2, Shelley J. decided that a judge may investigate whether error exists in a judgment and, when an error is identified, consider whether the defect warrants correction. She identified the benefits of such judicial intervention as including the avoidance of an otherwise unnecessary and costly appeal; and, where an appeal is nonetheless pursued, the benefit of the appeal court having a more fully developed trial consideration of the facts and law. The circumstances in which the later [sic] benefit might arise, she said, include where an issue had not been fully apprehended during preparation of the judgment.³

5. The Court found that Rule 9.13 “represents a considerable expansion of judicial discretion from that contained in the predecessor Rule 339,”⁴ observing that Rule 9.13 “expands the scope for correcting errors in judgments”.⁵
6. In *Luebke*, *Lewis Estates* was cited with approval for the proposition that Rule 9.13 should be used to vary a decision “where there is a plain and manifest error”.⁶

The Reasons and Security for Costs Order Reflect Plain and Manifest Errors of Law

7. The Court erred in law in finding that the Respondents had provided sufficient evidence to shift the burden of proof onto the Trustee.⁷

³ *Lewis Estates Communities Inc v Brownlee LLP*, 2013 ABQB 731 (*Lewis Estates*) [Trustee’s Authorities, Tab 2]

⁴ *Ibid*, at para. 20 [Trustee’s Authorities, Tab 2]

⁵ *Ibid*, at para. 28 [Trustee’s Authorities, Tab 2]

⁶ *Luebke v Manluk Industries*, 2017 ABQB 243, at para. 9 [Trustee’s Authorities, 3]

⁷ Reasons, at paras. 18, 22-23.

8. The statements from the Respondents' affidavit cited by the Court were *not evidence*.⁸ They were statements of belief by the Respondents' witness, based in part on her own interpretation of the Supreme Court of Canada's decision in *Redwater*.⁹
9. Proceeding on the basis that the evidentiary burden had shifted to the Trustee, the Court concluded that the Trustee could not show that the Estate would be able to pay a cost award in favour of the Respondents¹⁰ and that the Trustee "was intentionally preventing the discovery of relevant and material financial information of the estate for the purpose of these applications."¹¹
10. In granting the Security for Costs Order and issuing the Reasons, the Court erred in law in failing to consider relevant evidence:¹²
 - 10.1. Prior to the cross-examination of its representative, the Trustee had provided detailed financial information regarding the Estate (the "**Confidential Estate Information**") to the Perpetual Respondents, in their capacity as creditors and in accordance with s. 26(3) of the *Bankruptcy and Insolvency Act* (the "**BIA**").¹³
 - 10.2. The Trustee disclosed the Confidential Estate Information to the Perpetual Respondents on the express condition that, *unless the Court directed otherwise*, this

⁸ Reasons, at para. 22, citing September 23, 2019 affidavit of S. Rose, at para. 27.

⁹ *North American Polypropylene ULC v Williams Canada Polypropylene ULC*, 2018 ABQB 281 (*North American Polypropylene*), at para 7 [Trustee's Authorities, Tab 4]; *Renfrew Insurance Ltd v Donald*, 2012 ABQB 228, at para 38 [Trustee's Authorities, Tab 5]; *Banff Transportation and Tours Inc v Buchan*, 2002 ABQB 423, at para 35 [Trustee's Authorities, Tab 6]

¹⁰ Reasons, at para. 32

¹¹ Reasons, at para. 25.

¹² *364021 Alberta Inc. v Burnet, Duckworth & Palmer*, 2005 ABCA 257 (*Burnet*) [Trustee's Authorities, Tab 13]

¹³ *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, s. 26(3) [Trustee's Authorities, Tab 7]; Undertaking Responses of Paul J. Darby, Response to Undertaking No.1.

information would not be published generally and would only be used by the Perpetual Respondents in accordance with the *BIA*, as creditors, to consider the Trustee's administration of the Estate.¹⁴

10.3. The Perpetual Respondents took no issue with this condition and reviewed the Confidential Estate Information on that basis.¹⁵

10.4. Instead of complying with this condition, including by seeking an Order permitting the Trustee to disclose the Confidential Estate Information publicly notwithstanding s. 26(3) of the *BIA*, the Perpetual Respondents sought to introduce the Confidential Estate Information into a public cross-examination in a manner directly inconsistent with s. 26(3) and the disclosure conditions they had implicitly accepted.¹⁶

10.5. In an attempt to provide additional financial information regarding the Estate without offending s. 26(3), the Trustee's representative offered to go through each secured claim file with the Perpetual Respondents.¹⁷

10.6. Instead of accepting that offer, the Perpetual Respondents requested an undertaking that the Trustee publicly disclose, as part of the cross-examination record, "all the claims files for the estate for all the secured creditors".¹⁸ The requested undertaking was inconsistent with s. 26(3) of the *BIA*, Rules 40 and 41 of the *Bankruptcy and*

¹⁴ Undertaking Responses of Paul J. Darby, Response to Undertaking No.1.

¹⁵ Undertaking Responses of Paul J. Darby, Response to Undertaking No.1.

¹⁶ Transcript of Cross-Examination of P. Darby, Exhibit 3 and at p. 12, lines 4-16, p. 66 and lines 17-23.

¹⁷ Transcript of Cross-Examination of P. Darby, p. 62, lines 7-27, p. 63, p. 64, lines 1-25.

¹⁸ Transcript of Cross-Examination of P. Darby, p. 65, lines 2-8.

Insolvency General Rules and the disclosure conditions implicitly accepted by the Perpetual Respondents.¹⁹

11. The Court also erred in law in making findings against the Trustee inconsistent with the evidence before the Court:²⁰

11.1. The Court found that the Trustee's representative made no efforts to apprise himself of the Estate's financial situation prior to or during questioning and did not know the balance of funds in the Estate²¹ even though the Trustee's representative had testified that the bank balance at the date of his questioning was approximately \$2.5 million.²²

11.2. The Court criticized the Trustee's representative for refusing to publicly disclose the books and records of the Estate:

11.2.1. even though the Trustee's representative provided a detailed explanation of the position of the Trustee with respect to the Confidential Estate Information in response to the undertakings requested by the Respondents;²³ and

¹⁹ Transcript of Cross-Examination of P. Darby, Exhibit 3 and at p. 12, lines 4-16, p. 66 and lines 17-23

²⁰ *Coyle v. O'Keefe*, 2019 ABCA 442, at para. 23 [Trustee's Authorities, Tab 8]

²¹ Reasons, at para. 32.

²² Transcript of Cross-Examination of P. Darby, at p. 19, lines 10-18.

²³ Undertaking Responses of Paul J. Darby, Response to Undertaking No. 1, Exhibit 3, p. 12, lines 4-16, p. 66 and lines 17-23.

11.2.2. even though the Court expressly declined to find that the Trustee was necessarily required to provide full disclosure of the financial status of the Estate to a court.²⁴

12. The Court also erred in law in failing to address the arguments raised by the Trustee in its Memorandum of Argument²⁵ that:

12.1. a security for costs Order was unnecessary as the Respondents intended to seek costs from the Trustee personally and there was no suggestion that the Trustee personally had insufficient assets to satisfy a costs award;²⁶ and that

12.2. as the Respondents had allegedly contributed to the Estate's financial condition, they were not entitled to rely on the effects of their own conduct in seeking security for costs.²⁷

13. As the Reasons and the Security for Costs Order are the products of plain and manifest errors of law, they should be set aside, varied or modified to avert an injustice.²⁸

The Test for Permission to Appeal

14. An application for permission to appeal a decision of a single appeal judge should be granted if the applicant can establish a question of general importance, a possible error of law, an unreasonable exercise of discretion or a misapprehension of important facts.²⁹

²⁴ Reasons, at para. 56.

²⁵ *Andersen v Colvin*, 2019 ABCA 469, at para. 35 [Trustee's Authorities, Tab 9]

²⁶ Trustee's Memorandum of Argument, at paras. 4-7.

²⁷ Trustee's Memorandum of Argument, at paras. 20-26.

²⁸ *Lewis Estates*, *supra*, at para. 33 [Trustee's Authorities, Tab 2]

²⁹ *Settlement Lenders Inc. v. Blicharz*, 2016 ABCA 109, at para. 1 [Trustee's Authorities, Tab 10]

15. In *JE v Alberta (Workers' Compensation Board)*, Veldhuis JA held that an application for leave to appeal required the exercise of discretion in a "judicial manner and in accordance with the principles of fundamental justice."³⁰

The Decision Raises Serious Questions of General Importance

16. The Reasons raise serious questions of general importance, likely to affect the ability of trustees in bankruptcy across Canada to pursue claims under the *BIA*.
17. The Court focused the inquiry on the financial situation of the bankrupt estate³¹ holding that:
- in the context of bankruptcy proceedings, common sense suggests that a court must consider that assets in the estate will be subject to a hierarchy of claims and may or may not end up being exigible assets.³²
18. This approach requires a trustee in bankruptcy to consider and determine the merit and value of every secured and unsecured claim in the estate and to determine the value of all the assets in the estate, regardless of the information available to the trustee and the funds in the estate available to the fund the trustee's activities.
19. This approach would also require a trustee in bankruptcy to make full public disclosure of specific evidence regarding the financial affairs of the estate, including assets, liabilities and claims by creditors, presumably subject to cross-examination by parties who may or may not be creditors, which would be inconsistent with the confidentiality obligations imposed on trustees by the *BIA*.
20. The Reasons accordingly raise the following serious questions of general importance:

³⁰ *JE v Alberta (Workers' Compensation Board)*, 2016 ABCA 243, at para 2 [Trustee's Authorities, Tab 11]

³¹ Reasons, at para. 21.

³² Reasons, at para. 31.

20.1. Is a trustee required to value all of the assets in the estate and determine the merits and value of all the claims in the estate, regardless of the facts and the funding available in the particular circumstances of each case, simply to respond to a security for costs application?

20.2. Does an application for security for costs require a trustee in bankruptcy to make full public disclosure of the financial and other affairs of the estate, including the details of all claims submitted, regardless of the confidentiality obligations imposed on trustees by the *BIA* and the Bankruptcy Rules?³³

In contrast with the time and effort demanded of a trustee in bankruptcy, the approach to security for costs set out in the Reasons also allows the applicant to shift the burden of proof onto the trustee simply by expressing a *belief* that the estate will be unable to pay a potential costs award.

21. The Reasons confirmed that an applicant for an order for security for costs has the initial burden of establishing, on a balance of probabilities, that it is just and equitable to order security for costs or that the respondent will be unable to pay its costs. The Court then found that a statement of belief regarding three respects was sufficient to discharge this onus and to establish the required facts on a balance of probabilities.

22. By allowing the Respondents to discharge their onus merely by stating a belief, the Reasons effectively placed the initial burden of proof onto the Trustee. However, as discussed above, a non-expert witness' legal opinion, on the interpretation of case law, for example, is not

³³ *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, ss. 13.5 and 26(3); *Bankruptcy and Insolvency General Rules*, CRC c 368, s 40 [Trustee's Authorities, Tab 12]

evidence.³⁴ A “bald statement of belief” that a respondent is unlikely to be able to pay a costs award has “no evidentiary value” in a security for costs application.³⁵

23. This aspect of the Reasons raises the following serious questions of general importance:

23.1. Is a statement of belief sufficient to establish anything on a balance of probabilities in this context?

23.2. Does the onus in an application for security for costs shift onto the respondent if the applicant simply states a belief that a cost order will not be enforceable against exigible assets?

Errors of Law

24. The errors of law reflected in the Reasons and Security for Costs Order are discussed above.

25. If the Court declines to set aside, vary or modify the Reasons and Security for Costs Order, these errors of law support the granting of permission to appeal under Rule 14.5.

Questions of Law

26. The Trustee requests permission to appeal the Reasons on the following questions of law:

26.1. Should the Trustee be required to post security for costs on the basis that, because the Estate is in bankruptcy, it is unlikely to be able to pay an adverse cost award?

³⁴ *Renfrew Insurance*, *supra*, at para 38 [Trustee’s Authorities, Tab 5]; *Banff Transportation*, *supra*, at para 35 [Trustee’s Authorities, Tab 5]

³⁵ *North American Polypropylene*, *supra*, at para 7 [Trustee’s Authorities, Tab 4]

- 26.2. Was the Trustee required to determine the validity and amounts of all claims and the values of all assets in the bankrupt Estate in response to the application for security for costs?
- 26.3. Was the Trustee obliged to make full public disclosure of the financial and other affairs of the Estate, including claims submitted?
- 26.4. Was the statement of belief of Ms. Rose sufficient to meet the applicants' onus to establish facts on a balance of probabilities and to shift the onus to the Trustee?

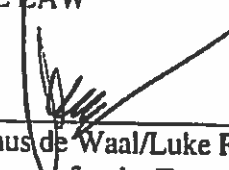
Calgary, Alberta
February 10, 2020

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)

TABLE OF AUTHORITIES

1. *Alberta Rules of Court*, AR 124/2010, ss. 9.13, 9.15(4), 14.5 and 14.37
2. *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 731
3. *Luebke v. Manluk Industries*, 2017 ABQB 243
4. *North American Polypropylene ULC v Williams Canada Polypropylene ULC*, 2018 ABQB 281
5. *Renfrew Insurance Ltd v Donald*, 2012 ABQB 228
6. *Banff Transportation and Tours Inc v Buchan*, 2002 ABQB 423
7. *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, ss. 13.5 and 26(3)
8. *Coyle v. O'Keefe*, 2019 ABCA 442
9. *Andersen v Colvin*, 2019 ABCA 469
10. *Settlement Lenders Inc. v. Blicharz*, 2016 ABCA 109
11. *JE v Alberta (Workers' Compensation Board)*, 2016 ABCA 243
12. *Bankruptcy and Insolvency General Rules*, CRC c 368, s 40
13. *364021 Alberta Inc. v. Burnet, Duckworth & Palmer*, 2005 ABCA 257

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File No. 089229-000174

February 11, 2020

Delivered by Email: laurie.baptiste@albertacourts.ca

Court of Appeal of Alberta
Registrar's Office
2600, 450 – 1st Street SW
Calgary, Alberta T2P 5H1

Attention: Laurie Baptiste, Case Management Officer

Dear Ms. Baptiste:

Re: Court of Appeal File Number 1901-0225AC: Application by Mr. Paul J. Darby for Reconsideration by a Panel of the Decision of Veldhuis J.A. dated February 5, 2020 & Other Relief

As you know, we act for Mr. Paul J. Darby in his efforts to respond to the findings made about his reputation and integrity in Reasons by Veldhuis J.A. dated January 29, 2020 (the "Reasons"). On February 5, 2020 Veldhuis J.A. gave a decision prohibiting Mr. Darby from filing an application pursuant to Rule 9.13 (b) (the "Feb 5 Decision").

This afternoon we attempted to file the attached Application and Memorandum of Law, as well as two Affidavits by Mr. Darby (one is a Confidential Affidavit) in support of the Application. The Application claims reconsideration by a Panel of the Court of Appeal of the Feb 5 Decision and related relief in respect of the Reasons (the "Reconsideration Application"). We understand from our associate who attended on the attempted filing of the Reconsideration Application, that he was informed by the Clerk that Veldhuis J.A. was consulted on the intended filing of the Reconsideration Application. Our associate was informed by the Clerk that Veldhuis J.A. had made the decision that the Reconsideration Application may not be filed. Our associate requested whether it was possible for such decision to be confirmed in writing, and was told by the Clerk that such a request should be addressed to the Case Management Officer.

We hereby request that you confirm to us in writing whether it is correct that Veldhuis J.A. directed that the Reconsideration Application may not be filed, and if so, the reasons for such decision. We respectfully request that this request be dealt with as one of urgency.

Sincerely,

BORDEN LADNER GERVAIS LLP

Josef G.A. Kruger, Q.C.

This is Exhibit " 7 " referred to in the

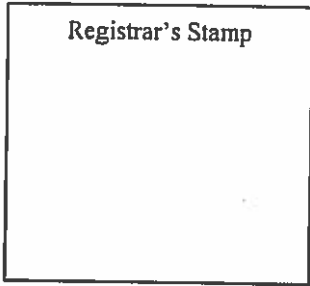
Affidavit of
Paul J. Darby
Sworn before me this *13th* day
of *February* A.D. 20*20*

A Notary Public & Commissioner for Oaths
in and for the Province of Alberta

LUKE RASMUSSEN
Barrister & Solicitor

COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]



COURT OF APPEAL FILE NUMBER: 1901-0225AC

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

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: Josef G.A. Kruger, Q.C. Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9563 Facsimile: (403) 266-1395 Email: jkruger@blg.com File No. 089229-000174

CONTACT INFORMATION OF ALL OTHER PARTIES: Luke Rasmussen, Barrister & Solicitor. Sworn before me this 13th day of February, A.D. 2020. A Notary Public, Commissioner for Oaths in and for the Province of Alberta.

Burnet, Duckworth & Palmer LLP D.J. MacDonald, QC / Paul Chiswell Tel: (403) 260-5724 Tel: (403) 260-0201 Fax: (403) 260-0332 Email: djm@bdplaw.com pchiswell@bdplaw.com File Number: 59140-43 Counsel for Perpetual Energy Inc., Perpetual Operation Trust, Perpetual Operating Corp.

LUKE RASMUSSEN Barrister & Solicitor

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File Number: 283.001
Counsel for PricewaterhouseCoopers Inc., LIT, in its
capacity as Trustee in Bankruptcy of Sequoia Resources
Corp., not in its personal capacity.

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: To be allocated by the Court
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. 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;
3. An Order by the Panel setting aside the Feb 5 Decision;
4. 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**”);
5. An Order by the Panel correcting, striking, changing, or modifying the Reasons in order to correct or strike the Findings;
6. An Order sealing the Confidential Affidavit of Paul James Darby, sworn on February 10, 2020; and
7. Such further and other relief as this Court deems just.

Grounds for making this application:

Reconsideration Application

8. 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.
9. 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,

Leave to Appeal Application

10. 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.
11. The Feb 5 Decision was issued without giving Mr. Darby any hearing.
12. The Feb 5 Decision is wrong in law.
13. Veldhuis J.A. did not exercise her discretion in a judicial manner, nor in accordance with the principles of fundamental justice.
14. 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.
15. The Panel has the discretion pursuant to Rule 14.38 (1) to hear this application at first instance.

Application to Intervene

16. 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.
17. 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.
18. 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.
19. 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

20. The grounds for modifying or changing the Reasons to strike or correct the Findings are:
 - a. no order has been entered in respect of the Reasons;
 - b. the Findings are based on a misapprehension of the evidence, the relevant legal principles, and the parties' positions related thereto;
 - c. 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
 - d. the Findings amount to a miscarriage of justice causing grave prejudice, such that it is just and equitable to modify the Reasons.

Sealing Order

21. The Confidential Affidavit of Paul James Darby, sworn on February 10, 2020, contains confidential information respecting the Estate.
22. 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.
23. The sealing order is the least restrictive means possible to prevent disclosure.
24. Such further and other basis as Counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

25. Affidavit of Paul James Darby filed on February 11, 2020.
26. Confidential Affidavit of Paul James Darby filed on February 11, 2020.
27. Such other materials as counsel advises and this Honourable Court admits.

Applicable Acts, regulations and rules:

28. *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.

29. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 13-38, 135, 136, and 187 and 197.
30. *Bankruptcy and Insolvency General Rules*, CRC c. 368, and in particular Rules 34-40.
31. *Judicature Act*, R.S.A. 2000, c. J-2.
32. Such other Acts, regulations or rules as counsel may advise.

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 1901-0225AC

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: **MEMORANDUM OF ARGUMENT OF PAUL J. DARBY**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: **Josef G.A. Kruger, Q.C.
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Facsimile: (403) 266-1395
Email: jkruger@blg.com
File No. 089229-000174**

This is Exhibit " 9 " referred to in the Affidavit of

Paul J. Darby
Sworn before me this 13th day
of February A.D. 2020

A Notary Public, Commissioner for Oaths
in and for the Province of Alberta

LUKE RASMUSSEN
Barrister & Solicitor

Registrar's Stamp

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File Number: 283.001

Counsel for PricewaterhouseCoopers Inc., LIT, in its
capacity as Trustee in Bankruptcy of Sequoia
Resources Corp., not in its personal capacity.

INTRODUCTION

1. This memorandum is filed in support of an application¹ seeking a reconsideration of, or alternatively leave to appeal, the decision issued on February 5, 2020 by Honourable Madame Justice Barbara L. Veldhuis (the “**Decision**”) refusing the Applicant, 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**”). This application has been brought before a full panel (the “**Panel**”) of the Court of Appeal pursuant to Rule 14.38(1).²
2. The Decision arose from a letter sent to the Case Management Officer (“**CMO**”) by counsel to the Applicant on February 4, 2020 seeking confirmation of the appropriate procedure to file the Rule 9.13 Application (the “**Procedural Direction Letter**”). Instead of providing any procedural direction, the CMO replied with the Decision on February 5, 2020, relaying a message from Veldhuis J.A. stating that “permission to file the application is not granted pursuant to R 9.13 (b) as existing authority provides that only a party may make such an application. See, e.g.: *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 731 [...]”
3. There is no leave requirement to file an application pursuant to Rule 9.13(b), in either the *Rules* or in the jurisprudence interpreting the Rule 9.13. The Procedural Direction Letter did not seek permission to file the Rule 9.13 Application, and did not make any submissions regarding leave or regarding the Applicant’s standing. Had the Applicant known that a leave requirement would unexpectedly be read into Rule 9.13(b), the Applicant would have made submissions regarding leave and standing, including by noting that *Lewis Estates* does not stand for the proposition “only

¹Capitalized terms herein not otherwise defined shall have the meaning ascribed to them in the Application, filed February 11, 2020.

² *Alberta Rules of Court*, 124/2010, at r.14.58 [Rules] [TAB 1].

a party may make” a Rule 9.13 Application.³ The question of a non-party’s ability to rely on Rule 9.13(b) was not at issue in *Lewis Estates* and is never mentioned or considered in that case. Further, in *Aubin*, which appears to be the only case on point, a non-party did bring an application pursuant to Rule 9.13(b).⁴ In *Aubin* there was no mention that the non-party was precluded from relying on the rule because they were a non-party, and instead, the non-party’s application was heard and determined on the merits. Further, and in any event, part of the Rule 9.13 Application was an application to become an intervener in the within Appeal, such that the Applicant would have become a “party” to the Appeal pursuant to Rule 14.1(1)(k).⁵

4. The Applicant submits that issuing the Decision without giving him a chance to file the Application, or any affidavits or a Memorandum of Law in support, is not only an error of law, it is a denial of fundamental justice and procedural fairness. By issuing the Decision in these circumstances, Veldhuis J.A. failed to exercise her discretion in a judicial manner. In light of the fundamentally unfair approach taken by Veldhuis J.A. in the Decision, the Applicant submits that only a hearing before a full Panel can provide the Applicant with fundamental justice and procedural fairness in the circumstances.
5. The basis for issuing the Decision is not only wrong at law, it also creates inconsistencies in the law respecting Rule 9.13(b) applications by: i) reading in a requirement that is found nowhere in the *Rules* or the relevant jurisprudence, that litigants must first obtain leave or permission before an application pursuant to Rule 9.13(b) will be heard; and ii) creating a rule that only current parties, and not prospective interveners who have been adversely affected by a decision, can bring

³ *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 731 [*Lewis Estates*] [TAB 2].

⁴ *Aubin v. Petrone*, 2018 ABQB 259 [*Aubin*] [TAB 3].

⁵ *Rules*, r. 14.1(1)(k) [TAB 1]

an application pursuant to Rule 9.13(b). These are serious, unresolved legal questions of general importance with high precedential value, which only the intervention of a full Panel can resolve.

FACTS

6. The essential facts are set out in the Affidavit of Paul James Darby, sworn on February 10, 2020.

ARGUMENT

Mr. Darby Should be Granted Permission to Intervene

7. As an officer of the Court, a bankruptcy trustee's "decisions are presumed to be right until they are shown to be wrong on appeal."⁶ The Court "must presume" that Mr. Darby acted "properly and impartially, unless there is clear evidence to the contrary."⁷ The presumption that "officers of the court will carry out their oaths of office [...] can only be displaced by cogent evidence."⁸
8. Given the strong presumption in favour of the integrity officers of the Court, it is well established that when this integrity is at risk as a result of findings made by a lower court, the court officer should be granted leave to intervene on appeal of the lower court's decision.⁹ It is indisputable that a court officer's integrity is put at risk when they face findings that they have "deliberately misled the court, suppressed information and otherwise conducted [themselves] unprofessionally."¹⁰ While the protection of a court officer's integrity is not the "usual basis on which intervention is granted,"¹¹ such intervention has been found to be necessary, in part because

⁶ *Mindens Ltd., Re*, 1933 CarswellOnt 55, 14 C.B.R. (N.S.) 145 [TAB 4]

⁷ *YBM Magnex International Inc., Re*, 2000 CarswellAlta 1068, [2000] A.J. No. 1118, at para 87 [TAB 5].

⁸ *Mother of God Portaitissa Saint Raphael, Nicholas, Irene & Olympia Greek Orthodox Monastery of Metropolitan Toronto Inc. v. Bakolis*, 2005 CarswellOnt 1592 (ONSC) [TAB 6], citing *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484. Regarding the adversarial role that a bankruptcy trustee is obligated to sometimes play in contested litigation see *Doyle Salewski Inc. v. Scott*, 2019 ONSC 5108 at para 48 [TAB 7]; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, at ss. 13-38, 135, 136, and 197 [TAB 8], and *Bankruptcy and Insolvency General Rules*, CRC c. 368, and in particular Rules 34-40 [TAB 9]

⁹ *Rules* at r.14.58 [TAB 1]; *SMTCL Canada Inc. v. Master Tech Inc.* 2017 ONCA 291 [SMTCL] [TAB 10]; *Butty v Butty*, 2009 CarswellOnt 8940, 190 A.C.W.S. (3d) (ONCA) [Butty] [TAB 11]; *W. (D.) v. White*, 2003 CarswellOnt 5199, [2003] O.J. No. 5222 (ONCA) [TAB 12]; *Bearden v. Lee*, 2005 CarswellOnt 1831, [2005] O.J. No. 1834 [TAB 13].

¹⁰ *Butty*, at para 1 [TAB 11].

¹¹ *SMTCL* at para 9 [TAB 10].

“the interests of justice favour a complete evidentiary record” where the integrity of a court officer is in issue,¹² and in part because there are “likely no other remedies available” to the court officer to address their serious concerns.¹³ Allowing the court officer to file affidavit evidence¹⁴ and make submissions will often be necessary because the court officer themselves is “the only person who can explain why he said what he said.”¹⁵ Even if such an intervention may place some additional burden on a party to the litigation, “the search for the truth should be an overarching concern.”¹⁶ Failing to allow such an intervention would mean that the proposed intervener could “end up as a casualty in a war in which he was never given an opportunity to use his ammunition. That would not be fair. In other words it would be a denial of Natural Justice.”¹⁷

9. The Applicant submits that, for the reasons set out in Schedule “A” hereto, the Reasons threaten Mr. Darby’s integrity as an officer of the Court, and accordingly, he should be granted leave to intervene for the purpose of bringing the Rule 9.13 Application.

The Decision Should be Reconsidered, or Alternatively Set Aside on Appeal, by a full Panel

10. This Court has jurisdiction to reconsider or rehear an application where it “is in the interests of fundamental fairness that the motion [...] should be reargued.”¹⁸ In such circumstances, it will be unfair for the justice who presided at the original hearing of the motion to also preside over the re-argument of the motion.¹⁹ In this case, given that the Rule 9.13 Application was erroneously and unfairly not permitted to be argued in the first place, it is in the interests of fundamental fairness to permit a re-argument of the motion afresh. Further, given that both the Decision, and the Rule 9.13

¹² *SMTCL* at para 10 [TAB 10].

¹³ *Buty*, at para 10 [TAB 11].

¹⁴ *SMTCL* at para 12 [TAB 10].

¹⁵ *Bearden*, at para 14 [TAB 13].

¹⁶ *SMTCL* at paras 10 and 15 [TAB 10].

¹⁷ *Peel (Regional Municipality) v. Greater Toronto Airports Authority*, 1999 CarswellOnt 1602, [1999] O.J. No. 1921, at para 20 [TAB 14].

¹⁸ *JH Drilling Inc. v. Parsons Creek Aggregates*, 2014 ABCA 223, at para 7 [TAB 15].

¹⁹ *Ibid*, at para 7 [TAB 15].

Application itself involve serious, unresolved legal questions of general importance with high precedential value²⁰ it is appropriate that such a re-argument occur before a full Panel.

11. Alternatively, leave to appeal the Decision should be granted, and a full Panel should set aside the Decision and consider the Rule 9.13 Application afresh. This Court has previously expressed concerns that requiring parties to seek permission to appeal a decision of a single appeal judge from the same judge who made the decision does not respect the principles of natural justice.²¹ It is submitted that in light of these concerns and the fundamental fairness concern raised by the Decision as discussed above, a full Panel should consider both the application for leave to appeal the Decision and the appeal itself. The Applicant meets the criteria for leave to appeal the Decision for the same reasons discussed above in relation to the application to reconsider the Decision.²²

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF FEBRUARY, 2020.

ESTIMATED TIME FOR ARGUMENT – 15 minutes.

BORDEN LADNER GERVAIS LLP

PER:



for Josef G. A. Kruger Q.C.

Counsel for the Applicant,

Paul James Darby

²⁰ In the case of the Rule 9.13 Application, the serious questions of general importance are described in Schedule "A" hereto, and include a need for clarity from the Court regarding 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.

²¹ *Stacey v Foy*, 2014 ABCA 447, at para 4, citing *Prefontaine v. Minister of National Revenue*, 2001 ABCA 288 [TAB 16].

²² See further *SRG Takamiya Co Ltd v. 58376 Alberta Ltd*, 2019 ABCA 301 at paras 5-7 [TAB 17]; *Schulte v. Alberta (Appeals Commission for Workers' Compensation Board)* 2015 ABCA 268 at paras 6-7 [TAB 18], *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd*, 2015 ABCA 257, at para 2 [TAB 19].

LIST OF AUTHORITIES

1. *Rules of Court*, AR 124/2010
2. *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 731
3. *Aubin v. Petrone*, 2018 ABQB 259
4. *Mindens Ltd., Re*, 1933 CarswellOnt 55, 14 C.B.R. (N.S.) 145
5. *YBM Magnex International Inc., Re*, 2000 CarswellAlta 1068, [2000] A.J. No. 1118
6. *Mother of God Portaitissa Saint Raphael, Nicholas, Irene & Olympia Greek Orthodox Monastery of Metropolitan Toronto Inc. v. Bakolis*, 2005 CarswellOnt 1592 (ONSC)
7. *Doyle Salewski Inc. v. Scott*, 2019 ONSC 5108
8. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
9. *Bankruptcy and Insolvency General Rules*, CRC c. 368.
10. *SMTCL Canada Inc. v. Master Tech Inc.* 2017 ONCA 291
11. *Butty v Buty*, 2009 CarswellOnt 8940, 190 A.C.W.S. (3d) (ONCA)
12. *W. (D.) v. White*, 2003 CarswellOnt 5199, [2003] O.J. No. 5222 (ONCA)
13. *Bearden v. Lee*, 2005 CarswellOnt 1831, [2005] O.J. No. 1834
14. *Peel (Regional Municipality) v. Greater Toronto Airports Authority*, 1999 CarswellOnt 1602, [1999] O.J. No. 1921
15. *JH Drilling Inc. v. Parsons Creek Aggregates*, 2014 ABCA 223
16. *Stacey v Foy*, 2014 ABCA 447
17. *SRG Takamiya Co Ltd v. 58376 Alberta Ltd*, 2019 ABCA 301
18. *Schulte v. Alberta (Appeals Commission for Workers' Compensation Board)* 2015 ABCA 268
19. *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd*, 2015 ABCA 257

SCHEDULE "A"

FINDINGS OBJECTED TO AND THE REASONS WHY

1. Reasons Paragraph 23:

- 1.1 It is incorrect that Paul Darby ("Darby") failed to provide "meaningful rebuttal evidence". Darby, an Officer of the Court, stated under oath that there were sufficient funds at the time he swore the Darby Affidavit to pay a cost award in the amount estimated by Ms. Rose.
- 1.2 The Trustee then provided to Perpetual (which it shared with Ms. Rose) financial information and records prior to the Darby Questioning.
- 1.3 The financial information which had been provided by the Trustee to Perpetual and shared with Ms. Rose prior to the Darby Questioning is summarized at Exhibit "H" to the Affidavit sworn by Darby in support of this application (the "Darby February Affidavit"), and is attached as Exhibits "A" and "B" to the Confidential Affidavit of Paul Darby sworn in support of this application (the "Confidential Affidavit").
- 1.4 During the Darby Questioning, Darby estimated the Estate bank balance at approximately \$2.5 million.

2. Reasons Paragraph 24 – 26 and 29:

- 2.1 It is incorrect that Darby "... purposely hindered meaningful cross examination."
- 2.2 Full information had been provided by the Trustee to Perpetual (which it shared with Ms. Rose) about the amount of the claims of secured creditors. Under Tab 16 of the Estate Binder, the complete Claims Register (running into some 54 pages, and giving particulars of 829 claims) was provided prior to the Darby Questioning. Particulars of all the creditors claiming to be secured was provided on pages 3 and 4 of Tab 16, reflecting claims totaling \$10,720,977.29.
- 2.3 There was nothing objectionable to the answers Darby gave in the excerpt from the Darby Questioning referred to in paragraph 24 of the Reasons. Perpetual and Ms. Rose had the Estate Binder and the S. 27 Report. Darby specifically said in his evidence (6 lines below the quoted passage at page 57/line 15) that he needed to look at the records contained in the boxes of claims files located at his office, not the summary of claims listed in the claims register.
- 2.4 Bankrupt estate records and information are not public records. The Trustee objected to the introduction of confidential Estate records and information into a public Questioning transcript.
- 2.5 The findings that (a) the Trustee "was intentionally preventing the discovery of relevant and material information of the Estate for the purposes of these Applications", and (b) "appeared unnecessarily obstructive" failed to take into account the confidential nature of the Estate's records and information. It also failed to take into account all the financial information which had by then already been provided by the Trustee, as well as the confidentiality conditions subject to which the records were provided to Perpetual (not

objected to by Perpetual), and the confidentiality conditions inherent under S26(3) of the BIA.

- 2.6 The Trustee was acting in accordance with the BIA in refusing Ms. Rose access to the confidential information and records of the Estate. Perpetual acted in breach of the BIA by sharing such confidential records with Ms. Rose. The fact that Ms. Rose is the CEO of Perpetual does not detract from the fact that she personally is not a creditor of the Estate and is a litigant in her personal capacity in this matter. Perpetual should have placed a confidentiality screen in place to avoid disclosure of the Estate's confidential information and records to Ms. Rose. If there was any conundrum, it was of Perpetual's own making.
- 2.7 If Perpetual wanted to rely on information contained in the Estate Binder in support of its Security Application, the correct approach was not to force Mr. Darby to publicly disclose confidential information in its possession on the record; rather, it should have prepared a confidential affidavit and sought a sealing order, which is common practice when relying upon confidential information in a court proceeding.

3. **Reasons Paragraph 27:**

- 3.1 Darby's statement that he did not want to look at the bank statements "right in front of you" must be read in context. Perpetual attempted to introduce the entire Estate Binder as an Exhibit into the public record. The Trustee rightfully objected. Darby was asked what the Estate's bank balance was at November 6, 2019 (the date of the Darby Questioning). The bank statements in the Estate Binder were current to September 30, 2019. Darby offered to look at the Estate's bank statements to establish the bank balance as at November 6, 2019, but his offer was not accepted (Darby Questioning page 19/line 1 – Page 20/line 10).

4. **Reasons Paragraph 28:**

- 4.1 It is not correct that "... because the examination of PD was producing no information ..." Perpetual and Ms. Rose made requests and asked Undertakings which were refused. Prior to the Darby Questioning, the Estate Binder and the S. 27 Report had been provided to Perpetual, and shared by Perpetual with Ms. Rose. Such financial information is summarized in Exhibit "H" to the Darby February Affidavit. During the Darby Questioning and in his Responses to Undertakings, Darby provided the financial information summarized in the Exhibit "K" to the Darby February Affidavit.

5. **Reasons Paragraph 32:**

- 5.1 The finding that Darby chose not to apprise himself of information is incorrect. Darby answered questions and responded to undertaking requests, providing only information that could properly be placed on the public record, and recognizing the fact that the much of the information requested by Perpetual was already in the possession of Perpetual and Ms. Rose by virtue of the Estate Binder and the S. 27 Report.

6. **Reasons Paragraph 53:**

- 6.1 The findings that Darby failed to fulfill his obligations "... to act impartially and with candour ..." are extremely prejudicial to him. They were made without giving him an opportunity to respond to those concerns. Those findings failed to take into account the confidential nature of the Estate's records, and that all the records and information which

had been made available to Perpetual and shared by Perpetual with Ms. Rose by the time of the Hearing. It is not correct that Darby had made "... no efforts to apprise himself of the Estate's financial situation prior to or during Questioning ...". Darby answered questions within the limitations placed by the BIA on the Estate's records and information, offered to look at relevant records, and provided answers to questions which were relevant and material to the Darby Affidavit.

5 Reasons Paragraphs 54 and 55:

- 6.1 The "hollow statement" ascribed to Darby fails to take into account that under the BIA, Ms. Rose had no right to inspect the books, records and documents of the Estate. Perpetual had such right, and the Trustee allowed it to exercise that right.

6 Reasons Paragraph 56:

- 7.1 It is wrong to blame Darby for proceeding in an adversarial manner. Litigation in Alberta is by nature adversarial, and a Trustee's duty to be impartial does not extend as far as the Defendants contend for in a litigation situation. The Trustee has a duty to the Estate to conduct this litigation with due care and diligence. Darby acted at all times with candour and in compliance with Section 39 of the *BIA Rules*. The Code of Ethics for Trustees does not detract from the fact that a Trustee in bankruptcy enjoys all the rights which plaintiffs generally enjoy in litigation in Alberta.

7 General Statement:

- 8.1 The statements, findings and comments objected to by Darby are unfair to him. He was entitled to be placed on notice of those concerns and should have been given an opportunity to defend his reputation.