



**VIA EMAIL Laurie.Baptiste@albertacourts.ca**

May 1, 2020

**Laurie Baptiste**

Case Management Officer  
Court of Appeal of Alberta  
2600, 450 – 1<sup>st</sup> Street SW  
Calgary, AB T2P 5H1

**PricewaterhouseCoopers Inc., LIT v. Perpetual Energy Inc., et al  
Appeal No. 1901-0255AC**

1. We write on behalf of the Perpetual Respondents in the above mentioned appeal to request solicitor-client, or otherwise enhanced, costs as against PricewaterhouseCoopers Inc. (**PwC**) personally, or alternatively as against the Plaintiff trustee in bankruptcy (the **Trustee**), in connection with the Order of the Honourable Madam Justice B. Veldhuis granted January 29, 2020 requiring the Trustee to post security for costs of its appeal.<sup>1</sup> Further to our previous correspondence, please bring this letter to the attention of the panel that will consider several applications in this matter on June 18, 2020.

2. We have reviewed the letter from counsel of the co-Respondent Ms. Rose with today's date, and adopt those submissions. We add the following.

3. The Perpetual Respondents attempted to avoid having to apply for security for costs by asking PwC to agree to be personally liable for the costs of its appeal or having the Trustee post security for costs. That offer was rebuffed.<sup>2</sup>

4. Mr. Darby, a Senior Vice-President with PwC, swore an affidavit opposing the security for costs application. In his affidavit, he faulted the Respondents for not inspecting the books and records relating to the administration of the estate under the *Bankruptcy and Insolvency Act* (the **BIA**).<sup>3</sup> Perpetual Energy Inc., as a creditor of the estate, then exercised its right under s. 26(3) of the *BIA* to inspect the records of the estate prior to cross-examining Mr. Darby on his affidavit.<sup>4</sup> Mr. Darby was separately requested to bring unredacted copies of the materials inspected to his

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<sup>1</sup> As previously advised, the Parties agreed that the Respondents could request costs by May 1, 2020 notwithstanding Rule 14.88.

<sup>2</sup> Affidavit of Susan Riddell Rose sworn September 23, 2019 at paras. 25, 28.

<sup>3</sup> Affidavit of Paul Darby sworn October 18, 2019 at para. 4.1

<sup>4</sup> Transcript of Paul Darby Questioning held November 5, 2019, filed November 14, 2019, Exhibit 2, 4 (**Darby Transcript**).

cross-examination.<sup>5</sup> He failed to bring any financial records.<sup>6</sup> At his cross-examination, Mr. Darby refused to even look at the Trustee's own books and records put before him.<sup>7</sup> His counsel objected to marking them as exhibits.<sup>8</sup> He also objected to questions that could be premised on information learned during the inspection<sup>9</sup>—as if the inspection somehow shielded Mr. Darby from answering questions "clearly relevant to assertions he had made in an affidavit."<sup>10</sup> He then refused to answer undertakings to produce basic financial information about the estate.<sup>11</sup>

5. At his questioning, Mr. Darby was, as Justice Veldhuis found, "intentionally preventing the discovery of relevant and material financial information of the estate for the purpose of these applications."<sup>12</sup> His obstructive behaviour included rebuking questions,<sup>13</sup> being unprepared—not having even looked at the books and records of the estate before attending,<sup>14</sup> having memory lapses,<sup>15</sup> and, what Justice Veldhuis charitably described as having, "limited awareness"<sup>16</sup> of basic information about the estate on which he was being questioned.<sup>17</sup> As Justice Veldhuis found: "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 [Mr. Darby] to apprise himself of this information before swearing his affidavit, before attending questioning or during questioning. He chose not to do so."<sup>18</sup>

6. The Trustee's conduct merits an award of solicitor-client costs. The Perpetual Respondents rely on the authorities cited by counsel for Ms. Rose and the circumstances endorsed by this Court to order solicitor-client costs as recently reiterated in *Secure 2013 Group Inc. v. Tiger Calcium Services Inc.*<sup>19</sup> Ms. Rose has sworn an affidavit in support of the Perpetual Respondents' request for enhanced costs that attaches a bill of costs showing the solicitor-client costs incurred by the Perpetual Defendants relating to the security for costs application.

7. The Perpetual Respondents seek these costs against PwC personally. In addition to relying on the authorities cited by counsel for Ms. Rose, the Perpetual Respondents rely on *Crossing Co. v. Banister Pipelines Inc.* and *Vancouver Trade Mart Inc. (Trustee of) v. Creative Prosperity Capital Corp.* for the "general proposition... that trustees in bankruptcy should not be allowed to pursue litigation with immunity against personal liability for costs... where there is no statutory duty to

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<sup>5</sup> Darby Transcript, Exhibit 6.

<sup>6</sup> Darby Transcript, pg. 24, ln. 1-7.

<sup>7</sup> Darby Transcript, pg. 20, lns. 4-6; pg. 22, ln. 12-27; Reasons for Decision of Madam Justice Veldhuis dated January 29, 2020 (2020 ABCA 36) at para. 27 (**Reasons**).

<sup>8</sup> Darby Transcript, pg. 10, ln 1 to pg. 13, ln. 16; pg. 15, ln. 22 to pg. 18, ln. 12; Reasons at para. 26.

<sup>9</sup> Darby Transcript pg 5, ln. 21 to pg 13, ln 16; pg. 15, ln 22 to pg. 18, ln. 27; pg. 33, ln 11 to pg. 35 ln 5; pg. 66, lns. 17-24.

<sup>10</sup> Reasons at para. 53.

<sup>11</sup> Reasons at para. 28.

<sup>12</sup> Reasons at para. 25.

<sup>13</sup> Darby Transcript at pg. 31, ln. 27; pg. 32, lns. 1-11.

<sup>14</sup> Darby Transcript at pg. 35, lns. 14-16; pg. 57, lns. 15-19;

<sup>15</sup> Darby Transcript at pg. 30, lns. 14-16; pg. 32, lns. 6-23; pg. 24, lns. 8-12; pg. 57, lns. 11-17.

<sup>16</sup> Reasons at para. 29.

<sup>17</sup> Darby Transcript at pg. 37, lns. 21-23; pg. 46, lns. 15-20; pg. 57, ln. 25 to pg. 57, ln. 8.

<sup>18</sup> Reasons at para. 32.

<sup>19</sup> *Secure 2013 Group Inc. v. Tiger Calcium Services Inc.*, 2018 ABCA 110 at para. 15 [**Tab 1**].

prosecute... and... there will likely be insufficient assets in the estate to satisfy an award of costs".<sup>20</sup>

8. In the alternative, the Perpetual Respondents seek these costs against the Trustee.

Yours truly,

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<sup>20</sup> *Vancouver Trade Mart Inc. (Trustee of) v. Creative Prosperity Capital Corp.* (1998), 7 CBR (4th) 3 at para. 30 (see also paras 24, 28-31) [**Tab 2**]; *Crossing Co. v. Banister Pipelines Inc.*, 2004 ABQB 56 at paras. 19-20 [**Tab 3**]. See also *Carter Oil & Gas Ltd. (Trustee of) v. 400133 B.C. Ltd.*, 1998 ABCA 372 at paras. 43-44 [**Tab 4**]; *Touche Ross Ltd. v. Weldwood of Canada Sales Ltd.* (1984), 49 C.B.R. (N.S.) 284 at paras. 5, 6 (Ont. S.C. in bankruptcy) [**Tab 5**].