

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 1901-0255AC

TRIAL COURT FILE NUMBER: 1801-10960

REGISTRY OFFICE: CALGARY

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

STATUS ON APPEAL: RESPONDENTS

STATUS ON APPLICATION: APPLICANTS

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

STATUS ON APPEAL: APPELLANT

STATUS ON APPLICATION: RESPONDENT

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

DOCUMENT: **MEMORANDUM OF ARGUMENT OF PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST and PERPETUAL OPERATING CORP.**

RE APPLICATION FOR SECURITY FOR COSTS

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I. OVERVIEW

1. Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp. (together, **Perpetual**), Respondents in this Appeal, apply for security for costs of this Appeal by PriceWaterhouseCoopers Inc., in its capacity as Trustee in Bankruptcy (the **Trustee**) of Sequoia Resources Corp. (**Sequoia**).
2. Perpetual relies on the memorandum of argument for security for costs filed by the other Respondent in this Appeal, Susan Riddell Rose.

II. SUMMARY OF FACTS

3. In 2016, Perpetual Energy Inc. agreed to sell assets to an unrelated third party (the **Purchaser**), as the sale of shares of a subsidiary (the **Aggregate Transaction**).
4. The Aggregate Transaction was effected through various steps. One of those steps was combining the beneficial interest in the assets in the subsidiary trustee, which already held the legal interest to those same assets (the **Asset Transaction**). The shares of the subsidiary trustee were then sold to the Purchaser.
5. The Purchaser then renamed the purchased company Sequoia and operated the company for 18 months. Sequoia then assigned itself into bankruptcy.
6. Almost two years after the Aggregate Transaction, the Trustee sued Perpetual, alleging, among other things, that the Asset Transaction constituted a transfer at undervalue within the meaning of s. 96 of the *Bankruptcy and Insolvency Act* (the **BIA**), amounted to oppression under the *Business Corporations Act* (Alberta), and was contrary to public policy, statutory illegality and equitable grounds.
7. Perpetual applied to summarily dismiss or strike all of the Trustee's claims. On August 15, 2019, the Honourable Justice Nixon issued oral reasons for judgment

dismissing or striking all of the claims except for the claim under the *BIA*.¹ Justice Nixon stated he intends to issue written reasons. The Parties are waiting for the written reasons to prepare the form of order.

8. On September 6, 2019, counsel for Ms. Rose wrote to the Trustee, including on behalf of Perpetual, to "request that your client consent to an order that it post security for the costs of Rose and the Perpetual defendants in responding to the [Trustee's] Appeal."² The letter also requested that the Trustee either confirm that it is personally liable for all costs as noted above or arrange to post commercially reasonable security"³ for the Trustee's appeal.
9. On September 11, 2019, counsel to the Trustee replied, denying any basis for the Trustee to provide security for costs, but also not stating whether the Trustee agreed that it was personally liable for costs.⁴

III. ARGUMENT

A. This Court has the jurisdiction to grant security for costs

10. This Court has jurisdiction to grant security for costs of the Trustee's appeal under both the *Business Corporations Act* and the *Alberta Rules of Court*.⁵

B. The reason Perpetual requires security for costs of the Trustee's Appeal

11. If the Trustee's appeal is dismissed, the estate of Sequoia likely has insufficient assets to pay any costs award.⁶ As a bankrupt corporation, Sequoia is not "an active, operating company" and has "no employees and no operating revenue."⁷

¹ Transcript of the Oral Reasons for Judgment of the Honourable Justice D.B. Nixon pronounced August 15, 2019, AR, Vol 1, Part II [**Transcript of Oral Reasons**].

² Affidavit of Susan Riddell Rose sworn September 23, 2019, Exhibit I [**Rose Affidavit**].

³ Rose Affidavit, Exhibit I.

⁴ Rose Affidavit, Exhibit K.

⁵ *North American Polypropylene ULC v. Williams Canada Propylene ULC*, 2018 ABQB 281 at paras. 43-44, 49-53 [**Tab 1**], citing *Business Corporations Act*, RSA 2000, c. B-9, s. 254 [**Rose Memorandum, Tab 5**] and *Alberta Rules of Court*, Alta. Reg. 124/2010, Rule 4.22 [**Rose Memorandum, Tab 7**]. See also *Alberta Rules of Court*, Rules 14.37 and 14.67 [**Tab 2**] and *Access Mortgage Corporation (2004) Ltd. v. Arres Capital Inc.*, 2017 ABCA 373 (Rowbotham J.A. in Chambers) [**Tab 3**].

⁶ Rose Affidavit at paras. 27(a)-(d), 32-33.

⁷ Rose Affidavit, Exhibit L.

A costs award would be an unsecured claim ranking behind secured claims,⁸ which in Sequoia's case exceed the value of its estate.⁹

12. Despite a written request, the Trustee has refused to acknowledge personal liability for any costs,¹⁰ notwithstanding that Canadian courts have held that a trustee in bankruptcy will be personally liable for costs where a trustee brings an action and the estate has insufficient assets to pay the costs in the event the trustee is unsuccessful, and trustees in bankruptcy have been ordered to post security for costs.¹¹
13. It would be unjust for the Trustee to immunize itself from the economic consequences of its litigation or engage in litigation with one-way risk. It would be equally unjust for Perpetual to be successful in the Trustee's appeal and be denied costs because the Trustee pursued litigation without assuring any ability to pay costs awards against it.¹²

C. The Trustee's Appeal lacks merit

14. The memorandum of argument of Ms. Rose sets out the merits of the Trustee's appeal regarding the striking of the oppression claim, which was also made against Perpetual. In striking the oppression claim against all Defendants, Justice Nixon held that the Trustee did not qualify as a complainant under the *Business Corporations Act*. That discretionary decision is entitled to significant deference on appeal.¹³
15. In striking the Trustee's claims that the Aggregate Transaction is void as contrary to public policy, or on the basis of statutory illegality or equitable grounds,

⁸ See Rose Memorandum of Argument at para. 6 and note 3, citing s. 136(1)(b)(iii) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 [**Rose Memorandum, Tab 1**].

⁹ Rose Affidavit at paras. 27(a)-(d), 33, Exhibit J.

¹⁰ Rose Affidavit, Exhibits I and K.

¹¹ *Future Health Inc. (Trustee of) v. State Farm Mutual Automobile Insurance Co. of Canada* (2006), 35 C.P.C. (6th) 168 (Ont. S.C.J.) at paras. 9-12 [**Rose Memorandum, Tab 6**].

¹² *Crossing Co v. Banister Pipelines Inc.*, 2005 ABQB 56 at paras. 18-19 (Master) [**Tab 4**].

¹³ *Business Corporations Act*, RSA 2000, c. B-9, s. 239(b) [**Tab 5**]; Transcript of Oral Reasons AR, Vol 1, Part II, F009, pg. 7, lns. 22-25.

Justice Nixon found these claims were hopeless. He held that these claims disclose no reasonable claim:

- (a) "The alleged public policy is not described, except that it is said to be 'reflected' in a statute, a regulation and three directives referred to as the 'Regulatory Regime.'"¹⁴
- (b) "There is no explanation as to what aspect [of] the [agreements forming the Aggregate Transaction] is prohibited by what Regulatory Regime."¹⁵
- (c) "[T]here is nothing in the Trustee's Statement of Claim which provides any particulars concerning the allegations that the Aggregate Transaction:
 - a. is prohibited by the Regulatory Regime;
 - b. is expressly or by necessary implication rendered illegal; or
 - c. could conceivably bring an agreement to transfer corporate shares within any of the recognized categories of agreements that are contrary to public policy. Those categories are (i) contracts that injurious to the state, (ii) injurious to the system of justice, (iii) encouraging immorality, (iv) affecting marriage, (v) in restraint of trade, and (vi) restrictive of personal liberties.

I find the absence of particulars to exist even if I assume everything in the Statement of Claim is true."¹⁶

- (d) "The phrase 'equitable rescission' is only referred to in a heading of the pleadings[... and, in any event] it is 'a remedy, not a cause of action'¹⁷ and "[t]he Trustee has not...alleged any facts that would support such claims"¹⁸ that could result in the remedy of rescission.

¹⁴ Transcript of Oral Reasons AR, Vol 1, Part II, F010, pg. 8, lns. 15-16.

¹⁵ Transcript of Oral Reasons, AR, Vol 1, Part II, F010, pg. 8, lns. 19-21.

¹⁶ Transcript of Oral Reasons, AR, Vol 1, Part II, F010, pg. 8, ln. 31 to pg. 9, ln. 4.

¹⁷ Transcript of Oral Reasons, AR, Vol 1, Part II, F011, pg. 9, lns. 17-25.

¹⁸ Transcript of Oral Reasons, AR, Vol 1, Part II, F011, pg. 9, lns. 26-29.

(e) "[I]t is not possible for the Trustee to seek partial rescission...no such remedy is known at common law or in equity."¹⁹

(f) "Rescission is only available between parties to a contract. Sequoia was not a party to the Share Purchase Agreement. This is a fatal bar to the Trustee seeking rescission...".²⁰

16. There is therefore little or no merit to the Trustee's appeal.


17. There is also no evidence that the Trustee's ability to pursue its appeal will be unduly prejudiced by an order to post security for costs.

IV. RELIEF SOUGHT

18. Perpetual seeks an Order directing the Trustee to post security for costs of the Trustee's appeal in the amount of \$400,000,²¹ or in the alternative, an amount calculated on the basis of five times Schedule C, Column 5 of the *Alberta Rules of Court*, related relief set out in its application, and granting Perpetual costs of this application.

RESPECTFULLY SUBMITTED ON SEPTEMBER 24, 2019.

BURNET, DUCKWORTH & PALMER LLP

Per: 
Daniel J. McDonald, Q.C./Paul G. Chiswell

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

¹⁹ Transcript of Oral Reasons, AR, Vol 1, Part II, F011, pg. 9, Ins. 34-35.

²⁰ Transcript of Oral Reasons, AR, Vol 1, Part II, F011, pg. 9, Ins. 37-39.

²¹ See Rose Affidavit at para. 34.

TABLE OF AUTHORITIES

1. *North American Polypropylene ULC v. Williams Canada Propylene ULC*, 2018 ABQB 281
2. *Alberta Rules of Court*, Alta. Reg. 124/2010, Rules 14.37 and 14.67
3. *Access Mortgage Corporation (2004) Ltd. v. Arres Capital Inc.*, 2017 ABCA 373
4. *Crossing Co v. Banister Pipelines Inc.*, 2005 ABQB 56
5. *Business Corporations Act*, RSA 2000, c. B-9, s. 239(b)