

**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



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: **MEMORANDUM OF ARGUMENT OF SUSAN RIDDELL ROSE  
APPLICATION RETURNABLE OCTOBER 31<sup>st</sup>, 2019**

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capacity as Trustee in bankruptcy of Sequoia  
Resources Corp., and not in its personal capacity

## **I. Introduction and Overview**

1. This memorandum is submitted on behalf of the Respondent Susan Riddell Rose (**Rose**), in support of an application to require the Appellant PricewaterhouseCoopers Inc., LIT, (**PwC**, or the **Trustee**) as trustee of Sequoia Resources Corp. (**Sequoia**), to post security for Rose's costs of the within Appeal.

2. It would be just and equitable to order that security for Rose's costs be posted in respect of this appeal, as:

- a. Rose has demanded the Trustee agree to be personally responsible for her costs, and the Trustee has refused;<sup>1</sup>
- b. Sequoia is insolvent;<sup>2</sup>
- c. the estate of Sequoia will be unable to pay a costs award to Rose;<sup>3</sup>
- d. requiring the Trustee to post security for Rose's costs will not impair or unduly prejudice the Trustee's ability to continue this Appeal; and
- e. the Trustee's appeal is of dubious merit.

## **II. The test for security for costs**

3. Where a trustee in bankruptcy commences litigation in ordinary civil courts the rules of those courts apply, including respecting security for costs.<sup>4</sup> Where a trustee is representing the interests of a narrower body of creditors rather than the estate in general, security for costs has

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<sup>1</sup> Affidavit of Susan Riddell Rose, sworn September 16, 2019 [**Rose Affidavit**] at paras 25 and 28, and at Exhibit 'I', letter of Rose to the Trustee dated September 6, 2019, and Exhibit 'K', Letter of the Trustee dated September 11, 2019.

<sup>2</sup> Rose Affidavit, Exhibit 'J', Preliminary Report of the Trustee dated April 11, 2018, pp 4-5.

<sup>3</sup> A costs award against a bankrupt is a preferred unsecured claim pursuant to s 136(1)(b)(iii) of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, as amended [the *BIA*] [**Tab 1**]. However, as the secured claims against Sequoia exceeded its available resources as of the date of the Trustee's appointment, the priority of a costs claim over other unsecured claims is irrelevant. No unsecured claims stand to recover anything at all from the Sequoia estate. Rose Affidavit, Exhibit 'J', Preliminary Report of the Trustee dated April 11, 2018, p. 4-5.

<sup>4</sup> *Re Di Paola*, [2006] OJ No 4381, 152 ACWS (3d) 800 at para 6 [**Tab 2**]; *V.I. International Holdings Ltd. v Henbar Investments Ltd.*, 1982 CarswellAlta 311, 19 Alta LR (2d) 237 (Alta Master) at para 4 [**Tab 3**].

been ordered in Alberta, and it was significant that no assets were available for preferred or unsecured creditors.<sup>5</sup> That is the case here too: the Sequoia *estate* stands to gain nothing from the Trustee's action; any gains from this litigation will clearly be offset by Sequoia's ostensibly mounting asset retirement obligations.<sup>6</sup> Even in the unlikely event that a Court simply voids the impugned transactions, the result will be to *remove* assets (and their associated liabilities) from the Sequoia estate; the likely benefit to Sequoia's preferred and unsecured creditors is nothing. Indeed, it appears the Trustee is exhausting what little cash Sequoia has on this litigation,<sup>7</sup> and has made no allowance for an obligation to pay costs at the end of the day.

4. In Alberta, security for costs against a corporation is governed by s. 254 of the Alberta *Business Corporations Act*, which provides:

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.<sup>8</sup>

5. The *ABCA* sets out a simple test for when a corporate litigant should be required to post security for costs: it only requires proof that a corporation will be unable to pay a costs award.

6. On any standard, that fact has been proven. The Trustee's reports to the Court disclose that as of the date of Sequoia's bankruptcy, Sequoia had only \$1,776,109 in available funds;<sup>9</sup> the secured claims against Sequoia totalled \$7,054,630. The Trustee's own witness gave sworn evidence that no further funding has been sought to pay what must be significant and growing professional costs related to this litigation.<sup>10</sup>

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<sup>5</sup> *B&W Building Maintenance Ltd v Superstein*, [1991] AWLD 92 (Alta Master) at paras 17-31 [Tab 4].

<sup>6</sup> Rose Affidavit, Exhibit 'L', Letter of the Trustee to the Court dated September 12, 2019.

<sup>7</sup> Rose Affidavit, para 33.

<sup>8</sup> Alberta *Business Corporations Act*, RSA 2000 c B-9, s 254 [the *ABCA*] [Tab 5].

<sup>9</sup> Rose Affidavit, Exhibit 'J', Preliminary Report of the Trustee dated April 11, 2018, p. 4-5.

<sup>10</sup> Rose Affidavit, paras 30-33.

7. An applicant is *prima facie* entitled to security for costs against a bankrupt litigant where the bankrupt cannot pay costs.<sup>11</sup> The burden then shifts to the Trustee, who bears “a very heavy onus ... to show that [it is] not able to raise the security.”<sup>12</sup>

8. The test for security for costs under the Alberta *Rules of Court* provides that the Court may order a security for costs award where the Court considers it just and convenient, taking into account: (a) whether it is likely that the applicant will be able to enforce against assets in Alberta; (b) the ability of the respondent to pay the costs award; (c) the merits of the action; (d) whether an order to give security for costs would unduly prejudice the respondent’s ability to continue the action, as well as any other matter the Court considers appropriate.<sup>13</sup>

9. This test is manifestly met by Rose. Sequoia will have *no* assets remaining after secured creditors are paid;<sup>14</sup> it has no ability to pay a costs award. There is no evidence that a security for costs award would prejudice the Trustee’s ability to pursue this claim; it is for the Trustee to prove that no party can underwrite or guarantee payment of Sequoia’s costs.<sup>15</sup>

10. Lastly, the merits of the Trustee’s appeal are dubious. The Trustee has appealed the *entirety* of Justice Nixon’s decision, including (presumably) his conclusions that (a) Rose was expressly released from all claims;<sup>16</sup> (b) the oppression claim should be struck;<sup>17</sup> and (c) that Rose “took her responsibilities as a director and officer ... seriously” and exercised her business judgment to the best of her ability.<sup>18</sup>

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<sup>11</sup> *Future Health Inc. (Trustee of) v State Farm Mutual Automobile Insurance Co of Canada*, [2006] OJ NO 4769, 153 ACWS (3d) 539 at para 8 [Tab 6].

<sup>12</sup> *Ibid* at paras 12-14.

<sup>13</sup> *Alberta Rules of Court*, Alta Reg 124/2010, Rule 4.22 [the *Rules*] [Tab 7].

<sup>14</sup> Rose Affidavit, para 27(d) and at Exhibit ‘J’, Preliminary Report of the Trustee, dated April 11, 2018, pp. 4-5.

<sup>15</sup> *Future Health*, *supra* note 11 at paras 12-14 [Tab 6].

<sup>16</sup> Rose Affidavit, para 22(e).

<sup>17</sup> Rose Affidavit, para 22(c).

<sup>18</sup> Rose Affidavit, para 22(h).

11. Personal liability of the Trustee for Sequoia's costs has not been determined. Although in Rose's view the Trustee should agree to underwrite Sequoia's costs (having commenced this litigation when it was clear that the Sequoia estate could never pay costs), the Trustee has refused to agree.<sup>19</sup> Given that uncertainty, security for costs should be ordered.

### III. The quantum of security for costs to be paid

12. Rose has necessarily incurred substantial legal costs in defence of this action.<sup>20</sup> She estimates she will incur an additional \$400,000 to respond to the Trustee's appeal.

13. Meanwhile, the Trustee has made clear that regardless of the outcome of this appeal it intends to continue its litigation against Rose, at further cost and inconvenience to all.<sup>21</sup>

14. Rose requests security for costs in the amount of \$400,000, as an approximation of her solicitor-client legal costs to be incurred in this Appeal.<sup>22</sup> In the alternative, she asks for solicitor-client costs based on five times the amount at Column 5, Schedule "C" of the *Rules*.<sup>23</sup>

15. Security for costs can be awarded on a solicitor-client basis where it appears a litigant's costs will likely be awarded as such.<sup>24</sup> In this case it is highly likely Rose is entitled to solicitor-client costs: the claim is enormous (nearly \$220 million), and the accusations against her carry substantial reputational risk (the Trustee alleges breaches of fiduciary duty, dishonesty, and that

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<sup>19</sup> Rose Affidavit, Exhibit 'K', Letter of the Trustee dated September 11, 2019.

<sup>20</sup> Rose Affidavit, para 27(e).

<sup>21</sup> Rose Affidavit, Exhibit 'K', Letter of the Trustee dated September 11, 2019.

<sup>22</sup> Solicitor-client costs have been awarded in cases in which a party has knowingly or recklessly presented unfounded allegations of dishonesty or breach of fiduciary, such that the counterparty's reputation is threatened: *Bell v Source Data Control Ltd.*, [1988] OJ No 1424, 12 ACWS (3d) 19 (ONCA) at para 47 [Tab 8]; *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9 at para 26 [Tab 9]. While solicitor-client costs awards are often granted in the context of unsubstantiated fraud claims, claims of dishonesty or misconduct may be sufficient: *McNaughton Automotive Ltd. v Co-operators General Insurance Co.*, 2008 ONCA 597 at para 45 [Tab 10]; *Greenlight Capital Inc. v Stronach*, [2008] OJ No 2749, 168 ACWS (3d) 91 (ONSC Div Ct) at para 73 [Tab 11].

<sup>23</sup> Security for costs equal to 5 times the amount on Column 5 of Schedule C was awarded by Wittmann C.J. in *Attila Dogan Construction v AMEC Americas Ltd.*, 2011 ABQB 175 [Tab 12]. Wittmann C.J. reasoned that the amount of the security was justified by the claim's significance and complexity, and directed security for costs in the amount of \$1.6 million: para 31. Other complex or high-quantum claims have also attracted security for costs on a multiple of Column 5 in Alberta: *Mudrick Capital Management v Wright*, 2018 ABQB 648 at paras 45-48 [Tab 13].

<sup>24</sup> *Hamza v Hamza*, 1997 ABCA 263 at para 17 [Tab 14]; *Emerex Oil and Gas Ltd. v Drover*, 2016 ABQB 420 at para 89 [Emerex] [Tab 15].

Rose benefited personally from the impugned transactions).<sup>25</sup> Moreover, the Trustee makes these claims in the face of clear findings of fact in the Court below, *and* an executed and binding release from the parties to the impugned transaction.<sup>26</sup>

#### **IV. The Trustee cannot avail itself of the protection given to a complainant in oppression under the Alberta *Business Corporations Act***

16. Section 243(3) of the *ABCA* provides immunity to complainants in oppression from security for costs.<sup>27</sup> It is of no assistance to the Trustee. In order to rely on s. 243(3), a party must establish that it is a proper complainant under Part 19 of the *ABCA*, and that oppression stands at the core of its claim.<sup>28</sup> In short, “merely uttering the word oppression is not sufficient.”<sup>29</sup>

17. Here, the Trustee has failed to establish even an arguable case that it is a proper complainant. The record (as well as the judgment appealed) demonstrates that it is not: the Trustee’s claim does not further the interests of Sequoia’s estate, and none of Sequoia’s current creditors were creditors of PEOC at the time of the impugned transactions. Moreover, this is not truly a claim in oppression, but a hybrid claim; oppression is *only one basis* of liability alleged by the Trustee. Accordingly, s. 243(3) is of no assistance to the Trustee.

#### **V. Relief sought**

18. Rose respectfully requests an Order directing the Trustee to post security for costs in the amount of \$400,000, or in the alternative in an amount calculated on the basis of five times the amount at Schedule C, Column 5 of the *Rules*.

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<sup>25</sup> Statement of Claim, paras 16.1, 16.3, 16.4, and 20.

<sup>26</sup> Rose Affidavit, para 22(e).

<sup>27</sup> The *ABCA*, *supra* note 8, s 243(3) [Tab 16].

<sup>28</sup> *Mudrick Capital Management v Wright*, 2018 ABQB 194 at paras 16-18 [Mudrick 2] [Tab 17]; *Broadway v Robson*, 2018 ABQB 463 at paras 4-7, 12 [Tab 18]. Where oppression is merely one claim among many, Courts have been willing to deduct the amount that relates to oppression from the security ordered: *Emerex*, *supra* note 24 at para 96 [Tab 15]; *Mudrick 2* at para 51 [Tab 15]; *Vaasjo v. Jurina*, 2016 ABQB 78 [Vaasjo] at para 22 [Tab 19]. In this case the Trustee’s oppression claims cannot be so extricated; the Trustee’s claim advances oppression as only one *basis* of liability arising from a series of transactions.

<sup>29</sup> *Vaasjo*, *supra* note 28 at para 22 [Tab 19].

## Table of Authorities

1. *Bankruptcy and Insolvency Act*, RSC 1985 c B-3
2. *Re Di Paola*, [2006] OJ No 4381, 152 ACWS (3d) 800
3. *V.I. International Holdings Ltd. v Henbar Investments Ltd.*, 1982 CarswellAlta 311, 19 Alta LR (2d) 237 (Alta Master)
4. *B&W Building Maintenance Ltd v Superstein*, [1991] AWLD 92, [1991] AJ No 17 (Alta Master)
5. *Business Corporations Act*, RSA 2000 c B-9
6. *Future Health Inc. (Trustee of) v State Farm Mutual Automobile Insurance Co of Canada*, [2006] OJ NO 4769, 153 ACWS (3d) 539
7. *Alberta Rules of Court*, Alta Reg 124/2010
8. *Bell v Source Data Control Ltd.*, [1988] OJ No 1424, 12 ACWS (3d) 19 (ONCA) at para 47
9. *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9
10. *McNaughton Automotive Ltd. v Co-operators General Insurance Co.*, 2008 ONCA 597
11. *Greenlight Capital Inc. v Stronach*, [2008] OJ No 2749, 168 ACWS (3d) 91 (ONSC Div Ct)
12. *Attila Dogan Construction v AMEC Americas Ltd.*, 2011 ABQB 175
13. *Mudrick Capital Management v Wright*, 2018 ABQB 648
14. *Hamza v Hamza*, 1997 ABCA 263
15. *Emerex Oil and Gas Ltd. v Drover*, 2016 ABQB 420
16. *Mudrick Capital Management v Wright*, 2018 ABQB 194
17. *Broadway v Robson*, 2018 ABQB 463
18. *Vaasjo v. Jurina*, 2016 ABQB 78