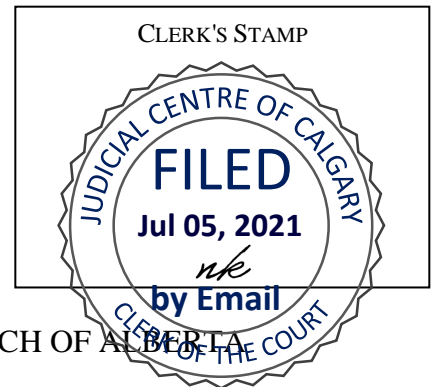


Justice D. B. Nixon
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July 23, 2021



COURT FILE NUMBER

1801-10960

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

PLAINTIFF

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

DEFENDANTS

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

DOCUMENT

COSTS BRIEF OF
PRICEWATERHOUSECOOPERS INC., LIT

For the hearing on July 23, 2021 at 10:00 a.m.
before Mr. Justice D.B. Nixon

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
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INTRODUCTION

1. In August 2018, PricewaterhouseCoopers Inc., in its capacity as the trustee in bankruptcy of Sequoia Resources Corp. (the “**Trustee**”) brought claims against Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. (the “**Perpetual Defendants**”) and Susan Riddell Rose (collectively, the “**Defendants**”), including pursuant to s. 96 of the *Bankruptcy and Insolvency Act* (the “**BIA**”).
2. The Defendants applied to strike and/or dismiss the Trustee’s claims brought against them (the “**2018 Applications**”), including the Trustee’s claim under the *BIA* (the “**BIA Claim**”). In August 2019, the Court struck or dismissed all of the Trustee’s claims, with exception of the *BIA Claim*.
 - 2.1. The Perpetual Defendants appealed the Court’s decision not to strike or dismiss the *BIA Claim*. The Trustee appealed the Court’s decision to strike or dismiss its remaining claims.
 - 2.2. In January 2021, the Court of Appeal dismissed the Perpetual Defendants’ appeal in respect of the *BIA Claim*. The Trustee’s appeal was allowed and the Order striking or dismissing the Trustee’s remaining claims was set aside. The question of costs of these proceedings was referred back for determination by this Court.
 - 2.3. The Court of Appeal awarded the Trustee five times Column 5 Schedule C costs for its appeal and its factum in response to the Perpetual Defendants’ appeal on the basis of the importance of the issues raised, the amount in dispute and the complexity of the proceedings.¹ The Court of Appeal also determined that it was “not appropriate” to depart from the default rule that those costs be payable forthwith.²
3. While the appeal against the August 2019 decision to dismiss their application to strike or summarily dismiss the *BIA Claim* was pending, the Perpetual Defendants brought a second

¹ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 92, at para. 7 [Trustee’s Authorities on Costs, Tab 1]

² *Ibid.*, at para. 6 [Trustee’s Authorities on Costs, Tab 1]

application to dispose of the Trustee's *BIA* Claim (the "**February 2020 Application**"). In January 2021, this Court summarily dismissed the *BIA* Claim.

4. There are two questions before the Court, regarding the costs of two applications:
 - 4.1. The Trustee seeks costs resulting from the Defendants unsuccessful 2018 Applications to strike and/or dismiss the Trustee's claims; while
 - 4.2. The Perpetual Defendants seek costs resulting from the dismissal of the *BIA* Claim by this Court pursuant to the February 2020 Application.
5. On the first question, the Trustee submits that the considerations applied by the Court of Appeal should govern the costs in this Court arising from the 2018 Applications. The Trustee is entitled to costs from the Defendants, calculated on five times Column 5 of Schedule C and payable forthwith.
6. On the second question, the Trustee submits that the Perpetual Defendants should be awarded Schedule C costs, without any enhancement.
7. The Trustee further submits that the cost awards should be set off against each other and that the net amount should be payable forthwith.

PART I – STATEMENT OF FACTS

8. The relevant facts will be referred to in the course of the submissions below.

PART II – ISSUES

9. The Trustee's submissions address the following issues:
 - 9.1. The quantum of costs the Trustee is entitled to as a result of the 2018 Applications;
 - 9.2. The quantum of costs the Perpetual Defendants are entitled to as a result of the February 2020 Application; and
 - 9.3. Whether any costs awarded in favour of the Perpetual Defendants as a result of the February 2020 Application should be set off against the costs payable by them as a result of the 2018 Applications.

PART III – ARGUMENT

A. The Defendants’ 2018 Applications

10. The Perpetual Defendants’ 2018 application to dismiss the Trustee’s *BIA* Claim was dismissed by this Court. Their appeal from that decision was also dismissed. The Trustee’s appeal in relation to the successful portion of the Defendants’ 2018 Applications was allowed.³
11. The Court of Appeal determined that the Trustee was entitled to five times the Column 5 tariff under Schedule C for its appeal.⁴ In making this determination, the Court specifically rejected the submission that costs should be “in the cause” or deferred until the end of the litigation:

While it is possible to defer the costs of interlocutory applications until the end of the litigation, the presumption is that those costs are paid once the application is completed: R. 10.29(1). The parties brought competing applications for summary judgment and summary dismissal, essentially agreeing that this was a proportionate and efficient way of resolving some key issues underlying this litigation. Many of those issues were, in fact, resolved or narrowed. It is not appropriate for the costs consequences of these complex proceedings to be in the cause, and costs are payable forthwith.⁵

12. In its decision on costs in *Stewart Estate*, the Court of Appeal discussed the factors to be considered in awarding costs:

Rule 10.33 of the Rules provides a list of factors a court may consider when determining costs. They include the degree of success, the amount claimed and recovered, the importance of the issues, the complexity of the action, and conduct that shortened proceedings.⁶

13. In determining the costs arising from the Trustee’s successful appeal and the Perpetual Defendants’ unsuccessful appeal, the Court of Appeal found that:

These appeals were complex, raising a number of important and some novel issues respecting corporate law, bankruptcy law, oil and gas regulation, contracts and procedure. The amounts involved are substantial. Rule 14.88 cannot be relied on, because the trial costs have apparently not been set. In any event, it is appropriate that costs of appeal 1901-0255AC be awarded on five times Column 5 of Schedule C, plus reasonable disbursements and GST. Appeal 1901-0262AC was, in some respects, a form of cross-appeal, although it did raise some discrete issues. The Trustee in Bankruptcy is entitled only to an additional

³ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 92, at para. 3 [Trustee’s Authorities on Costs, Tab 1]

⁴ *Ibid.*, at para. 7 [Trustee’s Authorities on Costs, Tab 1]

⁵ *Ibid.*, at para. 6 [Trustee’s Authorities on Costs, Tab 1]

⁶ *Stewart Estate v TAQA North Ltd*, 2016 ABCA 144, at para. 17 [Trustee’s Authorities on Costs, Tab 2]

fee for filing a factum in appeal 1901-0262AC, at three times item 19(1) of Column 5 of Schedule C.⁷

14. Consistent with the Court of Appeal’s direction on costs in the appeals resulting from the 2018 Applications, the Trustee submits that the Rule 10.33 factors support an award of costs on five times Column 5 of Schedule C:

14.1. The Trustee’s appeal was allowed and the Perpetual Defendants’ appeal was dismissed. The 2018 Applications were unsuccessful in all respects, as the Court of Appeal confirmed.⁸

14.2. The amount at issue was “substantial”, significantly exceeding the Column 5 threshold.⁹

14.3. The legal issues raised were “important” and “novel”, covering a number of areas of law.¹⁰

14.4. The proceedings were “complex”, justifying an award of multiple Schedule C costs.¹¹

15. There are no additional factors that would justify a departure from the Court of Appeal’s determination that these costs be payable by the Defendants forthwith, in the normal course.¹²

B. The Perpetual Defendants Are Entitled to Schedule C Costs for their February 2020 Application, without any Multiplier

16. Pursuant to Rule 10.29(1), the Perpetual Defendants are entitled to Schedule C costs arising from their successful February 2020 Application to dismiss the Trustee’s *BIA* Claim.¹³

⁷ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 92, at para. 7 [Trustee’s Authorities on Costs, Tab 1]

⁸ *Ibid*, at paras. 3 [Trustee’s Authorities on Costs, Tab 1]

⁹ *Ibid*, at para. 7 [Trustee’s Authorities on Costs, Tab 1]

¹⁰ *Ibid* [Trustee’s Authorities on Costs, Tab 1]

¹¹ *Ibid*, at paras. 7-8 [Trustee’s Authorities on Costs, Tab 1]

¹² *Ibid*, at para. 6 [Trustee’s Authorities on Costs, Tab 1]

¹³ *Alberta Rules of Court*, AR 124/2010, s. 10.29(1) [Trustee’s Authorities, Tab 3]

However, there is no basis to award a multiple of Schedule C costs or any form of enhanced costs.

17. In *Stewart Estate*, discussed above, our Court of Appeal discussed the factors to be considered in awarding costs.¹⁴ The Court stated that:

Rule 10.33 of the Rules provides a list of factors a court may consider when determining costs. They include the degree of success, the amount claimed and recovered, the importance of the issues, the complexity of the action and conduct that shortened proceedings. Costs may be denied when conduct unnecessarily lengthened proceedings or there was misconduct.¹⁵

18. Taken together, these factors do not support an award of enhanced costs in relation to the February 2020 Application. They support the reduction of any costs award in favour of the Perpetual Defendants.

1. Complexity of the Action and Amount in Dispute

19. The Action is complex and the amount in dispute is “substantial”.¹⁶

2. The Importance of the Issues

20. As noted by the Court of Appeal in *Stewart Estate*, the importance of the issues is a factor that should be considered in making a costs award.¹⁷ This factor supports a reduction of any costs award in favour of the Perpetual Defendants as a result of their February 2020 Application.
21. In granting intervenor status to the Orphan Well Association (the “OWA”) and Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Limited (the “**Industry Intervenors**”), the Court found that they would be affected by the February 2020 Application. With respect to the OWA, the Court found that:

While the Goodyear Assets are not yet designated as orphan wells, I am satisfied for purposes of this application that the OWA will be directly affected by the outcome of the BIA Summary Judgment Application. The regulatory obligations associated with the

¹⁴ *Stewart Estate v TAQA North Ltd*, 2016 ABCA 144, at para. 17 [Trustee’s Authorities on Costs, Tab 2]

¹⁵ *Ibid* [Trustee’s Authorities on Costs, Tab 2]

¹⁶ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 92, at para. 7 [Trustee’s Authorities on Costs, Tab 1]

¹⁷ *Stewart Estate*, *supra*, at para. 17 [Trustee’s Authorities on Costs, Tab 2]

Goodyear Assets will very likely become the OWA's responsibility if the Asset Transaction is not set aside.¹⁸

22. The Court also found that the Industry Intervenors would be directly affected by the February 2020 Application:

The Court does not make its decision in a vacuum. As third-party licensees in Alberta's oil and gas industry, the Industry Intervenors undoubtedly will be directly affected by the decision of the Court in the BIA Summary Judgment Application.¹⁹

23. The Court recognized the importance of the issues raised by the February 2020 Application in granting intervenor status to the OWA and the Industry Intervenors. In granting the February 2020 Application, the Court's reasons highlighted the potential need for amendments to the *BIA* definition of "insolvent person":

The comments of the ULCC also make it evidence that there is a need for *BIA* amendments in respect of clause (c) of the Insolvent Person Definition. If the federal Crown wants to include items such as ARO in the determination of the Insolvency Element, then legislative amendments to the *BIA* are required.²⁰

24. The importance of the issues raised by the February 2020 Application is a factor the Court should consider in reducing any costs award against the Trustee.

3. Conduct that shortened, or lengthened, the proceedings

25. This factor also supports a reduction of any costs awarded against the Trustee as result of the February 2020 Application.
26. As noted by the Court, the Trustee did not oppose the February 2020 Application on the basis that a trial was required to determine the issues raised in the Action,²¹ seek to cross-examine Mr. Schweitzer on his May 5 affidavit in support of the February 2020 Application or seek to supplement the substantive evidence on which it had relied since it filed its own summary judgment application.²²

¹⁸ Transcript of Proceedings on July 24, 2021, at p. 14, lines 39-41, p. 15, lines 1-5 [Trustee's Authorities on Costs, Tab 4]

¹⁹ Transcript of Proceedings on July 24, 2021, at p. 16, lines 15-18 [Trustee's Authorities on Costs, Tab 4]

²⁰ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABQB 2, at para. 159 [Trustee's Authorities on Costs, Tab 5]

²¹ *Ibid*, at paras. 222 and 243 [Trustee's Authorities on Costs, Tab 5]

²² *Ibid*, at paras. 222-226 [Trustee's Authorities on Costs, Tab 5]

27. In contrast, the Perpetual Defendants took a number of unsuccessful steps that had the effect of lengthening the proceedings leading up to the hearing of their February 2020 Application:

27.1. The Perpetual Defendants initially sought to delay the hearing of the applications for leave to intervene until after their February 2020 Application had been heard, on the basis of their expectation that a full-day hearing would be required, after cross-examination on the proposed intervenors' affidavits had taken place and undertakings had been answered.²³

27.2. On July 14, 2020, the Perpetual Defendants submitted that if their February 2020 Application was granted prior to the determination of the intervenor issue, the proposed intervenors could simply intervene in any resulting appeal.²⁴ The Court disagreed and directed that it would hear the intervenor applications prior to the Perpetual Defendants' February 2020 Application.²⁵

27.3. Then, at a further hearing, on July 24, 2020, the Court granted intervenor status to the OWA and the Industry Intervenors, notwithstanding the opposition of the Perpetual Defendants.²⁶ The Court also permitted the OWA and Industry Intervenors to provide new evidence, again over the objection of the Perpetual Defendants.²⁷

27.4. A further hearing was required on July 30, 2020 to address the Perpetual Defendants' attempt to have the Intervenors' submissions and evidence limited to the "grounds particularized in" the February 2020 Application. The Court confirmed that Intervenors were entitled to address any matters relevant to the February 2020 Application.²⁸

27.5. Yet another hearing was required on September 24, 2020 to address the Perpetual

²³ July 8, 2020 Letter from the Perpetual Defendants to the Court [**Trustee's Authorities on Costs, Tab 6**]; July 14, 2020 Letter from the Perpetual Defendants to the Court [**Trustee's Authorities on Costs, Tab 7**]

²⁴ Transcript of Proceedings on July 14, 2020, p. 9, lines 29-35 [**Trustee's Authorities on Costs, Tab 8**]

²⁵ Transcript of Proceedings on July 14, 2020, p. 19, lines 27-31 [**Trustee's Authorities on Costs, Tab 8**]

²⁶ Transcript of Proceedings on July 24, 2020, pp. 8-19 [**Trustee's Authorities on Costs, Tab 4**]

²⁷ Transcript of Proceedings on July 24, 2020, pp. 14-29 [**Trustee's Authorities on Costs, Tab 4**]

²⁸ Transcript of Proceedings on July 30, 2020, p. 9, lines 7-24 [**Trustee's Authorities on Costs, Tab 9**]

Defendants’ application to strike a further affidavit provided by the Trustee.²⁹ The Court also dismissed that application.

28. The hearings on July 14, July 24, July 30 and September 24, 2020 were all necessitated by positions unsuccessfully taken by the Perpetual Defendants. These should be taken into account in assessing costs resulting from the February 2020 Application.
29. The Perpetual Defendants also lengthened the proceedings significantly by deliberately choosing to scope their 2018 Application to dismiss the Trustee’s *BIA* Claim very narrowly, to address only one single issue – the “arm’s length issue”. As the Court noted, they wanted to terminate the *BIA* Claim without getting into the valuation issue.³⁰
30. Although the Court determined that the February 2020 Application was not an abuse of process, it did note that Perpetual Defendants chose to focus on different elements of the *BIA* Claim in framing the two applications.³¹
31. The Perpetual Defendants’ election to pursue a two-step approach to summary dismissal may have made sense to them from a strategic perspective, but it is directly relevant to their entitlement to costs arising from the February 2020 Application. As this Court noted, the foundational Rules “direct that we should always get to the merits of a case as fast, efficiently, inexpensively, and fairly as possible.”³²

C. Any Costs Resulting from the 2020 Application should be Set Off against the Costs Resulting from the 2018 Applications

32. Rule 10.31(4) provides that:

The Court may adjust the amount payable by way of deduction or set-off if the party that is liable to pay a costs award is entitled to receive an amount under a costs award.³³

²⁹ Application to Strike Affidavit and Amended Application to Strike Affidavit [Trustee’s Authorities on Costs, Tab 10]

³⁰ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABQB 6, at para. 90 [Trustee’s Authorities on Costs, Tab 11]

³¹ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABQB 2, at para. 46 and 48 [Trustee’s Authorities on Costs, Tab 5]

³² *Ibid*, at para. 45 [Trustee’s Authorities on Costs, Tab 5]

³³ *Alberta Rules of Court*, AR 124/2010, s. 10.31(4) [Trustee’s Authorities, Tab 3]

33. In *Colborne Capital*, the Court of Appeal directed that a costs award in favour of one party could be set off against costs awarded in favour of the other party.³⁴ In its costs reasons in this case, our Court of Appeal referred to Rule 10.31(4) and directed that “all the awards of costs for and against the same parties may be set off against each other.”³⁵
34. Consistent with Rule 10.31(4), any costs awarded against the Trustee as a result of the February 2020 Application should be set off against any costs awarded in favour of the Trustee as a result of the dismissal of the 2018 Applications.

PART IV - RELIEF SOUGHT

35. The Trustee respectfully requests an Order directing that:
- 35.1. The Trustee is entitled to costs of the 2018 Application, on five times Column 5 of Schedule C;
- 35.2. The Perpetual Defendants are entitled to Schedule C costs of the February 2020 Application, reduced in accordance with the Rule 10.33 factors discussed above; and
- 35.3. Any costs awarded against the Trustee in relation to the February 2020 Application are to be set off against the costs awarded against the Perpetual Defendants in relation to the 2018 Applications.

Calgary, Alberta
July 2, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per: 

Rinus de Waal/Luke Rasmussen
Counsel PricewaterhouseCoopers Inc., LIT, in its
capacity as the Trustee in Bankruptcy of Sequoia
Resources Corp.

³⁴ *Colborne Capital Corp. v 542775 Alberta Ltd.*, 1999 ABCA 361, at para. 29 [Trustee’s Authorities, Tab 12]

³⁵ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 92, at para. 10 [Trustee’s Authorities, Tab 1]

TABLE OF AUTHORITIES

1. [*PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*](#), 2021 ABCA 92
2. [*Stewart Estate v TAQA North Ltd.*](#), 2016 ABCA 144
3. [*Alberta Rules of Court*](#), AR 124/2010, ss. 10.29, 10.31 and 10.33
4. Transcript of Proceedings on July 24, 2021
5. [*PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*](#), 2021 ABQB 2
6. July 8, 2020 Letter from the Perpetual Defendants to the Court
7. July 14, 2020 Letter from the Perpetual Defendants to the Court
8. Transcript of Proceedings on July 14, 2020
9. Transcript of Proceedings on July 30, 2020
10. Application to Strike Affidavit and Amended Application to Strike Affidavit
11. [*PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*](#), 2020 ABQB 6
12. [*Colborne Capital Corp. v 542775 Alberta Ltd.*](#), 1999 ABCA 361