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The Sequoia Bankruptcy Part 4: Costs Lost in Time and Perpetual's New Subsidiary

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Cases Commented on: *PricewaterhouseCoopers Inc v Perpetual Energy Inc,* 2022 ABQB 592

This is part 4 of a series on the litigation resulting from the Bankruptcy of Sequoia Resources Corp. (Sequoia). Part 1 covered the first application for summary dismissal and an application to intervene. Part 2 covered a costs decision against the trustee and the appeal of the first summary dismissal. Part 3 covered interlocutory decisions and the appeal of the second summary dismissal decision.

This part covers a costs decision at the King's Bench level relating to the first and second applications for summary dismissal (but not either of the appeals of those summary dismissals). Ordinarily costs decision are relatively simple, but the intricate timeline of the Sequoia-related litigation has made this one incredibly complicated and has given it the feel of a poorly written time travel film.

The Sequoia-related litigation is significant because the case relates to the ability of oil and gas companies to use complex corporate structures and transactions to avoid financial responsibility for abandonment and reclamation costs. The facts are set out in my first post on the Sequoia bankruptcy, or in a short summary written by the Court of Appeal (*PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 at paras 3-13).

I will continue to use the short forms established in the earlier posts: Perpetual Energy Inc, Perpetual Operating Trust, and Perpetual Operating Corp (The Perpetual Group), Abandonment and Reclamation Obligations (ARO), and PricewaterhouseCoopers (the Trustee).

The Confused Timeline

PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2022 ABQB 592 (CanLII) is a costs decision written by Justice D. B. Nixon, the same justice who decided the first and second summary dismissal applications and the costs application for the first summary dismissal. All three of those previous decisions in *PricewaterhouseCoopers Inc v Perpetual Energy Inc* cases have been overturned by the Court of Appeal. This decision will be overturned as well.

Justice Nixon received the parties' submissions on costs on July 23, 2021 but did not issue his decision until August 31, 2022. However, on March 2022, the Court of Appeal had issued a decision overturning Justice Nixon's decision on the second application for summary dismissal. Justice Nixon noted that the Court of Appeal overturned his second decision regarding summary

dismissal but does not address or discuss the costs implications of the second summary dismissal having been overturned or the Court of Appeal's findings in that appeal (at para 17).

Justice Nixon Disputes, Misinterprets, and Ignores Court of Appeal Decisions

Justice Nixon comments on the Court of Appeal's conclusions that the Trustee's claim based on public policy should not have been struck (at paras 29-34). His comment show that he disagrees with the Court of Appeal. It is not the role of a Trial Judge to dispute the findings of the Court of Appeal in the guise of 'comments'.

Justice Nixon then misinterprets the Court of Appeal's comments in the appeal of the first summary dismissal (2021 ABCA 16) to find that the potential Oppression claim under the *Business Corporations Act*, RSA 2000, c B-9 has been confined to only the roughly one and a half million dollars in municipal taxes owed, and not the ARO costs (at paras 40-41). This is incorrect. As Justice Nixon noted, the Court of Appeal left the possibility that the oppression claim could impact the handling of the ARO open (at para 42). The Court of Appeal was clear that they were not making any final determinations on the Oppression remedy: "the state of the record and the complexity of the issues does not permit a fair disposition of this claim on a summary basis." (2021 ABCA 16 at para 144) The order resulting from the first appeal is written out in the related costs decision, and it does not strike any part of the oppression claim (2021 ABCA 92 at para 3). On the basis of this error, Justice Nixon finds that this "amounts to a win" for Perpetual and Ms. Rose (at para 43).

Justice Nixon then considers if the Perpetual Group and Ms. Rose improperly advanced inconsistent positions about the values of the Oppression claim. Justice Nixon concludes that none of the Perpetual Group and Ms. Rose's arguments were improper (at para 44-52). We already know this is incorrect because the Court of Appeal decision that Justice Nixon does not deal with found that the Perpetual Group did take inconsistent and improper positions (2022 ABCA 111 at paras 99-102).

Justice Nixon finds Perpetual and Ms. Rose (the parties he found in favour of in his three previous decisions) merited costs for both the first and second sets of applications.

Justice Nixon decided to award costs on Column 5 without a multiplier (at para 72-78) even though the Court of Appeal determined the complexity of the issues involved merited multipliers of five times and three times Column C for the different appeals. (2021 ABCA 92 at para 7). This odd decision to disagree with the Court of Appeal also ultimately favours Perpetual and Ms. Rose, as the scale of costs at the King's Bench level determines the presumptive scale of costs for the appeal. Rule 14.88(3) of the *Alberta Rules of Court*, Alta Reg 124/2010 sets the default costs rule for an appeal: "Unless otherwise ordered, the scale of costs in an appeal shall be the same as the scale that applies to the order or judgment appealed from."

Commentary

Justice Nixon used parts of the costs decision to try to defend his earlier decisions and interpret the first Court of Appeal decision as more favourable to his findings than it was. That is not the role of a Justice making a costs decision.

Justice Nixon's choice to only address the first of the two Court of Appeal decisions overturning his summary dismissals makes the decision incorrect. If Justice Nixon was meant to consider the Court of Appeal decisions (and I think he was) he should have considered both of them. Justice Nixon awarded costs to a party for bringing an application that the Court of Appeal had already determined was an abuse of process (2022 ABCA 111 at 83-103). That cannot be correct.

Justice Nixon should have either issued this decision prior to the Court of Appeal issuing the decision overturning the second application for summary dismissal, or asked the parties to make new submissions after the Court of Appeal released their second decision. That approach was used in a number of administrative law cases following the changes to the standard of review brought by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. See for instance: *Sarker v Canada (Citizenship and Immigration)*, 2020 FC 154 at paras 7-8. Issuing a decision that overlooks a more recent decision of a higher court in the same litigation produces a broken chronology and all but guarantees an appeal will be necessary.

The requirement of another appeal on costs will further delay the resolution of litigation with important legal and practical implications for oil and gas ARO in Alberta.

Perpetual Energy Inc.'s New Corporation

Another wrinkle is that during this lengthy litigation Perpetual Energy Inc. created a new subsidiary called "Rubellite Energy Inc." and has attempted to transfer assets to that subsidiary. The Trustee submitted a brief opposing the restructuring; arguing that Perpetual Energy Inc. would already be unable to pay for the ARO at issue in the Sequoia litigation (at para 15), and that:

> The effect of the Rubellite Transactions is to transfer value from Perpetual to its shareholders, in particular Ms. Rose, in circumstances where it cannot satisfy its existing obligations, including to its contingent creditor like the Trustee. (at para 122)

The Trustee's brief can be found here. In *Perpetual Energy (Re)*, 2021 ABQB 718 Justice M. J. Lema found that the Trustee had no standing to oppose the plan of arrangement (at para 6), and approved the plan of arrangement in September 2021. If the Trustee is correct, Perpetual will be unable to pay for the ARO costs at issue in *PricewaterhouseCoopers Inc v Perpetual Energy Inc* regardless of the legal outcome. I also note that transferring licenses for oil and gas assets in Alberta requires the approval of the AER, and the AER has not yet approved the transfer (see application no.1938806 on the AER's Integrated Application Registry).

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