COURT OF APPEAL OF ALBERTA

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REGISTRY OFFICE:	CALGARY
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
DEFENDANTS	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. and SUSAN RIDDELL ROSE
STATUS ON APPEAL:	RESPONDENTS
DOCUMENT:	**FACTUM OF THE RESPONDENT, SUSAN RIDDELL ROSE**

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Appeal from the Judgment of
The Honourable Mr. Justice D.B. Nixon
Dated the 14th day of January 2021

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

Norton Rose Fulbright Canada LLP
3700, 400 Third Avenue SW
Calgary, Alberta T2P 4H2

Lawyers: Steven H. Leitl, QC | Gunnar Benediktsson
Phone: (403) 267-8140 | (403) 267-8256
Fax: (403) 264-5973
Email: steven.leitl@nortonrosefulbright.com
File No.: 1001040549

Counsel for the Respondent, Susan Riddell Rose

CONTACT INFORMATION FOR ALL OTHER PARTIES:

Burnet, Duckworth & Palmer LLP
8th Avenue Place, East Tower
2400, 525 8th Ave. SW,

Calgary, Alberta T2P 1G1
Lawyers: Paul G. Chiswell | Michael Deyholos
Phone: (403) 260-0201 | (403) 260-0156
Fax: (403) 260-0332
Email: pchiswell@bdplaw.com | mdeyholos@bdplaw.com
File No.: 59140-43

D.J. McDonald, QC
Suite 707, 308 4 Ave SW
Calgary, Alberta T2P 0H7
Phone: (403) 680-3645
Email: dan@mcdonaldadr.com

Counsel for the Respondents, Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp.

DE WAAL LAW
Suite 1010, 505 – 3rd Street SW
Calgary, Alberta T2P 3E6
Lawyers: Rinus de Waal | Luke Rasmussen
Phone: (403) 266-0013
Fax: (403) 266-2632
Email: rdewaal@dewaallaw.com
File No. 283.001

Counsel for the Appellant, PricewaterhouseCoopers Inc., LIT, in its capacity as Trustee in bankruptcy of Sequoia Resources Corp.

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PART 1 - FACTS

(i) Introduction

1. This is the Factum of the Respondent Susan Riddell Rose (**Ms. Rose**) in response to the appeal of the trustee in bankruptcy (the **Trustee**) of Sequoia Resources Corp. (**Sequoia**) from the summary dismissal of the Trustee's claims (the ***BIA* Claims)** against the Respondents made pursuant to s. 96(1)(b)(ii)(A) of the *Bankruptcy and Insolvency Act* (***BIA***).[1]

2. Ms. Rose adopts the submissions in the Factum (the **Perpetual Factum**) of the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp. (collectively, **Perpetual**). Capitalized terms not defined herein have the meanings given in the Perpetual Factum.

3. *The Trustee's BIA Claims*. The *BIA* Claims concern a single component of a larger transaction in isolation—what the parties have been calling the Asset Transaction.[2] The Trustee challenges the Asset Transaction, alleging it to be a transfer at undervalue as provided for in s. 96(1)(b)(ii)(A) of the *BIA*.

4. *Elements of proof.* Subsection 96(1)(b)(ii)(A) of the *BIA* requires that the Trustee prove, among other things, that the Asset Transaction was a transfer of property made for consideration conspicuously undervalue[3] *and* that, at the time of the Asset Transaction (October 2016), PEOC was insolvent or was rendered insolvent[4] *by* the Asset Transaction.[5] If PEOC was not an "insolvent person" on the date of the Asset Transaction (October 2016), the transaction is not reviewable, and the BIA Claim fails.

5. As against Ms. Rose, the Trustee's claim must further establish that she was personally "privy" to the Asset Transaction *and* that she personally benefited from the Asset Transaction (in

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[1] RSC 1985, c. B-3 (***BIA***) [**Table of Authorities (TOA), Tab 1**].
[2] Appellant's Extracts of Key Evidence (**AEKE**) (Affidavit of Paul Darby, sworn August 2, 2018) at A049, Exhibit D.
[3] The *BIA* at s 2 [**TOA, Tab 1**], defines *transfer at undervalue* as "a disposition of property … for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor."
[4] Whether PEOC was insolvent at any time is determined with reference to the *BIA*'s definition of "*insolvent person*." Contrary to the curious argument in the Factum of the Appellant dated March 29, 2021(**PWC Factum**) at para 68, the definition does not ask the Court to consider whether the person might be insolvent within the next 5 years; it is a test applied in this case as at the date of the Asset Transaction (October 2016) as expressly alleged in the Trustee's Statement of Claim.
[5] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABQB 2 at para 52, (**PWC QB Reasons 2**) [**TOA, Tab 2**].

isolation) within the meaning of ss. 96(1) and (3) of the *BIA*.[6] The Trustee's Statement of Claim does not plead how Ms. Rose personally benefited from the Asset Transaction; the undisputed evidence shows she did *not* personally benefit from the Asset Transaction.[7]

6. *Application for summary judgment*. The Order under appeal arose from an application by Perpetual to summarily dismiss the *BIA* Claims[8] on the grounds that: (i) the Asset Transaction was not a "transfer" within the meaning of s. 96(1)(b)(ii)(A); (ii) the consideration received was not conspicuously undervalue; (iii) at the time of the Asset Transaction, PEOC was *not* insolvent; and (iv) the Asset Transaction did *not* render PEOC insolvent.

7. *Trustee's new position.* The Trustee's position with respect to the Asset Transaction has been a moving target. The Trustee's Statement of Claim expressly pleads the singular allegation that the abandonment and reclamation obligations (**ARO**) associated with the Goodyear Assets was a PEOC monetary liability owed to the Alberta Energy Regulator (**AER**) at the time of the Asset Transaction. The subsequent decision of the Supreme Court of Canada in *Redwater* conclusively held that ARO is not a monetary liability, but rather an obligation owed to society to do certain things.[9] In response to the Perpetual application, the Trustee abandoned the allegation (but did not seek to amend its claim), now submitting, without any corresponding pleading, that, at the time of the Asset Transaction, the estimated future ARO costs represented a non-payment "obligation" that should nonetheless be considered in determining whether PEOC was rendered insolvent by the Asset Transaction within the meaning of s. 96(1)(b)(ii)(A).[10] Then, faced with the obvious point that the *BIA* defines "insolvent person" as a person whose aggregate property is not,

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[6] Subsection (3) provides: "In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person." [**TOA, Tab 1**].

[7] This Court observed in *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16, [2021] AJ No 84 (QL) (**Appeal Reasons**) at para 114 [**TOA, Tab 4**]: "The Trustee in Bankruptcy did not plead any direct benefit that was received from the Asset Transaction. The argument presented orally was that the Asset Transaction accrued generally to the benefit of [Perpetual], which would cause its shares to rise in value, and that Ms. Rose, as a shareholder of [Perpetual] would derive an indirect benefit. The record suggests that the shares of [Perpetual] actually decreased in value after the Aggregate Transaction. Ms. Rose held approximately 1-2% of the publicly traded shares of [Perpetual], which may not constitute a sufficiently proximate 'benefit' to engage s. 96(3). The Trustee has not advanced any other theory of personal benefit." [Emphasis added.] Given that this Court expressly gave the Trustee leave to amend its Statement of Claim to address this and any other issues, it is notable that the Trustee has elected not to amend.

[8] Ms. Rose did not apply because, at the time, all claims against her had been dismissed. After the decision of this Court regarding the Trustee's prior appeal, Ms. Rose was granted standing as a Respondent in this appeal.

[9] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, [2019] 1 SCR 150 [***Redwater***] [**TOA, Tab 3**]; Appeal Reasons at para 95 [**TOA, Tab 4**].

[10] PWC QB Reasons 2 at para 30 [**TOA, Tab 2**].

at a fair valuation, sufficient to enable payment of all his obligations, due and accruing due, the Trustee asserted that the Chambers Justice should *ignore* this statutory definition and use "*something else*".

8. *Order of the Chambers Justice.* The Chambers Justice rightly applied the express provisions of the *BIA*; he acknowledged that at the time of the Asset Transaction: (a) PEOC's estimated future ARO costs were not a payment obligation to the AER, but rather an obligation to do something, and that the timing and amount of the future costs of doing that something were uncertain; (b) on that basis, he concluded that the ARO were not payment "obligations, due or accruing due"; and (c) therefore, PEOC was not insolvent at the time of or rendered insolvent by the Asset Transaction. On this basis, the Trustee's *BIA* Claims were justifiably dismissed.

9. *The object of the BIA is protection of the bankrupt's creditors, not the regulation of Alberta's energy industry.* The object of the *BIA* is the orderly distribution of a bankrupt's assets to its creditors. The object of s. 96(1)(b)(ii)(A) is to recover property of the bankrupt for the benefit of proven creditors where the property was improvidently "stripped" from the bankrupt.[11] Whether viewed as remedial or not, the *BIA* does not provide for the regulation of the Alberta energy industry. In Alberta, ARO that attach to licenses granted by the AER are part of the "cradle to grave" energy regulatory regime established by the *Environmental Protection and Enhancement Act*[12] and the *Oil and Gas Conservation Act.*[13] ARO are not payment "obligations" as that term is used in the *BIA.* ARO are obligations to do certain things; they may be (and might not be, and this case were not) enforced by the AER pursuant to its express enforcement powers.[14] A trustee in bankruptcy has no such enforcement authority.[15] Indeed, the Alberta regime specifically contemplates that there will be licensees who "do not have the financial means to contribute" to the costs associated with their licenses (*i.e.* bankrupts), and provides for ARO to be addressed by the Orphan Well Association (**OWA**) in those circumstances.[16]

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[11] *Urbancorp Toronto Management Inc (Re)*, 2019 ONCA 757, 74 CBR (6th) 23 at para 48 [**TOA, Tab 5**]; PWC Factum at para 64.
[12] RSA 2000, c E-12 (***EPEA***) [**TOA, Tab 6**]. The Trustee's Statement of Claim does not allege asset-stripping.
[13] RSA 2000, c O-6 (***OGCA***) [**TOA, Tab 7**]; *Redwater* at paras 1 and 8-18 [**TOA, Tab 3**].
[14] *OGCA* at s 105 [**TOA, Tab 7**].
[15] *BIA* at ss 16 – 38 [**TOA, Tab 1**].
[16] AEKE (Affidavit of Paul Darby, sworn August 2, 2018) at A009, paras 52-3; *OGCA* at s 70(2) [**TOA, Tab 7**].

10. *ARO are not payment obligations.* The Supreme Court of Canada has made it clear that ARO are not payment obligations owed to the AER, but obligations to society to do something - to perform certain abandonment and reclamation work on an uncertain future date, at an uncertain cost, with the costs to be paid to uncertain vendors (*not* the AER).[17] As noted in *Redwater*, the prospects of the AER later taking enforcement proceedings and becoming a judgment creditor are distant and remote – too speculative to make the AER a contingent creditor. Clearly, at the time of the Asset Transaction, PEOC had no payment obligations to the AER, due or accruing due. The Trustee does not allege or argue otherwise.

11. *ARO is a valuation factor*. The Supreme Court of Canada and this Court have acknowledged that the market value of an energy asset in Alberta is depressed by ARO.[18] In valuing an energy asset, any potential purchaser would consider both the estimated future cash flows as well as the estimated future costs, including those associated with ARO. It is common ground that, prior to, and at the time of the Asset Transaction, the market value of the Goodyear Assets was depressed by the estimated future ARO costs associated with the Goodyear Assets.[19] To characterize the estimated future ARO costs as a payment obligation of PEOC on the liability side of the balance sheet, when it is already accounted for in the market value of PEOC's assets, would be to count it twice. That does not make any sense. While this elementary point has been raised repeatedly, the Trustee continues to ignore it.

(ii) Facts

12. The following undisputed facts, not addressed by the Trustee, are noteworthy.

13. This proceeding started in August 2018 when the Trustee filed its Statement of Claim and simultaneously brought an application for summary judgment on all claims. The application was based on an affidavit sworn by Paul Darby in August 2018. Since that time, the Trustee has steadfastly maintained that its claims can be, and should be, determined summarily; that there are no issues warranting a trial.[20]

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[17] *Redwater* at para 139 [**TOA, Tab 3**].
[18] *Redwater* at paras 29-30 [**TOA, Tab 3**]; Appeal Reasons at para 97 [**TOA, Tab 4**].
[19] This is so whether one accepts the Trustee's advocated valuation, which incorporates estimated future ARO costs, or the arm's-length negotiated consideration provided for in the Share Purchase Agreement (of which the Asset Transaction was one component), which comprehensively considered all aspects related to the value of the Assets, including ARO.
[20] PWC QB Reasons 2 at paras 13-6 and 222 [**TOA, Tab 2**].

14. In support of its application to dismiss the *BIA* Claims, Perpetual cited the Darby Affidavit, the cross-examination thereon, the Defendants' affidavits filed previously, and the affidavit of Mark Schweitzer sworn May 5, 2020 (the **Schweitzer Affidavit**). The Trustee did not cross-examine on the Schweitzer Affidavit, and did not tender any evidence in response to Perpetual's application.[21] The Trustee has never sought to amend its Statement of Claim. The Trustee has put its best foot forward.

15. The Trustee persists in mischaracterizing the Asset Transaction: PEOC did not acquire or assume any additional ARO, as it already held legal title to, and was the licensee of, the Goodyear Assets at the time; thus, it was already responsible for the ARO under the existing licence granted by the AER. The Asset Transaction involved the acquisition by PEOC of the beneficial interest in the Goodyear Assets, previously held by PEOC in trust for POT, in order to satisfy the negotiated obligation to convey PEOC's shares with PEOC owning legal and beneficial title to the Goodyear Assets.[22] The Asset Transaction did not create any additional ARO. And as conceded by the Trustee, it did not breach any applicable Alberta laws or regulations.

16. The Trustee's mischaracterization of the Asset Transaction fails for another reason: there was no transfer at undervalue. The value of PEOC's assets (both before and after the Asset Transaction) was at least $5,670,000 (oil and gas reserves on the Goodyear Assets, net of associated ARO)[23], plus a Gas Marketing Contract and other assets.[24] The valuation of the Goodyear Assets at $5,670,000 is the fair market valuation advocated by the Trustee.[25] It is the Trustee's express position that fair market value is already necessarily depressed by ARO. Perpetual accepted that valuation for the purposes of its application. As a matter of evidence, and consistent with the parties' common position on the law, the valuation of the Goodyear Assets at $5,670,000 accounted for estimated future ARO costs associated with the Goodyear Assets.[26] In

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[21] PWC QB Reasons 2 at paras 194 and 224 [**TOA, Tab 2**].
[22] This Court stated in Appeal Reasons at para 99 [**TOA, Tab 4**]: "It was not disputed that the Perpetual Energy group and their officers and directors (on the one hand), and the Kailas Capital group, 198Co and their officers and directors (on the other hand) were dealing at arm's length. The Aggregate Transaction, which related to the disposition of the Goodyear Assets by the sale of the shares of Perpetual/Sequoia, was at arm's length."
[23] PWC QB Reasons 2 at paras 81 and 189 [**TOA, Tab 2**]; AEKE (Affidavit of Paul Darby, sworn August 2, 2018) at A006, para 37.2 and A177, Exhibit L.
[24] PWC QB Reasons 2 at paras 81 and 189 [**TOA, Tab 2**].
[25] PWC QB Reasons 2 at para 191 [**TOA, Tab 2**].
[26] AEKE (Affidavit of Paul Darby, sworn August 2, 2018) at A007, para 41.1. The evidence establishes that the principals of Sequoia carefully considered the ARO associated with the Goodyear Assets in negotiating the consideration payable under, and the terms of, the Aggregate Transaction: *e.g.* AEKE (Affidavit of Susan Riddell

light of the test under s. 96(1)(b)(ii)(A), there is no need for a trial to determine whether the fair market value was even higher.

17. On the other side of the balance sheet, PEOC's monetary liabilities were comprised solely of deferred municipal taxes totalling $1,560,890.[27] The Trustee does not challenge the Chambers Justice's finding of fact in this regard.

18. Again, at the time of the Asset Transaction, PEOC held legal title to and was the licensee associated with the Goodyear Assets.[28] As the licensee of the Goodyear Assets, PEOC held the asset retirement obligations associated with the Goodyear Assets, both before and after the Asset Transaction. PEOC did not "acquire" the ARO, as the Trustee argues. PEOC continued to be the licensee of the Goodyear Assets, and to be responsible for the ARO.[29] Contrary to the bare assertion of the Trustee, PEOC did not "receive" any additional obligations or liabilities.

19. Accordingly, on the basis of the undisputed evidence before the Chambers Justice, at the time of the Asset Transaction, the fair value of the Goodyear Assets was greater than PEOC's total liabilities. The *BIA* Claims are not sustainable.

20. Following the closing of the Aggregate Transaction (of which the Asset Transaction was only one component), PEOC (then called Sequoia), under new ownership and management, was not insolvent. It carried on active business operations for a period of over 17 months.[30] During that period, Sequoia successfully executed its business plan, reduced operating costs; acquired approximately 800 additional wells in three other arm's length transactions; steadily increased production; abandoned 150 wells; and obtained reclamation certificates for 90 wells.[31] Sequoia reported to its stakeholders that it had "reduced its overall environmental liabilities" and "ranked fifth in the Province of Alberta in terms of reclamation certificates received."[32]

Rose, sworn October 19, 2018) at A213, paras 29 and 34; A214, para 39(b); A008-9, para 46; A228, Exhibit E and A174, Exhibit K; PWC QB Reasons 2 at para 13 [**TOA, Tab 2**]. This Court confirmed in the Appeal Reasons at para 99 [**TOA, Tab 4**] that: "The Aggregate Transaction, which related to the disposition of the Goodyear Assets by the sale of the shares of Perpetual/Sequoia, was at arm's length." By definition, then, the Aggregate Transaction, of which the Share Transaction and the Asset Transaction were part, was not transfer at undervalue. Notably, the Trustee does not allege so, or that the Share Transaction (which was for the same assets, at the same time, and had the same consideration as under the Asset Transaction) was a transfer at undervalue.

[27] PWC QB Reasons 2 at paras 84, 202 and 205 [**TOA, Tab 2**].

[28] Appeal Reasons at para 4 [**TOA, Tab 4**].

[29] AEKE (Affidavit of Susan Riddell Rose, sworn October 19, 2018) at A209, para 10.

[30] PWC QB Reasons 2 at para 85 [**TOA, Tab 2**].

[31] PWC QB Reasons 2 at paras 178 and 223 [**TOA, Tab 2**].

[32] PWC QB Reasons 2 at para 178 [**TOA, Tab 2**].

21. It is common ground that over 17 months after the Asset Transaction, because of an interceding and unprecedented collapse in the natural gas market and decisions made by Sequoia's management, Sequoia elected to file a proposal under the *BIA*, and ultimately was assigned into bankruptcy.[33] Sequoia was by no means Alberta's only casualty of the crash of the natural gas market.

22. At the time of its bankruptcy, Sequoia had no payment obligations to the AER. The ARO associated with its assets was not the cause of its bankruptcy.

23. The Trustee does not allege that the Sequoia bankruptcy was caused by the Asset Transaction. Rather, it alleges that PEOC was rendered insolvent in 2016 *by the Asset Transaction*, notwithstanding Sequoia's ability to engage in business thereafter.

PART 2 - GROUNDS OF APPEAL

24. The Trustee submits that the Chambers Justice made a general reviewable error "in his analysis of s. 96 of the *BIA*" regarding the objects of the Act.[34]

25. The Trustee submits that the Chambers Justice made three specific reviewable errors in relation to ARO:

(a) "in failing to consider that ARO affect the value of a debtor's assets"[35];

(b) "in finding that ARO are a mere accounting estimate"[36]; and

(c) "in excluding ARO from the insolvency analysis under s. 96 on the basis that it was not 'completely constituted and presently exigible'."[37]

26. Finally, the Trustee submits that the Chambers Justice failed to find that the Perpetual application was an abuse of process.[38] Ms. Rose adopts the response of Perpetual on this point.

PART 3 - STANDARD OF REVIEW

27. Ms. Rose adopts the submissions of Perpetual regarding the applicable standards of review.

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[33] AEKE (Affidavit of Paul Darby, sworn August 2, 2018) at A002, para 9; Respondents Extracts of Key Evidence (**REKE**) (Transcript of Cross-Examination of Lars Thomas de Pauw, with Exhibits) at 008, Exhibit 1, page 3.
[34] PWC Factum at para 14.3.
[35] PWC Factum at para 14.1.
[36] PWC Factum at para 14.2.
[37] PWC Factum at para 14.4.
[38] PWC Factum at para 14.5.

PART 4 - ARGUMENT

(i) All legislation is "remedial"; that does not assist the Trustee

28. The Trustee argues that the Chambers Justice erred in not reading the *BIA* as "remedial" in purpose. There was no such error: the Chambers Justice correctly understood the legislative purposes of the *BIA*, and interpreted its provisions in a manner consistent with those purposes.

29. It is important to consider what the Trustee is advocating under the guise of a "remedial" interpretation of the *BIA*. The Trustee does not merely suggest that a remedial interpretation would change how one construes the words of the *BIA*, but rather that a remedial interpretation would permit this Court to ignore the words chosen by Parliament. The Trustee asks this Court to read the words "payment" and "obligations, due and accruing due" as though there was only "obligations" *simpliciter*, in order to permit the Trustee to include non-monetary and uncrystallised public duties as though they were balance sheet monetary obligations—and even though these are already considered and accounted for in the market value of an energy asset.

30. In one sense *all* legislation is remedial. The *Interpretation Act* states that all legislation "shall be given such a fair, large and liberal construction … as best ensures the attainment of its objects."[39] This means that a statute is to be interpreted in a manner that is consistent with that statute's purpose. It does not mean that an interpretation of the purpose should disregard the statute's words.

31. The Trustee cites a different Act, the *Companies' Creditors Arrangement Act* (the ***CCAA***). The remedial purpose of the *CCAA* (to permit insolvent companies to avoid bankruptcy and restructure their affairs) has no application to the Trustee's efforts to appoint itself as a quasi-regulator and enforce the ARO of Sequoia against its former owner and a director. In other words, the "remedial purpose" the Trustee *truly* urges this Court to accept as part and parcel of the *BIA* is not the orderly liquidation of a bankrupt's assets but a trustee's ability to enforce a bankrupt's ARO against persons who under the relevant regulatory regime were not responsible for them. Nothing in the *BIA* or the *CCAA* supports such an approach, remedial or not.

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[39] PWC Factum at para 46 citing *Interpretation Act*, RSC 1985, c I-21 at s 12 [**TOA, Tab 8**]; PWC QB Reasons 2 at paras 25-6 [**TOA, Tab 2**].

32. The Chambers Justice considered the Trustee's argument about the remedial aspect of the *BIA*, including the object of the *BIA*.[40] It is axiomatic that the object of the *BIA* is not the regulation of the environmental obligations of Alberta energy producers. As the Supreme Court of Canada emphasized in *Redwater*, that object is expressly addressed by the "cradle to grave" regulatory regime designed and enacted by the government of Alberta, and enforced by the AER.[41] The object of the *BIA* is, among other things, to create an orderly scheme for the administration of insolvent estates, including liquidation of the assets of insolvent persons, regulating and controlling the conduct of insolvent persons with respect to their assets and their estate, and balancing the interests of the bankrupt with those of the bankrupt's creditors (to whom the bankrupt has obligations due and accruing due).[42]

33. The Alberta energy regulatory regime was aptly explained by the Supreme Court of Canada in *Redwater*:

> [12] The third thing a company needs in order to access and exploit Alberta's oil and gas resources … is a licence issued by the Regulator [the AER]. The *OGCA* prohibits any person without a licence from commencing to drill a well or undertaking any operations preparatory or incidental to the drilling of a well, and from commencing to construct or operate a facility (ss. 11(1) and 12(1)). The *Pipeline Act* … similarly prohibits the construction of pipelines without a licence (s. 6(1)). …
>
> [13] The three relevant licensed assets in the Alberta oil and gas industry are wells, facilities and pipelines. A "well" is defined, inter alia, as "an orifice in the ground completed or being drilled . . . for the production of oil or gas" (*OGCA*, s. 1(1)(eee)). A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (*OGCA*, s. 1(1)(w)). A "pipeline" is defined as "a pipe used to convey a substance or combination of substances", including associated installations (*Pipeline Act*, s. 1(1)(t)).
>
> [14] The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. … It exercises a wide range of powers under the *OGCA* and the *Pipeline Act*. It also acts as the regulator in respect of energy resource activities under the *EPEA*, Alberta's more general environmental protection legislation (*REDA*, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee …
>
> [15] The Regulator has a wide discretion when it comes to granting licences to operate wells, facilities and pipelines. On receiving an application for a licence, the Regulator may

[40] PWC QB Reasons 2 at paras 25-7 [**TOA, Tab 2**].
[41] *Redwater* at para 1 [**TOA, Tab 3**].
[42] PWC QB Reasons 2 at para 25 [**TOA, Tab 2**] citing *Re Pocklington*, 2017 ABQB 621, [2017] AWLD 5457 at para 52 [**TOA, Tab 9**].

> grant the licence subject to any conditions, restrictions and stipulations, or it may refuse the licence (*OGCA*, s. 18(1); *Pipeline Act*, s. 9(1)). Licences to operate a well, facility or pipeline are granted subject to obligations that will one day arise to abandon the underlying asset and reclaim the land on which it is situated.
>
> [16] "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (*OGCA*, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 ("*Northern Badger*"), at para. 2). The abandonment of a pipeline refers to its "permanent deactivation . . . in the manner prescribed by the rules" (*Pipeline Act*, s. 1(1)(a)). "Reclamation" includes "the removal of equipment or buildings", "the decontamination of buildings . . . land or water", and the "stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land" (*EPEA*, s. 1(ddd)). A further duty binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (*EPEA*, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.
>
> [17] A licensee must abandon a well or facility **when ordered to do so by the Regulator or when required by the rules or regulations**. The Regulator may order abandonment when "the Regulator considers that it is necessary to do so in order to protect the public or the environment" (*OGCA*, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, inter alia, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in similar situations. The duty to reclaim is established by s. 137 of the *EPEA*. This duty is binding on an "operator", a broader term which encompasses the holder of a licence issued by the Regulator (*EPEA*, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93). [Emphasis added]

34. Not surprisingly, trustees in bankruptcy appointed under the *BIA* play no role in the AER's enforcement of the Alberta energy regulatory regime. Indeed, the Alberta regime provides its own mechanisms for addressing the insolvency of a licensee:

> [22] … Alberta's regulatory regime does contemplate the possibility that some of a licensee's end-of-life **obligations** will remain unfulfilled when the insolvency process has run its course. The Regulator may designate wells, facilities, and their sites as "orphans" (*OGCA*, s. 70(2)(a)). A pipeline is defined as a "facility" for the purposes of the orphan regime (*OGCA*, s. 68(d)). Directive 006 stated that "a well, facility, or pipeline in the LLR program is eligible to be declared an orphan where the licensee of that licence becomes insolvent or defunct" (s. 7.1). An "orphan fund" has been established for the purpose of paying for, *inter alia*, the abandonment and reclamation of orphans (*OGCA*, s. 70(1)). The orphan fund is financed by an annual industry-wide levy paid by licensees of wells, facilities and unreclaimed sites (s. 73(1)). The amount of the levy is prescribed by the

> Regulator based on the estimated cost of abandoning and reclaiming orphans in a given fiscal year (s. 73(2)).
>
> [23] The Regulator has delegated its statutory authority to abandon and reclaim orphans to the OWA (*Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001), a non-profit organization overseen by an independent board of directors. It is funded almost entirely through the industry-wide levy described above, 100 percent of which is remitted to it by the Regulator. The OWA has no power to seek reimbursement of its costs. However, once it has completed its environmental work, it may be reimbursed up to the value of any security deposit held by the Regulator to the credit of the licensee of the orphans. In recent years, the number of orphans in Alberta has increased rapidly. For example, the number of new orphan wells increased from 80 in the 2013-14 years to 591 in the 2014-15 years. [Emphasis added]

35. In *Redwater*, the Supreme Court of Canada emphasized that it is not the role of the courts to intervene to create alternative or additional regulatory schemes:

> [29] During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being offloaded onto the public. What Alberta *has* chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities …
>
> [30] Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the "development, conservation and management of non-renewable natural resources . . . in the province" (*Constitution Act*, 1867, ss. 92(13) and 92A(1)(c)). Alberta has devised a complex regulatory apparatus to address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid. Its solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings. [Emphasis added.]

36. Accordingly, there is no basis for the Trustee's implied submission that the *BIA* can be interpreted such that its remedial objects embrace the remedial objects of Alberta's energy regulatory regime.

37. The Trustee's arguments in this regard are illustrative. In advocating a supposedly "remedial" interpretation of the definition of "insolvent person" under the BIA (in reality, the Trustee argues that the Court should either disregard some of the words in that definition, or

perhaps apply a different yet unarticulated definition),[43] the Trustee relies on *Stelco Inc., Re*, which considered whether certain contingent monetary obligations should be considered in determining whether the application was a "debtor company" under the *CCAA*.[44] The distinguishing features of *Stelco* illustrate the problems with the Trustee's proposed approach: not only is *Stelco* decided under a different statute, but even the "expanded" definition proposed by Justice Farley encompasses contingent future monetary obligations—not obligations to perform societal "public duties" such as ARO.[45]

38. In *Newfoundland and Labrador v AbitibiBowater Inc.*,[46] the Supreme Court of Canada considered that issue: "The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*."[47] The Court summarized its conclusion as follows:

> In the environmental context, the CCAA court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A CCAA court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.[48] [Emphasis added.]

39. That is, even under *CCAA*, which gives the Court much more discretion than the *BIA*, regulatory obligations are not subject to the Act unless they will ripen into a financial liability to the regulator. *Redwater* specifically addressed ARO in this regard, finding conclusively that ARO is not a financial liability to the AER that is subject to the *BIA*.

40. In this case, at the time of the Asset Transaction,[49] the relevant regulatory body (the AER) had not exercised any power that could result in a monetary claim. There is no evidence that the

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[43] PWC Factum at paras 60 and 66-9.
[44] 2004 CanLII 24933 (ON SC), [2004] OJ No 1257 (QL) [***Stelco***] at para 1 [**TOA, Tab 10**].
[45] *Stelco* at para 1 [**TOA, Tab 10**].
[46] 2012 SCC 67, [2012] 3 SCR 443 [***Abitibi***] [**TOA, Tab 11**].
[47] *Abitibi* at para 1 [**TOA, Tab 11**].
[48] *Abitibi* at para 3 [**TOA, Tab 11**].
[49] The Trustee's BIA claim must be determined at that time: October 2016. As stated in *Abitibi* at para 26 [**TOA, Tab 11**]: "These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation." The Trustee incorrectly argues that the definition of "insolvent person" is somehow forward-looking as opposed to fixed at a point in time, based on the five-year statutory review period for non-arm's length transactions: Trustee Factum at paras 66-9. Again, the Trustee ignores the express words of the statute: section 96 only applies where "the

AER has exercised any such power even today (over 4 years later). The Trustee is prosecuting a phantom regulatory claim said to belong to the AER where, as found in *Redwater* and by this Court, the AER has no provable monetary claim against the Sequoia estate. The Trustee has no authority to pursue the claim on the basis of the unknown vendors who might, one day, be hired yet unpaid to do the reclamation work.

(ii) The Chambers Justice's consideration of Sequoia's ARO

(a) ***The Chambers Justice did not fail "to consider that ARO affect the value of a debtor's assets"***

41. The Chambers Justice had no reason to expressly find, as a matter of law, that ARO negatively affects the value of energy assets, as that issue was already settled in *Redwater*; reiterated by this Court[50]; and was common ground between the parties before the Chambers Justice. There is no error in not ruling on a non-issue.

42. For the purposes of the Perpetual application, it was common ground that the market value of the Goodyear Assets was $5,760,000. The valuation was based on a reserve engineer's report cited in the Darby Affidavit in support of the Trustee's opinion of value which accounted for estimated future ARO costs associated with the Goodyear Assets.[51] The Trustee elected not to file additional valuation evidence in response to the application for summary judgment, and maintained its reliance on the reserve report which accounted for ARO. Thus, as a matter of factual evidence, the Court considered and accepted that ARO was a factor incorporated into the Trustee's valuation.

43. Contrary to the Trustee's submission, the Chambers Justice did not "[reject] the argument that ARO should be considered in determining the value of a debtor's property".[52] He expressly accepted that ARO directly depresses an energy asset's fair value, noting, as did this Court, that it thus "goes to the issue of whether there was a transfer at undervalue, as opposed to whether the

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debtor was insolvent at the time of the transfer or was rendered insolvent by it" (not "by it *and things that happened afterward*"). *BIA* at ss 96(a)(ii) and 96(b)(ii)(A) [**TOA, Tab 1**]. The *BIA clearly* provides that the insolvency test is to be applied *at the time of the impugned transaction*. Indeed, that is what the Trustee's Statement of Claim expressly pleads.

[50] Appeal Reasons at paras 86 and 96 [**TOA, Tab 4**].

[51] AEKE (Affidavit of Paul Darby, sworn August 2, 2018) at A006, para 37.2; A007, para 41.1 and A178, Exhibit L.

[52] PWC Factum at para 19.

ARO falls within the ambit of the phrase 'obligations, due and accruing'."[53] That is simply stating the common sense point that the value of an asset (affected as it is by ARO) goes on the asset side of the balance sheet; and if so, it cannot also go on the liability side.

44. This was by no means "results-based reasoning" by the Chambers Justice.[54]

(b) The Chambers Justice did not err *"in finding that ARO are a 'mere accounting estimate'*

45. What the Chambers Justice rejected was the Trustee's assertion that accountants' estimates of the future *costs of* ARO *are* ARO. The fact that accountants give varying estimates of the future costs that may be incurred in satisfying societal obligation does not mean that the estimates are the societal obligation.

46. The Chambers Justice did not find that ARO itself is a "mere accounting estimate." The Chambers Justice had no reason to make a finding as to the nature of ARO; that issue was settled by the Supreme Court of Canada in *Redwater*. Rather, the Chambers Justice noted that the *evidence* before him included PEI's balance sheets, which included a provision for estimated ARO associated with producing assets, including the Goodyear Assets. The Chambers Justice correctly noted that these are "accounting estimates" and that their presence on a balance sheet does not signify that they are "obligations, due or accruing due."

47. The Chambers Justice acknowledged that accountants follow certain practices in estimating ARO[55]; but also that accounting practices are <u>not rules of law</u>.[56] Consistent with the ruling in *General Motors*, he acknowledged that:

> … what is recorded as a "liability" for accounting purposes may not be considered an absolute liability at law if a creditor with a legally enforceable claim cannot be identified. Similarly, <u>what is recorded as "obligations" for accounting purposes may not be considered "obligations, due and accruing due" at law if a creditor with a legally enforceable claim cannot be identified</u> …[57] [Emphasis added.]

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[53] PWC QB Reasons 2 at para 187 [**TOA, Tab 2**]; Appeal Reasons at para 97 [**TOA, Tab 4**]: "[ARO] may not be a conventional 'debt', but rather operate by depressing the value of assets; *whichever side of the equation they be on*, they could impact whether there is 'undervalue' in a transaction."

[54] PWC Factum at paras 19-23. The assertion of "results-based reasoning" is an assertion of judicial bias, which is entirely unsupported on the record before this Court.

[55] PWC QB Reasons 2 at paras 21 and 23 [**TOA, Tab 2**].

[56] PWC QB Reasons 2 at paras 22 and 156 [**TOA, Tab 2**].

[57] PWC QB Reasons 2 at para 23 [**TOA, Tab 2**] citing *General Motors of Canada Ltd v Canada*, 2004 FCA 370, [2004] FCJ No. 1858 at para 24, leave to appeal to SCC refused, [2005] SCCA No. 3 [**TOA, Tab 12**].

48. It bears emphasis that accounting estimates of future costs of ARO are very uncertain. The Trustee concedes that the ultimate costs of satisfying ARO can only be estimated in the present, and that various factors can materially change the estimate.[58] While the Trustee, based on an undisclosed "report" of a third party, estimated that the ARO associated with the Goodyear Assets to be in the range of $228 million, Perpetual's estimate was substantially lower.[59] Further, financial statements of other energy companies were tendered which underscored additional uncertainty caused by such factors as the estimate of well lifespans, and the use of different discount rates.[60]

49. Further, while energy companies disclose estimates of future ARO costs on the "right side" of the balance sheet – not as liabilities but as "provisions" [61] - when ARO is recorded, the estimated ARO net present value is balanced by grossing up the asset value.[62] The Trustee ignores this aspect of ARO accounting.

50. The Trustee cites the comment of this Court that ARO are routinely reported in the financial statements of energy companies.[63] With respect, *Redwater* holds conclusively that ARO are not monetary liabilities but obligations owed to the public at large to do something. The Trustee did not argue otherwise before the Chambers Justice. On the other hand, it is common ground that ARO are obligations owed to society.[64]

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[58] PWC QB Reasons 2 at para 82 [**TOA, Tab 2**]; AEKE (Affidavit of Paul Darby, sworn August 2, 2018) at A007, para 39.

[59] AEKE (Affidavit of Paul Darby, sworn September 22, 2020) at A309, paras 12-3: Perpetual estimated the ARO associated with the Goodyear assets at ~$129 million, as documented in their 2016 audited financial statements. Paragraph 41 of the PWC Factum notes that certain ARO was recorded as "current", but fails to acknowledge that this was not because there was a payment obligation due or accruing due but rather this was to advise the reader of the financial statements that these assets and associated liabilities were expected to be sold within the current fiscal period and be removed from the ongoing entity: AEKE (Affidavit of Paul Darby, sworn August 2, 2018) at A191, Exhibit P and A195, Exhibit P, Note 3.

[60] PWC QB Reasons 2 at paras 86-7 and 113 [**TOA, Tab 2**].

[61] REKE (Transcript of Cross-Examination of Paul Darby, with Exhibits) at 125-7, 90/24-92/26; PWC Factum at para 39; AEKE (Affidavit of John K. Brannan, sworn August 12, 2020) at A301, para 6.

[62] REKE (Transcript of Cross-Examination of Ronald Keith Laing, with Exhibits) at 180, Exhibit 1, page 44; "A Roadmap to Accounting for Environmental Obligations and Asset Retirement Obligations", Deloitte (August 2020) at s 4.3 citing US GAAP Rules 25-4 and 25-5 [**Book of Additional Authorities (BOAA), Tab 1**] at 93-5; "ASPE at a Glance" BDO (October 31, 2019) citing ASPE at s 3110 [**BOAA, Tab 2**] at 173-4.

[63] PWC Factum at para 38 citing Appeal Reasons at para 87 [**TOA, Tab 4**].

[64] *Redwater* at para 135 [**TOA, Tab 3**]; Appeal Reasons at para 85 [**TOA, Tab 4**] citing *Redwater* at para 16 [**TOA, Tab 3**] and AER Directive 020 – Well Abandonment (April 21, 2021) [**BOAA, Tab 3**] at 214 this Court stated: "In general terms, the end-of-life obligations of the owner of the well are to cement-in various formations deep underground, to 'cap' the well, and to restore it to its original condition."

(c) **The Chambers Justice did not err *"in excluding ARO from the insolvency analysis under s. 96 on the basis that it was not 'completely constituted and presently exigible'."***

51. The question considered by the Chambers Justice under s. 96 was relatively narrow: he limited his analysis to the issue of whether PEOC, as at the date of the Asset Transaction, was insolvent or rendered insolvent by the Asset Transaction.

52. Subsection 96(1)(b)(ii)(A) provides:

> **Transfer at undervalue**
>
> 96 (1)On application by the trustee, a court may declare that a transfer at undervalue is void as against, […] or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> […]
>
> (b) the party was not dealing at arm's length with the debtor and
>
> […]
>
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was **rendered insolvent by it**, […] [Emphasis added.]

53. The *BIA* defines "transfer at undervalue" as follows:

> transfer at undervalue means a disposition of property … for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; [Emphasis added.]

54. The *BIA* does not define "insolvent" or "rendered insolvent", but it defines "insolvent person" as follows:

> insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable **payment** of all his obligations, **due and accruing due**.[65] [Emphasis added.]

55. The *BIA* does not define "obligations, due and accruing due."

Balance Sheet Solvency Test

56. Before the Chambers Judge, it was effectively common ground that, at the time of the Asset Transaction, PEOC was *not* insolvent under either of the first two branches of the definition of "insolvent person" (known as "cash-flow insolvency"). Instead, argument focused on (c): whether the fair value of PEOC's property would be sufficient to enable payment of its obligations, due and accruing due (the **Balance Sheet Solvency Test**).[66]

57. Again, the Trustee asks this Court to pretend that the words "payment" and "due and accruing due" are not there.

The big picture: the nature and enforcement of ARO

58. The starting point for this analysis is the ruling in *Redwater* that ARO is not a debt or liability provable in bankruptcy. The 'O' in ARO stands for obligations to do something on an uncertain future date at an uncertain cost.[67] If that something is not done; if the AER takes enforcement proceedings and if the AER's enforcement proceedings result in a money judgment, a monetary liability might arise at some distant future date. Certainly, there was no payment obligation due or accruing due to the AER at the time of the Asset Transaction as alleged by the Trustee.[68]

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[65] PWC QB Reasons 2 at para 89 [**TOA, Tab 2**] citing *BIA* at s 2 [**TOA, Tab 1**] (emphasis added).
[66] PWC QB Reasons 2 at para 127 [**TOA, Tab 2**].
[67] *Redwater* at para 139 [**TOA, Tab 3**]: "These end-of-life obligations do not directly require Redwater to make a payment to the Regulator. Rather, they are obligations requiring Redwater to *do something*."
[68] *Redwater* at para 140 [**TOA, Tab 3**]: "What a court must determine is whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass -— in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement." In *Manitok Energy Inc (Re)*, 2021 ABQB 227, [2021] AWLD 1680 [**TOA, Tab 16**], Justice Romaine held that the proceeds of certain assets sold by the bankrupt company's trustee, having been sold before the relevant abandonment orders were issued, were to be distributed to certain holders of liens in priority to the obligation to abandon and reclaim the wells.

59. The obligation to abandon and reclaim the Goodyear Assets is an obligation created by Alberta's energy regulatory regime.[69] The regime provides for enforcement of regulatory obligations by the AER. There is no basis to interpret the *BIA* so as to make trustees in bankruptcy enforcers of such obligations.

Insolvent Person

60. As addressed above, for the purposes of this appeal, and as conceded by the Trustee before the Chambers Justice, whether PEOC was rendered an "insolvent person" by the Asset Transaction turns upon the Balance Sheet Insolvency Test.

61. The Trustee makes the strained, highly technical argument that the definition of "*insolvent* person" in the *BIA* should be disregarded in interpreting "*insolvent*" as it is used in s. 96 of the *BIA*.[70] The Trustee submits that "insolvent" in s. 96 "should be interpreted to mean something different", but does not say what that "something different" is. The Trustee does not offer any submission, in fact or in law, as to how PEOC could have been "rendered insolvent" by the Asset Transaction. As noted above, the assertion is manifestly fallacious given that PEOC was the licensee of the Goodyear Assets both before and after the Asset Transaction, and that Sequoia engaged in active business operations thereafter.[71]

payment of "obligations, due and accruing due"

62. Notably, the Trustee asked the Chambers Justice and this Court to disregard the word "payment" in the phrase, "sufficient to enable payment of its obligations, due and accruing due." Clearly, the Balance Sheet Solvency Test looks to obligations that can be quantified and that are payable with money. The Supreme Court in *Redwater* held unequivocally that ARO are not payment obligations.

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[69] *Redwater* at para 17 [**TOA, Tab 3**].
[70] PWC Factum at paras 57-9. We note that the Trustee's argument on this point is inconsistent between their filings with this Court. See Civil Notice of Appeal of the Appellant dated January 21, 2021 at s 5: "The Chambers Judge committed errors of law and fact in … disregarding the Appellants submission that ARO… should be considered under paragraph (c) of the *BIA* definition of 'insolvent person'." (emphasis added)
[71] Appeal Reasons at para 4 [**TOA, Tab 4**].

obligations

63. On the basis of decisions concerning the concept of obligations under the *CCAA*, the Trustee submitted to the Chambers Justice that "obligations due and accruing due" includes "contingent and unliquidated claims" including "all obligations of whatever nature or kind."[72]

64. A fundamental problem with the Trustee's submission is that ARO is not a payment obligation. Neither ARO nor an analogous "obligation to society" was considered in the *CCAA* cases cited by the Trustee.[73]

65. In *Stelco*, Farley J held that the "obligations" side of the balance-sheet test was intended "to cover off all obligations of whatever nature or kind and leave nothing in limbo".[74] *Stelco* is distinguishable. The Chamber's Judge was right to reject this interpretation in the *BIA* context, not only because it ignores the text of the *BIA*,[75] but because it was explicitly derived from the policy goal of facilitating timely arrangements of payment obligations under the *CCAA*[76] and the exercise of inherent jurisdiction under the *CCAA*.[77] Farley J. acknowledged this rationale for adopting an "expanded meaning" of insolvency, noting that companies often wait too long before turning to the *CCAA*, and reasoning that an expanded meaning would be consistent with the legislative purposes of the *CCAA*.[78] Even then, as noted above, Farley J. was only concerned with future monetary obligations, not the non-monetary public duty related to a licensee's ARO. Again, that issue was squarely addressed in *AbitibiBowater*, which the Trustee ignores.

66. In *Yukon (Government of) v Yukon Zinc*[79], the Court emphasized the differences between the *BIA* and the *CCAA* for the purposes of determining claims (and thus, monetary obligations of the debtor), stating:

> …it is not sufficient for there to simply have been an 'obligation' on the bankrupt in order to establish a claim provable in bankruptcy. What is required is a debt or liability to a creditor by reason of an obligation incurred before the date of

[72] PWC Factum at paras 66-9 citing *Stelco* at paras 50 and 52 [**TOA, Tab 10**]. Notably, the Industry Intervenors disagreed, arguing that ARO is "a critical and fundamental component of the determination of the fair market value of the person's aggregate property": PWC QB Reasons 2 at para 185 [**TOA, Tab 2**].
[73] PWC QB Reasons 2 at paras 104 and 156 [**TOA, Tab 2**].
[74] *Stelco* at para 50 [**TOA, Tab 10**].
[75] PWC QB Reasons 2 at para 110 [**TOA, Tab 2**].
[76] PWC QB Reasons 2 at paras 96–100 [**TOA, Tab 2**].
[77] PWC QB Reasons 2 at paras 108 and 111 [**TOA, Tab 2**].
[78] *Stelco* at paras 13-4 and 25 [**TOA, Tab 10**].
[79] 2021 YKCA 2, 2021 CarswellYukon 18 [***Yukon***] [**TOA, Tab 17**].

> bankruptcy. Hence, it cannot be an obligation of any kind. It must be an obligation creating a debt or liability.[80] [Emphasis added.]

67. The legislative purpose of the *BIA* is quite different from the *CCAA*; while an "expanded meaning" for insolvency might be appropriate to the "restructuring thrust" of the *CCAA*, that rationale does not apply to statutes that (like the *BIA*) have predominantly a "liquidation thrust".[81] In the context of the *BIA*'s legislative purpose it makes no sense to apply so expansive a definition, *or* to effectively read Parliament's words down such that "obligations due and accruing due" really means obligations *simpliciter*.[82]

68. The Chambers Justice carefully considered the Trustee's argument, noting that there are important differences between the *CCAA* and the *BIA*, including their remedial objectives.[83] He also noted that the unqualified definition of "obligations due and accruing due" advocated by the Trustee would likely mean that a good part of Canada's energy industry would be rendered insolvent.[84] That is particularly true if, as the Trustee's case implies, ARO is to be considered at its full undiscounted value as though all of it were due and owing immediately.

due and accruing due

69. The Chambers Judge correctly held that the relevant question is not whether ARO are simply obligations of any kind, but whether they are "obligations, due and accruing due", meaning payment obligations that are completely constituted.[85] ARO are not completely constituted because they have not yet been reduced to specific payment obligations owed by the owner of the assets to which they attach. Indeed, the regulatory regime allows the shutting-in and subsequent reactivation of wells, and does not provide a specific timeline for when abandonment and reclamation activities must occur.[86] Moreover, when the work is required, the licensee will either

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[80] *Yukon* at para 61 (*emphasis added*) [**TOA, Tab 17**].
[81] *Canada (Attorney General) v Reliance Insurance Co*, 2008 CanLII 8250 (ON SC), 40 CBR (5th) 292 at para 35 [**TOA, Tab 18**].
[82] PWC QB Reasons 2 at paras 96 and 110 [**TOA, Tab 2**].
[83] PWC QB Reasons 2 at paras 90 and 98-115 [**TOA, Tab 2**].
[84] PWC QB Reasons 2 at para 124 [**TOA, Tab 2**]; *Enterprise Capital Inc. v Semi-Tech Corp.*, 1999 CanLII 15003 (ON SC), 10 C.B.R. (4th) 133 [***Enterprise Capital***] at paras 17-19 [**TOA, Tab 19**]; *Re Les Oblats de Marie Immaculee du Manitoba*, 2004 MBQB 71, 182 Man. R. (2d) 201, at paras 37-8 [**TOA, Tab 20**]; *Industries Cover Inc. (Syndic des)*, 2015 QCCS 136, 21 CBR (6th) 1 at paras 412-26 [**TOA, Tab 21**].
[85] PWC QB Reasons 2 at para 107 [**TOA, Tab 2**] citing *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6, [2013] 1 SCR 271 [***Indalex***] at para 36 [**TOA, Tab 22**].
[86] AER Directive 20 at s 3.4 [**BOA, Tab 3**]; AER Directive 13 – Suspension Requirements for Wells, AER (April 21, 2021) at s 4 [**BOAA, Tab 4**] at 280 and *OGCA* ss 3.012 – 3.020 [**TOA, Tab 7**]. There are specific timelines for

do the work itself or pay various hired contractors. If it fails to do so, the AER *might* intervene, and that intervention might be to engage the OWA – the end result of which would most likely be that a payment obligation on the part of the licensee to the AER never exists. Thus, while ARO are obligations owed to society, they are not properly counted on the payment side of the Balance Sheet Solvency Test.[87]

70. By contrast, the Trustee argues for an interpretation of the Balance Sheet Solvency Test that counts obligations of every possible kind, not only those that are "due and accruing due".[88] It urges the Court to disregard the definition of insolvency set out in s. 2 of the *BIA* in favour of a different test, one based on a "remedial purpose" tied to provincial energy regulation.[89] The Trustee's interpretation of the statute would effectively mean that the words "due and accruing due" are superfluous and have no meaning, and that the *BIA* has purpose and meaning far beyond its words. Moreover, the Trustee asks the Court to ignore that the uncertain payments would be due to uncertain contractors hired by the licensee, in whose shoes the Trustee does not stand, or claim to stand.

71. The words "due and accruing due" are not "mere surplusage".[90] They are conditioned by "payment" and modify the word "obligations". They implicitly exclude some obligations of an insolvent debtor that, however real or inevitable, are not "due" or "accruing due" at the relevant time.

72. The Chambers Justice relied on Supreme Court jurisprudence for the meaning of the word "accrued," concluding that this must mean obligations that are "completely constituted." In *Indalex* the Supreme Court considered the meaning of the term "accrued", adopting the reasoning of Duff J in the earlier Supreme Court decision *Ontario Hydro-Electric Power Commission v Albright (1922):*

> [T]he word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted—and it may have this meaning although it appears from the context that the right completely constituted

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when suspension of wells must occur, but a well can be suspended indefinitely with no requirement to abandon and reclaim, provided the licensee continues to monitor the wellsite.

[87] PWC QB Reasons 2 at para 93 [**TOA, Tab 2**]. The Chambers Judge follows the common practice of referring to the obligations side of the balance-sheet test as the "right hand" side.

[88] PWC Factum at para 66.

[89] PWC Factum at paras 62-5.

[90] *R v Proulx*, 2000 SCC 5, [2000] 1 SCR 61 at 85 [**TOA, Tab 24**].

> or the liability completely constituted is one which is only exercisable or enforceable *in futuro*…[91] [Emphasis added]

73. In *Hydro-Electric*, a majority of the Court determined that certain pension-funding obligations were "completely constituted" as of the date of the fund's wind up, because after that date, no further pension entitlements would arise.[92] This principle has been followed in Alberta: in interpreting the *Personal Property Security Act*, Justice Romaine reasoned that a debt "accrues" when it is "completely constituted" and "is payable in the future, with the only pre-condition to its payment being the passage of time."[93]

74. Thus, as the Chambers Judge rightly held that, "obligations, due and accruing due" has established legal meaning. It refers to obligations that are completely constituted, whether they are payable now (i.e. "due") or with certainty in the future (i.e. "accruing due", such as rent under a lease).[94] It does not refer to "obligations" *simpliciter*, a reading which would presume Parliament's words to be superfluous.

75. Having established that not all obligations are "obligations due and accruing due", the Chambers Justice then considered whether the ARO attaching to the Goodyear Assets were "fully constituted" or "presently exigible" *at the time of the Asset Transaction* in 2016. He concluded, correctly, that they were not. Because the ARO were not payment obligations, due and accruing due they were not to be considered as payment obligations for the purposes of the Balance Sheet Solvency Test.

76. The Chambers Justice's reasons are consistent with the language of the *BIA*, which confirms that what is measured against the value of a debtor's property is its ability "to enable payment of all his obligations, due and accruing due".[95] The payment need not be due immediately, but it must be an obligation that can be defined in monetary terms, i.e. "properly chargeable", as

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[91] 64 SCR 306, [1922] SCJ No 40 (QL) [***Hydro-Electric***] at 312–3 [**TOA, Tab 25**] cited in *Indalex* at paras 35 and 143–44 [**TOA, Tab 22**]. Although the Court split over the application of this standard to the facts of the case, it agreed in adopting the definition given by Duff J.
[92] *Indalex* at para 36 per Deschamps J [**TOA, Tab 22**].
[93] *518718 Alberta Ltd v Canadian Forest Products Ltd*, 1998 ABQB 619, [1999] 3 WWR 672 at para 12 [**TOA, Tab 26**].
[94] PWC QB Reasons 2 at paras 105 and 154 [**TOA, Tab 2**]; *Indalex* at para 36 [**TOA, Tab 22**]: "[A] contribution has 'accrued' when the liabilities are completely constituted even if the payment itself will not fall due until a later date.".
[95] *BIA* at s 2 [**TOA, Tab 1**] (emphasis added).

of the date that insolvency is being assessed (the 2016 Asset Transaction).[96] As the court in *Indalex* held, a payment obligation cannot be completely constituted if it may still be affected by the addition of new liabilities or entitlements.[97]

77. There are sound policy reasons for this approach. As the Chambers Judge observed, to count every future payment as being due on the spot "would result in a good part of the population being insolvent."[98] Other courts have made similar observations.[99] In *Enterprise Capital Management*, the Court pointed out that many corporations with long-term debt that is expected to be paid out of future income would be rendered insolvent if all future payment obligations were included in the term "accruing due".[100]

78. Moreover, as noted above, Alberta's energy regulatory regime provides its own rules and remedies regarding ARO, including the industry-funded OWA which was created to address licensee insolvencies. As a result, there is no certainty that the licensee will *ever* have a payment obligation to the AER as alleged by the Trustee.[101] As noted by the Supreme Court in *Redwater*, even where the AER issued an enforcement order (which is not the case here) it was still unlikely that it would become a judgment creditor. It would be nonsensical to treat this future obligation to *do* something as a present obligation to *pay* something, in order to artificially and retrospectively shoehorn PEOC into the statutory definition of "insolvent person" 17 months before its bankruptcy.

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[96] *Royal Bank of Canada v Oxford Medical Imaging Inc*, 2019 ONSC 1020, [2019] OJ No 1295 (QL) [***Oxford Imaging***] at para 39 [**TOA, Tab 27**]. *Oxford Imaging* is evaluating insolvency in the context of a commercial lease termination, but imports analysis of the definition of insolvency from cases interpreting section 2 of the *BIA*.
[97] *Indalex* at para 36 [**TOA, Tab 22**]. The Trustee's own valuation opinion is based on a present discounted estimate of long-term future costs associated with fulfilling ARO; it does not purport to suggest that there is any current payment obligation, which there is not.
[98] PWC QB Reasons 2 at para 124 [**TOA, Tab 2**].
[99] See *supra* note 84 for case references.
[100] *Enterprise Capital* at para 17 [**TOA, Tab 19**].
[101] *Redwater* at paras 22-6, 149 [**TOA, Tab 3**]: "Even assuming that the OWA's abandonment of Redwater's licensed assets could satisfy the 'sufficient certainty' test, I agree with Martin J.A. that it is difficult to conclude that there is sufficient certainty that the OWA will in fact perform the abandonments. I also agree with her view that there is no certainty that a claim for reimbursement will be advanced should the OWA ultimately abandon the assets."; and para 154: "Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement."

double-counting of ARO

79. As addressed above, the Trustee effectively asks this Court to find that current estimates of the future costs associated with ARO depress an energy asset's fair market value (going to the asset value on the balance sheet) and that they should be considered a payment obligation (a provisional liability on the balance sheet). As a matter of basic accounting and logic, there is no basis to count it twice.

(iii) Conclusion

80. The Trustee has no more authority than that expressly conferred to it by the *BIA*. The Trustee has no authority to enforce Alberta's energy laws and regulations. The Trustee stands in the shoes of Sequoia, and cannot sue to enforce Alberta's energy laws.

81. ARO is an obligation owed to society; not a payment obligation; not an obligation due or accruing due. At the time of the Asset Transaction, the estimated future costs of satisfying the Goodyear Assets' ARO were not payment obligations, not obligations due, and not obligations accruing due. As a matter of law, the ARO could not render PEOC insolvent.

82. As a matter of fact, there was no *rendering* because PEOC was the licensee, and thus ARO obligor, both before and after the Asset Transaction. Further, PEOC (by then Sequoia) was able to actively operate following the Asset Transaction.

83. ARO directly depresses the market value of energy assets. That depressed value goes on the asset side of the Balance Sheet Solvency Test. To also characterize ARO as an obligation due or accruing due for the purposes of the Balance Sheet Insolvency Test would be to count it twice.

84. The kind of mischief targeted by s. 96(1)(b)(ii)(A) of the *BIA* – the stripping of valuable property from the bankrupt to the material prejudice of its creditors – did not happen here. The Trustee's *BIA* claims were properly dismissed.

PART 5 - RELIEF SOUGHT

85. Based on the foregoing, and the further submissions in the Perpetual Factum, Ms. Rose respectfully submits that the Trustee's appeal should be dismissed.

Counsel estimates the length of argument will not exceed 45 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF MAY, 2021.

Norton Rose Fulbright Canada LLP

Steven Leitl

Steven H. Leitl QC | Gunnar Benediktsson
Counsel for Susan Riddell Rose

Table of Authorities

Tab #	Style of Cause	Citation
1.	*Bankruptcy and Insolvency Act*	RSC 1985, c. B-3
2.	*PricewaterhouseCoopers Inc v Perpetual Energy Inc*	2021 ABQB 2
3.	*Orphan Well Association v Grant Thornton Ltd*.	2019 SCC 5
4.	*PricewaterhouseCoopers Inc v Perpetual Energy Inc*	2021 ABCA 16
5.	*Urbancorp Toronto Management Inc (Re)*	2019 ONCA 757
6.	*Environmental Protection and Enhancement Act*	RSA 2000, c E-12
7.	*Oil and Gas Conservation Act*	RSA 2000, c O-6
8.	*Interpretation Act*	RSC 1985, c I-21
9.	*Re Pocklington*	2017 ABQB 621
10.	*Stelco Inc., Re*	2004 CanLII 24933 (ON SC)
11.	*Newfoundland and Labrador v AbitbiBowater Inc.*	2012 SCC 67
12.	*General Motors of Canada Ltd v Canada*	2004 FCA 370
13.	A Roadmap to Accounting for Environmental Obligations and Asset Retirement Obligations, Deloitte (August 2020) (BOAA, Tab 1)	
14.	ASPE at a Glance, BDO (October 31, 2019) (BOAA, Tab 2)	
15.	AER Directive 020 – Well Abandonment (April 21, 2021) (BOAA, Tab 3)	
16.	*Manitok Energy Inc (Re)*	2021 ABQB 227
17.	*Yukon (Government of) v Yukon Zinc*	2021 YKCA 2

18.	*Canada (Attorney General) v Reliance Insurance Co*	2008 CanLII 8250 (ON SC)
19.	*Enterprise Capital Inc. v. Semi-Tech Corp.*	*1999 CanLII 15003 (ON SC)*
20.	*Re Les Oblats de Marie Immaculee du Manitoba*	*2004 MBQB 71*
21.	*Industries Cover Inc. (Syndic des)*	*2015 QCCS 136*
22.	*Sun Indalex Finance, LLC v United Steelworkers*	2013 SCC 6
23.	AER Directive 13 – Suspension Requirements for Wells, AER (April 21, 2021) (BOAA, Tab 4)	
24.	*R v Proulx*	2000 SCC 5
25.	*Ontario Hydro-Electric Power Commission v Albright (1922)*	64 SCR 306
26.	*518718 Alberta Ltd v Canadian Forest Products Ltd*	1998 ABQB 619
27.	*Royal Bank of Canada v Oxford Medical Imaging Inc*,	2019 ONSC 1020