REGISTRAR'S STAMP

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	2101-0021AC
TRIAL COURT FILE NUMBER:	1801-10960
REGISTRY OFFICE:	CALGARY
PLAINTIFF/RESPONDENT:	PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
STATUS ON APPEAL:	APPELLANT
DEFENDANTS/APPLICANTS:	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. and SUSAN RIDDELL ROSE
STATUS ON APPEAL:	RESPONDENTS
DOCUMENT:	**FACTUM**

Appeal from the Judgment of
The Honourable Mr. Justice D.B. Nixon
Dated the 14th day of January 2021
Filed the 22nd day of January, 2021

FACTUM OF THE APPELLANT

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INTRODUCTION

1. The Appellant PricewaterhouseCoopers Inc., LIT is the trustee in bankruptcy (the "**Trustee**") of the estate of Sequoia Resources Corp., formerly known as Perpetual Energy Operating Corp. ("**PEOC**").

2. The Trustee brought a claim pursuant to s. 96 of the *Bankruptcy and Insolvency Act* (the "***BIA***") against Perpetual Energy Inc. ("**PEI**"), Perpetual Operating Trust ("**POT**") and Perpetual Operating Corp. ("**POC**") (jointly, the "**Perpetual Respondents**") for an order declaring a sale and transfer of assets by POT to PEOC (the "**Asset Transaction**") void as against the Trustee, alternatively for judgment against the Perpetual Respondents and Ms. Rose (the "**Respondents**") for the difference between the consideration given and received by PEOC in the Asset Transaction (the "***BIA* Claim**").

3. In August 2018, the Respondents applied to dismiss the *BIA* Claim (the "**First Application**"), very specifically only on the basis PEOC was controlled by other entities and that POT and PEOC were therefore at arm's length at the time of the Asset Transaction. The Chambers Judge declined to strike or dismiss the *BIA* Claim on this specific basis.

4. Just over a month after the release of the Chambers Judge's Reasons for Judgment, the Perpetual Respondents applied again for summary dismissal of the *BIA* Claim (the "**Second Application**"), this time on the basis of the Chambers Judge's findings, while they appealed his refusal to dismiss the *BIA* Claim in the First Application.

5. The Chambers Judge granted the Second Application on January 14, 2021, while this Court's decision in the appeals from his decision on the First Application was under reserve – not on the basis pleaded by the Perpetual Respondents in the Second Application, but on other grounds, committing various errors of law in the process.

6. This Court issued its Memorandum of Judgment, allowing the Trustee's appeal of the decision on the First Application, less than two weeks after the Reasons for Judgment in the Second Application were released. Although the Reasons for Judgment on the Second Application do not include a single reference to the Supreme Court's decision in *Redwater*, this Court's Memorandum of Judgment in the appeals from the decision on the First Application addresses the same evidence and the same legal issues as the decision on the

Second Application and is sufficient to dispose of the appeal in the Trustee's favour.

PART I - STATEMENT OF FACTS

7. In August 2018, the Respondents brought the First Application under s. 96 of the *BIA*.[1] The basis of the First Application for striking or dismissing the *BIA* Claim was expressly limited to the argument that the transaction entered into between POT and PEOC was at "arm's length" because POT was controlled by PEI and PEOC was controlled by entities at arm's length to PEI.[2] The Perpetual Respondents argued that, as a result, the Asset Transaction occurred outside the review period for arm's length transactions and could not be challenged by the Trustee under s. 96.

8. In August 2019, the Chambers Judge dismissed the First Application in an oral decision. In January 2020, the Chambers Judge issued written Reasons for Judgment finding that the *BIA* Claim could not be dismissed *on the basis of the arm's length issue*.[3] The Chambers Judge pointed out that he was "bound to decide the BIA claim within the confines of the underlying application" but may have arrived at a "different conclusion" based on his other findings "if [he] had not been restricted to addressing the arm's length issue".[4]

9. Although he had struck the Trustee's oppression claim and its claims against Ms. Rose, the Chambers Judge nonetheless proceeded to analyze the "Post-*Redwater*" financial result of the Asset Transaction "for completeness".[5] He found that the "Alleged Aggregate ARO" had a value of "nil" and that the Asset Transaction resulted in positive consideration for PEOC of $4,109,391.[6]

10. While they appealed the dismissal of the First Application with respect to the *BIA* Claim, the Perpetual Respondents filed the Second Application to strike and/or dismiss the *BIA* Claim on the basis of the Chambers Judge's findings in the First Application.[7] The affidavit supporting the Second Application simply recited the Chambers Judge's findings in his

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[1] August 2018 Application **[AR, p. P29-33]**
[2] August 2018 Application, at para. 8 **[AR, p. P31]**
[3] *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABQB 6 (First Reasons for Judgment), at para. 88 **[Appellant's Authorities, Tab 1]**
[4] First Reasons for Judgment, at para. 110 **[Appellant's Authorities, Tab 1]**
[5] First Reasons for Judgment, at paras. 368-369 **[Appellant's Authorities, Tab 1]**
[6] First Reasons for Judgment, at paras. 232 **[Appellant's Authorities, Tab 1]**
[7] February 20, 2020 Application for Summary Dismissal **[AR, p. P34]**

Reasons for Judgment on the First Application: ARO was "not a liability" and had "nil" effect on the financial result of the Asset Transaction, such that there was no transfer at undervalue and PEOC was not rendered insolvent by the Asset Transaction.

11. In their written submissions in support of the Second Application, the Perpetual Respondents' added a third argument, based not on the Chambers Judge's Reasons for Judgment but on a comment the Chambers Judge had made earlier in the proceedings. They argued that POT was merely a relationship and that the Asset Transaction therefore was not between POT and PEOC, but PEOC as trustee for POT, and itself. At the same time, in the appeals from the decision in the First Application, however, the Perpetual Respondents continued to argue that the Asset Transaction was between POT and PEOC and that they were at arm's length.

12. In July 2020, the Chambers Judge granted Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd. (the "**Industry Intervenors**") and the Orphan Well Association (the "**OWA**") leave to intervene in the Second Application.

13. In October 2020, the Chambers Judge heard the Second Application and reserved judgment. The appeals from the Chambers Judge's rulings on the First Application were heard on December 10, 2020. On January 14, 2021, the Chambers Judge issued Reasons for Judgment, granting the Second Application. On January 25, 2021, this Court issued its Memorandum of Judgment granting the Trustee's appeal and dismissing the Perpetual Respondents' appeal, both arising from the decision in the First Application.

PART II - GROUNDS OF APPEAL

14. It is respectfully submitted that the Chambers Judge erred in law:

    14.1. in failing to consider that ARO affect the value of a debtor's assets;

    14.2. in finding that ARO are a "mere accounting estimate";

    14.3. in his analysis of s. 96 of the *BIA*;

    14.4. in excluding ARO from the insolvency analysis under s. 96 on the basis that it was not "completely constituted and presently exigible"; and

    14.5. in finding that the Second Application was not an abuse of process.

PART III – STANDARD OF REVIEW

15. The applicable standard of review on all these grounds is correctness.

PART IV – ARGUMENT

A. The Chambers Judge Erred in Failing to Consider that ARO Affect the Value of a Debtor's Assets

1. The Chambers Judge's Findings

16. The Trustee and the Industry Intervenors argued that ARO should be considered on the asset side of the balance sheet insolvency test. As ARO form part of the value of the Goodyear Assets transferred to PEOC, the ARO needed to be considered in determining whether the value of PEOC's assets following the Asset Transaction were sufficient to enable payment of its obligations. The Trustee and the Industry Intervenors cited the Supreme Court of Canada's decision in *Redwater* for the proposition that ARO depressed the present value of the Goodyear Assets:

> These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their lifecycles, *Redwater* cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. Canada*, [2013] 2 S.C.R. 336, which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves *to depress the tenure's value at the time of sale*" (para. 29).[8] [Emphasis added.]

17. The Chambers Judge dismissed this argument in three sentences:

> Concerning the arguments provided by the Industry Intervenors, its substantive focus was on the impact that ARO has on the determination of the fair market value of the person's property. *That point goes to the issue of whether there was a transfer at undervalue, as opposed to whether the ARO falls within the ambit of the phrase "obligations, due and accruing due".* That raises a number of issues, which is why I stated above that if it was the Transfer at Undervalue Element that was in issue, it should not be decided by way of summary judgment under Rule 7.3.[9]

18. Although the Chambers Judge's relied heavily on *Redwater* in his first decision striking and/or dismissing many of the Trustee's claims and although the Trustee relied on *Redwater*, it is not referred to at all in the Reasons for Judgment on the Second Application.

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[8] *Orphan Well Association v Grant Thornton Limited*, 2019 SCC 5 (*Redwater*), at para. 157 **[Appellant's Authorities, Tab 2]**

[9] Reasons for Judgment, at para. 187 **[AR, p. F40]**

2. The Chambers Judge engaged in results-based reasoning

19. The Chambers Judge rejected the argument that ARO should be considered in determining the value of a debtor's property, which is then to be weighed against the value of the debtor's "obligations, due and accruing due" to determine whether the debtor is insolvent. The Chambers Judge insisted on considering whether ARO were to be included on the liability side of the equation.[10]

20. The Chambers Judge rejected the argument in principle, because it was inconsistent with the analytical framework *he had chosen*: whether ARO was properly included *on the other side* of the balance sheet insolvency equation, as part of the debtor's "obligations, due and accruing due".

21. Significantly, although the Chambers Judge's Reasons for Judgment in the Second Application did not address the argument based on *Redwater* that ARO are embedded part of the value of a debtor's assets, the Chambers Judge had relied on that very argument based on *Redwater* to strike and/or dismiss many of the Trustee's claims in the First Application, on the basis that ARO are not a "liability":

> In *Redwater*, the Supreme Court of Canada address the ARO liability allegation from a different viewpoint. *Rather than being a form of liability*, the Supreme Court held that the "...end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front"[...].[11]

22. The Chambers Judge points out that if the value of the Goodyear Assets had to be determined as part of the analysis, the issue should not be decided by way of summary judgment:

> That raises a number of issues, which is why I stated above that if it was the Transfer at Undervalue Element that was in issue, it should not be decided by way of summary judgment under Rule 7.3.[12]

23. Thus, if ARO were to be considered on the value side of the balance sheet insolvency equation, as the Chambers Judge had held in his earlier decision, that would not permit the issue to be determined summarily. By framing the issue as whether "ARO falls within the framework of the phrase "obligations, due and accruing due", the Chambers Judge avoided having to determine the value of the Goodyear Assets, which allowed the Trustee's claims to be dismissed summarily.

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[10] Reasons for Judgment, at para. 187 **[AR, p. F40]**
[11] First Reasons for Judgment, at para. 6 **[Appellant's Authorities, Tab 1]**
[12] Reasons for Judgment, at para. 187 **[AR, p. F40]**

3. The Chambers Judge erred in law in failing to consider that ARO depress the present value of a debtor's assets

24. In allowing the Trustee's appeal from the Chambers Judge's first decision striking and/or dismissing its claims, this Court cited *Redwater* for the proposition that ARO serve "to depress the tenure's value at the time of sale".[13] This Court found that:

> Abandonment and Reclamation Obligations may not be a conventional "debt", but rather operate by depressing the value of the assets; whichever side of the equation they be on, they could impact whether there is "undervalue" in a transaction.[14]

25. As the Supreme Court found in *Redwater* and this Court confirmed it is previous decision in this matter, ARO operate "by depressing the value of the assets".[15] They had to be considered in applying the balance sheet insolvency test, to determine if the value of PEOC's assets following the Asset Transaction was sufficient to enable payment of its obligations.

B. The Chambers Judge Erred in Finding that ARO are a "Mere Accounting Estimate"

1. The Chambers Judge's findings

26. The Chambers Judge found that ARO were alleged future obligations of PEOC and should therefore not be included in assessing "all of [its] obligations, due and accruing due":

> To emphasize the point concerning "obligations, due", the enactment by a body politic of a statutory framework that *creates future obligations to society*, which causes an entity like Perpetual Energy to book an accounting estimate does not equate to the establishment of "obligations, due". Using ARO as an example, the accounting exercise to quantify the amount that may be due in the future is only an estimate of an obligation [sic] the time of the calculation. It does not establish an obligation that is "due" to an identifiable person at that time.[16]

27. The Chambers Judge went on to find that:

> [T]he *alleged* ARO is not known. *It is simply an estimate of an obligation, which will be impacted by unknown legislative changes over decades to come*. The vagaries of ARO are evidenced by the fact that the Perpetual Energy financial statements report that ARO will be settled in a range of up to 25 years. That timeline by itself creates uncertainty.[17]
>
> [...]
>
> [I]n considering the Insolvency Element, *alleged obligations that are mere estimates* are not to be included in the determination of the solvency of an entity.
>
> In making the above comment, I acknowledge the assertions of the Industry Intervenors (defined below) to the effect that ARO is a legislated liability that cannot be avoided. While there is merit to that argument insofar as there *may be an obligation owed to society*, there [sic] no amount "due" to a person until the obligation is completely constituted in respect of an

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[13] *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 16 (Memorandum of Judgment), at para. 96 **[Appellant's Authorities, Tab 3]**
[14] *Ibid*, at para. 97 **[Appellant's Authorities, Tab 3]**
[15] *Ibid*, at paras. 96-97, citing *Redwater*, supra, at para. 157 **[Appellant's Authorities, Tab 3]**
[16] Reasons for Judgment, at para. 104 **[AR, p. F27]**
[17] Reasons for Judgment, at para. 113 **[AR, p. F28]**

> identifiable person (i.e. a trade creditor). *Mere accounting estimates* do not effect that result under clause (c) of the Insolvent Person definition, as presently worded.[18]

28. The findings by the Chambers Judge that the "alleged ARO" were "mere accounting estimates" and potential "future obligations" that will be impacted "by unknown legislative changes over decades to come" and that, as a result, they need not be considered in valuing "all of [the debtor's] obligations, due and accruing due" were inconsistent with the law and the uncontradicted evidence, including from the Respondents.

2. ARO are present obligations of a debtor

29. The Supreme Court in *Redwater* did not find ARO were "future obligations" or "mere accounting estimates". ARO are not "claims provable" subject to the general priority scheme under the *BIA,*[19] but are "end-of-life obligations" binding on the bankrupt estate and have to be satisfied prior to any payment to the bankrupt's secured creditors.[20]

30. This Court commented on the Chambers Judge's interpretation of the *Redwater* decision in its previous decision in this matter and confirmed that ARO "are a continuing obligation":

> The case management judge focused on the fact that *Redwater* confirmed that the Alberta Energy Regulator is not a "creditor" with respect to the Abandonment and Reclamation Obligations, and accordingly the Abandonment and Reclamation Obligations cannot be a "claim provable in bankruptcy". That much is an accurate reading of *Redwater*, but *it does not mean* that Abandonment and Reclamation Obligations *are "assumptions and speculations" that do not exist, that they are not an obligation or liability of Perpetual/Sequoia, or that they should be valued at "nil"*. The Abandonment and Reclamation Obligations *are an obligation* of Perpetual/Sequoia, owed "to the public" and the surface landowners, but which *are nevertheless obligations* which the trustee of a bankrupt corporation cannot ignore. Not only did *Redwater* confirm that Abandonment and Reclamation Obligations *are a continuing obligation of a bankrupt corporation*, that decision confirms that those obligations had to be discharged even in priority to paying secured creditors.[21] [Emphasis added.]

31. The Chambers Judge's determination that the "alleged ARO" was a "mere accounting estimate" that "may" represent a "future obligation" was inconsistent with the Supreme Court's decision in *Redwater* and this Court's prior decision in this matter. ARO are "a real liability or obligation" and "exist whether or not abandonment notices have been issued by the Alberta Energy Regulator."[22]

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[18] Reasons for Judgment, at para. 155-156 **[AR, p. F36]**
[19] *Redwater*, *supra*, at para. 159 **[Appellant's Authorities, Tab 2]**
[20] *Ibid*, at paras. 160, 162 and 163 **[Appellant's Authorities, Tab 2]**
[21] Memorandum of Judgment, at para. 95 **[Trustee's Authorities, Tab 3]**
[22] *Ibid*, at para. 87 **[Appellant's Authorities, Tab 3]**

3. The Chambers Judge's finding that the "alleged" ARO "may be" a future obligation was inconsistent with the pleadings and the evidence

(a) The Chambers Judge's finding was inconsistent with the Respondents' own pleadings

32. In rejecting the Chambers Judge's finding that ARO were merely "assumptions and speculations", this Court noted that the Chambers Judge had overlooked the admission in the Respondents' own Statement of Defence that ARO were included in the PEOC's liabilities "at the time of the Transaction":

> 44(c) PEOC/Sequoia's liabilities at the time of the Transaction were comprised of the estimated future costs to be incurred over time by Sequoia in an efficient abandonment and reclamation program at a discount rate commensurate with the discount rate for other producing assets, and were considered in the value of the Goodyear Assets;[23]

33. In responding to the Perpetual Respondents' argument in the Second Application that ARO should not be considered in assessing whether PEOC was rendered insolvent by the Asset Transaction, the Trustee referred to the same paragraph in the Statement of Defence. The Trustee pointed out that the Perpetual Respondents "specifically plead" that PEOC's liabilities "at the time of the Transaction" were comprised of the "estimated future costs to be incurred by Sequoia in an efficient abandonment and reclamation program."[24] Although the Chambers Judge referred to the Perpetual Defendants' Statement of Defence, he again overlooked their admission regarding ARO.[25]

34. It was an error of law for the Chambers Judge not to consider and give effect to the admission in the Respondents' own Statement of Defence, that PEOC's liabilities "at the time of the Transaction" included the ARO. As he had noted previously, the Court's focus "is dictated by the pleadings".[26]

(b) The Chambers Judge's finding that the "alleged" ARO "may be" a "future obligation" was inconsistent with the uncontradicted evidence

35. The Chambers Judge found that *no portion* of the ARO associated with the Goodyear Assets should be included in "all of [the debtor's] obligations, due and accruing due":

> Based on the facts and analysis above, in order for any component of the ARO to fall within the phrase "obligations, due and accruing due" in clause (c) of the Insolvent Person Definition, it

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[23] Statement of Defence of the Perpetual Defendants, at para. 44(c) **[AR, p P23]**; Statement of Defence of Ms. Rose, at para. 5 **[AR, p. P30]**; Memorandum of Judgment, at para. 96 **[Appellants' Authorities, Tab 3]**
[24] Trustee's Brief in Second Application, at para. 33 **[AEKE, p. A392]**
[25] Reasons for Judgment, at para. 116 **[AR, p. F29]**
[26] First Reasons for Judgment, at para. 88 **[Appellant's Authorities, Tab 1]**

> must be completely constituted and presently exigible: *Hydro-electric* at 312. *Since the Trustee did not provide any evidence to established [sic] that the ARO, or any component thereof, is completely constituted and presently exigible*, I find that the amount of ARO to be included in the determination of the Insolvency Element is "Nil". [27]

36. The Chambers Judge found that the Trustee, who was *responding* to the Second Application, did not provide any evidence to satisfy the legal test he had developed *sua sponte* and after the close of written and oral submissions: that ARO must be "completely constituted and presently exigible" in order to be considered in the balance sheet insolvency test.

37. Absent from this analysis is a discussion of the evidence put forward by *the Respondents*, as the parties bearing the onus to establish that the Trustee's claims should be summarily dismissed. In support of the Second Application, the Perpetual Respondents relied on a 9-page affidavit that simply recited the Chambers Judge's previous findings.[28] The affidavit stated that PEOC was not rendered insolvent by the Asset Transaction because it was left with "net assets" of $4,109,391. The basis for this assertion was the Chambers Judge's previous determination that ARO had "nil" impact on the financial result of the Asset Transaction because ARO was "not a liability".[29]

38. This Court noted that the Perpetual Respondents' own financial statements confirmed that ARO was a "real liability or obligation".[30]

39. In any event, the Trustee's evidence included the Perpetual Respondents' audited financial statements for the year in which the Asset Transaction took place. These audited financial statements, prepared by KPMG LLP and approved by Ms. Rose,[31] confirmed that the ARO were reported to the market as "provisions" and that:

> Decommissioning obligations are measured at the *present value of the management's estimate of expenditures required to settle the present obligation* at the statement of financial position date using a risk free interest rate not adjusted for credit.[32]

40. The 2016 audited financials list the material change in the present value of the Perpetual Respondents' ARO over the 2016 year. The decommissioning obligations were

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[27] Reasons for Judgment, at para. 194 **[AR, p. F42]**
[28] May 5, 2020 Affidavit of M. Schweitzer **[AEKE, pp. A264-268]**
[29] May 5, 2020 Affidavit of M. Schweitzer, para. 12-14 **[AEKE, p. A264]**; First Reasons for Judgment, at para. 368 **[Appellants' Authorities, Tab 1]**
[30] Memorandum of Judgment, at para. 87 **[Appellants' Authorities, Tab 3]**
[31] Perpetual Energy 2016 Consolidated Financial Statements, pp. 2-3, September 22, 2020 Affidavit of P. Darby, Exhibit 1 **[AEKE, pp. A313-314]**
[32] Note 3(j), Perpetual Energy 2016 Consolidated Financial Statements, p. 14 **[AEKE, p. A325]**

$159,169,000 at the beginning of 2016 and only 33,620,000 at the end of 2016.[33] Decommissioning obligations of $129,602,000 had been "disposed" of during 2016.[34]

41. Also included in the Trustee's evidence were the Perpetual Respondents' interim financial statements for the period ending September 30, 2016, immediately before the closing of the Asset Transaction. These financial statements reported the present value of the ARO associated with the Goodyear Assets at $131,024,000.[35] This amount was included under "Current liabilities".

42. The Chambers Judge therefore found that the "alleged" ARO "may" be a "future obligation":

    42.1. in the absence of any supporting evidence from the Respondents;

    42.2. in the face of the uncontradicted evidence that the Respondents themselves reported the ARO associated with the Goodyear Assets to the market as a "present obligation" with a "present value" well in excess of $100,000,000; and

    42.3. in the face of uncontradicted evidence that the Respondents reported it to the market as a present obligation, with a present value.[36]

    It is also contrary to the decision of this Court that ARO are "real liabilities or obligations."[37]

C. The Chambers Judge Erred in his Analysis of s. 96 of the *BIA*

1. The Chambers Judge erred in his analysis of the *BIA* generally

43. The Chambers Judge found that the *BIA* "is analogous to a penal statute" and should be construed accordingly.[38]

44. He cited the Supreme Court's 2010 decision in *Century Services Inc v Canada (Attorney General)*[39] as authority for the propositions that:

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[33] Note 13, Perpetual Energy 2016 Consolidated Financial Statements, p. 21, September 22, 2020 Affidavit of P. Darby, Exhibit 1 **[AEKE, p. A332]**
[34] Note 13, Perpetual Energy 2016 Consolidated Financial Statements, p. 21, September 22, 2020 Affidavit of P. Darby, Exhibit 1 **[AEKE, p. A332]**
[35] Perpetual Energy Inc. Consolidated Interim Consolidated Statements of Financial Position, August 2, 2018 Affidavit of P. Darby, Exhibit P **[AEKE, p. A191]**
[36] *Hogberg v Hoult*, 2004 ABCA 167, at para. 6 **[Appellant's Authorities, Tab 4]**
[37] Memorandum of Judgment, at para. 87 **[Appellants' Authorities, Tab 3]**
[38] Reasons for Judgment, at para. 262 **[AR, p. F52]**
[39] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 (*Century Services*) **[Appellant's Authorities, Tab 5]**

44.1. the *BIA* "is generally not viewed as remedial";[40] and

44.2. the "only aspect of the *BIA* that is remedial is in respect of proposals under that statute".[41]

45. The Chambers Judge's finding that the *BIA* should be construed narrowly as a "penal statute" reflects three errors of law reviewable on a correctness standard:

45.1. it fails to consider the express statutory direction in the *Interpretation Act* that the *BIA* be construed broadly as remedial legislation;[42]

45.2. it misinterprets the Supreme Court's decision in *Century Services* as somehow overruling the *Interpretation Act*;[43] and

45.3. it fails to consider whether s. 96, as distinct from the *BIA* generally, has a remedial purpose.[44]

2. The Chambers Judge erred in law in failing to interpret the *BIA* in accordance with the *Interpretation Act*

46. The Trustee argued before the Chambers Judge that s. 12 of the federal *Interpretation Act* provides that:

> **Enactments *deemed remedial***
>
> *Every enactment* is deemed remedial, and *shall be given* such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.[45] [Emphasis added.]

47. The Chambers Judge erred in disregarding the express statutory direction in the *Interpretation Act* and finding that the *BIA* "is analogous to a penal statute" and should be "construed accordingly".[46] Contrary to s. 12 of the *Interpretation Act*, the Chambers Judge failed to give s. 96 "such fair, large and liberal construction as best ensures the attainment of its objects". Instead, he construed the *BIA* narrowly as "analogous to a penal statute".[47]

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[40] Reasons for Judgment, at para. 27 **[AR, p. F14]**
[41] Reasons for Judgment, at paras. 27 and 262 **[AR, pp. F14 and F52]**
[42] *TransAlta Generation Partnership v Balancing Pool*, 2014 ABCA 294, para. 12**[Appellant's Authorities, Tab 6]**
[43] *Mammoet 13220-33 Street NE Limited v. Edmonton (City)*, 2014 ABCA 229 (*Mammoet*), at para. 15 **[Appellant's Authorities, Tab 7]**
[44] *Engel v Prentice*, 2020 ABCA 462, at para. 21 **[Appellant's Authorities, Tab 8]**
[45] *Interpretation Act*, RSC 1985, c I-21, s. 12 **[Appellant's Authorities, Tab 9]**
[46] Reasons for Judgment, at para. 262 **[AR, p. F52]**
[47] Reasons for Judgment, at para. 262 **[AR, p. F52]**

48. This fundamental error of law affected the entirety of the Chambers Judge's analysis.

3. The Chambers Judge misinterpreted the Supreme Court's decision in *Century Services*

49. The Chambers Judge relied on the Supreme Court's decision in *Century Services* in support of his finding that the *BIA* is "analogous to a penal statute".[48] In the passage cited by the Chambers Judge, the majority in *Century Services* stated that:

> As I will discuss at greater length below, the purpose of the CCAA—Canada's first reorganization statute—is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic cost of liquidating its assets. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility.

50. There is no basis for the Chambers Judge's reliance on this paragraph for the proposition that "the only aspect of the *BIA* that is remedial is in respect of proposals under that statute". The majority in *Century Services* simply said proposals under the *BIA* "serve the same remedial purpose" as the *Companies' Creditors Arrangement Act* (the "***CCAA***"): permitting debtors to carry on business. The Court did not say that the *BIA*, or s. 96 in particular, does not serve *any other remedial purpose*.

51. The majority in *Century Services* actually emphasized the common purpose of the *CCAA* and the *BIA* and the need for consistency between them to avoid a "strange asymmetry" and "statute shopping by secured creditors."[49] The Court specifically referred to the *CCAA* as "part of" Canadian "remedial insolvency legislation", the other "part" being the *BIA*:

> Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals.[50]
>
> [...]
>
> My conclusion is reinforced by the purpose of the CCAA as part of Canadian remedial insolvency legislation.[51]

52. The majority in *Century Services* confirmed that the *CCAA* and the *BIA* are both part of "Canadian remedial insolvency legislation" and should be interpreted harmoniously consisted with their shared approach to insolvency. The majority's reasons in *Century Services* directly contradict the proposition for which they were cited by the Chambers

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[48] Reasons for Judgment, at paras. 27, 262 **[AR, p. F14 and F52]**
[49] *Century Services*, at paras. 44-56 **[Appellant's Authorities, Tab 6]**
[50] *Ibid*, at para. 54 **[Appellant's Authorities, Tab 6]**
[51] *Ibid*, at paras. 54 and 56 **[Appellant's Authorities, Tab 6]**

Judge: that "the only aspect of the *BIA* that is remedial is in respect of proposals under that statute".[52]

53. The Chambers Judge erred in law in relying on *Century Services* as authority for the proposition that "the *BIA* is analogous to a penal statute".[53]

4. The Chambers Judge erred in failing to consider the remedial purpose of s. 96

54. The Reasons for Judgment devote considerable attention to distinguishing, incorrectly, between the *CCAA*, as a remedial statute, and the *BIA*, as a "analogous to a penal statute". Having found that the *BIA* is analogous to penal statute, the Chambers Judge proceeds directly to a narrow interpretation of the words "obligations, due or accruing due". This reflects two additional errors of law:

54.1. the Chambers Judge failed to consider the meaning of the words "rendered insolvent" in s. 96 of the *BIA* as distinct from the definition of "insolvent person" in s. 2; and

54.2. the Chambers Judge failed to consider the remedial purpose of s. 96, as distinct from the *BIA* generally.

(a) The Chambers Judge failed to consider the meaning of the words "rendered insolvent" in s. 96 of the *BIA*

55. The Chambers Judge's analysis of the "statutory framework" proceeds from the assumption that s. 96 of the *BIA* simply incorporates the definition of "insolvent person" from s. 2. He found that:

> The relevant aspects of section 96(1) of the *BIA* are outlined above. As stated in that analysis, there are five elements embedded in the framework of section 96 of the BIA. For the purposes of the February 2020 Application, I only focus on the Insolvency Element.
>
> *The Insolvency Element engages the definition of "insolvent person"* which is defined in section 2 of the BIA (the "**Insolvent Person Definition**").[54] [Emphasis added.]

56. The Chambers Judge proceeds directly to an analysis of the s. 2 definition of "insolvent person", including the words "obligations, due and accruing due" without considering:

56.1. that s. 96(1) uses the words "rendered insolvent" rather than the words "caused the

[52] Reasons for Judgment, at para. 262 **[AR, p. F52]**
[53] Reasons for Judgment, at para. 262 **[AR, p. F52]**
[54] Reasons for Judgment, at para. 87 **[AR, p. F23]**

debtor to become an insolvent person"; and

56.2. that sections 2 and 96 of the *BIA* are different provisions, serving different purposes within the overall scheme of the *BIA*.

57. Section 2 of the *BIA* sets out the definition of an "insolvent person".[55] The gatekeeping function[56] of this definition is reflected in the fact that an "insolvent person" must satisfy certain criteria:

> "insolvent person" means a person who is not a 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 [...].[57]

58. Section 96(1), on the other hand, does not incorporate the definition of "insolvent person" from s. 2. Subsections 96(1)(a)(ii) and (b)(ii) use the words "the debtor was insolvent at the time of the transfer or was rendered insolvent by it".

59. The principle of consistent expression holds that the same words used in a statute have the same meanings and different words have different meanings.[58] In s. 95(1), Parliament uses the expression "insolvent person" in relation to preferences that can be set aside.[59] In contrast s. 96(1) uses different expressions, "debtor was insolvent" or "rendered insolvent", when dealing with transfers at undervalue.

60. The Chambers Judge erred in law in assuming, without any basis, that s. 96(1) "engages" the definition of "insolvent person" in s. 2. When Parliament wished to incorporate that definition, as in s. 95(1), it did so. The different words used in s. 96(1) should be interpreted to mean something different.

61. As the Chambers Judge's entire analysis assumes that the s. 2 definition of "insolvent person" can simply be imported into s. 96, this error of law was fundamental to the decision.

(b) The Chambers Judge erred in failing to consider the remedial purpose of s. 96

62. The Chambers Judge found that the *BIA* was "analogous to a penal statute" and "is generally not viewed as remedial, except in the context of proposals to creditors".[60] That error of law

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[55] *Bankruptcy and Insolvency Act* , RSC 1985, c B-3 (*BIA*), s. 2 **[Appellant's Authorities, Tab 10]**
[56] *Pocklington, (Re)*, 2017 ABQB 621, at pars. 52 and 68 **[Appellant's Authorities, Tab 11]**
[57] *BIA*, s. 2 **[Appellant's Authorities, Tab 10]**
[58] *R v Canadian Broadcasting Corp.*, 2018 ABCA 391, at para. 43 **[Appellant's Authorities, Tab 12]**
[59] *BIA*, s. 95 **[Appellant's Authorities, Tab 10]**
[60] Reasons for Judgment, at para. 27 **[AR, p. F14]**

was compounded by the Chambers Judge's failure to consider the remedial purpose of s. 96 itself, an issue overlooked entirely in his Reasons for Judgment.

63. It was common ground that s. 96 had a remedial purpose. The Perpetual Respondents submitted that s. 96 was "an anti-abuse mechanism" intended to "prevent a debtor from disposing of assets for no or inadequate consideration".[61] The Trustee also referred to the remedial purpose of s. 96.[62]

64. Section 96(1) provides for "a remedy to reverse an improvident transfer that strips value from the debtor's estate".[63] That remedial purpose makes importing the definition of "insolvent person" from s. 2 inappropriate. If s. 96 simply incorporated the "insolvent person" definition from s. 2, an otherwise valid s. 96 claim could be defeated on the basis of the gatekeeping elements incorporated in that definition, if:

64.1. the debtor did not reside, carry on business or have property in Canada at the time of the alleged transfer at undervalue; or if

64.2. the debtor did not have "liabilities to creditors provable as claims under this Act" amounting to $1,000 at the time of the transfer.

65. Incorporating these gatekeeping elements into s. 96 would be inconsistent with its remedial purpose. For that reason, Parliament did not use the words "insolvent person" in s. 96, as it did in other sections of the *BIA* incorporating the "insolvent person" definition.

(c) The Chambers Judge erred in finding that s. 96 is not forward-looking

66. The Trustee relied on the analysis of Farley J. in *Stelco* for the proposition that all of a debtor's obligations should be considered in applying the balance sheet insolvency test. As this test contemplates the sale of all the debtor's assets, all of the obligations that would have to be addressed as part of this "notional sale" should be included to avoid "orphan obligations".[64]

67. The Chambers Judge rejected this analysis on the basis that *Stelco* was decided under the

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[61] Perpetual Respondents' Brief in Second Application, at paras. 36 and 42**[AEKE, pp. A357, A359]**
[62] Trustee's Brief in Second Application, at paras. 53, 56.2 and 66.4, citing *Alberta Health Services v Networc Health*, 2010 ABQB 373 at para. 20 **[AEKE, pp. A396, A397, A400][Appellant's Authorities, Tab 13]**
[63] *Urbancorp Toronto Management Inc (Re),* 2019 ONCA 757, at para. 48 **[Appellant's Authorities, Tab 14]**
[64] *Stelco, Re*, [2004] OJ No. 1257, at para. 59 **[Trustee's Authorities, Tab 23]**

CCAA and "one needs to look forward into the future" under that legislation.[65] The Chambers Judge found that "[i]n contrast, I view the Insolvency Element under section 96 of the *BIA* as being measured as at a point in time."[66] The Chambers Judge cites no authority for this conclusion, which appears to be based on his incorrect finding that the *BIA* is analogous to penal legislation and should be construed strictly.[67]

68. In addition to being inconsistent with the *Interpretation Act*, which requires that s. 96 be given "such fair, large and liberal construction as best ensures the attainment of its objects", the Chambers Judge's conclusion is inconsistent with s. 96 itself. Section 96 is forward-looking: it contemplates that a transfer could render a debtor insolvent *five years before* the initial bankruptcy event. It necessarily requires the Court to "look forward into the future", contrary to the Chambers Judge's interpretation.

69. There was no basis to for the Chambers Judge to reject Farley J.'s analysis in *Stelco*. In assessing whether a debtor was rendered insolvent by a transfer under s. 96, the Court should consider all obligations assumed that could lead to an initial bankruptcy event within the subsequent five years.

D. The Chambers Judge Erred in Excluding ARO from the Insolvency Analysis

1. The Chambers Judge developed his own interpretation of the words "obligations, due and accruing due"

70. The Chambers Judge found that the words "obligations, due and accruing due" in paragraph c of the *BIA* definition of "insolvent person" only included obligations that were "completely constituted and presently exigible".[68] He proceeded to dismiss the *BIA* Claim on the basis that "the Trustee did not provide any evidence to established [sic] that the ARO, or any component thereof, is completely constituted and presently exigible".[69]

71. The "completely constituted and presently exigible" test was based on Duff J.'s interpretation of the word "accrued" in *Hydro-Electric*, a 1922 decision from the Supreme

[65] Reasons for Judgment, at para. 99 **[AR, p. F26]**
[66] Reasons for Judgment, at para. 101 **[AR, p. F26]**
[67] Reasons for Judgment, at para. 262 **[AR, p. F52]**
[68] Reasons for Judgment, at para. 186 **[AR, p. F40]**
[69] Reasons for Judgment, at para. 194 **[AR, p. F41]**

Court cited in a *Indalex*, a more recent decision.[70] Both decisions confirm that "accrued" refers to an obligation that is completely constituted *but not presently exigible*, as discussed below.[71]

72. Equally problematic is the fact that the Chambers Judge developed the "completely constituted and presently exigible" test without argument from the parties, after he had reserved his decision. The Chambers Judge then applied this newly developed standard to the evidence, *ex post facto*.

    72.1. The Perpetual Respondents sought to strike and/or dismiss the BIA Claim on the basis that the balance sheet insolvency test only considered "liabilities" and the ARO were "not a liability";

    72.2. The Perpetual Respondents did not refer to *Hydro-Electric* or *Indalex* or suggest that obligations had to be "completely constituted and presently exigible" to be included in "obligations, due and accruing due";

    72.3. The Trustee had no opportunity to address the test developed *ex post facto* by the Chambers Judge, including by pointing out that *Hydro-Electric* and *Indalex* support a different interpretation of the word "accrued".

73. As noted by the Chambers Judge in his previous Reasons for Judgment:

> The reason that I am not considering value is because my focus is dictated by the pleadings, and the relevant provision is clause 4(a) of the Summary Dismissal Application filed by Perpetual Energy. That pleading focuses the challenge of the *BIA* Claim on the arm's length issue. Indeed, it would be an error of law for me to consider the value issue since that would be outside the scope of this Application [citation omitted].[72]

74. The Perpetual Respondents brought the Second Application on the basis that ARO was "not a liability", relying only on the Chambers Judge's previous Reasons for Judgment. The Trustee provided evidence to respond to the application as set out in the Second Application. It was an error of law for the Chambers Judge to develop his own basis for summarily dismissing the Trustee's claims, after the Parties had made their submissions and provided

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[70] Reasons for Judgment, at para. 186, citing *The Hydro-Electric Commission of Ontario v Albright*, (1922) 64 SCR 306 (*Hydro-Electric*) and *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 (*Indalex*) **[AR, p. F40][Appellant's Authorities, Tabs 15 and 16]**

[71] *Hydro-Electric*, *supra*, at pp. 311-312, para. 23 **[Appellant's Authorities, Tab 15]**; *Indalex*, *supra*, at para. 35 **[Appellant's Authorities, Tab 16]**

[72] First Reasons for Judgment, at para. 88 **[Appellant's Authorities, Tab 1]**

their evidence on the application as pleaded.[73]

75. In allowing the appeal from the Chambers Judge's award of enhanced costs in favour of Ms. Rose, this Court commented on this approach:

> Partly as a result of this status, the case management judge criticized the Trustee in Bankruptcy on a number of fronts, such as the very commencement of what the case management judge though [sic] was doomed litigation, the failure to properly investigate the claim, the failure to give notice to the defendants before suing, and the content of the pleadings and affidavits. The case management judge recognized that the duties he expounded had not been previously recognized, but reasoned "I have an ongoing obligation to expand the common law, where appropriate": costs reasons at para. 112. *The Trustee in Bankruptcy points to the unfairness of identifying new standards of conduct, ex post facto and without allowing submissions from counsel, and then criticizing him for not having met them*.[74]

76. As in his previous decision on costs, it was unfair for the Chambers Judge to develop his own test for obligations "accruing due", after submissions had closed, and then criticize the Trustee for not providing evidence to show that this newly developed test had been satisfied.

2. The Chambers Judge erred in law in his interpretation of the Supreme Court's decisions in *Hydro-Electric* and *Indalex*

77. The Chambers Judge relied on the Supreme Court's decisions in *Hydro-Electric* and *Indalex* for the proposition that the words "all of his obligations, due and accruing due" referred only to obligations that are both "completely constituted" *and* "presently exigible". The Chambers Judge stated that:

> The relevant phrase is "obligations, due and accruing due" as opposed to the term "obligation" simpliciter. Second, the Supreme Court of Canada has construed the qualifying words such that only *obligations that are completely constituted and presently exigible* fall within the scope of that phrase: *Hydro-Electric* at 312; and *Sun Indalex* at para 36.[75] [Emphasis added.]

78. However, earlier in the Reasons for Judgment, the Chambers Judge *twice* adopted the opposite interpretation of *Hydro-Electric*:

> Similarly, I construe "obligations, ...accruing due" as one where there is an existing debtor/creditor or borrower/lender relationship in circumstances where the underlying obligation is completely constituted, albeit with an additional amount accumulating day to day, *but which is only enforceable in the future*: see *Hydro-Electric* at page 312 and 313.[76]
>
> [...]
>
> As a result, "obligations, ...accruing due" must be taken into account. In my view, *the only proviso is that the "accruing" obligation must be completely constituted* as at the "date of the test", albeit with an additional amount accumulating day to day, *but which is only enforceable in the future:* see Hydro-Electric at page 312 and 313. [Emphasis added.]

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[73] *Sobeski v Mamo*, 2012 ONCA 560, at para. 38 **[Appellant's Authorities, Tab 24]**
[74] Memorandum of Judgment, at para. 199 **[Appellant's Authorities, Tab 3]**
[75] Reasons for Judgment, at para. 186 **[AR, p. F40]**
[76] Reasons for Judgment, at para. 105 **[AR, p. F27]**

79. The Supreme Court in *Hydro-Electric* was required to consider a different phrase "shall *have accrued* but *shall not be yet due*".[77] In interpreting that phrase, Duff J. found that the word "accrued" referred to an obligation that is completely constituted but only "exercisable or enforceable" in the future.[78] Similarly, the Supreme Court in *Indalex* cited the correct interpretation of *Hydro-Electric*, that "accrued" has the meaning "simply of completely constituted" but "only exercisable or enforceable in the future".[79]

80. *Hydro-Electric* and *Indalex* provide no support for the interpretation ultimately adopted by the Chambers Judge in dismissing the Trustee's claims, that an obligation must be both "completely constituted" and "presently exigible" to be "accruing due",[80] when both decisions confirm that an "accrued" obligation can be "one which is only exercisable or enforceable *in futuro*".[81]

3. The Chambers Judge's interpretation is Inconsistent with the *BIA* definition of "insolvent person"

81. Section 2 of the *BIA* provides than "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 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 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*;[82] [Emphasis added.]

82. The Chambers Judge found that the words "all his obligations, due and accruing due" refer only to obligations that are "completely constituted *and presently exigible*".[83] In rejecting the Industry Intervenors' submission that the ARO were owed to society, the Chambers Judge confirmed that, in his view, "there is no amount 'due' to a person until the obligation is completely constituted in respect of an identifiable person (i.e. a trade creditor).[84] The

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[77] *Hydro-Electric*, *supra,* at pp. 311-312, para. 23 **[Appellant's Authorities, Tab 15]**
[78] *Ibid,* at pp. 312-313 **[Appellant's Authorities, Tab 15]**
[79] *Indalex*, *supra,* at para. 35 **[Appellant's Authorities, Tab 16]**
[80] Reasons for Judgment, at para. 186 **[AR, p. F40]**
[81] *Indalex*, *supra,* at para. 35, citing *Hydro-Electric*, at 312, para. 23 **[Appellant's Authorities, Tab 16]**
[82] *BIA,* s. 2 **[Appellant's Authorities, Tab 10]**
[83] Reasons for Judgment, at para. 194 **[AR, p. F42]**
[84] Reasons for Judgment, at para. 156 **[AR, p. F36]**

Chambers Judge stated that "I construe 'obligations, accruing due' as one [sic] where there is an existing debtor/creditor or borrower/lender relationship in circumstances where the underlying relationship is completely constituted, albeit with an additional amount accumulating day to day, but which is only enforceable in the future".[85]

83. The flaw in the Chambers Judge's analysis is that the *BIA* definition of "insolvent person" distinguishes between "liabilities to creditors *provable as claims* under this Act", on the one hand, and "obligations, due and accruing due" on the other.

84. The Chambers Judge's interpretation incorrectly ascribes the same meaning to these two different phrases. If an obligation was both "completely constituted in respect of an identifiable person (i.e. a trade creditor)" and "presently exigible" it would simply be captured by the words "liabilities to creditors provable as claims" used elsewhere in the definition of "insolvent person".

85. The principle of consistent expression presumes that the same words used in different parts of a statutory provision are intended to have the same meanings and different words are intended to have different meanings.[86] If Parliament had intended the words "all of his obligations, due and accruing due" to have the meaning ascribed to them by the Chambers Judge, it would simply have used "liabilities to creditors provable as claims" again in paragraph (c).

4. Even if his legal analysis were correct, the Chambers Judge overlooked the uncontradicted evidence that some of the ARO associated with the Goodyear Assets had become due at the time of Asset Transaction

86. The Chambers Judge found that *no portion* of the ARO associated with the Goodyear Assets should be included in "all of [the debtor's] obligations, due and accruing due":

> *Since the Trustee did not provide any evidence to established [sic] that the ARO, or any component thereof, is completely constituted and presently exigible*, I find that the Amount to be included in the Insolvency Element is "Nil". [87] [Emphasis added.]

87. As this Court pointed out in its previous decision in this matter:

> [O]nce a well has been exhausted, production has stopped, and the well has been shut-in, the Abandonment and Reclamation Obligations *have crystallized*. The Abandonment and Reclamation Obligations may be unperformed, *but they are no longer "contingent" in either*

[85] Reasons for Judgment, at para. 105 **[AR, p. F27]**
[86] *R v Canadian Broadcasting Corporation*, 2018 ABCA 391, at para. 43 **[Appellant's Authorities, Tab 12]**
[87] Reasons for Judgment, at para. 194 **[AR, p. F42]**

> *sense*. The owner of the well is under a public duty to shut in the well and reclaim the surface.[88]

88. In addition to reversing the onus of proof, the Chambers Judge overlooked the evidence that this Court pointed out in its previous decision: the Goodyear Assets were "mature" and included 910 shut in wells and 727 abandoned wells, "meaning that some portion of the obligation to reclaim was *due to be performed* or was imminent".[89] The ARO associated with the Goodyear Assets was "no longer 'contingent' it was merely unperformed."[90]

89. Accordingly, even if there was merit to the "completely constituted and presently exigible" test developed by the Chambers Judge, the ARO associated with the bulk of the Goodyear Assets had "crystallized" and were "due to be performed" at the time of the Asset Transaction.[91]

90. The Chambers Judge dismissed the *BIA* Claim on the basis that "as a matter of law" the ARO associated with the Goodyear Assets should be excluded in assessing whether PEOC was rendered insolvent by the Asset Transaction.

> [247] Returning to the sole issue, the substantive question is how the law applies to the ARO: *PWC QB Reasons* at para. 50; and *Weir-Jones* at para 21. *If the ARO is properly characterized as falling within the scope of "obligations, due and accruing due" for purposes of the Insolvency Element, then this Action must proceed to a trial proper in order to deal with the Section 96 BIA Claim*. On the other hand, if the ARO does not fall within the scope of "obligations, due and accruing due" for purposes of the Insolvency Element, then the Section 96 Claim fails because the Insolvency Element would not be satisfied.
>
> [...]
>
> [256] Given the evidence and analysis, I find as a matter of law that the ARO does not fall within the ambit of the phrase "obligations, due and accruing due". As a result of that finding, the facts in evidence and my aggregate analysis, I further find the ARO Variable has been established, on the balance of probabilities, to be an amount of "Nil".

91. Even if the "completely constituted and presently exigible" test had any basis in law, the Chambers Judge failed to consider the evidence before him that the Goodyear Assets included 910 shut in wells and 727 abandoned wells. The ARO associated with these wells had "crystallized" and become "due to be performed".[92]

92. The Chambers Judge erred in ascribing a value of "nil", "as a matter of law", to the ARO associated with all of the Goodyear Assets, including the 910 shut in wells and 727

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[88] Memorandum of Judgment, at para. 87(c) **[Appellant's Authorities, Tab 3]**
[89] Memorandum of Judgment, at para. 88**[Appellant's Authorities, Tab 3]**
[90] Memorandum of Judgment, at para. 88 **[Appellant's Authorities, Tab 3]**
[91] Memorandum of Judgment, at paras. 87(c) and 88 **[Appellant's Authorities, Tab 3]**
[92] Memorandum of Judgment, at paras. 87(c) and 88 **[Appellant's Authorities, Tab 3]**

abandoned wells.[93]

E. The Chambers Judge Erred in Law in Finding that the Second Application was not an Abuse of Process

1. The Chambers Judge's findings

93. The Trustee raised three issues in arguing that the February 2020 Application was an abuse of process:

93.1. The Perpetual Respondents relied on two inconsistent affidavits in support of two parallel applications, sworn by the same witness on the same day;

93.2. The Second Application was inconsistent with their own Statement of Defence; and

93.3. The Perpetual Respondents were applying again for the same relief sought previously in the First Application, the dismissal of the Trustee's *BIA* claim, on grounds that could have been advanced from the outset.

94. The Chambers Judge found that there was no abuse of process.

95. With respect to the different affidavits, he found that the "focal point" in time of the two affidavits was different.[94] The May 5 affidavit sworn in support of the summary dismissal affidavit "was looking backward in time" and focused on PEOC "at the time of the Asset Transaction".[95] The May 5 affidavit sworn in support of the security for costs application focused on "the status of PEOC looking forward in time from the date the affidavit was filed" and the Chambers Judge inferred that its "temporal focus" was October 2, 2020, the day the Perpetual Respondents' *BIA* Summary Dismissal Application was heard.[96]

96. Beyond mentioning the argument at the outset, the Chambers Judge analysis of the abuse of process issue did not consider the alleged inconsistency between the positions advanced by the Perpetual Respondents in their Statement of Defence and the *BIA* Summary Dismissal Application.[97] The Chambers Judge notes later in the Reasons for Judgment that the Perpetual Respondents' Statement of Defence disputes that PEOC was rendered insolvent

[93] Reasons for Judgment, at para. 256 **[AR, pp. F51-52]**
[94] Reasons for Judgment, at paras. 40-42 **[AR, pp. F16-17]**
[95] Reasons for Judgment, at para. 41 **[AR, p. F16]**
[96] Reasons for Judgment, at para. 42 **[AR, p. F17]**
[97] Reasons for Judgment, at paras. 38, 44 **[AR, p. F16]**

by the Asset Transaction.[98]

97. The Chambers Judge rejected the third argument raised by the Trustee, that the Perpetual Respondents were litigating the summary dismissal by installment, on the basis that:

> In framing the Perpetual October 2018 Application in an effort to strike and/or dismiss the claim of the Trustee under section 96 of the *BIA*, the Perpetual Defendants focused only on the "arm's length" issue: *PWC QB Reasons* at paras 60 and 90. In contrast, in the Perpetual February 2020 Application, the Perpetual Defendants focus on other elements that the Trustee must prove in order to establish its case.[99]

2. The Chambers Judge erred in law in finding that the two affidavits were not inconsistent

98. The Chambers Judge committed errors of law in finding that the two May 5 affidavits sworn on behalf of the Perpetual Respondents were not inconsistent.

99. The Chambers Judge committed an extricable error of law in considering an irrelevant factor:[100] the "temporal focus" of the two affidavits.[101] Affidavits must state past or present facts. The forward-looking nature of the security for costs analysis does not allow a witness to present evidence regarding the period "on or after October 2, 2020", five months *after the affidavit was sworn*.[102]

100. The two May 5 affidavits presented two inconsistent versions of the same factual issue, the financial effect of the ARO on the value of the Goodyear Assets, by selectively adopting two different bases for the analysis – a correct interpretation of the Supreme Court decision in *Redwater* in one affidavit and the Chambers Judge's incorrect interpretation of the same decision in the other affidavit.

101. In his affidavit in support of the security for costs application, Mr. Schweitzer swore that, based on his understanding of the *Redwater* decision, Sequoia's unsecured creditors stood to recover little or nothing because "the obligation of an insolvent company to perform asset retirement obligations is binding on a trustee in bankruptcy and must be performed prior to payment of either secured or unsecured creditors".[103]

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[98] Reasons for Judgment, at para. 72 **[AR, p. F21]**
[99] Reasons for Judgment, at para. 46 **[AR, p. F17]**
[100] *Housen v Nikolaisen*, 2002 SCC 33, at paras. 33-37 **[Appellant's Authorities, Tab 17]**
[101] Reasons for Judgment, at para. 40-42 **[AR, pp. F16-17]**
[102] Reasons for Judgment, at para. 42 **[AR, p. F17]**
[103] May 5, 2020 Affidavit of M. Schweitzer, para. 27 **[AEKE, p. A276]**

102. At the same time, in his affidavit in support of the *BIA* Summary Dismissal Application, Mr. Schweitzer swore that, based on the Chambers Judge's Reasons for Judgment interpreting *Redwater*, the ARO had a value of "nil" in assessing the "net financial result of the Asset Transaction".[104]

103. When it suited the Perpetual Respondents to accurately represent the financial effect of ARO on the Goodyear Assets, ARO were a present, priority obligation that rendered the Goodyear Assets worthless.[105] When it suited the Perpetual Respondents to argue the opposite position, ARO were assigned a value of "nil" in assessing whether PEOC was rendered insolvent by the Asset Transaction.[106]

104. The Chambers Judge erred in law in allowing the Perpetual Respondents to rely on two affidavits which asserted two inconsistent versions of the same facts.

3. The Chambers Judge erred in law in failing to consider that the Second Application was inconsistent with the Perpetual Respondents' own Statement of Defence

105. The Trustee's written submissions highlighted the inconsistencies between the Statement of Defence and the Second Application,[107] as well as between the Second Application and the appeal from the decision on the First Application to this court. [108]

106. The Statement of Defence pleads that POT transferred its beneficial interest in the Goodyear Assets to PEOC.[109] In the Second Application, POT was represented merely as a relationship, so that the Asset Transaction was between PEOC, as trustee for POT, and itself.[110]

107. The Statement of Defence pleads that PEOC liabilities at the time of the Aggregate Transaction included the ARO.[111] In the Second Application, ARO were not acknowledged as a liability at all.[112]

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[104] May 5, 2020 Affidavit of M. Schweitzer, paras. 13, 14 and footnote 3 **[AEKE, p. A265]**
[105] *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABCA 36, at paras. 31 and 33 **[Appellant's Authorities, Tab 18]**
[106] May 5, 2020 Affidavit of M. Schweitzer, paras. 13, 14 and footnote 3 **[AEKE, p. A265]**
[107] Trustee's Brief in Second Application, at paras. 25-37 **[AEKE, pp. A389-A392]**
[108] Trustee's Brief in Second Application, at para. 43, citing Perpetual Respondents' Factum, at para. 13(a) **[AEKE, p. A394]**
[109] Trustee's Brief in Second Application, at para. 27 **[AEKE, p. A390]**
[110] Trustee's Brief in Second Application, at para. 26 **[AEKE, p. A390]**
[111] Trustee's Brief in Second Application, at paras. 31 and 33 **[AEKE, p. A391-A392]**
[112] Trustee's Brief in Second Application, at paras. 30 and 32 **[AEKE, p. A391]**

108. The Chambers Judge noted the Trustee's argument that the Perpetual Defendants' Statement of Defence contained admissions directly inconsistent with the position advanced in their Second Application,[113] but did not discuss or make any findings regarding that issue in the Reasons for Judgment, except to refer to the fact that the Perpetual Respondents dispute that the Asset Transaction rendered PEOC insolvent.[114]

109. As in his Reasons for Judgment in the First Application, the Chambers Judge overlooked the admissions in the Perpetual Respondents' Statement of Defence.[115] The Chambers Judge's interpretation of the Perpetual Respondents' Statement of Defence is reviewable on a correctness standard.[116] He erred in law in failing to consider that the Perpetual Defendants' case for summarily dismissal was contradicted by their own Statement of Defence.

4. The Chambers Judge erred in failing to consider the test for re-litigating an interlocutory application

110. The Trustee cited this Court's decision in *Pocklington* for the test to determine when a second interlocutory application for the same relief can be brought as an exception to abuse of process doctrine. A second interlocutory application for the same relief will not be an abuse of process *only if*:

110.1. the ruling on the first application was not based on the merits of the issue but on a technical objection;

110.2. upon the first application the applicant failed to prove essential facts from mistake or inadvertence;

110.3. there is new evidence that seriously justifies reconsideration of the issue; or

110.4. there is a material change in circumstances of a non-evidentiary nature.[117]

111. The Trustee also cited this Court's reasons in *Workum* for the proposition that it is an error of law and an abuse of process to grant a second application for the same relief simply

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[113] Reasons for Judgment, at para. 38 **[AR, p. F16]**
[114] Reasons for Judgment, at para. 72 **[AR, p. F21]**
[115] Memorandum of Judgment, at para. 96 **[Appellant's Authorities, Tab 3]**
[116] *Lameman v Alberta*, 2013 ABCA 148, at para. 11 **[Appellant's Authorities, Tab 19]**
[117] Trustee's Brief in Second Application, at para. 12 **[AEKE, p. A384]**; *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, 1995 ABCA 111 (*Pocklington*), at paras. 8-14 **[Appellant's Authorities, Tab 20]**

because a new argument was advanced.[118]

112. The Chambers Judge did not follow the authority from this Court in *Pocklington* and *Workum.* The Chambers Judge did not consider the test laid down in *Pocklington* and his finding on the abuse of process issue is directly inconsistent with the ratio in *Workum*.

113. The Chambers Judge found that the Perpetual Respondents "focused only on the arm's length issue" in the First Application, but in the Second Application they "focus on other elements that the Trustee must prove". The implication is that, if a plaintiff has to prove two, three or four elements to make out a cause of action, a defendant could make two, three or four applications for summary dismissal, focusing on a different element in each application.

114. This Court's reasons in *Pocklington* and *Workum* are clear. A second application for the same relief, in this case the summary dismissal of the *BIA* claim, is an abuse of process unless the applicant can bring itself within certain narrow exceptions. As the Trustee pointed out before the Chambers Judge, there is no basis to find any of the exceptions applicable.

115. Deliberately limiting the scope of an application to a narrow focus is not one of the recognized exceptions. The Chambers Judge had previously found that the Perpetual Respondents *deliberately* scoped their First Application narrowly.[119] Having made that election, they cannot bring a second application to raise the arguments they deliberately held back in the first application.

116. The Chambers Judge erred in law in failing to consider and apply *Pocklington* and *Workum* in determining that the Second Application was not an abuse of process.

5. The Perpetual Respondents abused the Court's process by arguing inconsistent positions in the Second Application and in the appeals from the decision on the First Application

117. The Perpetual Respondents' position on two key issues in the Second Application was directly inconsistent with their position in the appeals from the Chambers Judge's decision in the First Application.

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[118] Trustee's Written Submissions, at para. 14 **[AEKE, p. A384-A385]**; *Proprietary Industries Inc. v Workum*, 2006 ABCA 226 (*Workum*), at para. 5 **[Appellant's Authorities, Tab 21]**

[119] First Reasons for Judgment, at paras. 60, 88, 89, 90 **[Appellant's Authorities, Tab 1]**

(a) Arm's Length

118. In Appeal No. 1901-0262, the Perpetual Respondents argued that the Asset Transaction was at "arm's length" because the parties to the transaction were POT and PEOC, both of which were controlled by arm's length parties, PEI and 198Co., respectively.[120] It suited the Perpetual Respondents to show that the Asset Transaction was between POT and PEOC, because they needed to show that the transfer of the Goodyear Assets was at "arm's length".

119. However, in the Second Application, the Perpetual Respondents argued that the Asset Transaction was between PEOC, as trustee for POT, and PEOC personally, so it was not a "transfer" within the meaning of s. 96.[121] For the purposes of the Second Application, it suited the Perpetual Respondents to show that Asset Transaction was between PEOC and itself, so they could argue there was no such entity as POT and there was no "transfer" at all.

120. If POT was "merely a relationship" and the Asset Transaction was between PEOC and itself, the Perpetual Respondents could not have argued in Appeal No. 1901-0262 that the transaction was an arm's length transfer. Conversely, if POT held the beneficial interest in the Goodyear Assets and transferred it to PEOC in the Asset Transaction, the Perpetual Respondents' could not argue in the second summary dismissal application that there was no "transfer".

(b) The Nature of ARO

121. In Appeal No. 1901-0255, the Perpetual Respondents and Ms. Rose argued that ARO was not a "current liability" because it was a "provision" that "influences the present value of licensed assets", including the Goodyear Assets.[122] In the Second Application, however, the Perpetual Respondents relied on the Chambers Judge Reasons for Judgment in the First Application to assert that ARO had "nil" effect *on the value of the Goodyear Assets*,[123] such that the Asset Transaction was not a transfer "at undervalue" and PEOC was not rendered insolvent by it.[124]

122. In Appeal No. 1901-0255AC, it suited the Respondents to argue that the Trustee's appeal

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[120] Perpetual Respondents' Factum, at paras. 13(a), 51, 52, 54 and 57.
[121] Perpetual Respondents' Brief in Second Application, at paras. 35-39 **[AEKE, p. A357-A358]**
[122] Factum on behalf of Ms. Rose, at paras. 30, 32 and 33; Perpetual Respondents' Factum, at para. 3.
[123] May 5, 2020 Affidavit of M. Schweitzer, at para. 13, 16(b) and Footnote 3 **[AEKE, p. A265-A266]**
[124] May 5, 2020 Affidavit of M. Schweitzer, at paras. 13, 14 and 16(b) **[AEKE, p. A264-A265]**

should be dismissed because the Chambers Judge had merely found that ARO was built into the value of the Goodyear Assets and was therefore not a "current liability".[125] In the Second Application, it suited the Perpetual Respondents to present evidence that the Chambers Judge had come to the opposite conclusion: ARO was "not a liability" at all, so it could be assigned a value of "nil" in *assessing the value of the Goodyear Assets*.[126]

(c) Submissions

123. The Perpetual Respondents should not be allowed to maintain the separation between the inconsistent positions they took in the different proceedings, according to the exigencies of their positions in each case. In *Toronto (City) v CUPE*, the Supreme Court noted that "a defendant may be quite pleased to litigate an issue decided against him" and proceeded to explain why that would be prevented by the abuse of process doctrine:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. [...] [I]f the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, *the inconsistency, in and of itself, will undermine the credibility of the entire judicial process*, thereby diminishing its authority, its credibility and its aim of finality.[127]

124. It was an abuse of process for the Perpetual Respondents to advance diametrically opposed positions on the key issues in different – even parallel – proceedings, as it suited them.

6. The Chambers Judge did not err in dismissing the Perpetual Respondents' argument that there was no "transfer" within the meaning of s. 96

125. One of the arguments advanced by the Perpetual Respondents in their submissions in support of the Second Application was that there was no "transfer" within the meaning of s. 96 because the Asset Transaction was between PEOC, as trustee for POT, and itself. They argued that POT, as a trust, was merely a relationship, and therefore it could not have transferred the beneficial interest in the Goodyear Assets to PEOC.[128] As a result, the Asset Transaction was effectively between PEOC, as trustee for POT, and PEOC itself.

126. The Chambers Judge dismissed this argument in one paragraph:

> POT transferred its beneficial interest in the Goodyear Assets to PEOC in the Asset

[125] Factum on behalf of Ms. Rose, at paras. 30, 32 and 33; Perpetual Respondents' Factum, at para. 3.
[126] May 5, 2020 Affidavit of M. Schweitzer, at para. 13, 16(b) and Footnote 3 **[AEKE, p. A265-A266]**
[127] *Toronto (City) v C.U.P.E., Local 79* , 2003 SCC 63, at paras. 50-51 **[Appellant's Authorities, Tab 26]**
[128] Perpetual Respondents' Brief in Second Application, at paras. 35-39, September 22, 2020 Affidavit of P. Darby, Exhibit 2 **[AEKE, pp. A357-A358]**

> Transaction.[129]

127. The Chambers Judge did not err in declining to accept the alternative version of the facts argued by the Perpetual Respondents.

128. The Perpetual Respondents Statement of Defence pleads an entirely different version: that there was a transfer of the beneficial interest in the Goodyear Assets from POT to PEOC and PEOC had no material assets or liabilities prior to "the Transaction".[130]

129. The Chambers Judge had accepted their first version of the facts in the First Application, describing one of the steps in the "Aggregate Transaction" as: "POT sold its beneficial interest in the Goodyear Assets to PEOC in the Asset Transaction."[131]

130. The argument was also inconsistent with *the evidence*. Section 2.01 of the purchase and sale agreement in the Asset Transaction confirmed that POT "sells, assigns, transfers, conveys and sets over" the Goodyear Assets to PEOC.[132] As noted by this Court in its previous decision, s. 2.06(b) of the same agreement "acknowledged that [PEOC] would assume the Abandonment and Reclamation Obligations".[133]

F. Having Regard to the Outcome of the Trustee's Previous Appeal, the *BIA* Claim is not Suitable for Summary Dismissal

131. In the First Application, the Chambers Judge struck or dismissed all the Trustee's claims except the *BIA* Claim.[134] The Chambers Judge then also granted the Second Application, summarily dismissing the *BIA* Claim before this Court released its decision allowing the Trustee's appeal arising from the First Application.

132. The Chambers Judge's application of the test for summary dismissal in the Second Application was premised on the *BIA* Claim being the "sole remaining issue" to be determined:

> Given that determination, I further find that the Trustee SOC should be dismissed summarily under Rule 7.3 *insofar as the Section 96 BIA Claim is the sole remaining issue within the trial*

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[129] Reasons for Judgment, at para. 8.
[130] Trustee's Brief in Second Application, at para. 27, September 22, 2020 Affidavit of P. Darby, Exhibit 3, citing paras. 24, 37 and 48 of the Perpetual Statement of Defence **[AEKE, p. A390]**
[131] First Reasons for Judgment, at para. 17 **[Appellant's Authorities, Tab 1]**
[132] Purchase and Sale Agreement, pp. 1 and 12, August 2, 2018 Affidavit of P. Darby, at Exhibit D **[AEKE, p. A52 and A63]**
[133] Memorandum of Judgment, at para. 11 **[Appellant's Authorities, Tab 3]**
[134] Memorandum of Judgment, at para. 39 **[Appellant's Authorities, Tab 3]**

division.[135] [Emphasis added.]

133. The Chambers Judge cited this Court's decision in *Windsor* for the proposition that "no trial is required" where a judge is able to reach a fair and just determination on the merits in a summary dismissal application.[136] He noted that summary dismissal is appropriate where it "is a proportionate, more expeditious and less expensive means to achieve a just result.[137]

134. This Court allowed the Trustee's appeal from the Chambers Judge's dismissal of the non-*BIA* claims in the First Application.[138] which invalidated the premise for the Chambers Judge's summary dismissal analysis: the Trustee's *BIA* Claim is no longer the "sole remaining issue" to be determined.[139] The Trustee's *BIA* Claim raises the same factual questions, including the value of the ARO assumed by PEOC in the Asset Transaction, as the Trustee's other claims, including its creditor oppression claim.[140]

135. In light of this Court's previous decision allowing the Trustee's closely related, non-*BIA* claims to proceed to trial, the summary dismissal of the Trustee's *BIA* Claim is not "the proportionate, more expeditious and less expensive procedure" in the circumstances.[141]

PART V – RELIEF SOUGHT

136. The Appellant respectfully requests that the appeal be allowed, with costs.

Calgary, Alberta
March 26, 2021

Estimated Time for Argument: 45 minutes

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per: _____

Rinus de Waal/Luke Rasmussen
Counsel for the Appellant, PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

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[135] Reasons for Judgment, at para. 278 **[AR, p. F55]**
[136] Reasons for Judgment, at para. 229 citing *Windsor v Canadian Pacific Railway*, 2014 ABCA 108, at para. 13 **[AR, p. F47]**
[137] Reasons for Judgment, at para. 229 **[AR, p. F47]**
[138] Memorandum of Judgment, at para. 227 **[Appellant's Authorities, Tab 3]** *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 92, at para. 3 **[Appellant's Authorities, Tab 25]**
[139] Reasons for Judgment, at para. 278 **[AR, p. F55]**
[140] Memorandum of Judgment, at paras. 140-141 **[Appellant's Authorities, Tab 3]**
[141] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, at para. 48 **[Appellant's Authorities, Tab 22]**

TABLE OF AUTHORITIES

1. *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABQB 6
2. *Orphan Well Association v Grant Thornton Limited*, 2019 SCC 5
3. *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 16
4. *Hogberg v. Hoult*, 2004 ABCA 167
5. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
6. *TransAlta Generation Partnership v Balancing Pool*, 2014 ABCA 294
7. *Mammoet 13220-33 Street NE Limited v. Edmonton (City)*, 2014 ABCA 229
8. *Engel v Prentice*, 2020 ABCA 462
9. *Interpretation Act*, RSC 1985, c I-21, s. 12
10. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, ss. 2, 95 and 96
11. *Pocklington, (Re)*, 2017 ABQB 621
12. *R v Canadian Broadcasting Corp.*, 2018 ABCA 391
13. *Alberta Health Services v Networc Health*, 2010 ABQB 373
14. *Urbancorp Toronto Management Inc (Re)*, 2019 ONCA 757
15. *The Hydro-Electric Commission of Ontario v Albright*, (1922) 64 SCR 306
16. *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6
17. *Housen v Nikolaisen*, 2002 SCC 33
18. *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABCA 36
19. *Lameman v Alberta*, 2013 ABCA 148
20. *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, 1995 ABCA 111
21. *Proprietary Industries Inc. v Workum*, 2006 ABCA 226
22. *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49
23. *Stelco, Re*, [2004] OJ No. 1257

24. *Sobeski v Mamo*, 2012 ONCA 560

25. *PricewaterhouseCoopers Inc. v Perpetual Energy Inc*., 2021 ABCA 92

26. *Toronto (City) v C.U.P.E., Local 79* , 2003 SCC 63