SCC Court File Number 39597

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM *THE COURT OF APPEAL OF ALBERTA*)

BETWEEN:
PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST and PERPETUAL OPERATING CORP.

APPLICANTS
(Appellants/Respondents)

AND:

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

RESPONDENT
(Respondent/Appellant)

RESPONSE

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

(Rule 27 of the *Rules of the Supreme Court of Canada*)

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MEMORANDUM OF ARGUMENT

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

RESPONDENT

(Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

1. PricewaterhouseCoopers Inc., LIT (the "**Trustee**"), in its capacity as the trustee in bankruptcy of Sequoia Resources Corp. ("**Sequoia**") refers to its Memorandum of Argument in the related application of Susan Riddell Rose ("**Rose**")(the "**Rose Application**") and does not propose to repeat those submissions which also apply in this application.

Overview

2. As in the Rose Application, the decision of the Alberta Court of Appeal (the "**ABCA**") in this case (the "**ABCA Decision**") does not raise any issues which, by reason of their public importance ought to be decided by the Supreme Court.

Concise Statement of Facts

3. The Trustee commenced an action against Perpetual Energy Inc. ("**PEI**"), Perpetual Operating Trust ("**POT**") and Perpetual Operating Corp. ("**POC**")(the "**Perpetual Defendants**"), *inter alia*, under s. 96 of the *Bankruptcy and Insolvency Act* (the "***BIA***").

4. PEI was the sole shareholder of Perpetual Energy Operating Corp. ("**PEOC**"), as Sequoia was known at the time of the transactions discussed below. PEOC was the trustee for POT and held the licences for the wells and related facilities of POT. Ms. Rose was an officer, director and shareholder of PEI and the sole director of PEOC.

5. In 2016, PEI decided to dispose of a large number of specifically identified POT assets (the "**Goodyear Assets**") with associated asset retirement obligations ("**ARO**") of $100 million or more, for nominal consideration in a series of transactions.[1] The Goodyear Assets were sold to PEOC (the "**Asset Transaction**"), PEOC was replaced as trustee for POT, which retained the selected remaining assets (the "**KeepCo Assets**") and the shares of PEOC were then sold by PEI to an arm's length purchaser ("**198Co**"), again for nominal consideration (the "**Share Transaction**").

6. The Asset Transaction was specifically designed to benefit PEI, as PEOC's sole shareholder. It separated and disposed of the net negative value Goodyear Assets to PEOC for nominal consideration, while retaining the selected positive value KeepCo Assets in POT. The Asset

[1] *Pricewaterhousecoopers Inc. v Perpetual Energy Inc.*, 2021 ABCA 16, at paras. 6, 11 and 89 [**Appeal Decision**]

Transaction harmed PEOC and its stakeholders in the same measure as it benefited PEI. PEOC assumed the obligations associated with the Goodyear Assets, without the benefit of the KeepCo Assets and with no ability to meet those obligations.

7. The Asset Transaction was also specifically structured to avoid regulatory oversight.

8. The Trustee sought to set aside the Asset Transaction and return the Goodyear Assets to POT. In the alternative, the Trustee sought a judgment that would reverse the financial effect of the Asset Transaction by requiring the Perpetual Defendants and Ms. Rose, the sole director of PEOC and president and Chief Executive Officer of PEI at the time of the Asset Transaction,[2] to compensate PEOC for the difference in consideration it gave and the consideration it received in the Asset Transaction.

9. The Perpetual Defendants and Ms. Rose applied to have the Trustee's s. 96 claim summarily dismissed *on the basis only* that the Asset Transaction was an arm's length transfer, because it was no more than "an imbedded step" in the sale of PEOC's shares by PEI to 198Co.

10. Even though 198Co paid $1 for PEOC shares and only acquired those shares after the Asset Transaction had closed, the Perpetual Defendants argued that 198Co had negotiated the terms of the Asset Transaction *at arm's length on behalf of PEOC* with PEOC's sole shareholder, PEI, and its sole director, Ms. Rose – the parties who controlled PEOC at the time. They argued that this theory alone was sufficient to rebut the presumption in s. 4(5) of the *BIA* that POT and PEOC, as two entities controlled by PEI, did not deal with each other at arm's length. They expressly declined to challenge the Trustee's determination, pursuant to s. 96(2), that the Asset Transaction was substantially at undervalue, to the extent of approximately $220 million.

11. The Perpetual Defendants' summary dismissal application was dismissed. The Court found that the arm's length question could not be decided on affidavit evidence alone.

12. The ABCA dismissed the Perpetual Defendants' appeal from that decision.

    12.1. The ABCA pointed out that 198Co, as a *future* shareholder of PEOC, had no legal capacity to dictate the consideration given and received by PEOC in the Asset Transaction, so that its involvement in the transaction still meant that the Asset

[2] Appeal Decision, at paras. 3-4.

Transaction was not at arm's length.

12.2. The ABCA confirmed that PEI, as sole shareholder, and Ms. Rose, as sole director, controlled PEOC until after the transfer of the Goodyear Assets had been completed.

12.3. The ABCA noted that there was no evidence that the nominal consideration PEOC received had been bargained for on behalf of PEOC by anyone at arm's length and had not simply been determined internally by the Perpetual Defendants.

PART II – QUESTIONS IN ISSUE

13. Both questions identified by the Perpetual Defendants are based on incorrect statements regarding the ABCA Decision.

When and how can the presumption in the BIA that related parties are not dealing at arm's length be rebutted?

14. It is submitted that the ABCA "disregard[ed] that the overall multi-step transaction was negotiated at arm's length", that the ABCA "treated Parliament's 2007 amendment to the BIA" as "meaningless" and that, as a result, "there are now inconsistent interpretations of "arm's length" across "Parliament's statute book".

15. In fact, the Perpetual Defendants had deliberately made no effort to rebut the presumption that POT and PEOC were not at arm's length during the negotiations, by showing that the Asset Transaction was a transfer at fair value. The consideration given and received by the related parties is a significant factor in determining whether a related-party transaction reflected arm's length bargaining. Here there was nominal consideration of $10. The Perpetual Defendants' own contemporaneous assessment was that $131 million in liabilities associated with the Goodyear Assets were disposed of through the Asset Transaction, representing 71% of total corporate liabilities.[3]

16. The ABCA expressly rejected the argument that with respect to the arm's length question the focus should not be on the parties to the particular transaction under review, but on the "overall multi-step transaction".

[3] Appeal Decision, at paras. 6, 11 and 89.

17. In response to the finding that they had presented *no evidence* to rebut the presumption, the Perpetual Defendants incorrectly submit that the ABCA effectively did not accept that the presumption can be rebutted.

Can a trustee in bankruptcy bring an oppression claim on behalf of a select few creditors of bankrupt estate?

18. The Perpetual Defendants assert that the oppression claim is a personal claim a trustee in bankruptcy should not be permitted to pursue,[4] that the ABCA Decision "radically expands trustees' powers, allowing them to bring claims on behalf of select creditors"[5] and that the ABCA Decision is "inconsistent with appellate authorities across Canada."[6]

19. The oppression remedy sought by the Trustee, an Order setting aside the Asset Transaction or directing the Defendants to repay to the Estate the shortfall in consideration received by PEOC for their benefit, would benefit all creditors. The ABCA authorized the Trustee to seek an oppression remedy on behalf of all of PEOC's creditors at the time of the Asset Transaction, not just on behalf of "a select few creditors". This is consistent with the principle that an oppression claim can never be advanced *ex post facto* on behalf of a party who was not a stakeholder at the time of oppressive conduct.

20. These issues have been dealt with extensively in the existing case law. Intervention by this Court is not required.

PART III – ARGUMENT

A. The *BIA* Claim

1. The Alberta Court of Appeal correctly applied s. 4(5) of the *BIA*

21. The Perpetual Defendants acknowledge that s. 4(5) of the *BIA* creates a rebuttable presumption that related persons do not deal with each other at arm's length. It provides that:

> **Presumptions**
>
> (5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the

[4] Perpetual Memorandum of Argument, at para. 5.
[5] Perpetual Memorandum of Argument, at para. 5.
[6] Perpetual Memorandum of Argument, at para. 6.

absence of evidence to the contrary, deemed not to deal with each other at arm's length.[7]

22. The 2007 amendments to the *BIA* introduced the words "in the absence of evidence to the contrary" into s. 4(5), allowing a respondent to a s. 95 or 96 application to rebut the presumption of non-arm's length dealing between related parties with "evidence to the contrary".

23. The Perpetual Defendants proceed from that premise to the conclusion that the ABCA applied s. 4(5) as if the presumption of non-arm's length dealing between related parties could not be rebutted. They submit that:

    23.1. the Appeal Decision "defeats Parliament's intent in amending s. 4(5)";[8] and

    23.2. the Appeal Decision represents "a retreat to pre-2007 bankruptcy law, where transactions between related persons are deemed to be non-arm's length – full stop."[9]

24. There is no merit to these submissions. The Chambers Judge and the ABCA confirmed that the s. 4(5) presumption *could be* rebutted with "evidence to the contrary".[10] However, both the Chambers Judge and the ABCA determined that the evidence presented by the Perpetual Defendants was *not sufficient to* rebut the s. 4(5) presumption.[11]

25. The ABCA considered and rejected the same argument advanced by the Perpetual Defendants in this application: that the Asset Transaction was an arm's length transaction because 198Co, the *future* shareholder of PEOC, negotiated on behalf of PEOC:[12]

> Exactly how the Perpetual Energy group rearranged its affairs to move the Goodyear Assets into Perpetual/Sequoia, and specifically the consideration to be paid under that transaction, was not a matter over in which [the Kailas Capital group] *had any legal interest, or over which they had any legal control*. There is no indication on this record that the acceptability of the overall Aggregate Transaction to the Kailas Capital group depended on the mechanism by, or consideration for which the Goodyear Assets were moved into Perpetua/Sequoia.[13]
>
> [...]
>
> On this record, *there is no legally relevant evidence to rebut the presumption* that the related

[7] *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, s. 4(5)[***BIA***]
[8] Perpetual Memorandum of Argument, at para. 28.
[9] Perpetual Memorandum of Argument, at para. 28.
[10] *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABQB 6, at para. 101 [**Queen's Bench Decision**]; Appeal Decision, at paras. 17 and 101.
[11] Appeal Decision, at para. 104; Queen's Bench Decision, at paras. 96-101.
[12] Perpetual Memorandum of Argument, at para. 30.
[13] Appeal Decision, at para. 101.

> members of the Perpetual Energy group were engaged in the Asset Transaction were not operating at arm's length. *The evidence on the present record is that the structure and pricing of the Asset Agreement were under the control of the directors and officers of the Perpetual Energy group*. That transaction was not shown to be negotiated at arm's length. Ms. Rose's conclusory statements to the contrary are *inconsistent with the documentary evidence and corporate law*.[14] [Emphasis added.]

26. There was ample evidence to support the ABCA's finding that the Perpetual Defendants exercised legal control over both parties to the Asset Transaction until after the Asset Transaction had closed:

    26.1. Ms. Rose confirmed that the Asset Transaction closed before the Share Transaction.[15]

    26.2. Ms. Rose confirmed that she executed the Purchase and Sale Agreement in the Asset Transaction on behalf of both PEOC and PEOC as trustee for POT.[16]

    26.3. Ms. Rose, as the sole director of PEOC, executed the director's resolution authorizing PEOC to enter into the Asset Transaction.[17]

    26.4. The Share Purchase Agreement described the Asset Transaction as a "Pre-Transaction Reorganization" and specifically confirmed that PEI, not 198Co, would remain in control of PEOC prior to the closing of the Share Transaction.[18]

27. The transactions were specifically structured so that Asset Transaction would close *before* the Share Transaction, while POT and PEOC were not at arm's length.[19] 198Co did not acquire control over PEOC until *after* PEOC had accepted the transfer of the Goodyear Assets from POT.

28. There was also ample evidence to support the ABCA's finding that the consideration in the Asset Transaction was determined while PEOC was controlled by PEI, its sole shareholder, and Ms. Rose, its sole director and the president and chief executive officer of PEI:[20]

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[14] Appeal Decision, at paras. 101 and 104.
[15] October 18, 2018 Affidavit of S. Rose, at para. 55.
[16] October 18, 2018 Affidavit of S. Rose, at para. 52.
[17] Director's Resolution, August 2, 2018 Affidavit of P. Darby, Exhibit Q; Appeal Decision, at para. 155.
[18] Share Purchase Agreement, p. 1, August 2, 2018 Affidavit of P. Darby, Exhibit E; October 18, 2018 Affidavit of S. Rose, at para. 43(e).
[19] October 18, 2018 Affidavit of S. Rose, at paras. 43(b) and 55.
[20] Appeal Decision, at para. 3.

28.1. The consideration to be paid in both agreements was nominal: 198Co. was to pay $1 for PEOC's shares[21] and PEOC was to pay $10 for acquiring the Goodyear Assets from POT.[22]

28.2. The Perpetual Defendants' interim financial statements for the period ending September 30, 2016 reported the disposition "of all assets and liabilities presented as held for sale at September 30, 2016 for a nominal amount".[23] The same interim financial statements listed the liabilities associated with the assets held for sale at $131,024,000, exceeding their reported asset value by over $21,000,000.[24]

28.3. Almost two months before these agreements were entered into, a Perpetual Group internal presentation set out the details of the Asset Transaction, including the number of wells included in the Goodyear Assets, to be sold by POT to PEOC, and the nominal $1 consideration to be paid by "BuyCo" for acquiring PEOC's shares.[25]

29. As noted by the ABCA, there was no evidence that the $10 nominal consideration to be paid by PEOC for acquiring the negative value Goodyear Assets was bargained for by any party.[26] The interest of 198Co in the Asset Transaction was limited to the $1 nominal consideration it was to pay for PEOC's shares.[27]

30. The ABCA did not "ignore" or "refuse to consider" the evidence and its decision does not "neuter" the rebuttable presumption in s. 4(5) of the *BIA*.[28] The ABCA considered the argument that the consideration in the Asset Transaction was negotiated by 198Co. or the Kailas Capital group on behalf of PEOC and rejected it on the basis that it was "inconsistent with the documentary evidence and corporate law".[29]

31. If the Perpetual Defendants had wanted to give PEOC the opportunity to bargain with POT

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[21] Share Purchase Agreement, s. 1.1(j), August 2, 2018 Affidavit of P. Darby, Exhibit D.
[22] Purchase and Sale Agreement, s. 1.01(kk), August 2, 2018 Affidavit of P. Darby, Exhibit D.
[23] Interim Financial Statements for Period Ending September 30, 2016, p. 5, August 2, 2018 Affidavit of P. Darby, Exhibit O.
[24] Interim Financial Statements for Period Ending September 30, 2016, p. 1, August 2, 2018 Affidavit of P. Darby, Exhibit O.
[25] Goodyear Presentation, pages 5-10, August 2, 2018 Affidavit of P. Darby, Exhibit C.
[26] Appeal Decision, at para. 109.
[27] *Juhasz Estate v Cordeiro*, 2015 ONSC 1781, at paras. 41-43 [***Juhasz***]; *National Telecommunications v Stalt*, 2018 ONSC 1101, at paras. 38 and 41 [***Stalt***]
[28] Perpetual Memorandum of Argument, at paras. 31-32.
[29] Appeal Decision, at para. 104.

at arm's length, PEI could have transferred its shares to 198Co. and Ms. Rose could have resigned as sole director *before* the terms of Asset Transaction were negotiated. Instead, the Perpetual Defendants took deliberate steps to ensure that they remained in control of PEOC until after it accepted the transfer of the negative value Goodyear Assets from POT, a related party, for nominal consideration.

2. The ABCA Decision is consistent with the *ITA* authorities relied on by the Perpetual Defendants

32. The Perpetual Defendants suggest that the Appeal Decision "ignores the *ITA* case law" and adopted a "judicial definition" of "arm's length" that is specific to the *BIA* and inconsistent with the interpretation of "arm's length" under the *ITA*.[30]

33. There is no merit to these submissions. The ABCA correctly distinguished the two *ITA* authorities relied on by the Perpetual Defendants, *McLarty* and *Teleglobe*, *on their facts*. The ABCA did not disagree with the principles set out in *McLarty* and *Teleglobe*: in assessing whether the Asset Transaction was an arm's length transaction, the ABCA properly considered the related Share Transaction and the role of the Kailas Capital group.

34. The ABCA simply did not accept the Perpetual Defendants' argument that summary dismissal should have been granted on the basis that 198Co's contractual right to acquire PEOC's shares *for $1* allowed 198Co to negotiate at arm's length on PEOC's behalf against PEOC's sole shareholder, PEI, and PEOC's sole director, Ms. Rose.

35. Although it is expressed in the language of legal principle, the Perpetual Defendants' critique of the ABCA's analysis of *McLarty* and *Teleglobe* amounts to a disagreement with the conclusions drawn by the ABCA from the undisputed facts.

36. With respect to the *McLarty*, for example, the ABCA's analysis is described as "unconvincing" because:

> It ignored the Supreme Court's direction [in *McLarty*] to look at the "entirety of the transactions", including that, by the time of the Asset Transaction, Kailas/198Co were that "external party" that was already contractually bound by the Share Purchase Agreement to acquire all of PEOC's shares and had negotiated the terms of the Asset Transaction to mirror those negotiated in the Share Transaction.[31]

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[30] Perpetual Memorandum of Argument, at paras. 33, 43 and 44.
[31] Perpetual Memorandum of Argument, at para. 39.

37. Similarly, the Perpetual Defendants assert that the ABCA "strained to distinguish *Teleglobe*":

> It stated: "There was no evidence on this record of any equivalent arms-length negotiation of the consideration set in the Asset Transaction for the transfer of the Goodyear Assets; that consideration was apparently set in-house, not at arm's length. As set out above, that was patently wrong.[32]

38. A fundamental problem with the Perpetual Defendants' argument that 198Co negotiated the Asset Transaction at arm's length on behalf of PEOC is that, unlike in *McLarty* and *Teleglobe*, 198Co's economic interest in the Asset Transaction was limited to the $1 nominal consideration it would pay for PEOC's shares in the Share Transaction. In *McLarty* and in *Teleglobe* the consideration paid was not nominal, creating an incentive for arm's length bargaining: McLarty paid $100,000 for the seismic data[33] and Memotec paid $448,268,000 for New Telecom's shares.[34]

39. The other fundamental problem is that the Asset Transaction and Share Transaction were deliberately structured so that the Asset Transaction would close *before* the Share Transaction, while PEI and Ms. Rose remained in control of PEOC.[35] They did not relinquish control of PEOC until *after* PEOC had accepted the transfer of the Goodyear Assets from POT for nominal consideration.

40. As the ABCA pointed out, there was no evidence that the $10 nominal consideration to be paid by PEOC for accepting the transfer of the Goodyear Assets was negotiated by any party:

> There is no indication on this record that the acceptability of the overall Aggregate Transaction to the Kailas Capital group depended on the mechanism by, or consideration for which the Goodyear Assets were moved into Perpetual/Sequoia.[36]

3. The ABCA decision does not create a "policy problem"

41. In holding that the proper scope of the arm's length analysis under s. 96 was the transfer at issue, the ABCA followed the reasoning adopted by the Ontario Court of Appeal in

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[32] Perpetual Memorandum of Argument, at para. 41; *Juhasz*, supra note 27, at paras. 41-43; *Stalt*, supra note 27, at paras. 38 and 41.
[33] *Canada v McLarty*, 2008 SCC 26, at paras. 4-5 [***McLarty***]
[34] *Teleglobe Canada Inc. v R,* 2002 FCA 408, at para. 8 [***Teleglobe***]
[35] October 18, 2018 Affidavit of S. Rose, at paras. 43(b) and 55.
[36] Memorandum of Judgment, at paras. 100 and 109.

Urbancorp:

> [T]he focus in determining whether the dealing was non-arm's length is on the relationship between the parties to the particular transfer. *The argument that non-arm's length, undervalue steps in a multi-step transaction can be disregarded is not consistent with the policy behind s. 96.*[37]

42. The Perpetual Defendants suggest that the ABCA ignored the *ITA* case law "holding that Courts must consider the entirety of the transaction and all relevant circumstances".[38] They contend that the ABCA analyzed the Asset Transaction "in isolation" on the basis that the entirety of the multi-step transaction was "irrelevant".[39]

43. That is not a fair reflection of the ABCA's analysis. Consistent with *McLarty* and *Teleglobe*, the ABCA did consider the Share Transaction and 198Co's role as part of its analysis of the arm's length issue in respect of the Asset Transaction.[40] However, it found that the evidence was *not sufficient* to rebut the presumption in s. 4(5) that the Asset Transaction was negotiated between related parties, POT and PEOC, other than at arm's length. The ABCA concluded that it would be inconsistent with the policy behind s. 96 to disregard a "non-arm's length, undervalue" step on the basis that the multi-step transaction as a whole was at arm's length.[41]

44. The ABCA did not ignore the evidence, the case law, or the Perpetual Defendants' arguments. It simply disagreed that the Trustee's s. 96 claim could be dismissed summarily on the basis that 198Co's future entitlement to acquire PEOC's shares for $1 allowed it to negotiate the terms of the Asset Transaction at arm's length against PEOC's sole shareholder and director. As the Court pointed out, this argument was inconsistent with the evidence and with corporate law: PEI remained the sole shareholder of PEOC and Ms. Rose remained PEOC's sole director until after the Asset Transaction had closed.[42]

45. The Perpetual Defendants assert that:

> In the modern corporate world, multi-step transactions between arm's length parties, requiring an internal transaction as one element, are the norm. If each step of an arm's length multi-step transaction can separately be challenged under s. 96, and the entirety of the multi-

[37] Appeal Decision, at para. 105 citing *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, at para. 46 [***Urbancorp***]
[38] Perpetual Memorandum of Argument, at para. 44.
[39] Perpetual Memorandum of Argument, at para. 45.
[40] Appeal Decision, at paras. 99-105.
[41] Appeal Decision, at para. 105.
[42] Appeal Decision, at paras. 104 and 155.

> step transaction is irrelevant to the question of arm's length, then the commercial reality is that many otherwise arm's length transactions could be challenged under s. 96.[43]

46. The Perpetual Defendants effectively take issue with s. 96 itself, not with the ABCA Decision. As discussed in *Urbancorp*. and in the Appeal Decision, s. 96 is directed at a "transfer" at undervalue and the focus of the arm's length analysis under s. 96 is on "the relationship between the parties to the particular transfer".[44]

47. The ABCA properly considered the context, including the Share Transaction and the Aggregate Transaction, in determining whether the Perpetual Defendants could rebut the presumption that POT and its trustee PEOC were non-arm's length parties when they carried out the Asset Transaction. However, the arm's length nature of the Aggregate Transaction itself was not relevant to that issue: a non-arm's length transfer at undervalue could not be excluded from the scope of s. 96 on the basis that it was a component of an arm's length transaction.

48. In any event, the Aggregate Transaction was specifically structured so that Asset Transaction would be carried out between non-arm's length parties, prior to the closing of the Share Transaction.[45] The Perpetual Defendants did not relinquish control over PEOC until after it had accepted the transfer of the Goodyear Assets from POT for nominal consideration. As the Perpetual Defendants were aware that the Asset Transaction was significantly at undervalue,[46] that structure served their short-term interests by avoiding the risk that a newly-independent PEOC would refuse to complete the Asset Transaction following the change of control.

B. The Oppression Claim

1. The Appeal Decision did not alter the law regarding a trustee's standing to bring an oppression claim on behalf of the bankrupt's creditors

49. The Perpetual Defendants state that the Appeal Decision represents a "radical and unworkable expansion of the trustee's powers"[47] and that the ABCA made "a deliberate

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[43] Perpetual Memorandum of Argument, para. 45.
[44] Appeal Decision, at para. 105; *Urbancorp*, *supra* note 37, at paras. 46.
[45] October 18, 2018 Affidavit of S. Rose, at paras. 43(b) and 55.
[46] Appeal Decision, at paras. 6, 11 and 89.
[47] Perpetual Memorandum of Argument, at para. 56.

decision that upends tenets of bankruptcy law."[48]

50. The Perpetual Defendants refer to the *Dorais* decision, in which the ABCA confirmed that a trustee in bankruptcy could pursue collective claims on behalf of all creditors.[49] They then submit that:

> The Court of Appeal stated that the collective nature of the claim was "that the oppression action was being brought by the Trustee...on behalf of the estate...not on behalf of individual creditors". But then it confirmed that the Trustee's oppression claim was "was on behalf of all other creditors who were owed money at the time of the alleged oppressive conduct". This statement acknowledges that the oppression remedy is a "personal claim": it is predicated on the particular complainant, the complainant's relation to the person alleged to have acted oppressively, and its reasonable expectations flowing from that relationship.[50]

51. There are two fundamental problems with this reasoning. Firstly, it ignores the nature of the oppression remedy sought by the trustee, which is the focus of the analysis in determining whether a claim is personal or collective. Secondly, if the Perpetual Defendants' argument were accepted, an oppression claim would always be a personal claim incapable of being advanced by a trustee in bankruptcy. A similar argument was considered and rejected by the Ontario Court of Appeal in *Essar Global*.[51]

52. This reasoning is also directly inconsistent with the earlier decision of the ABCA in *Dorais*, in which the Court examined the nature of the relief sought to determine whether the claims at issue were personal or collective. The trustee was entitled to pursue relief that would accrue to the advantage of all the estate's creditors, like a declaration that a transfer concerning the bankrupt was void or that certain property was subject to a constructive trust in favour of the bankrupt. These were not personal claims:

> One of the core duties of a trustee in bankruptcy is to gather in the assets of the bankrupt. The Havelock and Metz claims seek, in part, declarations that certain transfers of assets from the bankrupt to the respondents are void. If those claims are successful, those assets would revert back to the original owner, not to the individual plaintiffs seeking the declaration. Neither the Havelock nor the Metz plaintiffs would receive any preferential payment or treatment.[52]

53. As in *Dorais*, the oppression remedy sought by the Trustee is a declaration that the Asset

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[48] Perpetual Memorandum of Argument, at para. 51.
[49] Perpetual Memorandum of Argument, at para. 49; *BDO Canada Limited v Dorais*, 2015 ABCA 137 [***Dorais***]
[50] Perpetual Memorandum of Argument, at para. 52.
[51] *Ernst & Young Inc. v Essar Global Fund Limited*, 2017 ONCA 1014, at paras. 115-117 [***Essar Global***]
[52] *Dorais*, supra note 49, at para. 13 [***Dorais***]

Transaction is void.[53] Such a declaration would benefit all Sequoia's creditors equally by returning the negative value Goodyear Assets to POT. The alternative oppression remedy sought by the Trustee would also benefit all of the creditors equally: a judgment reversing the financial effect of the Asset Transaction by requiring the Defendants to repay *to the Estate* the benefit they obtained at the expense of PEOC and its creditors.

54. The flaw in the Perpetual Defendants' reasoning flows from a misunderstanding of the nature of the statutory oppression remedy as somehow analogous to a cause of action for damages. The Trustee is not "seeking to recover damages" for the "unpaid property taxes owed to three municipalities".[54] The Trustee seeks an Order reversing the Asset Transaction, either by declaring it void or by requiring the Defendants to repay the shortfall in consideration received by PEOC.[55]

55. The Perpetual Defendants also rely on the *Wildboer* decision in arguing that an oppression claim must be a personal claim because it is "predicated on the particular complainant, the complainant's relationship to the person alleged to have acted oppressively, and its reasonable expectations flowing that relationship."[56]

56. In *Essar Global*, relied on by Ms. Rose before the ABCA, the Ontario Court of Appeal considered the same argument, that *Wildboer* mandates "not only that each individual claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in the same class."[57]

57. The Ontario Court of Appeal in *Essar Global* held that *Wildboer* did not preclude "an oppression remedy in respect of individuals forming a homogenous group of stakeholders – for example, trade creditors, employees, retirees, or pensioners – simply because each of them, separately, may have suffered the same type of individualized harm."[58] A monitor appointed under the *Companies' Creditors Arrangement Act* ("***CCAA***") was entitled to pursue an oppression claim on behalf of a group of creditors who have "suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of

[53] Statement of Claim, Relief Sought, at para. 1.
[54] Perpetual Memorandum of Argument, at para 55.
[55] Statement of Claim, Relief Sought, at paras. 1-2.
[56] Perpetual Memorandum of Argument, at para. 52.
[57] *Essar Global*, supra note 51, at para. 139.
[58] *Ibid*, at para. 141.

the corporation."[59]

58. If the "the oppression remedy is a 'personal claim'",[60] as the Perpetual Defendants assert, a trustee in bankruptcy or a *CCAA* monitor would never be granted standing to seek relief from oppression on behalf of a corporation's creditors. *Dylex*, *Olympia & York* and *Essar Global*, among others, would have been decided incorrectly.[61]

2. The Appeal Decision is consistent with the authorities granting a trustee in bankruptcy standing to seek relief from oppression

59. There is only one line of authority regarding whether a trustee in bankruptcy can be a proper person to bring an oppression claim.

60. The only authority supporting the proposition that a trustee cannot seek relief from oppression is the 1991 decision in *Canada (AG) v Standard Trust Co*. This decision was distinguished in *Gainers Inc. v Pocklington* and not followed in *Dylex* and *Olympia & York*.[62] The Ontario Court of Appeal in *Essar Global* cited its 2003 decision in *Olympia & York* as trite law: "the trustee is neither automatically barred from being a complainant nor automatically entitled to that status." [63]

61. The Perpetual Defendants pose the following question, suggesting that this Court's intervention is necessary:

> How can permitting a trustee to bring an oppression claim on behalf of certain creditors be reconciled with the trustee's representative role as stepping into the shoes of the bankrupt estate on behalf of all creditors and the priority scheme for the distribution of the bankrupt's assets under the BIA?

62. There is no "conflicting appellate authority." This issue was settled by the Ontario Court of Appeal in *Olympia & York*. The issue was whether a trustee in bankruptcy had standing under the oppression remedy to challenge a non-arm's length transfer at undervalue between the bankrupt corporation and its affiliates. The trial judge granted a judgment in favour of

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[59] *Ibid*, at paras. 143-148.
[60] Perpetual Memorandum of Argument, at para. 52.
[61] *Dylex Ltd. (Trustee of) v Anderson*, [2003] O.J. No. 833, at paras. 11-17 [***Dylex***]; *Olympia & York Developments Ltd. (Trustee of) v Olympia & York Developments Ltd.*, [2003] O.J. No. 5242, at paras. 44-45 **[*Olympia & York*]**; *Essar Global*, supra note 51, at para. 127.
[62] *Gainers Inc. v Pocklington*, (2002) 7 BLR (2d) 87 [***Gainers***]; *Dylex*, *supra* note 63, at paras. 13-15; *Olympia & York*, *supra* note 61, at paras. 44-45.
[63] *Essar Global*, supra note 51, at para. 115.

the trustee to compensate for the loss suffered by the bankrupt, under the reviewable transaction provisions then in the *BIA* or as an oppression remedy.[64]

63. The Ontario Court of Appeal declined to follow *Standard Trust Co.*, noting that courts have unfettered discretion to determine who should be granted standing to seek relief from oppression:[65]

> In this case the appellants were affiliates of OYDL, the party with which the allegedly oppressive transaction was concluded. In that transaction, OYDL gave up something of significant value (the OYSF note) in return for something of no additional value (additional shares in OYRC). It would have been reasonable for the trial judge to conclude that since the appellants unfairly disregarded the interests of the OYDL creditors, those creditors could have properly been recognized as complainants. Thus, it was equally reasonable in the circumstances for the trial judge to find that this was a proper case in which to conclude that the trustee of OYDL was a proper person to be a complainant in effect on behalf of the creditors of OYLD. This conclusion is consistent with the bankruptcy principle of collective action to pursue the claims of the creditors of the bankrupt and the trustee's role as their representative.[66]

64. The Perpetual Defendants submission that the pursuit of an oppression claim somehow conflicts with the Trustee's obligations is based on their assumption that the pursuit of an oppression remedy is as analogous to a claim for damages. The Trustee is not "seeking to recover damages" for the "unpaid property taxes owed to three municipalities".[67]

65. The Trustee's pursuit of an oppression remedy on behalf of the creditors affected by the Asset Transaction is consistent with its obligation to gather in the assets of the bankrupt.[68] As in *Olympia & York*[69] the oppression remedy sought by the Trustee would benefit all of Sequoia's creditors: an Order setting aside the Asset Transaction or a judgment reversing the financial effect of the Asset Transaction by requiring the Defendants to repay into the Estate the difference between fair market consideration and the consideration actually received by Sequoia.

C. The Public Policy Claim

66. The Perpetual Defendants' submissions on this issue do not fairly represent the Appeal Decision. The Perpetual Defendants suggest that the ABCA found that the Trustee's

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[64] *Olympia & York*, *supra* note 61, at para. 2.
[65] *Ibid*, at para. 45.
[66] *Ibid*, at para. 46.
[67] Perpetual Memorandum of Argument, at para 55.
[68] *Dorais*, *supra* note 49, at para. 13.
[69] *Olympia & York*, *supra* note 61, at para. 2.

statutory illegality, public policy and equitable rescission pleadings should have been struck but refused to strike them, allowing the Trustee to amend instead.[70] On that basis, they argue that the Appeal Decision is somehow inconsistent with *Hyrniak* and *Atlantic Lottery*.[71]

67. Responding to the same argument which is raised again by the Perpetual Defendants in this application, the ABCA pointed out that the Trustee never suggested that it had a cause of action for damages based on statutory illegality, public policy or equitable rescission.[72] The Trustee had pleaded a response to an anticipated defence and it was not inappropriate for these pleadings to be included in a Statement of Claim rather than a Reply to Defence.[73]

68. The ABCA's findings on this point are straightforward. The Perpetual Defendants disagree with those findings. However, instead of acknowledging that they are simply dissatisfied with the result of the Appeal Decision, the Perpetual Defendants again rely on hyperbole: the ABCA refused to strike a plainly bad claim, undermining the "legacy of the *Hyrniak* and *Atlantic Lottery* culture shift".[74]

69. The Perpetual Defendants' dissatisfaction with the Appeal Decision obviously does not call for intervention by this Court.

D. Conclusion

70. The points raised by the Perpetual Defendants in conclusion also illustrate why this Court's intervention is not required.

    70.1. ***The Appeal Decision "throws the law interpreting "arm's length" in the BIA into a state of confusion".***[75] The ABCA followed the analysis adopted by the Ontario Court of Appeal in *Urbancorp*, a decision which had been relied on by the Perpetual Defendants themselves. There is no "confusion"; the ABCA simply disagreed that the theory presented by the Perpetual Defendants necessitated summary dismissal.

    70.2. ***Which approach should courts follow – "the decision here or the precedents of the Supreme Court and the Federal Court of Appeal decided under the ITA?"***

[70] Perpetual Memorandum of Argument, at para. 62.
[71] Perpetual Memorandum of Argument, at para. 62.
[72] Perpetual Memorandum of Argument, at para. 146.
[73] Perpetual Memorandum of Argument, at para. 146.
[74] Perpetual Memorandum of Argument, at para. 62.
[75] Perpetual Memorandum of Argument, at para. 63.

There is no conflict between the Appeal Decision, *McLarty* and *Teleglobe*. If 198Co had paid more than $1 for its shares in PEOC and if there was *any evidence* that the nominal $10 consideration paid by PEOC in the Asset Transaction was in fact bargained for, the ABCA may have reached a different conclusion.

70.3. ***What does s. 4(5) of the BIA "mean in the case of step-transactions between related parties that are part of multi-step transactions negotiated at arm's length?"*** Section 4(5) means that a defendant seeking to uphold a transfer between related parties which is challenged under s. 96, is required to provide evidence of arm's length dealing *between the parties to the transfer*, by showing that the transfer took place at fair value, for example.

70.4. ***Can the presumption in s. 4(5) of the BIA "ever be rebutted"?*** Yes, for example by providing evidence that the bankrupt received fair value consideration in the transfer, consistent with arm's length dealing.

70.5. ***Is a finding "by the trial court that all aspects of the transaction were negotiated by sophisticated, unrelated arm's length parties with the assistance of legal counsel, sufficient?"*** As the ABCA pointed out, there was no evidence that the nominal $10 consideration received by PEOC in the Asset Transaction was negotiated by anyone. 198Co, itself a shell corporation, was acquiring PEOC's shares for $1 and had no incentive or legal capacity to bargain on behalf of PEOC *against the parties who actually controlled PEOC* – its sole shareholder, PEI, and its sole director, Ms. Rose.

70.6. ***The Appeal Decision "also leaves bankruptcy trustees unclear as to whether they can pursue the claims of individual creditors against third parties".*** The Appeal Decision confirms, consistent with *Olympia & York*, that a trustee can pursue an oppression claim on behalf of creditors affected by an oppressive, related-party transaction that also harmed the bankrupt corporation. That has been trite law since 2003 and there is nothing "unclear" about it.

PART IV – COSTS

71. If the application for leave to appeal is dismissed, the Trustee should be awarded costs of the application.

72. If the application is granted, the Trustee submits that costs should be costs in the appeal Respondent respectfully requests that the application be dismissed, with costs.

PART V – ORDER SOUGHT

73. The Respondent Trustee seeks an Order dismissing the Perpetual Defendants' application for leave to appeal, with costs.

Calgary, Alberta
May 13, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per: _____

Rinus de Waal/Luke Rasmussen
Counsel for the Respondent,
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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