Action No. 1801-10960
E-File Name: CVQ20PRICEWATERHOUSECOOPERS
Appeal No._____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

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

Plaintiff

and

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

Defendant

P R O C E E D I N G S

Calgary, Alberta
October 1, 2020

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Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

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October 1, 2020	Morning Session
The Honourable Mr. Justice Nixon	Court of Queen's Bench of Alberta
R. de Waal (remote appearance)	For PricewaterhouseCoopers Inc.
L. Rasmussen (remote appearance)	For PricewaterhouseCoopers Inc.
D.J. McDonald, QC (remote appearance)	For Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operation Corp.
P.G. Chiswell (remote appearance)	For Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operation Corp.
M. Deyholos (remote appearance)	For Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operation Corp.
G. Benediktsson (remote appearance)	For S. Riddell Rose
K.T. Lenz, QC (remote appearance)	For Orphan Well Association
A.N. Stempien (remote appearance)	For Orphan Well Association
G.S. Watson (remote appearance)	For CNRL, Cenovus Energy Inc. and Torxen Energy Ltd.
C.W. Ang (remote appearance)	For CNRL, Cenovus Energy Inc. and Torxen Energy Ltd.
K. O'Brien	Court Clerk

THE COURT: Good morning. Please be seated madam clerk. Just for the information of the parties, I believe I have everything including the last submission that I received yesterday from Burnett Duckworth in respect to Perpetual. I've reviewed the materials. What I would like to do, just as a matter of process, of course, let the applicant go first, if possible, I would like the opportunity for an hour maybe a bit more for questions at the end of the day tomorrow. We take all of the time that's been allotted and otherwise I'll leave it to the parties to decide amongst themselves who follows the applicant in the ordinary course it would be Mr. de Waal, but again I'll leave that to the parties to decide.

And I'll also leave it to the parties to break in the morning and the afternoon as they see appropriate for 10 or 15 minutes, just so all of use have the opportunity to stretch our legs and we can break at 12:30ish or again, as is convenient to the party that is speaking at that time.

Other than that, I will turn it over to counsel, unless there's any other business that we need to touch on beforehand.

MR. MCDONALD: My Lord, it's Dan McDonald speaking and having heard no other business, I'll commence my submissions.

THE COURT: Thank you, sir, at your convenience.

Submissions by Mr. McDonald

MR. MCDONALD: My Lord, there's been a flurry of activity in recent weeks and days. We've had new intervenor affidavits, we've had a new affidavit from Mr. Darby, we've had cross-examinations of the intervenors, we've had new briefs and new reply briefs.

And it's tempting to start with the issues that are most immediate, but I'm going to resist that temptation and keep my focus on not what is more recent, but what is most important.

And I'd like to start by setting out some important points that, in my submission, we need to keep in mind throughout this proceeding over the next couple of days. The first is that this is an action by the Trustee and the allegations we need to address are those that remain in the statement of claim. They're well defined, there are only several paragraphs, they deal about a specific contract, the asset purchase and sale agreement or the Asset Transaction as we usually refer to it and a specific statute, the *BIA*.

This is not an action by the intervenors. They do not define the issues; they do not expand the issues. They were granted standing because they claimed they were effected and could assist the Court. In my submission, they're of no assistance to the Court as was shown on the cross-examination of the intervenor's affiants. They know nothing about the Asset Transaction and they know nothing about the *BIA*.

The second point that I want to focus on to frame the case, is that this is an application to strike or for summary dismissal that raises three separate issues. Those issues arise out of two essential elements in section 96, but we've framed them as three issues for the reasons that will be apparent from the brief.

The first issue is, was the Asset Transaction a transfer? The second, if so was the transfer at undervalue? And the third, was PEOC at the time of the transfer or rendered insolvent by it?

And when we consider the arguments, we need to keep in mind that on the strike application under *Rule 3.68*, you were only to consider the statement of claim. The summary judgment application on the other hand relies on the prior record including Ms. Rose's and Mr. Schweitzer's 2018 affidavits and the new Schweitzer affidavit of May 5th, 2020.

The Trustee was required to put its best foot forward, it would cross-examine on any of the affidavits and it did not file any responding evidence until last week when it filed the new Darby affidavit, doing little more than attaching Perpetual Energy Inc.'s 2016 consolidated financial statements.

I'd like to try to succinctly describe our submission on each of the three issues. Issue one; the Asset Transaction was not a transfer. PEOC held the Goodyear assets in trust for POT. The Asset Transaction combined the legal and beneficial interest in the Goodyear assets. On a proper understanding of the trust relationship and the law of trusts, the Asset Transaction did not constitute a disposition of property, as referenced in the definition of transfer at undervalue in section 2 of the *BIA* and it did not constitute a transfer at undervalue for the purposes of section 96 of the *BIA*.

Issue one; if the Asset Transaction was a transfer, it was not at undervalue. As alleged in the statement of claim and stated in the Darby affidavit, the value of the consideration received was the value of the Goodyear asset of $5.6 million. Embedded in and a fundamental part of that value was the ARO associated with the Goodyear assets. The value of the consideration given was the assumption of the municipal tax liabilities of $1.56 million period. The result is a positive value to PEOC of $4.1 million.

On issue three, PEOC was not insolvent at the time of the Asset Transaction. That allegation seemed to have been made perhaps inferentially in the statement of claim but it appears from the Trustee's brief that it is not argued, but there's two parts to this issue, of course, and the second part we say PEOC was not rendered insolvent by the Asset Transaction.

Following the Asset Transaction, it held the Goodyear assets with the embedded ARO with a value of $5.6 million and it had liabilities represented by the municipal taxes of $1.56 million. ARO is not a further deduction from the value of the Goodyear assets, whether it's characterized as a liability or an obligation or anything else.

In addition, it's important the Sequoia's successful operations after the transaction showed it was not insolvent. It became insolvent in 2018 following the collapse of natural gas prices in the fall of 2017. We submit that we're correct on all three of those issues, but it's important to keep in mind, that if you accept our argument on any one of them, the claim

should be struck or dismissed.

And to further complicate that a bit, in each case, there are two alternatives the first based only on the allegations in the statement of claim, that is the strike application and the second based on the evidence, the summary dismissal application. Once again, if you accept on any of the three principal issues, it should be either be struck or summarily dismissed and the entire claim should be struck or summarily dismissed.

The next central point I want to address is that there are certain important facts in law that are not or should not be contested. You made factual findings in your reasons and the new evidence in the record includes nothing that would change any of those findings. You reached conclusions of law in your Reasons.

The Supreme Court of Canada has clarified the law for us in *Redwater*. And from those fundamental starting points, I've identified ten key points that in my submission are not contested.

1: PEOC kept legal interest and licenses for the Goodyear assets. And I'll give you a reference in your reasons or whatever other reference there is for each of these points, paragraph 10 of your Reasons. It appears not all of the intervenors appreciated that finding.

2: 198 or the purchaser team and Perpetual Energy or the vendor team were at arms-length. The references are Reasons paragraphs 55, 85, 324.

3: ARO is a fundamental part of the value of the licensed assets. Many authorities for that, but I'll just give you your Reasons paragraphs 166 to 173.

4: ARO is not capable of being quantified. Reasons 114 and that became even more apparent under the cross-examination of the intervenors' affiants where they were questioned about estimates of ARO and assumptions that go into that, the purposes for which it's done and one passage, recognition that it -- in the eye of the beholder. And I'll refer you to our reply brief, that is the reply to the Intervenor's brief, at paragraphs 18 to 23 for discussion of that.

5: ARO is not a liability and there are many references for that. In your Reasons, 166 to 173, 224 to 225 and 357. Mr. Darby agreed with that when he was cross-examined and there was a discussion at our hearing on December 17th, 2018 about it and Mr. de Waal too accepted it and for that I'd refer you to the transcript of the December 17th, 2018 hearing at page 255, lines 29 to 35. It appears from the intervenor's evidence that they do not accept that and they make repeated reference to ARO being a definite financial

liability, is the expression used several times. Perhaps what's even more surprising is that the new brief received from the Trustee last Friday, which included some discussion about the intervenor's evidence, appears to want to support that and refers to several passages and suggests, as I read it, the position by the Trustee now that ARO are definite financial liabilities, contradicting Mr. Darby, Mr. de Waal's acceptance of Mr. Darby's evidence and your findings.

6: The ARO referenced in the statement of claim is a mere assumption. At Reasons paragraph 226.

7: ARO need not be considered a true fact on the strike application under *3.68* and that's paragraph 232.

8: PEOC could not have assumed a liability in respect of ARO in conjunction with the Asset Transaction. That's Reasons paragraph 225.

9: Financial statements record an accounting provision for various obligations, they do not in and of themselves create a liability. That’s in your Reasons at 358. And you will have seen from the new Darby affidavit and the new Trustee brief that the Trustee is now trying to use accounting entries for that very purpose. The Trustee is trying to show through Perpetual's 2016 consolidated financial statements, the existence and fair value of assets and ARO.

10: *Redwater* extinguishes the Trustee's assertion that the Asset Transaction resulted in a significant net deficit. You table at paragraph 368 of the Reasons shows a net surplus of $4.1 million.

The last fundamental point I want to make is that the Trustee's brief mischaracterizes Perpetual's position and many of the Trustee's arguments flow from that mischaracterization or perhaps just misunderstanding. What we say and you'll hear me saying probably too many times this morning, is that end of life obligations like ARO form a fundamental part of the licensed assets or an embedded part of the value or are inherent in the value, the same as if the associated costs had been paid up front. That appears in different places in the brief, but I'll just give you one reference, paragraph 51(a). You say that several ways repeatedly in your Reasons. The Supreme Court of Canada says that in *Redwater*. The *Redwater* reference I'll be referring to perhaps even more than once is paragraph 157.

The Trustee seems not to accept that or understand that or characterizes it differently than we've said it and from their misunderstanding flow their arguments. The Trustee says in its brief at paragraph 77: (as read)

> The Perpetual defendants assume that the Trustee's case is premised on ARO being a distinct liability.

We don't make that assumption. We say the Trustee's case fails whether ARO's called a liability, obligation an assumption or a provision.

They say at paragraph 86: (as read)

> The Perpetual defendants argue and incorrectly assume that ARO has no effect on value.

We don't make that assumption. It has an effect on value. It's embedded in the value. The Supreme Court of Canada says that. You say that and we say that.

They say at paragraph 85: (as read)

> The Perpetual defendants simply delete ARO from the value equation.

No, we don't.

Also at or at paragraph 86, they say: (as read)

> The Perpetual defendants assume ARO must be a liability to have any effect on value.

We don't make that assumption; it has an effect on value and it’s the embedded effect. And in short, the correct summary of our position, of the law and in our argument, is that ARO is part of the value equation, it has an effect on value and that effect is embedded in the value of the Goodyear assets.

There's a paragraph in the Trustee's brief that might bring what I see as an error into focus and that's paragraph 72.

THE COURT: I'm there, sir.

MR. MCDONALD: They say, referring to a suggestion we make as being incorrect: (as read)

> In fact, the Trustee alleges consistent with the approach mandated in *Diashowa* and *Redwater*, that the ARO associated with the Goodyear

> assets depressed their value at the time of the Asset Transaction such that the Goodyear assets themselves had a negative value to PEOC.

And one would read that and say, well they're referring to *Diashowa* and *Redwater,* I remember reading in those cases that ARO depressed the value of assets and they're making that point. But they're not making the complete point that the Supreme Court made and for that I'd like to take you to *Redwater* which is at tab 17 of our main brief, our first brief.

THE COURT: I'm there, sir.

MR. MCDONALD: Paragraph 157.

THE COURT: I'm there, sir.

MR. MCDONALD: I won't read the entire paragraph but just the sentence that contains the quote that you saw in my friend's brief which is the last sentence of 157: (as read)

> 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.

So what I'm saying paragraph 72 illustrates is the misunderstanding that the Trustee has of the effect of ARO, by isolating three words, "depress their value" and suggesting effectively that it's a separate deduction from the value in the -- say in the order of $220 million. Had they properly quoted the Supreme Court of Canada, they would've included the words just before "depressed their value" "embed in the forest tenure" in the case of the *Diashowa* forest asset or embedded in the licenses in the case of the *Redwater* licenses or the PEOC licenses.

I'm now going to turn to an argument that takes the first 14 pages of my friend's brief and that's the abuse of process argument and I hate to take this diversion from the focus on the principle issues, but I need to address it because in my submission it's without merit and it's merely an effort to try to prevent the Court from making a decision on these issues now. We shouldn't lose sight of the fact that it's the Trustee, the same party that told the Court at the outset of this case how important it was to move it quickly and to have its own summary judgment application heard quickly and indeed sought to have that heard within three months or so, three or four months of the filing of the statement of claim. It now says this should be pushed off for years.

The abuse of process argument was also made as you'll recall on the security for costs

application for some of the same grounds that are made today and was rejected. And it's important to be clear that it is not the law that a party only gets one chance for summary dismissal. It is not the law that a party cannot bring a second summary dismissal application and even the Trustee does not argue that. What the Trustee says is that a party cannot relitigate the same issue and if it does, in some cases, a Court will decide that's an abuse of process.

The Trustee has several cases that it relies on and I'd like to take you to some passengers in two of them. For that you'll need Volume 1 of the Trustee's book of authorities with their first brief.

THE COURT: Go ahead, Sir. Thank you.

MR. MCDONALD: The first case I'm going to refer to is the *City of Calgary* at tab 2, paragraphs 33 and 34.

THE COURT: Go ahead, Sir.

MR. MCDONALD: Perhaps, I think I can limit it to 33, after recognizing at the top of 32 that issue estoppel and res judicata, if they're not met then the abuse of process doctrine is till available in certain circumstances to prevent new litigation of the same issue.

The Court says at -- I'm sorry this is our Court of Appeal at paragraph 33: (as read)

> There is no definitive test for finding an abuse of process in this context. In *City of Toronto v. C.U.P.E*, the Court noted at paragraph 37:
>
> > Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.
>
> Absent a fixed test, there is a danger of "adding nothing but a vague sense of discretion" to the analysis. In applying the doctrine, the focus should be less on the interests or motives of the individual parties, and more on the integrity of the administration of justice.

I'd also have a passage I'd like to refer to in *Mystar* which is at tab 1 of this book, Decisions of Justice Brooker of this Court, I'll refer to paragraphs 45 and 45: (as read)

> The Ontario Court of Appeal recently commented on the test for abuse of process in *Niagara North Condominium Corp. No. 125 v. Waddington*, 2007 ONCA 184, which dealt with re-litigation of an identical claim that had been previously dismissed. In discussing the abuse of process doctrine, the Court commented as follows, at paragraph 21:
>
> > The application judge did not articulate a test for abuse of process. Abuse of process is a doctrine designed to provide a remedy in a variety of situations including a remedy for the unfairness of relitigating the same issue against the same party in circumstances where issue estoppel does not apply. Abuse of process is essentially a fairness doctrine.

It goes on and there are some other highlighted passages and my friend's highlighting including reference to the *City of Toronto* case.

What, in my submission we should take from those cases and indeed the other cases, my friend refers to, is that the relevant considerations are judicial economy, consistency, finality, integrity of the administration of justice and fairness, with the later two, administration of justice and fairness being the paramount concerns.

And the short answer to the abuse of process argument in this case, is that it is not in the interests of the administration of justice or in the administration of fairness or in the interests of Sequoia's estate or its creditors for the Court to decline to hear this application today. To leave these questions for trial, two or three or four years from now and many millions of dollars from now, would be unfair to the Perpetual defendants. It would be unfair to the Sequoia estate and its creditors. There is no risk of inconsistent decisions, that is a decision on this application inconsistent with your decision on that prior application. The issues are not the same.

What this application does is it promotes judicial economy and finality for everyone. It does precisely what the Supreme Court called for in *Hryniak* and provides relatively timely access to justice and the resolution of legal disputes promptly rather than through a full trial.

In my submission, you can dismiss the abuse of process arguments on that analysis alone,

but I won't leave it there because my friend makes some specific or has some specific grounds that the Trustee says you ought to take into account. So I'll address them.

The first one they rely on is a claim that the Perpetual defendants are relying on alternative evidence, as a starting point, that of course has nothing to do with the application to strike under *Rule 3.68* which does not even consider evidence. What it then focuses on are what it claims are differences in Mr. Schweitzer's May 5th affidavit in support of this application, which addresses that value of the Goodyear assets in 2016 and his May 5th affidavit in support of the security for costs application, which addresses the value of the Sequoia estate in 2020, the date when the Trustee is obliged to pay costs.

Counsel on this argument before and I apologize for bringing it again, but in my submission, it's an absurd argument and Mr. Darby, a chartered accountant, should recognize that. The affidavits address different property at a different time period. Mr. Schweitzer's May 5th affidavit on this application addresses the value of the Goodyear assets, that is the subject of the Asset Transaction, producing oil and gas properties in relation to facilities in 2016. His affidavit in support of the security for costs application addressed the Sequoia bankrupt estate, shut-in oil and gas wells, including wells acquired from other companies after the transaction with Perpetual. All the liabilities associated with those wells, $144 million in creditor's claims, a limited amount of cash and a large burn rate for professional fees.

There's also significant difference in circumstances between 2016 and 2020. You don't need to be a financial expert to understand that changes in circumstances have effected the value of energy properties between 2016 and 2020. As I said, the two affidavits don't value the same assets, the security for costs application values an additional set of assets acquired by third parties -- acquired from third parties. Commodity prices have collapsed, particularly natural gas prices. There's been production from the Goodyear assets since 2016, it has depleted their reserves. Cash flow has been spent on capital and operating costs and abandonment and reclamation costs, as set out in the Trustee's report. In 2016 there were many producing wells, 2020 they're shut-in and not producing and creditor claims and professional fees. In short, the two affidavits are not inconsistent.

The second argument the Trustee makes is the application contradicts the first application, that is the application to strike and summary dismissal related to the arms-length issue that led to your Reasons. The short answer that should be apparent to everyone is we are not relitigating the same issue. We all know what the issue was on the first application and you say it in your Reasons several places, just to make it clear, I'd like to refer to a couple of those. The first being at paragraph 60, do you have your Reasons? I have them in a separate volume but they're included at Tab 1 of our brief, our first brief.

THE COURT: You're talking about the decision I issued in January of this year?

MR. MCDONALD: Yes, I'm sorry, that's what we refer to our brief and what I've been referring to as your Reasons.

THE COURT: Yes.

MR. MCDONALD: I may -- I may at some point refer to other reasons you've issued, but that's not what I'm talking about generally when I say Reasons.

THE COURT: I've got a working copy here outside of your materials, so I do have it in front of me.

MR. MCDONALD: Okay.

THE COURT: Thank you.

MR. MCDONALD: Thank you and I'm going to ask you to turn to paragraph 60.

THE COURT: I'm there, sir.

MR. MCDONALD: (as read)

> Perpetual Energy Defendants framed their response to the *BIA* Claim as only involving the question of whether the parties were dealing at arm's length.

And then at paragraph 88 you make this even more clear.

THE COURT: I'm there, sir.

MR. MCDONALD: (as read)

> 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.

I don't need to take you to it, but you say something similar at paragraph 107.

We also all know what the issues are on this application. I don't need to beat those. So that's a complete answer to the authorities my friend has and to the proposition that abuse of process can arise when parties attempt to relitigate that same issue.

There's a spin on that that in my submission is incorrect. It's found at paragraph 10 of the Trustee's brief.

THE COURT: I'm there, sir.

MR. MCDONALD: The Trustee says: (as read)

> Subject to certain exceptions it is an abuse of process for a party to bring a second interlocutory application for the same relief.

So not reflecting the law that we've seen about relitigating same issues but changing that to for "for the same relief" and relying on our Court of Appeal's decision in *Pocklington* in the footnote to that statement. So I need to take you to *Pocklington* which is at tab 3 of my friend's authorities and I refer you to paragraphs -- 23 my friend refers to paragraphs 8 through 14, but I think I can make my point with just some of that.

At paragraph 8.

THE COURT: I'm there, sir.

MR. MCDONALD: The Court specifically refers to the "relitigation of issues already decided" and then about six lines up from the bottom of the page in a quotation from a case called *Talbot* quoting the Privy Council again the same issue and then over on the next at paragraph 9, third line, "issues already dealt with". *Pocklington* says what the other cases say, it's a doctrine dealing with preventing the relitigation of the same issues, not preventing as my friend says in paragraph 8, applications seeking the same relief.

And the final point my friend raises is that it's an abuse of process because there are some deficiencies or inconsistencies in the statement of defence. Some deficiencies in that statement of defence would not, in my submission, constitute an abuse of process or support an abuse of process argument. But first it's irrelevant to the application to strike which doesn't consider the statement of defence, but only considers the statement of claim and in my submission, the statement of defence has stood the test of time quite well. It was

filed 25 days after the statement of claim was filed and in my submission, fairly and properly sets out the issues in the allegations.

And in paragraph 5, it puts squarely before the Court the issues that we raise on this application. If I could take you to paragraph 5 of the statement of defence.

THE COURT: Go ahead, sir.

MR. MCDONALD: (as read)

> None of the essential conditions for a declaration that the step in the transaction is void or for a monetary award under the *BIA* had been met. There was no transfer at undervalue. The parties were dealing at arm's length. The transaction occurred more than one year Before Sequoia's bankruptcy. Sequoia was not insolvent at the time of the transaction nor rendered insolvent by it.

That's clearly set out, it's been a fundamental part of the defence from the day that document was filed and the Trustee can hardly claim any surprise or confusion by the statements that are set out there.

So that's -- that's all I have to say on abuse of process. It doesn't apply, this application is not an abuse of process, it's in the interests of everyone, including the Trustee that this application be decided now.

Before I turn to issue one, I'm just going to take you to a couple parts of our brief, just to identify where you'll find some points without arguing. Could I ask you to turn to paragraphs 22 and 23 -- or 23?

THE COURT: I'm there, sir.

MR. MCDONALD: And we say simply that the test and the law for striking pleadings and for summary dismissal is accurately and fairly set out in your Reasons and we adopt those for the purposes of this application, as well.

The only additional thing I have to say about that is that the Supreme Court of Canada has spoken on it, since you wrote that decision and the case is including in our brief in response to the intervenor's application -- intervenor's evidence -- the intervenor's briefs, I suppose accurately. Do you have that?

THE COURT: I do, sir, go ahead.

MR. MCDONALD: Just to clarify, some of the authorities are referred to in the brief, again are attached to the brief. There are additional authorities starting with this one that are just bound for convenience rather than handing up extra authorities that we had following receipt of my friend's materials, we included them in this brief and that's the *Atlantic Lottery Corp v. Babstock* decision of the Supreme Court of Canada of this year. That's the new decision on striking pleadings and we've highlighted paragraphs 18 and 19 for you.

THE COURT: Noted, sir, go ahead.

MR. MCDONALD: Paragraph 18 essentially reaffirms the *Hryniak* decisions and focuses on the timely and affordable access to justice: (as read)

> … where possible courts should resolve legal disputes promptly, rather than referring them to trial. This includes … striking claims that have no reasonable chance of success.

Then there's a discussion in paragraph 19 about novel claims: (as read)

> Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim, [there's recognition of the incremental development of the law]. [Line 4] That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings.

I point that out because the *OWA* in its brief argues that this case is complex and novel and neither of those arguments means that it should not be decided on a strike or summary dismissal application.

Returning to our main brief, I've taken you to paragraphs 22 and 23, I'd just point out that paragraphs 24 through 34, address the key passages in the *BIA* the definition of transfer undervalue in section 2, section 96 in paragraph 26, we address the purpose of section 96, it's an anti-abuse mechanism intended to assist the Trustee in recovering assets, that the debtor disposed on in advance of bankruptcy with little or no consideration thereby depriving the estate of value that would otherwise have been available to distribution to the creditors.

We point out section 96(2) that you're familiar with regarding establishing values and that

it's a rebuttable presumption. And then in paragraph 30, solely for the purposes of this summary dismissal application the Perpetual Energy defendants use the Trustee's opinion of value of the consideration received by PEOC of $5.6 million. And we referenced the flawed assumption that ARO is a liability, I've already touched on that, but as you've decided, the ARO referenced in the statement of claim is not a liability but an assumption that can be disregarded for the purposes of considering whether to strike or dismiss. In that case, you were speaking of the oppression claim, but in my submission, it applies equally to the section 96 claim.

You state it another way at paragraph 232, "the ARO is not a true fact" for the purposes of section 3.68. Over on the next page, we've got the definition of insolvent person. As we know, insolvency isn't defined, but insolvent person is and the last line of the definition of insolvent person refers to obligations due and accruing due. You've seen much about that in my friend's briefs and I'll address that this morning.

That takes me then, My Lord, to the first issue. Was there a transfer reviewable under the *BIA*? That argument is based on the PEOC/POT trust relationship and the impactions of the law of trusts. There is no response to the trust analysis from the Trustee remarkably. It's not addressed by the intervenors and the legal principles and cases that I'm about to take you to are neither challenged nor qualified in any of the briefs.

I'd like to take you through the argument, not by reading the brief, but by highlighting what we say what the authority is for it and why it's important and for that, I'd like to ask you to turn to paragraph 37 of our brief.

THE COURT: I'm there, sir.

MR. MCDONALD: And some of this, of course, you'll recall we discussed when we were addressing the answers to your questions on the prior application. A trust is not a legal entity. That's not controversial, the *Garon* from the Supreme Court of Canada is cited as one of the authorities for it. Too, the definition of person in the *BIA* does not refer to a trust. You've seen arguments by my friends trying to make that argument, it simply is not in the definition of person in the definition you'll find in the excerpts from the *BIA* at tab 3 of our materials. In passing, a trust is also not an entity as defined in the *BIA*.

A trust is a description of a fiduciary relationship that exists between parties. See the authority for that cited at footnote 45 and there are many authorities that say that in those words or similar words. The trust relationship involves obligations owed by the person who holds the trust property. In our case PEOC. The trust is a relationship between POT and PEOC.

If I could take you down to the fourth line from the bottom in the footnote.

THE COURT: I'm there, sir.

MR. MCDONALD: A trust is a form of property holding. It is not a legal entity or person. And once again the next line down, it's a relationship. I'm not going to take you to all those authorities, My Lord, they're important for the proposition that I'm making but they're not contested and I expect not controversial.

On the next page, as a trust is not a legal entity any liabilities are liabilities of the Trustee. I probably should've written that to say, any assets and liabilities are those of the Trustee. The Trustee is entitled to be indemnified out of the trust property. The authorities for those things are in the footnotes. So that sets the framework of what the relevant legal relationship is that we're speaking of when we speak of the relationship between PEOC and POT and when we analyze whether there was a disposition of property, the expression is referred to in the definition of transfer at undervalue

So paragraph 39 we say, there was no transfer or disposition of property when PEOC as Trustee transferred all of the beneficial interest in the Goodyear assets to PEOC in its own capacity. That transaction had no impact on the liabilities of PEOC. PEOC is the legal owner of the Goodyear assets, had those assets and liabilities before the Asset Transaction.

I think it's important that we just take a moment and look at the asset purchase and sale agreement. It's important in several contexts including this one and it's probably is as convenient place as any to do it. That document is exhibited to is Rose's affidavit.

THE COURT: I have it, sir.

MR. MCDONALD: I'm looking at the copy at Exhibit J to her affidavit.

THE COURT: I've just made a copy of it for writing purposes, so I have it in front of me. Thank you.

MR. MCDONALD: Okay. And I'm just going to highlight in some of the passages that in my submission you need to pay attention to for this or some of the other arguments that I'll be making.

The first recital: (as read)

> Whereas the vendor has agreed to sell the assets to the purchaser and the purchaser has agreed to purchase.

And of course, we know who the vendor and purchaser are, they're set out above. But we need to identify what the assets are and they're defined on the next page at sub-paragraph (g): "The assets mean the vendors interest in". I want to highlight those words; they appear repeatedly throughout the document. The vendor's interest in the hydrocarbon interest tangibles and miscellaneous interests and we know what the vendor's interest was, of course, it was the beneficial interest that PEOC was holding in trust for POT.

Over to the next page, paragraph V as in Victor, we have the definition of hydrocarbon interests, again we see the same words, it means the interest of the vendor in the leases. If we go down a few definitions, leases means the leases, licenses, permits, reservation certificates of title.

So we know again, it's the vendor's interests that is the equitable interest in the leases and we know the legal interest in the leases holds the licenses. I think my friends try to make something of the fact that leases includes the definition licenses, but of course, it's only the vendor's interest in the licenses that we're talking about. Miscellaneous interests and tangibles are also defined and also use the reference to vendor's interest in.

On page 7, subparagraph (gg).

THE COURT: I'm there, sir.

MR. MCDONALD: The parties have defined person and in their contract they defined person as a trust -- to include a trust, excuse me and that's fine for their contract but that doesn't amend the *BIA* or contract out of the *BIA.*

And then the operative words in terms of whether the transfer or the sale of assets is at paragraph 2.01.

THE COURT: I'm there, sir.

MR. MCDONALD: Upon the terms and subject to the conditions of this agreement, the vendor hereby sells, transfers, conveys and sets over to purchase and purchaser purchases from vendor at the closing time, all the right, title and interest of the vendor in the assets. So by the contract, they refer to it as a transfer, what is it a transfer of ? It's a transfer of the vendor's interests. What is the vendor's interest? It's an equitable interest that the vendor has by virtue of the relationship, called a trust, in the asset legally owned by PEOC.

The last paragraph I want to refer to in the agreement is purchase price certainty and this isn't of significance so much for this argument, but while we're here, I thought it was convenient to identify this because it speaks to so much of what we're speaking about in the issues on value and insolvency and shows how the parties treated ARO. Purchase price certainty 2.06: (as read)

> The amount and the scope of abandonment and reclamation obligations and environmental liabilities associated with the assets are not capable of being quantified at the time closing and depend upon numerous unknowable factors that are not within the control of the parties.

Sounds a lot like much of what we've seen in your Reasons and the authorities.

> (b) under applicable law the abandonment and reclamation obligations and environmental liabilities associated with the assets are inextricably linked with such assets, so that the purchaser will be liable for , I'm going to abbreviate it to ARO, associated with the assets in the absence of the specific assumption of such obligations by purchaser in this agreement.
>
> (c) the parties have taken the fact that the assets and any associated abandonment and reclamation obligations and environmental liabilities are inextricably linked into account in reaching this agreement and in establishing the purchase price of the assets.
>
> (d) neither the existence nor the amount of any accounting reserves or site reclamation costs or similar matters associated with the assets in the financial statements or accounting records of either party, has been of any relevance to either party in determining any matter under agreement, including the purchase price for the assets.

Mr. Darby and the Trustee in its recent brief didn't refer to that passage when they try to make much of the accounting entries.

And finally: (as read)

> (e) as a result of the foregoing the parties agree to attribute no value to the assumption of abandonment and reclamation obligations and the environmental liabilities, not the indemnities provided for in

article 10, associated with the assets.

So I -- they addressed -- by through that paragraph, they addressed a little bit from our issue 1 and the significance of the trust relationship, but we have it all there and I or others may return to it.

I'd like to now ask you to turn back to our brief and I was at the heading, The Implication of the Law of Trust on page 11.

THE COURT: I'm there, sir.

MR. MCDONALD: And we quote a question and answer that came up in our last proceedings, when you asked, what are the implications if POT is a relationship and not an entity?

And we like to highlight the last paragraph on that page and it goes over to the next page: (as read)

> The asset transfer agreement did not materially change PEOC's position with respect to the Goodyear assets and it therefore did not change the position of PEOC's creditors, if any, with respect to the Goodyear assets. According the asset transfer did not negatively impact or even materially change the value of PEOC's estate.

That's at the heart of this and you'll recall I took you to the purpose of section 96 and on a proper understanding of the trust relationship, in my submission, those are fundamentally important positions that the Court should accept.

PEOC held the licenses and the legal interest in the Goodyear assets before the Asset Transaction. PEOC held the licenses and the legal interest in the Goodyear assets and the beneficial interest after the Asset Transaction. That didn't negatively impact any creditors.

No value was stripped from PEOC, all that was out of the focusses of the concern or purpose of section 96 to address stripping of value from a debtor company. No liability was injected into PEOC and just to close on -- tie that up a little bit more carefully -- I'd have to refer you to our brief from yesterday.

THE COURT: I have it, sir. Thank you.

MR. MCDONALD: Paragraph 45.

THE COURT: Sorry which paragraph again?

MR. MCDONALD: 45.

THE COURT: Thank you. I'm there, sir.

MR. MCDONALD: Nor was PEOC injected with liabilities as the Trustee suggests, as the legal owner of the Goodyear assets with the licenses, PEOC had the same ARO exposure both before and after the Asset Transaction. Without a transfer of licenses there could be no transfer of ARO. In November 2018, the Trustee expressly conceded this point and the reference is to the Trustee's November 1, 2018 brief. The legal interest and licenses for the Goodyear assets were held by PEOC in its capacity as Trustee to POT, which owned the beneficial interest in the Goodyear assets.

As a result the sale by POT or the beneficial interest in the Goodyear assets required no transfers and no regulatory process or approval. We know that the ARO, as the Supreme Court has told us, is an inherent part of the value of the licenses that the Trustee concedes were not transferred.

Paragraph 42 is a further description of what I've just said about the mischief that section 92 is intended to address and that the Asset Transaction is not that mischief. Paragraph 43 makes the same point I think I just made a moment ago about before and after the Asset Transaction.

Paragraph 45 expands that a little further. So the summary that we say in paragraph 46 is whether one looks at the Asset Transaction through the lens of the law of trusts or considering the purpose of section 96, the conclusion is the same. There is no transfer reviewable under the *BIA*.

So what's the Trustee's response to this? The first one, well as I said, there's no response to the trust law. But the first response is that the Perpetual defendant's submission is inconsistent with the asset PSA and the *BIA* and then an argument is developed exclusively based on the definition of person and my friend says well the parties and the asset PSA find a person to include a trust. Correct. It doesn't change the *BIA*, but then they go onto say, well, seemingly recognizing that problem, well the *BIA* doesn't define person to include a trust, you should read it to include a trust because it includes a partnership and the definition isn't exhaustive.

Well, in my submission, there's no reasonable principle of interpretation that would allow you to take the definition of a person and the *BIA*, and plain language in that definition, the exclusion of the word trust and come to a conclusion that it includes a trust. But rather

than just saying that, we have some authorities to back that up and those authorities are found in the reply brief to the Intervenors, that where we put in our supplementary authorities, at tabs 7 through 10.

THE COURT: Go ahead, Sir.

MR. MCDONALD: Tab 7 is a Quebec case, called *Fiducie Cote Pornier* (phonetic) from 2017, unfortunately all we could find was a French version but the headnote is in English and it clearly sets it out and we've also got a passage from Houlden & Morawetz that refers to the case. So all I can offer you is on the second page in the headnote on reading five lines down from the top or so: (as read)

> Here only qualification available to trust was that of insolvent person. For trust to qualify as insolvent person it first had to be a person. [skipping a sentence] Therefore trust did not qualify as an insolvent person for the purposes of the *BIA* and in particular did not qualify as an insolvent person for the purpose of section 50 with respect to proposals.

Perhaps not as much help if it would be if we had an English version, so let me ask you then to turn to tab 8 and the except in reference to the case in Houlden & Morawetz.

THE COURT: I'm there, sir.

MR. MCDONALD: It just confirms that the trust was not a person, the Court held that although the trust constitutes autonomous patrimony it was never given legal personality by the legislature. Other than the plain language of the statute those are the additional authorities or the additional authority that seems to touch on the question.

At tab 9, I've included a decision from the Court, Justice Read in *Vicklund v. Peavine Metis Settlement* on the exclusio doctrine, *expressio exclusio*. Paragraph 52: (as read)

> There is also a so-called maxim of statutory interpretation which provides that to express one thing is to exclude another.

And then gives the Latin phrase and then it's the rationale for the implied exclusion doctrine.

I think it's well known I'm not going to read it, what I did not specifically do and I probably should have, is take you to where you'll find the definition of person in the *BIA,* which is in our main authorities at tab 3 on the second page.

THE COURT: I'm there, sir.

MR. MCDONALD: And I won't read it, but you can see it includes many different types of entities, it does not include a trust and proper application of the applied exclusive doctrine would tell you that a person does not include a trust. The point I'll make on this before I move on is at tab 9 of the other authorities, where I showed you the Quebec case, we just included for illustration a passage from the *Canada Business Corporations Act*, with an illustration of how a statute includes a trust as an, in this case entity, and it's easy, you put the word trust in the definition as we see in entity in the *CBCA*, on page 2 at that tab. The drafters of the *BIA* did not do that.

This is an interesting discussion but where does it take us? Well, my friend says, well if you conclude that a person includes a trust under the *BIA* then section 96 should preclude a transfer between a beneficiary and trustee. Well, firstly, it isn't, a person does not include a trust so the foundation of this argument falls away in a moment. But let's just pretend that it did and even if a trust was deemed to be a person for the purposes of the *BIA*, it is still just a description of a fiduciary relationship and deeming POT to be a person for the purposes of the *BIA* would not change the relationship between PEOC and POT. It would not change the fact that the Asset Transaction still just combines the legal and beneficial interests in Goodyear assets and it would not magically turn the combination of that legal and beneficial interest into a transfer of property.

So that's one argument that my friend's raise against the no transfer submission we make. They have another argument though and that's found in their heading at page 19 of their brief that says, Prior to the Asset Transaction PEOC was not the Legal Owner of the Goodyear Assets and the Person Liable for the Associated Liabilities. Well, I thought we left that far behind and I thought you had decided and my friends had acknowledged it. PEOC was the legal owner of the Goodyear assets and as owner of those assets, it was liable for the associated liabilities. And if we want to talk about one particular concept, it held the licenses embedded in those licenses was the ARO. So the heading frankly, in my submission, makes no sense.

And then the argument that follows it doesn't seem to support it but seems to make some other arguments and I have to ask you to look at paragraph 58 because it's another example of selective quotations. This argument is directly inconsistent, that is our argument that the position of the creditors remained the same, it is inconsistent with the Perpetual defendant's statement of defence, which pleads that prior to the Asset Transaction PEOC was a bare trustee and had no assets and liabilities. So you would think, well what's that statement of defence say because they've quoted from it? Well, we better see what that says, the reference is at paragraph 48 of the statement of defence.

And my friends neglected to include the section, prior to the transaction PEOC was a bare trustee and held only the legal interest in POT's oil and gas properties, contracts, licenses and permits. It held no beneficial interest in any property, made no material revenue, expenses, assets or liabilities, it was not insolvent. So my friend's characterization of our pleading in paragraph 58 of his brief is just wrong.

The other unrelated point that the Trustee makes in support of this -- or under this heading at any rate, references the right of indemnity. We know or I've argued and given you the authority that a trustee has a right of indemnity, it's a matter of law, well that right of indemnity can also arise in contract and we've given you some authority for that. And that's in our brief at tab 11, it's our first brief, the *C.D.I.C. v. CCB* case of Justice Wachowich.

THE COURT: I'm there, sir.

MR. MCDONALD: Paragraph 28 -- well let me start -- let me just point out at paragraph 26, His Lordship says: (as read)

> As an unincorporated unit trust is not a person, it cannot be a transferee, therefore it cannot be liable as a transferee under section 62(1) of the *Act.*

That was the -- it's not the *BIA* that was -- I'm sorry I don't know which *Act* he was referring to. I think this was restructuring. So in any event, paragraph 28: (as read)

> By virtue of the trust agreement of 27th May, 1982 between CCB and the R.E.I.T, the R.E.I.T. is liable to indemnify CCB …

And then he reads the passage from that indemnity agreement or trust agreement and then he emphasizes: (as read)

> Furthermore, in equity a trustee rightly carrying on business in accordance with the trust settlement is entitled to be indemnified out of the trust property against any liabilities which he has properly incurred.

So --

THE COURT: Just to pause you, is he not, in terms of paragraph 56 when he refer to *Act,* I think he's referring to the *Land Titles Act*, is he not?

MR. MCDONALD: Yes, I see that in the -- on the first page, you're absolutely right, the first page in the headnote refers to the *Land Titles Act* and apparently it seems like the *Land Titles Act*, the passage I see that might be helpful is about six lines into the headnote: (as read)

> Unincorporated trust not being transferee under section 62 of the *Land Titles Act* is not being a person within section 1(y) of the *Act*.

Mr. Chiswell tells me that's at paragraph 42 of the case, as well.

THE COURT: Thank you, Sir.

MR. MCDONALD: That we've highlighted.

THE COURT: Noted. Thank you.

MR. MCDONALD: So why are we talking about the Trustee and the right of indemnity? My submission it has nothing to do with the argument about the implications with the law of trust, by my friend points out that our argument referenced the trust indenture and he says, it's not in evidence and so you should ignore it. And that argument is technically accurate, I suppose, in that it was not attached as an exhibit to an affidavit, but it became part of the record of these proceedings when in November or December 2018, almost two years ago, we provided it to Your Lordship and to my friends, as part of the responses to the questions that you had posed to counsel at that time.

I don't need to refer to it today, but My Lord do you have it available to you?

THE COURT: I have it right here, the first amended and restated trust indenture dated August 1st, 2002?

MR. MCDONALD: Yes, that's the document.

THE COURT: Sorry, I just wanted to confirm on the record, I do indeed have the whole document including a photocopy of Schedule A which is $100 presumably the settlement property.

MR. MCDONALD: Okay. Exactly and that's what was provided to you and to my friends two years ago.

What the Trustee does not do surprisingly is describe the trust relationship including the

indemnity. My friend wants you to ignore it, in my submission, it's part of the record and properly before you, but even if you wanted to ignore it, you of course wouldn't ignore the indemnity that arises as a matter of later, by virtue of the trust relationship and finally, the indemnity has nothing to do with the argument we're making.

So that's it, My Lord, on issue one. We say there's compelling law when you properly understand the trust relationship and the law of trust that there was no transfer for the purposes of section 96, when the legal and beneficial interests in the Goodyear assets were combined under the asset share purchase agreement. The only answers to that are, a trust is a person, which it's not and you should ignore the trust deed because it wasn't an exhibit to an affidavit.

I'd now like to turn to the second issue, which is, if there was a transfer, if you disagree with what I've said, was the transfer at undervalue? I can keep going, but I know we've been going to a long time and if you or my friends would like a break we can take a break now.

THE COURT: I'm fine. Madam clerk, would you like a break?

THE COURT CLERK: No, that's fine.

THE COURT: Okay. Why don't we, subject to all the other parties, I'm certainly comfortable with proceeding until about 12:30, sir. I'll leave that to your discretion, but certainly if someone wants a break, please speak and we will do so.

Hearing now, let's proceed if that's convenient for you, Mr. McDonald.

MR. MCDONALD: Okay. Issue two, if there was a transfer, was the transfer at undervalue? And I'd like to ask you to go to paragraph 47 to 53 of our brief, dealing with the strike application.

THE COURT: I'm there.

MR. MCDONALD: And on issue 2 and issue 3, what I'm going to be doing, what my friends have done in their responsive brief, is deal with the strike application separately from the summary dismissal application, so that on the strike application, I just deal with the statement of claim, because that's the focus of the Court's attention on such an application.

So you will see my heading for issue 2, near the bottom of page 13 of the brief and then the subheading dealing with *Rule 3.68*. And if we turn first to the allegations regarding the

transfer undervalue and for convenience I put the allegations from the statement of claim in the text at the top of page 14.

THE COURT: I'm there, sir.

MR. MCDONALD: And it's a fairly simple set of allegations. It starts with the proposition that the Goodyear assets had no positive fair market value at the time of the Asset Transaction, that represented a significant net liability and that liability is alleged to arise by taking the difference between the consideration received of $5.6 million and the consideration given of $223 million, to show a net difference of minus $218 million.

And in paragraph 14, as a result the allegation goes, Sequoia acquired assets with associated ARO and other liabilities which exceeded the value of the assets. And the conclusion in paragraph 23, this was a disposition of property for the consideration received by PEOC with conspicuously less than the fair market value of the consideration given.

So we can see that essential to that allegation is the value of the consideration given by Sequoia of $223 million and you have already said at paragraph 212 of your Reasons that you conclude, as I submit is obvious, that the reference to liabilities in the statement of claim is to ARO. You have also said at paragraph 232 of your Reasons that you need not consider ARO as a true fact for the purposes of *Rule 3.68*.

And you and Mr. Darby and Mr. de Waal and I, are all saying, ARO is not a liability. And when you understand those simple points, my friend's equation changes. My friend's equation which says 5.6 minus 223 equals negative 218 disappears. And what's left based on those allegations is a value of the assets of $5.6 million which we know includes the embedded ARO and no liabilities or as Your Lordship found, $1.65 million in municipal tax liabilities.

And Your Lordship set that out for us clearly in your table at paragraph 368 of your Reasons. So we say for the purposes of the transfer of undervalue strike application the assumption that the ARO associated with the Goodyear assets was a liability is wrong, it's incapable of proof and its bound to fail. And when you consider that the result is that the claim that the consideration received by PEOC was conspicuously less than the fair market value of the consideration given by PEOC, is bound to fail. There was no arguable transfer at undervalue and the entire *BIA* claim should be struck. It discloses no reasonable cause of action.

So what's my friend's answer to that? The answer given is at paragraph 67 of the Trustee's

brief or starts there, I should say, and my friends say well this argument assumes that ARO must be a liability in order to affect the value of the Goodyear assets transferred to PEOC in the Asset Transaction. As I said earlier, we don't make any such assumption. If we make anything that might be characterized as an assumption it's really a premise, which we say is indisputably founded in the authorities that ARO affects the value of the Goodyear assets precisely as the Supreme Court of Canada and you have determined.

It's an inherent part of the value of the licensed assets. It's embedded in it. By being embedded in it, it depresses the value of it and it's built into the value. There's so much authority for that proposition , but it's so central to what we're talking about I want to turn you to a couple of passages in *Redwater* and one in your decision.

Redwater tab 17 of our argument at paragraph 29.

THE COURT: I'm there, sir.

MR. MCDONALD: Just read the second sentence: (as read)

> What Alberta has chosen is a licensing regime which makes such costs [referring to environmental costs including ARO] an inherent part of the value of the licensed assets.

It could not be plainer and 157 says it in a little more detail with reference to *Daishowa* and starting in the third line of 157: (as read)

> 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. … 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" .

And you say at paragraph 166 of your Reasons.

THE COURT: Go ahead, sir.

MR. MCDONALD: I won't read it, it would be repetitious but you refer to *Redwater,* the same passages I'm referring to put them in the context of our case, you refer to *Daishowa* in the same passages and then you describe four reasons why ARO is not a liability at paragraphs 169 through 173.

The Trustee either misunderstands or wants to ignore what ARO being an inherent part of

or embedded in the value of the licensed assets means. As we saw in the statement of claim, effectively they're saying well what it means is, the value of the licensed assets and then we separately do a deduction of, in this case, $200 million plus. But that's not what *Daishowa* or *Redwater* or you are saying.

It's embedded in the $5.6 million. You don't get to deduct it twice, first as an inherent part of the $5.6 million and the second as a deduction of some notional and contingent obligation dependent on a variety of assumptions, all the qualifications we've seen to what ARO is. The embedded ARO has already depressed the value of the asset, to $5.6 million. *Daishowa* gave an example of that very concept and I'll take you to that.

The second ARO that my friends want to deduct is as you have said, not referrable to an existing obligation, a notional and contingent obligation and a mere assumption that can be disregarded for purposes of considering whether to strike.

So my submission, without considering the evidence in the summary dismissal application, the transfer at undervalue argument, if you assume there was a transfer, should be struck.

So let's then go to the summary dismissal application because that's another way to get to the same place albeit within a different legal framework and a different test and consideration of different factors. But the legal argument is essentially the same and it's set out at paragraphs 54 to 56, it starts at 54 to 56 of our brief.

So I'll wait My Lord in case you're --

THE COURT: No, I'm there, sir, sorry.

MR. MCDONALD: I'm sorry.

THE COURT: I'm at page 15, at paragraph 54, and lines to 56 also, through to 56.

MR. MCDONALD: Right, thank you. We're on summary dismissal on issue 2 and so we need to look at the evidence. The Trustee's opinion of value and we know that he -- section 96 permits him to state an opinion, of the consideration received by PEOC as set out in the Darby affidavit is by reference to the value stated in the McDaniel Report of $5.67 million. And the quote at 56 from Darby: (as read)

> In the opinion of the Trustee the value of the consideration received by PEOC in the Asset Transaction was at most $5,670,200.

So we need to go to the Darby affidavit and that's his August 2nd, 2018 affidavit and the reference is at paragraph 41.

THE COURT: I'm there, sir.

MR. MCDONALD: (as read)

> I attach a schedule with the Trustee's estimated valuation of the Asset Transaction as Exhibit N. This shows a negative value of $223 million for PEOC immediately after the Asset Transaction.

41.1: (as read)

> I note that the McDaniel Report value of $5,670,200 includes an estimate of abandonment costs for those Goodyear wells included in the report, as well as estimates for salvage value. For these reasons the amount for ARO included in the schedule, Exhibit N, may be overstating as it has to some extent already been included in the value of some of the Goodyear wells.

The Trustee does not consider this to be material to its analysis. There's a lot of information in that paragraph. The McDaniel Report that is relied upon includes an estimate of abandonment costs for the Goodyear wells included in the report. Well, that should not be a surprise to Mr. Darby or to anyone because they are embedded in the value as a matter of law and it seems the authors of the McDaniel Report fully understood that when they came to their value after consideration of or embedded within it, the value of the ARO.

So it seems not only is the law clear, but Mr. Darby and the authors of the McDaniel Report understand that it's an embedded part of the value perfectly clear. And then remarkably Mr. Darby is prepared to casually dismiss it as simply the Trustee does not consider it to be material. The same ARO that he's asking this Court to accept as properly valued at $223 million, he can casually dismiss in one line of an affidavit by saying it's not material.

And then we go to paragraph or sorry Exhibit N, which is the schedule he referred to in paragraph 41.

THE COURT: Go ahead, sir.

MR. MCDONALD: And he's included his estimated valuation of PEOC and we see some numbers we're familiar with and though they're set out a little differently than what we've seen earlier, but he has a table that shows the value of, in this

case, $12.7 million. Then the ARO of $192 for the wells and $27 million for the facilities and attached liability, he's referring to as $10 million.

And again, recognizes in note A, second paragraph, that the Trustee notes that the reserve report value of $5.8 million includes an estimate of abandonment costs for those wells included in the report, as well as estimates for salvage. For this reason, the abandonment amount included in Note B, may be overstated, however, the Trustee does not consider it to be material for this analysis.

So he is recognizing in his own table that he's counting ARO twice, which I say, you cannot do. And he is prepared to dismiss that by saying the embedded one isn't material, without even trying to say how much it is and the other one is over $200 million. And the other one, of course, is the one that we know is based on assumptions, it's uncertain, it's all the things that I've said repeatedly.

I'd like you to turn to paragraph 56 of my brief.

THE COURT: I'm there, sir.

MR. MCDONALD: We say not only on the allegations in the statement of claim that I argued a moment ago, but based on the evidence, you don't get to deduct a $200 million a second time, you have to properly accept that it's embedded in the value as the authors of the McDaniel Report have done and your equation changes and your equation becomes the very table that you've set out at paragraph 368 of your Reasons. There was not a transfer of undervalue, there was a net positive value to PEOC of $4.1 million.

So I think I can deal with my friend's answer to this in ten minutes and we'll be ready to break at 12:30 with only one issue left.

My friend says, well, the Perpetual defendant's argument assumes incorrectly that ARO had no effect on value. It's patently wrong. ARO does have an effect on value. *Daishowa* says that, *Redwater* says that, you say it, we say it. That that effect is embedded in the $5.6 million.

My friend's say the Perpetual defendants assume the ARO must be a liability to have any effect on value. They say Perpetual defendants simply delete ARO from the value equation. Wrong and wrong again. We don't delete it. We don't assume it has to be a liability. We operate from the premise that it is what the Court says it is, embedded in the value of the asset.

I said a few minutes ago that I was going to take you to an interesting example in *Daishowa. Daishowa* is at tab 20 of the Trustee's brief, brief of authorities.

THE COURT: Go ahead, sir.

MR. MCDONALD: In *Daishowa* they -- they're not talking about an oil and gas lease, of course, but a forestry tenure and it had a value of $20 million which included an embedded equivalent of ARO being reforestation obligations.

It did not have a value of $20 million minus $11 million as my friend's proposition would lead you to. If you turn to paragraph 31 of *Daishowa* and it's a tax case and the facts are different but the important analysis is the same.

THE COURT: I'm there, sir.

MR. MCDONALD: (as read)

> The effect of Alberta's scheme is to embed the reforestation obligations into the forest tenure, such that the obligations cannot be severed from the property itself. As such, the reforestation obligations are simply a future cost tied to the tenure that depresses the value of the tenure. A prospective purchaser of the tenure would take into account the income-earning potential of the tenure as well as the expected future costs associated with ownership of the tenure. The existence of reforestation obligations, a future cost that cannot be severed from the tenure, would decrease the amount such a prospective purchaser would be willing to pay. Here, for instance, the record establishes that Tolko valued the High Level Division's forest tenure at $31 million less the $11 million estimated cost of future reforestation obligations. The forest tenure thus had a value of $20 million.

And then in the next paragraph the Court distinguishes that from mortgage on property. Well, by analogy the Goodyear assets had a value of $5.6 million, which includes the equivalent of the, by analogy equivalent of the $11 million reforestation obligations, embedded in that value.

So just as in *Diashowa* the value was $20 million because of the embedded environmental obligations. In this case, the value is $5.6 million because of the embedded ARO and it is not $5.6 million because of the embedded ARO less another $200 million or some other number, anymore than *Diashowa's* value is $20 million less the $11, once again.

So we then see a new way the Trustee seeks to approach this in the affidavit filed last week. And we see that $220 million number now go to $18 million, which on its own even if it was a sensible calculation, illustrates how uncertain the estimate for ARO is. And the new evidence from the Perpetual Inc. consolidation financial statements from 2016, leads to the argument or the conclusion that my friends would have you believe, that the Asset Transaction resulted in a $19 million gain for Perpetual on a consolidated basis, so presumably a $19 million loss for Sequoia, so presumably a transfer at undervalue. There are so many flaws in that argument, it's hard to know where to start.

We know the financial statements do not record fair market value. Your Lordship knows that better than anyone. Financial statements were referring to the aggregate transaction not the Asset Transaction, so even if you could infer something meaningful from them it would not be about the transaction that is the subject of this lawsuit.

And other flaw that are set out at paragraphs 47 through 51 of the brief we filed yesterday.

THE COURT: Thank you.

MR. MCDONALD: I can't say it any better than my colleagues have written in this section, it's such a weak argument that I'm not going to deal with it any further orally and I just refer you to that passage in this brief, that my submission, is a complete answer to whatever point was being made.

If you could indulgence me for 5 to 10 more minutes, I could finish up on issue 2, I have one other point I'd like to make.

THE COURT: Sir, I don't have any problem with that, as long as the other parties are fine. Any objection? Madam clerk, are you also okay for 10 minutes?

THE COURT CLERK: I'm fine.

THE COURT: Go ahead, sir.

MR. MCDONALD: There's another way to approach this value issue or if the transfer undervalue issue that illustrates that the Asset Transaction was a transaction at fair market value. And I'd like to refer you to paragraphs 41 to 48 of our reply to the Intervenors argument.

THE COURT: Go ahead, sir.

MR. MCDONALD: And here we say there's other evidence of fair market value and refer to Mr. Schweitzer's affidavit, I don't think I need to take you to it, I've quote it here: (as read)

> The fair market value of assets determined by negotiations between informed industry participants is complex and influenced by assumptions, forecasts, financing costs, business plans, strategies and competitive forces.

There's nothing too controversial about that. (as read)

> The fair market value of PEOC as of October 1, 2016 is uncontradicted.

That's the share transaction between an arm's length vendor, Perpetual Energy Inc. and purchaser 198 Co. pursuant to which all the shares of Perpetual were sold. That transaction closed two minutes after the Asset Transaction. And what 198 Co was buying in that arm's length negotiation and transaction was PEOC, a company that held the Goodyear assets with the embedded ARO, the gas marketing contract and some other components we've set out in the brief.

We also know from the evidence that the purchaser team necessarily considered ARO when it was assessing the value of the Goodyear assets for the purpose of the Asset Transaction and the aggregate transaction as a whole and we've summarized some of the evidence in paragraph 43, it's the due diligence associated with the ARO, the data room, the field visits, the technical discussions, the in-house abandonment and reclamation, equipment and processes and 198 Co's or post-transaction Sequoia's implementation of an aggressive and more effective, as they called it, abandonment and reclamation program.

The share transaction required the closing of the Asset Transaction as the purchaser required the combination of the legal and beneficial interests in the company it was buying. And what the Asset Transaction did, is it readied PEOC for sale. It combined the legal and beneficial interest. It assigned and novated PEOC into the gas marketing contract to provide price protection for the production for two years -- for a two year period. It included some proprietary seismic data. There were some closing adjustments.

Two minutes after that happened, the share purchase transaction was closed in the arm's length negotiation. The value of the consideration exchanged between POT and PEOC mirrored the consideration exchanged in the share transaction which we know was fair market value by definition.

So necessarily, My Lord, the arm's length determination of fair market value of PEOC's shares substantially equalled or were designed to mirror one another, to show on a totally different way of approaching the value analysis, a fair market value transaction not a transfer at undervalue.

So whether you want to approach this through the component analysis that we've been doing and that my friend does by subtracting one number from another, or whether you want to approach this from a market analysis and recognize the effect of the aggregate transaction and the necessary implications that follow from the fair market value consideration, you get to the same place. It wasn't a transfer at undervalue.

My Lord, I am now ready to turn to issue 3, so I suggest we break.

THE COURT: Certainly. Anything we should address from any party before we adjourn until 2 PM? Hearing none, madam clerk, if we could adjourn until 2 PM. Thank you.

PROCEEDINGS ADJOURNED UNTIL 2:00 PM

Certificate of Record

I, Katherine O'Brien, certify that the recording herein is the record of oral evidence of proceedings held in the Court of Queen's Bench, in courtroom 1203, at Calgary, Alberta on the 1st day of October, 2020 and I was the court official in charge of the sound recording machine during these proceedings.

Certificate of Transcript

I, Su Zaherie, certify that

(a) I transcribed the record, which was recorded by a sound recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

TEZZ TRANSCRIPTION, Transcriber
Order Number: AL2422
Dated: October 8, 2020

Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

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October 1, 2020	Afternoon Session
The Honourable Mr. Justice Nixon	Court of Queen's Bench of Alberta
R. de Waal (remote appearance)	For PricewaterhouseCoopers Inc.
L. Rasmussen (remote appearance)	For PricewaterhouseCoopers Inc.
D.J. McDonald, QC (remote appearance)	For Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operation Corp.
P.G. Chiswell (remote appearance)	For Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operation Corp.
M. Deyholos (remote appearance)	For Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operation Corp.
G. Benediktsson (remote appearance)	For S. Riddell Rose
K.T. Lenz, QC (remote appearance)	For Orphan Well Association
A.N. Stempien (remote appearance)	For Orphan Well Association
G.S. Watson (remote appearance)	For CNRL, Cenovus Energy Inc. and Torxen Energy Ltd.
C.W. Ang (remote appearance)	For CNRL, Cenovus Energy Inc. and Torxen Energy Ltd.
K. O'Brien	Court Clerk

THE COURT: Good afternoon. Please be seated madam clerk. Unless there's any other business, I will ask Mr. McDonald to continue.

Submissions by Mr. McDonald

MR. MCDONALD: There sounds like there's no other business, My Lord, so thank you very much and I'll move onto the third issues, which was PEOC insolvent at the time of the Asset Transaction or rendered insolvent by the Asset Transaction?

THE COURT: I'm there, sir.

MR. MCDONALD: Starting first with the strike application, an allegation that my friends rely on are found in several paragraphs of their statement of claim which I've highlighted at paragraph 61 of our brief.

THE COURT: I'm there, sir.

MR. MCDONALD: And that's paragraph 14, 20 and 22. What I did not include in there, but I probably should have, is the definition of ARO in the statement of claim and that's at paragraph 5 of the statement of claim. I don't know that you need to return to it, but it defines ARO as the abandonment and reclamation liabilities.

THE COURT: Thank you.

MR. MCDONALD: Initially it was my understanding that the Trustee was claiming both that PEOC was insolvent at the time of the Asset Transaction and was rendered insolvent by it. I take it from my friend's argument that indeed the Trustee is not arguing the PEOC was insolvent at the time of the transaction but only the second half of that aspect and that is that it was rendered insolvent by the Asset Transaction.

So I'm going to focus my submissions on whether it was rendered insolvent by the transaction and in that regard, I'd ask you to turn to paragraph 66 through 70, would you consider that argument only on the basis of the allegations in the statement of claim?

THE COURT: I'm there, Sir.

MR. MCDONALD: And we know from those allegations that the manner in which the insolvency by the transaction is developed is through the math that we see in paragraph 14, excuse me -- paragraph 20, excuse me of the statement of claim which is set out at the top of page 18 of the brief.

And that is if PEOC was not insolvent it was rendered insolvent and it goes onto say because it was liable for but unable to pay the municipal property taxes with respect to the Goodyear assets and secondly, it became viable for but unable to pay the ARO associated with the Goodyear assets.

And we know from your decision at paragraph 230 and 231, set at paragraph 67 of the brief, that your inference from the content of the statement of claim is that there was significant liability in PEOC, is the ARO associated with the Goodyear assets. In my submission, that's the correct difference and indeed the statement of claim doesn't allege any amount in respect of municipal taxes. We know we see that in the Darby affidavit, but that's not something for consideration in the application to strike.

The argument that I make is quite simple and that is that the assumption that the ARO associated with the Goodyear assets is a liability that should be deducted for the purposes

of a solvency analysis is wrong, incapable of proof and bound to fail. Whether one characterizes it as a liability or an obligation or a provision, it is a notional amount based on assumptions and for all the reasons that I described this morning, not something that you can take into account in considering the solvency of PEOC as a result of the Asset Transaction.

And quite simply then, the Asset Transaction based on the allegations in the statement of claim is incapable of proof and the claim should be struck on that basis alone. Now, my friend, of course says arguments that I now want to turn to and the first argument is that our position is inconsistent with the statement of defence. That's a curious argument to make on the strike application when our statement of defence isn't something that you can consider. So whatever the merits of what inconsistencies he might suggest there are in the statement of defence, they don't arise in a strike application.

The second argument the Trustee makes is that Perpetual assumes that ARO must be a liability for the Asset Transaction to have rendered PEOC insolvent and that argument is developed in my friend's brief at paragraphs 105 to 111. As I stated this morning, we don't make that assumption. If on the pleading itself we want to look at balance sheet test or the cash flow test, in my submission, it's clear that my friend has not disclosed however one characterizes ARO that PEOC was insolvent.

On a balance sheet test analysis it's the measure of the value of the assets which, as we know, and as I've argued this morning is $5.6 million inclusive of the embedded ARO, less the value of the liabilities which do not amount to anything more than the unquantified municipal taxes. So in the statement of claim we don't even have a number.

If we look at the cash flow test, the statement of claim says that PEOC was unable to pay these unquantified municipal taxes. Now, that's bound to fail without knowing what municipal taxes there might be a pleading that says you can't pay something doesn't help us much in assessing whether a company is insolvent. And unable to pay ARO and that's an interesting way to put it, but I think underlines the flaw in the Trustee's argument. Let's just look at that if I can ask you just to turn back to page 19 of our brief where we've quoted paragraph 20.

THE COURT: I'm there, sir. Thank you.

MR. MCDONALD: (as read)

> As a result of the transactions and the Asset Transaction, in particular, 20.3, PEOC became liable for but unable to pay the ARO associated with the Goodyear assets.

Well one doesn't pay ARO. It's an estimate -- putting aside the fact that it's embedded, it's a notional contingent estimate, it's not something that one must pay and yet my friends are arguing whether for the balance sheet test or the cash flow test, that this notational contingent concept of the ARO is something that a company pays and by failing to pay it, that company is insolvent. It's just, in my submission, a fundamental misunderstanding of what abandonment and reclamation obligations are. No matter what you label them, obligations, liabilities, or anything else.

And if I could ask you to turn to paragraphs 108 to 110 of the Trustee's brief.

THE COURT: I'm there.

MR. MCDONALD: These also put straight the flaw in the argument my friends are putting forward. 108 says: (as read)

> Consistent with *Diashowa* and *Redwater* the Trustee's allegation is that when the ARO and municipal taxes are built into the Goodyear assets, the Goodyear assets themselves had a significant negative value at the time they were transferred to PEOC in the Asset Transaction.

Well, that's the same misunderstanding of *Diashowa* and *Redwater* that we saw earlier when the words, depressed value, I think they were, were quoted in isolation. It ignores the earlier words from the Supreme Court, it ignores what I say is an indisputable concept that the ARO is already built-in and you don't build it in again.

Paragraph 109 illustrates the misunderstanding that I just mentioned: (as read)

> As a result following the Asset Transaction PEOC could not pay the municipal taxes, unquantified, and ARO.

In my submission, you don't pay ARO in the context that's referred to there. And 110 is really a repeat of 108 in an attempt to build in a second time ARO. It ignores the concept that it was already embedded.

In short, my friend hasn't answered the strike application in my submission. The statement of claim, as alleged, has not disclosed a cause of action and is bound to fail to the extent that it's trying to establish that PEOC failed the balance sheet test or the cash flow test or in anyway was rendered insolvent by the Asset Transaction.

So then turn to the summary dismissal application and the consideration of the evidence in the point and that's going to bring us to another argument that my friend's raise. Once again, I'm not going to address whether it was insolvent at the time of the transaction, because I take that not to be the allegation. And I've addressed at paragraphs 79 through 83, the summary judgment application we make to say that PEOC was not rendered insolvent by the Asset Transaction.

I'd like to start that argument by reference to Mr. Schweitzer's May 2020 affidavit. Do you have that handy?

THE COURT: I do, just give me a second. Go ahead, sir, I have it.

MR. MCDONALD: Starting at paragraph 12, the section, "PEOC was not rendered insolvent by the Asset Transaction."

THE COURT: I'm there, sir.

MR. MCDONALD: Mr. Schweitzer says that PEOC associated municipal taxes payable were $1.56 million, as described earlier in the affidavit and by Your Lordship, before and immediately after the asset transaction. PEOC had no other liabilities and PEOC had the Goodyear assets with all cost of operations paid up to the closing of the Asset Transaction as per the statement of adjustments and provided PEOC with a gas marketing contract to secure a minimum gas price for PEOC on approximately 9 percent of its production from the Goodyear assets from closing at a close to POT of $12.9 million.

Just for clarity because I haven't said much about the gas marketing contract yet, it was a requirement of the share purchase agreement that the gas marketing contract be in place. That contract was acquired by PEOC as Trustee for POT and then pursuant to the Asset Transaction was combined with the other Goodyear assets into PEOC, so that it was part of the package of assets that 198 bought when it bought PEOC shares.

Mr. Schweitzer then goes onto say at paragraph 13 that the net financial results of the Asset Transaction are as you set out at paragraph 368 of your affidavit and then at paragraph 14 closes this point by saying: (as read)

> This fully explains that PEOC was not insolvent at the time of the Asset Transaction and was not rendered insolvent by the Asset Transaction. Sequoia's subsequent insolvency is otherwise explained.

And he refers to some of the activity close to closing that I'll refer to in more detail in a few moments.

Mr. Darby tells us why he says PEOC was rendered insolvent in paragraph 46 of his affidavit which is quoted at paragraph 79 of our brief.

THE COURT: I'm there, sir.

MR. MCDONALD: In 46.1 he says that: (as read)

> Accordingly by acquiring Goodyear assets which according to PEI had been cash flow negative for many years.

Well, rendered insolvent isn't a backward looking exercise. What Mr. Darby wants to do is look backward and say PEI has said that these assets were cash flow negative in the past, but he's speaking of a future situation, the status of PEOC as a result of the Asset Transaction. So looking back doesn't help looking forward. And, of course, Mr. Darby doesn't make any reference to the gas marketing contract which provided price protection to PEOC for two years. So looking backwards and without the benefit of the price protection is not a fruitful exercise.

He then goes on at 46.2: (as read)

> Represented ARO and tax liabilities of more than $130 million on Perpetual's own records.

It's hard to know where to start with that one, but it's fully addressed in the brief we filed last night in response to the new Darby affidavit and the new Trustee brief. (as read)

> Financial statements recording an accounting provision for various obligations do not, in and of themselves, create a liability.

To quote Your Lordship at paragraph 358. So if that's the next support that Mr. Darby has, it's no support at all.

He then goes on 46.3 and says: (as read)

> The Goodyear assets required capital for ARO and recompletion of $22.6 millions over the next three years.

He doesn't identity the source of that information. We've searched and the best I can see it

it appears to have been an assumption that may have been made perhaps by McDaniel or at any rate by someone in the Goodyear presentation. But whatever the source is and whatever it is, its meaningless in assessing insolvency. If one is to look at whether PEOC required $22.6 million over the next three years in isolation it means nothing. What were the inflows? Without both sides of the income statement or both sides of the financial analysis, you don't know what impact having an obligation to pay some money over the next three years is going to be, is going to have. What's the timing of that payment?

Well, again without any information from Mr. Darby, who as I'll say in a moment, had access to all the information, what meaning are you ablet o draw from the existence of a supposed obligation to pay money for ARO or recompletion over the next three years? So again, on its own that is of no help in assessing the insolvency of PEOC as a result of the Asset Transaction.

So Mr. Darby then concludes though based on those statements: (as read)

> That as a result of the Asset Transaction PEOC had no property which, at fair valuation, was sufficient to enable payment of its obligations.

Which as I read it is a conclusion essentially that it failed the balance sheet test as a result of his complaints about the cash flow or his complaint based on the financial statements. Paragraph 57 is also quoted there and it talks about the municipal taxes that we now know are $1.57 million.

Mr. Darby also now has his entirely new approach to insolvency in his affidavit that he filed late last week attaching the PEOC financial statements and in the Trustee's brief and I'd like to just ask you to turn to paragraph 52 of our brief, which responds to that.

THE COURT: I'm there, sir.

MR. MCDONALD: And this is dealing with the Trustee's argument based on the Perpetual Energy Inc. consolidated financial statements. We say: (as read)

> The Trustee attempts to use those financial statements to demonstrate that ARO associated with the Goodyear assets exceeded the Goodyear assets recorded on the balance sheet by $19.2 million and conclude from that that Perpetual was insolvent following the Asset Transaction on the basis that the aggregate of its property would be insufficient to satisfy all of its obligation due and accruing due, which would include the $128 million in decommissioning obligations on that financial statement.

Again, I'm not going to repeat what's in this brief and what I said this morning about reliance upon Perpetual Energy Inc.'s financial statements as proof of the fair value of the assets as listed on those statements or the fair value of the abandonment and reclamation obligation, listed on those statements. They're, as you well know, not representative of those -- those two things and yet the Trustee tries to develop and argument that the difference of $19.2 million somehow, on a financial statement basis, somehow is proof of insolvency.

I might say that that brief, our brief that is, addresses such thing as says timing of payment, discount rates used and other variables that can materially affect the numbers that appear in the financial statement and indeed a different discount rate used by CNRL or Cenovus as compared to Perpetual have a material difference in the ARO calculation. That argument is set out in writing and because the whole financial statement says that it's evidence of fair value argument is hopeless and I won't take you through that.

What I didn't mention this morning that applies primarily to this argument, but also to the second issue, is just to remember that the Trustee had an obligation to put its best foot forward. It had the evidence that appears in Ms. Rose's 2018 affidavit, Mr. Schweitzer's 2018 affidavit and Mr. Schweitzer's 2020 affidavit that I just referred you to. There's a lot of evidence in support of this application, supporting the proposition that PEOC was not rendered insolvent as a result of the Asset Transaction.

So the Trustee knows it has to put its best foot forward, it has all of Sequoia's records for the 18 months following the transaction. It didn't produce one Sequoia financial record that might help to support its allegations. There's not one bank statement. There's not one revenue statement. There's not one expense statement. There are no records of capital or operating expenses or the timing and payment of abandonment and reclamation costs or any supposed inability to pay following the Asset Transaction.

And that, in itself, is very telling and not addressed at all by the Trustee, but it's even more telling when we look at the uncontradicted evidence that's on the record that points to Sequoia's solvency well beyond the Asset Transaction and on that point, I'd like to ask you to refer to paragraphs 80 through 93 of our brief.

THE COURT: I'm there, sir.

MR. MCDONALD: And this provides in some detail the evidence that shows the initial success that Sequoia had, the additional acquisition of assets, the successful abandonment of 150 wells and I believe 91 reclamation certificates and then the collapse of gas prices in the fall of 2017.

So paragraph 80 and I've footnoted all the evidentiary support for the propositions in these paragraphs: (as read)

> It continued to operate and acquire public assets including an additional 800 gas wells. It closed out of its gas marketing contract in the summer of 2017 thereby losing the benefits of the price protection on approximately 90 percent of the production from the Goodyear assets. Natural gas prices collapsed.

Just point out for your reference the *Singh* case referred to in the last sentence of paragraph 81 where the Court has held that: (as read)

> Where a downturn in the economy coincided with a transfer the challenging economic circumstances may explain the subsequent insolvency.

Clearly the timing is different here in this downturn of the economy and the demise of Sequoia didn't happen for over a year after the transaction. But one doesn't examine section 96 in isolation from an understanding of the surrounding economic circumstances.

We know that we have the exhibits to Mr. Schweitzer's 2018 affidavit, the letter dated March 26th, 2018 from Sequoia's Board of Directors and Management, however, I don't want to repeat it if you're familiar with it, as I expect you are. But if you need refreshing, I can take you to it.

THE COURT: I'm fine, sir, on that point.

MR. MCDONALD: Okay and it goes through much of what I have just mentioned and what's summarized in paragraph 82 of the brief. It goes through the causes of Sequoia's insolvency and summarized or quoted in paragraph 83 of the brief and then similarly referenced in paragraph 84, we have the Trustee's preliminary report that corroborates all this and once again, I'll take it that because we referred to these documents in the past, that I don't need to take you to it, but it too is an exhibit to Mr. Schweitzer's 2018 affidavit and it too explains the success that Sequoia had for the year or so following the transaction and then the cause of its demise.

Paragraph 85, we point out that while there's complaint about PEOC being unable to -- or excuse me -- Sequoia being unable to pay the 2016 municipal taxes, following the Asset Transaction the evidence is that PEOC was able to pay and did pay those taxes and you'll see reference to that at paragraph 85. There were also agreements entered into with

municipalities with respect to some property tax extensions.

And in paragraph 87, there's reference to the forecasting done at least at the time of the Asset Transaction, that with the benefit of gas marketing contract and a new operating model there wasn't an anticipate that PEOC would be rendered insolvent at all as a result of the Asset Transaction.

We've got another analysis of the balance sheet test and your table at paragraph 368 and your conclusion at paragraph 369, which I've quoted at paragraph 89 of the brief: (as read)

> In effect, the decision in *Redwater* extinguishes the Trustee's assertion that the Asset Transaction resulted in a significant net deficit.

If the Trustee had any intention of disputing that conclusion one would've expected significant evidence from the Trustee as it put its best foot forward and one would anticipate the Trustee, as the party in possession of PEOC's records had access to and to be able to muster the evidence if it exists. The Trustee put nothing forward.

So we conclude on this at paragraph 90, just as Your Lordship held that the *Redwater* extinguished the Trustee's public policy claim and the director claim. It also extinguishes the Trustee's *BIA* claim.

So the last thing I want to do then is address my friend's answers to this argument, the reason the Trustee says that indeed PEOC was rendered insolvent by the Asset Transaction. And as I understand the argument, the Trustee says consistently, but incorrectly, that ARO has to be considered separately as a deduction from the asset value and it is an obligation due and accruing due that would render Sequoia insolvent. And it's important to try to distinguish from this finding that ARO is not a liability to say, well okay, it's not a liability but it's an obligation due and accruing due and that's why Sequoia is rendered insolvent. Well the fundamental premise of the argument is wrong, whether you characterize ARO as a liability or an obligation, you don't count it twice.

But let's just pretend you do count it twice and let's consider the argument that ARO should be considered separately for the purposes of assessing solvency and even though it's a notional and contingent amount and referrable to an existing obligation; the ARO number has to be considered in the solvency analysis. And my friends rely on an interesting case for that that leads to a line of authority that I'm going to turn to now because at first blush, if you accept the premise that you deduct it from the value, it seems there might be some support for that and the case is the *Re: Stelco* restructuring case, which is found at tab 24 of the Trustee's materials.

THE COURT: I'm there.

MR. MCDONALD: And this is a case under the *CCAA* a 2004 decision of Justice Farley. The issue was whether a pension deficiency on a windup basis of $1 billion was an obligation due and accruing due for the purposes of assessing Stelco's solvency. And I'm going to take you through a few passages, over a couple of pages just before paragraph 1, it indicates that it was a motion by union that the steel company was not a debtor company as defined in the *CCAA*. And the first sentence of paragraph 3, Justice Farley points out: (as read)

> For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company …

And he goes on. So the questions was, was Stelco insolvent? If I could then ask you to turn to paragraph 11.

THE COURT: I'm there.

MR. MCDONALD: Stelco was quite unlike Sequoia in many ways, of course, but the purpose of the Stelco *CCAA* proceeding was to affect a restructuring of Stelco unlike the liquidation purpose of the Sequoia bankruptcy and that's an important distinction that I'll get to in a moment and that the authorities get to, as well.

Onto paragraph 50.

THE COURT: I'm there.

MR. MCDONALD: (as read)

> To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking in total; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

So that's the heart of my friend's argument. That's the high point of it and of course, the argument goes then like pension liabilities one ought to treat the entire amount of the ARO that might be required in however many -- there's 25 in Sequoia, (INDISCERNIBLE) in Perpetual's cases, 60 in Canadian Natural case and effectively collapse them as Justice Farley seems to be describing for the purposes of determining whether an obligation due and accruing due.

Onto paragraph 57 on the next page.

THE COURT: I'm there.

MR. MCDONALD: (as read)

> With the greatest of respect for my colleague, I disagree with the conclusion of Justice Ground J. in Enterprise Capital Management …

And here's where the divergence comes in on this line of authorities, I'm going to take you to Justice Ground's decision in a minute, but I just wanted to highlight that it's clear that Justice Farley disagrees with *Enterprise*.

And there at paragraph 59 he summarizes his conclusion when he says: (as read)

> It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods*. At least at some point in the future. Again, I would refer to my conclusion above that every obligation of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation [that's a balance sheet test], it is crystallized on the date of the test.

So I'm sure we'll hear more about *Stelco* from Mr. da Waal. What I'd like to take you to is the *Enterprise* line of authorities and explain why it's the better line of authorities generally and ought to be preferred in the case in the context of a bankruptcy as compared to a restructuring.

For that purpose I need to refer to the brief that we filed in reply to the Intervenor's at paragraphs 30 through 33.

THE COURT: I'm there, sir.

MR. MCDONALD: I'd just point out paragraph 29: (as read)

> First ARO forms a fundamental part of the value of the licensed assets.

If you agree with that and this is a bit of an academic exercise we're about to do but it's my friend's argument and I want to respond. Paragraph 30: (as read)

> Second for the purposes of determining whether a company is insolvent it is inappropriate to include every debt payable at some future date for the purpose of determining insolvency as this would render numerous corporations insolvent.

And I'm going to take you through the cases cited very briefly because they illustrate why the *Stelco* authority is not one that should be used in the Sequoia analysis. And the first case I'd like to take you to is the *Enterprise Capital Management* case, which is at tab 3.

THE COURT: Tab 3 of? This A, B, C, D?

MR. MCDONALD: Yes, tab 3 of the brief we filed in reply to the Intervenor's briefs.

THE COURT: Yes, mine are tabbed A, B, C, D, sir. Just to be clear this is the one you filed on September 28th, is it not? Oh my apologies -- there's -- they were just hidden by tabs A through D, but I'm now with you.

MR. MCDONALD: Right and just for reference, A through D are the transcripts of the Intervenor's cross-examinations.

THE COURT: Yes.

MR. MCDONALD: And then the authorities start with the numbered tabs.

THE COURT: I'm there, sir. Thank you.

MR. MCDONALD: So I'm on numbered tab 3, *Enterprise* case, decision of Justice Ground in 1999. It's another *CCAA* case and it's an application by *Enterprise* which was a noteholder for a declaration that the *CCAA* applied to a company called *Semi-Tech* and the issue in the case was whether *Semi-Tech* was insolvent. I'd ask

you to turn to paragraph 15.

THE COURT: I'm there, sir.

MR. MCDONALD: So the issue dealt with notes not ARO, but as the Court says at paragraph 15: (as read)

> It therefore becomes necessary to determine whether the principal amount of the Notes constitutes an obligation "due or accruing due" as of date of this application.

And then the Court at paragraph 17 describes the analysis that it goes through: (as read)

> Whatever relevance such definition [the definition of accruing due set out above] may have had for purposes of dealing with claims by and against companies in liquidation under the old winding up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for purposes of the *BIA* and therefore the *CCAA*. [I'm going to skip a few lines that refer to a US case] In my view the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

So you can see the sharp contrast between *Stelco* and *Enterprise* and in my submission the analysis in *Enterprise* is to be preferred to that in *Stelco* generally, including for as Justice Ground says, "long term debt". But more especially in the context of the Sequoia bankruptcy and in the context of something like ARO if one wants to consider it as deduction of some sort.

Next case I'd like to refer to as at the next tab, *Reliance Insurance Company*.

THE COURT: I'm there, sir.

MR. MCDONALD: And we've included this case even though the facts are complicated and not particularly helpful because it's an example of the Ontario Superior Court, in this case Justice Pepall in 2008, considering both *Stelco* and *Enterprise* and preferring *Enterprise* particularly in the liquidation context.

And for that I'd like to prefer you to paragraph 35.

THE COURT: I'm there, sir.

MR. MCDONALD: About a third of the way down the paragraph he refers to the *Stelco* decision and then a few lines down refers to *Enterprise* and then starting after the quote: (as read)

> His [referring to Justice Ground in *Enterprise*] interpretation of obligations due and accruing due was followed in *Re Les Oblats de Marie Immaculee* du Manitoba.[28] Leaving aside the appropriate test to be used under the *CCAA*, it seems to me that Ground J.'s analysis of "obligations accruing due" under the *CCAA* should be applied to the term "debts accruing due" under the *WURA*, [Windup & Restructuring Act] a statute with a liquidation history and focus.

And certainly the *BIA* in the context of Sequoia's bankruptcy is a statute with a liquidation history and focus.

The final case on this point is the next tab, *Industries Cover Inc.*

THE COURT: I'm there, sir.

MR. MCDONALD: And it's a case that deals with a lot of issues that are not relevant to us but there's a section that I think is important to our case and I'd ask you to turn to paragraph 410.

THE COURT: I'm there, sir.

MR. MCDONALD: And you'll see highlighting through the page that is analyzing text C, that's the balance sheet test, considers the realities that exist for a company, for example at paragraph 415 says: (as read)

> Based on the preponderant evidence, the Court finds that there is no

> "sufficient certainty" that these contingent claims of $42M existed or that they would even come to exist in the future.

417: (as read)

> The Court cannot accept Guardian's simplistic argument that Test C should be applied, to all intents and purposes, blindly or in a void by virtually ignoring Cover's present financial condition, its capacity to generate revenues under normal circumstances, its capacity and willingness to continue to honour valid claims made under its warranty program, as and when they are filed with Cover.
>
> The Court cannot ignore either the reality of the present case.

And the reason we put that to you is that you can't ignore what happened to Sequoia in the 18 months following the transaction. And to accept my friend's proposition and follow *Stelco* and collapse ARO if that was something even possible to do for the purposes of the insolvency analysis, completely ignores the reality of what happened in the time after the closing of the transaction.

And the conclusion that Justice Pinsonnault reaches is on the next page at 422: (as rad)

> The Tribunal is in total agreement with the following comments of Justice Ground in the case of Enterprise Capital Management Inc.

So although those comments fit better with a liquidation situation, but they fit better or the *Enterprise* analysis fits better when one considers the reality of the situation.

The bottom line on that, like the journey through a few cases, is that the *Stelco* authority is not of any assistance if you find it necessary to consider the argument, of the competing lines of authority, the *Enterprise* line is the one to be preferred.

There's just a couple of loose ends that I need to address on my friend's argument on rendered insolvent. One argument he says that -- at paragraph 129, there's some inconsistency in Mr. Schweitzer's May 5th affidavit. I think that's the same supposed inconsistency that I addressed earlier this morning and I don't think there's any need to address that further. Yes, it's just repeating the argument about the contrast between the affidavit in this application and the affidavit for security for costs. I've made my argument on that.

Paragraph 134 of my friend's brief, the Trustee's evidence is that ARO associated with the

Goodyear assets transferred to PEOC represented costs of $218 million. It illustrates what I've been saying about the misunderstanding of ARO. It is not a cost let alone a fixed sum liquidated number of $218 million.

And then at paragraph 136, my friend also makes the argument about the disclosure of ARO on the 2016 Perpetual Energy financial statements. And what my friend does not raise in his brief is anything to address the reality of Sequoia, the successful operations for a year or more until the collapse of the natural gas prices, as *Industry Cover* referred to, "the reality of the situation".

That's all I have to say on the third issue, My Lord. As I started, I simply say that whether you consider the application to strike or whether you consider the application to summarily dismiss on all three of the issues, in my submission the propositions we've brought before you are correct and on any of those issues, the entire *BIA* claim, that is everything remaining in the statement of claim should be struck.

Thank you, My Lord, that completes my submission.

THE COURT: Thank you Mr. McDonald. I certainly may -- I expect to have questions, but I'll wait until all parties have spoke to matters. Thank you.

Mr. de Waal would you like to step up next and should we take a break at this juncture? That's just a question, sir.

MR. DE WAAL: My Lord, if we can take a 10 minute break, I will certainly be next, I'd just like to stretch my legs, as well.

THE COURT: Okay. So let's adjourn for 15 minutes unless there's any business we need to address?

MR. DE WAAL: Thank you, My Lord.

THE COURT: Thank you. Hearing none if we could adjourn for 15.

(ADJOURNMENT)

THE COURT: Please be seated. Madam clerk. Mr. de Wall, at your convenience. I just will acknowledge that I did get an email with a case and I think some statute attached to it so I can access that electronically if need be.

Submissions by Mr. de Waal

MR. de WAAL: Thank you, My Lord. (INDISCERNIBLE) to my friends on Tuesday. So, My Lord, I propose to make some general submissions first before I get into the structure of my argument because I think that will be more productive. The first comment that my learned friend made this morning was that there has been a flurry of activity over the last few days, I think he said. The one thing that has not happened is that, despite the objection that Darby's affidavit is prejudicial, and is surprising and that there needs to be context provided to the financial statements in particular, and that will be provided through cross-examination of Mr. Darby, And although Mr. Darby made himself available there has been no cross-examination of Mr. Darby. And we understand that because we say his affidavit really says nothing new and it just puts the Perpetual financial statements on the record. What the context would be I don't understand, My Lord, but I'll take you to the financial statements in a minute here. My friend did not agree with that but we say for obvious reasons, but we'll take you to that in a few minutes.

The second point I want to make, My Lord, is that we accept in principle that (INDISCERNBLE) that is that the ARO is embedded in the body of an asset. And that is so because the cases say so. It doesn't necessarily mean that Perpetual or any other corporation account for those ARO numbers in the reflection on the financials of the value of assets. So they're two separate things. One is from the perspective of a potential purchaser, for example. Or if you look at the transaction from a tax perspective, is ARO separate from the inherent value of the asset? And the answer to that is one thing in principle. The second separate question is how is ARO accounted for, what is represented to the market, what do we see the public disclosure of a corporation? And a related question, we know that a provision for future abandonment liabilities or costs is required, why is a provision required and how is that reflected in the financials?

The third point, My Lord, we accept that -- well, there's a general statement that ARO is not a liability. But again, the question -- the real question is how is ARO accounted for to determine in the context of a section 96 application whether the consideration given and received is comparable or reasonable and to consider whether the debtor, the insolvent, provided or was solvent at that time as a result of the transaction -- or at the time of the transaction. Finally is the general proposition. We accept that accounting itself does not create liabilities and I think that speaks for itself. The problem though is that accounting may confirm existing liabilities. So the accounting in all of these general situations would provide the evidence to show what the actual position is regardless of whether in principle it changes anything. So again, just to repeat that, we accept that accounting does not create liabilities but we say that the accounting, particularly in a public company, will provide a very clear indication of where the existing liabilities were confirmed in the financials.

So with that, My Lord, as a background I want to refer you to the financials, which is Exhibit 1 to Mr. Darby's September 22nd affidavit. And these are audited financial statements for 2016.

THE COURT: Just bear with me, I have to bring it up electronically but I know I've got them. I'm just going to bring them up electronically. What's the date on that particular document?

MR. DE WAAL: My Lord, it was sworn on September 22nd but it was filed on September 23rd.

THE COURT: Just bear with me.

MR. DE WAAL: I understand the Court would have received this on the 25th, My Lord.

THE COURT: Okay. Go ahead, sir.

MR. DE WAAL: Thank you, My Lord. Now the first three pages are numbered in the bottom right-hand corner and then the first page after that is the consolidated statements of financial position. So it's a consolidated statement for Perpetual Energy Inc. and I'm just going to run through this fairly quicky, My Lord, but I do want to make a few points. One is as typical and is obvious you have -- on a statement like this you have assets, liabilities, and equity. There's nothing else. And if something's reflected on this statement it will either be as a category of assets, or liability typically, or equity as we see in this case. And under assets we have property, plant, and equipment, $290 million in -- as of December 31st, 2016. And there's a separate line item under liabilities were have current liabilities and under current liabilities we have provisions and there's a reference to a Note 13. And then the provisions under current liabilities add up as part of the total liabilities, and then we have equity obviously.

So again, just to address -- and I'm trying to just make a point simply, My Lord, that there is not provision that's not a liability. It's reflected on a statement like this under liabilities for accounting purposes. I'm not suggesting it's an existing liability or there's an existing creditor or anything like that but a provision for accounting purposes is reflected as a liability as it should be.

Then, My Lord, if you would turn to page 9 --

THE COURT: So if I -- can I just pause you there, sir, just so I have that. You're saying it is a liability full stop?

MR. DE WAAL: No, I'm saying it's not a current liability but it's certainly not an asset and not equity and for financial -- for accounting purposes it is a liability. It's a sub-class of liability.

THE COURT: Okay, I'll take that under advisement. Thank you. I just want to make sure I heard you right, sir.

MR. DE WAAL: Yes. And then page 9, My Lord. These are the notes to the consolidated financial statements and at page 9 under 'C' you're finally getting significant estimates --

THE COURT: Thank you.

MR. DE WAAL: -- and (INDISCERNIBLE) getting provisions for decommissioning obligations. (as read)

> Decommissioning, abandonment, and site reclamation expenditures for production facilities, wells, and pipelines are expected to be incurred by the company over many years into the future. Amounts recorded for decommissioning obligations and the association (INDISCERNIBLE) are calculated based on estimates of the extent, the timing of decommissioning activities, site remediation regulations and technologies, inflation, (INDISCERNIBLE) specific discount rates and related cash flows.

And then it says: (as read)

> The provision represents management's best estimate of the present value of the future abandonment and reclamation costs required. Actual abandonment and reclamation costs could be materially different from estimated amounts.

So what we have as the provision on these statements is management's best estimate -- not of a future value but the present value of those future costs that will be required. And again, it's not -- it's not a number that one can take lightly because it's management's best estimate presumably based on (INDISCERNIBLE) numbers and all kinds of other information that goes into that estimate. So that number on the financial statement is a real number as far as it can be.

Then on page 16, My Lord, there's a Note 5, property, plant, and equipment. And if I could

refer Your Lordship to the bottom of that page under that note in the last paragraph: (as read)

> On October 1, 2016, the company disposed of a significant portion of the company's gas properties in east, central, and northeast Alberta, the shallow gas properties for nominal cash consideration.

Not fair market value or anything else. Nominal cash consideration and the assumption of $128 million of decommissioning obligations associated with the shallow gas properties resulting in a gain on disposition of $19.2 million. So again, the $19.2 million is not an amount that's now adopted by the Trustee as my friend suggested earlier. This is a real number from the Perpetual financial statement. And what we do see is that this relates to decommissioning obligations that have been valued at $128 million and have been assumed presumably by someone else. In other words, out of the Perpetual financial statement.

In addition the transaction included marketing arrangements described (INDISCERNIBLE), The company will receive additional consideration -- now (INDISCERNIBLE) this but you heard it from the opposite side. You've been told that this is additional value received by PEOC. In fact, the way it's disclosed to the public in the financial statement is that this is an additional consideration in favour of Perpetual and then it does say that there's (INDISCERNIBLE) to that to the extent natural gas average monthly (INDISCERNIBLE) prices exceed (INDISCERNIBLE) and then it says, "Additionally, the company has retained price exposure," and then if the price drops and there's price exposure. But the point is that this is not something that's obviously an additional value to PEOC. In fact, the way it was presented is an additional value to Perpetual.

The, My Lord, if you will turn to page 21 under provisions, the Note 13 provisions. In 2016 you'll see the decommissioning obligations at the beginning of the year were $159 odd million. Obligations (INDISCERNIBLE) is $129 million. And then the decommissioning obligations at the end of that year you'll see under that subtotal is $33 million. So that's what we have in the Perpetual financials for the year 2016. To make the picture somewhat clearer we have the interim financial statements at the time of the transaction and that you'll find at tab P for Peter to the affidavit of Paul Darby in August 2018.

THE COURT: Bear with me for a second, sir. And again, tab B did you say?

MR. DE WAAL: 'P'.

THE COURT: 'E?'

MR. DE WAAL: 'P', 'P'.

THE COURT: Yes, I'm there, sir.

MR. DE WAAL: Now, these are the condensed interim consolidated statements of financial position and it compares the September 30, 2016, position with December 31st, 2015. Just two numbers I want to refer Your Lordship to. Again, under assets we have the last (INDISCERNIBLE) before the first line, assets held for sale, number 3, and those are the Goodyear assets, $109 million. That's the value of those assets. And then we have under liabilities, liabilities associated with assets (INDISCERNIBLE), again Note 3, $131 million. And if we then go to Note 3 on page 5, you'll see that it refers to this particular transaction and that the liabilities associated with the assets held for sale are described as decommissioning obligations of $131 million.

So on the interim financial statement, first of all, there's no suggestion that the ARO number is somehow simply incorporated into the value of the assets. They are affected separately. And again, if we look at those two separate numbers and without ignoring any of the (INDISCERNIBLE) principles, if we look at the two separate numbers the decommissioning obligations exceed the value of the assets on Perpetual's own version in both sets of financials by a significant margin. So although the recording of the liability does not establish that liability, we know what the reality was for Perpetual at the time when the transaction was completed in October of 2016 and we know how Perpetual saw the separate decommissioning obligations as opposed to just simply (INDISCERNIBLE) of the assets.

I beg your pardon, My Lord. So the next document I want to refer you to again is in the Paul Darby affidavit at tab 2. I beg your pardon, My Lord, that's the original affidavit and it's Exhibit C. That's the August 2018 affidavit, Exhibit C. Sir, that's the Goodyear presentation again with Perpetual internal presentation at the time so there's no dispute -- should be no dispute from Perpetual's side about what these numbers all mean. And if you turn to page 9 of that presentation -- and it's numbered not very clearly but at the bottom of the page on the right-hand side. So at page 9, My Lord, you'll see we have at the top there's a heading Major (INDISCERNIBLE) Impact and it compares the status quo (INDISCERNIBLE) transaction. And with respect to ARO, which is the second last item on that page, we have the projected year end 2016 including salvage $123 million versus $35 million. This is the Perpetual expectation of the financial effect of the transaction on ARO in particular. And dealt with separately, accounted for separately, presented separately.

The at page 10, My Lord, just one point. The bottom of that page in red you'll see the Goodyear assets include 2200 net wells, 584 net producing status, 910 net shut-in or

suspended, and 727 net abandoned. So not all these wells were producing, not all these wells were shut-in. There was a mix which we'll come to in a second. If I can then, My Lord, ask you to turn to the pleadings which -- and in particular the statement of defence, which is in our authorities at tab -- at tab 10, My Lord.

THE COURT: I'm there, sir.

MR. DE WAAL: Thank you, My Lord. So this was the case as it was pleaded by Perpetual and despite that arguments that we've had and despite the different briefs that have been filed and the (INDISCERNIBLE), nothing's changed. So this is still the Perpetual position on the pleadings with (INDISCERNIBLE). And in paragraph 44 on page 14 we say: (as read)

> The Perpetual defendants expressly deny the allegations in paragraphs 13 and 14 of the statement of claim. The value of consideration given by PEOC is not 223 million.

And then paragraph B we can skip and then we go to paragraph C. It says: (as read)

> PEOC Sequoia's liabilities -- [not anything else] liabilities at the time of the transaction were comprised of the estimated future costs to be incurred over time by Sequoia in (INDISCERNIBLE) abandonment and reclamation program at a discount rate -- commensurate with a discount rate of the producing assets and were considered in the value of the Goodyear assets.

We have a reference to PEOC Sequoia's liabilities and that obviously is comprised of abandonment and reclamation obligations, ARO. So to the extent that you've heard arguments about whether ARO constitute liabilities or not, that's not an issue on (INDISCERNIBLE).

Then 'D': (as read)

> The value of PEOC Sequoia's liabilities at the time of the time of the transaction was approximately equivalent to the value of its assets.

So again, here reference to liabilities, nothing else. And it says, "at the time of transaction it was approximately equivalent to the value of its assets," which again, My Lord, contradicts the suggestion that we don't have two separate things. We don't have assets and liabilities or assets and ARO. There should just be one number because that's what (INDISCERNIBLE) says. In fact, Perpetual understood and pleaded that there are two

separate numbers and whether they eventually need to be taken together is one thing, but for these purposes we know that they are -- there's a concession that we're dealing with liabilities and those -- that they are constituted as liabilities.

In paragraph 48 on the next page, My Lord, page 16.

THE COURT: I'm there.

MR. DE WAAL: (as read)

> Prior to the transaction, PEOC was a bare Trustee and only held the legal interest in POT's oil and gas assets, contracts, licenses, and permits --

Again, POT was the Trustee which is just a relationship so the question is so who owns the beneficial interest? Is it the trust or is it the beneficiary of the trust? Then it continues: (as read)

> -- and held no beneficial interest in any property and had no material revenue expenses, assets, or liabilities. It was not insolvent.

So on the Perpetual version on the pleadings PEOC was the bare Trustee with no liabilities at the time of the transaction and this notion that you've heard today that really because it was the licensee in all of these liabilities and nothing really changed with the transaction are inconsistent for the pleadings.

If you would forgive me, I wanted to turn back to the Darby affidavit and the same Exhibit C that I referred you to a minute ago, that's the Goodyear presentation. And you don’t really need to turn to that if you don't want to but --

THE COURT: I'm there.

MR. DE WAAL: -- I want to (INDISCERNIBLE).

THE COURT: I'm there, sir. What page?

MR. DE WAAL: Page 22, and that's the page that's not numbered but it follows 21 obviously.

THE COURT: I'm there.

MR. DE WAAL: Right at the bottom, My Lord, again in red, "Goodyear represents approximately 71 percent of forecast yearend 2016 corporate liabilities." (INDISCERNIBLE) about calling these liabilities and they represent approximately 71 percent of the forecast yearend 2016 liabilities. So on a forward looking basis 71 percent of Perpetual liabilities will be captured in the Goodyear transaction.

My Lord, you were referred -- and I apologize if I'm jumping around but I believe this will shorten things and make the points. You were referred to the table that you referred to in your own decision and I -- I'll have a paragraph number for you in a second, My Lord, it's --

THE COURT: Paragraph 368.

MR. DE WAAL: Paragraph 368. So (INDISCERNIBLE) you were referred to the decision a number of times but one of the references was to this particular table in which you analyzed the financial result of the transaction and prepared the statement of claim allegations with the (INDISCERNIBLE) *Redwater* situation. And significantly, My Lord, you also distinguish between ARO and the assets. So insofar as your decision refer to it's not authority for the proposition that there's only one number and that's the asset number and that already incorporates liabilities so you don't need to look at ARO separately. So just for that reference, My Lord.

My friend in his submissions today, My Lord, seems to adopt the $5.6 million value that the trustee had put forward. I just had wanted to comment about that. You will recall, and you remarked on this in your reasons, that Perpetual stayed -- deliberately stayed away from any discussion of value in the initial application for summary dismissal. And (INDISCERNIBLE) evidence and they (INDISCERNIBLE) produced their evidence of value. In fact, the only evidence we have was Mr. Schweitzer (phonetic) saying we need to retain experts to determine what the values were, we haven't done that yet, it's gonna cost a lot of money and we don't wish to do that. So really the Perpetual side has presented no number to you whatsoever except today we (INDISCERNIBLE) the 5.6 number is a number that Perpetual seems to be happy with.

The point of that, My Lord, is that that numbers comes from the McDaniel report or it's based -- it's the Receiver's number that the Receiver obtained from the McDaniel report. And what is significant about that number, My Lord, is that -- and is (INDISCERNIBLE) at the Darby initial affidavit, Exhibit N for November.

THE COURT: I'm just scanning to here electronically.

MR. DE WAAL: It's close to the 'N', My Lord.

THE COURT: Okay, thank you.

MR. DE WAAL: So in Exhibit N we have the Trustee's estimated valuation of the PEOC transaction but the point is in the notes. And you'll see in the second paragraph under Note A the Trustee notes that

> The reserve report value of $5.8 million includes an estimate of value in costs for those wells included in the report --

And that's important. The wells included in the report.

> -- (approximately 650 wells as well as estimates for salvage value.) For this reason, the value amount included 'B' may be overstated, however, the Trustee does not consider it to be material to this analysis.

The point is, My Lord, that the report and the valuation dealt with 650 wells out of the 2200 that we've seen on the Goodyear presentation of 2500 that was eventually involved. And you'll recall, My Lord, this ties in with that page of the Goodyear presentation that broke down the wells into producing, non-producing, shut-in, et cetera. So insofar as we are looking for an ARO number the value -- the positive value of the assets involved only relates to 650 of all the wells and not excludes in other words all the other wells. And we would expect that ARO with respect to those wells will then not be included in the value of the wells that are listed in the report. The ARO number will be substantially higher.

However, My Lord, we should not really be talking about numbers in an application for summary dismissal. What the application is based on is an argument in principle that ARO are not liabilities and that they are therefore not to be taken into account in adjusting -- in assessing whether there was adequate value or whether this was a transfer undervalue (INDISCERNIBLE). And secondly, whether insolvency at the time of the transaction or whether the transaction rendered PEOC the debtor insolvent. So it's not about the number because you don't have evidence of the different numbers. It's about whether in principle those should be excluded.

My Lord, before I get to the structure of my brief there are one or two other things I need to refer to perhaps at the outset before I get into that. If you would turn, My Lord, to my friend's brief served on -- sorry, my friend's brief served in response to the Trustee's brief. In other words, the ones filed on September 30, 2020. That's a reply brief.

THE COURT: I'm there, sir.

MR. DE WAAL: Thank you, My Lord. And if you turn to paragraph 19 on page 5 --

THE COURT: I'm there, sir.

MR. DE WAAL: -- you'll see that -- so mention is that in 2018 Mr. Darby admitted that ARO is not a liability and that for accounting purposes it was classified as a provision, which means it's uncertain in both and not (INDISCERNIBLE), it depends on many variable factors. It can only be estimated. And then you have a reference to the transcript in which -- where Mr. Darby allegedly made this admission. My Lord, I assume you have access to the transcript but I can read the pages that are referred to from page 90 line 24 to page 95. And there's nothing in there that constitutes an admission that ARO is not a liability. In fact, what happens is Mr. Leitl is putting to Mr. Darby certain questions. On page 91, for example -- I don't think Your Lordship has access to the transcript so I'll just read this.

THE COURT: Just hold for a second, I have access to it.

MR. DE WAAL: Thank you, My Lord.

THE COURT: What page again, sir? I'm at the transcript.

MR. DE WAAL: Ninety, My Lord, 9-0.

THE COURT: I'm there, sir.

MR. DE WAAL: And it starts at the bottom of the page, line 27: (as read)

> Q You're familiar with IFRS?
> A Yes.
>
> Q Can you remind me what that stand for? This is my ignorance.
> A International Financing Reporting Standards.
>
> Q And you're familiar with IAS, International Account Standards, the concept of them?
> A Yes.
>
> Q You'll agree that under IAS the liability is a present obligation?

A I don't read their definition.

Q Maybe I can help. This is a printout from PricewaterhouseCooper's website, you can confirm that, yes?
A Yes.

MR. LEITL: Can we mark this as the next exhibit?

And then Mr. Leitl in line 19: (as read)

Q You'll agree with this statement of your firm that a liability is a present obligation of the entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits?
A Yes.

Q That's how liability is defined?
A Yes.

Q And that's distinct from a provision which is a liability of uncertain timing or amount?
A Yes.

Q Right. When you talk about the liabilities of PEOC you talk about it in terms of provision, right, what ARO is provision. ARO is provision municipal tax would be a liability. And you will agree with me that in terms of estimating asset retirement and environmental obligations that involves a highly judgmental and nuanced process. I believe there's a lot of data --

And then it goes on, My Lord, and I don't need to read the whole section that's referred to but there's no admission as it's called that ARO is not a liability. In fact, if you read on page 92, line 5, when you talk about the liabilities of PEOC you talk about it in terms of the provision but just before that it says distinct -- that's distinct from a provision which is any liability of uncertain timing or amount is a liability. The only distinction is it's uncertain timing and amount, which is what we see in the financial statements. But Mr. Darby does not agree. He says that the distinction between a provision and a liability such as municipal taxes but he never says that a provision is not a liability.

The next submission, next paragraph, is it's remarkable that the Trustee, an accounting firm, relies on non-accountants with no understanding of it to undermine their own witness, Mr. Darby, an accountant, on whether ARO is a liability or a provision. And that submission doesn't really make sense to me, My Lord, but presumably the reference is to the interveners. It doesn't say that but that's the only way I think I can read this. And the suggestion is that these interveners in saying that a provision is in fact a liability is somehow undermining Mr. Darby's admission in the section that I just read. First of all, there's no admission. Secondly, the interveners are not anybody that Mr. Darby or the Trustee relies on. They have their own views of what is what. And the suggestion that an accounting firm should somehow be in a better position to comment on this, My Lord, is not a (INDISCERNIBLE).

Then over the page, paragraph 21: (as read)

> It is equally remarkable that the trustee is trying to argue that ARO is a liability after Mr. Darby and (INDISCERNIBLE) counsel both acknowledge it is not.

It is not. So what we take issue with again, My Lord, is that Mr. Darby somehow acknowledged that it's not a liability. And then the next reference is to the section where presumably I as the Trustee's counsel acknowledged that ARO is not a liability. And that reference, My Lord, is at page 255 of the consolidated transcripts of -- there was initial hearings in November and December. And if Your Lordship has those -- I'm not sure whether Your Lordship wants to find those but I can just -- it's two pages, I can just read it to Your Lordship. Otherwise --

THE COURT: Just let me -- I have access again, sir, just let me go to that. What was the date of that particular page?

MR. DE WAAL: My Lord, there's a consolidated transcript of November 8, 9, and December 17, 2018. But it's one transcript.

THE COURT: Yes, I don't have the consolidated, I just have them by date.

MR. DE WAAL: My Lord, it's page 255 so presumably it's the later one, not the earlier one.

THE COURT: Just give me a second here. For some reason I don't have those consolidated numbers often on the transcripts, Mr. de Waal. Give it to me and maybe someone here can send me the consolidated transcript because I've got them by

date but they only go from page 1 to whatever each day.

MR. DE WAAL: We'll do that, My Lord.

THE COURT: Thank you.

MR. MCDONALD: May I interrupt, I'm sorry, My Lord. Check page 110 of the non-consolidated version. I think that's the page that my friend is referring to.

THE COURT: Okay, bear with me.

MR. DE WAAL: Thank you.

THE COURT: I'm at page 110 now. Thank you, Mr. McDonald.

MR. DE WAAL: My Lord, it should start with "Under note A, second paragraph." That's at the top of the page if you have the right page.

THE COURT: Yes, thank you.

MR. DE WAAL: Thank you, My Lord. So the reference is to line 29 on this page, that's where the reference starts: (as read)

> THE COURT: I know we're touched on this ad nauseum today but ARO is a provision, municipal tax would be a liability. That's Mr. Darby's comment. Again, (INDISCERNIBLE) that we do not have liability with the ARO.

And I say, My Lord, again, ironic as Mr. Leitl would say, that this opinion, they're fine with that. Mr. Darby thinks -- he says he thinks this is not a liability and they're happy with that. The point is though, My Lord, that the issue is not whether there's a liability. If you look at the (INDISCERNIBLE) case -- and I continue to address something that's not really Your Lordship's question -- answer to Your Lordship's question. Over the page though Your Lordship asks for further comments and I say: (as read)

> MR. DE WAAL: I thank, My Lord. On that same point that's confirmed I think as inextricably linked. That's confirmed in the agreement and it's confirmed in the response, my friend's response to question 5. So the negative value aspect was inextricably linked to the value of the properties. If I can make one --

And I'm not sure whether Mr. Leitl misunderstood me and then Your Lordship says: (as read)

THE COURT: When you say negative value you're talking about --

MR. DE WAAL: [And then I say] The ARO that's called liability.

THE COURT: Potential obligation.

MR. DE WAAL: [I say] Indeed, My Lord. So underline potential, you're agreeing with that. It's a future, it's not even potential but it's a future. Certainly a future obligation. If you drill a well you have that obligation. It's not a potential obligation. Well, the law can change. You could sell the well and make it somebody else's obligation. But it's still an obligation.

THE COURT: The law can change.

MR. DE WAAL: [I say] It could.

THE COURT: [Your Lordship says] Regulations can change.

MR. DE WAAL: Yes, My Lord.

THE COURT: At this point is it not potential, is it not?

MR. DE WAAL: [And then I say] At this point it's a real obligation, My Lord.

THE COURT: Pardon me?

MR. DE WAAL: At this point it's a real obligation. It's a future obligation but it's an obligation.

THE COURT: [And the Court says] Okay, I'll

take that under advisement but it's not a liability.

MR. DE WAAL: [And I say] My Lord, here provision is a form of liability. That's what the rules say, the accounting rules.

So I don't read anything in there, My Lord, as an admission or an acknowledgment that ARO is not a liability. Now, this seems insignificant, My Lord, but in the context where much is made of the fact that the position on liability and whether ARO is a liability has in face been conceded and what's happening now with the interveners is they're trying to claw that back somehow. My Lord, that is in fact relevant and significant.

Now one or two other general comments. First of all, in a striking application, in particular -- this particular striking application relates only to section 96 of the *BIA.* That's all that's left. And what Your Lordship has to do, as my friend said earlier, is look at the pleadings, not evidence, and decide whether there's a reasonable cause of action made out on the pleadings. And if not, Your Lordship will strike that claim. Now, how that is different from what happened in November and December in 2018, well, I really don't see. At that point there was a striking application, Your Lordship looked at the claim as it was pleaded and determined that the claim should not be struck. And if the claim shouldn't have been struck then, nothing has changed, My Lord, except we now have a new attempt to get the same relief, perhaps based on a different argument. But as far as the striking application goes, if the claim is good in November 2018, it's still good today for the purposes of considering whether it should be struck. So all we should really be focusing on is whether that particular claim should be dismissed summarily regardless.

My Lord, it may be convenient now for me to refer to that case that you were sent by email. My friend argued earlier that the line of cases that he said contradicts the *Stelco* position. He said that really there should be a narrower test and you should not -- not simply regard any future liabilities as liabilities for the purposes of determining whether there's solvency or not. The first submission I'd make, My Lord, first of all is that -- not (INDISCERNIBLE) two lines of authority but they're also applying different circumstances. In the *Stelco* case there's an existing bankruptcy and in all these other cases -- in fact, there was one where there's an assignment into bankruptcy -- but in all the other cases the question is whether those future liabilities or continued liabilities even should be taken into account in putting somebody into bankruptcy. And what those cases say is you should apply a narrow test because the objective is to keep people out of bankruptcy rather than making it easy for them to get in.

What *Stelco* says is not inconsistent with that. *Stelco* deals with the situation where there's an existing bankruptcy and in the context of a section 96 case or the *Stelco* case the CCAA

but in the context of a section 96 claim we're not dealing with the liquidation situation and we are in fact looking at for the purposes of solvency -- under the *BIA* we're looking at remedial legislation which should be interpreted given a fair, large, and liberal construction interpretation as best ensures the attainment of it's objects. And those are the two authorities we've sent Your Lordship. The on is the *Interpretation Act* and the other in fact is a case from the B.C. Supreme Court in the context of a section 96 claim, the *Anderson* case. And at paragraph 10 the Court found that: (as read)

> There was no compelling evidence or argument suggesting that Glenn Anderson was not insolvent in August 2005, if his contingent liabilities [not even future liabilities but contingent liabilities] on guarantees are to be included as debts accruing due. I agree with the Trustee that the weight of authority favours his position that they should be, and thus that element is satisfied.

So in the context of a section 96 case, My Lord, we say the (INDISCERNIBLE) application applies. *Stelco* is good authority for that. We're not dealing with the situation where Your Lordship has to consider whether there should be bankruptcy proceeding or there should be a liquidation.

My Lord, I now propose to turn to my arguments as we set them out in the brief and because I've made these initial submissions I believe I -- I will probably go a lot quicker than I would have anticipated. The first point to address, My Lord, is our submission that this application is an abuse of process. I already made the point, My Lord, that with respect to the striking of the section 96 claim that has been argued and that has been determined. And whether there's a new argument or something that somebody has forgotten or put in a different -- in a different guise is not relevant as long as Your Lordship has already determined, as you have, that the claim should not be struck. So at least that aspect of the present application, My Lord, has already been determined and bringing that same application again is an abuse and I don't think there can be any argument. Of course, there will be but what I'm suggesting, My Lord, there cannot be a valid argument against that.

The second point I should make, My Lord, is we have the two affidavits from Mr. Schweitzer and although I recognize that they both relate to different time periods the essence of the distinction between the two are the same records on the same day, is whether ARO is to be taken into account as determining the value of the estate. And in the one affidavit -- the one in the application for security for costs where for the purposes of the application the applicant would want the estate to be unable to pay costs so that -- or to afford to paying costs so that there would be an order for security for costs. In paragraph 27 of that affidavit Mr. Schweitzer says: (as read)

> According to the above information and based on my understanding the Supreme Court of Canada's decision in *Redwater*, namely that the obligation of an insolvent company to perform asset retirement obligations is binding on the Trustee in bankruptcy and must be performed prior to payment of unsecured creditors. It appears the unsecured creditors of Sequoia stand to recover little or nothing.

And then he quotes from Mr. Darby's cross-examination and he agrees that these -- and this is over the page to page 9 -- that these are assets of marginal value. And the reason for that is because of the asset retirement obligations that have to be taken into account in assessing what that value is. So that's his position when he wants the estate, for the purposes of the application at least, not to be able to pay costs.

When we're dealing with summary judgment though, summary dismissal application, the affidavit states -- and this is paragraph 11 of the affidavit: (as read)

> PEOC was not insolvent at the time of the asset transaction. The positive value of the Goodyear assets PEOC held in trust for POT exceeded the value of any associated liabilities.

And then he goes on over the page on page 4, paragraph A, paragraph B, and then more significantly paragraph C he says: (as read)

> PEOC had no other liabilities. (i) ARO is not a liability.

So for the one purpose ne makes much of the fact that the ARO liabilities or the ARO associated with these assets are significant and they reduced the assets to marginal value assets. And on the other hand I'm saying that he says that there's a positive value and the ARO can be ignored. It doesn't -- it's not a liability. And we say you cannot do that. Justice Brooker said so in *Mystar*. And it's not just allegations, this is evidence. Justice Brooker said so in *Mystar* which is tab 1 of our authorities. And in the second reference I want to refer you to is the *Pocklington Foods* case, My Lord. That's at tab 3 of our authorities.

THE COURT: I'm there, sir.

MR. DE WAAL: And on that page I refer Your Lordship to everything that's highlighted you'll be happy to know. But on page 4 (INDISCERNIBLE) the bottom of that page --

THE COURT: I'm there.

MR. DE WAAL: -- where it says "he continued": (as read)

> The principle of res judicata or issue estoppel lies in what is just and reasonable. Applying that notion to an assertion that a ruling on an interlocutory application is res judicata when the same issue is raised in a subsequent interlocutory application in the same action, it will not be unjust and unreasonable to allow the second application to be heard for what is involved is not re-litigation of an identical issue of law or fact if …

And then there are four different situations in which *Pocklington* says it will not be a re-litigation of the identical fact in any one of these four situations. And we say and we provide the argument to support that that none of these exceptions apply. For example, the first one: (as read)

> If the ruling on the first application was not based on the merits of the issue but on a technical objection [is not applicable)]; if upon the first application the applicant failed to prove essential facts from mistake or inadvertence.

This is not one of those cases. This is in fact then the situation where it is unjust and unreasonable to allow a second application and that constitutes a re-litigation of an identical issue of fact in law. In paragraph 9: (as read)

> We accept this statement of principles governing the discretion of the chambers judge to entertain a second application on a procedural matter.

So that's the law. If you can bring yourself within one of those four exceptions you can have another go but if not, it is unjust and unreasonable to do so.

I'm not going to refer Your Lordship specifically to the Quinter (phonetic) decision, which is at tab 4 of our authorities but I do want to take Your Lordship to tab 5, the Court of Appeal decision in *Workum*. At page 3, paragraph 3 -- or paragraph 2, I should start there.

THE COURT: I'm there.

MR. DE WAAL: (as read)

> At the first application, Workum objected to PPI's use of the transcript claiming that it was hearsay. The chambers judge rejected

> Workum's argument based on Rule 305(3) of the *Alberta Rules of Court,* which permits hearsay evidence on information and belief to be adduced in support of interlocutory orders. The motion proceeded with the affidavit and its attached transcript.
>
> At a later application before the same chambers judge, Workum again applied to strike the transcripts from the affidavit alleging hearsay. This time, the chambers judge held that she could consider an argument not previously advanced regarding the hearsay evidence, and granted Workum's application striking the transcript.
>
> PPI appeals this decision, claiming that it constitutes an abuse of process. At the hearing of the appeal, we advised that the appeal was allowed with our written reason and here are the reasons.
>
> [And then it says at paragraph 5] The appeal is allowed for two reasons. First, we conclude that the chambers judge committed an abuse of process by allowing Workum to re-argue his case on the second application. Initially, the chambers judge decided to allow the transcript as admissible despite it being hearsay. At the second application, Workum relied on a legal argument supported by the Supreme Court's decision in *Walkerton v. Erdman*.
>
> [And then over the page, paragraph 6] This Court held in *Pocklington Foods "*where the second application seeks only to reargue the first application, or to make arguments which were available at the time of the first, it should be dismissed as an abuse of the court process, or as frivolous and vexatious."
>
> Nothing new arose from the time of the ruling on the first application and the second application to strike. All that was advanced was an additional argument that should have been made on the first occasion. That is exactly what *Pocklington* precludes.

So in this case, My Lord, any argument that, first of all, there was never a transfer. Could have been made, would still have been consistent with we say and what the pleadings and the evidence show. But there's no reason why that couldn't have been made. Any argument that ARO are not liabilities and therefore did not constitute one of the elements to be considered in considering a consideration or insolvency could have been made. And the fact that it wasn't made is the result of (INDISCERNIBLE) deliberate decision by the Perpetual defendants to restrict their initial application to one aspect only that

(INDISCERNIBLE). And there's no reason for them to do so but they chose to do so and for them to come back today with an argument they could have made and should have made then is an abuse.

We say that the abuse is so much greater in this case, and this is paragraph 18 of our brief, My Lord, because not only have you not petitioned for the same relief but essentially the same application on a different petition. So they're taking a different position than they had taken in the initial application. We now hear for the first time in this application that there never really was a transfer. Now, again, you would expect that to have been pleaded, first of all. There can be no application of section 96 because there never was a transfer. Or to have been argued before Your Lordship in November and December 2018. But it wasn't. Now for the first time we hear that there was no transfer.

In fact, the argument that was presented to Your Lordship on the first round was that there was a transfer but it was an arm's length because (INDISCERNIBLE) and there were two negotiating (INDISCERNIBLE) arm's length negotiating this transfer, which is completely inconsistent with the basis of the present application. And by the way, it's still the position of the Perpetual defendants in the appeal that's currently outstanding and is being heard in December. So at the same time before the Court of Appeal, Perpetual is taking one position whereas before Your Lordship in the application today it is a different argument that there never was a transfer.

My Lord, we say that it's also an abuse because it's inconsistent with the pleadings. And I've taken Your Lordship to the statement of defence and you'll see that there are pages of information about how this transfer occurred. What happened before, how the steps were planned and executed, and there was never any suggestion in that statement of defence in all those paragraphs to suggest that there never really was a transfer. In fact, the transfer is explained. That's exactly what's being explained.

Now, in paragraph 27 of our brief where we deal with that -- and I don’t propose to read all of that to you but this is the -- this is the quotes or extracts from the Perpetual statement of defence and you'll see in paragraph 24 POT transferred its beneficial interest. It involved the transfer of the beneficial interest. It had the material revenues, et cetera, et cetera. So the statement of defence pleaded that the asset transaction was between POT and PEOC and involved a transfer which now we understand is no longer the position.

My Lord, if I can then move to the three arguments on the merits. I notice that it's 4:22, My Lord, but perhaps if Your Lordship was inclined to sit until 4:30 perhaps this is a convenient time to break.

THE COURT: Certainly. Any business that we should address

before we adjourn? Mr. de Waal or any other party? If not -- and I think your correspondence earlier today, Mr. Rasmussen, indicated that the other parties already had those -- that case and the attachment of the legislation. So if there's any issue there just contact Mr. de Waal but I appreciate getting that case notwithstanding it's late. If there's no other business we will --

MR. LENZ: My Lord, it's Ken Lenz here.

THE COURT: Yes, sir.

MR. LENZ: I just want to confirm that both interveners are to try and confine their submissions to half-an-hour tomorrow, is that what was directed? I just want to make sure I'm ready.

THE COURT: Yes. Mr. de Waal, Mr. McDonald?

MR. DE WAAL: My Lord, I don't expect I will be very long, that's why I did a long introduction but I'm sure there's no time issue tomorrow even allowing for the extra time that Your Lordship wants for additional questions.

THE COURT: Yes. I just like to make sure I have an hour. If for some reason we get pressed then I will provide whatever I have in written format but certainly my objective is to ask some questions tomorrow afternoon, which is why I asked for the time. Does it look like it's going to work in terms of the scheduling for Mr. de Waal's remainder, the interveners, and then the opportunity for the applicant to reply?

MR. LENZ: My Lord, for my part half-an-hour is enough. I just didn’t want to show up tomorrow and then find out it was 15 minutes, that's all.

THE COURT: Yes. Well, let me say this about the interveners. If you've planned for 30 minutes then as far as the Court's concerned you will get 30 minutes. If we go a little over I'm fine with that. We'll play it by ear and if there's need to make up some time we can start at -- you know, we'll start a little earlier in the afternoon. So does that work for you, Mr. Lenz?

MR. LENZ: Thank you, Sir.

THE COURT: Okay.

MR. LENZ: It does, Sir. Thank you very much.

THE COURT: Very good.

MR. MCDONALD: My Lord, just for clarity, your order of July 24th specifically gave the interveners 30 minutes each and it gave Perpetual Energy defendants 60 minutes to reply. I don't anticipate needing 60 minutes to reply to them so I expect I'll be shorter than the 60 minutes.

THE COURT: Okay. And thank you, Mr. McDonald. I just asked that because I don't have the order in front of me, although I recalled it was 30 minutes. I just would like confirmation on it and I appreciate that input. Any other business that we need --

MR. WATSON: Sir, it's Scott Watson.

THE COURT: Go ahead, Mr. Watson.

MR. WATSON: Sir, I just wanted to throw my two pennies in here is that 30 minutes is going to be ample time for me. I anticipate I'll be under that by some margin, I don't know exactly how much. But -- yes, and I'm prepared to proceed right after Mr. de Waal's finished and before Perpetual replies.

THE COURT: Okay. I presume it will be -- given what you've just stated, Mr. Watson, you'll proceed after Mr. de Waal and then Mr. Lenz and then we'll turn the podium back to Mr. McDonald, is that correct?

MR. WATSON: I certainly can. I think that's maybe a matter for discussion with Mr. Lenz --

THE COURT: Okay.

MR. WATSON: -- but between the two of us we'll figure out the batting order.

THE COURT: Very good. I'm certainly open.

MR. LENZ: Thank you.

THE COURT: I only raise it to make sure the parties are talking.

MR. LENZ: Thank you, My Lord.

THE COURT: Okay.

MR. WATSON: Thank you.

THE COURT: Thank you very much. That being the business for the day we will adjourn until 10:00 tomorrow, thank you.

PROCEEDINGS ADJOURNED UNTIL 10:00 AM, OCTOBER 2, 2020

Certificate of Record

I, Katherine O'Brien, certify that the recording herein is the record of oral evidence of proceedings held in the Court of Queen's Bench, in courtroom 1203, at Calgary, Alberta on the 1st day of October, 2020 and I was the court official in charge of the sound recording machine during these proceedings.

Certificate of Transcript

I, Su Zaherie, certify that

(a) I transcribed the record, which was recorded by a sound recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

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