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COURT OF APPEAL OF ALBERTA

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

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

FACTUM OF THE RESPONDENTS PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST AND PERPETUAL OPERATING CORP.
(the **PERPETUAL RESPONDENTS**)

Co-Counsel for the Perpetual Respondents
D.J. McDonald, QC
Suite 707, 308 4 Avenue SW
Calgary, Alberta T2P 0H7
Tel: (403) 680-3645
Email: dan@mcdonaldadr.com

Co-Counsel for the Perpetual Respondents
Paul G. Chiswell / Michael Deyholos
Burnet, Duckworth & Palmer LLP
2400, 525 - 8 Avenue SW
Calgary, Alberta T2P 1G1
Tel: (403) 260-0201 / (403) 260-0156
Fax: (403) 260-0332
Email: pchiswell@bdplaw.com / mdeyholos@bdplaw.com

Counsel for the Respondent Susan Riddell Rose
Steven H. Leitl, QC / Gunnar Benediktsson
Norton Rose Fulbright Canada LLP
3700, 400 Third Avenue SW
Calgary, Alberta T2P 4H2
Tel: (403) 267-8140 / (403) 267-8256
Fax: (403) 264-5973
Email: steven.leitl@nortonrosefulbright.com / gunnar.benediktsson@nortonrosefulbright.com

Counsel for the Appellant PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity
Rinus de Waal / Luke Rasmussen
De Waal Law
1460 Watermark Tower, 530 – 8 Avenue SW
Calgary, Alberta T2P 3S8
Tel: (403) 266-0014 / Fax: (403) 266-2632
Email: rdewaal@dewaallaw.com / lrasmussen@dewaallaw.com

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PART 1 - FACTS

A. Overview[1]

1. Abandonment and reclamation obligations (**ARO**) are regulatory obligations of the owner of an oil or gas well to cement-in and cap the well and restore the surface. ARO are future costs that are embedded in and depress the value of a well. They are an obligation "to do something", not to pay someone, at an uncertain future date.

2. The Supreme Court addressed ARO in its January 2019 in *Redwater*. The Chambers Judge addressed ARO in his January 2020 decision regarding the Oppression Claim. He addressed ARO again in his January 2021 decision regarding the *BIA* Claim, relying in part on his January 2020 decision. Later in January 2021, the Court of Appeal reversed the January 2020 decision and disagreed with some of the Chambers Judge's analysis of ARO in the context of the Oppression Claim.

3. In the January 2021 decision under appeal, the Chambers Judge dismissed the *BIA* Claim. In view of the subsequent appeal decision, perhaps not all of the Chambers Judge's reasons regarding ARO within the oppression context in his January 2020 decision were apt. But none of that affects his conclusion regarding the *BIA* Claim in his January 2021 decision, and his reasons and Order are correct.

4. ARO are not obligations that render an oil and gas company insolvent. They depress the value of its assets. They are real obligations that require a company to spend some money some day. They are not "obligations, due and accruing due". The Chambers Judge did not err in so concluding.

5. There is another reason that the Order was not in error. The Trustee must prove as part of the *BIA* Claim that there was a "transfer at undervalue". The combination of the legal and equitable interests in property held in trust, as occurred in the Asset Transaction, is not a "transfer" for the purposes of the *BIA* Claim.

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[1] The abbreviations and defined terms in the Reasons for Judgment of the Honourable Justice D.B. Nixon dated January 14, 2021 (the **Reasons**) are used in this Factum [**Appeal Record (AR) F8**]. Italic in the text or quotations is added for emphasis.

B. Facts relevant to the Appeal

6. The facts are accurately described in the Chambers Judge's Reasons.[2]

1. The Aggregate Transaction and the Asset Transaction

7. In 2016, Perpetual Energy, a public company, decided to market the Goodyear Assets in a public sales process. Perpetual Energy held the beneficial interests of the Goodyear Assets through POT.[3] The legal interests and licenses for the Goodyear Assets were held by Perpetual Energy's wholly-owned subsidiary, PEOC, as trustee of POT.[4]

8. The sales process culminated in an offer from Kailas Capital, an unrelated arm's length party.[5] After four months of negotiations, Perpetual Energy sold the Goodyear Assets to Kailas Capital pursuant to the Aggregate Transaction on October 1, 2016.[6] The Aggregate Transaction consisted of several steps, including:

(a) The legal and beneficial interests in the Goodyear Assets were combined in PEOC (the **Asset Transaction**) pursuant to an asset purchase agreement dated October 1, 2016 (the **Asset Purchase Agreement**).[7] The Asset Transaction was structured as a debt-free transaction with Perpetual Energy responsible for paying all liabilities due and outstanding at the time of closing.[8]

(b) Perpetual Energy sold all of the shares in PEOC to 198Co (the **Share Transaction**), a wholly owned subsidiary of Kailas Capital, pursuant to a share purchase and sale agreement dated September 26, 2016 (the **Share Purchase Agreement**).[9]

9. The *BIA* Claim, the subject of this Appeal, is a claim about the Goodyear Assets and the legal effect of the Asset Transaction. It is not about any other assets (referred to in the previous Queen's Bench and Court of Appeal decisions as the "Keepco Assets" and the "Retained Interests")

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[2] Reasons at paras 1-19, 33-35, 222-226 [**AR F8**].
[3] Reasons at para 8 [**AR F8**]; Affidavit of Susan Riddell Rose filed October 19, 2018 (**Rose Affidavit**) at paras 10-13, 15, 19 [**Perpetual Respondents' Extracts of Key Evidence (PR EKE) 26**].
[4] Reasons at para 8 [**AR F8**]; Rose Affidavit at para 45 [**PR EKE 26**].
[5] Rose Affidavit at paras 18, 34 and Exhibit E [**PR EKE 26**].
[6] Reasons at paras 8-9 [**AR F8**]; Rose Affidavit at para 39 [**PR EKE 26**].
[7] Reasons at para 8 [**AR F8**].
[8] Rose Affidavit at paras 65-74 [**PR EKE 26**].
[9] Reasons at para 9 [**AR F8**].

and not about any other transaction or agreement. As this Court stated, those other assets "were not a part of the challenged transaction".[10]

2. PEOC/Sequoia's initial success and then bankruptcy

10. 198Co renamed PEOC "Sequoia Resources Corp" (**Sequoia**).[11] Sequoia started operations debt-free, subject to the statement of adjustments, and established new credit relationships with its suppliers and service providers.[12]

11. Sequoia's strategy was to acquire mature gas assets and reduce operating costs by pursuing an "aggressive abandonment and reclamation program". Its strategy was "successful and on target through to the end of the summer of 2017".[13] In its first 15 months of operations, Sequoia abandoned 150 wells and reclaimed 91 wells, ranking fifth in Alberta in terms of reclamation certificates. It acquired approximately 800 additional wells and associated facilities and pipelines (representing approximately 25% of Sequoia's inventory) from other parties.[14]

12. However, in the summer of 2017, gas prices and Sequoia's cash flow began to decline significantly. Concurrently, Sequoia closed out the Gas Marketing Contract, which had provided a floor price for 90% of Sequoia's production for two years.[15] As a result of the persistent low gas price environment, and without revenue protection provided by the Gas Marketing Contract, Sequoia could not sustain positive funds to continue to operate. Its attempts to refinance were unsuccessful.[16] On March 23, 2018, Sequoia filed a voluntary assignment into bankruptcy.[17]

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[10] *PricewaterhouseCoopers Inc v Perpetual Energy Inc,* 2021 ABCA 16 (**CA Reasons on First Appeal**) at para 4(i) [**Trustee's Book of Authorities (Trustee BOA), Tab 3**].
[11] Reasons at para 10 [**AR F8**].
[12] Rose Affidavit at paras 65-74 [**PR EKE 26**].
[13] Affidavit of Mark Schweitzer filed October 4, 2018 (**Schweitzer 2018 Affidavit**) at Exhibit A [**PR EKE 4**].
[14] Schweitzer 2018 Affidavit at Exhibits A, B [**PR EKE 4**].
[15] Affidavit of Mark Schweitzer for Summary Dismissal Application filed May 5, 2020 (**Schweitzer 2020 Affidavit**) at para 14 [**Trustee's Extracts of Key Evidence (AEKE) 260**].
[16] Schweitzer 2018 Affidavit at Exhibit B [**PR EKE 4**].
[17] Reasons at para 11 [**AR F8**]; Schweitzer 2018 Affidavit at Exhibit B [**PR EKE 4**].

3. Evidence of Value

13. The Darby Affidavit states that the value of the consideration received by PEOC in the Asset Transaction was at most $5,670,200.[18] By contrast, the 2016 municipal property tax assessments assessed the value of the Goodyear Assets for property tax purposes at approximately $257 million.[19]

14. The $5,670,200 value is based on the McDaniel Report, which expressly *includes* an estimate of ARO for the Goodyear Wells.[20] The report was effective as of December 31, 2015 (9 months before the Asset Transaction) and considered reserves from only 26% of the Goodyear Wells.[21] It was based on cost and other factors unique to Perpetual at the time. It did not consider the value of other assets comprising the Goodyear Assets—such as pipelines, other surface facilities, prospect drilling inventory, undeveloped acreage,[22] seismic data,[23] or heavy equipment[24]—or opportunities to recomplete or reactivate shut-in wells.

15. The Trustee's value estimate also does not include other assets PEOC received through the Asset Transaction and the Aggregate Transaction,[25] which included: (a) Crown royalty deposits and credits totalling $2,240,858;[26] (b) prepaid expenses of $3,922,533;[27] (c) payment of $134,022 from POT;[28] and (d) the Gas Marketing Contract (a net cost to POT of approximately $12.9 million to put in place).[29]

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[18] Affidavit of Paul Darby filed August 2, 2018 (**Darby 2018 Affidavit**) at 37.2, 38, 44.3 [**AEKE A1**].
[19] Schweitzer 2020 Affidavit at para 11(a), note 1, Exhibit A [**AEKE A260**].
[20] Darby 2018 Affidavit at para 41.1 [**AEKE A1**].
[21] Darby 2018 Affidavit at para 37.2, Exhibit L [**AEKE A1**].
[22] Schweitzer 2018 Affidavit at para 12(c) [**PR EKE 4**].
[23] Rose Affidavit at paras 43(c), 48(c) [**PR EKE 26**].
[24] Reasons at para 189 [**AR F8**]; Rose Affidavit at Exhibit J (Asset Purchase Agreement, Schedules E1 and E2) [**PR EKE 26**].
[25] Reasons at para 189 [**AR F8**].
[26] Rose Affidavit at Exhibit H (Schedule I to the Share Purchase Agreement) [**PR EKE 26**]. This is the sum of a Crown royalty deposit ($200,000), an excess deposit with the Alberta Crown ($413,335) and a Crown royalty account credit ($1,627,523).
[27] Rose Affidavit at Exhibit H (Schedule I to the Share Purchase Agreement) [**PR EKE 26**]. This is the sum of the Orphan Well levy, AER 2016 administration fee, mineral lease rentals, surface lease rentals, prepaid property taxes, prepaid seismic reproduction costs and prepaid October salaries.
[28] Rose Affidavit at para 48(a), Exhibits L and K (p 2) [**PR EKE 26**].
[29] Reasons at paras 81, 181 [**AR F8**]; Schweitzer 2020 Affidavit at paras 12(c) and 18 [**AEKE A260**]; Rose Affidavit at paras 21, 39(e), 42, 43(c)(i), 48(c), 49 and Exhibit I [**PR EKE 26**].

16. The Trustee has not provided any further evidence on value since the Darby Affidavit in 2018, despite having the opportunity to do so. Solely for the purposes of the Second Application (the subject of this appeal), the Perpetual Respondents accepted the value attributed to the Goodyear Assets by the Trustee of $5,670,200.

4. Evidence of Liabilities

17. The Darby Affidavit states that the "liabilities" associated with the Goodyear Assets are ARO and municipal property taxes.[30]

18. The Darby Affidavit explains that "[b]y its nature, future ARO costs depend on many variable factors and can only be estimated."[31] The Trustee relies on an XI Technologies Inc. computer model that estimates ARO of $192,127,274 associated with the Goodyear Wells and $26,831,000 for associated facilities at March 31, 2018 (the date of bankruptcy).[32]

19. The Darby Affidavit also acknowledges that the McDaniel Report already includes an estimate of ARO. It states, without explanation or quantification, that the amount of ARO estimated in the XI Technologies computer model and included in the schedule "may be overstated as it has to some extent already been included in the value of some of the Goodyear Wells" and that the Trustee "does not consider this to be material to its analysis".[33]

20. The Darby Affidavit estimates the annual property taxes payable for the Goodyear Assets are $10,047,744.[34] But that was for all *2015* property taxes; the Asset Transaction occurred in the fall of *2016*.[35] The Chambers Judge found as a fact that the outstanding municipal taxes at the time of the Asset Transaction were $1,560,890 owed to three municipalities—the only creditors of PEOC at the time of the Asset Transaction that remained unpaid at the date of bankruptcy.[36] Those municipalities voluntarily entered into payment plans with Sequoia sometime after October 1,

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[30] Darby 2018 Affidavit at para 40 [**AEKE A1**].
[31] Darby 2018 Affidavit at para 39 [**AEKE A1**].
[32] Darby 2018 Affidavit at paras 40-41, Exhibit N [**AEKE A1**].
[33] Darby 2018 Affidavit at para 41.1 [**AEKE A1**].
[34] Darby 2018 Affidavit at para 40.3, Exhibit M [**AEKE A1**].
[35] Darby 2018 Affidavit at Exhibit M [**AEKE A1**]; Schweitzer 2018 Affidavit at note 1 [**PR EKE 4**].
[36] Reasons at paras 84, 202, 205 [**AR F8**]. See also Rose Affidavit at paras 70-71, Exhibit Z (showing a property tax balance outstanding of $1,560,809) [**PR EKE 26**].

2016.[37] All other 2016 municipal taxes were funded by POT through the closing statement of adjustments.[38]

C. Procedural Background

21. On August 2, 2018, the Trustee sued the Perpetual Respondents and Ms. Rose, alleging that: (a) the Asset Transaction was a non-arm's length transfer at undervalue within the meaning of s. 96 of the *BIA* (the ***BIA* Claim**); (b) the business of PEOC had been conducted in a manner that was oppressive within the meaning of the (Alberta) *Business Corporations Act* (the **Oppression Claim**); (c) the Aggregate Transaction was contrary to public policy, was illegal, or otherwise a violation of equitable principles (the **Public Policy Claim**); and (d) Ms. Rose, the sole director of PEOC at the time of the Asset Transaction, had breached her duties under the *Business Corporations Act* (the **Director Claim**).[39]

22. On August 27, 2018, the Perpetual Respondents and Ms. Rose applied to strike and summarily dismiss each claim (the **First Applications**).

23. The First Applications raised discrete threshold issues that were potentially dispositive of the Trustee's claims. Regarding the *BIA* Claim, they addressed *only* whether the parties to the Asset Transaction were dealing at arm's length. They did not address the other elements of the *BIA* Claim: whether the Asset Transaction was a transfer at undervalue and whether PEOC was insolvent or rendered insolvent by it.

24. The Chambers Judge declined to strike or dismiss the *BIA* Claim on the arm's length issue, but struck the Oppression Claim and the Public Policy Claim.[40] The Perpetual Respondents appealed on the arm's length element of the *BIA* Claim. The Trustee appealed on the Oppression Claim and the Public Policy Claim. Subject to certain clarifications, the Court of Appeal dismissed the Perpetual Respondents' appeal and allowed the Trustee's appeal (the **First Appeal**).[41]

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[37] Rose Affidavit at paras 70-71 and Exhibit Z [**PR EKE 26**]; Darby 2018 Affidavit at para 41.2 [**AEKE A1**].
[38] Rose Affidavit at paras 65-71, Exhibit Z [**PR EKE 26**].
[39] Trustee's Statement of Claim filed August 2, 2018 [**AR P1**].
[40] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6 (**QB Reasons on First Applications**) at paras 374-377 [**Trustee BOA, Tab 1**].
[41] CA Reasons on First Appeal at paras 227-228 [**Trustee BOA, Tab 3**].

25. In February 2020, the Perpetual Respondents applied to strike or dismiss the *BIA* Claim on different grounds—namely, the transfer at undervalue and insolvency elements of the *BIA* Claim (the **Second Application**).[42] On January 14, 2021, the Chambers Judge granted the Second Application and dismissed the *BIA* Claim.

PART 2 - GROUNDS OF APPEAL

26. The issue properly before the Court is whether the Chambers Judge erred in granting the Order dismissing the *BIA* Claim. The Perpetual Respondents' position is that the Chambers Judge did not err because:

(a) PEOC was not insolvent at the time of the Asset Transaction nor rendered insolvent by it;

(b) there was no "transfer" within the meaning of s. 96 of the *BIA*; and

(c) the Second Application was not an abuse of process.

PART 3 - STANDARD OF REVIEW

27. The Chambers Judge's interpretation of s. 96 of the *BIA* is a question of law reviewable on a correctness standard. His application of the *BIA*, including s. 96 and the definition of "insolvent person", to the facts, and PEOC's solvency, are questions of mixed fact and law reviewable for palpable and overriding errors.[43]

28. Whether the combination of beneficial and legal interests is a "transfer" within the meaning of s. 96 is a question of law reviewable on a correctness standard.[44]

29. The Chambers Judge's finding that the Second Application was not an abuse of process is "a discretionary finding based on specific facts and therefore a review calls for deference, absent palpable and overriding error".[45]

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[42] Perpetual Respondents' Application to Strike and for Summary Dismissal filed February 25, 2020 [**AR P42**].

[43] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 (***Weir-Jones***) at para 9 [**Trustee BOA, Tab 22**], citing *Housen v Nikolaisen*, 2002 SCC 33 [**Trustee BOA, Tab 17**].

[44] *Weir-Jones* at para 9 [**Trustee BOA, Tab 22**].

[45] *Milne v Barnes*, 2013 ABCA 379 (***Milne***) at para 6 [**Perpetual Respondents' Book of Authorities (PR BOA), Tab 1**]; *Sangha v Alberta*, 2018 ABCA 32 at para 5 [**PR BOA, Tab 2**].

PART 4 - ARGUMENT

A. Introduction

30. Appeals lie from judgments or orders, not reasons.[46] This Appeal is from the Order, which states that the "Plaintiff's claims pursuant to s. 96 of the *BIA* are dismissed pursuant to Rule 7.3".[47]

31. This Appeal is complicated because, after the Chambers Judge issued his Reasons on the Second Application, this Court issued its reasons in the First Appeal, which did not agree with all of the Chambers Judge's reasons concerning ARO. Those differences, however, do not affect his conclusion and Order, which were not in error: the *BIA* Claim should be dismissed—PEOC was not insolvent at the time of the Asset Transaction nor rendered insolvent by it.

32. In the Second Application, the Perpetual Respondents also applied to summarily dismiss the *BIA* Claim on the grounds that there was no "transfer at undervalue" reviewable under s. 96. The Chambers Judge erred when he declined to consider that ground. He should have dismissed the *BIA* Claim for that reason as well.

33. This Factum addresses the points that the Perpetual Respondents say are properly in issue, and whether the Second Application was an abuse of process. Ms. Rose's Factum, which the Perpetual Respondents adopt, addresses the specific grounds in the Trustee's Factum.

B. The *BIA*

34. Section 96 of the *BIA* is an anti-abuse mechanism "intended to assist the trustee in recovering assets that the debtor disposed of in advance of bankruptcy for little or no consideration, thereby depriving the estate of value that would have been otherwise available for distribution to the creditors".[48] Applied here, it is intended to assist the Trustee in recovering assets if it is

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[46] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 254 at para 19 [**PR BOA, Tab 3**]; *ServiceMaster of Canada v Meyer*, 2019 ABCA 130 (***ServiceMaster***) at paras 31-32, 168 [**PR BOA, Tab 4**]; *Nova Pole International Inc v Permasteel Construction Ltd*, 2020 ABCA 45 (***Nova Pole***) at para 19 [**PR BOA, Tab 5**].

[47] January 14, 2021 Order of the Chambers Judge [**AR F1**].

[48] Industry Canada's Corporate and Insolvency Law Policy Director, Bill C-12: "Clause by Clause Analysis of An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005", available online: <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01983.html#a46>.

determined that PEOC disposed of assets at conspicuously less than fair market value, thereby depriving PEOC's estate of value that was otherwise available for distribution to creditors.

35. Section 96 of the *BIA* states in part:

> **Transfer at undervalue**
> 96 (1) On application by the trustee, a court may declare that a *transfer at undervalue* is void as against… the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
> …
> (b) the party was not dealing at arm's length with the debtor and
> …
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
> (A) *the debtor was insolvent at the time of the transfer or was rendered insolvent by it…*[49]

36. The Second Application and this Appeal engage two elements of s. 96 that the Trustee must prove: transfer at undervalue and insolvency.

37. Section 2 of the *BIA* defines "transfer at undervalue":

> "transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;[50]

38. Section 96(2) of the *BIA* requires the Trustee to state what, in the Trustee's opinion, was the fair market value of the actual consideration given or received by the debtor.[51] The Trustee's opinion of value was based on a reserve report that attributes a value of $5,670,200 *inclusive of ARO* to the Goodyear Assets,[52] which the Trustee used as its opinion of the value of the actual

[49] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (***BIA***), s. 96(1) (emphasis added) [**PR BOA, Tab 6**].
[50] *BIA*, s. 2 [**PR BOA, Tab 6**].
[51] *BIA*, s. 96(2) [**PR BOA, Tab 6**]. The Trustee's opinion is a rebuttable presumption subject to "evidence to the contrary" and "once some contrary evidence is adduced, the presumption has 'no more than its own weight'… The effect of the contrary evidence in effect, makes the presumption vanish": *Indarsingh, Re*, 2015 ABQB 158 (***Indarsingh***) at para 18 [**PR BOA, Tab7**]. See also: *Randen v HPCB-Online Ltd*, 2018 BCCA 123 at para 21 [**PR BOA, Tab 8**].
[52] Darby 2018 Affidavit at paras 37.2, 38 [**AEKE A1**].

consideration received by PEOC in the Asset Transaction. For the purposes of the Second Application and this Appeal, the Perpetual Respondents accept the Trustee's opinion.

39. As quoted above, s. 96(1)(b)(ii)(A) of the *BIA* states "the debtor was insolvent…". The *BIA* does not define "insolvent", but s. 2 does define "insolvent person":

> "**insolvent person**" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) *the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;*

40. The Trustee argues that the Chambers Judge erred in finding that s. 96 engages the definition of "insolvent person",[53] yet provides no alternative and contradicts its own Notice of Appeal[54] and authorities.[55] The Perpetual Respondents rely on Ms. Rose's Factum on this point.

41. The definition of "insolvent person" provides three tests for insolvency, explained by Professor Roderick Wood as follows:

> Paragraphs (a) and (b) are both cash flow tests. Paragraph (a) is forward looking in that it considers whether the debtor has the means to meet obligations that have or that are about to come due and does not require an actual default in paying obligations. Paragraph (b) is backward looking in that it considers whether the debtor has ceased to pay current obligations in the ordinary course of business. *Paragraph (c) is a balance sheet test that assesses whether the debtor's liabilities exceed the debtor's assets.*[56]

42. The Ontario Court of Appeal has held that the definition of insolvent person "is reserved for 'clear cut situations where the liabilities on which the petition is founded and the act of

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[53] Factum of the Trustee filed March 29, 2021 (**Trustee Factum**) at paras 60-66, 81-85.
[54] The Trustee's Notice of Appeal alleges that the Chambers Judge erred by "failing to give effect to the words 'and accruing due' in paragraph (c) of the *BIA* definition of 'insolvent person'…" [**AR F57**].
[55] The Trustee argues that the Chambers Judge erred by using the definition of "insolvent person" for the purposes of s. 96, yet also urged the Chambers Judge (and urges this Court) to follow *Stelco, Re*, where Farley J. applied that very definition, albeit with an expanded meaning for the *CCAA*. See: Trustee's Factum at para 66; *Stelco, Re*, [2004] OJ No. 1257 (***Re Stelco***) at paras 21-24, 26-27 [**Trustee BOA, Tab 23**].
[56] Roderick J. Wood, "Transfers at Undervalue: New Wine in Old Wineskins?", 2017 Annual Review of Insolvency Law 1 at p 9 (emphasis added) [**PR BOA, Tab 9**].

bankruptcy are clearly established by sound and convincing evidence'".[57] Houlden and Morawetz note: "The court will not presume insolvency; it must be proved… A mere statement by the trustee that it believes the debtor was insolvent at the time of the alleged preference is insufficient. Evidence that is speculative and based on hearsay will not be sufficient…".[58]

C. The legal nature of ARO

43. ARO have been the subject of judicial analysis in several cases, most recently the Supreme Court decision in *Redwater*,[59] the decisions of the Chambers Judge and the decision of this Court in the First Appeal.

44. *Redwater* decided that ARO are not a claim provable in bankruptcy. In the Second Application, the Chambers Judge held that the value of ARO associated with the Goodyear Assets at the time of the Asset Transaction was nil "*for purposes of clause (c) of the Insolvent Person definition*,"[60] not that ARO had no impact on value or was nil for all purposes. In the First Appeal, this Court addressed ARO *for the purposes of the Oppression Claim* and held:

(a) The Chambers Judge erred when he found that ARO were not a liability for purposes of the Oppression Claim.

(b) ARO are not a conventional "debt", but rather "operate by depressing the value of assets" and "whichever side of the equation they be on, they could impact whether there is 'undervalue' in a transaction".[61]

(c) ARO are a real liability or obligation, but may not be a "current" liability or obligation.[62] *Redwater* does not stand for the proposition that ARO are not a liability or obligation of a bankrupt corporation.[63]

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[57] *Kormos v Fast*, 2019 ONCA 430 at para 13 [**PR BOA, Tab 10**].
[58] L.W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (**Houlden & Morawetz**), F§206 at p 5-6 [**PR BOA, Tab 11**].
[59] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (***Redwater***) [**Trustee BOA, Tab 2**].
[60] CA Reasons on First Appeal at para 94, 95 [**Trustee BOA, Tab 3**].
[61] CA Reasons on First Appeal at para 97 [**Trustee BOA, Tab 3**].
[62] CA Reasons on First Appeal at para 87 [**Trustee BOA, Tab 3**].
[63] CA Reasons on First Appeal at para 94 [**Trustee BOA, Tab 3**].

(d) ARO are inevitable, but are "unliquidated" and "their quantum is uncertain".[64] It is not "possible to attach a monetary value to the obligation".[65] The present value of ARO will directly depend on how far into the future ARO will arise.[66]

(e) There is no creditor associated with ARO.[67]

45. In the First Appeal, the Court also noted that ARO are "contingent" in the sense that the moment when a well will cease production is unknown, but not in the sense that ARO will only come into existence if a condition precedent comes to pass.[68] The Court described the Goodyear Assets as "mature" and stated, "the record suggests that the Goodyear Assets included 910 shut-in wells and 727 abandoned wells, meaning that some portion of the obligation to reclaim was due to be performed or was imminent".[69] It added that the "exact cost of reclamation may have been unknown and unquantified, but the obligation was no longer "contingent"; the obligation was merely unperformed".[70] A few points of clarification are warranted.

46. First, the regulation contemplates reactivating and re-completing shut-in (suspended) wells,[71] meaning the timing of associated ARO are contingent on whether the licensee resumes production. When a well is inactive for twelve consecutive months, the licensee is required to suspend the well.[72] If the well is still suspended after 10 years, the licensee must either restart production, or abandon the zone or wellbore.[73] That is, an owner might shut-in a well today because it was uneconomic and reactivate it tomorrow (or years later), if commodity prices, market conditions, available infrastructure and technology, the regulatory regime, or other factors change.

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[64] CA Reasons on First Appeal at para 87 [**Trustee BOA, Tab 3**].
[65] CA Reasons on First Appeal at para 93 [**Trustee BOA, Tab 3**].
[66] CA Reasons on First Appeal at para 87 [**Trustee BOA, Tab 3**].
[67] CA Reasons on First Appeal at paras 93, 95 [**Trustee BOA, Tab 3**]; *Redwater* at para 139 [**Trustee BOA, Tab 2**].
[68] CA Reasons on First Appeal at para 86 [**Trustee BOA, Tab 3**].
[69] CA Reasons on First Appeal at para 88 [**Trustee BOA, Tab 3**].
[70] CA Reasons on First Appeal at para 88 [**Trustee BOA, Tab 3**].
[71] AER Directive 013: Suspension Requirements for Wells (July 24, 2007) (**Directive 013**), s. 4 [**PR BOA, Tab 12**]. Current version available online: <www.aer.ca/regulating-development/rules-and-directives/directives/directive-013>.
[72] Directive 013, s. 5, Table 1 [**PR BOA, Tab 12**].
[73] Directive 013, ss. 3-5, Table 1 [**PR BOA, Tab 12**].

47. Second, ARO are a performance obligation, not a payment obligation. Even if the licensee's obligation to *perform* its ARO are no longer contingent, the cost and timing of performing the ARO are still unknown. The licensee is not obligated to pay anything to anyone until it contracts a third party to do the work or performs the work internally.[74] There is no evidence to this day that the AER has issued any abandonment or reclamation orders for the Goodyear Assets like those ordered in *Redwater*.[75]

48. Third, while the Goodyear Assets were described as "mature", the uncontradicted evidence is that: (a) the Goodyear Assets collectively had production of approximately 35 MMcf/d;[76] (b) Sequoia "steadily increase[d] its production" after the Asset Transaction;[77] and (c) as part of the Asset Transaction, PEOC/Sequoia obtained the beneficial interest in the Gas Marketing Contract "to substantially eliminate natural gas price risk for PEOC/Sequoia… ensur[ing] profitable operation of the Goodyear Assets for close to two years".[78]

D. The Chambers Judge did not err in concluding that PEOC was not insolvent at the time of the Asset Transaction nor rendered insolvent by it

1. The Commercial Context

49. There is no evidence that PEOC at the time of the Asset Transaction was unable to pay its obligations, had ceased paying its current obligations, or could not meet the balance sheet insolvency test.

50. The Asset Transaction was structured as a debt-free transaction. POT paid all liabilities associated with the operation of the Goodyear Assets that were due and outstanding at the time of closing. Liabilities that were not yet due at the time of closing—such as certain municipal property taxes—were settled through the closing statement of adjustments.[79]

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[74] To that end, PEOC acquired "field and office employees and in-house abandonment and reclamation equipment and processes" as part of the Asset Transaction. See e.g.: Rose Affidavit at para 39(d); July 7, 2016 LOI at para 1(c), which is Rose Affidavit, Exhibit E; Schedules E1 and E2 to the Asset Purchase and Sale Agreement, which is Rose Affidavit, Exhibit J [**PR EKE 26**].

[75] Schweitzer 2018 Affidavit at Exhibits A, B [**PR EKE 4**].

[76] Rose Affidavit at para 19 [**PR EKE 26**]. "MMcf/d" means "million cubic feet per day".

[77] QB Reasons on First Applications at para 19 [**Trustee BOA, Tab 1**].

[78] Rose Affidavit at para 39(e) [**PR EKE 26**].

[79] Rose Affidavit at paras 39(f), 48(a), 65-76, Exhibit Z [**PR EKE 26**].

51. Following the Asset Transaction, Sequoia had production of approximately 35 MMcf/d from the Goodyear Assets[80] and a Gas Marketing Contract that provided a floor price on approximately 90% of production from the Goodyear Assets to August 31, 2018.[81] Sequoia established a sustainable cost structure, which reduced labour and other operating costs and G&A costs.[82] Investment in abandonment and reclamation activities were forecast to further reduce operating costs, while recompletions would increase production and revenue.[83] It did not have to pay office rent until March 31, 2018.[84]

52. Sequoia successfully pursued its business plan for 17 months after closing. It operated its producing wells and steadily increased its production. It abandoned and reclaimed other wells. It acquired approximately 800 additional wells.[85] Sequoia was able to meet its obligations until natural gas prices severely dropped in the summer of 2017. Sequoia sold the Gas Marketing Contract, thus losing price protection on the Goodyear Assets' production.[86] It assigned itself into bankruptcy six months later; 18 months after the Asset Transaction.

53. In a March 26, 2018 letter to stakeholders, Sequoia described its business plan: "These strategies were successful and on target through to the end of summer of 2017".[87] The letter explains how the collapse of gas prices, starting in the summer of 2017, caused its insolvency.[88]

54. The Trustee's preliminary report corroborates that Sequoia became insolvent for reasons unrelated to, and long after, the Asset Transaction. That report states that Sequoia acquired further assets when gas prices were at historic lows and thought to be at the bottom of the commodity cycle.[89] It abandoned approximately 150 wells and received reclamation certificates for approximately 90 wells. The Trustee's report reiterates that it was the collapse of gas prices in mid-

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[80] Rose Affidavit at para 19 [**PR EKE 26**].
[81] Rose Affidavit at paras 21, 34, 39(e), 42, 43(c)(i), 48(d), 49 and Exhibit I [**PR EKE 26**]; Schweitzer 2020 Affidavit at para 12(c) [**AEKE A260**].
[82] Rose Affidavit at para 39(b) and (e) [**PR EKE 26**]; Schweitzer 2018 Affidavit at Exhibit A [**PR EKE 4**].
[83] Schweitzer 2018 Affidavit at Exhibits A, B [**PR EKE 4**].
[84] Rose Affidavit at para 43(c)(ii) [**PR EKE 26**].
[85] Schweitzer 2018 Affidavit at paras 24 and 25, Exhibits A and B [**PR EKE 4**].
[86] Schweitzer 2018 Affidavit at paras 24 and 25, Exhibits A and B [**PR EKE 4**].
[87] Schweitzer 2018 Affidavit at para 24, Exhibit A [**PR EKE 4**].
[88] Schweitzer 2018 Affidavit at para 24, Exhibit A [**PR EKE 4**].
[89] Schweitzer 2018 Affidavit at Exhibit B [**PR EKE 4**]; Darby 2018 Affidavit at paras 32-33, Exhibit K [**AEKE A1**].

2017 that prevented Sequoia from continuing operations without sustaining significant cash losses in early 2018, after the acquisition of many more assets.[90]

55. To state the obvious, ARO did not cause Sequoia's bankruptcy. It did not file for bankruptcy because it had ARO obligations it had to perform in 5, 10 or 25 years. It went bankrupt as result of its own spending and commodity risk management, including the loss of natural gas price protection, and the collapse of natural gas prices, which resulted in its costs exceeding its revenues and cash resources. Where a downturn in the economy coincides with a transfer, the challenging economic circumstances may explain the subsequent insolvency.[91]

2. The Relevant Insolvency Analysis

56. The Chambers Judge held that "PEOC… met both the Liquidity Test or the Cease Payment Test as at the date of the Asset Transaction".[92] The Trustee does not challenge this finding of mixed fact and law.

57. The issues on appeal focus on the balance sheet insolvency test, specifically whether the value of PEOC/Sequoia's assets were "sufficient to enable payment of all [its] obligations, due and accruing due". On a summary dismissal application, the respondent must put its best foot forward. The Trustee's evidence of the value of the assets was based on a reserve report that considered the value of 26% of the Goodyear Wells effective December 31, 2015, inclusive of operating costs associated with the Goodyear Wells.[93] The Trustee's evidence of the value of the liabilities was based on a hearsay software model estimating undiscounted ARO effective March 23, 2018, that considered all of the Goodyear Assets.[94] Notably, the Trustee has not produced Sequoia's balance sheets or any information relating to ARO generated by Sequoia.

58. The question of PEOC/Sequoia's solvency can be considered from the perspective of ARO embedded in the value of its assets or as a separate obligation. Whichever side of the equation they

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[90] Schweitzer 2018 Affidavit at Exhibit B [**PR EKE 4**].
[91] *Indarsingh* at para 44 [**PR BOA, Tab 7**].
[92] Reasons at para 180 [**AR F8**].
[93] Darby 2018 Affidavit at Exhibit L [**AEKE A1**]; Schweitzer 2018 Affidavit at paras 11-12 [**PR EKE 4**].
[94] Darby 2018 Affidavit at para 40 [**AEKE A1**].

are on, the answer is the same: PEOC/Sequoia met the balance sheet insolvency test at the time of the Asset Transaction. On either analysis, it is essential to properly understand ARO.

3. ARO are embedded in the value of the Goodyear Assets of $5,670,200—they cannot be counted twice

59. The Trustee and the Perpetual Respondents agree: ARO form a fundamental part of the value of the licensed assets and are embedded future obligations that serve to depress the value.[95]

60. The Trustee's argument before this Court is that the Chambers Judge should have considered ARO on the "value side of the balance sheet insolvency question", not whether ARO are an "obligation, due and accruing due".[96] Yet the Trustee ignores its own evidence that the "value side of the balance sheet" is the value of the Goodyear Assets based on the McDaniel Report.[97] The McDaniel Report correctly considered ARO as part of the value of the Goodyear Assets considered,[98] consistent with the principle that ARO are embedded and serve to depress the value. That is, $5,670,200 is the net amount after considering the value of the assets (the amount is not stated) as depressed by ARO (this amount is also not stated).

61. The Trustee argues that the Chambers Judge ignored this.[99] He did not. Under the heading "Value Variable" of his Reasons, he found the "evidence was that the $5,670,200 value amount also included an estimate of some abandonment and salvage value".[100] This evidence was the only evidence of the value of the Goodyear Assets. For the purposes of the Application, the Perpetual Respondents accepted the Trustee's value. The net value of the assets after considering ARO was $5,670,200, which exceeded the value of PEOC's liabilities, which were municipal taxes of $1,560,890.[101] The Chambers Judge considered the evidence and found: "the evidence proves…that the value of the consideration received by [Sequoia] (formerly PEOC) was $5,670,200 for the purposes of the…Application".[102]

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[95] Trustee Factum at para 16; *Redwater* at para 157 [**Trustee BOA, Tab 2**].
[96] Trustee Factum at para 23.
[97] Darby 2018 Affidavit at paras 35-38 [**AEKE A1**].
[98] Darby 2018 Affidavit at paras 37.2, 38, 41.1, Exhibit N (note a) [**AEKE A1**].
[99] Trustee Factum at paras 16-17.
[100] Reasons at para 190 [**AR F8**].
[101] Reasons at paras 192, 202 [**AR F8**].
[102] Reasons at para 192 [**AR F8**].

62. If the Trustee sought to revisit the value of the Goodyear Assets, it should have done so. As its counsel stated on the first court hearing in this case: "But – but the values that you find in the application on which the trustee, by the way, stands or falls, if it's not good enough, then we lose the application…".[103] But the Trustee was prepared to win or lose on this evidence. The Chambers Judge stated:

> [I]f the Trustee wanted to revisit this value of $5,670,200 in the context of the Perpetual Energy 2020 Application, it could have done so. Indeed, the Trustee had an obligation to "put its best foot forward" concerning the value issue. For whatever reason, the Trustee took no such steps to update the evidence before me concerning the Value Variable. That being the case, I am obligated to deal with the evidence as it stands. In particular, in an application for summary judgment I am obligated to make a decision on the basis of the pleadings and evidence actually before me, and not on suppositions about what might be pleaded or proved in the future…[104]

63. The Second Application, and this Appeal, could be decided on this basis alone. It is unnecessary to consider a separate estimate of ARO as an obligation or liability on the "liability side of the balance sheet". It has already been considered and deducted in determining value. ARO cannot be deducted twice, once in valuing the Goodyear Assets and again as a deduction from that value. Yet that is precisely what the Trustee seeks.

4. The obligations considered in determining insolvency are those currently payable and chargeable

64. Turning to a consideration of ARO based on the "liability side of the balance sheet insolvency question", the Chambers Judge considered clause (c) of the definition of "insolvent person"—was the value of PEOC's property sufficient to enable payment of all its "obligations, due and accruing due"?

65. The Chambers Judge held that "obligations, due" require an existing obligation owed to an existing creditor in circumstances where the subject obligation is completely constituted and presently exigible,[105] and "obligations…accruing due" means there is an existing relationship in circumstances where the underlying obligation is completely constituted, albeit with an additional

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[103] Transcript of Proceedings before Justice Jeffrey held August 30, 2018 at 27/13-14 [**PR EKE 637**].
[104] Reasons at para 191 [**AR F8**].
[105] Reasons at para 102 [**AR F8**].

amount accumulating day-to-day, which is only enforceable in the future.[106] He found that "the amount of ARO *to be included in* [*this*] *determination…* is 'Nil'".[107]

66. The Chambers Judge did not refer to *Redwater*, but his understanding of ARO was influenced by it. In the First Appeal, this Court did not agree with all of the Chambers Judge's reasoning concerning ARO in the context of the Oppression Claim, finding that *Redwater* "does not mean that [ARO] are 'assumptions and speculations' that do not exist, that they are not an obligation or liability of Perpetual/Sequoia or that they should be valued at 'nil'".[108]

67. With respect, the Chambers Judge did not find on either application that ARO are assumptions and speculations that do not exist or have no value. In the First Applications, he found that they should not be considered for the purposes of the Oppression Claim. In the Second Application, he found ARO were not "obligations, due and accruing due". It is in those contexts only that he described the value of ARO as "nil".[109]

68. Bankruptcy law considers many different obligations, some of which are included and others not, in assessing whether a debtor is insolvent. The Chambers Judge addressed this extensively. The critical issue is set out in the contrast between the *Enterprise* and *Stelco* decisions.

69. In *Enterprise*, Ground J. held that only obligations "currently payable or chargeable"[110] should be considered in the balance sheet test. The *Enterprise* line of authorities hold that, "it is inappropriate to include every debt payable at some future date for the purposes of determining insolvency" as "[t]his would render numerous corporations insolvent".[111] Obligations should

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[106] Reasons at para 105 [**AR F8**].
[107] Reasons at para 194 [**AR F8**].
[108] CA Reasons on First Appeal at para 95 [**Trustee BOA, Tab 3**].
[109] Reasons at paras 194, 249 [**AR F8**].
[110] *Enterprise Capital Management Inc v Semi-Tech Corp*, 1999 CanLII 15003 (ON SC) (***Enterprise***) at para 17 (emphasis added) [**PR BOA, Tab 13**].
[111] *Royal Bank of Canada v Oxford Medical Imaging Inc*, 2019 ONSC 1020 (***Royal Bank***) at para 39 [**PR BOA, Tab 14**]. See also *Enterprise* at paras 15-18 [**PR BOA, Tab 13**]; *Canada (Attorney General) v Reliance Insurance Co*, 2008 CanLII 8250 (ON SC), [2008] OJ No 795 (ONSC) (***Reliance***) at para 35 [**PR BOA, Tab 15**]; *Re Industries Cover Inc. (Syndic)*, 2015 QCCS 136 (***Re Industries***) at paras 263-268, 388-393, 402-403, 410-422, and 424, 427 [**PR BOA, Tab 16**].

instead be measured against the fair valuation of the company's property and "limited to obligations currently payable or properly chargeable".[112]

70. In *Stelco*, Farley J. took a much broader view of "accruing due" for the purposes of determining insolvency in the *CCAA* context, concluding that "every obligation" must be treated as accruing due.[113] He reasoned that since the *CCAA* is focussed on rehabilitating struggling companies, courts should take a longer-term view of their debts and obligations. He explained that: (a) the "basic interest of the *CCAA* is to rehabilitate insolvent corporations for the benefit of all stakeholders"; (b) "[t]o do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around"; and (c) "given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the *CCAA*".[114] As Houlden and Morawetz explain:

> Unlike the *BIA*, the *CCAA* does not define "insolvent" or "insolvency". Although it is common practice to refer to the definition of "insolvent person" in the *BIA* in referring to insolvency in the context of the *CCAA*, the test for insolvency under the *CCAA* differs from that under the *BIA* in order to meet the special circumstances and objectives of the *CCAA*: *Re Stelco Inc*… where Farley J. held that "insolvent" should be given an expanded meaning under the *CCAA* in order to give effect to the rehabilitative goal of the Act and that a court should determine whether there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity condition or crisis that will result in the applicant running out of money to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection.[115]

71. When the Court determines insolvency under the *CCAA*, it is deciding whether the company should be allowed to avail itself of *CCAA* protections. The goal is for the company to emerge healthier and poised to continue as a going concern in the long term, taking into account all of its present *and future* obligations. This reasoning does not apply to the *BIA*, which is why courts have continued to follow *Enterprise* in the *BIA* context.[116] When the Court determines insolvency under the *BIA*, it is deciding whether the company is at a point of no return. If it is, the consequences are significant: the debtor's estate is vested in the trustee and distributed to creditors.

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[112] *Royal Bank* at para 39 [**PR BOA, Tab 14**]; *Enterprise* at para 17 [**PR BOA, Tab 13**].
[113] *Re Stelco* at para 59 (emphasis in original) [**Trustee BOA, Tab 23**].
[114] *Re Stelco* at paras 11-20, 24-25 [**Trustee BOA, Tab 23**].
[115] Houlden & Morawetz, B§25 at p 1 [**PR BOA, Tab 11**]. See also Frank Bennett, *Bennett on Bankruptcy*, 22nd Ed (Toronto, ON; LexisNexis Canada Inc., 2020) at pp 47-49 [**PR BOA, Tab 17**].
[116] See e.g. *Royal Bank* at para 39 [**PR BOA, Tab 14**]; *Reliance* at para 35 [**PR BOA, Tab 15**]; *Re Industries* at paras 409-428 [**PR BOA, Tab 16**].

When the Court determines insolvency for the purposes of s. 96, the consequences are even more acute, as it allows the trustee to reach back in time and potentially have otherwise valid contracts set aside. This is an extraordinary power, and the applicable insolvency test should reflect that.

72. Sequoia was not facing a "liquidity crisis" at the time of, or for nearly 18 months following, the Asset Transaction. At the time of the Asset Transaction, all Goodyear Asset obligations incurred up to closing were paid and accounted for, as shown on the statement of adjustments.[117] Before and after the Asset Transaction, PEOC/Sequoia successfully carried on business. It was not until the summer of 2017, when natural gas prices fell and Sequoia management elected to sell the price protection of the Gas Marketing Contract, that Sequoia started to experience financial difficulties.[118] And it was not until March 2018 that Sequoia "no longer had certainty it would have sufficient cash to continue its operations… and filed a voluntary assignment into bankruptcy".[119]

73. The Chambers Judge did not err in preferring *Enterprise*'s reasoning. The Trustee's attempt to rely on *Stelco* to include ARO as an "obligation, due and accruing due" should be rejected.

74. Finally, the Trustee says the Chambers Judge erred in citing *Hydro-Electric* and *Indalex* as support for finding that obligations must be completely constituted and presently exigible.[120] The Perpetual Respondents adopt Ms. Rose's submissions on this point and add only that the Trustee's argument misunderstands the Chambers Judge's Reasons. The Chambers Judge expressly held that an obligation only needs to be completely constituted to be "accruing due", stating: "the only proviso is that the 'accruing' obligation must be completely constituted as at the 'date of the test'" and "If the accruing obligation is completely constituted at that relevant date, it must be taken into account for purposes of the Insolvency Element".[121] He found no evidence that PEOC's ARO were completely constituted at the time of the Asset Transaction, and therefore did not take them into

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[117] Rose Affidavit at paras 72-74 and Exhibit H, Schedule I [**PR EKE 26**].
[118] Schweitzer 2018 Affidavit at Exhibits A, B [**PR EKE 4**]; Schweitzer 2020 Affidavit at paras 12(c), 14 [**AEKE A260**]; Rose Affidavit at paras 43(c)(i), Exhibit I [**PR EKE 26**].
[119] Schweitzer 2018 Affidavit at Exhibit B [**PR EKE 4**].
[120] See e.g. Trustee Factum at para 80.
[121] Reasons at para 154 [**AR F8**].

account for the Insolvency Test.[122] Whether they were presently exigible, and whether the Chambers Judge cited that as a requirement, had no effect on his conclusion.

5. ARO are estimates of amounts required to do something in the future, not obligations due and accruing due

75. Having considered what obligations should be included in the insolvency test under the *BIA*, how should ARO be considered in this analysis? Are they present obligations as the Trustee asserts? Are they obligations, due and accruing due? Are they obligations "currently payable or chargeable", as referenced in *Enterprise*? How do they impact the cash flow tests? The balance sheet test?

76. ARO are an obligation to do something—cement-in and cap a well and restore the surface. ARO are "public duties, owed…to fellow citizens".[123] They are "real" obligations inherent in any well and will require action and expense in an uncertain amount at some unknown date.

77. ARO are not a "debt".[124] There is no creditor or relationship akin to a debtor/creditor or borrower/lender relationship.[125] They are non-monetary obligations "that do not directly require…payment to the Regulator".[126] It is not possible to attach a monetary value to the obligation.[127] There are many reasons, including that the efficiencies and costs to abandon and reclaim wells can change drastically between the date of the estimate and whenever the work is actually performed. The evidence of the Intervenor Orphan Well Association (**OWA**) was that it was able to reduce abandonment costs relative to AER estimates by approximately 50% *in just three years*.[128] Clearly, whatever the OWA estimated for ARO at the beginning of that three-year period did not represent an amount due and accruing due.

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[122] See e.g. Reasons at paras 156, 196, 225, 261 [**AR F8**].
[123] *Redwater* at para 135 [**Trustee BOA, Tab 2**].
[124] CA Reasons on First Appeal at para 97 [**Trustee BOA, Tab 3**].
[125] Reasons at paras 23, 102-105 [**AR F8**]; *Redwater* at para 139 [**Trustee BOA, Tab 2**]; CA Reasons on First Appeal at para 139 [**Trustee BOA, Tab 3**].
[126] *Redwater* at para 139 [**Trustee BOA, Tab 2**].
[127] CA Reasons on First Appeal at para 93 [**Trustee BOA, Tab 3**].
[128] Transcript from Questioning of Lars de Pauw held September 15, 2020 at 71/23 – 74/12 [**PR EKE 283**].

78. The Chambers Judge correctly found that "the Trustee has not provided any evidence that any part of the ARO is completely constituted or presently exigible".[129] As noted earlier, even shut-in or abandoned wells do not necessarily have ARO that is completely constituted.

79. The Trustee loosely refers to the Q3 2016 financial statements of the "Perpetual Respondents" as evidence that ARO are current obligations.[130] The Chambers Judge rightly rejected these arguments, which are based on a misunderstanding of these financial statements.

80. First, the financial statements are not those of PEOC, but rather of Perpetual Energy on a consolidated basis, and reference the Goodyear Assets as "assets held for sale". As the OWA conceded: "The financial statements in evidence do not address the solvency of PEOC at the relevant time".[131] As "assets held for sale", the Goodyear Assets were presented on Perpetual Energy's September 30, 2016 interim financial statements as current assets, as was the associated ARO.[132] The Trustee's Factum wrongly states that this means that ARO are current liabilities or a "present obligation".[133] This misinterprets the accounting requirement: where there is a committed intention to sell a business or assets, the assets and liabilities being sold are reported as current assets and associated current liabilities.[134] This presentation reflects the expectation that the assets and associated liabilities being sold will be leaving the balance sheet "currently" as a result of the sale transaction—not that they will be collected or paid currently. The Trustee, an international accounting firm, knows this.[135]

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[129] Reasons at para 249 [**AR F8**].
[130] Trustee Factum at paras 39-42.
[131] Additional Submissions of the OWA Addressing the Honourable Justice D.B. Nixon's request on October 2, 2020, filed October 16, 2020 at para 9.
[132] Darby 2018 Affidavit at Exhibit P [**AEKE A1**]. The financial statements at Exhibit P to the Darby 2018 Affidavit are the September 30, 2016 interim financial statements of Perpetual Energy. The 2016 Consolidated Financial statements of Perpetual Energy are Exhibit 1 to the Affidavit of Paul J. Darby filed September 23, 2020 (**Darby 2020 Affidavit**). See: Darby 2020 Affidavit at Exhibit 1, p 21, Note 13 [**AEKE A307**].
[133] Trustee's Factum at paras 41 and 42.
[134] See e.g. International Financial Reporting Standard 5 *Non-current Assets Held for Sale and Discontinued Operations* (Standard 2021 Issued), s. 2-4, 6-8, 38 and Appendix A [**PR BOA, Tab 18**].
[135] Further, if the financial statements were those of PEOC, the Goodyear Assets would not be referenced as assets held for sale because they were not leaving PEOC's balance sheet. Perpetual Energy was selling PEOC; PEOC was not selling the Goodyear Assets.

81. Second, balance sheets do not purport to represent fair values and cannot be used in isolation to assess the balance sheet insolvency test. That is, including an accounting estimate on a balance sheet does not make it an obligation due and accruing due. As the Chambers Judge held: "Mere accounting estimates do not affect that result under clause (c) of the Insolvent Person definition…".[136] ARO provisions on financial statements are highly qualified estimates of obligations to be performed over an extended timeframe. Perpetual Energy's financial statements, for example, explain that the amounts recorded are "based on estimates of the extent and timing of decommissioning activities, future site remediation obligations and technologies, inflation, liability specific discount rates and related cash flow" and that "[a]ctual abandonment and reclamation costs *could be materially different from estimated amounts*".[137] Perpetual Energy's financial statements reported that the expected period for settling ARO was in the range of *up to 25 years*.[138] These estimates clearly do not represent an amount due and accruing due. Including them on a balance sheet for accounting purposes does not make them so.

82. The Perpetual Respondents filed their Statement of Defence before the Supreme Court's decision in *Redwater*. As the Trustee points out, paragraph 44(c) of the Statement of Defence states "PEOC/Sequoia's liabilities at the time of the Transaction…", and references ARO.[139] That statement was not made in the context of the insolvency test, but rather in the context of determining the value of the Goodyear Assets (paragraph 44(c) expressly pleads that such estimated future costs "were considered in the value of the Goodyear Assets"). The Perpetual Respondents do not disagree that ARO affect an asset's value. But they are not properly considered "obligations, due and accruing due". In any event, the Supreme Court in *Redwater* held that concessions of law are not binding and it is up to the "Court to determine points of law".[140]

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[136] Reasons at para 156 [**AR F8**].
[137] Darby 2020 Affidavit at Exhibit 1 (2016 PEI Financial Statements), Note 2(c)(ii) at p 9 (emphasis added) [**AEKE A307**].
[138] See e.g. Reasons at para 86, 113 (emphasis added) [**AR F8**]. By contrast, the financial statements for the Intervenor CNRL reported the expected time period for settling its ARO to be up to 60 years: Reasons at para 87 [**AR F8**].
[139] Perpetual Respondents' Statement of Defence at para 44 [**AR P23**]; Trustee's Factum at para 32.
[140] *Redwater* at para 125 [**Trustee BOA, Tab 2**].

6. The Trustee's interpretation creates unintended consequences

83. The Trustee asserts that "ARO are present obligations of a debtor",[141] that because the Goodyear Assets included shut-in wells and abandoned wells, some portion (the Trustee provided no evidence of the alleged amount) of ARO were due to be performed,[142] and that all of a debtor's obligations (including ARO) should be considered in applying the balance sheet insolvency test.[143]

84. As the Chambers Judge pointed out, adopting the Trustee's expansive interpretation of obligations due and accruing due "would likely render many of the oil and gas entities operating in Canada insolvent…".[144] Justice Ground said the same in *Enterprise*—that including every debt payable at some future date for purposes of determining insolvency would render numerous corporations insolvent.[145]

85. To illustrate: the Intervenor Canadian Natural Resources Limited's (**CNRL's**) 2019 audited financial statements reported that CNRL had $139M in cash and $4,737M in available bank line as at December 31, 2019, for total available liquidity of $4,876M to pay its current obligations.[146] Its balance sheet showed ARO of $5,563M.[147] CNRL would be unable to meet that obligation and would fail the cash flow test in paragraph (a) of the definition of "Insolvent Person". On the Trustee's view that ARO are present obligations of a debtor, CNRL is insolvent.

E. There was no "transfer" reviewable under s. 96 the *BIA*

1. The Chambers Judge erred in declining to address the Transfer Element

86. The Second Application also sought to strike or dismiss the *BIA* Claim on the ground that there was no "transfer at undervalue". The Perpetual Respondents argued that (a) there was no "transfer" within the meaning of s. 96, and (b) if there was, it was not "at undervalue".

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[141] Trustee Factum at p 7, heading 2.
[142] Trustee Factum at para 88.
[143] Trustee Factum at para 66.
[144] Reasons at para 124 [**AR F8**].
[145] *Enterprise* at para 17 [**PR BOA, Tab 13**].
[146] Transcript from Questioning of Ron Laing held September 15, 2020 (**Laing Questioning**) at Exhibit 1, pp 56, 59, 79 (2019 CNRL Report) [**PR EKE 360**].
[147] Laing Questioning at Exhibit 1, p 81 (2019 CNRL Report) [**PR EKE 360**].

87. The Chambers Judge briefly addressed this argument, but declined to consider it.[148] He gave two reasons. First, the determination of the Insolvency Element would be independent of this issue. This is correct, but not a reason for declining to address it. Second, he held that the transfer at undervalue issue "engages a number of issues that should be explored in a trial proper".[149] This would be a basis not to consider it if there was a reason given for that conclusion, which there was not, and if it was a reasonable conclusion, which it was not.

88. Whether the Asset Transaction constitutes a "transfer" within the meaning of s. 96 is a question of law—and the answer is dispositive of the *BIA* Claim. If there was no "transfer", then there could be no "transfer at undervalue". There is no reason why summary judgment is not appropriate for that issue.[150] Further, it is an error in law to not consider a party's key arguments.[151]

89. The Reasons do not address the merits of whether there was a "transfer" reviewable under s. 96. Nonetheless, this Court can consider the argument in deciding whether to dismiss the appeal.[152] As there are no findings of fact or law, this Court owes no deference to the Chambers Judge.

2. The Asset Transaction was not a "transfer" within the meaning of s. 96 of the *BIA*

90. In this Court, the Perpetual Respondents limit their submissions to the first of those arguments—was there a "transfer" reviewable under s. 96? The answer is no. The Asset Transaction merely combined the legal and beneficial interests in the Goodyear Assets in PEOC.

91. The Trustee's Factum misconstrues this argument. It is not, as the Trustee argues, that there was no transfer at all, or no transfer of a beneficial interest.[153] In a commercial sense, and according to the Asset Purchase Agreement, the beneficial interest in the Goodyear Assets was transferred to PEOC. But a transfer of a beneficial interest to combine the legal and beneficial interests in the

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[148] Reasons at para 60-64 [**AR F8**].
[149] Reasons at paras 63, 64 [**AR F8**].
[150] Questions of law are ideal for summary dismissal. See e.g. *Tottrup v Clearwater (Municipal District) No 99*, 2006 ABCA 380 at para 12 [**PR BOA, Tab 19**]; *Weir-Jones* at para 21 [**Trustee BOA, Tab 22**].
[151] *Brauti Thorning Zibarra LLP v. Trung Nguyen*, 2018 ONSC 3183 at paras 15, 19, rev'd on other grounds, 2019 ONCA 45 [**PR BOA, Tab 20**]; *West Van Inc. v. Daisley*, 2014 ONCA 232 at para 15 [**PR BOA, Tab 21**].
[152] See e.g. *ServiceMaster* at paras 32 [**PR BOA, Tab 4**]; *Nova Pole* at para 19 [**PR BOA, Tab 5**].
[153] Trustee's Factum at paras 128-130.

entity that already holds the legal interest is not a "transfer" reviewable under s. 96 as it is not a disposition of property and does not attract any mischief that s. 96 is intended to address.

3. The nature of a trust relationship and s. 96 of the *BIA*

92. The purpose of s. 96 is to permit the Trustee to recover assets that PEOC disposed of for inadequate consideration, depriving PEOC/Sequoia's estate of value. The Asset Transaction combined the beneficial interest in the Goodyear Assets with the legal interest already held by PEOC. But it was not a "transfer"—that is, a "disposition of property"—within the meaning of s. 96. This is the case for two reasons.

93. First, on a plain reading, s. 96 only applies to transfers between "persons". POT, as a trust, is not a person for the purposes of the *BIA*. A trust is not a legal entity, but rather a description of a fiduciary relationship between parties, unless a statute deems otherwise.[154] As the Supreme Court explained: "a trust is not a person at common law".[155] The Ontario Court of Appeal said the same thing: "As an unincorporated unit trust is not a person, *it cannot be a transferee*, and therefore it cannot be liable as a transferee under s. 62(1) of the [Land Titles] Act.[156] The *BIA* does not deem trusts to be persons.[157] Since s. 96 only applies to transfers between persons, the alleged "transfer" from POT to PEOC is not captured. The Asset Purchase Agreement was between PEOC (in its own capacity) and PEOC (in its capacity as trustee for POT). Section 96 cannot be interpreted to reverse a transaction that is between the bankrupt and itself—what would be the point? Accordingly, s. 96 does not apply.

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[154] *Robinson Engineering Co. v Wasabi Resources Ltd.* (1988), 93 AR 321 (QB) (***Robinson***) at para 17 [**PR BOA, Tab 22**]; *Canada Deposit Insurance Corp. v Canadian Commercial Bank*, 83 AR 341 (QB) (***Canada Deposit Insurance***) at para 15 [**PR BOA, Tab 27**]; *Spencer v Riesberry*, 2012 ONCA 418 at para 53: [**PR BOA, Tab 23**]; *Williamson v Williamson*, 2020 BCSC 108 at paras 22-25 [**PR BOA, Tab 24**]; *Healthcare of Ontario Pension Plan Trust Fund v Neuro Discovery II Limited Partnership*, 2017 BCSC 1743 at para 48 [**PR BOA, Tab 25**].
[155] *Garron Family Trust (Trustee of) v R.*, 2012 SCC 14 at para 10 [**PR BOA, Tab 26**].
[156] *Canada Deposit Insurance* at paras 26 and 42 [**PR BOA, Tab 27**].
[157] See *BIA* s. 2 and 4 [**PR BOA, Tab 6**]. The *BIA* defines an "entity" as a person other than an individual. The definition of "person" in the *BIA* does not refer to a trust, although it includes a corporation. The definition of "corporation" in the *BIA* does not contemplate a trust; it includes an "income trust", but POT does not fall within that term. The *Interpretation Act*, RSC 1985, c I-21, s 35(1) defines "person" to include a corporation, but does not expand this definition to include trusts [**PR BOA, Tab 28**].

94. Second, PEOC held the same legal—and exigible—interests in the Goodyear Assets before and after the Asset Transaction. As the licensee and legal owner of the Goodyear Assets, PEOC had the same ARO and municipal property tax liability before and after the Asset Transaction. ARO are obligations of the licensee.[158] The Trustee's own evidence correctly states that (a) PEOC held the "licenses, permits and legal title to" the Goodyear Assets before and after the Asset Transaction;[159] and (b) "Because [PEOC] already owned the licenses and permits, *no transfer of assets* … was required if POT assets were to be sold to PEOC. *PEOC would simply continue to own the assets*, but in its own right, rather than as trustee for POT."[160] As a result, the Asset Transaction did not change PEOC's position regarding the associated ARO. Simply put, there was no "disposition of property" from PEOC under the Asset Transaction, as required by the definition of "transfer at undervalue" in s. 2 of the *BIA*, and therefore no "transfer at undervalue", an essential element of s. 96. The Asset Transaction made no difference to the value of PEOC's estate—it did not remove any asset that would have otherwise been available to PEOC's creditors. No facts are in dispute that would require a trial of this issue.

95. Both reasons are consistent with each other. As POT is not a person, it cannot be sued, pay money, nor hold property. As a trust is not a legal entity, any liabilities or obligations are liabilities or obligations of the trustee. Those are responsibilities and liabilities of the owner of the legal interest, that is, PEOC as trustee prior to the Asset Transaction, and PEOC as legal and beneficial owner after the Asset Transaction. Whether one looks at the Asset Transaction through the lens of the law of trusts or the purpose of s. 96, the conclusion is the same: there was no "transfer" reviewable under s. 96.

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[158] See e.g. *Redwater* at paras 3 and 145 [**Trustee BOA, Tab 2**]; QB Reasons on First Applications at para 10 [**Trustee BOA, Tab 1**].

[159] Darby 2018 Affidavit at para 17 [**AEKE A1**]. See also Rose Affidavit at para 10 [**PR EKE 26**]; CA Reasons on First Appeal at para 4 [**Trustee BOA, Tab 3**].

[160] Darby 2018 Affidavit at para 17 (emphasis added) [**AEKE A1**]. Similarly, the Trustee acknowledged in the First Applications that "the legal interests and licenses for the Goodyear Assets were held by PEOC" and "[a]s a result, the sale by POT of the beneficial interests in the Goodyear Assets to PEOC required *no transfers*...": Trustee Brief filed November 1, 2018 at para 13.2 (emphasis added).

F. The Chambers Judge did not err in concluding that the Second Application was not an abuse of process

96. The Trustee has alleged inconsistent positions or abuse of process numerous times: once before Justice Veldhuis,[161] once before a panel of this Court,[162] twice before the Chambers Judge (on a security for costs application[163] and then on the Second Application[164]), and now, again, on appeal from his decision. Each time, the arguments have been dismissed. The Chambers Judge's most recent rejection of them is entitled to deference.

97. First, the Trustee alleges that Mr. Schweitzer swore two "opposing" affidavits. One affidavit for the Second Application; the other for a security for costs application. The affidavits are not inconsistent. They address different assets at different times and contexts. The Chambers Judge agreed, finding "no abuse of process in respect of those documents", which address "two different scenarios and are focused on two different time frames".[165]

98. The summary dismissal affidavit looked backward, addressing the value of the Goodyear Assets and associated ARO as at the time of the Asset Transaction. It is premised on the Chambers Judge's decision on the First Applications that as at October 1, 2016, any ARO associated with the Goodyear Assets were not a liability of PEOC.[166]

99. The security for costs application looked forward, addressing the status of the bankrupt Sequoia estate and its ability to pay a costs award in 2020, four years later (that is, after Sequoia acquired other wells, produced from the Goodyear Assets and depleted reserves, and abandoned and shut in wells and related facilities, and had creditor claims of approximately $244 million, limited cash, and mounting professional fees). It was premised on the ratio of *Redwater* that proceeds from the sale of a bankrupt's assets have to first be used to discharge ARO.[167]

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[161] See e.g. Trustee's Memorandum of Argument filed Nov 15, 2019 at para 8 [**PR EKE 641**]; Transcript of Proceedings before Justice Veldhuis held November 21, 2019 at p 17/13-30; 18/28-30 [**PR EKE 653**].
[162] See e.g. Trustee Submissions in Support of a Special Direction on Costs dated February 22, 2021 [**PR EKE 659**]; *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 92 [**PR BOA, Tab 29**].
[163] Trustee's Security for Costs Brief filed July 17, 2020 [**PR EKE 670**]; Transcript of Proceedings held before Justice Nixon held August 26, 2020 (Oral Reasons for Decision) at 39/21 – 40/8 [**PR EKE 696**].
[164] Reasons at paras 7, 33-50, 270-271 [**AR F8**].
[165] Reasons at para 270 [**AR F8**].
[166] Schweitzer 2020 Affidavit at paras 8 [**AEKE A260**].
[167] Affidavit of Mark Schweitzer for Application for Security for Costs filed May 5, 2020 at paras 24-31 [**AEKE A269**].

100. While the Trustee argues that the Chambers Judge's decision in the First Applications was incorrect, that argument does not make the statements in one affidavit incorrect or inconsistent with the other. The affidavits were expressly about the affiant's understanding of *Redwater*, as it applied to two different contexts and times. Both affidavits were before the same Chambers Judge in the same proceeding. The Trustee did not cross-examine on either affidavit. Nor did the Trustee appeal the Chambers Judge's order that the Trustee post security for costs.

101. Second, the Trustee argues that the Second Application involved arguments inconsistent with the Statement of Defence. The Perpetual Respondents argued that there was no "transfer" within the meaning of s. 96. This is not inconsistent with pleading that the Asset Transaction transferred the beneficial interest of the Goodyear Assets. Similarly, the Perpetual Respondents' argument post-*Redwater*, that ARO are not an "obligation, due and accruing due" for the purposes of the *BIA* solvency test, is not inconsistent with their pre-*Redwater* pleading referencing ARO as a liability as part of the transfer at undervalue element of the *BIA* Claim. As this Court held: "This pleading is consistent with the statement in *Redwater* at paragraph 157, that Abandonment and Reclamation Obligations serve 'to depress the tenure's value at the time of sale.'"[168]

102. Third, the Trustee argues that it is an abuse of process for the Perpetual Respondents to have applied to summarily dismiss the *BIA* Claim on the basis of the arm's length element and then to apply to summarily dismiss the *BIA* Claim on different grounds. As the Chambers Judge noted, the Trustee's argument is inconsistent with the new foundational *Rules of Court* and the culture-shift directed by *Hryniak v. Mauldin*.[169] It is also inconsistent with *Weir Jones*, which states that "the judge who dismisses an application for summary adjudication may still be in a position to advance the litigation," and that "a second application for summary judgment may be appropriate later in the proceedings when the record is clarified and the issues are perhaps narrowed."[170]

103. The Chambers Judge narrowed the issues in the First Applications. Further, the Supreme Court in *Redwater,* issued after the First Applications were filed, clarified the law. This Court in *Milne v Barnes* expressly notes that a second summary judgment application "*is possible, subject to the court's discretion*, for example where brought on a new record, after extensive discoveries,

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[168] CA Reasons on First Appeal at para 96 [**Trustee BOA, Tab 3**].
[169] *Hryniak v Mauldin*, 2014 SCC 7 at paras 2, 28, 31-33 [**PR BOA, Tab 30**].
[170] *Weir-Jones* at para 49 (emphasis added) [**Trustee BOA, Tab 22**].

a beneficiary to the trustee is not a "transfer" within the meaning of s. 96. These two positions are entirely compatible.

105. The Chambers Judge's conclusion that there was no abuse of process was discretionary and entitled to deference. The Trustee has not identified any palpable or overriding error in his analysis.

PART 5 - RELIEF SOUGHT

106. The Perpetual Respondents request that the appeal be dismissed with costs.

Respectfully submitted this 26th day of May, 2021.

Estimated time required for the oral argument: 45 minutes

D.J. McDonald, Q.C.
Co-counsel for the Perpetual Respondents

BURNET, DUCKWORTH & PALMER LLP

Paul G. Chiswell / Michael S. Deyholos
Co-counsel for the Perpetual Respondents

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2. *Sangha v Alberta*, 2018 ABCA 32

3. *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 254

4. *ServiceMaster of Canada v Meyer*, 2019 ABCA 130

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6. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 2, 4 and 96

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10. *Kormos v Fast*, 2019 ONCA 430

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16. *Re Industries Cover Inc. (Syndic)*, 2015 QCCS 136

17. Frank Bennett, Bennett on Bankruptcy, 22nd Ed (Toronto, ON; LexisNexis Canada Inc., 2020)

18. International Financial Reporting Standard 5 *Non-current Assets Held for Sale and Discontinued Operations* (Standard 2021 Issued)

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30. *Hryniak v Mauldin*, 2014 SCC 7