Action No.: 1801-10960
E-File Name: CVQ18PRICEWATERHOUSECOOPERS
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

Defendants

P R O C E E D I N G S

Calgary, Alberta
December 17, 2018

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L. Rasmussen	For PricewaterhouseCoopers Inc.
D.J. McDonald, QC	For Perpetual Energy Inc.
P.G. Chiswell	For Perpetual Energy Inc.
S.H. Leitl	For Susan Riddell Rose
A. Badami	For Susan Riddell Rose
K. Salguero	Court Clerk

Discussion

THE COURT CLERK: Order in court.

THE COURT: Good morning.

MR. DE WAAL: Good morning.

THE COURT: Please be seated.

MR. LEITL: Good morning, My Lord.

THE COURT: Just one housekeeping matter. I have a bar admission at 1:00 in this courtroom, otherwise the day is yours.

MR. MCDONALD: We better clean up at --

THE COURT: That's --

MR. MCDONALD: -- before we leave.

THE COURT: That's actually why I'm mentioning it. Just at least close your materials, et cetera, and --

MR. MCDONALD: Maybe --

THE COURT: -- flip them --

MR. MCDONALD: Is it okay if we put them in -- well, the jury box might be used, too, I suppose.

THE COURT: I suspect not.

MR. MCDONALD: Okay.

THE COURT: I'd put it over there.

MR. MCDONALD: Okay.

THE COURT: Thank you, sir.

MR. MCDONALD: Thank you.

THE COURT: At your convenience.

MR. MCDONALD: Thank you, My Lord. First, I wanted to say thank you for rescheduling after I made the mistake of saying I was available on November 30th and found I was supposed to be far away. I appreciate you accommodating me, and I thank my friends as well. And thank you also for the questions which we have been diligently working through over the last several days. Both of us have written answers or speaking points, depending on how you might like to treat them. We both just finished and just exchanged now, but I'll pass up to you the defendants, and that's the combined Norton Rose --

THE COURT: Thank you.

MR. MCDONALD: -- Burnet Duckworth (INDISCERNIBLE).

THE COURT: Thank you, madam clerk.

MR. DE WAAL: My Lord, I'll just hand up mine as well.

THE COURT: Certainly. Thank you, Mr. de Waal.

Thank you, madam clerk.

MR. MCDONALD: We've had a brief discussion among counsel about the most effective way to deal with this. I think we all see two options. One option would be for us to take you through the answers now. I don't think any of us intends to speak to every answer. The ones that are self-explanatory or don't require any further explanation we'd just leave with you in writing. There are others, though, that some context or elaboration might be helpful to you.

The other alternative, and perhaps the better alternative, if you wish, is to leave them with you for whatever period of time that might be, an hour, to allow you to read them quickly and perhaps identify some focused areas that you would like us to address and for us to read each other's so that we might, when we address our own, also take into account what the other side has said. I don't know how long it would take to read them. They're fairly comprehensive. There are a lot of attachments that I don't think you'd need to spend time with, but you would need to look at the answers. And my friend's appears to be about the same volume as ours, so I would think it's an hour, an hour and a half, something like that.

THE COURT: Let me turn the question around to all counsel. Would it be a benefit given what you've just stated for you to pause for an hour to read your friends' commentary and vice versa so that you can speak maybe more effectively?

MR. MCDONALD: I think so.

THE COURT: Okay. I'm not adverse to that. Would an hour be sufficient?

MR. MCDONALD: I don't know, but I guess we should think about trying to complete this today. You know, an hour would certainly be sufficient, in my view, to read what my friends have done, to thoughtfully organize it so that we incorporate it into our oral submissions. We could do our best.

THE COURT: I think I would get a lot more out of it if I had the benefit of your comments having considered your friends' response --

MR. MCDONALD: Okay.

THE COURT: -- and I suspect the parties would too. Mr. de Waal?

MR. DE WAAL: Yes, My Lord. In fact, that's -- I agree with that.

THE COURT: Okay. Why don't we adjourn for an hour and reconvene at 11:15. That would give us a clear hour --

MR. MCDONALD: Okay.

THE COURT: -- and if you feel comfortable advancing at time -- at that time, we will. Like I said, we have all day. The bar ad is only going to take probably 20 or 30 minutes at the most, so we can start again at 1:30, I suspect. Does that work?

MR. MCDONALD: Okay. Well, we'll be back at 11:15, hopefully ready to go.

THE COURT: Okay.

MR. MCDONALD: If we're not, we'll tell you where we are.

THE COURT: Advise me accordingly.

Madam clerk, if we could adjourn --

THE COURT CLERK: Sure.

THE COURT: -- until 11:15.

THE COURT CLERK: Order in court.

(ADJOURNMENT)

THE COURT CLERK: Order in court.

THE COURT: Please be seated. Mr. McDonald.

Submissions by Mr. McDonald

MR. MCDONALD: Thank you, My Lord. It's been rushed, but I think I'm in a position that I can address my friend's comments. I will do so essentially by going through the document that we provided to you. Some of the questions relate more to the issues that Mr. Leitl was arguing and others to ones that I was arguing, so I'll be skipping over those that Mr. Leitl will be addressing. And so it's going to be -- I think there -- in the first ten or so, they're mostly in my area and then it's a mix after that, probably mostly in

Mr. Leitl's area.

And there's some that I don't think I need to address at all. For example, number 1, I don't think there's any issue. Number 2, I don't know that there's a difference between us, but there is an explanation that's required. And you had asked to provide Schedule 'I' to the share purchase agreement, and you'll see that the answer is that that is Exhibit 'K' to Ms. Rose's affidavit. And I wonder if I could take you there for --

THE COURT: Yeah.

MR. MCDONALD: -- a moment because this --

THE COURT: I'm there. I just -- I do have questions that are vol -- I just want to make sure I had the right document because of --

MR. MCDONALD: Yes, and you --

THE COURT: -- the details we'll get into.

MR. MCDONALD: You do, and you don't.

THE COURT: Okay.

MR. MCDONALD: Schedule 'I' to the share purchase agreement is the first page of this document, not the second page. And so we had understood when we were before you last time that Schedule 'I' was these two pages, and that's incorrect. So the direct answer to your question is only the first page behind 'K'.

But to clarify, the second page or the back of that page if yours are copied on both sides --

THE COURT: Yes.

MR. MCDONALD: -- is called Statement of Adjustments Goodyear, and that is the statement of adjustments for the asset transfer agreement, and you'll see the reference to it in subclause 11.01(h) of the asset transfer agreement. And we have then included in the package at tab 2, not the entire statement of adjustments to the asset transfer agreement because that was some 290 pages, but what we've included is essentially the first pages of the schedules or when the pages were multiple sched -- where the pages were multiple pages, we've included the first and last page. So, for example, you'll see you turn -- if you're at tab 2 --

THE COURT: I'm there.

MR. MCDONALD: -- if you turn past the cover sheet, you'll see Schedule 1, and it's Statement of Adjustments Goodyear Property Tax --

THE COURT: I'm there.

MR. MCDONALD: -- and Schedule 2, Orphan Well Levy. And that takes you on to Schedule 5. So those are single-page documents.

And then you'll see a page described as Mineral Lease Per Diem Report for a project called a series of numbers ending in 004.

THE COURT: I'm there.

MR. MCDONALD: And it has in the left-hand corner page 1 of 49.

THE COURT: I'm there.

MR. MCDONALD: And then the next page is page 49 of 49. We didn't include the other 47 pages because we didn't think they would be helpful to anybody. And if you turn over, you'll see 1 of 68 and then 68 of 68. One of --

THE COURT: Yeah.

MR. MCDONALD: -- 71 and 71 of 71. So these are all the mineral release rental reports for three different -- what are called temporary projects.

THE COURT: Okay. Thank you.

MR. MCDONALD: And then if you go past the -- oh, sorry. There's one more, a six-page document.

THE COURT: Yeah, I see that.

MR. MCDONALD: And then it gets to a Schedule 6, which is a surface lease rental schedule. Schedule 7, Crown deposits, and those just had a couple supporting documents, so we included those.

THE COURT: Okay. Thank you.

MR. MCDONALD: Okay. So that's just really by way of explanation not a difference between the parties.

Item 3 might be similarly more of a description rather than a difference between the parties. You asked for a reconciliation between Exhibits 'I' and 'J' of the Darby affidavit?

THE COURT: Correct.

MR. MCDONALD: And in a nutshell, Exhibit 'I' are financial statements prepared at the request of 198 for 198's due diligence report, and they're consistent with the financial statements that PEOC prepared and filed for income tax purposes. They're the ones that show on the balance sheet assets of a hundred dollars, no liabilities.

And then Exhibit 'J' is prepared for the same purpose at the request of 198 and represents internal operating statements for the Goodyear assets on a pro forma basis as if PEOC had held the beneficial interest as per the asset transfer agreement, and those contain the actual numbers if one were to make those assump -- that assumption.

THE COURT: Yeah. Again, these being on a pro forma basis. The reason I had asked the question when I was glossing through the documents, when I see in the first gloss the balance sheet under 'I' of a hundred dollars, total assets at two different points in time and total liabilities, I was struck by under 'J' where I see revenue expenses/operating loss noted there. And I didn't see pro forma on the -- on that front page, so I just --

MR. MCDONALD: Okay. I don't know why it wasn't labelled that way, but my information is that they are pro forma, and the assumption is described in the answer to para -- to question 3 at -- in the answers we provided.

THE COURT: Noted. Thank you.

MR. MCDONALD: Question 4, I don't know that we differ particularly. The statement of claim is incorrect, and I think the plaintiffs acknowledge that PEOC purchased the Goodyear assets for itself while it was -- while it was trusteed upon. And indeed in the answer that we provided, we say PEOC purchased the Goodyear assets for itself.

And just --

THE COURT: Okay.

MR. MCDONALD: -- one additional fact that isn't set out in writing in the response that we provided is that the trust indenture, section 5.2, permits the trustee to purchase trust property, and the trust indenture has been included in response, I believe, to the question 60.

THE COURT: Yeah, 60(c).

MR. MCDONALD: You'll see it at tab 60(c) of the materials, and 5.2 is entitled transactions with trustee.

THE COURT: Noted. Thank you.

MR. MCDONALD: I believe in paragraph 5, we're in 5(a) and 5(b), each of us is referring to clause 2.06. We've got a couple other references that you'll see in the answers that we provided including when it says, does the asset -- your question (b): (as read)

> Does the asset transfer agreement recognize the conveyance involve the assumption of liabilities?

We refer specifically as well to clause 10.08.

We have a significant difference on 5(c). Your question is: (as read)

> As a stand-alone basis, did the Goodyear assets have value at the time they were conveyed to PEOC?

And my friend's answer talks about whether ARO should be regarded or disregarded and then refers to an asset value of 5.6 million based on one of the McDaniel reports and a liability or what is now referred to as a negative value embedded in the assets of $223 million based on the XI Technologies report. We're going to be dealing with the power submission on the many problems with using the McDaniel's report as a basis of asset value and the XI Technologies report as a basis of liabilities. And I won't deal with all of them here, but I'll come to them when -- in answer to some other questions.

But the answer that is provided in our materials is that the question of the value of the Goodyear assets on a stand-alone basis is something that will be required to be determined by expert evidence. The Goodyear assets were not sold on a stand-alone basis pursuant to the share purchase agreements, so we don't have the benefit of an arm's length transaction between 198 and PEOC, and we are -- have to consider as part of the consideration the

variation other components, the Mercuria contract, the office lease, the seismic, and that sort of thing.

So if one were to isolate the Goodyear assets on a stand-alone basis, one would value those, in our submission, with the analysis of an expert who would look at the performance of the assets, the production, commodity prices, operating costs, taxes, transportation costs, salvage value. All these things are listed in the answer to 5(c), apply an appropriate discount rate and determine a value.

And I also would like to refer you to paragraphs 99 to 128, which is referenced in the third paragraph in answer to (c), and that's the section of our brief, My Lord, that I didn't deal with in argument. That's the section that addressed if you dismiss our application, we have the application for a stay for the plaintiff's application. We decided to park that for the time being, but much of what you've asked relating to values and solvency or insolvency is addressed in that section of our brief, and the reason for that is that on the threshold issue dealing with whether or not the transaction was an arm's length transaction, we did not address value and solvency because they weren't relevant, in our submission, to the threshold issue. But we did address them extensively as part of the stay application because we take the position that that application cannot be determined -- that the plaintiff's application cannot be determined summarily because you need reliable evidence on, among other things, the value of the assets, the value of the liabilities, and solvency.

So I'm going to refer, and you'll see reference here and many other places in our answers, to that section of the brief, and we've set out there the frailties of relying on what the plaintiffs seek to rely on, an outdated engineering report of some of the properties, which Mr. Darby acknowledged on cross-examination didn't represent the fair market value, and yet they continue to say, including in this answer, that's the value of the assets. And we similarly say in that section of the brief you can't rely on the hearsay evidence of some computer model by an entity called XI Technologies, which appears to have assessed based on some assumptions that aren't disclosed the asset retirement obligations at some date in 2018, which my friends in answer to paragraph 5 say is what you should rely on to determine the value of the liabilities.

So I'll take you again when we get to some of the more specific questions to some of the sections of section -- of paragraphs 99 to 120(a) of our brief, but we've dealt with all of that in our sections, but I didn't argue them when we were last before you.

5(d), your question asked for whether the purchase was for a nominal amount, and I think both of us are just directing your attention to the amounts of the stated consideration in the agreements, $10 in the one agreement and $1 in the other, subject to the adjustments, and you have the statement of adjustments, which shows there are positive and negative

adjustments in the many millions of dollars. I don't know that anything turns on the use of the word "nominal". If nominal is intended to mean a small dollar figure, then $10 and $1 are small dollar figures. Nominal, as I understand it, has another meaning, which is below real value, and certainly we do not accept that it's below real value.

THE COURT: Now, just to be clear for both parties, I was asking the question in part because purchase price is defined, as I recall, in the agreement, and the use of nominal amount was not to suggest it was negative, this is just part of narrative, but when I saw the arguments as drafted, the purchase price, the nominal purchase price as defined in the agreement, did not take into account, and I'll use your phrase, Mr. McDonald, the plus and minuses, i.e., that's part of the reason why I asked are we dealing with an asset here? Let's just park the -- to the side the ARO. And I appreciate the comments that have been made that it's embedded, but we just didn't buy this -- this is a question -- for a nominal amount of $10. We bought it for the asset, acknowledging that there are some liabilities -- I'll use that term with a small 'L' right now -- and that's different from the purchase price as defined in the agreement.

MR. MCDONALD: Are we talking about the asset agreement or share agreement right now?

THE COURT: We're talking about the asset agreement.

MR. MCDONALD: Could I -- my memory is different from yours, and let's me just check for a moment.

MR. CHISWELL: It's at page 7.

THE COURT: Let's just go and have a look at that agreement.

MR. MCDONALD: Yes. At page 7, the agreement is tab 'J' to Ms. Rose's affidavit, and the purchase price is defined in 'KK' on page 7.

THE COURT: Sorry. Give me that tab again.

MR. MCDONALD: 'J' of Ms. Rose.

THE COURT: Okay. I'm there.

MR. MCDONALD: Page 7, paragraph -- or paragraph 'KK': (as read)

> Purchase price means $10 as adjusted in accordance with

subclause 11.01(i).

THE COURT: Correct.

MR. MCDONALD: And then if we go to 11.01(i), which is on page 24 --

THE COURT: I'm there.

MR. MCDONALD: -- it ref -- well, the article 11 is adjustments, and the purchaser and vendor agree in (i) to make monthly payments for the adjustments, and we'll do a final statement of adjustments within 128 days -- 180 days from closing. So my understanding of the agreement is that the stated consideration is the $10 as adjusted, and that draws in the --

THE COURT: Yeah.

MR. MCDONALD: -- statement of adjustments I just referred to.

THE COURT: Yeah, yeah. And I think you've answered the question when you say the $10 as adjusted.

MR. MCDONALD: Yes.

THE COURT: That -- that's my point.

MR. MCDONALD: Okay. If that's --

THE COURT: Yeah.

MR. MCDONALD: So have -- have I -- have I answered your question then?

THE COURT: Yeah.

MR. MCDONALD: That's what --

THE COURT: You have.

MR. MCDONALD: -- you're looking for? Thank you.

(e) of question 5 is: (as read)

> What evidence is there to support the assertion that the liabilities associated with the Goodyear assets exceeded the value of the Goodyear assets at the time of the conveyance?

And my friend argues in five bullet points all of the evidence that we say is unreliable and wrong. He starts with the ARO as if it's a liability when I believe he acknowledged on our first appearance that the ARO is not a liability. It's a provision. He turns to the LMR shortfall of $15.9 million, excluding pipelines.

I will take you to our argument in a moment, but LMR is not a value of assets or liabilities. It determines assets or liabilities. We're not a determination of fair market value, I suppose I should say. It's a value of calculation, but it attributes the gross value of the assets and liabilities of a well to the licensee. It doesn't consider the value on a net basis. So it's a formula that the AER has determined to use for a particular regulatory purpose. It's not a formula to determine the value of assets and liabilities of a company.

Municipal taxes is the next point that my friend refers to, plus or minus $10 million. Ms. Rose dealt with that in her affidavit, and that number is wrong, and the taxes were either paid or following the transactions Sequoia entered into, arrangements with three municipalities to defer taxes. My friend then refers to the ARO again, which has the same difficulties I just mentioned, and, finally, it seems once again referring to ARO, acknowledging it isn't a liability but treating it as if it were a liability for the purposes of valuation. So I say that the answer that the plaintiffs have given you is entirely unreliable.

If I could then take you to the answer in our materials. We effectively anticipated this, and to the extent that there's reliance on reserve reports, they're outdated. You'll read that the reserve report was effective December 31, 2015, and included only some of the wells, not all of the assets. He included estimated abandonment costs and salvage value for those wells. It was discounted at 10 percent and then compared that to an undiscounted ARO number calculated by -- in accordance with some computer model.

I think now might be a useful time to ask you to turn to the stay section of our brief where we address much of this. Could I ask you to turn to page 27.

THE COURT: (INDISCERNIBLE). Which paragraph again, sir?

MR. MCDONALD: Starting at paragraph 95.

THE COURT: I'm there.

MR. MCDONALD: So this is the section that I did not address. If I could then take you over two pages to a heading, the reason the plaintiff's application should be stayed.

THE COURT: I'm there.

MR. MCDONALD: There's reference initially to section 96(2) of the *BIA*, which permits a limited hearsay evidence on behalf of a trustee with respect to the value of the consideration given and received and creates a rebuttable presumption. But then we go on to say that at paragraph 104, well, I might say that -- that's for the purposes of the *BIA* claim. There's no similar statutory relaxation of the hearsay rules for the oppression claim and the other claims that the plaintiff makes. It's only for the *BIA* claim. Starting at 104, though, we make reference to what I've already referred you to, the reserve report and the software model, and say that the reason this case has to be decided, if you reject our sub -- our application, at a trial is that the evidence of value will be hotly contested.

If I could then turn -- ask you to turn over to page 32.

THE COURT: I'm there.

MR. MCDONALD: We refer to in paragraph 115 a decision called *Indarsingh*, which addresses the significance of section 96.2 of the *Act*, and the Court says: (as read)

> I appreciate that a certain informality is required under the *Act*, but unsworn opinion evidence or opinion evidence that is merely exhibited to an affidavit of someone other than the expert is, in my view, inadmissible or virtually weightless. The *Act* provides that where a specific matter of procedure is not dealt with in the *Act*, the rules of practice apply. In Alberta, rule 6.11 permits opinion evidence in support of an application but only if it is sworn and presumably without the strict necessity of having to prove the qualifications of the expert.

The trustee's opinion as to the value received by PEOC is based solely on an outdated reserve report, and there we've quoted Mr. Darby's answer to the question. I think my question was fair market value of the assets but whichever you prefer. The engineering report does not state the fair market value of the assets. So my friend in all the answers

today continues to rely on the engineering report to support the value of the assets when Mr. Darby himself concedes that it doesn't state the fair market value of the assets, and any of us who have had experience with engineering reports during the course of our careers know that they are for a specific purpose, and that purpose is not to state fair market value.

Paragraph 117 then lists some of the problems with the reserve report including an acknowledgment in paragraph -- described in paragraph (e) of 117 that there's already contrary evidence on the point where he says: (as read)

> The McDaniel report includes an estimate of abandonment costs as well as estimates for salvage value. For this reason, the amount of ARO may be overstated.

So he acknowledges that he's double counting ARO, but he doesn't try to deal with it. He goes on: (as read)

> The trustee does not consider this to be material without doing an assessment of what the amount is in the engineering report, without indeed even attaching the engineering report as an exhibit to his affidavit.

Paragraph 119 also points out that the trustee ignored the value of the other consideration that PEOC received on the transaction, including the gas marketing contract, the office lease, and the licences -- the seismic licences.

The other side that Mr. Darby relied on in his affidavit, and I'm not sure if he's relying on it in answer to 5(e) or if he's just referring to the ARO provision of Perpetual, but to the extent that he's relying on the XI Technologies -- well, I'm sorry. He is because he gets that $223 million number. So inevitably they're relying -- continue to rely on the XI Technologies software. That whatever work XI Technologies has done, we don't know because they haven't provided a witness, they haven't provided a report, we don't know what their inputs were, their assumptions were, their methodology. We don't know the qualifications of the people who did the work.

We do know, and this is set out in paragraph 122, that Mr. Darby has no training in calculating asset retirement obligations, and that he acknowledges that valuing asset retirement obligations is highly -- a highly judgmental and nuanced process. We also know -- this is set out in 123 -- that while the AER has filed a proof of claim in Sequoia's bankruptcy, it doesn't know what that amount is, and it's filed a claim between $1 and $225 million. And finally, the reference in 124 to Mr. Darby's submission that AR, asset requirement obligations, are not liabilities but provisions, which is a liability of uncertain

timing and amount.

And, finally on this point, and this comes up in many of your -- in answer of many of your questions, the comparison Mr. Darby makes is assets discounted at 10 percent against undiscounted liabilities, or ARO, which he treats as liabilities. And again, it's inconceivable, in my submission, that a Court could look -- compare a discounted number or assets with a undiscounted number for liabilities have come up with any meaningful conclusion. I'm sorry to repeat this. In addition, it's inconceivable that one could compare an asset value as of December 31, 2015, with a liability value two to three years later and come up with any meaningful conclusion.

I'll turn then to question 6. You asked: (as read)

> Is paragraph 20 of the Darby affidavit something on which this Court can rely upon for the purposes of this hearing?

And I'm not sure what your concern was on that paragraph, but Mr. Darby starts by referring to what the Perpetual group contemplated. He says: (as read)

> Although this was not specifically referred to in the Goodyear presentation, it appears from the events that followed that the Perpetual group contemplated that PEI would sell all the shares in PEOC.

Well, Mr. Darby is in no position to speak to what was in the minds of the Perpetual group or what the Perpetual group contemplated. Frankly, his description of the facts that followed in that paragraph doesn't seem unreasonable, but we take the position that his reference to whatever was in the contemplation of the Perpetual group is not admissible.

THE COURT: And just --

MR. MCDONALD: And my friend -- I think my friend's answer is essentially a witness can comment on documents produced by the other side, and there's nothing remarkable about that proposition, but that doesn't mean that a witness can provide his own opinion or perception of what was in the minds of the parties on the other side.

THE COURT: And just for the clarification of both parties, the reason I asked that question was because of the word "contemplated".

MR. MCDONALD: Okay.

THE COURT: I'm just sensitive to that in these particular circumstances, so --

MR. MCDONALD: Okay.

THE COURT: -- your friend can speak to that.

MR. MCDONALD: That takes us to question 7, which states: (as read)

> Exhibit 'G' to the Darby affidavit summarizes the LLR for the northern wells and facilities and the southern wells and facilities.

Ask you asked: (as read)

> Do the northern wells facilities and southern wells facilities comprise the Goodyear assets?

And my friend says basically the trustee doesn't know. So I don't know why that document was put in the record if the trustee doesn't know. He says it's a record we found in the -- or received in the production from the PEI data room for the sale of the Goodyear assets, but there's no suggestion in the evidence that the properties listed there are in fact the Goodyear assets.

The data room was populated in the spring of 2016. You've seen the evidence of the parties' negotiations of the land schedule and that was an evolving document that eventually was agreed to in the asset transaction and there is no -- well, you can't conclude that the northern wells and southern wells and facilities described on Exhibit 'G' are the Goodyear properties. And indeed I can take you to footnote 7, which is part of the answer to 7(a) --

THE COURT: I'm there.

MR. MCDONALD: -- question 7(a).

THE COURT: Yeah.

MR. MCDONALD: And just to identify not any specifics, but the fact that they were different properties, in Exhibit 'G', the deemed liabilities -- this is for LLR purposes -- are $202 million whereas the deemed liabilities ultimately were $176 million for the Goodyear properties. So that's only an illustration that they were different properties from what is in Exhibit 'G'.

THE COURT: Yeah. Again, for the benefit of all parties, the reason I posed the question is I saw these discrepancies, and I wanted to make sure I wasn't misunderstanding something.

MR. MCDONALD: Okay.

THE COURT: Okay.

MR. MCDONALD: I think the discrepancies exist because the properties are different.

THE COURT: Right. Okay. Thank you.

MR. MCDONALD: As I say, my friend's answer was that the trustee has no independent knowledge. In answer to 7(b), your question is: (as read)

> Is there any evidence that the actual value of the Goodyear assets equals the difference between the deemed assets and deemed liabilities as those two phrases are defined in directive 6?

And my friend's answer is, Not directly, which might be an acknowledgment of what we have stated more specifically in our answer. We say: (as read)

> No. LLR is calculated monthly by the AER as per gross operated working interests as opposed to net operated and non-operated interests. That is, it attributes 100 percent of the deemed assets and 100 percent of the deemed liabilities of a well to the licensee. It uses provincial and regional averages as opposed to actual assets and liabilities of a particular licensee. Nor does the LLR necessarily use site-specific abandonment and reclamation costs, and therefore cannot be considered as representative of the value of the Goodyear assets.

So I'm not sure. My friend's disagreeing with that when he says, Not directly, but that's a more specific answer to why the LLR calculation isn't a calculation of the fair value of the assets. And we've attached directive 6 to the materials, and you can see in the directive the manner in which the calculations are required to be made.

Question 7(c) is: (as read)

> Should this Court make findings based on deemed assets and deemed liabilities as those phrases are defined in directive 6, or should this Court make findings based on actual asset values and obligations?

Well, my answer to the first part of your question is you cannot use directive 6 to make findings. My friend seems to acknowledge that, but then goes on to say: (as read)

> It is not necessary to determine the value of assets deemed or actual for finding that the consideration received by PEOC was conspicuously less than the consideration provided in taking over the assets and associated liabilities.

I find that a remarkable assertion, My Lord, that he's essentially asking you although, frankly, I don't think you need to make a finding for the purposes of this application to find that the consideration was conspicuously less when he hasn't provided reliable evidence of the value of the assets or the liabilities. That would be an impossible finding to make, and I don't know what the assets are worth, I don't know what the liabilities are worth, but I know there's a big difference. That's not what courts do. And we say when -- if and when we ever get in this case to have it to determine the value of the assets and liabilities, the Court will determine that based on all the evidence before it, such as what I've referred to a little earlier.

At 7(d), we agree that the deemed liabilities for the LLR calculation are on an undiscounted basis.

It may be that paragraph 8 is one that Mr. Leitl will be addressing, but I would like to touch on it. And your question is that in paragraph 20 of the Darby affidavit states that PEOC was unable to pay the ARO the municipal property tax liabilities and other liabilities associated with the Goodyear assets and was insolvent at the time of or immediately after the asset transaction.

And you ask: (as read)

> What weight should the Court give to this conclusion?

And our answer is -- or "this assertion", and our answer is the Court should give no weight.

My friend's answer is quite different. He says that this is an inevitable conclusion from the uncontested facts. Well, certainly the facts are not uncontested. He goes on to say: (as read)

> PEOC had no other assets or sources of revenue when it received the 2,500 cash-flow-negative wells.

If you recall, PEOC had 32 million cubic feet per day of production revenue. You'll recall that under the sale -- purchase share sale agreement there was price protection provided by way of the Mercuria contract, so it's far from an inevitable conclusion that PEOC was unable to pay its liabilities at the time of the transaction.

And I might say that your question refers to Darby's reference to unable to pay the abandonment and reclamation costs. Well, we know you don't have to pay the undiscounted amount of the abandonment and reclamation costs. That's not a liability for the company. It's a provision, and we've discussed that at length. And so while the company has an obligation over time to reclaim wells, the ARO is not a calculation of an immediate liability that's payable and so can't be used as a measure of solvency.

Then the second part of paragraph 20, and perhaps more what you were driving at is --

THE COURT: We should clarify for the record. You've referred to paragraph 20. Indeed, it is paragraph 31, and that was my mistake --

MR. MCDONALD: Correct. Yeah.

THE COURT: -- so --

MR. MCDONALD: We both recognized that.

The second part of paragraph 31 was Darby's statement that PEOC was insolvent at the time of and immediately after the asset transaction. In our submission, you should give no weight to that conclusion. There are many reasons for that, the first of which is that it's an opinion, and while section 96(2) of the *Act* relaxes the hearsay rule for -- or the opinion evidence rule for the purposes of value, it doesn't do that for the purposes of solvency, and Mr. Darby has not been qualified to give an opinion on solvency.

There's no evidence, in my submission, in the Darby affidavit that PEOC was unable to make the payments as they became due. The reference to the munici -- well, the reference to ARO I've already addressed. Municipal taxes, you've seen the evidence in Ms. Rose's affidavit. They were paid. There were three municipals that the company was in penalty under, but those were taken over by Sequoia. They were adjusted in the statement of adjustments, and Sequoia entered into payment arrangements with those municipalities. And, of course, all the other liabilities were settled at the time of closing or adjusting.

I'd like to take you back to our brief and those -- actually, probably an easier way to do it is take you to Mr. Leitl's brief. Sorry, paragraph 9 of Mr. Leitl's brief.

THE COURT: Thank you. I'm there.

MR. MCDONALD: My friend -- or Mr. Darby makes the assertion that PEOC was insolvent at the time of and immediately after the transaction. I think I've addressed at the time of, and I refer you also to the more complete answer we've given to question 8(a), but let me also take you to what Sequoia says about their business operations.

Now, we have a difference between us about whether one tests the post-transaction solvency a moment after the transaction or at a later date, but Sequoia described in March 2018 in a letter to its stakeholders its business plan and how it operated and then the demise of its business. And it starts by saying it was formed to implement a gas acquisition strategy during what was thought to be the bottom of the gas price cycle: (as read)

> ...strategy involved in acquiring gas assets, some of which were close to the end of their life cycle, and working on reducing operating costs of these assets in part through the implementation of an aggressive abandonment and reclamation program that would see the restoration of the lands and inactive wells acquired from previous producers back to their original state prior to the commencement of oil and gas operations.

It goes on to describe this abandonment and reclamation program in the next paragraph: (as read)

> ...created an internal abandonment and reclamation team with in-house environmental functions guided by a seasoned and established operations team.

It abandoned, in the third paragraph: (as read)

> ...150 wells and received reclamation certificates for 91 wells.

It goes on to describe -- well, I'll take you to two more passages. Turning over to the next page, the second full paragraph: (as read)

> These strategies were successful and on target through to the end of the summer of 2017. Sequoia steadily increased its production and reduced its overall environmental liabilities. However, by the

> end of the summer of 2017, gas prices in Alberta began to slide.

Now, it's very apparent from that that it was a viable and operating business and appears to have been a successful business for the first year or so of its operation. And then, like many gas producers in Alberta, it was faced with the decline in the price of gas, and I won't take you through the balance of the letter, but it describes how this ultimately led to its bankruptcy. But Mr. Darby's conclusion that it was insolvent at the time of and immediately after the asset transaction should be given no weight, and the better evidence is that it was anything but.

I believe the answer my friends give to 8(b) -- well, it looks like we're on the same page on that. It looks like -- your question was: (as read)

> Did Mr. Darby determine the liabilities of PEOC on a discounted or undiscounted basis?

And we're all agreed it was an undiscounted basis.

You ask in question 9: (as read)

> Given that the disputed transaction occurred on October 1, 2016, what is the relevance and the status of the PEOC Sequoia wells as at March 23, 2018?

And, of course, our answer is that there is no relevance. My friend's answer is that the trustee tracked all the assets, but I think perhaps what he's referring to is the first page of Exhibit 'K', which shows that different wells were purchased by Sequoia from different venders at different dates. And indeed the trustee seems to have reconciled those, but that -- other than that small point, there's no relevance to the other statements or suggestions in Exhibit 'K', particularly the last page of Exhibit 'K', which is some sort of summary per the XI model. I mean, it doesn't state any effective date for that, but presumably from the context, it's sometime in 2018, and what that could possibly show about the information -- quite apart from all the many frailties with the XI model, what it could possibly show as of two years earlier is hard to conceive.

The second page of Exhibit 'K', if anything, seems to show that Sequoia was pursuing its business plan for that year and a half leading to its bankruptcy. To the extent that we see, we can draw some sort of conclusions from the status of abandoned, flowing, suspended, et cetera, wells listed there. On balance, frankly, I don't know that there's anything meaningful you can take from that document.

Your question 10 refers to paragraphs 44 and 51 of the Darby affidavit. You ask: (as read)

> How should the Court deal with each of those opinions for the purposes of this hearing?

And paragraph 44 refers to value, and so you do have to consider that in the context of section 96(2), but I've taken you to the passage in our br -- or passages in our brief that state that this only creates a rebuttable presumption. And even on Mr. Darby's own evidence, we have evidence to the contrary where he candidly admits that the engineering report he relies on for value isn't a -- has submitted fair market value, so I won't repeat what I've already argued.

Sorry, I'm going to have to a minute to refresh myself on what my friend argues.

I think my friend is just referring to section 96. We're on common ground there, and he says: (as read)

> The defendants have deliberately not presented evidence to the contrary yet.

And in a sense, that's correct in that we say that on the threshold issue that we put before you, you don't need to make a determination of value. It's the arm's length question that you need to address, but I think we've pointed out in the written materials that Mr. Darby's opinion, even with the benefit of section 96, isn't at all reliable.

Paragraph 51 of Mr. Darby's affidavit, the one in which he offered an opinion on what was in the best interests of PEOC, and my friend concedes that the Court should disregard that. He has, of course, no ability to offer that opinion.

10(b) refers to some of what we've already been addressing you, referred to the PwC brief at paragraph 1 point -- 104.1. It says: (as read)

> The trustee's evidence is that the difference between the consideration given and received by PEOC and the asset transaction was at least $217 million. On what basis does Mr. Darby determine this difference? Is he an expert in valuation?

You've heard me on that. I won't repeat what I've said, and I've addressed that in the written response as well and referred you to the paragraphs in the brief that address it. My friend acknowledges that Mr. Darby is not an expert in valuation, but resorts to section 96(2) again. My friends haven't addressed, maybe they will, in response in their oral argument to

the -- any points that we have made about the problems with the values that Mr. Darby is using.

Paragraph 11, you refer to -- question 11, you refer to paragraphs 46 and 47 of the Darby affidavit providing opinions to the Court: (as read)

> How should the Court deal with each of those opinions for the purposes of the hearing?

We say they are inadmissible and should be given no weight. These are the questions of solvency, and my friend's answer is that insolvency in this context is not a matter of opinion. Well, insolvency is not defined on its own in the *Act*, but indirectly it's defined, and I'm going to refer to the definition section of the *Bankruptcy and Insolvency Act* which is found at tab 16 of PwC's authorities.

THE COURT: I'm there.

MR. MCDONALD: Oh, it doesn't -- oh, it's page 5 of the *Act*, the small number at the bottom middle --

THE COURT: I'm there.

MR. MCDONALD: -- of the page. Definition of 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), (b), and (c). Well, we'll see the sections we're all familiar with, unable to meet the obligations as they generally become due, cease to paying current obligations in the ordinary course, or the aggregate of property at fair valuation is not sufficient to satisfy the obligations.

Surely, when a Court has to decide whether PEOC was insolvent or solvent, it's going to hear expert evidence about those very factors, and there's nothing that is found in the Darby affidavit that could satisfy you. Mr. Darby is not qualified to offer the opinion, and you have evidence, among other things, in the form of the Sequoia letter describing its business for the year and a half that suggests that it was anything but insolvent.

I'm going to skip over now to question 15. Mr. Leitl may well deal with some of those that

I've skipped. Your question was: (as read)

> Do all parties agree that PEOC was solvent at the end of business on September 2016? If not, please direct the Court to the evidence that supports this conclusion.

And, of course, we agree with that, and we refer you to some of the other answers that also address that. My friend's answer is: (as read)

> No, PEOC wasn't solvent.

And it say -- the answer goes on: (as read)

> If it was personally liable for property tax on the properties it held in its own name as trustee on behalf of POT, it was not solvent.

That's completely wrong. A party that might be personally liable for property taxes, like I am in the house I own, does not become insolvent if hasn't paid those taxes the day after their due. I mean, it's a test. You see -- you know the test of solvency. You know I say it's a matter of opinion. This answer, in my respectful submission, is fatally wrong.

Paragraph 17 raises some interesting questions, and you refer to paragraph 99.1 of the Pw brief that states that POT was an entity and PEOC as -- : (as read)

> PEOC, its trustee, was a person who controls the entity if it is controlled by one person.

And you ask: (as read)

> On what authority is POT an entity for the purposes of the *BIA?*

We've provided the answer in writing, and POT is not an entity for the purposes of the *BIA.* An entity is a person other than an individual, and the definition of person in the *BIA* does not refer to a trust. And I should take you to that definition. That's back in -- that's 16 of the PwC materials. Page 6.

THE COURT: I'm there.

MR. MCDONALD: (as read)

> Person includes a partnership, an unincorporated association, a

> corporation...

And it goes on. There is no reference at all to a trust. My friend seems to argue that, well, a partnership is a person, and so a trust also must be a person, and trust was not excluded by the definition I just took you to. In my submission, that's wrong. There's nothing in the definition of person or entity that would include a trust, and I just point out in the answer we've provided that the *Interpretation Act* doesn't assist the plaintiff, and the definition of corporation in the *BIA* does not include a trust although it does include an income trust, but POT, of course, is not an income trust. So to the extent you can draw some conclusions from other *Acts* or the other provisions of this *Act*, everything suggests to me that a trust is not an entity.

You say -- or your question in (b) is: (as read)

> As I understand the laws of general application, a trust is a relationship.

And we both agree with you on that, and we've cited some authority in our answer to support that proposition.

Your 17(c) question: (as read)

> For purposes of this hearing what are the implications if POT is a relationship and not an entity?

My friend's answer is that if POT is not an entity or a person or a party, then the other party to the -- I'm sorry. Let me -- I made a note of it, but I better read it more carefully. Oh, it appears that my friends are arguing that in the third bullet: (as read)

> If POT is removed from the occasion -- the equation, the asset transaction is still a related party transaction under section 96.

And I don't know if that's based on an argument that the counter party to the asset transaction is the beneficiary of the trust PEI or not. Sorry, I can't -- I'm sure my friend will elaborate on that.

But let me take you to our submission on that point, and that is that if POT is not an entity, then the asset transfer agreement was between PEOC in its own capacity and PEOC in its capacity as trustee for POT. And PEOC did not then deal with POT as a related person for the purposes of section 4 of the *Act.* More importantly, given that section 96 only applies to transfers between persons, the alleged transfer from POT to PEOC is not captured within

the meaning of section 96. Section 96 cannot reverse a transaction between a bankrupt and itself, and accordingly section 96 does not apply. It's a broad conclusion arising from that proposition, but in our submission, it's the correct one when one properly understands a trust and doesn't mischaracterize it as it seems to have been mischaracterized in the statement of claim.

We also point out in the third paragraph of that answer that when you consider the trust as a relationship, the transfer of the beneficial interest didn't affect the creditors of PEOC in any respect. The creditors of PEOC had their claims against PEOC before and after the beneficial interest was merged with the legal interest, and so the mischief that section 96 is directed at doesn't even arise.

And there's an analogy that I'd ask you to consider and that is what if POT -- the beneficial interest had been transferred to a third party rather than merged with the legal interest in PEOC? How would that have affected the creditors of PEOC? It wouldn't have affected them at all. They had their claims as PEOC against a trustee of POT before and after that transaction just as they had the same claims before and after the transaction in evidence by the asset transfer agreement.

I just noticed the time and was reminded of it. Would you like to break now?

THE COURT: I'm fine if you want to go for another, say, 5 or 10 minutes. I'm short -- I'm good with a short break before my --

MR. MCDONALD: Okay. I'll --

THE COURT: -- (INDISCERNIBLE) bar call.

MR. MCDONALD: I'll see what I can (INDISCERNIBLE).

THE COURT: I was leaving counsel to make that determination.

MR. MCDONALD: Well --

THE COURT: You break when --

MR. MCDONALD: -- we want to give you enough time to be ready for your bar admission, so --

THE COURT: I'm ready for it. I just need to get my robes and --

MR. MCDONALD: Okay. Well, then I'll keep going --

THE COURT: -- couple pages of notes.

MR. MCDONALD: -- for another 5 or 10 minutes.

THE COURT: Okay.

MR. MCDONALD: But I'm going to flip over --

THE COURT: And maybe while we're on this, as I mentioned this morning, I'm agreeable to start at 1:30 or 1:45. I should be done by 1:30 because this is just an out-of-province bar call.

MR. MCDONALD: We'll be waiting outside by 1:30, so if the --

THE COURT: Okay.

MR. MCDONALD: As the people leave, we can come in.

THE COURT: Okay. Thank you.

Does that work for all parties?

MR. DE WAAL: Yes, (INDISCERNIBLE)

THE COURT: Thank you.

MR. MCDONALD: May I next turn to question 28.

THE COURT: I'm there.

MR. MCDONALD: You referred to paragraph 197 of the PwC brief that suggests that current and contingent creditors of PEOC are persons for whose protection the regulatory regime was created. Then you have two questions. First: (as read)

> When you refer to the regulatory regime, please outline what statutes on which you are relying.

And my friend has answered that by listing the same statute relied on in the statement of

claim and then three other statutes never referred to in the statement of claim. He then refers to directive 6, which was in the statement of claim, and then a bullet, and that was not referred to in the statement of claim.

My only -- of course, the plaintiff can rely on whatever statutes it wants in answer to that question, but I want to make the point that our application on the statutory illegality regulatory regime points is to strike out the pleading because it fails to disclose a reasonable cause of action. And so we take the pleading as it is, and I suggest to you that you should not essentially amend the pleading by taking these initial statutes that my friend adds in answer to your question in considering that they are part of the pleading. They are not. And the pleading is defective for all the reasons we argued earlier and isn't remedied by listing a few more statutes.

Your second question, part of 28, is: (as read)

> Identify the statute or provisions you identify -- the factors I need to consider in the identification of the persons for whose protection the regulatory regime was created.

And I think this arose from the Ontario case. The name's on the tip of my tongue, the money lenders case. Can anyone help me on that?

Sidmay. *Sidmay* was the decision, and the argument my friend made was that *Sidmay* provided some relief when there was a specific statute that was for the benefit of people who borrowed money from entities that weren't licenced to loan money. I referred to those as the money lender cases. And so the argument was that the statutes here are for the -- by analogy are for the protection of the creditors of Sequoia, yet the answer that my friend provides is simply that these are statutes for the general benefit of the public, and, in my submission, there is no analogy you can draw from these statutes and the general benefit of the public to the type of analysis that the Court was doing in *Sidmay* in analyzing when there's a specific statute to specifically protect borrowers that certain consequences flow from that.

Turning to question 30.

THE COURT: I'm there.

MR. MCDONALD: Question is: (as read)

> Paragraph 26 of Ms. Rose's brief states that the trustee saw no reason to ask Mr. Wang or Mr. Yang about their participation in

the negotiation.

Well, my friend's answer is that that evidence would be hearsay. That doesn't address the question, with respect, because if the evidence is required and is hearsay, there's ways to get it. You ask the people for an affidavit. If they don't provide an affidavit, you can make an application under rule 6.8 for sworn evidence in respect of an application from a third party.

On the application that the defendants have brought, we have put before you the Perpetual defendant's evidence through Ms. Rose of negotiations, and that was not contradicted. My friends have an obligation to put their best foot forward, and if they wanted to address or respond to Ms. Rose's evidence about those events that engaged Mr. Yang or Mr. Wang, they should have done so either by getting an affidavit from one of those -- either both of those people or by obtaining their testimony, and they did neither. But, frankly, for the purposes of the threshold issue, in my submission, you don't need evidence from Mr. Yang or Mr. Wang.

I think I should stop there. (b) of 30 is a slightly different question, and it's going to take me more than a couple of minutes. So perhaps I could just start there after the break at 1:30.

THE COURT: Okay. Before we adjourn, any other business we should touch on? I'm assuming not, but just want to make sure.

MR. MCDONALD: Not for my purposes.

THE COURT: Madam clerk, we will adjourn until approximately 12:30-ish. Thank you.

THE COURT CLERK: Order in court.

PROCEEDINGS ADJOURNED UNTIL 1:30 PM

Certificate of Transcript

I, Sandy Voga, 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 not included orally on the record.

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

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December 17, 2018	Afternoon Session
The Honourable Mr. Justice Nixon	Court of Queen's Bench of Alberta
R. de Waal	For PricewaterhouseCoopers Inc.
L. Rasmussen	For PricewaterhouseCoopers Inc.
D.J. McDonald, QC	For Perpetual Energy Inc.
P.G. Chiswell	For Perpetual Energy Inc.
S.H. Leitl	For Susan Riddell Rose
A. Badami	For Susan Riddell Rose
K. Salguero	Court Clerk

Discussion

THE COURT CLERK: Order in court.

THE COURT: Good afternoon. Please be seated. At your convenience, counsel.

Submissions by Mr. McDonald

MR. MCDONALD: Thank you, My Lord. I'm at question 30(b).

THE COURT: I'm there.

MR. MCDONALD: And you ask: (as read)

> Would not evidence concerning the operations between October 1, 2016, and the date of bankruptcy be instructive to the Court in respect to the questions raised and the underlying allegations connected to this hearing?

In our submission, that evidence is not necessary to grant the defendant's application for summary relief on the threshold issues. We do consider it necessary if you dismiss our application, and we're dealing with the stay matter because, while my friends persist with the argument that the only relevant evidence is the date of the transfer when testing

solvency, we disagree with that and submit that all the evidence from the date of the transaction through to the date of the bankruptcy ought to be considered in assessing the question of solvency. But for our purposes today on the threshold issue, that evidence, in our submission, isn't necessary.

I'm next jumping over to question 46.

THE COURT: I'm there.

MR. MCDONALD: That question states: (as read)

> Pw asserts that -- PwC asserts that PEOC was set up to fail. What evidence supports that assertion? If that assertion is true, why did 198 co-purchase PEOC on October 1, 2016? Do the parties concede that 198 Co. was deemed -- was at arm's length from PEI but for the possible application of a deeming rule?

Well, our answer, as you see, is that there's no evidence that supports that assertion and indeed there's considerable evidence that is directly contradictory and we have taken you through in the brief the history of the transaction, the negotiations, the role of the counsel, the gas marketing contract, the office lease, the seismic data, the staffing, the low-cost structure that would assist the operations of Sequoia. All the evidence taken together speaks loudly to Sequoia having a business plan, executing that business plan, not being set up to fail but indeed being set up to succeed, and then, being faced with declining gas price and whatever management decisions were made to lead to their demise some year and a half later, going into bankruptcy.

My friend's answer seems really just to rely on the agreements, and the answer is the best evidence is in the terms of the share purchase agreement and the retained interest agreement. And indeed, the Goodyear assets didn't comprise all of POT's assets, and, you know, undoubtedly the KeepCo assets were retained and the Goodyear assets were sold, but that was a negotiated allocation as between the two parties to the sale purchase agreement and in no way set up PEOC to fail.

I think the only other question that I'm going to be addressing is question 51.

THE COURT: I'm there.

MR. MCDONALD: (as read)

> When considering the arm's length question, what evidence should

> the Court consider for purposes of the hearing? In particular, for purposes of section 96 of the *BIA*, what evidence to the contrary should this Court consider for purposes of the hearing?

And the short answer is all evidence that casts -- that is relevant to the relationship on among the parties: The context of the transaction, the negotiations of the transaction, the terms of the transaction, and anything else that would allow the Court to make a conclusion about arm's length.

The guidance that we've provided to you is the superintendent of bankruptcy's publication on bill C-12, which was the bill that was -- that enacted the evidence to the contrary provision in section 4(5) of the *Act*, and you'll see that we have quoted what the superintendent of bankruptcy says should be considered. And then in the paragraph following that tried to summarize that: (as read)

> The Court should consider evidence that
>
> (1) establishes the substance of the party's relationship with respect to the transfer was one that exhibited the characteristics of arm's length dealings or
>
> (2) distinguished the relationship transfer from the mischief that the deeming provisions try to address.

I've already spoken to that.

My friend's answer seems to resort to Mr. Darby's position on cross. It was highlighted in our brief that you look at the asset transfer agreement, you look at the parties, and you end your inquiry, and that's been set out in detail in our brief, and I won't repeat that.

My friend also refers to the *Legge* decision. We argued that last time, and I won't repeat the arguments, but it's a decision that essentially says to assess fair market value, your fair value -- I'm sorry. To assess an arm's length relationship, you just look at consideration; and if the consideration was less than the fair value, then it wasn't an arm's length transaction. And I argued last time that that reasoning is faulty and undermines the whole structuring of the *Act* if one doesn't -- if one can reach a conclusion on arm's length simply by looking at consideration, then the section 96 didn't require as a separate component of the analysis a determination of whether the relationship was at arm's length.

My friend has referred to one other case that supports *Dover* I think -- sorry, supports *Legge*. When we were last before you, we said it was the only case that seemed to follow

that approach. There's is a Quebec Superior Court case in my friend's materials called *Dover Financial*. It provides no analysis. It's simply cites and seems to agree with the *Legge* analysis.

My Lord, that's all I propose to address. There are some of the questions that I expect Mr. Leitl won't be addressing, but I think are adequately dealt with in the written materials. Otherwise I'll turn it over to Mr. Leitl.

THE COURT: Thank you, sir.

MR. LEITL: Thank you.

Good afternoon, My Lord.

THE COURT: Good afternoon.

Submissions by Mr. Leitl

MR. LEITL: Indeed, I'll leave Your Lordship with our written answers. I'm not going to read every one, and I'll try and highlight some that I think are more important. And I'll begin, if you have our answers handy, I'll walk you -- you're walking through them, I'm begin at page 8 to deal with question 8. And Mr. McDonald -- are you there?

THE COURT: I'm there.

MR. LEITL: Mr. McDonald addresses -- I'll be brief. The question is in the context of Mr. Darby's opinion or, if you prefer, argument that PEOC was unable to pay ARO at the time of the transaction, and Mr. McDonald's taken you through a lot of important evidence to show that when it's -- it's not plausible. The only answer we got from our friend in their written materials, which I presume they took some time to prepare, was that this is an inevitable conclusion based on what they call uncontested facts.

Now, the only inevitable conclusion, My Lord, is the decision that the Court will make. There's no inevitable conclusions put forward by parties, and that conclusion that they say inevitable or not based on uncontested facts, obviously the facts are very much contested.

Maybe contested is the wrong word. In fact, they just ignore the evidence that tells the contrary story. They ignore the evidence of Sequoia in whose shoes they stand today. When I say "they", the trustee. The trustee stands in the shoes of Sequoia. Sequoia reported on

the business activities they conducted following closing, and in fact the report that Mr. McDonald read to you, the letter from Sequoia, is adopted in the trustee's only report to date, the preliminary report of the trustee.

Historically, PEOC paid the taxes. I should back up. First ARO. I mean, at the risk of beating a dead horse, ARO is not a liability, was not at the time, is not today. As we stand here today on the evidence, the trustee still has not accepted the AER's proof of claim. The proof of claim on its face which says this might be worth $1, and the trustee has authority to say it's worth zero.

So as of October 1, 2006, to say that the AER was a creditor -- and I'll come to this in more detail -- is absurd. Insofar as they rely on municipal taxes, historically PEOC paid its taxes. On closing, most of the taxes were paid but for three. PEOC exercised a right to defer, which obviously went into the adjustment mix with Sequoia, and then you read Sequoia's report about how they operated through until 2018, and there is not one shred of evidence that any municipality had a default of taxes due.

Why isn't there an affidavit from the municipalities? Why in Sequoia's records were there no records of municipalities issuing notice of default? None of that. So for Mr. Darby to say they were unable to pay, it's entirely incongruous with the evidence.

Over to number 10. Page 10, Mr. McDonald dealt with paragraph 44, but I will focus on paragraph 51, a paragraph that I've been focusing on since I got involved, and you'll recall that's where Mr. Darby expresses his personal opinion that there was oppression. Remarkable from a trustee in bankruptcy. The answer from my friends is a partial concession. At page 6 of their response, the Court may disregard the opinion of the trustee in the first sentence, yet they ask the Court to accept the balance of the paragraph where he makes an argument about disregard and prejudice, both pure argument or, if you prefer, opinion. And he's not because "disregard", of course, is one of the magic words in the *ABCA* when it comes to oppression, and there's Mr. Darby opining that there was disregard. He is not an expert in corporate governance. The entire paragraph has to be struck -- or disregarded, I should say.

And Your Lordship may recall in my submissions when we were last before you in November, that paragraph was the sum and substance of the trustee's evidence on oppression. So without that paragraph, let's consider what we don't have in the issue of oppression. There is no evidence as to the reasonable expectations of the AER or the municipalities. In the context of the oppression claim, my friend harp and harp on their argument, which I say is flawed, but they harp on it saying the AER and the municipalities were creditors. From an oppression standpoint, the answer to that is pretty much, So what? Creditors do not get to sue for oppression unless there are a whole bunch of other things

involved, the Court exercising its discretion, and there being evidence of reasonable expectations that takes them, as you'll recall from our submissions, to the point where they expected to be treated as minority shareholders. Reasonably expected that.

In the absence of paragraph 51, there is no evidence about the exercise of business judgment from the trustee. Ms. Rose deposed in her affidavit about the exercise of her business judgment, and they didn't touch it on cross. And you may recall from my cross-examination of Mr. Darby, I said, Didn't you think it was important to ask Ms. Rose about that when you interviewed her? He didn't think so.

There was no evidence before the Court about the process followed in connection with the deal except the evidence of Ms. Rose. There was no evidence from the trustee about alternatives that Ms. Rose or PEOC should have considered because, you know, let's all, I submit, take a step back and look at this from the perspective of the real word. What alternatives were available to PEOC as a subsidiary, a single-purpose subsidiary, and the parent company wanted to enter a deal so the company would become something else? What alternatives do the trustees say should have been pursued that were in better interests of PEOC? They don't offer that, and the trustee is not qualified to muse about that.

So I'm over to number 12, My Lord, on page 12.

THE COURT: I'm there.

MR. LEITL: So you recall the statement of claim in the Darby affidavit both allege that that Ms. Rose personally benefitted from this transaction. Mr. Darby, I use the word "allege" purposely because in his affidavit he says she personally benefitted, but he doesn't say how or how much or what kind. That's why we say his state -- his bald statement is at most opinion, at worse argument.

You'll recall that Ms. Rose denied having received any personal benefit and explained why, and that was unshaken on cross-examination. And I'll come back to this when we deal with question 22. You'll see -- I'll just, as a note for your notes, My Lord, at page 7 of Mister -- of the trustee's counsel's submission at paragraph 12, they say: (as read)

> Every shareholder of PEI, including Ms. Rose, benefitted from the Goodyear restructuring.

As a matter of fact, not opinion. There's no evidence about that. And as I'll come to in relation to question 22, in fact the share price of PEI following the transaction being disclosed went down. So how did those shareholders benefit?

Mr. Darby didn't consider it and offers no analysis and could not explain the drop in the share price, and it's not any kind of personal benefit. If you're suing a director for oppression, it has to be the kind envisioned by the Supreme Court of Canada in *Wilson*, and there the Court gave two types of personal benefit -- immediate financial advantage or increased control of PEOC. There's evidence of neither. No evidence of either.

The next one I'll take Your Lordship to is number 14.

THE COURT: I'm there.

MR. LEITL: And simply to point out that I think I've addressed my submission on the alleged inability to pay, the question where Mr. Darby says there's no ability to pay. That's what -- again their answer, illogical conclusion from undisputed facts. The conclusions are for the Court, and the facts are not as they suggest.

I think the next one is paragraph 19 -- or question 19. I'm sorry.

THE COURT: I'm there.

MR. LEITL: Now, as I read Your Lordship's question, you're asking why PwC used the term "provable claim" in their brief and then as I read their answer, they say it's because something we said. But here's how this works, in my submission, in the context of the oppression claim. To have any basis for an oppression claim, the AER had to be a creditor on October 1, 2016. I don't say that it had to be -- the test on October 1, 2016, is that it had to have a claim provable in bankruptcy, that it had to be a creditor, and it was not. When we refer to the provable claim of AER, that we refer to the fact that the AER has still not proved a claim. It's still not a creditor.

My friend's response says that for the purpose of an oppression claim, contingent creditors might qualify. And that's true, but you have to ask what kind of contingent creditors, and all the cases they cite are where there was someone with a pressing claim against the corporation where the assets of the corporation had been stripped, and we addressed this at the hearing. That's a collective claim where a trustee might have standing to pursue in contrast with individual claims that a trustee cannot, like the one that the AER they say has or the municipalities.

But it's not all contingent creditors outstanding, and you still have to go through the other tests. Reasonable expectations -- no evidence. Just to give you one example, My Lord, and we don't have to go there unless you wish, but in our materials at tab 21, there's a decision of Justice Farley in a case called *Royal Trust.* And at paragraph 15, you'll see, just to illustrate, that's a case where the Court said, Your claim is too contingent to qualify for -- to

go ahead with an oppression claim.

And I'll come to this in detail, but while I'm on the subject as we know and is clear from the decisions of *Redwater* and *AbitibiBowater*, for the AER to become a creditor, it has to go through the three-part test in *AbitibiBowater*. And I'll be coming to that in support of the submission that that test is far from being met.

Over to number 20, question 20.

THE COURT: I'm there.

MR. LEITL: I think I've covered this. I just want to make sure, My Lord.

So the AER proof of claim, $1, maybe $0, maybe more than $1, and that is at the date of bankruptcy. There is no suggestion in the AER's proof of claim that it was ever a creditor previously, and that wouldn't make sense if it did. Which takes me to number 21, My Lord.

THE COURT: I'm there.

MR. LEITL: And you'll see here our submission, once something I've touched upon, that, yes, to be a provable claim in bankruptcy, a regulatory claim has to meet all three requirements of the *AbitibiBowater*. Or outside of bankruptcy for the AER to be a creditor, it has to meet that test. It didn't advance credit. It's not a lender. It didn't advance services or materials. It's a regulator, and the only way it can turn its regulatory power into becoming a creditor is to go through all the motions of the order, and this all follows after they reclaim the properties through the fund and then proceed.

And you'll see at number (b) on page 18, we break that out. For the three bullet points, there are just a paraphrasing of the test in *AbitibiBowater*. And you'll see above there -- sorry, I apologize, on page 18 above (a), where we quote from *Redwater* where the Court says regulatory order can become provable claims in certain circumstances, and that's where you get the concept of the conversion of a public duty into a monetary claim. Now, of course, in *Redwater*, the AER was resisting that, and the decision that's still under reserve, the AER position is we are not creditors, which is somewhat ironic given the trustee's assertion to the Court that they are and that they're representing their interests.

And to be clear, the AER may never be a creditor of Sequoia. The wells may get sold. The properties may get sold. Who knows? But we're not there yet. There's not even evidence before the Court that it's likely to happen.

So over to page 19(c), and Your Lordship asked the question about a comment made by Justice Martin in dissent. And I'm not sure I addressed your question, I stand to be corrected, but the implication of the dissent in *Redwater* makes our -- if the dissent succeeds on appeal, our case is even stronger because Justice Martin ruled that the AER does not become a creditor. And if so, they have their statutory rights and remedies, but they don't get to sue for oppression as a creditor is one implication.

If you go with the majority, maybe you could sue for oppression in theory, but you have to be a creditor, and that hasn't happened either. You have to satisfy the test in *AbitibiBowater*.

THE COURT: Yeah. Just for the benefit of the parties, the reason I raised that question is often dissents in one era become the law in the next era, and I just want to make sure I'm thinking about things in the proper context.

MR. LEITL: Yeah. And that why, My Lord, you asked me at the hearing, you know -- I think you asked in so many words, you know, should we wait for the decision to come out? And I say that --

THE COURT: I did.

MR. LEITL: -- it doesn't change our position either way. If the Justice Martin's cases wins, our case is even stronger. Based on the majority decision of the Alberta Court of Appeal in *Redwater,* our case is strong.

It would be really interesting if the trustee had adduced evidence from the AER saying, We think we are a creditor, and here's the evidence of that; and we think that our reasonable expectations existed and were violated, and here is the evidence of that. Nothing. Not even hearsay. And the same for the municipalities.

Twenty-two is still on page 19 here, My Lord.

THE COURT: I'm there.

MR. LEITL: Going back now to the issue of personal benefit. You asked about a part of Mr. Darby's cross-examination. The context of that cross-examination, which was being done by me, was me confirming with Mr. Darby that despite his role as an officer of the court and is supposed to be neutral and thorough and balanced, he had resolved to make an allegation of personal benefit against Ms. Rose and sat across the table from her and never put that to her, never asked her for her evidence on that. In that context and in the context of establishing that in his affidavit he'd given no basis for his argument of personal benefit, he fell back on this argument about the increase in the

asset base of PEI. So then we took him through that logically so see where it would go.

Now, the first proposition from the trustee is that, in essence, PEI was able to foist off to some unsophisticated parties almost a quarter billion dollars in debt for no consideration. So I put it to Mr. Darby do you agree that if PEI announced that its balance sheet had been -- I'm paraphrasing -- a balance sheet had been improved by a quarter billion dollars that would have been material. He agrees with that. Of course, he agrees with that.

So therefore, he has to agree that that would have had a positive impact on PEI's share price. I mean, imagine the press release from PEI. Guess what, market? We overstated our liabilities by a quarter billion dollars. So therefore, you would expect the share price to go up, but Mr. Darby's hadn't looked at PEI's share price history because in fact he had not considered personal benefit at all. He just said the words. When we did take him to the share price history, we showed him that the share price went down, and he has no explanation for that. It's totally inconsistent with his theory of personal benefit.

Yet, in my friend's response, there say there was an increase in the asset base, and what is the increase in the asset base? Basically, what they say is the value of the ARO. And, again, their increase in the asset base, while they now cite *Daishowa* in their materials, remember *Daishowa* stands for the proposition that the value of the asset is impacted by the ARO as a future provision, the ARO's not a liability. So if the ARO is, say, for argument sake, the present value -- I'm not accepting this but for argument sake -- but if the present value of the ARO or the present exposure equates to $200 million, and you sell an asset for $10, that means the asset, all other things being equal, is worth $200,000,010.

A flaw in the trustee's analysis, which is replete in all of their submissions, is that they agree with that. Like the definition of Goodyear assets in the statement of claim said this is a Goodyear's assets and the associated liabilities, in other words ARO. That's consistent with *Daishowa.* But then what they do is they say you also have to deduct the ARO as a liability, so they take it off twice. They take it off as $200 million suppressing value, and then they take it off again, $200 million as a liability. A double count.

Paragraph 23 -- sorry, I keep saying paragraph, question 23. This is put to the trustee: (as read)

> Please articulate the director duty that was breached.

And in the end, we had to wait for the answer to this one, and it's simply a reiteration of the allegations, My Lord. Including one such as that Ms. Rose failed to disclose things to PEOC. I mean, again, I'd ask us to go back to the real world. Ms. Rose was the sole director of PEOC. Her knowledge was PEOC's knowledge. How could she not have disclosed

something to PEOC? Insofar as the purchasers of PEOC became interested in PEOC's affairs, they conducted intensive due diligence. What was -- what was not disclosed to anybody?

Down to 24, and this the section 122(4) of the *ABCA.* We simply cited the proposition, My Lord, and it seems to have led to a big aggression of 122(4), for the proposition that a shareholder -- a director who's appointed by a class of shareholders may have regard to the interest of the shareholders even were there other interests. In this case, of course, there was only one shareholder, which only makes our argument stronger, that the -- you know, if the BCE and the law of court -- the corporate law of Canada is that the interest of the company are generally equated with the interests of the shareholders.

Companies don't have interests outside of their stakeholders, and this is another argument you've heard from my friend that Ms. Rose didn't look at the interest of PEOC; she only had regard for the interest of its sole shareholder. But what they don't say is what were the interests of PEOC aside from the interest of the shareholder? They don't say anything.

When a parent company creates a subsidiary, it's not like giving birth to a child. The child has its own interests; it's protected by the law. But a wholly owned subsidiary isn't something that all of a sudden has its own independent interests. It has the interests of its stakeholders. So when you see on page 12 of my friend's submission, something that I find is remarkable, he said that: (as read)

> If you accept my argument, it would allow a director to give special consideration to the interests of the shareholders generally.

I mean, what does that mean? Of course, they have to give consideration to the interests of the shareholder generally, and where there's only one shareholder, I guess you can call that special consideration.

Question 25, again the question was put to PwC, and they've done nothing but reiterate allegations, so there's nothing for me to add to that, I don't think, My Lord. And the same for 26, just the same arguments.

Sorry, 26 is context. We'll get into 27 now.

THE COURT: I'm there, 27.

MR. LEITL: I've done my best to articulate our position on the fact that there were no creditors at the time of the transaction that had any outstanding claims. AER was not a creditor. Municipalities were largely paid but for three, and

those -- and PEOC had exercised a right to defer, so they were not in default. But assuming, let's just assume, like Mr. McDonald missing his taxes on his house in his scenario, assuming that they had not paid at the time, surely the trustee would have to be here with some evidence to show that the municipalities had reasonable expectations that would take them into the realm of oppression law, but there's nothing there.

And over on page 14 of my friend's response with respect to (b), he focuses on the 1.5 million. That's, of course, that's the amounts that were deferred as of right. And then he says the only reasonable conclusion when all the other taxes were paid is that there were insufficient funds to pay the additional 1.5 million. That was never put to Ms. Rose. She said we exercised our right to defer. And you'll recall that there was an adjustment mechanism as between PEOC and its new owners that took care of things like this to the extent they were outstanding. And then my friend puts in his response, and this is one that bothers me, My Lord: (as read)

> Some of this was never paid.

Never. That's not in the evidence. And the trustee has access to Sequoia's records going back and, to date, have adduced no evidence that any municipalities are still unpaid in respect of taxes due on September 30, 2016. The Sequoia letter that Mr. McDonald took you to in telling its story to its stakeholders, one of the things they cite is an inability to get compromise from the municipalities to reduce the taxes in 2017. And the natural inference there, My Lord, in the absence of any evidence, is that they were fine -- they were able to satisfy the municipalities until that time, but there's no positive evidence of any default.

The next one I'll go to is question 32, I believe.

THE COURT: I'm there.

MR. LEITL: To answer this question to explain where our submission was going, My Lord, was we were talking about the trustee's ostensible investigation process when they were asking for records from Perpetual and met with Perpetual, and, in our submission, the cross-examination of Mr. Darby is clear that they took the view that it was a non-arm's length transaction, and they were never going to have a different view. When they sent their so-called preliminary views, Mr. Darby agreed that those were their final views. That's the only point there.

So I'll move on to 33, and here we again for the third time talk about the issue of personal benefit. And at page 19 in following of the trustee's answers they address this. This was put more to them than us. They have confirmed that their theory of personal benefit to Ms. Rose is premised solely on the asset transaction, yet separately they say that the theory of

personal benefit is an increase to the asset base of PEI. So, in my submission, those two theories are not reconcilable. And looking at what my friends wrote, they say benefit is a con -- as a concept is a conclusion, not a fact, and there, My Lord, is a concession, in my submission, that when Mr. Darby used the word "benefit", he was giving nothing more than an argument.

They then argue section 96.3 of the *Bankruptcy and Insolvency Act* in defining benefit, but the Supreme Court of Canada in *Wilson*, when it talked about a specific kind of personal benefit in relation to oppression claims against directors personally didn't refer to section 96.3 of the *BIA*. It's apples and oranges.

I'm going go to part of 34. Mr. McDonald addressed part --

THE COURT: I'm there.

MR. LEITL: -- (b). My friends have now confirmed that they are not challenging per se the release, the validity of the release. They seem to today be taking the position that the share purchaser agreement was not arm's length even though Mr. Darby said he never looked at it because it's outside of his mandate. I don't know how it lies in their mouth to make any comment on the share purchase agreement, but here they do in attacking the release.

We continue with the release now into question 35, and they say the trustee does not -- this is in their answer: (as read)

> The trustee does not concur that the release was negotiated at arm's length.

You'll see in our brief, I'm not going to repeat it to Your Lordship, that we cross-examined Mr. Darby on this, about the negotiations, and he said he has no idea what happened other than what the record says. And to back up further, recall the theory of the trustee in attacking the release, which they don't mention in their answers, and this is the theory to which we defended, and this is the theory in respect of which I cross-examined Mr. Darby. And the statement of claim and Mr. Darby's affidavit say that Ms. Rose caused PEI to -- and I'm paraphrasing, I apologize, I don't have it in front of me, but caused PEI to induce the new owners of PEOC to enter the release. That's the theory that's no longer mentioned by my friends. And we established that Ms. Rose was not in a position to cause PEI to do anything, and it's clear on the evidence that the parties acquiring the shares of PEOC were sophisticated business people represented by McCarthy Tetrault.

So on page 21 under 35(a), the first bullet, my -- the trustee's counsel writes: (as read)

The evidence shows that nobody represented PEOC in all of this.

I mean, that's totally inconsistent with the evidence. The release had a signature on behalf of PEOC signed by the new owners. The release recited that all the parties to the release were informed and knew what they were doing and had independent legal counsel, yet my friends argue that PEOC wasn't represented.

A common theme that runs through the trustee's position appears to be, My Lord, that Sequoia entered such a stupid deal that somehow must have been a breach of fiduciary by Ms. Rose, but that's just ridiculous. You can see from the evidence that Sequoia had a business plan and if they were right about the price of natural gas, a business plan that likely would have worked. But not all business plans succeed, and that doesn't mean that those business plans were doomed to fail.

Still on the release but now on question 36 -- oh, I'm sorry. This is still under my friend's answer to number 35, now on page 22. They argue there is no evidence that the new directors were aware of potential claims against Ms. Rose at the time release executed. The new directors were advised by McCarthy Tetrault, and they were the ones that negotiated the deal that the trustee is now challenging, so for them to say that the director somehow couldn't have been opinion aware of a possible claim against Ms. Rose at the time is absurd.

The next bullet they say: (as read)

A fiduciary cannot rely on a release if there was non-disclosure.

Referring to *Tongue,* which is an entirely different case of insider trading. There was no non-disclosure in this case. The trustee today is in the shoes of PEOC. PEOC asked for this mutual release. The release was negotiated in connection with the deal.

Now moving to question 36, which asked about paragraph 51 of my client's brief, and my friend's deal with the issue about the *ABCA* provision and to the extent it applies to releases of directors. And in their response, they rely on one case a few times, *McKay-Cocker*, which we deal with in our brief, and if I may remind Your Lordship that that one case was a pleadings motion in Ontario where somebody was granted leave to amend a pleading, and the issue was never finally determined.

And you'll see over to page 23 and 24 of my friend's answers.

THE COURT: You're on to question 37 now?

MR. LEITL: Thirty-seven and 38, yes, sorry.

THE COURT: Yes.

MR. LEITL: They all bleed into each other. The trustee is taking the position, there should be no doubt, that a director can never be released in relation to prior conduct in respect of its duties to the company. So if that's the case, we better issue a bulletin to the D & O insurance industry right now because that means you can never settle a lawsuit against a director for alleged breaches of duties to the corporation ever, and that doesn't make any sense, in my submission, My Lord.

What makes sense is the interpretation of the provision -- and I'm not going to repeat what's in our brief -- that directors cannot contract out of existing duties owed to the corporation. If you read, for example, Delaware Law on director liability, there has been some historic issues with the ability of companies to contractually elect their directors out of their fiduciary duties. In Canada, it can't do it. If you're going to be a director, you can't have a contract with a company saying, by the way, I'm relieved of my fiduciary duty. That can't happen. You can retrospectively settle an allegation that you didn't do so.

My friends go so far on page 24 to say that this situation is analogous to the release of a director for criminal liability. I say it's not even close to that. For criminal liability, you go to gaol. You can't contract out of going to gaol, but that's just a red herring.

In paragraph -- sorry, question 39, My Lord, you asked a hypothetical, and I'll leave you with our answer. And just to remind you that at the hearing, my friend conceded that if this transaction had been conducted as a direct transfer of assets, we wouldn't be here today. So why are we here today? And they've never answered that in terms of director duties.

Question 43, My Lord. The --

THE COURT: I'm there.

MR. LEITL: My client's statement of defence filed in August pleaded that the trustee had no authority to pursue this lawsuit against her. After we filed our brief for our November hearing, I think we filed our brief in October, my friend wrote to me. And that is at tab 43 of these answers, and this is on the issue of inspector approval.

THE COURT: Right.

MR. LEITL: And he said that they hadn't seen us as challenging that point previously, but in any event reported to confirm by e-mail that the

inspectors had authorized the lawsuit. And you'll see my response on the same day in less than an hour: (as read)

> Reserving all rights, I'd ask you to send me the evidence of that.

To date, no response; not a response even in the context of the Court's question to the trustee about this issue; no evidence of informed inspector approval to go ahead and sue Ms. Rose.

Question 44, these were all questions for the trustee, and just to take you to touch briefly upon some of the answers from the trustee on page 27 --

THE COURT: Okay. I'm there.

MR. LEITL: -- and you'll see this reference to the case of *Downtown Eatery* and other cases. Those again were examples of the kinds of cases where contingent creditors might be granted leave to proceed with an oppression case. And, of course, in those cases, that's when the actual contingent creditor came to court, not a trustee, and when there was evidence about the contingent creditor, and there was evidence of the contingent creditor's reasonable expectations. None of that here.

Another argument my friends make, they say there was no evidence to suggest PEOC's creators had any opportunity to protect themselves. There was no evidence about PEOC's creditors from the trustee, period. There was no argument from my friends about what they could have done. If you're an unsecured creditor of a corporation, the corporation can do all kinds of things lawfully that might impact the creditor's exposure about which they can do nothing. That's why creditors negotiate security, ask for guarantees, things like that.

There is law about what the municipalities could have done, and I'm sure Your Lordship's familiar with the legislation that deals with them. I'm told the *Act* is something like 600 pages, but they have rights on default including lien rights. No evidence about that.

And the AER has enforcement powers but only those granted to it by statute. At question 44(d), which is over to page 32 of our materials --

THE COURT: I'm one.

MR. LEITL: -- one of the questions Your Lordship asked: (as read)

> Should a trustee be allowed to advance a creditor-based oppression

claim that concerns just two particular creditors?

We've referred you back to our brief while we say no, and there's a clear delineation between the kinds of creditor claims a trustee can bring and can't. They have to be what I would call collective claims that are claims as a right of all the creditors. You know, the kind of claim we talked about where somebody strips a company of assets to defeat them, so all of their rights are collectively impaired. That's not the case here.

In my friend's answer: (as read)

The trustee represents all the creditors of PEOC.

The phrase that should be added there is all of the creditors of Sequoia as at the date of bankruptcy. To the extent that the creditors were different or had different claims on October 1, 2016, the trustee does not represent them.

THE COURT: Sorry. What where were you reading that last --

MR. LEITL: Sorry. Page 28 of the trustee's answers under --

THE COURT: I'm there.

MR. LEITL: -- (d). And it says: (as read)

The trustee represents all the creditors of PEOC.

THE COURT: Yes. Thank you.

MR. LEITL: And I'm just adding the temporal reference of as at the date of bankruptcy.

And you'll see while we're on this page some things that jump out at me. They cite *BCE* for the proposition about the need to establish reasonable expectations, but they don't give any evidence of that. They say that the claim against Ms. Rose satisfies the test for personal liability because they say that she received an immediate financial advantage, and we've covered how the evidence just shows the opposite.

Question number 47. I believe I've addressed this, but just in that context, to reiterate, when the question is, Do their circumstances warrant this oppression claim? Their circumstances refer to the only theoretical creditors at the time to miss three municipalities who had no outstanding claim at the time. They're the only parties you could possibly consider and only

possibly if there was evidence about reasonable expectations. Otherwise, they just get to exercise their credit rights and -- creditors' rights, and they get to do it directly themselves.

One thing I'd love to hear my friends tell the Court when they're on their feet when I sit down is why did the AER never proceed against my client directly or against Perpetual? Why didn't the municipalities ever take any steps?

On page 30 of my friend's response to question 48, Your Lordship asked about the test for personal benefit and the factors and I've addressed that and give you references. In my friend's answer, which is at page 30 of his materials, he said: (as read)

> The imposition of personal liability can also be justified where the directors breached a personal duty.

Ms. Rose didn't owe any personal duties. She owed directors to PEOC as a director of PEOC.

They then argue that the benefit that Ms. Rose received as a shareholder can be quantified, yet they don't quantify it. What they say is how the formula would work. It is that it would be $223 million in, quote, liabilities, which we know are not liabilities, transferred to PEOC, multiplied by her shareholding, and they advocate that formula even though the evidence shows that the share price went down.

Question 49 -- I think I'm near the end for me -- was: (as read)

> What evidence should the Court consider in assessing the business judgment that Ms. Rose exercised?

I would submit you should consider Ms. Rose's evidence in her affidavit where she talks about her business judgment; and consider that when they cross-examined her, they didn't ask her about that; and consider Mr. Darby's admission that he never asked her about it when he interviewed her because he thought the answer was so obvious. Yet, for some reason, we see in writing in my friend's response the argument that Ms. Rose exercised no business judgment. The trustee is in no position to make that argument because that contradicts the evidence, and they're not experts in business judgment.

And they don't stop there. The next bullet says: (as read)

> She deliberately abandoned her role as PEOC's sole shareholder.

Deliberately. Malfeasance. Never put to her on cross-examination and never stated in those

words in any -- in the affidavit of Mr. Darby. If you want to accuse someone of deliberately doing something wrong, you have to put it to them on cross-examination, and they didn't bother.

Another bullet down on this page, they say that: (as read)

> ...this failure to consider all available information in determining fair market value.

In other words, second guessing, valuation, and business judgment where they have proffered no alternative. In the *Greenlight* case, which I cited when I was on my feet last time, is an example where the Court tests the process in relation to evidence about other alternatives available to the company. Now, those cases tend to be in relation to a public company broadly held by different shareholders which is in a value maximization process, and the board or the special committee is considering should we take the offer to buy our shares from 'X' Co.? Should we sell some of our assets under the offer from 'B' Co.? You know, and weighing the alternatives.

What are the alternatives that my friends say should have been followed by a wholly owned subsidiary controlled by the parent? Should PEOC, this notional PEOC, stand up and say, No, I think we should do something different. We should open a retail store. I don't like this -- these assets. I mean, it's just commercially absurd.

My friends argue at page 33 that there was no reasonable degree of prudence or diligence brought to bear. They have offered no evidence about what else should have taken place, what should have happened differently, what should have been done differently, and it doesn't lie in their mouth to now argue that.

So subject to questions about my answers to your questions, those are my submissions.

THE COURT: I may have some after I hear from your friend. Thank you.

MR. LEITL: Thank you.

THE COURT: I wonder if we -- Mr. de Waal, can we take a 2- or 3-minute break? I've got a couple of binders I meant to bring down just with some reference materials that I had tabbed, and I'd like to get. So if we could adjourn for -- would 5 minutes be --

MR. DE WAAL: Yes, My Lord.

THE COURT: -- sufficient for everyone?

MR. DE WAAL: Yes.

THE COURT: Thank you.

Madam clerk.

THE COURT CLERK: Order in court.

(ADJOURNMENT)

THE COURT CLERK: Order in court.

THE COURT: Please be seated.

At your convenience, counsel.

Submissions by Mr. de Waal

MR. DE WAAL: Thank you, My Lord. My Lord, like my friends, I don't propose to read all my responses to you, but I do want to clarify certain of our comments and respond to some of my friend's comments.

The first question I want to take you to is question number 2, and that's Schedule 'I' to the share purchase agreement, and my friend Mr. McDonald referred you to that. The only point I want to make in addition -- and maybe you don't have to turn to that, but --

THE COURT: I'm there.

MR. DE WAAL: -- it does refer to liabilities a number of times, current liabilities, total current liabilities, total liabilities, and it's a theme that we find consistently throughout the financial statements of Perpetual, that these are referred to as liabilities. In Mr. Darby's affidavit, he attaches the financials and Exhibit 'P' to his affidavit, for example, has liabilities associated with assets held for sale, note 333 -- $131 million, so these are referred to as liabilities. I'm not suggesting that that actually makes it liabilities, but to the extent that liabilities as a term is an issue, certainly on the Perpetual version they regarded these as liabilities. I'm not making anything more than that of that, My Lord.

Then the Exhibits 'I' and 'J', there was a question about the -- what document 'J' or Exhibit

'J' actually means, and Your Lordship pointed out that it doesn't say pro forma. What it does, though, My Lord is -- well, two things. One, it shows that in the six months ended June 30, 2016, these assets operated at a substantial loss for those six months, and it's consistent with a cash flow negative proposition that's in the evidence, so it operated at a -- at a substantial loss, and then if you turn over the page to the basis of presentation, you'll see in the first paragraph --

THE COURT: Just to be clear, it's on not a notional basis. It's on a pro forma basis.

MR. DE WAAL: Pro forma basis, indeed, My Lord.

THE COURT: There was no actual loss.

MR. DE WAAL: Yes, My Lord. I --

THE COURT: Okay.

MR. DE WAAL: And I'll come to that to explain how they came up with that number, what they did. The first paragraph under paragra -- under the numbered paragraph 1, basis for presentation, in the middle of that paragraph: (as read)

> The PEOC assets are being acquired by PEOC pursuant to the purchase and sale agreement dated October 1, 2016. Land and lease costs and overhead recoveries, which are not included in these internal unaudited operating statements have been added as corporate costs.

And then it says: (as read)

> These internal unaudited operating statements have been derived from lease operating statements, which were generated from Perpetual Energy Inc.'s internal accounting system by extracting sales volumes, revenues, royalties, operating and transportation expenses, land and lease costs and overhead recoveries directly associated with the PEOC assets on a production month basis for the year ended --

Et cetera, et cetera. And it says, the next paragraph: (as read)

> These internal unaudited operating statements do not include any

expenses related to general and administrative costs, interest, income, and capital taxes on any provisions relating to depletion --

Et cetera, et cetera. So this is the basis. It takes the assets from the lease operating statements and puts together this statement. So again, it's -- as you point out, My Lord, it's a pro forma statement, and it indicates a -- what I would say a loss, whether it's substantial or not, but a loss over the first six months.

THE COURT: But all it's presenting is revenue expenses and coming down, as you say, on a pro forma basis to a number.

MR. DE WAAL: Yes, My Lord.

THE COURT: We don't see a balance sheet. That's why I was curious. When I said reconciliation, first of all, I didn't see pro forma. Second, I didn't see any reference to negative retained earnings or shareholders' equity, and I'm always curious when I see a half-presentation. That's why I was asking the question. I wanted a reconciliation because I see an income statement on one document and a balance sheet on another.

MR. DE WAAL: Yes. Correct, My Lord, but -- so for our purposes, as we have argued before Your Lordship, you have PEOC --

THE COURT: Well, you're answering a different question than I asked, but I'm going to let you go ahead.

MR. DE WAAL: Thank you, My Lord.

THE COURT: I just wanted reconciliation, but go ahead.

MR. DE WAAL: My Lord, so what we're saying is in Exhibit 'I', we have the position of PEOC prior to the asset transfer, and it is -- has really nothing going on. There's no liabilities, which is one of the reasons why whether it actually had liabilities at that date or not is somewhat up in the air, but no liabilities shown, almost no assets, but certainly no operations. And the next day, we have this -- almost said dumped on it, but it's in this position, the Exhibit 'J' position, where it has 2,500 wells operating on this level, and that is what happens in the share -- in the asset transfer agreement, and that is what the director of PEOC is looking at.

THE COURT: Well, there's many companies in the oil and gas sector, especially these days, that has negative operations. Does that mean they're

insolvent?

MR. DE WAAL: No, My Lord.

THE COURT: Thank you.

MR. DE WAAL: If it has assets that could cover the liabilities, that's fine.

THE COURT: Thank you.

MR. DE WAAL: But in this case, we know that those assets -- or we know what the -- there's a dispute about whether the --

THE COURT: We know?

MR. DE WAAL: We have -- we know what PEI reflected those as. That's what I should say.

THE COURT: Continue.

MR. DE WAAL: My Lord, question number 5(b), Mr. McDonald referred to this, but the clause is specifically quoted there in our submissions at page 2: (as read)

> Although no specific assumption was required, clause 2.06B confirms that under applicable law, the abandonment and reclamation obligations and the environmental liabilities associated with the assets are inextricably linked with such assets so that purchaser will be liable for abandonment and reclamation obligations and environmental liabilities associated with the assets in the absence of the specific assumption of such obligations by the purchaser.

So there's no doubt, we submit, My Lord, that that was the net effect of that transaction. And it was recognized on both sides.

Question (d), 5(d), you asked whether PEOC purchased the Goodyear assets for a nominal amount, and our response at page 3, yes, paid for -- purchased the Goodyear assets for a stated purchase price of $10. The PEOC shares were then purchased for $1, and we say that that represented the full extent of the financial interests of 198 in the transaction. So

there was also a net negative adjustment, so there was in fact an amount payable to the purchaser at the -- on closing. But the point is, My Lord, that the $10 -- there's no suggestion anywhere in the records, no suggestion that the $10 was an amount that actually calculated as the true value of any of these assets or of the transaction. It was just an amount, a number that was picked, and that's why we say the consequences flow. You cannot regard that as a real number.

I'm not going to read what's in paragraph (e), but the conclusion at the bottom of that section is that all the evidence shows that the liabilities associated with the Goodyear assets exceeded the value of the Goodyear assets at the time of the transfer. There's no evidence to the contrary. And instead of calling them liabilities, My Lord, the negative aspects, whether financial, whether future, whether contingent, the negative aspects affecting the value exceeded the positive aspects on the PEI own version by a large margin. And --

THE COURT: So was the 131 million on a present value basis?

MR. DE WAAL: Not -- I don't believe that those -- that was a discounted number, 131, or the 133 as it appeared in the -- in the financial statement. These are note --

THE COURT: And --

MR. DE WAAL: -- note 3, I believe, to those financial statements.

THE COURT: And is it a liability?

MR. DE WAAL: My Lord, it's -- certainly is a contingent liability for which a provision is required.

THE COURT: Is it a liability?

MR. DE WAAL: Not an immediate current liability, but it's shown as a liability on the PEI version.

THE COURT: Is it shown as a provision or a liability?

MR. DE WAAL: As a liability. As a current liability. My Lord, I'll just take you to that. It's the -- it's Exhibit 'P' to the Darby affidavit.

THE COURT: 'B' as you said.

MR. DE WAAL: 'P', My Lord. 'P' for Peter.

THE COURT: 'P'. Sorry.

MR. DE WAAL: 'P' for Perpetual.

THE COURT: Okay.

MR. DE WAAL: Under liabilities, the last line there, liabilities associated with assets held for sale, and it's under current liabilities, 131. And if you go to note 3, My Lord, you'll also see the assets associated with those liabilities. Now, those are referred to or reflected as 109 million, and we've seen nothing else; certainly there's nothing else in evidence before you to suggest that that 109 million is a -- is a real number.

THE COURT: Sorry. Give me that last comment again, sir.

MR. DE WAAL: My Lord, this is note 3 --

THE COURT: No. I'm reading it. I'm asking what your comment was on the 109.

MR. DE WAAL: Yes, My Lord. I'm saying that there's nothing else in evidence before you to support that 109 number. The highest value certainly that the trustee could find -- and it has been put before you on that basis -- is just under 6 million as the positive value of these assets.

THE COURT: So let's go to -- let's go to note 12.

MR. DE WAAL: Yes, My Lord.

THE COURT: It says decommissioning obligations, and it goes through a number of calculations, and that comes to the 131, which is transferred to note 3.

MR. DE WAAL: Yes, and --

THE COURT: Is that -- is that a liability?

MR. DE WAAL: My Lord, here it's referred to under provisions.

THE COURT: Is that a liability, counsel?

MR. DE WAAL: It is, My Lord.

THE COURT: Whose lia -- who is it owed to?

MR. DE WAAL: It's eventually owed to the AER, My Lord.

THE COURT: You just made a comment "eventually." What did you mean by that?

MR. DE WAAL: Because it's not payable immediately, My Lord.

THE COURT: It's not payable immediately.

MR. DE WAAL: No.

THE COURT: Is this a gross number or a present value number?

MR. DE WAAL: My Lord, I believe --

THE COURT: That's a different issue than whether you have liability, but I just want to make sure --

MR. DE WAAL: Yes. I believe that's -- you'll see just the note just under -- at the bottom of the note 12, --

THE COURT: I'm there.

MR. DE WAAL: -- (as read)

> The corporation used the weighted average risk-free rate of 1.72 to calculate the present value of the decommissioning obligation.

So it is in fact a discounted number.

THE COURT: So you're saying it is a present value number.

MR. DE WAAL: Yes, My Lord.

THE COURT: Okay.

MR. DE WAAL: My Lord, so just a conclusion then, going back to note 3, on these financial statements, the Perpetual version, the -- with respect to the assets held for sale only, the transfer of these assets to PEOC was a transfer at undervalue.

THE COURT: What I'm struggling with, just to continue your point on footnote 3, is why would an arm's length party take these assets and liabilities?

MR. DE WAAL: My Lord, because the extent of the arm's length parties' interest in these assets is $1. If 198 had gone up and taken one vehicle offsite and sold that vehicle, it would have had its money back. The rest are all ARO numbers sitting in a self-contained entity called PEOC that it could walk away from as it eventually did.

THE COURT: You're standing in the shoes of that entity right now. Why would it have pursued -- and I don't mean to break your focus, but we're just looking at these numbers. Why would it have pursued and spent money on its obligations in the first let's just say 12 months?

MR. DE WAAL: My Lord, that's a more complicated question perhaps than Your Lordship may anticipate. There's in the -- in the Goodyear presentation and in the correspondence -- I believe it's Exhibit 'Z' to the Rose affidavit -- there's an indication that Perpetual failed to complete abandonment and reclamations, held back certain wells in order to make the deal better for the purchaser. Now, these wells that were in fact then abandoned would have been ready for abandonment perhaps. We don't have that evidence before us. But -- so how much money they actually spent, My Lord, is -- first of all is questionable, and then secondly, whether they spent more money than they absolutely have to to retain these assets is another question. But keeping these assets in anticipation that if there is an increase in the share price, they would benefit, certainly, My Lord, made sense if all you had to pay up front was the $1. How much they spent in addition to that and on what basis they spent that, we don't know.

THE COURT: So aside of the deeming rule, which I'm sure you'll get to, do you agree that this transaction in terms of the purchase and sale of the shares of PEOC was between arm's length parties?

MR. DE WAAL: No, My Lord. And the argument there -- and we'll get to that, My Lord. The argument there is in fact an argument my friends make, and they say that if a party has the right to acquire the shares with respect to control over the entity that's acquiring the shares from, it is deemed to be in the same position --

THE COURT: I said outside of the deeming rule.

MR. DE WAAL: Outside of the deeming rule, 198 had nothing to do with Perpetual, correct.

THE COURT: They were at arm's length.

MR. DE WAAL: Yes.

THE COURT: Okay. Thank you.

MR. DE WAAL: My Lord, but the argument -- I'm sorry, My Lord. I shouldn't agree so quickly. We say that if you look at the terms of the deal and you look at whether the interest -- whether 198 had an interest to pursue the best possible commercial deal, that is an indication that there was not an arm's length deal even though they may have been arm's length -- at arm's length to each other, the parties themselves.

THE COURT: Can you explain that to me again?

MR. DE WAAL: Yes, My Lord. If -- and we've quoted the cases, My Lord. If there is -- if 198 had no interest in negotiating the best possible commercial deal, the interest in PEOC then became the interest of the creditor, so that's the focus. 198 cannot be regarded as an arm's length party because it had no interest in negotiating for anything more than the $1 it had invested.

THE COURT: Why did it issue the letter it did or the reporting notice that's at paragraph 9 of the Norton Rose brief?

MR. DE WAAL: Yes.

THE COURT: And I'm cognizant that this is broader than the threshold issue. I just want to make sure I'm understanding the context.

MR. DE WAAL: My Lord, I was going to comment on this. First of all --

THE COURT: Okay. I'll turn it back to you, Sir. I don't mean -- I didn't mean to derail you.

MR. DE WAAL: No. I've been derailed anyway, My Lord. The question is -- the proposition is this, this is an after the fact, so many months after the fact, explanation by management about why there was an eventual bankruptcy. Doesn't deal with insolvency. Doesn't deal with the reasons for the deal in the first place. It says it had

a plan. That does not mean that its plan meant that it had to pay more than $1 to get into that plan. To the extent that my friends complain about hearsay, this is the best example we have of hearsay in all of this. Why they wrote this and what this all means for the transaction going back to October 2016, My Lord, I say is not something Your Lordship can properly consider. Whether the bankruptcy eventually followed, that's what they try to explain, you know, why the bankruptcy followed, not whether the deal initially was in -- was an arm's length and financially prudent transaction or not. They don't get into that.

Just on your -- on your previous question, My Lord, we deal with the whole arm's length question, the question Your Lordship posed to me in response to your question number 34.

THE COURT: I'm there.

MR. DE WAAL: So we say: (as read)

> We do not agree that this was an arm's length transaction. They may have been arm's length parties at the time, but the trustee has no standing to act or challenge the share purchase.

And then we quote the authorities in which -- and *Juhasz* is the first one, My Lord, saying that: (as read)

> The transfer of equity and property was on the verge of insolvency, so it had no economic interest -- sorry -- the economic interest and the equity had shifted to creditors, and she had no economic incentive to engage in ordinary commercial dealing. Even though the parties were unrelated, the transaction did not reflect an arm's length bargaining.

And we say that's the situation here. If you just look at 198 and you just look at PEI, then you may say these are arm's length parties, but when they negotiate in these circumstances -- and this has been cited with approval in those other cases, My Lord -- when you deal with these circumstances, then the focus is on the interests of the creditors because 198 no longer is in arm's length -- is negotiating at arm's length. And then over the page, My Lord --

THE COURT: Just if I can pause you there, are you saying that because of the deeming rule or not?

MR. DE WAAL: No, My Lord. We say because of the nature of the transaction, the fact that it had invested $1 and it was only interested in the potential

upside. That's what we say over the page. So it had no interest in limiting its own exposure. Its exposure was limited in fact as much as it possibly could to the $1, and as long as it's in there simply for the potential upside, then somebody else has to look after the creditors, and that's where the focus then should be.

THE COURT: And who are the creditors?

MR. DE WAAL: These are trade (INDISCERNIBLE), the farmer, the landowners, surface rights owners, the AER, the -- the truckers, everyone who services these 2,500 wells, --

THE COURT: Yeah. And when --

MR. DE WAAL: -- municipalities.

THE COURT: Sorry. Go ahead.

MR. DE WAAL: Including municipalities, My Lord.

THE COURT: And when are you measuring the creditor's interest?

MR. DE WAAL: At the time of the transaction.

THE COURT: So who are the creditors at the time of the transaction?

MR. DE WAAL: At the time of the transaction, everyone I've just mentioned, so --

THE COURT: So just --

MR. DE WAAL: Yeah.

THE COURT: Okay. Let's just pause there. Again, I'm asking for context.

MR. DE WAAL: Yes.

THE COURT: This is just narrative. What creditors at the time of the transaction ultimately did not get paid?

MR. DE WAAL: There's no evidence before you except to -- for the AER and the municipalities.

THE COURT: Is AER a creditor?

MR. DE WAAL: Yes, My Lord. It --

THE COURT: Where is it a creditor?

MR. DE WAAL: My Lord, the difficulty is whether we're dealing with *BIA* provisions or whether we're dealing with the oppression remedy, which is an Alberta corporations -- corporate corporations act -- Alberta *Business Corporations Act* concept, the -- we have to be careful that we -- that we don't just say there has to be a creditor or a liability. In the context of the Alberta *Business Corporations Act*, My Lord, and the oppression remedy, you don't have to be a creditor with a claim and a default as Mr. Leitl suggested. That's not required. So in the context of an oppression --

THE COURT: So you're telling me we don't need creditors?

MR. DE WAAL: Not --

THE COURT: Is that what you're saying? I'm just trying to understand your --

MR. DE WAAL: Yes, My Lord. You don't need a creditor in the sense of somebody who has a judgment and has not been paid.

THE COURT: You raise two or three times there, the oppression remedy, and while I'm still thinking about this, I want to just read a couple of phrases here out of some reference material. And I haven't concluded anything. I just glossed over this in preparation for today. In one service it says: (as read)

> Although it is typically considered to be a tool for minority shareholders, the federal and provincial business corporation statutes also grants statutory standing to --

This is all in the context of oppression.

> -- directors, officers, current and former shareholders and, in some cases, creditors.

So I'm caught by the soft reference to creditors. In a different service -- you might want to think about this in the context of your overall questions -- again talking about the oppression remedy in a bankruptcy service: (as read)

> In the same vein, the right to obtain relief from oppression is a personal remedy belonging only to the individuals who have been oppressed. It is not a right granted by statute or otherwise to a trustee in bankruptcy to assert in a representative capacity on behalf of a bankrupt corporation's creditors.

So I just raise those two comments because they caught my attention. And again, just seeking some explanation.

MR. DE WAAL: My Lord, we -- in our brief, we quoted those cases that say insofar as a claim is a credit claim only, so if somebody's oppressed and its shareholding or voting rights or something else is affected, presumably then the trustee would not be making that claim, that oppression claim on behalf of that particular, let's say, shareholder. But in *Juhasz* and the other cases that have followed since, it has been clearly stated, we say, My Lord, that even somebody with a claim only, not proven yet, only somebody with a claim, could be in certain circumstances regarded as a creditor for the purpose of the oppression remedy, and we say in this case -- the question started with whether this is an arm's length transaction or not, and we say in this case the interest that we are seeking to protect here is not the interest of a creditor per se but somebody who would normally be entitled to the protection of the *Act* in those circumstances, and so the reason for that is because 198 -- and this is all set out in -- our response to paragraph 34, My Lord, the reason is that the bankrupt was not making transfers with a view to advancing its own -- was making transfers in its own interest and not acting prudently anymore. So these are not arm's length transactions in that sense anymore.

THE COURT: I'll just note for the record the *Juhasz* case is 2015. Again, I'm not suggesting I've made any decision on this at all yet, but the service I'm reading from is updated 2018, so it's pretty current. Be that as it may, I'll leave that.

MR. DE WAAL: Yeah. The *Royal Trust* case that my friend, Mr. Leitl, I think, referred to is a '93 case if I'm not mistaken. But there have been cases, My Lord. We refer to them on page 20 of our responses. And in circumstances, we say, like these, even though 198 was an arm's length -- would have been considered as an arm's length party, the facts and the circumstances indicate that the focus should be on the interest of others because 198 was clearly only interested in the upside of this transaction for itself.

My Lord, if I can go back then to question 5, which is where I was, and just refer to one aspect of section 96, --

THE COURT: I'm there.

MR. DE WAAL: -- which has not been mentioned, My Lord, section 96(2) says:

> In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received.

Now, that far, we got every time, and it's opinion, so there's no doubt about that. And then it goes on to say: (as read)

> The values on which the Court makes any finding under this section are, in the absence of evidence to the contrary, the value stated by the trustee.

So that explains why the opinion of the trustee's in there, because it says "shall," "the trustee shall state." So it's required. The trustee's required to state his opinion.

And the second part of the aspect -- or the question is the Court's entitled to rely on that opinion. Whether he's an expert in valuation or expert in oil and gas or expert in abandonment and reclamation, this *Act* gives the Court the authority, in fact, the direction, to make a decision based on that unless there's evidence to the contrary.

And my friends have both said that there is sufficient evidence to the contrary, and then they refer to criticism of the trustee's position. They say that the reservoir reports, reserve reports referred to are dated and that there were other problems with the documents that Mr. Darby relied on. However, that's not other evidence. That's criticism of his own evidence. There's no evidence before this Court by the respondents, by the -- by the defendants -- applicants, I should say -- by the defendants to suggest any other values. The only values before you are the values stated by Mr. Darby in his opinion pursuant to section 96.

Question 6, My Lord, I just want to make this one point in -- on page 4: (as read)

> In a bankruptcy situation, it's unlikely the officers or employees of the bankrupt will be willing or able to provide firsthand personal

> knowledge. Courts have recognized this in accepting affidavit evidence from the trustee's representative.

And then I've -- we've quoted the cases in which -- and it's all in our material, so I'm not going to refer Your Lordship to that -- but in which the trustee states his opinion about bankruptcy or solvency, and the Courts have accepted that.

My Lord, question 8, my friends -- and I'm trying to combine my notes as well as my friend's comments. Question 8, my friends say the Court should give no weight to the assertion in the Darby affidavit, and then they say that -- then they quote that this -- what they call the SRC letter in response, which if there's ever hearsay, that's hearsay, and then they say this is a viable business, it operated for awhile after this -- these transactions, and therefore, it certainly was not insolvent at the time. But that, My Lord, does not follow. The fact that they kept going for awhile after the transaction does not mean that it was not insolvent.

On that same page of my friend's responses to the questions, My Lord -- I don't -- oh. It's page 8. I just want to refer you to the footnote on that page.

THE COURT: I'm there.

MR. DE WAAL: It refers to the Darby affidavit, and it says: (as read)

> Schedule 2 to the statement of adjustments for the asset transfer agreement shows that the PEOC LLR or deemed liabilities is 176.3 million.

So again, My Lord, if you look at the woods instead of the trees, if the deemed liabilities were 176 million on the PEI or Perpetual version, the only -- again, the only evidence of any assets, if one considers in the section 96 context consideration provided and consideration received, if the deemed liabilities were more than $170 million, the assets -- the only evidence of any assets do not exceed $6 million or, on that financial statement that we saw, My Lord, 109 million. So again, on the -- on the Perpetual own version, clearly a transfer at undervalue.

And I should interrupt myself, My Lord, just to remind you of this, this is an application for summary dismissal and what my friends have to show and convince you is that there is no merit to this claim, not that the trustee is unable to put a particular number on the ARO or it's arguable whether --

THE COURT: My assistant just needs to speak to me for a minute, but let's continue on, and at an appropriate time, if you --

MR. DE WAAL: My Lord, I'll just --

THE COURT: -- break for --

MR. DE WAAL: I'll just finish this submission.

THE COURT: Certainly.

MR. DE WAAL: So again, what my friends have to show is that there's no merit to this claim, not that there's criticism to be levelled against Mr. Darby's affidavit or to say that the reserve report was dated. That, with respect, does not get them to a summary dismissal of the application, and maybe I can break there, My Lord.

THE COURT: Okay. I will be just a couple of minutes. Madam clerk, if we could adjourn.

THE COURT CLERK: Order in court.

(ADJOURNMENT)

(PORTION OF PROCEEDINGS NOT RECORDED)

THE COURT: -- combination.

At your convenience, Mr. de Waal.

MR. DE WAAL: Thank you, My Lord. With respect to question number 10(b), just one comment on my friend's answer. They say that: (as read)

> Mr. Darby determined the difference on the basis of an incorrectly calculated asset value and an incorrectly calculated liability value --

And again, they say incorrectly calculated, but they don't say what the right calculation is.

> -- and does not consider the potential impact on value represented by Sequoia's business plan.

Now, with respect, My Lord, it also did not consider the potential impact on the value of litigation, for example. Those things are just speculation. And what Mr. Darby has said is based on his review of the Perpetual records. If there's criticism or suggestions that certain things should have been considered that have not been considered, that's for the defendants in this case, the applicants, to bring forward. For the time being, the opinion is as stated, and the Court's directed to -- or at least authorized to make a decision based on that.

Then paragraph 12 -- or question 12 --

THE COURT: Sorry. On that last comment, you're saying that the Court's authorized?

MR. DE WAAL: Yes, My Lord. The section 96(2) says for the purpose of:

> ...the values on which the Court makes any finding under this section are, in the absence of evidence to the contrary, --

THE COURT: Yeah.

MR. DE WAAL: -- the value stated by the trustee.

THE COURT: The reason I'm pausing you, I make the decision, correct?

MR. DE WAAL: Yes. Yes. Yes. But you make the decision based on what -- you may make the decision based on what the trustee tells you his opinion is because section 96 says you can do that.

THE COURT: Yeah. Just and you might want to address this. The reason I was asking the question about opinions is normally in an affidavit -- I think we would likely all agree here -- but for any provision in a statute, I'm not to consider an opinion in an affidavit. So I just want to be sensitive to the boundaries there.

MR. DE WAAL: Indeed, My Lord. It's like the evidence -- admissibility of opinion evidence at trial. There are requirements, and what I think or the witness thinks has nothing to do with what Your Lordship will eventually determine, but in this case, the trustee is not only authorized to state his opinion, he's directed to state his opinion. Must state, shall state, it says.

THE COURT: Do you agree with your friends in terms of when

that applies and when it doesn't?

MR. DE WAAL: My Lord, certainly the question of value is something right within section 96, so he shall state -- and it's defined. He shall state what's -- what in his opinion is the far -- fair market value -- I keep saying far -- fair market value of the property or services and what, in his opinion, was the value of the actual consideration given or received. And actual consideration, My Lord, goes beyond -- consideration given or received goes beyond liability or debt or fair market value. What was the consideration given by PEOC in this transaction, and what was the consideration received. And if you look at that paragraph of his affidavit -- I think it's 44 -- that's exactly the wording followed in that paragraph.

THE COURT: And on insolvency, the issue of insolvency?

MR. DE WAAL: No, My Lord. It's -- he's not -- he's not -- certainly not pursuant to section 96 is not authorized to say something about insolvency, but the cases that I've referred you to do state opinions of trustees in affidavits before the Court, including on insolvency, and the Courts have followed those, accepted the opinions.

THE COURT: So am I to take -- and I just want to probe this one more -- with one more question, if I may, sir. Am I to take Mr. Darby's affidavit on Exhibit 'M' concerning municipal taxes owing without question?

MR. DE WAAL: No, My Lord. What Mr. Darby says with respect to any of these record -- Perpetual records -- and my friends make a point about the -- what is it -- the LLR document, that he says, I don't have any knowledge about the background to this document. That goes for all the Perpetual records. So he doesn't know, for example, whether these just include the Perpetual assets or not or the Goodyear assets or not. He doesn't. But it's in the data room. It's a document given to him by Perpetual, and he assumes and explains that assumption; he assumes that that relates to these assets.

So when he says something based on their records, it's not an opinion. He says, This is the Perpetual version, this is what Perpetual tells me, and if Perpetual tells me that the value, the reserve value, for example -- excuse me, My Lord -- if Perpetual tells me in their records that the reserve values are either negative 34 million or, at best for them, positive 5.5 million, that's not an opinion; that's just saying, This is your evidence, this is value that I come up with because of your evidence or your records. Not an opinion.

So not everything that he got from Perpetual, which is a defendant in this case, is hearsay or opinion. If -- the reason for that is because he didn't hear it from a third party. He heard it from Perpetual and read it in the Perpetual records. And for Perpetual to say, "Well, you

don't know what this document really means, do you?" is not sufficient to propose, certainly with respect to values, an alternative position that the Court can regard in determining what the real value is. It's still the only version before the Court.

THE COURT: So I know I'm digressing here and we're going back to something we discussed before, and I still want to think about the discounted because I'm -- I've seen conflicting materials or comments on discounting, but be that as it may, on the balance sheet where you focused on liabilities associated with the assets held for sale of 131 million, this is in a document, at least the one I'm looking at, under tab 'P' as in Paul, that is headed up condensed interim consolidated financial -- statements of financial position. It's not audited. I don't know who the reader is. What weight do I give that?

MR. DE WAAL: My Lord, this is a Perpetual document, so with respect to Perpetual, this is Perpetual's version, so there's no reason for you to trust Perpetual's or use Perpetual's version in making a finding with respect to Perpetual. If this was a document created by some third party that somehow the trustee introduced into evidence, that would have been hearsay, irrelevant, of no weight, but this is a Perpetual document. This is the Perpetual document. Not contested, it's not disputed this is the Perpetual document. And so Perpetual's a public company. Presumably, its financial statements, including its press releases eventually about the value of -- which is consistent with this, 128 million, 131 million, if that's the public disclosure by this public company, then is there any reason for my friends to argue that Your Lordship should not just take them at their word?

THE COURT: I'm just posing the question.

MR. DE WAAL: That's -- My Lord, I'm -- my suggestion is there's absolutely no basis for my friends to say you should not accept Perpetual's own statements. And the fact that we criticize them as being old material or perhaps not all the wells -- you know, we can find some discrepancies between the financial statements -- does not present an alternative version on value that Your Lordship can confidently accept to rebut the presumption in section 96.

THE COURT: Okay.

MR. DE WAAL: And on any of these numbers -- My Lord, maybe this is the point I made, I remember, on the -- at the -- on the first occasion. On any of these values, if it had been a matter of the discount rate used or there was a small enough difference so that we could say, Well, that financial statement overstates something by a certain margin and here's a better one, then sure, My Lord, we -- perhaps just to use what

Mr. Leitl referred to, then I would have said, We wouldn't have been here. But the different is so vast, My Lord, that you can accept any number from Perpetual on the -- on the value side -- positive value side and almost any number on the negative value side, and there's a huge difference, and this becomes or is clearly a transfer at undervalue. There's no scenario, no combination, that would not give you that result.

THE COURT: That's on your premise, if I understand correctly, that you've got a quarter of a billion dollars here that's deficient.

MR. DE WAAL: Not even, My Lord. If we take this value, if we take the 131 instead of 225 or 215 -- I forget what the number is. You can take any value. Take the 6 million in assets, the highest possible value, and you take a lowest negative value, and you still have a transfer at undervalue.

THE COURT: Continue.

MR. DE WAAL: Question 12, My Lord -- and I'll try and move a little quicker. I just want to read my response. The evidence is that Ms. Rose was a shareholder, and this relates to a personal benefit, and again, My Lord, this is where -- whether the benefit was -- is an opinion expressed by Mr. Darby or not. The evidence is that she's a shareholder, not disputed. PEI had shared approximately 71 percent of its liabilities, not disputed. That's in the PEI document. Increased its net asset value by 28.5 million -- that's the PEI information -- as a result of the transaction. So every shareholder of PEI, including Ms. Rose, benefitted from the Goodyear restructuring as a matter of fact, not opinion.

And for Mr. Leitl to say the price did not reflect that, well, that does not mean that realistically the 71 percent of the liabilities had not been sent away to PEOC and that there was a corresponding benefit to shareholders. Share price -- in fact, Mr. Darby -- he didn't refer to this, but Mr. Darby responded to his question in cross-examination. Mr. Darby said to him, The share price may have been inflated at the first -- in the first place. So you cannot predict what the share price would do, and it doesn't track the actual value of the shares on a day-to-day basis as Mr. Leitl would suggest.

THE COURT: So how do you define benefit?

MR. DE WAAL: Again, My Lord, we've made the submission any benefit directly or indirectly, and it could be a financial benefit, and it could be some other benefit, could be -- in some cases, it's a -- you shares are now converted, no longer nonvoting shares, you now have voting shares, or you have -- you dilute the shareholding of some other shareholder. That would be a benefit. In this case, the benefit we say is a

direct financial benefit, indirect financial benefit.

THE COURT: So that's your definition?

MR. DE WAAL: Yes, My Lord.

THE COURT: Direct financial benefit.

MR. DE WAAL: Yes, My Lord.

THE COURT: Where's the direct financial benefit?

MR. DE WAAL: The -- her equity stake in Perpetual increased by the amount that the liabilities for Perpetual were reduced.

THE COURT: Just to make sure, I'm understanding what you're saying, where -- direct me to where you're -- you illustrate a direct financial benefit. I'm using your term.

MR. DE WAAL: Yes, My Lord. Say as a shareholder, you own a certain portion of the company. So if you own a hundred percent or 50 percent or 5 percent of Perpetual --

THE COURT: Yeah.

MR. DE WAAL: -- and Perpetual, through this transaction, gets rid of 71 percent of its liabilities, to that extent, your 5 or 50 percent interest in that is your benefit.

THE COURT: Where is there evidence that Ms. Rose received a financial benefit?

MR. DE WAAL: She was a shareholder. That's the evidence, My Lord. And Perpetual's liabilities were decreased by 71 percent.

THE COURT: But Mr. Leitl pointed out the stock price went down.

MR. DE WAAL: Yes, My Lord, but the stock price, as I submitted, does not necessarily reflect the value of the company. You could have an Internet company with a stock price of $20 a share but no assets. In this case, we have a real financial basis

for saying 71 percent of the -- of the liabilities were transferred out.

And it's not just that, My Lord. It's combined with the fact that the good assets that those liabilities would have been able to be realized against -- those good assets were sheltered in this transaction. So if you have 71 percent of your liabilities in a vehicle that also had assets that could pay those liabilities, then that's one thing. But in this case, those two were separated, and what ended up in PEOC was simply the liabilities.

THE COURT: So in terms of measuring the benefit -- I'm going to come at it from a different angle, and again, I'm just searching here to make sure I understand your position -- was there a legitimate business relationship between the vendors and the purchasers?

MR. DE WAAL: A legitimate business relationship between the vendors and the purchasers. Are you -- I'm not sure whether you're referring to the share transfer or the asset transfer, My Lord.

THE COURT: Well, I'm looking at the whole transaction when I ask that question.

MR. DE WAAL: My Lord, we deal with the section 96 analysis, and our position is that you cannot look at the whole transaction because 96 does not -- does not contemplate that. Section 96 deals only with one discrete transaction between the debtor and another party. And in this case, the only transaction in which the debtor is involved is the asset transfer.

THE COURT: Okay. So let's explore that. We have a vendor -- dealing with the asset transaction -- in the form of, just for discussion purposes, the trust --

MR. DE WAAL: Yes.

THE COURT: -- and a purchaser in the form of PEOC that acquired those assets. What is the net benefit to Ms. Rose as a result of that transaction?

MR. DE WAAL: The net benefit is, My Lord, that -- remember, before the transaction, there were -- and I'll call them KeepCo assets and Goodyear assets.

THE COURT: Yeah. Just say Keepers and Goodyear.

MR. DE WAAL: They were KeepCo assets, Goodyear assets. The

KeepCo assets could potentially, I assume, pay for some of the liabilities associated with the Goodyear assets. Now what you do is you take the good assets and you hive them off. You put them in a -- in -- with a different trustee. So you protect them against any --

THE COURT: Well, let's just deal with if transaction we're dealing with. The trust sold them to PEOC. What's the difference immediately after that transaction in terms of Ms. Rose?

MR. DE WAAL: When PEOC -- that transaction on its own, My Lord, when PEOC was -- owned only the beneficial interest in the Goodyear assets, they were worth -- they had a negative value. When they -- prior to that, when it was still in POT, those specific assets would have had the same negative value, but they would have been positive assets associated with them.

THE COURT: M-hm. But you said just look at the asset transaction.

MR. DE WAAL: Yes, My Lord.

THE COURT: I want to make sure I'm understanding.

MR. DE WAAL: So the asset transaction --

THE COURT: Just let me ask a question just to make sure we've got the right context. The trust sold the assets -- again, this is just narrative -- to PEOC. Immediately -- what is the difference -- what is the benefit to Ms. Rose when I compare that structure immediately before the conveyance to what was the circumstance immediately after the conveyance of the assets?

MR. DE WAAL: Immediately after the conveyance, the good assets are gone, are separated, and now you're dealing with a vehicle -- you're dealing with -- and perhaps, My Lord, the analogy would be a garbage can. You put all the garbage in the garbage can, and it's all in the one garbage can. When the garbage was still in the kitchen, there was other stuff around. Now, you've taken all that, and you've put it in one discrete entity.

THE COURT: Okay. So what? Immediately after the transaction -- you said to focus on the asset sale. Immediately after the transaction, we had a hundred percent entity of Perpetual Energy Inc. holding PEOC. What's the net difference?

MR. DE WAAL: The associated liabilities have also been

separated.

THE COURT: But aren't they -- aren't they in the same -- immediately after the transaction, it's still a hundred percent sub.

MR. DE WAAL: My Lord, if the associated liabilities -- for the sake of our discussion, if the associated liabilities associated with the Goodyear assets were a thousand dollars, those thousand dollars would have been payable from all the assets. Now you put them in the garbage can with the assets that are not worth a thousand dollars.

THE COURT: Yeah. Let's not use the term "garbage can." Use the term NewCo or use the term PEOC.

MR. DE WAAL: PEOC. So you put -- you put the -- you put the assets in PEOC, and you put the associated liabilities -- the thousand dollars in associated liabilities in PEOC so that those liabilities -- with respect to those liabilities, no other assets are available. So now you have a vehicle, PEOC, with a thousand dollars in liabilities and no assets to cover those liabilities.

THE COURT: Okay. So let's use that example, thousand dollars in liabilities, no assets. What's the net impact as a result of that conveyance -- if I'm understanding you correctly, what's the net impact that would give rise to a benefit?

MR. DE WAAL: If those liabilities are not paid, they end up with the trustee.

THE COURT: No. No. You said just look at the asset transaction.

MR. DE WAAL: Indeed, My Lord.

THE COURT: Now you've done the share transaction.

MR. DE WAAL: No, My Lord.

THE COURT: No?

MR. DE WAAL: No.

THE COURT: Are you now saying look at the whole transaction?

MR. DE WAAL: No, My Lord. I'm saying the asset transaction only, the effect is as soon as you separate --

THE COURT: Okay. Let's just -- let me give you a numerical example. We've got the trust. What do we have in there -- give me some notional figures. What do we have there for assets and liabilities?

MR. DE WAAL: Let's say you have a thousand dollars in assets all related to good assets and you have a thousand dollars for liabilities all related to the bad assets.

THE COURT: Okay. In your scenario, we've got zero value in the trust. Is that correct?

MR. DE WAAL: You have zero value, but -- you have zero value, and that's from a shareholder perspective in the -- in the parent company, zero value.

THE COURT: Okay.

MR. DE WAAL: As soon as you separate those, then you have two separate companies. You now have the trust separate -- separately from the -- from PEOC, and in PEOC, you have the -- did I say -- thousand dollars in liabilities --

THE COURT: Light liabilities.

MR. DE WAAL: -- and zero in assets.

THE COURT: Right.

MR. DE WAAL: And in the trust, you still have a thousand dollars in assets and no liabilities.

THE COURT: How... I misunderstood something. I thought you conveyed -- or you had a shifting of thousand dollars in liabilities over to the PEOC --

MR. DE WAAL: Yes.

THE COURT: -- entity.

MR. DE WAAL: Yes.

THE COURT: So they're no longer in the trust --

MR. DE WAAL: Yes.

THE COURT: -- is what you're saying.

MR. DE WAAL: Yes, My Lord.

THE COURT: I'm not saying I agree or disagree. So don't you now in your example have a hund -- or a thousand dollars of assets in the trust?

MR. DE WAAL: Yes, My Lord.

THE COURT: And a thousand dollars of liabilities assumed by PEOC?

MR. DE WAAL: Yes, My Lord.

THE COURT: So what's the net difference?

MR. DE WAAL: If the thousand dollars in PEOC are not paid, then there are no assets to satisfy --

THE COURT: No. We're talking about the benefit to Ms. Rose, full stop. What's the net difference at this point in time?

MR. DE WAAL: You now have a thousand dollars in assets in the trust unencumbered by any liabilities. So that's the benefit, and what you can do then is exactly what happened --

THE COURT: So just to pause, before the shares are sold, you're saying that because we have, again on your theory, a thousand dollars of liabilities in PEOC, that that's not impacting on the --

MR. DE WAAL: Before the transfer, My Lord?

THE COURT: Before the transfer of shares, --

MR. DE WAAL: Yes.

THE COURT: -- the shifting -- I'll use the word "shifting." Better word is "assumption." As a result of this asset transaction before the share transaction, you're saying the trust has a thousand dollars of assets and PEOC has thousand dollars of liability, and I'm saying -- or I'm asking, Where is the benefit at that point in time to Ms. Rose?

MR. DE WAAL: If you look at the two still as one entity because they're both owned by PEI, mathematically, My Lord, the position is the same. You haven't sold any assets, you're still in the same position.

THE COURT: Okay. So let's pause right there. That's why I'm asking the question.

MR. DE WAAL: But your position has changed. You're now in a position to move your clean assets --

THE COURT: No. No. Before we -- are you now going to the share transaction?

MR. DE WAAL: My Lord, I'm still dealing with before the share transaction. You've now reorganized your affairs, and you've now benefitted from the reorganization of your affairs. Although on a balance sheet you'd say -- still say you have zero net value, your position is different.

THE COURT: So on a consolidated basis, you agree that there's no change.

MR. DE WAAL: Until the share transfer, yes.

THE COURT: No. We're not talking about the share transaction. You said only the asset transaction.

MR. DE WAAL: I say until the share transaction, --

THE COURT: Yeah.

MR. DE WAAL: -- your position does not change. Yes, My Lord.

THE COURT: "Until" is I think the operative word there.

MR. DE WAAL: Yes, and that's --

THE COURT: I just want to understand what you're asserting.

MR. DE WAAL: That's what I was saying.

THE COURT: Okay. Thank you.

MR. DE WAAL: But the position is not the same anymore. You now have the ability to do exactly what happened.

THE COURT: So how do I measure that benefit at that point in time before the shares are sold? Again, I'm just assuming you're correct on your --

MR. DE WAAL: My Lord, it's not necessary to measure the benefit. There's -- the *Wilson* case, Supreme Court of Canada case, says, for example, that you don't have to measure that. You don't even have to have the benefit, the financial benefit or (INDISCERNIBLE) benefit.

THE COURT: Okay. You just said you don't have to have -- you do not have to have the financial benefit. Is that right?

MR. DE WAAL: Yes, My Lord.

THE COURT: So if you don't have a financial benefit, how can there be a benefit to Ms. Rose?

MR. DE WAAL: Because it's not a financial benefit, My Lord.

THE COURT: So that goes back to my first question. How do you measure -- how do you measure benefit?

MR. DE WAAL: My Lord, the benefit is in the -- in the -- in the restructuring of the PEI ownership of these assets.

THE COURT: Unless you have anything further to say, let's maybe move on to the next.

MR. DE WAAL: My Lord, I referred you to the *Wilson* case. I just want to give you the citation. It's tab 45 --

THE COURT: M-hm.

MR. DE WAAL: -- of the Rose authorities, and it starts at paragraph 47, and that (INDISCERNIBLE) that no specific benefit is required.

MR. LEITL: Sorry. Which paragraph?

MR. DE WAAL: I don't know. I've closed it. 47.

MR. LEITL: Thank you.

THE COURT: But doesn't it say, in the *Wilson* case, "immediate financial advantage"?

MR. DE WAAL: No, My Lord. I don't believe so.

THE COURT: But I don't want to spend too much on this. It's an important point, but I can go back and reread the case.

MR. LEITL: It's paragraph 49, My Lord, and it says exactly that.

MR. DE WAAL: It says: (as read)

> Where directors have derived a personal benefit in the form of either an immediate financial advantage or increased control of the corporation, a personal order will tend to be a fair one.

We went through this analysis, My Lord, at the last hearing.

THE COURT: I remember.

MR. DE WAAL: Mr. Leitl's brief says there only -- you have to have one of these two. And in fact, all the Court says is you have to have -- there has to be a fair result, and in these cases, the result tends to be fair, but it's not -- it's not a requirement.

THE COURT: Sorry. That last sentence, (INDISCERNIBLE) put this down, but what do you mean by that last sentence?

MR. DE WAAL: My Lord, the overall concern is that the -- there has to be an adequate basis for holding a director personally liable, and one of the things you look at -- so in order to impose personal liability, that has to be fit in all the

circumstances, and then the Court says:

> The oppression remedy request must in itself be a fair way in dealing with the situation.

And it refers to a certain indicia of fairness:

> Where directors have derived a personal benefit --

That's one example.

> -- in the form of either an immediate financial advantage or increased control of the corporation, a personal order will tend to be a fair one. Similarly where directors have breached a personal duty they owe as directors or misused a corporate power, it may be fair to impose personal liability.

But it's not a requirement that an applicant or plaintiff has to prove one of those two, a personal financial benefit, an immediate financial advantage or increased control.

THE COURT: But it says:

> Where directors have derived a personal benefit, in the form of either an immediate financial advantage...

Do you see an immediate financial advantage here?

MR. DE WAAL: No.

THE COURT: Base --

MR. DE WAAL: Not immediately, no.

THE COURT: Thank you. Do you see an increase in control of the corporation?

MR. DE WAAL: No, My Lord.

THE COURT: Thank you.

MR. DE WAAL: And then the next paragraph -- I'm sorry, My

Lord, before you put that away, --

THE COURT: Go ahead.

MR. DE WAAL:

> To be clear this is not a closed list of factors or a set of criteria to be slavishly applied. As explained above, neither a personal benefit nor bad faith is a necessary condition in the personal liability equation.

THE COURT: So how should I measure it? That goes back to my question. How do -- how do you measure personal benefit here? What am I supposed to consider a personal benefit?

MR. DE WAAL: My Lord, you should consider whether there was a breach of a personal duty as director to the company and whether personal liability of the director in these circumstances will be fit in the circumstances. Whether there's a personal financial or a direct financial benefit should give you the comfort that that will be a fit result, but it's not the only circumstance. So there's no need for you to measure personal financial benefit. You have to determine whether in these circumstances, if there was a breach of the duty of the director to PEOC, whether that director should be personally liable.

Number 24, My Lord. This is in response to the suggestion that because PEI was the (INDISCERNIBLE) shareholder of PEOC, whatever PEI wanted was legitimate for the director of PEOC to consider, and the question was, Where are these two prerequisites found? And we say, My Lord, that by definition, the notion that you have a director considering the interests of those -- in other words, not all, but only those -- shareholders who elected him or her, must by -- must necessarily imply that there is more than one director.

Paragraph 25.

THE COURT: Do you have any authority for that?

MR. DE WAAL: My Lord, I would submit, My Lord, that that's the only logical way to interpret that. If you -- if there's only one director, then that director, by implication, cannot consider only the interest of a certain number of shareholders. Then that director considers all the shareholders. So if you -- any reference to anything less than all the shareholders must necessarily imply that there's another director, at least one more.

THE COURT: Do you have authority for that, sir?

MR. DE WAAL: No, My Lord, except that -- oh, there's a case, *Pocklington*.

THE COURT: Do you want to give me the cite?

MR. DE WAAL: I'll get it to you in a second, My Lord. I -- we gave it to you the last time, and that's the Court of Appeal, and it rejected that argument. We'll find it again.

THE COURT: Okay. So just to be clear, did -- I remember *Pocklington* being raised before, but did that case talk about this provision specifically?

MR. DE WAAL: Yes, My Lord. It dealt with the argument that because a particular director was elected by a certain number of shareholders, that that director was then entitled to consider the interests of those shareholders over the interests of the corporation in that case.

THE COURT: Yeah, but the question I'm asking is do you have authority that this only applies -- I have no problem with that premise from *Pocklington*. I'm asking if you have authority that this provision only applies if you have, as you say, more than one -- I -- multiple directors is the way it was phrased -- and one or more directors is elected or appointed, et cetera, by that group. That's --

MR. DE WAAL: Not case authority, My Lord, because, again, as I -- as I've submitted, if a director is appointed or elected by a certain number of shareholders or shareholders from a certain --

THE COURT: Yeah. I have no problem with that, Mr. de Waal, but if we have a wholly owned corporation that appoints a director, why wouldn't this provision apply?

MR. DE WAAL: It applies not to the exclusion, though, and not to trump the interests of the corporation. There's no doubt that any director has to consider all kinds of people like creditors and shareholders but not to the exclusion of the interests of the corporation, and so in this case that's a special consideration, where you have a shareholder elected just by a specific group. Presumably, the other shareholders would not have the same specific considerations, but not again to the exclusion of the interests or to trump the interests of the corporation in the first instance. That's the submission, My Lord.

THE COURT: Thank you.

MR. DE WAAL: My Lord, we now have agreement, it seems, that the concept of a provable claim is not relevant, so I'll just move on.

27, My Lord, 27(a), the question is whether the trustee is asserting that the asset transfer rendered PEOC insolvent. And just in addition to the answer there at the bottom of the page, I should refer you to the evidence of Mr. Darby in cross-examination with respect to the $14 million that would have been required as a deposit if this had not -- if this transaction had not been structured in the way that it was. That's page 51, line 22, and page 80, line 3.

THE COURT: Sorry. You're referring to?

MR. DE WAAL: My response on page 13 to question 27, My Lord.

THE COURT: Right.

MR. DE WAAL: And in addition to what I've set out there that I'm not going to repeat, My Lord, Mr. Darby testified in cross-examination on two occasions that if the transaction had not been structured in this way, there would also in addition have been a $14 million deposit required, and I've given you the references page 51, line 22 and page 80, line 3.

THE COURT: And you're referring to his questioning.

MR. DE WAAL: Yes My Lord. Cross-examination.

THE COURT: Yeah.

MR. DE WAAL: Yes. Yes. Question number 30, My Lord.

THE COURT: I'm there.

MR. DE WAAL: The question relates to whether evidence subsequent to the transactions and up to the date of the bankruptcy would have been relevant or instructive. Instructive, I think, is the word. And we say at page 18 at the top: (as read)

> The relevant facts all relate to the time of the transfer or the oppressive conduct.

And then:

> The five-year review period is strong evidence that the trustee is not required to establish any nexus between the insolvency at the time of the transaction and the potential bankruptcy five years later.

If I could just -- I'm sorry, My Lord. I skipped over this, but my friends' comments to question 31(b), they quoted Morawetz, and I just want to make one point there, My Lord. This is at page 25 of their submissions. The second paragraph: (as read)

> Moreover, as a bankruptcy trustee, it was inappropriate for Mr. Darby to offer opinions on issues that are to be determined by the Court. Morawetz and Houlden state:
>
> > In bringing proceedings such as an application to set aside a preference, the trustee should not adopt an adversarial or hostile role. Rather, the trustee should present the relevant facts to the Court in a dispassionate, non-adversarial manner and leave the matter to the Court for decision.

So if there's a complaint, My Lord, it should not be that the trustee has put the facts before the Court, whether it's from the records of PEI or somewhere else, is that the Court -- is that the trustee did not act according to its dispassionate, non-adversarial manner, and the only evidence we have of that, despite the fact that the accusation has in fact been levelled against Mr. Darby, is the fact that he was -- he had an intention to include the director of PEOC in the lawsuit but did not advise her of that. I think there's a section of Mr. Leitl's cross-examination that deals specifically with these allegations of bias or something to that nature, but that's the -- that's the extent of it, not the fact that the trustee puts forward these facts; it's that the trustee's biased.

33, My Lord.

THE COURT: I'm there, sir.

MR. DE WAAL: The question was again benefit to Ms. Rose, and I wanted to add one comment to the response that we've given you. If Sequoia -- PEOC had -- if the shares in PEOC had not been sold, the effect of the asset transaction would

have been exactly the same, and so for the purposes of considering the validity of that transfer, whether it was under value or not, that is not affected by whether there was a subsequent share transfer or not. The analysis and the result is exactly the same.

THE COURT: So we would be here today?

MR. DE WAAL: If the bankruptcy eventually followed. But this all depends on whether the shareholder or some other entity is entitle -- is prepared to put money in, and whether the bankruptcy eventually happened or not is the issue. If there's no bankruptcy, PEOC and Perpetual can enter into all the deals they want. As soon as there's a bankruptcy, that triggers this inquiry, and we say for -- if that had in fact happened, the analysis and the result would have been the same. So if we had ended up here and Perpetual was still sole shareholder, there'd never been a share transfer, the result would have been the same.

35, My Lord.

THE COURT: I'm there.

MR. DE WAAL: We say in the first bullet point after (a): (as read)

The evidence shows that nobody represented PEOC in all of this.

PEOC did not have separate legal counsel. PEOC's interests were represented, according to Ms. Rose, by the purchaser of the shares eventually, and when this release was negotiated, that was -- that was negotiated in the context of the share transfer. There was a deliverable pursuant to the share transfer transaction, and in that transaction, of course, PEOC was not a party to that. So the negotiation about the potential release occurred between PEI and 198 at a point in time when presumably the directors of PEI negotiated against the interests of PEOC in granting this release. We make that point in the third bullet as well.

Just to clarify pursuant to a comment that you just made, when Mr. Leitl said my submission at the time of the first hearing was that if this had been a deal directly between 198 and the trust, then we would not have been here, that does not mean that I think that that would have been a good deal or that that would have been a beneficial transaction -- the share purchase would have been a beneficial transaction. All that means is that other mechanisms would have been triggered. It would have been other requirements for the transaction, and that's why we would not have been here. This could not have happened without the retained interest agreement, for example. Could not have happened without separating the good assets and the bad assets.

As for the release itself, My Lord, we do not take issue with the fact that releases can be granted. However, the wording of the *Act* is clear. If you grant a release with respect to a breach of the director's duties under the *Act*, that has no effect, and so you can release the director from all kinds of things, including negligence, but you cannot release the director from liability under the *Act*, from her duties or from -- subsequently from liability. Presumably in terms of a settlement, thinking practically, the parties can agree that there was no breach. I imagine that that could be -- I'm not a solicitor, but I imagine that that could be something that you could agree to. But insofar as there's a release that's pursuant -- or that's contrary to the direct language of the *Act*, that has no effect.

So we do not take the position, as I think Mr. Leitl suggested, that no releases can ever work and the whole world should know that. That's not what we say. We're effectively just saying look at the *Act*, and as long as you stay within the boundaries of that exclusion or outside of the boundaries of that exclusion, releases work.

Number -- question 40, My Lord, four zero.

THE COURT: I'm there.

MR. DE WAAL: The last bullet point we make on page 25 is worth noting, My Lord. Mr. Leitl reminded you that we now rely on this. We've always said that the inherent value of the transaction from a section 90C -- section 96 perspective relates not to specific liabilities or specific amounts; it's consideration given and received. And in deciding what conversation was given by PEOC in this transaction, the ARO -- not a particular number, but the ARO, the future obligations, as in *Daishowa* is a valid consideration. And if somebody -- if I had to buy those shares, My Lord, I would certainly be looking at what the future obligations were, and in that context, a trustee is obliged to consider how much somebody would pay for this and how much would have been given as consideration that would be commensurate with the consideration received. And I've made the point, My Lord, that on none of the evidence before you it's even close, so that's the conclusion.

With respect to 44, Mr. Leitl submitted that there are lots of things that is a corporation can do that unsecured creditors cannot prevent, and that's true as a proposition. What we're dealing with here, though, is something that would oppress unsecured creditors or deal with unsecured creditors in a manner that would invoke the provisions of the oppression remedy, and so it's not a matter of saying an unsecured creditor now has reason to complain about what happened at PEOC. That's not the point. The point is that it happened in a way that unfairly disregarded or deliberately disregarded their interest.

We quote on page 27 in the third bullet the *Downtown Eatery* and *The Brick Furniture* and the other cases, My Lord, that deal with internal maneuvering to prejudice creditors.

46, My Lord, the issue of whether PEOC was set up to fail, we again make the argument, My Lord, that 198, in acquiring the shares of PEOC, after it had collected all these assets, paid $1, and that was its complete and total exposure to the downside, so it only had one interest, and that was the interest going forward. And in order to make that deal work, the whole thing was structured -- including the retained interest agreement -- was structured in a way that would avoid the usual scrutiny and the regulatory regime that's set up to not have these things land in a -- in a public (INDISCERNIBLE) as we -- as we quote in those statutory provisions that we refer to in the end.

49, we say Ms. Rose exercised no business judgment on behalf of PEOC. As I understand Mr. Leitl's argument, he says unless the trustee tells us what else she should have considered, we cannot say that she didn't consider the best interests of PEOC. In fact, My Lord, there is a question in the -- in the transcript, the cross-examination transcript, at page 79, line 2. I said: (as read)

> Q I'm going to ask you just a open-ended question, and then you can tell me what you think. Why was this asset purchase agreement in the best interests of PEOC?
> A It affected the transaction, the transaction. The deal was part of the arrangement with 198 and Kayliss (phonetic). It was a requirement. And it -- it was certainly in -- as I've already described, I think that going forward they had a business plan that was actually very positive.

In other words, it was in the interests of PEOC because it was a requirement of the bigger transaction between Perpetual and 198 and Kayliss, which doesn't really explain why PEOC would benefit from that. And then it says: (as read)

> Going forward, they had a business plan that was actually very positive.

In other words, if they could make this work, then maybe that was good for PEOC. Doesn't explain why the assets had to be transferred into PEOC when -- just because there was a future business plan. So how was this good for PEOC? That's the complete answer to the business judgment question.

50, again suggestion that Ms. Rose -- question is how did she breach her duties, and her evidence is clear that she never considered the interests of PEOC as separate from that. In

fact, Mr. Leitl's submission today is consistent with that, that -- I remember he called PEOC a fictional blob, but he called them something else this morning. But if you regard PEOC as something without its own interests -- he said it wasn't a baby that was born. But in fact, in corporate terms, corporate law, PEOC was a baby, and somebody had to take care of it, and somebody had to consider its assets -- its interests.

51, you refer to the arm's length question, and I say the arm's length question in section 96, My Lord, specifically relates only to the party paying consideration to the debtor and the debtor, and in this case, that can only mean one transaction, the asset transaction.

And then finally, My Lord, perhaps at the bottom of page 36, question 59, the Darby affidavit and hearsay to the extent that there is hearsay. We say -- we refer to the *Rules*, and then we say in the second bullet point there, My Lord: (as read)

> A party responding to an application for summary dismissal is entitled to rely on hearsay.

So this whole argument about whether something is hearsay -- and that's hearsay. That's not opinion. But that whole argument, My Lord, that's the answer to that. And then in the (INDISCERNIBLE), one of the decisions, it specifically deals with business records as admissible, so it's -- hearsay itself is not excluded by definition. There are exceptions, and one of the exceptions is business records, in this case, the business records of Perpetual itself. And the last bullet point there under that number, I say towards the end: (as read)

> In the present case, the trustee's only saying what PEI had said regarding the intent of -- with the transactions, the purpose and objectives of each transaction, the values of the Goodyear assets and their associated liabilities, and the overall objective of the transactions collectively.

So it's really the PEI version.

So, My Lord, in authority then, this is a summary dismissal application, and the question that you have to decide is whether, despite these arguments about specific issues, like whether something's an entity or whether there was liability, whether you can find with confidence on this record that there's no merit to the claims, and I submit that you cannot.

May I have just a second. My Lord, the decision -- we expect that the decision that was referred to in those texts that you refer to is the *Royal Trust* decision. If there is a basis -- *Standard Trust Company*, My Lord. It's the 1991 decision, *Standard Trust Company*. So in that decision, there was suggestion that the trustee cannot bring an

oppression claim, but that has since been overruled by the cases that we've -- specifically decided and overruled by the cases that we've referred you to. We were just look --

THE COURT: So you're saying that this 2018 commentary -- and who knows how long it goes back -- is not correct? And again, --

MR. DE WAAL: My Lord, we --

THE COURT: -- that's just a question.

MR. DE WAAL: We anticipate that it comes from that decision because there was a decision that said that, but the subsequent decisions have overruled that -- or not overruled, but not followed that.

THE COURT: Do you have a full cite for that case.

MR. DE WAAL: Yes, My Lord. I should be able to give it to you in a second. My Lord (INDISCERNIBLE) second.

THE COURT: Is that a case of Justice Houlden?

MR. DE WAAL: I don't remember, My Lord.

UNIDENTIFIED SPEAKER: Yes.

MR. DE WAAL: Well it's referred to in *Olympia Trust* and in *Dylex* subsequently. I just don't have the reference.

THE COURT: I think the cite, if I can assist, was [1991] OJ No. 1945, or an alternative cite, 5 OR (3d) 660 (Gen. Div.). I say that with a bit of hesitancy because of the way they do the footnotes in the service. But it refers to *Standard Trust, Canada (A.G.) v. Standard Trust Co.*, Houlden's decision. I'm just paraphrasing here.

MR. DE WAAL: Yes, My Lord.

THE COURT: I'll have a look at that. Thank you.

MR. DE WAAL: My Lord, that's referred to in -- at tab 11 of our authorities initially. That's where it was dealt with by *Olympia & York*. It's referred to there. Yes. (1991) 5 OR (3d) 660.

THE COURT: Thank you.

MR. DE WAAL: Yes. My Lord, then one final submission, My Lord, the suggestion that if the trust is not an entity, then we still -- then PEOC was simply negotiating with itself, and I'm not sure whether the conclusion then is it was at arm's length or not, but if it a trust is collapsed in that way, My Lord, then the trust ceases to exist. What happens is the interest of the beneficiary of the trust should be taken into account. So the -- for the sake of the argument, to deal just with the argument, if there is no trust because, as my friends argue, the trust is not an entity, then you still cannot ignore the fact that there's a trust beneficiary, and without that relationship between the trust beneficiary and the trustee, there would not have been a transfer and there would not have been a trust.

THE COURT: Okay. So let's just pause there because I was actually looking through my notes because I wanted to ask you about that. First of all, in your reply to question 15 -- the question is: (as read)

> Do all parties agree that PEOC was solvent at the end of business on September 30th, 2016? If not, please direct the Court to the evidence that supports a contrary conclusion.

Your answer -- and I'm just reading the text here: (as read)

> No. If it was personally liable for property tax on the properties, it -- pardon me. If it was personally liable for property tax on the properties it held in its own name (as trustee on behalf of POT), it was not solvent.

MR. DE WAAL: Yes. And if --

THE COURT: So who has the liability?

MR. DE WAAL: The liability, in fact we know now it's conceded in the -- in the responses from my friends there were some tax -- there were some tax liabilities outstanding with respect to what they call a small number of municipalities. This is in response to question 42. Those were outstanding. And the evidence of Ms. Rose is not that there was this -- that they had an entitlement to negotiate an extension. They had to pay a penalty first of all. But she says in her affidavit that those negotiations occurred after the closing. So at the time of the transfer, at the time of the -- when the deal closed, those liabilities were still outstanding, and those liabilities were PEOC liabilities.

THE COURT: At what point in time?

MR. DE WAAL: At the time of the transfer. At the time of the closing of the share transfer -- the asset transfer.

THE COURT: Okay. At the time of the close of the es --

MR. DE WAAL: Yes.

THE COURT: -- asset transfer.

MR. DE WAAL: Yeah.

THE COURT: So question 15 says -- I'm going to repeat it: (as read)

> Do all parties agree that PEOC was solvent at the end of business on September 30th, 2016?

And your -- I'll won't read the rest of it, but your answer is: (as read)

> No. It was personally liable for property tax on the properties it held in its own name.

MR. DE WAAL: Yes. So it held its properties in its own name as trustee. So it is required to hold the properties in its name --

THE COURT: Okay. So just -- let's just pause. Who's got the liability?

MR. DE WAAL: The person whose name the property's registered.

THE COURT: Okay.

MR. DE WAAL: That's the taxpayer.

THE COURT: Okay. So if it has the liability on September 30th, does it have all of the relevant liabilities?

MR. DE WAAL: With respect to property tax, My Lord?

THE COURT: Well, I didn't say, in the question, property tax. I said, Do the parties agree that PEOC was solvent at the end of business on September 30th, 2016? And you said, No.

MR. DE WAAL: My Lord, because the answer is if you look at those two exhibits to the Darby affidavit, 'I' and 'J', PEOC had no assets. It had a hundred dollars, had no assets, had no business, but it had this liability. And so despite what 'I' shows -- it doesn't show those as liabilities -- we know from the Rose affidavit, we know from my friends' answers to these questions, we know that it had the liability for the municipal tax. So if it had the liabilities and had no revenue on its own, then it --

THE COURT: Okay. So let's just pause there. You're saying it has those liabilities under the *Act*.

MR. DE WAAL: Yes, My Lord.

THE COURT: Okay. So if it has those liabilities before the conveyance, then we don't need to assume those liabilities?

MR. DE WAAL: No. It had the liabilities. It now -- the -- it just changes the capacity in which it holds the -- its --

THE COURT: Well, no. I -- I'm ask -- I asked the question, Is it solvent? You said, No. And you said no because it has the liability. So does it have the liabilities or not?

MR. DE WAAL: It does, My Lord, yes.

THE COURT: It does.

MR. DE WAAL: Yes.

THE COURT: Okay. So if it has the liabilities, then it didn't assume anything. Is that what you're telling me?

MR. DE WAAL: Yes, My Lord.

THE COURT: Thank you. If it -- if those liabilities for the municipal property tax -- and again, you've added that in here, and that's fine. I'm just trying to explore this. If it had those liabilities in the first instance, i.e., before the conveyance, and if the obligations for remediation are not liabilities, then did the conveyance improve

the status of PEOC? That's a different question than I've asked here, but you've got my curiosity now.

MR. DE WAAL: Well, the --

THE COURT: If PEOC already had the liabilities, then what does the conveyance of if I can use the term "the assets" do to PEOC?

MR. DE WAAL: My Lord, this issue came up in the context of whether there was -- there were claims and whether there were creditors at the time, and it's in the response, the written response, but it's sections 304 and 331 of the *Municipal Government Act*.

THE COURT: Yeah. I'm not --

MR. DE WAAL: So in the context of --

THE COURT: You already conceded, I think, the point on the municipal property tax, and if I accept that position, then doesn't PEOC already have the liabilities?

MR. DE WAAL: For the municipal property tax, My Lord? Yes.

THE COURT: Okay.

MR. DE WAAL: Well, could I add one comment? And this is tab 17 of my friend's authority, so it's part of their replies to the questions. In the tabs attached, --

THE COURT: I'm there.

MR. DE WAAL: -- tab 17.

THE COURT: It's got a number of sub tabs.

MR. DE WAAL: 17(a), My Lord.

THE COURT: Yes, I'm there.

MR. DE WAAL: The Ontario Court of Appeal decision in *Spencer v. Riesberry*, and I want you take you to paragraphs 54 and 55.

THE COURT: I'm there.

MR. DE WAAL: And this is something we did not discuss, My Lord:

> Trust is also a type of relationship, namely, the fiduciary relationship that exists between trustee and beneficiary. The foundation of the trust relationship is a separation of roles between the trustee and the beneficiary with the trustee being the legal owner of the trust property and the beneficiary being the equitable owner of the trust property. The trustee holds legal title to the trust property so it can manage, invest and dispose of the trust property solely for the benefit of the beneficiaries. The trust can only exist when there is a separation between legal ownership in the trustee and equitable ownership in the beneficiaries.
>
> If the Court were to ignore or conflate the separate entities, it would destroy the foundation of the trust relationship. Put another way, absent the separate entities, there is no trust relationship and, therefore, no trust.

And this goes to Mr. Leitl's submission in particular that PEOC was simply dealing with itself in purchasing these assets because the trust was not an entity.

THE COURT: So the first sentence at paragraph 54, I think, confirms that it's just a relationship, correct?

MR. DE WAAL: Yes, My Lord, as is an unincorporated association, as is a partnership.

THE COURT: Yeah, well.

MR. DE WAAL: And those are all included in that definition.

THE COURT: Yeah. Partnership is mentioned, but trust isn't mentioned, so how do -- how do you deal with that?

MR. DE WAAL: It's not, but it says including, and then it lists things like an unincorporated association, for example, which is a relationship, not an entity. So there's no reas -- it's never excluded. Trust is not excluded. And the only reason

why an income trust is separately dealt with is because it is regarded as a corporation. So it's a person or a corporation.

THE COURT: M-hm.

MR. DE WAAL: So income trust falls on that side of the definition, but --

THE COURT: So --

MR. DE WAAL: -- there's no exclusion of the trust.

THE COURT: So under the laws of general application again, as I understand it, is trust is a relationship. Is it an entity that falls within --

MR. DE WAAL: Yes, My Lord.

THE COURT: -- the definition?

MR. DE WAAL: Yes.

THE COURT: And what's your authority for that?

MR. DE WAAL: We say the definition lists a number of entities, including the examples, and those exam -- never excludes trust, and those examples includes other relationships.

THE COURT: Okay. Why then for -- and I'll just use an analogy. For income tax purposes, why do we need to have a particular provision in the *Income Tax Act* that treats a trust as a taxpayer if it's already an entity?

MR. DE WAAL: I don't know, My Lord. But for the *BIA* purposes, which has to be construed broadly to -- but there's no exclusion of trust.

THE COURT: Yeah. I didn't ask for an exclusion. I asked for direction to where it's defined or where it's clearly captured.

MR. DE WAAL: That's all I can say, My Lord.

THE COURT: Just give me a second here. I know Mr. McDonald wants to speak. I've got a few questions for your friends.

Mr. de Waal, I asked the question earlier about the narrative that's in paragraph 9 of the Norton Rose submission, and I think your answer was -- and correct me if I'm wrong -- was that this is just hearsay. Is that correct?

MR. DE WAAL: It's hearsay, My Lord, but it also relates to events to explain or describe the circumstances giving rise to the bankruptcy as opposed to the circumstances of the transaction so many months earlier. So hearsay, yes, but you cannot -- you cannot take from the fact that there was a plan that didn't work out, that the transaction was not a good transaction for PEOC. If they were looking at the upside as we say they were, and only at the upside because there's no interest in covering any of the downside or $1 worth of interest, then explaining why the upside never materialized really doesn't address the issue.

THE COURT: So is it hearsay?

MR. DE WAAL: It is still hearsay, yes, My Lord.

THE COURT: Okay. So when I look at the financials that are unaudited that we referred to earlier that are in the binder here and they are a component of Mr. Darby's affidavit, do I take all of that information to be -- and both parties can address this -- valid for the proof of the truth of their contents?

MR. DE WAAL: My Lord, it's Mr. Darby -- and I think we addressed this, My Lord. Mr. Darby cannot say that all those documents are factually correct. He can only say, This was the Perpetual version business record recording of what it was thinking and what it was doing and what -- the values it attached to these properties, et cetera. And that's all. He's not putting it forward as for the truth of its contents because he simply wasn't around, which is, unfortunately, the case of a trustee generally. You can only rely on the business records that you're presented with. And he presents the case for the trustee on the basis of Perpetual's own records, and it's for Perpetual to come forward and say, Here's why we said this, we actually meant that, or, Here's why we had this value but there was a subsequent revision or anything to that effect. And they have not done that.

THE COURT: Thank you, sir.

Mr. McDonald, I know you were going to rise. I've got a few questions, but maybe I'll let you have the floor first.

Submissions by Mr. McDonald

MR. MCDONALD: Well, I'll try to be brief. I only planned to deal with three points arising out of my friend's submissions, but of course, I'd be pleased to answer your questions.

The first point -- and I hesitate to go back here because we have heard so much about it -- is the value question. My friend argued that essentially Mr. Darby is required under section 96(2) of the *Act* to state the value of the consideration given and received and you should accept that absent evidence to the contrary, and he says evidence to the contrary necessarily means evidence coming from the defendants. What he's asking you to do when he says that, in my submission, is accept evidence that is patently unreliable.

And the answer is that evidence to the contrary is not limited to evidence that comes from the opposing party in the lawsuit. A Court looks at all the evidence that's before it, and if it finds within the evidence of one party conflicting evidence -- and in this case, patently conflicting evidence to show that in the case of the value of the assets the $5 million that my friends are relying on is unreliable -- then it has evidence to the contrary. And that's an easy example because while Mr. de Waal argues the asset value is $5 million based on the engineering report, Mr. Darby testified the engineering report isn't -- doesn't present the fair market value of the assets. Now, surely that's evidence to the contrary, and surely it would be absurd for you to say, Well, in spite of that evidence that -- from the very witness for the plaintiff that it's not fair market value, I'm going to treat it as fair market value. The same thing goes with respect to the liabilities or the value of the consideration received.

And that takes us to this question of ARO and whether ARO is a liability. And you've heard so much and so many conflicting things, in my submission, on that. You asked the question directly in question 40, and the answer was, well, the ARO is a provision which is a form of liability. I don't know what that means. Mr. Darby testified about it at page 91 of his cross-examination, and I don't know if you have that --

THE COURT: Yeah, I do.

MR. MCDONALD: -- handy.

THE COURT: Tab 17. I'm there.

MR. MCDONALD: Page 91, line 19.

THE COURT: I'm there.

MR. MCDONALD: He was presented with a present out from the PwC website. Mr. Leitl said: (as read)

Q You'll agree with this statement on your firm website, 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 an uncertain timing or amount?
A Yes.

Q Right? When you talk about the liabilities of PwC, you talk about it in terms of provisions, right? What -- ARO is a provision?
A ARO is a provision. Municipal tax would be a liability.

And finally, in terms of this evidence to the contrary relating to the $220 million number, the very part that the plaintiff says is owed this liability or provision, the AER, has presented evidence that its claim is between $1 and $220 million. So surely when you put that all together, you have evidence to the contrary coming from the plaintiffs, and you would find it as unacceptable to take at face value Mr. Darby's evidence that the liabilities are $220 million as you would find it unacceptable to take his evidence at face value that the assets were valued at $5 million.

My second point addresses the discussion you had with my friend about whether Sequoia was set up to fail, and his answer was, Yes, it was; it only paid $1; had it sold one truck, it could have recouped its investment. Well, if you look at all of the evidence, part of the transaction, part of what Sequoia had following the transaction was a hedging contract which Ms. Rose testified cost $12.7 million. Surely a company set up to fail and without a business plan other than to fail would have cashed in the hedging contract on day two and pocketed the $12 million. The evidence is also that there were 32 million cubic feet of gas produced per day. Surely a company that was set up to fail would just pocket that production revenue. But that's not what happened. And we know what happened. The company was a viable business for a year and continued in operations for another half year before it went into bankruptcy. So in my submission, on all the evidence, it wasn't set up to fail. It was a legitimate business plan, and it was one that, for all the reasons you've heard, wasn't successful.

My third point was to address something that actually wasn't addressed by my friend, but because of your comments, I wondered if you were interesting -- interested to hear submissions on it and that was this question of whether 198 and Perpetual were dealing at arm's length when one considers the deeming rule. And there was an exchange between you, and I don't know that anyone's addressed that other than I believe we addressed it in our submissions on day one. Is the deeming rule that you're thinking of 4(3)(c) of the --

THE COURT: Correct.

MR. MCDONALD: -- *Act*? Well, let me then deal with that in case I didn't deal with it as well as I should have the first time. Before I go there, I want to just remind everyone of Mr. Darby's evidence on whether or not the parties were at arm's length because this seems to be inconsistent with some of the answers that were given by my friends today in answer to your questions, and in that regard, could I refer you to Mr. Darby's transcript at page 53?

THE COURT: I'm there.

MR. MCDONALD: There's a reference to paragraph 22 of the statement of claim. I'll start at line 21 on 53.

THE COURT: I'm there.

MR. MCDONALD: This is me asking the question: (as read)

> Q I'm correct, am I, that the trustee is alleging only that the asset transaction was not at arm's length, and you accept that the share transaction was at arm's length?
> A I never reviewed the related status of the share transaction, but my understanding was they were an unrelated party.
>
> Q Acting at arm's length?
> A Yes.

So that's the evidence we have from Mr. Darby. Now, the deeming rule, as I understand the argument made in my friend's brief, relies on section 43(c) of the *BIA*, which is at tab 16 of my friend's authorities.

THE COURT: Just bear with me here.

MR. MCDONALD: White bound volume, quite thick.

THE COURT: Yeah. Oh. Just a second. (INDISCERNIBLE) right here. Go ahead.

MR. MCDONALD: And the section is at page 10 of the *Act*.

THE COURT: I'm there.

MR. MCDONALD: And the argument my friend makes is that once the share purchase agreement was executed on September 26th, 198 had a right under contract to acquire the shares of PEOC that brings into play 4(3)(c), which says a person who has a right under a contract to acquire an ownership interest is deemed to have the same position in relation to control of the entity as if the person owned the ownership interest. And my friend then uses that section to argue that 198 is related to PEOC -- fair enough -- but makes the leap that I don't -- in my submission, cannot be made that it also causes 198 to be related to Perpetual or PEI. And the argument's not really developed, but it's stated, and I take it that's what my friend is saying.

And I have four points to make in response to that. The first is that just on the plain wording of the section, that's not what it says. It -- I already closed the book. It doesn't say that it is deemed to --

THE COURT: It isn't --

MR. MCDONALD: The party with the right under contract is deemed to be related to the owner of the party, that is, the party in the position of Perpetual.

THE COURT: But just let me pause you, and is he not asserting that -- and maybe he can speak to it -- because of the deeming the rule in sub (5)?

MR. MCDONALD: Well, I will -- I'll get to that, but I didn't think that was his argument. I thought he was saying 4(3)(c) makes 198 and PEI related parties.

THE COURT: M-hm.

MR. MCDONALD: And I thought that's what you were concerned about.

THE COURT: Well, it is but not to exclude the application of 4(5).

MR. MCDONALD: That's the -- that's the ultimate answer. I think there are many answers to it, but the ultimate answer is 4(5) still applies. Even if you accept that 4(3)(c) makes 198 and PEI related -- and I don't accept that -- 4(5) says that they are -- the related parties are, in the absence of evidence to the contrary, deemed not to deal at arm's length, and so it takes us in a circle back to the evidence of the contrary argument.

THE COURT: Yeah, and I haven't forgot your argument and, you know, the submissions that were made in the first instance. I just wanted to make sure we weren't glossing over (5).

MR. MCDONALD: No. Okay. Well, the other arguments I was about to make -- he referred to a case called *Green Gables*. It doesn't take him where he wants to be. And my colleague, Mr. Chiswell, had taken you to the Income Tax Bulletin example, --

THE COURT: M-hm. M-hm.

MR. MCDONALD: -- which again illustrates it doesn't go as far as my friend argues. But the final answer to all that is that 4(5) is still in play. You still consider all the evidence, and you've heard all our arguments on the evidence to the contrary.

THE COURT: Thank you.

MR. MCDONALD: That's all I have to say, My Lord, but I'm happy to answer your questions, or perhaps if you prefer Mr. -- if I don't know if your questions will be ones that better fit in my --

THE COURT: Well, let me just --

MR. MCDONALD: -- court or Mr. Leitl's.

THE COURT: I don't have very many more. We've been on -- touched on a lot of things. Just bear with me for a minute here.

These are not in any particular order, but first question I have for Mr. McDonald or Mr. Leitl -- and either one can respond to it -- is, What is your position on the discounting question I asked earlier today that Mr. de Waal pointed me to buried in the notes of the financial statements? And there seems to be conflicting information on that. So that's one question.

Second question, response from your side on Mr. de Waal's comments on the business judgment rule. Just bear with me here.

Third question, any further comments on ARO given Mr. de Waal's comments.

Next question, any further comments regarding the entity, i.e., the relationship, the trust issue.

Next question, If it is the case that PEOC already has the liability for the property tax, is PEOC improved by virtue of -- and, again, just narrative -- the conveyance of the assets from the trust to the body corporate?

And I do have a couple questions for Mr. de Waal, but I'll let -- part of the reason that I'm querying coming back to the ARO, on page 10, in response to question 8 that I asked, the response to 8(b), the question was: (as read)

> In swearing the Darby affidavit did Mr. Darby determine the liabilities of PEOC on a discount or an undiscounted basis?

And the answer is -- that I was provided was: (as read)

> Mr. Darby determined the ARO and municipal taxes of the Goodyear assets on an undiscounted basis.

And the letters "UN" in undiscounted were underlined. So that's why I was pausing there, because I think I was getting a different answer from the parties.

Go ahead.

MR. MCDONALD: Shall I try some of those? The first question was discounting and --

THE COURT: And there's some overlap obviously here, so --

MR. MCDONALD: Right.

THE COURT: Yeah.

MR. MCDONALD: My answer when -- in the context of value -- and I think that's what we're talking about when we're talking about discounting -- is that it's important to compare apples to apples when you're comparing assets and liabilities to

assess whether there's this conspicuous difference that my friend refers to, and it's completely unhelpful to compare undiscounted numbers with discounted numbers or to compare discounted numbers with different discount rates. One gets different results every time, and it's not a fair comparison.

And to deal with the facts, we know on the asset side of the analysis, Mr. Darby's dealing with a discounted -- 10 percent discounted number, and on the liability side of the analysis, putting aside for the moment whether ARO is a liability and just talking about the discounting point, we know from Exhibit 'N' to Mr. Darby's affidavit, --

THE COURT: I'm there.

MR. MCDONALD: -- which is a description of the -- well, in part, refers to the XI Technology work, item -- or paragraph (b) about halfway down the page, --

THE COURT: I'm there.

MR. MCDONALD: -- (as read)

> Estimated value of abandonment and reclamation costs for the wells included in the PEOC transaction undiscounted generated from the XI ARO model --

And that's the number that we see above of $192 million, and with some other calculations, it gets to the 223 million that we're dealing with.

THE COURT: I'm there.

MR. MCDONALD: So comparing a $5 million discounted at 10 percent number with an undiscounted number provides a meaningless comparison.

The one other place that we see discounting is in the excerpt from the PEI financial statements at Exhibit 'B' to Mr. Darby's affidavit.

THE COURT: I'm there.

MR. MCDONALD: Provision -- or sorry. Note 12 on page 9.

THE COURT: Did you say 'B' as --

MR. MCDONALD: No. I meant -- I'm sorry. Note 12, page 9, entitled

provisions.

THE COURT: But what tab? Sorry.

MR. MCDONALD: Oh. 'P' as in Peter.

THE COURT: Thanks. I was looking at 'B' again. I'm there.

MR. MCDONALD: And here we see the provisions including the -- well, the $131 million number that's referred to as transferred to assets for sale. But at the bottom, what I was referring is: (as read)

> At September 30, 2016, the corporation used a weighted average risk-free rate of 1.72 percent; December 31, 2015, 2.31 percent, to calculate the present value of the decommissioning obligation.

THE COURT: Right.

MR. MCDONALD: And I don't know the significance of the use of that discount rate as compared to some other discount rate, but the point I'm making is again we don't have an apples and apples comparison, and so to the extent my friend and his answers today was using the $131 million figure, perhaps to distance PwC from the XI Technologies report, it's still a number discounted at a particular discount rate that doesn't bear fair comparison to an undiscounted number or, indeed, to a 10 percent discounted number.

Does that address what -- oh. Just one more point. Oh. And Mr. Chiswell just refers me, I guess, to one other piece of information. The trustee's answer to question 8(b), where it's acknowledged that the trustee's numbers referring to the liabilities are presented on an undiscounted basis.

THE COURT: If I can just pause. I'm not writing all these questions down, but, Mr. de Waal, if you respond to that 8 -- answer to 8(b) of your materials.

Continue, Mr. McDonald.

MR. MCDONALD: That's all I have to say about discounting, and I circle back to --

THE COURT: Yeah. That covers --

MR. MCDONALD: -- to get a meaningful answer, you need apples to apples.

THE COURT: Yeah.

MR. MCDONALD: Mr. Leitl will deal with the business judgment rule. You asked if I had any additional comments on ARO. Frankly, I don't, but if you have anything specific arising out of my friend's submissions, I'd like to address it.

THE COURT: And the reason I asked the broad -- the broad question is going back to effectively do we have a liability here or not.

MR. MCDONALD: No. We don't -- we don't have a liability here, and Mr. Darby says that. The -- Mr. Leitl probably argues that more than I did, but it's not a liability. It's a provision. They're distinct accounting terms, and they're described by PwC on its website and accepted by Mr. Darby, and --

THE COURT: When you --

MR. MCDONALD: -- perhaps the more -- the -- if it's a liability, is it a liability to whom? And my friends say it's a liability to the AER. And of course, that's patently wrong. The AER is not owed any money until certain events occur, as Mr. Leitl described. And so whether you want to characterize it as a liability, or a provision, it's not a sum of money owed to the AER at the time of the transaction. It's a reflection of an amount calculated on a certain basis to be set up in financial statements to show that there will be obligations to be incurred in the future by an oil and gas producer to satisfy its statutory obligations to abandon and reclaim its properties. It isn't a debt owing to a third party.

Your fourth question was the entity trust issue and whether I had anything further to say on that. My friend's argument that trust isn't excluded from the definition of person and so it must be analogous to a partnership and included, in my submission, is unpersuasive, and the far better answer is that a trust is not an entity.

Your fifth question is if PEOC had the property tax liabilities before the asset transaction, is PEOC improved by a conveyance of the property or the assets from the trust or, as we've been characterizing it, a merger of the beneficial and legal interest. And I hadn't thought of it in this context before, and perhaps Mr. Leitl will have a better answer, but my answer would be that it's neutral. It didn't improve or whatever the opposite of improve is -- make PEOC's position any worse. Before the transaction, PEOC as trustee had a right under the

trust indenture to pay the obligations it has -- it incurred as trustee under the trust property and, that is found in the trust indenture -- oh. It's 6(c) -- or 60(c) of our answers, but I wanted to give you the paragraph reference (INDISCERNIBLE), and I had a moment ago, but I'm sorry. I probably (INDISCERNIBLE).

MR. DE WAAL: So it's on page 17.

MR. MCDONALD: Page 17, tab 60(c). It's under 4.2, power and authority of the trustee, sub (t), payment of expenses.

THE COURT: I'm there.

MR. MCDONALD: One of the powers of the trustee is to settle and pay and satisfy out of the assets or property of the trust properties any of the obligations of the trust, including, without limitation, the following: Item 1, the amount of any -- lists a number of -- or other tax. So if PEOC was obligated to pay the municipal tax before the transaction, it had a right to pay that out of the trust property. If the trust property then was merged into PEOC, it had the right, through its own property, to pay the tax. And so as I see, it would not have been effected in that respect before or after, which I guess, from that, one could conclude that if the mischief of next section, 96, is directed at, is a transfer of property that acts to the detriment of the creditors of the bankrupt, this certainly isn't that sort of transfer.

THE COURT: Okay.

MR. MCDONALD: That's all I have in answer to questions unless you have others or need more from me.

THE COURT: No. No, I do not, sir.

Mr. Leitl.

MR. MCDONALD: Thank you. We'll see if Mr. Leitl can improve on those now.

Mr. Chiswell just points out that we've got a cite incorrect in our answers that we should correct for you.

So it's (INDISCERNIBLE) 15, so it is the Schweitzer affidavit, but it's not paragraph 20. It's paragraph 12.

THE COURT: 12.

MR. MCDONALD: And that's the cite for the discounted basis where (INDISCERNIBLE).

THE COURT: Thank you.

MR. MCDONALD: Okay. Thanks.

THE COURT: Did Mr. de Waal get that just --

UNIDENTIFIED SPEAKER: Yes, he did.

THE COURT: Thank you.

Submissions by Mr. Leitl

MR. LEITL: (INDISCERNIBLE) thank you, My Lord. I won't be long. I appreciate the indulgence to go so late.

The Sequoia letter quoted at paragraph 9 of our brief -- and if I can call it the Sequoia letter -- my friend's submission that it's hearsay, there's some irony to that because the trustee is Sequoia before you today in the sense that it's standing in the shoes of Sequoia, and it somehow wants to downplay one of its own records. These are records the trustee had amongst thousands and thousands more, according to Mr. Darby, that they obtained and have not cited. That letter from the -- from Sequoia, however, was cited in the trustee's preliminary report, which is an exhibit to Mr. Schweitzer's affidavit. They've treated it as credible. So in essence, it's a party telling you, Our own evidence is hearsay, which doesn't make sense.

Mr. de Waal talked about -- in the context of your questions -- about personal benefit. He said that PEI had been able to send away 75 -- 71 percent of its liabilities. Now, aside from the fact that that number 71 percent is completely fallacious because it's almost entirely premised on the idea that the ARO is current liability, which is completely fallacious, but you can't, as a matter of law, send away liabilities. If I am your creditor, you can't send me away and say, You now can claim this as against somebody else. Real liabilities get assumed with the consent of the creditors, and that didn't happen because these weren't real liabilities.

You then pressed Mr. de Waal on the concept of personal benefit in the context of the asset transaction alone, and I have nothing substantive to say other than there was an express

concession on his part that the personal benefit theory holds no water when you look at it in the isolated context. It doesn't generally, but it doesn't when you artificially look at it in the asset transaction isolated scenario alone either.

Now, Mr. de Waal said that *Wilson* stands for the proposition that you can prove oppression on the part of a director without proving a personal benefit, and ironically, he's right. And here's why I say it's ironic -- and if you have that, it's at tab 45 of our authorities.

THE COURT: I'm there.

MR. LEITL: At paragraph 50. Sorry there are no page number -- or there is. Page --

THE COURT: I'm there.

MR. LEITL: Page 13. The Court -- don't read the whole paragraph except to go over to the scenarios, but the court says there are basically four scenarios where there might be personal liability, and if you go over the page, first one is the director acted in bad faith and obtained a personal benefit. Not the case, no allegation of bad faith. The second is director acted in bad faith but did not obtain a personal benefit. Not the case, but that is an example of where you might approve oppression in the absence of personal benefit, but again, not applicable. The director acted in good faith and obtained a personal benefit. There, personal benefit is required; you still have to prove it. And fourth, the director acted in good faith and did not obtain a personal benefit. And they say, of course, that fourth one is also possible to prove oppression.

I just find it remarkable that the trustee, who's supposed to be a dispassionate officer of the court, persists in advocating this idea of personal benefit, changing its position throughout, changing its position today in writing, and then changing its position on their feet, where it just flies in the face of the evidence.

My friend said he's happy to see that the concept of provable claim is no longer relevant, that there's agreement. There's no agreement. Again, while you don't have to prove in proving oppression that your claim is provable under the *BIA*, you have to prove that you're a creditor, and for the AI -- AER to prove that it is creditor, it has to, in this -- in these circumstances, prove its claim in bankruptcy, and it still hasn't done so, and it may never. It's nothing more than a placeholder at the moment, the proof of claim.

My friend referred to Mr. Darby's evidence on the cross-examination about the -- if the transaction had been done differently, there would have been a deposit paid to the AER. That is hearsay that was totally unsubstantiated. It's not -- there's no evidence from the

AER as to whether they would require that deposit or in what amount.

My friend said that PEOC did not have separate legal counsel. Well, PEOC did have legal counsel as reflected by the writing in the release. McCarthy was -- were there. And I think we should ask, If another lawyer was retained and said you're now acting for PEOC in this transaction, what would that advice have been? Would it have been to do anything but that which they did? And again, my friend didn't answer that.

With respect to the release. My friend argued that it's inoperative, and he said the way you might deal with it otherwise is for the parties -- and I'm paraphrasing -- to pretend that there had never been a breach. I was just very struck by that. So he's saying you can't release someone based on the facts, but the parties can mutually agree to false facts to get it done. That is absolute absurdity, and when I say that, I'm referring to the absurdity principle of statutory construction cited in my friend's brief.

My friend accepted my analogy of childbirth and subsidiaries and said that PEOC is a baby and has separate interests, but despite my undiplomatic poking and poking and poking and I said earlier today I can't wait for my friend to stand up and answer the question, What are those interests, what else should it have done, you still don't have an answer, and I submit that that is now foreclosed. There is no answer. There's no parens patriae jurisdiction for the Court to deal with the interests of wholly owned special purpose subsidiaries.

Your Lordship asked -- well, my friend said in relation to the cases and the services you cited, he said, No, that's wrong because of *Standard Trust* or cases following *Standard Trust*. *Standard Trust* was Justice Houlden. It was the first time a Court looked at the issue of whether a trustee in bankruptcy could sue for oppression, and Justice Houlden thought not. And I agree that that has changed, and we dealt with this at length when it was last before Your Lordship, and it's dealt with in our brief. Where there's a fork in the road, a trustee can come forward and seek to advance an oppression claim, but it has to be a collective claim. It can't be a personal claim. I think the authorities cited by Your Lordship in this was on a different point and that is, what kind of creditor does a party have to be to get into the oppression remedy, and that's different. And again, not all creditors get their foot in the door.

With respect to your specific questions on the business judgment rule, my friends cite some authority, but they don't offer any evidence or viable argument. The Courts do defer to the judgment of directors unless there is evidence of a bad process or unless there's evidence that the board or directors didn't look at viable alternatives. There is no evidence of a bad process, and the trustee has no expertise in that regard, and there's no evidence of any alternatives that were better than the one that was followed.

And in relation to the question about whether PEOC would be better or worse, as I took -- understood it, in terms of receiving the beneficial interest, I don't know how you can say a trustee who only has the legal interest in an asset, who receives the beneficial interest, can -- how can you say that that party is worse off? They -- after -- among other things, after the combination of the interest, PEOC now had the beneficial ownership of substantial gas reserves.

So unless you have any questions flowing from that, My Lord, I'm done.

THE COURT: No, sir. Thank you very much for that.

Submissions by Mr. McDonald

MR. MCDONALD: My Lord, I'm sorry to rise, but --

THE COURT: Yes, sir. That's fine.

MR. MCDONALD: -- I just I spoke to my client, and he pointed out one thing that related to what I've been arguing that I failed to mention, although I believe it is -- was mentioned earlier. When we were talking about ARO and value and discounting, there's also a problem with the ARO analysis of my friends because it's double counted. It's included in the engineering report and discounted presumably through the discounting of the future cash flows for 26 percent of the properties, and then it's also calculated separately by XI Technologies or calculated separately for the purposes of the accounting provision. So there's a double counting problem in there that further undermines the reliability of any value calculations.

THE COURT: Thank you, Mr. McDonald. That's actually a springboard.

I only have a few questions for Mr. de Waal, but I did want your reply to the double counting. It was mentioned earlier, I think by Mr. Leitl, and I think the phrase was Goodyear assets taken off twice, double counting.

Submissions by Mr. de Waal

MR. DE WAAL: My Lord, Mr. Darby makes that clear. He says there was -- I'm just trying to find it. Here we go. That's Exhibit 'N' to his affidavits.

THE COURT: I'm there.

MR. DE WAAL: Under note 'A', second paragraph --

THE COURT: I'm there.

MR. DE WAAL: -- (as read)

> 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, approximately 650 wells --

So it's not all the wells.

> -- as well as estimates for salvage value. For this reason, the abandonment amount included in note 'B' may be overstated. However, the trustee does not consider it to be material to this analysis.

Now, again, there's no -- this is not the trustee's document. Trustee got these numbers from Perpetual, fully disclosed the concern about possible double counting but says it's not material. Again, the point of the argument is, well, these numbers are not to be trusted, but there is no other number. My friends in fact filed an affidavit saying, We're not going to get into issues of valuation or numbers at this point, we will need experts and more time and opportunity to present those numbers. So eventually, we end up in this situation, where the only numbers before the Court are the Perpetual numbers presented by the trustee, and my friends are poking holes in that number and saying, We don't have an alternative number, but because you cannot trust that number, the only number before the Court, you should disregard that despite section 96(2).

THE COURT: I know we're touching on this ad nauseam today, but ARO is a provision; municipal tax would be a liability. That's Mr. Darby's comment. Again, are we ad idem that we do not have a liability with the ARO?

MR. DE WAAL: My Lord, again, ironic, as Mr. Leitl would say, that this opinion, they're fine with that. If Mr. Darby says he thinks this is not a liability, then 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 *Daishowa* case and if you look at what Mr. Darby, the trustee, has to consider for purposes of section 96, it's whether the ARO number is a number or is a factor that has legitimately been concerned -- that is legitimately to be considered by a prospective purchaser of these properties to effect the consideration provided and received. That's the issue. Now, whether you call that a liability as Perpetual does in its own statements, whether you call that a liability as the -- as the accounting -- the standards

request even though it's a -- it's an allowance or a provision, My Lord, it's a factor to be considered which affects negatively the consideration received, and in this case, because it's the account -- it's a negative, it affects the consideration provided by the PEOC in assuming these liabilities.

THE COURT: Further comments?

MR. DE WAAL: My Lord, on that same point that's the -- 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 --

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

MR. DE WAAL: The ARO (INDISCERNIBLE) that's called liability.

THE COURT: -- potential obligation.

MR. DE WAAL: Indeed, My Lord. So --

THE COURT: Underlying potential, you're agreeing with that.

MR. DE WAAL: 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.

THE COURT: Well, the law can change.

MR. DE WAAL: 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: It could.

THE COURT: Regulations can change.

MR. DE WAAL: Yes, My Lord.

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

MR. DE WAAL: 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: Okay. I'll take that under advisement, but it's not a liability.

MR. DE WAAL: My Lord -- yeah, provision is a form of liability. That's what the rules say, the accounting rules.

THE COURT: Is that a liability? If it's a liability, who's it a liability to?

MR. DE WAAL: Well, if it's -- if it's paid, it's an obligation that's paid. It's not payable to someone. It's a cost that's inextricably linked and has to be incurred by -- it's not a payment to some --

THE COURT: And I'll take -- I'll take that comment under advisement. You've said it a few times today. Who's the liability to?

MR. DE WAAL: My Lord, it's not a payment --

THE COURT: Or the --

MR. DE WAAL: -- owing to --

THE COURT: Who's the -- who's the obligation to?

MR. DE WAAL: Obligation is to the -- to the owner of the well, so the licensee.

THE COURT: No, no, no.

MR. DE WAAL: But it's not --

THE COURT: That's who has the burden.

MR. DE WAAL: My Lord, it's not a payment to someone or --

THE COURT: Yeah.

MR. DE WAAL: -- an obligation to someone. It's like in *Daishowa*. It's an obligation to incur these expenses in the future. If you don't pay them, it becomes --

THE COURT: Yeah.

MR. DE WAAL: -- a liability.

THE COURT: I think you're agreeing with me. We don't have a party that we can say the amount is -- an amount is owed to.

MR. DE WAAL: I agree, My Lord.

THE COURT: Okay.

MR. DE WAAL: Yes. Then, My Lord, just finally -- and I'm sure whether, as I said, Mr. Leitl misunderstood me or I misunderstood him, but when he says this 71 percent of the corporate liabilities that were -- that went with the Goodyear assets to PEOC, he says those included the ARO. And I gathered that he -- that he'd understood that that's a number that I calculated, but that's in fact, again, the PEI Goodyear presentation number, and it's at tab 'C' to the affidavit of Mr. Darby, just behind page 21, at the bottom of page 22.

THE COURT: We looked at this earlier, I think, did we?

MR. DE WAAL: Yes, we did, at the last time, My Lord, not this time. But the question is, Where does the 71 come from? And I think the submission was that because that includes AROs, you cannot really take the 71 to mean what it says, something to that effect.

THE COURT: Sorry. Give me that last statement again, sir.

MR. DE WAAL: My Lord, you said the 71 percent includes ARO and because ARO is a number that's up in the air, the 71 really doesn't mean what it seems

to mean. That's at page 22. It's not numbered, but at the bottom of the page, My Lord.

THE COURT: I'm there.

MR. DE WAAL: And it does refer to corporate liabilities, for what it's worth.

THE COURT: Just refer me to what you were touching on.

MR. DE WAAL: My Lord, in red --

THE COURT: Oh. Right at the bottom. Sorry.

MR. DE WAAL: At the bottom.

THE COURT: Yes. I was looking at the text. Okay.

MR. DE WAAL: Well, it's text, My Lord.

THE COURT: No. Sorry. In terms of the inside the tables as --

MR. DE WAAL: Yes.

THE COURT: -- opposed to at the bottom. I'll take the comment under advisement, but I appreciate that.

MR. DE WAAL: Thank you.

THE COURT: Thank you. Mr. de Waal spoke. You have the last word. Anything else?

MR. MCDONALD: Nothing here.

MR. LEITL: No.

THE COURT: Okay. Thank you all for your submissions today and for your patience in going over. I wanted to finish. I'm going to reserve, and I will -- I hope to have a decision out in January. That's my objective. I would hope earlier rather than later, but let me reflect on the points made today. Again, thank you very much.

Madam clerk, we can adjourn.

UNIDENTIFIED SPEAKER: Thank you, My Lord.

MR. MCDONALD: Thank you, My Lord.

THE COURT CLERK: Order in court.

PROCEEDINGS ADJOURNED

Certificate of Record

I, Karina Salguero, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench, held in courtroom 1603, at Calgary, Alberta, on the 17th day of December, 2018, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Sandy Voga, 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.

Sandy Voga, Transcriber
Order Number: AL-JO-1002-1688
Dated: December 19, 2018