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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
DEFENDANTS	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. and SUSAN RIDDELL ROSE
DOCUMENT	**RESPONSES OF PRICEWATERHOUSECOOPERS INC., LIT (OCTOBER 2, 2020 ISSUES)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PERSON FILING THIS DOCUMENT	DE WAAL LAW 1460, 530– 8th Avenue Street SW Calgary, AB T2P 3S8 Phone: (403) 266-0012 Attention: Rinus de Waal/Luke Rasmussen Direct: (403) 266-0014 Facsimile: (403) 266-2632 E-mail: lrasmussen@dewaallaw.com Rinus de Waal/Luke Rasmussen Counsel for the Respondent PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp.

THE TRUST INDENTURE

1. The Defendants relied on the "First Amended and Restated Trust Indenture" in their brief in support of the *BIA* Summary Dismissal Application.[1]

2. In its July brief, the Trustee specifically pointed out that the Defendants sought to rely on a document which was not in evidence and that this in itself meant that the claim should not be dismissed summarily.[2] Mr. Darby again referred to this in his September 22, 2020 affidavit as an outstanding issue.[3]

3. Despite this, the Defendants initially deliberately chose not to put the "First Amended and Restated Trust Indenture" (the "**Document**")[4] into evidence. They first asserted that it was "part of the record of the Court",[5] but acknowledged during oral submissions on October 1, 2020 that the Document was not in evidence before the Court.

4. Initially, the Defendants also urged the Court not to rely on the Document. However, the following day, when the Court again raised the issue, the Defendants applied for permission to enter the Document into evidence. When it was pointed out by counsel for the OWA that the Document seemed incomplete and did not even seem to relate to the parties before the Court, the Defendants refused to provide any additional documents and insisted that their application and the Court's ruling was limited to the Document.

5. On October 6, 2020 the Defendants served an affidavit sworn by a legal assistant. The affiant states that she is informed *by the Defendants' counsel* that her affidavit attaches records which had been "attached as Tab 60" to answers the Defendants had provided to the Court and the Trustee in December 2018.[6] In addition to the Document and despite refusing to provide any other related records, the affidavit also includes 5 other documents, ostensibly "in accordance with" the Court's October 2, 2020 Order – when the Defendants only sought leave to admit one particular document, when the Court Order only permitted the one particular document to be presented and when the Defendants themselves had opposed the admission of any other documents.

<u>The Defendants cannot rely on an unauthenticated document</u>

6. The affidavit does not authenticate any of the exhibits, including the Document. Neither the legal assistant nor Defendants' counsel are presumably in a position to do so anyway.

7. The Defendants have acknowledged that an affidavit by a legal assistant is not admissible in support of an application for summary dismissal.[7] As noted by former Chief Justice Wittmann in *Attila Dogan*, Rule 13.18 "recognizes that where an application concerns

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[1] Summary Dismissal Brief, at para. 77 and footnote 82, September 23, 2020 Affidavit of P. Darby, Exhibit 2.
[2] Trustee's Summary Dismissal Brief, at paras. 63-64, September 23, 2020 Affidavit of P. Darby, Exhibit 3.
[3] September 22, 2020 Affidavit of P. Darby, at paras. 15-17.
[4] There is no evidence that this is in fact the First Amended and Restated Trust Indenture.
[5] Application to Strike the Affidavit of P. Darby, at para. 15.
[6] Affidavit of Sheena Criece, October 6, 2020, at para. 3.
[7] November 1, 2018 Brief of the Perpetual Defendants, at para. 103.

disposition of some or all claims in a case, as here, the Court requires evidence to meet the standards required at trial."[8] The Court cited *R v Schwartz* for the proposition that:

> Before any document can be admitted into evidence there are two obstacles it must pass. First, it must be authenticated in some way by the party who wishes to rely on it. This authentication requires testimony by some witness; a document cannot simply be placed on the bench in front of the judge.[9]

8. The Defendants have had ample opportunity, at least since July when the Trustee first specifically raised the issue, to authenticate the Document. They cannot rely on it in support of their *BIA* Summary Dismissal Application.

The Evidence is Incomplete

9. Section 5.2 of the "First Amended and Restated Trust Indenture" document states that:

> **Transactions with the Trustee**
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> The Trustee may at any time and from time to time sell assets of the Trust Properties to, or purchase assets of the Trust Properties from, the Trustee, in its personal capacity, and *in case of any such sale or purchase the price and terms thereof shall be fixed by a resolution of the Beneficiaries* holding not less than fifty-one percent (51%) of the Pro Rata Shares in the Trust [...]. [Emphasis added]

10. Although a "resolution of the sole beneficiary" document is included in the October 6, 2020 affidavit, it refers only to s. 5.11 and deals only with PEOC's resignation as trustee. There is no "resolution of the sole beneficiary" document from PEI fixing "the price and terms" of the Asset Transaction. If the "First Amended and Restated Trust Indenture" is what it purports to be, this resolution would be required to allow the Asset Transaction to occur.

    10.1. If there is a s. 5.2. resolution by PEI, it is not before the Court and the decision not to provide it in these circumstances, justifies an inference that it would not support the Defendants' case.

    10.2. If there is no s. 5.2. resolution, the Asset Transaction was not properly authorized.

11. Similarly, although the Defendants provide a "First Supplemental Trust Indenture" document, they have not provided the "Arrangement Agreement" or the "Plan of Arrangement", required for a proper understanding of the First Supplemental Trust Indenture.[10] They have also provided a "Second Supplemental Trust Indenture" document, but not the Order "authorizing the amendment of the plan of arrangement", which should have been included as Schedule "A".[11]

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[8] *Attila Dogan v AMEC Americas*, 2015 ABQB 120, at para. 59 **[Trustee's Supplemental Authorities, Tab 52]**
[9] *Ibid*, at para. 80, citing *R v Schwartz*, [1988] 2 SCR 443, at 476 **[Trustee's Supplemental Authorities, Tab 52]**
[10] "First Supplemental Trust Indenture" document, s. 1.1.
[11] "Second Supplemental Trust Indenture" document, s. 1.1(e) and Schedule "A".

12. These deficiencies raise material questions about the state of the record sufficient to prevent the Court from granting summary judgment, dismissing the claim.[12]

The Document is consistent with the Defendants' Statement of Defence

13. The Document is consistent with the position in paragraph 48 of the Defendants' Statement of Defence, that PEOC was not insolvent prior to the Transaction because it was a "bare trustee" with "no material revenue, expenses, assets or liabilities".[13]

14. However, the Document is inconsistent with the Defendants' *new argument* that the Asset Transaction was not a "transfer" because the trust was just a relationship and PEOC was always "the legal owner of the Goodyear Assets and the person liable for the associated liabilities".[14] The Document confirms that:

    14.1. The trust is a "person", that can incur "indebtedness, liability or obligation" and have "creditors" and "lenders";[15] and that

    14.2. PEOC did not incur personal liability for contracts entered into on behalf of the Trust and was "not required to expend or risk its own funds or otherwise incur financial liability in the performance of any of its duties".[16]

15. The preamble to the Trust Indenture Document refers to the "Original Indenture" and a "Royalty Agreement" in which:

> [T]he Trust first grants to [Paramount Energy Trust] a royalty for a percentage of the net revenue from certain petroleum and natural gas assets *of the Trust* [...].[17] [Emphasis added.]

16. Section 1.1 defines "person" to include a "trust". Section 2.4, "Contracts of the Trust", provides that every contract entered into by the trustee on behalf of the trust *shall* include a provision stating that:

> The parties hereto acknowledge that [Paramount Energy Operating Corp./●] is entering into this agreement solely in its capacity as [the Trustee/agent on behalf of Paramount Energy Operating Corp. as the Trustee,] on behalf of the Paramount Operating Trust and *the obligations of the Paramount Operating Trust* hereunder *shall not be personally binding* upon Paramount Energy Operating Corp. [...], such that any recourse against [...] Paramount Energy Operating Corp. in its capacity as the Trustee [...] of Paramount Operating Trust [...], in any manner in respect of any indebtedness, obligation or liability of the Paramount Operating Trust arising hereunder [...] shall be limited to, and satisfied only out of, the Trust Properties [...].

It also provides that the omission of such a provision from a written instrument shall not operate to impose personal liability on the Trustee or the Beneficiaries [...].

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[12] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49, at para. 47 **[Trustee's Authorities, Tab 22]**

[13] Defendants' Statement of Defence, at para. 48 **[Trustee's Authorities, Tab 10]**

[14] Defendants' Summary Dismissal Brief, at para. 45.

[15] "First Amended and Restated Trust Indenture" document, ss. 1.1, 2.4, 4.2(j).

[16] "First Amended and Restated Trust Indenture" document, ss. 2.4 and 5.7.

[17] "Second Supplemental Trust Indenture" document, p. 1.

17. Section 4.2(i) "Insurance" provides that the Trustee is authorized:

> to arrange for and purchase on behalf of the Trust, insurance contracts and policies of insurance insuring the assets of the Trust against any and all risks [...]. [...] The Trustee shall have the power to assign [...] any insurance policies or the proceeds payable thereunder to or for the benefit of any lenders to or creditors of the Trust, whether directly or as a result of any liabilities, obligations or indebtedness being guaranteed by the Trust *or for which it may be liable*, directly or indirectly [...].

18. Section 5.7 "No Obligation on the Trustee to Risk Funds" provides that:

> None of the provisions contained in this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur financial liability in the performance of any of its duties or in the exercise of its rights, powers, authorities or discretions.

19. These provisions are consistent with the terms of the Asset Purchase Agreement, in which POT as vendor and PEOC as purchaser in its personal capacity, confirmed that "Purchaser *will be liable for* the Asset Retirement Obligations... associated with the Assets in the absence of a specific assumption of such obligations by Purchaser" because they are "inextricably linked with such Assets".[18]

20. The Defendants' argument that PEOC, as license holder, was always liable for the ARO is also inconsistent with *Redwater*, in which the Supreme Court was careful to distinguish between the "licenses" and the "profits à prendre" as "licensed assets":

> Compliance with the LMR conditions prior to the transfer of licenses reflects the inherent value of the assets held by the bankrupt estate. *Without licenses, the profits à prendre are of limited value at best.* All licenses held by Redwater were received by it subject to the end-of-life obligations that would one day arise. The obligations form a fundamental part of *the value of the licensed assets*, the same as if the associated costs had been paid up front.[19] [Emphasis added.]

21. Consistent with *Redwater* and the terms of the Asset Purchase Agreement, the ARO were "inextricably linked with" the assets held by POT prior to the Asset Transaction. PEOC only assumed the ARO when it acquired the Goodyear Assets in the Asset Transaction.

22. This is also consistent with PEI's financial disclosure to the market as a reporting issuer, before and after the Asset Transaction. The provision for $129,602,000 in ARO associated with the Goodyear Assets was properly included PEI's "total liabilities" at the beginning of 2016.[20] By the end of 2016, those ARO had been "disposed" of by PEI and the provision by PEI for ARO included in "total liabilities" was reduced to $37,774,000, with $7,656,000 being listed as current.

23. In their October 9 brief, the Defendants submit that sections 5.4 and 5.5 of the Document mean that:

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[18] Purchase and Sale Agreement, s. 2.06(b), p. 12, August 2018 Affidavit of P. Darby, Exhibit D.

[19] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (*Redwater*), at para. 157 **[Trustee's Authorities, Tab 19]**

[20] Note 12 and Balance Sheet, Consolidated Financial Statements for 2016, pp. 4 and 21, September 22, 2020 Affidavit of P. Darby, Exhibit I

> [*B*]*efore the Asset Transaction, PEOC could be indemnified for costs* it was responsible for *related to assets it held in its capacity as trustee* (namely, the Goodyear Assets) if and when it was required to incur abandonment or reclamation obligations. *After the Asset Transaction, PEOC held both the legal and beneficial interests in the Goodyear Assets.* [Emphasis added.]

24. As the Defendants appear to acknowledge, as a result of the Asset Transaction, the Goodyear Assets ceased to be trust assets in relation to which PEOC, as trustee, could claim an indemnity from POT: after acquiring the Goodyear Assets from POT in its personal capacity, PEOC was no longer entitled to be indemnified from the assets in POT for costs relating to them.

25. However, the Trustee disagrees with the implication that, prior to the Asset Transaction, the only assets in POT, and therefore available to indemnify PEOC as trustee for POT, were the Goodyear Assets.[21] Section 5.4 provides that the trustee "shall be entitled to be indemnified and saved harmless out of the Trust Properties to the extent of the Trust Properties in respect of...all liabilities, losses, costs...for or in respect of acting as or on behalf of the Trust".[22]

26. The Defendants assert that, prior to the Asset Transaction, the "Trust Properties" consisted of the Goodyear Assets *and the KeepCo Assets*, which remained in POT at all times: the beneficial interest in the assets "not sold to PEOC, referred to as the KeepCo assets, remained in POT."[23]

27. The Defendants also do not dispute that PEOC remained the trustee of POT until after the Asset Transaction.[24] Although the Defendants elected not to produce the Title Trust Agreement referred to in paragraph 26 of their Statement of Defence, they plead that:

    27.1. PEOC did not resign as trustee of POT and appoint POC as its successor trustee until October 1, 2016.

    27.2. Prior to PEOC's resignation as trustee, POC acted as PEOC's nominee.

28. Accordingly, prior to the Asset Transaction, the Goodyear Assets were trust assets for which PEOC, as trustee for POT, could claim an indemnity in relation to all liabilities, losses or costs "out of the Trust Properties to the extent of the Trust Properties", which included the KeepCo Assets. As a result of the Asset Transaction, the Goodyear Assets "sold to PEOC" by POT ceased to be trust assets for which PEOC, as trustee, could claim any indemnity from POT.

OTHER ISSUES

The Court requested additional written submissions from the parties on three issues:

A. Paragraph 28 of the Trustee's September 25, 2020 brief, addressing the purposes of s. 96 of the *BIA*

[21] Defendants' July Brief, at para. 43.
[22] "First Amended and Restated Trust Indenture" document, ss. 2.4 and 5.7.
[23] October 2018 Affidavit of S. Rose, at para. 50.
[24] Purchase and Sale Agreement, p. 28, August 2018 Affidavit of P. Darby, Exhibit C.

29. The Defendants had submitted that s. 96 is "intended to assist the trust in recovering assets the debtor disposed of".[25] In paragraph 28 of its September 25 brief, the Trustee argued that:

> Contrary to the Defendants' submission, s. 96 does not *only* apply to assist a trustee in "recovering assets" that the debtor disposed of in advance of bankruptcy for little or not [sic] consideration.[26] [Emphasis in original]

30. The Trustee cited *Urbancorp* for the proposition that "s. 96 is a remedy to reverse an improvident transfer that *strips value* from the debtor's estate"[27] and cited *Option Industries* for the proposition that the focus under s. 96 is the effect of the transfer on the debtor's "net financial position" from a "balance sheet perspective".[28]

31. Consistent with this approach to s. 96 and the approach to ARO mandated by *Redwater*, the Trustee's Statement of Claim alleges that the ARO associated with the Goodyear Assets "depressed their value" at the time of the Asset Transaction, such *the Goodyear Assets* themselves had a net negative value to PEOC. The Trustee pleads that:

> [13] *The Goodyear Assets* had no positive fair market value at the time of the Asset Transaction, *but represented a significant net liability*;
>
> [13.1] The value of the actual consideration given by Sequoia, then known as PEOC, in the Asset Transaction was at least $223,241,000 and
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> [13.2] The value of the actual consideration received by Sequoia in the Asset Transaction was at most $5,670,200.
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> [14] As a result of the Transactions [...] Sequoia acquired assets with associated ARO and other liabilities *which exceed the value of the assets*.[29] [Emphasis added.]

32. The Trustee pleads that ARO are liabilities in the broad sense, in that they negatively affected PEOC's net financial position from a balance sheet perspective.

33. This is consistent with the treatment of ARO in the Defendants' own financial statements.

    33.1. ARO of $131,024,000 are listed as "liabilities associated with assets held for sale" in the September 30, 2016 interim financial statements.[30]

    33.2. ARO of $129,602,000 were disposed of on October 1, 2016, reducing the provision for "decommissioning obligations" on the Defendants' 2016 consolidated balance sheet from $159,169,000 at the beginning of 2016 to

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[25] Defendants' Summary Dismissal Brief, at para. 26.
[26] Trustee's September 25, 2020 Brief, at para. 28
[27] Trustee's September 25, 2020 Brief, at para. 29, citing *Urbancorp, Re*, 2019 ONCA 757, at para. 8 **[Trustee's Authorities, Tab 48]**
[28] Trustee's September 25, 2020 Brief, at para. 30, citing *Option Industries, Re*, 2020 ABQB 535, at para. 31 **[Trustee's Authorities, Tab 47]**
[29] Statement of Claim, at paras. 13-14 **[Trustee's Authorities, Tab 23]**
[30] Balance Sheet and Note 3, Consolidated Interim Financial Statements for the Period Ending September 30, 2016, pp. 1 and 3, August 2018 Affidavit of P. Darby, Exhibit P.

$37,774,000 at the end of 2016.[31] This provision is included in "total liabilities".[32]

34. Setting aside the Asset Transaction, as a transaction which stripped value from the PEOC estate and negatively affected the net financial position of PEOC from a balance sheet perspective is entirely consistent with the objectives of s. 96.

B. The Correct Test for "Insolvency" in the Context of s. 96

The correct test for insolvency depends on the *BIA* provision at issue

35. The Defendants submit that Justice Farley's reasoning in *Stelco* is not applicable to a determination of solvency (by implication for any purposes) under the *BIA*:

> When the Court determines insolvency under the *BIA*, the Court is deciding whether the company is at the point of no return. If it is, the consequences are the significant: the debtor's estate is vested in the trustee and distributed to creditors and the trustee is granted extraordinary rights and remedies.[33]

36. This highlights the different functions performed by different sections of the *BIA*.

37. The definition of "insolvent person" in s. 2 performs a gatekeeping function, to determine if a debtor should go *into bankruptcy*.[34] This requires the Court to take a narrower approach, in line with the objective to *exclude* certain persons from the protections and remedies afforded by the *BIA*[35] and, as the Defendants point out, to ensure that a potential bankrupt is truly "at the point of no return" because of the irreversible effects of a bankruptcy.

38. Section 96, however, is "a remedy to reverse an improvident transfer that strips value from the debtor's estate".[36] The words "rendered insolvent" in s. 96 must therefore be given "such fair, large and liberal construction and interpretation as best ensures the attainment" of that objective.[37]

39. Section 96 recognizes the distinction between insolvency and bankruptcy. Section 96(1)(b)(ii) contemplates that a debtor can be "rendered *insolvent*" by a transfer within the meaning of s. 96 up to five years *before* the "initial *bankruptcy* event".

40. In determining whether a debtor should go into bankruptcy, the Court is required to determine whether it is "at the point of no return". Section 96 only applies to debtors who are already in bankruptcy, so the gatekeeping function performed by the s. 2 definition of

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[31] Balance Sheet and Note 13, Consolidated Financial Statements for 2016, pp. 4 and 21, September 22, 2020 Affidavit of P. Darby, Exhibit 1.

[32] Balance Sheet, Consolidated Financial Statements for 2016, p. 4, September 22, 2020 Affidavit of P. Darby, Exhibit 1

[33] Defendants' October 9, 2020 brief, at para. 6.

[34] *Pocklington, Re*, 2017 ABQB 621, at paras. 28 and 52 **[Trustee's Supplemental Authorities, Tab 53]**

[35] This is reflected, for example, in the s. 2 requirement that an "insolvent person" is a person "whose liabilities to creditors provable as claims under this Act amount to one thousand dollars"; *Pocklington, supra*, at para. 52 **[Trustee's Supplemental Authorities, Tab 53]**

[36] *Urbancorp, Re*, 2019 ONCA 757, at para. 48 **[Trustee's Authorities, Tab 48]**

[37] *Interpretation Act*, RSC 1985, c I-21, s. 12 **[Trustee's Supplemental Authorities, Tab 54]**

"insolvent person" is not engaged and the remedial objective of the section requires a broader approach by the Court.

41. The only case referred to by any of the Parties in which the Court considered the solvency test in the context of s. 96 is *Anderson*. The Court found that the weight of authority favoured inclusion even of the debtor's *contingent* liabilities in assessing solvency under s. 96.[38] The Defendant have not provided any contrary authority, for the proposition that a narrower test should apply under s. 96.

Regardless of the test, the Defendants focus on the wrong side of the solvency equation

42. The test under paragraph (c) provides that an "insolvent person" is a person:

> *The aggregate of whose property is not at a fair valuation, sufficient, or if disposed of at fairly conducted sale under legal process, would not be sufficient* to enable payment of all of his obligations, due and accruing due.[39] [Emphasis added.]

43. The focus of the Defendants' analysis is the "obligations, due and accruing due" side of the paragraph (c) equation: initially on the basis that only liabilities are included in obligations "due and accruing due" and ARO are not a liability[40] and, later, on the basis that only obligations "currently payable or chargeable" are included, such that ARO should not be included in assessing solvency.[41]

44. The other side of the solvency equation, not addressed by the Defendants, is the "fair valuation" of the aggregate of the debtor's property. And, as the Supreme Court confirmed in *Redwater*, ARO are a "fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front."[42] Like the obligations considered in *Daishowa*, ARO are an "embedded" future cost that serves to depress the value of the licensed asset "at the time of sale".[43]

45. In accordance with *Redwater* and *Daishowa*, ARO are properly considered on the fair valuation of the debtor's property side of the solvency equation: ARO are not an obligation that can be separated from the debtor's property, to then be weighed as obligations, due and accruing due against that property's "fair valuation".

46. The Supreme Court in *Daishowa* illustrated this distinction using the example of a property encumbered by a mortgage:

> Here, for instance, the record establishes that Tolko valued the High Level Division's forest tenure at $31 million less the $11 million estimated cost of future reforestation obligations. The forest tenure thus had a value of $20 million. To include the full $31 million in DMI's proceeds of disposition would

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[38] *Anderson, Re*, 2012 BCSC 956, at para. 10 **[Trustee's Supplemental Authorities, Tab 57]**
[39] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 2 **[Trustee's Authorities, Tab 17]**
[40] Defendants' July 8, 2020 Brief, at para. 88
[41] Defendants' October 9, 2020 Brief, at para. 4.
[42] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 (*Redwater*), at para. 157 **[Trustee's Authorities, Tab 19]**
[43] *Ibid* **[Trustee's Authorities, Tab 19]**

> disregard *the fact that DMI did not have $31 million of value to sell. Under no circumstances could DMI have received $31 million for the forest tenure.*
>
> This distinguishes a reforestation obligation tied to a forest tenure *from a mortgage, which does not affect the value of the property it encumbers.* For instance, a property worth $31 million that is encumbered by a mortgage of $11 million, despite the mortgage, still has a value of $31 million. *The vendor of such property could obtain $31 million for it and then pay off the mortgage.* Alternatively, the vendor could obtain $20 million and have the purchaser assume the mortgage. In either case, *it makes sense for the vendor's proceeds of disposition to equal the full $31 million because that is the value of the asset being sold.* [Emphasis added.]

47. Applying the paragraph (c) "net worth" test to this fact pattern:

    47.1. The property would have a "fair valuation" of $31 million and the obligation due or accruing due would be the mortgage of $11 million.

    47.2. The forest tenure, however, would be property with a "fair valuation" of only $20 million, not $31 million, because "under no circumstances" could the vendor receive $31 million for it. The $11 million is not a separate obligation due or accruing due, to be deducted subsequently under the paragraph (c) solvency test.

48. The only evidence regarding the "fair valuation" of PEOC's property following the Asset Transaction is provided by the Trustee. As there is no "evidence to the contrary", s. 96(2) requires the Court to rely on the Trustee's values in making "any finding" under s. 96.[44]

49. The Trustee's uncontradicted evidence is that:

> [T]he Goodyear Assets, transferred to PEOC pursuant to the Asset Transaction, had no positive fair market value at the time of the Asset Transaction, but represented a significant net liability of at least $223,241,000;[45]

50. Even if PEOC's only obligation "due and accruing due" following the Asset Transaction were outstanding municipal property taxes of $1,560,800,[46] the aggregate of PEOC's property (which includes ARO) was "not at a fair valuation, sufficient...to enable payment" of this obligation.

51. Accordingly, regardless of whether the Court applies the balance sheet in *Enterprise*, *Stelco* or *Anderson*, PEOC was insolvent following the Asset Transaction.

C. Deferred Tax Items in the CNRL and Cenovus Balance Sheets

52. CNRL's consolidated 2019 balance sheet shows total liabilities of $43,130,000,000, which include "deferred income taxes" of $10,539,000,000. It also includes "other long-term liabilities" of $7,363,000,000, which in turn includes $5,563,000,000 of non-current ARO.[47] Note 13 states that "Deferred income tax assets" of $2,655,000,000 were

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[44] *BIA*, s. 96(2) **[Trustee's Authorities, Tab 17]**
[45] August 2018 Affidavit of P. Darby, at para. 44.1.
[46] Reasons, at para. 368; Defendants' July 8 Brief, at para. 88; May 5, 2020 Affidavit of M. Schweitzer, para. 11(b).
[47] Consolidated Balance Sheets, CNRL 2019 Annual Report, p. 56, Transcript of Cross-Examination of R. Laing (Laing Cross-Examination), Exhibit 1.

deducted from "Deferred income tax liabilities" of $13,194,000,000 to generate a "net deferred income tax liability" of $10,539,000,000.[48]

53. Cenovus' consolidated 2019 balance sheets include "Deferred Income Taxes" of $4,032,000,000 in "Total Liabilities" of $16,512,000,000.[49] Also included in "Total Liabilities" are "Decommissioning Liabilities" of $1,235,000,000 and "Other Liabilities" of $195,000,000. Note 12 to the Cenovus 2019 financial statements states that the "Deferred Income Tax Liabilities" are $4,543,000,000, with only $3,000,000 to be settled within 12 months and $4,540,000,000 to be settled after that.[50] The "Net Deferred Income Tax Liability" is calculated by deducting the "Deferred Income Tax Assets" from the "Deferred Tax Liabilities" over the same time periods.[51]

54. In *Anderson*, the Court confirmed that even contingent liabilities should be considered in assessing solvency *under s. 96*. The deferred tax liabilities listed on the balance sheets of CNRL and Cenovus would be included in assessing solvency *under s. 96* if they became bankrupt and had participated in an "improvident transfer" prior to becoming bankrupt.[52]

55. The deferred tax liabilities would also be included in assessing solvency in a *CCAA* context under the test articulated by Justice Farley in *Stelco*. "Every obligation" is to be included and crystallizes on the "date of the test".[53]

56. The deferred tax liabilities are provisions, as the Defendants acknowledge,[54] and would be included in obligations "accruing due" based on the test articulated in *Oblats de Marie*, a decision citing *Enterprise* with approval. In that case, the "contingent" claims relating to the litigation were not shown as liabilities on the balance sheet and were described as "possible" as "distinguished from probable".[55] In contrast, provisions are recognized when a present obligation will *probably* result in a future outflow of economic resources the present value of which is the provision amount.[56]

Calgary, Alberta
October 16, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per: _____

Rinus de Waal/Luke Rasmussen
Counsel for the Respondent, PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp.

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[48] Note 13, CNRL 2019 Annual Report, p. 83, Transcript of Cross-Examination of R. Laing, Exhibit 1.
[49] Balance Sheet, Cenovus 2019 Consolidated Financials Statements, p. 9, Transcript of Cross-Examination of A. Jackson on September 16, 2020 (Jackson Cross-Examination), Exhibit 1.
[50] Note 12, Cenovus 2019 Consolidated Financials Statements, p. 33, Jackson Cross-Examination, Exhibit 1.
[51] Note 12, Cenovus 2019 Consolidated Financials Statements, p. 33, Jackson Cross-Examination, Exhibit 1.
[52] *Urbancorp*, supra, at para. 8 **[Trustee's Authorities, Tab 48]**
[53] *Stelco, Re* (2004), 48 C.B.R. (4th) 299, at para. 59 **[Trustee's Authorities, Tab 24]**
[54] Defendants' October 9 Brief, at para. 14.
[55] *Oblats de Marie, supra*, at paras. 42-46 **[Trustee's Supplemental Authorities, Tab 55]**
[56] IAS 37, Item 14, p. 1149, Reply Brief of the Orphan Well Association, Tab 1.

TABLE OF AUTHORITIES