

CLERK'S STAMP

COURT FILE NUMBER

1801-10960

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

**BRIEF OF THE RESPONDENT**  
**PRICewaterhouseCOOPERS INC., LIT**  
**(INTERVENOR EVIDENCE)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PERSON FILING THIS DOCUMENT

DE WAAL LAW  
1460, 530 – 8<sup>th</sup> Avenue 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](mailto: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.

## INTRODUCTION

1. Perpetual Energy Inc. (“**PEI**”), Perpetual Operating Corp. and Perpetual Operating Trust (“**POT**”)(collectively, the “**Defendants**”) apply to strike or dismiss the remaining claims brought against them by PricewaterhouseCoopers Inc., LIT, in its capacity as the trustee in bankruptcy of Sequoia Resources Corp. (the “Trustee”). The application (the “**BIA Summary Dismissal Application**”) is scheduled to be heard on October 1, 2020.
2. On July 24, 2020, the Court granted Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd. (the “**Industry Intervenors**”) and the Orphan Well Association (the “**OWA**”)(collectively, the “**Intervenors**”) leave to intervene in the *BIA* Summary Dismissal Application. The Court had previously confirmed that the Trustee may make additional written submissions on the *BIA* Summary Dismissal Application regarding anything arising from the Intervenors’ application for leave to intervene and their evidence.
3. The Intervenors filed affidavits and the Defendants cross-examined their witnesses on September 15 and 16, 2020.
4. These submissions address the Intervenor affidavit evidence not struck by the Court and the evidence elicited by the Defendants in cross-examination..

## PART I – THE INTERVENORS’ EVIDENCE

### 1. The Intervenors’ Affidavit Evidence

5. In his June 29, 2020 affidavit, Lars De Pauw of the OWA addresses the OWA’s concerns about the “significant abandonment and reclamation liabilities associated with the Goodyear Assets”.<sup>1</sup> The OWA expects these liabilities to substantially increase the OWA levy imposed by the AER on oil and gas companies across Alberta.<sup>2</sup>
6. Ron Laing expresses similar concerns on behalf of CNRL in his July 14, 2020 affidavit:

---

<sup>1</sup> June 29, 2020 Affidavit of Lars De Pauw, at para. 13.

<sup>2</sup> June 29, 2020 Affidavit of Lars De Pauw, at paras. 6 and 13.

I understand that if the Transaction is permitted to endure, the approximately \$200,000,000 cost to abandon and reclaim the Goodyear Assets (as estimated by the Trustee) will be unfairly and unjustly borne by the licensees of Alberta's oil and gas regulatory regime, including Canadian Natural. Canadian Natural expects these financial consequences to persist beyond the principal year as the liabilities are expected to substantially increase the Levy in future years.<sup>3</sup>

7. Mr. Laing confirms that CNRL is a creditor of the PEOC/Sequoia Estate and that the "direct financial impact" of the Transactions on CNRL is approximately \$42,000,000.<sup>4</sup>
8. Antonio Jackson swore an affidavit on July 14, 2020 confirming that Cenovus is a creditor of the PEOC/Sequoia Estate and that the direct financial impact of the Transactions on Cenovus is approximately \$6,000,000.<sup>5</sup>
9. John Brannan swore an affidavit on July 15, 2020 on behalf of Torxen in which he estimates the direct financial impact of the Transactions on Torxen to be \$6,500,000.<sup>6</sup> He says:

I understand that as a result of Sequoia's financial inability to satisfy its abandonment and reclamation obligations, these liabilities will become the responsibility of the OWA, which is primarily funded by the Orphan Fund Levy (the "Levy"). The Levy is maintained by the Alberta Energy Regulator (the "AER"), and funded by the industry contributors, including Torxen.<sup>7</sup>

## 2. The Intervenor's Evidence in Cross-Examination

10. The Defendants cross-examined the Intervenor's witnesses and elicited evidence on issues the Defendants consider to be relevant.
11. Mr. De Pauw asked whether regulatory approval was required for the Asset Transaction or the Share Transaction:

1 Q MR. McDONALD: Well, to put it plainly, there  
2 was no transfer of licenses on -- in relation to the  
3 transactions; correct?  
4 A My understanding is that there was internal transfers  
5 in the Perpetual owned companies.  
6 Q And internal transfers do not require regulatory  
7 approval; right?

---

<sup>3</sup> July 14, 2020 Affidavit of Ron Laing, at para. 15.

<sup>4</sup> July 14, 2020 Affidavit of Ron Laing, at paras. 16 and 19.

<sup>5</sup> July 14, 2020 Affidavit of Antonio Jackson, at paras. 17 and 20.

<sup>6</sup> July 15, 2020 Affidavit of John Brannan, at para. 16.

<sup>7</sup> July 15, 2020 Affidavit of John Brannan, at para. 10.

8 A I'm not sure of that.  
9 Q Are you guessing about whether there were general  
10 transactions, or are you able to say that under oath?  
11 A My review of the materials that were provided to the  
12 board of directors of Perpetual indicated that licenses  
13 were moving from one organization to the other to set  
14 up its corporate sale.<sup>8</sup>

12. Mr. Laing was asked about his evidence that ARO are “definite financial liabilities”. It was put to him that a provision is not a form of liability, but distinct from a liability. Mr. Laing confirmed that ARO is a liability:

19 Q And do you know if it's a liability for financial  
20 statement purposes?  
21 A It should be -- yes, it should be on their financial  
22 statements, absolutely.  
23 Q As a liability?  
24 A Yes.  
25 Q Or a provision?  
26 A Oh, I -- I'm not an accountant to start getting into  
27 pedantics of how they define them, so I couldn't tell  
1 you one way or the other. I'm talking high level  
2 liability versus a -- an obligation whether -- how it  
3 works in a definition.  
4 Q You don't know the difference between a liability and a  
5 provision for financial statements --  
6 A Not specific -- no, I'm not an IFR expert by any means.  
7 THE COURT REPORTER: I'm sorry, you'll have to  
8 repeat that.  
9 A I'm not an IFR expert.  
10 Q MR. McDONALD: But you want to stick with  
11 your answer that ARO are liabilities owed to the  
12 regulator, do you? Or do you want to change that to  
13 they are something that has an impact on multiple  
14 parties?  
15 A I was comfortable with the way it was written and what  
16 my intent was. I still think it's definitely a  
17 liability.<sup>9</sup>

13. When it was put to Mr. Laing that “provision” is defined as “a liability of uncertain timing or amount”, Mr. Laing confirmed that ARO could be both a liability and a provision.<sup>10</sup>

14. The Defendants entered CNRL’s 2019 Annual Report as an exhibit<sup>11</sup> and Mr. Laing was cross-examined regarding its contents.<sup>12</sup>

<sup>8</sup> Transcript of Cross-Examination of Lars De Pauw on September 15, 2020, p. 37, lines 1-15.

<sup>9</sup> Transcript of Cross-Examination of Ron Laing on September 15, 2020, p. 59, lines 12-27, p. 60, p. 61, p. 62, p. 63, lines 1-7, p. 65, lines 1-4.

<sup>10</sup> Transcript of Cross-Examination of Ron Laing on September 15, 2020, p. 65, lines 1-24.

15. Mr. Brannan was also asked whether ARO constitute a liability. As with Mr. Laing, it was put to him that a provision is not a liability, but Mr. Brannan confirmed that abandonment obligations are a “minus” to be considered in determining the value of an asset:

7 Q You agree with me that ARO on financial statements,  
8 audited financial statements, is not listed as a  
9 liability, but as a provision.  
10 A Yeah, you'll -- I'm not an accountant. I don't know  
11 the difference between a liability and a provision, but  
12 yeah. You consider that when you determine the value  
13 of an asset. You take what -- the pluses and take away  
14 what's the minuses. Abandonment obligations are a  
15 minus.<sup>13</sup>

16. Mr. Brannan was questioned about the statement in his August 2020 affidavit that ARO are considered “definite financial liabilities”:

13 Q MR. CHISWELL: But in any event, sir, what do  
14 you mean by "definite financial liabilities" with your  
15 heading of paragraph 6?  
16 A I think in the statement that I made when you're  
17 evaluating the net worth of a particular asset, take  
18 all of the production. You take the revenue stream,  
19 and then you subtract all the minuses and liabilities  
20 would be a piece of the minus. Nobody would buy  
21 something if -- if you weren't aware of the liabilities  
22 associated with it. So, you know, the worth of any  
23 particular company is all the good things plus all the  
24 bad things.  
25 Q Okay, but what do you mean by "definite financial  
26 liabilities"?  
27 A So abandonment regulatory -- abandonment obligations  
1 are part of the financial liability.  
2 Q Okay. What do you mean by "definite financial  
3 liabilities" as opposed to financial liabilities?  
4 A Well, maybe it shouldn't be capitalized. Maybe it  
5 should be they are definitely a financial liability.  
6 Q Okay. What do you mean by definitely financial --  
7 "definitely financial liabilities"?  
8 A I think we explained that. It's a minus. It's  
9 something that detracts from the value of your asset.  
10 Q Okay. So you just mean that it's a financial  
11 liability?  
12 A Yes. It definitely is.<sup>14</sup>

---

<sup>11</sup> Transcript of Cross-Examination of Ron Laing on September 15, 2020, p. 55, lines 15-21, p. 56, lines 1-23, p. 61, lines 19-21, p. 62, 1-9, p. 63, lines 9-27, p. 64, lines 1-27, p. 65, lines 1-24.

<sup>12</sup> Transcript of Cross-Examination of Ron Laing on September 15, 2020, p. 55, lines 22-27, p. 56, lines 1-23

<sup>13</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 40, lines 20-27, p. 41, lines 1-15.

17. When he was pressed to explain who the ARO liability was owed to, Mr. Brannan confirmed that “they’re a part of the asset”.<sup>15</sup> Mr. Brannan was also cross-examined regarding Torxen’s audited financial statements, which the Defendants asked to be provided as an undertaking response.<sup>16</sup>
18. The cross-examination of Mr. Jackson of Cenovus did not touch on whether ARO are a liability. However, counsel for the Defendants concluded the cross-examination by entering Cenovus’ consolidated financial statements for the year ended December 31, 2019 as an exhibit.<sup>17</sup>

## **PART II – ISSUES**

19. The evidence of the Intervenors addresses issues raised by the *BIA* Summary Dismissal Application, including:
  - 19.1. Whether there was a “transfer” within the meaning of s. 96 of the BIA;
  - 19.2. Whether ARO should be considered in assessing the consideration given and received by a debtor for the purposes of s. 96 of the BIA;
  - 19.3. Whether ARO should be considered in determining whether a transfer rendered a debtor insolvent for the purposes of s. 96 of the BIA; and
  - 19.4. Whether summary dismissal would be a “proportionate, more expeditious and less expensive means to achieve a just result” having regard to the “importance and complexity of the issues”.

---

<sup>14</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 42, lines 1-27, p. 43, lines 1-2.

<sup>15</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 43, lines 24-27, p. 44, lines 1-22.

<sup>16</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 40, lines 1-27, p. 41, lines 1-22.

<sup>17</sup> Transcript of Cross-Examination of Antonio Jackson, p. 26, lines 16-26.

### PART III – ARGUMENT

1. **The Defendants’ “Issue #1”: was there a “transfer” reviewable under s. 96**
20. In their brief in support of their *BIA* Summary Dismissal Application, the Defendants submit that:
  - 20.1. The “Asset Transaction made no difference to the value of PEOC/Sequoia’s estate in that it did not remove any value that would have otherwise been available to PEOC’s creditors”.<sup>18</sup>
  - 20.2. The “mischief that s. 96 is intended to address – to prevent a debtor from disposing assets for no or inadequate consideration to deprive its estate of value that would otherwise have been available for its creditors – does not exist here.”<sup>19</sup>
  - 20.3. Whatever creditors PEOC had “immediately before and after the Asset Transaction, the position of the creditors remained the same”.<sup>20</sup>
21. These submissions are inconsistent with the evidence provided by the Intervenors.
22. The Industry Intervenors CNRL and Cenovus are creditors of the PEOC/SRC Estate.<sup>21</sup>
23. Their evidence is that if the Asset Transaction, described as the “Asset Transfer”, is set aside pursuant to s. 96, the amount available for distribution to the PEOC/SRC creditors would be increased.<sup>22</sup> The evidence from CNRL and Cenovus is that the direct financial impact of the Transactions on them is approximately \$42,000,000 and \$6,000,000, respectively.<sup>23</sup>
24. The Defendants also submit, in relation to “Issue #1”, that:

---

<sup>18</sup> Defendants’ Summary Dismissal Brief, at para. 36.

<sup>19</sup> Defendants’ Summary Dismissal Brief, at para. 42.

<sup>20</sup> Defendants’ Summary Dismissal Brief, at para. 42.

<sup>21</sup> July 14, 2020 Affidavit of Ron Laing, at para. 16; July 14, 2020 Affidavit of Antonio Jackson, at para. 17.

<sup>22</sup> July 14, 2020 Affidavit of Ron Laing, at para. 16; July 14, 2020 Affidavit of Antonio Jackson, at para. 17.

<sup>23</sup> July 14, 2020 Affidavit of Ron Laing, at para. 19; July 14, 2020 Affidavit of Antonio Jackson, at para. 20.

- 24.1. Section 96 is an “anti-abuse mechanism”.<sup>24</sup>
- 24.2. The “purpose” of s. 96 is to assist the trustee “in recovering assets that the debtor disposed of in advance of bankruptcy for little or not consideration, thereby depriving the estate of value that would otherwise have been available for distribution to the creditors.”<sup>25</sup>
- 24.3. “The Asset Transaction did not materially change PEOC’s position with respect to the Goodyear Assets”.<sup>26</sup>
25. Evidence provided by witnesses for the Industry Intervenors Torxen and CNRL in cross-examination addresses the submission by the Defendants that the Asset Transaction “made no difference to the value of PEOC/Sequoia’s estate”.<sup>27</sup>
26. Although it was put to him that ARO are not a liability on audited financial statements,<sup>28</sup> Mr. Brannan explained that ARO are “definite financial liabilities” because they are a “minus” that must be considered in determining the “net worth” of an asset.<sup>29</sup> They are not owed to a particular creditor; instead, they are “part of the asset.”<sup>30</sup>
27. Although it was put to him that there “difference between a liability and a provision for financial statements”,<sup>31</sup> Mr. Laing’s evidence was that ARO could be a liability *and* a provision based on the IFRS definitions put to him.<sup>32</sup> Mr. Laing’s evidence was that ARO are not “a maybe” as they “will occur” and “can’t be avoided”.<sup>33</sup>

---

<sup>24</sup> Defendants’ Summary Dismissal Brief, at para. 26.

<sup>25</sup> Defendants’ Summary Dismissal Brief, at paras. 26 and 36.

<sup>26</sup> Defendants’ Summary Dismissal Brief, at para. 45.

<sup>27</sup> Defendants’ Summary Dismissal Brief, at para. 36.

<sup>28</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 41, lines 7-15, p. 42, lines 41, line 27, p. 42, lines 1-7.

<sup>29</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 40, lines 20-27, p. 41, lines 1-15; p. 42, lines 1-27, p. 43, lines 1-2.

<sup>30</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 43, lines 1-2 and 24-27, p. 44, lines 1-22.

<sup>31</sup> Transcript of Cross-Examination of Ron Laing on September 15, 2020, p. 62, lines 4-9. 2

<sup>32</sup> Transcript of Cross-Examination of Ron Laing on September 15, 2020, p. 65, lines 1-21.

<sup>33</sup> Transcript of Cross-Examination of Ron Laing on September 15, 2020, p. 59, lines 12-21.



28. 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 consideration".<sup>34</sup>
29. The proper interpretation of the scope of s. 96 is reflected in *Option Industries*, a September 14, 2020 decision from this Court. Justice Lema cited the Ontario Court of Appeal's 2019 decision in *Urbancorp* for the proposition that "s. 96 is a remedy to reverse an improvident transfer that *strips value* from the debtor's estate, where its conditions are met."<sup>35</sup>
30. Consistent with the focus on the effect of the impugned transfer on the *value of the estate*, the Court in *Option Industries* examined the effect of the transfer from a "balance sheet perspective" on the "net financial position" of the debtor:

From a balance-sheet perspective, the asset reductions represented by the various "transfers out" were offset, in full, by the account-payable reductions in equal amounts. OII's *net financial position remained unchanged*. The concern addressed by the "transfer at undervalue" provision was accordingly not engaged.<sup>36</sup>

31. The Goodyear Assets transferred to PEOC in the Asset Transaction negatively affected its net financial position from a balance sheet perspective:
  - 31.1. Because of the ARO associated with them, the Goodyear Assets transferred to PEOC had a net negative value of more than \$200,000,000.<sup>37</sup>
  - 31.2. As explained by Mr. Brannan, ARO are a "minus" that must be considered in determining the "net worth" of an asset because they are "part of the asset".<sup>38</sup>

---

<sup>34</sup> Defendants' Summary Dismissal Brief, at para. 26.

<sup>35</sup> *Option Industries Inc (Re)*, 2020 ABQB 535 (*Option Industries*), at para. 10, citing *Urbancorp Toronto Management Inc (Re)*, 2019 ONCA 757 (*Urbancorp*), at para. 8 [Trustee's Authorities, Tabs 47 and 48]

<sup>36</sup> *Ibid.* at para. 31 [Trustee's Authorities, Tab 47]

<sup>37</sup> August 2, 2018 Affidavit of Paul Darby, at paras. 40, 41, and 44.

<sup>38</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 40, lines 20-27, p. 41, lines 1-15; p. 42, lines 1-27, p. 43, lines 1-2.

- 31.3. Mr. Laing's evidence in cross-examination was that ARO are not "a maybe" as they are "obligations that will come to fruition". ARO "can't be avoided" and "will occur".<sup>39</sup>
- 31.4. Unlike in *Option Industries*, PEOC did not receive anything sufficient to offset this "minus" and preserve its net financial position. In their 2016 financial statements, the Defendants' auditor described the transaction as resulting in "a gain on disposition of \$19.2 million" because it involved, *inter alia*, "the assumption of \$128.0 million in decommissioning obligations".<sup>40</sup>
32. Section 96 is intended to reverse an improvident transfer that "strips value from the debtor's estate".<sup>41</sup> The effect of a transfer is determined by assessing its effect on the "net financial position" of the debtor from a "balance sheet perspective".<sup>42</sup> Contrary to the Defendants' submission, s. 96 does not *only* apply to assist a trustee in "recovering assets".<sup>43</sup>
- 2. The Defendants' Issue #2: was the Asset Transaction a transfer "at undervalue"**
33. The Defendants' case for summary dismissal on the basis of their "Issue #2", transfer at undervalue, is that:
- 33.1. The Trustee opinion as to the value of the consideration given by PEOC in the Asset Transaction was "wrong" because ARO is "not a liability" that should be considered in assessing the value of consideration given under s. 96;<sup>44</sup>
- 33.2. The value of the consideration given by PEOC in the Asset Transaction was actually only \$1,560,809, because the \$218,958,274 in ARO could be ignored in

---

<sup>39</sup> Transcript of Cross-Examination of John Laing on September 15, 2020, p. 59, lines 19-21.

<sup>40</sup> 2016 Consolidated Financial Statements, p. 16, September 22, 2020 Affidavit of P. Darby, Exhibit 1.

<sup>41</sup> *Option Industries*, *supra*, at para. 10 citing *Urbancorp*, at para. 8 [Trustee's Authorities, Tabs 47 and 48]

<sup>42</sup> *Ibid*, at para. 31 [Trustee's Authorities, Tab 47]

<sup>43</sup> Defendants' Summary Dismissal Brief, at para. 26.

<sup>44</sup> Defendants' Summary Dismissal Brief, at para. 56.

determining whether the Asset Transaction was “at undervalue” under s. 96;<sup>45</sup>  
and

- 33.3. Mr. Schweitzer testified that “there was no transfer at undervalue”, “the value of the consideration given by PEOC was \$1,560,809” and “the Trustee’s opinion of value mischaracterizes ARO as a liability.”<sup>46</sup>
34. Torxen’s witness, Mr. Brannan, was cross-examined regarding Torxen’s audited financial statements. It was put to him that ARO are “not a liability on financial statements” as they are “a provision”.<sup>47</sup>
35. Mr. Brannan confirmed that abandonment obligations are a “minus” to be considered in determining the value of an asset.<sup>48</sup>
36. Mr. Brannan was also cross-examined regarding his statement that ARO are considered “definite financial liabilities by industry members”.<sup>49</sup> He confirmed that “abandonment obligations are part of the financial liability” because they are something that “detracts from the value of your asset.”<sup>50</sup> They are “part of the asset” when an asset is purchased.<sup>51</sup>
37. CNRL’s witness, Mr. Laing, was also cross-examined regarding his statement that ARO are considered “definitely financial liabilities.”<sup>52</sup> It was put to him that a liability was distinct from a provision and ARO could not be a liability because it was not “owed to anybody.”<sup>53</sup> When the IFRS definitions of “provision” and “liability” were put to Mr. Laing, he confirmed that ARO “can be both” based on those definitions.

---

<sup>45</sup> Defendants’ Summary Dismissal Brief, at para. 57.

<sup>46</sup> Defendants’ Summary Dismissal Brief, at para. 57, citing para. 16 and footnote 3 of Affidavit of M. Schweitzer in support of *BIA* Summary Dismissal Application.

<sup>47</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 40, lines 2-24.

<sup>48</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 40, lines 20-27, p. 41, lines 1-15.

<sup>49</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 41, lines 23-27, p. 42, lines 1-15.

<sup>50</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 42, lines 13-27, p. 43, lines 1-12.

<sup>51</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 42, lines 13-27, p. 43, lines 11-16.

<sup>52</sup> Transcript of Cross-Examination of John Laing on September 15, 2020, p. 59, lines 12-19.

<sup>53</sup> Transcript of Cross-Examination of John Laing on September 15, 2020, p. 59, lines 20-27, p. 60-64, p. 65, lines 1-21.

38. The CNRL 2019 Annual Report was entered into evidence during Mr. Laing's cross-examination.<sup>54</sup> During his cross-examination, Mr. Brannan was asked to provide Torxen's most recent financial statements.<sup>55</sup> Cenovus' 2019 financial statements were entered into evidence at the conclusion of Mr. Jackson's cross-examination.<sup>56</sup>
39. Cenovus' 2019 balance sheet lists its assets, liabilities and shareholders' equity.<sup>57</sup> "Decommissioning Liabilities" are included in the "Total Liabilities", which are subtracted from "Total Assets" to determine the "Shareholders' Equity" listed on the balance sheet.<sup>58</sup> Note 27 describes the "decommissioning liabilities", stating in part that:

The decommissioning *provision* represents the present value of the expected future costs associated with the retirement of upstream crude oil and natural gas assets, refining facilities and the crude-by-rail terminal.<sup>59</sup> [Emphasis added.]

40. The treatment of decommissioning liabilities in Cenovus' 2019 financial statements is consistent with the evidence of Mr. Brannan and Mr. Laing in cross-examination, as well as the IFRS definitions of "provision" and "liability":
- 40.1. ARO are a "minus" that must be considered in determining the "net worth" of an asset.<sup>60</sup>
- 40.2. ARO are not "a maybe" as they are "obligations that will come to fruition". They "can't be avoided" and "will occur".<sup>61</sup>
- 40.3. ARO are a liability because they are 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".<sup>62</sup>

---

<sup>54</sup> Transcript of Cross-Examination of John Laing on September 15, 2020, p. 55, lines 20-21.

<sup>55</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 41, lines 20-22.

<sup>56</sup> Transcript of Cross-Examination of Antonio Jackson on September 16, 2020, p. 26, lines 22-25.

<sup>57</sup> Consolidated Balance Sheets, Cenovus Energy Inc. Consolidated Financial Statements for the year ended December 31, 2019, p. 28, not yet filed.

<sup>58</sup> Consolidated Balance Sheets, Cenovus Energy Inc. Consolidated Financial Statements for the year ended December 31, 2019, p. 28, not yet filed.

<sup>59</sup> Note 27, Cenovus Energy Inc. Consolidated Financial Statements for the year ended December 31, 2019, p. 42, not yet filed.

<sup>60</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 40, lines 20-27, p. 41, lines 1-15; p. 42, lines 1-27, p. 43, lines 1-2.

<sup>61</sup> Transcript of Cross-Examination of John Laing on September 15, 2020, p. 59, lines 19-21.

- 40.4. ARO also fall within the provision subcategory of liability: they are “*a liability of uncertain timing or amount*”.<sup>63</sup>
41. Although it was put to Mr. Laing and Mr. Brannan that ARO are “not a liability on financial statements” because they are “a provision”<sup>64</sup>, the Defendants’ own 2016 audited financial statements include “Provisions” in calculating “Total Liabilities”.<sup>65</sup>
42. In Note 13 to the Defendants’ 2016 audited financial statements, the auditor states that:
- 42.1. The Defendants “disposed” of \$129,602,000 in “decommissioning obligations” in the October 1, 2016 transaction referred to in Note 5(a);
- 42.2. This reduced their total decommissioning obligations from \$159,169,000 at the beginning of 2016, to \$37,774,000 at the end of 2016;
- 42.3. As a result of efficiencies and cost savings in 2015 and 2016, there was a revision “to estimated future abandonment liabilities for all oil and natural gas assets.”<sup>66</sup>
43. Note 5(a) to the Defendants’ 2016 audited financials describes the transaction that resulted in \$129,602,000 of “Obligations disposed”.<sup>67</sup>

On October 1, 2016, the Company disposed of a significant portion of the Company’s shallow gas properties in east central and northeast Alberta (the “Shallow Gas Properties” *for nominal cash consideration and the assumption of \$128.0 million of decommissioning obligations associated with the Shallow Gas Properties, resulting in a gain on disposition of \$19.2 million.* <sup>68</sup> [Emphasis added.]

---

<sup>62</sup> Transcript of Cross-Examination of John Laing on September 15, 2020, p. 65, lines 14-18.

<sup>63</sup> Transcript of Cross-Examination of John Laing on September 15, 2020, p. 65, lines 14-18.

<sup>64</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 41, lines 20-24; Transcript of Cross-Examination of John Laing on September 15, 2020, p. 61, lines 6-25.

<sup>65</sup> Consolidated Statements of Financial Position, Perpetual 2016 Consolidated Financial Statements, p. 4, September 22, 2020 Affidavit of P. Darby, Exhibit 1.

<sup>66</sup> Note 13, Perpetual 2016 Consolidated Financial Statements, p. 21, September 22, 2020 Affidavit of P. Darby, Exhibit 1.

<sup>67</sup> Note 13, Perpetual 2016 Consolidated Financial Statements, p. 21, September 22, 2020 Affidavit of P. Darby, Exhibit 1.

<sup>68</sup> Note 5(a), Perpetual 2016 Consolidated Financial Statements, p. 16, September 22, 2020 Affidavit of P. Darby, Exhibit 1.

44. Section 96 is intended to reverse an improvident transfer that “strips value from the debtor’s estate”.<sup>69</sup> The effect of a transfer is determined by assessing its effect on the “net financial position” of the debtor from a “balance sheet perspective”.<sup>70</sup>
45. The Defendants’ auditor reported that the Defendants obtained a “gain on disposition of \$19.2 million” because part of the consideration they received in the October 1, 2016 transaction was “the assumption of \$128.0 million in decommissioning obligations.”<sup>71</sup>
46. Assuming that the Defendants’ 2016 audited financial statements accurately reflect the consideration given and received in the transaction, the effect on PEOC’s “net financial position” is clear.<sup>72</sup> The Defendants \$19.2 million “gain on disposition” was PEOC’s loss: in addition to assuming \$128.0 million in decommissioning obligations, PEOC also paid the “nominal consideration” described in Note 5(a).

**3. The Defendants’ Issue #3: Whether PEOC was rendered insolvent by the Asset Transaction**

47. In their brief in support of the *BIA* Summary Dismissal Application, the Defendants submit in relation to Issue #3 that:
  - 47.1. PEOC was “not rendered insolvent by the Asset Transaction”<sup>73</sup> on the balance sheet test because the ARO associated with the Goodyear Assets should be excluded in assessing post-transfer solvency under s. 96;<sup>74</sup>
  - 47.2. Following the Asset Transaction, the “value of PEOC’s assets exceeded its liabilities by at least \$4,109,391”<sup>75</sup>.

---

<sup>69</sup> *Option Industries, supra*, at para. 10 citing *Urbancorp*, at para. 8 [Trustee’s Authorities, Tab 47]

<sup>70</sup> *Ibid*, at para. 31 [Trustee’s Authorities, Tab 47]

<sup>71</sup> Note 5(a), 2016 Consolidated Financial Statements, p. 16, September 22, 2020 Affidavit of P. Darby, Exhibit 1.

<sup>72</sup> *Option Industries, supra*, at para. 31 [Trustee’s Authorities, Tab 47]

<sup>73</sup> Affidavit of M. Schweitzer in support of *BIA* Summary Dismissal Application, at para. 14.

<sup>74</sup> Defendants’ Summary Dismissal Brief, at para. 88.

<sup>75</sup> Defendants’ Summary Dismissal Brief, at para. 88; Affidavit of M. Schweitzer in support of *BIA* Summary Dismissal Application, at para. 13.

48. Mr. Brannan, Torxen's witness, and Mr. Laing, CNRL's witness, were cross-examined regarding the treatment of ARO. Mr. Brannan's evidence was that:

13 Q MR. CHISWELL: But in any event, sir, what do  
14 you mean by "definite financial liabilities" with your  
15 heading of paragraph 6?  
16 A I think in the statement that I made when you're  
17 evaluating the net worth of a particular asset, take  
18 all of the production. You take the revenue stream,  
19 and then you subtract all the minuses and liabilities  
20 would be a piece of the minus. Nobody would buy  
21 something if -- if you weren't aware of the liabilities  
22 associated with it. So, you know, the worth of any  
23 particular company is all the good things plus all the  
24 bad things.<sup>76</sup>

49. Mr. Laing's evidence was that:

12 Q I'm now going to turn to the heading on page 5 of your  
13 affidavit. (AS READ):  
14 ARO's are considered definite financial  
15 liabilities by industry members.  
16 Do you see that?  
17 A Yeah, I see it.  
18 Q What's a "definite financial liability"?  
19 A They aren't a maybe. These are obligations that will  
20 come to fruition. They can't be avoided. They are --  
21 they will occur.<sup>77</sup>

50. The cross-examination of Mr. Jackson, Cenovus' witness, did not touch on the treatment of ARO for the purposes of financial reporting. However, Cenovus' 2019 consolidated financials were put into evidence by the Defendants.<sup>78</sup> "Decommissioning Liabilities" are included in the "Total Liabilities", which are subtracted from "Total Assets" to determine the "Shareholders' Equity" listed on the balance sheet.<sup>79</sup>

51. The Defendants' own 2016 audited financial statements include \$33,620,000 in "Decommissioning obligations" in their "Total Liabilities" of \$178,692,000.<sup>80</sup> The Defendants' auditor also reported that the Defendants obtained a "gain on disposition of

---

<sup>76</sup> Transcript of Cross-Examination of John Brannan on September 16, 2020, p. 42, lines 13-24.

<sup>77</sup> Transcript of Cross-Examination of Ron Laing on September 15, 2020, p. 59, lines 13-21.

<sup>78</sup> Transcript of Cross-Examination of Antonio Jackson, p. 26, lines 11-24.

<sup>79</sup> Consolidated Balance Sheets, Cenovus Energy Inc. Consolidated Financial Statements for the year ended December 31, 2019, p. 28, not yet filed.

<sup>80</sup> Consolidated Statements of Financial Position and Note 13, Perpetual 2016 Consolidated Financial Statements, pp. 4 and 21, September 22, 2020 Affidavit of P. Darby, Exhibit 1.

\$19.2 million” arising from the October 1, 2016 transaction because, in addition to receiving “nominal consideration”, they were able to dispose of “\$128.0 million in decommissioning obligations.”<sup>81</sup>

52. Based on the Defendants’ own reporting of the financial consequences of the Asset Transaction, the value of the consideration given by PEOC in the Asset Transaction exceeded the value of the consideration received by PEOC by \$19.2 million.
53. Unless the Defendants’ 2016 audited financial statements were inaccurate, PEOC was insolvent following the Asset Transaction: the aggregate of its property would not “be sufficient to enable payment of all of [its] obligations, due and accruing due.”<sup>82</sup>
54. PEOC obligations “due and accruing due” following the Asset Transaction would include the \$128.0 million in “decommissioning obligations” it assumed by paying “nominal consideration”, in order to yield a \$19.2 “gain on disposition” in favour of the Defendants.<sup>83</sup>

#### 4. The test for summary dismissal

55. The Defendants acknowledge that the test for summary dismissal set out in *Weir-Jones* requires the applicant to do more than establish its version of the facts on a balance of probabilities. In their brief in support of the BIA Summary Dismissal Application, they submit that:

[92] There is no genuine issue requiring a trial. No trial is required to determine whether PEOC was insolvent at the time of or was rendered insolvent by the Asset Transaction. A *fair and just determination* can be made on the merits on a summary dismissal application.

---

<sup>81</sup> Notes 5(a) and 13(a), Perpetual 2016 Consolidated Financial Statements, p. 16 and 21, September 22, 2020 Affidavit of P. Darby, Exhibit 1.

<sup>82</sup> *BIA*, s. 2.

<sup>83</sup> Note 5(a), Perpetual 2016 Consolidated Financial Statements, p. 16, September 22, 2020 Affidavit of P. Darby, Exhibit 1; *Stelco, supra*, at para. 50 [Trustee’s Authorities, Tab 24] *451992 Canada Inc., Re, supra*, at para. 31 [Trustee’s Authorities, Tab 25]



[93] Here, summary dismissal allows the judge to make the necessary findings of fact, apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result.<sup>84</sup> [Emphasis added.]

56. The test for summary dismissal requires the Court to determine that summary dismissal will be a “just result”.<sup>85</sup>
57. The Court of Appeal in *Weir-Jones* emphasized that “the chambers judge is entitled to take into consideration the fairness of the process, and its ability to achieve a just result, at all stages.”<sup>86</sup> Procedural and substantive fairness “must always be a part of the summary disposition process” and “mere establishment of the facts” is “not a proxy for summary adjudication.”<sup>87</sup>
58. Summary dismissal is discretionary.<sup>88</sup> However, the Court must consider the “importance and complexity of the issues” to determine whether summary dismissal is a “proportionate, more expeditious and less expensive means to achieve a just result.”<sup>89</sup>
59. The Industry Intervenors, CNRL, Cenovus and Torxen, and the OWA have provided evidence regarding the importance of the issues raised by the BIA Summary Dismissal Application:
  - 59.1. The approximate financial consequences are \$42,000,000 for CNRL,<sup>90</sup> \$6,000,000 for CNRL<sup>91</sup> and \$6,500,000 for Torxen.<sup>92</sup>
  - 59.2. The OWA would be required to assume \$200,000,000 of abandonment and reclamation liabilities, which would be passed on to energy companies across Alberta by the AER through the Orphan Funds Levy.<sup>93</sup>

---

<sup>84</sup> Defendants' Summary Dismissal Brief, at paras. 92-93.

<sup>85</sup> July 24, 2020 hearing transcript, p. 31, lines 34-41, p. 32, lines 6-14.

<sup>86</sup> *Weir-Jones*, supra, at para. 46 [Trustee's Authorities, Tab 26]

<sup>87</sup> *Ibid*, at paras. 46 and 47(b) [Trustee's Authorities, Tab 26]

<sup>88</sup> *Ibid*, at para. 47(d) [Trustee's Authorities, Tab 26]

<sup>89</sup> Defendants' Summary Dismissal Brief, at paras. 92-93; *Weir-Jones*, supra, at para. 26 [Trustee's Authorities, Tab 26]

<sup>90</sup> July 14, 2020 Affidavit of Ron Laing, at para. 19.

<sup>91</sup> July 14, 2020 Affidavit of Antonio Jackson, at para. 20.

<sup>92</sup> July 15, 2020 Affidavit of John Brannan, at para. 16.

<sup>93</sup> June 29, 2020 Affidavit of Lars De Pauw, at paras. 6 and 17.

60. Although the immediate potential effects of the *BIA* Summary Dismissal Application are significant, the Intervenor's raise a greater concern: the precedential effect of a decision dismissing the Trustee's s. 96 claim summarily.

61. Cenovus' evidence, for example, is that:

[33] Cenovus intends to submit that if the Transactions are tolerated, the Court's determination in the *BIA* Application would effectively sanction similar obligation dispensing schemes, and provide guidance to Alberta's oil and gas industry on methods of avoiding municipal taxes, and escaping abandonment and reclamation obligations.

[34] Furthermore, if such transactions to avoid liabilities become routine, all participants in Alberta's oil and gas industry would be pressured to adopt similar strategies, thus incentivizing insolvency and causing the regulatory regime to spiral into obsolescence. This would occur to the detriment of the environment, and lead to the disconnect of costs from benefits: the costs no longer allocated pursuant to the polluter-pay principal, but rather to solvent third party industry members, and ultimately Albertans.<sup>94</sup>

62. These concerns are echoed by the OWA, CNRL and Torxen<sup>95</sup> and should be taken into account by the Court in determining whether summary dismissal is a "proportionate, more expeditious and less expensive means to achieve a just result."<sup>96</sup>

---

<sup>94</sup> July 14, 2020 Affidavit of Antonio Jackson, at paras. 33-34.

<sup>95</sup> June 29, 2020 Affidavit of Lars De Pauw, at para. 14; July 14, 2020 Affidavit of Ron Laing, at paras. 33-34; July 15, 2020 Affidavit of John Brannan, at paras. 18-20;

<sup>96</sup> Defendants' Summary Dismissal Brief, at paras. 92-93; *Weir-Jones*, supra, at para. 26 [Trustee's Authorities, Tab 26]

**PART IV - RELIEF SOUGHT**

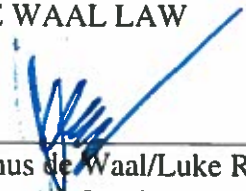
63. The Trustee respectfully submits that the *BIA* Summary Dismissal Application should be dismissed, with costs.

Calgary, Alberta  
September 25, 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.

## TABLE OF AUTHORITIES

47. *Option Industries Inc (Re)*, 2020 ABQB 535
48. *Urbancorp Toronto Management Inc (Re)*, 2019 ONCA 757
49. *Alberta Rules of Court*, AR 124/2010, ss. 6.3 and 6.6
50. Civil Practice Note 2
51. *Callidus Capital Corporation v Baumann*, 2019 ABQB 120